Patrolmen's Benevolent Association
Of The City Of New York, Incorporated

BEFORE THE NEW YORK STATE SENATE
STANDING COMMITTEE ON CRIME VICTIMS, CRIME AND CORRECTIONS
STANDING COMMITTEE ON ELECTIONS

Public Hearing on the review of standards in the granting of parole and the issuance of conditional pardons related to voting rights
Monday, October 1, 2018, 12:00 pm
Hearing Room B
Legislative Office Building
198 State St., 2nd Floor
Albany, NY 12210

STATEMENT OF PATRICK J. LYNCH, PRESIDENT OF THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK

Good afternoon, Senator Gallivan, Senator Akshar and Senate committee members. Thank you for the opportunity to provide testimony on this very important issue.

As you know, our union represents more than 24,000 rank-and-file members of the New York City Police Department. They are the women and men who patrol New York City's streets and do the difficult and dangerous work of protecting every resident and every visitor within the five boroughs.

As law enforcement professionals, we recognize that the judicious granting of parole release to certain offenders is not only necessary for the efficient operation of our criminal justice system — it is essential to the principles of fairness and justice on which that system is founded.

However, like all discretionary aspects of criminal justice, the parole system requires clear, well-considered guidelines and strong institutional controls in order to successfully balance individual rights with public protection. Without such guidelines and controls, the parole system will become plagued with dysfunction, error and arbitrariness in its decision-making and, ultimately, with outright abuse that jeopardizes public safety and undermines respect for the law.

Unfortunately, recent events suggest we have reached that point in the State of New York.

In particular, the New York State Board of Parole (hereinafter "the Parole Board" or "the Board") has, on multiple occasions over the past year, made the unconscionable decision to grant parole release to individuals convicted of murdering police officers or other members of law enforcement in the performance of their duties.

The murder of a police officer is one of the most serious offenses against the people of our state, because it represents not only the taking of a life, but also an attack on the rule of law and our society as a whole. That understanding was reflected in the Crimes Against Police Act of 2005[1], which created the offense of aggravated murder[2] of police officers or certain other public safety professionals in the performance of their duties, punishable by life imprisonment without parole.

While this law ensured that post-2005 cop-killers would receive sentences commensurate with their crimes, those convicted of murders pre-dating its enactment are currently serving sentences that allow for parole release. Over the past 20 years, as increasing numbers of these individuals have completed their minimum sentences and become eligible for parole consideration, the PBA and its thousands of members have made opposing their release a significant priority.

We have assisted the families of fallen police officers in delivering their victim impact statements, conducted media campaigns to educate New Yorkers about the offenders and the brutal nature of their crimes, and urged the public to contact the Parole Board and express their opposition to the parole of specific criminals and the parole of cop-killers, in particular.

This has been a focused and ongoing effort, especially for the families of the victims, who are forced to relive their pain and loss every two years when their loved one's killer once again appears before the Parole Board. Until recently and with rare exceptions, the Parole Board routinely denied cop-killers' requests for parole because of this public pressure.

That practice appeared to change suddenly and dramatically in March of this year, when a Parole Board panel voted to release Herman Bell, who was convicted of the brutal 1971 ambush assassination of New York City Police Officers Waverly Jones and Joseph Piagentini, and who later pled guilty to his involvement in the assassination of a San Francisco Police Department sergeant that same year.

Bell's release shocked the conscience of law enforcement and law-abiding New Yorkers, because his crimes are especially abhorrent even forty-seven years later. These were not crimes of passion or acts of desperation — they were premeditated and brutal terrorist attacks intended to tear at the fabric of our society. Nor was Bell involved accidentally or collaterally — he held the gun, pulled the trigger, and left not one but three families grieving for a husband, a father, a brother or a son who would never return. For nearly 40 years after the incident, Bell repeatedly and consistently refused to take responsibility for his actions. It was only during his most recent appearances before the Parole Board that Bell suddenly began to express remorse and sympathy for his victims' families, with statements tailor-made to sway the Board in favor of his release.

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[1] Chap.765 of the Laws of 2005

[2] Penal Law § 125.26

On seven previous occasions, Parole Board panels had considered the facts and circumstances of Bell's crimes and rightly concluded that his release would be "incompatible with the welfare of society" and would "so deprecate the seriousness of his crime as to undermine respect for the law."[3] Nonetheless, the current panel disregarded these consistent findings and the very basic statutory standards for considering parole, including the statutory requirement that it obtain and review the original sentencing minutes in the case.[4] Instead the board's decision was premised and disproportionately relied upon "the redemptive and restorative values intrinsic to our criminal justice system,"[5] which is a single factor added in recent revisions to the parole guidelines.

Had the panel reviewed Bell's sentencing minutes as required, they would have learned that one of the defense attorneys in the case stated that Bell and his co-defendants were so bent on overthrowing our society as to make them "beyond rehabilitation."[6] They would have learned that the sentencing judge, noting the then-recent U.S. Supreme Court decision in *Furman v. Georgia* to invalidate all existing capital punishment statutes,[7] compared those statutes to the actions of Bell and his accomplices, who "although they are spared the risks of capital punishment, had no aversion to inflicting capital punishment upon others in a fashion which was random and arbitrary."[8]

Bell's release sent a clear message to New Yorkers: there is no crime too vicious and no criminal too depraved to earn a favorable hearing and release from the current Parole Board.

Unfortunately, that message is now being borne out in practice, with alarming regularity and speed. Since Bell's release in April, the Board has also granted parole to Robert Hayes, another avowed domestic terrorist convicted of murdering New York City Transit Police Officer Sidney Thompson in 1973. They have released Jose Diaz, a drug dealer who murdered Bronx County Assistant District Attorney Sean Healy with an automatic weapon in 1990. And, just last week, we were notified of the impending parole release of Demetrius Bennet, who participated in the 1994 murder of New York City Police Officer Ray Cannon.

These outrageous parole decisions have made it abundantly clear that the parole system is broken and the current parole guidelines are fundamentally flawed. Even with revisions to the guidelines, they will still require a board that will properly adhere to them as is statutorily required and demanded by the public.

The responsibility for addressing this crisis rests in many hands, including those of Governor Cuomo, whose appointees form the overwhelming majority of current Parole Board members. Ultimately, however, the issue cannot be resolved without affirmative legislative

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[3] Executive Law § 259-i(2)(c)(A)

[4] Executive Law §259(i)(2)(c)(A)(vii)

[5] NYS Board of Parole Decision Re: Herman Bell (Interview Date: March 1, 2018)

[6] *People v. Bottom*, 76 Misc.2d 525 (1974), Minutes of Sentence pp. 170-171: William Mogulescu, Esq. "These men perceive that they are at war and men are killed at war. They are beyond rehabilitation. There is no question of that because they feel unless our society is restructured and overthrown, that there is no justice, that there is no hope, that there is no way."

[7] *Furman v. Georgia*, 408 U.S. 238 (1972)

[8] *Supra* note 6, pp. 174-175

action to strengthen the parole guidelines and introduce the strong institutional controls that the Parole Board is so clearly lacking.

We therefore respectfully request that you, as New York State Senators and members of these combined committees, take action in the following areas:

I. Repeal amendments to the Executive Law regarding the use of risk and needs assessments by the Parole Board

Upon reviewing the record related to the parole of Herman Bell and other cop-killers, it is apparent that the current Parole Board has focused almost exclusively on the aforementioned "redemptive and restorative values" — in our view, to the unjustified exclusion of other applicable criteria. This over-reliance appears to be based on a series of legislative and rule-making changes in recent years, beginning with amendments to the Executive Law enacted in 2011.[9]

Prior to these amendments, Executive Law Section 259-c specified that the Parole Board's written procedures "may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision."[10]

The 2011 amendments removed the Parole Board's discretion with regard to the use of risk and needs assessment instruments, and instead mandated that the Board's "written procedures shall incorporate risk and needs principles," further specifying that the purpose of such procedures would be "to measure the rehabilitation of persons appearing before the board, [and] the likelihood of success of such persons upon release."[11]

These amendments triggered initial revisions of the Parole Board Rules which, following their implementation in 2014, were criticized by parole reform advocates for failing to fully comply with the legislative directive.[12] A subsequent revision to the Parole Board Rules, implemented in 2017, went significantly further towards prioritizing these "rehabilitative" objectives in the Board's release determinations, by mandating that those determinations "shall be guided by" numerical scores generated by the Correctional Offender Management Profiling for Alternative Sanction ("COMPAS") assessment tool.[13] Moreover, the revised rules specify that any parole determination that departs from the COMPAS score must be accompanied by "an individualized reason for such departure."[14]

Without debating the merits of the COMPAS assessment tool or risk and needs principles in general, we believe there is a clear tension between these probabilistic and speculative metrics and fixed criteria such as the inmate's criminal record and the nature of the instant offense. The

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[9] Chapter 62 of the Laws of 2011
[10] Executive Law § 259-c(4) (as amend by Chapter 56 of the Laws of 2009)
[11] Executive Law § 259-c(4) (as amended by Chapter 62 of the Laws of 2011)
[12] Stashenko, Joel "Parole Reform Groups Say Proposed Rules Don't Go Far Enough" *New York Law Journal*, December 13, 2016
[13] 9NYCRR § 8002.2(a)
[14] *Id.*

amended Executive Law and Parole Board Rules strongly suggest, based on recent parole decisions, that the fixed statutory criteria must yield to the COMPAS assessment scores.

We believe that such an approach is at odds with the Parole Board's core function, which is to consider and balance *all* of the required criteria in order to render a just and reasonable determination regarding a specific inmate's parole release. If the COMPAS instrument were indeed authoritative and error-proof in every case, then the Parole Board would be reduced to a purely administrative function, and arguably would no longer need to exist at all.

Repeal of the 2011 amendments to the Executive Law would neither preclude the continued use of risk and needs assessment tools, nor infringe upon the Parole Board's rule-making authority. We therefore believe that such a repeal is warranted as an expression of legislative intent, to confirm that the "redemptive and restorative" concept of criminal justice does not obliterate the equally important concepts of accountability and public safety.

II. Enact statutory requirements that re-emphasize the seriousness of the instant offense, the welfare of the public and respect for the law in the Parole Board's decision-making process

Even if the above-noted statutory changes are enacted, the Parole Board will retain its present authority over its own rules and procedures, including its procedures for rendering parole determinations. However, as the New York State Constitution makes clear, the Parole Board is ultimately subordinate to the will of the Legislature,[15] and the parole statutes play a limiting role on the Board's discretionary authority, essentially providing a "floor" below which the criteria for parole release may not fall.

With the release of Herman Bell and other cop-killers, it appears that the "floor" is a bottomless pit. As previously noted, we believe that almost any offender can now be cleared for parole, no matter how heinous or destructive their original crime.

In our view, this drift away from the minimum statutory standards is demonstrated in the most recent revision to the Parole Board's rules, which deleted a key preamble. Prior to the 2017 revisions, the Parole Board Rules began with a broad directive mirroring the language of the Executive Law, which read in part:

> "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."[16]

The removal of this language was a not-so-subtle effort to elevate the new standards imposed by the Board, especially its reliance on the COMPAS assessment scores, at the expense of the statutory criteria. This was not a mistake, because each of the other criteria articulated in the

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[15] New York State Constitution, Article 17, Section 5

[16] *Supra* note 3

Executive Law is replicated nearly verbatim in the Parole Board Rules.[17] Importantly, this change will have – and indeed, has had – the practical effect of permitting the Board to accomplish precisely what the Executive Law had counseled against: granting parole release merely as a reward for good conduct.

The purpose of the COMPAS assessment appears to be to evaluate whether there is a "reasonable probability" that the inmate will not again commit a crime. Whether the inmate's release is "incompatible with the welfare of society" or will serve to "deprecate the seriousness of his crime as to undermine respect for the law" is not necessarily a function of his or her recidivism risk, nor are these factors mutually exclusive.

It is not even necessary to imagine a scenario in which an inmate who qualifies for parole release based on the the COMPAS assessment would nonetheless be definitively disqualified in consideration of the welfare of society and respect for the law — we have already seen that exact scenario in the release of Herman Bell, for whom the Parole Board panel "decided to not veer away from the findings as indicated by the COMPAS risk assessment noting [his] low/unlikely risk" of reoffending the law.

We believe it is essential for the Legislature to strengthen the parole statutes to affirmatively require the Parole Board to seriously consider and give significant weight to the serious nature of the instant offense, explicitly in connection with its impact on respect for the law and the welfare of society as a whole. At a minimum, this criterion must not be made subordinate to any of the other factors that the board is required or permitted to consider, and must become the determinative factor when the facts of the case so warrant.

III. Amend the Executive Law to clarify that crime victims, their family members or representatives have standing to appeal Parole Board determination

Any improvements to the parole statutes or guidelines will be rendered meaningless without an adequate mechanism to ensure their consistent and rational application to individual parole decisions. Here, once again, the case of Herman Bell highlights a glaring deficiency in the current system.

Upon learning of Bell's impending parole, the widow of P.O. Joseph Piagentini, Mrs. Diane Piagentini, submitted, with the PBA's assistance, a request pursuant to the Parole Board Rules[18] to suspend Bell's release date pending a rescission hearing on grounds that the Board failed to consider significant information, including the original sentencing minutes and victim impact statements of Piagentini and Jones family members.

When no suspension of Bell's release or rescission hearing was granted, Mrs. Piagentini filed an Article 78 petition in Albany County Supreme Court, seeking a stay of Bell's release and an order to compel the Board to conduct a new hearing before a new Parole Board panel.[19] The Court dismissed Mrs. Piagentini's petition, in part by crediting the incredible assertion by the

[17] Compare Executive Law §259(i)(2)(c)(A)(i) through (viii) with 9NYCRR § 8002.2(b)(1) through (8)
[18] 9 NYCRR 8002.5 [b] [2] [i]
[19] *Matter of Piagentini v New York State Bd. of Parole* 60 Misc 3d 713

Attorney General that the current statute does not confer standing to a victim to challenge a determination of the Parole Board, and that "no legislative history is advanced to suggest a contrary conclusion."[20]

Mrs. Piagentini has appealed this ruling to the Appellate Division, 3rd Judicial Department, and that appeal remains pending at this time. A plain reading of the statute clearly provides that individuals like Mrs. Paigentini do indeed have standing to challenge Parole Board determinations. Indeed, if not the family member of a deceased crime victim, then who could have standing?

Moreover, it is plainly illogical to assume that the Legislature would empower crime victims – or the family members or representatives of deceased crime victims – to participate in the parole process by providing victim impact statements, and by requiring the Parole Board to consider those statements in making parole release decisions,[21] while simultaneously leaving them with no recourse to challenge the resulting decision, especially when it appears that the Board failed to adhere to the statutory criteria or its own rules.

To the extent that the Court believes the legislative history is unclear on this issue, the Legislature has an opportunity to resolve that uncertainty. Your colleague, Senator Golden, has already introduced a bill to amend the Executive Law to unambiguously grant standing to appeal parole determinations to crime victims or, where the crime victim is deceased or is mentally or physically incapacitated, the victim's family member or representative.[22] We strongly support this legislation and urge its passage and enactment without delay, so that the Parole Board can be held accountable by those most impacted by any erroneous or arbitrary determination regarding parole release.

IV. Exercise greater scrutiny over Parole Board appointments

Even with stronger guidelines and greater accountability, the success or failure of our parole system will continue to depend on individual parole commissioners exercising reasonable discretion and sound judgment in rendering parole determinations. It is therefore imperative that Parole Board appointees be held to the highest possible standards of professionalism and impartiality.

While there are certainly well-qualified and fair-minded members currently serving on the Board, other appointments have fallen well short of these standards. In some cases, commissioners' decisions or conduct while on the Board have failed to exhibit the kind of even-handedness that New Yorkers rightfully expect and deserve in such a critical role. In the case of Herman Bell, for example, the presiding commissioner initiated the proceeding by encouraging Bell to approach the proceeding with "fresh answers, a fresh look, and just an optimism that this is a new panel, a new day, and there's different decisions to be made, based on what transpires

[20] 2018 NY Slip Op 28167
[21] Executive Law § 259-i(2)(c)(A)(v)
[22] S8921. S. Reg. Sess. 2017-2018 (N.Y. 2018)

today and our review of the information,"[23] all before Bell had made a single statement relevant to the parole criteria.

Parole commissioners are certainly entitled to their own views and beliefs regarding the parole system or criminal justice in general. What they must not do, however, is substitute their own beliefs for the facts in a given case or the proper application of the defined parole criteria, and under no circumstances should they be using their position on the board as a vehicle to advance a personal or political agenda.

It is the Governor's responsibility, in the first instance, to screen potential parole commissioners for these forms of bias, in addition to the basic professional qualifications defined in the statute. However, as all Parole Board appointments are made upon advice and consent of the Senate, we urge you and your colleagues to engage in the most thorough vetting process possible, including substantive discussions with the appointees to ascertain their ability and willingness to consider each case on its own merits, using only the criteria defined in the statute and the Parole Board rules. Nominees who do not satisfy the qualifications and temperament for a position on the Parole Board should not be approved by the Senate.

We understand that there may be considerable pressure – including the real operational issues that arise from a short-staffed Parole Board – to fill current or upcoming vacancies. A rushed or cursory confirmation process will only serve to exacerbate the problems we have discussed today. We therefore urge you to insist that the Executive Chamber make any necessary appointments to the board in a timely fashion, and decline to act upon appointments unless and until there is sufficient opportunity for the Senate to conduct its due diligence.

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In all of the reforms we have proposed today, it should be clear that the objective is not a generalized reduction in the number of inmates or the types of instant offenses for which the Board grants parole release. As previously noted, the Penal Law currently distinguishes the murder of a police officer as more severe than other violent crimes, and accordingly assigns it the highest penalty our Courts may impose. It must also be noted that the *release* of a cop-killer also has a more severe impact than the release of other violent offenders, in two key ways:

First, it sends police officers in every corner of our state a profound message about the way our mission and sacrifice is valued. When we see cop-killers lauded as shining examples of redemption and rehabilitation, when we hear their virulent anti-police ideologies excused or justified, we cannot help but wonder whether we have the support of the public or our elected leadership as we carry out our public safety mission.

Second, it sends average New Yorkers a profoundly disturbing message about their personal safety. The paroled cop-killers now walking our streets were bold enough to attack and murder an armed and trained police officer – what chance does the ordinary citizen stand against such a threat?

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[23] N.Y. Board of Parole *Interview In the Matter of Herman Bell DIN# 79C0262* Tr. 3:21-25

The recent releases of cop-killers should be abhorrent to all New Yorkers, but nothing compares to the impact they have had on the families of the fallen. At present, there are at least 59 killers of New York City police officers appearing regularly before the Parole Board. This means that dozens of families of fallen police officers, who are currently in the unenviable position of preparing to oppose the release of their own loved one's killers, continue to witness the Parole Board permitting other cop killers to walk free.

This week alone, the families of P.O. Anthony Abruzzo, who was killed while he was off-duty and intervening in an assault on his father-in-law, and P.O. Sean McDonald, who was shot and killed while arresting two robbery suspects, will be delivering their victim impact statements to the Board. And later this month, both the Piagentini and Jones families will appear before the Board to argue against the release of Herman Bell's accomplice, Anthony Bottom.

Each of these families is terrified that this will be their last opportunity to make their voices heard, that the Parole Board will ignore their pain and fear and return the individuals who terrorized their families to our society. Senators, as I know you all appreciate, there is simply no time to waste in your efforts to fix our broken parole system and restore the proper functioning of the Parole Board.

On behalf of all New York City police officers, I thank you all for your efforts in this area so far. We look forward to continuing to work with you towards our shared goal of a stronger, safer New York. I am happy to answer any questions you may have.