

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON**

MUTULU SHAKUR,)	
)	
Petitioner,)	
)	
v.)	
)	
DAVID PAUL, FMC Lexington Warden,)	Case No.
PATRICIA K. CUSHWA, Acting Chair)	
of U.S. Parole Commission, CHARLES)	
T. MASSARONE, Commissioner of U.S.)	
Parole Commission,)	
)	
Respondents.)	

**MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS**

I. Introduction

Mutulu Shakur is a 72-year-old man who has been incarcerated for 36 and a half years. He is currently dying from bone marrow cancer that is ravishing his body and mind. Mr. Shakur’s BOP-contracted doctor stated in May 2022 that he has less than six months to live due to his terminal, incurable multiple myeloma (Exhibit 1, 5/18/22 Medical Report). Since that grim prognosis, Mr. Shakur’s condition continues to deteriorate significantly. His medical provider documented that he experiences confusion, hallucinations and there has been a “decline in activity and function.” (Exhibit 2, 5/24/2022 and 5/25/2022 Medical Reports). Mr. Shakur is on the verge of death and is clearly not a threat to anyone. He has spent decades demonstrating rehabilitation, exemplary conduct in prison, and lack of risk to reoffend.

On April 27, 2022, the United States Parole Commission (“The Commission”) conducted a mandatory parole hearing for Mr. Shakur. Prior to the hearing, Mr. Shakur’s counsel submitted

a parole packet along with exhibits on behalf of Mr. Shakur (Exhibit, Parole Packet). Mr. Shakur was denied parole and the purported justification for this denial is contradicted by the facts in the record. Therefore, there is no rational basis for the Commission's conclusion to deny parole to Mr. Shakur. As a result, the Commission has violated Mr. Shakur's substantive due process right under the Fifth Amendment to be free from parole decisions that lack a rational basis and are arbitrary, capricious, and an abuse of discretion. Additionally, the Commission failed to follow its own regulations, violating Mr. Shakur's procedural due process rights. Mr. Shakur has filed a habeas corpus petition seeking to have this Court enforce his constitutional rights and order the Commission to reverse its decision and grant him immediate parole.

II. Statement of the Case

a. Criminal Conviction

As a young man in the 1970's, Mutulu Shakur participated in the Black liberation struggle. As Mr. Shakur became increasingly disillusioned and radicalized by the oppression of Black people in the United States, and colonized people around the world, he gravitated toward individuals and groups that were engaged in violent and illegal activities as a method to further their political objectives. In 1982, an indictment was filed in the United States District Court for the Southern District of New York. The indictment brought conspiracy charges against a group of political activists, including Mr. Shakur, for bank robberies and other actions which took place in the Northeastern United States. According to the Government prosecution, the conspiracy was referred to as "The Family." In 1987, Mr. Shakur was convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), participation in a racketeering enterprise, bank robbery, armed bank robbery, and bank robbery murder, in violation of 18

U.S.C. §§ 1961, 1962(d), 1962(c), 2113(a), 2113(d), 2113(e), and 2. *United States v. Shakur*, 888 F.2d 234 (2nd Cir. 1989). On August 2, 1988, Mr. Shakur was sentenced to an aggregate term of 60 years. 36 years later, Mr. Shakur’s sentence establishes a presumption of release on “mandatory parole.” He has been denied release, despite his decades of demonstrated rehabilitation, exemplary conduct in prison, advanced age, near-death medical condition, and lack of risk to reoffend.

b. Institutional Adjustment

Throughout Mr. Shakur’s 36 years in prison, he has demonstrated remarkable rehabilitation, exceptional conduct, and his behavior has earned the respect and commendations of BOP staff who support his release. Carlyle Holder, retired warden of FCI Coleman describes how Mr. Shakur “was well respected by both staff and inmates alike because of the way he conducted himself.” (Exhibit 4, Holder Letter). Mr. Holder describes how Mr. Shakur facilitated prosocial programs, which “provided a safe humane environment for rehabilitation and restoration.” (*Id.*). There was minimal violence at the prison and Mr. Holder credits Mr. Shakur with contributing to making the environment safe. (*Id.*). Tony Weeks was employed as a BOP Recreation Specialist and describes how Mr. Shakur volunteered to do whatever he could to help Mr. Weeks with programming. (Exhibit 5, Weeks letter). Mr. Shakur played an active role in helping with every recreational program Mr. Weeks established at the prison and played a key role in bring together a diverse group of prisoners of all races and backgrounds. (*Id.*).

Dr. Sayida Peprah was the Deputy Chief Psychologist at Victorville and came to know Mr. Shakur through his participation in the Suicide Watch Inmate Companion program. (Exhibit 6, Dr. Peprah letter). Through the program, Mr. Shakur received specialized training in suicide

prevention, assisting other prisoners suffering from mental illness. (*Id.*). Participants in the program had to go through an extensive clearance from BOP staff who would vouch for the prisoner's character and level of responsibility. Dr. Peprah also credits Mr. Shakur with initiating an anti-drug program at Victorville to inform prisoners about the dangers of K2/Spice, a drug that had been introduced into the prison and causing threats to both staff and prisoners. (*Id.*).

Scott Keilman, a former Associate Warden at USP Victorville stated that Mr. Shakur “demonstrated a personal initiative to enhance the overall environment to which he is engaged by maintaining a degree of respect across the various prisoner groups and my staff.” (Exhibit 7, Keilman Letter). Associate Warden Keilman writes, “My years of experience with the Bureau has made me quite astute to the judgment of men and their character. I sincerely believe if given the opportunity, Mr. Shakur will not re-offend and will abide by the law and be an asset to the overall environment and community.” (*Id.*). Similarly, Warden Holder writes, “I have no hesitation if given the opportunity to be released he will not be a danger to society and will lead a crime free and successful life. (Exhibit 4).

These individuals have held leadership positions in the BOP, and they have supervised Mr. Shakur's daily routine and prison conduct. Considering their professional experience in the field of corrections and years of direct contact with Mr. Shakur, they have a unique ability to speak directly to Mr. Shakur's rehabilitation and to conclude that he is not a danger to anyone.

During his incarceration, Mr. Shakur has also focused a tremendous amount of energy on helping other prisoners improve themselves. Warden Holder writes of Mr. Shakur's willingness to be a “role model and mentor to other men incarcerated at the facility.” (*Id.*). Mr. Shakur has played this role for countless men, many of whom have submitted letters in support of Mr.

Shakur's parole, describing the role he played in their rehabilitation. One of those men, Deondre Williams, writes, "I am proud to be a positive member of my community today. If it wasn't for Mr. Shakur, I wouldn't be the man I am for myself or my family." (Exhibit 8, Williams Letter). Mr. Williams recalls a particularly powerful moment where Mr. Shakur stated that "family is love," looked in Mr. Williams' eyes, said, "if you love your family, you wouldn't come back" to prison. (*Id.*). Mr. Williams describes how he thinks of these words every night, as he spends time with his family. (*Id.*). Mr. Williams writes, "I continue to embrace everything [Mr. Shakur] taught me" and as a result, he has not even contemplated returning to a life of crime. (*Id.*).

Ra' Sekou P'tah was serving a double life sentence, plus thirty years when he met Mr. Shakur, who he describes as a father figure. (Exhibit 9, Ra' Sekou P'tah letter). P'tah writes: "Today, I recognize Dr. Mutulu Shakur not only as my father, but as the man who changed my way of thinking and saved my life. Because of Dr. Shakur, I did not return to the same lifestyle that led me to prison. Today, I continue to pass forward Dr. Shakur's lessons of love, positivity and education through youth mentorship." (*Id.*). Steven Hinshaw describes how when he met Mr. Shakur in prison, he was young, scared, impressionable, and was becoming frustrated by his surroundings. (Exhibit 10, Hinshaw letter). He writes that "instead of inciting me to act out and become violent Mutulu nurtured my inquiring mind." (*Id.*). He writes that Mr. Shakur helped him to see value in himself, encouraged him to change positively and that he "continues to be inspired and appreciative today" for what Mr. Shakur provided to him. (*Id.*). Today, Mr. Hinshaw is leading a successful life where he is employed, focused on his family, and is not engaged in any criminal activity. He is confident that Mr. Shakur will do the same. He concludes

his letter stating that “I strongly believe that upon his release he will continue to be a positive influence in the lives of many others.” (*Id.*)

In addition to mentoring younger prisoners, Mr. Shakur has selflessly assisted prisoners in other ways. Edgar Mosquera Gamboa describes how he suffered a massive heart attack while exercising in the prison yard. Mr. Shakur ran through the yard to his side, rendering assistance and utilizing acupressure techniques until medical staff arrived. (Exhibit 11, Edgar Gamboa Letter). Mr. Gamboa explains how impressed he was that a man who he had never met rushed to help him and writes, “My respect and admiration is based on what I believe is the humane character of his gesture and actions.” (*Id.*). Mr. Gamboa credits Mr. Shakur’s acts as playing a role in saving his life, writing, “it could have given me some precious time to reach the operation room where my life was saved and therefore I am very grateful for what he did.” (*Id.*).

In addition to his extraordinary contributions to the prison environment, Mr. Shakur’s conduct in prison has been exemplary. He has only had four disciplinary incidents throughout the course of 36 years, and “maintained clear conduct” for over fifteen years, with no incidents of violence. (Exhibit 12, Shakur Progress Report). The Commission does not dispute that Mr. Shakur has not “seriously or frequently violated institutional rules,” underscoring that his in-prison conduct has been overwhelmingly positive. Corrections Expert Jack Donson writes that “his institutional conduct is not indicative of the likelihood of further criminal activity, nor does it correlate to dangerousness.” (Exhibit 13, Donson Declaration, ¶ 7). Mr. Shakur’s in-prison conduct and rehabilitation is further supported by the extensive classes and programming he has completed (Exhibits 5; 6; 12; 14, Program Certificates; 15, Schuldts letter). To deny parole to Mr.

Shakur on the face of his record would be to ignore his decades long commitment to rehabilitation, mentorship, and nonviolence.

c. Mandatory Parole

Under the law at the time of his sentencing, Mr. Shakur's sentence established presumptive release on "mandatory parole," after serving 30 years of his sentence. Under federal law, the Parole Commission "shall release any prisoner on mandatory parole having served two-thirds of their sentence or thirty years of a sentence of more than forty-five years." 18 U.S.C. § 4206(d). The federal parole structure provides that prisoners are initially eligible for "discretionary parole" under 18 U.S.C. § 4206(a). Under § 4206(a), the Commission has discretion to grant parole if a prisoner has "substantially observed the rules of the institution" and the Commission makes certain determinations, including that the "release would not depreciate the seriousness of his offense or promote disrespect for the law." 18 U.S. § 4206(a). After a prisoner serves thirty years or reaches their "two-thirds" date, the standard shifts from "discretionary parole" to "mandatory parole." The law establishes that at that point, there is a "rebuttable presumption" of release. See *Shakur v. Milusnic*, No. 5:19-cv-00727-SVW (GJS), 2022 U.S. Dist. LEXIS 29894, at *11 (C.D. Cal. Feb. 7, 2022) and *La Magna v. United States Bureau of Prisons*, 494 F. Supp. 189, 192 n.11 (D. Conn. 1980). The law then limits the factors the Commission can rely on to overcome that strong presumption of release on parole. The Commission has only two grounds upon which it may deny mandatory parole; if it determines that a prisoner has "seriously or frequently violated institutional rules and regulations or that there is a reasonable probability that he will commit any Federal, State or local crime."

Mr. Shakur was initially scheduled for release on mandatory parole in 2016. At that time, the Commission denied his release, finding that Mr. Shakur had “seriously or frequently violated the rules of the institution” and that he was likely to “commit another Federal, State, or local crime.” In making its determination, the Commission relied heavily on a disciplinary incident from 2013. Mr. Shakur challenged the denial in the United States District Court for the Central District of California. On February 17, 2022, the Court issued an order finding that the disciplinary incident itself, and the Commission’s reliance on it to deny parole, violated Mr. Shakur’s due process rights. The court ordered that Mr. Shakur be provided with a new initial mandatory parole hearing, without consideration of the now invalidated 2013 disciplinary incident. *Shakur v. Milusnic*, 2022 U.S. Dist. LEXIS 29862 (C.D. Cal. Feb. 17, 2022).

A new mandatory parole hearing was scheduled for April 2022. Prior to the hearing, Mr. Shakur’s counsel submitted a parole packet on behalf of Mr. Shakur, which included a written brief and extensive exhibits. (Exhibit 3). The packet gave great detail about Mr. Shakur’s declining medical condition, exemplary institutional adjustment, advanced age, viable parole plan, and other factors supporting parole. At the hearing, Mr. Shakur and his counsel described Mr. Shakur’s medical condition, demonstrated rehabilitation, and parole plan. Mr. Shakur also took the opportunity to express remorse to the victims, who were observing via remote video.

The Commission refused to grant him parole, despite the fact that the evidence showed there is no reasonable probability that Mr. Shakur will commit another crime and despite the fact that he has not seriously or frequently violated institution rules and regulations. (Exhibit 16, USPC Notice of Action denying parole). In denying parole, the Commission states that Mr. Shakur will be scheduled for a Statutory Interim Hearing for April 2024. Unfortunately, Mr.

Shakur will be dead by then. Mr. Shakur, through counsel, appealed the Commission's denial of mandatory parole. The Parole Commission affirmed its decision. (Exhibit 17, USPC Notice of Action affirming denial)¹

III. Jurisdiction and Venue

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. 2241(a), "the order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had." Mr. Shakur is currently detained at the Federal Medical Center, operated by the Bureau of Prisons, in Lexington, Kentucky and is therefore restrained in this judicial district.

IV. Argument

a. Claim I: The Commission Violated Substantive Due Process

i. 1. Legal Standard

The Commission committed a substantive due process violation by denying parole to Mutulu Shakur. "We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government,'" *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 535 (6th Cir. 2008) (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)). "[T]he exercise of power without any reasonable justification in the service of a legitimate governmental objective" violates substantive due process. *Lewis*, 523 U.S. at 846. "[T]he Due Process Clause contains a

¹ The Notice of Action affirming the Parole Commission's denial of mandatory parole was dated June 9, 2022. However, Mr. Shakur's counsel did not receive the notice until August 3, 2022. Upon information and belief, Mr. Shakur either never received this notice, or was in such a deteriorated physical and cognitive condition that he was unable to read or comprehend it.

substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Pearson v. Grand Blanc*, 961 F.2d 1211, 1220 (6th Cir. 1992). "[T]he exercise of power without any reasonable justification in the service of a legitimate governmental objective" violates substantive due process. *Lewis*, 523 U.S. at 846.

"[W]hen a State adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law whenever those standards are met." *Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 19 (1979). Thus, parole eligible prisoners "have a liberty interest flowing directly from the due process clause in not being denied parole for arbitrary or constitutionally impermissible reasons." *Block v. Potter*, 631 F.2d 233, 236 (3d Cir. 1980). If the "law wrests from the board selected aspects of its discretion—for example by unequivocally requiring release upon the prisoner's demonstration of certain conditions, or in the absence of others—a liberty interest protectable under the Due Process Clause is recognized." *Jergens v. State Dep't of Rehab. & Corr. Adult Parole Auth.*, 492 F. App'x 567, 570 (6th Cir. 2012) (Internal citations omitted). Executive action, such as a denial of parole, violates substantive due process "when 'it can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Lewis*, 523 U.S. at 847. A federal court may grant habeas relief on a substantive due process claim predicated upon a denial of parole "if there is [no] basis for the challenged decision." *Barnes v. Wenerowicz*, 280 F.R.D. 206, 218 (E.D. Pa. 2012) (quoting *Hunterson v. DiSabato*, 308 F.3d 236, 246 (3d Cir. 2002)). While this Court must "remain mindful of the Board's expertise in this area," that is so only to the extent that "its decision is based on the evidence." *Barnes*, 280

F.R.D. at 219. “When the Parole Board bases its decision on factors that bear no rational relationship to rehabilitation or deterrence, it transgresses the legitimate bounds of its discretion.” *Block*, 631 F.2d at 237. Non-specific assertions that parole applicants showed a “lack of remorse” have been recognized as arbitrary bases for parole denials by the Court. *Barnes*, 280 F.R.D. at 220. In reviewing decisions of the Commission the role of the court is “determining whether a rational basis exists for the Commission's conclusions.” *Redmond v. Holland*, 2017 U.S. App. LEXIS 20556, at *7 (6th Cir. Aug. 10, 2017) (citing *Kimberlin v. White*, 7 F.3d 527, 533 (6th Cir. 1993)).

18 U.S.C § 4206(d) establishes is the applicable statutory criteria for mandatory parole. The Commission must release a prisoner unless it can point to evidence to demonstrate that 1) he has seriously or frequently violated institution rules and regulations or 2) there is a reasonable probability that he will commit another Federal, State, or local crime. Courts have held that this is a “rebuttable presumption” for release and that the statute creates a “very strong presumption in favor of parole.” See *Shakur v. Milusnic*, 2022 U.S. Dist. LEXIS 29894, at *11 (C.D. Cal. Feb. 7, 2022) and *La Magna v. United States Bureau of Prisons*, 494 F. Supp. 189, 192 n.11 (D. Conn. 1980).

ii. 2. The Commission Abused its Discretion in Denying Parole to Mr. Shakur, as his Near-Death Condition, Age, and PATTERN Scores Demonstrate that he Poses no Risk to Reoffend.

There is no reasonable probability that Mr. Shakur will commit another Federal, State, or local crime and it was arbitrary, capricious, and an abuse of discretion for the Commission to assert otherwise. The Commission’s purported justification for denying parole to Mr. Shakur was that there is a reasonable probability that Mr. Shakur will commit any Federal, State, or local

crime if released. There was no rational basis for this conclusion, and such a claim is contradicted by the facts in the record.

A. Medical Condition

Mr. Shakur's debilitating medical condition alone is conclusive evidence that he poses no reasonable risk of committing another crime. He has received a prognosis that he had less than six months to live due to his terminal, incurable multiple myeloma. Mr. Shakur was first diagnosed in 2019 with this bone marrow cancer, for which there is no cure. Since then, he has undergone treatment, including three different forms of chemotherapy, radiation, and a stem cell transplant in October 2020. In June 2021, Mr. Shakur suffered a relapse and in July 2021 he began receiving a "salvage therapy" for use when all other therapies have failed. In September of 2021, Dr. Niesvizky, a multiple myeloma specialist and expert reviewed Mr. Shakur's case and his prognosis was that should Mr. Shakur's treatment be unsuccessful, he would die within 11 months. (Exhibit 17, Niesvizky Declaration). Even if the treatment were successful, Dr. Niesvizky estimated that Mr. Shakur would still die within 2-3 years. This prognosis projected that should the treatment be unsuccessful, Mr. Shakur would die in August 2022 – this month.

The information presented at Mr. Shakur's April 2022 hearing was that Mr. Shakur's treatment was not entirely successful, placing his Mr. Shakur's life expectancy at between 4-17 months from the time of his April 2022 hearing. (Exhibit 3). Diagnostic studies performed days after Mr. Shakur's hearing made it clear that the salvage treatment had stopped working completely and his cancer has continued to progress and attack his body. MRIs conducted on May 1 showed extensive cancer invading and weakening the bones of his axial skeleton.²

² The axial skeleton is comprised of eighty bones including the skull chest, rib cage, and vertebral column.

(Exhibit 18, May 1, 2022 Medical Report). A bone marrow biopsy on May 2 showed 65-70% infiltration of the multiple myeloma cancer cells, confirming progression of the cancer, despite treatments. (Exhibit 19, May 18, 2022 Medical Report).

Mr. Shakur's condition has continued to worsen daily. On May 25, 2022, his provider assessed that "he has been experiencing confusion" and that "he is able to state his name but is very disoriented to time, place and situation," and that he is "frequently incontinent." (Exhibit 2). On that same date, Dr. Myriam Melendez Rosa describes Mr. Shakur's deteriorating mental facilities, stating "Mr. Shakur seems to have abnormal mentation, he is obtunded." (Exhibit 21, 5/25/22 Medical Report). The doctor goes on to state that Mr. Shakur is "in a clinical downward trend." (*Id.*). A BOP internist treating Mr. Shakur, Dr. Mansi Parekh, stated on June 1, 2022, "I agree that patient should be compassionately release[d] in the setting of life limiting illness and prognosis of months." (Exhibit 21, 6/1/22 Medical Report).

Mr. Shakur has presented these medical updates to the Commission and despite this evidence that Mr. Shakur's terminal cancer is destroying his body, the Commission has irrationally maintained that Mr. Shakur is likely to commit another crime. At this point, he is clearly on an end-of-life trajectory. Should he be released, the focus would be on palliative care in an attempt to provide him with some comfort as the cancer overcomes his body in the final days of his life, as opposed to him committing any crimes. *See United States v. Rice*, 2020 U.S. Dist. LEXIS 139807, at *10-11 (S.D.N.Y. Aug. 5, 2020) (Defendant submitted "sufficient evidence to prove he is no longer a danger," including his advanced age and serious health problems.); *United States v. Ebbers*, 432 F. Supp. 3d 421, 432 (S.D.N.Y. 2020). The court in *Ebbers* held that, "There is no dispute that Ebbers is not a danger or risk to society. He is sick,

weak, disoriented, and bedridden. His ability to care for himself is nearly gone, his cognitive functions are impaired, and his body is wasting away. His remaining time on earth will be spent in end-of-life care, not fashioning fraudulent securities schemes.” *Ebbers*, at 432 (S.D.N.Y. 2020). The same exact analysis applies to Mr. Shakur, as he is sick, weak, disoriented, bedridden, unable to care for himself, physically wasting away and his cognitive functions are impaired. His remaining time on earth will be spent in end-of-life care, not participating in armed robberies or criminal conspiracies. It is arbitrary, capricious and shocking to the conscience for the Commission to continue to maintain that Mr. Shakur is a risk, despite him being unable to take care of his own daily living activities due to his devastated medical state. To deny parole to Mr. Shakur in the face of such a record which clearly points to serious diminished capacity and loss of physical ability is to do so in an arbitrary and capricious manner.

B. Advanced Age

Mr. Shakur’s advanced age is objective evidence demonstrating that there is no rational basis to fear that he will reoffend. At 72, Mr. Shakur is now in an age group with an essentially non-existent risk of recidivism. *See United States v. Piggott*, 2022 U.S. Dist. LEXIS 5293, at *8 (S.D.N.Y. Jan. 11, 2022) (“It is also well-established that recidivism decreases significantly with age.”); *United States v. Smith*, 482 F. Supp. 3d 1218, 1226 (M.D. Fla. 2020) (“Statistics show that age exerts a powerful influence on the recidivism rate, which declines as offenders get older.”); *United States v. Eccleston*, 543 F. Supp. 3d 1092, 1151 (D.N.M. 2021) (“the Sentencing Commission concludes that ‘[a]ge exerted a strong influence on recidivism across all sentence length categories. Older offenders were less likely to recidivate after release than younger offenders who had served similar sentences, regardless of the length of sentence imposed.’”);

United States v. Whitted, No. 3:04-cr-0176, 2021 U.S. Dist. LEXIS 15706, at *21 (D.V.I. Jan. 28, 2021) (“Studies show that only about 4% of inmates released over the age of 65 return to prison. Furthermore, ‘older offenders have the lowest recidivism rate of any age [group] in U.S. prisons.’”).

Agencies within the federal government have reviewed available data and concluded that older prisoners like Mr. Shakur are less likely to reoffend. In analyzing FBI data, the Office of the Inspector General of the Department of Justice found the recidivism rate for former prisoners over 70, like Mr. Shakur, was 0%.³ The United States Sentencing Commission has “found that older offenders are substantially less likely to recidivate following release compared to younger cohorts” and that “as age increases recidivism by any measure declined.”⁴ The objective data demonstrates that Mr. Shakur, at 72, is extremely unlikely to commit another crime. When considering Mr. Shakur’s dire medical condition, the risk of recidivism is further reduced to the point of being almost non-existent. To come to the opposite conclusion, without any evidentiary support from the April 2022 hearing was an irrational abuse of discretion.

C. PATTERN Scores

In addition to his medical condition, advanced age, commitment to rehabilitation, strong institutional record, and mentorship, Mr. Shakur’s PATTERN scores further indicate that there is no rational basis to conclude that he is likely to commit another State, Federal, or local crime if released. This risk and assessment tool was created by the DOJ at the direction of Congress.

³ DOJ’s Office of the Inspector General Report “The Impact of an Aging Inmate Population on the Federal Bureau of Prisons” p. 38-40 <https://oig.justice.gov/reports/2015/e1505.pdf>.

⁴ United States Sentencing Commission, “The Effects of Aging on Recidivism Among Federal Offenders” p. 30 https://www.ussc.gov/sites/default/files/pdf/researchandpublications/researchpublications/2017/20171207_Recidivism-Age.pdf.

(Exhibit 13, ¶ 8). The National Institute of Justice, the research and development agency of the DOJ, has found it to have a “high value of predictive accuracy,” and the BOP relies on the scores for numerous assessments and determinations of prisoner safety, security, and risk of recidivism. (*Id.*). Mr. Shakur is in the lowest possible category of risk, with negative scores for both “general recidivism” and “violent recidivism.” (Exhibit 22, PATTERN Assessment). Corrections Expert Jack T. Donson submitted a declaration stating that Mr. Shakur had the lowest PATTERN scores he had ever seen. (Exhibit 13, ¶ 10). After reviewing materials from Mr. Shakur’s BOP file, Mr. Donson stated that in his professional opinion, there was not a “reasonable probability” that Mr. Shakur would commit another federal, state, or local crime. (*Id.*, ¶ 13).

The Commission disregarded the fact that Mr. Shakur’s PATTERN scores objectively demonstrate that he’s highly unlikely to reoffend. The tool was created by the DOJ and is relied upon by both the BOP and courts to show that individuals with low scores are unlikely to reoffend. Courts have held that low PATTERN scores are a factor in determining that an individual is not a danger. See *United States v. Taylor*, 2020 U.S. Dist. LEXIS 193381 (E.D. La. Oct. 20, 2020) (Defendant’s PATTERN score placing him at “minimum” status supports argument that defendant is not a danger); See also *United States v. Rodriguez*, 2022 U.S. Dist. LEXIS 8717, 2022 WL 158685 (S.D.N.Y. Jan. 18, 2022) (Motion for reduction in sentence granted based on medical conditions, age at release (sixty-years-old), and "minimum" PATTERN score); *United States v. Greene*, 516 F. Supp. 3d 1 (D.D.C. 2021) (Granting motion for compassionate release by seventy-two-year-old petitioner, considering medical conditions and PATTERN score of "minimum"); *United States v. Hearron*, No. 91-392-2, 2020 U.S. Dist. LEXIS 141413, 2020 WL 4569556 (D.Az. Aug. 7, 2020) (Motion for compassionate release by

eighty-two-year-old petitioner granted based on medical conditions and age granted, considering PATTERN score of "medium").

Mr. Shakur's PATTERN scores are evidence that he poses no risk of reoffending. This analytic tool, along with Mr. Shakur's demonstrated rehabilitation as described by BOP staff, his end-of-life trajectory, and advanced age is undisputed and conclusive evidence that Mr. Shakur poses no risk of committing another crime. There is no rational basis to find otherwise and the Commission's denial of parole to Mr. Shakur was a substantive due process violation.

iii. 3. The Evidence in the Record Demonstrates Mr. Shakur Accepts Responsibility and There is No Rational Basis to Find Otherwise.

The Commission's denial not only failed to give proper weight to Mr. Shakur's terminal cancer, age, rehabilitation and PATTERN scores, it also relied on reasoning that lacks support in the record and is contradicted by the evidence. The Commission claims that there is a reasonable probability that Mr. Shakur will commit a Federal, State, or local crime and its claim that he has had not "fully accepted responsibility for [his] crimes" is its purported justification for this conclusion.

This Court is only bound to defer to the Parole Commission to the extent that "its decision is based on the evidence." *Barnes*, 280 F.R.D. at 219. Denying parole on the basis of "an inaccurate factual predicate" is impermissible. *Gambino v. Morris*, 134 F.3d 156, 162 (3d Cir. 1998) (factual error an "invalid basis" for parole denial); *Campbell v. U.S. Parole Commission*, 704 F.2d 106, 109 (3d Cir. 1983) (Parole "Commission may not base its judgment as to parole on an inaccurate factual predicate."). The evidence clearly shows that Mr. Shakur has fully accepted responsibility for his actions. During the mandatory parole hearing in April 2022, Mr. Shakur accepted responsibility and repeatedly expressed remorse. Below are direct

quotes by Mr. Shakur during his mandatory parole hearing in April 2022 (Exhibit 23, Audio Recording of Statements by Mutulu Shakur):

- “I owe it from my heart to their families...repentance. Empathy.”
- “My acknowledgement of the pain I have caused them. The families, the children, now it’s grandchildren.”
- “You cannot explain the thinking that caused me to...be a part of the process that took these men’s lives, who did nothing to me. They were not directly or indirectly responsible for what I felt were my fears.”
- “And so hopefully this experience might allow...the victims [to] accept the pain I feel for what crimes I have committed against them and their family.”
- In reference to his cancer, Mr. Shakur stated, “I don’t take my survival lightly. I know that I am blessed. And I know also that I owe penance for a lot of things... And I owe. And clearly I cannot say I owe if I do not recognize that I owe the victims...”
- “It’s unexplainable that the fears that motivated me to cause so much pain where clearly, I could have found a different path.”
- “I believe in God. And I believe sincerely that I still have something to do. And hopefully, some time, somewhere, in the path of my life, I have some effect on your family in some way that you can forgive me.”

In addition to these statements by Mr. Shakur, his representative submitted a packet of materials to the Parole Commission, which included repeated references to Mr. Shakur accepting responsibility and expressing remorse, including this excerpt:

“Mr. Shakur now regrets the decisions he made and actions he took decades ago. As Mr. Shakur has grown, matured, and evolved, he has acknowledged and accepted responsibility for his role in the actions that led to his incarceration. He has expressed that he is extremely remorseful for the deaths that resulted from his involvement in the crimes that led to his conviction. He has also acknowledged that his actions caused harm beyond the individual lives lost and that it has impacted the victims’ families and entire communities.”

(Exhibit 3).

Despite these statements presented to the Commission before and during Mr. Shakur's 2022 mandatory parole hearing, the Commission erroneously and irrationally concluded that he did not accept responsibility for his crimes. Remarkably, in coming to that irrational determination, the Commission did not cite a single statement made by Mr. Shakur during his 2022 hearing or anything in the materials presented in advance of the hearing. Instead, it referenced topics Mr. Shakur did not discuss and which the Commission never asked about. Specifically, the Commission stated "you have not fully accepted responsibility because you believe your prosecution to be politically motivated" and "you have not disavowed the 'Family' in any statements to the Commission." (Exhibit 16).

Not only did the Commission not ask about these issues, the Commissioner even stated to Mr. Shakur and his counsel prior the April 2022 hearing that he did not intend to ask about the underlying case. (Exhibit 24, Thomson Declaration). Mr. Shakur and his counsel took this as a clear statement that the Commissioner considered a discussion of Mr. Shakur's indictment and his co-conspirators to be unnecessary and irrelevant to the consideration of mandatory parole. Based on the fact that a prisoner's underlying conviction is not part of the statutory criteria under § 4206(d), and the Commissioner's representation that he would not be asking about it, Mr. Shakur did not discuss it. Instead, he answered the Commissioner's questions and when given the opportunity, he expressed empathy and remorse directly to the victims. It is arbitrary and capricious for the Commission to inform a prisoner that it will not be addressing a particular topic, not ask the prisoner any questions on the issue, then use the prisoner's silence on that matter as a justification to deny him parole. It is even more irrational to then rely on prior hearings, while claiming the hearing is being conducted *de novo*.

There is no rational basis to penalize Mr. Shakur for not specifically offering an unprompted “disavowal” of his co-conspirators and co-defendants, as such a “disavowal” is not part of the statutory criteria for mandatory parole. It is also entirely unclear how one is expected to “disavow” a conspiracy that no longer exists and that the Government acknowledges ended four decades ago. This is not a situation where there is a gang or criminal organization that is an ongoing enterprise. If there was some rational connection between such a “disavowal” and the statutory criteria, then the Commission could have and should have asked Mr. Shakur about this during the hearing. However, at no point during the 2022 hearing, or any prior parole hearing, did the Commission ask about this topic that is purportedly significant enough to deny release.

Similarly, the Commission also states, “neither you nor your representative commented on whether you believe your continued incarceration is politically motivated.” (Exhibit 16). Again, Mr. Shakur is being kept in prison for statements he did not make during the parole hearing, regarding topics he was never asked about. To support its irrational conclusion, the Commission asserts that the “only comments in the record from previous hearings that the commission can consider is that you believe your incarceration is politically motivated.” (*Id.*). First, this is contrary to how the Commission claimed the hearing would proceed. The Commission represented to Mr. Shakur and his counsel that based on the February 17 court order, the 2022 hearing would be conducted *de novo* under the standard for mandatory parole and not rely on prior, invalidated hearings.

More importantly, the Commission’s selective references to prior hearings are factually inaccurate, mischaracterize his statements, and completely ignore evidence from those same hearings that underscore that Mr. Shakur has, in fact, accepted responsibility. In 2020, Mr.

Shakur *did* accept responsibility, writing, “The offender admitted to the crimes, accepted responsibility and expressed remorse to the families of the victims.” (Exhibit 25, 2022 Pre-Hearing Summary, p. 14). It is entirely arbitrary for the Commission to find in 2020 that he accepted responsibility, and then find in 2022 that he has not accepted responsibility by referencing facts from 2020 and prior.

The Commission’s reliance on Mr. Shakur’s 2018 hearing to deny parole was similarly misplaced. First, contrary to the 2022 Notice of Action denying parole, the audio recording of Mr. Shakur’s 2018 hearing does not include any statement that Mr. Shakur “believe[s] that [his] continued incarceration is politically motivated.” (Exhibit 24). Further, the Commission also disregarded numerous statements Mr. Shakur made during the 2018 hearing where he fully accepted responsibility:

- “I was guilty of those crimes and I today, *fully accept responsibility*.” (Emphasis added)
- “I am guilty of the crimes I have been convicted of. All of them.”
- “Today I understand that no one else is to blame for my participation in these crimes – I am responsible for my choices and I understand that I alone must accept responsibility for the crimes.”
- “I am guilty of those crimes and I today fully accept responsibility for all that took place during those bitter times. I also want to say that today I feel deep guilt and remorse for my crimes.”
- “At the time, we thought we were part of some violent political struggle against injustice. We thought we were combatants in an armed struggle. But that thinking was destructive.”⁵

(Exhibit 26, Shakur 2018 Parole Statement)

⁵ While Mr. Shakur does not use the specific language “I disavow The Family,” he clearly denounced the criminal actions he engaged in with his co-conspirators.

During the 2018 hearing, Mr. Shakur stated numerous times that he accepted responsibility. He repeated his acceptance of responsibility in 2020 and the Commission, in fact, concluded that he did accept responsibility at that hearing. During the 2022 hearing (purportedly a *de novo* hearing) he again reiterated his acceptance of responsibility and never minimized, qualified, or undermined that acceptance of responsibility. In spite of this evidence of his acceptance of responsibility, the Commission shockingly found that he has not accepted responsibility. There is no rational basis for this conclusion, as it is based on alleged “statements” Mr. Shakur never made.

The Sixth Circuit has held that in a parole setting, “a statement of acceptance is not an end in and of itself.” *Redmond v. Holland*, 2017 U.S. App. LEXIS 20556, at *7 (6th Cir. Aug. 10, 2017). In *Redmond*, the court found that the United States Parole Commission lacked a rational basis for denying Redmond parole for failing to accept responsibility for his crime. *Id.* at 9. There, the prisoner was maintaining his actual innocence and the court *still* held that his lack of acceptance should not be determinative. *Id.*, at 2, 10. Therefore, under Sixth Circuit law, the Commission’s purported justification alone is not a rational basis to deny parole. Such an arbitrary decision becomes even more irrational when considering that Mr. Shakur *has* accepted responsibility and the Commission has acknowledged that fact, but claims he hasn’t “fully accepted responsibility” because he didn’t use the exact language which the Commission apparently requires, but did not ask about. Here, Mr. Shakur is being penalized not for anything he said or did, but for what he apparently failed to say – about topics he was never asked about.

The Commission’s view that “not disavowing the family” and its claim that Mr. Shakur believed his indictment to be “politically motivated” has no rational basis to the claim that he is

likely to reoffend. This is especially true, as those assertions have no support from the record of the April 2022 hearing and are based on misrepresentations from prior hearings. The Commission then used this erroneous finding as a basis to assess that Mr. Shakur is likely to reoffend, despite Mr. Shakur's terminal cancer and end-of-life trajectory, his age, his low PATTERN scores, and his remarkably positive in-prison conduct. The evidence shows that there is no likelihood that he will reoffend. As there remains "[no] basis for the challenged decision," *Barnes*, 280 F.R.D. at 218, it "can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense." *Lewis*, 523 U.S. at 847.

b. Claim II: The Commission Violated Procedural Due Process

The Commission committed a procedural due process violation by failing to follow its own guidelines when denying mandatory parole to Mr. Shakur. "Courts evaluating claims that an agency, such as the Parole Commission, failed to follow its own regulations have found that such claims fall under the procedural due process guarantees." *Lee v. Rios*, 360 F. App'x 625, 629 (6th Cir. 2010). "We do note...that principles of due process require an agency to follow its own regulations, which have the force of law." *Marshall v. Lansing*, 839 F.2d 933, 943 (3d Cir. 1988). Here, the Commission failed to follow its own regulations because it did not provide a summary of the opposition to parole, as required by the Parole Commission Guidelines. According to the Commission's regulations, a prisoner can be excused from the presentation by opposition, however "The reason for any such exclusion must be documented in the record and any testimony out of the prisoner's presence must be promptly summarized for the prisoner with

an opportunity for response.” U.S. Parole Commission Manual at 2.13-11(b).⁶

Mr. Shakur was not present for the presentation by the opposition and he was not provided with a summary, or given an opportunity to respond. (Exhibit 24). The materials produced to Mr. Shakur’s counsel pursuant to FOIA included the audio recording of the April 27, 2022 hearing. The recording ends with a representative of the U.S. Attorney’s Office providing his name, the names of family members of victims who are opposed to parole, and discussing technological issues. (*Id.*). However, no record was provided of what this Assistant U.S. Attorney or the family members of the victims presented to the Commission.

The hearing summary and the May 16, 2022 Notice of Action denying parole make numerous references to Mr. Shakur’s underlying conviction. As these specific facts were not raised by Mr. Shakur, his representative, or the Commissioner in the presence of Mr. Shakur, they were almost certainly introduced by the Assistant U.S. Attorney. The Commission clearly relied on this information presented by the government attorney and Mr. Shakur and his counsel were denied the ability to address it during the hearing or before the Commission made its determination. The question of whether Mr. Shakur’s prosecution was “politically motivated” or had “denounced ‘The Family’” was likely raised by the prosecutor. As such, Mr. Shakur was prejudiced by this lack of opportunity to address the opposition and his due process rights were violated as a result.

⁶ Accessible at <https://www.justice.gov/sites/default/files/uspc/legacy/2010/08/27/uspc-manual111507.pdf>. Last viewed on August 7, 2022.

V. Conclusion

In conclusion, the United States Parole Commission has violated Mutulu Shakur's due process rights. He poses no risk to reoffend due to his declining medical condition, advanced age, acceptance of responsibility, commitment to rehabilitation, and exemplary prison conduct. This parole denial is arbitrary, capricious and an abuse of discretion. Mutulu Shakur therefore respectfully requests that this Court grant his petition for a writ of habeas corpus, vacate the May 16, 2022 decision of the United States Parole Commission, and order the Commission to release him from custody. Mr. Shakur would seek alternative relief and request that this Court order the Commission to provide Mr. Shakur with a new parole hearing, pursuant to 4206(d) on an emergency basis. However, given Mr. Shakur's imminent death, he is unlikely to be alive long enough for the Commission to conduct another hearing. Even if he manages to survive, his condition will prevent him from being able to meaningfully participate in such a hearing.

WHEREFORE, Petitioner requests that this Petition be granted, that the Commission's decision be reversed, and that he be granted immediate parole.

Respectfully submitted,

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*Pro Hac Vice**

*Pursuant to Forthcoming Motion

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