Superior Court of New Jersey

APPELLATE DIVISION

No. A-4908-18T3

KEVIN STOUT	:	**CIVIL ACTION**
Appellant,	:	ON APPEAL FROM A FINAL DECISION OF THE NEW JERSEY STATE PAROLE BOARD
v.	:	
NEW JERSEY STATE PAROLE BOARD,	:	
Respondent.	:	

INITIAL BRIEF OF APPELLANT KEVIN STOUT

JEANNE LOCICERO
TESS BORDEN
American Civil Liberties Union of New Jersey Foundation
89 Market St.
Newark, NJ 07102
973-642-2086

Of Counsel and on the Brief

RONALD K. CHEN, NJ Atty No. 02719-1983
Rutgers Constitutional Rights Clinic
Center for Law & Justice
123 Washington St.
Newark, New Jersey 07102
973-353-5378
ronchen@law.rutgers.edu

Attorney for Appellant Kevin Stout

January 27, 2020.
(rev. February 13, 2020)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

PRELIMINARY STATEMENT

In this appeal, Kevin Stout is challenging a May 29, 2019, final decision of the New Jersey State Parole Board ("Parole Board") denying his application for parole and imposing a thirty-six-month future eligibility term ("FET"). This Mr. Stout's fourth denial of parole.

Thirty-nine years ago, at the age of nineteen and while struggling with drug addiction, Mr. Stout committed murder and attempted robbery. He was sentenced to a mandatory minimum term of twenty-five years. During the first part of his incarceration, while still addicted to drugs, Stout committed a number of institutional infractions, including one that resulted in a 1997 conviction for possession of a controlled dangerous substance.

Since 2000, however, he has been completely infraction-free, and has completed numerous programs offered by the Department of Corrections for the rehabilitation of prisoners. Indeed, for almost the past 20 years, Mr. Stout has fit the paradigm of a so-called "model prisoner." Mr. Stout became eligible for parole in 2009, and was therefore presumptively entitled to parole, absent a showing "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."

N.J.S.A. § 30:4-123.53(a).

Having been eligible for parole for over ten years but denied four times—each time for the same scantily reasoned and diffusely explained justifications—Mr. Stout presents this Court with several significant legal issues:

(1) may the Parole Board establish a substantial likelihood that a now fifty-nine year old prisoner—whose substantive offense occurred thirty-nine years ago when he was nineteen years old and addicted to drugs, and who has been infraction-free for the past nineteen years—will commit another crime, based primarily on its finding that he lacks "insight" into the reasons for his original offense?

(2) Does the Parole Board's "checklist" methodology, by which it lists but does not weigh through any critical analysis the factors that favor and disfavor parole, create a record by which this Court can engage in meaningful judicial review?

Mr. Stout contends that the Parole Board has applied improper, amorphous concepts in denying him parole, failed to articulate in any comprehensible fashion the reasons why on balance it concluded that the statutory standard for denying parole had been met, and therefore abused its discretion in denying parole.

Similarly, the imposition of a three-year FET was an abuse of discretion since the Parole Board failed to articulate the

reasons for its departure from the presumptive FET, and failed to address the bases for this Court's previous rejections of extended FETs for Mr. Stout in prior proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Mr. Stout acknowledges that thirty-nine years ago, on December 20, 1980, he committed a murder in connection with an attempted robbery in a Plainfield variety store. As noted in the Statements of Decision, he has not denied commission of the crime. Aa1, AaAa45.[2] It is also true that at the time of this crime, Mr. Stout was on parole for a strong arm robbery for which he had received an indeterminate eight year sentence. *Id.* He also had a host of other convictions or juvenile adjudications before committing the crime for which he is currently serving his sentence. *Id.* And in the first 18 years of his incarceration, Mr. Stout's institutional record was, as this Court put in in 2011, "far from exemplary." *Stout v. New Jersey State Parole Board*, 2011 N.J. Super. Unpub. LEXIS 1452, *2 (App. Div. 2011) (Aa27). In 1997 he was convicted for possession of a controlled dangerous substance, and he committed

---

[1] Because in this appeal from a final administrative agency decision, the procedural history and the facts are inextricably intertwined, these sections are combined in this brief to promote conciseness and clarity.

[2] References to Appellant Kevin Stout's accompanying Appendix shall be in the form "Aa__".

a large number of institutional infractions, many serious. Aa54.

And yet, for the last nineteen years, since 2000, Mr. Stout has had no institutional infractions. He has successfully completed numerous therapeutic programs in anger management, coping skills, distress tolerance, behavior modification and culinary arts. Aa62-68. This is clearly linked to overcoming his drug addiction, which the Parole Board itself implicitly acknowledges Aa1, Aa44. (no finding that "substance abuse problem has not been sufficiently addressed").

Mr. Stout's progress notes indicate that he has completed participation in program(s) specific to behavior, participated in other institutional programs, received average to above average institutional report(s), and achieved and maintained minimum custody status, and that his institutional adjustment has been favorable. Aa1. In short, in the past 19 years, Mr. Stout's record of behavior has been exemplary.

Mr. Stout first became eligible for parole in 2009 after he had served twenty-five years of his sentence. On May 26, 2010, the Parole Board denied parole to Mr. Stout and set a 180 month (fifteen year) FET. On appeal, this Court affirmed the denial of parole, but found that the 180 month FET was manifestly excessive, and remanded the case back to the Parole Board in 2011 to determine an appropriate FET "in conformity with the

law." *Stout v. New Jersey State Parole Board*, 2011 N.J. Super. Unpub. LEXIS 1452 (App. Div. 2011) Aa26.

After a year, the Parole Board without explanation imposed the same 180 month FET that this Court had already found excessive. Noting that while "state administrative agencies are free to disagree with our decisions. . . [t]hey are not, however, free to disregard them," this Court directed the Parole Board set a new FET within 45 days. *Stout v. New Jersey State Parole Board*, No. A-5695-11T4 ((App. Div. Jan. 27, 2014). Aa30. On July 30, 2014, the Parole Board set a new FET of 120 months (ten years), still more than three times the default period provided in the Administrative Code.

Mr. Stout appealed from that 120 month FET, but due to work and minimum custody credits and the concomitant reduction in the FET, he nevertheless next became eligible for parole on July 20, 2014, before that appeal could be heard. This time a two-person board panel split on whether Mr. Stout should be granted parole, and a third member was added. The third member voted to deny Mr. Stout parole and the Parole Board set a new FET of thirty-six months (three years), nine months greater than the presumptive FET established in the Administrative Code. Following an administrative appeal, the Parole Board rendered a final agency decision on February 25, 2015, denying parole and setting a 36 month FET.

On further appeal, this Court noted that the original 120 month FET imposed in 2014, and the 36 month FET imposed in 2015, had by that time both expired, and dismissed those aspects of the pending appeals as moot, leaving only the 2014 denial of parole as a live controversy. *Stout v. New Jersey State Parole Board*, No. A-3623-14T1 ((App. Div. 2016). Aa33. This Court was informed that after expiration of the 36 month FET, on July 20, 2016, a panel of the Board had yet again denied Stout parole, and despite having previously granted a 36 month FET, established a new 60 month FET. Aa44-45. The Board rendered a final decision on the denial of parole on November 3, 2016 (Aa46), and on the 60 month FET on January 25, 2017.

Noting that "given the time necessary to perfect both an internal appeal to the Parole Board and one to this court, we could continue in a cycle which has now thwarted effective appellate review of this case for several years," this Court declined to dismiss as moot the appeal from the 2014 denial of parole. When the Parole Board rendered a final denial of third application for parole and a 60 month FET, those matters were docketed in this Court at No. A-2478-16T1, and consolidated with the 2014 denial of parole (No. A-3623-14T1).[3] This Court heard

[3] On November 30, 2017, this Court issued a *sua sponte* order appointing undersigned counsel Ronald K. Chen as pro bono counsel to represent Mr. Stout in the then pending appeals.

oral argument on March 12, 2018, and rendered a decision on July 23, 2018, affirming both the denial of parole and the 60 month FET. *Stout v. New Jersey State Parole*, 2018 N.J. Super. Unpub. LEXIS 1787 (App. Div. Jul. 23, 2018). Aa36.

Mr. Stout had his most recent hearing on application for parole on October 26, 2018, before a two-person panel of the Board. The panel denied Mr. Stout's latest application, and imposed an FET of 36 months.[4] Aa1. The panel checked off the following mitigating factors:

1) Infraction free since last panel.
2) Participation in programs specific to behavior.
3) Participation in institutional programs.
4) Institutional reports reflect favorable institutional adjustment.
5) Attempt made to enroll and participate in programs but was not admitted.
6) Minimum custody status achieved/maintained.
7) Commutation time restored.

The panel noted the following reasons for denial:

1) [Facts and circumstances] of offense(s). Specifically: shot and killed woman during a robbery.[5]

[4] Under the latest FET, Mr. Stout's next parole eligibility date is October 20, 2020, subject to work and minimum custody credits earned and awarded on a monthly basis which can further reduce his sentence by eleven days each month.

[5] Underlined font indicates language that was handwritten on the Notice of Decision.

2) Prior offense record is extensive.

3) Offense record is repetitive.

4) Prior offense record noted.

5) Nature of criminal record increasingly more serious.

6) Committed to incarceration for multiple offenses.

7) Current opportunity(ies) on community supervision (probation/parole) has (have) been violated / terminated / revoked in the past for technical violations.

8) Prior incarceration(s) did not deter criminal behavior.

9) Institutional infractions: numerous / persistent / serious in nature; loss of commutation time; confinement in detention and/or Administrative Segregation; consistent with offense record. Last infraction: _____

10) Insufficient problem resolution. Specifically:

   a. Minimizes conduct[6]

   b. Other: Im [inmate] still lacks insight into his criminal behavior and why he would shoot a woman in the face point blank, other than responding he was impatient that victim did not give him the money fast enough. Im has a long history of violence and noncompliance with supervision. He admits he was getting high on drugs during his crime spree, that it's a day to day struggle even though he reports 18 years clean.

11) Risk Assessment evaluation: 32.

---

[6] The "Minimizes Conduct" box was checked in the 2018 Panel Decision, even though the narrative comments that follow focus on "lack of insight," which was not checked. In the 2016 Panel Decision, however, the "Minimizes Conduct" box was not checked and the "Lack of Insight into Criminal Behavior" was checked, together with written comments that addressed that lack of insight. This inconsistency in the record is difficult to understand, apart from the possibility of a pure clerical error in checking the wrong box in 2018.

Aa1.

After an internal administrative appeal that Mr. Stout filed pro se, the full Parole Board issued a full Notice of Final Agency Decision in narrative format, affirming the denial of parole and the 36 month FET. Aa4. In particular, the full Board decision repeated verbatim the written comments of the panel that:

> Inmate still lacks insight into his criminal behavior and why he would shoot a woman in the face point blank, other than responding he was impatient that victim did not give him the money fast enough. Inmate has a long history of violence and noncompliance with supervision. He admits he was getting high on drugs during his crime spree, that it's a day to day struggle even though he reports 18 years clean.
>
> [(Aa4-5).]

Kevin Stout filed a timely Notice of Appeal to this Court on July 12, 2019, with the assistance of undersigned counsel.

LEGAL ARGUMENT

I. THE PAROLE BOARD HAS NOT DEFINED THE STANDARDS BY WHICH IT DETERMINED THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT MR. STOUT WILL COMMIT A CRIME IF RELEASED ON PAROLE. (NOT RAISED BELOW)[7]

The underlying facts relevant to Mr. Stout's application for parole are undisputed and are a matter of objective record. He committed serious crimes in December 1980, the murder of a 64 year old woman during an attempted convenience store robbery, which were a culmination of a pattern of increasingly anti-social behavior committed by a 19 year old addicted to drugs. Soon thereafter, in January 1981, he also committed an armed robbery, which led to his being taken into custody. He has been incarcerated since then. During the first part of his incarceration he continued to struggle with drug addiction, which led to numerous institutional infractions and an additional 1997 criminal conviction for CDS possession.

It is also undisputed, however, that for almost 20 years,

---

[7] *See*, R. 2:6-2(a)(1). While the legal arguments made here were not raised *in haec verba* in the hearing before the Parole Board below, this is obviously because Mr. Stout is a prisoner who is not entitled to counsel at such hearings and who himself could not be expected to raise points of law. Moreover, the Parole Board, which is not comprised exclusively or even substantially of lawyers, would not be in a position to consider any legal arguments, even if Mr. Stout had raised them.

Moreover, this appeal "concerns matters of great public interest" and therefore should be heard on appeal, even if they were not raised by *pro se* appellant below. *Nieder v. Royal*

i.e. since November 2000, Mr. Stout has been infraction free, has participated in rehabilitative programming offered by the Department of Corrections to the extent such programming was available, and has attained the minimum custody status available to a prisoner with his conviction record. All objective evidence (including presumably frequent testing) indicates that he has not used CDS since that time.

The issue before the Parole Board, and now before this Court, is whether Mr. Stout *currently* presents a significant likelihood that he will commit another crime if released. Almost all the aggravating factors leading the Board to deny parole stem from his original crimes in 1980 and 1981, or from the early part of his incarceration, up to his last infraction in November 2000. All of the mitigating factors favoring parole derive from his infraction free record that he has developed from 2000 to the present day. The obvious question, therefore, is why the aggravating factors stemming from behavior that, at its most recent, is almost 20 years old, and in large measure is

---

Indem. Ins. Co., 62 N.J. 229, 234 (1973). In New Jersey, courts maintain broad discretion to relax court rules in the interest of justice and fairness. R. 1:1-2. It would be fundamentally unfair to expect uncounseled prisoners to raise constitutional issues at the agency level or bar subsequent review of them. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers").

part of his original set of criminal offenses 39 years ago, are more convincing in establishing the *current* likelihood of recidivism than the spotless record that Mr. Stout has developed since then?

The superficial answer apparently lies in the two aggravating factors that facially arise from the present day: (1) the finding of "insufficient problem(s) resolution" and particularly the finding that Mr. Stout "lacks insight" into the reasons for his criminal behavior, and (2) the risk assessment evaluation, *i.e.* the LSI-R score, which rose from 26 (medium risk) (Aa44) during the last parole application in 2016, to 32 (high risk) in the present proceeding (Aa1), despite there being no objective event or aggravating circumstance that would explain this discrepancy. Both these factors are subjective judgments rather than objective facts.

As argued further below, Appellant Kevin Stout's presumptive entitlement to parole cannot be overcome solely based on the *ipse dixit* conclusory pronouncements that he "lacks insight" or that he is a "high risk" of committing another crime. Rather, if these concepts are to be relevant in determining the continued deprivation of Mr. Stout's liberty, they must be *defined* with sufficient clarity to satisfy both constitutional and statutory requirements of administrative due process. Furthermore, their use must be *explained*, and the

process of critical analysis and balancing against the mitigating factors must be sufficiently revealed, so that the ultimate result can be the subject of meaningful judicial review by this Court.

A. The Parole Board's Decision Did Not Apply the Statutory or Regulatory Standards for Parole. (NOT RAISED BELOW).

It is a basic tenet of due process, both under the Fourteenth Amendment and under New Jersey constitutional and administrative law, that someone subject to the law's constraints must have fair notice of the standards by which their liberty is to be granted or withheld. As Justice Neil Gorsuch recently wrote for the Court, "In our constitutional order, a vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319 (2019) (striking down phrase "crime of violence" as unconstitutionally vague in defining criminal offense); *accord, Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018).

New Jersey statute "creates a protected expectation of parole in inmates who are eligible for parole." *Trantino v. N.J. State Parole Bd.*, 154 N.J. 19, 25 (1998)(*Trantino II*). Under the version of the Parole Act applicable to Mr. Stout, parole must be granted unless it is shown 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. § 30:4-123.53(a);

see, In re Application of Trantino, 89 N.J. 347, 366 (1982) (*Trantino I*).

Through the rulemaking process, the Parole Board has adopted rules and regulations implementing and giving definition to this statutory standard. Thus, N.J.A.C. § 10A:71-3.11(b) delineates twenty-three (23) factors that hearing officers, panels and the full Board must consider in making parole decisions:

1. Commission of an offense while incarcerated;
2. Commission of serious disciplinary infractions;
3. Nature and pattern of previous convictions;
4. Adjustment to previous probation, parole and incarceration;
5. Facts and circumstances of the offense;
6. Aggravating and mitigating factors surrounding the offense;
7. Pattern of less serious disciplinary infractions;
8. Participation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration. This includes, but is not limited to, participation in substance abuse programs, academic or vocational education programs, work assignments that provide on-the-job training and individual or group counseling;
9. Statements by institutional staff, with supporting documentation, that the inmate is likely to commit a crime if released; 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;

10. Documented pattern or relationships with institutional staff or inmates;

11. Documented changes in attitude toward self or others;

12. Documentation reflecting personal goals, personal strengths, or motivation for law abiding behavior;

13. Mental and emotional health;

14. Parole plans and the investigation thereof;

15. Status of family or marital relationships at the time of eligibility;

16. Availability of community resources or support services for inmates who have a demonstrated need for same;

17. Statements by the inmate reflecting on the likelihood that he or she will commit another crime; the failure to cooperate in his or her own rehabilitation; or the reasonable expectation that he or she will violate conditions of parole;

18. History of employment, education, and military service;

19. Family and marital history;

20. Statement by the court reflecting the reasons for the sentence imposed;

21. Statements or evidence presented by the appropriate prosecutor's office, the Office of the Attorney General, or any other criminal justice agency;

22. Statement or testimony of any victim or the nearest relative(s) of a murder/manslaughter victim;

23. The results of the objective risk assessment instrument.

In reviewing the Parole Board's decision, therefore, this Court must consider whether its findings and conclusions are sufficient to satisfy the ultimate statutory standard, as

informed by the factors contained in the regulation that reasonably interpret that standard. *See Trantino I*, 89 N.J. at 372 ("[T]he individual's likelihood of recidivism is now the sole standard for making parole determinations"); *Trantino II*, 154 N.J, at 31 (cautioning against treating recidivism and rehabilitation as "cognate criteria," since rehabilitation is relevant "only as it bears on the likelihood that the inmate will not again resort to crime.").

This Court should thus view with some skepticism Parole Board findings or conclusions that are not facially directed towards the statutory standard, particularly when those findings or conclusions are based on factors that have not been vetted appropriately through the rule-making procedures under the Administrative Procedures Act ("APA"), N.J.S.A. § 52:14B-4. Indeed, ultimately, the New Jersey Constitution requires that the public be given fair notice of regulations that affect the public.

> No rule or regulation made by any department, officer, agency or authority of this state, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law. The Legislature shall provide for the prompt publication of such rules and regulations.
>
> [N.J. Const., Article V, §4, ¶6.]

While the Parole Board's exercise of discretion is entitled

to substantial deference, an administrative agency's discretion to act in "selecting the appropriate procedures to effectuate their regulatory duties and statutory goals . . . is not absolute." *In re Auth. for Freshwater Wetlands Statewide Gen. Permit 6, Special Activity Transition Area Waiver for Stormwater Mgmt., Water Quality Certification*, 433 N.J. Super. 385, 413 (App. Div. 2013). Hence, "it is fundamental that administrative regulations must not only be within the scope of the delegated authority, but also must be sufficiently definite to inform those subject to them as to what is required." *Matter of Health Care Administration Bd.*, 83 N.J. 67, 82 (1980).

B. *The Parole Board Engaged in Improper Ad Hoc Rulemaking in Using "Lack of Insight" as the Basis for Denying Parole. (NOT RAISED BELOW)*

Here, as in Mr. Stout's prior parole denial decision, the factor that figured prominently in the Parole Board's decision to deny parole is its conclusion that he lacked "insight" into the motivations underlying his crime committed 39 years ago. The Parole Board's focus on this issue therefore begs the question: what is "insight" and what is its relevance in determining the ultimate statutory question of whether there is a substantial likelihood that Mr. Stout would commit a crime if released?

While the 23 factors contained in N.J.A.C. § 10A:71-3.11(b), having been vetted through the notice and comment

process required under the APA, may be presumed to be reasonably relevant in considering parole applications, lack of insight is not listed among those factors. Use of "insight," upon which the Board relied so heavily in Mr. Stout's case, appears therefore to be an example of ad hoc rulemaking that violates the APA.

As this state's Supreme Court has held, "Where the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rulemaking procedures should be invoked." *Metromedia, Inc. v. Dir., Div. of Taxation*, 97 N.J. 313, 331 (1984) (citations omitted). The Court further explained the importance of the rulemaking procedure under the APA:

> The procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that should surround the ultimate agency determination. These procedures call for public notice of the anticipated action, broad participation of interested persons, presentation of the views of the public, the receipt of general relevant information, the admission of evidence without regard to conventional rules of evidential admissibility, and the opportunity for continuing comment on the proposed agency action before a final determination.
>
> [*Id.*]

The rule-making process mandated in the Administrative Procedures Act is therefore one way by which the Legislature is discharging the constitutional obligation to publish, and thereby give the public meaningful notice, of administrative

rules and regulations.

Metromedia requires that if an agency has in effect adopted an administrative rule, then it must promulgate that rule through the prescribed rulemaking procedures. *Metromedia* outlined six factors that inform the conclusion that an agency has engaged in *de facto* rulemaking:

1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;

2) is intended to be applied generally and uniformly to all similarly situated persons;

3) is designed to operate in future cases, that is, prospectively;

4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;

5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and

6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Id. at 331-32. "The pertinent evaluation focuses on the importance and weight of each factor and is not based on a quantitative compilation of the number of factors which weigh for or against labeling the agency determination as a rule." *In re Provision of Basic Generation Serv. for Period Beginning*

June 1 2008, 205 N.J. 339, 343 (2011). Each of these *Metromedia* factors, however, weigh in favor of finding that the use of "lack of insight" in determining parole eligibility should have been promulgated and vetted through the rule-making process required by the APA.

First, the use of "insight" as used by the Parole Board in parole applications is intended and has continued to encompass a large segment of the public, *i.e.* all incarcerated people in New Jersey Department of Corrections custody seeking parole. As mandated by N.J.S.A. § 30:4-123.53(a), every one of these individuals is entitled to parole upon parole eligibility unless the Board proves otherwise. As these individuals apply for their statutory right to parole, their applications are assessed according to factors the Parole Board has promulgated under its own regulation, under which they utilize "insight" into prior criminal history. Indeed, this Court has reviewed many Parole Board decisions in which "insight" is used as a determinative factor, including most recently in *Acoli v. Parole Board,* ___ N.J. Super. ___, 2019 N.J. Super. LEXIS 178 (App. Div. Dec. 27, 2019), *on remand from* 224 N.J. 213 (2016).[8]

---

[8] A number of unpublished opinions of this Court also refer to lack of "insight" as undergirding the Parole Board's decision under review. *See, e.g., Coburn v. N.J. State Parole Bd.*, No. A-4921-16T3, 2018 N.J. Super. Unpub. LEXIS 1898 (App. Div. Aug. 10, 2018); *Hankins v. N.J. State Parole Bd.*, No. A-5060-14T3,

Second, the use of "insight" is not applied to a specific group of parole eligible prisoners. Parole hearing officers uniformly assess each applicant for whether they possess "insight" into their prior criminal history. Perhaps the most obvious evidence of the generality of the use of insight as a factor in parole determinations is the fact that the Parole Board has now included it as part of the standard checklist in the preprinted Notice of Decision form that is presumably used in *every* parole determination.

Third, these same facts show that the use of "insight" is a prescribed legal standard that is being used both presently by the Parole Board, and prospectively for future parole determinations, *i.e.* it was is not a specialized finding that applied only to Mr. Stout or Mr. Acoli but not for future parole applicants. The first three *Metromedia* factors are interconnected, especially when an agency has statutory rulemaking authority. In such circumstances, "its ruling in [one] case" would apply to "all other" matters, thereby

---

2017 N.J. Super. Unpub. LEXIS 281 (App. Div. Feb. 6, 2017); *Balisnomo v. N.J. State Parole Bd.*, No. A-0960-14T4, 2016 N.J. Super. Unpub. LEXIS 1642 (App. Div. July 18, 2016). Pursuant to *R.* 1:36-3, counsel includes these unpublished opinions in the appendix. Counsel offers them for the limited proposition that the Board frequently refers to lack of "insight" in its decisions. Counsel is aware of no cases that are contrary to that limited proposition.

satisfying the first three *Metromedia* factors. *See, Dep't of Envtl. Protection v. Stavola*, 103 N.J. 425, 438 (1986) (holding that if the Department of Environmental Protection "has implied statutory authorization to regulate certain beach club cabanas, then its ruling in this case would apply to all other beach clubs . . . thus falling within *Metromedia* guidelines Nos. (1), (2), and (3)"). Clearly, the Parole Board has statutory rulemaking authority to establish criteria for parole that supplement the statutory standard.

Fourth, lack of "insight" is clearly a legal standard that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization. N.J.S.A. § 30:4-123.53(a) establishes the ultimate legal standard as whether there is "a substantial likelihood an inmate will commit another crime if released." There is no obvious, or even non-obvious, inferential chain leading from the ultimate statutory standard and a finding of "lack of insight," in large measure because it is not known or knowable to the reasonably informed person what is meant by lack of "insight."

Fifth, the use of "insight" was not previously expressed in any official and explicit agency determination, adjudication or rule, *i.e.* this is not a situation of a non-substantive restatement of a previous policy that had already been vetted through the rule-making process required by the APA.

Finally, the use of "insight" as a significant factor in determining parole eligibility clearly reflects a decision by the Parole Board in the nature of the interpretation of law or general policy. Lack of "insight" is being used as an interpretation by the Parole Board of its statutory responsibility to determine whether a "substantial likelihood exists [that] the inmate will commit another crime." "Insight" has now acquired an importance in parole determinations that equals, if not exceeds, that of any of the 23 factors that are contained explicitly in the parole regulation, N.J.A.C. § 10A:71-3.11(b), which have been vetted through the rulemaking process. The APA requires that it be validated through that same process.

All these factors highlight the fatal defect in using the lack of "insight" in parole determinations without having been first vetted through the rule-making process to determine whether it has any relevance to the ultimate statutory standard. Of foremost concern, of course, is the definitional question: what is "insight" or lack thereof? While the term "insight" apparently is a technical term of art in the fields of psychology and psychoanalysis,[9] it has not been established that

[9] The concept of "insight" in particular stems from the Gestalt school of psychology. *See generally*, Janet Davidson & Robert Sternberg, eds., THE NATURE OF INSIGHT (MIT Press 1996)(ISBN

this is the meaning that the Parole Board intends.

Even if the definitional question were resolved, there remains the ultimate question of whether lack of "insight," however defined, has bearing on the sole statutory issue before the Parole Board, *i.e.* the likelihood that the applicant will commit another crime? Establishing this nexus is exactly what the rulemaking process would achieve, and therefore its absence is all the more erroneous under the *Metromedia* standards. "Agencies should act through rulemaking procedures when the action is intended to have a 'widespread, continuing, and prospective effect,' deals with policy issues, materially changes existing laws, or when the action will benefit from rulemaking's flexible fact-finding procedures." *In re Provision of Basic Generation Serv. for Period Beginning June 1, 2008*, 205 N.J. at 349-50.

Acceptance of such an amorphous term as "lack of insight," without the definitional clarity that the rulemaking process would hopefully bring, would also inject unbridled administrative discretion into the parole process. As this Court found in another procedural context in *613 Corp. v. State, Div. of State Lottery*. 210 N.J. Super. 485 (App. Div. 1986),

---

9780262691871). Whether it has general acceptance in the scientific community is one question that would have been vetted in the notice and comment process.

inclusion of extraneous subjective factors not included in formal rule violates the APA. In *613 Corp.*, three adult bookstore corporations challenged the denial of state lottery licenses by the Division of State Lottery ostensibly based on the ground that there was a "sufficiency of existing agents in its area." *Id.* at 489. But this Court found that the agency's denial of the licenses was based not only on proximity to other licensees in the area, but also on other factors such as the controversial nature of their businesses, and consideration of such factors had not been the subject of rulemaking. One of the primary concerns this Court expressed was that by injecting this new criterion, the agency's review of lottery applications was now "fraught with indicia of subjectivity." *Id.* at 502. Although multiple factors were considered in their determination, the agency did not "approximate a formula delineating the relative weight given to each factor." *Id.*

The record here is fraught with indicia of "subjectivity":

> The testifying officials allegedly relied upon multiple factors in reaching conclusions as to sufficiency; however, they were unable to even approximate a formula delineating the relative weight given to each factor. In some instances a particular factor would have no bearing in the determination; in others, that same factor would be the conclusive element. The only procedural guidelines were in a one-page document which the District Manager had not even seen. It was admitted that the decision boiled down to the investigator's "gut reaction" based upon asserted subjective knowledge of a given area.

[*Id.*]

Explaining further, this Court concluded: "The absence of published standards to ensure fair and consistent application of eligibility requirements has resulted in a procedure which vests unfettered discretion in the Director and his staff in violation of the principles which structure such discretionary actions." *Id.* And this Court cogently concluded: "There can be no public confidence in a system that awards licenses based only on an individual's 'gut reaction' or subjective impressions. Such a system breeds suspicion and fosters contempt and corruption." *Id.* at 503.

So too here, the vesting of unfettered discretion in the officers of the Parole Board to meld the undefined concept of "lack of insight" into whatever conclusion they wish to reach (almost inevitably the denial of parole), fatally undermines the validity of the Board's ultimate conclusion. "Lack of insight" is becoming an all too convenient method of explaining parole denial in the absence of any other reasons more susceptible to contradiction or review. If the Parole Board is not held accountable for its invention, without intervening public notice and comment, of the conclusory term "lack of insight," then the concept of deference to the Parole Board's decisions will have crossed the line to unquestioning judicial acquiescence to the Parole Board's determinations.

Judicial acquiescence would necessarily be unquestioning precisely because there would be no basis for the courts to examine the validity of the conclusion, nor any way for prisoners to adduce evidence to rebut the claim. "Lack of insight" would become the "one size fits all" expression of agency discretion that could explain any result, without fear of contradiction. In the absence of such rulemaking procedures, the Parole Board's ad hoc adoption of insight as an indicator of whether Mr. Stout and other parole applicants are likely to commit a crime in the future should be rejected as an exercise in ad hoc rulemaking forbidden by the APA. It constitutes a *per se* abuse of discretion.

C. Use of the Catch-All Phrase "Any Other Factors Deemed Relevant" Does Not Allow the Parole Board to Dispense with Its Rule-Making Obligations. (NOT RAISED BELOW)

Although administrative agency regulations are presumptively valid, the Supreme Court has held that "an administrative agency may not under the guise of interpretation give a statute a greater effect than the [enabling] language allows." *In re Barnert Memorial Hosp. Rates*, 92 N.J. 31, 40 (1983). Therefore, administrative agencies are "merely a 'creature of legislation who must act only within the bounds of the authority delegated to [it].'" *Brunswick Corp. v. Director, Div. of Taxation*, 135 N.J. 107, 112 (1994) (Garibaldi, J., dissenting) (quoting *In re Jamesburg High School Closing*, 83

N.J. 540, 549 (1980)). Our courts are obliged to "restrain an administrative agency when it acts beyond the scope of the authority granted it by the Legislature." *Id.* Applicable here is the Court's rule that "when the rule of an administrative agency contravenes the statute which created it, the rule lacks efficacy." *Kamienski v. Board of Mortuary Science*, 80 N.J. Super. 366, 270 (App. Div. 1963).

In the parole context, the Supreme Court in *Trantino II*, 89 N.J. 347 held that under N.J.S.A. § 30:4-123.53(a), "the individual's likelihood of recidivism is now the sole standard for making parole determinations." Any factors other than those bearing on this question, such as "punishment that serves society's needs for general deterrence or a concern or retribution," are not relevant. Therefore, the Parole Board is authorized to only consider those factors relevant to this inquiry, and this inquiry alone.

The loose construction of the Parole Board's regulation, N.J.A.C. § 10A:71-3.11(b), containing the catch-all phrase "any other factors deemed relevant" would allow the agency to consider factors that have no bearing on the standard contained in the enabling statutory authorization. In Mr. Stout's case, the use of "insight" to deny him parole constituted ad hoc rulemaking and deprived Mr. Stout of administrative due process. If this Court were to accept the Parole Board's logic that the

agency can apply any factors it deems relevant, such as "insight," in determining parole release without having to explain what the factor entails or to engage in rulemaking procedure, this Court would be rendering the APA and the Supreme Court's decision in *Metromedia* meaningless.

D. In Order to "Tether" the Facts to a Rule or Regulation, It Is Necessary to Know What the Rule or Regulation Is. (NOT RAISED BELOW)

In its prior decision concerning Mr. Stout's parole denial, this Court "acknowledged that the Board's reliance on an inmate's 'lack of insight into his violent criminal behavior' untethered to specific facts would likely be an insufficient basis to support denial of parole." Stout, 2018 N.J. Super. Unpub. LEXIS 1787, at *26 (App. Div. 2018). However, this Court then reconciled the use of "lack of insight" as relevant to at least three factors delineated in N.J.A.C. § 10A:71-3.11(b):

> (11) Documented changes in attitude toward self or others, (12) Documentation reflecting personal goals, personal strengths or motivation for law-abiding behavior and (17) Statements by the inmate reflecting on the likelihood that he or she will commit another crime; the failure to cooperate in his or her own rehabilitation; or the reasonable expectation that he or she will violate conditions of parole.
>
> [*Stout*, 2018 N.J. Super. Unpub. LEXIS 1787, at *27.]

With respect, however, there are several serious concerns with this reasoning. First, if the Parole Board had intended to invoke one of these three parole criteria promulgated in

N.J.A.C. § 10A:71-3.11(b) in Mr. Stout's case, presumably it could and would have done so, but it did not. If it had done so, it then would have provided the "documentation" required by the text of the regulation; Mr. Stout could have responded accordingly, and this appeal would have taken a different and perhaps more conventional course. But it does not assist the process of judicial review to posit a statement of decision by the Parole Board that it did not actually make.

Second, it is at this point still conjecture as to whether the concept of "lack of insight" would have been relevant to any of these enumerated factors, since, as demonstrated above, the Parole Board has not defined what "lack of insight" means. It is not possible to "tether" facts to any analytical framework without knowing what that framework is. Otherwise, there is no basis to determine which facts are relevant and which are not. In order to tether facts to a regulation, it is paramount to know what that rule or regulation is. In this instance, the problem remains that there is neither a rule nor a regulation that explicitly defines and sets out the parameters of what constitutes a "lack of insight."

II. THE PAROLE BOARD'S CHECKLIST METHODOLOGY OF DENYING MR. STOUT PAROLE FAILED TO ARTICULATE ITS BASIS FOR ITS DECISION IN A MANNER THAT PERMITS MEANINGFUL JUDICIAL REVIEW. (NOT RAISED BELOW)

The New Jersey Supreme Court has consistently held that

"[a]lthough administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded." *In re Vey*, 124 N.J. 534, 543 (1991) (internal citations omitted). Administrative decisions must be "exercised in a manner that will facilitate judicial review." *Id.* To facilitate judicial review, administrative agencies "must articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *Id.* at 543-44. Additionally,

> Agency determinations will not be disturbed unless the findings could not have been reasonably reached on sufficient credible evidence considering the proofs as a whole, giving due regard to the agency's expertise where such is a relevant factor . . . The sense of 'wrongness' arises in several ways, among which are the lack of inherently-credible supporting evidence, *the obvious overlooking or undervaluation of crucial evidence* or a clearly unjust result.
>
> [*613 Corp.*, 210 N.J. Super. at 495 (emphasis added)(citing *Mayflower Securities v. Bureau of Securities*, 64 N.J. 85, 92-93, 162 (1973)).]

Here, as this Court has itself observed in a prior proceeding, the Parole Board has not only overlooked but essentially ignored crucial evidence, namely the past 19 years of Mr. Stout's exemplary behavior, and instead inexplicably given greater importance to criminal conduct stemming from almost 40 years ago.

A. The Rote and Mechanical Process by Which the Parole Board Considered Mr. Stout's Parole Application Precludes Meaningful Judicial Review. (NOT RAISED BELOW)

The principles of administrative review that apply

generally are equally applicable to the Parole Board. "[T]he inherent difficulty in gauging whether a parole determination constitutes an abuse of discretion does not engender a more exacting standard of judicial review than that applicable to other administrative agency decisions." *Trantino v. N.J. State Parole Bd.*, 154 N.J. at 25; *In re Hawley Parole Application*, 98 N.J. 108, 112 (1984) (finding "no reason to exempt the Parole Board from the well-established principle" and generally accepted standard of review applicable to administrative agencies). Parole decisions are "highly subjective and discretionary." *Hawley*, 98 N.J. at 116. For that very reason, however, "one of the best protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Id.* at 115. "Such reasons are necessary "'not only [to insure] a responsible and just determination' by the agency but also '[to afford] a proper basis for effective judicial review.'" *Id.* at 116 (quoting *Monks v. N.J. State Parole Bd.*, 58 N.J. 238, 245 (1971)).

However, the Parole Board has adopted a rote and mechanical "checklist" methodology of review that does not allow for meaningful judicial review, and conceals arbitrary decision-making. The pre-printed panel Notice of Decision that Mr. Stout received is essentially a checklist that allows a panel member

to, with as few penstrokes as possible, reduce to tangible form the ostensible basis for the decision. Yet the cause of brevity has superseded the goal of clarity and cogent explanation. In Mr. Stout's case, the checklist for the most part merely catalogs objective and undisputed facts that are already available in the written record, such as the facts underlying his original crimes in 1980-1981.

Similarly, the Final Agency Decision of May 2019 merely recites, albeit in narrative form, the list of factors checked off by in panel decision; in one instance it quotes the handwritten comment on lack of "insight," and then, without any critical analysis or weighing of those factors, summarily affirms the decision.

The problem with checklists is that they are a mere inventory of factors; they do not reveal the critical process of how the Parole Board has *weighed* those factors to reach its ultimate conclusion. It is that balancing process that this Court must review to determine whether it was reasonable. But if there is no articulation by the Parole Board of how it engaged in that balancing, then quite literally there is nothing for this Court to review. "Quasi-judicial administrative decisions must set forth 'an *analytical* expression of the basis which, applied to the found facts, led to the holdings below. . . .' It is not only the duty of the agency to find the

necessary facts, but also to explain its reasoning." *In re Valley Hosp.*, 240 N.J. Super. 301, 306 (App. Div. 1990)(emphasis added, internal citations omitted). "[D]eference does not require that we forego a careful review of administrative decisions simply because an agency has exercised its expertise. We cannot accept without question an agency's conclusory statements, even when they represent an exercise in agency expertise. The agency is "obliged . . . 'to tell us why.'" *Balagun v. N.J. Dep't of Corr.*, 361 N.J. Super. 199, 202-03 (App. Div. 2003).

This Court has grappled with the use of similarly discretionary methodology in the context of prison disciplinary hearings. *Mejia v. New Jersey Department of Corrections*, 446 N.J. Super. 369 (App. Div. 2016). There, the appellant argued that his sanction of three and one-half years in administrative segregation, the longest sanction possible, was improper due in part to the use of sanctioning criteria that was not mandated by a separate agency regulation requiring an agency officer to articulate their reasons for relying on certain factors. *See id.* at 378-79. The Court was concerned that "[t]he DOC regulations include factors to be utilized in imposing sanctions, but unfortunately leave the use of those or other 'such factors' entirely to the discretion of the hearing officer." *Id.* at 378. "Without any regulation requiring the articulation of

sanctioning factors, we have no way to review whether a sanction is imposed for permissible reasons and is located at an appropriate point within the allowable range." *Id.* at 379. This Court reversed the sanction imposed on the appellant for being impermissibly excessive and anticipated "that the requirement for the consideration and articulation of sanctioning factors by hearing officers this opinion imposes will assure the sanctioning of state prisoners becomes more 'fair and equitable.'" *Id.* at 380.

Although the procedural context in *Mejia* is different than that in Mr. Stout's case, like prison disciplinary hearing officers, parole hearing officers are also authorized to consider factors on a checklist entirely under their own discretion but are not required to articulate the basis for weighing the factors so identified. As will be discussed *infra*, this procedure also has the effect of barring effective, if any, meaningful judicial review. This lack of justification undermines any confidence in a parole hearing officer's decision, similar to the excessive sanction that was imposed on the appellant in *Mejia*.

Indeed, this Court has criticized the Parole Board's practice of checking off factors in denying prisoners their right to parole release. In an unpublished decision, this Court vacated the Parole Board's decision denying the appellant parole

and remanded the decision for full reconsideration. *Geiger v. N.J. Parole Bd.*, No. A-5782-12T2, 2015 N.J. Super. Unpub. LEXIS 884 (App. Div. 2015). Aa19. This Court's description of the record in *Geiger* is remarkably similar to the one before the Court here:

> [T]he panel's and the Board's reasoning for its finding are not adequately explained. The panel's decision is cursory, consisting only of a check list which makes only fleeting reference to an interview and documents in the file, *without making any effort to explain their significance*. Instead, it dwells on problem resolution, a catchall phrase that has no specific content, especially in the context of the law governing the Board's decision.

Geiger, 2015 N.J. Super. Unpub. LEXIS 884, at *12 (emphasis added).[10] Aa22.

Likewise, in this case, there has been no attempt to balance and weigh the significance of the mitigating factor against the aggravating factors. After Mr. Stout was denied parole in his parole interview, the parole officer failed to provide any clear reasoning for his decision. The parole officer only explained in completely conclusory terms that Mr. Stout

[10] Pursuant to *R.* 1:36-3, Counsel offers *Geiger* for the limited proposition that a Parole Board decision that consists only of a check list which makes only fleeting reference to an interview and documents in the file, without making any effort to explain their significance, cannot be sustained upon judicial review. Counsel is aware of no cases that are contrary to that limited proposition.

needs to keep focused and "keep working on the things he is working on." 36T23-25.[11] When asked to elaborate, he referred Mr. Stout to "the green sheet," or the Notice of Decision which contains the checklist of factors. 36T25-37T1. However, in Mr. Stout's case, the only reasoning the parole officer provided was a trite analogy:

> [S]ometimes when you're younger, right, you know, when you're taking like algebra for instance and you don't get it the first time . . . [I]t takes a little time before it finally clicks in. And then when it clicks in, then you're good, and you never have to take algebra again.

37T19-22:38T1-4. Such a statement fails to provide any substantive explanation or reasoning for denying parole, other than to refer to the checklist of factors that were well-known to Mr. Stout.

The Parole Board made no effort to explain in its decision the significance of any of the factors the hearing officer checked off in denying him parole, similarly making fleeting reference to Mr. Stout's statements during his hearing. Absolutely no relationship to the ultimate standard of proving a likelihood that Mr. Stout would commit another crime if released was established. Like in *Geiger*, the Parole Board checked off "insufficient problem resolution," a catch-all factor not delineated in N.J.A.C. § 10A:71-3.11(b), and opined only that

---

[11] References to the Hearing Transcript of October 26, 2018, are in the form [page]T[lines].

Stout "lacked insight" into his prior criminal behavior for failing to explain why he committed the crime.

While a checklist methodology may serve as a useful tool for guiding the Parole Board in *identifying* the factors the likelihood of a prisoner committing another crime if released, it does not assist in *weighing and balancing* those factors. This Court has approved of this methodology where the checklist is "adequately defined" and has "sufficient flexibility" only "to carry out the purposes of the legislation." *Toms River Affiliates v. Dep't of Envtl. Protection*, 140 N.J. Super. 135, 144 (App. Div. 1976). That is not the case here: The Parole Board's use of a checklist and its practice of checking off factors without articulating the underlying reasoning does not fulfill the agency's duty to explain its decision in a meaningful way. The checking-off of factors alone, without more, is too facile a procedure. This Court must reverse and remand the Board's decision to deny Mr. Stout parole and require the agency to adequately define its reasoning in relation to the ultimate statutory goal.

The Parole Board's Notice of Final Agency Decision suffers from similar deficiencies. The Parole Board merely restates the mitigating and aggravating factors checked off in the Notice of Decision, again failing to cite to any material relied upon by the panel. The Parole Board's summary conclusion that "the Board

panel appropriately weighed the factors in [Mr. Stout's] case" was without any logical support.

In *Drake v. Dep't of Human Servs. Div. of Youth & Family Servs.*, 186 N.J. Super. 532, 538 (App. Div. 1982), this Court held that a Final Decision issued by the Director of the Division of Youth and Family Services terminating the residential placement of a child with disabilities at a school was deficient for failing to substantiate the findings for the termination. As with the Final Agency Decision in the case of Mr. Stout, the Final Decision in *Drake* "merely [sustained] the Recommended Decision of the 'Adolescent Services Specialist' 'for the reasons expressed by [her] in her Recommended Decision." *Id.* at 533. The Final Decision in *Drake* did not provide this Court with any information sufficient for meaningful judicial review, or include any information about the child "except for broad generalizations about his 'excellent progress at [the school] and the fact that he 'enjoys his relationship with [his mother] and his family.'" *Id.* at 534. Any conclusions about the child were unsubstantiated by any facts; "[t]he single conclusion that 'he has the ability to be self-sufficient with respect to activities of daily life' is naked; there are no findings at all to support this determination." *Id.* Furthermore, this Court held that there were terms that were not defined, such as "activities of daily life," leaving this Court

"relegated to presumptions." *Id.*

The Parole Board's Notice of Final Agency Decision mirrors the Final Decision in *Drake* in that it fails to provide this Court with sufficient information for meaningful judicial review, again leaving this Court "relegated to presumptions." Standing alone, a 'checklist methodology' such as the one employed by the Parole Board fails to make a rational connection between the facts on record and the Parole Board's decision analyzing and balancing the weight of the factors. *See Drake*, 186 N.J. Super. at 536 (holding a reviewing court must "examine why and under what authority the agency acted," in which the administrative agency should "catalogue the full scope of that to be considered by a competent factfinder.").

B. The Parole Board Failed to Assess Direct Empirical Evidence of Non-Likelihood of Future Criminality, Including Nineteen Years of Infraction Free Behavior. (NOT RAISED BELOW)

The factors used by the Parole Board to deny Mr. Stout parole can be grouped into two general categories: (1) Mr. Stout's prior criminal history and early record of institutional infractions, which are undisputed, but which occurred either on or before the date of Mr. Stout's crime in 1980, or else more than 19 years ago while incarcerated;[12] and (2) the Parole

[12] *See supra* text accompanying notes 5-6 for the enumerated aggravating factors.

Board's finding that he had not demonstrated sufficient "insight into [his] violent criminal behavior" which led the Board to conclude that Mr. Stout had "insufficient problem resolution" skills, as well as the LSI-R score which inexplicably rose from a medium risk 26 in 2016 (Aa47) to 32 (high risk) in 2018.

The Parole Board failed to explain why the most recent 19 year record of completely acceptable behavior by Mr. Stout, combined with the mitigating factors that the Board acknowledges are present here, are not more reliable predictors of the current likelihood of recidivism than those factors it cited that are qualitatively and quantitatively more remote in time and circumstance.

While Mr. Stout does not contend that the passage of 39 years from the original crimes inevitably means there can never be substantial likelihood that a person will commit a new crime if released, this significant passage of time is certainly a very relevant consideration. The Parole Board was at least required to explain how it had weighed the remoteness of time of the aggravating factors and why it felt that his most recent record of infraction-free conduct was a less reliable indication of the likelihood he would commit another crime than the criminality that occurred decades before.

In this case, however, the Parole Board merely recited the fact of the prior criminal activity and parole violations

without even attempting to explain why those incidents, as serious as they were, are still relevant in assessing the current risk of re-offense. When the record presents such an obvious reason to question the relevance of activity that took place 39 years ago, the Parole Board's failure in its duty to articulate the reasons for its decisions or to demonstrate that there is sufficient preponderance of credible evidence to support its conclusions, amounts to an abuse of discretion.

In 2011, this Court itself observed that with regard imposing a lengthy FET on Mr. Stout, the Parole Board "did not properly account for the temporal remoteness of Stout's criminality and prohibited acts, the last occurring in 1997 and 2000 respectively." *See, Stout v. Parole Board*, 2018 N.J. Super. Unpub. LEXIS 1787 at *4 (App. Div. 2018) (App. Div. 2018)(Aa37)(quoting *Stout v. State Parole* Bd., 2011 N.J. Super. Unpub. LEXIS 1452 at *10 (App. Div. 2011) (Aa29). The Parole Board's failure to support through articulated analysis the counter-intuitive inference that the most recent 19-year record of commendable conduct by Mr. Stout is less indicative of the current risk of recidivism that he presents, compared to conduct that occurred up to 39 years ago, is a fatal deficiency. If the Board is privy to some understanding that rebuts the logical inferences to be drawn from the past 19-year experience, then it must reveal that understanding to the Court so that its decision

capable of meaningful judicial review. Otherwise, the Board's conclusions are an abuse of discretion and erode whatever judicial deference to which the Parole Board is usually entitled.

III. THE RECORD ESTABLISHED IN THIS CASE DOES NOT SATISFY THE REQUIREMENTS OF THE PAROLE ACT OF 1979 THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT MR. STOUT WILL COMMIT A CRIME IF RELEASED. (NOT RAISED BELOW)

Having been denied parole four times for reasons that are demonstrably insufficient, Appellant Kevin Stout believes that the Parole Board has been given more than ample opportunity to make its case. At this point, a remand is inadequate to vindicate his legal rights, and therefore requests that this Court order his release outright.

The Parole Act of 1979 requires that a prisoner "shall be released on parole at the time of parole eligibility, unless [it is shown] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime . . . if released on parole at such time." *Trantino II*, 166 N.J. at 126 (quoting N.J. Stat. § 30:4-123.53). This is a much narrower standard than the previous law, the Parole Act of 1948, which required "a reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society." *In re Application*

of Trantino, 89 N.J. 347, 355 (quoting N.J.S.A. § 30:4-123.14 (repealed)).

In *Williams v. New Jersey State Parole Bd.*, the appellant appealed a decision by the Parole Board to deny him parole and impose an 18-month FET. This Court reversed the finding of the Parole Board because its decision was "not supported by substantial credible evidence." *Williams v. New Jersey State Parole Bd.*, 336 N.J. Super. 1, 3 (App. Div. 2000). In 1996, the appellant was released on parole, but was arrested again seventeen months later for allegedly violating his parole by "fail[ing] to obtain approval for a change in his residence and employment and had failed to comply with the registration provisions of Megan's Law." *Id.* at 3-4. It was later shown that his move was subsequently approved by his parole officer and that he did register with police a few days past the deadline. *Id.* The appellant expressed remorse but stated that through his actions, "he moved from a placement situation with no money to an apartment with a job. He paid off his fines, got married on 08/30/97 (reason why he moved), complied with reporting directives under the auspice of ISSP and produced no positive urines." *Id.* The Parole Board subsequently denied parole a second time. *Id.* at 6.

Due to the dates of his actions, the Court in *Williams* applied the Parole Act of 1979 and not the amendments in 1997

that had recently been implemented. *See id.* at 7. The Court concluded that the appellant's parole denial was unsupported by evidence showing he was likely to commit another crime if released. The Court was unconvinced by medical reports used by the Parole Board in their decision, stating they are "entirely without foundation and [are] contradicted by the empirical evidence." *Id.* at 9. The court ordered the appellant to be immediately released on parole. *Id.* at 10.

The record in *Williams* that led this Court to order not remand but immediate release is comparable to the record here. The record shows that Mr. Stout, during his incarceration was charged with third degree possession of a controlled dangerous substance and sentenced to a concurrent sentence of five years, ending in 2000. Mr. Stout states that he has not used drugs since November 2000, and there is no contravening evidence despite the fact that prisoners are subject to random drug testing—. The conviction for drug use is the last documented infraction on Mr. Stout's record since he has been in prison, marking 19 years of infraction free behavior.

Mr. Stout has continued to show remorse for his actions and take responsibility for what he has done. This and the aforementioned factors would not appear to a reasonable person to be the actions and temperament of an individual who would commit a crime again if released. Similar to the Parole Board's

actions in *Williams*, the Parole Board here has not shown sufficient empirical evidence to support its decision. The Parole Act has failed to meet the requirement of the Parole Act of 1979 by not being able to show by a preponderance of the evidence that Mr. Stout is likely to commit a crime if released.

The requirement of the Parole Act of 1979 is that there must be a preponderance of the evidence, a showing that it is more likely than not, that Mr. Stout will commit a crime if released from prison. The Parole Board fails in meeting this requirement.

While the Parole Board is inferring that Mr. Stout is likely to commit a crime if released under the Parole Act of 1979, Mr. Stout has actually gone to great lengths since November 2000 to prepare himself for parole and show that he is ready to re-enter society as a law-abiding citizen. The Parole Board did not acknowledge Mr. Stout's completion of a cosmetology certificate, a forklift license, a degrease license, 3,000 hours of warehousing, performance of dental lab work, and additional certificates in carpentry, building trades, and electronics. Additionally, Mr. Stout has participated drug treatment programs that have addressed his prior drug addiction and plans to continue such programs once released. The Parole Board apparently did not find probative the fact that Mr. Stout has a daughter and other family members eager to provide support

during his reentry process. The Parole Board members themselves have recommended he "continue doing what he is doing," but continuously deny him parole. Mr. Stout may rightly ask what more he can do, to which the Board has provided no answer.

IV. THE PAROLE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ESTABLISHING A FUTURE ELIGIBILITY TERM INCONSISTENT WITH ITS OWN REGULATIONS. (NOT RAISED BELOW)

The Parole Board has a long history of applying lengthy and unjustified Future Eligibility Terms ("FET") to Mr. Stout. In 2010, the Parole Board attempted to give Mr. Stout a 180-month FET, which the Court found to be excessive. The Parole Board attempted to give Mr. Stout a 180-month FET again in 2012, which was again found abusive by the Court. They then tried to apply a 120-month FET to Mr. Stout, which was reduced to a 36-month FET by the Court.

N.J.A.C. § 10A:71-3.21 governs the schedule of future parole eligibility dates for prisoners by the Parole Board. It provides that "a prison inmate serving a sentence for murder, manslaughter, aggravated sexual assault or kidnapping or serving any minimum-maximum or specific sentence in excess of 14 years for a crime not otherwise assigned pursuant to this section shall serve 27 additional months." N.J.A.C. § 10A:71-3.21(a).

Here, the Parole Board deviated from the presumptive FET of 27 months by establishing an FET of 36 months. Mr. Stout is aware of the provisions of N.J.A.C. § 10A:71-3.21 which

provides: "The future parole eligibility dates required pursuant to (a) and (b) above may be increased or decreased by up to nine months when, in the opinion of the Board panel, the severity of the crime for which the inmate was denied parole and the prior criminal record or other characteristics of the inmate warrant such adjustment." But the increased FET imposed in this case suffers from much the same defect as the other aspects of the Parole Board's decision-making process: failure to articulate in any meaningful or reviewable way the basis and reasons for the discretionary departure from the presumed norm.

While Mr. Stout's crime was undoubtedly serious, it was for that very reason that he is subject to the presumptive 27 month FET in the first place pursuant to N.J.A.C. § 10A:71-3.21(a). Thus, there must have been an additional aggravating factor. While the nine month extension of the FET is not as outlandish as the 180 month FETs that the Board originally attempted to impose upon Mr. Stout, the principle of administrative law remains the same. At a minimum, this Court should give clear direction to the Board that its decisions must be undergirded by reasons *and* reasoning, so that the judiciary may, when necessary, perform its constitutional function of engaging in appropriate review.

CONCLUSION

"No matter how great the pressure, agencies of government cannot ignore the law in special cases." *Trantino v. N.J. State Parole Bd.*, 166 N.J. 113, 197 (2001). Because there is "no longer a substantial likelihood that he would commit another offense," *id.* at 190, the time has come to faithfully execute the provisions of the Parole Act in Mr. Stout's case. Such faithful execution requires his release. For the foregoing reasons, this Court should reverse the Parole Board's decision to deny parole to Mr. Stout.

January 27, 2020.
(revised February 13, 2020)

Respectfully submitted,

JEANNE LOCICERO
TESS BORDEN
American Civil Liberties
Union of New Jersey
Foundation
89 Market St.
Newark, NJ 07102
973-642-2086

Of Counsel and on the Brief

RONALD K. CHEN, NJ Atty No. 02719-1983
Rutgers Constitutional Rights Clinic
Center for Law & Justice
123 Washington St.
Newark, New Jersey 07102
973-353-5378
ronchen@law.rutgers.edu

Attorney for Appellant Kevin Stout

* Counsel is grateful to Amrit Singh and Victoria Manuel, law students in the Rutgers Constitutional Rights Clinic, for their assistance in the preparation of this brief.