

A-24-24

HORACE COWAN,)	SUPREME COURT OF NEW JERSEY
)	DOCKET NO. 089243
Appellant-Petitioner,)	<u>Civil Action</u>
v.)	On Petition Granted from a Final
)	Judgment of the Superior Court
NEW JERSEY STATE)	of New Jersey, Appellate Division
PAROLE BOARD,)	
)	Sat Below:
Respondent-Respondent.)	Hon. Mary G. Whipple, J.A.D.
)	Hon. Catherine Enright, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT
NEW JERSEY STATE PAROLE BOARD

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SUPREME COURT
OF NEW JERSEY

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PRELIMINARY STATEMENT

This narrow issue in this case is whether the Parole Board's establishment of a 200-month "extended" future eligibility term (FET) in petitioner Horace Cowan's case was arbitrary, capricious or unreasonable, in light of his criminal history and infraction history while incarcerated. It was not, and the record here confirms that the Board performed the proper analysis required by applicable law and thoroughly justified its decision.

Cowan is presently serving an aggregate custodial term of life imprisonment for convictions of aggravated manslaughter, possession of a weapon for an unlawful purpose, conspiracy to commit aggravated assault, criminal restraint and escape. Since beginning his State incarceration in 1993, Cowan has amassed twenty-one disciplinary infractions, eight of which were serious infractions, and he committed three infractions in 2018—including a serious infraction for fighting, less than two years prior to his 2020 parole eligibility date. In 2020, the Board denied Cowan parole and imposed the 200-month FET, with a focus on Cowan's risk of recidivism and the knowledge that the FET could be substantially reduced by the application of credits (assuming that Cowan does not engage in any additional misconduct that might disallow such credits).

As the Appellate Division found, the 200-month FET was not arbitrary,

capricious or unreasonable because: (1) the Board based its decision on sufficient credible evidence in the record, which the Board detailed in a comprehensive written decision that explained why the Board concluded that Cowan lacks insight into his criminal behavior and his extensive history of institutional infractions; and (2) the Board's decision focused on the potential for recidivism in establishing the FET, as required by controlling law.

Cowan claims that the FET imposed here was improper. He asks this Court to hold that, to impose an extended FET, the Board must demonstrate that: (1) the presumptive FET is not long enough to reduce the inmate's risk of recidivism below the parole-release standard of "substantial likelihood"; and (2) the FET period chosen mirrors the period in which a "substantial likelihood" exists that the parolee will commit a crime if released. He erroneously claims that the Appellate Division endorsed that approach in Berta v. N.J. State Parole Board, 473 N.J. Super. 284, 324 (App. Div. 2022). Berta did not so hold, and nor should this Court.

In short, in establishing an extended FET, the Board followed the applicable law, including Berta, by focusing on recidivism and explaining both why the presumptive FET was clearly inappropriate and why the FET that was actually imposed is necessary and appropriate. Accordingly, the determination of Cowan's FET was not arbitrary, capricious or unreasonable.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The State relies on the statement of procedural history and facts in its prior briefing in the Appellate Division, except to highlight the following.

A. Facts and Circumstances of Cowan's Present Crimes

Cowan is currently serving a life sentence stemming from crimes committed between February 1990 and February 1991. (Ra28-32; Cra3-4; Cra17-18).² First, in February 1990, Cowan shot and killed a man, "W.W.," on a Camden street while committing a robbery and then fled the scene with two other males. (Cra3-4). Cowan was later found guilty of aggravated manslaughter and sentenced to life imprisonment. (Ra28-31).

Second, on February 20, 1991, while Cowan was awaiting trial on the Camden charges and housed at the Monmouth County Jail, he assaulted a corrections officer, "L.R.," with a metal bar. (Cra17-18). Then, after another inmate, Fitzpatrick, dragged the officer to the shower area, Cowan, Fitzpatrick and another inmate, Brunson, bound L.R.'s ankles and wrists, stole his car keys and wallet, and forced him to give them his ATM code after threatening his

¹ Because the procedural history and counterstatement of facts are closely related, they are combined for efficiency and the court's convenience.

² "Asb" refers to appellant's supplemental brief, and "Asa" refers to appellant's supplemental appendix. "Rsb" refers to the Board's supplemental brief, "Ra" refers to the Board's Appellate Division appendix, and "Cra" refers to the Board's confidential Appellate Division appendix

family. (Cra18). Fitzpatrick retrieved a fire extinguisher, at which time a maintenance worker, “T.B.,” arrived in the area. Ibid. Cowan then threatened T.B.’s life with a screwdriver and placed T.B. in the shower with L.R., who was bleeding profusely from the head. Ibid. Upon locking T.B. in the shower area, the three inmates used the fire extinguisher to break a window and escape the jail. Ibid.

Cowan, Brunson and Fitzpatrick were all apprehended by the next day. (Cra19). Cowan pleaded guilty to conspiracy to commit aggravated assault, criminal restraint and escape. (Ra32; Cra15). Cowan was sentenced on these charges to an aggregate term of ten years, with a mandatory-minimum term of five years, consecutive to the Camden County sentence. (Ra32-34).

B. Cowan’s Prior Criminal Record

As an adult, Cowan has prior convictions for possession of a handgun, receiving stolen property, aggravated assault with a deadly weapon (two counts) and theft. (Ra49; Ra136-37; Cra23-24). He has had one prior opportunity on probation and has also had one prior term of incarceration. Ibid. Cowan has a juvenile record, which will not be discussed in detail due to the confidential nature of juvenile proceedings. Ibid.

C. Cowan’s Institutional Disciplinary Infractions

While in prison, Cowan has committed twenty-one disciplinary

infractions, including eight “asterisk” offenses, which are considered the most serious and result in the most severe sanctions. (Asa33-39; Ra51-52; Ra137-38); N.J.A.C. 10A:4-4.1(a). He committed his first infractions, for two counts of failure to comply with written rules, in February 1993. (Asa33; Ra52). He committed his most recent infraction, for the offense of refusing to accept a work/housing assignment, in August 2018. (Asa39; Ra51; Ra123). In between those dates, he committed eighteen additional infractions, including all eight of the serious “asterisk” offenses. (Asa33-39). He committed two serious infractions in May 2018 for prohibited acts *.004 (fighting with another person) and *.306 (conduct which disrupts or interferes with the orderly running of the institution). (Asa38-39; Ra51; Ra137).

His other asterisk infractions include the following: possession/introduction of a weapon (October 1993); possession/introduction of prohibited substances such as drugs (June 1997); possession/exhibition of anything related to a security threat group (October 2000); attempt to assault any person (September 2010); conduct which disrupts the orderly running of the institution (September 2010); and use of any prohibited substances (February 2016). (Asa33-38; Ra51; Ra137-38). His additional non-asterisk offenses include: refusing to obey an order (November 1995); possession of anything not authorized for retention or receipt (August 1997); being in an unauthorized

area (July 1998); failure to comply with written rules (March 16, 1999, and March 18 1999); refusing to accept a work assignment (March 1999); refusing to obey an order (June 1999); possession of anything not authorized for retention or receipt (November 2002); correspondence/conduct with a visitor in violation of regulations (March 2007); and engaging in sexual acts with others. (September 2011). Ibid.

D. Cowan's parole review

Cowan first became eligible for parole on February 19, 2020, after serving approximately thirty years of his sentence (including pre-sentence jail credit). (Ra48). On January 2, 2020, a two-member panel denied parole and referred the matter to a three-member panel for the establishment of a future eligibility term (FET) outside of the administrative guidelines. (Ra55). The panel's cited reasons for denial included:

- The facts and circumstances of the offenses, namely aggravated manslaughter, aggravated assault and escape;
- An extensive and repetitive prior offense record;
- An increasingly more serious criminal record;
- The fact that the offenses were committed while on probation and also while incarcerated, and that probation and prior incarceration failed to deter criminal behavior;

- The commission of numerous, persistent and serious institutional disciplinary infractions, including the serious 2018 infractions occurring less than two years prior to his parole hearing;
- Insufficient problem resolution, specifically a “lack of insight into criminal behavior”;
- The results of an objective risk assessment indicating a moderate risk of recidivism.

[Ra55.]

As for his insufficient problem resolution, the Board elaborated that Cowan had more than twenty infractions, with the most recent ones occurring in 2018, including refusing to work and fighting. (Ra55). The Board found that these infractions indicated that Cowan has not addressed his criminal behavior or thinking and that he needs to participate in his own rehabilitation by addressing his behavior during incarceration. Ibid. The Board concluded that those concerns were not outweighed by mitigating factors like Cowan’s participation in institutional programs or reports indicating favorable institutional adjustment. Ibid.

On March 3, 2020, the two-member Board panel issued an amended decision clarifying the aggravating and mitigating factors, which were not reflected in the original notice of decision. (Ra123-26). Regarding aggravating factors, the Board panel noted that Cowan’s “institutional infractions” were numerous, persistent and serious in nature, resulted in loss of commutation time,

confinement in detention and administrative segregation and were consistent with his offense record. Ibid. In addition, in the amended decision, the Board panel clarified its finding of “insufficient problem resolution,” indicating that it was based upon Cowan’s “lack of insight into [his] criminal behavior.” Ibid. The Board also clarified that Cowan had committed a current offense while incarcerated. Ibid. Regarding mitigating factors, the Board panel removed “positive interview is noted” as a factor. Ibid.

On May 6, 2020, a three-member Board panel convened and established a 200-month FET, explaining its reasoning in a ten-page decision. (Ra133-42). The three-member Board panel determined that imposing the presumptive FET under N.J.A.C. 10A:71-3.21(a) would be inappropriate because Cowan had not shown satisfactory progress in reducing the likelihood that he would engage in criminal activity if he were to be released on parole. (Ra141). Therefore, the three-member panel established an FET in excess of the presumptive FET (extended FET) in accordance with N.J.A.C. 10A:71-3.21(d), basing its decision on the same factors relied on by the two-member panel in denying Cowan parole, detailing, among other things, his insufficient problem resolution and lack of insight into his criminal behavior. (Ra141-42).

Notably, the 200-month FET is significantly reduced by applicable credits such as commutation, work and minimum-custody credits. (Ra142). Based on

the application of Cowan's earned credits, his current eligibility date is September 9, 2031. Ibid. However, this date will be further reduced by the application of any work credits and minimum custody credits he earns, resulting in a projected eligibility date in June 2030. Ibid. Thus, the Board panel imposed the FET with the knowledge that the actual FET is substantially less than 200-months.³ Ibid.

The three-member panel thoroughly explained its reasons for imposing an FET outside the guidelines in its ten-page narrative notice of decision, including comments on Cowan's insufficient problem resolution, his lack of insight into his criminal behavior, and his institutional infraction record. (Ra133-42). The Board found that, even after twenty-seven years of incarceration in State prison (from 1993 to 2020), Cowan did not understand the causes of his criminal behavior and the dynamics to his criminal thinking. (Ra141-42). Specifically, Cowan blamed his crimes on his desire to seek acceptance from his peers, but the panel found that he articulated little or no insight into why he sought to achieve social acceptance through committing crimes, including crimes of violence. Ibid. The Board further found that Cowan had not made sufficient

³ In his brief, Cowan acknowledges that the 200-month FET, as explained herein and in the Board's narrative decision, would be substantially reduced by credits, and that the actual length of the FET is approximately ten years and four months. (Asb14; Ra142).

progress in the rehabilitative process. (Ra142). In particular, the Board noted that, notwithstanding his prison programming and counseling, he required further programming to assist in gaining a better understanding of his criminal thinking. Ibid. Finally, in establishing the FET, the Board considered that Cowan's lengthy disciplinary history included multiple instances of assaultive or disruptive behavior, including recent incidents involving fighting and narcotics, with the most recent fighting infraction occurring in May 2018. Ibid.

On November 18, 2020, the full Board rejected Cowan's administrative appeal of the panels' decisions and affirmed the denial of parole and imposition of a 200-month FET. (Ra256-61). Regarding the establishment of the FET, the Board concurred with the three-member panel's finding that, after twenty-seven years of State prison incarceration, Cowan has only identified a contributing factor to his criminal thinking (namely his alleged need for peer acceptance) but that he still lacks an understanding of his use of violence to gain social acceptance. (Ra259-60). This failure on Cowan's part to gain an understanding of why he used violence to gain social acceptance demonstrated to the Board that he has not made adequate progress in the rehabilitative process. (Ra260).⁴

⁴ In his brief, Cowan references a psychological evaluation prepared in October 2023 by Dr. David Kalal, in which Dr. Kalal questions the finding of a lack of insight and its significance to granting parole. (Asb61; Asa19). The court should decline to consider this report, as it was prepared more than three years after both the two-member panel's January 2020 decision denying parole

Finally, the Board concurred with the three-member panel's finding that Cowan's extensive history of disciplinary infractions, including twenty-one total infractions, eight serious infractions and several recent infractions, supported the establishment of the extended FET in his case. (Ra260-61).

Cowan challenged the Board's decision in the Appellate Division, which affirmed. (Asa1-7). He claimed that the Board's establishment of an extended FET was arbitrary and lacked support in the record. (Asa5-6). In rejecting these arguments and affirming the FET, the court noted that, "[t]he review of an FET also focuses on the likelihood of recidivism." (Asa6) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 565 (App. Div. 2002)). The court found that the FET decision was not arbitrary, capricious or unreasonable because it was supported by sufficient credible evidence in the record. (Asa6). The court cited the Board's "detailed ten-page decision outlin[ing] all the reasons and considerations leading to the 200-month FET, noting Cowan lacked insight into his criminal behavior and committed twenty-one infractions, eight of which were serious in nature" and that the "most recent infractions occurred in 2018 for disruption, fighting and rejecting work assignments." Ibid.

Regarding his lack of insight, the court relied on the Board's findings that "Cowan needed to 'develop a better understanding to the dynamic of [his]"

(Ra55), and the three-member panel's decision setting the FET. (Ra133-42).

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.” Ibid. (alterations on original). The court also relied on the Board’s finding that, “Cowan needed to better assess and understand his triggers to be able to rectify his behavior and enhance his interactions with others.” Ibid.

The court found that, “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.” Ibid. The court further found that the Board had considered all applicable mitigating factors in Cowan’s case, including his involvement in anger management programming and other counseling, “but determined Cowan would benefit from further programming given his history of infractions.” (Asa7). The court thus concluded that the Board had “considered the aggregate of all pertinent factors including those set forth in N.J.A.C. 10A:71-3.11(b), and its findings are supported by sufficient, credible evidence in the record.” Ibid.

Cowan petitioned this court for certification on the FET decision only, and not the parole denial. (Petition for Certification). On January 14, 2025, this Court granted the petition for certification. (Asa8).

ARGUMENT

BASED ON COWAN'S CRIMINAL HISTORY AND HIS INFRACTION HISTORY WHILE INCARCERATED, THE BOARD'S DECISION ESTABLISHING A 200-MONTH EXTENDED FET IN HIS CASE WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE.

The narrow issue in this case is whether the FET that the Board imposed in Cowan's case is arbitrary, capricious or unreasonable. (Asb3; Asb58-67). It was not.

In imposing the FET in his case, the record establishes that the Board considered all pertinent factors under N.J.A.C. 10A:71-3.11(b), that its decision was properly focused on the potential for recidivism, and that the Board supplied ample explanation for why it reached its conclusion that a 200-month FET is appropriate for Cowan due to his criminal history and his infraction history, both of which reflect a lengthy history of violence and impulsiveness that he has failed to address while incarcerated. Thus, the Board followed the law for establishing an extended FET in Cowan's case and properly imposed a 200-month FET.

Generally, judicial review of administrative agency determinations is limited to evaluating whether the agency acted arbitrarily or abused its discretion in rendering its decisions. In re AG Law Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 489 (2021); In re State & Sch. Emps. Health Benefits

Comm’n’s Implementation of Yucht, 233 N.J. 267, 279 (2018); In re Herrmann, 192 N.J. 19, 27-28 (2007); Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). In conducting this limited review, courts accord agency actions presumptions of validity and reasonableness, and the burden is on the challenging party to show that the agency’s actions were unreasonable. In re AG Law Enf’t Directive, 246 N.J. at 489. This deferential standard, which “recognizes the ‘agency’s expertise and superior knowledge of a particular field,’” is consistent with “the strong presumption of reasonableness that an appellate court must accord an administrative agency’s exercise of statutorily delegated responsibility.” Ibid. (citations omitted).

“In applying this standard, courts do not consider what they might have done in the agency’s place or substitute their judgment for the agency’s.” Ibid. (citing Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). This is especially true here, where the Legislature has delegated to the Board—a body of individuals who have been “[a]ppointed by the Governor with the advice and consent of the Senate” because of their specialized “expertise in ‘law, sociology, criminal justice or related branches of the social sciences’”—the “exceedingly difficult” responsibility of making predictive pronouncements about an individual’s likelihood to reoffend. Acoli v. N.J. State Parole Bd., 224 N.J. 213, 222, 226 (2016) (“Acoli II”) (quoting N.J.S.A. 30:4-123.47(a)).

The Board makes “highly predictive and individualized discretionary appraisals” in assessing an inmate’s suitability for parole, which are “inherently imprecise.” Acoli II, 224 N.J. at 222 (first quoting Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973)). These “discretionary assessment[s]” turn on “a multiplicity of imponderables.” Ibid. (quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 10 (1979) (alteration in original) (additional citations omitted)). The Board is tasked with predicting an inmate’s future behavior, a highly subjective determination mandating broad discretion in the Board’s decision-making process. Acoli II, 224 N.J. at 222.

In this case, because Cowan committed his crimes before August 19, 1997, when the parole release standard was amended, the Board’s determination must be supported by “a preponderance of the evidence that that there is a substantial likelihood” that he will re-offend if released on parole. See N.J.S.A. 30:4-123.53(a); 30:4-123.56(c). In making this determination, the Board must consider the non-exhaustive list of factors applicable in each case, including those set forth in N.J.A.C. 10A:71-3.11(b), but there is no requirement that the Board consider each and every factor enumerated in the regulation. McGowan, 347 N.J. Super. at 561.

In his supplemental brief, Cowan notes that this Court has never substantially addressed a challenge to the appropriate length of an FET (Asb19), and thus suggests that the Court should review this matter in light of two

published Appellate Division cases which have addressed extended FETs: McGowan, 347 N.J. Super. at 565, where the court affirmed a thirty-year FET; and Berta, 473 N.J. Super. at 324, where the court reversed and remanded the imposition of a six-year FET. Ibid. Cowan suggests that those cases support a conclusion that the 200-month FET is inappropriate here. (Asb19). Most prominently, Cowan relies on Berta to argue that his FET was arbitrary and should be reversed by the Court. (Asb29-31; Asb47-50).

That argument misses the mark and erroneously suggests that the Board's decision is at odds with the Appellate Division's judgment in Berta. The primary reason Cowan's argument fails is that the record here demonstrates that, in imposing Cowan's FET, the Board did follow the framework for decisions that Berta supplied, and decided—based on its considerable expertise and knowledge related to parole decisions and the factors it was to weigh under Berta—that a 200-month FET was required. (Ra133-42; Ra259-60).

In Berta, 473 N.J. Super. at 322-23. the court held that, in imposing an extended FET, the Board must explain why the presumptive FET is clearly inappropriate, and why the FET that was actually imposed is necessary and appropriate. The Appellate Division reversed the Board's decision in Berta because it concluded that the Board "failed to adequately explain why it fixed an FET almost three times as long as the presumptive twenty-seven-month FET

imposed by N.J.A.C. 10A:71-3.21(a)” for Berta. Id. at 322. The court viewed the “clearly inappropriate” standard for imposing an extended FET “to be a high threshold to vault,” and found that to impose an extended FET, the Board must explain why the presumptive FET is clearly inappropriate. Id. at 322-23. It further held that the Board “must explain not only why the presumptive FET is clearly inappropriate, but also why the FET that was actually imposed is necessary and appropriate” and that the “Board cannot simply pick a number out of thin air.” Id. at 323. The court stressed that an FET must not be imposed as a form of punishment, and the decision to impose an FET beyond the presumptive FET, like the underlying decision to deny parole, must be tied directly to the goal of reducing the likelihood of future criminal behavior.⁵ Ibid.

Cowan contends that the standard for establishing FETs is the same “substantial likelihood” standard that applies to the decision to grant or deny parole. (Asb38-49). He asserts that the FET statute, N.J.S.A. 30:4-123.56(b), when read in context with the parole release standard under N.J.S.A. 30:4-123.53, provides that extended FETs may only be as long as the Board finds

⁵ Berta also contained a concurrence from Judge Geiger that specifically addressed the Board’s FET determination. Berta, 473 N.J. Super. at 325-29. In the concurrence, Judge Geiger questioned the Board’s imposition of extended FETs without adequate explanation and suggested that extended FETs imposed by the Board warranted closer scrutiny under a less deferential standard of review. Id. at 327.

necessary for the likelihood of recidivism to drop below the “substantial likelihood” standard. (Asb46-50). He further argues, relying on Berta, that imposing an FET that is not directly tied to the time that it would take to reduce the risk of recidivism to below the “substantial likelihood” level would constitute an improper alteration of his sentence and exceed the Board’s authority in establishing FETs. Ibid.

Cowan also claims that the Board did not follow the law in establishing an extended FET in his case, and he asks the Court to “adopt Berta’s construction of NJAC 10A:71-3.21(d) and hold that,” to impose an extended 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) an extended FET “is no longer than necessary to reduce the likelihood of recidivism below the level of substantial likelihood.” (Asb57).

The Court should reject Cowan’s requested relief because it is unnecessary and it is beyond the scope of the narrow issue on which the Court granted certification: namely, whether Cowan’s FET was arbitrary, capricious or unreasonable. Furthermore, Cowan’s position that Berta held that the length of an FET must mirror the time needed to reduce the risk of recidivism to below substantial level (raised for the first time in his supplemental brief in this Court) is unsupported by a plain reading of Berta, which never says anything of the

sort. (Asa8). In essence, Cowan suggests that the period of an extended FET must reflect the Board's forecast of a date when an inmate will satisfy the criteria for parole. That creates a conundrum that the Board's extended FET determination can be argued to reflect a finding that parole should be granted after the expiration of the extended FET. Neither the relevant regulations nor case law support the argument that the Board's extended FET calculation is required to reflect a forecast of when a parolee will satisfy the criteria for being paroled.

Contrary to Cowan's assertions, the record here shows that the Board followed the law, as discussed in Berta, in establishing extended FETs by focusing on recidivism and, in so doing, explaining why the presumptive FET was clearly inappropriate and why the FET that was actually imposed is necessary and appropriate. (Asa6-7; Ra133-42). And because the Board has supplied the necessary justification for its decision here (a justification that was absent in Berta), the Appellate Division affirmed the 200-month FET, finding that it was not arbitrary, capricious or unreasonable because sufficient credible evidence in the record supported the Board's decision. (Asa6). In so doing, the court cited the Board's "detailed ten-page decision outlin[ing] all the reasons and considerations leading to the 200-month FET, noting Cowan lacked insight into his criminal behavior and committed twenty-one infractions, eight of which

were serious in nature,” including recent infractions in 2018 for disruption, fighting and rejecting work assignments. (Asa6; Ra133-42). The court found that, as required, the FET decision reflected “a focus on the potential for recidivism,” and that the Board had provided a justification as to why the 200-month FET was “necessary in order to address the issues detailed” in the Board’s report, “since Cowan had not made adequate progress in his rehabilitative process.” (Asa6).

The court further found that the Board had considered all applicable mitigating factors in Cowan’s case, including his involvement in anger-management programming and other counseling, “but determined Cowan would benefit from further programming given his history of infractions.” (Asa7). The court concluded that the Board had “considered the aggregate of all pertinent factors including those set forth in N.J.A.C. 10A:71-3.11(b), and its findings are supported by sufficient, credible evidence in the record.” Ibid.

As discussed in its narrative decision, the Board’s focus in establishing the FET in Cowan’s case was his risk of recidivism. In particular, the Board determined that Cowan needs a significant amount of time to overcome that risk because he had an extensive history of disciplinary infractions and because he displayed a lack of insight into the reasons for his criminal behavior. (Ra133-142). Cowan’s infraction history was both lengthy and serious, spanning a

quarter century, from 1993 to 2018, including a most recent infraction in August 2018—a mere eighteen months prior to his parole-eligibility date in February 2020. (Asa39; Ra48; Ra51; Ra123). Equally troubling, only three months prior to that infraction he committed two serious infractions involving violence in May 2018, for fighting with another person and for conduct which disrupts or interferes with the orderly running of the institution. (Asa38-39; Ra51; Ra137). Aside from those three 2018 charges, Cowan committed eighteen additional infractions, including six serious ones between October 1993 and February 2016 (Asa33-39; Ra51). These included serious infractions involving possession of a weapon; possession of prohibited substances such as drugs; possession or exhibition of anything related to a security threat group; attempted assault; conduct which disrupts the orderly running of the institution; and use of any prohibited substances. (Asa34-38; Ra51; Ra137-38). Thus, Cowan's history showed a persistent inability to follow the rules that continued even as he approached his parole-eligibility date, and included violent, impulsive acts less than two years from his initial parole-eligibility date. (Asa38-39; Ra48; Ra51; Ra137-38).

The Board also amply supported its conclusion that Cowan has insufficient problem resolution, which touches upon both his criminal and infraction history, finding that Cowan lacked insight into his criminal behavior

and concluding that he had failed to adequately address his criminal behavior and thinking. (Ra55; Ra123). In support of this finding, the Board noted his most recent disciplinary infractions committed in 2018 involving refusing to work and fighting, and found that he required additional time to address his lack of insight into his behavior and thinking. Ibid.

Cowan's responses to the Board's questioning at his hearing illustrate why the Board was concerned about Cowan's problem resolution. At that hearing, the Board questioned Cowan about his motivations to kill W.W. and what prompted him to act with such extreme violence, resulting in W.W.'s death and the violent assault on L.R. (Ra139-40). The Board raised these issues because it needed to assess whether Cowan had gained an understanding of his motivations for his criminal behavior and whether he recognized the triggers and stressors that impelled him to act in such a violent manner. Ibid. This assessment by the Board was necessary to determine whether Cowan would act or react in a similar manner in the future and thereby assess his risk of recidivism. Ibid. Based upon his responses to questions posed at the hearing, the Board found that Cowan had not come to terms with the violence he exhibited when he shot W.W., assaulted L.R. and violently escaped from the Monmouth County Jail. Ibid. The Board further found that Cowan must conduct an introspection into the factors that resulted in his criminal behavior, the true

nature of his violent actions and how he would realistically address stress and conflict if he was granted parole. Ibid.

Cowan's lack of insight or problem resolution is also reflected in his responses at the hearing about why he had shot and killed W.W.: he initially stated only that he was "really thinking as a juvenile, doing dumb stuff," and that he was "out there trying to get money the illegal way, robberies and things like that." (Ra139). When the Board panel asked him what made it necessary to fire his weapon in what was intended to be a robbery, he stated, "to me it was a really nervous situation . . . when he (the victim) started to reach (into pocket during robbery) I really thought he had a weapon to defend himself and I basically got scared and I end up shooting him." Ibid. (alterations in original).

Cowan showed a similar lack of insight regarding the escape conviction: he claimed he was "mentally really going through it" at the time, stating that, at that time, his girlfriend was pregnant with his child and that he supposedly escaped to be with his family. (Ra139). Regarding the assault and criminal-restraint convictions, Cowan offered only, "I know I hit him with the stick, or whatever I had," and that he and his co-defendants had confronted T.B. and threatened him with harm before locking him in the shower area with L.R. Ibid.

The Board's FET decision here also took into account Cowan's commission of institutional infractions, including the two serious infractions

committed in May 2018, numerous narcotic-related infractions, and infractions involving fighting, assault and disruptive behavior, as well as Cowan's explanations for that behavior. (Ra139). The Board panel asked Cowan why the record in his case was "replete with violence." Ibid. He responded by asking, "institution or the street?" Ibid. When the Board panel asked him to pick either one, he replied, "on the street, like I said I had a juvenile mind and basically I just wanted to fit in. I was one of them [sic] kids that just wanted to fit in. Be cool. So I just found myself doing a lot of dumb stuff that shouldn't [sic] been done." Ibid. Regarding the violence he exhibited in prison, Cowan stated, "I only been [sic] in a few fights. I'm somebody that will defend myself but I am not going to seek out to hurt anybody." (Ra140).

When asked about his 2018 infractions for fighting and conduct which disrupts, he essentially faulted others for those incidents, contending that, after voicing his opinion to younger inmates about how they were living, he was "bullied," prompting him to complain to corrections officers. (Ra140). Subsequently, he claimed that three inmates assaulted him in his cell, and that he was charged with fighting because he had fought back. Ibid.

Based upon his entire criminal history and the above-mentioned statements at his parole hearing, the Board concluded that Cowan "need[s] to develop a better understanding to the dynamics of [his] personality defects that

impelled [him] to criminal behavior.” Ibid. More particularly, the Board concluded that he “must conduct an introspection to adequately understand all components to the triggers and stressor that make [him] think or want to think in such a criminal manner.” Ibid. It explained that conclusion by noting that, regarding his institutional conduct, Cowan “justified [his] negative behavior by asserting [he] had to act in such a manner to survive the prison environment.” Ibid. He had “advised the Board panel [of] a belief that [he is] older, that [he] understand[s] [his] past behavior and that [he] would like to counsel individuals who may be acting in a negative manner.” Ibid. The panel, however, noted that “in 2018 [he] admittedly conducted [himself] in such a manner, choosing to interact and lecture inmates on how they were living in negative life based upon their street gang affiliations,” which “resulted in animosity and an incident during which [he] claim[ed] [he] had to defend [himself] from three (3) inmates who attacked [him].” Ibid. The Board thus found that Cowan “need[ed] to develop better judgment in dealing with and interacting with others, during situations of discourse and confrontation.” Ibid.

The record here confirms that the Board took all of this information into account and appropriately determined what length of FET was required to “reduc[e] the likelihood of future behavior.” (Ra55; Ra123; Ra133-42). See N.J.A.C. 10A:71-3.21(a); Berta, 473 N.J. Super. 323-24 (“We emphasize in this

regard that N.J.A.C. 10A:71-3.21(d) authorizes the Board to set a higher FET ‘if the future parole eligibility date which would be established pursuant to [N.J.A.C. 10A:71-3.21(a)] is clearly inappropriate due to the inmate’s lack of satisfactory progress in reducing the likelihood of future behavior.’” (emphasis and alteration in original)). Berta never equated the time appropriate to address a “lack of satisfactory progress in reducing the likelihood of future behavior” with the time for the likelihood of recidivism to drop below the “substantial likelihood” standard (Asb46-50), and the relevant regulations pertaining to parole decisions and FET calculation contain vastly different language. Therefore, this Court should decline to read such disparate language as purportedly announcing the same standard, particularly when Cowan has introduced this new argument after the Court’s certification decision here.

Turning to Berta’s actual holdings and Cowan’s suggestion that his circumstances and the Board’s decision here parallel those in Berta (Asb58-62), that is also far from the case. First, Berta’s institutional record was much more positive than Cowan’s—most notably, there is a stark disparity in their infraction histories. In Berta, 473 N.J. Super. at 313, the court concluded the Board improperly found that Berta’s disciplinary history suggested a likelihood of reoffending because Berta had been infraction-free for nearly twenty years. Although Berta had committed seven disciplinary offenses, six occurred within

the first five years of Berta's incarceration and the most recent, in 2002, was a non-asterisk offense. Id. at 313-14. The court concluded, "[w]e are satisfied that Berta's disciplinary history, viewed in its entirety and considering the temporal remoteness of the infractions, cannot reasonably be deemed to suggest a likelihood of reoffending, and thus should not have been considered to be a negative circumstance militating against parole." Id. at 314. The court reasoned that Berta's "sustained improvement in institutional behavior is a positive circumstance that should be rewarded so as to provide incentive for inmates to refrain from committing infractions" and that in Berta's case, the "recent pattern of sustained infraction-free conduct suggests that an inmate will be willing and able to comply with parole rules just as he or she has learned to comply with prison rules." Id. at 314-15.

Here, as discussed, Cowan committed many more infractions than Berta, his infraction history spans a much longer period of time, and it includes recent infractions, including serious infractions involving violence. (Asa33-39; Ra48; Ra51; Ra137-38). Thus, unlike Berta, Cowan has clearly not demonstrated "sustained improvement in institutional behavior," but just the opposite, and this supports the Board's finding that his risk of recidivism still remains high more than twenty-five years into his incarceration. (Ra133-142).

Cowan is also wrong in suggesting that Berta precludes the Board from

premising an extended FET based on an inmate's need to develop a deeper understanding of their criminal thinking, and not having made adequate progress in the rehabilitative process, and that the Board's reliance on those factors necessitates a reversal of the Board's FET decision here. (Asb58-61). In making this argument, Cowan notes that these two factors that the Board cited in Cowan's case for imposing the FET were also cited in Berta, 473 N.J. Super. at 324. (Asb60).

But that is where the similarities between the two cases on those factors ends. In Berta, the Board's finding that he lacked insight was based entirely on the fact that Berta denied culpability for his crime, and did not account for two psychological evaluations concluding that he was a low risk for recidivism. Berta, 473 N.J. Super. at 317-20. The court found that denial of culpability alone was inadequate to support the Board's findings and to impose an extended FET. Id. at 324-25. That bears no resemblance to the decision here in Cowan's case, where the Board made detailed findings based upon Cowan's own statements at his hearing which supported its conclusion that he lacked insight into his criminal behavior and needed a significant amount of time to overcome his risk of recidivism (Ra139-40), which the Appellate Division credited in affirming the FET. (Asa6-7).

Cowan's case is much more analogous to McGowan, 347 N.J. Super. at

559, in which the court approved an even longer FET than that imposed here. In McGowan, the court affirmed the Board's imposition of a thirty-year FET, notwithstanding the fact that McGowan was infraction-free during his entire incarceration. Ibid. In so doing, the court largely relied upon McGowan's lack of insight into his crimes, as demonstrated by his statements at his parole hearing, and found that the Board, in setting the FET, had "focus[ed] its attention squarely on the likelihood of recidivism." Id. at 563-65. This is exactly what the Board did here.

Cowan attempts to distinguish McGowan by noting that McGowan was convicted under Title 2A and, as such, he would be entitled to annual review hearings by the Board under N.J.A.C. 10A:71-3.21(f), at which the Board might decide to reduce the length of the FET based on his progress while incarcerated. (Asb28-29). However, the court's opinion in McGowan makes clear that its affirmance of the FET was based upon the substantial evidence in the record supporting the likelihood of recidivism, and not because McGowan was entitled to annual reviews where the Board may, but was not required to, reduce the FET. McGowan, 347 N.J. Super. at 563-65.

Finally, in arguing that the 200-month FET is excessive, Cowan relies on parole regulations that have no relevance to this case or to the establishment of an FET following a parole denial. (Asb64-67). Specifically, Cowan cites to the

regulations permitting the Board to postpone an inmate's parole eligibility date (PED) for committing a new institutional infraction (N.J.A.C. 10A:71-3.4), and to impose an FET upon revocation of parole (N.J.A.C. 10A:71-7.17(e)). Ibid. Cowan notes that the length of the postponement of the PED for committing a new infraction, and the length of the FET imposed following a parole revocation, are substantially less than the FET that the Board imposed in his case, and argues that these should be guideposts for establishing an FET in his case. (Asb64-67). However, as explained herein (Rsb17-20), the decision to establish an FET following a parole denial is separate and distinct from those scenarios and is dictated by an entirely different legal standard and framework that do not apply to postponing a PED or imposing an FET following parole revocation. This court should reject this argument.

CONCLUSION

This Court should affirm the Appellate Division's judgment.

Respectfully submitted,

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