

SUPREME COURT OF NEW JERSEY

Docket No. 083980

SUNDIATA ACOLI,
Plaintiff-Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,
Defendant- Appellee.

PLAINTIFF'S BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

This appeal as of right seeks parole for Sundiata Acoli, now 83 years old and one of the longest serving inmates in the United States. He has been incarcerated 47 years for the 1973 killing of Trooper Werner Foerster at a traffic stop on the New Jersey Turnpike.

At trial, the State said the shooting was an intentional act in connection with Acoli's membership in the Black Liberation Army (BLA). For his part, Acoli has always said he has no memory of firing his weapon and believes Trooper Foerster was killed by a weapon fired by a third person at the scene, a point also made by the prosecutor who told the Parole Board that Trooper Foerster may have been killed by his own weapon fired by a passenger in Acoli's car. Although he has denied direct responsibility for Trooper Foerster's death, Acoli has always acknowledged his association with the radical movement and admits that on the day of the shooting he was driving to the South on a recruiting mission for the Black Liberation Army.

Acoli has been a model inmate for decades with his last offense in or about 1979 (an escape attempt that involved no violence on his part). He has had perfect institutional compliance for 25 years, since 1996, without a single violation or infraction of any kind.

Acoli has been honored by the Federal Bureau of Prisons as an inmate Peer Leader, placement in the Honor Unit and has received dozens of citations for academic excellence. Among other aspects of his model behavior, he was selected by the Federal Bureau as an inmate representative on the council that establishes programs and

activities for the inmate population. He is today so trusted that he teaches the federal course on avoiding recidivism to the younger inmates.

It was because of this admirable record, and his personal change and evolution, that State psychologist Lois Goorwitz, Ph.D, recommended parole for Acoli more than ten years ago and the federal Psychology Services staff concluded he will make a successful transition to the community. Nevertheless, the Board has denied parole at least six times (including four times since Dr. Goorwitz's favorable recommendation).

This appeal comes to the Court through a long legal passage. In 2014, the Appellate Division unanimously reversed the Board's 2011 denial of parole on the ground that due to Acoli's exceptional record (and other factors) the Board could not prove he is "substantially likely" to commit future crime, the only legal basis for denial of parole as to this inmate.

In 2016, this Court remanded on the jurisdictional ground that the full Board had not conducted a testimonial hearing prior to judicial review. Following the remand hearing, the Board *again* denied parole for reasons virtually identical to its 2011 denial.

In 2019, the Appellate Division, in a 2-1 decision, reversed its 2014 holding and affirmed the denial of parole, though the record was unchanged in every material aspect.

This appeal as of right is based on the opinion of the Hon. Garry S. Rothstadt, J.A.D., who dissented from the 2019 affirmance on the ground that there was no evidence to support continued denial of

parole. Judge Rothstadt was the only judge on the new panel who also sat on the 2014 panel that had unanimously ordered Acoli be paroled.

Today, there continues to be no legal basis to deny parole to this now-elderly man, who worked hard and exceptionally to become a model inmate, now in advanced old age, with onset of dementia, frail and infirm with cardiac disease and hospitalized recently with a serious case of COVID-19. Sundiata Acoli is at an age past any reasonable fear of crime, as his long peaceable and law abiding record in prison demonstrates.

Based on this record, it is respectfully requested that parole be ordered on the reasoning of Judge Rothstadt's dissent and, in view of Mr. Acoli's age and declining health, that there be no further administrative review.

STANDARD OF REVIEW

Under the 1979 Parole Act, a presumption of release arises on an inmate's parole eligibility date that "shifts the burden to the State to prove that the inmate is a recidivist and should not be released." Trantino v. N.J. State Parole Bd. [Trantino VI], 166 N.J. 113, 197 (2001), quoting New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983).

This Court has held that an inmate "shall be released on parole at the time of parole eligibility unless [it is shown from the record] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime...if released on parole at such time." Trantino VI, 166 N.J. at 126 [emphasis added], citing

In re Application of Trantino [Trantino II], 89 N.J. 347, 366 (1982).¹

To sustain a denial of parole the reviewing court must find that the Board has proven the inmate is substantially likely to be a recidivist; if the record does not establish such inference, parole must be granted.

CONCISE PROCEDURAL HISTORY²

The parole denial that forms the basis of this appeal comprises a legal odyssey that goes back more than ten years to March 4, 2010.

At that time a two-member Panel of the New Jersey State Parole Board (the "Board") denied parole to Sundiata Acoli, after he had been incarcerated for thirty-seven (37) years. 107a. It was his fourth parole denial since 1996; he has since been denied parole *twice* more while this appeal was pending.

On February 23, 2011, the full Board affirmed denial on a review of the paper record. 170a.

On September 29, 2014, the Appellate Division unanimously reversed and ordered the Board to implement parole promptly on the ground that there was no evidence to support any inference, let alone a "*substantial* likelihood", that the then 77-year old inmate (now 83)

¹ This brief follows the chronology in Trantino v. New Jersey State Parole Board, 166 N.J. 113 (2001), where the Court referred to the Trantino decisions as I-V. Hence, the final holding in Trantino, 166 N.J. 113, is referred to Trantino VI.

² The following comprise the transcripts:

Transcript of Hearing, March 4, 2010 – 1T.

Transcript of Hearing, June 8, 2016 - 2T.

would commit future criminal acts. Acoli v. N.J. State Parole Bd. (Acoli I), 2014 N.J. Super. Unpub. LEXIS 2340 (App. Div. 2014).

The State sought certification on the ground that the Appellate Division should not have asserted jurisdiction because N.J.S.A., § 30:4-123.55f, the statute governing parole in cases of murder, required a live testimonial hearing in front of the full Board to enable victims to testify before an appeal could be made to the courts. Notably, the State did not make such claim until *after* it had lost unanimously on the merits in Acoli I.

On this jurisdictional basis, this Court granted certification.

In a 4-1 decision, with Justice Albin dissenting and two justices not participating, including the Chief Justice, the Court held that the legislative intent behind §30:4-123.55f required the full Board to conduct a testimonial hearing prior to the Appellate Division asserting jurisdiction. Acoli v. New Jersey State Parole Bd. (Acoli II), 224 N.J. 213, 232 (2016).

In its remand order this Court stated it was not addressing the Appellate Divisions's findings on the merits, holding only that the appellate court had "missed a step". 224 N.J. at 232.

At the remand, no victims testified and the full Board *again* denied parole on grounds virtually indistinguishable from those the Appellate Division reversed in 2014. (287a,297a-306a,324a).

Mr. Acoli again filed a timely notice of appeal to the Appellate Division. (336a)

On December 27, 2019, with two new members on the panel, the Appellate Division reversed itself by a 2-1 vote and affirmed the

Board's denial of parole, with Judge Rothstadt dissenting. Acoli v. New Jersey State Parole Bd. (Acoli III), 462 N.J. Super. 39 (App. Div. 2019).

Judge Rothstadt was the only judge remaining from the 2014 panel in Acoli I that had unanimously ordered parole.

This appeal as of right followed.

SUMMARY OF THE PAROLE BOARD'S DECISION DENYING PAROLE AND THE DECISION BELOW

No victims testified at the remand hearing. Instead, the Board summoned only Mr. Acoli. He was then 81-years old with memory issues, confusion and mental status changes, as documented by the Board's own psychologist, Julia Van Pelt, Ph.D. Ca81.

Acoli was subjected to six and a half hours of close cross-examination over a single day, from 9:50 AM to 4:35 PM, 2T281:10-15, sitting alone before the Board, fielding hundreds of questions, nearly all of which concerned the then 43-year old offense from 1973 and Acoli's life 55-65 years earlier (and even his adolescence, 70 years earlier).

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. 2T131:4-7 (three lines); 2T134-140 (five pages); 2T138-139 (one and one-half pages); 2T167:8-170-:13 (three pages).

At a point midway through the hearing, Acoli told the Board he believed he may have Alzheimer's and was worried about his memory, 2T137:9-13, but the Board persisted for hours more in close questioning

of half-century old events (even though the Board had before it the report of its new psychologist Dr. Van Pelt, who confirmed Acoli's mental status and memory changes since his last examination in 2010. Ca81.

The remand hearing was conducted in a manner distinctly unfavorable to the inmate who was without a microphone, 2T41:8-42:2; 2T71:9-11, though the Board acknowledged at the outset that he was quiet and soft-spoken. 2T5:12-14. It was held in a location where Acoli was seated far from the Board who repeatedly could not hear him, 2T5:5-14, to the point where his table had to be moved closer though he was still without a microphone. 2T25:26-9. Noise is heard on the record from other sources, including "a sewing machine" that the chair admitted "was interfering" with the proceeding. 2T70:22-71:8.

The transcript is pervaded by complaints too numerous to cite from Board members and Mr. Acoli that they frequently could not hear each other; in fact, he was without a microphone for at least the first 71 pages of the hearing, 2T71:9-11; and it is not clear from the record when, or if, a microphone was ever provided to him. His age-related hearing deficits were exacerbated by this manner of proceeding.

Repeating the pattern of the Adult Panel in 2010, the remand hearing focused exclusively, almost obsessively, on Mr. Acoli's recollection of the original crime - 43 years earlier (now 47 years ago) - and his reasons for joining the black revolutionary movement in the late 1960's, nearly 60 years ago, and his earlier life 65-75

years ago.³ What should have been the primary focus of a parole inquiry – the inmate’s life in prison since the offense and the person he has since become – was ignored almost completely by the Board.

This was directly contrary to the Appellate Division’s 2014 admonition that the Board acted arbitrarily when it “completely disregarded [Acoli’s] lengthy institutional success” while incarcerated over these many decades. Acoli I, 2014 N.J. Super. Unpub. LEXIS 2340 at 28 [emphasis added]. The Board’s approach also contradicts this Court’s teaching in the Trantino decisions that in parole considerations the Board’s task lies in “considering the extent of [the inmate’s] rehabilitation and his fitness for parole.” Trantino VI, 166 N.J. at 127.

Rather than doing so, the Board treated the remand as an opportunity to attempt to improve its case for denying parole, replacing psychologist Lois Goorwitz, Ph.D., who had made a favorable recommendation for parole in 2010, on which the Appellate Division relied in its 2014 decision, with a new psychologist, Julia Van Pelt, Ph.D. No explanation has been offered as to why Dr. Goorwitz was replaced.

In his dissent, Judge Rothstadt noted that the Board failed to explain *why* it chose to ignore Dr. Goorwitz’s favorable report “but instead considered a new, less favorable report from a different professional”. Sa54,n.5.⁴ Dr. Goorwitz still works for the State and

³ A detailed summary of the remand hearing was included at Appellant’s Merits Brief below; Pb73-87.

⁴ “Sa” refers to Appellant’s Supplemental Appendix.

no reason was advanced by the Board to justify replacing her with a new psychologist; this Court's remand order did not authorize dispensing with the existing record.

As it did in 2011, the Board "completely disregarded", Dr. Goorwitz's report, Ca17-23, and the report of the Federal Bureau of Prisons Psychology Services that also supported parole. 27a. Instead, the Board chose to make use of some mildly negative comments from Dr. Van Pelt's report. Ca93.

The Board's denial of parole following the remand order was on grounds virtually indistinguishable from those the Appellate Division had reversed unanimously in 2014. The only "difference" identified by the Board is Mr. Acoli's statement during the remand hearing that he thought that when he "struggled" with Trooper Foerster the officer may have been killed by accidental "friendly fire". 301a-302a. The Board contended that this statement differed from Mr. Acoli's earlier statements that he was unconscious after "a bullet grazed his head". 298a-301a; Sa2-3.

Aside from this single comment as to possible "friendly fire", the record remained entirely unchanged, as conceded by the Attorney General at oral argument when he said "Nothing else had changed about Acoli." Sa54,n.4. As Judge Rothstadt observed, the Attorney General agreed that the Parole Board

"relied primarily upon Acoli's refusal to admit he pulled the trigger on the gun that killed Trooper Foerster, and that nothing else had changed about Acoli since we last reviewed the Parole Board's 2010 denial."

Sa54, n4 [emphasis added].

The majority did not dispute or take issue with Judge Rothstadt's characterization of the Attorney General's concession that other than the "friendly fire" comment, "Nothing else had changed about Acoli..." Id.

The majority suggested that "the new psychologist report [Van Pelt's report]...added different critical insight for the Board's consideration", Sa39, but nowhere did the Board (or the majority) identify *what* that "critical insight" was or *how* it altered the holding from 2014.

Aside from commenting that "the psychologist rendered her twelve-page, single-spaced report after interviewing Acoli on two days" and "reviewing...twenty-one documents...", Sa41, the majority identifies nothing in the "twelve-page" report at all, let alone anything that could have so drastically altered the record to now reverse Goorwitz's 2010 recommendation for parole.

Other elements of the Board decision consist of reference to Mr. Acoli's supposed "insufficient problem resolution", his lack of "spontaneous" answers, Sa21, or the claim that his "responses were insincere, rehearsed, shallow, and emotionless". Sa41. But such conclusory phrases provide no actual findings to support a denial of parole and their opaque nature prevents any meaningful judicial review.

The Board also did not explain how Acoli's "problem resolution" is a bar to parole when its own evaluator Goorwitz found "There are NO psychological contraindications to granting parole", Ca20 [upper case in original], that Acoli "has no obvious psychopathology", Ca21,

and recommended him for parole ten years ago, Ca23, as did the federal psychologists who said he was "ready to transition to the community if paroled." 27a.

The Board also did not explain how Acoli is "substantially likely" to be a recidivist when he has not had a single infraction of any kind in 25 years and for the past four years has been assigned by the Bureau of Prisons to teach the federal course on avoiding recidivism to the younger inmates. 334a. Nor does the Board address *how* Acoli's supposed lack of "spontaneity" or "insincere" answers would satisfy the Board's burden of proving a "substantial likelihood" Acoli will commit future crime.⁵

It is significant that the Board refused to acknowledge Dr. Goorwitz's findings that Acoli was "cooperative, self reflective, thoughtful and non defensive in his responses to the questions posted to him", Ca22, the very opposite of the Board's conclusions that Acoli was "insincere, rehearsed, shallow, and emotionless". D41. Dr. Goorwitz's interview of Acoli occurred in a private and non-confrontational setting where a more natural response would be expected from this elderly man as opposed to the full Board hearing where he sat alone (at 81 years of age) facing cross-examination from a dozen public officials for more than six hours. As Judge Rothstadt

⁵ Neither the Board nor the majority acknowledged that Acoli's documented mental status changes could account for the "inconsistent responses", Sa30, or that it was unduly burdensome to bombard an elderly man who has mental status changes with hundreds of questions about 50-65 year old events.

in dissent noted, no explanation has been offered by the Board for replacing Goorwitz with a new psychologist. Sa54,n.5.

The majority acknowledged the Appellate Division's 2014 holding that Acoli's failure to admit he pulled the trigger could not be a basis for denial of parole as it would have "the draconian effect of condemning him to prison for the rest of his life". Sa22-23. Having said this, however, the majority went on to affirm the Board's reasoning that parole should be denied because Acoli does not acknowledge he killed Trooper Foerster and has "minimized" his responsibility. The majority does not explain how the Appellate Division could reject this reasoning in its 2014 opinion and, contrarily, accept this same reasoning in 2019.

In any event, Acoli's recent speculation that Trooper Foerster may have been killed by a third person, i.e., "friendly fire", and "his continuing denial that he [Acoli] pulled the trigger", is consistent with a general version of the facts known and agreed by all parties, including the Prosecutor. The majority itself noted the Prosecutor's statement that Acoli may not have fired the weapon that killed Trooper Foerster:

In our prior opinion, we stated that "[t]here were no eyewitnesses to [Trooper] Foerster's shooting[,] and [that] the Middlesex County Prosecutor[,] in a letter to the Board opposing Acoli's parole before the hearing, pointed out that [Acoli's passenger] might have fired [Trooper] Forester's gun."

Sa35,n.5, citing Acoli I, slip op. at 8 n.9. Thus, the prosecutor accepts that a third person may have fired the weapon that killed the officer, just as Acoli has always said. Parole cannot fairly be

denied because Acoli, after nearly 50 years in prison continues to deny he fired the weapon that killed Trooper Foerster where the prosecutor also recognizes this may have been the act of a third person at the scene.

Judge Rothstadt also recognized that Acoli's speculation about "friendly fire" was just that, "an opinion about a possibility and not a statement of fact...". Sa58.⁶ Admittedly Acoli does not recognize or remember that his own weapon discharged injuring the officer, but he may simply not understand or remember the ballistics evidence at trial. As the dissent observed,

"He is now over eighty years old. He speaks slowly and forgets things. As we previously noted in 2014 his recollection overall was 'consistent but flawed'".

Sa58, citing and quoting, in part, Acoli I, slip op. at 24.

The dissent was referring to the Appellate Division's unanimous opinion in 2014 (not disturbed on the merits by this Court) that Acoli's "consistent but flawed" recollection of the events that led to Trooper Foerster's death is not a basis on which to find he is substantially likely to commit future crime. In this respect, Acoli I (and Judge Rothstadt's recent dissent) follow precisely this

⁶ Acoli is certainly wrong about "friendly fire" being the cause of Trooper Foerster's death, Sa46,n.1, but this appears to be a late speculation made, for the first time, at the final Board hearing. As Judge Rothstadt noted, Van Pelt's report two years earlier "did not state that Acoli said anything about 'friendly fire' when asked to speculate about who killed Foerster." Sa55, n.11. Thus, Acoli's comment about "friendly fire" appears to be a late speculation by an elderly and declining man and should not be a basis for parole denial.

Court's holding in Trantino VI that the inmate's failure to acknowledge direct responsibility cannot be a bar to parole:

This inmate's alleged lack of candor about events that occurred three or four decades ago simply has no bearing on his present likelihood of recidivism. We flatly reject the dissent's assertion that that evidence is material to or supportive of the Board's denial of parole.

166 N.J. at 193 [emphasis added].

As part of its grounds for denial of parole, the Board also claimed that "Acoli could not articulate how he changed his anti-social position", Sa35, and that "upon release, [Acoli] may be faced with similarly charged situations regarding social injustice and community activism." Sa35-36. Just what "similarly charged situations" a declining 83-year old with increasing memory problems will "be faced with" is left unsaid. Acoli has had no disciplinary problems of any kind in the past 25 years, despite living in an institution with violent offenders, yet the Board denies parole on speculation he may be unable to handle "charged situations" in the future. 298a. The majority effectively rubber-stamped this reasoning.⁷

The majority also relied, again without substantive analysis, on the Board's claim that Mr. Acoli could not remember the details of

⁷ Cf., In re Amendment to Recreation and Open Space Inventory of City of Plainfield, 353 N.J. Super. 310, 328 (App.Div. July 18, 2002)("our review of an agency decision is 'not simply a *pro forma* exercise in which we rubber stamp findings that are not reasonably supported by the evidence . . .'), quoting Chou v. Rutgers, 283 N.J. Super. 524, 539 (App.Div.1995), *certif. denied*, 145 N.J. 374 (1996).

a course on "Criminal Thinking" he had taken in prison in the 1990's. Sa36-37. The absurdity of such focus is self-evident. Even younger people in good cognitive health could not answer questions about the contents of a course taken three decades earlier, let alone an elderly man with acknowledged memory problems and mental status changes.⁸

Judge Rothstadt observed that the majority's opinion "inflicts a blow to the integrity of our justice system", Sa45, by "fulfilling Justice Albin's prediction...that the Supreme Court's remand to the Parole Board in Acoli II would amount to nothing more than a 'show hearing', and only result in the denial of parole again 'for no rational or just purpose'". Sa45, quoting Acoli v. New Jersey State Parole Board (Acoli II), 224 N.J. 213, 240 (2016). Such prediction has come fully to life. The Board's denial of parole on a "record that has remained virtually unchanged", Sa45, will condemn this inmate to life in prison in violation of the statute and due process, the very result Justice Albin feared when he dissented in 2016.⁹

⁸ Pointedly, the majority and the Board gave no weight at all to the Bureau of Prisons's decision to assign Acoli to teach the Critical Thinking course in avoiding criminal activity to the younger inmates. 334a. This trusted assignment would appear to be far more significant as to Acoli's rehabilitation than whether an elderly man can remember the contents of a prison course from 30 years earlier.

⁹ Both Judge Rothstadt and Justice Albin summarized in some detail this inmate's record of institutional accomplishment and achievement, an analysis the Appellate Division majority and the Board did not undertake. Rothstadt, J (dissenting) at Sa54, n.5, citing Albin, J (dissenting), Acoli II, 224 N.J. at 238-39.

As the dissenting judge noted, the "reality" is that Acoli is being denied parole without any evidence to demonstrate a substantial likelihood he will commit any future crime, a decision that is in direct violation of the public policy underlying the Parole Act:

"The majority's comprehensive explanation of the Parole Board's actions does not alter the reality that Acoli, who is one of the longest-serving inmates in New Jersey, if not the longest, and who has been a model prisoner for decades, is being denied parole without any evidence that he is substantially likely to commit a crime if released. Both Acoli and other prisoners who will look to the Parole Board's action there and see no reason to hope that they will be paroled when eligible, are being wrongfully denied the predictability and justice the the Parole Act of 1979 was intended to secure – not only for their benefit but for the benefit of the public as well."

Rothstadt, J. (dissenting opinion)[emphasis added]. Sa60.

Judge Rothstadt also observed that the "deference" to be paid to an administrative agency does not extend to affirming a decision that "thwart[s] the law in unpopular cases". Sa57, quoting Acoli II, 224 N.J. at 240 (Albin, J, dissenting)(citing Trantino VI, 166 N.J. at 197). An inmate who killed a police officer is, without question, among the most "unpopular cases" and is certainly "disfavored", Sa57, citing Trantino VI at 198, but even the "most despised inmate is entitled to the protection and enforcement of the law", meaning New Jersey's law governing the right to parole. Sa45-46. Judge Rothstadt's dissent, follows this Court's longstanding holding that "public outrage...has no place in a parole proceeding and is to be given no weight in a parole decision." Trantino II, 89 N.J. at 376, quoted in Trantino VI at 127.

A troubling element of the Board's denial of parole, as Judge Rothstadt also observed, Sa57,n.7, is that at least one Board member appears to have passed his decision based on the view that this Court's holding in Trantino VI was misguided and need not be followed. Id. On the record, the member accused Acoli of "having taken a page out of the Trantino handbook, you know, which is basically, you know, how to kill – how to kill a police officer, and then get paroled for it later on in life by – by saying I don't remember." Sa57, n7. Such reasoning is a direct repudiation of this Court's holding in Trantino.¹⁰

The dissent noted that the majority shifts the burden of parole onto the inmate, contrary to the purpose of the 1979 Parole Act. Sa48-51. Among the purposes of placing the burden on the State, Judge Rothstadt observed, was to encourage the very type of productive behavior that "model prisoners, like Acoli" have shown. Sa50.

Inmate Acoli is a classic example of the salutary benefits of parole, as Judge Rothstadt put it, namely that it "encourages prisoners to adhere to prison rules and maintain good behavior in prison." Sa50. Acoli's 25 years of perfect institutional compliance and his strong record of achievement in prison reflect on the purpose and objective of New Jersey's parole policy.

The dissent writes that the Board's denial of parole was an "abuse of the Parole Board's discretion" because it is based upon reasoning

¹⁰ The transcript shows that none of the other Board members took issue with this complete disregard of this Court's holding in Trantino. 2T159:11-15.

that cannot establish a substantial likelihood of committing future crime, namely an octogenarian's hesitant manner of speech and his refusal to concede he was the shooter:

The Parole Board based its decision on on his slow manner of speaking, the lack of depth to his answers, and significantly, as the majority recognized, the Parole Board's primary concern that Acoli still refused to admit that he shot Foerster. The Parole Board relied on that refusal to discount Acoli's repeated expressions of remorse for his involvement in the conduct the led to the Trooper's death and his exemplary record as a model prisoner for at least the past twenty years." Sa56.

As Judge Rothstadt observed, this is the sum total of the Board's basis for denying parole, a decision that hinges almost entirely on Mr. Acoli's refusal to acknowledge he shot Trooper Foerster and his age-related manner of communication. No other grounds are offered for denial of parole to this inmate.

Judge Rothstadt's dissent helps us to understand that the Board's methodology is a tool that would allow any "unpopular" or "disfavored" inmate to be denied parole. Sa45-46.

This appeal respectfully submits that the majority below is in error and that Judge Rothstadt's dissent represents the appropriate decisional approach.

The Court is respectfully asked to order parole on the same substantive grounds as the unanimous 2014 Appellate Division decision, with no further administrative proceedings in view of the advancing age and ill health of this inmate.

ARGUMENT

I. THE BOARD'S DECISION SHOULD BE REVERSED BECAUSE THE RECORD DOES NOT SHOW BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE THAT APPELLANT HAS A "SUBSTANTIAL LIKELIHOOD" OF COMMITTING FUTURE CRIME IF RELEASED ON PAROLE

As this Court recognized nearly 40 years ago, "The parole decision must be confined solely to whether there is a *substantial* likelihood for a repetition of criminal behavior." In re Application of Trantino (Trantino II), 89 N.J. at 369 (1982)[emphasis added]. Trantino II recognized that the "substantial likelihood" test "is now the sole standard for making parole determinations. Id. at 372, citing N.J.S.A., § 30:4-123.53(a)[emphasis added].¹¹

As Trantino VI held, the 1979 act shifts the burden to the State creating a presumption of release that must be followed "unless" the State can "prove" the prisoner is a recidivist:

The Parole Act of 1979 eliminated the conventional parole discretion to release a prisoner once the punitive aspect of a sentence has been served. That statute provided only that a prisoner "shall be released on parole at the time of parole eligibility, unless...there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." N.J.S.A. § 30:4-123.53(a). "The legislation shifts the burden to the State to *prove* that the prisoner is a recidivist and should not be released."

Trantino VI, 166 N.J. at 198 [emphasis added], quoting New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983).

As case law clearly shows, it falls to the Parole Board to prove the inmate *will* be a recidivist, not merely speculate as to the

¹¹ Accord Kosmin v. New Jersey State Parole Bd., 363 N.J. Super. at 41("The dispositive issue governing the parole decision is whether the rehabilitative aspect of the sentence has been satisfied,...")

"possibility" he "may" commit a crime, 298a,299a, by comments such as: he is still "capable of pulling a trigger", 1T45; as an elder he can "lead the younger ones to do...the violent work...", 1T44; he may contact his co-defendant Joanne Chesimaud, (173a); under the guise of "self-defense" he may commit a crime based on some "thought" or "Philosophy", as speculated by Board Member Garcia, 2T188:24-189:1; that "upon release you may be faced with similarly charged situations...", 298a; that future crimes may be committed because "your client is in good health and is involved in many activities", 174a-175a; and similar comments throughout the record that in no way demonstrate a "substantial likelihood" that an 83-year old, ill and frail man "will commit" future crime after 25 years of prison life without a single infraction and the onset of dementia.

Speculation is not a lawful basis on which to deny parole. New Jersey State Parole Bd. v. Cestari, 224 N.J. Super. 534, 550 (App. Div. 1988)(reversing denial of parole based on speculation that inmate has "potential" to commit future crime). Speculation in place of proof would allow the Board to bar parole to *any* person convicted of a violent crime, interposing an automatic barrier to parole, the very type of "discretion" it was the purpose of the 1979 act to eliminate. Trantino VI, 166 N.J. at 198 (the 1979 Act "eliminated the [Board's] conventional parole discretion..."). As Judge Rothstadt concluded in his dissent, this record is devoid of any actual evidence to support a denial of parole:

"[Acoli] is being denied parole without any evidence that he is substantially likely to commit a crime if released." Sa59.

Trantino VI recognizes that a New Jersey defendant has a "federally-protected liberty interest" in parole requiring that the Board meet its burden of *proving* a "substantial likelihood" of recidivism:

[T]he Legislature recognized that under the Parole Act of 1979 a parole eligibility date creates a legitimate expectation of release...absent findings that justification for deferral exists. Based upon this interpretation of our statute, we find that a federally-protected liberty interest exists." Id. at 207, 460 A.2d 103.

New Jersey Parole Bd. v. Byrne, 93 N.J. at 207, quoted in Trantino VI at 197 [emphasis added].

Parole in New Jersey is, therefore, a protected liberty interest that, as the dissent also noted, Sa49, brings with it an "expectation of release", an interest that exists at the highest constitutional level, certainly not one to be disposed of by arbitrary action and only where the record substantially supports such denial. A "makeweight" for real evidence is not sufficient to deprive a would-be parolee of his liberty. Trantino VI at 121.¹²

In Trantino, this Court held that the inmate, who had killed two police officers and, unlike Acoli, had a prior history of abusive and aggravated violence, still

"had a constitutionally protected right to parole unless the State could prove that there was a "substantial likelihood"

¹² Accord, Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107, 120-21 (App. Div. 1986) ("New Jersey prisoners have a protected liberty interest, rooted in the language of our parole statute, in parole release, and a resulting constitutional right to due process of law [in the parole process].

that he would commit another crime. It is the absence of that proof that entitles Trantino to parole, not sympathy or compassion for him. No matter how much we may abhor the admitted killing of those two officers, the law must apply.

Trantino VI at 197 [emphasis added]. Parole is thus a "right" and the "absence of proof" of recidivism "entitles [an inmate] to parole". Id.

Such burden cannot fairly be met by speculation that an inmate has the "potential" or "may" commit a future crime, as the Board has done with respect to inmate Acoli. Speculation is the "absence of proof". See e.g. Pelose v. Green, 222 N.J. Super. 545, 550-51 (App. Div.), *certif. denied*, 111 N.J. 610 (1988) ("Mere guess or conjecture is not a substitute for legal proof," and "speculation surrounded by expertise [is], nonetheless, speculation.").¹³

Recognizing the liberty interests at stake, the Parole Act imposes a heightened burden of proof that "parole be denied only if a 'preponderance of the evidence' demonstrated that Trantino was substantially likely to commit another crime if released." Trantino VI at 192 [emphasis added]. A parole board's "concerns" that an inmate "may" commit future crime, 299a, or that "upon release you may be faced with similarly charged situations...", 298a, and

¹³ See also Clifton v. Weber, 84 N.J. Super. 333, 339 (App. Div. 1964) ("We cannot substitute speculation for proof..."); Havens v. Brown, 99 N.J. Eq. 75, 132 A. 755 (1926) ("What the arrangement was rests in speculation, not proof."); see also Jabbar Singh v. S. Brunswick Plaza, Ltd. P'ship, No. A-4633-06T2, 2008 N.J. Super. Unpub. LEXIS 2586, *16-17 (App. Div. Jan. 17, 2008) ("Speculation without proofs does not create an ambiguity and does not create a genuine issue of material fact.")

similar comments by the Board as to Acoli, offer speculation in place of proof.

Trantino II recognized the purpose of the 1979 Act was to eliminate such speculation and to limit the Board's scope to deny parole, i.e., to impose "a much narrower standard for determining an inmate's fitness for parole..."; in doing so, the Act "effected a radical change in the parole system in New Jersey." 89 N.J. at 355. It was on this basis that the Appellate Division in N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 550 (App. Div. 1988), concluded that the purpose of the 1979 Act was "to reduce the discretionary authority of the Board." Cestari at 548, n.6 [emphasis added]. This Court cited Cestari with approval in Trantino VI, 166 N.J. at 172-173.

Not only does the majority fail to acknowledge it is effectively overruling Cestari (and disregarding Trantino), but it predicates its holding upon a "narrow" conception of judicial review in parole matters, Sa15, despite this Court's conclusion in Trantino II that the purpose of the 1979 Act was to "narrow" not the court's powers *but the Board's discretion*.

Parole determinations are unlike other agency decisions, impacting the highest order of liberty interest. N.J. State Parole Bd. v. Byrne, 93 N.J. at 208, quoting Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) ("[I]t is undeniable that '[l]iberty from bodily restraint always has been

recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'")

Ordinary administrative discretion is narrowed under the 1979 Act precisely because of the liberty interest at stake, a point that underscores this Court's holdings in Byrne and Trantino (and the Appellate Division in Cestari). A denial of parole invokes continued imprisonment and loss of most of the individual's rights as a citizen, due process concerns of a far higher order than ordinary agency decision-making.

An inmate's liberty interests demand and require the reviewing court make a searching review of the Parole Board's analysis to determine if the Board has been "obvious [in] overlooking or undervaluation of crucial evidence". Trantino VI at 192. It was this very factor that led the Appellate Division in 2014 (and Judge Rothstadt in dissent below) to find that the Board "completely disregarded" and ignored all of the evidence that established Acoli's entitlement to parole:

[T]he Board...did not describe why it completely disregarded his lengthy institutional success, his feasible parole plan and positive support system, the positive reports from the federal psychology services staff, and the numerous positive aspects of Dr. Goorwitz's report, which is uncontradicted in the record.

Acoli v. N.J. State Parole Bd. (Acoli I), 2014 N.J. Super. Unpub. LEXIS 2340 at 28.

Acoli's denial of parole was based on "the [Parole] Board's selective and arbitrary reliance on only those portions of the record that could possibly support [denial of parole]" and Acoli's

"refusal to admit that he shot Foerster." Sa52-53. As Judge Rothstadt further noted, "the Board ignored 'substantial evidence in the record, spanning many years of infraction-free incarceration and [a] favorable psychological evaluation [], that demonstrated [Acoli's] likelihood of success on parole.'" Sa53, citing and quoting Trantino VI at 189.

Where the Board relies "on evidence arbitrarily selected to support a desired result," Kosmin, supra, the result should be overturned. This is seen, for example, where the Board ignores the inmate's statements that explain his feelings or emotions, Trantino, 166 N.J. at 176, as the Board did in disregarding Acoli's actual testimony and Dr. Goorwitz's report of his personal comments showing his remorse, his abandonment of political violence and his rejection of terrorism, as he also testified in both the 2010 panel and 2016 full Board hearings.

Like the inmate in Trantino, Mr. Acoli gave multiple impactful statements of his insight into the effects of his crime.

Even the latest Board psychologist, Dr. Van Pelt, quoted his understanding of the effect of the crime on the families:

"On the subject of empathy, the inmate endorsed Victim Impact as one of the most helpful interventions he has participated in at prison. He indicated 'It helped me understand the effect of crime on people. They do not need your apology. What they really want is for those who hurt them to know exactly how much it hurts.'" Ca78.

Acoli testified as to the much greater harm his actions have had on Trooper Foerster's family compared to his own children, 2T239:1-240:13, who, he said, at least still have their father, a

demonstration of the very "empathy" towards the victims of the crime that the Board claims is lacking. As the record shows, id., these were spontaneous answer, not the product of leading questions.

Acoli also spoke movingly as to how he hurt his own daughter through his lifetime of incarceration. 2T239:1-15.

An inmate's testimony that demonstrates an understanding of the dual impact of his offense on both families is not only empathic but reflects a deep insight into the effect of criminality. As the dissent noted, however, the Board chose to ignore the "[inmate's] insight into [his] criminal behavior", Sa56, because of his refusal to admit "[he] was the actual shooter." Id. This was, the dissent says, "an abuse of the Parole Board's discretion", id., and contrary to this Court's holding in Trantino VI that the inmate's refusal to accept responsibility cannot be a barrier to parole. 166 N.J. at 193.

In this same light, the Board, in totality, ignores Dr. Goorwitz's report recommending parole based on her 2010 finding that Mr. Acoli has demonstrated "genuine" remorse and that he explained in detail how he has abandoned violence and political violence in particular. Ca20-22. Dr. Goorwitz specifically recommended parole based upon the clear and indisputable changes in this inmate over these many years:

"Maturity through aging and years of mental health treatment appear to have result in significant self-growth, the ability to take responsibility for his crimes, and significantly changed views on politics and the use of violence." Ca23.

The Board ignored all of Dr. Goorwitz's favorable recommendations for parole, not even acknowledging the existence of her report. Since

Dr. Goorwitz was still available in 2016 to continue Acoli's review, it appears she was replaced with Dr. Van Pelt in an effort to obtain a more negative gloss as to this inmate. No other explanation for replacing Goorwitz has ever been advanced by the Board or the Attorney General, as the dissent also noted. Sa54,n.5.

The Board ignored equally the Federal Bureau of Prisons Psychology Services favorable recommendation for Acoli. The Bureau noted that in 2008 Mr. Acoli had initiated, at his own request, twice-monthly counseling sessions at FCI Otisville "to develop coping/self help skills and other skills relevant to community transition". 27a. Just prior to the 2010 parole hearing, the federal Psychology Services staff report considered that Acoli has "positive rapport with both staff and inmates" (26a), is "well developed" in his psychological functioning, with adequate "coping" skills and will "be able to transition to the community if paroled":

"Psychology Services staff report that Mr. Acoli is well-developed in these areas and has demonstrated adequate coping skills, an organized approach to completing goals and ability to establish positive interaction with others.

Psychology Services staff indicate they expect Mr. Squire [now Acoli] to be able to transition to the community if paroled."

Progress Report, "D. Counseling Programs", FCI Otisville, 2009. 27a.

The Board fails to explain how it can ignore the Federal Bureau's finding that Acoli is "well-developed" in "coping skills", "has positive rapport with both staff and inmates" and is "able to transition to the community if paroled", 27a, but should be denied parole because of "insufficient problem(s) resolution", 107a, or

because he supposedly will be unable to face “charged situations”, 298a, once released. The Board’s disregard of Goorwitz’s and the Psychology Services staff recommendations is the “‘obvious overlooking or undervaluation of crucial evidence’” of which the dissent complains. Sa60.

The Board’s vague conclusions as to “potential” or “possible” issues Acoli may face if released cannot be reconciled with the professional reports that Acoli is likely to succeed on his return to the community, thereby violating the mandate in Trantino VI that the Board must “explain adequately its reasons for rejecting” the professional opinions recommending parole. Trantino VI, 166 N.J. at 188, citing Trantino v. N.J. State Parole Bd. (Trantino IV), 154 N.J. 19, 36 (1998). It is this “selective” pruning of the record that caused the dissent to describe the Board’s denial of parole as the product of “evidence arbitrarily selected to achieve a desired result,…” Sa60.

In addition, the Board’s relentless focus on the nearly 50-year old facts of the crime, and Acoli’s earlier convictions for minor offenses 55 years ago, contradicts this Court’s holding in Trantino VI that a denial of parole based on “distant events” was a “makeweight to overcome the lack of substantial evidence to support the Board’s conclusions”. 166 N.J. at 190. In 2014, the Appellate Division cited this very language of Trantino when it rejected the Board’s reliance on Acoli’s remote, prior convictions dating from 55 years ago. See Acoli v. N.J. State Parole Bd., 2014 N.J. Super. Unpub. LEXIS 2340 at 28-29. Without explanation, the new majority in

2019 abandoned this approach, again disregarding this Court's holding in Trantino.

Like its 2011 decision, the Board's June 21, 2017 decision states that among its reasons for parole denial is "nature of criminal record increasingly more serious". 190a. This refers to Acoli's gun possession charge and the marijuana possession conviction 52 to 55 years earlier, far more remote than Trantino's record and, unlike Trantino's prior offenses, completely non-violent. Acoli's institutional record is just as productive and demonstrative of rehabilitation as Trantino's. See *infra* at 31-33.¹⁴

This Court has held that reliance on remote prior acts many decades old provides no basis for a denial of parole:

The Board failed to reasonably explain how Trantino's conduct in the early sixties could reveal his suitability for parole in 1999, when the only relevant inquiry before the Board was whether Trantino was likely to commit another crime....In the light of these findings and the record before us, the conclusion by the Board that Trantino's conduct while on parole in New York some thirty-six to thirty-nine years earlier supports his denial of parole could not reasonably have been reached, and fails to apply the appropriate standard for parole.

166 N.J. at 178, quoting Trantino V, 331 N.J. Super. at 619-20.

Despite this clear holding, the Board relied on Acoli's conviction 56 years ago for "the offenses of Disorderly Conduct and Possession of Marijuana" (no longer even criminal) and a gun possession charge (for which he received probation), as evidencing a "substantial likelihood" of recidivism. 147a,172a. In 2011, these

¹⁴ See also the summary of Acoli's institutional record at Merits Brief below, Pb29-39.

offenses were 45 years old and in 2017 they were 53 years old; today, they are 56 years old, far more remote than the violent offenses that Trantino VI held could not support a denial of parole.

Trantino VI held that reliance by the Parole Board on such distant prior events “substantially undermined” the deference it was to be accorded:

We conclude that the Parole Board's extensive reliance on evidence relating to a 1956 robbery, assaultive conduct in 1963 with his first wife, violations from 1961 to 1963 of conditions of his parole from a New York prison, efforts by attorneys in 1974 to remove a New York detainer, and other evidence relating to events occurring prior to the 1963 murders was arbitrary and capricious. That evidence provided no substantial support for the Board's conclusion that Trantino was substantially likely to commit another crime if released on parole now. The Board's reliance on evidence of such remote events was a makeweight to compensate for the lack of substantial evidence to support the Board's conclusions. *Moreover, the Board's insistence on the relevance of such evidence substantially undermined the deference that courts ordinarily confer on agency decisions.*

166 N.J. at 121 [emphasis added]. In other words, the Board loses the respect normally accorded an administrative agency when it relies on irrelevant and arbitrary factors.

The instant case is even more compelling than Trantino. Acoli's prior offenses were non-violent and far more remote, dating back to 1966, nearly 55 years ago. As in Trantino, this long-ago criminal record must be measured against the fact that Acoli has had no criminal charges in nearly four decades, his 1979 escape attempt involved no violence on his part and is, itself, now 39 years old with no later criminal activity; he hasn't had a single institutional infraction – not even of the most trivial kind – since 1996. Trantino

VI has been the governing law throughout Acoli's parole process and its reasoning should apply in equal force to Acoli, as it did with Trantino.¹⁵

In actuality, this inmate "has an exemplary record as a model prisoner for at least the past twenty years." Sa56.

Acoli has had constant employment even in his seventies with "above average work evaluations", 162a, though he is now, at 83, retired from most prison work; over the past four years he has taught the federal course to the younger inmates on avoiding future crime for FCI Cumberland's Education Department, 334a; he has extensive participation in personal self-help programs; respect by prison staff as a peer leader; numerous awards and certifications; he was assigned to the Honor Unit at Allenwood; he completed over 100 courses as of 2010, 14a-26a, Ca19, with many more completed since, most with high honors; highly favorable reports from prison staff; a favorable psychological assessment by the U.S. Bureau of Prisons that "he will be able to transition to the community if paroled, 27a; recommendation for parole from the State's 2010 evaluator, Dr. Goorwitz, Ca19-23; a

¹⁵ In this same way, Acoli's incarceration for "multiple offenses" in connection with the killing of Trooper Foerster, 172a, should not be a basis for denial of parole. As recognized in Kosmin and Acoli I, "multiple" offenses are misplaced in a parole determination where "all were part of the same ongoing event". Kosmin, 363 N.J. Super. at 328. Here, too, the "multiple" offenses, i.e., weapons possession, assault and robbery, were all part of the same event that led to Trooper Foerster's death, not separate unrelated acts, and should not be a basis for denial of parole. Moreover, the "multiple offenses" are already nearly 50 years old and, obviously, remote.

finding that he displays "positive rapport with both staff and inmates"; see generally 14a-27a; 161a-167a; Ca19-23; Sa56,n.5.¹⁶

Acoli has taken and passed the two-year paralegal and real estate course, 163a, for which he received a letter of accommodation for "Academic Achievement", 166a; he was Public Relations Officer for the African Culture Group, 167a; he was assigned a trusted position as Prisoner Representative to the Allenwood Social Resource Organization that "establishes programs and activities for the inmate population, 167a; he was noted for maintaining a 4.0 average in the Allenwood Education Department, 166a; he obtained certification for completing the OSHA General Industry Safety and Health course, 21a; he completed the Criminal Thinking, Anger Management, Self Discovery and Stress management courses for which "He was considered to be an excellent participant by the group counselors". 167a.

Acoli has been so well thought of by the staff in his institutions that when Dr. Goorwitz was leaving FCI Otisville, where she interviewed Mr. Acoli, a prison staff member on his own initiative "made a point of saying that he teaches the computer class [in which Acoli was enrolled] and that *the IM [inmate] attends the class 'regularly without fail and on time' and 'is an excellent student.'*" (Ca19)[emphasis added]. It is the rare inmate who receives positive unsolicited recommendations from prison staff.

¹⁶ A partial listing of the courses he has completed appears in the Appendix (332a-333a). As Dr. Goorwitz noted, he has actually completed more than 100 courses, Ca19, some more than once since he has apparently exhausted the federal system's course catalog.

Acoli's rehabilitation is so complete that, after the Appellate Division's 2014 decision, he was assigned to teach the Federal Bureau of Prison's "Critical Thinking" course designed to provide "guidance" to the younger inmates on avoiding future criminal behavior, as his federal Re-Entry Plan states:

"He is currently instructing the Critical Thinking course for the Education Department. He has held this position for approximately four years and he conducted over twelve courses. He is responsible for providing guidance to the younger inmate population and teaches them to act out of rationality rather than allowing their emotions to control their actions."

Individualized Re-Entry Plan, May 23, 2018 at 2. (334a) This new assignment came about in the three years between the 2014 Appellate Division decision and the Board's 2017 denial of parole on remand. Acoli's record favoring parole is, therefore, even stronger today than it was in 2014.

What more by way of rehabilitation could the Board possibly demand? Surely, Acoli cannot be deemed "substantially likely" to commit future crimes if the Federal Bureau that knows this man best (they have supervised and housed him for the past 40 years) believes he can be trusted to teach the younger inmates in avoiding crime and living a straight life. This, alone, speaks to the absence of a record on which to deny parole. As Judge Rothstadt said in his dissent, the Board ignores this "exemplary record" in favor of an almost exclusive reliance on the fact that "Acoli still refused to admit that he shot Foerster." Sa56.

The Board's focus on Acoli's unwillingness to agree that he shot Trooper Foerster pervades the Board's reasoning. 298a-300a.

For example, in 2011 the Board said that Acoli's disavowal of future crime "based upon his age is tempered by the fact that a website in his name puts forth philosophies that he is innocent and that he and his co-defendants were ambushed on the night of the event by the New Jersey State Police..." (174-175a). The Board also asserted in 2011 that Acoli can commit future crimes because he "is in good health and is involved in many activities, including participating in a website on his behalf, which includes his own writings, that continue to put forth a proclamation of innocence in his case." 174a-175a.

In 2017, the Board made identical statements with the only new addition being the reference to the "friendly fire" comment Acoli made in the remand hearing. 298a-301a. Even the Attorney General conceded at oral argument that "nothing else had changed about Acoli..." Sa54,n4.

Nowhere does the Board explain how a claim of innocence (or others claiming innocence on his behalf) demonstrates the likelihood that a soon to be 84-year old man with early dementia who has not had a single prison violation in 25 years, and who is even assigned to teach the Federal course on avoiding recidivism, has a "substantial likelihood" of committing future crime. Nor does the Board explain how it can maintain such position against the views of the State's own psychologist Goorwitz and the Federal Bureau of Prison's Psychological Services staff that this inmate was ready for release into the community more than ten years ago.

An inmate's refusal to acknowledge premeditation or a direct personal role in a crime "three or four decades ago...has no bearing on" the singular question of whether he is substantially likely to be a recidivist if paroled:

"This inmate's alleged lack of candor about events that occurred three or four decades ago simply has no bearing on his present likelihood of recidivism. We flatly reject the dissent's assertion that that evidence is material to or supportive of the Board's denial of parole."

166 N.J. at 193 [emphasis added]. As Trantino IV recognized, it need not be "total or full or real rehabilitation in any sense other than there is no likelihood of criminal recidivism." 154 N.J. at 31. An inmate's refusal to admit guilt could indicate less than "total or full...rehabilitation" but, as Trantino VI held, it would not indicate a substantial likelihood of recidivism, especially when the inmate is ill, elderly and has a record of 25 years of perfect institutional compliance.

As the Appellate Division observed in 2014, the Board's refusal to grant parole because of Acoli's failure to admit the crime means condemning him to prison for the rest of his life, defeating the very purpose of parole:

The Board's reasoning that Acoli is likely to commit another crime if he does not recall the State's version of his crime has the draconian effect of condemning him to prison for the rest of his life. However, in light of Acoli's acceptance of responsibility for his crimes and the psychologist's opinion that Acoli was honest in his expression of remorse, regret, and rejection of violence, the fact that his version differs from that of the State, in and of itself, should not stand in the way of Acoli's parole. Acoli v. N.J. State Parole Bd., 2014 N.J. Super. Unpub. LEXIS 2340 at 25.

This reasoning is directly consistent with Trantino IV and Trantino VI and was not disturbed by this Court's remand order, Sa58,n.8, citing Acoli II, 224 N.J. at 232, nor did the State challenge its reasoning on appeal.

In this same vein, the Board's contention that parole should be denied because of Acoli's failure to "articulate why" he entered the radical movement nearly 60 years ago, 173a,299a, gives weight and focus to a half-century old offense, what this Court has called a "makeweight to compensate for the lack of substantial evidence to support the Board's conclusions". Trantino VI at 121. As the transcript (Volume 2T) shows, the Board gave almost exclusive, indeed, relentless focus on the facts of the 47-year old offense that have little relevance under the 1979 Parole Act: "[T]he gravity of the crime may not...be considered an independent reason for continuing punishment and denying parole..." Trantino II, 89 N.J. at 373.

The Board's conclusion that Acoli failed to "articulate" *why* he joined the movement or *how* his views have changed is diametrically contrary to the record. At both the 2010 and 2016 hearings, he acknowledged his prior life, his participation in a violent revolutionary movement and his reasons for doing so. When asked by the Adult Panel in 2010, "Would you consider yourself...a leader in the movement?", he replied, "I was finance officer...in the Black Panther Party." 1T3-14. This is hardly a denial of his leadership role.

Acoli admitted to the 2010 panel that on the day of the killing he was driving to the South on a recruiting mission for the Black Liberation Army. 1T20. He acknowledged that he was a "revolutionary". 1T28. He agreed that the "philosophy" of the Black Panther Party was "revolutionary nationalism". 1T30. When asked if he agreed that the Black Panthers and the Black Liberation Army "were into, you know, the violent overthrow of the system...", Mr. Acoli not only agreed but acknowledged that as a member "I was willing to do what was necessary to achieve freedom and equality". 1T31. He openly admitted these facts.

It was based on this record that the Appellate Division in 2014 rejected the Board's conclusion that Mr. Acoli had failed to acknowledge or articulate such past associations:

"Acoli acknowledged that at the time of the crimes he was involved in revolutionary groups, was armed with a weapon, and was traveling with a wanted fugitive."

Acoli v. N.J. State Parole Bd., 2014 N.J. Super. Unpub. LEXIS 2340 at 23. Today, the record remains the same.

At the 2016 remand hearing before the full Board, Mr. Acoli again acknowledged he had entered a "violent" movement and that "Violence...was...part of the struggle". 2T228:2-6. He acknowledged that he joined the Black Panther Party ("BPP" in the transcript) and knew that it had an "anti police" agenda. 2T24:8-2T30:16. He acknowledged that he was "finance officer of the Harlem office" and that "my car was caught in a – shootout on the Harlem River Drive in which a Panther woman...Joan Bird was arrested." 2T33:6-12. Mr. Acoli acknowledged that after his acquittal on charges in the Panther 21

case, he began "Recruiting people into the Black Liberation Army...".
2T39:6-2T40:10.

All this he openly acknowledged and in his own words, not in response to leading questions. The transcript shows that he made such statements as fully and fairly as an elderly, infirm man can do.

At one point Acoli even rejected a Board member's attempt to get him to deny that he had entered the movement to fight for black freedom. This occurred in the 2010 panel hearing when Panel Member R2 suggested that he joined the movement to oppose capitalism; instead, Acoli told the Panel that he joined "To free black people, you know, struggle for like equality". 1T29. He said he saw himself in 1973 as someone "who struggled for black freedom and all oppressed people". Id.

In the 2016 hearing Acoli explained he had entered what he believed was a worldwide revolutionary movement seeking justice. 2T222:17-2T228:6. He explained his motivation for entering the movement in 1964 was the Goodman killing in Alabama and that he joined to fight the murder of civil rights workers. 2T22:16-2T24:7.¹⁷

What more could this man possibly say to "articulate *why*" he joined the movement? Acoli openly admitted, in as much detail as can fairly be expected of an elderly declining man, his willing participation in a violent revolutionary movement in the 1960's and

¹⁷ Mr. Acoli was referring to the murder of civil rights workers James Chaney, Andrew Goodman and Michael Schwerner who disappeared after an arrest for "speeding" in June 1964 just outside Philadelphia, Mississippi and whose bodies were found two months later buried in an earthen dam.

early 1970's and the reasons why he joined - he never shied from these facts, he openly acknowledged their truth. None of this reflects a lack of candor, as the Board persists in contending. This record cannot support by a preponderance of the credible evidence - or by any standard - the Board's conclusion that Mr. Acoli has not been candid or open about his past.

It was precisely because of this open acknowledgment of his past that the Appellate Division in 2014 concluded:

Acoli explained to the panel why he became involved in the black power political movement of the 1960's and 1970's, to struggle for freedom and equality, and why now he feels that, although he believes change is still needed, it can be accomplished through non-violent means.

Acoli I, 2014 N.J. Super, Unpubl. LEXIS 2340 at 26.

The record also does not support the Board's claims that Acoli has not explained "*how*" his views have changed. Indeed, it appears the Board intentionally closed its eyes to the evidence of his changed thinking and evolution and at one point sought to block such statements.

For example, during the 2010 Adult Panel hearing Mr. Acoli clearly attempted to state that he no longer believes in change by violent means, but was cut off by a panel member. When panel member "R2" suggested that because people from the "movement" are "still alive" Acoli could join back up with them if released, Acoli went on to state that times had changed and that he has rejected the use of such measures, but was cut off:

S: But you know I think things have changed. (yet you also got), you got [80:28] change tactics [80:30] black people achieve

freedom and equality for black people. [80:41] I think black people can achieve equality [80:50] without -

1T31-32.

As the transcript shows, the plain sense of his statement, "I think black people can achieve equality without — " shows that he was about to say "without *violence*", or words to such effect but was cut off by the panel member. For the Panel to interrupt him off as he was about to disavow violence, and then claim he has failed to do so, is inherently arbitrary. This type of conduct is precisely what the dissent means when it calls the denial of parole a decision based on "arbitrarily selected evidence [intended] to support a desired result,..." Sa60.

The Board and Panel also ignored completely Dr. Goorwitz's comprehensive findings that Mr. Acoli has abandoned violence and violent political associations and that he expressed what she judged to be genuine remorse for Trooper Foerster's killing:

"[T]his evaluator found the IM to be very cooperative, self reflective, thoughtful and non defensive in his responses to the questions posted to him. IM expressed regret and remorse about his involvement in the death of the state trooper. IM stated 'I deeply regret my part in Trooper Foster's [sic] death...I wish it had never happened.' He went on to say 'I want to apologize to his family...it may give them some degree of comfort to know that I'm sorry.'"

Ca22. Dr. Goorwitz reported that Acoli "no longer believes in the use of violence for political purposes" and that he said he had no interest in being associated with the "Black Panthers and the BLA" or "in being involved with any groups that have evolved from them." Id [emphasis added]. She also reported he has abandoned any belief in terrorism against the U.S. or other countries:

"This evaluator also questioned the IM on his views of those Islamic groups that are committed to terrorism against the U.S. and as well as other countries. IM stated clearly that he was opposed to terrorism and killing people. He said, 'they say if you're not with us you're against us. I don't agree with that. Its wrong.'" Ca22-23.

Dr. Goorwitz also noted Mr. Acoli's explanation of his personal growth and maturity: "First of all I'm a lot older, I'm 73. I see things differently now." Ca22. "He indicated that the years he has participated in individual as well as group counseling has led him to see life differently." Ca22. It was on the basis of these comments that Dr. Goorwitz concluded Acoli *should* be considered for parole because of his "changed views on politics and the use of violence":

"[I]t is this evaluator's impression that it is time to seriously consider the IM for parole. The current recommendation is consistent with the most recent pre-parole evaluation in 2004. Maturity through aging and years of mental health treatment appear to have result in significant self-growth, the ability to take responsibility for his crimes, and significantly changed views on politics and the use of violence." Ca23.

Dr. Goorwitz also noted that "IM [inmate] has participated in at least 100 different programs over the years", Ca19, and that he "reported finding the counseling courses 'very helpful for self improvement, my outlook on life, dealing with issues in a positive way'". Ca19. Dr. Van Pelt also reported that Acoli's Victim Impact courses have helped him to understand the effect of crime on victims' families. Ca78. His 25 years of complete institutional compliance since 1996 further evidences his personal evolution.

What more could fairly be demanded by way of a changed attitude and the reasons for it? It is undoubtedly because of his growth, his

change in attitude towards violence and his understanding of its impact on the victim's family (and his own family) that Mr. Acoli is now assigned to teach the federal course in avoiding future crime. 334a.

Acoli's age must also, inevitably, favor heavily his release on parole, since offending diminishes materially in the very old, a point the dissent noted below: "Also, as Acoli is now an octogenarian, there is a substantial decrease in any likelihood that he would commit a crime if released." Sa59; see also State v. David, 96 N.J. 611, 618 (1984), cited in Rothstadt, J. (dissenting opinion)(noting studies showing that older inmates 55-59 years old "are highly unlikely" to repeat their offense on release and that age is relevant in understanding a propensity for future crime).

As the Federal Bureau's psychology staff noted 12 years ago when Acoli was 72 years old, "the older an offender is, the less likely they are to re-offend." 27a. This reflects a widespread understanding that elderly inmates almost never re-offend on release:

"[O]bservers of the criminal justice system have long acknowledged the 'key' argument 'that elderly offenders pose so low a risk to the public that long or otherwise harsh sentences have little to no utilitarian benefit.'"

Cf., United States v. Payton, 754 F.3d 375, 378-79 (6th Cir. 2014), quoting, in part, Dawn Miller, *Sentencing Elderly Criminal Offenders*, 7 Nat'l Acad. Elder L. Att'ys. J. 221, 232 (2011).

Crime and criminality are virtually unknown in inmates of advanced years, especially the very elderly, as the court in Payton also observed: "elderly offenders have the lowest rate of recidivism of

all types of offenders; in fact, only about one percent of elderly offenders ever face a second conviction." Id.; see also United States v. Howard, 773 F.3d 519, 532-33 (4th Cir. 2014)("[S]tudies demonstrate that the risk of recidivism is inversely related to an inmate's age.")

Surely, if this logic applies upon sentencing of an elderly offender, as in Payton, supra, it applies with equal force to a parole decision, especially where the offender has had decades of peaceful and law abiding prison life. Only two years ago, the Appellate Division noted in an unpublished decision that there is no generally no "public safety" benefit to keeping even a murderer in prison through advanced old age. State v. Passarelli, No. A-2932-15T4, 2018 N.J. Super. Unpub. LEXIS 2755, *25 (App. Div. Dec. 17, 2018).¹⁸

Acoli will be 84 years old when this appeal is argued, an age beyond any reasonable concern as to recidivism. His advanced age, his long peaceful and productive record and his infirm and declining state, along with mental status changes, mitigate against any inference that this now elderly man will commit future crime.

The Board's decision itself demonstrates that the legal standard for denial of parole cannot be met. In its own words, the Board said it was "assessing the possibility of your engaging in future criminal

¹⁸ Citing, The Pew Charitable Trusts & the John D. and Catherine T. MacArthur Foundation, *State Prison Health Care Spending: An Examination*, 9 (Jul. 2014).

behavior" and that "concerns remain that you would commit a crime if released on parole.") 298a, 299a.

As a matter of law, the "possibility", "potential" or "concern" that an inmate "may" commit future crimes is not evidence of a "substantial likelihood" of recidivism. Cestari, 224 N.J. Super. at 550 (reversing denial of parole where Board found only a "potential" not a "substantial likelihood" that inmate would commit future crime); accord Trantino VI, 166 N.J. at 169.

Under the lessened standard of "possible" "concerns" of recidivism that the Board has applied to Acoli, *every* inmate convicted of a serious crime could be denied parole, as the court in Cestari observed, 224 N.J. Super at 550, defeating outright the purpose of the 1979 Act that presumes in favor of parole and places the burden on the State to *prove* otherwise.

The Board's reasoning is also highly speculative. For example, the Board expressed "concerns" that

"upon release you [Acoli] may be faced with similarly charged situations regarding social injustice and community activism. Therefore the Board finds it is imperative for you to comprehend the exposure you may have to those situations and how you will react if you encounter such situations." 298a [emphasis added].

This is conjecture. The Board does not provide a documented finding that this now 84-year old, infirm and long-peaceful man will commit future crime. The Board speculates that if released Acoli "may be faced with "charged situations regarding social injustice" and "community activism", yet, it never identifies just what "charged

situations" will cause an 84-year old man with increasing dementia to commit future crime after 25 years of peaceful and productive living.

Using such a "standard", any long-term inmate can be denied parole since they will always face new circumstances, new social settings or "charged situations", having been away from society for so many years. None of this demonstrates a "substantial likelihood" of committing future crime that the Legislature imposed as the only test for denial of parole. The Board's imposition of standards that do not fairly establish a "substantial likelihood" of recidivism is an effort, as the dissent noted, to "thwart the law" as to an "unpopular" or "despised" inmate. Sa57-58.

An air of unreality pervades the Board's analysis. This inmate has lived more than four decades in federal prisons for a violent crime, has been housed for decades with many violent offenders and despite a half-century in such an environment has not had a single offense on his record in 39 years (since the 1979 escape attempt) and not a single disciplinary violation in 25 years (since 1996). It is hard to imagine an environment with more potentially "charged situations" that an inmate could daily face, yet this man for decades has lived and acted solely in a peaceful and lawful manner.

The suggestion that as an infirm, elderly man he will suddenly change and react violently to imagined, unknown "socially charged situations" is pure speculation. Moreover, the Board does not find that Acoli *will* commit future crime but only that it has "concerns" about how he will react in "charged" situations. As Cestari, supra, held, such concerns are not a finding of a "substantial likelihood"

he will commit crime if released on parole.¹⁹ As noted earlier, his advanced age almost entirely negates such possibility.

The Board's "concerns" are also contradicted by what the Board itself called Acoli's "remarkable" self-control in the course of an "in-depth interview" that took "6 hours over two days". Ca93. In evaluating his conduct at the remand hearing, the Board stated that Mr. Acoli "was in remarkable control of his emotions and even when challenged remained completely calm." Ca93 [emphasis added]. What is even more compelling about his "remarkable control" is that the "in-depth interview" was six hours of cross-examination by a full Parole Board in which Acoli was alone, without even a fellow inmate to provide company, yet, in the Board's own words, he never lost control and "remained completely calm". Id.

What better demonstrates that this inmate is NOT "substantially likely" to commit future crime in "charged" situations or at times of "societal conflict" than what the Board itself called his "remarkable control of his emotions" when cross-examined for six hours by a dozen public officials, many of whom are former law enforcement

¹⁹ Similarly, the Board said that Acoli's long-ago membership – more than 50 years ago – in "a radical organization" gives rise to a question of how

"you will conduct yourself and address and process confrontational situations or situations involving societal conflict...". Narrative, December 22, 2016 at p. 2 (298a).

As with its claim of future "charged situations", id., the Board never identifies just what "societal conflict" an ill, elderly man will encounter that would cause him to commit crime, where he has lived peacefully and lawfully for 25 years in federal prisons rife with opportunities for "societal conflict".

officers.²⁰ In this respect, the Board's speculation runs squarely against Dr. Goorwitz's professional conclusion that

"Maturity through aging and years of mental health treatment appear to have resulted in significant self-growth, the ability to take responsibility for his crimes, and significantly changed views on politics and the use of violence." Ca23 [emphasis added].

Rather than a basis to deny parole, this inmate's "remarkable self-control" demonstrates *the opposite*: the very progress, growth and change that caused Dr. Goorwitz to recommend parole more than 10 years ago.

This scenario underscores the fundamental arbitrariness of the Board's decision-making in which nothing (and anything) the inmate does provides the platform on which to deny parole. On the one hand, the Board denies parole because of its speculation Acoli will lose control in "charged" situations and then holds that his "remarkable control of his emotions" in front of 12 public officials over six hours of close questioning about the killing of a state trooper, undoubtedly a "charged situation", also demonstrates his unfitness for release. Such reasoning is without root in law or consistent logic, the very model of arbitrary decision-making.

Even the prison staff at Cumberland deny that Mr. Acoli would ever be seen as a source of trouble. Dr. Van Pelt reports that when Mr. Acoli's counselor at FCI Cumberland, Mr. Courtney, was asked "if Mr. Acoli's name would ever cross his mind, should there be a trouble

²⁰ In any event, the possibility of losing control in socially charged situations does not indicate a substantial likelihood of committing crime and should not have been a basis for the Board's decision.

at his unit, this Case Manager [Courtney] said that if anything, he would think of him as an old man in the way". Ca80-81 [emphasis added]. Courtney added that Mr. Acoli is "not necessarily a leader or an organizer of any type". Ca80.

Where then is the basis for the Board's "concerns" that Acoli will at 84 years of age, infirm and with onset of dementia, lead a revolutionary movement if he is released? Mr. Courtney who has known Acoli for years says he is, at best, "an old man in the way" and not "a leader or organizer of any type." Ca80. In his decades of incarceration, there has not been the slightest suggestion that Acoli ever, on any occasion, attempted to influence other inmates in any ideological activity, particularly radicalism or violence. The Board's presumption that he will somehow re-enter the revolutionary movement runs squarely against this mass of evidence, his four decades of completely peaceful living and his age and infirm condition.

Such contentions also run counter to Mr. Courtney's report that Acoli is "extremely predictable in his routine and whereabouts, always easily located at the exact same spot in the dayroom, where he spends nearly 75% of waking hours, watching television." Ca80. This is not an individual likely to engage in crime, or react in a "charged" confrontation, but one more suited to the banal routine of prolonged retirement or assisted living.

Dr. Van Pelt confirmed Courtney's report that Acoli has experienced mental status changes "regarding processing and retaining of information they discuss, similar to observations of this examiner (e.g. looking confused, asking to repeat questions, searching for

words)". Ca81 [parenthetical text in original]. In other words, dementia. Not only is this elderly man not about to lead a radical movement, but his mental status changes would logically prevent such activities.²¹

Similarly, the Board's "concerns" about his hesitance in speech, lack of spontaneous answers, that his answers lacked "depth" and "quality", 299a, do not establish a substantial likelihood of future crime. Most likely, these are related to the aging and mental status changes reported by Mr. Courtney and Dr. Van Pelt. Dr. Goorwitz as far back as 2010 said that Acoli had "age related" slow speech, Ca17, but was otherwise "cooperative, self-reflective, thoughtful and non defensive", with "[f]air judgment" and "adequate insight". Ca22, Ca17. That he showed difficulty communicating at the remand hearing, seven years later, when he has entered advanced old age and with onset of dementia, is neither surprising nor a basis for denial of parole.

Acoli's prison counselor, Mr. Courtney, reported that Acoli typically presents in a hesitant, reluctant way with new people until he gets to know them. Dr. Van Pelt reported Courtney as saying:

"[H]e described him [Acoli] as very slow to warm up around new people but, with time, becoming more open and genuine in their presence." Ca80.

²¹As an officer of the Court, the undersigned represents that in phone conferences (meetings are not available because of COVID-19) Mr. Acoli is today more confused and loses track of complex issues. He is today changing, rapidly, for the worse and if relief by way of parole is not granted it will soon be meaningless.

To deny parole because of Acoli's allegedly "hesitant" or "insincere" manner of speaking in view of the evidence of his prison counselor that he needs time to become warm and genuine with new people, and has had mental status changes, is inherently arbitrary.

Other speculation pervades the record. Obscurely, Dr. Van Pelt claims that "he [Acoli] continues to at least passively condone aggression, whether on individual or a more global cultural level." Ca83. Just what it means to "passively condone aggression" as an "individual" or on a "global cultural level" is left completely unstated? Dr. Van Pelt does not explain her reasoning or give examples to support it. In any event, such "finding" cannot support a conclusion that this inmate is substantially likely to engage in criminal activity. If the worst the evaluator can say of a then 81-year man with mental status changes is that he may "passively" condone someone else's "aggression", it would mean that Acoli can be expected to act *passively*, not violently.

Van Pelt's conclusion that he may "condone aggression" on a "global cultural level" also comes perilously close, if not actually crossing the line, to a denial of parole because of ideology or viewpoint. This is reflected in her comment that Mr. Acoli is "not persuasive with respect to intentions not to get involved in any political organization or employ his status as an inspirational leader/civil rights activist to cause disturbance." Ca83.

A parolee has every legal right to become involved with politics or protests. Sobell v. Reed, 327 F.Supp. 1294, 1303-06 (S.D.N.Y. 1971)(a state has no right to restrict the First Amendment rights

of a parolee who had been convicted as a communist spy from speaking at political gatherings). That Mr. Acoli's "inspirational" role may "cause disturbance", as Van Pelt puts it, is also not within the Parole Board's area of concern. Hyland v. Proconier, 311 F. Supp. 749 (N.D. Cal. 1970)(a parole board may not place limits on parolee's right to speak to student demonstrators at a correctional facility because of "fears of student sponsored demonstrations outside the prison..."). Thus, Van Pelt's concerns that the future political activities of Acoli may "cause disturbance", Ca83, are not within the power of a parole board.²²

Moreover, the fact that Acoli "may" become an inspirational leader in the civil rights movement is conduct that is plainly protected under the First Amendment. See e.g. Block v. Potter, 631 F.2d 233 (3d Cir. 1980)(Seitz, Chief Judge, dissenting)("Prisoners are protected from parole denial based on their religious or political beliefs by the first amendment"). As the U.S. Supreme Court has put it, "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" does not give rise to a governmental interest in a citizen's speech. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969). It follows that Acoli's potential role as an "inspirational" leader in some

²² The principle has been stated too often for extensive citation that mere fear of a "disturbance" from speech is not a basis for governmental action. See e.g. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)("Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").

unknown, undescribed movement that may cause "disturbance" is not a basis on which to deny parole (assuming he even has such capacity in view of his age, ill state and declining cognitive capacity).

In this same vein, Van Pelt concludes that Acoli "will not openly denounce violence and [has] a grandiose sense of mission in life." Ca84. She bases this on the claim that "He feels it is his obligation to bring about changes, be that in the community or this own family." Id. And what is wrong with this? Merely seeking change in one's community or family is not proof or even an indicia of a substantial likelihood to commit future crime nor does it fairly suggest "a grandiose sense of mission." Id. Whatever these things mean, and Van Pelt does not explain, they are not a basis on which to deny parole.²³

Even taking Van Pelt's "concerns" at face value, in the final analysis her moderately critical report merely speaks to the "potential" for *possible* future crime, not a "substantial likelihood" of future crime, a distinction the court in Cestari made clear:

Although Dr. Rotgers' report was unfavorable to Cestari, it did not say that there was a "substantial likelihood" he would commit another crime if released. Dr. Rotgers only concluded that "Mr. Cestari must still be considered to have the potential to become involved in a violent incident in the future. Rotgers' opinion that Cestari has "the potential to become involved in a violent incident" does not mean that there is a "substantial likelihood" he will commit another crime.

²³ It is not even clear why Van Pelt reports he will not "denounce violence" since he plainly has done so with Dr. Goorwitz, as the Appellate Division found in 2014 and that even the majority on the most recent decision did not dispute.

Cestari, 224 N.J. Super. at 550.

As Cestari recognized, the expert's belief that the inmate had "the *potential* to become involved in a violent incident" does not mean that there is a "substantial likelihood" he *will* commit another crime. In such case, the Court noted, nearly all inmates could be denied parole:

"it could be accurately said that nearly all violent offenders, and many persons who have never been convicted of violent offenses, have the "potential" to become involved in a violent incident. It is only when that "potential" rises to the level of a "substantial likelihood" that another crime will be committed that parole may be denied."

Cestari, supra. Thus, the Board's "concerns" about the "possibility" Acoli may commit future crime do not satisfy the legal standard of proof of a "substantial likelihood" he will do so.

Considering that inmate Acoli was a vital and active person through much of this incarceration, his avoidance of crime and violence over these many decades speaks to the fact that the killing of Trooper Foerster and the wounding of Trooper Harper, as tragic and misguided as it was, is not the product of a person naturally inclined to violence or criminality. For decades Mr. Acoli has been a model inmate and his record over nearly 40 years demonstrates his commitment to peaceful and productive living since his incarceration.

This inmate's record of nearly 40 years without an offense and 25 years without a single violation or infraction; his four decades of counseling, self-improvement, education and programming; the respect he has earned as a peer leader from prison staff; his assignment to the Honor Unit; his exemplary work record even at an advanced age; his

current assignment to teach the federal course on avoiding recidivism; his high achievement in course work that even prompted an unsolicited recommendation from a staff member to Dr. Goorwitz, rare for any inmate; the recommendation for parole from Dr. Goorwitz who found him to be a "changed and reformed person"; the Federal Bureau's Psychology Services staff finding that he will make a successful "transition" to the community; all militate conclusively in favor of parole. His advanced age and onset of dementia mandate no other fair conclusion.

On the basis of this inmate's exemplary record, and his age and infirmity, parole cannot fairly or reasonably be denied. As the dissenting judge observed, the Board has deprived Acoli of parole "without any evidence that he is substantially likely to commit a crime if released." Sa60. The Board cannot assume a substantial likelihood of recidivism, it must "prove" such likelihood, and it cannot do so on this record.

CONCLUSION

For the foregoing reasons, the denial of parole should be reversed under the reasoning of Judge Rothstadt's dissent and parole be directed without further administrative proceedings in view of the inmate's age and declining mental status.

Dated: December 24, 2020



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