SUPREME COURT OF NEW JERSEY
DOCKET NO.
APP. DIV. DKT. NO. A-2875-22

FRED KRUG,	:	CIVIL ACTION
Plaintiff-Petitioner,	:	On Petition for Certification from a Final Judgement of the Superior
v.	:	Court of New Jersey, Appellate Division.
NEW JERSEY STATE PAROLE BOARD,	:	
	:	Sat Below:
Defendant-Respondent.	:	Hon. Arnold L. Natali, Jr., J.A.D. Hon. Lisa A. Puglisi, J.A.D.
	:	

PETITION FOR CERTIFICATION AND APPENDIX ON BEHALF OF PLAINTIFF-PETITIONER

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QUESTIONS PRESENTED

1. Does the substantive/procedural analysis with respect to ex post facto violations pronounced in Trantino v. New Jersey State Parole Bd., 331 N.J. Super. 577, 607-11 (App. Div. 2000), fail to comport with the United States Supreme Court's sufficient-risk test (see, e.g., California Dept. of Corrections v. Morales, 514 U.S. 499, 509 (1995)), as found by the United States Court of Appeals for the Third Circuit in Holmes v. Christie, 14 F.4th 250 (3d Cir. 2021)?
2. Does it violate constitutional equal protection principles and prohibitions against cruel and unusual punishment to use inescapable poverty as grounds for denying parole?

STATEMENT OF THE CASE

Mr. Krug spent much of his youth—roughly a decade—in an orphanage where he was "mentally and psychologically and emotionally abused." (2T19-21 to 25).[1] From that abuse, he developed anger issues that were later compounded by severe drug and alcohol addictions. Unsurprisingly for someone who grew up abused, alone, poor, and severely addicted to alcohol and drugs, Mr. Krug had a number of prior criminal convictions by the time he was given a life sentence for murder in 1974 at the age of 27 and a litany of disciplinary infractions in his early years in prison.

However, more than fifty years now separate who Mr. Krug is today from who he was when he was committed to prison in 1974. Today, Mr. Krug is 77 years old, blind in one eye, emphysemic, arthritic, and suffering from back and heart issues for which he takes a total of fourteen medications. While he had a number of infractions when he first came to prison, he has had just four infractions in the past twenty-nine years and only one, non-violent, non-drug-related infraction in the past twenty years. Mr. Krug has also made innumerable rehabilitative efforts, including community college paralegal programs, alcohol and drug addiction programs, general health and wellness programs, religious

[1] Ppa = plaintiff's petition appendix
Pa = plaintiff's appellant appendix
2T = de novo parole hearing transcript dated January 23, 2023

studies programs, programs geared towards understanding criminal behavior, programs dealing with self-control and anger issues, work programs, and other college courses. Mr. Krug has also taken on consistent jobs within the prison, developed friendships with staff and other inmates, and maintained minimum custody status.

However, almost everyone Mr. Krug knew before his confinement has either passed away or cut off contact with him; because he had no significant funds before coming into prison, has no meaningful material support outside, and has no way to develop pecuniarily while making $25 a month doing prison labor, he remains impoverished.

Mr. Krug's most recent parole hearing was his fifth, and he has been parole-eligible for almost thirty years. Having become eligible for parole in his forties and now in ill health in his late seventies, Mr. Krug was candid during his hearing that he had largely lost faith in the parole process or his possibility of being paroled. Nonetheless, upon encouragement from the Board, he discussed openly his life and his past. Mr. Krug opened up about his addictions and the way his past abuse was likely the cause of much of his anger issues. When first asked about the most important thing he learned from his anger management programming, he replied, "Empathy," and explained this meant "put[ting] other people before me, to have compassion for other people." (2T21-

10 to 19). When asked the same question a second time later in the hearing, he said, "How to forgive somebody, how to act with kindness towards people, how to put other people first, how to stop and think before I act." (2T73-25 to 74-12). He discussed openly the murder, where he became intoxicatingly enraged when a woman he made advances on called him "Shrimpy."[2] (2T21-20 to 24-6). When asked how he would manage conflict being back in society, he said "The way I do in here, I let it go. We have confrontations with the C.O.s all the time, we have confrontations with one another, so I just suck it up and let it go." (2T29-7 to 15). As to his addictions, he said that he no longer has any desire to use, that he has the ability to decline when it is around (in prisons it often is), and that although he is not interested in a 12-step program outside he would participate in one if it was asked of him. (2T31-13 to 33-20).

A significant sticking point with the Board, however, was how Mr. Krug was going to financially sustain himself if he was released, especially given how much medical treatment he required day to day. Early in the hearing, the Board asked Mr. Krug if he qualified for Social Security and questioned him at length about what work prospects he—as a person in his late seventies, incarcerated for the past fifty years for murder, and in ill health—might have upon release. (2T34-21 to 37-25). When it was clear his prospects of employment were not

[2] Mr. Krug is roughly five-feet tall and weighs about 100 pounds.

strong, the Board expressed concern, saying, "Mr. Krug, you know, most people come before the Parole Board, they have a way to support themselves." (2T38-1 to 3).

Later, the Board pressed him on the cost of living outside, and said that they thought he would be more likely to commit offenses if he could not afford basic necessities:

> MR. MOLINARI: All right, let me ask you this question. Let's talk about this 'cause this is important. We touched on some placement and stuff like that, but are you focused on what it is truly like to try and go live on the outside right now? Do you have any idea what the price of a dozen eggs is today?
>
> MR. KRUG: Yeah, it's about $10, right?
>
> MR. MOLINARI: Yeah.
>
> . . .
>
> MR. KRUG: So what's that got to do with me?
>
> MR. MOLINARI: I'll tell you why, I'll tell you why. Because in order to be successful you have to get a job where you can support yourself. And support yourself means that you have to pay your groceries, you have to pay your means of transportation, you have to pay probably healthcare, you probably have to pay rent, electric. So what I'm saying is you have to be able to get gainful employment in order to be able to afford these things. If you don't what happens is you're going to put yourself in a predicament where you're going to be forced to maybe do some stealing, some theft, some larceny to be able to do that.

> MR. KRUG: That's -- that's -- I'm going to just sit on the sidewalk when I get out there, so you ain't got to worry about me doing a larceny, doing a robbery.
>
> MR. MOLINARI: Okay. But how are you going to pay the rent?
>
> MR. KRUG: Okay?
>
> MR. MOLINARI: How are you going to pay rent?
>
> MR. KRUG: I'll tell you the same thing that I told her [referring to the Halfway Back program that helps people apply for benefits and get jobs].
>
> MR. MOLINARI: You're going to bag groceries?
>
> [(2T67-7 to 69-2).]

After asking about what jobs Mr. Krug was working while in prison, they continued to press him about his financial status:

> MS. STEINHARDT: Okay. And how much money do you have saved up for when you hit the streets?
>
> MR. KRUG: I have nothing.
>
> MS. STEINHARDT: Okay.
>
> MR. KRUG: You can't save up too much when you only get $20, $25 a month.
>
> MS. STEINHARDT: All right. So did you have any savings prior to you coming to prison?
>
> MR. KRUG: No.
>
> MS. STEINHARDT: Did you have a bank account?

> MR. KRUG: No.
>
> MS. STEINHARDT: And do you have any health problems right now at your age that would hurt you with getting a job?
>
> MR. KRUG: Well, I don't know, let me see here. I got a bad prostate problem which I'm on four different medications for. I'm blind in my right eye. I had a stroke in my left eye, I'm on special -- I go out every three months to see the specialist for my eyes. Okay? I'm on high blood pressure medication. I have osteoarthritis throughout my body. I have anemia, I have COPD, and I have a bad platelet count. It's supposed to be 400,000, it's 90,000. I'm on 14 different medications.
>
> MS. STEINHARDT: So how do you plan to keep up with your health issues when you're out in the community?
>
> MR. KRUG: Take the medications and do what the doctors tell me to do --
>
> MS. STEINHARDT: Okay.
>
> MR. KRUG: -- just like I do here.
>
> MS. STEINHARDT: How do you plan to actually get the money for your medications when you're out?
>
> [(2T70-12 to 71-19).]

Mr. Krug again emphasized hopes for getting on assistance programs through the Halfway Back reentry program, which the Board said was "not really supporting yourself . . . ." (2T72-1 to 10). Soon after, the Board said that if Mr. Krug would have "really no money to pay for rent," he might wind up in a

"rooming house," which also might make it more likely for him to reoffend. (2T73-9 to 73-24).

Ultimately, the two-member panel denied Mr. Krug release on parole, citing a litany of checkbox reasons, including: "the facts and circumstances of the offense," five factors relating to his criminal history and prior arrest record, four factors addressing his having committed a new offense while released on parole in the 1970s, that prior prison terms "did not deter criminal behavior," his prior infraction record, his more recent infraction, "insufficient problem resolution" based on "lack of insight into criminal behavior" and "minimiz[ing] conduct," a lack of adequate parole plan, and the results of the confidential psychological assessment and risk assessment evaluations. (Pa51). A handwritten addendum also stated, "[Inmate] shows no signs of remorse for victims. [Inmate] downplays his criminal behavior. [Inmate's] criminal thinking and behavior are concern by failing to comply with previous supervision. [Inmate] has not fully addressed criminal sexual behavior. [Inmate] has no adequate parole plan." (Pa51).

Mr. Krug subsequently administratively appealed, raising in relevant part (1) that the Board erroneously relied on information predating his most recent hearing to deny parole because the statute applicable to his parole process only permitted the Board to consider "new" information to deny parole, N.J.S.A.

30:4-123.56(c) (1979), relying in part on Holmes v. Christie, 14 F.4th 250 (3d Cir. 2021), and (2) that dismissing the viability of the Halfway Back program as a plan for release and requiring him to have "pre-existing resources" violated equal protection principles.

The full Board ultimately rejected Mr. Krug's appeal and affirmed the denial by the two-member panel. As to Mr. Krug's Holmes argument, the Board stated that, because the Parole Act was amended in 1997:

> the Board is no longer restricted to considering only new information. At each time of parole consideration, the Board may consider the entire record and therefore, if deemed appropriate, may cite some of the same or different reasons for parole denial. As long as the factor is deemed relevant, utilization of the same factors is legally permissible.
>
> [(Pa66).]

The Board also noted, "[m]ost of the information in your case remains the same . . . ." (Pa66). As to the equal protection argument, the Board stated that the panel had appropriately determined "that placement in a program would not overcome the preponderance of evidence supporting a decision to deny parole at this time." (Pa67).

These facts present several important questions that require this court's attention:

(1) In Trantino v. New Jersey State Parole Bd., 331 N.J. Super. 577, 607-11 (App. Div. 2000), the Appellate Division held that retroactively applying the amendment removing the limitation that the Board could only use "new" information to deny parole after a first hearing did not violate ex post facto protections because the provision was merely "procedural" and not "substantive." Nonetheless, after Trantino, inmates continued to regularly raise this ex post facto argument, saying that case was wrongly decided. Ultimately, this argument made its way to the United States Court of Appeals for the Third Circuit in Holmes v. Christie, 14 F.4th 250 (3d Cir. 2021). That case agreed that Trantino's reasoning was incongruous with binding, United States Supreme Court ex post facto decisions and that retroactively applying the amended statute could be an ex post facto violation if it increased the chances of denying the inmate parole. Id. at 260-62.

Since that decision, however, the Appellate Division has continued to rely on Trantino to deny this ex post facto argument in every case where it is raised, either writing off the Holmes decision as non-binding or, like in Mr. Krug's case, not mentioning it at all. It is imperative that this Court address this on-going and serious issue so that Trantino's faulty reasoning can be rectified and there can be uniformity in how the Appellate Division addresses the ex post facto issue after Holmes.

(2) It is a foundational tenet of the criminal justice system that constitutional equal protection ensures the indigent cannot be treated differently or more harshly because they are indigent. Nonetheless, in Mr. Krug's parole hearing, as in many others, it was considered an aggravating factor for denial that he had no money, little job prospects, and potentially no settled housing.

The United States Supreme Court has repeatedly held that confining someone who might otherwise be released because she is poor violates equal protection principles. Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983). Similarly, several United States Supreme Court cases have recognized that imprisoning someone for a "status" that is beyond his or her control violates the prohibition against cruel and unusual punishment. Robinson v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514 (1968). Multiple jurisdictions have synthesized this caselaw to hold that an inmate cannot be denied release on parole because he is impoverished without violating those important constitutional protections. Barnes v. Jeffreys, 529 F. Supp. 3d 784 (N.D. Ill. 2021); State v. Adams, 91 So. 3d 724 (Ala. Crim. App. 2010). So too should this Court make clear that, while reasonable inquiries into an inmate's parole plans and potential employment are permissible, it cannot veer into using an inmate's inescapable poverty as a basis for denying parole.

* * *

Mr. Krug relies on his appellate brief and reply brief and raises all arguments contained therein in support of his petition for certification. He offers the following brief to address the failings of the Appellate Division decision and why the issues presented in this case are substantial ones meriting certification by this Court.

LEGAL ARGUMENT

POINT I

THIS COURT MUST BRING OUR EX POST FACTO LAW INTO CONFORMITY WITH UNITED STATES SUPREME COURT PRECEDENT BY OVERRULING TRANTINO V.

All parties agree that the strictures of the 1979 Parole Act govern Mr. Krug's parole proceedings. Under that version of the Act, the governing standard for someone who is up for parole after initially having been denied is as follows:

> 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 [N.J.S.A. 30:4-123.54] 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.
>
> [N.J.S.A. 30:4-123.56(c) (1979) (emphasis added).]

In 1997, however, the statute was amended to read:

> An inmate shall be released on parole on the new parole eligibility date unless information filed pursuant to a procedure identical to that set forth in section [N.J.S.A. 30:4-123.54] indicates by a preponderance of the evidence that the inmate has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole imposed pursuant to [N.J.S.A. .30:4-123.59] if released on parole at that time.
>
> [N.J.S.A. 30:4-123.56(c) (emphasis added).]

Again, the Board agrees that every provision of the 1979 version of this section applies to Mr. Krug's parole except for the removal of the limitation that the Board may only use "new" information to deny parole at a subsequent hearing. When this change was enacted in 1997, it was clear that it was a significant part of a major overhaul of the parole system with an aim towards vesting the Board with much greater discretion to deny parole. Indeed, the 1996 Study Commission on Parole called the new-information limitation "one of the most significant and inappropriate limitations that existing law places on the [B]oard's discretion." Trantino v. New Jersey State Parole Bd., 331 N.J. Super. 577, 607-11 (App. Div. 2000) (internal quotations and citation omitted) ("Trantino V"). Nonetheless, in Trantino V, the Appellate Division held that retroactively applying this amended change was not an ex post facto violation because the "change in the law [was] a procedural modification that does not constitute a substantive change in the parole release criteria." Id. at 610.

Whether a change is procedural or substantive, however, is not the test for determining whether retroactively applying such change is an ex post facto violation. Rather, the test is whether there is a "sufficient risk," sometimes also called a "significant risk," of prolonging the individual's incarceration by retroactively applying the amended law. California Dept. of Corrections v. Morales, 514 U.S. 499, 509 (1995); Garner v. Jones, 529 U.S. 244, 251 (2000). Indeed, the United States Supreme Court explicitly stated that, while "not every retroactive procedural change" to parole laws constitutes an ex post facto violation, the inquiry was "a matter of degree." Garner, 529 U.S. at 250 (citing Morales, 514 U.S. at 508-09). Accordingly, even after Trantino V, inmates continued to raise challenges in the following decades that this retroactive change was an ex post facto violation and Trantino V was wrongly decided.

Although repeatedly raised, the issue was never again discussed in a published New Jersey opinion, and most decisions dismissed the argument with little discussion by relying on Trantino V.[3] Gallicchio v. New Jersey State Parole Bd., A-2168-04T1 (App. Div. Sept. 28, 2005) (slip op. at 2); Oliver v. New Jersey State Parole Bd., A-0920-04T2 (App. Div. Dec. 20, 2005) (slip op. at 4);

[3] The issue was mentioned in Berta v. New Jersey State Parole Bd., but because the old information was held to be an inappropriate basis for parole denial on other grounds, the argument was not meaningfully discussed. 473 N.J. Super. 284, 315-17(App. Div. 2022).

Hardy v. New Jersey State Parole Bd., A-3727-04T3 (App. Div. June 23, 2006) (slip op. at 4); Thomas v. New Jersey State Parole Bd., A-2649-05T3 (App. Div. Aug. 22, 2007) (slip op. at 2-3); Coar v. New Jersey State Parole Bd., A-0675-07T1 (App. Div. May 16, 2008) (slip op. at 2); Robbins v. New Jersey State Parole Bd., A-4394-06T2 (App. Div. Dec. 5, 2008) (slip op. at 4).

Notably, several such decisions cited Third Circuit caselaw in conjunction with Trantino V as supportive authority for denying the ex post facto argument. Righetti v. New Jersey State Parole Bd., A-2942-13T1 (App. Div. July 8, 2016) (slip op. at 3) (citing Royster v. Fauver, 775 F.2d 527, 533–35 (3d Cir.1985)); Williams v. New Jersey State Parole Bd., A-1410-15T2 (App. Div. July 21, 2017) (slip op. at 2) (same). Another notable unpublished case addressed the United States Supreme Court sufficient-risk test in detail with respect to this issue. Williams v. New Jersey State Parole Bd., A-2126-11T2 (App. Div. July 19, 2013) (slip op. at 3-7). However, while the panel ostensibly rejected the ex post facto challenge based on the sufficient-risk test, it did little to reconcile Trantino V with that test and reaffirmed that case's holding. Ibid.

Eventually, this argument made its way to the Third Circuit Court of Appeals in Holmes v. Christie, 14 F.4th 250 (3d Cir. 2021). Although refraining from specifically stating that Holmes had shown an ex post facto violation in his

case,[4] the Holmes court found that Trantino V was in fact wrongly decided and failed to comport with binding Supreme Court precedent. Id. at 264. Specifically, the Third Circuit stated that the procedural/substantive distinction underlying the Trantino V rationale "finds no foundation in controlling cases or the functional approach that animates them," and that it saw "no way to reconcile the Appellate Division's formalist analysis with the functional approach embodied in Morales, [Richardson v. Pennsylvania Bd. of Prob. & Parole, 423 F.3d 282 (3d Cir. 2005)], and Garner." Ibid. Thus, if Holmes could show that the removal of the new-information limitation posed a sufficient risk of prolonging his incarceration, he could establish an ex post facto claim. Id. at 260-62.

Holmes's decision, however, has not meaningfully impacted either how the Appellate Division is treating this issue or how the Board handles its hearings; the Board continues to maintain it is permitted to deny parole using the amended statute, and every Appellate Division decision since Holmes has continued to deny the ex post facto argument by citing Trantino V as binding authority. One decision simply dismissed the ex post facto argument out-of-hand by citing the procedural/substantive distinction of Trantino V just as the court was doing before Holmes, without any reference to the necessary sufficient-risk

[4] That issue was not before that court, as the challenge was only to an order dismissing Holmes's 1983 claim. Thus, the only live issue presented was whether he plausibly asserted a violation, not whether he definitively proved it.

test. Lumumba v. New Jersey State Parole Bd., A-1997-22 (App. Div. May 21, 2024) (slip op. at 3). Other decisions stated Holmes was irrelevant because it was an appeal of a motion to dismiss a 1983 claim rather than a direct appeal of a parole denial, and similarly cited to Trantino V to deny the argument without engaging with the required sufficient-risk test. Kiett v. New Jersey State Parole Bd., A-0894-21 (App. Div. July 18, 2023) (slip op. at 11-12); Coburn v. New Jersey State Parole Bd., A-2766-22 (App. Div. May 14, 2024) (slip op. at 3).

In Mr. Krug's case and another case, W.M. v. New Jersey State Parole Bd., A-0072-19 (App. Div. Dec. 6, 2022), the sufficient-risk test was at least mentioned, although both arguments were still rejected. Krug v. New Jersey State Parole Bd., A-2875-22 (App. Div. June 24, 2024) (slip op. at 6); W.M., slip op. at 9. The language rejecting the argument in both cases is almost identical; both rely on Trantino V as binding authority and both say that there was no sufficient risk of prolonging the inmates' imprisonment because new information developed since the last hearing "figured prominently" in the denial.[5] Krug, slip op. at 6; W.M., slip op. at 9. Much like the substantive/procedural distinction, however, the idea that there can be no ex post facto violation because the Board could have reasonably denied parole anyway

[5] Notably, W.M. references Holmes only in a dismissive footnote, and in Mr. Krug's case the court did not reference Holmes at all. Krug, slip op. at 6; W.M., slip op. at 9 n.2.

has no basis in the required sufficient-risk analysis. Holmes, 14 F.4th at 265-66. Nor is writing off the old information as insignificant supported by the record here, as it was quantitatively and qualitatively much more substantial than any "new" information in Mr. Krug's case.

In short, it is imperative that this Court accept Mr. Krug's petition and provide guidance on this issue. It should be significantly concerning that the Third Circuit has held our caselaw fails to comport with binding United States Supreme Court precedent, but our courts have not yet grappled with that holding. In Mr. Krug's case specifically, the Board conceded that it retroactively used the amended statute to deny parole and that most of the information relied upon to deny parole was "old" information. Accordingly, Mr. Krug respectfully requests that this Court grant his petition to address this important issue.

POINT II

THIS COURT MUST MAKE CLEAR TO THE BOARD AND THE COURTS THAT INMATES' POVERTY CANNOT BE GROUNDS FOR DENYING PAROLE WITHOUT VIOLATING EQUAL PROTECTION PRINCIPLES AND THE PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The United States Supreme Court has repeatedly held that a person cannot be imprisoned based on poverty without violating the Equal Protection Clause. Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971);

Bearden v. Georgia, 461 U.S. 660 (1983). Similarly, the U.S. Supreme Court has likewise made clear that imprisoning someone based on an involuntary status violates the Constitution's prohibition against cruel and unusual punishment. Robinson v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514 (1968).

While the Board is of course permitted to make general inquiries into what an inmate's prospective plans are for release, such inmate's involuntary impoverishment cannot be used as an aggravating circumstance for denying parole. Yet the Board's questioning and checklist decision make clear that that is what happened in this case. As evidenced by that denial and the court's acceptance of the Board's rationale, it is apparent that more guidance is necessary so that inmates are not denied parole on the basis of poverty.

Mr. Krug has no meaningful chance of employment sufficient to pay for rent, food, transportation, etc. if he is released on parole. And this is true of many inmates. While Mr. Krug is uniquely disadvantaged because of advanced age, serious health issues, and a murder conviction, a staggering 80% of former inmates make less than $15,000 a year after release. Brittany L. Deitch, Rehabilitation or Revolving Door: How Parole Is A Trap for Those in Poverty, 111 Geo. L.J. Online 46, 66 (2022). Put simply, it is both "discriminatory to make poverty the dividing line between imprisonment and freedom" and

improper to "imprison someone for something over which they have no control." Jean Galbraith et al., Poverty Penalties As Human Rights Problems, 117 Am. J. Int'l L. 397, 429 (2023). Several other courts have already reached this conclusion. Barnes v. Jeffreys, 529 F. Supp. 3d 784 (N.D. Ill. 2021); State v. Adams, 91 So. 3d 724 (Ala. Crim. App. 2010). Mr. Krug respectfully submits that this Court should hold similarly.

CONCLUSION

For the reasons expressed herein, and for the reasons expressed in briefing and at oral argument before the Appellate Division, Mr. Krug's petition for certification should be granted, the decision of the Appellate Division reversed, and the matter remanded for a new parole hearing.

Respectfully Submitted,

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Date: July 2, 2024