SUPREME COURT OF NEW JERSEY
DOCKET NO. 083980
APP. DIV. DOCKET NO. A-5645-16T2

SUNDIATA ACOLI,	:	CIVIL ACTION
Plaintiff-Appellant,	:	On Appeal from a Judgment of the Superior
v.	:	Court of New Jersey, Appellate Division
NEW JERSEY STATE PAROLE BOARD,	:	
	:	Sat Below: Hon. Douglas M. Fasciale, P.J.A.D.
Defendant-Respondent.	:	Hon. Garry S. Rothstadt, J.A.D. Hon. Scott J. Moynihan, J.A.D.

BRIEF AND APPENDIX ON BEHALF OF AMICUS CURIAE OFFICE OF THE PUBLIC DEFENDER

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DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Two decades ago, this Court reversed the Board's denial of parole to Thomas Trantino, who was convicted of the brutal murder of two police officers. Although his release may have caused public outcry due to the nature of the crime, the Court found that release was required because the Board failed to demonstrate by a preponderance of evidence that Trantino was substantially likely to commit a crime if released. The Court stressed, "If ever courts permit agencies of government to create exceptions to the rule of law, applying it for the many but exempting the disfavored, we will have irreparably damaged the foundation of our democracy." In this case, the Board's decision to deny parole to Sundiata Acoli threatens this foundational principle. Now 84 years old, in failing health and a COVID survivor, having been incarcerated for nearly five decades with an exemplary institutional record, Mr. Acoli is respectfully requesting that the Court remain faithful to the rule of law and order his parole.

The parole decision in Acoli's case is governed by the Parole Act of 1979, which commands that the inmate "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." The 1979 Parole Act was a

dramatic departure from the highly subjective, discretionary appraisals under the Parole Act of 1948, under which the inmate had the burden to prove that if released he would "assume his proper and rightful place in society." Despite the well-established presumption of release in the Act, the Board failed to apply that standard. Instead, the Board erroneously applied a subjective "highly discretionary" standard, shifting the burden to Acoli to prove that he was sufficient rehabilitated.

Although this Court has emphasized the need to defer to the expertise of the Board, the Board has forfeited all claims to deference in this case. As in Trantino's case, it has repeatedly failed to adhere to the legislative standard mandating an objective appraisal of Mr. Acoli's risk of recidivism. Mr. Acoli must receive constitutionally guaranteed due process, and the Board must be faithful to the legislative standard of the 1979 Act.

Because the Board repeatedly failed to follow the law in Acoli's case, the Office of the Public Defender urges this Court to reverse and order that Acoli be paroled. Additionally, as this case demonstrates, there is a need for this Court to forcefully reaffirm the correct standard of review for parole decisions under the 1979 Act.

STATEMENT OF INTEREST IN THE CASE

Founded on July 1, 1967, the Office of the Public Defender (OPD) was the first centralized state-wide public defender system in the United States, created following the landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963). OPD was created "to provide for the legal representation of any indigent defendant who is formally charged with the commission of an indictable offense." N.J.S.A. 2A:158A-5; L. 1967, c. 43. OPD represents the vast majority of criminal defendants in our courts and previously represented the vast majority of incarcerated defendants whose parole determinations are governed by the Parole Act of 1979. In its criminal-defense function, the OPD not only provides legal counsel at the Superior Court trial level in the State's 21 counties, but also handles appeals, post-conviction relief proceedings, and other significant ancillary legal proceedings.

This case presents an issue of statewide importance relating to the appropriate application of the standard set by the Legislature in the Parole Act of 1979 for parole determinations. The Court's opinion in this case will directly impact many OPD clients, especially those serving pre-NERA life sentences, who, despite the presumption of release, are typically denied parole. Further, over ninety percent of incarcerated persons who appear before the Parole Board are pro

se and over ninety percent of those who file direct plenary appeals are also pro se.

Within the past few years, the OPD has begun a Parole Project representing a select limited number of clients in: (1) submitting mitigation letters for initial parole hearings; and (2) filing direct appeals of parole denials to the Appellate Division for defendants serving pre-NERA life sentences. The OPD and our Parole Project believe we will provide added value and an important perspective to assist the Court in reaching its decision.

The role of an amicus curiae is to "assist in the resolution of an issue of public importance," R. 1:13-9, "[by] provid[ing] the court with information pertaining to matters of law about which the court may be in doubt," Keenan v. Bd. Of Chosen Freeholders, 106 N.J. Super. 312, 316 (App. Div. 1969), or by advising the court "of certain facts or circumstances relating to a matter pending for determination." Case v. Male, 63 N.J. Super. 255, 258 (Essex Co. Ct. 1960). The participation of amicus curiae is particularly appropriate in cases with "broad implications," Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 17 (1976), or of "general public interest." Case, 63 N.J. Super. at 259. This case presents issues of great public importance because the 1979 Act commands that inmates who do not present a substantial risk of committing

new crimes must be released; inmates who no longer present a risk to society should not be forever warehoused in our state prison system.

LEGAL ARGUMENT[1]

POINT I

BECAUSE THE PAROLE BOARD HAS REPEATEDLY FAILED TO CORRECTLY APPLY THE OBJECTIVE STANDARD OF THE 1979 PAROLE ACT IN REVIEWING ACOLI'S CASE, THIS COURT MUST REVERSE THE BOARD'S DENIAL AND ORDER THAT ACOLI BE PAROLED.

While courts give deference to agency decisions, a reviewing court must reverse a final agency action if "it is arbitrary, capricious, or unreasonable." Matter of Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020) (citation omitted); see also In re Application of Hawley, 98 N.J. 108, 112 (1984) (citing N.J. Const. art. VI, § 5, ¶ 4; R. 2:2-3(a)(2)). This Court has held that judicial review of the Board's denial of parole consists of three inquiries: "(1) whether the agency's action violates express or implied legislative policies, i.e., did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a

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[1] The following abbreviations will be used:

1T – Mar. 4, 2010 (Panel Hearing)

2T – June 8, 2016 (Full Board Hearing)

OPDa – Appendix of Amicus Curiae Office of the Public Defender

Appellant's Appendix will be cited using the page number of the appendix followed by a lowercase "a" (for example, "100a") as Appellant's attorney numbered the pages of his appendix in this manner rather than using a unique letter prefix.

conclusion that could not reasonably have been made on a showing of the relevant factors." Trantino v. N.J. State Parole Bd. (Trantino IV), 154 N.J. 19, 24 (1998) (citing Brady v. Department of Personnel, 149 N.J. 244, 256 (1997)). The Board's decision denying Acoli parole fails all three of these inquiries.

Because Acoli was sentenced prior to the 1997 amendments to the parole statute, the Parole Act of 1979 governs the Parole Board's decision in his case. Acoli v. N.J. State Parole Bd. (Acoli III), 462 N.J. Super. 39, 52 (App. Div. 2019). The 1979 Act "states that '[a]n adult inmate shall be released on parole at the time of parole eligibility, unless [it is demonstrated] . . . by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the Laws of this State if released.'" In re Application of Trantino (Trantino II), 89 N.J. 347, 355 (1982) (quoting N.J.S.A. 30:4-123.53(a) (1979)). Because the statute creates a presumption that the inmate "shall be released" unless a contrary finding is made, this Court held that the statute created a liberty interest protected by the Due Process Clause:

> the Legislature recognized that under the Parole Act of 1979 a parole eligibility date creates a legitimate expectation of release . . . absent findings that justification for deferral exists. Based upon this interpretation of our statute, we find that a federally-protected liberty interest exists.

> [N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 207 (1983).]

Thus, an inmate who is eligible for parole has "a constitutionally protected right to parole unless the State could prove that there was a 'substantial likelihood' that he would commit another crime." Trantino v. N.J. State Parole Bd. (Trantino VI), 166 N.J. 113, 197 (2001) . When the Board denies parole without meeting the "substantial likelihood" standard or without applying the correct standard, the Board not only violates the statute, but also violates the due process protections of the Fourteenth Amendment to the United States Constitution and Article 1, Paragraph 1 of the New Jersey Constitution. Such was the case here.

As set forth in Part A, the Board did not apply the correct legal standard under the 1979 Parole Act. Rather than confining its decision "solely to whether there is a substantial likelihood of repetition of criminal behavior," the Board shifted the burden to Acoli to establish his rehabilitation and applied the repealed "highly individualized discretionary appraisal standard" of the 1948 Act. As set forth in Part B, the Board's denial was arbitrary and capricious because it failed to consider or afford appropriate weight to factors the Board's own reports have shown to be statistically related to likelihood of reoffending, including Acoli's advanced age, his lack of prior

prison terms; the length of Acoli's sentence; Acoli's LSI-R score; and that Acoli's conviction is for a violent offense. Instead the Board based its decision on factors that it failed to demonstrate have any relation to the likelihood of reoffending -- "lack of insight" and "denial of offense." Because the Board both applied the wrong legal standard and "clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors," its decision denying Acoli parole must be reversed.

A. Because the Board Did Not Correctly Apply The Objective Standard Of The 1979 Parole Act Requiring It To Parole Acoli Unless It Demonstrated By A Preponderance Of The Evidence That Acoli Was Substantially Likely To Commit A Crime If Released, The Board's Decision Must Be Reversed.

The first inquiry in assessing the validity of the Parole Board's denial of parole -- whether the agency followed the law -- requires assessing "whether the Parole Board applied the correct standard governing parole." Trantino IV, 154 N.J. at 24, 27. In this case, the single legislative standard for parole determinations is "whether there is a substantial likelihood of future criminal activity if the prisoner is released. That standard for parole release is legislatively mandated, and it is the judiciary's obligation to adhere to express legislative enactments and to effectuate legislative intent." Id. at 43. To determine whether the Board applied the correct standard, the

Court must "examine the reasons and grounds for the Parole Board's several decisions and ultimate determination." Id. at 27. Here, it is clear that the Board did not "focus[] sufficiently on the likelihood that [Acoli] will commit crimes if released, but instead focused on the achievement of complete rehabilitation" and applied a subjective, discretionary review of Acoli's case for parole Id. at 38. Accordingly, the Board's decision fails the first inquiry of judicial review and must be reversed.

1. The Parole Act of 1979 replaced the subjective, discretionary standard of the 1948 Parole Act with an objective standard based solely on the risk of recidivism, created a presumption of parole, and shifted the burden to the Board to prove a substantial likelihood of recidivism in order to deny parole.

The 1979 Act "effected a radical change in the parole system" from the previous statutory standard that had existed under the Parole Act of 1948. Trantino II, 89 N.J. at 355 (1982). Under the Parole Act of 1948, before granting parole, the Board had to make an affirmative finding in favor of the inmate -- specifically, the Board "was required to find 'that there is 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.'" Trantino IV, 154 N.J. at 26 (quoting N.J.S.A. 30:4-123.14, repealed by L. 1979,

c. 441, § 27)). The Board was required to assess "whether the inmate had served enough time in prison and been sufficiently punished in terms of both society's need for adequate punishment and the inmate's individual progress toward rehabilitation." Byrne, 93 N.J. at 204. The 1948 Act placed the burden on the inmate to "prove his fitness to be released in order to be granted parole." S. Law, Pub. Safety & Def. Comm. Statement to A. 3093 2 (Dec. 10, 1979). (OPDa50)

Because the assessment of whether a prisoner can "assume his proper and rightful place in society" and of the compatibility of his release with the "welfare of society" are highly subjective -- and because the Parole Board was required to make an affirmative finding of the inmate's "fitness" for parole in order to grant parole -- this Court has described the Board's determinations under the 1948 Act as "highly predictive and individualized discretionary appraisals." Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973); see also Byrne, 93 N.J. at 204 (describing parole determinations under the 1948 Act as "intensely discretionary").

In contrast to the 1948 Act, the Parole Act of 1979 set forth "a much narrower standard" for parole decisions. Trantino II, 89 N.J. at 355. Specifically, "'[a]n adult inmate shall be released on parole at the time of parole eligibility, unless [it is demonstrated] . . . by a preponderance of the evidence that

there is a substantial likelihood that the inmate will commit a crime under the Laws of this State if released.'" Ibid. (emphasis added) (alteration in original) (quoting N.J.S.A. 30:4-123.53(a) (1979), amended by L. 1997, c. 214). The parole standard of the 1979 Act "sharply contrast[s] with the previous scheme" in several ways. Byrne, 93 N.J. at 204.

> This bill repeals the existing parole statutes, procedures and authorities and replaces them with an omnibus parole statute. The goal of the bill is to make the parole process more consistent, predictable. objective and efficient.
>
> . . . .
>
> The bill also modifies the burden of proof as to parole release. Having attained his parole eligibility date, the existing law requires the inmate to prove he is fit to be released. This bill would require the authorities to show that the inmate is likely to commit a crime if he is released on parole. This shift accords with the existing practicalities of parole procedure, complements the generally longer sentences of the new Criminal Code, and renders the process more objective and consistent. . . . Placing the burden of proof on the authorities also accords with existing practicalities: it is impossible for a man to prove he will not do something'; in practice, the authorities have to present evidence to show he is likely to do something. This shift also renders the decision-making process more objective, cutting down the wide discretion that paroling authorities have under current law, and making the more closely subject to statutory prescriptions.
>
> [A. Jud., Law, Pub. Safety & Def. Comm. Statement to A. 3093 1-2 (Dec. 3, 1979)) (emphasis added). (OPDa41-42)]

Accordingly, the 1979 Act drastically altered the parole standard from that of the 1948 Act: (1) it "effectively establishe[d] a presumption in favor of parole, Trantino II, 89 N.J. at 356; (2) it narrowed the standard for parole decisions so that "the individual's likelihood of recidivism [was] the sole standard," Id. at 372; (3) it "shift[ed] the burden to the State to prove that the prisoner is a recidivist and should not be released." Byrne, 93 N.J. at 205; and it thereby (4) made "the parole process more consistent, predictable, objective and efficient," Trantino II, 89 N.J. at 360, and "reduced the discretion involved in parole decision." Byrne, 93 N.J. at 205 (emphasis added).

Although the Legislature spoke with great clarity regarding these departures from the 1948 standard, both this Court and the Appellate Division have continued to quote the prior decision in Beckworth, characterizing parole decisions under the 1948 Act as "highly predictive and individualized discretionary appraisals." Beckworth, 62 N.J. at 359. See, e.g., Acoli v. N.J. State Parole Bd. (Acoli II), 224 N.J. 213, 222 (2016) ; Trantino VI, 166 N.J. at 173; Acoli III, 462 N.J. Super. at 51. However, while decisions under the 1948 Act were indeed highly discretionary, the explicit goal of the 1979 Act, in centering parole decision around a single, objective standard of the risk of recidivism, was to "reduce[] the discretion involved in parole decision."

Byrne, 93 N.J. at 205 (emphasis added). As explained in the Assembly Committee statement, shifting the burden of proof to the Parole Board "to show that the inmate is likely to commit a crime if he is released on parole . . . . renders the decision-making process more objective, cutting down the wide discretion that paroling authorities have under [the 1948 Act]." A. Jud., Law, Pub. Safety & Def. Comm. Statement to A. 3093 2. (OPDa42) Accordingly, Beckworth's characterization of parole decisions under the 1948 Act is entirely inapplicable to decisions under the 1979 Act. In order to give the clearest guidance to the Board for how it must apply the 1979 Parole Act standard, the Court should clarify that Beckworth does not describe the standard for decisions under the 1979 Parole Act.

For the same reasons, the Court should clarify that the U.S. Supreme Court's decision in Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1 (1979), does not describe the parole standard of the 1979 Act. The Court in Greenholtz characterized a parole decision as a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done," 442 U.S. at 10. This characterization has been quoted by this Court, Acoli II, 224 N.J. at 222, and the Appellate Division, Acoli III, 462 N.J. Super. at 51, as if described parole determinations under the 1979 Act. Greenholtz also

described parole decisions as dependent on some elements that are "purely subjective appraisals by the Board members . . . evaluating the advisability of parole release," 442 U.S. at 10, which was quoted by this Court in Hawley, 98 N.J. at 121. Curiously, only the dissent in Trantino VI quoted Greenholtz to describe the parole decision as a "discretionary assessment of a multiplicity of imponderables" "fraught with subjectivity," 166 N.J. at 201 (Baime, J.A.D., dissenting), but this Court elevated this language to the majority in Acoli II. 224 N.J. at 222. However, just as with Beckworth, Greenholtz simply does not at all accurately describe that parole standard of the 1979 Act.

Greenholtz's characterization of parole decisions was based on its interpretation of Nebraska's parole statute. 442 U.S. at 11. Similar to New Jersey's Parole Act of 1948, the Nebraska statute allowed for the denial of parole if the Nebraska Board of Parole found that one of several subjective factors existed:

> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

[Greenholtz, 442 U.S. at 11 (quoting Neb. Rev. Stat. § 83-1,114 (1) (1976))].

The consideration of subjective factors like whether an inmate's release would "depreciate the seriousness of his crime" or whether continued incarceration would "enhance" the inmate's capacity to lead a law-abiding life at a later date rendered the Nebraska Board's decisions discretionary, involving appraisals of "imponderables" to determine "what a man is and what he may become." Id. at 10. The Court noted that for the parole-release decision, "there is no set of facts which, if shown, mandate a decision favorable to the individual." Id. at 10 (emphasis added).

Unlike the Nebraska statute, there is a set of facts mandating a decision in favor of the inmate under the New Jersey Parole Act of 1979 -- namely, any set of facts that fails to demonstrate by a preponderance of the evidence that the inmate is substantially likely to commit a crime if released. N.J.S.A. 30:4-123.53(a) (1979). The Legislature explicitly departed from the "purely subjective appraisals" of the 1948 Act in favor of a single, objective standard. See Trantino II, 89 N.J. at 355-56, 360. Thus, decisions under the 1979 Act are not highly individualized or discretionary as were decisions under the 1948 Act or the Nebraska statute. No longer is the Board charged with appraising a "multiplicity of imponderables, entailing primarily

what a man is and what he may become." Greenholtz, 442 U.S. at 10. "No longer [i]s the Parole Board required to assess whether the inmate had achieved such a high level of rehabilitation that he was fit to assume a responsible role in society that was compatible with the public welfare." Trantino IV, 154 N.J. at 27. While an assessment of whether there is a preponderance of the evidence that the individual inmate is substantially likely to commit a crime if released is an "individualized" assessment in the sense that it is an assessment of that individual's likelihood of reoffending, it is entirely distinct from the 1948 Act's "highly individualized" assessment of whether the inmate is "fit to be released."

To be clear, the validity of the decisions in Greenholtz and Beckworth are not at issue here. But it is imperative to note that the standards for parole in the statutes each of these cases analyzed differ drastically from the standard set forth in the 1979 Act. To ensure that the Board and our Courts remain true to the standard intended by the Legislature in the 1979 Act, this Court should make clear (1) that these quotes from Greenholtz and Beckworth do not accurately characterize the 1979 Act's standard and (2) that under the 1979 Act the sole question before the Board is an objective assessment of whether there is a substantial likelihood that the inmate will recidivate, not a

subjective, discretionary assessment of whether the inmate is fit to be released into society.

2. Instead of applying the objective standard "confined solely to whether there is a substantial likelihood for a repetition of criminal behavior," the Board erroneously shifted the burden of proof to Acoli to prove he was sufficiently rehabilitated to the Board's subjective satisfaction.

Despite the clarity with which the Legislature spoke in enacting the parole standard of the 1979 Act, the Board failed to apply the correct standard and instead reviewed Acoli in a manner much more closely resembling the repealed standard of the 1948 Act.

First, the Board wrote that it conducted the testimonial hearing with Acoli "to determine [his] suitability for parole release and assess whether there is a substantial likelihood that [he] would commit a new criminal offense if released on parole." (279a) The Board's use of the conjunctive "and" indicates the Board's belief that these inquiries were not one and the same -- that the Board must consider Acoli's "suitability" for parole release in addition to whether there was a substantial likelihood that he would commit a crime if released. However, under the 1979 Act's standard, there is no question of "suitability for parole" separate and apart from the question of likelihood of reoffending. Additionally, characterized its task of determining Acoli's "suitability for

parole release" as a "highly individualized discretionary appraisal." (297a) Thus, at the outset, the Board framed its decision under the 1948 Act's discretionary standard instead of the objective, risk-based standard of the 1979 Act.

Further evidence that the Board failed to adhere to the standard of the 1979 Act is the Board's failure to conclude that there was a substantial likelihood that Acoli would commit a crime. In its 2016 decision, the Board wrote that it "assessed whether . . . [Acoli has] the ability to recognize and appropriately process factors that could affect [him] to behave in an unacceptable manner," and then concluded, "Based upon the answers you provided at the hearing, the Board finds that concerns remain that you would commit a crime if released on parole." (298a-299a) At other times, the Board wrote that Acoli does not "recognize what changes [he] need[s] to make to ensure a crime free lifestyle," (301a) Nowhere in its December 2016 Decision did the Board affirmatively conclude that there was a substantial likelihood that Acoli would commit another offense.

The Board's statements convey its belief that it had to deny parole unless it could ensure there was no possibility that Acoli would commit a crime in the future, instead of recognizing that it must release Acoli unless a preponderance of the evidence demonstrated a substantial likelihood that Acoli would reoffend. But even if the likelihood that a particular person

will commit a crime at some point in the future is below the "substantial likelihood" threshold, there is always some possibility that any person might commit a crime in the future. The Board's mandate is not to deny parole unless it can "ensure" -- as in guarantee with certainty -- that the inmate will be "crime free" in the future. (301a) The Board's mandate is to grant parole unless there is a substantial likelihood that the inmate will commit another crime.

While it does not appear that any case has clearly defined the "substantial likelihood" standard, in other contexts the phrase "substantial likelihood" has been equated to "more likely than not," State v. Osorio, 402 N.J. Super. 93, 102 (App. Div. 2008), and distinguished from a mere "possibility." State v. Norman, 151 N.J. 5, 33 (1997). The Appellate Division in N.J. State Parole Bd. v. Cestari: distinguished a "substantial likelihood" of committing another offense from a mere "potential" to commit another offense

> "[T]he potential to become involved in a violent incident does not mean that there is a "substantial likelihood" he will commit another crime. Indeed, it could be accurately said that nearly all violent offenders, and many persons who have never been convicted of violent offenses, have the "potential" to become involved in a violent incident. It is only when that "potential" rises to the level of a "substantial likelihood" that another crime will be committed that parole may be denied.

[224 N.J. Super. 534, 550, (App. Div. 1988).]

In one passage in Trantino V, the Appellate Division suggested that to meet the "substantial likelihood" standard the Board would have "to demonstrate [the inmate] would probably commit another crime now." Trantino v. N.J. State Parole Bd. (Trantino V), 331 N.J. Super. 577, 617 (App. Div. 2000) (emphasis added), aff'd, 166 N.J. 113 (2001). Accordingly, expressing concerns about the possibility of future criminal activity simply fails to meet the "substantial likelihood" standard.

Likewise, the Board may not deny parole if it is merely concerned that "factors" could affect the inmate "to behave in an unacceptable manner." (299a) The Board has to find that it is probable (not "possible") that the inmate will behave (not "could behave") in a manner that violates the criminal laws of New Jersey (not "in an unacceptable manner"). Accordingly, it is clear that the Board failed to apply or adhere to the "substantial likelihood" standard.

Instead of starting from the presumption that Acoli would be paroled unless there was a preponderance of the evidence that Acoli was substantially likely to commit a crime, the Board shifted the burden to Acoli to demonstrate he was "sufficiently rehabilitated" to the Board's subjective satisfaction. For example, the Board wrote the following statements:

- "Inmate cannot articulate how he has changed his anti-social thought patterns. Presents as continuing to believe his actions were justified. Has no understanding why he believed violence was necessary to affect social change, nor does he demonstrate understanding how his criminal thinking pattern has changed." (289a)

- "At these [annual parole] reviews your progress, or lack thereof, towards rehabilitation will be monitored. . . . If the Board panel determines at your annual review that you have made progress towards your rehabilitation, the Board panel may authorize a reduction in the future eligibility term." (302a)

- "You appear to be conflicted in your thinking and are unable to fully reconcile your behaviors and actions in the time leading up to the murder and the crime itself."

- "You present as being emotionless and lacking empathy and do not appear to realize the severity of your violent actions. (301a)

- The Board finds that although you . . . [have not] made positive strides in understanding your anti-social behavior." (301a)

- "More work needs to be done on your part to undergo a meaningful introspection into the internal and external factors that impelled your life choices." (301a)

- "The Board finds that you have made only made negligible progress into understanding why you chose to be a part of a violent militant organization nor do you recognize what changes you need to make to ensure a crime free lifestyle." (301a)

- "Mr. Acoli has demonstrated a lack of satisfactory progress in reducing future criminal behavior." (191a)

Even more than the Board's language framing its task as a "highly individualized discretionary appraisal," (297a), these quotes demonstrate that the Board applied a purely subjective, discretionary standard in evaluating Acoli for parole. The Board

saw its task as evaluating Acoli's "progress toward rehabilitation" and its metric for rehabilitation was evaluating whether Acoli demonstrated sufficient insight and introspection into his criminal behavior to the Board's subjective satisfaction.

As revealed through the above statements, the Board erroneously placed the burden on Acoli to articulate a self-reflective analysis to satisfy the Board that he was rehabilitated. But under the applicable standard of the 1979 Parole Act -- as opposed to the 1948 Act -- "the burden of proof as to an inmate's eligibility for parole [shifted] from the inmate to the Parole Board;" thus, Acoli did not have the burden "to prove his fitness to be released in order to be granted parole." Acoli III, 462 N.J. Super. at 69 (Rothstadt, J.A.D., dissenting) (quoting S. Law, Pub. Safety & Def. Comm. Statement to A. 3093 2 (Dec. 10, 1979)). Even the Appellate Division majority erroneously framed the Board's task as "deciding whether Acoli satisfied the criteria for parole release" rather than "deciding whether the basis for denying parole was met," placing the burden on Acoli to affirmatively establish fitness for parole rather than on the Board to establish grounds for denying parole. Acoli III, 462 N.J. Super at 51.

Moreover, "[r]ehabilitation is relevant under [the statutory] test only as it bears on the likelihood that the

inmate will not again resort to crime. It need not be total or full or real rehabilitation." Trantino IV, 154 N.J. at 31. Because the Board had demonstrated that it will continue to deny parole unless Acoli proves to the Board that he is sufficiently rehabilitated to their subjective satisfaction, the Board applied the wrong standard and erroneously shifted the burden of proof to Acoli. Cf. Malcolm v. N.J. Dep't of Corr., 2021 N.J. Super. Unpub. LEXIS 1356, *4, 2021 WL 2774849 (App. Div. July 2, 2021) (reversing the DOC's decision where the hearing officer "improperly shifted the burden of proof to appellant"). (OPDa56)

Because the only dispositive issue is whether the inmate is substantially likely to reoffend, the Board's focus on rehabilitation was erroneous for another reason. An inmate might be sufficiently deterred from committing another offense -- such that there is not a substantial likelihood of him reoffending -- without being rehabilitated. Imagine an inmate serving time for a conviction for manslaughter where the inmate contended at trial that he used force in self-defense, but the jury nevertheless found him guilty. The inmate might still believe his actions were justified as self-defense but credibly express to the Board that he has hated being deprived of his freedom such that he will never again take any action that could land him back in prison regardless of whether he feels it might be justified. The Board could not lawfully deny parole to such an

inmate who is sufficiently deterred by prison such that he is unlikely to commit another offense on the basis that the Board believes the inmate is "conflicted in his thinking" and "unable to fully reconcile his behaviors and actions" in committing manslaughter. If prison has sufficiently deterred the inmate from committing another offense, the Board could not find a substantial likelihood of reoffending regardless of whether it believed that the inmate was sufficiently rehabilitated.

In Acoli's case, the Parole Board "followed the more exacting and difficult test of full or complete rehabilitation, assessing not only whether he "will continue to lead a law-abiding life, but also [whether] he . . . will assume a responsible role in society consistent with the public welfare" rather than the correct test focusing exclusively on the likelihood of criminal recidivism." Trantino IV, 154 N.J. at 32. Notwithstanding the failure of the Board to apply the correct standard in its 2016 decision and its failure to affirmatively find that there was substantial likelihood that Acoli would reoffend, the Board falsely claimed in its 2017 Final Agency Decision -- rendered in response to Acoli's administrative appeal -- that it had made such a finding. (191a; 193a) The Final Agency Decision essentially defended and regurgitated the 2016 merits decision, and so it is the 2016 Decision that must be reviewed to discern the standard applied by the Board. And as

noted, in the 2016 Decision, the [Board] failed to apply or strictly adhere to the "substantial likelihood" standard. Thus, its decision denying parole must be reversed.

B. The Board's Denial Was Arbitrary And Capricious Because It Failed To Consider Or Appropriately Weigh Factors The Board's Own Reports Have Shown To Be Statistically Correlated With a Lower Risk Of Reoffending, Instead Basing Its Decision On Factors That It Failed To Demonstrate Have Any Relation To The Likelihood of Reoffending.

"Since the statute creates a presumption of release on the parole eligibility date, the decision not to release must be regarded as arbitrary if it is not supported by a preponderance of evidence in the record." Kosmin v. N.J. State Parole Bd., 363 N.J. Super. 28, 42 (2003) (citing N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 547 (App. Div. 1998)). "Under this standard, the agency's decision will be set aside" if the reviewing court finds "'the lack of inherently credible supporting evidence, the obvious overlooking or undervaluation of crucial evidence or a clearly unjust result.'" Cestari, 224 N.J. Super. at 547 (quoting 613 Corp. v. State of N.J., Div. of State Lottery, 210 N.J. Super. 485, 495 (App. Div. 1986)); see also Trantino VI, 166 N.J. at 192. An agency decision must also be set aside if "the decision 'was not premised upon a consideration of all relevant factors . . . [or conversely] a consideration of irrelevant or inappropriate factors.'" In re

Warren, 117 N.J. 295, 297 (1989) (alteration in original) (quoting State v. Bender, 80 N.J. 84, 93 (1979)).

Because "[t]he parole decision must be confined solely to whether there is a substantial likelihood for a repetition of criminal behavior," Trantino II, 89 N.J. at 369, the Board may consider only factors that have a material connection to the likelihood of recidivism. See Trantino VI, 166 N.J. at 180-82. This is because an agency, "whether through regulations or administrative actions, 'cannot alter the terms of a legislative enactment nor can they frustrate the policy embodied in [a] statute.'" Williams v. N.J. Dep't of Corr., 423 N.J. Super. 176, 183 (App. Div. 2011) (alteration in original) (quoting N.J. Ass'n of Realtors v. N.J. Dep't of Envtl. Prot., 367 N.J. Super. 154, 159-60 (App. Div. 2004)).

Additionally, because there is a presumption that the inmate will be paroled, and the Board has the burden of proof to overcome that presumption by establishing a substantial likelihood that the inmate will commit an offense if released, Byrne, 93 N.J. at 205, the Board has the burden to demonstrate that any factor it relies on to deny parole has a material connection to the inmate's likelihood of committing an offense if released. In Trantino VI, this Court found that, in denying Trantino parole, the Board erroneously relied on several assertions that had no relevance to the question whether

Trantino would be "substantially likely" to commit another crime if he were released on parole, including:

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

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

> No psychological, behavioral, or domestic abuse experts were interviewed by the Board to establish a connection between domestic abuse

> and recidivism. The Board did not rely on evidence of recidivism rates in relation to prior untreated domestic violence . . . . In short, no evidence in this record provides any support for the Parole Board's conclusion that Trantino's lack of counseling for domestic violence that he engaged in more than thirty-seven years ago demonstrates a substantial likelihood that he would commit another crime if released on parole.
>
> [Id. at 181-82.]

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

Additionally, the Board must consider and appropriately weigh all factors it knows to have a relation to likelihood of recidivism, not merely "evidence arbitrarily selected to support a desired result." Id. at 192. Because a central goal of the 1979 Parole Act was to transition from the subjective standard of the 1948 Act to an objective standard focused on the risk of recidivism alone, see Trantino II, 89 N.J. at 355-56, 360, the 1979 standard necessitates that the Board place the greatest weight on factors statistically shown to have an objectively demonstrable relationship to the risk of recidivism.

As set forth in Part 1, infra, the Board failed to either consider or appropriately weigh five factors in Acoli's favor that are correlated with a lower risk of recidivism as demonstrated by the Board's own reports. As set forth in Part 2, infra, the Board failed to sustain its burden of proof by failing to demonstrate the relevance of either the factors it relied on to deny parole -- "lack of insight" and "denial of offense" -- to Acoli's alleged risk of recidivism.

1. The Board failed to consider or adequately weigh Acoli's advanced age; that he had served no prior prison terms; the length of his sentence; his LSI-R score; and that his conviction is for a violent offense.

In 2009, the Legislature passed a law requiring the Parole Board to work with the Commissioner of Corrections and the Juvenile Justice Commission "to record and analyze the recidivism of all inmates and juveniles adjudicated delinquent who are released from a State correctional facility." N.J.S.A. 30:4-91.15(a), enacted by L. 2009, c. 329. The law also mandated that the data "be analyzed to determine whether the rates and nature of rearrests and convictions differ according to the criminal histories and personal characteristics of releasees." N.J.S.A. 30:4-91.15(b). Starting in 2012, the Board has published annual reports assessing recidivism data for cohorts of inmates released each calendar year, following them over a three-year period. See State of New Jersey Department of

Corrections, State Parole Board, Juvenile Justice Commission, Release Outcome 2007 through Release Outcome 2015, *available at* https://www.state.nj.us/corrections/pages/OffenderInformation.html. These reports reveal five factors present in Acoli's case that cut against the Board's finding of a substantial likelihood that Acoli will commit an offense if released: Acoli's age, length of time served, Level of Service-Revised (LSI-R) score, lack of any previous prison terms, and that his sentence is for violent offenses. Despite the Legislative mandate that the Board analyze recidivism data for such correlations and the Board's reports documenting these correlations, the Board failed to either consider or appropriately weigh any of these factors in Acoli's favor.

Since at least 2012, the Board has co-authored annual reports finding that the age of an offender at release has one of the most robust relationships with a decreased likelihood of reoffending. See, e.g., State of New Jersey Department of Corrections, State Parole Board, Juvenile Justice Commission, Release Outcome 2007: A Three-Year Follow-Up 15 ("Multivariate statistics indicated that age was inversely related to the odds of rearrest; for every one-year increase in age, the offender's odds of a new arrest decreased by a factor of .95."); State of New Jersey Department of Corrections, State Parole Board, Juvenile Justice Commission, Release Outcome 2008: A Three-Year

Follow-Up 16 (same); State of New Jersey Department of Corrections, State Parole Board, Juvenile Justice Commission, 2015 Release Cohort Outcome Report: A Three-Year Follow-Up 19 ("Each age group thereafter decreased in recidivism rates. These results follow the typical age-crime curve").

Acoli has repeatedly referenced the "age-crime" curve to the Board to no avail. During his 2010 interview with the two-member Board panel, when he was seventy-three years old, Acoli stated that "it's almost certain people my age don't commit crimes." (1T44) The panel's Notice of Decision failed to list Acoli's age as a mitigating factor. (239a) Nor did the full Board's single page or narrative Notices of Decision in 2016 -- when Acoli was seventy-nine years old -- mention Acoli's advanced age as a mitigating factor. (289a, 297a-302a) On administrative appeal to the full Board from the Board's 2016 parole denial, Acoli argued that the Board failed to afford appropriate weight to his "advanced age" in its decision. (311a) In its 2017 Notice of Final Agency Action, the Board responded to this argument by simply stating:

> The Board finds that the Board reviewed Mr. Acoli's entire record in rendering its decision. His age and [other factors] . . . are all matters of record, were noted in the pre-parole report, the parole case file, and/or the Case Assessment at the time of his-Initial Parole Hearing, and were considered by the Board.

[(192a)]

The Board's 2017 Final Agency Decision utterly failed to address the extraordinarily strong connection between age and likelihood of recidivism. Studies of the rate of criminal offending show that it is not constant over the life span of a person, but rather peaks early on and then "declines sharply with age." National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 143-45 (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014); see also David P. Farrington, Age and Crime, 7 Crime & Just. 189, 189 (1986). Of all variables studied, age has consistently proven to have one of the strongest correlations to criminal activity. Travis Hirschi & Michael R. Gottfredson, Age and the Explanation of Crime, 89 Am. J. Soc. 552 (1983). The correlation between age and the rate of criminal activity has been called the "age-crime relation," the "age-crime distribution," or the "age-crime curve." Id. at 556, 569; Farrington, Age and Crime, at 189 (1986).

While various studies have come to different conclusions as to the age at which the curve peaks as well as the rate of the decline across different criminal offenses, demographic groups, and time periods, there is one universally accepted conclusion about the age-crime curve -- crime decreases as age increases. Gary Sweeten, Alex R. Piquero, & Laurence Steinberg, Age and the

Explanation of Crime, Revisited, 42 J. Youth Adolescence 921, 921 (2013); Farrington, Age and Crime; T.E. Moffitt, "Life-Course-Persistent" and "Adolescence-Limited" Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674 (1993). Alex R. Piquero, David P. Farrington, & Alfred Blumstein, The Criminal Career Paradigm, 30 Crime & Jus. 359 (2003), Alex R. Piquero, David P. Farrington, & Alfred Blumstein, Key Issues in Criminal Careers Research: New Analysis from the Cambridge Study In Delinquent Development (2007). Accordingly, "offending rates of prison inmates . . . for the period immediately prior to their incarceration will tend to substantially overstate what their future offending rate will be, especially in their middle age and beyond." National Research Council, The Growth of Incarceration in the United States at 145.

The age-crime curve holds true when looking specifically at rates of recidivism. In other words, "recidivism rates decline markedly with age." Id. at 155. In a 2017 study, the United States Sentencing Commission found that defendants released at age twenty-one to twenty-four had a 66.6 percent rate of re-arrest, but that defendants released at age sixty-five or older had only a 13.4 percent rate of re-arrest. United States Sentencing Commission, The Effects of Aging on Recidivism Among Federal Offenders 23 (Dec. 2017). Furthermore, defendants

released at age sixty-five or older had only a 6.5 percent rate of incurring a new conviction and only a 4.1 percent rate of reincarceration. Ibid. Data tracking released New Jersey inmates also demonstrate a steady decline by age cohort in the percentage of released inmates who are convicted of a new offense. 2015 Release Cohort Outcome Report 19.

Given this robust relationship between advanced age and a significantly decreased likelihood of reoffending, merely stating that it had "considered" Acoli's age because it was a "matter of record" does not remotely satisfy the Board's obligation to consider and appropriately weigh all relevant evidence. The Board, like every other administrative agency, "must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached." Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985). However, "[i]t is not only the duty of the agency to find the necessary facts, but also to explain its reasoning." In re Hackensack Water Co., 249 N.J. Super. 164, 175 (1991) (emphasis added). Agencies "must set forth an 'analytical expression of the basis which, applied to the found facts, led to the holdings below.'" Smith v. E.T.L. Enterprises, 155 N.J.

Super. 343, 348 (App. Div. 1978) (quoting Benjamin Moore & Co. v. Newark, 133 N.J. Super. 427, 428 (App. Div. 1975)).

The Board merely stated it had considered Acoli's age (1) without setting forth any findings of fact regarding the relationship between age and recidivism, (2) without analyzing the weight the age-crime curve warranted in its determination of Acoli's likelihood of reoffending, (3) and without giving any explanation for why the factors it relied on to deny parole outweighed the robustness of the age-crime curve. The Board thus failed in its basic duty as an administrative agency. Moreover, given, the robustness of the age-crime curve and the corresponding weight that the Board should have given Acoli's advance age, the Board's failure to do so constituted an "obvious . . . undervaluation of crucial evidence," Cestari, 224 N.J. Super. at 547.

In addition to recognizing the correlation between age and a stark decline in recidivism, the Board's annual recidivism reports also set forth the following findings:

> - The presence of a prior state prison sentence was strongly correlated with the risk of recidivism. Depending on the year for which data was analyzed, inmates released from their first prison term were two times less likely to be rearrested than inmates who had served one additional prison term prior to that from which they were being released, and three or four times less likely to be rearrested than

inmates who had served at least two prior prison terms.[2]

- "the amount of time served was inversely related to the odds of rearrest; for every one month increase in time served, the offender's odds of a new arrest decreased by a factor of .99."[3]
- "violent offenders were rearrested proportionally less than other types of offenders."[4]
- LSI-R scores were correlated with the risk of recidivism:

Year	Average LSI-R Score for Recidivists	Average LSI-R Score for Non-Recidivists
2008[5]	25.9	23.4
2009[6]	26.68	23.89
2010[7]	23.02	20.38

Each of these factors weighs in Acoli's favor, supporting a conclusion that he is not substantially likely to reoffend, and yet the Board failed to consider or weigh any of them in Acoli's favor. Acoli did not serve any prior prison terms before his

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[2] See, e.g., Release Outcome 2007 at 14.

[3] See, e.g., id. at 15.

[4] See, e.g., id. at 15; Release Outcome 2008 at 19; Release Outcome 2009 at 17; Release Outcome 2010 at 16.

[5] Release Outcome 2008 at 17.

[6] Release Outcome 2009 at 17.

[7] Release Outcome 2010 at 17. In the 2017 report tracking the 2012 cohort, the writers indicated that the Department of Corrections had begun phasing out the LSI-R to adopt an alternative risk assessment and thus not enough members of the 2012 cohort had been assessed using the LSI-R to warrant inclusion in the data set. 2015 Release Cohort Outcome Report at 19.

present incarceration. (146a-147a) At the time of the Board's 2016 Final Decision, Acoli had served forty-two years in prison. (297a) Neither the June 8, 2016 one-page decision nor the December 22, 2016 decision mention these factors as weighing in Acoli's favor. (289a, 297a-302a) Although the offenses for which Acoli is incarcerated are violent offenses, the Board did not note that violent offenders are less likely to recidivate.

Finally, the Board erroneously considered Acoli's LSI-R score as one of the reasons for denying parole rather than as a mitigating factor. (289a) The LSI-R is the assessment the Board has chosen to meet its statutory obligation to conduct an "objective risk assessment" prior to each parole eligibility date. N.J.S.A. 30:4-123.52(e). The risk assessment is one of the few factors that the hearing officer is statutorily mandated to consider in deciding whether to recommend parole. N.J.S.A. 30:4-123.55(a)(2); see also N.J.A.C. 10A:71-3.11(b)(23) (listing "the results of the objective risk assessment instrument" as one of the twenty-four factors that the Board's regulation requires to be considered, the majority of which are not enumerated in any of the statutes governing parole). Upon adopting and implementing the LSI-R in 2004, the Board referred to the LSI-R as a "proven instrument for measuring the likelihood of recidivism." New Jersey State Parole Board, 2004 Annual Report 6 (2005). In a recent Notice of Action on Petition for Rulemaking,

the Board denied the petitioner's request to publish aggregate statistics on its LSIR scores to "promote transparency and public confidence in a fair and balanced application of the law of risk assessments," reasoning that "[t]he LSIR has been validated for New Jersey and is performed by trained professional staff." 52 N.J.R. 1030(a) (May 4, 2020).

Although Acoli's LSI-R score of 20 was lower than the average score for recidivists tracked by the Board between 2008 and 2010 -- and also lower than even the lowest average score for non-recidivists over the same period -- the Board considered Acoli's LSI-R score as one of the reasons for denying parole, rather than as a mitigating factor. (289a) Even setting aside the data from the Board's reports on recidivism, the Board gave no explanation for arbitrarily weighing Acoli's LSI-R score of 20 against him as a basis for denial despite the fact that a score of 20 indicates only a "moderate" risk of recidivism. (190a, 289a) LSI-R scores are categorized into four risk bands: low risk (0-16); moderate risk (17-23); medium risk (24-30); and high risk (>30). Michael Ostermann & Laura M. Salerno, The Validity of the Level of Service Inventory-Revised at the Intersection of Race and Gender, 96 Prison J. 554, 560 (2016). Given these risk bands, it defies reason that the Board found that Acoli's score in the "moderate" risk band was evidence that he was "substantially" likely to commit a new crime if released.

In evaluating the degree of risk, the term "substantial risk" is routinely used to designate a higher risk than "moderate risk." See, e.g., Athalia Christie et al, Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage, 70 Morbidity & Mortality Weekly Rep. 1044, 1045 (2021), *available at* https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7030e2-H.pdf (distinguishing between low, moderate, substantial, and high transmission levels of SARS-CoV-2). Thus, the Board "clearly erred in reaching a conclusion" -- that Acoli's "moderate risk" LSI-R score of 20 was evidence that there was a substantial likelihood he would reoffend -- "that could not reasonably have been made on a showing of the relevant" evidence. Trantino IV, 154 N.J. at 24.

Thus, in failing to weigh these five factors in favor of granting parole -- Acoli's advanced age; that he served no prior prison terms; the length of his sentence, his LSI-R score, and that his conviction is for a violent offense -- the Board overlooked and undervalued crucial evidence relevant to Acoli's risk of reoffending. Accordingly, the Board's decision must be reversed. Cestari, 224 N.J. Super. at 547.

2. The Board's denial was based entirely on "lack of insight" and "denial of offense," yet the Board failed to offer any evidence linking either factor to a substantial likelihood that Acoli would commit a crime if released.

In the Board's single page form "Notice of Decision" issued on June 8, 2016, the Board checked the box for "Insufficient problem(s) resolution, specifically: lack of insight into criminal behavior; denial of offense(s); minimizes conduct." (289a) In the five lines allowing for a narrative elaboration, the Board wrote:

> Inmate cannot articulate how he has changed his anti-social thought patterns, presents as continuing to believe his actions were justified. Has no understanding why he believed violence was necessary to affect social change, nor does he demonstrate understanding how his criminal thinking pattern has changed.
>
> [(289a)]

In its December 22, 2016, more fulsome "Notice of Decision," the Board summarized the core of its basis for denial.

> The Board finds that after 42 years of incarceration:
>
> Your presentation to the Board demonstrated no depth or insight that you understand your lifestyle and behavior choices you were making leading up to the murder. Regarding your present frame of mind, you state that you no longer advocate violence, but attached to this claim is the undeniable fact that you cannot provide any specific tangible examples or explanations of how you changed your behavioral choices as you claim. The Board finds that you have made only made negligible progress into understanding why you chose to

> be a part of a violent militant organization nor do you recognize what changes you need to make to ensure a crime free lifestyle[.]
>
> You appear to be conflicted in your thinking and are unable to fully reconcile your behaviors and actions in the time leading up to the murder and the crime itself. You repeatedly state that you take ownership and responsibility for the trooper's murder but there is a significant contradiction to those statements when you speak further. You present as being emotionless and lacking empathy and do not appear to realize the severity of your violent actions. The Board finds that although you adamantly believe that you have made positive strides in understanding your anti-social behavior, you have not. More work needs to be done on your part to undergo a meaningful introspection into the internal and external factors that impelled your life choices.
>
> [(301a)]

In its 2017 Notice of Final Agency Decision, the Board essentially repeated this language from the 2016 Decision and added, "Mr. Acoli does not demonstrate the insight necessary to be a viable candidate for parole release at the present time." (191a-192a)

While the Board's "Notice of Decision" form has a check box for "insufficient problem resolution" and three subcategories -- "lack of insight into criminal behavior," "denial of offense," and "minimizes conduct" -- none of these factors is enumerated in the Board's regulation setting forth the twenty-four factors to be considered at parole hearings. See N.J.A.C. 10A:71-3.11(b). While this regulation allows the board to

"consider any other factors deemed relevant," ibid., this requires, of course, that any other factor taken into consideration is relevant to the inmate's likelihood of committing another offense.

As set forth above, Trantino VI makes clear that (1) the Board may consider only those factors that have a demonstrable connection to whether an inmate is substantially likely to commit a crime if released and (2) the Board has the burden of proof to establish a connection between the factors it relies on and the risk of recidivism. 166 N.J. at 176-182. In at least one unpublished decision, the Appellate Division applied this reasoning specifically to the failure to admit guilt:

> If there is linkage between De La Roche's failure to admit full guilt and probable recidivism, it should be established through medical expertise. Although the substantial likelihood of recidivism is a fact question, it is a fact question that on occasion must be informed by expert evidence. The proposition that anyone who does not admit guilt must be a likely recidivist, is a non sequitur. It simply carries no force of logic in and of itself.
>
> [De La Roche v. N.J State Parole Bd., 2009 N.J. Super. Unpub. LEXIS 2879, *8, 2009 WL 4251634 (App. Div. Nov. 19, 2009). (OPDa59)]

In Acoli's case, the record is completely devoid of any evidence connecting "lack of insight into criminal behavior," "denial of offense," or "minimiz[ing] conduct" to a substantial likelihood of reoffending. Just as in Trantino, no psychological

or behavioral experts established a connection between these factors and recidivism. Nor did the Board cite evidence of recidivism rates for inmates who lack insight, deny the crime for which they were convicted, or minimize their conduct in the incident that led to their conviction. Therefore, the Board failed to demonstrate by a preponderance of the evidence that the alleged presence of these factors in Acoli's case established a substantial likelihood of recidivism.

Effectively, the Board's 2016 Decision started with the presumption that Acoli's prior membership in the Black Panther Party and Black Liberation Army along with his conviction for murdering Trooper Foerster rendered him likely to commit another offense -- even fifty year later -- unless he could sufficiently articulate to the Board's subjective satisfaction why he had believed violence was necessary and why he changed his views. As noted in Part A.2, this violated the presumption in favor of parole and erroneously shifted the burden of proof to Acoli. This aspect of the Board's decision-making process is especially troublesome in light of Acoli's age, trouble with his memory, and struggle to articulate a variety of answers throughout the hearing; there were at least eighteen moments throughout the hearing when Acoli stated he could not remember something. (2T14-22, 33-25 to 34-3, 37-2, 52-13 to 15, 53-3, 69-15, 103-5, 136-8, 148-5, 159-10, 230-19, 231-9, 232-11, 232-17, 232-14,

242-12, 245-4, 262-4) It is simply a fact that people vary widely in their ability to clearly and compellingly articulate their process of self-reflection and what they learned. The Board's opinion that there was "no depth" to Acoli's answers and that he could not "articulate any cognitive thoughts that would indicate [his] understanding of seeking resolution to an issue without resorting to criminal activity" is essentially an appraisal of how articulate Acoli is, rather than how likely Acoli is to commit another offense. (299a) As Acoli ages, it would not be surprising if his faculty for articulating thoughts declines even further. Simply put, articulateness is not and cannot be the metric to evaluate whether there is a substantial likelihood of recidivism.

C. The Court's Remedy Must Be To Order That Acoli Be Paroled.

In deciding to remand this case for a live testimonial hearing before the full Board in Acoli II, this Court repeatedly referenced the Board Member's "expertise" and "specialized knowledge." Acoli II, 224 N.J. at 222, 226, 229. The resulting hearing, rather than exhibiting the knowledge and expertise of the Board, was the "show hearing" that Justice Albin had feared:

> "[W]e cannot expect the Parole Board will change the view it expressed in a nine-page, single-spaced decision. Instead, we have the makings of a show hearing. Acoli will be given the opportunity to appear before the full Parole Board to repeat what he has said

> earlier and to be called lacking in credibility based on his in-person presentation."
>
> [Acoli II, 224 N.J. at 240 (Albin, J., dissenting).]

The Board knew Acoli's version of the events of May 2, 1973, as Acoli has been consistent in his account at every parole hearing. (216a-219a; 1T2 to 7, 15 to 18; 2T56 to 96) Despite the fact that it quickly became clear during the 2016 hearing that Acoli's account of that day had not changed, the Board nearly half the hearing (measured by transcript pages) grilling Acoli about the events of that day. (2T42 to 56, 60 to 96, 101 to 109, 112 to 116, 135 to 136, 151 to 163, 171 to 184, 189 to 193, 202 to 204, 206 to 214, 217, 252 to 254, to 258-259, 268, 270 to 272) Board Members repeatedly interrupted Acoli, dismissed his answers that departed from their image of Acoli as a violent terrorist, and sought to redirect the conversation to advance their agenda rather than allowing Acoli to fully explain his work and evolution in thinking over the course of his life leading up to 1973. The hearing transcript is utterly devoid of any display of the Board's supposed "expertise" in objectively evaluating the likelihood that Acoli would reoffend. Instead, the Members acted as armchair psychologists, giving their subjective opinions about how they felt about Acoli's answers, despite their lack of any clinical training.

Additionally, the reasons the Board gave for denying Acoli parole in 2016/2017 were identical to the reasons it gave for denying parole in 2011: that he "lacks insight into his criminal behavior, minimizes his conduct and denies key aspects to his ·commitment offenses." (170a, 190a) The Board has given every indication that it will continue to deny Acoli parole so long as he gives the same account of what happened on May 2, 1973 because it differs from the State's version of events. In 2014, reviewing the Board's 2011 denial of parole, the Appellate Division held that "the Board's findings that Acoli is likely to engage in criminal activity in the future if paroled is not supported by the record." Acoli v. N.J. State Parole Bd. (Acoli I), 2014 N.J. Super. Unpub. LEXIS 2340, *29 (App. Div. Sept. 29, 2014). Nothing has changed since then. The Board relied on the same factors to deny parole in 2016/17 that it did in 2011 despite its failure to present any evidence connecting "lack of insight" or "denial of offense" to Acoli's risk of recidivism. The Board failed to consider in Acoli's favor five factors that are correlated with a lower risk of recidivism as shown by the Board's own reports. And the Board continued to apply a subjective, discretionary standard rather than the objective, risk-based standard mandated by the 1979 Parole Act. The Board has now had two chances to get this right and has failed to do so. In the face of an agency refusing to comply with its

legislative mandate, justice requires that this Court intervene to order that the agency do so -- specifically by ordering that the Board parole Acoli.

CONCLUSION

Because the Board failed to correctly apply the legal standard of the 1979 Parole Act and because the record does not support a finding that Acoli presents a substantial likelihood of committing a new crime if released, this Court should reverse the Board's denial of parole and order that Acoli be paroled.

Moreover, the Court's opinion must make the standard of the 1979 Parole Act crystal clear: (1) the Board must start its analysis from the presumption that the inmate will be paroled, not from the perspective that the inmate must prove his rehabilitation in order to be paroled; (2) the sole question before the Board is an objective assessment of whether there is a substantial likelihood that the inmate will recidivate, not a subjective, discretionary assessment of whether the inmate is fit to be released into society; (3) a "substantial likelihood" of recidivism is more than the possibility or potential to recidivate -- it means that recidivism is probable; and (4) to sustain its burden in order to deny parole, the Board (a) may consider only those factors that are related to the risk of recidivism (b) has the burden to establish that that the factors on which it relies have a connection to the risk of recidivism; and (c) must place the greatest weight on factors statistically shown to have an objectively demonstrable relationship to the risk of recidivism.

Respectfully Submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

By: 

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DATED: September 10, 2021

30:4-123.45 to 30:4-123.68

LEGISLATIVE HISTORY CHECKLIST

("Parole Act of 1979")

NJSA 30:4-123.45 to 30:4-123.68; 30:4-1.1 et al

LAWS OF 1979 CHAPTER 441

Bill No. A3093

Sponsor(s) Jackman and Herman

Date Introduced January 25, 1979

Committee: Assembly Judiciary, Law, Public Safety and Defense

Senate Law, Public Safety and Defense

Amended during passage Yes XX

Date of Passage: Assembly Dec. 6, 1979

Senate Dec. 17, 1979

Date of approval February 21, 1980

Following statements are attached if available:

Sponsor statement		Yes	XX
Committee Statement:	Assembly	Yes	XX
	Senate	Yes	XX
Fiscal Note		XXX	No
Veto message		Yes	XX
Message on signing		Yes	XX

Following were printed.

Reports	Yes	XX
Hearings	Yes	XX

Public hearings, held by Assembly Judiciary Committee, on May 1 and May 2, 1979, were not transcribed. To listen to tapes, contact Hermine Kelty, 292-5526 or committee aide, Bert Weltman.

(over)

9/1/78
pf

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974.90 Public hearing addressing the issue of crime
c929 held 12-1-78, Trenton, 1978.
1978a (Covers topics proposed in act; e.g. "presu

Recommendations made in:

J364.62 N.J. Association on Correction.
C824a Report of the Special Study Commission on Parole Reform, February 12, 1975.

974.90 N.J. Correctional Master Plan Policy Council.
P959 New Jersey correctional master plan. March, 1977.
1977a Trenton, 1977.

See also: (attached)

974.901 N.J. Governor (Byrne, 1974-)
G52 5th annual message, 1-19-79.

Hearing on earlier proposed legislation:

974.90 N.J. Legislative Senate. Committee on Institutions.
P959 Health and Welfare.
1973e Public hearing on S.1122, held 6-21-73
Trenton, 1973.

CHAPTER 441 LAWS OF N. J. 1979
APPROVED 2-21-80 L.I.V.

[OFFICIAL COPY REPRINT]

ASSEMBLY, No. 3093

STATE OF NEW JERSEY

INTRODUCED JANUARY 25, 1979

By Assemblymen JACKMAN and HERMAN

Referred to Committee on Judiciary, Law, Public Safety and Defense

AN ACT concerning parole, establishing a consolidated State Parole Board, revising procedures for granting parole, amending P. L. 1971, c. 384*, *amending R. S. 30:4–148, supplementing P. L. 1972, c. 58** and repealing sections 30:4–106 *[and]* *,* 30:4–108 to 30:4–113*, *30:4–155 and 30:8–28** of the Revised Statutes and P. L. 1948, c. 84, P. L. 1950, c. 30 and P. L. 1952, c. 32.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. **a.* This act shall be known and may be cited as the "Parole Act of 1979."

**b. In this act, unless a different meaning is plainly required:*

(1) "Adult inmate" means any person sentenced as an adult to a term of incarceration.

(2) "Juvenile inmate" means any person under commitment by a juvenile court pursuant to subsection h. of section 2D of P. L. 1973, c. 306 (C. 2A:4–61(h)).

(3) "Parole release date" means that date certified by a member of the board for release of an inmate after a review of the inmate's case pursuant to sections 11, 13 or 14 of this act.

(4) "Primary parole eligibility date" means that date established for parole eligibility for adult inmates pursuant to section 7 or 20 of this act.

(5) "Public notice" shall consist of lists including names of all inmates being considered for parole, the county from which he was committed and the crime for which he was incarcerated. At least 30 days prior to parole consideration such lists shall be forwarded to the appropriate prosecutor's office, the sentencing court, the Office of the Attorney General, any other Criminal Justice agencies whose information and comment may be relevant, and news organizations.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

*(6) Removal for "cause" means such substantial cause as is plainly sufficient under the law and sound public policy touching upon qualifications appropriate to a member of the parole board or the administration of said board such that the public interest precludes the member's continuance in office. Such cause includes, but is not limited to, misconduct in office, incapacity, inefficiency and nonfeasance.**

2. a. *[This]* **Except as otherwise provided by this act, this** act shall apply to all persons now serving or hereafter sentenced or committed to State correctional facilities and to all persons now serving or hereafter sentenced to county jails, workhouses or penitentiaries.

b. In the case of persons now serving sentences or committed, the board hereinafter established may postpone for a reasonable period of time not to exceed 6 months from the effective date of this act the application of this act in order to permit an orderly conversion to the system hereinafter established.

3. a. There is hereby created and established within the Department of Corrections a State Parole Board which shall consist of a chairman and six associate members. The chairman and associate members shall be appointed by the Governor **with the advice and consent of the Senate** from qualified persons with training or experience in law, sociology, criminal justice, juvenile justice or related branches of the social sciences. Members of the board shall be appointed for terms of 6 years, but of the associate members first appointed, one shall be appointed for a term of 1 year, one for a term of 2 years, one for a term of 3 years, one for a term of 4 years, one for a term of 5 years and one for a term of 6 years. Member's terms shall commence on the effective date of this act and the terms of their successors shall be calculated from the expiration of the incumbent's term. Members shall serve until their successors are appointed and have qualified.

b. Any vacancy occurring in the membership of the board, otherwise than by expiration of term, shall be filled in the same manner as one occurring by expiration of term, but for the unexpired term only. In the event that any member of the board shall be rendered incapable of performing his duties, the Governor shall appoint a qualified person to act in his stead during the period of his incapacity. Any member of the board may be removed from office by the Governor for cause.

c. The members of the board shall devote their full time to the performance of their duties and be compensated pursuant to section 2 of P. L. 1974, c. 55.

d. At the time of appointment, the Governor shall designate two associate members of the board to serve on a panel on juvenile commitments. The remaining four associate members of the board shall be appointed by the Governor to panels on adult sentences. The chairman of the board shall assign two of the associate members so appointed to a panel on prison sentences and the remaining two associate members so appointed to a panel on young adult sentences. The chairman of the board shall be a member of each panel.

4. a. All policies and determinations of the Parole Board shall be made by the majority vote of *[a quorum of]* the members.

b. Except where otherwise noted, parole determinations on individual cases pursuant to this act shall be made by the majority vote of a quorum of the appropriate board panel established pursuant to this section.

[b.] *c.* The chairman of the board shall be the chief executive officer of the board and, after consulting with the board, shall be responsible for designating the time and place of all board meetings, for appointing the board's employees, for organizing, controlling and directing the work of the board and its employees, and for preparation and justification of the board's budget. The *non-secretarial* professional *and supervisory* employees of the board such as, but not limited to, hearing officers, shall serve at the pleasure of the chairman and shall not be subject to the provisions of Title 11 of the Revised Statutes. *Nothing contained herein shall be deemed to affect the employees of the Department of Corrections, such as parole officers assigned to supervise parolees.*

[c.] *d.* The board shall promulgate such reasonable rules and regulations, consistent with this act, as may be necessary for the proper discharge of its responsibilities. The chairman shall file such rules and regulations with the Secretary of State. The provisions of the "Administrative Procedure Act," P. L. 1968, c. 410 (C. 52:14B–1 et seq.) shall apply to the promulgation of rules and regulations concerning policy and administration, but not to other actions taken under this act*, such as parole hearings, parole revocation hearings and review of parole cases*. In determination of its rules and regulations concerning policy and administration, the board shall consult the Governor and the Commissioner of Corrections.

[d.] *e.* The board, in conjunction with the Department of Corrections, shall develop a uniform information system in order to closely monitor the parole process. *Such system shall include participation in the Uniform Parole Reports of the National Council on Crime and Delinquency.*

[e.] *f.* The board shall transmit a report of its work for the preceding fiscal year*, including information on the causes and extent of parole recidivism,* to the Governor *[and]* *,* the Legislature *and the Criminal Disposition Commission* annually.

[f.] *g.* The board shall give public notice prior to considering any adult inmate for release.

h. The board shall give notice to the appropriate prosecutor's office and to the committing court prior to the initial consideration of any juvenile inmate for release.

5. *[a. Two associate members of the board shall be appointed by the Governor to a panel on juvenile commitments. The remaining four associate members of the board shall be appointed by the Governor to panels on adult sentences. The chairman of the board shall assign two of the associate members so appointed to a panel on prison sentences and the remaining two associate members so appointed to a panel on young adult sentences. The chairman of the board shall be a member of each panel.

b. Except where otherwise noted, parole determinations on individual cases pursuant to this act shall be made by the majority vote of a quorum of the appropriate board panel established pursuant to this section.]*

[c.] *a.* The chairman of the board, after consulting with the board, shall assign any *[special]* case *not otherwise assigned, such as county jail, workhouse, or penitentiary cases,* to a board panel as necessary for the efficient functioning of the board.

[d.] *b.* Nothing contained in this act shall be deemed to preclude a member of any board panel from exercising all the functions, powers, and duties of a hearing officer upon designation by the chairman*; provided, however, that no member so designated shall participate in the disposition of a panel or board review of his initial decision*.

[e.] *c.* No hearing officer assigned to review adult cases shall be assigned to review juvenile cases pursuant to sections 13 and 19 of this act*, nor shall any hearing officer assigned to review juvenile cases be assigned to review adult cases*.

d. Representatives of the board or the chairman designated pursuant to this act may include employees of the board and employees of other agencies such as the Department of Corrections, provided that no employee of the Department of Corrections shall be so designated without the approval of the Commissioner of Corrections. Such representatives shall not participate in the disposition of parole cases.

6. a. The Department of Corrections shall provide such office facilities and clerical assistance as may be necessary to enable the board to perform properly its duties and to keep and maintain the records required herein.

b. The Department of Corrections, the chief executive officers and staffs of those facilities assigned to the Department of Corrections, the chief executive officers and staffs of the county jails, workhouses, and penitentiaries and the chief executive officers and staffs of those facilities assigned to the Department of Human Services where inmates or parolees are housed shall render full and complete cooperation to the board in the matter of furnishing the board all pertinent data and information relating to particular inmates. It shall also be the duty of the clerk of the court from which the inmate was committed, and of county probation officers and other officials, to forward to the board any commitment order, any presentence report, and the sentencing court's written reasons for any sentence imposed. The board shall in addition have the power to compel the appearance of witnesses and the production of documentary evidence relevant to any proceedings before it. Failure to respond to any subpena shall carry the penalty prescribed by law for failure to so respond in *[a county court]* *the Superior Court*.

7. a. Each adult inmate sentenced to a specific term of years at the State Prison or the correctional institution for women shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term, or one third of the sentence imposed where no mandatory minimum term has been imposed*[,]* less *[in each instance]* commutation time for good behavior pursuant to R. S. 30:4–140 and credits for diligent application to work and other institutional assignments pursuant to R. S. 30:4–92. **Consistent with the provisions of the New Jersey Code of Criminal Justice (N. J. S. 2C:11–3, 2C:14–6, 2C:43–6, 2C:43–7), commutation and work credits shall not in any way reduce any judicial or statutory mandatory minimum term and such credits accrued shall only be awarded subsequent to the expiration of the term.*

b. Each adult inmate sentenced to a term of life imprisonment shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term, or *[20]* *25* years where no mandatory minimum term has been imposed*[,]* less *[in each instance]* commutation time for good behavior and credits for diligent application to work and other institutional

assignments. If an inmate sentenced to a specific term or terms of years is eligible for parole on a date later than the date upon which he would be eligible if a life sentence had been imposed, then in such case the inmate shall be eligible for parole after having served *[20]* **25* years, less commutation time for good behavior and credits for diligent application to work and other institutional assignments. **Consistent with the provisions of the New Jersey Code of Criminal Justice (N. J. S. 2C:11–3, 2C:14–6, 2C:43–6, 2C:43–7), commutation and work credits shall not in any way reduce any judicial or statutory mandatory minimum term and such credits accrued shall only be awarded subsequent to the expiration of the term.*

c. Each inmate sentenced *[after September 1, 1979 for a term]* **to a specific term of years* pursuant to the "Controlled Dangerous Substances Act" P. L. 1970, c. 226 (C. 24:2101 through 45) shall become primarily eligible for parole after having served one third of the sentence imposed less commutation time for good behavior and credits for diligent application to work and other institutional assignments.

d. Each adult inmate sentenced to an indeterminate term of years as a young adult offender pursuant to N. J. S. 2C:43–5 shall become primarily eligible for parole consideration pursuant to a schedule of primary eligibility dates developed by the board, less adjustment for program participation. In no case shall the board schedule require that the primary parole eligibility date for a young adult offender be greater than primary parole eligibility date required pursuant to this section for the *[maximum specific]* **presumptive* term for the crime authorized pursuant to N. J. S. *[2C:43–6]* **2C:44–1(f)*.

e. Each adult inmate sentenced to the Adult Diagnostic and Treatment Center, Avenel, shall become primarily eligible for parole upon recommendation by the special classification review board pursuant to N. J. S. 2C:47–5*, *except that no such inmate shall become primarily eligible prior to the expiration of any mandatory or fixed minimum term imposed pursuant to N. J. S. 2C:14–6**.

f. Each juvenile inmate committed to an indeterminate term shall be immediately eligible for parole.

g. Each adult inmate of a county jail, workhouse or penitentiary shall become primarily eligible for parole upon service of a full 9 months of his aggregate sentence. No inmate sentenced to a specific term of years at the State Prison or the correctional in-

stitution for women shall become primarily eligible for parole until service of a full 9 months of his aggregate sentence.

h. When an inmate is sentenced to more than one term of imprisonment, the primary parole eligibility terms calculated pursuant to this section shall be aggregated by the board for the purpose of determining the primary parole eligibility date, except that no juvenile commitment shall be aggregated with any adult sentence. The board shall promulgate rules and regulations to govern aggregation under this subsection.

i. The primary eligibility date shall be computed by a designated representative of the board and made known to the inmate in writing not later than 90 days following the commencement of the sentence. **Each inmate shall be given the opportunity to acknowledge in writing the receipt of such computation. Failure or refusal by the inmate to acknowledge the receipt of such computation shall be recorded by the board but shall not constitute a violation of this subsection.***

j. *[Each]* **Except as provided in this subsection, each*** inmate sentenced *[for a fixed minimum and maximum term or a life term]* pursuant to **N. J. S. 2A:113–4 for a term of life imprisonment,** *[R. S.]* **N. J. S.*** 2A:164–17 **for a fixed minimum and maximum term*** or *[N. J. S. 2C:1–1]* **N. J. S. 2C:1–1(b)*** shall not be primarily eligible for parole on a date computed pursuant to this section, but shall be primarily eligible on a date computed pursuant to P. L. 1948, c. 84 (C. 30:4–123.1 et seq.)*, *which is continued in effect for this purpose. Inmates classified as second, third or fourth offenders pursuant to section 12 of P. L. 1948, c. 84 (C. 30:4–123.12) shall become primarily eligible for parole after serving one-third, one-half or two-thirds of the maximum sentence imposed, respectively, less in each instance commutation time for good behavior and credits for diligent application to work and other institutional assignments; provided, however, that if the prosecuting attorney or the sentencing court advises the board that the punitive aspects of the sentence imposed on such inmates will not have been fulfilled by the time of parole eligibility calculated pursuant to this subsection, then the inmate shall not become primarily eligible for parole until serving an additional period which shall be one half of the difference between the primary parole eligibility date calculated pursuant to this subsection and the parole eligibility date calculated pursuant to section 12 of P. L. 1948, c. 84 (C. 30:4–123.12). If the prosecuting attorney or the sentencing court advises the board that the punitive aspects of the sentence*

*have not been fulfilled, such advice need not be supported by reasons and will be deemed conclusive and final. Any such decision shall not be subject to judicial review except to the extent mandated by the New Jersey and United States Constitutions. The board shall, reasonably prior to considering any such case, advise the prosecuting attorney and the sentencing court of all information relevant to such inmates' parole eligibility**.

8. a. If the appropriate board panel determines that an adult inmate has seriously or persistently violated specifically defined institutional rules or has engaged in conduct indictable in nature while incarcerated, the inmate's parole eligibility date may be increased pursuant to a schedule developed by the board. In developing such schedule, particular emphasis shall be placed on the severity of the inmate's conduct. **The board shall deduct from the scheduled penalty any loss of commutation time imposed by the Department of Corrections pursuant to R. S. 30:4–140.**

b. If the appropriate board panel determines that an adult inmate has made exceptional progress, **as evidenced by documented participation and progress in institutional or community educational, training or other programs,** the inmate's parole eligibility date may be decreased, except that no parole eligibility date shall be set below the primary parole eligibility date without the consent of the sentencing court, which need not conduct a hearing ***and in no case shall a parole eligibility date be set below any judicial or statutory mandatory minimum term, incuding any parole eligibility date set pursuant to section 23 of this act**.

c. The appropriate board panel shall annually monitor the progress of each adult inmate and provide the inmate with a written statement of any changes in his parole eligibility.

9. a. An adult inmate shall be released on parole at the time of parole eligibility, unless information supplied in the report filed pursuant to section 10 of this act or developed or produced at a hearing held pursuant to section 11 of this act indicates ***by a preponderance of the evidence*** that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time. **In reaching such determination, the board panel or board shall state on the record the reasons therefor.**

b. A juvenile inmate shall be released on parole when it shall appear that the juvenile, if released, will not cause injury to persons or substantial injury to property.

10. a. At least 120 days but not more than 180 days prior to the parole eligibility date of each adult inmate, a report concerning the inmate shall be filed with the appropriate board panel, by the staff members designated by the superintendent or other chief executive officer of the institution in which the inmate is held.

b. The report filed pursuant to subsection a. shall contain pre-incarceration records of the inmate, state the conduct of the inmate during the current period of confinement, *include a complete report on the inmate's social, physical and mental condition,* include an investigation *by the Bureau of Parole* of the inmate's parole plans, and present information bearing upon the likelihood that the inmate will commit a crime under the laws of this State if released on parole.

c. A *[summary]* *copy* of the report filed pursuant to subsection b. of this section *, excepting those documents which have been classified as confidential pursuant to rules and regulations of the board or the Department of Corrections,* shall be served on the inmate at the time it is filed with the board panel. The inmate may file with the board panel a written statement regarding the *[summary]* report, but shall do so within 105 days prior to the primary parole eligibility date.

11. a. Prior to the parole eligibility date of each adult inmate, a designated hearing officer shall review the reports required by section 10 of this act, and shall determine whether there is a basis for denial of parole in the preparole report or the inmate's statement, or an indication, reduced to writing, that additional information providing a basis for denial of parole would be developed or produced at a hearing. If the hearing officer determines that there is no basis in the preparole report or the inmate's statement for denial of parole and that there is no additional relevant information to be developed or produced at a hearing, he shall at least 60 days prior to the inmate's parole eligibility date recommend in writing to the assigned member of the board panel that parole release be granted.

b. If the assigned member of the board panel concurs in the hearing officer's recommendation, he shall certify parole release pursuant to section 15 of this act as soon as practicable after the eligibility date and so notify the inmate and the board.

c. If the hearing officer or the assigned member determines that there is a basis for denial of parole, or that a hearing is otherwise necessary, the hearing officer or assigned member shall notify the appropriate board panel and the inmate in writing of his determination, and of a date for a parole consideration hearing. Said

hearing shall be conducted *[according to principles of fundamental fairness]* by the appropriate board panel at least 30 days prior to the eligibility date. *[The notice of hearing shall inform the inmate of his right to rebut documentary evidence, and to present evidence on his own behalf.]* **At the hearing, which shall be informal, the board panel shall receive as evidence any relevant and reliable documents or testimony. All such evidence not classified as confidential pursuant to rules and regulations of the board or the Department of Corrections shall be disclosed to the inmate and the inmate shall be permitted to rebut such evidence and to present evidence on his own behalf. The decision of the board panel shall be based solely on the evidence presented at the hearing.*

d. At the conclusion of the parole consideration hearing, the board panel shall either (1) certify the parole release of the inmate pursuant to section 15 of this act as soon as practicable after the eligibility date and so notify the inmate and the board, or (2) deny parole and file with the board within 30 days of the hearing a statement setting forth the decision, the particular reasons therefor, *[and the facts relied on]* **except information classified as confidential pursuant to rules and regulations of the board or the Department of Corrections*, a copy of which statement shall be served upon the inmate together with notice of his right to appeal to the board.

e. Upon request by the hearing officer or the inmate, the time limitations contained in sections 10 and 11 may be waived by the appropriate board panel for good cause.

12. a. The board shall develop a schedule of *[release dates]* **future parole eligibility dates** for adult inmates denied release at their eligibility date. In developing such schedule, particular emphasis shall be placed on the severity of the offense for which he was denied parole and on the characteristics of the offender, such as, but not limited to, the prior criminal record of the inmate and the need for continued incapacitation of the inmate.

b. If release on the eligibility date is denied, the board panel which conducted the hearing shall refer to the schedule published pursuant to subsection a., and include in its statement denying parole notice of the date of future parole consideration. If such date differs from the date otherwise established by the schedule, the board panel shall include particular reasons therefor. Such future parole eligibility date shall take into account usual remissions of sentence for good behavior and diligent application to work and other assignments. Such future parole eligibility date may also be altered pursuant to section 8 of this act.

c. An inmate shall be released on parole on the new parole eligibility date unless new information filed pursuant to a procedure identical to that set forth in section 10 indicates *by a preponderance of the evidence** that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time. The determination of whether there is such an indication in the new preparole report or whether there is additional relevant information to be developed or produced at a hearing, and the determination of whether the inmate shall be released on the new parole eligibility date shall be made pursuant to the procedure set forth in sections 11 and 12.

13. a. An assigned member of the board panel on juvenile commitments or a designated hearing officer shall periodically, but not less than quarterly, review the case of each juvenile inmate committed to determine whether release should be granted pursuant to subsection b. or section 9.

b. Such review shall include a personal interview of the inmate by the assigned member or the designated hearing officer*, *and prior to such review a designated representative of the board panel shall discuss with and explain to the juvenile inmate all documents relevant to the case, excepting those documents which have been classified as confidential pursuant to rules and regulations of the board or the Department of Corrections**.

c. If such review is conducted by a hearing officer, the hearing officer shall, at the conclusion of the review, recommend in writing any appropriate action to the assigned member of the panel on juvenile commitments.

d. At the conclusion of the review, the assigned member of the board panel shall either (1) certify parole release of the juvenile as soon as practicable, or (2) file with the board a statement setting forth the decision of the member, a copy of which statement shall be served upon the juvenile, the juvenile's parents or guardians, and the court.

e. The board panel on juvenile commitments shall at least yearly review the case of each juvenile confined to determine the reasons for the continued confinement of the juvenile. A report of such review shall be forwarded to the board, the Commissioner of Corrections and the committing court.

14. a. Any denial of parole by a board panel shall*, *in accordance with criteria established by the board,** be appealable to the full board by the inmate or one acting on the inmate's behalf. If appealed, the full board shall decide the appeal except that any board member who participated in the decision from which the appeal is

taken may not participate in the *[resolution]* *_disposition_* of that appeal. The board shall serve written notice on all parties setting forth the decision, the particular reasons therefor, and the facts relied on.

b. The board may upon its own initiative and for good cause, in a timely manner, review the decision of any hearing officer, board member or board panel and take appropriate action *_pursuant to sections 9 and 16 of this act_*.

c. If information comes to the attention of the appropriate board panel which bears upon the likelihood that the inmate will commit a crime but which was not considered pursuant to sections 11, 12 and 13 of this act, the board panel may suspend any parole release date certified pursuant to section 11 or 13 for a period of not more than 60 days in order to conduct a rescission hearing to determine whether parole release on the original parole release date should be denied or delayed.

15. a. Each parolee shall at all times remain in the legal custody of the Commissioner of Corrections, and shall remain under *[parole supervision]* *_the supervision of the Bureau of Parole of the Department of Corrections_* in accordance with the rules of the board.

b. Each parolee shall agree, as evidenced by his signature to abide by specific conditions of parole established by the appropriate board panel which shall be enumerated in writing in a certificate of parole and shall be given to the parolee upon release. Such conditions shall include, among other things, a requirement that the parolee conduct himself in society in compliance with all laws and refrain from committing any crime*_, a requirement that the parolee obtain permission from his parole officer for any change in his residence,_* and a requirement that the parolee report at reasonable intervals to an assigned parole officer. In addition, based on prior history of the parolee, the member or board panel certifying parole release pursuant to section 11 may impose any other specific conditions of parole deemed reasonable in order to reduce the likelihood of recurrence of criminal behavior. Such special conditions may include, among other things, a requirement that the parolee make full or partial restitution, the amount of which restitution shall be set by the sentencing court upon request of the board.

c. The appropriate board panel may in writing relieve a parolee of any parole conditions, and may permit a parolee to reside outside the State *_pursuant to the provisions of the Uniform Act for Out-of-State Parolee Supervision (N. J. S. 2A:168–14 et seq.)_*

*and the interstate compact on juveniles P. L. 1955, c. 55 (C. 9:23–1 to 9:23–4)** if satisfied that such change will not result in a substantial likelihood that the parolee will commit an offense which would be *[an offense]* **a crime** under the laws of this State. The appropriate board panel may revoke such permission or reinstate relieved parole conditions for any period of time during which a parolee is under its jurisdiction.

d. The appropriate board panel may parole an inmate to any residential facility funded in whole or in part by the State **if the inmate would not otherwise be released pursuant to section 9 without such placement**. Such facility shall receive the parolee and shall not discharge or otherwise release the parolee without the consent of the board panel.

e. The assigned parole officer shall provide assistance to the parolee in obtaining employment, education or vocational training or in meeting other obligations.

f. The board panel on juvenile commitments and the assigned parole officer shall insure that the least restrictive available alternative is used for any juvenile parolee.

g. If the board has granted parole to any inmate **from a State correctional facility** and the court has imposed a fine on such inmate, the appropriate board panel shall release such inmate on condition that he make specified fine payments to the Bureau of Parole. For violation of such conditions, **or for violation of a special condition requiring restitution,** parole may be revoked only for refusal **or failure** to make a good faith effort to make such payment.

h. Upon collection of the fine the same shall be paid over by the Department of Corrections to the State Treasury, *[to be deposited in a separate account for appropriation to the Violent Crimes Compensation Board created pursuant to P. L. 1971, c. 317 (C. 52:4B–1 et seq.) in satisfying claims]*.

16. a. Any parolee who violates a condition of parole may be subject to an order pursuant to section 17 of this act providing for one or more of the following: (1) That he be required to conform to one or more additional conditions of parole; (2) That he forfeit all or a part of commutation time credits granted pursuant to R. S. 30:4–140.

b. Any parolee who has seriously or persistently violated the conditions of his parole, may have his parole revoked and may be returned to custody pursuant to sections 18 and 19 of this act. The board shall be notified immediately upon the arrest or indictment of a parolee. The board shall not revoke parole on the basis

of new criminal charges which have not resulted in a disposition at the trial level except that upon application by the *[prosecutor]* *prosecuting authority*, the chairman of the board or his designee may at any time detain the parolee and commence revocation proceedings pursuant to sections 18 and 19 of this act when he determines that the new charges against the parolee are of a serious nature and it appears that the parolee otherwise poses a danger to the public safety. *In such case, a parolee shall be informed that, if he testifies at the revocation proceedings, his testimony and the evidence derived therefrom shall not be used against him in a subsequent criminal prosecution.*

c. Any parolee who is convicted of a *[criminal offense]* *crime* committed while on parole *[may]* *shall* have his parole revoked and *[may]* *shall* be returned to custody *unless the parolee demonstrates, by clear and convincing evidence at a hearing* pursuant to section 19 of this act*, that good cause exists why he should not be returned to confinement*.

17. a. If the parole officer assigned to supervise a parolee has probable cause to believe that the parolee has violated a condition of his parole, such violation not being a basis for return to custody pursuant to subsection b. or c. of section 16, the parole officer may require that the parolee appear before a designated representative of the board for a review of the parolee's adjustment.

b. If the board's designated representative finds that a parolee has violated a condition of his parole, such violation not being a basis for return to custody pursuant to subsections b. or c. of section 16, the designated representative may subject the parolee to one or both of the actions set forth in subsection a. of section 16.

c. A parolee or the parolee's assigned parole officer may apply to the board's designated representative for modification of the conditions of parole.

d. Any action to modify the conditions of parole and any forfeiture of commutation time credits shall be appealable to the appropriate board panel, which may take appropriate action *pursuant to subsection 16a. of this act,* but need not conduct a hearing.

18. a. If a parole officer assigned to supervise a parolee has probable cause to believe that the parolee has violated a condition of his parole, such violation being a basis for return to custody pursuant to subsection b. of section 16, a designated representative of the chairman of the board may issue a warrant for the arrest of the parolee *if evidence indicates that the parolee may not appear at the preliminary hearing or if the parolee poses a danger to the

*public safety**. With the parole warrant, a law enforcement officer may apprehend the delinquent parolee and cause his return to a facility designated by the Department of Corrections or cause the parolee's confinement in an appropriate institution pending return to a facility designated by the Department of Corrections. Upon enforcement of the warrant, the appropriate board panel shall be promptly notified. No parolee held in custody on a parole warrant shall be entitled to release on bail.

b. A parolee retaken under this section shall within 14 days be granted a preliminary hearing to be conducted by a hearing officer not previously involved in the case, unless the parolee or the hearing officer requests postponement of the preliminary hearing, which may be granted by the appropriate board panel for good cause*, *but in no event shall such postponement, if requested by the hearing officer, exceed 14 days**.

c. The preliminary hearing shall be for the purpose of determining:

(1) Whether there is probable cause to believe that the parolee violated a condition of his parole being the basis for return to custody pursuant to subsection b. of section 16, and

(2) Whether revocation and return to custody is desirable in the instant matter.

d. Prior to the preliminary hearing the parolee shall be provided with written notice of:

(1) The conditions of parole alleged to have been violated;

(2) The time, date, place and circumstances of the alleged violation;

(3) The possible action which may be taken by the board after a parole revocation hearing;

(4) The time, date and place of the preliminary hearing;

(5) The right pursuant to P. L. 1974, c. 33 (C. 2A:158A–5.1 et seq.), to representation by an attorney or such other qualified person as the parolee may retain; and

(6) The right to confront and cross-examine witnesses.

e. The hearing officer who conducts the hearing shall make a summary or other record of said hearing.

f. If the evidence presented at the preliminary hearing does not support a finding of probable cause to believe that the parolee has violated a condition of his parole, such violation being a basis for return to custody pursuant to subsection b. of section 16, or if it is otherwise determined that revocation is not desirable, the hearing officer may, in accordance with the provisions of subsection a. of section 16 and section 17 of this act, issue an order modifying

parole and releasing the offender, or continuing parole and releasing the offender.

g. If the evidence presented at the preliminary hearing supports a finding of probable cause to believe that the parolee has violated a condition of his parole, the hearing officer shall determine whether the parolee shall be retained in custody or released on specific conditions pending action by the appropriate board panel.

h. Conviction of a *[criminal offense]* *_crime_* committed while on parole shall be deemd to constitute probable cause to believe that the parolee has violated a condition of parole.

19. a. If the hearing officer finds probable cause pursuant to subsection c. (1) of section 18 and finds that revocation is desirable pursuant to subsection c. (2) of section 18, or if the parolee is convicted of a criminal offense committed while on parole, the board shall cause a revocation hearing to be conducted by a hearing officer, other than the hearing officer previously designated *_pursuant to section 18 of this act_*, within 60 days after the date a parolee is taken into custody as a parole violator unless the parolee or the hearing officer requests postponement of the revocation hearing, which may be granted by appropriate board panel for good cause*, *but in no event shall such postponement, if requested by the hearing officer, exceed 120 days*.

b. Prior to the revocation hearing, the parolee shall be given written notice of:

(1) The time, date and place of the parole revocation hearing;

(2) The right to pursuant to P. L. 1974, c. 33 (C. 2A:158A–5.1 et seq.), to representation by an attorney or such other qualified person as the parolee chooses;

(3) The right to confront and cross-examine witnesses, and to rebut documentary evidence against him; and

(4) The right to testify, to present evidence and to subpena witnesses in his own behalf, provided a prima facie showing is made that the prospective witnesses will provide material testimony.

c. The hearing officer shall maintain a full and complete record of the parole revocation hearing.

d. After consideration of all evidence presented, if there is clear and convincing evidence that a parolee has violated the conditions of his parole, such violation being a basis for return to custody pursuant to subsections b. or c. of section 16, and if revocation and return to custody is desirable in the instant matter, the appropriate board panel may revoke parole and return such parolee to custody,

for a specified length of time, or in accordance with the provisions of sections 16 and 17 of this act, or the appropriate board panel may issue an order modifying parole and releasing the offender or continuing parole and releasing the offender.

e. Not more than 21 days following the hearing conducted pursuant to this section, the parolee and his representative shall be informed in writing of the decision, the particular reasons therefor, and the facts relied on.

20. a. The board shall develop a schedule of *[release dates]* *_future parole eligibility dates_* for parole violators whose parole has been revoked pursuant to section 19 of this act. In developing such schedule particular emphasis shall be placed on the severity and circumstances of a parole violation and on the characteristics of the parole violator. The board shall establish special provisions for release of the parole violator to begin serving any new sentence, which emphasize the length of time remaining to be served on the prior sentence and the length of any new sentence.

b. No *_future parole eligibility date for a_* parole violator returned to custody for reasons other than new criminal charges shall be *[ordered confined for parole violation for any period to exceed 1 year]* *_set more than 1 full year from the date of the parolee's return to custody_*.

c. Any parole violator ordered confined for commission of a *[criminal offense]* *_crime_* while on parole shall serve at least 6 months or that portion of the custodial term remaining, whichever is less, before parole release.

d. Any period of confinement for parole violation shall be deemed to be a parole eligibility term for purposes of aggregation pursuant to subsection *[g.]* *_h._* of section 7.

21. *[a. Offenders serving separate parole terms pursuant to N. J. S. 2C:43-9 shall be subject to the provisions of sections 15 through 20 of this act, and, pursuant to sections 16 and 17 may forfeit all or part of commutation time credits granted pursuant to R. S. 30:4-140 on the sentence imposed.]*

[b.] The duration of time served prior to parole, plus the duration of any time served on parole, less any time after warrant for retaking of a parolee was issued pursuant to section 18 but before the parolee is arrested, plus the duration of any time served after revocation of parole, shall not exceed the term specified in the original sentence *[plus any separate parole term under N. J. S. 2C:43-9.]*.

22. The appropriate board panel may give any parolee a complete discharge from parole prior to the expiration of the full maximum term for which he was sentenced, provided that such parolee has made a satisfactory adjustment while on parole, provided that continued supervision is not required, and provided the parolee has made full payment of any fine or restitution.

23. *a.* The appropriate board panel and the Department of Corrections may enter into formal agreements with officials of the board, officials of the Department of Corrections and individual parolee or inmates reduced to writing and signed by all parties, which agreements stipulate individual programs of education, training, or other activity which shall result in a specified reduction of the parolee's parole term *pursuant to section 22 of this act* or the inmate's primary parole eligibility date pursuant to section 8 of this act, upon such successful completion of the program. *[The parolee or the inmate shall be given a copy of any such agreement. The board shall promulgate rules and regulations governing parolee and inmate eligibility for such agreements, the components of such agreements, and measurement of performance.]*

b. Any parolee or inmate shall be permitted to apply to the board for such an agreement. The board panel shall review all such applications and may approve any application consistent with eligibility requirements promulgated by the board pursuant to section 4 of this act.

c. Upon approval of the parolee or inmate's application, the board panel shall be responsible for specifying the components necessary for any such agreement. Upon acceptance of the agreement by the Department of Corrections, by the board panel and by the parolee or the inmate, the board panel shall reduce the agreement to writing. The parolee or inmate and the Department of Corrections shall be given a copy of any such agreement.

*d. Any such agreement shall be terminated by the board panel in the event the parolee or inmate fails or refuses to satisfactorily complete each component of the agreement. The inmate or parolee shall be notified in writing of any such termination and the reasons therefor. Any such termination may be appealed to the full board pursuant to section 14 of this act.**

24. All records, files and documents of the State Parole Board created pursuant to P. L. 1948, c. 84 (C. 30:4–123.1 et seq.) shall be transferred to the board, and all rules, regulations and functions of the State Parole Board, and the Boards of Trustees relating to

parole, shall continue in force until duly modified or repealed by the board.

25. Section 18 of P. L. 1971, c. 384 (C. 30:4–1.1) is amended as follows:

18. It shall be the duty of the local boards of trustees to advance long-range planning for the medical care, correctional and training programs at their respective institutions; and maintain general oversight of the institution. The board shall not administer the individual institutions.

The board of trustees shall have power to:

a. Review institutional needs;

b. Exercise visitorial supervision over the institution under the supervision or control of the department. Its visitorial general powers of supervision are hereby defined as visiting such institution to examine into its manner of conducting its affair and to advise the commissioner on the observance and enforcement of the laws of the State;

c. Develop with the commissioner and his staff and jointly promulgate and maintain a comprehensive master plan which shall be long-range in nature and be regularly revised and updated, including priorities for the construction of new institutions and the development of new programs;

d. Recommend and advise the commissioner on building programs of the institution as required by the master plan, provided that provision is made therefor in the annual or a supplemental or special appropriation act of the Legislature or otherwise;

e. Review and comment upon budget requests from the institution;

f. Encourage harmonious and cooperative relationship with other similar institutions in the area, public and private;

g. Review periodically existing programs of care, training, rehabilitation, research and public service in the institution, and in similar institutions of other states, and advise the State board and the commissioner as to any desirable change.

h. Make to the commissioner such recommendations as it deems necessary with regard to services, lands, buildings, and equipment to be furnished by the institution;

i. Authorize such studies and require such reports from the chief executive officer of the institution as it may deem necessary from time to time;

j. Advise the institutional head;

k. Control and determine the use of patient or inmate welfare funds within the general regulation of the State board;

l. Interpret the mandate and work of the institution to the public;

m. Carry out such other duties as the commissioner or the State board may assign to the board or to its individual members[; and

n. Release upon parole, such inmates of their respective institutions heretofore or hereafter committed as they may determine to be eligible therefor. Whenever, in their judgment, a paroled individual has violated the terms, conditions and limitations of his parole and is unfit to be further at liberty, or if such paroled individual shall be convicted of a crime in any court of this State or of any other state, or of the United States, committed after the issue of his parole, the board of trustees shall have power to revoke such parole by an order in writing, signed by the chairman and attested by the secretary. These powers shall not apply to the trustees of the State Prison].

n. Periodically review existing rules, regulations and policies of the State parole board and advise the parole board as to any desirable or necessary changes.

*o. Review the cases of such inmates as may be eligible for parole consideration and provide the appropriate parole board panel with a written recommendation regarding the case. The State parole board shall, prior to considering any inmate for release, provide the boards of trustees with a written notice of all such inmates to be considered. The boards of trustees may, in addition, review the cases of such inmates as may appeal decisions pursuant to section 14 of this amendatory act and provide the parole board with a written recommendation regarding the case, which shall be considered by the board. The State parole board shall state on the record its reasons for rejecting any recommendation made pursuant to this section.**

26. Section 25 of P. L. 1971, c. 384 (C. 30:4–4a) is amended to read as follows:

25. Whenever in any law, rule, regulation, contract, document, judicial or administrative proceeding or otherwise, reference is made to the board of managers of any institution, the same shall mean and refer to the chief executive officer of the institution[, except with respect to parole matters as prescribed in article 8 of chapter 4 of Title 30 of the Revised Statutes, such reference shall mean and refer to the respective boards of trustees].

*26A. R. S. 30:4–148 is amended to read as follows:

30:4–148. The courts in sentencing [to the Youth Correctional Institution Complex] *pursuant to N. J. S. 2C:43–5* shall not fix or limit the duration of sentence, but the time which any person

shall serve in confinement or on parole shall not in any case exceed 5 years or the maximum term provided by law for the crime for which the prisoner was convicted and sentenced, if such maximum be less than 5 years; provided, however, that the court, in its discretion, for good cause shown, may impose a sentence greater than 5 years, but in no case greater than the maximum provided by law, and the commitment shall specify in every case the maximum of the sentence so imposed. [The term may be terminated by the board of managers in acordance with its rules and regulations formally adopted.]*

27. The following are repealed:

R. S. 30:4–106;

R. S. 30:4–108 to 30:4–113;

P. L. 1948, c. 84 (C. 30:4–123.1 et seq.);

P. L. 1950, c. 30 (C. 30:4–123.40 et seq.);

P. L. 1952, c. 32 (C. 30:4–123.43 et seq.)*[.]* *;*

6A *R. S. 30:4–155;*

6B *R. S. 30:8–28.**

The repeal of any of the foregoing acts or parts thereof shall not revive or be construed to reenact any acts repealed thereby.

28. All acts and parts of acts which are inconsistent with the provisions of this act are, to the extent of such inconsistency, superseded*, *provided however, that no provisions of the New Jersey Code of Criminal Justice shall be superseded hereby**.

29. Board schedules required pursuant to section 7, 8, 12 and 20 of this act shall, notwithstanding subsection c. of section 4, be promulgated within 30 days of the effective date of this act. Schedules so promulgated shall expire on a date established by the board which shall be not more than 2 years after the date of adoption.

30. There is hereby appropriated for the purposes of this act the sum of $335,000.00.

31. This act shall take effect *[120]* *60* days following enactment *[or on September 1, 1979, whichever is earlier]*.

ASSEMBLY, No. 3093

STATE OF NEW JERSEY

INTRODUCED JANUARY 25, 1979

By Assemblymen JACKMAN and HERMAN

Referred to Committee on Judiciary, Law, Public Safety and Defense

AN ACT concerning parole, establishing a consolidated State Parole Board, revising procedures for granting parole, amending P. L. 1971, c. 384 and repealing sections 30:4–106 and 30:4–108 to 30:4–113 of the Revised Statutes and P. L. 1948, c. 84, P. L. 1950, c. 30 and P. L. 1952, c. 32.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Parole Act of 1979."

2. a. This act shall apply to all persons now serving or hereafter sentenced or committed to State correctional facilities and to all persons now serving or hereafter sentenced to county jails, workhouses or penitentiaries.

b. In the case of persons now serving sentences or committed, the board hereinafter established may postpone for a reasonable period of time not to exceed 6 months from the effective date of this act the application of this act in order to permit an orderly conversion to the system hereinafter established.

3. a. There is hereby created and established within the Department of Corrections a State Parole Board which shall consist of a chairman and six associate members. The chairman and associate members shall be appointed by the Governor from qualified persons with training or experience in law, sociology, criminal justice, juvenle justice or related branches of the social sciences. Members of the board shall be appointed for terms of 6 years, but of the associate members first appointed, one shall be appointed for a term of 1 year, one for a term of 2 years, one for a term of 3 years, one for a term of 4 years, one for a term of 5 years and one for a term of 6 years. Member's terms shall commence on the effective date of this act and the terms of their successors shall be calculated from the expiration of the incumbent's term. Members shall serve until their successors are appointed and have qualified.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

b. Any vacancy occurring in the membership of the board, otherwise than by expiration of term, shall be filled in the same manner as one occurring by expiration of term, but for the unexpired term only. In the event that any member of the board shall be rendered incapable of performing his duties, the Governor shall appoint a qualified person to act in his stead during the period of his incapacity. Any member of the board may be removed from office by the Governor for cause.

c. The members of the board shall devote their full time to the performance of their duties and be compensated pursuant to section 2 of P. L. 1974, c. 55.

4. a. All policies and determinations of the Parole Board shall be made by the majority vote of a quorum of the members.

b. The chairman of the board shall be the chief executive officer of the board and, after consulting with the board, shall be responsible for designating the time and place of all board meetings, for appointing the board's employees, for organizing, controlling and directing the work of the board and its employees, and for preparation and justification of the board's budget. The professional employees of the board such as, but not limited to, hearing officers, shall serve at the pleasure of the chairman and shall not be subject to the provisions of Title 11 of the Revised Statutes.

c. The board shall promulgate such reasonable rules and regulations, consistent with this act, as may be necessary for the proper discharge of its responsibilities. The chairman shall file such rules and regulations with the Secretary of State. The provisions of the "Administrative Procedure Act," P. L. 1968, c. 410 (C. 52:14B–1 et seq.) shall apply to the promulgation of rules and regulations concerning policy and administration, but not to other actions taken under this act. In determination of its rules and regulations concerning policy and administration, the board shall consult the Governor and the Commissioner of Corrections.

d. The board, in conjunction with the Department of Corrections, shall develop a uniform information system in order to closely monitor the parole process.

e. The board shall transmit a report of its work for the preceding fiscal year to the Governor and the Legislature annually.

f. The board shall give public notice prior to considering any adult inmate for release.

5. a. Two associate members of the board shall be appointed by the Governor to a panel on juvenile commitments. The remaining four associate members of the board shall be appointed by the

Governor to panels on adult sentences. The chairman of the board shall assign two of the associate members so appointed to a panel on prison sentences and the remaining two associate members so appointed to a panel on young adult sentences. The chairman of the board shall be a member of each panel.

b. Except where otherwise noted, parole determinations on individual cases pursuant to this act shall be made by the majority vote of a quorum of the appropriate board panel established pursuant to this section.

c. The chairman of the board, after consulting with the board, shall assign any special case to a board panel as necessary for the efficient functioning of the board.

d. Nothing contained in this act shall be deemed to preclude a member of any board panel from exercising all the functions, powers, and duties of a hearing officer upon designation by the chairman.

e. No hearing officer assigned to review adult cases shall be assigned to review juvenile cases pursuant to sections 13 and 19 of this act.

6. a. The Department of Corrections shall provide such office facilities and clerical assistance as may be necessary to enable the board to perform properly its duties and to keep and maintain the records required herein.

b. The Department of Corrections, the chief executive officers and staffs of those facilities assigned to the Department of Corrections, the chief executive officers and staffs of the county jails, workhouses, and penitentiaries and the chief executive officers and staffs of those facilities assigned to the Department of Human Services where inmates or parolees are housed shall render full and complete cooperation to the board in the matter of furnishing the board all pertinent data and information relating to particular inmates. It shall also be the duty of the clerk of the court from which the inmate was committed, and of county probation officers and other officials, to forward to the board any commitment order, any presentence report, and the sentencing court's written reasons for any sentence imposed. The board shall in addition have the power to compel the appearance of witnesses and the production of documentary evidence relevant to any proceedings before it. Failure to respond to any subpena shall carry the penalty prescribed by law for failure to so respond in a county court.

7. a. Each adult inmate sentenced to a specific term of years at the State Prison or the correctional institution for women shall become primarily eligible for parole after having served any

judicial or statutory mandatory minimum term, or one third of the sentence imposed where no mandatory minimum term has been imposed, less in each instance commutation time for good behavior pursuant to R. S. 30:4–140 and credits for diligent application to work and other institutional assignments pursuant to R. S. 30:4–92.

b. Each adult inmate sentenced to a term of life imprisonment shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term, or 20 years where no mandatory minimum term has been imposed, less in each instance commutation time for good behavior and credits for diligent application to work and other institutional assignments. If an inmate sentenced to a specific term or terms of years is eligible for parole on a date later than the date upon which he would be eligible if a life sentence had been imposed, then in such case the inmate shall be eligible for parole after having served 20 years, less commutation time for good behavior and credits for diligent application to work and other institutional assignments.

c. Each inmate sentenced after September 1, 1979 for a term pursuant to the "Controlled Dangerous Substances Act" P. L. 1970, c. 226 (C. 24:2101 through 45) shall become primarily eligible for parole after having served one third of the sentence imposed less commutation time for good behavior and credits for diligent application to work and other institutional assignments.

d. Each adult inmate sentenced to an indeterminate term of years as a young adult offender pursuant to N. J. S. 2C:43–5 shall become primarily eligible for parole consideration pursuant to a schedule of primary eligibility dates developed by the board, less adjustment for program participation. In no case shall the board schedule require that the primary parole eligibility date for a young adult offender be greater than primary parole eligibility date required pursuant to this section for the maximum specific term for the crime authorized pursuant to N. J. S. 2C:43–6.

e. Each adult inmate sentenced to the Adult Diagnostic and Treatment Center, Avenel, shall become primarily eligible for parole upon recommendation by the special classification review board pursuant to N. J. S. 2C:47–5.

f. Each juvenile inmate committed to an indeterminate term shall be immediately eligible for parole.

g. Each adult inmate of a county jail, workhouse or penitentiary shall become primarily eligible for parole upon service of a full 9 months of his aggregate sentence. No inmate sentenced to a specific term of years at the State Prison or the correctional in-

stitution for women shall become primarily eligible for parole until service of a full 9 months of his aggregate sentence.

h. When an inmate is sentenced to more than one term of imprisonment, the primary parole eligibility terms calculated pursuant to this section shall be aggregated by the board for the purpose of determining the primary parole eligibility date, except that no juvenile commitment shall be aggregated with any adult sentence. The board shall promulgate rules and regulations to govern aggregation under this subsection.

i. The primary eligibility date shall be computed by a designated representative of the board and made known to the inmate in writing not later than 90 days following the commencement of the sentence.

j. Each inmate sentenced for a fixed minimum and maximum term or a life term pursuant to R. S. 2A:164–17 or N. J. S. 2C:1–1 shall not be primarily eligible for parole on a date computed pursuant to this section, but shall be primarily eligible on a date computed pursuant to P. L. 1948, c. 84 (C. 30:4–123.1 et seq.).

8. a. If the appropriate board panel determines that an adult inmate has seriously or persistently violated specifically defined institutional rules or has engaged in conduct indictable in nature while incarcerated, the inmate's parole eligibility date may be increased pursuant to a schedule developed by the board. In developing such schedule, particular emphasis shall be placed on the severity of the inmate's conduct.

b. If the appropriate board panel determines that an adult inmate has made exceptional progress, the inmate's parole eligibility date may be decreased, except that no parole eligibility date shall be set below the primary parole eligibility date without the consent of the sentencing court, which need not conduct a hearing.

9. a. An adult inmate shall be released on parole at the time of parole eligibility, unless information supplied in the report filed pursuant to section 10 of this act or developed or produced at a hearing held pursuant to section 11 of this act indicates 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.

b. A juvenile inmate shall be released on parole when it shall appear that the juvenile, if released, will not cause injury to persons or substantial injury to property.

10. a. At least 120 days but not more than 180 days prior to the parole eligibility date of each adult inmate, a report concerning the inmate shall be filed with the appropriate board panel, by the staff

members designated by the superintendent or other chief executive officer of the institution in which the inmate is held.

b. The report filed pursuant to subsection a. shall contain pre-incarceration records of the inmate, state the conduct of the inmate during the current period of confinement, include an investigation of the inmate's parole plans, and present information bearing upon the likelihood that the inmate will commit a crime under the laws of this State if released on parole.

c. A summary of the report filed pursuant to subsection b. of this section shall be served on the inmate at the time it is filed with the board panel. The inmate may file with the board panel a written statement regarding the summary report, but shall do so within 105 days prior to the primary parole eligibilty date.

11. a. Prior to the parole eligibility date of each adult inmate, a designated hearing officer shall review the reports required by section 10 of this act, and shall determine whether there is a basis for denial of parole in the preparole report or the inmate's statement, or an indication, reduced to writing, that additional information providing a basis for denial of parole would be developed or produced at a hearing. If the hearing officer determines that there is no basis in the preparole report or the inmate's statement for denial of parole and that there is no additional relevant information to be developed or produced at a hearing, he shall at least 60 days prior to the inmate's parole eligibility date recommend in writing to the assigned member of the board panel that parole release be granted.

b. If the assigned member of the board panel concurs in the hearing officer's recommendation, he shall certify parole release pursuant to section 15 of this act as soon as practicable after the eligibility date and so notify the inmate and the board.

c. If the hearing officer or the assigned member determines that there is a basis for denial of parole, or that a hearing is otherwise necessary, the hearing officer or assigned member shall notify the appropriate board panel and the inmate in writing of his determination, and of a date for a parole consideration hearing. Said hearing shall be conducted according to principles of fundamental fairness by the appropriate board panel at least 30 days prior to the eligibility date. The notice of hearing shall inform the inmate of his right to rebut documentary evidence, and to present evidence on his own behalf.

d. At the conclusion of the parole consideration hearing, the board panel shall either (1) certify the parole release of the inmate pursuant to section 15 of this act as soon as practicable

after the eligibility date and so notify the inmate and the board, or (2) deny parole and file with the board within 30 days of the hearing a statement setting forth the decision, the particular reasons therefor, and the facts relied on, a copy of which statement shall be served upon the inmate together with notice of his right to appeal to the board.

e. Upon request by the hearing officer or the inmate, the time limitations contained in sections 10 and 11 may be waived by the appropriate board panel for good cause.

12. a. The board shall develop a schedule of release dates for adult inmates denied release at their eligibility date. In developing such schedule, particluar emphasis shall be placed on the severity of the offense for which he was denied parole and on the characteristics of the offender, such as, but not limited to, the prior criminal record of the inmate and the need for continued incapacitation of the inmate.

b. If release on the eligibility date is denied, the board panel which conducted the hearing shall refer to the schedule published pursuant to subsection a., and include in its statement denying parole notice of the date of future parole consideration. If such date differs from the date otherwise established by the schedule, the board panel shall include particular reasons therefor. Such future parole eligibility date shall take into account usual remissions of sentence for good behavior and diligent application to work and other assignments. Such future parole eligibility date may also be altered pursuant to section 8 of this act.

c. An inmate shall be released on parole on the new parole eligibility date unless new information filed pursuant to a procedure identical to that set forth in section 10 indicates that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time. The determination of whether there is such an indication in the new preparole report or whether there is additional relevant information to be developed or produced at a hearing, and the determination of whether the inmate shall be released on the new parole eligibility date shall be made pursuant to the procedure set forth in sections 11 and 12.

13. a. An assigned member of the board panel on juvenile commitments or a designated hearing officer shall periodically, but not less than quarterly, review the case of each juvenile inmate committed to determine whether release should be granted pursuant to subsection b. or section 9.

b. Such review shall include a personal interview of the inmate by the assigned member or the designated hearing officer.

c. If such review is conducted by a hearing officer, the hearing officer shall, at the conclusion of the review, recommend in writing any appropriate action to the assigned member of the panel on juvenile commitments.

d. At the conclusion of the review, the assigned member of the board panel shall either (1) certify parole release of the juvenile as soon as practicable, or (2) file with the board a statement setting forth the decision of the member, a copy of which statement shall be served upon the juvenile, the juvenile's parents or guardians, and the court.

e. The board panel on juvenile commitments shall at least yearly review the case of each juvenile confined to determine the reasons for the continued confinement of the juvenile. A report of such review shall be forwarded to the board, the Commissioner of Corrections and the committing court.

14. a. Any denial of parole by a board panel shall be appealable to the full board by the inmate or one acting on the inmate's behalf. If appealed, the full board shall decide the appeal except that any board member who participated in the decision from which the appeal is taken may not participate in the resolution of that appeal. The board shall serve written notice on all parties setting forth the decision, the particular reasons therefor, and the facts relied on.

b. The board may upon its own initiative and for good cause, in a timely manner, review the decision of any hearing officer, board member or board panel and take appropriate action.

15. a. Each parolee shall at all times remain in the legal custody of the Commissioner of Corrections, and shall remain under parole supervision in accordance with the rules of the board.

b. Each parolee shall agree, as evidenced by his signature to abide by specific conditions of parole established by the appropriate board panel which shall be enumerated in writing in a certificate of parole and shall be given to the parolee upon release. Such conditions shall include, among other things, a requirement that the parolee conduct himself in society in compliance with all laws and refrain from committing any crime and a requirement that the parolee report at reasonable intervals to an assigned parole officer. In addition, based on prior history of the parolee, the member or board panel certifying parole release pursuant to section 11 may impose any other specific conditions of parole

deemed reasonable in order to reduce the likelihood of recurrence of criminal behavior. Such special conditions may include, among other things, a requirement that the parolee make full or partial restitution, the amount of which restitution shall be set by the sentencing court upon request of the board.

c. The appropriate board panel may in writing relieve a parolee of any parole conditions, and may permit a parolee to reside outside the State if satisfied that such change will not result in a substantial likelihood that the parolee will commit an offense which would be an offense under the laws of this State. The appropriate board panel may revoke such permission or reinstate relieved parole conditions for any period of time during which a parolee is under its jurisdiction.

d. The appropriate board panel may parole an inmate to any residential facility funded in whole or in part by the State. Such facility shall receive the parolee and shall not discharge or otherwise release the parolee without the consent of the board panel.

e. The assigned parole officer shall provide assistance to the parolee in obtaining employment, education or vocational training or in meeting other obligations.

f. The board panel on juvenile commitments and the assigned parole officer shall insure that the least restrictive available alternative is used for any juvenile parolee.

g. If the board has granted parole to any inmate and the court has imposed a fine on such inmate, the appropriate board panel shall release such inmate on condition that he make specified fine payments to the Bureau of Parole. For violation of such conditions, parole may be revoked only for refusal to make a good faith effort to make such payment.

h. Upon collection of the fine the same shall be paid over by the Department of Corrections to the State Treasury to be deposited in a separate account for appropriation to the Violent Crimes Compensation Board created pursuant to P. L. 1971, c. 317 (C. 52:4B–1 et seq.) in satisfying claims.

16. a. Any parolee who violates a condition of parole may be subject to an order pursuant to section 17 of this act providing for one or more of the following: (1) That he be required to conform to one or more additional conditions of parole; (2) That he forfeit all or a part of commutation time credits granted pursuant to R. S. 30:4–140.

b. Any parolee who has seriously or persistently violated the conditions of his parole, may have his parole revoked and may be returned to custody pursuant to sections 18 and 19 of this act.

The board shall be notified immediately upon the arrest or indictment of a parolee. The board shall not revoke parole on the basis of new criminal charges which have not resulted in a disposition at the trial level except that upon application by the prosecutor, the chairman of the board or his designee may at any time detain the parolee and commence revocation proceedings pursuant to sections 18 and 19 of this act when he determines that the new charges against the parolee are of a serious nature and it appears that the parolee otherwise poses a danger to the public safety.

c. Any parolee who is convicted of a criminal offense committed while on parole may have his parole revoked and may be returned to custody pursuant to section 19 of this act.

17. a. If the parole officer assigned to supervise a parolee has probable cause to believe that the parolee has violated a condition of his parole, such violation not being a basis for return to custody pursuant to subsection b. or c. of section 16, the parole officer may require that the parolee appear before a designated representative of the board for a review of the parolee's adjustment.

b. If the board's designated representative finds that a parolee has violated a condition of his parole, such violation not being a basis for return to custody pursuant to subsections b. or c. of section 16, the designated representative may subject the parolee to one or both of the actions set forth in subsection a. of section 16.

c. A parolee or the parolee's assigned parole officer may apply to the board's designated representative for modification of the conditions of parole.

d. Any action to modify the conditions of parole and any forfeiture of commutation time credits shall be appealable to the appropriate board panel, which may take appropriate action but need not conduct a hearing.

18. a. If a parole officer assigned to supervise a parolee has probable cause to believe that the parolee has violated a condition of his parole, such violation being a basis for return to custody pursuant to subsection b. of section 16, a designated representative of the chairman of the board may issue a warrant for the arrest of the parolee. With the parole warrant, a law enforcement officer may apprehend the delinquent parolee and cause his return to a facility designated by the Department of Corrections or cause the parolee's confinement in an appropriate institution pending return to a facility designated by the Department of Corrections. Upon enforcement of the warrant, the appropriate board panel shall be promptly notified. No parolee held in custody on a parole warrant shall be entitled to release on bail.

b. A parolee retaken under this section shall within 14 days be granted a preliminary hearing to be conducted by a hearing officer not previously involved in the case, unless the parolee or the hearing officer requests postponement of the preliminary hearing, which may be granted by the appropriate board panel for good cause.

c. The preliminary hearing shall be for the purpose of determining:

(1) Whether there is probable cause to believe that the parolee violated a condition of his parole being the basis for return to custody pursuant to subsection b. of section 16, and

(2) Whether revocation and return to custody is desirable in the instant matter.

d. Prior to the preliminary hearing the parolee shall be provided with written notice of:

(1) The conditions of parole alleged to have been violated;

(2) The time, date, place and circumstances of the alleged violation;

(3) The possible action which may be taken by the board after a parole revocation hearing;

(4) The time, date and place of the preliminary hearing;

(5) The right pursuant to P. L. 1974, c. 33 (C. 2A:158A–5.1 et seq.), to representation by an attorney or such other qualified person as the parolee may retain; and

(6) The right to confront and cross-examine witnesses.

e. The hearing officer who conducts the hearing shall make a summary or other record of said hearing.

f. If the evidence presented at the preliminary hearing does not support a finding of probable cause to believe that the parolee has violated a condition of his parole, such violation being a basis for return to custody pursuant to subsection b. of section 16, or if it is otherwise determined that revocation is not desirable, the hearing officer may, in accordance with the provisions of subsection a. of section 16 and section 17 of this act, issue an order modifying parole and releasing the offender, or continuing parole and releasing the offender.

g. If the evidence presented at the preliminary hearing supports a finding of probable cause to believe that the parolee has violated a condition of his parole, the hearing officer shall determine whether the parolee shall be retained in custody or released on specific conditions pending action by the appropriate board panel.

h. Conviction of a criminal offense committed while on parole shall be deemed to constitute probable cause to believe that the parolee has violated a condition of parole.

19. a. If the hearing officer finds probable cause pursuant to subsection c. (1) of section 18 and finds that revocation is desirable pursuant to subsection c. (2) of section 18, or if the parolee is convicted of a criminal offense committed while on parole, the board shall cause a revocation hearing to be conducted by a hearing officer, other than the hearing officer previously designated, within 60 days after the date a parolee is taken into custody as a parole violator unless the parolee or the hearing officer requests postponement of the revocation hearing, which may be granted by appropriate board panel for good cause.

b. Prior to the revocation hearing, the parolee shall be given written notice of:

(1) The time, date and place of the parole revocation hearing;

(2) The right to pursuant to P. L. 1974, c. 33 (C. 2A:158A–5.1 et seq.), to representation by an attorney or such other qualified person as the parolee chooses;

(3) The right to confront and cross-examine witnesses, and to rebut documentary evidence against him; and

(4) The right to testify, to present evidence and to subpena witnesses in his own behalf, provided a prima facie showing is made that the prospective witnesses will provide material testimony.

c. The hearing officer shall maintain a full and complete record of the parole revocation hearing.

d. After consideration of all evidence presented, if there is clear and convincing evidence that a parolee has violated the conditions of his parole, such violation being a basis for return to custody pursuant to subsections b. or c. of section 16, and if revocation and return to custody is desirable in the instant matter, the appropriate board panel may revoke parole and return such parolee to custody, for a specified length of time, or in accordance with the provisions of sections 16 and 17 of this act, or the appropriate board panel may issue an order modifying parole and releasing the offender or continuing parole and releasing the offender.

e. Not more than 21 days following the hearing conducted pursuant to this section, the parolee and his representative shall be informed in writing of the decision, the particular reasons therefor, and the facts relied on.

20. a. The board shall develop a schedule of release dates for parole violators whose parole has been revoked pursuant to section 19 of this act. In developing such schedule particular emphasis shall be placed on the severity and circumstances of a parole violation and on the characteristics of the parole violator. The board shall

establish special provisions for release of the parole violator to begin serving any new sentence, which emphasize the length of time remaining to be served on the prior sentence and the length of any new sentence.

b. No parole violator returned to custody for reasons other than new criminal charges shall be ordered confined for parole violation for any period to exceed 1 year.

c. Any parole violator ordered confined for commission of a criminal offense while on parole shall serve at least 6 months or that portion of the custodial term remaining, whichever is less, before parole release.

d. Any period of confinement for parole violation shall be deemed to be a parole eligibility term for purposes of aggregation pursuant to subsection g. of section 7.

21. a. Offenders serving separate parole terms pursuant to N. J. S. 2C:43–9 shall be subject to the provisions of sections 15 through 20 of this act, and, pursuant to sections 16 and 17 may forfeit all or part of commutation time credits granted pursuant to R. S. 30:4–140 on the sentence imposed.

b. The duration of time served prior to parole, plus the duration of any time served on parole, less any time after warrant for retaking of a parolee was issued pursuant to section 18 but before the parolee is arrested, plus the duration of any time served after revocation of parole, shall not exceed the term specified in the original sentence plus any separate parole term under N. J. S. 2C:43–9.

22. The appropriate board panel may give any parolee a complete discharge from parole prior to the expiration of the full maximum term for which he was sentenced, provided that such parolee has made a satisfactory adjustment while on parole, provided that continued supervision is not required, and provided the parolee has made full payment of any fine or restitution.

23. The appropriate board panel and the Department of Corrections may enter into formal agreements with officials of the board, officials of the Department of Corrections and individual parolees or inmates reduced to writing and signed by all parties, which agreements stipulate individual programs of education, training, or other activity which shall result in a specified reduction of the parolee's parole term or the inmate's primary parole eligibility date pursuant to section 8 of this act, upon such successful completion of the program. The parolee or the inmate shall be given a copy of any such agreement. The board shall promulgate rules and regulations governing parolee and inmate eligibility for such

agreements, the components of such agreements, and measurement of performance.

24. All records, files and documents of the State Parole Board creatd pursuant to P. L. 1948, c. 84 (C. 30:4–123.1 et seq.) shall be transferred to the board, and all rules, regulations and functions of the State Parole Board, and the Boards of Trustees relating to parole, shall continue in force until duly modified or repealed by the board.

25. Section 18 of P. L. 1971, c. 384 (C. 30:4–1.1) is amended as follows:

18. It shall be the duty of the local boards of trustees to advance long-range planning for the medical care, correctional and training programs at their respective institutions; and maintain general oversight of the institution. The board shall not administer the individual institutions.

The board of trustees shall have power to:

a. Review institutional needs;

b. Exercise visitorial supervision over the institution under the supervision or control of the department. Its visitorial general powers of supervision are hereby defined as visiting such institution to examine into its manner of conducting its affair and to advise the commissioner on the observance and enforcement of the laws of the State;

c. Develop with the commissioner and his staff and jointly promulgate and maintain a comprehensive master plan which shall be long-range in nature and be regularly revised and updated, including priorities for the construction of new institutions and the development of new programs;

d. Recommend and advise the commissioner on building programs of the institution as required by the master plan, provided that provision is made therefor in the annual or a supplemental or special appropriation act of the Legislature or otherwise;

e. Review and comment upon budget requests from the institution;

f. Encourage harmonious and cooperative relationship with other similar institutions in the area, public and private;

g. Review periodically existing programs of care, training, rehabilitation, research and public service in the institution, and in similar institutions of other states, and advise the State board and the commissioner as to any desirable change.

h. Make to the commissioner such recommendations as it deems necessary with regard to services, lands, buildings, and equipment to be furnished by the institution;

i. Authorize such studies and require such reports from the chief executive officer of the institution as it may deem necessary from time to time;

j. Advise the institutional head;

k. Control and determine the use of patient or inmate welfare funds within the general regulation of the State board;

l. Interpret the mandate and work of the institution to the public;

m. Carry out such other duties as the commissioner or the State board may assign to the board or to its individual members[; and

n. Release upon parole, such inmates of their respective institutions heretofore or hereafter committed as they may determine to be eligible therefor. Whenever, in their judgment, a paroled individual has violated the terms, conditions and limitations of his parole and is unfit to be further at liberty, or if such paroled individual shall be convicted of a crime in any court of this State or of any other state, or of the United States, committed after the issue of his parole, the board of trustees shall have power to revoke such parole by an order in writing, signed by the chairman and attested by the secretary. These powers shall not apply to the trustees of the State Prison].

26. Section 25 of P. L. 1971, c. 384 (C. 30:4–4a) is amended to read as follows:

25. Whenever in any law, rule, regulation, contract, document, judicial or administrative proceeding or otherwise, reference is made to the board of managers of any institution, the same shall mean and refer to the chief executive officer of the institution[, except with respect to parole matters as prescribed in article 8 of chapter 4 of Title 30 of the Revised Statutes, such reference shall mean and refer to the respective boards of trustees].

27. The following are repealed:

R. S. 30:4–106;

R. S. 30:4–108 to 30:4–113;

P. L. 1948, c. 84 (C. 30:4–123.1 et seq.);

P. L. 1950, c. 30 (C. 30:4–123.40 et seq.);

P. L. 1952, c. 32 (C. 30:4–123.43 et seq.).

The repeal of any of the foregoing acts or parts thereof shall not revive or be construed to reenact any acts repealed thereby.

28. All acts and parts of acts which are inconsistent with the provisions of this act are, to the extent of such inconsistency, superseded.

29. Board schedules required pursuant to section 7, 8, 12 and 20 of this act shall, notwithstanding subsection c. of section 4, be promulgated within 30 days of the effective date of this act.

Schedules so promulgated shall expire on a date established by the board which shall be not more than 2 years after the date of adoption.

30. There is hereby appropriated for the purposes of this act the sum of $335,000.00.

31. This act shall take effect 120 days following enactment or on September 1, 1979, whichever is earlier.

STATEMENT

This bill repeals existing parole statutes and replaces them with an omnibus parole statute which is designed to consolidate State paroling authorities; to introduce more consistency, objectivity and predictability into the parole process; and to eliminate many problem areas in existing law which have led to inequities in the administration of parole. Sections one through six create a seven member State Parole Board which would consist of a chairperson and six associate members. All members would be appointed by the Governor with the advice and consent of the Senate, and would reflect the various social, economic and ethnic groups in the State's population. The board would exercise parole jurisdiction over all juveniles and adults committed or sentenced to State correctional facilities and those sentenced to county facilities. The board members would be assigned to parole panels which would consider inmates according to the type of sentence received.

Sections seven through fourteen provide for parole release proceedings. Inmates sentenced prior to the effective date of the New Jersey Code of Criminal Justice would be eligible for parole under current legislation. Parole eligibility for state prison inmates sentenced under the new code is established at one-third of the maximum sentence unless a judicial or statutory mandatory minimum sentence is set. Parole eligibility for young adult offenders sentenced to the Youth Correctional Complex would be established by a Parole Board eligibility schedule similar to the current practice of the United States Parole Commission. Parole eligibility would be the same for multiple offenders, since sentencing judges would take prior offenses into account in sentencing inmates to extended terms of imprisonment. Section nine provides that the Parole Board will deny parole to achieve the incapacitation of dangerous criminal offenders.

Sections fifteen through twenty-three provide for parole supervision and parole revocation proceedings. Criminal fines collected

from parolees will be paid over to the State Treasury for appropriation to the Violent Crimes Compensation Board. Parole may be revoked if the parolee is guilty of serious or persistent violations of the conditions of parole set by the board, or if the parolee is convicted of a new offense. A system of less serious penalties is established for less serious violations. Parole revocation proceedings are consistent with the provisions of the United States Supreme Court decision *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), 92 Sup. Ct. 2593, 33 L. Ed. 2nd 484, including a preliminary probable cause hearing and a revocation hearing. The specific rights of the parolee and the standards for revocation are set forth.

ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY AND AND DEFENSE COMMITTEE

STATEMENT TO

ASSEMBLY, No. 3093

STATE OF NEW JERSEY

DATED: DECEMBER 3, 1979

This bill repeals the existing parole statutes, procedures and authorities and replaces them with an omnibus parole statute. The goal of the bill is to make the parole process more consistent, predictable, objective and efficient. This will contribute to the effectiveness of parole as a tool for reducing recidivism, and will contribute to the maintenance of institutional order. The official reports on the riots in Rahway State Prison and in Attica Prison cited uncertainties about parole and perceptions of injustice in the parole process as key causes of the riots.

In summary, the bill operates in three major ways. First, it abolishes the paroling authority of the institutional boards of trustees at the Youth Correctional Institution Complex, the Correctional Institution for Women and the training schools, and gives that paroling authority to an expanded State Parole Board. By Assembly Judiciary, Law, Public Safety and Defense Committee amendment, the institutional boards retain advisory powers on parole matters. Second, the bill establishes a series of parole procedures, to accord the statutory law with constitutional due process required by court rulings and with administrative procedure found to be most efficient and effective.

Third, the bill modifies existing parole standards, to accord with the new sentencing provisions of the Penal Code. The bill modifies initial parole eligibility for repeat offenders. The current parole law provides for variously extended parole eligibility for repeat offenders, from one-third to four-fifths of maximum sentence. This bill provides for the same initial parole eligibility, one-third of sentence, for all offenders who do not have a mandatory minimum which they must serve before parole. This provision is in recognition of the broad powers in the Code to give a repeat offender an extended term and/or a mandatory minimum. Thus, the Code plus this bill move the authority to incarcerate repeat offenders for extended periods from the parole process to the sentencing process. The bill also modifies the burden of proof as to parole release. Having attained his parole eligibility date, the existing law requires the inmate to prove he is fit to be released. This bill would require the authorities to show that the inmate is likely to commit a crime if he is released on parole. This shift accords with the existing practicalities of parole procedure, complements the generally

longer sentences of the new Criminal Code, and renders the process more objective and consistent. The practicalities of parole procedure are such that the likelihood that the inmate will recidivate is in fact the key issue in granting or withholding parole: the inmate was imprisoned for committing a crime; the State's main interest once parole eligibility has been reached, and the punitive and retributive aspects of the sentence have thereby been satisfied, is to ensure that he does not commit another crime. Placing the burden of proof on the authorities also accords with existing practicalities: it is impossible for a man to prove he will not do something; in practice, the authorities have to present evidence to show he is likely to do something. This shift also renders the decision-making process more objective, cutting down the wide discretion that paroling authorities have under current law, and making the more closely subject to statutory prescriptions. Finally, this shift complements the longer sentences of the Code in further moving the power to incarcerate, the power to decide how long a convict should serve in order to satisfy the punitive and retributive aspects of a sentence, from the parole process to the sentencing process. The Code has prepared for this by providing that in determining a sentence, a judge must specifically consider parole eligibility as a factor (N. J. S. 2C:43–2d.).

More specifically, the provisions of the bill are:

Sections one through six create a seven member State Parole Board which would consist of a chairperson and six associate members. All members would be appointed by the Governor with the advice and consent of the Senate, and would reflect the various social, economic and ethnic groups in the State's population. The board would exercise parole jurisdiction over all juveniles committed and adults sentenced to State correctional facilities and those sentenced to county facilities. The board members would be assigned to parole panels which would consider inmates according to the type of sentence received.

Sections seven through fourteen provide for parole release proceedings. Parole eligibility for state prison inmates sentenced under the new code is established at one-third of the maximum sentence unless a judicial or statutory mandatory minimum sentence is set. Parole eligibility for young adult offenders sentenced to the Youth Correctional Complex and the Correctional Institution for Women would be established by a Parole Board eligibility schedule similar in format to that used by the United States Parole Commission. Parol eligibility would be the same for multiple offenders, since sentencing judges would take prior offenses into account in sentencing inmates to extended terms of imprisonment. Section nine provides that the Parole Board will deny parole to achieve the incapacitation of dangerous criminal offenders.

Sections fifteen through twenty-three provide for parole supervision and parole revocation proceedings. Parole may be revoked if the parolee is guilty of serious or persistent violations of the conditions of parole set by the board, or if the parolee is convicted of a new offense. A system of less serious penalties is established for less serious violations. Parole revocation proceedings are consistent with the provisions of the United States Supreme Court decision *Morrissey v. Brewer*, 408 U.S. 471 (1972), 92 Sup. Ct. 2593, 33 L. Ed. 2nd 484, including a preliminary probable cause hearing and a revocation hearing. The specific rights of the parolee and the standards for revocation are set forth.

The definitions on page 1, section 1 are for clarity. Definitions (1) and (2) are to make clear that a juvenile is someone sentenced to an indeterminate sentence under the law governing delinquency and is to be distinguished from an adult for purposes of parole, as in section 7f of the bill and 9b. Definitions (5) and (6) reaffirm in statutory form what is present policy and practice.

The amendment on page 1, section 2a, line 1 is to clarify that this section does not make the bill operate retroactively, and to avoid a conflict with section 7j of the bill.

The amendment on page 1, section 3, line 4 makes the appointment of Parole Board members subject to the advice and consent of the Senate.

The amendment on page 2, section 3, after line 25 shifts the position of section 5a. of the bill and ensures that once board members have been appointed to panels, they will not subsequently be shifted to other panels.

The amendment on page 2, section 4, line 2 requires that policy decisions be made by a majority of the total board members.

The amendment on page 2, section 4, after line 2 shifts the position of section 5b. of the bill.

The amendment on page 2, section 4b, line 8 is to clarify which parole board employees will be covered by civil service and other guarantees and which will not.

The amendment on page 2, section 4, line 8 is to clarify that while some Corrections personnel may do work under this act, they are not covered by these personnel provisions.

The amendments on page 2, section 4c, line 18 and on page 2, section 4c, line 19 clarify that the procedures of the Administrative Procedure Act do not apply to parole hearings and reviews, and that the Board will, consistent with the requirements of this bill and the Constitution, and in consultation with the Governor and the Commissioner of Corrections, develop its own procedures.

The amendment on page 2, section 4d, line 24 specifies that New Jersey should, as has previously been recommended by legislative report, participate in the NCCD uniform parole reports.

The amendment on page 2, section 4e, line 26 specifies recidivism as a subject of annual report by the Parole Board, and specifies that such information be sent to the Criminal Disposition Commission established by the new Penal Code, so that the commission's recommendations on sentencing can be coordinated with the parole process to help develop the maximum effect for corrections.

The amendment on page 2, section 4g, line 28 reflects the fact that juveniles, under N. J. S. 2A:4–61h, are sentenced to indeterminate sentences and are immediately eligible for parole. This amendment gives the prosecutor and the judge the chance to object if one or both feel that, given their knowledge of the juvenile and the case, a juvenile is being considered too soon for parole release.

The amendment on page 3, section 5c, line 14 clarifies what was originally termed "special" cases is a category of cases, of state prisoners in county facilities, and not specific individuals.

The amendment on page 3, section 5d, line 19 clarifies that the same Parole Board member may not make the initial parole decision on an inmate and then sit on the panel which reviews that initial decision.

The amendment on page 3, section 5e, line 22 clarifies that different board members do juvenile cases and adult cases, and that their case loads will not be mixed.

The amendment on page 3, section 5f, after line 22 reflects the fact that the Parole Board relies on Corrections employees to do some serving of warrants and some data collecting and data processing, as in section 7i. of the bill.

The amendment on page 3, section 6a., line 21 reflects the recent abolition of the county courts.

The amendments on page 4, section 7a., lines 6, 8 and 20 eliminates the use of "good time" credits, earned under N. J. S. 30:4–140 for the purpose of accelerating parole eligibility where a judicial or statutory mandatory minimum term has been set. Where the statute or judge has determined that a set minimum should be served before parole eligibility, this decision should not be modified by the use of credits earned in prison.

However, commutation credits can accrue while the mandatory minimum is being served, and, once that mandatory minimum is served, will be applied.

The amendments on page 4, section 7b, lines 11-13 and page 4, section 7b, line 18 comport the definition of life imprisonment with that of the Penal Code, N. J. S. 2C:43–7b.

The amendment on page 4, section 7c, line 21 reflects the fact that the new Penal Code has gone into effect since the drafting of this bill.

The amendment on page 4, section 7d, lines 34-35 is technical, to better comport with the Penal Code.

The amendment on page 4, section 7e., line 39 confirms that the parole eligibility of Adult Diagnostic and Treatment Center sex offender inmates is subject to any mandatory minimum they may have been sentenced to, as under 2C:14–6.

The amendment on page 5, section 7i, line 58 should eliminate disputes about whether inmates received the appropriate notices.

The amendment on page 5, section 7j, line 59 provides a modification of parole eligibility for certain repeat offenders sentenced under the pre-criminal code law. This is a compromise provision. Absent any mandatory minimum, the current law provides a parole eligibility for first offenders at one-third of the maximum sentence, for second offenders at one-half, for third offenders at two-thirds, for fourth offenders at four-fifths. Absent any mandatory minimum, this act provides for parole eligibility for all offenders, sentenced under the new Penal Code, at one-third. This amendment would provide that, subject to the veto of the prosecutor or sentencing judge, currently incarcerated inmates classified as second, third or fourth offenders become eligible for parole after one-third, one-half or two-thirds of the maximum sentence. This amendment balances the desire to fulfill the punitive intent of the sentence with the desire to equalize the treatment of current prisoners with that of new prisoners, and thereby achieve the full effect of this act and help maintain institutional order.

The amendment on page 5, section 8a, line 7 clarifies that an inmate shall not be subject to "double jeopardy" in having loss of "good time" deducted twice for the same violation of institutional rules.

The amendment on page 5, section 8b, line 9 defines "exceptional progress" which, as one of the "contract parole" provisions of the bill, might accelerate parole eligibility, but in no case can a mandatory minimum term be reduced by such procedure.

The amendment on page 5, section 8c, line 12 ensures that inmates will be kept up to date on their parole status and what they must do to increase their chances of parole.

The amendment on page 5, section 9a, line 4 provides the standard of proof which must be shown to overcome an adult inmate's presumption of parole release when he reaches his parole eligibility date. It also provides that parole decisions must be stated on the record.

The amendment on page 6, section 10b, line 8 specifies some of the material which must be in the institutional parole report filed with the Parole Board, prior to a parole determination.

The amendment on page 6, section 10c, lines 12-14 provides that the inmate shall get a copy of the institutional parole report, minus certain confidential material.

The amendment on page 6, section 11c, line 23 et seq. outlines the format of a parole hearing: informal, receiving any relevant and reliable evidence, all of which, minus any confidential material, shall be disclosed to the inmate who shall be permitted rebuttal; decisions based solely on the hearing evidence.

The amendment on page 7, section 11d, line 34 provides that the the statement of reasons for parole denial, which must be furnished to the inmate, may omit confidential material.

The amendment on page 7, section 12a, line 1 is technical.

The amendment on page 7, section 12c, line 20 complements that on page 5, section 9a, line 4.

The amendment on page 8, section 13b, line 7 outlines the preliminary procedure for a juvenile parole case.

The amendment on page 8, section 14a, line 1 requires the Board to establish criteria for appeals from a Board Panel to the full Parole Board.

The amendment on page 8, section 14a, line 5 is technical.

The amendment on page 8, section 14b, line 11 specifies that the Parole Board may on its own initiative review parole release or parole revocation decisions and take action to give or revoke parole.

The amendment on page 8, section 14c, after line 11 sets up a procedure for recision of parole, suspension of parole release date, for an inmate about whom new information has been discovered.

The amendment on page 8, section 15, lines 2-3 is technical.

The amendment on page 8, section 15b, line 10 outlines another specific condition of parole.

The amendment on page 9, section 15, line 22 ties this act in with two New Jersey statutes dealing with out-of-state parolees.

The amendment on page 9, section 15c, line 24 clarifies that a parolee may be relieved of some parole conditions if there is no substantial likelihood that he will commit a crime.

The amendment on page 9, section 15d, lines 29-31 clarifies that an inmate who would not be released on street parole may be paroled to a residential facility, such as a half-way house.

The amendments on page 9, section 15, lines 38 and 45-48 comport this bill with two other pending bills dealing with fines and the Crimes Compensation Board.

The amendment on page 9, section 15g, lines 41-43 specifies refusal or failure to make good faith efforts at required restitution as a ground for parole revocation.

The amendment on page 10, section 16b, line 13 is technical.

The amendment on page 10, section 16b, line 18 clarifies the due process right of a parolee who testifies at a revocation hearing prior to a criminal prosecution for the same charge.

The amendment on page 10, section 16c, lines 19-20 outlines the criteria and procedures for revoking parole subsequent to new criminal conviction.

The amendment on page 10, section 17d, line 19 specifies the action that a board panel may take in modifying parole conditions.

The amendment on page 10, section 18a, line 6 provides the criteria for taking a parolee into custody prior to a parole revocation hearing, which include danger to the public as well as possibility of absconding.

The amendment on page 11, section 18b, line 18 sets a limit on the postponement of a preliminary hearing for a parolee taken into custody for parole violation.

The amendment on page 11, section 18h, line 54 is technical.

The amendment on page 12, section 19a, line 10 sets a limit on the postponement of a parole revocation hearing where probable cause has been found.

The amendment on page 12, section 20a, line 1 are technical.

The amendment on page 13, section 20b, line 10 et seq. clarifies that the first parole eligibility date for persons whose parole has been revoked for reasons other than new criminal convictions shall be within 1 year of return to custody.

The amendments on page 13, section 20c, line 14 and on page 13, section 20d, line 19 are technical.

The amendment on page 13, section 21a, line 1 is in conformity with P. L. 1979, chapter 178 (section 86A of Senate Bill 3203), which deletes N. J. S. 2C:43–9b of the Penal Code, which had provided a separate parole term for every sentence of imprisonment.

The amendments on page 13, section 21b., lines 6 and 11 are technical.

The amendments on pages 13-14, section 23, line 1 et seq. elaborate the procedures for establishnig and terminating "contract parole" arrangements between inmates and the Parole Board or Department of Corrections.

The amendments on page 15, section 25, after line 55 establish an advisory role for the institutional boards of trustees on parole policy and on individual parole cases. The State Parole Board must formally solicit this advice and formally respond to it.

The amendment on page 15, section 26, after line 9 provides for the same sentencing and paroling practices for men and women sentenced as young adult offenders to the Youth Correctional Complex and to

Clinton Correctional Institute for Women, in accord with the Supreme Court rulings on the subject. The amendment complements the repeal by amendment of 30:4–155 in section 27 of the bill.

The amendments also eliminate the paroling authority of the boards of managers at the Youth Correctional Institution and the Correctional Institution for Women.

The amendment on page 15, section 27, lines — repeals 30:8–28, a special parole provision for prisoners in county jails.

The amendment on page 15, section 28, line 3 guarantees the supremacy of the provisions of the Criminal Code in case there is any conflict with this parole act.

The amendment on page 16, section 31, line 1 shortens the period between enactment and effect.

SENATE LAW, PUBLIC SAFETY AND DEFENSE COMMITTEE

STATEMENT TO

ASSEMBLY, No. 3093

STATE OF NEW JERSEY

DATED: DECEMBER 10, 1979

Assembly Bill No. 3093, the Parole Act of 1979, repeals existing statutes relating to parole and parole procedures and replaces them with the provisions contained therein. The stated goal of Assembly Bill No. 3093 is to make the parole system more consistent, predictive, objective and efficient. The major provisions of Assembly Bill No. 3093 include the following:

1. Expansion of the authority and size of the State Parole Board.

The bill would abolish the paroling authority of the institutional boards of trustees at the Youth Correctional Complex, the Correction Institution for Women, and the training schools. However, the institutional boards would retain advisory powers on parole matters. The paroling authority of these bodies would be shifted to an expanded parole board which would consist of a chairman and six associate members. The board would be appointed by the Governor with the advice and consent of the Senate. The members would serve for terms of six years. Thus, the Parole Board would have paroling authority over all adults and juveniles sentenced to state and county correctional facilities.

2. Parole Eligibility.

Under Assembly Bill No. 3093, all adults sentenced to a specific term of years, except those sentenced to a judicially or statutorily set mandatory minimum sentence, would be eligible after serving ⅓ of their sentence less good time credits. Good time credits could not, however, be used to reduce a mandatory minimum sentence.

This basic eligibility requirement would eliminate extended parole eligibility for repeat offenders. Under present law, second offenders are eligible after serving ½ of their term, third offenders after ⅔ of their term, and fourth offenders after serving ⅘ of their sentence. The rationale for elimination of extended eligibility for repeaters lies in the new sentencing structure of the penal code which gives the sentencing court the authority to impose extended terms and mandatory minimums. It is felt the decision with regard to repeat offenders belongs in the sentencing court rather than [illegible] the parole process.

Adult offenders sentenced to indeterminate sentences as youthful offenders would be eligible for parole pursuant to a schedule promulgated by the board.

As under present law, inmates serving a life sentence when no mandatory term has been imposed would be eligible for parole after serving 25 years less good time.

Also, as under present law, juveniles would be immediately eligible for parole upon incarceration.

3. Retroactivity.

An issue somewhat related to the question of parole eligibility is the question of retroactivity, that is what effect would enactment have on the eligibility for parole of those already incarcerated. Assembly Bill No. 3093 would not affect first offenders. As under present law, they would be eligible for parole after serving ⅓ of their sentence.

Assembly Bill No. 3093 would have an effect on the parole eligibility status of repeat offenders. Second offenders who would have been eligible after serving ½ of their sentence would be eligible after serving ⅓, third offenders who would have been eligible after serving ⅔ of their sentence would be eligible after ½, and fourth offenders ⅔ of their sentence instead of ⅘. If, however, the prosecuting attorney or sentencing court objected to this reduction in eligibility date, the amount of time which would have been reduced by this formula would be cut in half.

4. Burden of Proof with regard to Parole Release.

Having reached his parole eligibility date, an inmate must, under present law, prove his fitness to be released in order to be granted parole. Assembly Bill No. 3093 provides that an inmate would be paroled on his primary eligibility date unless the State proves "by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime if released. . . ."

Various rationales are offered for this shift in the burden of proof with regard to parole. First, it is felt that this shift better complements the generally longer sentence of the code and that the power to decide how long a convict should be imprisoned belongs to the sentencing court rather than the parole board.

Secondly, it is argued that the shift better reflects the practicalities of the parole process. Since the key issue in determining fitness for parole is the question of recidivism and since it is impossible for a person to prove he will not do something, the present practice is for the authorities to present evidence showing a likelihood of future criminal activity in order for there to be a denial of parole. Thus, it is felt that in shifting the burden, Assembly Bill No. 3093 merely confirms statutory law to the practical dynamics of the parole process.

The third reason offered for the shift in burden is the hope that it will make the parole process more consistent and predictable. The official reports on the Rahway and Attica riots cited uncertainties about parole and perceptions of injustice in the parole process as key causes of the riots.

5. Other Points of Interest.

1. Assembly Bill No. 3093 carries an appropriation of $335,000.00.

2. It establishes parole revocation proceedings consistent with the provisions of the U. S. Supreme Court decision in *Morrissey v. Brewer,* 408 U. S. 471 (1972).

3. The board does have the authority to reduce a parole eligibility date if the inmate has made exceptional progress and if the sentencing court consents or if the inmate satisfactorily completes an individual program of rehabilitation. However, neither of these provisions can be used to reduce a statutorily or judicially set minimum sentence.

STATE OF NEW JERSEY

February 21, 1980

ASSEMBLY BILL NO. 3093 (OCR)

STATEMENT

Pursuant to Article V, Section 1, Paragraph 15 of the Constitution, I am appending to Assembly Bill 3093 (OCR) at the time of signing it, this statement of the items or parts thereof, to which I object so that each item, or part thereof, so objected, shall not take effect.

On Page 21, Section 30, Line 2: The appropriation of $335,000.00 for the purposes of this Act is reduced to $70,000.00.

This bill represents a major revision of our Parole legislation; it was introduced with my support and effects changes in our parole sytstem which I believe are desirable and important. The need for a $335,000 appropriation was calculated based on an effective date of September 1, 1979; it had been hoped at the time of introduction that this bill would become effective at the same time as the new Penal Code. Since the effective date will be April 21, 1980, the appropriation must be reduced accordingly.

Respectfully,

GOVERNOR

Attest:

CHIEF OF STAFF, SECRETARY

FROM THE OFFICE OF THE GOVERNOR

FOR FURTHER INFORMATION

FEBRUARY 21, 1980

FOR FURTHER INFORMATION

KATHRYN FORSYTH

Governor Brendan Byrne today signed the Parole Act of 1979 in a public ceremony in his office.

The bill, A-3093, was sponsored by Assembly Speaker Christopher J. Jackman (D-Hudson). It provides for the first major overhaul in the state's parole statutes since the current system was established in 19-8. The bill is effective April 21, 1980.

The Governor reduced the appropriation in the bill from $335,000, which was based on a September 1, 1979 effective date, to $70,000 for the period from the new effective date to the end of the current fiscal year.

Under the current system, there are four separate paroling authorities: the State Parole Board, which considers the cases of the inmates in the state prisons, and the Boards of Trustees at the Youth Correctional Complex, the Correctional Institution for Women and the State Training School for Boys and Girls. The State Parole Board is full-time; the other three authorities are part-time, volunteer citizens' boards.

In addition, each board has established different policies and procedures. This has resulted in a great disparity in the length of time inmates actually serve in different correctional facilities.

A-3093 abolishes the four authorities and creates a consolidated, full-time professional board consisting of a chairman and six associate members. The members will be appointed to three separate panels to consider parole cases according to the type of sentence; juvenile court commitments, adult reformatory sentences and adult state prison sentences.

Appellate review and policy decisions will be the responsibility of the board as a whole.

The bill sets legislative parole standards that parallel the determinate sentencing provisions in the new penal code and establishes the following parole eligibility for each type of offender:

-more-

16 shortage the Legislature has determined to authorize local units

-- State Prison inmates: one third of the sentence, less credits, except when the sentencing court has imposed a minimum term for parole;

-- Life terms: the minimum term set by the sentencing court or 25 years less credits;

-- Youthful offenders: the bill requires the board to set an eligibility schedule;

-- Sex offenders: the review board makes a recommendation, provided that any court-imposed minimum has been served;

-- Juveniles: immediate eligiblity, although the board is permitted to adopt a schedule under the bill;

-- County jail inmates: nine months.

The bill eliminates the "multiple offender" status for parole purposes. The court will take the defendant's past record into consideration when imposing the sentence. This is consistent with the sentencing philosophy of the new penal code.

The measure also establishes new standards for granting parole for both adult and juvenile inmates.

An adult inmate will be released at the time of parole eligibility, unless the board can give strong 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 the time." The board must provide the inmate with a statement as to its reasons for denial.

A juvenile inmate will be released on parole "when it shall appear that the juvenile, if released, will not cause injury to persons or substantial injury to property."

The bill also codifies and standardizes the due process requirements at the various stages of the parole process.

# # # #

great difficulty in the State, [illegible] in order to alleviate this housing
16 shortage the Legislature has determined to authorize local units

Malcolm v. N.J. Dep't of Corr.

Superior Court of New Jersey, Appellate Division

May 13, 2020, Submitted; July 2, 2021, Decided

DOCKET NO. A-3419-18

Reporter
2021 N.J. Super. Unpub. LEXIS 1356 *; 2021 WL 2774849

SEAN MALCOLM, Appellant, v. NEW JERSEY DEPARTMENT OF CORRECTIONS, Defendant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the New Jersey Department of Corrections.

Counsel: Sean Malcolm, appellant, Pro se.

Gurbir S. Grewal, Attorney General, attorney for respondent (Jane C. Shuster, Assistant Attorney General, of counsel; Niccole L. Sandora, Deputy Attorney General, on the brief).

Judges: Before Judges Fuentes and Enright.

Opinion by: FUENTES

Opinion

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Appellant Sean Malcolm is currently incarcerated at New Jersey State Prison serving a thirty-year term of imprisonment for murder, *N.J.S.A. 2C:11-3a(1)*, with an eighty-five percent period of parole ineligibility under the *No Early Release Act, N.J.S.A. 2C:43-7.2*, as well as related lesser included offenses. He appeals from the decision of a Hearing Officer who found he committed a disciplinary infraction, to wit prohibited act *.203, possession of any prohibited substance. Appellant was originally charged with prohibited act *.503, making an intoxicant. However, based on insufficient evidence to support the accusation that appellant actually made the intoxicant, the Hearing Officer amended the charge to *.203. Corrections Officer Sergeant Bezek served appellant with this amended charge on February 6, 2019.

The Corrections Officer who searched appellant's cell on February 5, 2019, found a bottle **[*2]** containing a liquid with a strong odor of alcohol. Sergeant Bezek averred that he sniffed the bottle found in appellant's possession and its content smelled like an alcoholic beverage "based on his training and experience." Appellant claimed the content of the bottle was only juice. He pleaded not guilty and at his request was granted counsel substitute. He admitted possession of the bottle, but denied it contained any intoxicants.

Counsel substitute argued that the Department of Corrections (DOC) did not present proof that there was bread or sugar found in the bottle and Sergeant Bezek did not have the kind of "specialized training" to permit him to differentiate, based on smell alone, between spoiled fruit juice and fruit juice modified to create an alcoholic beverage. The Hearing Officer reviewed the evidence and considered the arguments presented and found the content of the staff reports were sufficient to find appellant guilty of disciplinary infraction *.203.

The Hearing Officer imposed a sanction of 120 days of administrative segregation, 120 days loss of commutation time, permanent loss of contact visits, 365 days of urine monitoring, referral for a mental health evaluation, **[*3]** and confiscation of the prohibited item. Appellant administratively appealed the Hearing Officer's decision and on March 5, 2019, an associate administrator upheld the guilty finding, as well as the sanctions imposed. This appeal followed.

Based on the standard of proof required, we reverse. "A finding of guilt at a disciplinary hearing shall be based upon substantial evidence that the inmate has committed a prohibited act." *N.J.A.C. 10A:4-9.15(a)*. "Substantial evidence" means "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Figueroa v. New Jersey Dep't of Corr., 414 N.J. Super. 186, 192, 997 A.2d 1088 (App. Div. 2010)* (quoting *In re Public Serv. Electric & Gas Co., 35 N.J. 358, 376, 173 A.2d 233 (1961)*). An appellate court may reverse a disciplinary conviction that is "not supported by substantial credible evidence in the record as a whole." *Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980)*.

Although a lay person may opine about whether a person is under the influence of alcohol, Sergeant Bezek testified the liquid was an alcoholic beverage based on his specialized training. In *Blanchard v. New Jersey Dep't of Corr.*, we held that the DOC "acted arbitrarily, capriciously or unreasonably in denying a confirmatory laboratory test of a powder, seized from the inmate, which a field test indicated contained cocaine." *461 N.J. Super. 231, 235, 220 A.3d 488 (App. Div. 2019)*. The situation here is analogous. The content of the bottle may have had **[*4]** an odor associated with an alcoholic beverage, but this alone does not constitute substantial evidence.

This court has made clear that,

> "although the determination of an administrative agency is entitled to deference, our appellate obligation requires more than a perfunctory review." *Blackwell v. Dep't of Corr., 348 N.J. Super. 117, 123, 791 A.2d 310 (App. Div. 2002)*. Accordingly, our function is not to merely rubberstamp an agency's decision, *Williams v. Dep't of Corr., 330 N.J. Super. 197, 204, 749 A.2d 375 (App. Div. 2000)*; rather, our function is "to engage in 'a careful and principled consideration of the agency record and findings.'" *Ibid.* (quoting *Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93, 312 A.2d 497 (1973)*).
>
> [*Figueroa, 414 N.J. Super. at 191*].

Here, the Hearing Officer held that appellant "did not provide any evidence to discredit staff reports. As such, [the Hearing Officer] will rely on written reports and clarification received to support the charge as amended." The Hearing Officer improperly shifted the burden of proof to appellant. Without some basis to assess the reliability of the specialized training received by Sergeant Bezek, the Hearing Officer's findings are not supported by substantial evidence.

Reversed.

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De La Roche v. New Jersey State Parole Bd.

Superior Court of New Jersey, Appellate Division

October 21, 2009, Submitted; November 19, 2009, Decided

DOCKET NO. A-3456-07T1

Reporter
2009 N.J. Super. Unpub. LEXIS 2879 *; 2009 WL 4251634

HARRY DE LA ROCHE, Appellant, v. NEW JERSEY STATE PAROLE BOARD, Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from a Final Agency Decision of the New Jersey State Parole Board.

De La Roche v. New Jersey State Parole Bd., 2005 N.J. Super. Unpub. LEXIS 776 (App.Div., Sept. 28, 2005)

Counsel: Harry De La Roche, appellant, Pro se.

Anne Milgram, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Christopher C. Josephson, Deputy Attorney General, on the brief).

Judges: Before Judges Sabatino and Newman.

Opinion

PER CURIAM

Appellant Harry De La Roche, serving four concurrent life sentences for murdering four of his family members in 1976, returns to this court a fourth time, following the respondent State Parole Board's most recent denial of parole to him on August 22, 2007, and the setting of a Future Eligibility Term (FET) of 120 months on February 20, 2008, to run from the date parole was denied.

The relevant background is amply set forth in our prior opinions of March 19, 2003 (No. A-2138-01), September 28, 2005 (No. A-6652-03), *2005 N.J. Super. Unpub. LEXIS 776*, and May 12, 2006 (No. A-6024-04), *2006 N.J. Super. Unpub. LEXIS 1222*. Suffice it to say, after returning home for Thanksgiving break from his freshman studies at the Citadel Military Academy in November 1976, appellant shot and killed his parents and his two younger brothers at the family residence. After confessing his crimes to the local police, appellant was convicted in 1978 **[*2]** of all four murders. He was sentenced under former Title 2A to four concurrent life sentences.

Since his arrest in 1976, appellant has been continuously incarcerated for the past thirty-three years. Throughout his incarceration, appellant has failed to acknowledge killing his parents and his younger brother, asserting instead that all three had been shot by his other brother, who appellant claims to have shot in retaliation.

When appellant first became eligible for release in May 2002, the Board denied him parole and imposed a ten-year FET term. In March 2003, we remanded that disposition to the Board. *De La Roche v. N.J. State Parole Bd.*, No. A-2138-01 (App. Div. Mar. 19, 2003). We did so because the Board had denied parole based upon appellant's continued failure to accept full responsibility for his family members' deaths, without the Board having competent expert proof demonstrating that appellant's lack of insight placed him at substantial risk for re-offense. *Id.* at *6.

On remand, the Board arranged an evaluation of appellant by a clinical psychologist, Leland Mosby, Ed.D., which was conducted over four days in May and June 2003. Dr. Mosby concluded that appellant has never addressed **[*3]** the latent psychological problems of anger, rage, repression, and denial connected to murdering his family. Dr. Mosby opined that appellant, if paroled, would be prone to commit further acts of violence if he were confronted with similar stressors. Based upon Dr. Mosby's negative assessment, the Board reaffirmed its prior denial of parole, and appellant sought further review from this court.

Meanwhile, as the result of earning certain credits on his ten-year FET for good behavior within the institution, appellant again became eligible for parole consideration in 2004. The Board arranged another psychological evaluation of appellant, this time by Dr. Kevin Amory, a psychologist, in September 2004. Dr. Amory found that appellant's psychological problems, which were identified by Dr. Mosby, persisted, and he opined that appellant, who continued to blame others for his misdeeds, had "a significant lack of insight into his behaviors and motivations," and was "under-reporting psychopathologies to an extreme degree." Dr. Amory concluded that appellant remained "a poor to below-average risk for parole," predicting that "unless [appellant] becomes willing to deal with the scope of his emotional **[*4]** problems, [he] may have a significantly difficult time with living independently."

Following Dr. Amory's evaluation, two-member and three-member Board panels successively denied appellant parole, and imposed a new five-year FET. The full Board affirmed the five-year FET extension in June 2005, and appellant filed an appeal concurrent with his still-pending appeal of the remanded ten-year FET from 2003.

On September 28, 2005, we affirmed the Board's post-remand decision from 2004, determining that Dr. Mosby's unfavorable 2003 psychological evaluation of appellant supplied the Board with an ample basis to deny parole and to reaffirm the ten-year FET. *De La Roche vs. N.J. State Parole Bd., No. 6652-03, 2005 N.J. Super. Unpub. LEXIS 776 (App. Div. Sept. 28, 2005)*. In our opinion, we emphasized the substantial expertise of the Board in parole decisions. *Id.* at *2; *see, e.g., In re Vey, 272 N.J. Super. 199, 205, 639 A.2d 724 (App. Div. 1993)*, *aff'd.*, *135 N.J. 306, 639 A.2d 718 (1994)*.

The current scenario replicates, in large measure, what has previously transpired. Appellant continues to insist that he only shot and killed his brother, Ronald, upon learning that Ronald had killed their mother, father, and younger brother, Eric. Appellant remains compliant **[*5]** within institutional rules while incarcerated. Dr. Amory interviewed appellant on April 19, 2007, for an in-depth psychological evaluation. Dr. Amory found appellant's comments "suggest a tendency towards rationalization of his behavior" when referring to his past deviant behavior. According to Dr. Amory, appellant is "somewhat immature," "lacks insight into his behavior and motivations," and has not "fully developed effective coping skills needed to deal with the challenges of everyday life." While appellant may be able to function in a highly structured and supervised environment, "[i]mpulse control problems may arise in a less structured environment."

Dr. Amory recognized that appellant had participated in a variety of behavioral programs. Nonetheless, appellant appeared to lack understanding of "how to incorporate the information . . . into his everyday life." Dr. Amory, based on appellant's presentation and testing results, was of the view that appellant was a poor to below average risk for parole.

The full Parole Board denied parole, satisfied that its decision was based upon a determination by a preponderance of the evidence that there is a substantial likelihood that appellant **[*6]** would commit a crime if released on parole. *N.J.A.C. 10A:71-3.18(f)*.

In setting the 120 month FET, the full Parole Board rendered a twenty-six page decision. Appellant appeared before the full Board for the first time and was questioned by the Board members. Appellant's responses, in a number of instances, demonstrated that his explanations, which distanced himself from the murders of all four family members, were not plausible. Appellant's refusal to accept responsibility for the deaths of his entire immediate family continued to confound him emotionally. Appellant was still attempting to retry his case by noting minor discrepancies to prove his innocence. Appellant seemed unreceptive to identifying the issues he faced. So long as

he refrained from properly addressing the issues for himself through extended treatment, it was "unlikely that [he] will meet the statutory standard for parole."

The full Board was well aware that the previous FETs imposed on appellant "were progressively less." However, in view of his presentation before the full Board, a sufficient basis for the 120 month FET was formed.

On appeal, appellant raises the following points for our consideration:

POINT I

THE DECISION **[*7]** TO DENY PAROLE WAS ARBITRARY AND CAPRICIOUS.

POINT II
THE BOARD CANNOT RELY ON INACCURATE INFORMATION TO MAKE THEIR DECISION.

POINT III
ANY ARGUMENT THAT THE BOARD CAN SUBSTANTIALLY REDUCE THE LENGTH OF THE FET THROUGH ANNUAL REVIEWS IS MISLEADING.

POINT IV
MY RECORD SHOWS THAT I AM NOT LIKELY TO COMMIT A CRIME WHEN RELEASED.

POINT V
THE BOARD DID NOT FOLLOW THEIR OWN REGULATIONS AND STATE RULES AND LAWS.

POINT VI
THE BOARD DID NOT JUSTIFY IMPOSING A 10 YEAR FUTURE ELIGIBIITY TERM (FET).

POINT VII
THE BOARD INCORRECTLY CALCULATED THE START DATE OF THE FET.

POINT VIII
THE BOARD'S INACTION CAUSED GREAT HARM.

We need not address the points specifically because they are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(2)*.

Appellant's primary argument is that the FET of 120 months is not supported by substantial credible evidence in the record. This is the point underscored by the descending order of FET in the past three parole hearings from fifteen years, to ten years, and to a five-year FET. Appellant contends that the only reason for the denial of parole and an increase in the FET is his refusal to admit to killing all four family members.

In our decision of March 19, **[*8]** 2003, we indicated that the failure to admit to all the murders may be a legitimate consideration by the Parole Board, but that the "implications on the standard of review are not self-evident and are no where to be found in the present record." We went on to say:

> [l]ogically, the consequence of defendant's failure to admit guilt, in light of the nature of his crimes, his lack of prior criminal involvement, and his otherwise apparent rehabilitation, is a matter for expert psychological analysis. If there is linkage between De La Roche's failure to admit full guilt and probable recidivism, it should be established through medical expertise. Although the substantial likelihood of recidivism is a fact question, it is a fact question that on occasion must be informed by expert evidence. The proposition that anyone who does not admit guilt must be a likely recidivist, is a non sequitur. It simply carries no force of logic in and of itself, at least not on the present facts.

Here, the full Board had the benefit of a psychological evaluation by Dr. Amory of April 19, 2007. Dr. Amory found appellant's "defensive nature, coupled with his self-esteem issues in coping, may affect his ability to **[*9]** react appropriately to the challenges of everyday life." Dr. Amory was of the view that he "may be able to function

adequately in a highly structured, highly supervised living situation," but in a less structured environment, problems may arise. As a consequence, Dr. Amory viewed defendant as having significant emotional problems, despite having taken a variety of behavior programs. In Dr. Amory's view, appellant lacks the understanding to incorporate what information he has learned into his everyday life.

Dr. Amory's evaluation informed the Parole Board and led it to conclude that there was a substantial likelihood of recidivism. Indeed, in establishing the 120 month FET, the Board based its decision on defendant's insufficient problem resolution, specifically grounded on his lack of insight into his criminal behavior and his denial of crime. In its decision, the panel of the Board recommended that appellant consider participating in one-to-one counseling. According to appellant, one-to-one counseling is not available to him. There is a question of whether appellant is eligible to receive one-to-one counseling based on his status in prison. If it is not available because of his status, **[*10]** it should be made available to him since it is the Board's recommendation, if he is willing to participate. Otherwise, the Board is not providing him with an opportunity for problem resolution, which appears to be the primary basis for denying parole and imposing a 120 month FET.

On the present record, we are satisfied that the Parole Board has carried its burden by a preponderance of the evidence to establish that appellant presently poses a substantial likelihood he would commit another crime if released on parole and that the imposition of a 120 month FET was well-grounded.

Affirmed.

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