Decision in Art. 78 proceeding - Copeland, Phillip (2022-02-01)

SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

In the Matter of the Application of

PHILLIP COPELAND

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

DECISION, ORDER
And JUDGMENT
Index No. 908604-21
RJI No. 01-21-ST1972
(Hon. Lynch, J.)

-against-

TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE,

Respondent.

INTRODUCTION

In this Article 78 proceeding, Petitioner challenges Respondent's denial of parole release by decision rendered on November 10, 2020.[1] By all accounts, this is a high-profile case involving the murder of Edward Byrne, a 22-year-old police officer, in 1988. Petitioner, too, was 22 years old at the time he was charged with the crime.[2]

Following his 1989 conviction for Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree by jury verdict in Queens County Court, Petitioner was sentenced to an aggregate indeterminate term of imprisonment of 25 years to Life.[3] Petitioner

[1] NYSEF Doc. No. 3, pages 30-32.
[2] NYSEF Doc. No. 35 Amended Petition ¶ 19.
[3] These are Petitioner's only criminal convictions. The Court notes that the Connecticut Bench Warrant for a Murder charge issued against Defendant was withdrawn on December 6, 1996 – see NYSEF Doc. No. 75 – Administrative Appeal Exhibit "5" – Inmate Status Report for November 2012 Parole Board Appearance.

was first eligible for parole in 2012 and has now been denied parole release five (5) times.[4] This case has long garnering extensive opposition from the police community.[5]

Defendant's convictions were affirmed on direct appeal (see People v. Copeland, 197 A.D.2d 629 [2d Dept. 1993], leave to appeal denied 82 N.Y.2d 848 [1993]).[6] In Copeland v. Walker, 258 F. Supp. 2d 105 [E.D.N.Y 2003], the Court denied Petitioner's Writ of Habeas Corpus (Certificate of Appealability Denied), and, in so doing, also rejected Petitioner's claims of Judicial Bias (id at 55-70).[7]

Oral argument was held on the record on January 31, 2022.

FACTS

The interview was conducted on May 10, 2020 before Commissioners Marc Coppola[8] and W. William Smith, Jr.[9] Commissioner Coppola introduced Commissioner Smith and the following colloquy took place:

> "Commissioner Coppola: **I know you know who I am.** We met a **couple of times in the past.**

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[4] See NYSEF Doc. No. 3 – Interview and Decision 11/10/20; NYSEF Doc. No. 4 – Interview and Decision 1/23/19; NYSEF Doc. No. 17 – Interview and Decision 11/15/17; NYSEF Doc. No. 16 – Interview and Decision 5/12/15; and NYSEF Doc. No. 15 – Interview and Decision 12/19/12.

[5] NYSEF Doc. No. 15 – 2012 Interview, p.10-11, where the Commissioner noted: "Now, in addition to the family, there is also a **tremendous amount of opposition from law enforcement** who felt a tremendous amount of loss, not only in the City of New York at the time, but across the entire nation. **This was the most highly attended funeral for a police officer in the whole nation.** People came to this funeral from other countries, all the elected officials were there, community members, people from local elementary schools, this case had a tremendous impact on the entire nation, **and still from the letters of opposition continues to have a tremendous impact on law enforcement** and many members of New York City, including all of the officials who remember this case and remember the way that it completely shocked and terrified the members of the community." (emphasis added) See also NYSEF Doc. No. 16 – 2015 Interview, p.17, line 15-21, where the Commissioner noted: "We also have, I'm sure as you know, community opposition to your release. **There's letters from judges**, DAs, U.S. attorneys, police officers, politicians, mayors, senators, **thousands of police officers** and citizens. So I am sure you are aware there's a lot of community opposition to your release, right?" (emphasis added)

[6] The Court rejected the Batson Challenge (id at 629-630).

[7] The Court also denied the Batson Challenge, noting, "the prosecutor had twenty challenges available to him and an additional two challenges with respect to the selection of alternates. Of these twenty challenges, he used a total of nineteen, ten of which were used to exclude black jurors from the venire from which the twelve jurors were empaneled." (id at 28) (c.f. Flowers v. Mississippi, 139 S. Ct. 2228, 2251 [2019]).

[8] Commissioner Coppola previously sat on the January 23, 2019 Board which denied parole release – see NYSEF Doc. No. 4.

[9] NYSEF Doc. No. 3.

> Petitioner: Yeah, I remember you.
> Commissioner Coppola. At one time you were getting a lot of postponements. I remember and I told you **I was going to take it personal** if you got another one.
> Petitioner: I remember.
> Commissioner Coppola: I was **joking** at the time, **but we've seen each other a couple of time in the past.**"[10] (emphasis added)

Petitioner advised the Commissioners that he had a heart attack in 2017, resulting in high blood pressure, and that he also suffered from Covid.[11]

Commissioner Coppola stated this was a "**reappearance interview of course**" for the underlying murder conviction, and that "**you were sentenced by the Honorable Judge Demakos,**" noting the "sentencing minutes were in the file for review and consideration."[12] (emphasis added) Commissioner Coppola continued, "**Obviously we've been through this before. I know you've been through it a number of times.**"[13] (emphasis added)

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[10] NYSEF Doc. No. 3, p. 2, Lines 4-16. Commissioner Coppola made a similar "personal" remark at the January 23, 2019 interview – NYSEF Doc. No. 4, p. 3, line 13-15. Given the seriousness of the underlying convictions, the "joking" reference is most troubling.

[11] NYSEF Doc. No. 3, p. 2-3.

[12] NYSEF Doc. No. 3, p. 3, Line 14-24. Ordinarily, referring to the name of the sentencing Judge is of no moment. The specific reference to Judge Demakos, however, is highly significant. Judge Demakos made the following statement at sentencing, to wit: "Now I have received a multitude of letters asking that I impose a life sentence without parole, and under our law, I cannot do that. However, **what I can and will do is to promise you that I intend to make a recommendation to the parole board that you are never to be paroled**. I know I will no longer be sitting on the bench twenty-five years from now, but rest assured, **my last judicial function before I retire from the judiciary will be to write to the parole board to remind them of my strong feeling that I have expressed to you today.** The sentence of this court shall be, as to the conviction for murder in the second degree, twenty-five years to life, again, with a recommendation to the parole board **that you are never paroled."**

[13] NYSEF Doc. No. 3, p. 4, Line 1-2. This colloquy is telling for several reasons. First, despite the passage of 31 years, it highlights the Board's continued reliance on sentencing Judge Demakos comments, which, as more fully appears below, were inappropriate and over personalized. Next, by continuously reminding Petitioner that he had been to the Board before, it is manifest that the Board took a same old, same old approach, instead of engaging in a reasoned, objective and intellectually honest evaluation of the current facts.

Commissioner Coppola acknowledged that the underlying conviction was not based on a claim that Petitioner was the shooter, but rather that Petitioner had ordered the shooting.[14] He advised Petitioner that it was not the Board's function to "overturn your case" and Petitioner acknowledged he understood.[15] Commissioner Coppola asked Petitioner about the status of his litigation to challenge the conviction. Petitioner advised there had been no change since his last interview and he had not yet filed a 440 motion.[16] Commissioner Coppola noted it should not be held against Petitioner for trying to clear his name.[17]Commissioner Coppola queried why Petitioner had not been successful on appeal, stating, "politics is one thing but the law is the law."[18] Petitioner explained he had difficulty getting an attorney to take the case. When Petitioner expressed trepidation filing a 440 in the same sentencing court, Commissioner Coppola responded:

> "**I don't think he could hold it**. I'll be honest with you, you know and **I know in his sentencing minutes, he said – they talked about the death penalty. He said that you should never be released and on his last day in office, he was going to make sure he wrote the parole board - -** "[19] (emphasis added)

Commissioner Coppola acknowledged that it was the Board's "responsibility to at least consider your claim of innocence,"[20]yet he then posed a hypothetical of actual innocence, and then stated, "would you at least say you would be guilty by association."[21]

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[14] NYSEF Doc. No. 3, p. 4.

[15] NYSEF Doc. No. 3, p. 6.
[16] NYSEF Doc. No. 3, p. 7-8.
[17] NYSEF Doc. No. 3, p. 15, line 17-19.

[18] NYSEF Doc. No. 3, p. 11, line 20.

[19] NYSEF Doc. No. 3, p. 12, line 8-12. While Commissioner recognizes the conflict with the same Judge handling the 440, he does not, in any way, distance himself from the Judge's remarks. After the passage of 31 years, the fact that the Commissioner is still focusing on the Judge's remarks that he would write a letter on his last day in office, evinces the continuing impact that the Judge's over-personalized and vindictive remarks.
[20] NYSEF Doc. No. 3, p. 7, line 13; p. 9, line 2-7.

Commissioner Coppola reviewed the parole packet and noted several favorable letters from Corrections officers, as well as a letter from Petitioner's sister and brother-in-law indicating they would give Petitioner a place to live on release.[22]Commissioner Coppola asked Petitioner about his disciplinary record.[23] The Risk Assessment for "Prison Misconduct" was 8, based on a Tier II Ticket in 2020, notwithstanding the last violent ticket was in 1990.[24] The following colloquy took place:

> Commissioner Coppola: "…**while you've been inside you've been doing well.** I don't think you had a ticket since 2000, right?
> Petitioner: I had a ticket not too long ago. It was a Tier II, though.
> Commissioner Copploa: Wait a minute**. It was small. You don't get in any fights?**
> Petitioner: No, I don't…[25]
>
> Commissioner Coppola: Outside of that, though, and I know that things must happen. **You went 20 years without a ticket. Actually, if this is correct, I think it is. The last violent ticket that you even had was back in 1990**?
>
> Petitioner: Yes."[26] (emphasis added)

Commissioner Coppola also noted the following:

> "**You are program satisfied**. Your case plan, the description of your goals, tasks and activities indicate that. You completed all mandatory programs. You completed volunteer programs. Other that -you have in your case plan a number of citations, continuing

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[21] NYSEF Doc. No. 3, p. 14, line 21. Clearly, an "associate" is not subject to accessory liability under Penal Law § 20.00.
[22] NYSEF Doc. No. 3, p. 9-11.

[23] NYSEF Doc. No. 3, p. 15, line 21. See also NYSEF Doc. No. 5.

[24] NYSEF Doc. No. 6.
[25] NYSDEF Doc. No. 69 – Parole Board Report cites the Tier II ticket as follows: 05/18/20.04:45 PM, WENDE HEARING: 05/20/20 09:55 104.11 VIOLENT CONDUCT 104.15 CREATE DISTURB 100.15 FIGHTING 10 D KEEPLOCK.
[26] NYSEF Doc. No. 3, p. 16-17.

> to work in the law library, continue to work on your case…"[27] (emphasis added)

He also noted, "and your work in the RMU of course was cited by one of the officers, if not more. It's good."[28] He then stated, "You're convicted. So [,] it's not fair for me to pass a further judgment on the crime itself."[29]

Commissioner Coppola turned the floor over to Commissioner Smith.[30] He questioned if Petitioner ever got his GED in prison and Petitioner said he did so in 1997.[31]He acknowledged **"it's a good accomplishment**."[32] (emphasis added) He also asked Petitioner if he had a social security card and birth certificate. Petitioner explained he was working on the application with his counselor, and Commissioner Smith stated, "and you need to do that because those are critical documents once released."[33]

Commissioner Coppola resumed the interview, stating, "in just the final – well, just going back to your risk and needs assessment, prison misconduct is high, **eight out of ten**. I think that Tier II tripped you up. **I disagree with that. I think its obvious that your misconduct is not high**."[34] (emphasis added) Commissioner Coppola then stated,

> We all have a bad day. When you go 20 years without anything, I think that's a different story. **So [,] with that low family support, everything is low and unlikely.**[35]Of course this doesn't take in other factors with regard to the crime [,] but it does take in a

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[27] NYSEF Doc. No. 3, p.17, line 16-21.

[28] NYSEF Doc. No. 3, p.18, line 10-11; NYSEF Doc. No. 9 – Inmate Progress Report dated 1/1/19 in which Petitioner received an "Excellent" rating in all categories and was described by the Sergeant as "Inmate Copeland has a good attitude and goes above and beyond in his work assignments. Very respectable to all staff, and other inmates." See also Memo from Captain Gilliam who described Petitioner as follows: "Copeland is an asset to RMU and has a great work ethic. **He has been a pleasure and has shown great integrity**." (emphasis added).

[29] NYSEF Doc. No. 3, p.18, line 24-25.

[30] NYSEF Doc. No. 3, p. 21.

[31] NYSEF Doc. No. 3, p. 21. See NYSEF Doc. NO. 7, p. 4.

[32] NYSEF Doc. No. 3, p. 22, line 9.

[33] NYSEF Doc. No. 3, p. 23, line 2-3. See also, NYSEF Doc. No.8, p. 4.

[34] NYSEF Doc. No. 3, p. 23, line 23 – p. 24, line 2; NYSEF Doc. No. 6, p. 2.

[35] NYSEF Doc. No. 6, p. 2 – Low risk of criminal involvement, felony violence, arrest, or absconding.

> number of other factors, your **age,** things like that. Your **health** it might play a role in there. I'm trying to cover the areas that I wanted to cover. Again, there are -- you're not the only one but there are other cases that whether they're high profile or not. **Your case is what we would consider for lack of a better term high profile and this is not a secret. You have support for your release and significant opposition…It's never been a secret for you.** I don't think it's appropriate for especially when somebody took it to trial and is still fighting their case to belabor the point of the crime. It's not -- I don't think it's helpful in either way?[36] (emphasis added)

Commissioner then queried Petitioner about the potential conflict between an actual innocence claim and the perceived lack of remorse factor during a parole release review.[37]Petitioner maintained his innocence. Commissioner Coppola claimed he had read the file, which he characterized as "huge."[38]

At the conclusion of the interview, the Panel issued a decision denying parole release.[39] On June 10, 2021, the Board affirmed that decision.[40]

PETITION

Petitioner seeks Judgment to annul Respondent's November 10, 2020 denial of parole and an Order directing the Parole Board to conduct a de novo parole review before a different panel of the Board.

ANSWER

Respondent's Answer primarily consists of general or conclusory denials. Respondent also pled an objection in point of law pursuant to CPLR R 3211 (a) (2) and (7), to wit: Failure to state a claim and claims barred that were not raised in the administrative appeal.

[36] NYSEF Doc. No. 3, p. 24, line 4-21.
[37] NYSEF Doc. No. 3, p. 25
[38] NYSEF Doc. No. 3, p. 28, line 5.

[39] NYSEF Doc. No. 3 and 36.
[40] NYSEF Doc. No. 11 and 44.

With respect to the claimed failure to state a cause of action, Petitioner has clearly pled that Respondents actions were arbitrary and capricious, i.e., a cause of action under CPLR § 7803 (3).

Respondent asserts that Petitioner's claims that (1) the decision was based on the Judge's, District Attorney's, and Police organizations opposition; (2) Commissioner Smith was politically active against parole release, and (3) the entire file must be turned over to the Court, were not raised during the administrative appeal are barred in the Article 78; Respondent admits, however, that Petitioner did raise his claim that the denial was predetermined in the administrative proceeding.[41]

In this Court's view, the fact that Petitioner claimed the denial was predetermined, encompasses the first two (2) claims and they are not barred herein.[42] Frankly, the Board raised the issue of penal philosophy at the interview by expressly referencing the Judge's comments at sentencing, as well as the Judge's letters to the Board that Petitioner should never be paroled, all as set forth above. It is equally clear that Petitioner did in fact raise the issue that the Board's actions were predicated on the sentencing Judge's penal philosophy in his administrative appeal, claiming "the board took on the **personae** of the sentencing court."[43]

With respect to the requested relief that the entire parole file be turned over to Petitioner, that request is denied (see Matter of Wade v Stanford, 148 A.D.3d 1487 [3d Dept. 2017]; see also Matter of Justice v. Commissioner of the N.Y. State Dept. of Corr. & Community Supervision, 130 A.D.3d 1342, 1343 [3d Dept. 2015], where the Court held,

[41] NYSEF doc. No. 66 – Memo of Law p. 2 (p. 4/18).
[42] Petitioner did raise the impropriety of considering penal policy during the administrative appeal – see NYSEF Doc. No.74, p. 22.
[43] NYSEF Doc. No.74, p. 21. See also NYSEF Doc. No. 88 - Reply Aff Rayner ¶ 8-13.

> "The Board of Parole is authorized to treat records as confidential if their release "could endanger the life or safety of any person" (Public Officers Law § 87 [2] [a], [f]; *see* Executive Law § 259-k [2]; 9 NYCRR 8000.5 [c] [2] [i] [a] [3]). Given petitioner's violent crimes, ongoing mental health issues and previous threats to staff at his prior residence while he was on parole, we find no abuse of discretion in Supreme Court's denial of petitioner's request for access to the confidential documents. Nor is there any merit to petitioner's contention that his constitutional rights were violated by the denial of his motion for discovery inasmuch as the Board of Parole's determination is administrative and the rights afforded to a defendant in a criminal proceeding do not apply.") (emphasis added; case law citations omitted)

In fine, the record, including the in-camera submissions, was sufficient to decide the Petition on the merits.[44]

STATEMENT OF LAW

Was the Parole release denial affected by an error of procedural or substantive law, arbitrary and capricious, and/or an abuse of discretion (CPLR §7803 (3)). This presents a narrow issue, which must be considered within the statutory and regulatory framework governing the determination of a parole release application.

Executive Law § 259-i (2) (a) (i) provides, inter alia:

> "at least one month prior to the date on which an incarcerated individual may be paroled pursuant to subdivision one of section

[44] On January 27, 2021 and January 28, 2021, our Chambers received 8 boxes Marked Exhibit "N" from Wende Correctional Facility. Each Box contained approximately 3,000 letters/e-mails in opposition to parole release, i.e., 24,000 letters/e-mails in opposition to parole release. Box 1 of 8 contained approximately 500 letters from 2012, and 2,500 unsigned form letters dated 2020, with pre-printed text of "I vehemently oppose parole for Phillip Copeland, killer of P.O. Edward Byrne on 2/26/1988", with a either a typed full name or "Concerned Citizen" with Last name, indicating the sender. Box 2 of 8 contained same unsigned form letters dated 2018, and letters/petitions from 2012. Box 3 of 8 contained same unsigned form letters dated 2018, 2019, and 2020. Box 4 of 8 contained same unsigned form letters dated 2018. Box 5 of 8 contained same unsigned form letters dated 2018, 2019, and 2020; approximately 2,000 letters dated 2020. Box 6 of 8 contained approximately 2,700 unsigned form letters from "Concerned Citizens" dated 2018 and approximately 300 form e-mails. Box 7 of 8 contained approximately 100 form letters "Re No Parole for Phillip Copeland" addressed "To whom It may Concern", with the balance consisting of the unsigned form letters. Box 7 of 8 also contained a letter from a PBA dated May 8, 2017, which provided: "…**I strongly urge you to make sure that Edward Byrne's merciless assassins leave prison only in coffins."** (emphasis added) Box 8 of 8 consisted of opposition letters and opposition form letters. The Court notes that of the 24,000 documents submitted as Exhibit "N", there wasn't a single document or letter submitted in Petitioner's favor. In this Court's view, the one-sided bent of the submission undermines the integrity of Respondent's Exhibit "N."

> 70.40 of the penal law, a member or members as determined by the rules of the board shall personally **interview** such incarcerated individual and determine whether he or she should be paroled in accordance with the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article. **If parole is not granted** upon such review, the incarcerated individual shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. **Such reasons shall be given in detail and not in conclusory terms**." (emphasis added)

Executive Law § 259-i (2) (c) (A) lists eight (8) factors that must be considered by the Board as follows, to wit:

> "**Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such incarcerated individual is released, he or she will live and remain at liberty without violating the law, and that his or her release is not incompatible with the welfare of society and will not so deprecate the seriousness of his or her crime as to undermine respect for law.** In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the **following be considered**: (i) the **institutional record** including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and incarcerated individuals; (ii) performance, if any, as a participant in a temporary release program; (iii) **release plans** including community resources, employment, education and training and support services available to the incarcerated individual; (iv) any deportation order issued by the federal government against the incarcerated individual while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) **any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased** or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the incarcerated individual would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of

> the penal law; (vii) the **seriousness of the offense** with due consideration to the type of sentence, length of sentence and **recommendations of the sentencing court**, the district attorney, the attorney for the incarcerated individual, the pre-sentence probation report as well as consideration of **any mitigating and aggravating factors**, and activities following arrest prior to confinement; and (viii) **prior criminal record,** including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." (emphasis added)

Executive Law 259-c (4) provides that the Board of Parole shall:

> "**establish written procedures** for its use in making parole decisions as required by law. Such written procedures **shall incorporate risk and needs principles to measure the rehabilitation of persons** appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which incarcerated individuals may be released to parole supervision…" (emphasis added)

The Board did adopt regulations for the conduct of parole release interviews and determinations.

9 NYCRR § 8002.1 provides, inter alia:

> **"(b)** The parole release interview shall be conducted by a Board of at **least two members** of the board.
> **(c)** The Board conducting the parole release interview **shall discuss with the inmate each applicable factor set forth in section 8002.2 of this Part**, excluding confidential information." (emphasis added)

9 NYCRR § 8002.2 provides, inter alia:

> **(a) Risk and needs principles**: in making a release determination, the board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, Department Risk and Needs Assessment). **If a board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the board shall specify any scale within the Department Risk and**

Needs Assessment from which it departed and provide an individualized reason for such departure. If other risk and needs assessments or evaluations are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending, and such assessments or evaluations are made available for review at the time of the interview, the board may consider these as well.

(b) Transitional accountability plan: The board also shall consider the most current case plan that may have been developed by the New York State Department of Corrections and Community Supervision pursuant to section 71-a of the Correction Law…

(d) Factors to be considered in all release determinations: the board **shall** consider the following factors in making a release determination:

(1) the **institutional record**, including program goals and accomplishments, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates…

(3) release plans, including community resources, employment, education and training and support services available to the inmate…

(5) any **statement** made or submitted to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated…

(7) the **seriousness of the offense** with due consideration to the type of sentence, length of sentence and **recommendations of the sentencing court,** the district attorney and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated, the pre-sentence probation report, as well as consideration **of any mitigating and aggravating factors**, and activities following arrest prior to the inmate's current confinement; and

(8) **prior criminal record,** including the nature and pattern of the inmate's offenses, age at the time of commitment of any prior criminal offense, adjustment to any previous periods of probation, community supervision and institutional confinement." (emphasis added)

9 NYCRR § 8002.3 provides, inter alia:

> "(b) Denial of release. If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview, of the decision denying him or her parole and the factors and reasons for such denial. **Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 of this Part were considered in the individual's case.** "

In the event of a parole release denial, an administrative appeal may be taken in accord with 9 NYCRR § 8006.1 – 8006.4.

The foregoing statutory and regulatory structure provides the means for an intellectually honest and objective analysis of every parole release application. This structure necessarily requires that the Commissioner's genuinely evaluate the stated criteria, and that they not be unduly influenced by any community or political agendas of third parties, or by their own personal agenda.

Respondent asserts its actions are entitled to a presumption of validity, citing People ex rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916 [3d Dept. 1992] where the Court held, "Petitioner did not present sufficient evidence to overcome the **presumption of honesty and integrity that attaches to** judges and **administrative fact finders.**"[45](emphasis added) In Matter of Campbell v. Stanford, 173 A.D. 3d 1012, 1015 [2d Dept. 2019], the Court stated the judicial review standard as follows:

> "**Judicial review** of a determination of the Parole Board is **narrowly circumscribed.** A Parole Board determination to deny early release may be set aside only where it evinces **"irrationality bordering on impropriety".** The Parole Board is required to consider the relevant statutory factors (*see* Executive Law § 259-i [2] [c] [A]), although it is not required to address each factor in its decision or accord all the factors equal weight. Whether the Parole

[45] NYSEF Doc. No. 44.

> Board considered the proper factors and followed the proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript." (Caselaw citations omitted; emphasis added)

Clearly, the Court may not substitute its judgment for that of the Board (Mtr. of Cowan v. Kern, 41 N.Y. 2d 591 [1977]).

While judicial review is narrow, it is not a rubber stamp. Rather, judicial review must be intellectually piercing and honest, necessarily assessing whether a Board's claimed compliance with the statutory review standards is genuine, or pretextual. Where record scrutiny evidences that the sole basis of the denial is the seriousness of the offense, or disproportionately based on community opposition, or based on the individual penal philosophy of the Commissioners, the denial will not stand (see Matter of Campbell v. Stanford, supra. at 1016; Matter of Banks v. Stanford, 159 A.D. 3d 134 [2d Dept. 2018]; Matter of Huntley v. Evans, 77 A.D. 3d 945 [2d Dept. 2010])).

In Matter of Pulliam v. Board of Parole Dept. of Corr. & Community Supervision, 197 A.D.3d 1495, 1496 [3d Dept. 2021], the defendant had been convicted of Murder in 1996, and sentenced to 25-years to life. Following his first appearance before the Parole Board in 2019, the Board's parole release denial was upheld at the trial level. On appeal, the Court affirmed, stating,

> "Contrary to petitioner's claim, the record reflects that respondent **considered the relevant statutory factors in reaching its determination, including the serious nature of petitioner's crime, his otherwise clean criminal record, his favorable prison disciplinary history, his program and educational accomplishments, his work assignments, his post release plans and his low score on the COMPAS Risk and Needs Assessment**. Moreover, respondent's concern that granting parole would **deprecate the seriousness of the crime is supported by petitioner's limited remorse and insight into his crime**. Although petitioner expressed remorse at the parole hearing, he stated that six months prior to the hearing **he was not**

> **even sure that he had committed the crime and he did not offer an explanation as to why he did it.** In view of the foregoing, we do not find that respondent's decision evinces "irrationality bordering on impropriety" (emphasis added; internal citations omitted).

In Matter of Pulliam, the statutory factors appeared favorable to the applicant, yet parole was denied. As a procedural matter, the applicant in Matter of Pulliam was making his first appearance before the Board, as distinguished from Petitioner herein who made his fifth Board appearance. Moreover, the applicant in Matter of Pulliam clearly lacked insight and remorse (see also Matter of Applegate v New York State Bd. of Parole, 164 A.D.3d 996 [3d Dept. 2018], where Court upheld parole release denial of applicant who had been convicted of the brutal Murder of a 22-year-old woman in 1989, sentenced to 26 ½ years to life, based, inter alia, on "his minimization of the crimes during the appearance.") In stark contrast, Petitioner has repeatedly expressed sorrow for Officer Byrne and his family and has never minimized the seriousness of the crime; at the same time, he has consistently asserted his actual innocence. The point made is that the merits of each case must stand on their own.

In a stunning case of first impression, in Matter of Ferrante v. Stanford, 172 A.D. 3d 31, 37 [2d Dept. 2019], the Court sustained a finding of civil contempt against the Board based on the manner it denied parole release. Defendant had been convicted of the murder of a police officer in 1975 and was sentenced to 25 years to life. Upon his 8th parole release application in 2014, he was 68 years old, and had already been incarcerated for 40 years. During his incarceration, he earned three (3) college degrees, had numerous commendations, assumed leadership positions, was assessed low for all risk factors, and had not had a disciplinary infraction since 1980. On appeal of the Article 78 proceeding, the Court cited the underlying history of the litigation,

> "In a judgment dated October 2, 2015, the Supreme Court, in effect, granted the petition and annulled the Board's determination. The Supreme Court concluded, inter alia, that the Board's **determination to deny parole release was not supported by an application of the factual record to the statutory factors** set forth in Executive Law § 259-i, that it was clear that the Board's determination was **based exclusively on the severity of the petitioner's offense, and that there was no rational support in the record for the Board's determination**. The Supreme Court **remitted** the matter to the Board "to make a ***de novo*** determination on petitioner's request for parole release" **to be held before a different panel of the Board.** The Board did not appeal from the Supreme Court's judgment." (id at 34) (emphasis added)

In 2015, the Board conducted a de novo review before a different panel, which denied parole release. Following a contempt hearing for a claimed violation of the judgment dated October 2, 2015 order, the trial Court held the Board in contempt, finding the denial, once again, was based solely on the underlying conviction. On appeal, the Court held, **"we agree with the Supreme Court's exercise of its discretion in granting the petitioner's motion to hold the [Parole Board] in civil contempt"** (Matter of Ferrante v. Stanford, supra. at 38).[46] (emphasis added)

DECISION TO DENY PAROLE RELEASE

In a 2-page decision, the Board denied parole release.[47] In the first paragraph of the decision, the Board wrote:

> "After a review of the record, interview, and deliberation, the Board has determined that your release would be incompatible with the welfare and safety of society and would be so deprecate the serious nature of the crime as to undermine respect for the law. Parole is denied."

[46] Needless to say, the Board's disregard of a Court Order, resulting in a contempt finding, constitutes an abrogation of its statutory obligation under Executive Law § 259-i. The defendant died during the ongoing proceeding – see NYSEF Doc. NO. 35 Amended Petition ¶ 81.

[47] NYSEF Doc. No. 3, p. 30-31 and NYSEF Doc. No. 36. Interestingly, the decision effectively mirrors the January 23, 2019 Board decision denying parole release, akin to a canned decision on file – see NYSEF Doc. No. 4, p. 35-36.

Frankly, that statement merely parrots the provision of Executive Law § 259-i (2) (c) (A), without reference to facts in the record to support the conclusion (see Matter of Rossakis v New York State Bd. of Parole, 146 A.D.3d 22 [1st Dept. 2016], where the Court held "we take the **unusual step** of affirming the annulment of a decision of respondent-appellant New York State Board of Parole denying parole" finding,

> "The Board **summarily listed petitioner's institutional achievements, and then denied parole with no further analysis of them**, in violation of the Executive Law's requirement that the reasons for denial not be given in "conclusory terms" (Executive Law § 259-i [2] [a]). Moreover, **the Board's decision began by stating that petitioner's release "would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." These statements came directly from the language of Executive Law § 259-i (2) (c), further violating the Executive Law's ban on the Board making conclusory assertions** (*see* Executive Law § 259-i [2] [a])"). (id at 23, 28) (emphasis added)

The Board then wrote,

> **"Required statutory factors have been considered**, together with your institutional adjustment, including discipline and program participation, your Risk and Needs Assessment and your needs for successful reentry into the community. Also considered are letters of support for your release and letters or statements opposed."

There is no question that the Board reviewed the statutory factors, noting, for example that it did not agree with the high score for prison misconduct. (see Matter of Schendel v. Stanford, 185 A.D. 3d 1365, 1366 [3d Dept. 2020]) This Court is unable to discern, however, the Board's basis to determine Petitioner's release would be incompatible with the welfare and safety of society and would deprecate the serious nature of the crime as to undermine respect for the law, where, as here, the record continues to evidence Petitioner's risk of re-offense is low, he is program satisfied, his overall conduct in prison for the last 31 years has been good, and he will have

family support on release. [48] There comes a point in time when general conclusory language must give way to articulated facts to support a Board's determination. The time is now! Executive Law § 259-i (2) (a) (i) requires that "**reasons shall be given in detail and not in conclusory terms,**" yet the Board utterly failed to do so. (emphasis added)

Next, the Board wrote,

> "**More compelling** however, are the following: Your serious IOs of murder second and CPW second degrees which involved you and your co-defendants causing the death of a police officer, officer Edward Byrne, while he sat in his patrol car. It is stated in the record that this act was committed as retaliation against law enforcement from a drug dealing organization and it's leader. In fact, a further aggravating factor is that officer Byrne was guarding the home of a witness because of this organization, one that you admit being a part of…"

The Board is permitted to place emphasis on the seriousness of the underlying crime (Matter of Schendel v. Stanford, supra. at 1366). The Board is not, however, permitted to deny parole release based solely on the seriousness of the crime (Matter of Ferrante v. Stanford, supra. at 37). Clearly, if the Board were permitted to limit its analysis to the seriousness of the crime, that would constitute an abrogation of its duty to genuinely assess the other statutory factors. (see Matter of Rossakis v New York State Bd. of Parole, supra. at 27, where the Court found,

> The Board focused exclusively on the seriousness of petitioner's conviction and the decedent's family's victim impact statements (which it incorrectly described as "community opposition to her release") without giving **genuine consideration** to petitioner's remorse, institutional achievements, release plan, and her lack of any prior violent criminal history.")

[48] See NYSEF Doc. NO. 35 Amended Petition ¶ 39.

The grant of unfettered discretion to focus on the seriousness of the crime would effectuate a life sentence without parole, in derogation of the legislative intent to set the maximum sentence at 25-years to Life.[49]

Next, the Board wrote,

> The **Board notes your positive programming and relatively clean disciplinary record since 2000, despite your Tier II ticket March of this year**. However, discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. **Also weighed and considered are the results of your Risk and Needs Assessment and the low scores indicated therein.** As discussed during your interview, your **claim of innocence** was also considered. **However,** the Board does not intent to, nor have the authority to, undermine the jury's verdict. **In playing a role in the murder of Officer Byrne you demonstrated a callous disregard for human life and a complete lack of respect for the-law."** (emphasis added)

Once again, the Board circles back to the seriousness of the crime in the exercise of its discretion (see Matter of Montane v. Evans, 116 A.D.3d 197, 203-204 [3d Dept. 2014], where the Court held,

> "The Board need not enumerate, give equal weight or explicitly discuss every factor considered **and was entitled, as it did here, to place a greater emphasis on the gravity of his crime**. As the Board's decision **does not exhibit irrationality bordering on**

[49] Respondent has asserted an untenable and one-dimensional position, to wit: "The Legislature has spoken clearly: a "defendant must be sentenced to life imprisonment without parole upon conviction of the crime of" killing a police officer. P.L. § 70.70(5) (incorporating P.L. § 125.26); see also P.L. § 125.26(1)(a) ("the intended victim was a police officer . . . who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known the victim was a police officer"). By Petitioner's own rationale, to the extent that the Board considered any philosophy that Petitioner should never be released, they were considering the wishes of the society as expressed by the Legislature." (See NYSEF Doc. No. 66, Respondent's Memo of Law p. 10-11, 12-13 of 18). The fact is that Petitioner was not sentenced to Life in Prison Without Parole. The issue of parole release must be considered in context of the actual sentence of 25 years to Life, which, of course, necessitates an intellectually honest and genuine consideration of parole release within the statutory and regulatory structure.

> **impropriety, it must be upheld**." (internal quotations and citations omitted; emphasis added)

Bearing in mind that the statutory and regulatory framework requires fundamental fairness, the true question is whether the Board's exercise of its discretion has been disproportionately impacted by personal and political pressure from the community, including police community, as well as undue deference to the over-personalized comments of the sentencing Judge, more fully discussed below.

ADMINISTRATIVE APPEAL

Petitioner filed an administrative appeal.[50] The decision to deny parole release was affirmed on June 10, 2021.[51] The appellate decision consists of encyclopedic references to case citations and general principles, is devoid of any analytical assessment of the record, and is couched in wholly conclusory form, all in derogation of the Board's obligation under Executive Law § 259-i (2) (a) (i).

JUDGE DEMAKOS

Based on the multiple references to Judge Demakos's comments set forth above, and the Board's corresponding deference, it is manifest that Judge Demakos' over personalized and vindictive comments continue to stand like a dark cloud undermining the integrity of the underlying proceedings.[52]

The Board's 2020 reference to Judge Demakos has precedent. Apart from his comments at sentencing, Judge Demakos submitted letters dated February 22, 1995 and October 2, 2012, in which he recommended Petitioner **"never be paroled"** and **"I repeat, never, never, never,**

[50] NYSEF Doc. No. 74.
[51] NYSEF Doc. No. 11 and 44.
[52] See NYSEF Doc. No. 72 – Letter of Frank J. Hancock (Petitioner's Trial Counsel) dated February 18, 1995 who described Judge Demakos,"a former career prosecutor he had served as Chief Assistant district Attorney, in the very office of the prosecution."

never parole them," respectively.[53] During the 2012 interview, the Commissioner referred to Judge Demakos' sentencing statements 3 times.[54] During the 2017 interview, the Commissioner referred Judge Demakos tearing into Petitioner.[55]

Clearly, a sentencing judge has the right to make relevant comments at sentencing, and to submit letters to the Parole Board. Here, however, the judge's comments strike an unusually personal and vindictive note (see People v. Lancaster, 2021 N.Y. App. Div. LEXIS 7085, p. 10 [3d Dept. 12/16/21]), where the Court reduced as 20-year sentence to 12-years, citing the Judges' remarks at sentencing that "**include vindictive commentary revealing he over-personalized this case"**).[56] (emphasis added)

It is undeniable that Judge Demakos comments were also made without the benefit of having and assessing all the facts that accrued from 1989 to 2020. Moreover, Judge Demakos' comments run afoul of the risk and needs principles that the Board was required to incorporate into the decision-making process (Executive Law 259-c (4); 9 NYCRR§ 8002.2 (a)). Last, Judge Demakos' personal penal philosophy (i.e., never, never, never, never, grant parole) is not a considered factor in making the release determination (see In Re King v. New York State Div. of Parole, 83 N.Y. 2d 788, 791 [1994], where the Court held, inter alia:

> "There is evidence in the record that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute, **including penal philosophy,** the historical treatment of individuals convicted of

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[53] See NYSEF Doc. No. 72.
[54] NYSEF Doc. No. 15, p.4, line 2-3; p.7, line 4 – p. 8, line 4 -specific reference to Judge Demakos recommending no parole; p. 15, line 15 – referencing letter from the Judge.
[55] NYSEF Doc. No. 17, p. 18-19, where the Commissioner noted: "I mean, not a secret, the judge tore into you." He then referenced the Judge's comments, to wit: "This was an assassination of a deliberate premeditated intentional act to kill a cop…There is no doubt of the three Copeland was the worst… And finally[,] **what I can and will do is promise you that I intend to make a recommendation to the parole board that you are never to be paroled. I know I will no longer be sitting on the bench 25 years from now, but rest assured my last judicial function before I retire from the judiciary will be to write a letter to the parole board**." (emphasis added)
[56] The Judge's over personalized efforts to make sure Petitioner never be paroled is manifested by the fact that he wrote his October 2, 2012 letter as a "Retired" Justice.

> murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law § 259-i).

In this Court's view, the Board's continued citation to Judge Demakos' over personalized and vindictive comments is not a substitute for its obligation to genuinely assess all the statutory factors relative to a parole application, and evinces an arbitrary and capricious predisposition to deny parole.[57]

COMMISSIONER SMITH

Petitioner alleges that Commissioner Smith donated eight (8) times to the election campaign of Senator Patrick Gallivan, who is a strong advocate against parole release for anyone convicted of killing a police officer.[58] Petitioner also alleges that Commissioner Smith has never voted to grant parole release to anyone convicted of killing a police officer.[59] Significantly, Petitioner also alleges that Commissioner Smith voted in the 2015 and 2016 de novo reviews and release denials of John McKenzie, the subject of the contempt finding in Matter of Ferrante v. Stanford, supra.[60] Clearly, Respondent has access to Commissioner Smith's voting record as part of its own records. Political contributions are public records maintained by the Board of Elections, and Respondent also has access to same, not to mention they could have reviewed the allegation with Commissioner Smith. Respondent had access to information that would have enabled it to either deny or admit the foregoing allegations yet chose not to do so. The Court finds that Respondent's election to interpose generic responses (i.e., denying sufficient

[57] NYSEF Doc. No. 35 Amended Petition ¶ 5 (b).
[58] NYSEF Doc. No. 35 Amended Petition ¶ 61-72. In the Answer, Respondents denied sufficient knowledge or information to form a belief relative to these allegations – See NYSEF Doc. No. 65 – Answer ¶ 10.
[59] NYSEF Doc. No. 35 Amended Petition ¶ 73. In the Answer, Respondents denied sufficient knowledge or information to form a belief relative to these allegations – See NYSEF Doc. No. 65 – Answer ¶ 10.
[60] NYSEF Doc. No. 35 Amended Petition ¶ 73-81; NYSEF Doc. No. 56 and 57. In the Answer, Respondents denied sufficient knowledge or information to form a belief relative to these allegations – See NYSEF Doc. No. 65 – Answer ¶ 10.

knowledge or information to form a belief relative to the allegations) evinces a lack of good faith (New York Practice, 6th Ed. Siegel and Connors, § 221, p. 416).

The Court took judicial notice of the relevant campaign finance statements maintained by the Board of Elections, which indicated Commissioner Smith's contributions to the Senator Gallivan Campaign, to wit: $500.00 in 2010; $99.00 in 2012; $99.00 in 2015; $500.00 in 2018; $500.00 in 2019; Two (2) donations in the sum of $500.00 and $1,000.00, a total of $1,500.00 in 2020. It is manifest that a clear appearance of an impropriety, at a minimum, arises out of Commissioner Smith's donations to Senator Gallivan, while contemporaneously serving on the Board hearing parole release applications of individuals, including Petitioner, convicted of killing a police officer (People ex rel. Pyclik v. Smith, 81 A.D. 2d 1016 [4th Dept. 1981], where the Court ordered a new parole hearing, finding, inter alia: "it is not necessary to decide whether the revocation hearing was affected by actual prejudice inasmuch as even the appearance of impropriety should be avoided"). The record supports a reasoned inference that Commissioner Smith injected his personal and political views to deny the subject release application, in disregard of the requisite statutory criteria, and his undisclosed conflict-of-interest undermined Petitioner's due process right to a fair hearing. [61]

HIGH PROFILE MEDIA CASE

At the interview, Commissioner Coppola stated, "It's a **highly charged and media case, there's no doubt about that**."[62] (emphasis added) He also stated, "Your case is what we would consider for lack of a better term **high profile** and this is not a secret. You have support for your

[61] NYSEF Doc. No. 35 Amended Petition ¶ 83-88, 95. Since the record is sufficient for the Court to make a merits determination, the Court declines to conduct an evidentiary hearing pursuant to CPLR §7804 (h).
[62] NYSEF Doc. No. 3, p. 8, Line 2-3.

release and significant opposition…It's never been a secret for you."[63] (emphasis added) Since the record lacks any assessment or explanation of how Petitioner's release would be incompatible with the welfare and safety of society and would so deprecate the serious nature of the crime as to undermine respect for the law, in context of the statutory factors, the reasoned inference is that Board reacted to the "high profile" and "media" nature of the case, rendering denial a foregone conclusion.

RISK AND NEEDS PRINCIPLES

Clearly, the risk assessment evidenced that Petitioner is a low risk of re-offense.[64]Moreover, as set forth above, Commissioner Coppola recognized that Petitioner was **"program satisfied," "everything [i.e., risk] is low and unlikely"** and **"its obvious that your misconduct is not high."** (emphasis added) Yet, the Board denied parole release, without setting forth any specific facts for its departure from the risk assessment (Executive Law 259-c (4); 9 NYCRR§ 8002.2 (a)). The reasoned inference to draw from this failure is that the Board engaged in a tragically myopic focus on the seriousness of the crime, due to its undue deference to the penal philosophy of Judge Demakos and Commissioner Smith (evidenced by his campaign donations to Senator Gallivan), and opposition from the police community.

[63] NYSEF Doc. No. 3, p. 24, line 13-14.

[64] NYSEF Doc. No. 6.

CONCLUSION

For the reasons more fully stated above, it is the finding of the Court that that the Board acted with irrationality bordering on impropriety and therefore arbitrarily and capriciously when it denied petitioner parole, and the Petition is Granted, and it is further,

ORDERED, ADJUDGED, AND DECREED, that (1) the Board shall schedule a new parole hearing for petitioner to take place within 60 days of the issuance of this decision before a board of Commissioners who have not sat on his previous hearings; and (2) the Commissioners shall render a decision on the new hearing within 30 days from its completion.

This memorandum constitutes the decision, order, and judgment of the Court.

Dated: Albany, New York
February 1, 2022

Peter A. Lynch

PETER A. LYNCH, J.S.C.

02/01/2022

PAPERS CONSIDERED:
All e-filed Pleadings and exhibits, as well as in Camera Submissions referenced in NYSEF Doc. Nos. 69, 70, 79 and 80.

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