SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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ANTHONY BOTTOM

Petitioner,

-against-

DEPARTMENT OF CORRECTIONAL SERVICES AND COMMUNITY SUPERVISION, BOARD OF PAROLE

Respondent.

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MEMORANDUM OF LAW IN SUPPORT OF PETITION PURSUANT TO CPLR ARTICLE 78

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ARGUMENT

THE PANEL'S DETERMINATION SHOULD BE ANNULLED AND A NEW HEARING ORDERED.

i. Standards Governing Parole

The Parole Board's release decisions are governed by Executive Law 259-i(c). That section provides, in relevant part, as follows:

> (c)(A) 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 inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.

In making the §259-i determination, the Board must consider the factors delineated in Exec. Law 259-i(c)(A). They are i) the institutional record and achievements of the inmate including any therapy, ii) performance, if any, in a temporary release program, iii) the release plan, iv) any deportation order, v) statements by the crime victim(s) and/or their lawful representative vi) if the provisions of P.L. §§70.70 or 70.71 apply, the length of any comparable determinate sentence, vii) the seriousness of the offense with due consideration to various recommendations and viii) the inmate's prior criminal record.

Effective in 2010, the procedures utilized by the Panel must incorporate the COMPAS factors. The Board

> 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 inmates may be released to parole supervision.

Executive Law 259-c (4).

ii. Judicial Review

The Parole Board is vested with discretion to grant or deny parole release. The Board decides how much weight to give each of the factors set forth in the Executive Law. *Phillips v. Dennison*, 41 A.D.3d 17 (1st Dept. 2007). When rendering a decision, the Board need not discuss each of the factors, *Walker v. Travis*, 252 A.D.2d 360 (3rd Dept. 1998), but its decision cannot be given in conclusory terms. Exec.Law §259-i(2)(a); *Wallman v. Travis*, 18 A.D.3d 304 (1st Dept. 2005). The Board's decision on the merits must be set aside if it was the result of "irrationality bordering on impropriety". *Russo v. New York State Board of Parole*, 50 N.Y.2d 69 (1980).

While accorded considerable deference, the Parole Board's discretion is not unlimited. A parole board cannot base its decision to deny parole solely on the serious nature of the underlying crime. *Perfetto v. Evans*, 112 A.D.3d 640, 641 (2nd Dept. 2013); *King v. New York State Division of Parole*, 190 A.D.2d 423 (1st Dept. 1993), *aff'd.* 83 N.Y.2d 788; *Cappielo v. NYS Board of Parole*, 800 N.Y.S.2d 343 (NY Co. 2004); *Morris v. NYS Dept. of Corr. And Community Supervision*, 963 N.Y.S. 2d 852 (Col. Co. 2013); *Almonor v. NYS Division of Parole* 847 N.Y.S.2d 900 (N.Y.Co. 2007). In addition, while the board can decide what weight to place on each of the statutory factors and need not mention each one, it still must consider each of the factors. Exec.Law §259-1(2)(a). *West v. NYS Board of Parole*, 980 N.Y.S. 2d 279 (Albany Co. 2013). *See also Matter of Rossakis*, A.D.3d (1st Dept. 2016) N.Y.L.J. 11/10/2016 (ordering new parole hearing where board failed to give "genuine" consideration to statutory factors other than seriousness of the crime). A decision to deny parole cannot based on erroneous information. *Matter of Phez v. Travis*, 17 A.D.3d 879, 880 (3rd Dept. 2005); *Matter of Lewis v. Travis*, 9 A.D.3d 800, 801 (3rd Dept. 2005). The Parole Board also may not consider factors outside the

scope of the statute. *Matter of Quartararo*, 224 A.D.2d 266 (1st Dept. 1996). This includes the Commissioners' own penal philosophy. *King v. New York State Division of Parole* 83 N.Y.2d at 791 ("the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder but to determine whether, as of this moment, given all the relevant statutory factors, he should be released."). Finally, a parole board may not retry an inmate, harass, badger or argue with an inmate, second guess the findings of competent experts at the inmate's trial, or infuse their personal beliefs into the proceedings. *King v. New York State Division of Parole*, 190 A.D.2d at 432.

The Panel's decision in the instant case violated several of the foregoing principles. First, the Panel's decision to deny parole was based solely on the seriousness of the offense. Second, Commissioner Sharkey and Coppola's questioning was argumentative, badgering, and biased. Third, the Panel considered prohibited factors in relying on purported community opposition to Mr. Bottom's release.

iii The Panel's Based Its Decision Solely on The Seriousness of The Offense and Failed to Give Genuine Consideration to The Other Statutory Factors.

Over a decade ago, the Parole board received an "exceptional submission" from slain police officer Waverly Jones' son; "a compelling victim impact statement which *advocates* for the release of the prospective parolee." (*Bottom v NY State Bd. of Parole*, 30 AD3d 657, 659 [3rd Dept 2006], emphasis in original). Mr. Bottom's 2016 submissions to the parole board contained a letter from Waverly Jones Jr. reflecting on his 2004 submission and noting that Mr. Bottom's continued incarceration "simply serves no purpose" and that "[n]othing would please us more than to hear that release on parole has been granted. (Petition, Ex. 2). This remarkable submission along with Mr. Bottom's favorable COMPAS score and his impressive array of

accomplishment have all been ignored by a Parole Board myopically focused on the instant offense.

In his now over 45 years incarceration, Anthony Bottom has amassed an extraordinary list of accomplishments. Among them are two Bachelor's Degrees, extensive institutional program achievements, and productive literary and volunteer work above and beyond what many accomplish inside or out of prison. He has earned the respect and support of elected officials, hundreds of visitors, and various members of the community. These include Archbishop Desmond Tutu, New York Assemblyman Charles Barron, and multiple members of the San Francisco Board of Supervisors. He has accepted responsibility for the deaths of Waverly Jones and Joseph Piagentini. He understands that his political beliefs did not and could not justify his actions. As he stated in his written statement to the Parole Board:

> I was arrested on August 28th, 1971 in San Francisco, California, when I was 19 years old for the murder of officers Waverly Jones and Joseph Piagentini. I am deeply remorseful about the loss of these officers' lives and the suffering my actions caused to their families.

(Personal Statement, Ex. 3)

In its Decision, the Panel made a determination "that there is a reasonable probability that [Mr. Bottom] would not live and remain at liberty without again violating the law." The Panel further claimed that it "considered" Mr. Bottom's positive accomplishments. This "reasonable" determination is not backed up with reasoning and the "consideration" given is not a genuine evaluation so much a rote repetition of statutory factors. The panel concludes with its sole consideration, the seriousness of the offence, stating that the "panel remains concerned about [Mr. Bottom's] history of unlawful and violent conduct and [his] COMPAS risk assessment of high for *history of violence*." (PH 22, emphasis added). This concern (for a history that cannot change) is functionally indistinguishable from a re-sentencing. When the Parole Board's decision

is viewed in the context of Mr. Bottom's list of accomplishments, release plan, low-risk COMPAS assessment, his current age, his age when originally incarcerated, his expressions of remorse, and his insight into his criminal actions, one thing is clear: In the Parole Board's opinion no set of positive factors will ever overcome the seriousness of the crime—his 25 to life sentence is thus a *de facto* sentence of life without parole. A result that not only inflicts injustice on Mr. Bottom, but undermines the independence of the judiciary by overtaking rather than faithfully executing a judicial determination. This power is beyond the Parole Board's statutory authority. *Matter of Rossakis*, A.D.3d (1st Dept. 2016) N.Y.L.J. 11/10/2016 (ordering new parole hearing where board failed to give "genuine" consideration to statutory factors and focused too intently on seriousness of the offense). *Perfetto v. Evans*, 112 A.D.3d at 641; *King v. New York State Division of Parole*, 190 A.D.2d 423 (1st Dept. 1993), *aff'd.* 83 N.Y.2d 788; *Cappielo v. NYS Board of Parole*, 800 N.Y.S.2d 343 (NY Co. 2004); *Morris v. NYS Dept. of Corr. And Community Supervision*, 963 N.Y.S. 2d 852 (Col. Co. 2013); *Almonor v. NYS Division of Parole* 847 N.Y.S.2d 900 (N.Y.Co. 2007).

Parole denial for Mr. Bottom has now become systematic and his hearings' results a foregone conclusion. The Decisions of the Panels in 2009, 2010, 2012, 2014 and 2016 are illustrative. Their remarkable similarity reveal a mind-set that will never result in a decision to grant parole release:

> 2009 Decision
>
> Parole denied. Following careful review and deliberation of your record and interview, this panel concludes that discretionary release is not presently warranted due to concern for the public's safety and welfare. The following factors were properly weighed and considered: Your instant offenses in Manhattan in May 1971. Involved you and a codefendant fatally shooting two New York City police officers. Your criminal history indicates you have a conspiracy related conviction in California. Your institutional

programming indicates progress and achievement, which is noted to your credit. Your disciplinary record indicates one Tier II report. Your discretionary release at this time would thus not be compatible with the welfare of society at large and would tend to deprecate the seriousness of the instant offenses and undermine respect for the law. (Commissioners concur.)

2010 Decision

Parole is denied. After a careful review of your record, your personal interview, and due deliberation, it is the determination of this panel that, if released at this time, there is a reasonable probability that you would not live at liberty without violating the law, your release at this time is incompatible with the welfare of the community and will so deprecate the seriousness of this crime as to undermine respect for law. The decision is based on the following factors. You appear before this panel with the serious instant offense of murder (two counts) wherein you, acting in concert, killed 2 police officers in what appears to be a premeditated act. One police officer was shot in the back of the head. This was a cowardly, heinous crime in which you took advantage of 2 peace officers who were in a vulnerable position. Consideration has been given to any program completion and any satisfactory behavior, as well as all statutory requirement, however, parole is denied.

August 2012 Decision (*de novo* rehearing)

Denied 24 months; next appearance 6/2012. After a personal interview, record review and deliberation, this Panel finds your release is incompatible with the public safety and welfare of the community and would so deprecate the serous nature of the crime as to undermine respect for the law. Your criminal record reflects prior unlawful behavior. Your crime was brutal and a senseless killing of police officers. Your actions exhibited a depraved indifference to human life. The Panel notes your programming, educations achievements, release plans and several letters of support and your good disciplinary record; however, despite these accomplishments, when considering all relevant factors, discretionary release is not warranted. (All Commissioners concur.)

September 2012 Decision (*de novo* rehearing)

Denied 24 months; next appearance June 2014. This Panel has concluded that your release to supervision is not compatible with the welfare of society and therefore parole is denied. This finding is made following a personal interview, record review and deliberation. Of significant concern is the clear intent you displayed during the instant offenses of murder; where you obtained and ultimately used a firearm to kill a police officer. Positive factors considered include your program accomplishments, letters of support, document submissions and parole plans. In addition, your instant offense involved an in-concert actions where two police officers were killed. Your denial of responsibility to past Parole Panels that you admit were lies are of great concern. Your attempts to deflect responsibility for your statements are noted. To grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law. Required statutory factors have been considered, including your risk to the community, rehabilitation efforts and your needs for successful community reintegration. (All Commissioners concur).

2014 Decision

Denied twenty-four months next; appearance June 2016. Commissioner Halderin respectfully dissents. Parole denied. After a persona interview and record review and deliberation, this Panel finds that your release is incompatible with the public safety and welfare. You continue to serve a sentence for an in concert crime where two police officers were shot and killed. You admit to firing a weapon during the crime. Other unlawful actions resulted in what you indicate led to a probation, as well as a period in California State prison. Your instant offenses led to your only New York State prison term. Your receipt of a Tier 3 disciplinary violation in February of 2013 is noted. You have multiple prior disciplinary violations during this term and your risk, because of prison misconduct, is scored as "high". Required statutory factors have been considered, including your risk to the community, rehabilitation efforts and your needs for successful community reintegration. Your document submissions, program accomplishments and letters from defense attorneys and official sources were noted. You have good financial and employment expectation is also noted in those low risk scores. While you have accepted responsibility for what occurred, your more specific responsibility is deemed as positive. Your June 13, 2014 addendum was considered but fails to mention the August 1st, 2006 Parole Board interview (Page 5) and the September 18th, 2011, Parole Board interview (Pages 19 through 21). When all factors are considered, it is determined that release at this time would deprecate

the seriousness of your instant offense and undermine respect for the law, You need to improve your behavior in order to demonstrate your ability to comply with rules, which will be necessary when in the community. (Commissioner Smith and Commissioner Sharkey concur.) (Commissioner Hallerdin dissents.)

2016 Decision

Denied 24 months. Next appearance June 2018. After a review of the record and interview, the panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your 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. The panel has considered your institutional adjustment including discipline and program participation. Required statutory factors have been considered, including your risk to society, rehabilitation efforts, and your needs for successful reentry into the community. Your release plans have also been considered, as well as your COMPAS Risk and Needs Assessment, Case Plan, and Sentencing Minutes which are in the file. Your instant offense murder (two counts) involved you acting in concert shooting and killing two police officers. You admitted firing a weapon during the crime. You have engaged in other unlawful actions which resulted in probation and serving state time in California state prison. You are a multistate offender with offenses committed in California as well as New York. You also have a juvenile history and a conviction in the Federal System. Due consideration was given to your document submissions, program accomplishments, and letters of support from defense attorneys and official sources and program completions. Due consideration was given to a packet of National Lawyers Guild. This panel remains concerned about your history of of unlawful and violent conduct and your COMPAS risk assessment of high for history of violence. Your conduct which could be viewed as an assassination of two unsuspecting police officers who are merely walking toward their cars reflects a depraved indifference to human life. There is significant community opposition to your release. You also expressed limited remorse for the death of two police officers who are merely doing their jobs. Accordingly, discretionary at this time is not warranted. Parole is denied.

Denial of parole was a foregone conclusion. At each decision contains a section where the Panels simply mouth the statutory factors and a section where the offense is then described in

virtually identical detail with the Panels adding their own characterization of it ("cowardly", "depraved", "brutal"). They then list Mr. Bottom's criminal history, a factor that will never change. There is a brief interlude in the 2014 panel where the Panel seems to rely on a disciplinary infraction rather than the nature of the offense, ending their decision with what appears to be a clear instruction on how Mr. Bottom might gain release, "You need to improve your behavior in order to demonstrate your ability to comply with rules, which will be necessary when in the community." However, this instruction is proven to be meaningless by the 2016 Panel. The 2016 panel fails to even acknowledge Mr. Bottom's clean disciplinary record since the instruction was given.

The seriousness of the offense is a static, backward-looking factor. All of the forward-looking factors in Mr. Bottom's case, are positive. Mr. Bottom has a low COMPAS risk assessment. He has amassed an extraordinary list of accomplishments. He has received hundreds of visitors and maintains deep contact with outside communities. He has received accolades from his prison supervisors, performed extensive volunteer work, and earned the respect and admiration of notables in society. He has the support of his family and a solid release plan. He is now an elder, a group with the lowest risk of recidivism. He has acknowledged responsibility, expressed remorse, and has even been forgiven by the son of his victim.

Because it is a fact that can never change court have recognized that the "seriousness of the offense" can be the sole basis for denying parole only where there are "some aggravating circumstances beyond the inherent seriousness of the crime itself." *King v. New York State Division of Parole*, 190 A.D.2d 423, 433 (1st Dept. 1993), *aff'd.* 83 N.Y.2d 788 (1994). There were no such aggravating factors here.

Of course, every murder is of utmost seriousness. But the Legislature has determined that a conviction, even where the victim is a police officer, does not preclude parole. Over time, in this case where Mr. Bottom has been incarcerate since 1971, it should play little role in determining whether to grant parole release. For Mr. Bottom, however, it has become the *only* basis upon which the Board has relied. Mr. Bottom's release to parole supervision, at 65 years old and after having served over 45 years in prison would not, as the Panel found, "deprecate" the seriousness of the offense. That determination was arbitrary and capricious and should be annulled.

iv. The Panel Improperly Considered Letters Solicited By Law Enforcement Lobbying Organizations Containing Erroneous Information.

The Parole Board's dubious over-reliance on the seriousness of the offense is counterpoised with and equally unconvincing inflation of "statements by the crime victim." The Board has allowed this valid, narrow, consideration to become a broad, public referendum as demonstrated by the fact that Board' decisions fail to ever mention the support Mr. Bottom has received from the family of officer Waverly Jones, while regularly referring to the non-statutory "community opposition" that Mr. Bottom faces in their decision.

A significant part of Mr. Bottom's 2016 hearing was spent discussing the relative merits of letters written by individuals in support an in opposition to parole release. The board noted in its decision that "there is significant community opposition to your release." Consideration of these "letters" opposing Mr. Bottom's release was improper and warrants that a new hearing be ordered.

"Community opposition" to an inmate's release is not a factor set forth in Exec.Law §259-i. Accordingly, it should not have played a role in the Panel's decision. *Matter of*

Quartararo, 224 A.D.2d 266 (1st Dept. 1996). Moreover, even if the letters were properly before the Board, they should not have been considered without giving Mr. Bottom an opportunity to review them. It is not known whether they contained false or otherwise erroneous information about Mr. Bottom, his history, or the facts of the case. Where erroneous information is submitted and might have played a role in a parole decision, a new hearing is mandated. *Matter of Plevy v. Travis*, 17 A.D.3d 879, 880 (3rd Dept. 2005) (relying in part on expunged probation violation required new hearing); *Matter of Lewis v. Travis*, 9 A.D.3d 800, 801 (3rd Dept. 2004) (erroneously referring to conviction as murder in first degree rather than murder in second degree warrants new hearing); *See also Flores v. Dennison*, 25 A.D.3d 864 (3rd Dept. 2006)(submission of erroneous information harmless where it was corrected on the record prior to decision being rendered).

Moreover, these letters were not simply from members of the "community" at large or people who know Mr. Bottom. They were likely generated by police associations. Such organizations take the position that those convicted of killing law enforcement officers should never be released. At least three organizations, Officer Down Memorial Project, the New York City and Buffalo Patrolman's Benevolent Association (PBA) participated in public campaigns to prevent Mr. Bottom's release. At a January 2014 press conference Patrick Lynch, president of the New York City PBA declared "there is not now, nor will there ever be any justification for granting [co-defendant] Bell and Bottom parole". PBA press releases and facebook pages contained links to assist people in writing letters to the parole board opposing Mr. Bottom's release. (Petition, Ex. 7).

Furthermore, Commissioner Coppola is a former sheriff, was likely a PBA member, and may currently remain an alumni association member. Commissioner Coppola has also received thousands of dollars in donation from the PBA for his multiple State Senate campaigns.

Clearly, the Parole Board is not exercising its independent judgment. It is being intimidated by the PBA's campaign to prevent Mr. Bottom's release. The Board is no doubt afraid that should they properly apply the statutory factors and order release to parole supervision, the Board itself would be subjected to the PBA's wrath. This is an improper basis upon which the deny parole. *Matter of Quartararo*, *supra*.

CONCLUSION

Wherefore, for all the foregoing reasons, this Court should issue an order vacating the decision denying Mr. Bottom parole release and ordering his immediate release on parole or alternatively a new hearing and granting such other and further relief as this Court deems just and proper.

Dated: Brooklyn, New York
April 10, 2017

Respectfully submitted,

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