SUPREME COURT OF NEW JERSEY
DOCKET NO. 089603
APP. DIV. DKT. NO. A- 2875-22

FRED KRUG,	:	CIVIL ACTION
Plaintiff-Petitioner	:	On Certification Granted from a Final Judgement of the Superior Court of
v.	:	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.

BRIEF ON BEHALF OF PLATINFIFF-PETITIONER

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PRELIMINARY STATEMENT

Under the Parole Act of 1979, the Parole Board could only again deny parole to an inmate who had previously been denied parole by citing to damaging "new" information developed since the last hearing. This version of the Act was understood to prevent consideration of either an inmate's criminal history or previous infraction history at subsequent parole hearings and to effectively require release where an inmate had committed no new infractions since his last hearing. This evidentiary limitation existed in conjunction with an already strong entitlement to release that required the Board to grant parole unless it could prove by a preponderance of the evidence that there was a "substantial likelihood" the inmate would reoffend if released.

In 1997, New Jersey joined a slew of other states in passing tough-on-crime changes to its parole scheme, both modifying the standard of release to make it more restrictive and removing the limitation that the Board could only consider "new" information at subsequent parole hearings. A commission assembled by the governor during that time to evaluate New Jersey's parole system called the new-information limitation "one of the most significant and inappropriate limitations that existing law places on the Board's discretion." When the 1997 Act was passed and the Legislature removed that limitation, it

noted this conclusion by the Commission to explain why the statute was amended. So too did contemporary news articles about the 1997 Act tout the fact that this specific change would dramatically expand the discretion of the Parole Board to keep many more inmates in jail.

The ex post facto clauses of the New Jersey and United States constitutions, however, prevent the retroactive application of statutes that extend the amount of time an inmate must serve for offenses he or she committed before the enactment of that statute. According to the U.S. Supreme Court, where there is a "sufficient risk" of an amended parole statute disadvantaging an inmate's prospects of release, the retroactive application of that amended statue will be an ex post facto violation.

Despite those protections, and despite the amended Act expressly giving the Board substantially greater discretion to deny parole, the current Parole Board retroactively applies the 1997 removal of the new-information limitation to inmates whose offenses were committed before the enactment of that statute. In Mr. Krug's case specifically, because it was his fifth parole hearing and he had been in prison for roughly fifty years, most of the reasons cited for his most recent denial were the same as his previous denials. In his administrative appeal where he raised an ex post facto challenge to this issue, the Board told Mr. Krug that it believed it was permitted to deny him parole using this amended statute.

Other of his administrative appeal arguments were denied by the Board citing exclusively old information.

It is clear that the 1997 elimination of the new-information limitation substantially disadvantages inmates more so than the 1979 version of the Parole Act. In Mr. Krug's case specifically, it is uncontested that it contributed to his denial. Accordingly, retroactive application of the 1997 removal of the new-information limitation to Mr. Krug's parole hearing was an ex post facto violation requiring a new hearing where the proper law is applied and the Board is prohibited from relying on "old" information to deny parole.

PROCEDURAL HISTORY

Plaintiff-petitioner Fred Krug respectfully refers this Court to the procedural history set forth in his appellant brief and adds the following:

On June 24, 2024, the Superior Court, Appellate Division, issued an unpublished decision denying Mr. Krug's appeal in full and affirming the Board's denial of parole. (Ppa1-19).[1]

Mr. Krug filed his Notice of Petition for Certification on June 25, 2024, and his petition for certification on July 2, 2024. (Ppa20).

In an order posted October 3, 2024, this Court partially granted Mr. Krug's petition, limited to the ex post facto question raised in his Point I. (Psa1-2).

[1] Psa = plaintiff's supplemental appendix
Ppa = plaintiff's petition appendix
Pa = plaintiff's appellate brief appendix
Ppb = plaintiff's petition brief
1T = two-member panel hearing transcript dated July 18, 2022
2T = two-member panel hearing transcript dated January 23, 2023

STATEMENT OF FACTS

Mr. Krug respectfully refers this Court to the statements of facts previously submitted in his appellant briefing and petition for certification and adds the following as a supplement for the ex post facto issue:

At Mr. Krug's most recent parole hearing, the topic the Board members dwelled on more than any other was his criminal history. Indeed, the very first words of the hearing were a recitation of that history, including the fact that he had previously violated parole in the 1970s. (2T3-1 to 24). The Board then immediately moved on to discussing his institutional infractions that were likewise decades old. (2T4-1 to 9). That focus was to set the framing for much of the rest of the hearing.

Once the Board members launched into their questioning of Mr. Krug in earnest, they stated at the outset, "We are going to ask you some questions about your past." (2T8-14 to 17). The Board went on to question him intensively about his history, including offenses that were not the subject of his current incarceration. (2T9-6 to 10-25). The Board explained they were engaging in that questioning "[b]ecause you have quite a history prior to this murder. You have a lot of violence." (2T10-24 to 11-2).

Mr. Krug asked at one point if there was any new information between his last hearing and now that they were going to use for their decision, and the Board

stated it had received confidential information that he could not know about or have the opportunity to address. (2T12-3 to 6). Instead, the Board members focused the conversation largely on his past. Time and again, the Board expressed concern that Mr. Krug's murder offense was originally committed while he was on parole. (2T15-8 to 11, 26-8 to 13, 48-1 to 4). So too did the Board continually focus on his decades-old infraction history from his early days in prison. (2T30-4 to 6, 50-13 to 20).

At one point, after Mr. Krug took issue with the Board's focus on crimes and infractions that were incredibly remote, one of the panel members emphasized how critical that information was to their decision:

> [W]hat I'm looking -- okay, what I'm looking at is the big picture. I'm looking at the big picture that starts from 18 to where we are today, the history and everything else, that's what I'm discussing. I understand you made a very well documented point, you haven't had a discipline since 2017. My point was you have 30, 30 infractions during your incarceration.
>
> [(2T51-3 to 10).]

Later, after repetitive questioning about his criminal history, Mr. Krug again expressed frustration about the focus on his past, saying,

> Fifty years ago I did do those things. I did every single crime that you have there, 50 years ago. I'm not the same young kid that I was then, I'm totally different. I'm an old man going downhill. I've got nothing to do with any of that stuff there, but you keep acting like it was yesterday that I did these things.

[(2T75-11 to 17).]

At the conclusion of the hearing, the two-member panel ultimately denied Mr. Krug's request to be released on parole. In its checklist decision, the panel cited to sixteen[2] reasons for denying parole. Of those sixteen reasons, twelve dealt with factors that predated his last parole hearing, including:

- Facts and circumstances of offense.
- Prior record is extensive.
- Offense record is repetitive.
- Prior offense record noted.
- Nature of criminal record increasingly more serious.
- Committed to incarceration for multiple offenses.
- Prior opportunities on community supervision (parole) terminated / revoked for the commission of new offense.
- Committed new offense on community supervision (parole) but status not formally terminated / revoked.
- Prior opportunities on community supervision (probation / parole) have failed to deter criminal behavior.
- Prior opportunities on community supervision (probation / parole) have been violated / terminated / revoked in the past for technical violations.
- Prior incarcerations did not deter criminal behavior.

[2] "Insufficient problem resolution" has various subsections but is really a single checklist reason.

- Institutional infractions: numerous / persistent / serious in nature; loss off commutation time; confinement in detention and / or Administrative Segregation; consistent with offense record.[3]

  [(Pa51).]

Mr. Krug made an administrative appeal of his denial to the full Board, arguing, in relevant part, that there was no new information developed since his last hearing that warranted denying parole, and that "[m]ere repetition of the record relied upon to previously deny parole is not new evidence." (Pa53) (emphasis in original). Because, he argued, the 1979 Parole Act applicable to his parole proceedings did not permit consideration of information that occurred before his most recent parole hearing, reliance on any such information was improper. (Pa53).

In its final agency decision, the full Board affirmed the two-member panel's denial of parole. (Pa65-69). As with the two-member panel checklist, the full Board extensively referenced Mr. Krug's prior criminal history and infraction history in its decision. (Pa65-69). In specific response to Mr. Krug's new-information argument, the Board's final decision stated that, because the Parole Act was amended in 1997 to expand the scope of what the Board could consider in denying parole, "the Board is no longer restricted to considering only

[3] The decision does not indicate which of these descriptors apply to Mr. Krug's infraction history.

new information." (Pa66). Pursuant to this new Act, "[a]t 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 further stated it reviewed his previous denials and saw that they "contain some, but not all, of the same reasons for denial of parole." (Pa66). The Board informed Mr. Krug that, while "[m]ost of the information in your case remains the same, for example, your prior criminal history, substance abuse history and employment history," other information was different, "such as your institutional disciplinary record and program participation. Therefore, your appeal based on this contention lacks merit." (Pa66).

Notably, in response to Mr. Krug's equal protection argument, the Board cited exclusively to old information in finding there was a "substantial likelihood" of him committing a new offense on parole:

> [T]he Board finds that the Board panel determined that a preponderance of evidence indicated a substantial likelihood that you would commit a crime if release at this time. Of concern to the Board panel was your record of five (5) prior adult convictions, and your total of three (3) prior opportunities for community release, supervision, and treatment, with each such opportunity being followed by additional drug use and additional criminal behavior. In assessing your case, the Board panel determined that placement in a program would

> not overcome the preponderance of evidence supporting a decision to deny parole at this time. In reviewing the matter, the Board concurs with this assessment by the Board panel and, therefore, finds your contention is without merit.
>
> [(Pa67).]

Most of Mr. Krug's other arguments were similarly rejected by reliance on old information. (Pa65-69).

LEGAL ARGUMENT

POINT I

THE PAROLE BOARD'S RELIANCE ON INFORMATION OTHER THAN "NEW" INFORMATION WITHIN THE MEANING OF THE 1979 PAROLE ACT TO DENY PAROLE IS AN EX POST FACTO VIOLATION AND REQUIRES THAT MR. KRUG RECEIVE A NEW HEARING WHERE SUCH INFORMATION IS EXCLUDED.

The 1979 Parole Act appliable to Mr. Krug's parole proceedings was amended in 1997 with the express purpose of denying many more inmates release on parole. The ex post facto clauses of the state and federal constitutions, however, preclude the retroactive application of statutes that enhance a criminal penalty. Thus, when a state legislature amends its parole laws, those amendments cannot be retroactively applied to inmates who committed offenses before their enactment if there is a sufficient risk of prolonging an inmate's incarceration by retroactively applying the statute.

One of the most important changes to Parole Act in 1997 was an amendment eliminating the limitation that the Parole Board, after initially denying an inmate parole, could only rely on "new" information developed since the most recent hearing to again deny the inmate parole. The amendment was explicitly seen as the most significant change to the old Act, and it was enacted specifically to vest the Board with much greater discretion to deny parole.

In Mr. Krug's case, the Board expressly used this amended statue and expressly relied primarily on old information to deny him parole. Accordingly, retroactive application of the amendment eliminating the "new" information limitation at Mr. Krug's hearing was an ex post facto violation, and he is entitled to a new hearing where the correct law is applied.

A. The Ex Post Facto Clauses Preclude Retroactive Application of Statutes that Sufficiently Harm an Inmate's Prospects of Release on Parole.

The ex post facto clauses of the United States and New Jersey constitutions prohibit the retroactive application of statutes that enhance a criminal penalty. Garner v. Jones, 529 U.S. 244, 249 (2000); State v. Muhammad, 145 N.J. 23, 56 (1996); U.S. Const. art. I, 10, cl. 1; N.J. Const. art. IV, 7, ¶ 3; see also Calder v. Bull, 3 Dall. 386, 390 (1798) ("[T]he restriction not to pass any ex post facto law, was to secure the person of the subject from injury, or punishment, in consequence of such law."). At the country's founding, the Framers ranked the Ex Post Facto Clause "among the Constitution's most fundamental guarantees." Holmes, 14 F.4th at 258 (citation omitted); see also California Dept. of Corrections v. Morales, 514 U.S. 499, 515 (1995) (Stevens, J., dissenting) ("[Alexander] Hamilton counted the prohibition on ex post facto laws among the three protections that he described as 'greater securities to liberty and republicanism than any [the Constitution] contains.'"). Thus, the

protections of the ex post facto clauses have been "scrupulously" enforced. Id. at 516.

These protections apply not only to laws that explicitly extend a possible sentence but also to certain changes in parole laws. See Garner, 529 U.S. at 250. Thus, retroactive changes to parole laws that pose a "sufficient risk" of prolonging the incarceration of inmates whose offenses were committed before the enactment of the change violate ex post facto principles. Ibid. While "not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited," the question is "a matter of degree." Ibid. (quoting Morales, 514 U.S. at 508-09). Minor changes that create only a "speculative" or "attenuated" risk of increased time in prison (e.g., changes in polices reducing availability of law-library time) will not constitute an ex post facto violation. Morales, 514 U.S. at 509-10. However, if retroactive enforcement sufficiently "disadvantage[s]" an inmate by a applying a law that is "more onerous than the law in effect on the date of the offense," the retroactive application will violate the Ex Post Facto Clause. Weaver v. Graham, 450 U.S. 24, 29-31 (1981).

Undergirding the Ex Post Facto Clause is a "lack of fair notice" to people who are retroactively punished under harsher laws. Id. at 30-31. The laws governing parole are part of a person's expectations about what his or her

sentence for an offense will be, and thus, inmates who have a statutory possibility of parole have a "constitutional expectation" that "the parole criteria in effect at the time of the crime will be applied." Mickens-Thomas v. Vaughn, 321 F.3d 374, 391-92 (3d Cir. 2003).

The fact that release on parole is in part a discretionary decision of the Board does not mean the laws governing that discretionary process are outside the ambit of ex post facto protections. Id. at 386; see also Garner, 529 U.S. at 253 ("The presence of discretion does not displace the protections of the Ex Post Facto Clause."). Nor does the fact that a statutory change may be deemed in some sense "procedural" mean its retroactive application cannot be an ex post facto violation if the substantive effect of its application may sufficiently harm a prospective parolee. Holmes, 14 F.4th at 264-65; see also Collins v. Youngblood, 497 U.S. 37, 46 (1990) ("[B]y simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."). The Supreme Court of the United States has been clear that "[s]ubtle ex post facto violations are no more permissible than overt ones." Collins, 497 U.S. at 46.

In examining whether retroactive application of a change to parole laws constitutes an ex post facto violation, it is important to look at the existing class of incarcerated people who are affected by that application. See Morales, 514

U.S. at 510. Similarly, "the Board's pronouncements of policy and its public statements" help "shed light on the interpretation of" changes to the parole laws. Mickens-Thomas, 321 F.3d at 384. While the new changes may be seen as better public policy for this or that reason, "[t]hat a Board or legislature may learn from experience does not mean that those who were sentenced at an earlier juncture may now be more severely re-sentenced in the light of newly-found wisdom." Id. at 387.

When the retroactive application of an amendment to a parole law "by its own terms show[s] a significant risk" of keeping inmates in prison longer, that retroactive application is unconstitutional on its face. Garner, 529 U.S. at 255. If the statute does not demonstrate a sufficient risk on its face, it is on the challenger to show that "retroactive application [of the contested statue] will result in a longer period of incarceration than under the earlier rule." Ibid.

B. The Removal of the "New Information" Limitation Was Seen as the Most Important Feature of a Sweeping Overhaul of New Jersey's Parole System to Make It More Severe.

New Jersey's 1979 Parole Act was enacted along with our modern Title 2C Criminal Code to replace the Parole Act of 1948. Trantino v. New Jersey State Parole Bd., 154 N.J. 19, 25-26 (1998) ("Trantino IV").[4] Pursuant to the old

[4] Although Mr. Krug's offenses were committed under the old Title 2A scheme, all parties recognize he is entitled to the protections of the 1979 Parole Act.

1948 Act, whether an inmate had been rehabilitated and whether an inmate had been sufficiently punished underscored the Board's assessment. Ibid. Under the new 1979 Act, by contrast, inmates were assumed to have satisfied the punitive aspects of their sentence, since periods of parole disqualification were now explicitly part of sentencing judges' duties. Ibid. Accordingly, the 1979 Act required that the Parole Board "shall" release an inmate upon parole eligibility unless it could prove by a preponderance of the evidence that "there is a substantial likelihood that the inmate will commit a crime" if released on parole. New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983) (quoting N.J.S.A. 30:4-123.53(a) (1979)). This section "shift[ed] the burden to the State to prove that the prisoner is a recidivist and should not be released." Ibid. The language of the statute "creates a legitimate expectation of release" that is afforded state and federal due process protections. Id. at 206-07.

This expectation of release was even stronger for inmates who had already been denied parole. Under the 1979 Act, after initially having denied someone parole, the Parole Board was required to release an inmate "unless new information" developed since the last hearing demonstrated "by a preponderance of the evidence that there is a substantial likelihood that the inmate" will commit

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(Db12); see also Acoli v. New Jersey State Parole Bd., 250 N.J. 431 (2022) (applying 1979 Act standards in evaluating inmate's parole hearing pertaining to offenses that predated the Act).

more offenses if released. N.J.S.A. 30:4-123.56(c) (1979). This statute was understood as "prevent[ing] the Board from denying parole at subsequent hearings if there have been no institutional infractions committed by the inmate since his or her last review." Governor's Study Commission on Parole, Report of the Study Commission on Parole at 21 (Dec. 1996).

Then enters the tough-on-crime era. In the 1990s, crime in the United States had reached a historic peak from an upward trend that began in the 1960s. Matt Ford, What Caused the Great Crime Decline in the U.S.?, The Atlantic (Apr. 15, 2016). In tandem, anti-crime fervor had also been growing from the late-60s onward, culminating in a slew of tough-on-crime legislation, both federally and in many states, during the 1980s and 1990s.[5] James Cullen, The History of Mass Incarceration, The Brennan Center for Justice (July 20, 2018). As a result, America's prison population exploded, with per capita rates of incarcerated people going from 161 per 100,000 people in 1970 to 755 per 100,000 people by 2008. World Prison Brief – United States of America, prisonstudies.org.

[5] Such anti-crime legislation from the tough-on-crime era is now often viewed under a much more critical light. See, e.g., Carrie Johnson, From Clinton to Trump, how talk about crime has changed since a landmark bill, NPR (updated Sept. 13, 2024) ("In the years since [the enactment of the 1994 Violent Crime Control and Law Enforcement Act], many of its architects have come to consider it a terrible mistake.").

As part of this anti-crime backlash, many states enacted sweeping changes to their parole schemes in the 1980s and 1990s to make it much more difficult for inmates to obtain early release. See Holmes v. Christie, 14 F.4th 250, 255 (3d Cir. 2021) (noting New Jersey's 1997 Parole Act "had its roots in the early 1990s when many states moved to recalibrate their parole regimes."); see also Morales, 514 U.S. at 521 (Stevens, J., dissenting) (noting parole amendment at issue was "better viewed as part of that national trend toward 'get-tough-on-crime' legislation," as there were "many currently popular statutes designed to cut back on the availability of parole."). New Jersey, "[n]ot content to sit on the sidelines," was one such state that sought to significantly change its parole scheme to restrict the possibility of early inmate release. Holmes, 14 F.4th at 255.

In the wake of several high-profile crimes committed by people who had been released on parole, New Jersey created a Study Commission on Parole to evaluate the state's parole system and recommend changes.[6] Scott Fallon, Tougher parole standards become law, The Philadelphia Inquirer (Aug. 20,

[6] Dramatic legislative responses to sensationalist news stories have also been routinely criticized in recent years. See, e.g., Jessica Jackson, Clemency, Pardons, and Reform: When People Released Return to Prison, 16 U. St. Thomas L.J. 373, 374 (2020) (noting that, in the post-Willie-Horton era, anti-crime advocates often used "extremely rare outlier crimes to demand the most draconian criminal justice policies.").

1997). The Commission's primary focus was "unwavering[ly]" to recommend changes that "first and foremost" would "protect public safety by reducing to the greatest extent possible the likelihood that a person released from prison will commit a new crime and injure more victims." Report of the Study Commission on Parole at 2. Thus, the Commission's most prominent recommendations were for "specific revisions to our parole statute" that would "expand the authority of the Parole Board to deny parole to inmates." Id. at 5.

In this regard, the Commission recommended three major changes to the 1979 Parole Act to make it more difficult for inmates to be released: (1) to change the standard of release from the substantial-likelihood-of-reoffense standard to requiring only a showing 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"; (2) to no longer allow commutation credits to be applied to reduce future eligibility terms ("FET");[7] and (3) to remove the limitation that the Board could only consider "new" information at subsequent parole hearings in denying parole. Id. at 15-22. Ultimately, all three changes were enacted by the Legislature in a sweeping transformation of the parole scheme through the 1997 Parole Act. N.J.S.A. 30:4-123.53, L.1997, c.

[7] An FET is the amount of time an inmate must serve after a parole denial before again becoming eligible for parole. N.J.A.C. 10A:71-3.21(a)(1).

213, § 1, eff. Aug. 18, 1997; N.J.S.A. 30:4-123.56, L.1997, c. 213, § 2, eff. Aug. 18, 1997.

Under this new regime, the 1979 Parole Act that was seen as being too favorable to incarcerated persons was now "a thing of the past," and in its place was the 1997 Parole Act that would "toughen[] standards for inmate release" and "keep violent criminals behinds bars." Fallon, Tougher parole standards become law. The 1997 changes were seen as providing the Parole Board with "much broader discretion" to deny inmates release, "making it tougher for some offenders to get out." Greg Trevor, N.J. enacts sweeping reform of parole law, Asbury Park Press (Aug. 20, 1997).

Of the three major changes at the forefront of the massive overhaul of our parole system, one was emphasized as being of particular importance. In the news release from then-Governor Christine Todd Whitman's office promoting the new Act, the removal of the new-information limitation was singled out as emblematic of the revolutionary new changes: in a move to vest the Board with "greater discretion and more control during parole hearings," the inmate's "entire record" could now be examined, whereas before, "[a]n inmate's full record was not allowed to be considered." Office of the Governor, News Release (Aug. 19, 1997).

Similarly, the Commission's report heavily emphasized the significance of this change. The Commission called the new-information provision "one of the most significant and inappropriate limitations that existing law places on the Board's discretion." Report of the Study Commission on Parole at 21. For this reason, the Commission "strongly" (a word not used in pushing for the other changes) recommended the elimination of this provision. Id. at 22.

The legislative amendments enacting this change cited the Commission's biting critique of the new-information limitation as supportive of its decision to change the law. Assembly Law and Public Safety Committee Statement to Assembly, No. 21, L.1979, c.441; Senate Law and Public Safety Committee Statement to Assembly, No. 21, L.1979, c.441. Likewise, the news articles announcing the 1997 Act similarly focused on this prominent new feature that greatly expanded the Parole Board's discretion to deny parole to inmates based on their criminal history. Fallon, Tougher parole standards become law; Trevor, N.J. enacts sweeping reform of parole law.

To be sure, the removal of the new-information limitation was the most prominent and significant piece of a major revision of our parole system designed to give the Board much wider latitude to keep more inmates in prison.

C. Trantino V Misstated the Correct Standard for Evaluating Ex Post Facto Claims, a Problem Finally Rectified by the Court of Appeals for the Third Circuit in Holmes v. Christie but Repeated in Mr. Krug's Appeal.

In 2000, our Appellate Division considered whether retroactive application of the 1997 elimination of the new-information limitation was an ex post facto violation when used to deny an inmate parole. Specifically, in Trantino v. New Jersey State Parole Bd. ("Trantino V"), the Appellate Division heard an appeal of a parole denial involving six argument points and about twenty subpoints. 331 N.J. Super. 577, 602-03 (App. Div. 2000). One of the four subpoints of the sixth argument point involved an ex post facto challenge to the retroactive removal of the new-information provision. Id. at 603.

Although the court ultimately agreed with some of Trantino's other arguments and ordered his release on parole, it disagreed with his ex post facto claim. Id. at 607-11, 624. The decision discusses at length the extensive legislative history showing that the enactment of the statute was intended to be a significant change giving the Board much broader discretion to deny parole. Id. at 610-11. Nonetheless, it concludes that the amendment was a "procedural modification that does not constitute a substantive change in the parole release criteria," and that it "simply allows the Board to consider all available evidence relevant to the application of that standard." Ibid. The opinion further suggests

that the consideration of any new information in denying parole negated the possibility of an ex post facto violation. Ibid.

It is clear based on the legislative history and the Board's checklist form that it uses to make parole release decisions that this change was not minor and was in fact a significant substantive change to the parole release criteria. Regardless, even if the change is seen as "procedural" technically speaking, procedural changes to parole laws are still within the ambit of the ex post facto clauses. Garner, 529 U.S. at 250. Rather than "procedural v. substantive," the relevant inquiry is whether there is a significant risk of prolonging the inmate's incarceration, a test that, while mentioned in passing in a block quote, was not actually applied in the opinion. Trantino V, 331 N.J. Super. at 610-11.

After numerous subsequent challenges in the Appellate Division and District Court of New Jersey, this ex post facto argument made its way to the Court of Appeals for the Third Circuit in Holmes v. Christie. Holmes dealt with an order dismissing an inmate's Section 1983 claim[8] for, in relevant part, failing to state an ex post facto claim where the Board had retroactively applied the removal of the new-information limitation to deny him parole. Holmes, 14 F.4th at 256-57. The Third Circuit reversed the district court's denial and held that

[8] 42 U.S.C.A. § 1983 allows for a civil action for certain violations of constitutional rights.

Holmes "easily" demonstrated a plausible ex post facto violation based on the Board's written decisions showing substantial reliance on old information, as well as the explicit policy statements showing the 1997 Act was intended to limit the number of inmates who were released on parole. Id. at 259-63.

Crucially, the Third Circuit also devoted a substantial portion of its opinion to debunking the faulty reasoning of Trantino V. Id. at 264-65. According to the Holmes Court, the procedural/substantive distinction pronounced in Trantino V "finds no foundation in controlling cases or the functional approach that animates them." Id. at 264. Rather, "a challenged rule's constitutionality hinges on its effect, not its form." Ibid. Indeed, not only was that distinction not founded in caselaw, but the Supreme Court of the United States "expressly reject[ed]" that distinction for evaluating ex post facto claims. Id. at 265. Thus, "despite [its] best efforts," the Holmes Court "[saw] no way to reconcile the Appellate Division's formalist analysis with the functional approach embodied in Morales, [Richardson v. Pa. Bd. of Prob. & Parole, 423 F.3d 282, 290 (3d Cir. 2005)], and Garner." Ibid.

Despite Holmes's holding, however, the Parole Board continues to retroactively apply the removal of the new-information at all parole hearings for inmates who are otherwise governed by the 1979 Parole Act. Additionally, the Appellate Division continues to reject every ex post facto challenge by citing to

Trantino V's reasoning and, in most cases, not referencing the necessary sufficient-risk test at all. (Ppb16-17).

In Mr. Krug's case, as in all other similar cases, the Appellate Division relied almost exclusively on Trantino V to deny his ex post facto argument. Krug v. New Jersey State Parole Bd., A-2875-22 (App. Div. June 24, 2024) (slip op. at 15-17). Specifically, the appellate panel reiterated Trantino V's erroneous conclusion that the 1997 new-information amendment was outside the scope of the ex post facto clauses because the amendment was "procedural" and not "substantive." Id. at 16. The panel also stated that because the new information "figured prominently" in the denial like in Trantino V, there was otherwise no ex post facto violation. Id. at 16-17. The decision did not make any reference to the Holmes decision. Id. at 15-17.

D. Retroactive Removal of the New-Information Limitation Facially Constitutes an Ex Post Facto Violation.

Of the three major tough-on-crime changes made to the Parole Act in 1997, there seems to be at least implicit acknowledgement by the Parole Board and the Office of the Attorney General that retroactive application of two of those changes would likely be ex post facto violations. The Board continues to apply the 1979 substantial-likelihood-of-reoffense standard for evaluating release and continues to allow for application of commutation credits to FETs

for inmates who committed their offenses before the 1997 amendments. The only change the Board insists on retroactively applying is the one singled out as the most significant (perhaps precisely because it is the most significant): the removal of the new-information limitation for subsequent parole hearings.

It would seem beyond cavil that retroactively removing the new-information limitation substantially "disadvantages" inmates whose release should be governed by the strictures of the 1979 Parole Act. See Weaver, 450 U.S. at 29-31. Not only does the change dramatically expand the scope of the information the Parole Board can use to deny inmates parole by allowing it to consider the most damning aspects of inmates' records, but it was also amended for the express purpose of denying many more inmates parole. See Report of the Study Commission on Parole at 21; see also Mickens-Thomas, 321 F.3d at 384-85 (discussing importance of policy behind tough-on-crime change to parole procedure in finding change was ex post facto violation).

It is especially implausible to say the change does not disadvantage the select class inmates for whom the 1979 Parole Act applies because they all should have very high chances of being released on parole in the absence of extreme circumstances. As mentioned earlier, inmates covered by the 1979 Parole Act had a strong entitlement to release: an inmate eligible for parole "shall" be released under the 1979 Act unless the Board can demonstrate by a

preponderance of the evidence a substantial likelihood that an inmate will reoffend. N.J.S.A. 30:4-123.56(a) (1979). This Court has recently described the substantial-likelihood standard as "a fairly high predictive bar that must be vaulted." Acoli v. N.J. State Parole Bd., 250 N.J. 431, 456 (2022).

Additionally, any inmates for whom the 1979 Act applies are (1) older than most inmates, as their offenses are now all roughly thirty years old or older, and (2), given the length of their sentences, will mostly have been committed for serious violent offenses. Statistically, older inmates committed to long-term sentences for violent offenses are among the least likely to reoffend when released on parole. See J.J. Prescott et al., Understanding Violent-Crime Recidivism, 95 Notre Dame L. Rev. 1643 (2020) (discussing at length statistically low recidivism rates of older inmates committed for violent offenses based on multi-state study). Thus, taking a strong entitlement to release and applying it to a class of inmates that are statistically the least likely to reoffend, the inmates who are at issue for the ex post facto concern are among (or at least, if the law is properly applied, should be among) the most likely to be granted release on parole in the absence of substantial new information proving a poor suitability for release.

Finally, allowing consideration of old information for these inmates is especially damaging because they are almost certain to have criminal histories

that have very serious, but remote, offenses. In other words, such inmates may have little to nothing in the way of new information to prove a substantial likelihood of re-offense, but they may very well have a great deal in their history (like Mr. Holmes and Mr. Krug) that is damaging from their much younger days before coming into prison and from their early years of confinement. Whereas the previous Act would have essentially mandated release if there were no new infractions, now these inmates are at a much greater disadvantage based on factors they are unable to change.

In short, given that this legislative amendment was expressly designed to significantly increase the discretion to deny parole, and today is exclusively retroactively applied to disadvantage inmates who should otherwise have extremely high prospects of release, retroactive removal of the new-information provision should flatly be considered violative of the state and federal ex post facto protections as there is virtually no conceivable situation where it would not pose a sufficient risk of harm to the inmate. See Garner, 529 U.S. at 255.

In this respect, there is disagreement with the Holmes Court's conclusion that retroactive elimination of the new-information limitation is not an ex post facto violation on its face. See Holmes, 14 F.4th at 260. According to the Holmes decision, the change in the statute's terms left ambiguity as to how it would be applied, and thus, was not facially violative of the Ex Post Facto Clause:

> Perhaps the Board continues its past practice of treating new information as dispositive. Perhaps the Board prioritizes old information that helps prisoners, such as family or educational history. Or perhaps Holmes has committed new disciplinary infractions that the Board views as foreclosing release, no matter what old information it considers. We cannot rule out these and other possibilities without reviewing at least some evidence as to the manner in which the Board is exercising its discretion.
>
> [Ibid. (internal quotations and citations omitted).]

For several reasons, this logic fails to survive scrutiny. First, we know definitively that the Board does not continue its past practice of treating the new information as dispositive. That is the entire substance of this appeal. The Board is openly using the amended statute and old information to deny parole to every inmate who should have his proceedings governed by the 1979 Act. Second, the 1979 statute's terms only limited the use of old information with respect to denying parole. There is nothing about the language of the 1979 Act that restricted the Board from considering old information that was beneficial to a potential parolee. Third, as to inmates with serious new infractions, an inmate who has a new infraction so severe it undisputably dispels any reasonable possibility of parole is an extreme outlier situation. And even still, such an inmate is going to have a serious criminal history and (most likely) previous infractions that are cited by the Board as reasons for denial in that instance as well. In other words, there is realistically going to be no instance in which

retroactive application of the amended statute is not significantly harmful to the incarcerated person involved.

It is also worth noting that, even if this Court holds that ex post facto violations for this amendment have to be established on a case-by-case basis, the practical solution for moving forward would have to be the same regardless. If old information is used to deny an inmate parole at a hearing, then it would be a clear ex post facto violation. If the old information is immaterial to the decision to deny parole, then obviously there would be no harm in excluding it from consideration at the outset. The only sensible way to proceed with future hearings, then, is to not retroactively apply this amendment at all for inmates to whom the 1979 Act applies. Either the information will be material to the decision and an ex post facto violation, or it will be immaterial and unnecessary for it to have been a part of the hearing in the first place. To do otherwise would create continuous and unnecessary litigation of this issue to which the Board will always respond that it didn't need the old information anyway to make its decision. Thus, to flatly prohibit retroactively applying the statute would best protect incarcerated persons' constitutional rights while not unduly encumbering the Board.

Accordingly, because retroactive application of this statute is an ex post facto violation on its face, Mr. Krug's constitutional rights were violated at the

hearing such that a new hearing is required. Additionally, whether considered an ex post facto violation on its face or whether it must be determined on a case-by-case basis, retroactive removal of the new-information limitation cannot be permitted in future parole cases; there is no other workable path for moving forward with this issue.

E. Even Under a Case-by-Case Analysis, The Use of Old Information in Mr. Krug's Hearing Violated Ex Post Facto Protections and Requires a New Hearing.

Finally, even if retroactive application of the amended statue is not per se an ex post faction violation, it is otherwise clear that the Board did, in fact, violate ex post facto principles when it used old information to deny Mr. Krug parole at his most recent hearing.

First, it should be clear that merely citing to any "new" information alone is insufficient to cure any ex post facto concern. The test is whether consideration of the old information posed a "sufficient risk" of prolonging the person's incarceration, and that risk is not eliminated solely by the consideration of new information.

Nor can the test be a post hoc assessment of whether the Board could have plausibly denied parole in the absence of the old information. As discussed at length in Holmes, denying the existence of an ex post facto violation wherever a reviewing court believes the Board could have plausibly denied parole anyway

essentially shifts the test to a "but-for" test, i.e., a test requiring the inmate to show he would have been granted parole but for the old information. Holmes, 14 F.4th at 265-66. But again, that is not the test the United States Supreme Court has enunciated; an incarcerated person need only show a "sufficient" possibility that the old information negatively impacted the decision-making process against him, not make a conclusive showing that it did. Ibid.; see also Morales, 514 U.S. at 509. As succinctly explained by the Holmes Court, "the Ex Post Facto Clause takes risk, not causation, as its touchstone." Id. at 266.

Looking at Mr. Krug's case, which is undoubtedly comparable to most other similarly situated inmates, it is incredible to say that the old information did not pose a significant risk of resulting in an adverse decision. Of the sixteen reasons cited by the two-member panel for denying parole, twelve were founded old information. Even qualitatively, his prior violent offenses were undoubtedly more substantively severe than any of the new information, such as the fact that the Board believed he had not taken enough classes since his last hearing.[9] Likewise, the Board's final agency decision expressly stated it was relying on old information to deny him parole and rejected his credible equal-protection

[9] As mentioned multiple times throughout the various briefing for this case, Mr. Krug is almost 80 years old, has been in prison for about fifty years, and has taken many college courses, anger management classes, substance abuse courses, etc., over that time.

appeal argument by citing to exclusively old information. In short, the Board overtly acknowledged the old information was central to its decision, and there was nothing in the new information that was "so damaging as to deprive" Mr. Krug "of any real hope for release." Holmes, 14 F.4th at 267. The Board's decisions sufficiently demonstrate a risk of prolonged confinement based on the retroactive application of law to qualify as an ex post facto violation.

To reiterate, the amendment at issue here was specifically enacted to grant the Board much greater discretion to deny parole, the Board admits that it used that amendment to deny Mr. Krug parole, and every statement of reasons for denying him parole cites substantially to old information. That is all an inmate should need to show to establish a sufficient risk for an ex post facto violation. When the governor, the Legislature, and the Board all expressly say that the amendment was designed to keep more incarcerated persons in prison, and it was expressly used to keep an inmate in prison in this case, we can take those offices at their word.

Accordingly, Mr. Krug is entitled to a new parole hearing that only considers "new" information in assessing his eligibility for release on parole, in accordance with 1979 Parole Act.

CONCLUSION

The record overwhelmingly supports that retroactive elimination of the new-information limitation from the 1979 Parole Act contributed to the denial of Mr. Krug's parole. Accordingly, for the reasons expressed herein, and for the reasons expressed in his arguments to the Appellate Division, the decision of the Appellate Division should be reversed, and the matter remanded for a new parole hearing where the strictures of the 1979 Parole Act are applied.

Respectfully Submitted,

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