SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0072-19

W.M.,[1]

Appellant,

v.

NEW JERSEY STATE
PAROLE BOARD,

Respondent.

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Argued September 15, 2021 – Remanded October 7, 2021
Reargued May 23, 2022 – Decided December 6, 2022

Before Judges Messano, Accurso and Rose.

On appeal from the New Jersey State Parole Board.

Joseph J. Russo, Deputy Public Defender, and Scott M. Welfel, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Joseph J. Russo, of counsel and on the briefs; Scott M. Welfel, on the briefs).

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[1] We use initials to protect the appellant's privacy interests because the appeal requires we discuss the appellant's mental health records.

Deborah Hay, Deputy Attorney General, and Christopher C. Josephson, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Acting Attorney General, attorney; Jane C. Schuster, Assistant Attorney General, and Sookie Bae-Park, Assistant Attorney General, of counsel; Christopher C. Josephson, on the briefs).

Tess Borden and Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Tess Borden, Alexander Shalom and Jeanne LoCicero, on the brief).

Dillon J. McGuire argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, PC, attorneys; CJ Griffin and Zachary Levy, on the brief).

Jennifer B. Condon argued the cause for amici curiae Disability Rights New Jersey and The Arc of New Jersey (Center for Social Justice, Seton Hall Law School, attorneys; Jennifer B. Condon, of counsel and on the brief; Hannah N. Eaves and Nicholas D. Velez, appearing pursuant to Rule 1:21-3(b), on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

This is W.M.'s appeal from the July 31, 2019 final decision of the New Jersey State Parole Board denying parole and establishing a 120-month future eligibility term (FET). The procedural history is protracted, but because it informs our decision, we summarize the salient points.

W.M. was convicted by a jury of the brutal stabbing death of his live-in girlfriend in January 1983. State v. Mitchell, No. A-4583-82 (App. Div. Sept. 25, 1985) (slip op. at 2-3). The evidence at trial established defendant and the victim were quarreling in the car when they dropped off the victim's thirteen-year-old sister at school at 8:30 a.m. Id. at 3. At ten after nine, defendant drove to the Mercer County Sheriff's Office with blood on his clothes, and told detectives he'd stabbed his girlfriend to death in their apartment because she was "fooling around on him" and "spending his money." Ibid. When they asked how he knew she was dead, W.M. replied that he'd "stabbed her eight times" and twisted the knife into her heart. Ibid. The detectives described defendant as calm and coherent. Id. at 3-4. The pathologist report confirmed the victim had been stabbed multiple times in the chest and abdomen with great force and a twisting of the knife. Id. at 4.

W.M. was sentenced to a discretionary extended term of life imprisonment with a twenty-five-year period of parole ineligibility. Id. at 13. We affirmed his conviction and sentence. Id. at 16. In rejecting W.M.'s claim that his sentence was excessive, we noted the trial court's finding that W.M. had two prior assault convictions in South Carolina, one "of a high and aggravated nature," and that the pre-sentence report reflected defendant had

been arrested and charged with another aggravated assault several months before the murder, which remained pending at sentencing. Id. at 14-15. The Supreme Court denied W.M.'s petition for certification. State v. Mitchell, 102 N.J. 362 (1985).

In December 2007, twenty-four years and eleven months after his conviction, the Parole Board denied W.M. parole and imposed a revised parole eligibility date of March 1, 2019.

On November 5, 2018, a two-member Board panel again denied W.M. parole, and on January 16, 2019, a three-member panel established a 120-month FET. Based on the application of commutation credits, the panel calculated W.M.'s new parole eligibility date to be April 16, 2026, while noting work and minimum custody credits could advance that date to May 2025. W.M. appealed to the full Board, which issued its final decision affirming the denial of parole and the 120-month FET on July 31, 2019.

W.M. filed a timely notice of appeal pro se. Following our denial of W.M.'s request for the assignment of counsel, the Office of the Public Defender entered its appearance for him. In response to counsel's request for the documents listed in the Statement of Items Comprising the Record,

the deputy attorney general representing the Board sent counsel the non-confidential documents and a consent protective order for the four confidential documents: (1) mental health records from 1983-1993; (2) an in-depth psychological evaluation of August 23, 2018; (3) reports of November 5, 2018; and (4) an undated addendum to the Parole Board's final decision. The order would have permitted counsel to obtain and review the confidential documents to prosecute the appeal but would not permit him to share or discuss those documents with W.M. Counsel refused to sign the consent order and moved in February 2021 for summary reversal and a remand for a new parole hearing at which W.M. would be represented by counsel and have unrestricted access to his confidential mental health evaluations.

We granted W.M.'s motion in part, remanding for the limited purpose of permitting the Parole Board to provide a "written statement of reasons supporting its decision to maintain the confidentiality of the records at issue" in accord with Thompson v. N.J. State Parole Board, 210 N.J. Super. 107, 126 (App. Div. 1986). The two-member and three-member Board panels thereafter issued nearly identical agency forms entitled "Confidential Reports Considered" in which each checked off the following reasons explaining why the panels withheld the August 24, 2018 psychological evaluation prepared by

Jan Segal, Ph.D.: (1) fear of retaliation against the report's author; (2) the potential for manipulation of future evaluations prepared for parole consideration; (3) the inmate could become less than forthcoming in future evaluations; and (4) the evaluator is able to assess the inmate fairly without risk of retaliation. The full Board thereafter issued a "decision sheet" noting its unanimous vote to affirm the panels' decisions to withhold disclosure of the 2018 Segal evaluation for the same reasons offered by the panels. We thereafter granted the motion of the American Civil Liberties Union of New Jersey to appear as amicus curiae in support of W.M.'s appeal.

The parties submitted supplemental briefs with W.M. arguing the Parole Board's waiver of confidentiality of three of the four items it previously designated as confidential required those items be turned over to his appellate counsel without restrictions, that the 2018 Segal evaluation should also be released without restrictions thereby permitting counsel to discuss and share the evaluation with W.M., and because W.M. did not have access to the documents previously designated as confidential during his parole hearings, that we should summarily reverse the Board's decision and remand "for a new hearing with assigned counsel physically present." The Parole

Board argued we should deny W.M.'s motion for remand, because he is not entitled to unrestricted access to his mental health evaluations, nor counsel at a parole release hearing.

After hearing argument in September 2021, we directed counsel for the Parole Board to submit the four confidential documents for our in camera review. After reviewing the documents, we issued an order in October 2021, determining there was "no current reason for any of those documents," including the 2018 Segal evaluation, "the only one the Parole Board claimed played a substantial role in the denial of parole to [W.M.]," to remain confidential. See Thompson, 210 N.J. Super. at 116-27. We accordingly ordered counsel for the Parole Board to serve W.M.'s counsel with the documents, all of which we deemed could be shared with W.M., and permitted the parties to file amended or supplemental briefs in anticipation of oral argument on the appeal. We subsequently granted the motions of the Association of Criminal Defense Lawyers of New Jersey and Disability Rights New Jersey and The Arc of New Jersey to also appear amicus in support of W.M.'s appeal.

At the time the Parole Board issued its final decision in 2019, W.M. had accumulated ninety-five institutional infractions, including sixty "asterisk"

infractions, over twenty of which were assaults. Asked about that assaultive history, W.M. told the two-member panel at his board panel hearing "it wasn't because of [his] misbehavior." Instead, he claimed he did what he had to do to protect himself. He maintained he wasn't "a troublemaker," but "if a person does try to violate me and I see that person trying to hurt me, . . . that's what I'm going to have to do to protect myself to keep him from . . . hurting me." W.M. claimed many of those assaults occurred years ago when he "had no idea who it was about." Although W.M. admitted he "knew it was wrong . . . before [he] did what [he] did," he maintained he "wasn't really, really guilty of – of striking somebody, because this person violated [him]."

While many of those assaults occurred years and even decades before, not all were in the distant past. Among W.M.'s more serious and recent infractions was an incident in 2014, more than thirty years into his sentence, when he stabbed his cellmate in the eye with a pencil. Asked about that assault at the parole hearing, W.M. explained his cellmate had "disrespected" and "violated" him by "running off his mouth" about how W.M. wouldn't be granted parole, notwithstanding the time W.M. spent preparing his parole papers. W.M. was placed in administrative segregation for 180 days following that incident, but two years after being moved back into the general population

in January 2017, he was found guilty of another assault and fighting, for which he received another year of administrative segregation.

When asked at the parole hearing about the murder for which he was incarcerated, W.M. said he went to trial rather than plead guilty because he wasn't guilty. He acknowledged being told he'd confessed to the murder of his girlfriend, but said he didn't remember anything about it. When the panel asked whether he and his girlfriend, whom he described as a "nice lady," ever argued, he claimed "nothin' serious." He maintained he had no memory of the murder, adding "[s]o if you don't remember something after all them years then there's nothin' you can really say about it."

Parole Board panels document their decisions using a checklist of "mitigating factors" and "reasons for denial." In its November 5, 2018 decision denying W.M. parole and referring the case to a three-member panel for the establishment of an FET outside the administrative guidelines, the two-member panel checked off the following mitigating factors:

- All opportunities on community supervision completed without violation.
- Participation in programs specific to behavior.
- Participation in institutional programs.
- Institutional reports reflect favorable institutional adjustment.

- Commutation time restored.

The panel checked off the following reasons for denial:

- Facts and circumstances of offense: Specifically: first degree murder.
- Offense record is repetitive.
- Prior offense record noted.
- Nature of criminal record increasingly more serious.
- Committed new offenses on community supervision (probation) but status not formally terminated/revoked.
- Prior opportunities on community supervision (probation) have failed to deter criminal behavior.
- Prior incarceration did not deter criminal behavior.
- Institutional infractions (since last panel hearing): numerous; persistent; serious in nature; loss of commutation time; confinement in detention and Administrative Segregation; consistent with offense record. Last infraction 1/29/2017.
- Insufficient problem resolution. Specifically, "inmate claims to not remember the crime. His mental health issues, coupled with his sense that people want to hurt him and he becomes assaultive, raise concerns that he would commit a crime" were he released. As demonstrated by interview; documentation in case file; and confidential material / professional report.
- Risk assessment evaluation. LSI-R [Level of Service Inventory-Revised score] 29.

The three-member panel reviewed the matter and established a 120-month FET, explaining its reasoning in its February 23, 2019, six-page narrative decision. Echoing the factual findings of the two-member panel, the three-member panel noted W.M.'s two prior convictions for assault pre-dating the murder, which W.M. committed while still on probation after his three-year prison sentence for assault and battery of "high and aggravated nature" in South Carolina was suspended after one year and he was placed on probation supervision. It also noted W.M.'s lengthy institutional infraction history, including three "asterisk" offenses committed since his last parole hearing, two for assaults with a weapon and the other for fighting.

The three-member panel found W.M. had "not fully come to terms with the violence . . . exhibited" when he committed the murder, or why he behaved "in an extreme anti-social manner" in a correctional setting, evidenced by his answers to questions at the parole hearing and his "overall presentation," including that he claimed not to recall murdering his girlfriend or barely anything about their relationship or the circumstances preceding her death.

The panel noted W.M. took no responsibility for any of his ninety-five institutional infractions, admitting no wrongdoing and maintaining he only ever acted to protect himself in a prison setting. The panel found it

particularly troubling that W.M. had committed two assaults since his last hearing, both with a weapon, noting the "very matter of fact manner" in which he described stabbing his cellmate in the eye with a pencil for having expressed his opinion on the unlikelihood of W.M. obtaining parole. The panel found W.M. "must conduct an introspection to honestly assess [himself], the true nature of [his] violent actions" and how he would realistically handle life experiences of a stressful or confrontational nature if released on parole.

As to the reason for setting a 120-month FET, the three-member panel found W.M. distanced himself from his actions and failed to recognize or acknowledge any weaknesses or deficiencies he could work to improve. It found he did not understand the gravity or consequences of his actions and had failed to make "sufficient progress in [his] rehabilitative process." Based on its review of the record, the panel found it "clear" W.M. "remain[ed] a threat to public safety" after thirty-five years of incarceration, given his lack of "insight into [his] negative behavior and decision-making."

The panel acknowledged Dr. Segal's 2018 confidential psychological evaluation played a significant role in its decision to establish a 120-month FET. Segal evaluated W.M. on August 14, 2018, conducting a clinical interview, reviewing his medical records, and administering the Level of

Service Inventory-Revised (LSI-R) and the Millon Clinical Multiaxial Inventory-III (MCMI-III) tests.

Segal noted W.M., born in 1954, had "a history of extensive psychiatric difficulties indicating he was first hospitalized as [a] teen" in 1968. He was hospitalized again two years later "for behavior described as aggressive, destructive and threatening." W.M. was again hospitalized several months after his murder conviction in 1983 and again in 1984 when he was reported as "paranoid, threatening, [and] hostile with religious delusions." Segal reported W.M.'s medical records note eighteen admissions to the State Forensic Psychiatric Hospital on transfer from state prison over the next decade, the last occurring in 1993. Segal reported W.M. "has long been on the Mental Health Special Needs Roster and has been receiving psychiatric care during this bid."

W.M. told Segal he lived with the victim, his girlfriend, for four years, and that while he'd been working, he'd filed a claim for a back injury "so finances were tight." As to the murder, W.M. reported "'from the time this was committed and up to now, it was not something knowingly I would take the blame for' (but then added I) 'Don't remember what I did.'"

Segal reported W.M. presented with "[n]o delusional ideation," but noted a history of infractions, the majority of which "were of a violent nature" and

several of which "were fire related" in the period between 1990 and 1992. He reported W.M.'s "[m]otivation for programming and institutional behavior have been poor, although he is certainly less behaviorally problematic now compared with the first half of his bid." Segal noted W.M.'s "more obvious and problematic psychiatric symptoms" at the time of the interview were "well controlled with current medication," with which he was compliant, but he was "not talkative or engaged in his care." Segal found W.M. "fully oriented but with very little insight" and "impaired judgment."

Segal reported the MCMI-III testing revealed "[a] distinct tendency toward avoiding self-disclosure" that might "signify a characterological evasiveness or an unwillingness to divulge matters of a personal nature." "[B]road deficits in introspectiveness and psychological-mindedness, owing to emotional impoverishment or thought vagueness" were "[a]lso possible." W.M.'s personality profile was "consistent with individuals that exhibit an inflated sense of self-worth, an air of imperturbability, and a pretense of self-satisfaction." "[R]ebuffs" to such an individual "may disrupt their characteristically unruffled composure and elicit a range of unpredictable behavior, such as anger, depression, anxiety, and withdrawal." On the LSI-R, W.M.'s score of 29 reflected a medium-high risk of reoffending with a twenty-

eight percent chance of rearrest and a twenty-one percent chance of reconviction within two years of parole release.

With respect to risks, Segal noted W.M.'s weaknesses included "a history of criminality, including [a] propensity to violent behavior," and a previous violation of community supervision. Segal highlighted W.M.'s "[c]hronic, serious psychiatric difficulties with reactivity and associated violence" and "poor institutional adjustment with multiple incidents of violence," along with "antisocial personality traits" and "little to no effort in rehabilitation programming." Segal further noted W.M. lacked a high school education, has "limited ability to work and support himself" and has "few productive, supportive relationships, either family or peer." Because W.M. "accepts no personal responsibility" and has "virtually minimal personal insight," Segal deemed W.M. "not likely to 'learn from his mistakes.'" On the strengths side, Segal noted W.M. had no history of substance abuse and "a relative diminution of frequency of violent or disruptive behavior in recent years," which was "likely commensurate" with the natural decrease in impulsivity, reactivity, and criminality that comes with age, although noting W.M.'s most recent violent infraction occurred only the year before.

Segal diagnosed W.M. with schizoaffective disorder (per his electronic medical records) with narcissistic, paranoid, and antisocial personality features. While opining W.M.'s "chronic, more overt serious psychiatric disorder appears generally contained with current psychotropic regimen and current milieu placement," Segal concluded W.M.'s "insight into his illness [wa]s minimal," and he remained "distrusting with a history of violence under stress and conflict with others." Segal assigned W.M. a Global Assessment of Functioning (GAF) score of 55 to 60.

Although not recommending W.M. be released on parole, Segal recommended that if released, W.M.'s "release plans must include an absolute requirement for maintaining current level of psychiatric care." Segal noted W.M. would need "assistance with placement, which will need to incorporate availability of full array of mental health services (psychiatric medication management, counseling, supportive milieu and rehabilitative services, discharge planning to assist with acquiring SSD funds for psychiatric disability)." Segal suggested that "PACT [patient aligned care team] team level of care might be an option as this may be able to access the above required services in a community-based placement." Although noting W.M. did not meet the criteria for civil psychiatric commitment at the time of the

evaluation, Segal questioned whether W.M. would continue psychiatric services if released, noting if he did not do so, his "psychiatric state would likely deteriorate."

Segal also opined W.M.'s history of violence, both in the community and while incarcerated "in a treatment oriented and secure, structured custody environment," reflected "poor emotion management and behavioral control with obvious psychiatric concerns," leading to "clinical (non-empirical) estimates indicat[ing] this inmate appears to be a high risk for future violence if released with risk increasing if he were to discontinue his psychiatric medication."

In all, Segal opined W.M. had a "very poor" likelihood of "successfully completing a projected term of parole." He recommended that prior to release, W.M. should "[r]emain infraction free with demonstration of stable, cooperative behavior," should continue to "participat[e] in mental health services," including programs "focus[ed] on reduced maladaptive thinking, improved emotion/anger control, and prosocial problem solving skills," and "[l]ife skills and other vocational programs and experiences in support of prosocial behavior with self-management capabilities."

W.M. appealed the panels' decisions to the full Board, relying on a six-page brief prepared with the assistance of inmate paralegals. W.M. argued the panels failed to consider material facts, including that his criminal history was over thirty-five years old and should not continue to be used to deny parole; failed to document a preponderance of the evidence indicating a substantial likelihood he would commit a crime if released on parole; that the panels held him to "an unreasonable standard" in light of his illiteracy and "schizoaffective mental health disorder"; and that his 120-month FET should be "rescinded" and he "be paroled to a mental health reentry program."

The full Board rejected W.M.'s arguments and affirmed the panels' decisions. As relevant to the issues now on appeal, the Board noted it was provided by the Department of Corrections "with a medical report and in-depth psychological report" neither of which "indicates a serious, imminent medical or mental health condition that would affect [W.M.'s] ability to participate in the parole process." The Board found the panels were aware of W.M.'s mental health issues as well as his educational level and that the electronic recording of the hearing before the two-member panel made clear he was "asked appropriate questions about [his] commission of serious disciplinary infractions, the nature and pattern of [his] previous convictions, the facts and

circumstances of [his] current offense, [his] program participation and [his] mental and emotional health in a professional manner and . . . afforded a significant opportunity to speak on several points." It further found it apparent from the panel's follow-up questions that it had listened to W.M.'s answers and incorporated his responses into their decisions.

W.M. appeals, raising the following issues:

> POINT I
>
> THIS COURT SHOULD REMAND TO THE PAROLE BOARD FOR RECONSIDERATION AND ORDER THAT [W.M.] BE ASSIGNED COUNSEL TO ASSIST IN HIS PAROLE APPLICATION AND ANY APPEAL TO THE FULL BOARD. (Not Raised Below).
>
> A. Due Process Protections Of The Fourteenth Amendment Require Assignment Of Counsel For Parole-Release Decisions Governed By The 1979 Act; At Minimum, Counsel Is Required Where The Inmate Has A Cognitive Impairment Or Mental Illness Or Faces A Lengthy Future Eligibility Term (FET).
>
> 1. Because the 1979 Parole Act gives an inmate a constitutionally protected right to parole unless the Board proves there is a substantial likelihood that he will commit another crime, the liberty interest in parole is strong.
>
> 2. Because the Board's denial of parole to 91.2 percent of lifers from 2012 to 2019

shows the Board is not complying with the presumption of parole under the 1979 Act, counsel is necessary to reduce the risk of an erroneous deprivation of the right to parole, and counsel is especially necessary for inmates who, like [W.M.], have a cognitive impairment or mental illness.

3. The Government's interest in accurate, objective, predictable risk determinations — and in releasing all those inmates who can safely be released — would be assisted by the participation of counsel.

4. Because only about six percent of DOC inmates are governed by the 1979 Act, the fiscal and administrative burdens of providing counsel would be minimal.

B. The Due Process Protections Of Article I, Paragraph 1 Of The New Jersey Constitution Require That [W.M.] Be Assigned Counsel In Connection With His Parole Proceeding.

C. Because A Prison Sentence Subject To The 1979 Parole Act Incorporates The Right To Release When There Is No Longer A Substantial Likelihood That The Inmate Will Recidivate, Any Future Eligibility Term Departing From The N.J.A.C. 10A:71-3.21 Schedule Is A Sentencing Determination That Triggers The Right To Counsel Under The Sixth Amendment And Article 1, Paragraph 10 Of The New Jersey Constitution.

POINT II

THE BOARD BASED ITS PAROLE DENIAL IN LARGE PART ON [W.M.]'S MENTAL HEALTH ISSUES WITHOUT ASSESSING THE VIABILITY OF REASONABLE MODIFICATIONS, THUS VIOLATING THE AMERICANS WITH DISABILITIES ACT AND NEW JERSEY LAW AGAINST DISCRIMINATION. (Not Raised Below).

POINT III

THE PAROLE BOARD'S RELIANCE ON INFORMATION OTHER THAN "NEW INFORMATION" WITHIN THE MEANING OF THE APPLICABLE 1979 PAROLE ACT VIOLATED THE EX POST FACTO CLAUSE.

Amici ACLU and Criminal Defense Lawyers of New Jersey echo W.M.'s due process arguments that W.M. is entitled to a new parole hearing where he would be represented by counsel. Amici Disability Rights New Jersey and The Arc of New Jersey argue denying parole based on a person's psychiatric and intellectual disabilities violates the Americans with Disabilities Act (ADA) and New Jersey's Law Against Discrimination (LAD), both of which "compel the Parole Board to reasonably accommodate disability in its parole determinations."

We begin our analysis mindful the Parole Board's "decisions are highly 'individualized discretionary appraisals,'" Trantino v. N.J. State Parole Bd.,

166 N.J. 113, 173 (2001) (Trantino VI) (quoting Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973)), entitled to both a presumption of validity, see In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994), and our deference to the Board's "expertise in the specialized area of parole supervision," J.I. v. N.J. State Parole Bd., 228 N.J. 204, 230 (2017). We may not upset the determination of the Parole Board absent a showing it was arbitrary, capricious, or unreasonable; that it lacked fair support in the evidence; or that it violated legislative policies. Trantino v. N.J. State Parole Bd., 154 N.J. 19, 24-25 (1998) (Trantino IV). The burden is on the inmate to show the Board's actions were unreasonable. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002).

Because the decision on W.M.'s parole is governed by the 1979 Parole Act, he is entitled to "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." Acoli v. N.J. State Parole Bd., 250 N.J. 431, 455 (2022) (alterations and omissions in original) (quoting Trantino VI, 166 N.J. at 126). As counsel for W.M. correctly notes in his brief, the 1979 Act "shift[ed] the burden to the State to prove that the prisoner is a recidivist and should not be

released." Id. at 456 (alterations in original) (quoting N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983)).

Our Supreme Court has explained that requiring the Board to show "a substantial 'probability' that an inmate will reoffend is a fairly high predictive bar that must be vaulted — even though such an assessment will defy scientific rigor and involves a certain degree of subjectivity." Ibid. "Assessing the risk that a parole-eligible candidate will reoffend requires a finding that is more than a mere probability and considerably less than a certainty." Ibid. It is not enough for the Board to find "the mere 'potential' that an inmate if released may reoffend . . . . Only when the risk of reoffending rises to 'a substantial likelihood' may a parole-eligible inmate be denied parole" under the 1979 Act. Ibid.

The 1979 Act requires the Board to assess the twenty-four factors listed in N.J.A.C. 10A:71-3.11(b) in making a parole decision, which the Acoli Court noted include:

> facts and circumstances related to the underlying crime; offenses and disciplinary infractions committed while incarcerated; participation in institutional programs and academic or vocational education programs; documentation reflecting personal goals, personal strengths or motivation for law-abiding behavior; mental and emotional health; parole plans; availability of community resources or support

> services; statements by the inmate reflecting on the likelihood that he [or she] will commit another crime; the failure to rehabilitate; history of employment and education; and statement or testimony of any victim.
>
> [250 N.J. at 457.]

The board's decision must "be based on the aggregate of all pertinent factors," as well as any others the Board deems relevant. N.J.A.C. 10A:71-3.11(a) to (b).

W.M. does not explain how the Board erred in assessing the pertinent factors of the regulation in finding it substantially likely he would commit a crime if released at this time. Instead, he contends "counsel could have contextualized [his] numerous institutional infractions in light of DOC's failure to provide adequate mental health treatment." He further asserts the ADA and the LAD required the Board consider whether his inability to articulate "insight into [his] negative behavior and decision-making" was a product of his intellectual disability, review "the DOC's psychiatric treatment regimen to determine whether [W.M.]'s schizoaffective disorder might be better controlled with a different regimen and/or whether there are 'risk reduction programs' for people with mental illness that [W.M.] might participate in to reduce the risk of recidivism associated with his mental illness." We reject his arguments.

A long line of precedent establishes there is no right to counsel at parole release proceedings. Puchalski v. N.J. State Parole Bd., 55 N.J. 113, 115 (1969); Monks v. N.J. State Parole Bd., 58 N.J. 238, 244 (1971); Beckworth, 62 N.J. at 364-65; Byrne, 93 at 211. While there is no question but that a state prisoner has a constitutionally protected liberty interest in the "legitimate expectation of parole eligibility," the Court has unequivocally held "[o]nly a few, basic procedures" are necessary "to deal with the risks of erroneous or arbitrary determinations" in parole eligibility proceedings, and the right to counsel is expressly not one of them. Byrne, 93 N.J. at 206, 211.

Moreover, the Court has recently reaffirmed the Byrne approach in the context of the medical furlough and parole program initiated in Executive Order 124 in response to the spread of the COVID-19 virus in the State's prisons. In re Request to Modify Prison Sentences, 242 N.J. 357, 387-88 (2020) (holding "a full-blown set of procedural protections — an adversarial hearing with counsel and a detailed statement of reasons — is not required. Byrne offers a better approach"). Accordingly, we reject W.M.'s various claims of any due process or Sixth Amendment right to be represented by counsel at his parole release hearings.

We also reject W.M.'s claims that the Parole Board violated either the ADA or the LAD in denying him parole and establishing a 120-month FET. Initially, we note both the ADA and the LAD have complaint procedures and statutes of limitations that have not been complied with here, making the claims not actionable on this appeal. See N.J.A.C. 10A:1-3.3(2) (providing an ADA grievance should be filed within thirty days); Montells v. Haynes, 133 N.J. 282, 292 (1993) (LAD claims subject to two-year statute of limitations); Moore v. Dep't of Corr., 335 N.J. Super. 103 (App. Div. 2000) (rejecting LAD claim first raised on appeal).

Further, there is nothing in the record to suggest W.M. was denied parole based on his intellectual disability, that the DOC's psychiatric treatment regimen for W.M. was subpar or that the Parole Board failed to consider the services W.M. would require on parole to maintain his mental health and reduce the risk of recidivism associated with his mental illness. W.M. raised his intellectual disability and his schizoaffective mental health disorder to the full Board in his administrative appeal, contending "[t]he combination of [his] illiteracy and mental health illness makes it impossible for him to psychoanalyze his thoughts and adequately articulate what he discovered about his triggers."

The Board rejected the argument, finding neither the medical report furnished by the DOC nor Dr. Segal's evaluation "indicat[ed] a serious, imminent medical or mental health condition that would affect [his] ability to participate in the parole process." Although it is obvious W.M. is intellectually limited from a review of his record, the parole hearing transcript does not reveal his disability prevented him from communicating with the panel. Further, the panels were in possession of and made clear they relied on Dr. Segal's evaluation in which he expressly notes that W.M.'s habit of avoiding self-disclosure could be the result of "broad deficits in introspectiveness and psychological-mindedness, owing to emotional impoverishment or thought vagueness."

Counsel for W.M. confirmed at oral argument that there is no question but that W.M. is competent. The in-depth psychological evaluation we required the Parole Board share with Michell makes clear he has long-standing mental health issues, with Dr. Segal confirming the diagnosis of schizoaffective disorder with narcissistic, paranoid and antisocial personality features included in W.M.'s medical records. But Segal also noted W.M. "has long been on the Mental Health Special Needs Roster" and received regular psychiatric care. Segal noted W.M.'s "[m]ost recent psychiatric consult

offered he was stable on his meds (Risperdal), not overtly depressed, with no evidence of a current, acute mood disorder and generally nonpsychotic, [with his] acute symptoms likely under generally good pharmacologic management," which was consonant with Segal's own clinical impression and GAF score.

While W.M. has had numerous admissions to the State Forensic Psychiatric Hospital during his incarceration, the last one appears to have been thirty years ago. That length of time since W.M.'s last psychiatric admission, the medical records Segal reviewed, as well as his clinical impression of W.M. all suggest W.M.'s schizoaffective disorder has for many years been well controlled by DOC's psychiatric treatment regimen. And Segal's several comments on the extensive services W.M. would need in preparation for his parole — "assistance with placement, which will need to incorporate availability of full array of mental health services (psychiatric medication management, counseling, supportive milieu and rehabilitative services, discharge planning to assist with acquiring SSD funds for psychiatric disability)" and "PACT team level of care" to access the necessary services in a community-based placement — suggest the Parole Board was mindful of the services W.M. would require on parole to reduce the risk of recidivism associated with his mental illness.

Finally, we reject W.M.'s claim the Parole Board violated the Ex Post Facto Clauses of the federal and state constitutions by considering information that preceded the Board's prior parole denial, thereby allegedly violating the 1979 Parole Act, which limited the Board's consideration for parole after an initial denial to "new information" contained in a pre-parole report or hearing. L. 1979, c. 441, § 9 (amended by L. 1997, c. 213, § 1, and codified at N.J.S.A. 30:4-123.56(c)).

We rejected a similar argument in Trantino v. N. J. State Parole Board, 331 N.J. Super. 577, 610 (App. Div. 2000), aff'd in part, modified in part and remanded, 166 N.J. 113 (2001), modified, 167 N.J. 619 (2001) (Trantino V), in which we held that applying the 1997 amendment that deleted the new information mandate to the parole hearing of an inmate whose offense occurred prior to 1997 "did not violate the ex post facto clause," because the change in the law was simply "a procedural modification that does not constitute a substantive change in the parole release criteria." We reasoned the amendment "simply allow[ed] the Board to consider all available evidence relevant to" the release standard set forth in the 1979 law. Id. at 611. See also McGowan, 347 N.J. Super. at 561 ("The current standard for Title 2A inmates involves a limited consideration of rehabilitation as it affects individual

deterrence; i.e., whether there is a substantial likelihood that the inmate will commit a crime if released on parole."). We were also "persuaded that much of the additional information considered by the Board at the remand hearings was, arguably, 'new information' and could be considered by the Board even under the pre-1997 version of N.J.S.A. 30:4-123.56c." Trantino V, 331 N.J. Super. at 611.

We find the same to be true here. A review of the Board's decision makes clear that new information, predominantly W.M.'s three violent "asterisk" infractions since his last parole hearing, figured prominently in the Board denying him parole and setting a 120-month FET. Having reviewed the record, we are satisfied application of the 1997 amendment in this case did not create a significant risk of increasing W.M.'s punishment so as to violate the Ex Post Facto Clauses in the federal and state constitutions. See Garner v. Jones, 529 U.S. 244, 255 (2000) (holding when considering retrospective application of a particular change in a parole law, which does not on its face show a significant risk of a longer period of incarceration than under the

earlier rule, the prisoner "must show that as applied to his own sentence the law created a significant risk of increasing his punishment").[2]

In the final analysis, "whether there is a substantial likelihood an inmate will commit another crime if released, although predictive of future conduct rather than a finding as to past conduct, is essentially factual in nature." N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 547 (App. Div. 1988). Thus, our task is only to determine whether the Board's factual finding that W.M. was substantially likely to commit another crime if released in 2019 could reasonably have been reached on the sufficient credible evidence in this record. Following his last parole hearing in 2008, W.M. remained on maximum custody status, and although over sixty years old and having already been incarcerated for over thirty years, committed three new assaultive infractions, one for fighting and two for assault with a weapon, one in which

[2] The Third Circuit's recent decision in Holmes v. Christie, 14 F.4th 250, 265 (3d Cir. 2021), critical of our approach to the Ex Post Facto analysis in Trantino V, does not alter our view. Leaving aside that the case is not binding on us, see State v. Gaitan, 209 N.J. 339, 389 n.5 (2012) (J. Albin, dissenting); Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 80 (1990), we agree with that court's observation that "[w]hether the provision's retroactive application passes constitutional muster depends not on its terms, but on how the Board implements them." Holmes, 14 F.4th at 260. Because Holmes was an appeal from the State's successful motion to dismiss Holmes' complaint, see id. at 257, it has little to offer in the way of factual analysis.

he stabbed his cellmate in the eye with a pencil for "running off his mouth" about the likelihood of W.M. being denied parole, according to his own account of the incident. W.M. took no responsibility for his aggressive behavior. The in-depth psychological evaluation conducted in 2018 concluded W.M. had a "very poor" likelihood of "successfully completing a projected term of parole" in light of his history of violence, both in the community and while incarcerated "in a treatment oriented and secure, structured custody environment." Given the record, we cannot conclude the Board acted arbitrarily in concluding there exists a substantial likelihood W.M. would commit another crime if released on parole at this time.

We likewise find no merit in W.M.'s argument that the Board's decision to establish a 120-month FET was arbitrary and capricious. N.J.A.C. 10A:71-3.21(d) permits the Board to impose an FET that differs from the presumptive schedule if that schedule is "clearly inappropriate" as a result of the inmate's lack of progress in reducing the likelihood of future recidivism. In imposing an FET in excess of the presumptive term, the panel must consider the factors enumerated in N.J.A.C. 10A:71-3.11 that pertain to eligibility for parole. The Board's decision makes clear it did so here. Further, the Board established the term understanding it would be reduced by commutation, earned work and

minimum custody credits. The Parole Board projects based on the application of W.M.'s current earned credits that he will again be eligible for parole in April 2026, while noting future work and minimum custody credits could advance that date to May 2025. We cannot find that the FET on this record was beyond what the Board could reasonably impose.

Affirmed.