

HORACE COWAN,

Plaintiff-Petitioner,

V.

NEW JERSEY STATE PAROLE  
BOARD,

Respondent-Respondent.

SUPREME COURT OF NEW JERSEY

DOCKET NO. 089243

APP. DIV. DOCKET NO. A-1131-20

**Criminal Action**

Sat Below:

Hon. Mary Gibbons Whipple

Hon. Catherine I. Enright

**RECEIVED**

JUL 17 2024

SUPREME COURT  
OF NEW JERSEY

PETITION FOR CERTIFICATION

Horace Cowan SBI#338754B  
East Jersey State Prison  
Lock Bag R  
Rahway, NJ 07065

**Defendant is Confined**

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### **STATEMENT OF THE MATTER INVOLVED**

On February 19, 2020, Horace Cowan became eligible for parole after serving the mandatory 30-year parole disqualifier on his life sentence. On January 2, 2020, Mr. Cowan appeared before a two-member Parole Board Panel consisting of Julio Marengo and Ronald Slaughter. During the January 2nd hearing, the two-member Board panel denied Mr. Cowan an opportunity for parole. The denial was largely influenced by the two infractions incurred on May 10, 2018. According to the Notice of Decision dated January 2, 2020, the two-member Board panel listed multiple aggravating factors in support of their reason for denying Mr. Cowan opportunity for parole and for recommending him to the three-member panel to establish a Future Eligibility Term (FET) beyond the presumptive 27-months.

On May 6, 2020, the three-member Board panel convened and set a new FET at 200-months. Shortly thereafter, Mr. Cowan hired private counsel Telissa K. Lindsey to appeal both the denial of parole and the 200-month FET imposed beyond the presumptive 27-months pursuant to N.J.A.C. 10A: 71-3.2(a)(1). On November 18, 2020, the Full Parole Board entered a final agency decision affirming the 200-month FET.

On December 12, 2023, Mr. Cowan appealed the New Jersey State Parole Board's decision to deny parole and imposition of a 200-month FET beyond the presumptive 27-month extension before the honorable Judges Whipple and

Enright. On January 25, 2024, the Appellate Division affirmed the New Jersey State Parole Board's decision.

Mr. Cowan Petitions this court to determine the standard by which a FET would be deemed "clearly inappropriate" and whether the Board, in imposing the 200-month FET "simply pick a number out of thin air" when it decides "to impose a higher FET." Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 322-23, 280 A.3d 797 (App. Div. 2022)

**QUESTION PRESENTED**

- (1) Does the New Jersey Parole Board's frequent and routine imposition of extended Future Eligibility Terms (FET) constitute a modification of sentence where Petitioner was given a 200-month FET?
- (2) Does the imposition of an extended FET require greater judicial scrutiny?

## **ERRORS COMPLAINED OF**

### **I**

**THE NEW JERSEY STATE PAROLE BOARD'S FREQUENT AND ROUTINE IMPOSITION OF EXTENDED FUTURE ELIGIBILITY TERMS REQUIRE REVIEW BECAUSE THERE IS DEBATE AMONG THE APPELLATE COURT PANELS ON THE STANDARD OF REVIEW UNDER THE 1979 PAROLE ACT N.J.S.A. 30:4-123.53.**

Like many other incarcerated persons eligible for parole, Mr. Cowan received a 200-month Future Eligibility Term (FET) outside the presumptive 27-month FET pursuant to N.J.A.C. 10A:71-3.21(a)(1). The New Jersey State Parole Board's frequent and routine imposition of extended FET has caused debate among Appellate Court Panels as to the standard of review requiring this Court's intervention.

#### **A. New Jersey's Parole System**

Since its inception, the New Jersey Parole system has featured two types of parole hearings: initial hearings and successive hearings. When a prisoner first becomes eligible for release, New Jersey's Parole Board holds a hearing, decides whether to grant parole, and, if it declines to do so, sets a date to revisit its decision. See N.J.S.A. § 30:4-123.53(a) (2011). In the course of these initial hearings, the Board may consult any information it deems relevant, including an inmate's criminal history. See *id.*

Before 1997, however, a different set of evidentiary rules governed successive parole hearings. Under those rules, the Board could not consider old information, see id. § 30:4-123.56(c) (1996), and instead based successive parole decisions "strictly on information developed since the previous denial of parole," Assembly Law and Public Safety Committee, Statement to Assembly Bill No. 21 (Mar. 3, 1997). In practice, this prevented the Board from taking account of inmates' criminal history-often the most damaging aspect of their records-after the initial hearing.

The change wrought in 1997 had its roots in the early 1990s when many states moved to recalibrate their parole regimes. See, e.g., Mickens-Thomas v. Vaughn, 321 F.3d 374, 380 (3d Cir. 2003) (describing the impetus behind contemporaneous changes in Pennsylvania's parole law). Not content to sit on the sidelines, New Jersey's then-Governor appointed a Commission to study the state's parole system and propose reforms. The history from that point on is described in detail in Trantino v. New Jersey State Parole Board-a seminal state court opinion in which the Superior Court's Appellate Division upheld that change under the Ex Post Facto Clause as merely "procedural" and not "substantive." 331 N.J. Super. 577, 752 (N.J. Super. App. Div. 2000).

According to the Appellate Division, the purpose of the Commission was to "recommend legislation that would 'enlarge the discretion of the Board to deny parole,'" and the Commission's final report documented the practical effects of the

rule against considering old information in successive hearings. *Id.* at 780 (quoting James Holzapfel, et al., Final Report of the Study Commission on Parole (Dec. 1996), (hereinafter, Final Report)). Among those effects were that "the Board [wa]s effectively required to grant parole, even though the inmate may not be rehabilitated." *Id.* (quoting Final Report at \*21). And because the Commission ranked the rule as "one of the most significant and inappropriate limitations that existing law place[d] on the Board's discretion," it urged New Jersey's legislature to relax the rule and allow the Parole Board to examine "all relevant information" at every hearing. *Id.* (internal quotation marks omitted) (quoting Final Report at \*21-22).

#### B. The 1997 Amendments

Just a few months after the Commission released its Final Report, the New Jersey legislature implemented its recommendations in the 1997 Amendments to the Parole Act. See 1997 N.J. Sess. Law Serv. ch. 213. Two of those amendments undergird this appeal:

The All-Information Provision: Consistent with the Commission's recommendation, the Amendments eliminated the prohibition against reviewing old information. Compare N.J.S.A. § 30:4-123.56(c) (2011), with N.J.S.A. § 30:4-123.56(c) (1996). Under the new regime, the Board enjoys free rein to revisit an inmate's criminal history during successive hearings.

The Risk-Assessment Requirement: The Amendments also instructed the Board to prepare an "objective risk assessment" before every parole hearing, including successive hearings. N.J.S.A. § 30:4-123.52(e) (2001). This assessment must incorporate old information-including an inmate's "educational and employment history" and "family and marital history"-along with any other "static and dynamic factors which may assist the [B]oard." Id.

Since 1997, the Board has applied these changes to all prisoners, including those convicted before the Amendments came into force. See Trantino, 752 A.2d at 781.

A two-member Board panel may increase or decrease the standard FET "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).5

A three-member Board panel may establish an FET different from the standard 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). In making that determination, the three-member panel is required to "consider the factors enumerated in N.J.A.C. 10A:71-3.11." N.J.A.C. 10A:71-3.21(d).

### C. Future Eligibility Term

An inmate serving a murder sentence is presumptively assigned a twenty-seven-month future eligibility term (FET) after a denial of parole. N.J.A.C. 10A:71-3.21(a)(1). Pursuant to N.J.A.C. 10A:71-3.21(d), the Parole Board is authorized to set a higher FET if the future parole eligibility date which would be established pursuant to N.J.A.C. 10A:71-3.21(a) 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(d) also provides that the FET may be increased or decreased by up to nine months when, in the opinion of the Parole 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. When doing so, the Board shall consider the factors in N.J.A.C. 10A:71-3.11 but must focus "squarely on the likelihood of recidivism." McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 565 (App. Div. 2002)

### D. The New Jersey Parole Board frequent and routinely utilizes the "clearly inappropriate" standard and impose FET outside of the presumptive twenty-seven-month FET.

"[T]he 'clearly inappropriate' standard [is] a high threshold to vault" and "[t]he presumption that convicted murderers denied parole should be given a twenty-seven-month FET is not to be dispensed with for light or transient reasons." Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 322-23 (App. Div. 2022). "The Board cannot simply pick a number out of thin air" when it decides "to impose a

higher FET." Id. at 323. Rather, "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." Ibid.

However, a check of recent New Jersey Appellate Case involving the application of the "clearly inappropriate" standard demonstrates frequent imposition of a higher FET:

- a. RICHARD REDDEN, v. NEW JERSEY STATE PAROLE BOARD, 2023 NJ Super Unpub LEXIS 8682023 N.J. Super. Unpub. LEXIS 868 DOCKET NO. A-3293-20 (June 5, 2023, Decided **120-month FET Affirmed**)
- b. LUIS ANGEL RIVERA, v. NEW JERSEY STATE PAROLE BOARD, 2023 NJ Super Unpub LEXIS 12092023 N.J. Super. Unpub. LEXIS 1209 DOCKET NO. A-3499-20 (July 18, 2023, Decided **60-month FET Affirmed**)
- c. IMARAKASIMU, v. NEW JERSEY STATE PAROLE BOARD, 2023 NJ Super Unpub LEXIS 13082023 N.J. Super. Unpub. LEXIS 1308 DOCKET NO. A-3676-20 (July 28, 2023, Decided **96-month FET Affirmed**)
- d. KEVIN SABATINI, v. NEW JERSEY STATE PAROLE BOARD, 2023 NJ Super Unpub LEXIS 9952023 N.J. Super. Unpub. LEXIS 995 DOCKET NO. A-2581-20 (June 19, 2023, Decided **180-month FET Vacated and Remanded**)
- e. MARK MCLAUGHLIN, v. NEW JERSEY STATE PAROLE BOARD, 2023 NJ Super Unpub LEXIS 8712023 N.J. Super. Unpub. LEXIS 871 DOCKET NO. A-3695-20 (June 5, 2023, Decided **120-month FET Vacated and Remanded**)

"Parole Board decisions are highly individualized discretionary appraisals" that should be reversed only if arbitrary or capricious. Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179-80, 845 A.2d 684 (App. Div. 2004) (quoting Trantino, 166 N.J. at 173). However, the nature of parole decisions "does not engender a more exacting standard of judicial review than that applicable to other administrative agency decisions." Trantino, 166 N.J. at 173

The focus on these three inquiries to determine if an agency action is arbitrary, capricious, or unreasonable:

- (1) whether the agency's action violates express or implied legislative policies, i.e., did the agency follow the law;
- (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
- (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Trantino, 154 N.J. at 24 (citing Brady v. Dep't of Personnel, 149 N.J. 244, 256 (1997)).]

The Parole Board's frequent and routine imposition of FETs outside of the presumptive 27-month, including Mr. Cowan's 200-month FET, warrants this Court's review under the "arbitrary, capricious, or unreasonable" standard. Id.

**THE REASON WHY CERTIFICATION  
SHOULD BE ALLOWED**

This Court should allow Certification because the Parole Board's routine imposition of FETs beyond the presumptive 27-month term is tantamount to "modify[ing] sentences." Berta, *supra*, 473 N.J. Super. at 326.

In the concurrent opinion of Berta, Justice Geiger warned that the imposition of a FET is not punishment and there should be greater scrutiny on the practice:

" The role of the Board is not to modify sentences. Similarly, the intended purpose of imposing a FET is not punishment. See State 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."). 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 Thomas, 470 N.J. Super. at 194-95.

\* \* \*

In my view, an extended FET must be based on substantial credible evidence in the record that objectively demonstrates that its duration directly relates to the amount of time necessary to address the reasons identified for denying parole. In turn, appellate review of an extended FET warrants a higher degree of scrutiny by a reviewing court than afforded under the deferential standard of review we are currently obligated to apply.

Berta, 473 N.J. Super. at 327-29.

Justice Geiger concurring opinion highlights the necessity of this Court to establish a more comprehensive standard of review on the Parole Board's imposition of an extended FET.

**COMMENTS WITH RESPECT TO THE APPELLATE DIVISION  
DECISION**

In affirming the Parole Board's 200-month FET, the Appellate Division decision failed to acknowledge that "an FET must not be imposed as a form of punishment; and . . . the decision to impose an FET beyond the presumptive FET, like the underlying decision to deny parole, must be tied directly to the goal of reducing the likelihood of future criminal behavior." Berta, 473 N.J. Super. at 323.

The Parole decision to impose a 200-month FET is "a form of punishment" which is not "tied directly to the goal of reducing the likelihood of future criminal behavior." Id.

**CONCLUSION**

As the Berta Court acknowledged, “[a] parole decision is not intended to achieve [. . .] just deserts.” Mr. Cowan’s Petition should be granted to decide the scope of the parole board’s imposition of a FET outside of the presumptive range.

Dated: \_\_\_\_\_

*July 10, 2024*

Respectfully Submitted,

*Horace Cowan*  
\_\_\_\_\_  
Horace Cowan, pro se