

SUNDIATA ACOLI, a/k/a CLARK  
EDWARD SQUIRE,

Appellant,

v.

NEW JERSEY STATE PAROLE  
BOARD,

Respondent.

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 083980

Civil Action

On Appeal as of Right From:  
Superior Court of New Jersey  
Appellate Division

Douglas M. Fasciale, P.J.A.D.  
Garry S. Rothstadt, J.A.D.  
Scott J. Moynihan, J.A.D

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**BRIEF OF PROPOSED AMICI CURIAE THE NATIONAL ASSOCIATION OF  
BLACKS IN CRIMINAL JUSTICE, THE BLACK POLICE EXPERIENCE,  
BLACKS IN LAW ENFORCEMENT OF AMERICA, AND THE GRAND COUNCIL OF  
GUARDIANS IN SUPPORT OF THE APPELLANT & REVERSAL**

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### INTEREST OF AMICI CURIAE

The following organizations, each of which represents Black current or former members of law enforcement, seek to participate in this matter as amici curiae: the National Association of Blacks in Criminal Justice, the Black Police Experience, Blacks in Law Enforcement of America, and the Grand Council of Guardians, Inc. (hereinafter "Amici"). Pursuant to R. 1: 13-9, these groups should be permitted to participate in this matter as amici curiae since their motion to do so is timely, will not prejudice the parties, and because, as demonstrated by the accompanying Certification of Katharine Naples-Mitchell, Esq., their unique expertise, experience, and perspective on public safety and racial justice "will assist in the resolution of an issue of public importance." Id. Moreover, participation of amici curiae is particularly appropriate in cases, like this one, with "broad implications." Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6 (1976).

The *Amici* organizations ask leave to participate to offer their expertise as public safety and law enforcement professionals. Particularly since Black people in New Jersey face the worst racial disparities in imprisonment in the country, parole must be attainable for all who are eligible and not a risk to release. Parole has important community safety benefits, and denying parole in cases without a substantial



likelihood of future crime violates the law. *Amici* will elucidate how the functioning of the New Jersey Parole Board and its adherence to governing law--in a high-profile matter involving the murder of a fellow member of law enforcement--has broad implications for equal justice far beyond this case.

The **National Association of Blacks in Criminal Justice** is dedicated to advancing the needs, concerns, and contributions of African Americans and other people of color in the administration of equal justice. The National Association of Blacks in Criminal Justice is a multiethnic, nonpartisan, nonprofit association formed in 1974 comprised of criminal justice professionals, law enforcement members, students, and community leaders dedicated to improving the administration of justice; to protecting and respecting the civil, legal, and human rights of all individuals; and to promoting equal justice for all, with particular attention to redressing inequality experienced by Black people and other people of color. The National Association advances research-based policy related to the administration of justice nationally, regionally, and locally.

The **Black Police Experience** is an advocacy organization focused on law enforcement issues as they relate to the experiences of Black officers, Black women, and vulnerable communities. Founded by Sonia Y.W. Pruitt, a retired police

captain from Maryland and former Chairwoman of the National Black Police Association, the Black Police Experience works to advance social justice and police reform from positions both inside and outside of law enforcement agencies. Through public engagement, education, and empowerment, the Black Police Experience endeavors to shape justice equity and police reform, with a focus on Black and other underserved, marginalized, and oppressed communities.

**Blacks in Law Enforcement of America (BLEA)** is a national membership organization of Black law enforcement professionals which works to support policies, training, and procedures to promote equity within law enforcement, prevent crime, and establish law enforcement accountability in the use of force. BLEA advocates for law enforcement professionals through continuous training and support, and fights for freedom, justice, and equality for all people. Members are Black law enforcement professionals who pledge their time, honor, and talent toward uplifting their communities and fostering a purpose of truly protecting and serving in partnership with communities. BLEA aims to shift law enforcement agencies' relationship to their communities, undoing and interrupting policing practices designed to contain the poor, those who are economically disadvantaged, or those who have been oppressed.

The **Grand Council of Guardians, Inc.** was formed in 1974 as an umbrella organization for local Law Enforcement chapters throughout New York State. The Grand Council of Guardians aims to render effective service to the Community, to eliminate injustice, and to actively promote accelerated entry of African Americans into law enforcement. Through programs, conferences, gatherings, and meetings for its members and the communities they serve, the Grand Council of Guardians maintains the high standards of integrity, honor, and courtesy of its members; fosters a spirit of brotherhood, benevolence, temperance, and patriotism amongst them; and inculcates in them a high sense of loyalty to one another and to their duties and their government.

**PRELIMINARY STATEMENT**

*Amici* file this brief in support of the Appellant and in favor of reversal of the Appellate Division decision below. Sundiata Acoli is an 84-year-old man, born in 1937 in Texas in the era of Jim Crow. Mr. Acoli has been incarcerated for nearly five decades for his role in the murder of State Trooper Werner Foerster in 1973 on the New Jersey Turnpike. Mr. Acoli has spent more than half of his life in prison cells the size of a parking space, including nearly twenty years as a senior citizen. Though first eligible for parole almost thirty years ago, and despite a significant record of personal development and rehabilitation during his incarceration, including no disciplinary infractions

for at least the last 25 years, Mr. Acoli has been repeatedly denied parole and subject to lengthy future eligibility terms at each subsequent hearing.

The Parole Board is not tasked with meting out punishment; that role belongs solely to the sentencing judge. The 1979 Parole Act "eliminated the conventional parole discretion relating to the adequacy of punishment . . . ." In re Trantino, 89 N.J. 347, 368-69 (1982). By statute, the Parole Board cannot take into account the punitive aspects of a sentence as a ground for withholding parole; to do so would be contrary to law. The Parole Board's exclusive role is to provide an individualized and considered evaluation of an incarcerated person's likelihood of future criminal activity, despite the inherent fallibility of predictive judgments, see Acoli v. N.J. State Parole Bd., 462 N.J. Super. 39, 51 (App. Div. 2019) (noting that the Parole Board's task is "inherently imprecise" and "fraught with subjectivity").

Lawfully, Mr. Acoli's continued incarceration can *only* be justified by a *substantial* likelihood that he will commit a crime if released, based on the preponderance of the evidence. In re Trantino, 89 N.J. at 369 ("The parole decision must be confined solely to whether there is a substantial likelihood for a repetition of criminal behavior."); accord Perry v. N.J. State Parole Bd., 459 N.J. Super. 186, 197 (App. Div. 2019) ("The

Board must determine parole eligibility for such inmates by considering whether there is, by a preponderance of the evidence, a substantial likelihood the inmate will commit a crime if released on parole . . . ."). If the Parole Board's decision is "not supported by substantial credible evidence in the record as a whole" or "violates express or implied legislative policies" or reflects a clearly erroneous conclusion that could not reasonably have been made based on the record, it must be reversed by a reviewing court. Acoli, 462 N.J. Super. at 50 (citations omitted).

By any fair read of the substantial evidence of the record, Mr. Acoli lacks any criminal proclivities. Holistic review of the parole hearing transcript from the full June 2016 hearing suggests the Parole Board does not fear Mr. Acoli has a substantial likelihood of future criminal activity; rather, the questioning by Parole Board members reveals a deep-seated discomfort with Mr. Acoli's political affiliations and beliefs, anger and frustration at his unwillingness to accede to the facts of the crime as found by the jury which he has always maintained he does not remember, and concern that he has not been sufficiently punished even after all these years. Dissatisfaction with an old man's contrition and memory does not equate to credible evidence of a substantial likelihood that he will commit a crime if released.

Mr. Acoli has served the base punishment portion of his sentence twice-over. He is an old and frail man in ailing health who has had no disciplinary infractions in prison for decades. The Parole Board's decision to withhold parole was not supported by the record and was improperly tied to members' views that he still needs to be punished, an arbitrary and capricious agency action requiring reversal.

#### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

*Amici* adopt the statement of facts and procedural history presented in the Appellant's brief.

#### **LEGAL ARGUMENT**

The record below suggests that the Parole Board allowed broad considerations of accountability and punishment to direct members' questioning and shape their decision in Mr. Acoli's case. Some lines of questioning explicitly concerned the adequacy of his punishment, not his likelihood of future crime. But beyond these specific lines of inquiry, the creeping influence of punishment is most evidenced by the predominant focus in the parole hearing transcript, the Parole Board's decision, and the Appellate Division's majority opinion on Mr. Acoli's role in and memory of the crime itself.

Broader data patterns support this read of the record. Since the presumption of parole was established in law in 1979, the Parole Board has become increasingly stingy with respect to

parole grants for people serving life sentences, even as empirical research has shown that people released on parole serving life sentences have *the lowest* recidivism of any group, and that this effect is further compounded when an elderly person is released given that people age out of criminal behavior. Not only is this pattern of denials indicative of arbitrary and capricious agency action, it contravenes legislative policies. Punishment for punishment's sake does not foster community safety, is an affront to racial justice, and undermines the purpose and societal benefits of parole.

**I. Perpetual punishment is inconsistent with public safety and equality under the law.**

As membership organizations comprised of law enforcement professionals of color, *Amici* hold the values of community safety and of equal justice in high regard. Mr. Acoli's circumstances illustrate how those core components of ordered liberty are undermined by the New Jersey Parole Board pursuing retributive ends that are beyond its statutory authority.

**A. The purpose of parole is undermined if parole is not meaningfully available.**

Parole exists to enable more effective reentry, to incentivize rehabilitation and rule compliance in prison, and to offer people hope.<sup>1</sup> See generally Acoli, 462 N.J. Super. at 68-69

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<sup>1</sup> See, e.g., Am. Civil Liberties Union of N.J., A Vision to End Mass Incarceration in New Jersey 11 (2017), <https://www.aclu->

(Rothstadt, J., dissenting). As this Court explained in State v. Black, “the purpose of parole is ‘to help individuals reintegrate into society as constructive individuals as soon as they are able . . . .’” 153 N.J. 438, 447 (1998) (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)) (emphasis added). This Court further emphasized that the “general purpose of parole [is] rehabilitative rather than punitive in nature.” Ibid. Empirical research demonstrates that the policy goals of parole supervision are not merely theoretical. In a 2013 report commissioned by The Pew Charitable Trusts using New Jersey data from a cohort of 2008 prison releases, people who were released to parole supervision were less likely to be rearrested, reconvicted, or reincarcerated for new crimes within three years than people who “maxed out” their full prison sentences and were not released to supervision.<sup>2</sup>

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[nj.org/files/5915/1318/4660/2017\\_12\\_13\\_mass\\_incarceration\\_vision.pdf](https://www.nj.gov/files/5915/1318/4660/2017_12_13_mass_incarceration_vision.pdf) (“Parole allows people to safely reintegrate into society and connect with resources that help them develop the skills needed to secure education, employment, and housing. Once released, parolees can reenter the workforce, reconnect with their families, and seek support from their own communities.”).

<sup>2</sup> The Pew Charitable Tr., The Impact of Parole in New Jersey 1-2 (2013), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs\\_assets/2013/psppnjparolebriefpdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/psppnjparolebriefpdf.pdf). See also N.J. Reentry Corp., Improving Upon Corrections in New Jersey to Reduce Recidivism and Promote a Successful Reintegration 9 (2017), [https://www.njreentry.org/application/files/4915/4344/4576/NJRC\\_CORRECTIONS\\_REPORT\\_2017.pdf](https://www.njreentry.org/application/files/4915/4344/4576/NJRC_CORRECTIONS_REPORT_2017.pdf) (“It is now widely accepted that parole reduces the recidivism rate and increases the time out before reconviction . . . .”).



The public policy shifts reflected in the 1979 Parole Act made the rehabilitative focus of parole more explicit. That law, which governs the Parole Board's decision in this case, removed any consideration of punishment from the Parole Board's purview and established presumptive release on parole at first eligibility. N.J. Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983) ("The act, in effect, eliminated the conventional parole discretion relating to adequacy of punishment, and transferred it substantially to the judiciary as a function of its sentencing authority. . . . [T]he punitive aspects of the inmate's sentence will be satisfied by the time the parole eligibility date arrives.").

In the dissent below, Judge Rothstadt reviewed the legislative history of the 1979 Parole Act established through contemporaneous statements issued by the Assembly, the Senate, and the Governor in 1979:

In those statements, the need for the reform was based upon "uncertainties about parole and perceptions of injustice in the parole process [that had been] key causes" of riots in prisons in New Jersey and elsewhere. Assembly Judiciary, Law, Public Safety and Defense Committee, Statement to Assembly Bill No. 3093, at 1 (Dec. 3, 1979). The Legislature envisioned that the reforms would "contribute to the effectiveness of parole as a tool for reducing recidivism, and [would] contribute to the maintenance of institutional order." Ibid. (emphasis added).

. . .

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. [Senate Law, Public Safety and Defense Committee, Statement to Assembly Bill No. 3093, at 2-3 (Dec. 10, 1979) (emphasis added).]

As the Legislature recognized, predictability is vital to the parole process. In order to maintain public safety, inmates must understand that their protected interest in being paroled is honored by the grant of parole to deserving prisoners. The anticipation of parole for inmates who have served sentences with little or no incidents or infractions provides positive reinforcement for behavioral change, and is a viable incentive for prisoners to rehabilitate themselves while in prison . . .

. .

Acoli, 462 N.J. Super. at 69-70 (Rothstadt, J., dissenting).

Although the 1979 Parole Act removed punishment from the Parole Board's purview and established a presumption of release, thereby also "reduc[ing] the discretion involved in parole decisions," Byrne, 93 N.J. at 205, data show that over the last 30 years the Board has *increasingly denied* parole to people serving life sentences--over time displacing the presumption of release required by law, ignoring the supposed constraints on discretion, and resorting to an improper reliance on punishment.

In 1999, a study supported by the New Jersey Parole Board using an experimental design in which four types of cases were randomly assigned to ten parole hearing officers found that offense of conviction was the single most influential factor in simulated parole decisions in New Jersey, undermining the desired effect of the 1979 legislative change twenty years earlier.<sup>3</sup> Real-world data bolster this unfortunate conclusion. In a 2017 research brief featuring profiles of thirty-two jurisdictions, the nonpartisan research and advocacy organization The Sentencing Project determined that between 1985 and 2013, based on data New Jersey provided on parole hearing outcomes only for lifers with murder convictions, the parole grant rate for people sentenced to parole-eligible life terms for murder in New Jersey “fell dramatically . . . from 42% in the late 1980s to 31% in the 1990s and 2000s, to 12% between 2010 and 2013.”<sup>4</sup> That pattern has become even starker within the last few years. In March 2021, the *Washington Post* reported based on data obtained by the New Jersey Public Defender’s Office through an Open Public Records Act request that among the

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<sup>3</sup> Carolyn Turpin-Petrinoso, Are limiting enactments effective? An experimental test of decision making in a presumptive parole state, 27 J. Crim. Just. 321, 323, 328-29 (1999), <https://www.sciencedirect.com/science/article/abs/pii/S0047235299000045>.

<sup>4</sup> Nazgol Ghandnoosh, The Sentencing Project, Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences 42-43 (2017), <https://www.sentencingproject.org/wp-content/uploads/2018/03/32-lifer-parole-policies.pdf>.

445 lifers who went before the Parole Board between 2012 and 2019, only 39 were released. The remaining 406 people, a whopping 91% of those who went before the Board, were denied parole.<sup>5</sup> Further, most of those whose parole was denied were given future eligibility terms substantially longer than the statutory presumption of 27 months.<sup>6</sup>

If parole is functionally unavailable to people serving life sentences, the Board is converting parole-eligible sentences into sentences of life without the possibility of parole and thereby assuming the role the Legislature assigned exclusively to the sentencing judge. The clear rehabilitative and behavior-incentivizing aims of parole are frustrated by withering parole grant rates, and this compromises community safety, see supra at 10-11, and equal justice, see infra at 15-22, alike. To the extent the Parole Board continues to attempt to punish people sentenced to life terms, the Board is exceeding its circumscribed statutory role.

In a recent decision, the Appellate Division was presented with data showing that, despite the legal presumption of release, the Parole Board “frequently” denies parole “when

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<sup>5</sup> Caren Chesler, A former member of the Black Panther Party seeks parole nearly 50 years after he was convicted of murder, Wash. Post (Mar. 13, 2021), [https://www.washingtonpost.com/national-security/sundiata-acoli-black-panther-parole/2021/03/12/68254ace-81c2-11eb-ac37-4383f7709abe\\_story.html](https://www.washingtonpost.com/national-security/sundiata-acoli-black-panther-parole/2021/03/12/68254ace-81c2-11eb-ac37-4383f7709abe_story.html).

<sup>6</sup> Ibid.

convicted murderers first become eligible.” State v. Tormasi, 466 N.J. Super. 51, 68-69 (App. Div. 2021). The Appellate Division disclaimed the relevance of the data, reasoning that “the fact that other inmates convicted of murder have been initially denied parole is *presumably* based on an individualized consideration of the regulatory factors as applied to those inmates.” Id. at 69 (emphasis added). But where the data are so consistent, and where independent research confirms that the crime of conviction is the single-most important factor in denying parole, but see Acoli, 462 N.J. Super. at 72 (Rothstadt, J., dissenting) (“It should not place undue emphasis on any one factor, especially the crime that the inmate committed.”), courts should reconsider whether it is appropriate to *presume* that “data showing the frequency of parole denial is not probative.” Tormasi, 466 N.J. Super. at 69.

These data are probative; they demonstrate that the Parole Board’s focus on the crime of conviction, for people convicted of murder in particular, creates a tunnel-vision effect that undermines the policy objectives of the 1979 Parole Act and defeats an express legislative policy. Where 42% of people received parole for the same category of offenses in the late 1980s but a mere 9% did between 2012 and 2019, the Parole Board’s decisions have clearly become more discretionary, not less, as the years have passed since the 1979 Parole Act was

first implemented, and the Parole Board has failed to adhere to the legislative presumption of parole. It is fundamentally arbitrary that a person with the same governing offense had more than four times the chance at release three decades ago than they have today. Further, the Parole Board's decisions risk undermining parole's core rehabilitative purpose. As Judge Rothstadt explained below, "the Parole Board's actions here established a disincentive for inmates to pursue proper conduct while incarcerated, thereby threatening the public's safety." Acoli, 462 N.J. Super. at 69 (Rothstadt, J., dissenting).

**B. Given New Jersey's gross racial disparities in imprisonment, meaningful access to parole is required for racial equity.**

In a statement last year in the aftermath of the killing of George Floyd by police officer Derek Chauvin, this Court acknowledged racial disparities in incarceration as one of the primary stains of structural racism and present barriers to racial equality in New Jersey: "it is clear that racial disparities still exist in the justice system, from children of color in our foster care system who wait longer to be placed in permanent homes to the disproportionate incarceration of black men and women in our jails and prisons."<sup>7</sup> According to the 2019 report of the New Jersey Criminal Sentencing and Disposition

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<sup>7</sup> Press Release, Statement of the New Jersey Supreme Court (June 5, 2020), <https://www.njcourts.gov/pressrel/2020/pr060520a.pdf>.

Commission, "the incarceration rate for black people is twelve times the white incarceration rate (i.e., a 12:1 ratio), the highest disparity of any state in the nation."<sup>8</sup> The Hispanic incarceration rate in New Jersey, though "lower relative to national and regional ethnic disparities," is "double the white incarceration rate (i.e., a 2:1 ratio)."<sup>9</sup> People of color comprise the overwhelming majority of people in New Jersey's prisons, and more than three-fifths of New Jersey's prison population is Black.<sup>10</sup> A mere 15.1% of New Jersey's population is Black.<sup>11</sup> These statistics hold for people serving life sentences. According to a 2017 report by The Sentencing Project, New Jersey had a cumulative 2,080 people serving parole-eligible life sentences, life without the possibility of parole, and virtual life sentences in 2016.<sup>12</sup> Of those 2,080 people, 62.1% were

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<sup>8</sup> N.J. Criminal Sentencing & Disposition Comm'n, Annual Report 4 (2019), [https://www.njleg.state.nj.us/OPI/Reports to the Legislature/criminal sentencing disposition ar2019.pdf](https://www.njleg.state.nj.us/OPI/Reports%20to%20the%20Legislature/criminal%20sentencing%20disposition%20ar2019.pdf).

<sup>9</sup> Ibid.

<sup>10</sup> N.J. Dep't of Corr., Offender Characteristics Report on January 1, 2021 36 (2021), [https://www.state.nj.us/corrections/pdf/offender statistics/2021/Entire%20Offender%20Characteristics%202021.pdf](https://www.state.nj.us/corrections/pdf/offender%20statistics/2021/Entire%20Offender%20Characteristics%202021.pdf) (finding that 62% of people in New Jersey state prisons are Black, and 61% of people in all New Jersey correctional institutions are Black).

<sup>11</sup> U.S. Census Bureau, Quick Facts: New Jersey (2019), <https://www.census.gov/quickfacts/fact/table/NJ/RHI225219#RHI225219> (listing population representation of people who identify as Black or African American alone).

<sup>12</sup> Ashley Nellis, The Sentencing Project, Still Life: America's Increasing Use of Life and Long-Term Sentences 15 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>.

Black.<sup>13</sup> Accordingly, lacking data on the racial demographic breakdown of parole grants and denials, and even discounting any possible disparities attributable to the decisions of the Parole Board itself, the Parole Board's pattern of denying parole releases disproportionately affects people of color, Black people in particular, because of existing overrepresentation in prison.

Release on parole is an essential tool to remedy the disproportionately harsh sentencing Black people in New Jersey have faced, but without meaningful access to parole, Black people will remain disproportionately incarcerated. Further, deeper issues of inequity require careful attention by all stakeholders in the criminal legal system charged with making discretionary decisions. The United States long ago developed, and to this day continues to reproduce, a "powerful racial stereotype--that of [B]lack men as 'violence prone.'" Buck v. Davis, 137 S. Ct. 759, 776 (2017) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)). This "particularly noxious strain of racial prejudice," id., is longstanding and pervasive in American society.<sup>14</sup> Because of widespread,

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<sup>13</sup> Ibid.

<sup>14</sup> See generally Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2010); see also, e.g., Sophie Trawalter et al., Attending to Threat: Race-Based Patterns of Selective Attention, 44 J. Exp'l Psychol. 1322, 1322 (2008) (discussing the "overwhelming



pernicious associations between Black men, criminality, and violence in media and culture, these stereotypes have become part of the social fabric and mean that, even without conscious animus, anyone can manifest implicit racial bias; “[t]he mere presence of a Black man . . . can trigger thoughts that he is violent and criminal.”<sup>15</sup> Even Black members of law enforcement are not immune from these stereotypes and from hostile treatment in the performance of their duties from colleagues and superiors.<sup>16</sup>

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evidence that young Black men are stereotyped as violent, criminal, and dangerous”); Eric A. Stewart et al., Neighborhood Racial Context and Perceptions of Police-Based Racial Discrimination Among Black Youth, 47 Criminology 847, 854 (2009) (noting that “recent research supports the existence of relatively strong stereotypes associating race and crime, as well as disorder and other social problems”); Lincoln Quillian & Devah Pager, Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime, 107 Am. J. Soc. 717, 718 (2001) (finding that the percentage of a neighborhood’s Black population, particularly the percentage of young Black men, is significantly associated with perceptions of the severity of neighborhood crime, even when controlling for official crime rates and other neighborhood characteristics); Lincoln Quillian & Devah Pager, Estimating risk: Stereotype amplification and the perceived risk of criminal victimization, 73 Soc. Psych. Q. 79 (2010).

<sup>15</sup> Jennifer L. Eberhardt et al., Seeing Black: Race, Crime, and Visual Processing, 87 J. Personality & Soc. Psychol. 876, 876 (2004).

<sup>16</sup> See, e.g., Dan Frosch & Ben Chapman, Black Officers Say Discrimination Abounds, Complicating Reform Efforts, Wall St. J. (June 16, 2020), <https://www.wsj.com/articles/for-black-police-discrimination-abounds-complicating-reform-efforts-11592299800>; N.J. Legislative Black and Latino Caucus, A Report on Discriminatory Practices Within the New Jersey State Police 12 (1999), <https://www.njleg.state.nj.us/legislativepub/reports/police.pdf>

Researchers have found that this stereotyping influences behavior in a wide range of situations and circumstances, particularly in discretionary decisions, including actions taken by law enforcement. Perceiving someone's race as Black versus white influences "people's memory for who was holding a deadly razor in a subway scene, people's evaluation of ambiguously aggressive behavior, people's decision to categorize nonweapons as weapons, the speed at which people decide to shoot someone holding a weapon, and the probability that they will shoot at all."<sup>17</sup> The association of Black males with danger and violence has been shown to have particularly intractable application: "[m]erely thinking about Blacks can lead people to evaluate ambiguous behavior as aggressive, to miscategorize harmless objects as weapons, or to shoot quickly, and, at times, inappropriately."<sup>18</sup> In the context of parole, studies have shown

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("[T]he racial profiling to which minority motorists are subjected on the highways is an extension of the racially hostile work environment that minority troopers are subjected to in their barracks. Former state troopers described the State Police as an organization in chaos, managed by fear, intimidation, and racial discrimination. Troopers who complain about the discriminatory practices are disciplined, disrespected, denied re-enlistment and labeled by the hierarchy as an 'enemy of the State.'"); see also Devon W. Carbado & L. Song Richardson, The Black Police: Policing Our Own, 131 Harv. L. Rev. 1979 (2018).

<sup>17</sup> Eberhardt et al., supra note 15 (citations omitted).

<sup>18</sup> Ibid.; see also Joshua Correll et al., Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control, 42 J. Exp'l Psychol. 120 (2006).

that race can have a significant effect on parole decision-making and that parole boards are not immune from deeply ingrained stereotypes which associate Blackness, criminality, and dangerousness.<sup>19</sup>

Given the operation of these prejudicial stereotypes as background music that influences how all people move through American society, particular attention should be paid to parole decision-making in racially charged cases.<sup>20</sup> In this case, where Mr. Acoli's crime of conviction was the murder of a police officer in connection with an armed revolutionary Black political organization, the risk of inadvertently invoking racial stereotypes about danger is significant. As the hearing transcript illustrates, in focusing so squarely on the crime of conviction and in expecting Mr. Acoli to demonstrate an odd

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<sup>19</sup> See, e.g., Beth M. Huebner & Timothy S. Bynum, The Role of Race and Ethnicity in Parole Decisions, 46 Criminology 907 (2008); Stéphane Mechoulan & Nicolas Sahuguet, Assessing Racial Disparities in Parole Release, 44 J. Legal Stud. 39 (2015).

<sup>20</sup> Amici curiae entering a case while on appeal are generally limited to addressing the issues already presented by the parties. See State v. Gandhi, 201 N.J. 161, 191 (2010) (“[A]n amicus must take the case on appeal as they find it.”); accord Bethlehem Tp. Bd. of Ed. V. Bethlehem Tp. Ed. Assn., 91 N.J. 38, 48-49 (1982). However, the role of amici is to provide the Court with a point of view not represented by the parties of the case. Thus, to the extent an amicus is making different arguments related to the same issues, those may properly be advanced. “Although an amicus curiae is ordinarily limited to arguing issues raised by the parties, an amicus may present different arguments than the parties relating to those issues.” Lewis v. Harris, 378 N.J. Super. 168, 185 n.2 (App. Div. 2005), aff’d as modified, 188 N.J. 415 (2006).

preoccupation with violence,<sup>21</sup> the Parole Board flattens Mr. Acoli, freezes him in time, and renders him the caricature of a dangerous, violent Black man, instead of seeing him as an even-tempered, elderly man in front of them who committed a violent act nearly 50 years ago.<sup>22</sup> The discretionary decision to deny a now-84-year-old Mr. Acoli presumptive parole may have some relationship to this enduring stereotype,<sup>23</sup> without any conscious animus or discriminatory intent on the part of Parole Board members. In the state with the worst racial disparity in incarceration in the country, meaningful access to presumptive parole, coupled with attentive care toward minimizing and

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<sup>21</sup> For example, when Mr. Jones questioned Mr. Acoli about the origin of his name, Mr. Acoli explained that his surname derived from a Ugandan tribe "that has a lot of qualities that I admire." In his very next question, Mr. Jones responded, "Are they violent?" Mr. Acoli replied, "Oh, I don't think so, but basically they're kind of -- mostly impressed me was the -- the civil features of their life, you know, the way that they work together, and -- and live together." Mr. Jones then dropped that line of questioning and immediately pivoted to the question "Did you ever fire any weapon? Did you ever shoot at anyone?" Tr. 138:18-139:13.

<sup>22</sup> The transcript features multiple passages in which Mr. Acoli's prior acts of violence, as well as past and present thoughts about the utility of violence, are explored. See, e.g., Tr. 131:4-135:3; id. 148:17-150:25; id. 184:21-193:9; id. 227:13-229:19. In each such exchange, Mr. Acoli maintains his personal reason for carrying a weapon nearly fifty years ago was for self-defense and that he renounced political violence as a means of social change over a period of the past ten to fifteen years.

<sup>23</sup> See, e.g., Gustav J. W. Lundberg et al., Racial bias in implicit danger associations generalizes to older male targets, PLoS One, vol. 13, iss. 6, at 1 (2018) (finding with a priming exercise that implicit danger associations commonly evoked by Black versus White men in their twenties appear to apply similarly to Black versus White men in their late sixties).

eliminating bias, is crucial to redress the systemic racism baked into New Jersey's system of criminal punishment.<sup>24</sup>

**C. Spending on incarceration for elderly prisoners with decades of spotless disciplinary records, like Mr. Acoli, is an affront to the welfare of society.**

Long-term and life sentences produce declining impacts on public safety as people grow out of criminal behavior,<sup>25</sup> but correctional costs increase as people grow old behind bars.<sup>26</sup> Estimates suggest that life imprisonment per each adult prisoner costs approximately \$1 million, with expenses increasing "precipitously after middle-age."<sup>27</sup> With more than two thousand

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<sup>24</sup> See, e.g., Ryan P. Haygood et al., Opinion, Black community leaders: Make Black lives really matter in New Jersey, Star-Ledger (June 7, 2020), <https://www.nj.com/opinion/2020/06/black-community-leaders-make-black-lives-really-matter-in-new-jersey.html>.

<sup>25</sup> See Harvard Inst. of Politics, Reforming Parole for Life Sentences with Parole: A Commission Presented to the Sentencing Project 21 (2019), [https://iop.harvard.edu/sites/default/files/sources/program/IOP Policy Program 2019 Life Sentences w Parole.pdf](https://iop.harvard.edu/sites/default/files/sources/program/IOP%20Policy%20Program%202019%20Life%20Sentences%20w%20Parole.pdf) ("Many of these elderly people are in prison for crimes committed in their twenties and thirties. Now, in their older years, there is a much lower chance of them being capable to return to their former exploits, especially given their physical limitations."); Ashley Nellis, The Sentencing Project, No End in Sight: America's Enduring Reliance on Life Imprisonment at 25 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> ("The age-crime curve is evident across dozens of empirical studies on the topic and reflects the fact that people are most at-risk for committing crime in the late teenage years to their mid-twenties.") (collecting studies).

<sup>26</sup> See generally Marc Mauer & Ashley Nellis, The Meaning of Life: The Case for Abolishing Life Sentences (2018).

<sup>27</sup> Nellis, supra note 12, at 26.

people sentenced to life or virtual life sentences as of 2016,<sup>28</sup> New Jersey is poised to spend roughly *two billion dollars* to keep them in prison over their life course. Community-based alternatives are both more cost-effective and better for public safety,<sup>29</sup> freeing public dollars for upstream sources of health, wellness, and crime prevention.

Further, aging accelerates in prisons, such that prisoners are generally considered geriatric at age 50 or 55.<sup>30</sup> "A partial

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<sup>28</sup> Id. at 10.

<sup>29</sup> Reentry Coal. of N.J., Impact of Community Corrections in New Jersey: Reducing Prison Population, Incarceration Costs & Recidivism (2017), <https://reentrycoalitionofnj.org/wp-content/uploads/2018/04/Impact-of-Community-Corrections-in-New-Jersey.pdf>.

<sup>30</sup> See, e.g., Lisa Armstrong, Lost Opportunity, Lost Lives, The Marshall Project (June 29, 2021), <https://www.themarshallproject.org/2021/06/29/lost-opportunity-lost-lives> ("In 15 states, incarcerated people in prison are considered 'older' starting at age 50, according to the Vera Institute. A National Institute of Corrections report recommended that correctional agencies nationwide adopt age 50 'as the chronological starting point to define "older offenders."'); Brie Williams & Rita Abraelde, Growing Older: Challenges of Prison and Reentry for the Aging Population, in Public Health Behind Bars at 56, 56 (Robert B. Greifinger ed., 2007), [https://www.researchgate.net/publication/226961323\\_Growing\\_Older\\_Challenges\\_of\\_Prison\\_and\\_Reentry\\_for\\_the\\_Aging\\_Population](https://www.researchgate.net/publication/226961323_Growing_Older_Challenges_of_Prison_and_Reentry_for_the_Aging_Population) ("In some states, inmates as young as 50 are defined as geriatric; in other states, inmates are not considered geriatric until they reach age 55 or 60." (citations omitted)); Brie A. Williams et al., Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Health Care, 102 Am. J. Pub. Health 1475 (2012), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2012.300704> ("The National Institute of Corrections and several research studies define older inmates as being aged 50 years or older." (citing B. Jayne Anno et al., Nat'l Inst. of Corr., U.S. Dep't

cause of the eventual doubling of expenses as prisoners age is the heavy toll that prison itself has on human health. . . . [T]he harsh prison environment, accompanied by inadequate treatment, exacerbates prisoners' health status and accelerates the aging process."<sup>31</sup> Mr. Acoli testified to his own experience with this phenomenon during the full hearing in 2016, explaining, "I've been [locked up for] 43 years, so I don't -- can't tell how much damage it has done to me physically and mentally." Tr. 278; accord id. 137.

New Jersey has the third-highest percentage of life-sentenced prisoners who are elderly in the country; 42% of New Jersey's lifers are age 55 and older.<sup>32</sup> Without oversight of the Parole Board's increasingly frequent parole denials for people serving life sentences, this number is only likely to increase in the near future. And this is true even though studies consistently show that paroled lifers "have very low recidivism rates, like other older people released from prison after serving long sentences even for serious or violent offenses."<sup>33</sup>

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of Justice, Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates (2004)).

<sup>31</sup> Nellis, supra note 12, at 26.

<sup>32</sup> Nellis, supra note 25, at 22.

<sup>33</sup> Ghandnoosh, supra note 4, at 29, 29 n.9 (citing Nazgol Ghandnoosh, Minimizing the Maximum: The Case for Shortening All Prison Sentences, in Smart Decarceration: Achieving Criminal Justice Transformation in the 21st Century (Matthew W. Epperson & Carrie Pettus-Davis eds., 2017)); Ashley Nellis & Breanna Bishop, The Sentencing Project, A New Lease on Life at 8, 14

Empirical research in California found that 860 lifers with murder convictions who were paroled between 1995 and 2011 had a “miniscule” recidivism rate for new crimes; less than 1% of these 860 released individuals were sentenced to jail or prison for new felonies, and none were sentenced for new life-term crimes.<sup>34</sup> California is not the only jurisdiction with such findings:

According to a 2009 study by the Michigan-based Citizens Alliance on Prisons and Public Spending, parolees originally convicted of homicide reoffended the least of all groups of ex-prisoners. Of 2,558 homicide parolees in that state, only 2.7 percent were returned to prison for any new crime, and only 0.5 percent were returned for another homicide. Other states have observed similar trends. . . . In New York, just 2.6 percent of 1,480 murderers paroled from 1986 to 2006 were returned to prison for committing new crimes.<sup>35</sup>

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(2021), <https://www.sentencingproject.org/wp-content/uploads/2021/06/A-New-Lease-on-Life.pdf> (collecting empirical studies on recidivism among lifers with murder convictions released on parole, including in New Jersey).

<sup>34</sup> Ibid. (citing Robert Weisberg et al., Stanford Criminal Justice Ctr., Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California 17 (2011), [http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/164096/doc/slspublic/SCJC\\_report\\_Parole\\_Release\\_for\\_Lifers.pdf](http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/164096/doc/slspublic/SCJC_report_Parole_Release_for_Lifers.pdf)).

<sup>35</sup> Jean Trounstein, Why Massachusetts’ Parole System Requires Reform, Bos. Mag. (June 25, 2013), <https://www.bostonmagazine.com/news/2013/06/25/massachusetts-needs-parole-reform>; see also Barbara Levine, Citizens Alliance on Prisons & Public Spending, Issue brief: Paroling people who committed serious crimes: What is the actual risk? (2014), [https://www.prisonpolicy.org/scans/cappsmi/CAPPS\\_Paroling\\_people\\_who\\_committed\\_serious\\_crimes\\_11\\_23\\_14.pdf](https://www.prisonpolicy.org/scans/cappsmi/CAPPS_Paroling_people_who_committed_serious_crimes_11_23_14.pdf).



Mr. Acoli is a man well into his 80s. He has not committed a single disciplinary infraction during the last twenty-five years of his imprisonment. The idea that he might commit a new crime if released is a remote possibility - indeed, it would be a wild statistical anomaly.<sup>36</sup> But the costs for the public of *not* releasing him are concrete and demonstrable. As a matter of public welfare, it is arbitrary and unreasonable to keep elderly and infirm people who are eminently releasable locked away indefinitely, long past the time where they are capable of or have any inclination toward committing an act of serious harm. "[A] sentence that outlasts an offender's desire or ability to break the law is a drain on taxpayers, with little upside in protecting public safety or improving an inmate's chances for success after release."<sup>37</sup>

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<sup>36</sup> Dana Goldstein, Too Old to Commit Crime?, N.Y. Times (Mar. 20, 2015), <https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html> ("Research by American social scientists shows all but the most exceptional criminals, even violent ones, mature out of lawbreaking before middle age, meaning that long sentences do little to prevent crime.").

<sup>37</sup> Ibid. See Am. Civil Liberties Union of N.J., supra note 1, at 12 ("[D]enying the release of elderly people who are no longer considered dangerous defies public safety, financial sense, and compassion for seniors and their families. Older people pose fewer disciplinary problems during their incarceration and reoffend at lower rates upon release. The significant medical needs of elderly individuals make them an extraordinarily costly group to house, and prisons and jails are simply not equipped to handle the complexities involved in caring for aging adults.").

**II. Mr. Acoli long ago satisfied the "punitive aspects" of his sentence, and it was arbitrary and capricious and contrary to law for the Parole Board to venture into considerations of punishment in order to deny his parole.**

As described supra, governed by the 1979 Parole Act, the sole province of the Parole Board at this hearing was to determine whether there is substantial likelihood that Mr. Acoli will commit a crime if released on parole sufficient to disrupt the presumption of parole release. "The Parole Act of 1979 created presumptive parole, meaning that when [a person] appears before a Board Panel, the assumption, before anything is said or reviewed, is that the [person] has a legitimate expectation of release upon his or her parole eligibility date."<sup>38</sup> The state must "prove that the prisoner is a recidivist and should not be released." Byrne, 93 N.J. at 205. By law, the Board is not permitted to pursue retributive ends. Black, 153 N.J. at 447 ("[U]nder the current New Jersey Code of Criminal Justice (Code), we presume that the punitive aspects of an inmate's sentence have been satisfied by the time he or she becomes eligible for parole.").

Where the Parole Board's action is arbitrary and capricious--meaning, "willful and unreasoning action, without

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<sup>38</sup> N.J. Dep't of Corr., State Parole Bd., Juvenile Justice Comm'n, 2015 Release Cohort Outcome Report: A Three-Year Follow-Up 6 (2018), [https://www.state.nj.us/corrections/pdf/offender\\_statistics/2015\\_Release\\_Recidivism\\_Report.pdf](https://www.state.nj.us/corrections/pdf/offender_statistics/2015_Release_Recidivism_Report.pdf).

consideration and in disregard of circumstances" or in violation of legislative policies--this Court has the authority to overturn it. Perry, 459 N.J. Super. at 193 (citations omitted). "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. New Jersey State Parole Bd., 363 N.J. Super. 28, 42 (App. Div. 2003).

**A. The Parole Board's explanation for denying Mr. Acoli parole is not supported by the balance of evidence in the record.**

As an initial matter, reading the 2016 transcript of the full hearing, it is difficult to find evidence that the members of the Parole Board entered the hearing *presuming* parole release, as they must. Instead, the undercurrent running through the entire hearing was a focus on dissecting Mr. Acoli's crime of conviction and the 1973 events on the New Jersey Turnpike. See, e.g., Tr. 42-95, 100-09, 112-16, 135-36, 151-63, 170:19-184:20, 189:19-193:9, 202:21-204, 205:17-213, 216:20-218; 252-54, 270-72. Parole Board members could not move past this fixation despite dozens of pages devoted exclusively to reviewing Mr. Acoli's role in and memory of the crime itself. See Tr. 246-48 (hours into the hearing, praising Mr. Acoli's often direct answers on other topics, but lamenting the specificity of his answers when facing "questions relative to

the crime"). As Mr. Acoli's brief explains, "Out of 286 pages of transcript from the remand hearing, only twelve pages were directed to Mr. Acoli's activities, achievements and his life over this nearly half-century in prison, and this in the most cursory fashion." Appellant's Br. at 6. During the questioning, Parole Board members were aware that the predominant focus of the hearing was the crime itself. For example, after dozens of pages of testimony focused on the crime, and immediately on the heels of one four-page passage revisiting it, Mr. Robertson asserted, "We're not harping on, you know, what happened that day only." Tr. 116:17-18.

The laser focus on Mr. Acoli's crime and Board members' voiced dissatisfaction with Mr. Acoli's responses to questions about it suggests not only the absence of a presumption that Mr. Acoli should be released but rather that members harbored the opposite view: a presumption of parole *denial*. See, e.g., Tr. 119:24-25 ("Do you think that's responding to his question?"); id. 187:16-18 ("Ten or 15 years ago, you came to the conclusion that violence was wrong, is that what you want us to believe?"); id. 219:21-22 ("That would be yes or no, that's how you answer that question."); id. 258 ("I don't understand how a man can do 43 years and still act like he didn't do it."). "Where, as here, the Parole Board denies parole because of an inmate's refusal to accept the facts as found by the jury, its decision cannot

stand. '[E]ven the most despised inmate is entitled to the protection and enforcement of the law.'" Acoli, 462 N.J. Super. at 75 (Rothstadt, J., dissenting) (citation omitted).

The Appellate Division devoted virtually no attention to the 180-month future eligibility term (FET) rendered by the Parole Board in its December 2016 decision, an astounding deviation from the 27-month statutory presumption. This period awaiting review is nearly *seven times* as long as the statute presumes--in other words, more than *six hundred and fifty percent longer*. Such a long FET is particularly unreasonable and inappropriate for an old man in cognitive decline. *More* frequent review than the statute presumes would be an appropriate reaction to a man whose recollection of the events surrounding his crime grows hazier as he ages, and who, as discussed supra, statistics predict has a miniscule chance of recidivism. This 15-year setback appears designed to ensure that Mr. Acoli will die in prison.<sup>39</sup>

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<sup>39</sup> Although it is outside the record in this case, after his most recent parole review, a three-person panel of the Parole Board *again* denied Mr. Acoli parole on July 6, 2021, for substantially similar reasons offered in the decision at issue here. That July panel issued a future eligibility term of 60 months (five years), still more than double the statutory presumptive term. The Parole Board appears set on ensuring that Mr. Acoli, now an 84-year-old man, dies behind bars, usurping both judicial and legislative authority as he was given a parole-eligible sentence by law and was first eligible for presumptive parole in 1994.

The key findings of the Parole Board's denial were summarized by the Appellate Division majority as follows:

After completing its in-person interview of Acoli, the Board concluded that he lacked insight into his criminal behavior, denied key aspects of his crimes, and minimized his criminal conduct and anti-social behavior. The Board found Acoli did not answer questions at the hearing spontaneously, paused "before answering each question," and was "often hesitant to provid[e] details to even the simplest of questions." The Board determined that his responses were "superficial in nature and appeared rehearsed in their structure."

Acoli, 462 N.J. Super. at 53. These findings are internally inconsistent and contradicted by the balance of evidence in the record.

For example, the Board concluded that Mr. Acoli sounded rehearsed. Indeed, one Board member directly questioned whether he had "rehearsed" for the hearing, Tr. 259, and expressed concern that Mr. Acoli had made an effort to improve his performance before the Board, Tr. 232. But the Board also criticized him for pausing before answering questions. These grievances are fundamentally inconsistent. Rehearsed answers suggest rote responses; pauses suggest reflection and contemplativeness. Further, neither criticism amounts to evidence that Mr. Acoli had a substantial likelihood of future criminal activity, the only legal basis on which to disturb the presumption of parole.

The Board further critiqued Mr. Acoli's answers as being shallow and unspecific, but a review of the transcript shows that Board members often cut him off before he could fully answer their questions to expound on their own views in iterative and lengthy question prompts. See, e.g., Tr. 132:22-33:24 (discounting Mr. Acoli's changed views on violence, even though he'd also expressed distaste for violence at a 2004 parole hearing, since Mr. Acoli had written an article in 1985 about the importance of armed struggle, without allowing Mr. Acoli a chance to respond). Mr. Acoli's answers to questions about his views on violence, which the Appellate Division omitted or glossed over, crisply explain how and why his views have changed while he has been incarcerated. He unequivocally disclaimed any intent to engage in criminal activity, Tr. 235:6-7, and gave thorough explanations for why his views toward violence had changed related to the election of President Obama, the societal shift that election reflected, and his own growth in counseling. Tr. 130-32, 185-87. These are significant passages where he explains that he has renounced political violence and now believes in social change achieved through other means. Neither the Board nor the Appellate Division cited those portions of the transcript. The Parole Board's view that Mr. Acoli offered shallow and unsatisfactorily vague answers in response to questions about one "criminal thinking" course he

took among one-hundred programs he has completed across more than forty years in prison does not support the Board's conclusion that he could not explain his views on violence.

Further, the Parole Board said Mr. Acoli lacks empathy, is emotionless, and minimized his anti-social behavior. However, on the record he expressed empathy and remorse for the profound loss experienced by the victim's family, Tr. 204-05, 239-40, for oppressed people all over the world, Tr. 200, 224-25, and for the hardship his incarceration has imposed on his own family, Tr. 169-70, 239. Over dozens of pages and multiple exchanges Mr. Acoli is forthcoming about his personal history, what led him to the Black Panther Party followed by the Black Liberation Army, see generally Tr. 24-42, and his utter lack of interest in future criminal activities, see, e.g., Tr. 131:4-135:3, 148:17-150:25, 184:21-193:9, 227:13-229:19, 235. Moreover, his prison disciplinary record for the last two decades, plus his role as an instructor of anti-recidivist programming, offer significant evidence to confirm his testimony. Reviewing the underlying record as a whole, "[t]he preponderance of the evidence cannot support a finding of any likelihood, to say nothing of a substantial likelihood, that appellant would commit another crime if released. To the contrary, the preponderance of the evidence impels exactly the opposite prediction." Kosmin, 363 N.J. Super. at 42.



**B. Members of the Parole Board repeatedly probed the adequacy of Mr. Acoli's punishment, illustrating a retributive purpose beyond their statutory authority.**

Decades ago this Court announced that "the punitive aspects of a sentence may no longer be considered as an independent ground for denying parole under the Parole Act of 1979. Because the individual's likelihood of recidivism is now the sole standard for making parole determinations, N.J.S.A. 30:4-123.53(a), punishment that serves society's need for general deterrence or a concern for retribution is not truly relevant." In re Trantino, 89 N.J. at 367-72. It appears both from the Board's questioning and from the decision itself that the Board's objection to Mr. Acoli's release is intricately tied up in a concern that Mr. Acoli has not been sufficiently punished for his crime. See Tr. at 240:1-4 ("[I]t just seems so many things that you have said today have indicated and disassociated you with any responsibility towards his death. And, in fact, has been more focused on your suffering . . . ."). In the absence of evidence of a substantial likelihood that Mr. Acoli will commit a new crime if released, this constitutes arbitrary and capricious agency action, requiring reversal.

Parole Board members repeatedly questioned Mr. Acoli about his beliefs about the adequacy and legitimacy of his punishment. These were not one-off, fleeting lines of inquiry by an isolated Board member; the adequacy of Mr. Acoli's punishment was a

thread repeatedly pulled by at least seven Board members, a majority of the eleven Board members who questioned Mr. Acoli. (Many of the Board members did not conduct lengthy questioning of Mr. Acoli: Mr. Ross questioned Mr. Acoli for only two pages of the transcript in total, Mr. Plousis for only five pages, Ms. Erdos for only seven pages, and Mr. Butch declined entirely.)

Mr. Acoli was asked whether his sentence was fair or "overkill" (Tr. 272:17-275:15, questioning by Mr. Henderson), whether he viewed his incarceration as unjust (Tr. 198:5-202:3, questioning by Ms. Garcia), whether he had "paid his debt to society" (Tr. 218:7-19, questioning by Mr. Plousis), whether he considered himself a political prisoner or a prisoner of war (Tr. 120:5-123:8, questioning by Mr. Robertson; Tr. 263:16-264:22, questioning by Ms. Erdos), to what extent he felt his actions were justified (Tr. 242:21-244:14, questioning by Mr. Haaf), whether the officer's family should express remorse for his predicament in prison (Tr. 239:16-240:13, questioning by Mr. Haaf); and whether he would engage in political activities and "rewrite history" on the "extradical circuit" if released (Tr. 169:13-170:15, questioning by Mr. Riccardella). These threads reveal a theme woven throughout the hearing: frustrated by Mr. Acoli's inability or unwillingness to accede to the facts of the crime as found by the jury, Parole Board members wanted to know

whether he had suffered enough, gauged by Mr. Acoli's own experience of his punishment.

To what extent can these questions be explained by a motivating goal of individual deterrence--a reasonable consideration at a parole hearing given the rehabilitative inquiry parole requires, see In re Trantino, 89 N.J. at 372-73--versus retribution, a desire to see Mr. Acoli continue to be punished? The recurrent attention to the length and justness of Mr. Acoli's sentence, and to whether he had suffered, suggest a fixation on vengeance, on punishment proportional to the harm he caused. The exploration of Mr. Acoli's experience of his sentence and his incarceration, coupled with extensive questioning about "taking responsibility" for Trooper Foerster's murder, seems inextricably bound up with punitive ends.

Mr. Acoli was questioned by multiple Board members about taking responsibility for the murder of Trooper Foerster. The idea of taking responsibility--of being held accountable for harm caused--has a much stronger connection to retributivism than it does to a substantial likelihood of committing a future crime. Board Members repeatedly questioned Mr. Acoli about his responsibility in order to try to get him to accede to the facts as found by the jury--and when he would not, their frustration shows in the exchanges. Consider the following excerpts:

MR. JEFFERSON: . . . I don't understand what you think of yourself today. You -- you don't believe you committed murder. You're able to absolve yourself for the crime that you're serving a life sentence for. I don't understand how a man can do 43 years and still act like he didn't do it.

MR. ACOLI: I took responsibility for it.

MR. JEFFERSON: How can you take responsibility, sir, for something you say you didn't do?

MR. ACOLI: I -- uh, I explained what I said I -- that I did, that I struggled with him, and preventing him from going to the aid of his --

MR. JEFFERSON: Sir, you didn't get life for a struggle. You got life for the murder, for putting the bullets in his head, that's what you got life for.

MR. ACOLI: I didn't put the bullets in his head.

MR. JEFFERSON: But that's what you got life for.

MR. ACOLI: Um, that's what I took responsibility for then.

MR. JEFFERSON: All right. It seems to me that you just want to paint yourself as the victim of the crime here, and not Trooper Foerster.

MR. ACOLI: I never said that.

MR. JEFFERSON: I don't have any other questions.

Tr. 258:11-259:13. See also Tr. 243:22-244:1 ("You don't accept the responsibility of what your actions did, yet in another phase, you say, 'Well, I'm sorry for the death for his family, the person that died.' But you - you're not responsible for the death, are you?").

In one final revealing passage, Mr. Riccardella posits, "Why would we think that you haven't taken a page out of the Trantino handbook, you know, which is basically, you know, how to -- how to kill a police officer, and then get paroled for it

later on in life by -- by saying 'I don't remember'?" Tr. 159:11-15. Moments later, he continues, "Well, it's basically a blanket disclaimer of responsibility for anything that happened because 'I just -- I just can't remember it.'" Tr. 160:1-3. Here, Mr. Riccardella implicitly questions the wisdom of this Court's decision with respect to Mr. Trantino--an entirely improper digression--but also reveals specific discomfort with what he perceives to be a pattern of people, first Mr. Trantino and now Mr. Acoli, disclaiming responsibility in the murder of a police officer and escaping their just deserts through feigned ignorance. Mr. Acoli was punished and sentenced pursuant to governing law. Quarreling with the sentence he received, or the law as it existed "at the time," Tr. 275, is not a proper exercise for the Parole Board.

Throughout the hearing, there was an effort made to depict Mr. Acoli as a dangerous man purveying dangerous ideas.<sup>40</sup> The Board repeatedly dredged up events in which Mr. Acoli had been implicated or accused but ultimately exonerated--for example, the mass arrests in Harlem in the Panther 21 trial, Tr. 32-35, an escape attempt in Trenton State Prison for which he was not

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<sup>40</sup> The Parole Board questioned Mr. Acoli about the Black Panthers' political education in communist teachings including Fidel Castro, Mao Tsetung, and Ho Chi Minh, Tr. at 29, 40, 49, 226; search and destroy missions in Vietnam, Tr. at 113; and even which member of the Black Panther Party was related to Tupak Shakur, Tr. at 45-46.

ultimately prosecuted, Tr. 164-66, and an attempted 1989 escape orchestrated by a white supremacist organization called The Order in Leavenworth where charges were never brought against Mr. Acoli, Tr. 166:23-167:7. Revisiting these incidents has the effect of painting Mr. Acoli with a broad brush as someone who repeatedly escaped punishment in connection with events for which Board Members thought he should have been held culpable. All told, the transcript illustrates an undercurrent that the Board believes Mr. Acoli has not been held accountable for his actions. But there is nothing to suggest a genuine fear, supported by evidence, that as an octogenarian in ailing health and cognitive decline Mr. Acoli will engage in a nouveau armed revolution if released. However, there are significant indicia that the Parole Board denied Mr. Acoli parole in order to punish him--perhaps none more striking than the Board's determination in 2016, when he was 79, that his future eligibility term should be 180 months: another 15 years of waiting for even the chance at release. Mr. Acoli has been eligible for *presumptive* parole for nearly thirty years; he has served the base punishment portion of his sentence twice-over, much of it in federal prison far from his family, and continuing to incarcerate him simply to satiate the Board's desire for punishment is arbitrary and capricious and beyond the Board's authority.

## CONCLUSION

In 1973, Mr. Acoli was involved in the execution of a New Jersey State Trooper on the side of the New Jersey Turnpike. The jury found that Mr. Acoli killed Trooper Foerster in cold blood. Mr. Acoli has maintained he was knocked out during a preceding hand-to-hand struggle and therefore has a cloudy recollection of what happened, which, though admittedly dissatisfying, cannot on its own defeat his chances at parole because it has little bearing on a substantial likelihood that he will commit another crime if released. Nearly five decades later, continuing to keep him incarcerated as an 84-year-old man after 25 years without disciplinary infractions in prison, and after he has renounced political violence and explained to the Parole Board why he reached his altered views, is gratuitous and extralegal punishment. The Parole Board's reticence to parole lifers convicted of murder, demonstrated in empirical data on the dramatic changes in rates of release over the last four decades, compromises public safety and the welfare of society. The Parole Board's decision was contrary to law. This Court should reverse, and Mr. Acoli should be granted parole.

Respectfully submitted,

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