

SUNDIATA ACOLI,

Plaintiff-Appellant,

v.

New Jersey State Parole Board,

Defendant-Appellee.

Richard Lomurro, ESQ.
Of Counsel
NJ ATTORNEY ID # 15072007

Emeka Nkwuo, ESQ.
Of Counsel
NJ ATTORNEY ID #035952010

HOWARD UNIVERSITY SCHOOL OF LAW
MOVEMENT LAWYERING CLINIC
Justin Hansford, ESQ.
On the Brief
**Pro Hac Vice pending*
2900 Van Ness Street NW
Washington, D.C. 20008
(202) 806-8082

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 083980

ON APPEAL FROM THE SUPERIOR
COURT OF NEW JERSEY,
APPELLATE DIVISION

DOCKET NO. BELOW: A-5645-16T2

SAT BELOW: HON. DOUGLAS
FASCIALE, P.J.A.D., HON.
SCOTT MOYNIHAN, J.A.D., AND
HON. GARY ROTHSTADT, J.A.D.

CRIMINAL ACTION

**BRIEF OF *AMICUS CURIAE*
NATIONAL CONFERENCE OF BLACK
LAWYERS**

LOMURRO, MUNSON, COMER, BROWN
& SCHOTTLAND, LLC
Monmouth Executive Center
4 Paragon Way, Suite 100
Freehold, New Jersey 07728
(732) 414-0300
Attorneys for Proposed *Amicus
Curiae*, National Conference
of Black Lawyers

Table of Contents

TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	2
ARGUMENT.....	3
I. Parole boards are inherently risk averse and uniquely susceptible to influence by public opinion, political concerns, and implicit bias	4
i. Public opinion and political concerns	4
ii. Implicit bias	8
II. The considerations on which the Parole Board relied permit boundless discretion and allow the Board to deny parole even when it cannot show there is a substantial likelihood an individual will recidivate	10
i. The Parole Board denied parole largely because of the crime for which Mr. Acoli was convicted	10
ii. Considerations of lack of insight and remorse invite increased bias into an already vulnerable process	18
CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases

<i>Acoli v. New Jersey State Parole Bd.</i> , 2014 WL 4798735 (N.J. Super. Ct. App. Div. Sept. 29, 2014) (2016) (“ <i>Acoli I</i> ”)	19
<i>Acoli v. New Jersey State Parole Bd.</i> , 462 N.J. Super. 39 (App. Div. 2019)	passim
<i>Greenholtz v. Inmates of Nebraska Penal & Corr. Complex</i> , 442 U.S. 1 (1979)	11
<i>In re Shaputis</i> , 265 P.3d 253 (Cal. 2011)	21
<i>Kosmin v. New Jersey State Parole Bd.</i> , 363 N.J. Super. 28 (App. Div. 2003)	20
<i>New Jersey State Parole Bd. v. Cestari</i> , 224 N.J. Super. 534 (App. Div. 1988)	22
<i>State v. Andujar</i> , No. 084167 (N.J. July 13, 2021)	10
<i>State v. Miller</i> , 108 N.J. 112 (1987)	10
<i>Trantino v. New Jersey State Parole Bd.</i> , 166 N.J. 113 (2001)	5, 17, 18

Statutes

N.J.S.A. § 30:4-123.47	7
N.J.S.A. § 30:4-123.53(a)	4

Other Authorities

Amanda Carlin, <i>The Courtroom as White Space: Racial Performance as Noncredibility</i> , 63 UCLA L. REV. 450 (2016)	23
American Law Institute, <i>Model Penal Code: Sentencing. Tentative Draft No. 2</i> (Mar. 25, 2011) §6.06, “Comment,”	8

Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, THE SENT'G PROJECT (July 2009), available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf> 5

Ashley Nellis, Sent'g Project, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS 3* (2016), available at <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> 25

Assembly Judiciary, Law, Public Safety and Defense Committee
Statement, Assembly No. 3093 (December 3, 1979) 3

Beth M. Huebner & Timothy S. Bynum, *The Role of Race and Ethnicity in Parole Decisions*, 46 *CRIMINOLOGY* 907 (2008).... 10

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 13

Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 *J. CRIM. JUST.* 321 (1999)..... 12

Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 *IOWA L. REV.* 491 (2008) 3,25

Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 *AM. J. CRIM. L.* 353 (2019) .. 8, 9,24

J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643 (2020). . . 15

Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROBATION 16 (2007) 13

Jonathan Simon, *Drugs Are Not the (Only) Problem: Structural Racism, Mass Imprisonment, and the Overpunishment of Violent Crime*, in RACE, CRIME, AND PUNISHMENT: BREAKING THE CONNECTION IN AMERICA 142 (2011) 15

JT Aregood, *Lesniak: Replace Parole Board Members with Retired Judges and Deny Jack Kelly*, OBSERVER (May, 25 2015), <https://observer.com/2016/05/lesniak-replace-parole-board-members-with-retired-judges-and-deny-jack-kelly/> 6

Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158 (2020) 23

Keith Wattley, *Insight into California's Life Sentences*, 25 FED. SENT. R. 271 (2013) 20

Letter from Nicholas Sorrano, Jr., Association of Former New Jersey State Troopers, President, to New Jersey State Parole Board (Nov. 13, 2020), available at <https://www.ftanjsp.org/attachments/FTA%20Sundiata%20Acoli%20Parole%20Hearing%20Letter%2011132020.pdf> 6

Lilliana Paratore, *"Insight" into Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice*, 21 BERKELEY J. CRIM. L. 95 (2016) 21

M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018) 22,23

Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565 (2019) 6

Marie Gottschalk, *No Way Out? Life Sentences and Politics of Penal Reform*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) 7

Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. Rev. 249 (2017) 5

Natasha Lennard, *After Half Century in Prison, Elderly Black Panther Should Not Be Left to Die*, THE INTERCEPT (Mar. 28, 2021), <https://theintercept.com/2021/03/28/elderly-prisoner-black-panther-parole/> 7,17

New Jersey Criminal Sentencing & Disposition Commission, ANNUAL REPORT (Nov. 2019), available at https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf 25

Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 Mo. L. REV. 321 (2020) 9,10,23,24

Olinda Moyd, *Racial Disparities Inherent in America's Fragmented Parole System*, CRIM. JUST., Spring 2021 16

Robert Weisberg, Debbie A. Mukamal & Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, STANFORD CRIM. JUST. CTR. 17 (Sept. 2011), available at https://law.stanford.edu/index.php?webauth-document=child-page/164096/doc/slspublic/SCJC_report_Parole_Release_for_Lifers.pdf 15

Salvador Rizzo, *N.J. Justices Overturn Parole For Man in 1973 State Trooper Killing*, North Jersey (Feb. 23, 2016), <https://www.northjersey.com/story/news/2016/02/23/nj-justices-overturn-parole-for-man-in-1973-state-trooper-killing/94508756/> 6

Statement of the New Jersey Supreme Court (June 5, 2020),
available at
<https://www.njcourts.gov/pressrel/2020/pr060520a.pdf> 25

Susan A. Bandes, *Remorse and Judging*, in REMORSE IN CRIMINAL
JUSTICE: MULTI-DISCIPLINARY PERSPECTIVES (Steven Tudor et al.
eds. 2021) 22

The Sent'g Project, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR
PAROLE ON LIFE SENTENCES (2017), *available at*
[https://www.sentencingproject.org/wp-
content/uploads/2018/03/32-lifer-parole-policies.pdf](https://www.sentencingproject.org/wp-content/uploads/2018/03/32-lifer-parole-policies.pdf) 14

The Sent'g Project, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE
IMPRISONMENT (2021), *available at*
[https://www.sentencingproject.org/wp-
content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-
Reliance-on-Life-
Imprisonment.pdf?eType=EmailBlastContent&eId=74b0a93c-3ad7-
4ddd-9d3c-87bff675fd46](https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf?eType=EmailBlastContent&eId=74b0a93c-3ad7-4ddd-9d3c-87bff675fd46) 14

Victoria Palacios, *Go and Sin No More: Rationality and Release
Decisions by Parole Boards*, 45 S.C. L. REV. 567 (1994) 5,6

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Conference of Black Lawyers was established in 1968. It is an association of lawyers, scholars, judges, legal workers, law students and legal activists. Its mission is to serve as the legal arm of the movement for Black Liberation, to protect human rights, to achieve self-determination of Africa and African Communities in the Diaspora and to work in coalition to assist in ending oppression of all peoples.

PRELIMINARY STATEMENT

Sundiata Acoli has been imprisoned for nearly fifty years. For almost thirty of those years, Mr. Acoli has been eligible for parole. Despite New Jersey state law's presumption of release, the Parole Board has denied Mr. Acoli parole at every opportunity he has had before it, even after the Appellate Division found in 2014 that he was entitled to parole under the statute governing his release. At 84 years of age and in declining health, Mr. Acoli will be nearing his nineties at his next opportunity before the parole board in the event that the Appellate Division's decision is upheld. In effect, the Parole Board's decision and the opinion affirming it have likely sentenced Mr. Acoli to life in prison despite his exemplary record throughout his past thirty years in prison and his impressive attempts to improve himself—including the completion of over 100 courses in which he has excelled—

eliminating any chance that he will attain the freedom afforded to him under applicable New Jersey state law.

It is against this backdrop that *Amicus* writes to emphasize two points. *First*, even when the law imposes standards on parole boards, such bodies are inherently risk averse and subject to potential influence by public opinion, political concerns, and implicit bias. Due to the notoriety surrounding Mr. Acoli's case in the state of New Jersey and the background of the case, this reality is particularly salient and requires that the Board's decision receive meaningful judicial review. *Second*, the Board's decision almost exclusively focused on certain factors such as the crime involved and the lack of remorse rather than the likelihood of recidivism. Primarily focusing on the underlying offense results in the Board summarily denying parole and invites impermissible bias into those decisions. These considerations require more than simple blanket deference to a parole board's decision, especially in cases like this that draw significant public attention. For these reasons, and for the reasons stated in Appellant's brief, the lower court's decision should be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies primarily on the facts and procedural history set forth in plaintiff-appellant Sundiata Acoli's brief as well in the appellate decisions relating to this matter.

ARGUMENT

In 1979, the New Jersey legislature passed the Parole Act of 1979 ("Parole Act"), which implemented a number of meaningful changes to the state's parole release system. One of the purposes of the Parole Act was "to introduce more consistency, objectivity and predictability into the parole process" and "to eliminate many problem areas in existing law which [had] led to inequities in the administration of parole."¹ The hope was to "render[] the decision-making process more objective, cutting down the wide discretion that paroling authorities [had] under current law."²

Prior to these changes, commentators had noted that the New Jersey Parole Board was "omnipotent, answerable to nobody, and not required to justify its actions."³ With that in mind, the new law sought to recognize that the power to decide how long an individual should be incarcerated rested within the province of the sentencing court rather than the parole board.⁴

In order to accomplish these goals, the Parole Act shifted the burden to the state and provided that the Board must release an individual unless it can prove "by a preponderance of the

¹ Assembly Judiciary, Law, Public Safety and Defense Committee Statement, Assembly No. 3093 (December 3, 1979).

² *Id.*

³ Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, n. 64 (2008) (quoting Ad Hoc Parole Comm., *The Parole Denial Process in New Jersey* 15 (1975)).

⁴ Assembly Judiciary, *supra* note 1.

evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released.”⁵ In order to ensure that the state’s burden has actual meaning and that the Parole Act’s purposes when enacted are realized, parole board actions—especially in the case at hand—deserve a meaningful review to maintain “the integrity of [the state’s] justice system.”⁶

I. Parole boards are inherently risk averse and uniquely susceptible to influence by public opinion, political concerns, and implicit bias

i. Public opinion and political concerns

In the decision below, the lower court indicated that it was not “permitted to substitute [its] judgment for that of the Board’s” due to the “subjective nature of the Board’s prediction of an inmate’s future behavior” and because of “the highly specialized composition of the Board itself.”⁷ In so doing, the court emphasized the qualifications-based selection of the parole board by the Governor.⁸ Despite this recognition, legal and academic scholars alike have long criticized parole processes across the nation, particularly for the very discretion afforded to them and the political influence inherent in their structure

⁵ *N.J.S.A.* § 30:4-123.53(a).

⁶ *Acoli v. New Jersey State Parole Bd.*, 462 N.J. Super. 39, 67 (App. Div. 2019) (Rothstadt, J.A.D. dissenting) (“*Acoli III*”) (internal citation omitted).

⁷ *Acoli III*, 462 N.J. Super. at 51.

⁸ *Id.* at 50.

and design. Such criticism recognizes that “[p]arole decision makers are the gatekeepers of the criminal justice system.”⁹ And, “[f]or persons who have been sentenced to life but are parole eligible, prospects for release have become increasingly politicized in recent years.”¹⁰ As this Court has previously stated, “public outrage over an imminent parole determination...has no place in a parole proceeding and is to be given no weight in a parole decision.”¹¹ And, in this case, the decision was undoubtedly based upon the “strong winds of public opinion.”¹²

As critics have noted, governors often appoint parole board members with deep ties to the law enforcement community, such as former prosecutors, parole officers, law enforcement, agents, and those involved in correctional and supervision work.¹³ Further, because parole board members are gubernatorial appointees,

⁹ Victoria Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 567 (1994).

¹⁰ Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, THE SENT’G PROJECT (July 2009), available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf>.

¹¹ *Trantino v. New Jersey State Parole Bd.*, 166 N.J. 113, 127 (2001) (quoting *In re Application of Trantino*, 89 N.J. 347, 376 (1982)).

¹² *Acoli III*, 462 N.J. Super. at 67 (Rothstadt, J.A.D. dissenting) (quoting *Acoli v. New Jersey State Parole Board*, 224 N.J. 213, 241 (2016) (“*Acoli II*”).

¹³ Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. Rev. 249, 263 (2017).

additional concerns exist such as political patronage.¹⁴ Such has often been a concern in New Jersey.¹⁵ These compositions, whether intentionally or implicitly, make parole boards uniquely susceptible to outside influence and political bias,¹⁶ particularly in cases such as this that involved the death of a state trooper.

Indeed, in the aftermath of the Appellate Division's 2014 decision ordering Mr. Acoli's release, there was significant public outrage regarding the decision, including the president of the New Jersey State Troopers Fraternal Association commenting that Mr. Acoli should remain "locked up and away from civil society for the rest of his life."¹⁷ Likewise, the Association of Former New Jersey State Troopers has continued to advocate for the Parole Board to deny Mr. Acoli release.¹⁸ While the sentiments from these

¹⁴ Palacios, *supra* note 9, at 580.

¹⁵ JT Aregood, *Lesniak: Replace Parole Board Members with Retired Judges and Deny Jack Kelly*, OBSERVER (May, 25 2015), <https://observer.com/2016/05/lesniak-replace-parole-board-members-with-retired-judges-and-deny-jack-kelly/> (noting recommendation by former New Jersey State Senator that parole board members should be replaced with retired judges to eliminate political patronage and ensure the requisite experience to apply the law).

¹⁶ *Id.*; see also Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 570 (2019) ("Given their well-documented disorder, political bias, and lack of expertise, parole boards as entities are [] far more likely to violate substantive sentencing rights of defendants.").

¹⁷ Salvador Rizzo, *N.J. Justices Overturn Parole For Man in 1973 State Trooper Killing*, North Jersey (Feb. 23, 2016), <https://www.northjersey.com/story/news/2016/02/23/nj-justices-overturn-parole-for-man-in-1973-state-trooper-killing/94508756/>.

¹⁸ See, Letter from Nicholas Sorrano, Jr., Association of Former New Jersey State Troopers, President, to New Jersey State Parole

groups are not surprising, their opinions are not founded in the law and demonstrate the great pressure on the Parole Board to keep certain individuals imprisoned indefinitely even if they have made great strides in attaining release.¹⁹ And, the continuation of the Board to do just that demonstrates a degree of disdain for the laws in place at the time of Mr. Acoli's sentencing.

For this very reason and to insulate state parole boards from the "wrath of public opinion," the President's Commission on Law Enforcement and the Administration of Justice recommended over four decades ago that boards "be composed of psychologists, social workers, corrections officials, and other professionals with specialized training and expertise to evaluate offenders' suitability for release."²⁰ Although New Jersey does mandate requirements for the members of its parole board,²¹ the Board continues to lack social workers, psychologists, or other such individuals that can meaningfully determine whether an individual

Board (Nov. 13, 2020), available at <https://www.ftanjsp.org/attachments/FTA%20Sundiata%20Acoli%20Parole%20Hearing%20Letter%2011132020.pdf>.

¹⁹ Natasha Lennard, *After Half Century in Prison, Elderly Black Panther Should Not Be Left to Die*, THE INTERCEPT (Mar. 28, 2021), <https://theintercept.com/2021/03/28/elderly-prisoner-black-panther-parole/> ("Powerful police unions fight with near-religious zeal to ensure that "cop killers" never see a day of freedom.").

²⁰ Marie Gottschalk, *No Way Out? Life Sentences and Politics of Penal Reform*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY 227, 257 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

²¹ See N.J.S.A. § 30:4-123.47.

is likely to recidivate, the relevant standard under the applicable release statute.

Notably, a 2011 revision of the Model Penal Code noted that “[r]esearch, historical inquiry, and the firsthand experience of participants in the drafting process support the judgment that parole boards, when acting as prison-release authorities, are failed institutions.”²² The influential document written by legal scholars further commented it failed to find any “documented [] example in contemporary practice, or from any historical era, of a parole-release system that has performed reasonably well in discharging its goals.”²³ Widespread criticism such as this makes it necessary for reviewing courts to ensure that meaningful consideration is given to parole board decisions, especially in the context of controversial cases.

ii. Implicit bias

Implicit biases are “attitudes and stereotypes that function automatically without individual awareness.”²⁴ These attitudes and stereotypes can affect an individual’s decision-making process, especially when those individuals—in this case parole board members—necessarily make judgments through the lenses of race,

²² American Law Institute, *Model Penal Code: Sentencing. Tentative Draft No. 2* (Mar. 25, 2011) §6.06, “Comment,” p. 9.

²³ *Id.*

²⁴ Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 391 (2019).

socioeconomic class, gender, and culture, among others.²⁵ In the criminal legal system, “[c]onsiderable evidence...suggests that implicit bias is pervasive, and affects judgments about character traits associated with criminal behavior, particularly violence, dangerousness, and lack of remorse.”²⁶

For example, in one study researchers found that minority individuals were less likely to receive a federal sentence reduction for acceptance of responsibility even after controlling for offender and offense characteristics.²⁷ In another study of mock capital trials, participants were less willing to consider identical evidence as a mitigating factor when that evidence was introduced for Black defendants as opposed to white defendants.²⁸ These results offer just a snapshot of the way in which implicit considerations of factors such as race can negatively affect the ability of decisionmakers to act completely free of bias.

Similarly, with respect to parole decisions, parole boards operate with nearly *carte blanche* regarding the justifications required to deny an individual parole. Some research has already suggested that race may be used as a “cue for dangerousness and

²⁵ Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 MO. L. REV. 321, 347 (2020).

²⁶ Rhode, *supra* note 24.

²⁷ Bronnimann, *supra* note 25, at 348.

²⁸ *Id.* at 349.

risk" in the parole process.²⁹ In the parole context, the potential role of implicit bias deserves particular attention because "the parole process is unique and not governed by the same due process safeguards afforded to [individuals] at arrest or sentencing" and "discretion may be more pronounced at parole" hearings.³⁰

This Court itself recently reaffirmed its recognition that "implicit bias is no less real and no less problematic than intentional bias."³¹ Although the recognition came in a different context, it is no less relevant here where parole decisions receive the smallest amount of scrutiny. Here, implicit bias "may be exacerbated when a perceiver not only has implicit bias against the offender but a heightened ability to empathize with the victim."³² That is precisely the case here.

II. The considerations on which the Parole Board relied permit boundless discretion and allow the Board to deny parole even when it cannot show there is a substantial likelihood an individual will recidivate

i. The Parole Board denied parole largely because of the crime for which Mr. Acoli was convicted

According to this Court, "factors invoked by the Legislature to establish the degree of the crime should not be double counted when calculating the length of sentence."³³ Yet, in this case, the

²⁹ Beth M. Huebner & Timothy S. Bynum, *The Role of Race and Ethnicity in Parole Decisions*, 46 CRIMINOLOGY 907, 926 (2008).

³⁰ *Id.* at 928.

³¹ See *State v. Andujar*, No. 084167, at *17 (N.J. July 13, 2021).

³² Bronnimann, *supra* note 25, at 349.

³³ *State v. Miller*, 108 N.J. 112, 122 (1987).

Parole Board has effectively usurped the role of the sentencing body and transformed Mr. Acoli's term of imprisonment into a de facto life without parole sentence seemingly based on the crime for which he was convicted rather than on a substantial likelihood that he will commit another crime if released. The Board has done so "despite the fact that in 1974, Acoli's sentence could not legally have been life without parole."³⁴

The law imagines that parole decisions should "entail primarily what a man is and what he may become rather than simply what he has done."³⁵ However, throughout Mr. Acoli's numerous parole denials, the Parole Board has focused almost exclusively on Mr. Acoli's role in the incident on the turnpike that resulted in Trooper Foerster's death, rather than on what he has done since that transpired. In fact, only twelve pages of a 286-page transcript of Mr. Acoli's hearing on remand concerned his activities and achievements during his lengthy imprisonment,³⁶ such considerations that should have been the Board's focus and that bear most heavily on his likelihood of recidivism.

Mr. Acoli is not alone in his experience of the crime for which he was convicted affecting his subsequent parole decisions,

³⁴ *Acoli III*, 462 N.J. Super. at 67 (Rothstadt, J.A.D. dissenting) (internal citation omitted).

³⁵ *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 10 (1979).

³⁶ Appellant Br. At 6.

even though his institutional record and age demonstrate that he satisfies the statutory criteria for release. Although comprehensive data regarding parole release decisions are relatively scarce, one study was conducted in 1999 to determine whether New Jersey parole board decisions complied with the Parole Act of 1979 and how and whether such factors as the type of crime affected these decisions.³⁷ The results of the study indicated that the type of crime for which an inmate was incarcerated was the most influential factor in parole release decisions,³⁸ despite the likelihood of recidivism being the driving concern behind the Parole Act. Based on the results of the study, the author suggested that parole board hearing officers "applied a correction in cases where the crime and sentence received were perceived as incongruent."³⁹ Such a conclusion belies the aims of the Parole Act and suggests that considerations other than the likelihood of recidivism are driving parole release decisions.

Another detailed review of empirical literature on parole release decision-making suggested that "despite guidelines, parole release decisions remained irregularly applied" and were primarily

³⁷ See Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. CRIM. JUST. 321 (1999).

³⁸ *Id.*

³⁹ *Id.*

the function of such factors as institutional behavior, crime severity, and victim input.⁴⁰

More recent data obtained by New Jersey's Office of the Public Defender from the parole board through an open records request—one of the few ways to obtain such data—suggest that Mr. Acoli's case is just one example of the Parole Board's reluctance to honor the presumption of release provided by New Jersey law. It also suggests that those convicted of murder are extremely unlikely to obtain release by the parole board. The data showed that only 39 of the 445 individuals sentenced to life imprisonment, all of whom were convicted of murder, who went before the parole board between 2012 and 2019 were released.⁴¹ The remaining 406 individuals—91 percent—were denied parole by the Board.⁴² The Board further required 30 percent of those denied to wait four to nine years to seek parole again and 20 percent to wait ten years.⁴³

This data becomes even more concerning in the context of the fact that 64 percent of those serving life sentences or virtual life sentences in New Jersey are Black, with people of color

⁴⁰ Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROBATION 16 (2007).

⁴¹ 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.

⁴² *Id.*

⁴³ *Id.*

representing over three quarters of the state's life sentences.⁴⁴ And, approximately 42 percent of the overall population serving life-sentences is over the age of 55, despite the fact that population of people is highly unlikely to recidivate.⁴⁵

In addition to these data, other data obtained by the Sentencing Project found that the parole grant rate in New Jersey for those convicted of murder with life sentences has significantly declined since the 1980s. According to the data, the parole grant rate for such individuals was 42 percent in the late 1980s, 31 percent in the 1990s and 2000s, and fell to 12 percent between 2010 and 2013.⁴⁶ Although the reasons for such denials are not readily available, the numbers suggest that the Parole Board has nearly unbridled discretion to deny parole to those serving life sentences for murder.

The outsized denial of parole to individuals convicted of murder—especially in cases such as this where Mr. Acoli has clearly demonstrated that he will not be likely to recidivate, much less

⁴⁴ The Sent'g Project, *NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT* 19 (2021), available at <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf?eType=EmailBlastContent&eId=74b0a93c-3ad7-4ddd-9d3c-87bff675fd46>.

⁴⁵ *Id.* at 22.

⁴⁶ The Sent'g Project, *DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES* 42 (2017), available at <https://www.sentencingproject.org/wp-content/uploads/2018/03/32-lifer-parole-policies.pdf>.

be a danger to society—is concerning in light of the fact that “[c]riminologists have long documented the fact that prisoners who are released after serving time for homicide crimes have among the lowest recidivism rates, both for other homicides and crimes generally.”⁴⁷ As an example, one study of New York and California between 1999 and 2014 showed that only one percent of those convicted of murder were re-incarcerated for a similar offense within three years and for individuals over the age of 55 that number dropped to .02 percent.⁴⁸ Although data from New Jersey is wanting and “[f]ew studies have been conducted documenting the recidivism rates for lifers [nationally] the few that exist all suggest that the recidivism rate—as defined by recommitment for a new offense—is relatively low.”⁴⁹

Along with the crime itself, “[t]he status of the victim is another oblique factor that parole boards, consciously or

⁴⁷ Jonathan Simon, *Drugs Are Not the (Only) Problem: Structural Racism, Mass Imprisonment, and the Overpunishment of Violent Crime*, in RACE, CRIME, AND PUNISHMENT: BREAKING THE CONNECTION IN AMERICA 142 (2011).

⁴⁸ J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1647 (2020).

⁴⁹ Robert Weisberg, Debbie A. Mukamal & Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, STANFORD CRIM. JUST. CTR. 17 (Sept. 2011), available at https://law.stanford.edu/index.php?webauth-document=child-page/164096/doc/slspublic/SCJC_report_Parole_Release_for_Lifers.pdf.

unconsciously, take into consideration in decision-making.”⁵⁰ In cases like this, where the death of a law enforcement officer is at issue, the victim’s status becomes a central factor in the determination that an individual is not suitable for parole. Indeed, when parole boards are comprised predominantly of individuals with backgrounds in law enforcement, the potential for such a factor to impermissibly weigh on a parole decision is evident. This is so even when the factor may have no bearing on whether an individual is likely to recidivate upon release and in the face of an individual’s model success while incarcerated.

In a particularly consequential case, the New York State Parole Board denied John MacKenzie parole ten times based on the fact that the victim of his crime was a police officer, despite evidence of his myriad achievements while incarcerated and deep remorse for his crime.⁵¹ The New York Supreme Court ultimately held the parole board in contempt for refusing to follow the law in making the parole determination, but not before Mr. MacKenzie took his own life.⁵² Notably, two other individuals long-denied parole for their role in the murder of two New York police officers were granted parole in recent years when reforms to the state’s parole laws required the Board to base decisions on an evaluation

⁵⁰ Olinda Moyd, *Racial Disparities Inherent in America's Fragmented Parole System*, CRIM. JUST., Spring 2021, at 6, 7.

⁵¹ *Id.*

⁵² *Id.*

of the individual's risk and not on the nature of his crime.⁵³ Mr. Acoli has demonstrated that he presents no risk of recidivism, but the burden of proof is not on Mr. Acoli.

The New Jersey State Parole Board likewise appears to base its parole decision heavily—if not exclusively—on the fact that the crime for which Mr. Acoli remains incarcerated involved the death of a state trooper. Notably, during Mr. Acoli's parole hearing, one board member stated that Mr. Acoli took "a page out of the Trantino handbook...which is basically...how to kill a police officer and get paroled for it later..."⁵⁴ And, a majority of the questioning during Mr. Acoli's hearing involved the incident rather than Mr. Acoli's impressive record while incarcerated. It is not the role of the Parole Board to relitigate that incident, for which a court sentenced Mr. Acoli almost fifty years ago, nor is it the Board's role to assume the role of a sentencing body.

In this case, the Parole Board's intensive questioning regarding the crime for which Mr. Acoli was convicted and the facts surrounding it demonstrate that the conviction, rather than Mr. Acoli's likelihood of committing a crime if released was its primary concern. Even in light of the fact that he "has disavowed...the necessity for violence, and he acknowledged the change in his thinking through counseling, classes, and President

⁵³ Lennard, *supra* note 19.

⁵⁴ Appellant's Br. at 17.

Obama's election,"⁵⁵ the Parole Board has continued to maintain that Mr. Acoli is unfit to be released on parole. Overall the Board's "reliance...on evidence of such distant events can be understood only as a makeweight to overcome the lack of substantial evidence to support the Board's conclusions."⁵⁶ Therefore, this Court should not permit such a decision to stand.

ii. Considerations of lack of insight and remorse invite increased bias into an already vulnerable process

In affirming the Parole Board's denial of Mr. Acoli's parole release, the opinion below gave great deference to the Board's observations that Mr. Acoli presented as "insincere, rehearsed, shallow, and emotionless."⁵⁷ According to the court, "each Board member's first-hand opportunity at the hearing to observe and listen to his testimony" was a factor "that no reviewing court (without being there) can perceive simply by reading a transcript."⁵⁸ Apparently, the Board's perception of Mr. Acoli's "demeanor and mannerisms,"⁵⁹ rather than the substance of his statements regarding his deep regret and remorse for what transpired showed that he lacked insight into the crime that was committed. Indeed, as it did in Mr. Acoli's previous denials of

⁵⁵ *Acoli III*, 462 N.J. Super. at 76 (Rothstadt, J.A.D. dissenting) (quoting *Acoli II*).

⁵⁶ *Trantino*, 166 N.J. at 190.

⁵⁷ *Acoli III*, 462 N.J. Super. at 65.

⁵⁸ *Id.*

⁵⁹ *Id.*

parole, “[the Board] disregarded his statements and explanations, including his assertion that he no longer espoused violence, while selectively picking over his statements and improperly discounting his admission of guilt and expression of remorse.”⁶⁰

1. Lack of insight

In relying on the non-statutory factor that Mr. Acoli lacked insight into his crime, the Board “discount[ed] Acoli’s repeated expressions of remorse for his involvement in the conduct that led to the Trooper’s death.”⁶¹ Further, the Board did so despite previous evaluations by a psychological professional that Mr. Acoli “expressed regret and remorse about his involvement in the death of the state trooper and appeared to be answering honestly.”⁶² Although the lower court emphasized in its opinion that a more recent negative evaluation indicated otherwise, it failed to explain how and nothing in the Board’s more recent decision to deny Mr. Acoli parole explains its decision to discount past positive evaluations that favor Mr. Acoli’s release.

This Court has previously cautioned that “the Parole Board cannot insist that [an] appellant’s insight into her criminal behavior is impaired by reason of the fact that [he] will not admit

⁶⁰ *Acoli v. New Jersey State Parole Bd.*, 2014 WL 4798735, at *5 (N.J. Super. Ct. App. Div. Sept. 29, 2014) (2016) (“*Acoli I*”).

⁶¹ *Acoli III*, 462 N.J. Super. at 74 (Rothstadt, J.A.D. dissenting).

⁶² *Acoli II*, 224 N.J. at 238 (Albin, J. dissenting) (internal quotations omitted).

that [he] was the actual shooter.”⁶³ That is because the “dispositive issue governing the parole decision is whether the rehabilitative aspect of the sentence has been satisfied, and the basic test thereof is whether there is a substantial likelihood that the defendant will commit another crime if released on parole.”⁶⁴ Apparently, the Parole Board’s difficulty believing Mr. Acoli’s consistent version of the events was sufficient to demonstrate that he lacked insight into his behavior and is therefore substantially likely to commit another crime if released on parole.

While this Court has not extensively scrutinized the way in which the non-statutory factor of lack of insight affects the decision to grant parole, courts in other states have. In California, after a dramatic increase of the use of lack of insight as reason to deny parole to incarcerated individuals,⁶⁵ Justice Liu of the California Supreme Court cautioned that the connection between a lack of insight and the denial of parole must be rationally articulated “lest ‘lack of insight’ become, impermissibly, a new talisman with the potential to render almost

⁶³ *Kosmin v. New Jersey State Parole Bd.*, 363 N.J. Super. 28, 42 (App. Div. 2003).

⁶⁴ *Id.* at 40-41.

⁶⁵ Keith Wattley, *Insight into California’s Life Sentences*, 25 FED. SENT. R. 271, 273 (2013).

all life inmates unsuitable for parole."⁶⁶ This particular factor's danger lies precisely in its "broad and flexible definition...and its potentially tenuous relationship to recidivism."⁶⁷ So too is the case in New Jersey.

Where, as here, "[t]he Board appeared to rely most heavily on its evaluation that Acoli lacked insight into his criminal behavior,"⁶⁸ such reliance should require more explanation than that provided by the Board to ensure that it is not acting in an arbitrary and capricious manner. The Board's perception that Mr. Acoli's responses were "superficial in nature and appeared rehearsed in their structure" along with other general observations regarding his demeanor⁶⁹ do not provide a reasonable basis for the Board to determine that he lacks insight—especially considering the potential for bias relating to perceptions of demeanor discussed below.

2. Remorse

In addition, the Parole Board's repeated conclusions that Mr. Acoli lacks remorse and empathy and its disregard of his statements indicating otherwise are very much a cause for concern that this

⁶⁶ *In re Shaputis*, 265 P.3d 253, 278 (Cal. 2011) (Liu, J. concurring).

⁶⁷ Lilliana Paratore, "Insight" into Life Crimes: The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice, 21 BERKELEY J. CRIM. L. 95, 110 (2016).

⁶⁸ *Acoli III*, 462 N.J. Super. at 54.

⁶⁹ *Id.* at 53.

Court should consider. As scholars have noted, decisions based on remorse in the legal context “tend to exist in a realm unconstrained by legal rules and unilluminated by psychological knowledge.”⁷⁰ This is especially so under circumstances—like those here—where parole board members have near unlimited discretion and are likely to “be influenced by extra-legal, ineffable factors like [their] subjective impression of the defendant’s remorse and general character.”⁷¹ Although such considerations may be appropriate in some contexts, “[t]he entire notion that remorse can be evaluated via demeanor and body language has—at present at least—no empirical support.”⁷²

Further, studies show that in the context of judging remorse, references to the decisionmaker’s “‘gut instinct,’ ‘intuition,’ and ‘general feel for people,’ or their ability to feel or sense remorse, appear with some frequency.”⁷³ However, the “gut” reaction of members of the Parole Board is not an appropriate substitute for consideration of all the evidence pertinent to whether a prospective parolee is likely to commit another crime.”⁷⁴

⁷⁰ Susan A.

Bandes, *Remorse and Judging*, in REMORSE IN CRIMINAL JUSTICE: MULTI-DISCIPLINARY PERSPECTIVES 2 (Steven Tudor et al. eds. 2021).

⁷¹ M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 309 (2018).

⁷² Bandes, *supra* note 69, at 22.

⁷³ *Id.* at 14.

⁷⁴ *New Jersey State Parole Bd. v. Cestari*, 224 N.J. Super. 534, 551 (App. Div. 1988).

In this case, the Board's discount of Mr. Acoli's remorse is founded in nothing more than their feeling that he is not acting in a sincere and honest manner.

Even more concerning, "assessing remorse is a subjective process that provides fertile ground for cognitive bias."⁷⁵ This is because, in assessing remorse, parole boards "must accurately read the defendant's countenance, demeanor, tone of voice, and style of speech and do so free from cultural assumptions."⁷⁶ Among these potential biases "[r]ace is one of the most salient characteristics to examine for implicit bias and selective empathy, and evidence suggests that evaluation of remorse is not safe from racially influenced judgments."⁷⁷

This has led theorists to argue that "the primacy of demeanor has serious implications for African Americans in the courtroom."⁷⁸ One scholar has argued that the emphasis on demeanor acts as mechanism for reinforcing penalties for nonwhite racial performance in the courtroom.⁷⁹ So too is the case in the context of parole. When making a parole decision, parole boards "views a person with a race, a gender, a cultural background, a

⁷⁵ Hanan, *supra* note 70, at 308.

⁷⁶ *Id.*

⁷⁷ Bronnimann, *supra* note 25, at 348.

⁷⁸ Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 169 (2020).

⁷⁹ See, Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 476-77 (2016).

socioeconomic class, and a mental status, all factors that..may affect the commissioner's perception of remorse."⁸⁰

Legal decision-makers are more prone to use their own feelings as a template to imagine how similar-looking offenders must feel.⁸¹ On the contrary, for those who are dissimilar to them, they are more likely to resort to stereotypes to infer internal states.⁸² For example, in one experiment where the race of the defendant was manipulated, participants were less willing to allow identical evidence to weigh as a mitigating factor when it was introduced for Black defendants than when it was introduced for white defendants.⁸³ The white offenders were therefore more likely to be considered remorseful.⁸⁴ This effect may be exacerbated when a perceiver not only has implicit bias against the offender but a heightened ability to empathize with the victim.⁸⁵ This is especially relevant in a society that already makes prejudicial associations between "blackness" and "criminality."⁸⁶

Decades of research have revealed racial disparities at every level of the criminal justice system: searches, arrests, pretrial detention, charges, sentences, probation, and parole.⁸⁷ And such

⁸⁰ Bronnimann, *supra* note 25, at 347.

⁸¹ *Id.* at 348.

⁸² *Id.*

⁸³ *Id.* at 348-49.

⁸⁴ *Id.* at 348.

⁸⁵ Rhode, *supra* note 24, at 380.

⁸⁶ *Id.*

⁸⁷ *Id.* at 388.

a reality has not escaped New Jersey. Despite its overall decrease in prison population and efforts to implement criminal legal reform over the past decades, a 2016 report by the Sentencing Project found that Black people in New Jersey are imprisoned at a rate 12 times higher than white people and over half of its prison population is Black.⁸⁸ And, indeed, one examination of the New Jersey parole system described “the stereotypical recipient of a parole grant ‘white and contrite.’”⁸⁹

The New Jersey Criminal Sentencing & Disposition Commission noted in a 2019 report that “history and the evidence of racial disparity in New Jersey’s incarceration of minorities requires a serious, sustained examination that spans a range of issues from policing and prosecution to prison and parole.”⁹⁰ And, this Court itself has noted, “[w]herever it exists in the criminal justice system, we must identify and root out bias in all forms.”⁹¹ While these disparities are undoubtedly due to a range of factors, parole

⁸⁸ Ashley Nellis, Sent’g Project, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS* 3, 8 (2016), available at <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

⁸⁹ Medwed, *supra* note 3.

⁹⁰ New Jersey Criminal Sentencing & Disposition Commission, *ANNUAL REPORT* (Nov. 2019), available at [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).

⁹¹ Statement of the New Jersey Supreme Court (June 5, 2020), available at <https://www.njcourts.gov/pressrel/2020/pr060520a.pdf>.

decisions—with almost unlimited discretion inherent in them—are one area that has gone under scrutinized and overlooked as a potential area ripe for such disparities to flourish. This is doubly so when determinations like lack of insight and remorse rely almost entirely on a parole board's imprecise examination of the way in which an individual comports himself.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's brief, the Appellate Division's opinion should be reversed, and conditions for Mr. Acoli's release should be set immediately.

Respectfully submitted,



RICHARD, LOMURRO, ESQ.

Dated : 8/23/2021