SUPREME COURT OF NEW JERSEY

DOCKET NO. 089243

HORACE COWAN,

Petitioner-Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Respondent-Respondent.

CRIMINAL ACTION

On Petition for Certification from:

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.

BRIEF OF AMICUS CURIAE
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In Support of Petitioner-Appellant

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STATEMENT OF INTEREST OF AMICUS CURIAE

Seton Hall University School of Law's Center for Social Justice (CSJ) respectfully submits this amicus brief urging the Court to protect the interests of those incarcerated in New Jersey's prisons by establishing legal principles for judicial review of New Jersey Parole Board decisions so as to protect the legislature's intent and the integrity and coherence of the parole process.

Seton Hall University School of Law is dedicated to providing a quality legal education while fostering personal and social values of integrity, loyalty, and engagement with the needs of its community. Its commitment to service and to aiding the public interest is demonstrated most notably through its support of the CSJ, which houses the law school's clinical programs.[1] The CSJ is both a state-certified legal services program and a clinical legal education program in which law students and professors work together on issues of public interest affecting the poor, minority groups, and other disempowered members of society. The CSJ provides free legal representation for hundreds of indigent citizens of New Jersey and neighboring states each year. It regularly provides

[1] The CSJ expresses its gratitude to law students Tyler Callagy, Christopher Frey, William Grabas, and Charlotte Sweeney. Each is a Seton Hall Law student enrolled in the CSJ's Impact Litigation Clinic. These students drafted this amicus brief under Professor Romberg's supervision.

pro bono and amicus representation to incarcerated people concerning the conditions of their confinement and their efforts to be granted parole.

PRELIMINARY STATEMENT

After serving 30 years in prison, petitioner Horace Cowan was denied parole. A three-member Parole Board panel, in a decision later adopted by the full Board, informed Cowan that he would be eligible to apply again for parole in 200 months, nearly 17 years later. This excessive Future Eligibility Term ("FET") is arbitrary, capricious, and unsupported by substantial evidence.

Point I explains the legal and factual background, including: the Board's denial of parole; its imposition of a presumptive FET of 36 months' parole ineligibility under a comprehensive regulatory schedule, N.J.A.C. 10A:71-3.21(a), (c); and—challenged here—the three-member panel's determinations under N.J.A.C. 10A:71-3.21(d) to: depart from that presumptive FET; and to depart for an FET imposing an additional 164 months.

As explained in Point II, the Board's decision to impose an FET outside the presumptive 36-month FET schedule was unlawful because it considered the circumstances of Cowan's criminal offense. Under N.J.A.C. 10A:71-3.21(d), the Board can only depart from the presumptive FET if it is clearly inappropriate, and only on the basis of an inmate's lack of progress in decreasing his likelihood of recidivism. An inmate's lack of progress depends entirely on his conduct after the underlying offense, thus the panel's consideration of his criminal offense

conduct in deciding to further depart was impermissible.

As explained in Point III, the extent of the Board's departure under N.J.A.C. 10A:71-3.21(d) was also unlawful, arbitrary and capricious, and in conflict with express and implicit legislative policies. The Parole Act of 1979, Code of Criminal Justice, and the regulatory scheme implemented thereunder require the Board to follow a predictable, determinate schedule when imposing an FET, limiting the Board's discretion. Most notably, the presumptive FET already encompasses the Board's power under N.J.A.C. 10A:71-3.1(c) to adjust an FET up or down by up 9 months (above the schedule set on the basis of the crime of conviction) to take into account not only the inmate's criminal record, but all of an inmate's characteristics. The Board's power under N.J.A.C. 10A:71-3.21(d) to depart further based on lack of progress toward reducing recidivism requires that the basis for and extent of departure be proportionate to the scheduled, upper limit of 9 months set in N.J.A.C. 10A:71-3.21(c). Here, the 164-month further departure was disproportionate. See Point III.A.

As explained in Point III.B, the Board's assessment of Cowan's actual record as supporting an extraordinarily disproportionate FET departure was also arbitrary and capricious, lacking substantial evidence. The Board relied on the nebulous and unfounded criterion of Cowan's purported lack of multi-factorial insight into the cause of his criminogenic behavior. Moreover, the Board entirely ignored objective factors strongly suggesting Cowan had at most a moderate risk

of recidivism, most importantly an empirically validated LSI-R score reflecting an objective risk assessment that the Board is obligated by regulation to consider—but did not—that placed Cowan at the very low end of Moderate risk, along with an advanced age suggesting very low risk. The Board also ignored significant parts of the record demonstrating Cowan's genuine remorse and growth and commitment to leaving a life of violence, even at great personal risk. The Board instead simply announced its contrary intuitions.

Finally, as explained in Point III.C, the arbitrariness and capriciousness of the Board's substantive decision is further amply demonstrated by its complete failure to explain why a 200-month FET—including a 164-month upward departure—is necessary and appropriate, why it is proportional to the 9-month upper limit for upward adjustment under the scheduled, presumptive FET, or how it calculated the length of 164 months. This failure to provide particular reasons for the FET length violates a statutory obligation, contravenes administrative fairness and rightness, and precludes meaningful judicial review.

LEGAL ARGUMENT

POINT I

The Legal And Factual Background to the Parole Board's Arbitrary and Capricious Imposition of a 200-Month Future Eligibility Term (FET) Before Cowan Could Re-Apply for Parole.

A. The Legal Standards for Parole and the Imposition of an FET, and the Parole Board's Decisions in this Matter.

"[T]he Parole Act [of 1979] and its implementing regulations set forth the process that normally governs parole determinations" for inmates such as Cowan subject to that statute given the date of their conviction. Acoli v. N.J. State Parole Bd., 224 N.J. 213, 222 (2016) (citing N.J.S.A. 30:4-123.45 to -123.69; N.J.A.C. 10A:71-3.1 to -4.3). The Parole Board's imposition of a 200-month FET for Cowan, most notably the additional 164 months imposed under N.J.A.C. 10A:71-3.21(d), violated the statutory and regulatory scheme.

The Act sets forth the primary parole eligibility date for inmates, like Cowan, serving terms of life imprisonment. N.J.S.A. 30:4-123.51. Cowan became eligible for parole on February 19, 2020, after serving 30 years. (Ra43, Ra48). Under the Parole Act, the incarcerated person "shall be released on parole at the time of parole eligibility, unless [the Board shows] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime . . . if released on parole." N.J.S.A. 30:4-123.53 (1979). A two-member panel denied Cowan parole. (Ra55). The CSJ does not dispute this decision.

For inmates not granted parole at their initial hearing, the Legislature has directed the Board to "develop a schedule of future parole eligibility dates for adult inmates denied release at their eligibility date." N.J.S.A. 30:4-123.56(a). By regulation implementing this statutory obligation to proceed according to a "schedule" (i.e., a guided, determinate process), the Board sets a Future Eligibility Term ("FET") during which the inmate is ineligible to apply for parole, calculated pursuant to N.J.A.C. 10A:71-3.21. A presumptive FET is established; first, a period from 17 to 27 months is imposed, taking into account a schedule based on the severity of the underlying conviction, N.J.A.C. 10A:71-3.21(a); second, that FET can be "increased or decreased by up to nine months when, in the opinion of the Board panel, the severity of the crime for which the inmate was denied parole and the prior criminal record or other characteristics of the inmate warrant such adjustment," N.J.A.C. 10A:71-3.21(c).

Under the presumptive FET schedule, Cowan was subject to a 27-month FET for "a prison inmate serving a sentence for murder, manslaughter" or other particularly serious crimes. N.J.A.C. 10A:71-3.21(a)(1). Cowan was further subject to an increase of an additional 9 months—the top end of the applicable adjustment range schedule—because the Board panel believed such an adjustment to be appropriate due to the "severity of the crime for which the inmate was denied parole and the prior criminal record or other characteristics of the inmate." N.J.A.C. 10A:71-3.21(c). The Board applied a presumptive FET

of 36 months, i.e., 27 months under N.J.A.C. 10A:71-3.21(a)(1) for particularly severe crimes, and an additional 9 months, the very top of the range within the regulatory schedule, given the severity of Cowan's crimes, his prior criminal record, and his other characteristics (which includes his characteristics related to his progress toward reducing recidivism during incarceration).

The CSJ does not dispute the propriety of this 36-month presumptive FET applicable to inmates, such as Cowan, who have committed the most severe offenses, who have the most significant prior criminal record, and whose other characteristics are particularly concerning, thus placing them at the very top end of the presumptive FET schedule. For inmates in this group, the regulatory schedule makes plain that it would be pointless to permit them to apply for parole within three years. I.e., there is no material possibility that, within that three-year period, the Board would be unable to meet its burden to prove that the inmate would again be denied parole because he would have a substantial likelihood of committing another crime. N.J.S.A. 30:4-123.56(c) (1979).

The two-member panel, in addition to denying parole, referred the matter to a three-member panel to determine whether an FET outside the presumptive guidelines might be warranted under N.J.A.C. 10A:71-3.21(d). (Ra55). A three-member panel may impose an FET greater than the presumptive FET (here, 36 months) on narrowly specified grounds, far more narrowly cabined than the bases for establishing the presumptive FET. An FET increased beyond the upper

range of 9 months permitted under N.J.A.C. 10A:71-3.21(c) is permitted if the three-member panel concludes the presumptive FET 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). To depart upward, the presumptive FET must be clearly inappropriate, and the only permissible benchmark is lack of progress toward reducing recidivism, a criterion that does not include the circumstances of the underlying criminal offense.

Under N.J.A.C. 10A:71-3.21(d), the three-member panel is to consider the factors set forth in N.J.A.C. 10A:71-3.11, i.e., the factors governing initial parole determinations. Under N.J.A.C. 10A:71-3.11(a), "decisions shall be based on the aggregate of all pertinent factors." Ibid. (emphasis added). N.J.A.C. 10A:71-3.21(d) only permits consideration of factors related to lack of satisfactory progress toward reducing recidivism—i.e., progress after the criminal offense conduct for which the inmate has been sentenced and punished and made ineligible for an initial parole determination. Thus, the "pertinent" factors under N.J.A.C. 10A:71-3.11 relevant to increasing an FET above the presumptive FET do not include factors relevant to the severity or circumstances or background of the underlying criminal offense, i.e., N.J.A.C. 10A:71-3.11(b)(3) to (6). The pertinent factors include the inmate's conduct and adjustment while incarcerated, his plans and support in the community if paroled, and "[t]he results of the objective risk assessment instrument," N.J.A.C.

10A:71-3.11(b)(23).

The three-member Board in this matter: (1) Determined that Cowan should be subject to an FET outside of the presumptive FET of 36 months. See (Ra136-Ra141) ("Particular reasons for establishing a future parole eligibility date outside of the administrative guidelines"), and (2) Imposed an FET of 200 months, i.e., an upward departure of an additional 164-month FET under N.J.A.C. 10A:71-3.21(d), on top of the 9-month FET upward departure imposed under N.J.A.C. 10A:71-3.21(c) applicable to the subset of inmates at the upper limits of the ordinary range of inmates least suited for parole. See (Ra141-Ra142) ("Specific reasons for the imposition of the two hundred (200) month future parole ineligibility term"). The CSJ contests these two decisions as arbitrary and capricious.

First, as explained in Point II, the three-member Board's decision to depart from the presumptive FET was legally erroneous because it improperly considered factors outside those authorized under N.J.A.C. 10A:71-3.21(d), which empowers the Board to consider only the inmate's progress toward reducing recidivism, not the circumstances of his underlying offense. Second, as explained in Point III, the Board was arbitrary and capricious in the extent of the 164-month additional FET it imposed—nearly 14 years—for a total of 200 months before which Cowan will again be entitled to apply for parole. This additional FET was imposed on top of the presumptive 36-month FET, including

the 27-month FET already applicable to inmates with the most severe underlying offenses, and on top of the very upper end of the 9-month upward departure the Board is permitted to impose upon those inmates with the most severe criminal offenses, criminal records, and any other characteristics suggesting they should not be provided an opportunity to apply for parole for an extended time.

B. The Board's Duty to Explain the Bases for its Decisions.

An essential part of the court's "careful and principled consideration of the agency record and findings" is its review of the Board's explanation of its decision. Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 303 (App. Div. 2022). "Absent a sufficient statement of reasons, [the court] cannot ascertain whether the Board's decision is justified or arbitrary and capricious." Mejia v. N.J. Dep't of Corr., 446 N.J. Super. 369, 378-79 (App. Div. 2016). The duty to explain is "'one of the best procedural protections against arbitrary exercise of discretionary power.'" Berta, 473 N.J. Super. at 303 (quoting Monks v. N.J. State Parole Bd., 58 N.J. 238, 245, 277 (1971)). "[T]he Board's obligation to explain the reasons for imposing an FET longer than the presumptive FET is no less important than its obligation to explain the reasons for overcoming the presumption of parole." Id. at 322.

C. Judicial Review of Parole Board Decisions.

Appellate courts review final agency decisions, including decisions of the Parole Board, to determine if they are "arbitrary, capricious or unreasonable or

[if the decision] is not supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). A "Parole Board's decision is entitled to deference—but not blind deference," and "our courts are the ultimate arbiters of whether the Board has acted within the bounds of the law." Acoli v. N.J. State Parole Bd., 250 N.J. 431, 436, 455 (2022). Parole Board decisions that violate legislative policy, are not supported by substantial evidence, or "could not reasonably have been made on a showing of the relevant factors" should be overturned. Trantino v. N.J. State Parole Bd. (Trantino IV), 154 N.J. 18, 24-25 (1998); see also Acoli, 250 N.J. at 455.

POINT II

The Board Erred in Deciding Cowan's 36-Month Presumptive FET Was Clearly Inappropriate and Warranted a Further Upward Adjustment Under N.J.A.C. 10A:71-3.21(d) Because the Board Considered Impermissible Factors Concerning Cowan's Criminal History that Are Not Relevant to His Lack of Progress Toward Reducing Recidivism.

The three-member Board legally erred under N.J.A.C. 10A:71-3.21(d) by considering improper factors—related to Cowan's criminal offenses, rather than to his progress since those offenses toward reducing recidivism—when deciding it proper to depart from his presumptive FET. Cf. Cnty. of Hudson v. Dep't of Corr., 152 N.J. 60, 71 (1997) ("[A]lthough an administrative agency may change its regulations, so long as they are in force the agency is bound by them.").

Cowan's presumptive FET was set at 36 months under N.J.A.C. 10A:71-3.21(a) and (c), see Point I.A, a determination the CSJ does not challenge. The three-member Board panel has authority under N.J.A.C. 10A:71-3.21(d) to further increase an FET, departing upward above the presumptive FET. But it may only do so if it determines that the presumptive FET set under the schedule established by N.J.A.C. 10A:71-3.21(a) and (c) 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). Thus, the panel, deciding whether it is proper to increase a presumptive FET, may only consider the inmate's progress toward reducing recidivism—in other words, factors related to change in his likelihood of recidivating after his underlying offense of conviction.

Such progress does not encompass the facts or circumstances relevant to the crimes for which the inmate is incarcerated because those circumstances are the baseline from which progress must be measured. The factors related to the crime of conviction are already built into the presumptive FET established under N.J.A.C. 10A:71-3.21(a) and (c), but those factors are simply not permissible criteria for the Board to consider in deciding whether to further increase the FET under N.J.A.C. 10A:71-3.21(d).

Not only does the plain regulatory language of N.J.A.C. 10A:71-3.21(d) so dictate, this Court's construction of the statutory and regulatory scheme supports this reading. "Because a sentence of imprisonment imposed under Title

2C," the determinate Code under which Cowan was sentenced, "incorporates parole disqualification as a sentencing element, inmates serving such sentences 'will have presumptively satisfied all punitive aspects of their sentences at the time they become eligible for parole.'" Trantino IV, 154 N.J. at 27.

Moreover, "under the Parole Act of 1979, . . . 'punishment that serve[d] society's need for general deterrence or a concern for retribution' [i]s no longer 'truly relevant' for parole determinations." Ibid. "Rather, for purposes of parole, consideration of punishment [i]s limited solely to rehabilitation encompassing individual deterrence, i.e., is there a 'substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole.'" Ibid. (quoting In re Trantino (Trantino II), 89 N.J. 347, 372 (1982); N.J.S.A. 30:4-123.56(c)). Denial of parole under the Act, or of an opportunity to apply for parole, can only be a function of risk of recidivism, not of punishment for the criminal offense.

An inmate's presumptive FET under N.J.A.C. 10A:71-3.21(a) and (c) already incorporates the statutory and regulatory judgment about the extent to which factors related to the offense of conviction suggest a presumptive FET of further parole ineligibility for up to 36 months (the FET applicable to Cowan). The interrelated set of expert policy judgments reflected in N.J.A.C. 10A:71-3.21—judgments intended to reflect the legislative directive to impose a schedule—recognizes a presumptive FET during which an inmate is not entitled to reapply for parole because of the implications of the criminal conduct and

record for which he was convicted: first, a period of up to 27 months applies for the most severe offenses, N.J.A.C. 10A:71-3.21(a); and second, an adjustment up or down from that period is permissible given the implications of the circumstances surrounding that crime, the inmate's criminal record, and any other relevant characteristics of the inmate—but that adjustment is capped at a maximum of 9 additional months. N.J.A.C. 10A:71-3.21(c).

Yet another upward departure beyond that presumptive FET range is permissible, but only if the presumptive FET 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). This benchmark of progress toward reducing recidivism does not include baseline offense characteristics or criminal record prior to the offense of conviction. If the Board decides, as here, to depart upward from the presumptive FET for reasons grounded on factors related to the offense of conviction, i.e., factors not authorized under the regulatory scheme, that serves to punish the inmate after he has served the sentence that fully imposed punishment for his criminal conduct.

Here, the Board impermissibly considered Cowan's (admittedly horrific) crimes, and Cowan's (admittedly extensive) criminal history, impermissible factors in deciding the presumptive FET imposed under the administrative guidelines was clearly inappropriate because of a lack of progress toward reducing recidivism. Under the heading "Particular Reasons for Establishing a

Future Parole Eligibility Date Outside of the Administrative Guidelines," (Ra136-Ra141), i.e., the Board's determination under N.J.A.C. 10A:71-3.21(d) to depart from the presumptive FET, the three-member Board decision extensively relied on Cowan's criminal offenses and record.[2]

The Board is not authorized to consider the criminal offense from which the inmate seeks parole because they do not bear on his "lack of satisfactory progress in reducing the likelihood of future criminal behavior." N.J.A.C. 10A:71-3.21(d). Rather, they relate to factors that are permissible bases for the original sentence and initial period of parole ineligibility; they are also permissible bases for establishing the presumptive FET concerning the crimes for which he is currently incarcerated, N.J.A.C. 10A:71-3.21(a), and the propriety of an upward adjustment for up to 9 further months dependent on "the

[2] "The Board panel notes the facts and circumstances of the offenses. On February 18, 1990, you shot a victim with a sawed-off shotgun, causing his death. While pending adjudication on that offense, you escaped from the county jail." (Ra136). Moreover, "The Board Panel notes that your prior offense history is extensive and repetitive," then discusses Cowan's juvenile record and the crimes he committed before the ones for which he is currently incarcerated. Ibid. "The Board Panel notes that you escalated the seriousness of your criminal record, as evidenced by committing the violent crime of Aggravated Manslaughter." Ibid. The Board also states that Cowan is incarcerated for multiple offenses, and points to Cowan's prior placement on juvenile probation and community supervision, both of which occurred before the crimes for which he is currently incarcerated. (Ra136-Ra137). The Board only then discussed Cowan's institutional record and other factors actually related to his progress toward reducing recidivism. (Ra137-Ra141).

severity of the crime for which the inmate was denied parole and the prior criminal record or [any of the inmate's] other characteristics," N.J.A.C. 10A:71-3.21(c). Put another way, the majority of the factors the Board relied on in the section of the decision specifically considering and justifying departing from the presumptive FET can only permissibly be used to establish the presumptive FET. This violates N.J.A.C. 10A:71-3.21(d). The Board's decision to depart upward from the presumptive FET was grounded on legally impermissible criteria and was thus arbitrary and capricious.

POINT III

Even Assuming an Increased FET Was Permissible Under N.J.A.C. 10A:71-3.21(d), the Imposition of an Additional 164 Months, for a Total FET of 200 Months, Was Disproportionate, Unscheduled, and Unexplained, Thus Arbitrary and Capricious.

Even assuming the Board's decision to depart upward from Cowan's presumptive FET was permissible, but see Point II, the Board was arbitrary and capricious in its determination that it would do so by imposing an additional 164 months of parole ineligibility, see Point III, below.

The Board applied an understanding of the parole scheme that is improperly indeterminate and lacking in proportionality, thereby violating the express and implied legislative policies of The Parole Act of 1979 and the Code of Criminal Justice. See Point III.A. Its selective construction of the record and

its failure to consider highly relevant factors such as objective risk assessment and age was arbitrary and capricious. See Point III.B. It entirely failed to explain its decision, as required by statute, regulation, and by the principle of administrative fairness and rightness. See Point III.C. And this Court should not assess the arbitrariness and capriciousness of the 200-month FET as reduced by commutation credits as the Attorney General suggests. See Point III.D.

A. The Board's Imposition of 164 Months of Additional FET Is Improperly Disproportionate and Indeterminate, Conflicting with the Statutory Obligation that Parole Be Governed by a Determinate Schedule and with the Underlying Policies of the 1979 Parole Act and Code of Criminal Justice.

The Board decided to extend Cowan's presumptive FET by 164 additional months. Under N.J.A.C. 10A:71-3.21(a), Cowan's baseline FET, given the gravity of the offense of conviction, was 27 months. Then, the Board exercised its specific, scheduled, discretionary authority to adjust that baseline FET under N.J.A.C. 10A:71-3.21(c) to further account for specific factors related to Cowan's criminal offense, criminal history, and any other characteristics. The Board did so by adjusting upward to the very upper limit, imposing an additional 9 months of FET. Among the ordinary range of inmates, for whom the presumptive FET is not "clearly inappropriate," those who are average in their progress toward reducing recidivism by definition don't warrant a departure in either direction. Given a normal distribution of progress toward reducing recidivism, fewer than half of inmates will have made meaningfully greater-

than-average progress, warranting a downward departure, as much as 9 months for the most deserving; fewer than half will have made meaningfully less-than-average progress, warranting an upward departure, reaching as much as 9 additional months for the least deserving among those. Cowan's 36-month presumptive FET already placed him in the small subset of inmates who least deserve an opportunity to apply for parole in the short term, even among those inmates who have committed particularly severe crimes such as murder or manslaughter.

The Board then rejected Cowan's 36-month presumptive FET as clearly inappropriate, warranting further upward departure. Even assuming the decision that it would depart further was permissible, but see Point II, the Board's decision how far it would depart further was arbitrary and capricious—disproportionate, unscheduled and unguided, and unexplained.

Rather than the presumptively applicable upper limit of 9 months upward adjustment for those particularly undeserving of parole in the short term, the Board departed upward by a further 164 months. That is more than 18 times longer than the 9 months scheduled as the upper limit of the presumptive adjustment range applicable to the significant majority of inmates—those for whom the presumptive FET is not "clearly inappropriate."

The worst of the worst, the clearly least deserving of the chance even to apply for parole in the short term, given their lack of progress toward reducing

recidivism, are subject to this further period of parole ineligibility under N.J.A.C. 10A:71-3.21(d), imposing an additional FET on top of that applicable to the presumptive, ordinary range of recalcitrant murderers subject to a 9-month upward adjustment under N.J.A.C. 10A:71-3.21(c).

The length of that further upward departure adjustment under N.J.A.C. 10A:71-3.21(d), even when legally permissible, is subject to strict legal requirements: It must be fair and just and reasoned. In particular, under the logic of the parole schedule, and under the strictures of administrative fairness and rightness, its length must be proportional to the scheduled, presumptive 9-month upper limit of upward adjustment under N.J.A.C. 10A:71-3.21(c), and its length must be adequately explained.

The determination must be made in light of the legislative scheme requiring that the FET be determined through a schedule, one that is determinate and predictable. The current version of N.J.A.C. 10A:71-3.21(d) does not satisfy that criterion as to guiding the permissible extent of departure, thus unless and until the regulatory scheme is amended to become more determinate, judicial review of upward departure decisions under N.J.A.C. 10A:71-3.21(d) must properly apply the principles that the regulation itself should impose.

The Board's 200-month FET, including the additional 164 months, necessarily assumes that there is no material possibility that anything could happen in the next 17 years that could result in Cowan's satisfying the standards

of the Parole Act to warrant parole. To be more precise, the Board's 200-month FET necessarily assumes that there is no meaningful possibility that the Board might fail to meet its burden to prove that Cowan has a substantial likelihood of recidivating if he were to be paroled, no matter what happened over the following 17 years. An inmate's lack of progress toward reducing recidivism would have to be truly extraordinary to justify an FET of the length imposed on Cowan (and numerous other inmates, as detailed in other amicus briefs so not repeated here). The Board is arbitrary and capricious when it definitively predicts that the next 17 years necessarily preclude rehabilitation.

The Board's decision to impose a 200-month FET, including an additional 164-month upward departure, violates the express and implied legislative policies underlying both the Parole Act of 1979 and the New Jersey Code of Criminal Justice ("the Code"). The Parole Act of 1979 and the nearly contemporaneous Code were a combined effort to make criminal sentencing and parole more predictable, determinate, and equitable. See Acoli, 250 N.J. at 256. The Board's decision here was anything but.

Even when agency action is supported by substantial evidence, this Court has consistently recognized that the action is properly set aside when inconsistent with "express or implied legislative policies." George Harms Const. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994). In making this determination, the Court has considered both statutory text and the broader policies revealed by

legislative history. See Brady v. Bd. of Rev., 152 N.J. 197, 211 (1997) ("To ascertain the underlying legislative policies of the Act, we examine the Act's declaration of public policy and its legislative history."). Here, the text and legislative history of both the Parole Act of 1979 and the Code show that that the Board's process for setting the FET in this and similar cases violates legislative policies.

1. The Parole Act Requires that FETs Be Scheduled.

The Parole Act of 1979 directs the Board to develop a "schedule of future parole eligibility dates" for those denied parole on their initial eligibility dates. N.J.S.A. 30:4-123.56(a) (emphasis added). In developing this schedule, the Act specifies that "particular emphasis shall be placed on the severity of the offense" and "the characteristics of the offender, such as, but not limited to, the prior criminal record of the inmate and the need for continued incapacitation of the inmate," ibid., and the presumptive FET schedule follows that dictate.

The word "schedule" means a "procedural plan that indicates the time and sequence of each operation." "Schedule," Merriam-Webster's Collegiate Dictionary (11th ed. 2004). Thus, the Act directs the Board to develop a structured set of timetables and numerical guidelines, one applicable to all inmates. And the regulatory scheme satisfies that standard in imposing a schedule for granting or denying parole and, for those denied parole, in establishing a presumptive FET under N.J.A.C. 10A:71-3.21(a) and (c).

If the Board denies parole, it must apply a schedule when setting the FET. N.J.S.A. 30:4-123.56(b). Although the Board can depart from the presumptive FET schedule under N.J.A.C. 10A:71-3.21(d), the Act allows the Board to do so only if it does so pursuant to its overarching obligation to do so pursuant to a schedule, and only if it can explain "particular reasons" for its departure. N.J.S.A. 30:4-123.56(b) ("If such [FET after denial of parole] differs from the [FET] otherwise established by the schedule, the board panel shall include particular reasons therefor.") The word "particular" means specific, "distinctive among other examples or cases of the same general category" "Particular," Merriam-Webster's Collegiate Dictionary (11th ed. 2004); "Particular," Cambridge Dictionary (online), https://dictionary.cambridge.org/dictionary/english/schedule ("special or single, or this and not any other"). Thus, the Act requires the structure, guidance, and predictability of a schedule in setting an FET, authorizing departure from the scheduled, presumptive FET only if there are "particular reasons" for doing so—that is, specifically identified and reasoned bases for not only the existence, but the extent, of the departure.

It strains credulity to believe that the Legislature carefully and overtly constrained whether the Board was authorized to depart from the presumptive FET schedule, but that it imposed no constraint as to the length of departure. Instead, the principle to be derived from the legislative and regulatory scheme is that a further upward FET departure under N.J.A.C. 10A:71-3.21(d) must be

proportional to the justification for—and the 9-month maximum of—upward FET adjustment under N.J.A.C. 10A:71-3.21(c).

Yet the Board has entirely failed to satisfy these criteria, in this case and in many others, imposing extremely lengthy and disproportionate FETs arising from an upward departure without justification or explanation. The regulations establishing the FET schedule classify murder and manslaughter as crimes that automatically warrant a 27-month FET, and that timeframe can be adjusted up or down by up to an additional 9 months. N.J.A.C. 10A:71-3.21(a)(1), (c). In departing from this presumptive schedule, the Board added an additional 164 months, far beyond the 27 months originally contemplated in the schedule—and, most importantly, far beyond and grossly disproportionate to the 9-month upward adjustment allowed by the schedule for the most undeserving among the ordinary range of inmates (those for whom the presumptive FET, even as adjusted up by 9 months, is not clearly inappropriate).

This cannot be what the Legislature intended. The Act allows departures from the presumptive schedule, but it does not allow unscheduled, unguided, unexplained departures of whatever length the Board intuits to be appropriate. See Charles H. Koch Jr., Judicial Review of Administrative Discretion, 54 Geo. Wash. L. Rev. 469, 475 (1986) ("The court must therefore ensure that the official's individual decision has not strayed an impermissible distance beyond the boundaries of the general rule; the official is to make individualizing

adjustments in the general rule, not ignore or distort it.").

The policy of determinacy about parole eligibility is further demonstrated by the fact that the Parole Act requires that the initial parole eligibility date be definitively calculated without any adjustment by the Board. This contrasts with the prior parole regime, under which a "complex of factors and computations required by statute, administrative regulations and institutional rules and practices governed the amount of time an inmate was required to serve in prison before he was entitled to parole consideration." Trantino II, 89 N.J. at 367.

The initial parole eligibility dates are objectively determined and entirely independent of the Board's discretion. See N.J. Parole Bd. v. Byrne, 93 N.J. 192, 205, (1983) ("[A]lthough fitness for parole remains a determination for parole authorities to make, parole eligibility is now a function of the sentence received. In effect, setting the parole eligibility date has become a judicial responsibility to be exercised at the time of sentencing and within the bounds set by the Legislature.") (second and third emphases added); see also N.J.S.A. 2C:43-6(b) (authorizing the sentencing judge to set minimum periods of parole ineligibility). Similarly, the presumptive FET is set under a regime that is entirely determinate as to the underlying offense, see N.J.A.C. 10A:71-3.21(a)(1), and then is closely constrained in how much it can be adjusted—a maximum of 9 months, up or down, see N.J.A.C. 10A:71-3.21(c).

It would undermine legislative intent, and the coherence of the parole

scheme, for the Board to be able to extend the FET under N.J.A.C. 10A:71-3.21(d) unconstrained by, and to an extent that is disproportionate to, the presumptive upper bound for departure under the strictures of N.J.A.C. 10A:71-3.21(c). It would be contrary to the legislative and regulatory intent behind this carefully designed scheme for the Board to have unguided discretion in setting the length of that further adjustment—and for the length of that further adjustment to be unconstrained by the need to be proportional to the presumptive increment of 9 months for the subset of inmates demonstrating unusually unsatisfactory progress toward reducing recidivism. The Board's imposing nearly 14 additional years is disproportionate, arbitrary, and capricious.

2. The 200 Month FET Violates the Implied Legislative Policies of the Parole Act of 1979 and the Code of Criminal Justice

A 200-month FET violates the implicit legislative policies of both the Parole Act of 1979 and the Code. The 1979 Act was meant to "correspond" with the Code, which provided for ''more definite and severe sentences.'' Acoli, 250 N.J. at 256 (quoting Byrne, 93 N.J. at 205). Christopher Dietz, the chairman of the Parole Board at the time, and one of the principal advocates of the 1979 Act, explained that "[t]he new penal code and the new parole system fit each other like a hand in glove," and that, with the passage of the new parole law, "[s]tability has been established in a system that was once characterized as arbitrary and capricious." Pub. Hearing Before Subcomm. of the S. Judiciary

Comm. on the N.J. State Parole Bd., 199th Leg., 2d Ann. Sess. 3-4 (Mar. 26, 1981). Excessive, disproportionate, unguided, and unexplained FETs violate the Code's goal of determinate sentencing and the Parole Act of 1979's corresponding goals of "introduc[ing] more consistency, objectivity and predictability into the parole process," and "eliminat[ing the] many problem areas in existing law which have led to inequities in the administration of parole." Sponsor's Statement to A. 3093, 16 (L. 1979, c. 441) (as introduced on Jan. 25, 1979).

The Parole Act of 1979 "effected a radical change in the parole system in New Jersey." Trantino II, 89 N.J. at 355. The Act abolished the "intensely discretionary" process of the 1948 Parole Act, see L. 1948, c. 84, and replaced it with an objective and predictable system, where the ultimate parole decision was "confined solely to whether there is a substantial likelihood for a repetition of criminal behavior." Trantino II, 89 N.J. at 369. In its report on the Parole Act of 1979, the Assembly Judiciary Committee made note of the recent riots at Attica Prison and, as it was then known, Rahway State Prison. Assemb. Judiciary, Law, Pub. Safety & Defense Comm. Statement to A. 3093, 1 (Dec. 3, 1979).

The Act was in part designed to "maintain institutional order" because official reports addressing those riots mentioned "uncertainties about parole and perceptions of injustice in the parole process as key causes of the riots." Ibid;

see also Andrew Vachss, Parole as Post-Conviction Relief: The Robert Lewis Decision, 9 New Eng. L. Rev. 1, 20 (1975) (noting Governor Cahill's response to the riots, including "[d]evelopment of more equitable and rational parole criteria."); Ad Hoc Parole Comm., Public Information Report #1: The Parole Denial Process in New Jersey 12 (1975) (comparing the pre-1979 parole process to the Star Chamber).

The Code's policy of determinacy and predictability was also implemented in the Parole Act, as made clear by Chairman Dietz:

> The court, within legislative guidelines, should establish the appropriate time to be served by an inmate, based upon the offense and prior record. The Parole Board should review an inmate's case after this time is served and grant parole to those inmates who are determined not to represent a danger to society. The two functions should not mix; the court should not attempt to guess what an inmate will be like years after sentencing, and the Parole Board should not sit as a super court by resentencing inmates based on the prior record and offense.
>
> [S. Judiciary Hearing, supra, at 3-4]

Under these legislative principles and policies, the Board's decision to set a 200-month FET is arbitrary and capricious: The Board is either guessing, without adequate basis, that Cowan could not possibly do anything over the next 17 years that might make him deserving of parole (in particular, that might alter whether the Board could meet its burden for the next 17 years to determine that Cowan is substantially likely to reoffend if paroled), or it is visiting further

punishment on him for his criminal conduct. However horrific an inmate's criminal conduct, as here, he has already been fully punished when he becomes initially eligible for parole. See Byrne, 93 N.J. at 205.

The Code and the Parole Act of 1979 were intended to make the parole process more objective and predictable, and thus more legitimate, both as a matter of reality, and in the perception of the public and of inmates themselves. See Ad Hoc Parole Comm., supra, at 11 ("The decisions of the Parole Board emerge from a 'black box'—it is impossible to figure out what is going on inside. . . . The uncertain sentence . . . creates in most prisoners living in this uncertain and arbitrary world, a sense of hopelessness and helplessness. In a certain few it creates . . . an undying hate of the unempathetic authority."). Query how much has really changed.

A consistent theme running through the Parole Act of 1979 and the Code is the cabining of discretion, the use of definite standards, and the necessity of predictability and constraints, both as to the bases for denying parole and the timeframe in which parole is simply unavailable. The Board's entirely unconstrained and disproportionate upward adjustment of Cowan's FET in this case contravenes these legislative policies.[3]

[3] These actions also violate the principles of administrative fairness and rightness for exactly the same reasons. Because other amici have addressed the legal basis for those arguments, in an effort to avoid duplication they are not

B. The Parole Board's Construction of the Record was Arbitrary and Capricious

In addition to larger-scale concerns with the Board's approach set forth above, the Board was arbitrary and capricious in how it considered Cowan's particular record; similar shortcomings regularly recur in other Board determinations so are useful to address here. The Board based its imposition of a 200-month FET, including a 164-month upward FET adjustment, on its entirely nebulous and not empirically grounded finding that Cowan lacked sufficient "insight." It also pointed to a recent disciplinary infraction in which Cowan got into a fight because he was attacked by three inmates, angered because he had counselled them to leave a gang; the Board's conclusion was that Cowan thereby displayed poor judgment and interpersonal skills. The Board thus misconstrued these aspects of the record that it did consider.

Moreover, the Board failed to consider the mandated criterion of objective assessments of future risk of recidivism—determinations that are empirically validated, and that showed Cowan's risk to be at the very bottom of the Moderate range for risk of recidivism, sharply different from the Board's conclusion. And the Board entirely ignored Cowan's advanced age, which empirically suggested a very low risk of recidivism.

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raised at any length here, but the same principles apply, whether understood as a matter of legislative and regulatory intent or a baseline requirement of fairness.

1. The Parole Board Improperly Required Cowan to Develop Some Unspecified, Nebulous, Sophisticated Form of Multi-Factorial Insight Over the Next 17 Years Before He Could Again Apply for Parole.

The Parole Board's central basis for imposing a 200-month FET was its directive to Cowan that he develop some unspecified, nebulous further insight into the reasons for his criminal behavior 30 years earlier, a benchmark it apparently believed he might be able to accomplish through 17 more years in which he would "conduct an introspection."

The Board entirely ignored compelling evidence of Cowan's acceptance of responsibility, sincere regret about his criminal behavior, and commitment to rehabilitation. The Board entirely ignored letters from long-time DOC employees who frequently interacted with Cowan over long periods of time, and who provided detailed and moving expressions of Cowan's regret about his past criminal behavior and his sincere and meaningful progress toward rehabilitation and personal growth—and reduced risk of recidivism. (Ra214-Ra218); see, e.g., Letter from Rev. Dr. Lawrence Akins ("I found it highly uncommon for an incarcerated individual to not only take ownership of the fact that he took another person's life, but also acknowledge how his behavior created severe, ongoing trauma in the lives of the victim's family. [T]hough, facing an extensive sentence, he has never wavered in his belief that his life and circumstances could be transformed by proactively engaging in the rehabilitative process. . . . [H]e

he has participated in nearly every [rehabilitative] program that the New Jersey Department of Corrections offers.") (Ra216-Ra217); Letter from Kathleen Jacinto, M. Div. ("Mr. Cowan stood out above all others [in an inmate support group] because of his transparency. It was clear that he was not just open to sharing personal matters and past mistakes but responded extremely well to constructive criticism from other members of his group.") (Ra214-Ra215).

In justifying an FET beyond the presumptive range, the Board focused instead on its own, brief interaction with Cowan. "The Board panel finds that you need to develop a better understanding to [sic] the dynamics of your personality defects that impelled you to [sic] criminal behavior." (Ra140). The Board acknowledged that Cowan had expressed to the Board his insight that his criminal behavior had been driven by peer pressure and a desire to fit in:

> You offered multiple times to the Board panel, [sic] that your conduct and decision-making was influenced by your desire to "fit in" with your neighborhood peers and to be "cool." You noted that reflecting back, your behavior was needless and "dumb" and emphasized multiple times that you were "young" at that time. The Board panel finds that a desire to socially be accepted by your peers was a contributory factor.
>
> [(Ibid.)]

The Board nonetheless found that

> your choice to commit criminal acts, including acts with the component of violence, demonstrate the ability on your part to completely disregard laws and ordinances with no care for the consequence of your actions. This behavior continued until a victim

> lost his life at your hands. Seemingly lost on you is that there were multiple factors that impelled you to criminal conduct. The Board panel finds you must conduct an introspection [sic] to adequately understand all components to [sic] the triggers and stressors that make you think or want to think in such a criminal manner.
>
> [(Ra140).]

In deciding to impose a 200-month FET, the Board concluded:

> You present as having identified contributory factors of your criminal thinking. Seeking acceptance from your peers as a juvenile was a contributory factor. The Board panel finds you must develop a deeper understanding into why you made the choice and found it easily acceptable to act in a criminal manner, at times with the use [sic] violence, to achieve social acceptance. You must conduct an introspection [sic] to understand the emotional and psychological dynamics of your criminal thinking.
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> [(Ra141-Ra142).]

This is impenetrable jargon from non-clinicians. It provides no guidance whatsoever to Cowan (who, as the Board acknowledged, had already identified the primary reason for his criminal behavior 30 years earlier) about what it would mean to "conduct an introspection to understand the emotional and psychological dynamics of your criminal thinking." The Board supplied no reason, overt or implicit, that it could confidently conclude that it would take Cowan nearly 17 years before there was any material possibility he could complete conducting such an introspection. And the Board provided no basis for Cowan—or this Court—to understand what sophisticated, multi-factorial insight developed over the next 17 years of conducting an introspection might

eventually prove satisfactory to the Board.

The malleability and unreliability of a purported lack of insight is a deep concern as the basis for denial of parole. As Justice Liu explained in a concurrence to a California Supreme Court decision concerning the proper role of criminal insight in parole decisions, "there is good reason to require the Board to articulate a rational nexus between insight and dangerousness in each case, taking into account all other evidence of suitability or unsuitability." In re Shaputis, 265 P.3d 253, 278 (Cal. 2011) (Liu, J., concurring). When "psychological evaluations" reflect a relatively low risk of recidivism, as here, the Parole Board's "contrary conclusion must be based on more than a hunch or mere belief that [the inmate] should gain more insight into his past behavior. The Board must point to evidence from which it is reasonable to infer that the inmate's lack of insight reveals a danger undetected or underestimated in the psychological reports." Id. at 277.

"'[O]ne always remains vulnerable to a charge that he or she lacks sufficient insight into some aspect of past misconduct even after meaningful self-reflection and expressions of remorse." Id. at 278. (quoting In re Ryner, 196 Cal. App. 4th 533, 548 (Cal. Ct. App. 2011)). The Board's reliance on something as nebulous as "insight" rewards those inmates who over the course of a parole hearing can "produce linguistic utterances in a socially legitimate form," even though such an ability depends on a range of problematic and likely irrelevant

factors such as "socioeconomic class, educational attainment, and mental and physical health." Victor L. Shammas, The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight, 42 Pol. & L. Anth. Rev. 142, 151 (2019).

Cowan is not a trained psychologist (though he received his GED while incarcerated), has gone through extensive counseling while in prison, and has taken nearly every rehabilitative program the DOC offers. Even assuming his brief interview with the Board did not demonstrate the sophisticated, nuanced, multi-factorial insight the Board desired, he has solid insight into the reasons for, and deep insight into the wrongness of, his criminal past. And he has demonstrated through his actions that he wants to share that insight with others, and that his progress toward reducing his risk of recidivism simply does not place him among the worst of the worst among those who have taken a life and thus face a presumptive 36-month FET.[4]

2. The Parole Board Improperly Ignored the Objective Assessment of Cowan's Risk of Recidivism, Conducted by an Expert Psychologist, that Placed Him at the Very Bottom of the Moderate Range of Risk.

A far more reliable way to measure Cowans' risk of recidivism than the

[4] As amicus ACLU-NJ suggests, the CSJ agrees (but does not herein duplicate the argument) that the proper role of insight—if any—should be the subject of rulemaking rather than ad hoc, unguided intuition from Board panels.

Board's intuition about introspection and insight are objective assessments, a benchmark the Board is obligated to consider, N.J.A.C. 10A:71-3.11(b)(23), but entirely ignored. The objective assessment conducted for Cowan was the LSI-R. Cowan's LSI-R was 24 on a 54-point scale, (Ra48, Ra55), placing him at the very bottom of the Moderate risk category. The Low/Moderate range is 14 to 23, and the Moderate range 24 to 33. Increased risk level means an increased propensity to commit future criminal acts. Chistopher T. Lowenkamp & Kristin Bechtel, The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System, 71 Federal Probation 3, 2 (2007).

The LSI-R is a "standardized actuarial instrument" that studies have proven to have more validity than risk assessments based on "professional, or clinical, judgment concerning an individual's risk to recidivate" (and the panel members do not have professional or clinical training, unlike the trained psychologist who evaluated Cowan), and even clinical judgment can be "potentially based on subjective biases, rather than on standardized objective risk measures" like the LSI-R. Id. at 1. The LSI-R was found to be a "valid predictor of offending outcomes for incarcerated populations as well as offenders in community and residential settings." Id. at 3.

Cowan's LSI-R of 24, at the very bottom of Moderate risk and one point above Low/Moderate, provides a strong objective basis for the Board to assess

his progress toward reducing recidivism and thus for determining both whether the presumptive FET is clearly inappropriate, and how long any such departure should be. The additional FET precludes Cowan's right even to apply for parole for 17 years, justified only by the Board's unexplained intuition that it would be effectively impossible to conclude anything but that Cowan had a substantial likelihood of recidivism for that entire timeframe.[5]

As Justice Liu explained, "[p]recisely because lack of insight is such a readily available diagnosis, its significance as an indicator of current dangerousness must be rationally articulated under the individual circumstances of each case – lest 'lack of insight' become, impermissibly, a new talisman with the potential to render almost all life inmates unsuitable for parole." Shaputis, 265 P.3d at 278.

Furthermore, the Board's decision entirely failed to account for the objective and highly relevant factor of Cowan's mature age. At the time of the full Parole Board's decision in November 2020, Cowan was already 52 years old. He would have been 55 before the end of his 36-month presumptive FET—

[5] This Court also properly considers any expert Psychological Assessment in the Confidential Appendix to determine if it supports or undermines the Board's conclusions. And if it is inconsistent with the Board's conclusions, this Court would also properly consider whether the Board provided sufficient reasons for its intuition to override the objective assessment and expert evaluation in favor of its own subjective intuitions.

an age by which risk of recidivism declines sharply, even setting aside the precipitously further reduced risk over the course of his 200-month FET.

The strongly "inverse relationship between age and recidivism" has been well-documented. Sarah Rakes et al., Recidivism Among Older Adults: Correlates of Prison Re-entry, 15 Just. Pol'y J., Spring 2018, at 4. Age accounts for "more variation in recidivism than any other demographic or criminogenic variable." Id. at 9. Specifically, there is a statistically significant difference in rates of recidivism among those below age 45, those between 45 and 54, those between 55 and 64, and those above 65. Id. at 8-9. Moreover, the Board's own data confirm the same statistically significant relationship between age and recidivism. State of New Jersey, Release Outcome 2014: A Three-Year Follow-Up 20 (examining 9,108 adults released from custody in 2014 and finding that "the differences across age were statistically significant. Inmates who were rearrested were younger than those who were not rearrested . . . . Multivariate statistics indicated that age was inversely related to the odds of rearrest; for every one year increase in age, the inmate's odds of a new arrest decreased by a factor of almost one (0.93).")

Cowan's advanced age makes it much less likely that he will recidivate than the typical inmate. And by the time his presumptive 36-month FET expires (i.e., absent the 164-month upward departure under N.J.A.C. 10A:71-3.21(d) challenged in this brief), he will already be over 55, an age category with quite

low recidivism risk. The United States Sentencing Commission found that federal offenders aged 55-59 were rearrested at a 22.2% rate and reconvicted at a 12.2% rate (compared to a 66.6% rearrest rate and 48.4% reconviction rate for those below 25, and 63.6% rearrest rate and 42.7% rearrest for those 25-29). The Effects of Aging on Recidivism Among Federal Offenders at 23, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf.

The full Board brushed aside Cowan's objection to the three-member panel's failure to consider his age as highly relevant to risk of recidivism:

> With regard to your claim that Cowan's mature age should have been a factor in his parole, be advised that the Board panel has the obligation to determine if there is a reasonable expectation that Cowan would commit a crime if released on parole. Cowan's age is a matter of record, was noted on the Case Summary at the time of his Initial Hearing, and was considered by the Board panel. However, an offender's age is not dispositive of whether the offender is suitable for parole release. Therefore, your contention is without merit.
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> [(Ra258).]

First, and quite concerningly, the full Board legally erred in concluding that a "reasonable expectation" of recidivism is the proper benchmark; it is not.[6] The statutory standard is not simply a reasonable expectation but instead a

[6] The regulations relevant to parole allow consideration of the "reasonable expectation that the inmate will violate conditions of parole," N.J.A.C. 10A:71-3.11, not a reasonable expectation of recidivism.

"substantial likelihood" of recidivism. See N.J.S.A. 30:4-123.56(c); Trantino IV, 154 N.J. at 27; Acoli, 250 N.J. at 455-56 ("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," and "'substantial' is defined as 'considerable in amount' or 'being that specified to a large degree.'").

Moreover, the Board's observation that Cowan's age is a matter of public record and was listed on the Case Summary, and its statement that "an offender's age is not dispositive," (Ra258), do nothing to establish that the highly relevant (though of course not dispositive) implications of Cowan's mature age were in any way considered by the three-member panel. The three-member panel simply stated in passing, "you are currently fifty-two (52) years of age," (Ra139), not suggesting that it considered, let alone accorded non-arbitrary weight, to Cowan's mature age in assessing his risk of recidivism.

In sum, the three-member panel gave no apparent consideration or weight to the highly relevant, objective factors suggesting Cowan's recidivism risk was moderate, at most, rather than clearly substantial for the next 17 years. The three-member panel did not consider Cowan's age. And it did not so much as mention, (Ra133-Ra142), let alone evidence any consideration, of Cowan's objective LSI-R score of 24, at the very bottom of the range for Moderate risk of recidivism, an empirically validated factor that the panel is by regulation obligated to consider, N.J.A.C. 10A:71-3.11(b)(23). The panel's failure, at the

very least, to explain why its intuition was sufficient to override objective evidence strongly undermining its conclusion was arbitrary and capricious.

3. The Parole Board Improperly Considered Cowan's Disciplinary Record and Criminal Insight to Set a 200-Month FET.

Finally, the Board, in imposing a 200-month FET, was arbitrary and capricious in its failure to properly consider the full context and import of Cowan's institutional disciplinary record. When considering Cowan's institutional disciplinary record, the Parole Board entirely failed to consider the exculpatory factors relating to Cowan's asterisk infraction for fighting and purportedly disruptive conduct in 2018.

The three-member panel cited repeatedly to the fighting infraction, demonstrating that it was a significant factor in its decision to impose a 200-month FET. In July 2018, Cowan was charged with fighting and "conduct that disrupts" (Ra140) for his involvement in an altercation between him and three other inmates; this act of "fighting" was brought about by Cowan's having told those inmates that they should drop their gang affiliation, which caused the inmates to attack Cowan and him to defend himself. The Parole Board acknowledged Cowan's explanation that he was

> housed at Bayside State Prison and there was a significant amount of younger inmates that had gang affiliations (CRIPS). You indicated "I always voice my opinion to whoever about the way that they [sic] living. Far as they need to be thinking more positive." You noted that because you did so to these inmates, you were looked down upon as a "nerd" and you were bullied. When you went to

> corrections officers to let them know what was happening, there was "tension" between you and the inmates in question. You noted that a prisoner is "not supposed to do that, going to the officers about another prisoner." Soon thereafter, you were assaulted by three (3) inmates in your cell and that because you fought back, "I was charged with fighting."
>
> [Ibid.]

Cowan felt unsafe given the inmates' reaction to his counseling them to leave a gang; he requested a transfer, but before a transfer could occur, the three inmates entered Cowan's cell, where the fight occurred. (Ra164-Ra165). The medical records describe Cowan's dire condition after the attack:

> Upon arrival inmate found laying supine in his housing unit. Per officer on location inmate was involved in an altercation with multiple inmates in which he was possibly stomped. Upon assessment pt was found to have multiple facial lacerations, slurred speech, non reactive to pain below waist and swelling to nose. Pt's left eye was reactive however the right eye was non reactive.
>
> [(Ra174).]

Cowan was nonetheless charged with asterisk offenses for fighting and disruptive conduct, and a subsequent non-asterisk offense for refusing a work order when he refused to be transferred back to Bayside Prison, where he had been attacked, out of fear for his life. Cowan had had a Classification status of 1 before the incidents arising out of his attempting to counsel young inmates out of gang affiliation. (Ra164-Ra165).

The Board recognized that, in Cowan's Parole interview, he stated that his plans when released on parole were to "counsel people to recognize the same

ignorance that I was doing because I really was a young ignorant kid, I was out there trying to fit in." (Ra140). The Board's takeaway from Cowan's demonstrated commitment to counseling other inmates to move away from gang affiliation toward more positive conduct was this:

> You advised the Board panel a belief [sic] that you are older, that you understand your past behavior and that you would like to counsel individuals who may be acting in a negative manner. However, in 2018 you admittedly conducted yourself in such a manner, choosing to interact and lecture inmates on how they were living a negative life based upon their street gang affiliations. This resulted in animosity and an incident during which you claim you had to defend yourself from three (3) inmates who attacked you. The Board panel finds that you need to develop better judgment in dealing and interacting with others, during situations of discourse and confrontation.
>
> [Ra140.]

In other words, Cowan's decision to counsel other inmates to leave gang affiliation and to move toward more positive conduct—conduct he undertook at great personal risk—was acting in a negative manner, not indicative of progress toward reducing risk of recidivism. Instead, it demonstrated poor judgment in situations of discourse and confrontation, apparently reflecting the likelihood that if paroled he might unwisely counsel young gang members to leave a life of crime, thereby increasing the risk of confrontation and his need to engage in criminal conduct to defend himself from retribution.

When the full context of Cowan's 2018 asterisk charges was raised by

Cowan's attorney on administrative appeal to the full Parole Board, it upheld the relevance of the non-asterisk disciplinary charge related to Cowan's refusing a work assignment (i.e., objecting to being transferred back to Bayside, where he had been severely beaten). (Ra258). But the full Board did not mention or uphold any negative implication arising from the full circumstances of the more serious asterisk charges for fighting and disruptive conduct. The full Board ignored the fact that the three-member panel had extensively relied on those charges, but not the work assignment charge, in setting the FET. (Ra140). And the full Board ignored the three-member panel's reliance on Cowan's counseling other inmates to leave gang affiliation as poor "judgment" "during situations of discourse and confrontation," (Ra142), a decidedly opaque and contestable conclusion.

Cowan expressed insight into his criminal behavior, acknowledged the problematic role of his desire to fit in with peers 30 years earlier when he had committed horrific crimes, and expressed remorse and acceptance of responsibility. He both expressed and demonstrated his desire to change his behavior as an older and wiser man. He both expressed and demonstrated his desire to help others avoid the violent, criminal behavior that marked his youth. The three-member panel's decision, upheld by the full Board without any acknowledgment of its manifest shortcomings, was arbitrary and capricious.

C. The Board's Failure to Explain and to Provide Particular Reasons for its Decision to Impose an Additional 164-Month FET Is Arbitrary and Capricious and Inadequate to Enable Judicial Review.

In addition to the Parole Board's substantively improper decision to depart upward from the 36-month presumptive FET, and its arbitrary and capricious decision to impose an additional 164 months on top of that presumptive FET, as discussed above, the Board is also legally obligated to explain its reasoning in taking those extraordinary actions, and why imposing the additional FET of that length is necessary and appropriate. It did not do so.

The upward FET departure here of 164 months is more than 18 times longer than the maximum 9-month adjustment permissible under the presumptive regulatory schedule; that upward adjustment takes into account factors specific to the inmate, including those related to the criminal offense, criminal record, and any other characteristics of the inmate. N.J.A.C. 10A:71-3.21(c). Yet the Board entirely failed to explain how the panel arrived under N.J.A.C. 10A:71-3.21(d) at a further 164 months of FET, instead providing threadbare recitations of the same reasons for which Cowan was denied parole. This complete failure to explain the basis for the length of departure—especially given such a substantial and disproportionate departure from the presumptive FET—provides a further basis for vacating the Board's decision.

This Court has "long pointed to the need for suitable expression of the controlling findings or reasons" for an administrative agency's decision,

including in the Parole Board context. Monks, 58 N.J. at 244; see also Berta, 473 N.J. Super. at 303–04 (App. Div. 2022). Here, the Board was statutorily obligated to provide specific, particular reasons for arriving at an upward departure of 164 months above the presumptive FET. "'[T]he Board must explain not only why the presumptive FET is clearly inappropriate, but also why the FET that was actually imposed [above the presumptive FET] is necessary and appropriate." Berta, 473 N.J. Super. at 323; see also id. at 327 (Geiger, J. concurring) (raising significant concerns parallel to those at issue here).

The duty to explain arises from the statutory obligation to provide "particular reasons," N.J.S.A. 30:4-123.56(b) ("If such [FET after denial of parole] differs from the [FET] otherwise established by the schedule, the board panel shall include particular reasons therefor."), from the need for judicial review of arbitrariness and capriciousness, Monks, 58 N.J. at 249, and from this State's principles of administrative fairness and rightness that require agencies to be fair and just and to explain their reasoning. See id. at 249 ("[F]airness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons.").[7]

[7] The CSJ wholeheartedly agrees with the argument of amicus ACDL-NJ that principles of administrative fairness and rightness preclude the Parole Board from unguided, unexplained imposition of upward adjustments to presumptive FETs. To avoid duplication, it does not repeat those arguments here.

Courts find that agency decisions are deficient for the purpose of judicial review when agencies, including in the prison context, exercise their authority to impose penalties beyond recommended limits without explanations for doing so. In Mejia v. New Jersey Department of Corrections, 446 N.J. Super. 369, 378 (App. Div. 2016), the Appellate Division reversed the unexplained decision to discipline the inmate by imposing the "longest possible period of administrative segregation available at the time" for conduct undisputedly making him eligible for discipline. Although the relevant statute gave the hearing officer authority to apply "totally discretionary sanctioning factors" in deciding an appropriate sanction "within the allowable range," the court found as insufficiently explained the "generic affirmance acknowledg[ing] the sanction imposed must be equitable." Id. at 378–79.

Courts have similarly reversed Parole Board decisions to impose excessive FETs under N.J.A.C. 10A:71-3.21(d). In Berta, 473 N.J. Super. at

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The CSJ further notes that, apart from the duty to explain why the Board arrived at a particular length of upward departure, administrative fairness and rightness also dictate the substantive need for proportionality between the upper limit of upward adjustment of 9 months under N.J.A.C. 10A:71-3.21(c) and the entirely unconstrained upward departure authorized on top of that adjustment, on narrower but entirely overlapping grounds, under N.J.A.C. 10A:71-3.21(d). At least until such time as rulemaking occurs to place proper guidance and limits on the extent of such departure, fairness and rightness requires courts to scrutinize carefully the extent of such upward departure so that is constrained substantively by proportionality and procedurally by the duty to provide particular reasons.

303–04, the Appellate Division concluded that "the Board failed to adequately explain why it fixed an FET almost three times as long as the presumptive twenty-seven-month FET imposed by N.J.A.C. 10A:71-3.21(a)." The court emphasized the Board's deficient reasoning as to why the inmate exhibited a "lack of satisfactory progress in reducing the likelihood of future behavior," N.J.A.C. 10A:71-3.21(d), sufficient to necessitate a 45-month increase in the presumptive FET. "The Board, in other words, essentially incorporated the reasons it had relied upon to deny parole, labeled those collective reasons as 'serious' in nature, and then re-purposed them to nearly triple the presumptive FET." Berta, 473 N.J. Super. at 324.

Here, like the Board's failure in Berta to explain its imposition of an FET almost three times as long as the presumptive 27 months, the three-member panel failed to explain its basis for imposing an FET more than 18 times longer than the 9-month adjustment permissible under the presumptive regulatory schedule. Although the final section of the panel's ten-page decision is entitled "Specific Reasons For The Imposition Of The Two Hundred (200) Month Future Parole Eligibility Term," (Ra141), the text in fact fails to provide any specific reasons, failing to provide any justification for the extent of the additional 164-month upward adjustment or of the ultimate 200-month FET the panel adopted.

Like the DOC's "generic affirmance" of its obligations and authority under N.J.A.C. 10A:4–9.17(a) in Mejia, the Board begins by simply restating its

authority under N.J.A.C. 10A:71-3.21(d) to set "a future eligibility term which differs from the presumptive term of twenty-seven (27) months (± 9 months)." (Ra141). The Panel then, in three short paragraphs, reiterates the same bases (more in the nature of conclusions than particular reasons) for which Cowan was denied parole: the need to "develop a deeper understanding into why [Cowan] made the choice and found it acceptable to act in a criminal manner," "not having made adequate progress in the rehabilitative process," and Cowan's infractions committed while in prison. (Ra141–Ra142). At no point does the panel explain why these reasons justify a 164-month departure above the presumptive 9-month adjustment. The panel's failure to explain its decision fails to satisfy its statutory obligation to provide particular reasons, is inadequate for judicial review of arbitrariness and capriciousness, and is contrary to this State's principles of administrative fairness and rightness.

D. The Propriety of the Board's Imposition of a 164-Month FET Cannot Be Justified, as the Attorney General Suggests, by Discounting that Length by Cowan's Current and Possible Future Credits.

This Court should reject the Attorney General's argument on behalf of the Board suggesting that Cowan's 200-month FET is not so significant because, once reduced by commutation and other credits, Cowan's "actual FET will be substantially less than 200-months." Opposition to Petition for Certification at 5. Justifying an otherwise unlawful and excessive FET by factoring in an inmate's commutation and work credits violates the text of the 1979 Parole Act,

which makes the determination of the FET entirely distinct from the separate operation of credits to reduce the FET.

The Attorney General suggests that the Board's imposition of a 200-month FET, even if otherwise unlawful, can pass muster because, given Cowan's credits, the actual FET will be substantially less than 200 months. The Appellate Division has repeatedly shrugged off excessive FETs under N.J.A.C. 10A:71-3.21(d) applying this improper line of reasoning.[8] But this mode of analysis is entirely improper.

The Parole Act of 1979 (unlike the 1997 Parole Act) expressly provides two distinct statutory calculations, one to set the FET, and a separate process to reduce that FET to the extent of credits earned. The Board's FET determination is intended to stand on its own, whatever credits may or may not apply. The propriety of the Board's FET stands—or, as here, falls—on its own. The Board's FET decision in this matter was, for the multiple reasons explained above, arbitrary and capricious.

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[8] See, e.g., Camilo v. New Jersey State Parole Bd., 2019 WL 5592843, at *3 (N.J. Super. Ct. App. Div. Oct. 30, 2019) ("[C]amilo's parole eligibility date is currently January 17, 2024, and with anticipated work credits and minimum custody credits his projected parole eligibility date is actually in February 2022. Hence, the 200-month FET is not nearly as severe as it may first appear."); Vessels v. New Jersey State Parole Bd., 2017 WL 1422877, at *4 (N.J. Super. Ct. App. Div. Apr. 21, 2017) ("Additionally, as the Board correctly acknowledged, Vessels is entitled to receive commutation and work credits, thereby reducing his FET to substantially less than 240 months.").

CONCLUSION

For the foregoing reasons, amicus curiae the Seton Hall Law School Center for Social Justice respectfully requests that this Court vacate the Parole Board's decision and remand for the Board to (1) determine if any FET beyond the presumptive 36 months is clearly justified, taking into account only Cowan's progress toward reducing the risk of recidivism, and not taking into account his criminal record or history as explained in Point II, and (2) if so, setting—and explaining—any FET that is longer than 36 months, and doing so consistent with the principles of proportionality and fairness and rightness set forth in Point III.

Respectfully submitted,

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Dated: April 22, 2025