SUPREME COURT OF NEW JERSEY
DOCKET NO. A-24-24 (089243)
APP DIV. DOCKET NO. A-1131-20

HORACE COWAN,	:	CIVIL ACTION
Plaintiff-Appellant,	:	On Appeal from a Final Agency Action of the Parole Board,
v.	:	Setting A Future Eligibility Term
NEW JERSEY STATE PAROLE BOARD,	:	
	:	
Defendant-Respondent.		

REDACTED SUPPLEMENTAL SUPREME COURT BRIEF ON BEHALF OF APPELLANT

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PRELIMINARY STATEMENT

After the passage of the Criminal Code (the "2C") and the 1979 Parole Act, the punitive portion of an inmate's sentence is completed by the time he is first eligible for parole. The inmate then enjoys a presumption of parole, and the New Jersey State Parole Board (the "Board") must parole him unless it proves by a preponderance of evidence that he is substantially likely to commit a new crime if he is released. A "substantial likelihood" is more than a mere probability; the Board must release the inmate even if it believes he is not "fully rehabilitated" and still poses "some risk" of committing a new crime—so long as there is not a substantial likelihood that he will commit a new crime. The inmate has no burden to prove his fitness for parole. These features of the 1979 Parole Act were implemented to make the parole process more consistent, predictable, objective and efficient and to cut down on the wide discretion of the Board to deny parole. When the Board denies parole, it must set a "future parole eligibility date" (also called a "future eligibility term" or "FET") for the inmate; at the new eligibility date, the Board must release the inmate unless it can prove he still poses a substantial likelihood of committing a new crime if released. The 1979 Act directed the Board to publish a schedule of FETs but allows the Board to depart from this schedule.

Although the sole criterion for parole eligibility under the 1979 Act is risk of recidivism, and although the Act was intended to make the parole process more objective and predictable, the Board routinely imposes FETs longer than the maximum permitted by its own published schedule of FETs. Since 2010, of all the FETs imposed on inmates serving a life sentence, forty-seven percent have been longer than the maximum scheduled length of three years. This appears to occur for several reasons: (1) despite ample case law evaluating the Board's decisions to deny parole, there are only three published cases assessing the standard for imposing an FET, but even these three cases focus mostly on the Board's decision to deny parole; (2) most inmates who appeal the Board's decisions are pro se; (3) and without a clear standard for evaluating FETs, the Appellate Division seems to have most often felt constrained to resort to deferring to the Board.

This case presents this Court's first opportunity to focus exclusively on the FET statute and regulation and articulate a clear standard for the Board to apply in setting FETs. This Court should adopt the standard recently articulated by the Appellate Division in Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284 (App. Div. 2022). The Court should thus hold: (1) there is a presumption that the Board will impose an FET within the schedule; (2) the Board must overcome the presumption of the scheduled FET by demonstrating

that the inmate will still pose a substantial likelihood of recidivism by the end of the maximum scheduled FET; and (3) the Board must demonstrate that the FET imposed is only as long as is necessary to reduce the inmate's risk of recidivism below the level of "substantial."

Applied to the Board's imposition of a 200-month FET for Mr. Cowan, it is clear that this FET fails this test. The Board's two stated reasons for imposing the 200-month FET were (1) that Mr. Cown needs to develop a better understanding of his criminal thinking through (a) introspection and (b) further programming, and (2) Mr. Cowan's infraction history, which included a 2018 infraction for fighting. The first reason was also asserted by the Board in Berta and found to be insufficient to justify the 72-month FET imposed in that case. The Board did not point to any specific programs or treatment and otherwise explain why it would take Mr. Cowan 200 months to gain the necessary insight. Nor did the Board explain why it would need to see Mr. Cowan remain infraction free for 200 months to be able to find he was no longer substantially likely to reoffend. Moreover, the record simply cannot support a finding that Mr. Cowan will remain substantially likely to commit a new crime for the next 200 months. It has now been nearly five and a half years since Mr. Cowan was denied parole—nearly double the maximum scheduled FET. Accordingly, this Court should reverse the FET and remand for a new parole hearing.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Horace Cowan was born on January 15, 1968, the youngest of three children. (Ra35, [redacted]

On February 18, 1990, when he was twenty-two years old, Horace Cowan and two accomplices attempted a robbery of a twenty-one-year-old

[1] Due to the interrelated nature of these sections, they are combined for clarity.

male, W.W.[2] (Ra133)[3] During the robbery, he shot W.W. with a sawed-off shotgun. (Ra133) W.W. died of the gunshot wound. (Ra134) Mr. Cowan was charged under Camden County Indictment 90-06-1805-I with murder and two related firearms counts. (Ra134, 28)

While in the Monmouth County Jail awaiting trial, on February 20, 1991, Mr. Cowan assaulted corrections officer L.R. and maintenance worker T.B. with two accomplices while committing the crime of escape. (Ra134) He hit L.R. on the head with a metal pipe, threatened T.B. with a screwdriver to his neck, and confined them both in the shower room. (Ra134) Mr. Cowan and his accomplices then used a fire extinguisher to beat open the steel rods of a window through which they escaped. (Ra134) Mr. Cowan was apprehended the following day and returned to jail. (Ra135) He was charged under Monmouth County Indictment 91-04-549-I with attempted murder, aggravated assault, armed robbery, kidnapping, criminal restraint, escape, and weapons offenses. (Ra135)

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[2] In its Appellate Division brief, the Parole Board referred to the victims in this case by their initials. Appellant follows suit.

[3] The following abbreviations will be used:
Ra – Respondent's App. Div. Appendix (filed Sept. 21, 2023)
Cra – Respondent's Confidential App. Div. Appendix (filed Sept. 21, 2023)
Asa – Appellant's Supreme Court Appendix (filed with this brief)

After proceeding to a jury trial on Camden County Indictment 90-06-1805-I, on May 28, 1992, Mr. Cowan was found guilty of the lesser-inclusive offense of aggravated manslaughter and both firearms offenses related to the sawed-off shotgun. (Ra35, 135) On July 31, 1992, Mr. Cowan was sentenced to life with twenty-five years without parole on the count of aggravated manslaughter; count three merged with count two, and Mr. Cowan received a concurrent sentence of fifteen years on count two, possession of a firearm for an unlawful purpose. (Ra35)

On Monmouth County Indictment 91-04-549-I, Mr. Cowan pleaded guilty to second degree conspiracy to commit aggravated assault, third-degree criminal restraint, and second-degree escape. (Ra32) On October 16, 1992, Mr. Cowan was sentenced to ten years with a five-year period of parole ineligibility on the count of conspiracy to commit aggravated assault with the sentences on the other counts to run concurrent. (Ra32) This aggregate sentence was imposed consecutively to his sentence of life with twenty-five on Camden County Indictment 90-06-1805-I. (Ra32)

During his incarceration, Mr. Cowan incurred 22 disciplinary infractions, 8 of which were asterisk[4] infractions. (Ra4, 13-19, 51-52) The

[4] Asterisk infractions "are considered the most serious and result in the most severe sanctions." N.J.A.C. 10A:4-4.1(a).

majority of these infractions were incurred during Mr. Cowan's first two decades in prison. (Ra51-52) Between 2011 and 2020, Mr. Cowan incurred only four infractions, three of which were related to a fight between Mr. Cowan and three other inmates. (Ra51, 140) Mr. Cowan told the Board the fight occurred because he told three men "they were living a negative life based upon their street gang affiliation," which created tension between him and the inmates, and after Mr. Cowan reported this tension to a corrections officer that three men came into his cell and attacked him. (Ra140) As indicated by his medical records, Mr. Cowan was badly beaten:

> 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)]

Mr. Cowan's most recent infraction occurred on August 22, 2018, when the DOC proposed to transfer him back to Bayside Prison, where the men who had beaten him were housed. (Ra51; Asa9-18) Mr. Cowan refused, and was accordingly charged with infraction *.254, refusing to accept a housing unit assignment. N.J.A.C. 10A:4-4.1(a)(2)(xvi). (Asa9-18) As of April 21, 2025,

Mr. Cowan had not incurred any additional infraction after August 22, 2018. (Asa20-49)

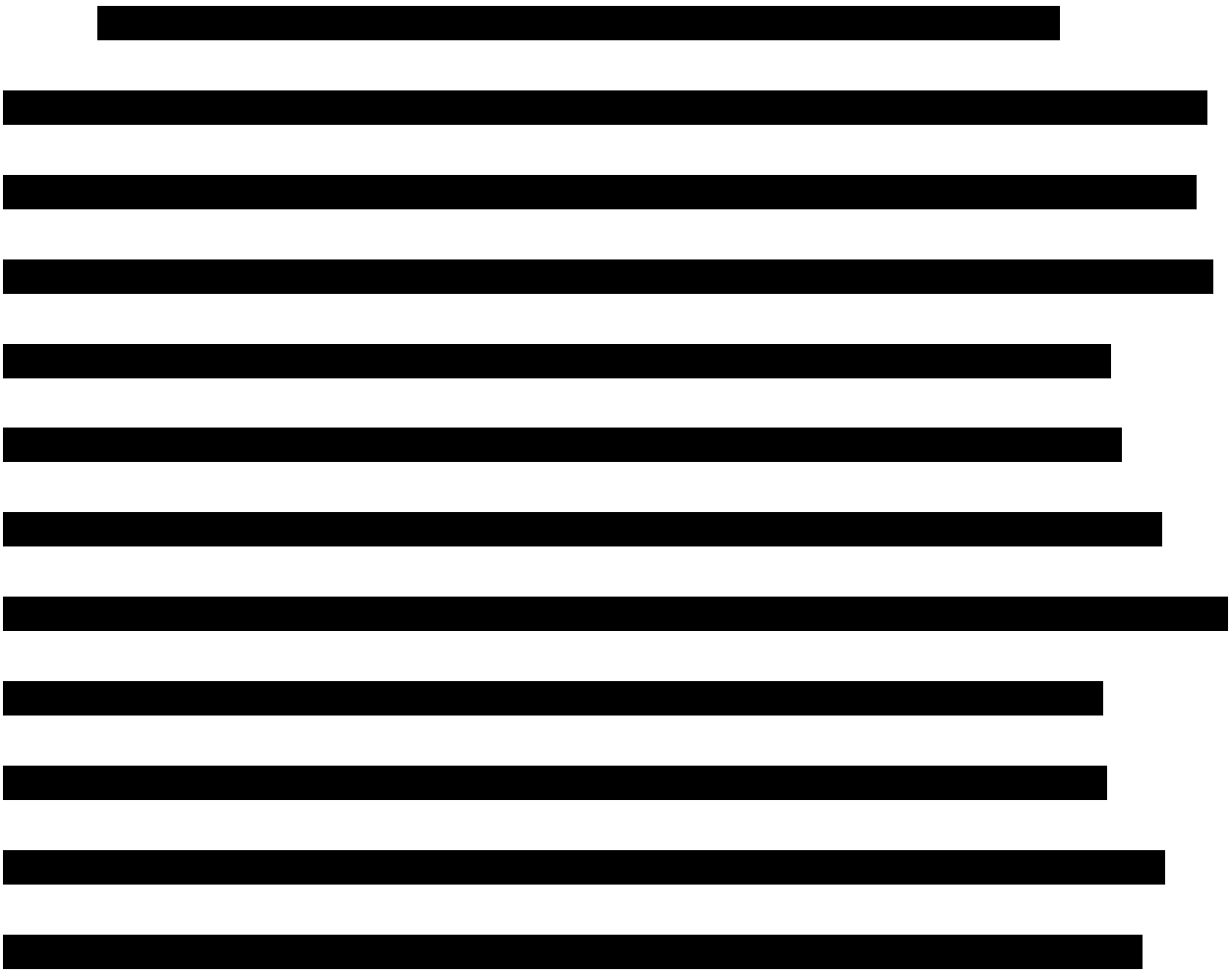
Since 2001, Mr. Cowan has maintained employment in the prison kitchen, bakery, dining room, and building sanitation unit. (Ra2-3) He obtained his high school diploma while in prison. (Ra77-84) Mr. Cowan has completed seven therapeutic or substance abuse programs, including Focus on The Victim, Thinking For a Change, Cage Your Rage Anger Management, Living in Balance, 12 Step Education, Successful Transition and Reentry (STAR) Program, HOPE Parenting Program, and Employment Readiness. (Ra3-4, 11) He also completed several vocational programs, including DOT Hazmat and CPR. (Ra3-4) And as of the date his Face Sheet was run in November 2019, he was on the waiting list for Anger Management as well as to take Focus on the Victim again. (Ra4)

On February 23, 2015, Mr. Cowan married Yvonne Benton in a ceremony conducted by Imam Aly. (Ra25, 104-106) His primary eligibility date was February 19, 2020. (Ra1, 48) His parole plan was to live with his wife Yvonne in Wenonah, New Jersey. (Ra52, 104-106) He was given a letter of a promise of employment from Bar-Rae Choice, the owner of Choice Legacy Consulting. (Ra117-118) On October 7, 2019, he sent a letter to the Board discussing his commission of the homicide:

> On February 2, 1990, I did something unimaginable by taking [W.W.]'s life. I hurt and destroyed a family in a way that I will never be able to fix or ever stop regretting. I will try not to blame it on my just being young; my youth played a part, but mostly, it came from my ignorance and callousness for anyone's life, aside from many other factors. I actually came to appreciate the prison time I served because in doing so I came to know and understand what is important in life and how I have changed from a common street thug to the person I slowly grew into today.
>
> I cannot help but to believe that I should have died that day rather than [W.W.]. . . . It took me a long time to meet I was a truly reprehensible person at the time I took [W.W.]'s life.
>
> [(Ra74-75)]

Several people also submitted letters to the Board advocating that the Board grant Mr. Cowan parole. (Ra104-113) Mr. Cowan's wife Yvonne's letter discussed Mr. Cowan's remorse for causing W.W.'s death and that she truly believes he is a changed man—"a man of integrity, honesty, loyalty, fairness, and compassion." (Ra104) Yvonne Cowan's daughter Yvonne Burnett wrote that Mr. Cowan was able to be an incredibly supportive partner to Mrs. Cowan even from prison because he is an excellent listener, gives her sound advice, and always makes sure she is taking care of herself. (Ra114) Kathleen Jacinto, a chaplain at East Jersey State Prison, wrote that she had engaged Mr. Cowan in one-on-one counseling, found him to be deeply remorseful for taking W.W.'s life, and "found him to be a consistent, honest,

and inquisitive individual who is sincere in his commitment to self-improvement." (Ra107-108) Reverend Dr. Lawrence Akins, Supervisor of Chaplaincy Services for East Jersey State Prison, also engaged Mr. Cowan in one-on-one counseling and similarly wrote that he found Mr. Cowan's level of remorse and confronting of the gravity of his crimes to be "highly uncommon" among incarcerated individuals. (Ra109-110) Mr. Cowan's brother James W. Young expressed a similar sentiment and noted he had offered Mr. Cowan employment at his barbershop. (Ra112-113)



[redacted]

On January 2, 2020, a two-member panel issued a one-page checklist decision denying parole. (Ra55) The decision listed the following mitigating factors:

- All opportunities on community supervision completed without violations
- Participation in programs specific to behavior
- Participation in institutional programs
- Institutional reports reflect favorable institutional adjustment
- Attempt made to enroll and participate in programs but was not admitted
- Positive Interview is noted

It also listed the following reasons for denial:

- Facts and circumstances of the offense: multiple acts of violence, one involving a fatality
- Prior offense record is extensive
- Offense record is repetitive
- Prior offense record noted
- Nature of criminal record increasingly more serious
- Committed to incarceration for multiple offenses
- Committed new offense on community supervision
- Prior opportunities on community supervision have failed to deter criminal behavior
- Prior incarcerations did not deter criminal behavior

[5] https://www.nj.gov/parole/functions/community-programs/

- Institutional infractions: last infraction 8/22/2018 – refusing work assignment
- Insufficient problem resolution: "IM has over 21 infractions with the most recent ones committed in 2018 including refusing to work and fighting. The infractions indicate that IM still has not addressed his criminal behavior or thinking. IM needs to participate in his own rehabilitation by addressing his behavior during incarceration."
- Commission of the current offense while incarcerated
- Risk assessment evaluation: LSI-R 24

[(Ra55)]

The two-member panel's checklist identifying mitigating and aggravating factors was identical to the checklist prepared by Hearing Officer Theodore Sadiwnyk with the exception that Officer Sadiwnyk did not identify "insufficient problem resolution" as an aggravating factor. (Ra53) The panel suggested that he remain infraction free. (Ra55)

On March 3, 2020, the two-member panel issued an amended checklist that made two substantive changes: (1) it checked the "lack of insight into criminal behavior" box under "insufficient problem resolution;" and (2) it removed "positive interview noted" from the mitigating factors. (Ra123-125) The panel's only explanation for the latter change is as follows: "This factor appeared on the Initial Hearing Case Assessment, however, it does not appear appropriate for the Board panel's interview." (Ra125)

The two-member panel informed Mr. Cowan that it was referring his case to a three-member panel for consideration of an FET greater than the

presumptive scheduled FET. (Ra56) On May 6, 2020, the three-member panel issued a one-page decision indicating it was imposing a 200-month FET. (Ra129) On June 5, 2020, the three-member panel issued a ten-page written explanation of its reasons for denying parole and imposing a 200-month FET. (Ra133-142)

The three-member panel decision centered around its assertion that Mr. Cowan lacks insight into his criminal behavior. (Ra138-140) The panel then specified three "specific reasons for the imposition of the two hundred (200) month future parole eligibility term":

> - 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 violence, [sic] to achieve social acceptance. You must conduct an introspection to understand the emotional and psychological dynamics of your criminal thinking; and
>
> - You present as not having made adequate progress in the rehabilitative process. The Board panel notes your participation in programming/counseling included Thinking for a Change, Focus on the Victim, Anger Management and Successful Transition and Reentry Series (STARS). However, the Board panel finds that further programming will assist you in gaining a better understanding to your criminal thinking; and
>
> - You committed twenty-one (21) infractions, with eight (8) of the infractions being serious (asterisk). The

> serious infractions involved you exhibiting assaultive and disruptive behavior, along with incidents with components of fighting and narcotics. . . . Though you claimed at the hearing that you are older and are no longer the young man who made poor choices in the past, the Board panel finds that your recent *.004 – Fighting Any Person infraction from 2018 demonstrates that problematic issues still exist regarding how you interact with others.
>
> [(Ra141-142)]

Although 200 months is equivalent to sixteen years and eight months, the panel estimated that with commutation credits, Mr. Cowan's projected parole eligibility date was June 2030, or ten years and four months after his initial eligibility date. (Ra142)

The Appellate Division affirmed the Board's denial of parole[6] and the imposition of the 200-month FET, reasoning as follows:

> The imposition of the 200-month FET was not arbitrary, capricious, or unreasonable because the decision is supported by sufficient credible evidence on the record. R. 2:11-3(e)(1)(D). The Board in its detailed ten-page decision outlined all the reasons and considerations leading to the 200-month FET, noting Cowan lacked insight into his criminal behavior and

[6] The Appellate Division articulated the wrong standard, citing the less favorable standard of the 1997 Parole Act instead of that of the applicable 1979 Parole Act. Cowan v. N.J. State Parole Bd., No. A-1131-20 (Jan. 25, 2024) (slip op. at 4-5). (Asa4-5) ("[T]he Board should generally grant parole requests for release on an inmate's parole date unless it can be shown by a preponderance of the evidence that there is an indication the inmate failed to cooperate in his or her rehabilitation or there is a "reasonable expectation that the inmate will violate conditions of parole.").

> committed twenty-one infractions, eight of which were serious in nature. The most recent infractions occurred in 2018, for disruption, fighting, and rejecting work assignments.
>
> The Board found Cowan needed to "develop a better understanding to the dynamics of [his] personality defects that impelled [him] to criminal behavior" and that there "were multiple factors that impelled [him] to criminal conduct" which he had not yet appreciated. The Board further found Cowan needed to better assess and understand his triggers to be able to rectify his behavior and enhance his interactions with others.
>
> Furthermore, with a focus on the potential for recidivism, the Board found the 200-month FET was "necessary in order to address the issues detailed" in its decision since Cowan had not made adequate progress in his rehabilitative process.
>
> [Cowan v. N.J. State Parole Bd., No. A-1131-20 (Jan. 25, 2024) (slip op. at 6). (Asa6)

The Appellate Division also noted the Board's assertion "that the parole eligibility could be reduced by commutation credits, making his current eligibility parole date September 2031." Id. (slip op. at 7).

Mr. Cowan filed a pro se petition for certification, which this Court granted. Cowan v. New Jersey State Parole Bd., 259 N.J. 485 (2025). At this Court's request, the Office of the Public Defender assumed representation of Mr. Cowan and is filing this supplemental brief on his behalf.

LEGAL ARGUMENT

POINT I

THIS COURT SHOULD REVERSE THE 200 MONTH FET AND REMAND FOR A NEW PAROLE HEARING BECAUSE THE BOARD FAILED TO DEMONSTRATE (1) THAT A 36-MONTH FET WAS NOT ADEQUATE TO SUFFICIENTLY REDUCE MR. COWAN'S LIKELIHOOD OF RECIDIVISM AND (2) THAT THE 200-MONTH FET WAS NO LONGER THAN NEEDED TO REDUCE COWAN'S LIKELIHOOD OF RECIDIVISM.

"Judicial review of administrative agency action is a matter of constitutional right in New Jersey." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 383 (2013) (citing N.J. Const. art. VI, § 5, ¶ 4); see also Monks v. New Jersey State Parole Bd., 58 N.J. 238, 242 (1971). A court reviews the Board's decisions under an abuse of discretion standard, evaluating whether the decision was arbitrary or capricious through three inquiries: "(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 v. N.J. State Parole Bd., 154 N.J. 19, 24 (1998) (Trantino IV) (citing Brady v.

Department of Personnel, 149 N.J. 244, 256 (1997)). The Board's decision to impose a 200-month FET in this case was arbitrary and capricious under each of these inquiries.

Part A below sets forth the statutory, regulatory, and case law background surrounding the FET determination. Part B argues that the Board's determination to set a longer-than-scheduled FET and the length of that FET must be directly tied to an assessment of when the inmate's risk of recidivism will decrease below the level of substantial for three reasons: (1) Although the FET statute does not contain an explicit standard for setting longer-than-scheduled FETs, it must be construed to contain such a standard for it to be constitutional, as the absence of a standard would render it unconstitutionally vague and an unconstitutional delegation of unconstrained legislative authority to an administrative agency; (2) the overall purpose of the 1979 Parole Act makes clear that FETs must be governed by the same principle as parole-denial decisions; and (3) the Board's regulation cannot contravene the Legislature's purpose and would be unconstitutionally vague if not construed to require that longer-than-scheduled FETs be directly tied to the risk of recidivism. For these reasons, this Court should adopt the rule in Berta, which requires that the FET determination be tied directly to the inmate's risk of recidivism.

Part C applies this standard to the 200-month FET given to Mr. Cowan. The Board based the 200-month FET on its conclusions (1) that Mr. Cowan needs to develop a better understanding of his criminal thinking through (a) introspection and (b) further programming, and (2) Mr. Cowan's infraction history, which included a 2018 infraction for fighting. The Board failed to abide by the legislative policy requiring that, in order to impose a longer-than-scheduled FET, it: (1) demonstrate that the Mr. Cowan will still pose a substantial likelihood of recidivism even after the maximum scheduled FET; and (2) demonstrate that the 200-month FET was only as long as is necessary to reduce the Mr. Cowan's risk of recidivism below the level of "substantial." Moreover, there was not substantial evidence in the record that could support a 200-month FET under the relevant standard; in comparison, the maximum FET for an inmate who is paroled, commits a new crime of murder while on parole, and thereby has his parole revoked, is only 100 months.

For all these reasons, and because it has now been nearly five and a half years since Mr. Cowan was denied parole—nearly double the maximum scheduled FET, this Court should reverse the FET and remand for a new parole hearing.

A. The Statutory, Regulatory, and Case Law Background Governing FETs.

This Court has evaluated the FET set by the Board in only one prior case, Trantino IV, and that opinion primarily focused on the Board's decision to deny parole. The Court's reversal of the ten-year FET in Trantino IV was briefly discussed in a single paragraph that set forth a single basis for reversing both the decision denying parole as well as the FET—that the Board had applied the wrong standard. Id. at 38-39. There are only two published Appellate Division cases evaluating FETs: McGowan v. New Jersey State Parole Bd., 347 N.J. Super. 544 (App. Div. 2002), which also employs a cursory analysis relying on Trantino IV; and Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284 (App. Div. 2022). Because of the scant case law, and because this is the first time this Court has the opportunity to focus entirely on the appropriateness of an FET, it is necessary to begin with a review of the statutory and regulatory landscape governing FETs.

At the time that Mr. Cowan committed the offense in 1990, the Parole Act of 1979 was the governing law that set the standards for parole release and the assignment of an FET if parole was denied. L.1979, c. 441, § 9 (enacting N.J.S.A. 30:4-123.53, governing parole release); L.1979, c. 441, § 12 (enacting N.J.S.A. 30:4-123.56, governing FETs). Although parts of both these provisions were amended by L. 1997, c. 213, because Mr. Cowan's offense

was committed prior this law's effective date of August 18, 1997, the parole decision in his case is governed by the 1979 Parole Act. Acoli v. N.J. State Parole Bd., 250 N.J. 431, 437 (2022) (Acoli IV); Perry v. New Jersey State Parole Bd., 459 N.J. Super. 186, 196 (App. Div. 2019); Williams v. New Jersey State Parole Bd., 336 N.J. Super. 1, 7 (App. Div. 2000).

Two provisions of the 1979 Parole Act in particular are relevant to this appeal: N.J.S.A. 30:4-123.53, governing the standard for parole-release determinations, and N.J.S.A. 30:4-123.56, governing the setting of an FET if parole is denied. Section 123.53 set the following standard that the Board must employ in determining whether to grant parole: "'[a]n adult inmate shall be released on parole at the time of parole eligibility, unless [it is demonstrated] . . . by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the Laws of this State if released.'" In re Application of Trantino (Trantino II), 89 N.J. 347, 355 (1982) (quoting N.J.S.A. 30:4-123.53(a) (1979)).

In turn, Section 123.56 stated in relevant part:

> a. The board shall develop a schedule of future parole eligibility dates for adult inmates denied release at their eligibility date. In developing such schedule, particular emphasis shall be placed on the severity of the offense for which he was denied parole and on 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.
>
> b. If the release on the eligibility date is denied, the board panel which conducted the hearing shall refer to the schedule published pursuant to subsection a., and include in its statement denying parole notice of the date of future parole consideration. If such date differs from the date otherwise established by the schedule, the board panel shall include particular reasons therefor.
>
> c. An inmate shall be released on parole on the new parole eligibility date unless new information filed pursuant to a procedure identical to that set forth in section 10 indicates by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time. The determination of whether there is such an indication in the new preparole report or whether there is additional relevant information to be developed or produced at a hearing, and the determination of whether the inmate shall be released on the new parole eligibility date shall be made pursuant to the procedure set forth in sections 11 and 12.
>
> [N.J.S.A. 30:4-123.56 (1979), L.1979, c. 441, § 12. (Asa60)]

The Board enacted a schedule of FETs pursuant to section 123.56, which presently creates a presumptive FET of 27 months for inmates serving a sentence for manslaughter. N.J.A.C. 10A:71-3.21(a). Subsection (c) of this regulation allows the Board to depart from this FET schedule by either increasing or decreasing the scheduled FET by up to nine months, while subsection (d) allows the Board to completely depart from the schedule

without any numerical limit or constraint whatsoever. N.J.A.C. 10A:71-3.21(c), (d).

The Board first promulgated the FET schedule in 1980, originally codified at N.J.A.C. 10A:71-3.19. 12 N.J.R. 338 (June 5, 1980). (Asa87-91) Subsection (a) created four groups of offenses based on their severity, assigning each group a different presumptive FET:

	(i)		**(ii)**	
	Serving a sentence for:	OR	**For offenses not listed in (i), serving a sentence with a mandatory minimum of:**	**FET**
1	murder, rape, kidnapping		> 14 years	30 mos.
2	armed robbery or robbery		> 8 years < 14 years	24 mos.
3	breaking and entering, narcotic law violations, theft, arson, or assault and battery		> 4 years < 8 years	21 mos.
4	escape, bribery, conspiracy, gambling, or possession of a dangerous weapon		< 4 years	18 mos.

[N.J.A.C. 10A:71-3.19(a) (1980). (Asa89)]

After making adjustments and renumbering N.J.A.C. 10A:71-3.19 as N.J.A.C. 10A:71-3.21, the Board arrived at the current version of this schedule in 1990:[7]

[7] In 1985, the Board amended the list of Category 1 offenses to encompass murder, manslaughter, aggravated sexual assault or kidnapping, lowered the presumptive FET for Category 1 offenses from 30 to 27 months. 17 N.J.R. 1113 (May 6, 1985). (Asa99-100) For Category 3 offenses, the Board amended "breaking and entering" to "burglary," amended "assault and battery" to

	(i)		**(ii)**	
	Serving a sentence for:	OR	**For offenses not listed in (i), serving a sentence with a mandatory minimum of:**	**FET**
1	murder, manslaughter, aggravated sexual assault, kidnapping, or strict liability for drug induced death		> 14 years	27 mos.
2	armed robbery or robbery		< 14 years > 8 years	23 mos.
3	burglary, narcotic law violations, theft, arson, or aggravated assault		< 8 years > 4 years	20 mos.
4	escape, bribery, conspiracy, gambling, or possession of a dangerous weapon		< 4 years	17 mos.

[N.J.A.C. 10A:71-3.21(a) (2025).]

As noted, subsection (c) of N.J.A.C. 10A:71-3.21 authorizes the Board to increase or decrease the presumptive FET "by up to nine months when, in the opinion of the Board panel, the severity of the crime for which the inmate

"aggravated assault" and lowered the presumptive FET from 21 to 20 months. Ibid. The Board also made a procedural change, providing that if a two-member panel denying parole adds a third member and this three-member panel then decides whether to impose an FET beyond the presumptive—replacing the requirement that FETs beyond the presumptive could only be imposed by the full Board. Ibid. In 1990, the Board decreased the presumptive FETs for Category 2 and 4 offenses to their present schedules: 23 and 17 months, respectively. 22 N.J.R. 827-828 (Mar. 5, 1990). (Asa109-110)

was denied parole and the prior criminal record or other characteristics of the inmate warrant such adjustment."[8]

Subsection (d) of the regulation allows a three-member panel to impose an FET greater than nine months above the presumptive FET if the panel determines that the presumptive FET plus nine months would be "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior . . . . consider[ing] the factors enumerated in N.J.A.C. 10A:71-3.11." N.J.A.C. 10A:71-3.21(d). This language was enacted in 1999[9] and replaced the original language of subsection (d), which had allowed the Board to depart from the presumptive FET if it found the presumptive FET was "clearly inappropriate in consideration of the circumstances of the crime, the characteristics and prior criminal record of the inmate and the inmate's institutional behavior." N.J.A.C. 10A:71-3.19(d) (1980), promulgated by 12 N.J.R. 338 (June 5, 1980). (Asa89)

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[8] The original regulation promulgated in 1980 limited the authorized departure to six months. 12 N.J.R. 338 (June 5, 1980). (Asa89) In 1981, the Board amended subsection (c) to increase the range of the scheduled FETs from 6 months above or below the subsection (a) presumptive FETs to 9 months above or below the presumptive FETs. 13 N.J.R. 228(d) (Apr. 9, 1981); 13 N.J.R. 363(c) (June 4, 1981). (Asa93-95)

[9] 31 N.J.R. 1490(a) (June 7, 1999). (Asa145)

Looking at N.J.S.A. 30:4-123.56 and N.J.A.C. 10A:71-3.21 together, a few observations bear noting. First, subsection (a) of N.J.S.A. 30:4-123.56 contains explicit criteria for the FET schedule it directs the Board to promulgate—that the schedule be based on "the severity of the offense . . . , the prior criminal record of the inmate and the need for continued incapacitation of the inmate". N.J.S.A. 30:4-123.56(a). The Board chose to implement this mandate through subsections (a) and (c) of N.J.A.C. 10A:71-3.21. Subsection (a) creates presumptive FETs based on the severity of the crime, while subsection (c) then allows the Board to increase or decrease the presumptive FET by up to nine months if "the severity of the crime for which the inmate was denied parole and the prior criminal record of the inmate or other characteristics of the inmate warrant such adjustment." N.J.A.C. 10A:71-3.21(a),(c).

Second, subsection (b) of N.J.S.A. 30:4-123.56 allows the Board to depart from the schedule it enacted in subsections (a) and (c) of N.J.A.C. 10A:71-3.21, but does not set forth any criteria or standard: (1) for deciding whether, in the case of a particular inmate, to set an FET "differ[ent] from the date otherwise established by the schedule;" or (2) for setting the length of the FET beyond the schedule. However, subsection (c) of the statute, which governs subsequent considerations for parole after completion of the FET, sets

forth the same standard for parole-release as the standard for parole-release at an inmate's first consideration set forth in of N.J.S.A. 30:4-123.53. Namely, after completing his FET, "[a]n inmate shall be released on parole on the new parole eligibility date unless . . . [the Board demonstrates] a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." N.J.S.A. 30:4-123.56(c) (1979), enacted by L.1979, c. 441, § 12(c). (Asa60)

Subsection (d) of the Board's FET regulation does articulate a standard for deciding whether to depart from the FET schedule—if the FET schedule 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). However, the regulation does not articulate any standard for setting the length of an FET beyond the schedule.

Turning to the case law, this Court's sole opinion assessing an FET, Trantino IV, principally assessed the Board's denial of parole. 154 N.J. at 28-39. In the paragraph reversing the denial of parole, the Court also addressed the 10-year FET and reversed for the same reason:

> We conclude that the Parole Board's decision that Trantino is not at present ready for parole and that he will not be eligible for parole for another ten years was influenced by the application of a standard of parole that may not have focused sufficiently on the likelihood that Trantino will commit crimes if released, but

> instead focused on the achievement of complete rehabilitation. . . . The current state of the record and the several decisions of the Parole Board do not support and explain a determination that Trantino, if paroled, will likely again resort to crime. Accordingly, we set aside the Parole Board's decision denying parole and postponing reconsideration of parole eligibility for ten years.
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> [Id. at 38-39 (emphasis added).]

Trantino IV did not cite N.J.A.C. 10A:71-3.21 and cited N.J.S.A. 30:4-123.56 in only a single instance; in comparing the 1948 Parole Act to the 1979 Parole Act, the Court noted that under the 1979 Act, "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.'" Id. at 27 (quoting N.J.S.A. 30:4-123.56(c)).

Following Trantino IV, the Appellate Division in McGowan considered the application of the pre-July 1999 version of N.J.A.C. 10A:71–3.21(d)—allowing a greater-than-scheduled FET where the scheduled FET "is clearly inappropriate in consideration of the circumstances of the crime, the characteristics and prior criminal record of the inmate and the inmate's institutional behavior"—to McGowan's thirty-year FET. 347 N.J. Super. at 564. The court noted:

> N.J.A.C. 10A:71–3.21(d) was amended, effective July 7, 1999, to allow the Board to extend an FET "due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior." The amendment was intended to give the Board a broader basis for its FET determinations rather than limiting the panel to the consideration of only three factors. The prior code provision was "deemed restrictive and, therefore, inappropriate." 31 N.J.R. 710 (March 15, 1999). Instead, the panel is now permitted "to consider all the factors enumerated in N.J.A.C. 10A:71-3.11." Ibid. The language in the amended code provision mirrors the Trantino holding and is meant to guide the Parole Board in making a decision under the Trantino standard.
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> [Id. at 564 n.1.]

Although the Appellate Division held that the pre-July 1999 code applied to McGowan,[10] the Court noted that "Trantino [IV] clarified the requirement that the Board focus its attention squarely on the likelihood of recidivism . . . [in its] FET determination as well." Id. at 565. The Court concluded, without any analysis specific to the FET, that "[t]he decision to impose a thirty-year FET is within the Board's discretion and is supported by substantial evidence." Ibid. It's crucial to note, however, that the Court specifically contextualized its affirmance of the FET in light of the fact that

[10] The Court does not explain whether the reason the pre-July 1999 code applies to McGowan is because McGowan's crime was committed prior to the amendments or because the Board panel set his FET prior to the effective date of the amendments (though the full Board's final decision was after the effective date of the amendments).

McGowan was "entitled to an annual hearing as a Title 2A offender," and accordingly "the Board may assess his progress and institute a parole hearing [prior to the completion of this thirty-year FET] should he show significant changes in his response to psychiatric treatment." Ibid. Thus, McGowan's reasoning for affirming such a lengthy term is not applicable to inmates convicted under the 2C Code (like Mr. Cowan) who do not receive annual reviews.

Most recently, the Appellate Division assessed—and reversed—a seventy-two-month FET in Berta. 473 N.J. Super. at 322-35. Beginning its analysis with the language of N.J.A.C. 10A:71-3.21(d)—that the Board may only impose an FET beyond the presumptive FET if the presumptive FET "is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future behavior"—the Court noted that the "clearly inappropriate" standard is "a high threshold to vault" and that the presumptive FET "is not to be dispensed with for light or transient reasons." Id. at 322-23. To meet its burden to overcome the presumption that the scheduled FET will be imposed, the Board must (1) explain why the scheduled "FET is clearly inappropriate" and (2) "why the FET that was actually imposed is necessary and appropriate." Id. 323.

The Appellate Division then elaborated on the considerations that must undergird the FET decision. The Court noted that because "the 'punitive aspect' of an inmate's sentence has already been satisfied by the time he or she first becomes eligible for parole," "an FET must not be imposed as a form of punishment." Ibid. Instead, "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." Ibid. "[A]n FET is comparable to a term of parole ineligibility," and "the Parole Board may only impose a de facto term of parole ineligibility as may be needed to reduce the likelihood of future criminal behavior." Ibid.

Analyzing the Board's reasons for the seventy-two month FET, the Court noted the Board "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." Id. at 324. The Appellate Division found that the Board's FET analysis "thus suffers from the same flaws that [it had] already identified with respect to the Board's underlying decision to deny parole." Ibid. The Court found that it was "not acceptable" for the FET decision to be "strongly influenced, if not driven, by Berta's refusal to admit his guilt . . . . especially in the absence of social science evidence to support the proposition tacitly relied upon by the Board

that denial of guilt correlates to the risk of re-offense." Id. at 325. Thus, the Court reversed the Board's imposition of a seventy-two month FET. Ibid.

Judge Geiger concurred in the result but wrote separately to suggest that this Court "examine the Board's largely unbridled discretion to impose extended FETs, whether inmates should be afforded greater procedural rights before extended FETs are imposed, and whether the imposition of extended FETs warrants closer scrutiny under a less deferential standard of review." Id. at 327 (Geiger, J., concurring). Judge Geiger noted that "[t]he role of the Board is not to modify sentences" and yet observed that "the Board's actions appear to cross those boundaries," where, as in Berta's case, "the Board's actions had cumulative real-time consequences that effectively extended his parole ineligibility period for sixteen years" even though Berta had been " a model prisoner since 2002." Id. at 326-27. Judge Geiger also raised due process and fundamental fairness concerns when such lengthy FETs are imposed, "[c]onsidering the limited rights afforded to inmates to present their case for parole to the Board and to challenge the evidence relied upon by the Board in setting an FET, coupled with our deferential standard of review based on the resulting limited record developed before the Board." Id. at 327.

As will be explained in Part B, infra, Judge Geiger's concerns deserve serious consideration by this Court. Despite the presumption that an inmate

who is denied parole will receive an FET within the Board's published schedule, since 2010, of all the FETs imposed on inmates serving a life sentence, forty-seven percent have been longer than the maximum scheduled length of three years. (Asa146-149) Although Judge Geiger's concerns were clearly well founded, Mr. Cowan asserts that the solution, rather than turning on the standard of review, turns on clearly articulating the standard for imposing an FET outside the schedule and holding the Board accountable to this standard.

B. To Impose A Longer-Than-Scheduled FET, The Board Has The Burden To Demonstrate That The Scheduled FET Is Not Long Enough To Reduce The Inmate's Risk Of Recidivism Below The Level Of A Substantial Likelihood, And Any Longer-Than-Scheduled FET May Be No Longer Than Necessary To Reduce The Likelihood Of Recidivism Below The Level Of Substantial Likelihood.

All three published cases discussing FETs have held that the decision to set an FET outside the scheduled FET must be informed by the standard for parole-release, which focuses on whether there is a substantial likelihood that the inmate will commit a crime if released. Trantino IV, 154 N.J. at 38 (reversing an FET that "may not have focused sufficiently on the likelihood that Trantino will commit crimes if released"); Berta, 473 N.J. Super. at 323 (the decision to exceed the presumptive FET "must be tied directly to the goal of reducing the likelihood of future criminal behavior" and the FET may be

only so long as is "needed to reduce the likelihood of future criminal behavior"); McGowan, 347 N.J. Super. at 565 ("Trantino [IV] clarified the requirement that the Board focus its attention squarely on the likelihood of recidivism . . . . [in its] FET determination as well.").

Importantly, this Court in Trantino IV and the Appellate Division in McGowan reached this conclusion even though the then-applicable Board regulation did not explicitly reference the risk of recidivism as the barometer for an FET beyond the scheduled FET; the then-applicable regulation directed the Board to consider whether the scheduled FET was "clearly inappropriate in consideration of the circumstances of the crime, the characteristics and prior criminal record of the inmate and the inmate's institutional behavior." N.J.A.C. 10A:71-3.19(d) (1980). Implicit in this conclusion is the recognition that to determine whether the scheduled FET was "clearly inappropriate" in light of the inmate's crime, criminal record, and institutional behavior, the Board was required to determine how those factors affected the inmate's risk of recidivism.

Why must courts refer to the statutory standard for parole-release in evaluating a longer-than-scheduled FET? (1) Although the FET statute does not contain an explicit standard for setting longer-than-scheduled FETs, it must be construed to contain such a standard for it to be constitutional, as the

absence of a standard would render it unconstitutionally vague and an unconstitutional delegation of unconstrained legislative authority to an administrative agency; (2) the overall purpose of the 1979 Parole Act makes clear that FETs must be governed by the same principle as parole-denial decisions; and (3) the Board's regulation cannot contravene the Legislature's purpose and would be unconstitutionally vague if not construed to require that longer-than-scheduled FETs be directly tied to the risk of recidivism.

1. To be constitutional, N.J.S.A. 30:4-123.56 must be construed to contain a standard for setting longer-than-scheduled FETs; the absence of a standard would render it unconstitutionally vague and an unconstitutional delegation of unconstrained legislative authority to an administrative agency.

First, the FET statute would be unconstitutionally vague if it were construed not to contain a standard for setting longer-than-scheduled FETs. Because the 1979 Parole Act creates a presumption that the inmate "shall be released" unless the Board proves by a preponderance of evidence that the inmate is substantially likely to commit a new crime if released, the statute creates a legitimate expectation of release and a concomitant liberty interest protected by the Due Process Clause. N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 207 (1983). Thus, an inmate who is eligible for parole has "a constitutionally protected right to parole unless the State could prove that there

was a 'substantial likelihood' that he would commit another crime." Trantino v. N.J. State Parole Bd., 166 N.J. 113, 197 (2001) (Trantino VI).

A statute violates state and federal due process if it takes away a protected liberty interest under a law "so vague that it . . . [is] so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595 (2015) (citing Kolender v. Lawson, 461 U.S. 352, 357-358 (1983)); State v. Lenihan, 219 N.J. 251, 267 (2014); U.S. Const. amend. XIV; N.J. Const. art. I, ¶ 1; see also Hill v. Colorado, 530 U.S. 703, 732 (2000) ("A statute is "impermissibly vague . . . if it authorizes or even encourages arbitrary and discriminatory enforcement.") (citing Chicago v. Morales, 527 U.S. 41, 56–57 (1999)); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

A law can survive a vagueness challenge if it contains "an imprecise but comprehensible normative standard," but must be struck down if "no standard of conduct is specified at all." Coates v. City of Cincinnati, 402 U.S. 611, 614, (1971). In other words, a law "may use 'broad terms, provided it is controlled by a sufficient basic norm or standard.'" K.G. v. New Jersey State Parole Bd., 458 N.J. Super. 1, 43 (App. Div. 2019) (quoting Karins v. City of Atl. City, 152 N.J. 532, 542 (1998)). Thus, due process requires that a law contain some

discernible standard of application in order to protect against arbitrary application. In the context of parole-release statutes, the Ninth Circuit has held that to survive a vagueness challenge, "the language of the statute [must] allow[] the Board to make a 'principled distinction' between those whose parole should be postponed and those whose parole should not." Hess v. Bd. of Parole & Post-Prison Supervision, 514 F.3d 909, 914 (9th Cir. 2008) (quoting Lewis v. Jeffers, 497 U.S. 764, 776 (1990)). Thus, N.J.S.A. 30:4-123.56(b) must contain some standard for setting a longer-than-scheduled FET or it would be unconstitutionally vague.

A second reason that N.J.S.A. 30:4-123.56(b) must contain some standard for setting a longer-than-scheduled FET is to comport with the New Jersey Constitution's separation of powers clause, which prohibits the Legislature from an unrestrained delegation of its legislative authority to the executive branch. N.J. Const., art. III, § 1. The separation of powers provision serves "to prevent oppressive action by the government" through "'prevent[ing] the concentration of unchecked power in the hands of any one branch.'" Worthington v. Fauver, 88 N.J. 183, 206 (1982) (quoting David v. Vesta Co., 45 N.J. 301, 326 (1965)).

This Court has recognized that "'the legislature may delegate to an administrative body the exercise of a limited portion of its legislative power

with respect to some specific subject matter,'" but to comport with the separation of powers clause, "'such delegation of legislative power must always prescribe the standards that are to govern the administrative agency in the exercise of the powers thus delegated to it."' In re Protest of Cont. for Retail Pharmacy Design, 257 N.J. 425, 439-40 (2024) (quoting State v. Traffic Tel. Workers' Fed'n of N.J., 2 N.J. 335, 353 (1949) (emphasis added)); see also Worthington, 88 N.J. at 208 ("The Legislature may delegate its authority as long as it provides standards to guide the discretionary exercise of the delegated power.") (citing Roe v. Kervick, 42 N.J. 191 (1964)). An administrative agency may not be "given such unbridled discretion in the administration of [a statute] as to constitute an abdication of the duty of the Legislature to make the law." Roe, 42 N.J. at 232. Thus, a statute delegating authority to an administrative agency "must impose basic standards, guidelines and a reasonably definite policy to be followed in its administration." Ibid.

Thus, N.J.S.A. 30:4-123.56(b) cannot constitutionally be construed as giving the Board "unbridled discretion" to determine when to impose a longer-than-scheduled FET and how long such an FET should be. If N.J.S.A. 30:4-123.56(b) contained no standard constraining the Board's discretion in deciding to impose a longer-than-scheduled FET, it would constitute an

unconstitutional delegation of the Legislature's authority to the Board in contravention of N.J. Const., art. III, § 1.

2. The language, structure, and purpose of the 1979 Parole Act makes clear that FETs must be no longer than necessary to reduce the inmate's risk of recidivism to the level at which he would be eligible for release.

This Court must "'construe a challenged statute to avoid constitutional defects if the statute is reasonably susceptible' to such a construction." State v. Higginbotham, 257 N.J. 260, 280 (2024) (quoting Lenihan, 219 N.J. 266 (quotation omitted)). As is implicitly recognized by Trantino IV and McGowan, N.J.S.A. 30:4-123.56(b) is susceptible to a construction rendering it constitutional because it does contain a standard constraining the Board's discretion in deciding to impose a longer-than-scheduled FET—the same "substantial likelihood of committing a new crime if released" standard that governs parole-release decisions. Cf. Szabo v. New Jersey State Firemen's Ass'n, 230 N.J. Super. 265, 287 (Ch. Div. 1988) (holding that the challenged statute's "stated objectives provide overall standards sufficient to withstand constitutional attack").

The reason our Courts in Trantino IV, Berta, and McGowan have held that the standard governing the decision to impose a longer-than-scheduled FET is directly derived from to the parole-release standard found in Sections

N.J.S.A. 30:4-123.53(a) and N.J.S.A. 30:4-123.56(c) is because this standard was the central feature and governing principle of the 1979 Parole Act.

The 1979 Parole Act "effected a radical change in the parole system" from the previous system that had existed under the Parole Act of 1948. Trantino II, 89 N.J. at 355. "The goal of the bill [wa]s to make the parole process more consistent, predictable, objective and efficient" in order to increase "the effectiveness of parole as a tool for reducing recidivism" and "the maintenance of institutional order." A. Jud., Law, Pub. Safety & Def. Comm. Statement to A. 3093 1 (Dec. 3, 1979). (Asa73) Specifically with respect to preserving institutional order, the Legislature cited the official report on the riots in Rahway State Prison, which "cited uncertainties about parole and perceptions of injustice in the parole process as key causes of the riots." Ibid. The 1979 Act, which was enacted the year after the current Criminal Code (the "2C") was adopted, sought to accomplish these goals through three central reforms: (1) organizational reform that centralized paroling authority in a State Parole Board; (2) procedural reform to accord with constitutional due process; and (3) a reform of the standard for release on parole. Ibid.

While all three prongs of the reform were important, the revised standard for release was at the heart of the reform and permeated the entirety of the bill. The preceding Parole Act of 1948 had a parole standard that was

"quite subjective and le[ft] the Board with a broad discretion in the grant or denial of parole;" "[o]nly if the Board [wa]s of the unanimous opinion that 'there is a reasonable probability that . . . [the inmate] will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society,' [wa]s the Board authorized to release him on parole. Puchalski v. New Jersey State Parole Bd., 104 N.J. Super. 294, 299-300 (App. Div.) (quoting N.J.S.A. 30:4-123.14), aff'd, 55 N.J. 113 (1969). The 1948 Act placed the burden on the inmate to "prove his fitness to be released in order to be granted parole." S. Law, Pub. Safety & Def. Comm. Statement to A. 3093 2 (Dec. 10, 1979). The Board was also required to assess "whether the inmate had served enough time in prison and been sufficiently punished in terms of both society's need for adequate punishment and the inmate's individual progress towards rehabilitation," Byrne, 93 N.J. at 204, as "[t]he punitive aspects of [inmates'] sentences will not necessarily have been fulfilled by the time parole eligibility has occurred." Trantino II, 89 N.J. at 347.

In contrast to the 1948 Act, the Parole Act of 1979

> eliminated the conventional parole discretion relating to adequacy of punishment, which discretion the Legislature transferred substantially to the judiciary as a function of its sentencing authority under the Code. The longer sentences and mandatory minimum terms anticipated under the Code serve to insure that the

> punitive aspects of the inmate's sentence will be satisfied by the time parole eligibility arrives. Hence, parole decisions for inmates sentenced under the Code cannot—and need not—take into account or be based upon whether the punitive aspects of a sentence as such have been satisfied as an independent and separate ground for granting or withholding parole. The parole decision must be confined solely to whether there is a substantial likelihood for a repetition of criminal behavior.
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> [Trantino II, 89 N.J. at 368-69 (emphasis added).]

As noted by the Assembly Judiciary, Law, Public Safety, and Defense Committee:

> The bill also modifies the burden of proof as to parole release. Having attained his parole eligibility date, the existing law requires the inmate to prove he is fit to be released. This bill would require the authorities to show that the inmate is likely to commit a crime if he is released on parole. This shift accords with the existing practicalities of parole procedure, complements the generally longer sentences of the new Criminal Code, and renders the process more objective and consistent. . . . [T]he likelihood that the inmate will recidivate is in fact the key issue in granting or withholding parole: the inmate was imprisoned for committing a crime; the State's main interest once parole eligibility has been reached, and the punitive and retributive aspects of the sentence have thereby been satisfied, is to ensure that he does not commit another crime. Placing the burden of proof on the authorities also accords with existing practicalities: it is impossible for a man to prove he will not do something; in practice, the authorities have to present evidence to show he is likely to do something. This shift also renders the decision-making process more objective, cutting down the wide discretion that paroling authorities have under current law, and making

> them more closely subject to statutory prescriptions. Finally, this shift complements the longer sentences of the Code in further moving the power to incarcerate, the power to decide how long a convict should serve in order to satisfy the punitive and retributive aspects of sentence, from the parole process to the sentencing process. The Code has prepared for this by providing that in determining a sentence, a judge must specifically consider parole eligibility as a factor (N.J.S. 2C:43-2d.).
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> [A. Jud., Law, Pub. Safety & Def. Comm. Statement to A. 3093 1-2 (Dec. 3, 1979) (emphasis added). (Asa73-74)]

Accordingly, the 1979 Act: (1) "effectively establishe[d] a presumption in favor of parole," Trantino II, 89 N.J. at 356; (2) narrowed the standard for parole decisions so that "the individual's likelihood of recidivism [was] the sole standard," id. at 372, thereby "reduc[ing] the discretion involved in parole decisions," Byrne, 93 N.J. at 205; and (3) "shift[ed] the burden to the State to prove that the prisoner is a recidivist and should not be released." Ibid.

The 1979 Act's laser focus on the likelihood the inmate will commit a crime if released as the sole consideration for release on parole is evident in that it appears in four separate provisions of the Act. The Act requires the Board to generate a report at least 120 days prior to the inmate's parole eligibility date containing "information bearing upon the likelihood that the inmate will commit a crime . . . if released on parole." L.1979, c. 441, §10.b, codified at N.J.S.A. 30:4-123.54(b) (1980). (Asa58) It then commands that the

inmate "shall be released" on his eligibility date unless "there is a substantial likelihood that the inmate will commit a crime . . . if released on parole." L.1979, c. 441, §9.a, codified at N.J.S.A. 30:4-123.53(a) (1980). (Asa58) If, after the Board decides to grant parole but before the inmate is actually released, "information comes to the attention of the appropriate board panel which bears upon the likelihood that the inmate will commit a crime but which was not considered," the panel may "conduct a rescission hearing to determine whether parole release on the original parole release date should be denied or delayed." L.1979, c. 441, §14.c, codified at N.J.S.A. 30:4-123.58(c) (1980). (Asa62) If instead the Board denies parole and sets an FET, the Act directs that the inmate "shall be released on parole on the new parole eligibility date" unless "there is a substantial likelihood that the inmate will commit a crime . . . if released." L.1979, c. 441, §12.c, codified at N.J.S.A. 30:4-123.56(c) (1980). (Asa60)

Although subsection (b) of N.J.S.A. 30:4-123.56 does not explicitly state that the risk of recidivism must constrain any longer-than-scheduled FET—indeed it contains no explicit criteria at all—the structure, purpose, and language of other provisions of the Act make clear that this must be the case. Release on parole is presumptive at the first eligibility date and can only be denied if the Board proves via a preponderance of evidence that the inmate is

substantially likely to commit a crime if released. After an inmate who is denied parole completes his FET, he must be released at his subsequent parole date unless the Board again proves he is still substantially likely to commit a new crime if released at that time. Thus, the period of time between the denial—at which time the Board determined the inmate was presently substantially likely to commit a new crime—and the next review—at which time the Board must evaluate whether there is still a substantial likelihood that the inmate will commit a crime if released—must be the period of time the Board finds is necessary for the inmate's likelihood of committing a new crime if released to drop below the level of "substantial."

Further support for this conclusion is evident when considering alternative possible standards for setting an FET, which must be rejected. The FET length cannot be based on how reprehensible the Board finds the underlying offense for which the inmate is incarcerated, as "the punitive aspects of the inmate's sentence [are] satisfied by the time parole eligibility arrives." Trantino II, 89 N.J. at 369. Nor can the FET length be used to sanction the inmate for misconduct, as a separate provision, N.J.S.A. 30:4-123.52(a), seeks to deter inmate misconduct by allowing the Board to increase an inmate's parole eligibility date for serious or persistent institutional infractions. See also N.J.A.C. 10A:71-3.4. And finally, as discussed in

Trantino IV, the FET length cannot be based on the Board's belief about whether the inmate is sufficiently rehabilitated to the Board's subjective satisfaction.

In Trantino IV, this Court applied the 1979 Parole Act standard—and contrasted it with the standard of the former 1948 Parole Act—to the Board's decision to deny parole and to set an FET of ten years. 154 N.J. at 22. The Court first evaluated "whether the Parole Board applied the correct standard governing parole" by "examin[ing] the reasons and grounds for the Parole Board's several decisions." Id. at 27. The Court found that the Board's decisions "concentrated on whether Trantino had made sufficient progress toward 'reintegration into society,' was 'fully rehabilitated,' [or] had realized 'his real rehabilitative potential.'" Id. at 30. The Court criticized this reasoning, admonishing the Board that "[t]he test for parole fitness . . .is whether there is a substantial likelihood the inmate will commit a crime if released on parole[,] . . . not . . . total or full or real rehabilitation." Id. at 31. The Court concluded "that the Parole Board's decision that Trantino is not at present ready for parole and that he will not be eligible for parole for another ten years was influenced by the application of a standard of parole that may not have focused sufficiently on the likelihood that Trantino will commit

crimes if released, but instead focused on the achievement of complete rehabilitation." Id. at 38 (emphasis added).

Thus, when N.J.S.A. 30:4-123.56(b) is read in context with the standard for parole-release set forth in N.J.S.A. 30:4-123.53(a) and N.J.S.A. 30:4-123.56(c), it is clear that a longer-than-scheduled FET may be only so long as the Board finds is necessary for the inmate's likelihood of committing a new crime if released to drop below the level of "substantial." Cf. Savage v. Twp. of Neptune, 257 N.J. 204, 215 (2024) (Courts "read each part of a statute 'in context with related provisions so as to give sense to the legislation as a whole.'") (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)); Dep't of Health v. Owens-Corning Fiberglas Corp., 100 N.J. Super. 366, 382–83 (App. Div. 1968) ("When dealing with the question of standards, a court is not confined to the specific terms of the particular section in question, but must examine the entire act in the light of its surrounding and objectives. Standards may reasonably be implied from a consideration of the statutory scheme as a whole.") (emphasis added), aff'd, 53 N.J. 248 (1969); Vance v. State Div. of Motor Vehicles, 67 N.J. Super. 63, 67 (App. Div. 1961) (holding that the discretionary decision of the Director of the Division of Motor Vehicles under N.J.S.A. 39:5-32 to restore a suspended or revoked license must "be read *in pari materia* with N.J.S.A. 39:5-30 [authorizing revocation or suspension of a

driver's license] to fix as the standard for decision on the matter of restoration") (emphasis added).

Finally, it is important to note that imposing a lengthy FET whose duration is not directly tied to the time it would reasonably take to reduce the inmate's risk of recidivism below substantial would constitute a modification of the inmate's sentence. See Berta, 473 N.J. Super. at 326, 328 (Geiger, J., concurring). Under the Criminal Code and the 1979 Parole Act, a defendant's eligibility for parole is an integral part of his sentence. As noted by the Assembly Committee Statement, a sentencing court must "state on the record the reasons for imposing the sentence, including . . . , where imprisonment is imposed, consideration of the defendant's eligibility for release under the law governing parole." N.J.S.A. 2C:43-2(e) (cited by A. Jud., Law, Pub. Safety & Def. Comm. Statement to A. 3093 2 (Dec. 3, 1979)). Additionally, the Legislature determined that giving inmates the presumption of parole and shifting the burden of proof to the Board to deny parole "better complements the generally longer sentence of the code and that the power to decide how long a convict should be imprisoned belongs to the sentencing court rather than the parole board." S. Law, Pub. Safety & Def. Comm. Statement to A. 3093 2-3. (Asa82-83)

Thus, a sentence of incarceration—even a life sentence—is not a presumptive term of incarceration for the entire term with merely a possibility that the inmate might be released early if he meets the discretionary criteria for parole; rather, it is a term of incarceration during the period of parole ineligibility and a presumption of release on parole thereafter. Essentially, an inmate's sentence includes an expectation that he will be released as soon as there is not a substantial likelihood that he will commit a crime if released. Because a term of incarceration subject to New Jersey's 1979 Parole Act includes the right to parole when there is no longer a substantial likelihood that the inmate will recidivate, a lengthy FET longer than reasonably necessary to reduce the risk of recidivism below substantial constitutes a modification of the inmate's sentence.

In State v. Thomas, 470 N.J. Super. 167 (App. Div. 2022), the Appellate Division recognized, albeit in an admittedly different context, that the actions of the Board—including the imposition of lengthy FETs—can alter the fundamental character of the sentence. Thomas "was sentenced to life in prison without a specified period of parole ineligibility and ha[d] been incarcerated for over forty years for crimes committed when a juvenile." Id. at 197. He "was initially eligible for parole after serving thirteen years" but had "been denied parole and received lengthy future eligibility terms (FET) seven times"

which "totaled forty-eight years" despite having "remained infraction-free during the forty years he ha[d] been incarcerated" and having "been found to be at low risk of recidivism by numerous evaluating psychologists." Id. at 171, 177. He filed motion to correct an illegal sentence under State v. Zuber, 227 N.J. 422 (2017) and Miller v. Alabama, 567 U.S. 460 (2012), which forbid sentencing a juvenile to life in prison without "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 171.

The State argued that Thomas was not entitled to a Miller/Zuber hearing because "his original sentence was neither life without parole nor 'the practical equivalent of life without parole;'" indeed, Thomas certainly had an "opportunity" for release since he had completed his first thirteen years. Id. at 178. But the Appellate Division held that the Board's actions in denying Thomas parole seven times and imposing lengthy FETs fundamentally altered the character of the sentence such that Thomas was entitled to a Miller/Zuber hearing to challenge the legality of his sentence. Id. at 197, 199. While this case is admittedly different, Mr. Cowan cites the case simply as recognition that the actions of the Board in that context were seen as altering the sentence. Mr. Cowan contends that a lengthy FET not tethered to the time necessary to reduce the inmate's risk of recidivism to the level at which he is eligible for release would also be effectively altering an inmate's sentence and would thus

exceed the Board's authority. See Berta, 473 N.J. Super. at 323 ("[U]nlike sentencing judges—who impose mandatory or discretionary periods of parole ineligibility for purposes of punishment—the Parole Board may only impose a de facto term of parole ineligibility as may be needed to reduce the likelihood of future criminal behavior.").

For all the reasons in this section, this Court should hold that the 1979 Parole Act requires that FETs must be no longer than necessary to reduce the inmate's risk of recidivism to the level at which he would be eligible for release.

3. The Board has the burden to overcome the presumption that the inmate will receive the scheduled FET by demonstrating that the scheduled FET is not long enough to reduce the inmate's risk of recidivism below the level of a substantial likelihood, and any longer-than-scheduled FET may be no longer than necessary to reduce the likelihood of recidivism below the level of a substantial likelihood.

This Court thoroughly explored the application of the 1979 Parole Act in Trantino v. N.J. State Parole Bd. (Trantino VI), 166 N.J. 113 (2001). The Court found that, in denying Trantino parole, the Board erroneously relied on several assertions that had no relevance to the question of whether Trantino would be "substantially likely" to commit another crime if he were released on parole, including:

> - "the Board's finding that Trantino's plans for a second book evince a lack of empathy for the victims' families";
> - the Board's conclusion that Trantino had not been candid regarding an incident in a halfway house where it was alleged he became "agitated" and "perturbed";
> - Trantino's alleged minimization of assaulting his first wife;
> - Trantino's alleged misrepresentation of his employment history with his psychologist; and
> - "Trantino's failure to address in psychological counseling the issues that led him to engage in domestic violence with his first wife."
>
> [166 N.J. at 176-182.]

For each of these factors, this Court found that "the Parole Board has failed to establish any material connection between [the factor] . . . and the 'substantial likelihood' that if released on parole presently he would commit another crime" and thus concluded that "the Parole Board's reliance on [each factor] to support its denial of parole was arbitrary and improper." Ibid. In particular, regarding the Board's reliance on Trantino's failure to undergo domestic violence counseling, this Court clearly spelled out how the Board had failed to meet its burden to connect that factor to the risk of recidivism:

> No psychological, behavioral, or domestic abuse experts were interviewed by the Board to establish a connection between domestic abuse and recidivism. The Board did not rely on evidence of recidivism rates in relation to prior untreated domestic violence . . . . In short, no evidence in this record provides any support for the Parole Board's conclusion that Trantino's lack

> of counseling for domestic violence that he engaged in more than thirty-seven years ago demonstrates a substantial likelihood that he would commit another crime if released on parole.
>
> [Id. at 181-82.]

Accordingly, Trantino VI makes clear that under the 1979 Parole Act, (1) the Board may consider only those factors that have a demonstrable connection to whether an inmate is substantially likely to commit a crime if released and (2) the Board has the burden of proof to establish a connection between the factors it relies on and the risk of recidivism.

These same principles apply to the Board's decision to impose an FET in excess of the scheduled FET and in setting the length of that FET. Trantino IV, 154 N.J. at 38. Just as there is a presumption that an inmate shall be paroled, if an inmate is denied, there is a presumption that he will receive the scheduled FET. "An inmate serving a murder sentence is presumptively assigned a twenty-seven-month FET after a denial of parole." Berta, 473 N.J. Super. at 306 (citing N.J.A.C. 10A:71–3.21(a)(1)). This "presumption . . . is not to be dispensed with for light or transient reasons;" instead, the Board has the burden to establish that this scheduled FET "'is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future behavior,'" which is "a high threshold to vault." Id. at 322-23 (quoting N.J.A.C. 10A:71-3.21(a)). "[T]he 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," and the "Board may only impose a[n] [FET] as [long as is] needed to reduce the likelihood of future criminal behavior." Id. at 323.

And just as the Board has the burden to establish that factors it relies on to deny parole are objectively related to the risk of recidivism, the Board has the burden to establish that factors it relies on in setting the length of the FET. Id. at 325 ("As to both the in-or-out and length-of-stay decisions, the Board carries the burden of overcoming a presumption."). In Berta, the Board had "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." Id. at 324. The Appellate Division found that the Board's FET analysis "thus suffers from the same flaws that [it had] already identified with respect to the Board's underlying decision to deny parole." Ibid. For example, the Court found that it was "not acceptable" for the FET decision to be "strongly influenced, if not driven, by Berta's refusal to admit his guilt . . . . especially in the absence of social science evidence to support the proposition tacitly relied upon by the Board that denial of guilt correlates to the risk of re-offense." Id. at 325.

In sum, this Court should hold that under the 1979 Parole Act: (1) there is a presumption in favor of the scheduled FET; (2) the Board has the burden to overcome that presumption by demonstrating that there will still be a substantial likelihood that the inmate will commit a crime if released after the scheduled FET period; (3) to meet this burden, the Board must demonstrate that the factors it relies on have a correlation with the risk of recidivism; and (4) the length of the FET must be tied to the inmate's risk of recidivism in that it may be no longer than necessary to reduce the likelihood of recidivism below the level of a substantial likelihood.

4. The Board's regulation allowing a longer-than-scheduled FET cannot be construed to contravene or provide a less stringent standard than that required by the 1979 Parole Act.

An investiture of rulemaking authority "is a grant of administrative power for the execution of the statutory policy; and its exercise is of necessity restrained by the declared policy and spirit of the statute and the criteria and standards therein laid down." Abelson's Inc. v. New Jersey State Bd. of Optometrists, 5 N.J. 412, 423 (1950) (emphasis added). A grant of rulemaking authority not constrained by any legislative standards "would constitute a delegation of essential legislative power in contravention of constitutional limitations" because agencies, as part of the executive branch, are authorized to execute—but not to make—the law. Ibid. "It is a corollary of this principle

that the rules and regulations and administrative action cannot subvert or enlarge upon the statutory policy or the rules and regulations therein set down." Id. at 424. Whenever there is an "inconsistency between the regulation and the statute it implements, a violation of policy expressed or implied by the Legislature, [or] an extension of the statute beyond what the Legislature intended," the regulation will be found to be "arbitrary, capricious or unreasonable." New Jersey Ass'n of Sch. Adm's v. Cerf, 428 N.J. Super. 588, 595-96 (App. Div. 2012)

The relevant Board regulation here, N.J.A.C. 10A:71-3.21(d), allows the imposition of a longer-than-scheduled FET if the three-member panel finds the presumptive FET is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior . . . . consider[ing] the factors enumerated in N.J.A.C. 10A:71-3.11." As noted, above, the Court in Berta interpreted this regulation to be consistent with what Mr. Cowan contends is required by the 1979 Parole Act: (1) "the Board carries the burden of overcoming [the] presumption" that the inmate will receive the scheduled FET; (2) "the Board must overcome the presumption by explaining why [the scheduled] FET is clearly inappropriate" "tied directly to the goal of reducing the likelihood of future criminal behavior;" and (3) "the

Parole Board may only impose an [FET] as may be needed to reduce the likelihood of future criminal behavior." 473 N.J. Super. at 323, 325.

Berta's interpretation is necessary to comport with the principles articulated in Ableson's, Inc and Cerf. It is also required to avoid the necessity of striking down N.J.A.C. 10A:71-3.21(d) for failing to explicitly provide any standard for choosing the length of the FET upon deciding to depart from the schedule. "[A] a rule which does not contain a clear or objectively ascertainable standard may not be upheld." In re Dykas, 261 N.J. Super. 626, 630 (App. Div. 1993) (citing New Jersey Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 82 (1980)). "[A]dministrative regulations must not only be within the scope of the delegated authority, but also must be sufficiently definite to inform those subject to them as to what is required." Matter of Health Care Admin. Bd., 83 N.J. 67, 82 (1980).

This Court has "on several occasions invalidated the actions of administrative agencies when there was a significant failure to provide either statutory or regulatory standards that would inform the public and guide the agency in discharging its authorized function." Lower Main St. Assocs. v. New Jersey Hous. & Mortg. Fin. Agency, 114 N.J. 226, 235 (1989) (holding that a regulation of the HMFA was "invalid in view of its failure to specify or suggest any criteria or standards to guide the agency in the exercise of its

discretion"). Although this Court's "strong inclination" "is to defer to agency action that is consistent with the legislative grant of power," "deference does not require abdication by the judiciary of its function to assure that agency rulemaking . . . provides standards to guide both the regulator and the regulated." Id. at 236.

This Court need not take such a drastic measure here. The Berta Court's construction of N.J.A.C. 10A:71-3.21(d) both aligns the regulation with the implicit legislative standard set forth in Part B.2, supra, and specifies a standard for setting the length of a longer-than-scheduled FET, filling a gap that would otherwise require the regulation to be invalidated for its failure to specify a standard. Accordingly, this Court should adopt Berta's construction of N.J.A.C. 10A:71-3.21(d) and hold that to impose a longer-than-scheduled FET, the Board has the burden to demonstrate (1) that the scheduled FET is not long enough to reduce the inmate's risk of recidivism below the level of a substantial likelihood, and (2) a longer-than-scheduled FET it imposes is no longer than necessary to reduce the likelihood of recidivism below the level of a substantial likelihood.

C. The Board Failed To Demonstrate That Its Decision To Give Cowan An FET Beyond The Published Schedule Was Tied Directly To The Goal Of Reducing Recidivism And That The 200 Month FET Was No Longer Than Needed To Reduce Cowan's Likelihood Of Future Criminal Behavior.

In imposing a 200-month FET, the three-member panel cited N.J.A.C. 10A:71-3.21(d), stating that it had evaluated Mr. Cowan's case to determine whether "the presumptive schedule is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior . . . consider[ing] the factors enumerated in N.J.A.C. 10A:71-3.11." (Ra141) It then concluded "that the factors supporting the denial of parole, collectively, are of such a serious nature as to warrant the setting of a future eligibility term which differs from the presumptive term of twenty-seven (27) months (± 9 months)." (Ra141)

The panel then specified three "reasons for the imposition of the two hundred (200) month future parole eligibility term":

> - 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 violence, [sic] to achieve social acceptance. You must conduct an introspection to understand the emotional and psychological dynamics of your criminal thinking; and

- You present as not having made adequate progress in the rehabilitative process. The Board panel notes your participation in programming/counseling included Thinking for a Change, Focus on the Victim, Anger Management and Successful Transition and Reentry Series (STARS). However, the Board panel finds that further programming will assist you in gaining a better understanding to your criminal thinking; and

- You committed twenty-one (21) infractions, with eight (8) of the infractions being serious (asterisk). The serious infractions involved you exhibiting assaultive and disruptive behavior, along with incidents with components of fighting and narcotics. . . . Though you claimed at the hearing that you are older and are no longer the young man who made poor choices in the past, the Board panel finds that your recent *.004 – Fighting Any Person infraction from 2018 demonstrates that problematic issues still exist regarding how you interact with others.

  [(Ra141-142)]

The full Board affirmed the 200-month FET imposed by the three-member panel, stating:

> The Board also concurs with the determination of the two-member Board panel that a future eligibility term established pursuant to N.J.A.C. 10A:71-3.21(a), (b), and (c) is clearly inappropriate due to Mr. Cowan's lack of satisfactory progress in reducing the likelihood of future criminal behavior and the determination to refer his case to a three-member Board panel for the establishment of a future eligibility term. Further, the Board concurs with the determination of the three-member Board panel to establish a future eligibility term pursuant to N.J.A.C. 10A:71-3.21(d) and, pursuant to N.J.A.C. 10A:71-3.21(d)(4), the particular

> reasons for the establishment of said term as set forth in the Narrative Notice of Decision.
>
> [(Ra260-261)]

First, it is worth noting that the first two reasons the Board identified as justifying the 200-month FET are nearly identical to the reasons the Board gave for the 72-month FET it imposed in Berta, 473 N.J. Super. at 324 n.20. For both men, the Board's first stated reason for the FETs was that the men had "identified a contributory factor of [their] criminal thinking" but needed to "develop a deeper understanding as to why" they acted criminally. Ibid. (Ra141-142) The Board accordingly directed both men to "conduct an introspection to understand the emotional and psychological dynamics of [their] thinking." Ibid. (Ra142) The Board's second reason for the FETs was its assertion that the men "present[ed] as not having made adequate progress in the rehabilitative process." Ibid. (Ra142) The Board noted the men's participation in various programs, but found "that further programming will assist you in gaining a better understanding to your criminal thinking." Ibid. (Ra142)

Just as the Berta Court concluded that these two reasons "failed to adequately explain why [the Board] fixed an FET almost three times as long as the presumptive twenty-seven-month FET," id. at 322, this Court should conclude that these same two reasons failed to explain or justify an FET the

200-month FET the Board gave Mr. Cowan. The Board did not explain why it believed sixteen years and eight months were necessary for Mr. Cowan to gain a better understanding into his criminal thinking.[11] The Board did not identify which programs it felt would assist Mr. Cowan in gaining a better understanding as to his criminal thinking and accordingly the 200-month FET was not tied to the length of time it would take to complete this unspecified "further programming." Although the DOC, rather than the Board, controls the programming available to the inmate, the Board is thoroughly aware of the full set of DOC programmatic offerings, and the DOC can be "directed to heed the Parole Board's request" to "consider" the inmate for various rehabilitative programing. Trantino IV, 154 N.J. at 41. Because "the Parole Board may only impose an [FET] as may be needed to reduce the likelihood of future criminal

[11] The assertion that Mr. Cowan needs to gain a better understanding into his criminal thinking is different wording for the Board's assertion that Mr. Cowan lacks insight into his criminal behavior. (Ra138-140) This Court can and should find that, even accepting *arguendo* the Board's finding that Mr. Cowan presently lacks insight, the Board failed to explain how this justifies a 200-month FET. However, it's worth noting that prison psychologist Dr. David Kalal opined that Mr. Cowan demonstrated "sufficient insight around his state of mind and motivations at the time his offense, given that it occurred more than three decades ago" and that he "appeared remorseful."(Asa19) Dr. Kalal noted that he could not say that "developing even greater 'insight' into [Mr. Cowan's] mindset of an event that occurred 30+ years ago would be meaningful in any clinical way." (Asa19) Finally, Dr. Kalal noted that, "given the absence of any current mental illness I cannot offer Mr. Cowan any additional psychotherapy at this juncture." (Asa19)

behavior," Berta, 473 N.J. Super. at 323, the Board was obligated to explain why it believed it would take Mr. Cowan over sixteen years to gain the necessary understanding of his criminal thinking to reduce his risk of committing a new crime below the level of "substantial." Because it failed to do so, this Court should hold the Board's first two reasons failed to justify the 200-month FET.

In Mr. Cowan's case, the Board did identify a third reason for the longer-than-scheduled FET that it did not cite in Mr. Berta's case—Mr. Cowan's twenty-one infractions, with the most recent infraction being "*.004, fighting with another person," from 2018. (Ra142) Undoubtedly, an institutional infraction for fighting close in time to an inmate's consideration for parole is a relevant fact that can support the Board's finding that an inmate is substantially likely to commit a new crime if released at that time. Indeed, since there is a presumption of release on parole and the Board has the burden to rebut that presumption with a preponderance of evidence that the inmate is substantially likely to reoffend if released, one would expect the majority of inmates who have no recent infraction history will be released, and conversely, that the majority of inmates for whom the Board successfully rebuts the presumption of release will have had at least one recent infraction. But the

relevance of a recent infraction to the decision to deny parole is separate and distinct from the question of whether it justifies a longer-than-scheduled FET.

Here, the Board's purported connection between Mr. Cowan's infraction history and its decision to impose a 200-month FET was simply its conclusion that the recent infraction for fighting demonstrates that "problematic issues still exist regarding how [he] interact[s] with others." (Ra142) It is entirely reasonable and consistent with the legislative FET standard for the Board to demand, in a case where it justifiably[12] denied release based in part on an inmate's recent infraction(s), that the inmate demonstrate his ability to remain infraction-free for a certain period of time prior to being reevaluated for parole. But the Board in this case did not consider that imposing the maximum scheduled FET of 36 months would give Mr. Cowan 54 months between his last infraction and his next evaluation for parole to demonstrate his ability to remain infraction free.[13] The Board did not even attempt to assert (1) that an infraction-free period of 54 months would be insufficient to conclude Mr.

[12] We are not conceding that it would always be proper for the Board to deny release based on any and all fractions that occur close in time to an inmate's consideration for parole, but merely asserting that in a case where the Board has justifiably done so it would be appropriate for the Board to demand the inmate prove he can remain infraction free for a certain period of time.

[13] Mr. Cowan's last infraction occurred August 2018, 18 months prior to his parole eligibility date in February 2020.

Cowan would no longer be substantially likely to reoffend if released or (2) that an infraction-free period of 200 months would be necessary to conclude Mr. Cowan would no longer be substantially likely to reoffend if released. (Ra142) And even if the Board had made these assertions, it did not present any "psychological, behavioral, or [other] experts" or "recidivism rates in relation to" infraction history in order to establish the period of infraction-free time necessary to reduce an inmate's risk of recidivism below the level of substantial. Trantino VI, 166 N.J. at 181-82.

Finally, even if the Board had attempted to demonstrate that Mr. Cowan would need to remain offense free for 200 months in order for the Board to conclude he would no longer be substantially likely to commit a new crime if released, such an assertion would be arbitrary and an abuse of discretion in light of the Board's published schedule for adjusting parole review dates for commission of infractions or upon revocation of parole for commission of a new crime. Mr. Cowan was found guilty of the infraction of "*.004 fighting with another person," which is classified as a Category B offense in the DOC's disciplinary regulations. N.J.A.C. 10A:4-4.1(a)(2)(i). (Ra142). Mr. Cowan was not charged with or found guilty of either of the Category A offenses, "*.002 assaulting any person" or "*.003 assaulting any person with a weapon."

N.J.A.C. 10A:4-4.1(a)(1)(ii), (iii). And he was not charged with a new criminal offense.

The Board promulgated a regulation that allows it to postpone an inmate's parole eligibility date if the inmate commits certain institutional infractions. N.J.A.C. 10A:71-3.4. The regulation classifies infractions into Categories A through G—distinct from the DOC's category classifications—with A being the most serious. Ibid. Under the Board's regulation, Mr. Cowan's infraction of fighting is classified as a Category E infraction. N.J.A.C. 10A:71-3.4(d)(5). The commission of a Category E infraction "shall result in an increase of the inmate's eligibility date" of four months, a period, which "may be further increased" by up to an additional four months if "the inmate's conduct and the characteristics of the inmate warrant an adjustment in the increase in the eligibility date." N.J.A.C. 10A:71-3.4(e)(5), (g)(5) (emphasis added). In comparison, Category B (the second-most serious offense) results in an increase of the parole eligibility date of twelve months, which can be increased by an additional six months. N.J.A.C. 10A:71-3.4(e)(2), (g)(2).

The Board has also promulgated a schedule of FETs when an inmate who has been granted parole has his parole revoked for the commission of a new crime, which also serves as a useful comparison. N.J.A.C.

10A:71-7.17(e). Mr. Cowan was not charged with or convicted of committing a new criminal offense for the 2018 fighting incident—but consider the following: While the DOC administrative code does not set forth the required elements of the various institutional infraction offenses, it should be noted that the offense of fighting is graded as a less serious category of offense than either of the assault charges of which Mr. Cowan was not charged. N.J.A.C. 10A:4-4.1(a)(1), (2). Thus, since Mr. Cowan's conduct constituting "fighting" did not rise to the level of the more serious disciplinary charge of "assault," it is also unlikely to have risen to the level of the criminal offense of aggravated assault. Cf. N.J.S.A. 2C:12-1(b). But even an inmate convicted of aggravated assault while released on parole would receive a lower FET than Mr. Cowan received: between 12 and 16 months (with a presumptive of 14 months) for third-degree aggravated assault, or between 16 and 28 (with a presumptive FET of 22 months) for second-degree aggravated assault.[14] N.J.A.C. 10A:71-7.17(e)(3), (f)(3). The 200-month FET Mr. Cowan received is a world apart from a 28-month FET that an inmate would receive after being revoked for committing second-degree aggravated assault while on parole. It is even

[14] The regulation also allows the Board to depart from the scheduled FET if it "is clearly inappropriate in consideration of the circumstances of the parole violation and the characteristics and prior criminal record of the parolee." N.J.A.C. 10A:71-7.17(m).

longer than the maximum scheduled FET for committing murder or kidnapping while on parole—100 months. N.J.A.C. 10A:71-7.17(e)(5). In light of this enormous gap and the Board's failure to explain why a 200-month FET was necessary in light of Mr. Cowan's 2018 infraction for fighting, the Board's decision must be found to be arbitrary and an abuse of discretion.

For the reasons in this section, this Court should conclude that the Board failed to overcome the presumption that Mr. Cowan receive the scheduled FET because it failed to explain why a thirty-six month FET would be "clearly inappropriate" when "tied directly to the goal of reducing the likelihood of future criminal behavior," and it failed to explain why a 200-month FET was needed to reduce the likelihood of future criminal behavior." Berta, 473 N.J. Super. at 323. Accordingly, the Court should reverse the 200-month FET. Furthermore, because: (1) the record could not support a 200-month FET under the applicable legal standard; (2) it has now been nearly five and a half years since Mr. Cowan was denied parole—nearly double the maximum scheduled FET; and (3) Mr. Cowan has committed no new infractions since his last infraction in August of 2018, this Court should reverse the FET and remand for a new parole hearing rather than for the setting of a new FET.

CONCLUSION

For the reasons in Part B, this Court should hold that to impose a longer-than-scheduled FET, the Board must (1) overcome the presumption of the scheduled FET by demonstrating that the inmate will still pose a substantial likelihood of recidivism by the end of the maximum scheduled FET, and (2) demonstrate that the FET imposed is no longer than necessary to reduce the inmate's risk of recidivism below the level of "substantial."

For the reasons in Part C, this Court should hold that the Board failed to apply and to meet the standard to justify its imposition of a 200-month FET for Mr. Cowan and that the record could not support a 200-month FET under the relevant standard. Because it has now been nearly five and a half years since Mr. Cowan was denied parole—nearly double the maximum scheduled FET, this Court should reverse the FET and remand for a new parole hearing.

Respectfully Submitted,

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