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**ADMINISTRATIVE APPEAL OF
NEW YORK STATE PAROLE DECISION FOR**

[REDACTED]

NYSID: [REDACTED]
DIN: [REDACTED]
AC #: [REDACTED]

Parole Interview Date: November 7, 2018
Denial Date: November 15, 2018
Inmate Parole Hearing Location: Eastern Correctional Facility
Parole Panel Location: Poughkeepsie, New York
Notice of Appeal Filed: December 19, 2018

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Submitted on 3/25/2019 to:

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INTRODUCTION

This brief is submitted in support of the timely filed notice of administrative appeal for Mr. [REDACTED]. Mr. [REDACTED] appeared before Commissioners Carol Shapiro, Tana Agostini, and William Smith via video conference at Eastern Correctional Facility on November 7, 2018. On November 15, 2018 the Parole Board (hereinafter “Board”) denied Mr. [REDACTED] parole. Mr. [REDACTED] has appeared before the Board on four prior occasions, yet has been denied parole each time. In 1981, Mr. [REDACTED] was convicted of Murder in the Second Degree and Criminal Possession of a Controlled Substance in the Second Degree. Ex. A. (Rap Sheet). Mr. [REDACTED] was sentenced to 31 years to life and has served 38 years of an indeterminate sentence. *Id.* Despite one of the Commissioners voting for his release, Mr. [REDACTED] was denied parole for the fifth time on November 15, 2018, as the other two Commissioners chose to keep him incarcerated. As the foregoing appeal will demonstrate, there are numerous independent errors that require reversal. As any one of these errors necessitates reversal, Mr. [REDACTED] should be granted a new parole interview and review in front of a set of commissioners that does not include Commissioners Agostini and Smith.

First, the Department of Corrections and Community Supervision (hereinafter “DOCCS”) failed to provide Mr. [REDACTED] access to portions of the case record that were relied on by the Board in violation of 9NYCRR 8000.5(a)(2)(i). A finding that any one of the relevant portions were withheld requires reversal. Second, the Board based its decision on several pieces of inaccurate information in the case record, each of which warrants reversal. *See Matter of Lewis v. Travis*, 9 A.D.3d 800, 801 (3rd Dep’t., 2004) (“Inasmuch as the Board relied on incorrect information in denying petitioner's request for parole release, the judgment must be reversed and a new hearing granted.”). Third, the Board relied on “opposition” letters that conveyed penal philosophy in contradiction of the law. *See King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994)

(holding that a commissioner's use of penal philosophy as a factor for denial was improper). Lastly, the Board's decision contained several violations of statutory law each of which is grounds for a new hearing. *See In re Platten v. N.Y. State Bd. of Parole*, 47 Misc. 3d 1059 (Sup. Ct. Sullivan Cnty., 2015) ("In the instant matter, the court finds that the Board failed to meet the statutory requirements of conduct by rendering a conclusory decision lacking in specificity as required by the statute, unsupported by the record and petitioner's history of incarceration.").

I. MR. [REDACTED] WAS DENIED ACCESS TO PORTIONS OF THE PAROLE FILE CONSIDERED BY THE BOARD IN VIOLATION OF THE LAW

A parole applicant "may have access to information contained in the parole case record, (i) prior to a scheduled appearance before the board." See 9 NYCRR 8000.5(c)(1)(i). "The term case record means any memorandum, document, or other writing pertaining to a present or former inmate, parolee...and maintained pursuant to sections 259-a(1)-(3) and 259-c(3) of the Executive Law." 9 NYCRR 8008.2(a). Additionally, "the term record or records includes tabulations or other writing, other than a case or employee record, maintained by the division". *See* 9 NYCRR 8008.2(b). The parole regulations further provide that a parole applicant "shall be granted access to those portions of the case record which will be considered by the board or authorized hearing officer." 9 NYCRR 8000.5(a)(2)(i).

The Board has authority to promulgate rules to maintain the confidentiality of records, but the legislature has placed limits on those restrictions. *See Matter of Clark v New York State Bd. of Parole*, 2018 NY Slip Op 30745[U], *1,*6 (Sup. Ct, New York Cnty, 2018), *aff'd*, 166 A.D.3d 531(1st Dep't., 2018). The regulations state that, "Access shall not be granted to those portions of the case record to the extent that they contain:

- (1) diagnostic opinions which if known to the releasee could lead to serious disruption of his institutional program or supervision;
- (2) materials which would reveal sources of information obtained upon a promise of confidentiality; or

(3) any information which if disclosed might result in physical harm or otherwise, to any person.”

9 NYCRR 8000.5(a)(2)(a)(1-3).

Furthermore, the *Clark* court held that while “regulations provide a basis to redact or withhold records. . .” there must be an appropriate analysis to determine whether disclosing the information would satisfy or meet any of the exceptions stated above. *See id.* Therefore, while a parole applicant does not have complete access to the case record, there are limited exceptions to information that can be withheld from the parole applicant.

In the instant action, the record establishes that the Board categorically denied Mr. [REDACTED] access to the District Attorney letter, “opposition” letters, portions of the COMPAS, medical summaries and other documents rather than provide an individualized determination whether the documents met any of the exceptions to disclosure per 9 NYCRR 8000.5(a)(2)(a)(1)-(3). As a result, Mr. [REDACTED] was denied access to portions of the parole file considered by the Board in reaching its decision in violation of 9 NYCRR §§ 8000.5(c)(1) and 8000.5(a)(2)(i). Each portion of the case record that was impermissibly withheld provides an independent ground for reversal.

A. Mr. [REDACTED] Made a Timely Request for His Parole Case Record but Portions of the Record Were Withheld or Redacted

On August 24, 2018, four months prior to his November 2018 parole hearing, Mr. [REDACTED] submitted a written request to review his case record pursuant to 9 NYCRR 8000.5(c)(1). *See Ex.*

B. (Rules and Procedures for the Review of Your Guidance and Parole File Form dated August 24, 27 and 30, 2018). On August 27, 2018, Mr. [REDACTED] received a form stating certain documents would not be made available for review. *Id.* The form stated that “the following records WILL NOT be made available for review:

Pre-Sentence/Probation Reports
 RAP Sheets
 Confidential Reports
 Separatee Inforamtion

Evaluative Reports/Evaluative Comments in Chronos
 ASAT and Treatment Information
 Letters of Support or Against Inmate's Release
 Crime Victim Statements
 Parole Board Reports Parts II & III (inmate status reports)"

Id. Additionally, although Mr. [REDACTED] received a copy of the 2018 COMPAS report, it was redacted. Ex. C. (Redacted COMPAS Report provided to Mr. [REDACTED] On August 30, 2018, Mr. [REDACTED] reviewed his "guidance and parole files" minus the aforementioned withholdings. Ex. A. As such, Mr. [REDACTED] was denied access to his parole case record in violation of 9 NYCRR §§ 8000.5(c)(1) and 8000.5(a)(2)(i).

B. Mr. [REDACTED] Was Unlawfully Denied Access to the District Attorney Letter

The November 2018 Parole Board report indicates that the Board received an official letter from the District Attorney (hereinafter "D.A. letter"). *See* Ex. D. (November 2018 Parole Board Report). The August 24, 2018 Rule and Procedures form denied Mr. [REDACTED] review of "Letters of support or against inmate's release" which includes letters from judges, district attorneys and defendant's counsel. Ex. B; Exec. L. 259-i(c)(A)(vii) (stating "recommendations of the sentencing court, the district attorney, the attorney for the inmate" shall be considered.). Therefore, Mr. [REDACTED] was denied access to the D.A. letter prior to his November 2018 appearance before the Board.

On February 11, 2019, in connection with this appeal, counsel for Mr. [REDACTED] submitted a request for the production of the case record, including the D.A. letter. Ex. E. (February 11, 2019 Aaron Drew email). In response, on February 12, 2019, Samantha Koolen, Office of Counsel, DOCCS, stated: "there are no DA, Judge or Defense Attorney letters in the Parole file of [REDACTED] 81A1110." Ex. F.

But, the interview transcript establishes there was a D.A. letter in Mr. [REDACTED] case record. Commissioner Shapiro states, "Okay. In every case we do reach out to the judge, the DA, and defense attorney to see if they have any comments for our consideration, in your case it looks like

we do have a letter from the district attorney, which we will now consider.” Ex. G at 14:17-20(November 2018 Parole Board Interview and Decision). It appears the D.A. letter was in the case file and considered, but may have been inadvertently misplaced by the Board. Thus, it was withheld from Mr. [REDACTED] without any evidence of an appropriate or independent analysis which would support its withholding in violation of 9 NYCRR 8000.5(a)(2)(a)(1-3) and *Clark v. New York State Board of Parole*, 166 A.D.3d 531, 532 (1st Dep’t., 2018) (noting Board’s admission that withholding of letters by “public officials and members of the community” was improper).

Alternatively, if there is, in fact, no District Attorney letter contained in Mr. [REDACTED] case record as Ms. Koolen avers, then the parole board’s reliance on a document, namely the November 2018 Parole Board report, Ex. D, contained in Mr. [REDACTED] case record that purports receipt of a District Attorney letter that was never actually received. This is tantamount to reliance on incorrect information and grounds for a new hearing.¹ See *In the Matter of John L. Lewis v. Travis*, 9 A.D.3d 800, 801 (3d Dept. 2004).

C. Mr. [REDACTED] Was Unlawfully Denied Access to the “Opposition” Letters Considered by the Board

The Board considered letters in opposition. Ex. G at 22:19-22. These letters were not provided to Mr. [REDACTED] prior to his November 2018 parole hearing. Ex. B. This withholding was “improper.” See *Clark*, 166 A.D.3d 531, 532 (1st Dep’t., 2018) (noting Board’s admission that withholding of letters by “public officials and members of the community” was improper). Additionally, since denying Mr. [REDACTED] access, the Board has provided Mr. [REDACTED] counsel with letters in opposition pursuant to a request in connection with this administrative appeal. Ex. H. (January 22, 2019 email from ORC Richard M. Downey); 9 NYCRR 8000.5(c)(1) (iii) (allowing for access to the parole file “prior to the timely perfecting an administrative appeal of the final

¹ The Appeals Unit should conduct an independent review of Mr. [REDACTED] case record to determine if there is a letter from the District Attorney.

decision of the board.”). This should be viewed as the Board’s concession that opposition letters must be disclosed to a parole applicant before the parole interview.²

D. Mr. [REDACTED] Was Unlawfully Denied Access to the Medical Summaries in the Case Record

On August 24, 2018, pursuant to 9 NYCRR 8000.5(c)(1), Mr. [REDACTED] submitted a written request to review his case record in preparation for his November 2018 parole hearing. Ex. B. On August 27, 2018, Mr. [REDACTED] was advised by letter that “Psychiatric Reports, Evaluative Reports/Evaluative comments in Chronos, ASAT and Treatment Information would be withheld.” *Id.* (indicating that “the following records WILL NOT be made available for review...Psychiatric Reports, Evaluative Reports/Evaluative comments in Chronos, ASAT and Treatment Information”).

The Board has not identified how these records qualified for withholding under the regulation. 9 NYCRR 8000.5(a)(2)(a)(1-3). The Board has not offered evidence that it conducted an appropriate analysis to determine whether disclosing the information would satisfy any of the exceptions set forth in 9 NYCRR 8000.5(a)(2)(a)(1-3). Specifically, the board has not shown that the record, (1) contains diagnostic information that would lead to serious disruption of Mr. [REDACTED] institutional program or supervision; (2) would reveal a confidential source; or (3) would result in physical harm to anyone or otherwise pursuant to 9 NYCRR 8000.5(a)(2)(a)(1-3).

Furthermore, since the 2018 November denial, the Board has provided Mr. [REDACTED] counsel with “Confidential Comprehensive Medical Summaries that were part of [REDACTED] Parole folder,” pursuant to a request in connection with this administrative appeal. Ex. I (February 13, 2019 letter from ORC Richard Downey enclosing medical summaries); 9 NYCRR

² Although Mr. [REDACTED] was provided with the “opposition” letters in connection with this administrative appeal, Mr. [REDACTED] objects to the redaction of senders’ full addresses. The country and state of origin should not be redacted to permit undersigned counsel to determine the geographical relevancy of such letters.

8000.5(c)(1) (iii) (allowing for access to the parole file “prior to the timely perfecting an administrative appeal of the final decision of the board.”). This should be viewed as a concession by the Board that medical information contained in Mr. ██████ case record must be disclosed to a parole applicant prior to a parole hearing before the Board. As ██████ was not provided this information prior to his November 2018 parole hearing, this withholding was improper.

E. Mr. ██████ was Denied Access to Separatee Information Contained in the Case Record

On August 24, 2018, four months prior to his November 2018 parole hearing, Mr. ██████ submitted a written request to review his case record pursuant to 9 NYCRR 8000.5(c)(1). On August 30, 2018, Mr. ██████ received a form stating “separatee information” will not be accessible for review. Ex. B. On December 17, 2018, counsel for Mr. ██████ requested his parole file for the purpose of perfecting this administrative appeal, pursuant to 9 NYCRR 8000.5(c)(1). Ex. E. On February 12, 2019, DOCCS stated that it would not disclose this information. Ex. J.(February 12, 2019 email from Ms. Koolen, DOCCS). According to DOCCS’ Office of Counsel, “separatee information is essentially an enemy list—it includes the names of inmates who cannot be housed near or with an individual, [and] ...any separatee information/list will be withheld in every 8000.5 case for serious safety concerns.” *Id.*

The categorical withholding of this information is contrary to law. *See* 8000.5(a)(2)(a)(1-3). The Board did not conduct an individualized analysis to determine whether withholding was justified under the exceptions to disclosure.³ *Id.* Therefore, this withholding was improper.

³ Mr. ██████ objects to the withholding of this portion of the case record as to the administrative appeal.

F. Mr. [REDACTED] was Denied Access to the Full COMPAS Report Prior to the Parole Interview

On August 24, 2018, pursuant to 9 NYCRR 8000.5(c)(1), Mr. [REDACTED] submitted a written request to review his case record in preparation for his November 2018 parole hearing. Ex. B. Mr. [REDACTED] was provided with a redacted copy of his 2018 COMPAS report. Ex. C. Since then, the Board has provided Mr. [REDACTED] counsel with an un-redacted copy of his COMPAS report pursuant to his request for his case record in connection with this administrative appeal. Ex. M. The Board's disclosure of the un-redacted 2018 COMPAS for the administrative appeal should be a concession that the un-redacted 2018 COMPAS was unlawfully withheld from Mr. [REDACTED] in connection with his November 2018 parole review.

II. THE PAROLE BOARD BASED ITS DENIAL ON INACCURATE INFORMATION CONTAINED IN MR. [REDACTED] PAROLE FILE.

The Board's reliance on multiple inaccuracies in Mr. [REDACTED] case record requires a new parole review. *See Matter of Lewis v. Travis*, 9 A.D.3d 800, 801 (3rd Dep't., 2004) (holding "[i]n as much as the Board relied on incorrect information in denying petitioner's request for parole release, the judgment must be reversed and a new hearing granted."). Mr. [REDACTED] case record contains multiple inaccuracies which the board relied on when denying his parole. First, the Board based its decision on the incorrect belief that Mr. [REDACTED] shot the victim six times. Second, the Board relied on an inaccurate assessment Mr. [REDACTED] criminal history. Third, the Board's relied on a flawed COMPAS report that overinflated Mr [REDACTED] propensity for drug abuse, incorrectly reflected that Mr. [REDACTED] had no employment opportunities, and stated, without support, that Mr. [REDACTED] would incur financial hardship upon release. Each error is a ground for reversal.

A. The Board’s Claim that the Victim was Shot Six Times is Inaccurate

The November 15, 2018 decision denying parole misstated the facts of the crime two times.

First, the Board stated:

“And when Police Officer ██████ arrived you fired 6 rounds causing his death.”

Next, the Board stated:

“The majority of this Panel believes that your discretionary release at this time remains incompatible with the welfare of the community which still suffers from your crime. Shooting PO ██████ six times causing his most painful death was so unnecessary given the circumstances that your release at this time would so deprecate the serious nature of your offense as to undermine respect for the law.”

Ex. G at 21:7-13.⁴

However, the evidence contained in Mr. ██████ case record, which includes the trial testimony of Dr. ██████ ██████ Chief Medical Examiner for the City of ██████ (hereinafter “Dr. ██████” and the January 24, 2017 letter from Mr. ██████ trial defense attorney Mr. Michael D. Stalonas, established that the victim was not shot six times. *See* Exs. K, L.

According to the prosecution’s witness, Dr. ██████ the victim could have been shot no more than three times and as few as two. Dr. ██████ testified that there were “three entry perforations and three exit perforations,” but that he could not tell with any degree of medical certainty if the victim had been hit with three separate bullets, rather than two. Ex. L at 1336, 1348. Dr. ██████ testified that one bullet could have caused two entry and exits wounds by entering and exiting the forearm, then entering and exiting the chest. *Id* at 1347-1349. In essence, one bullet could have made two entry wounds and two exit wounds. Dr. ██████ could not determine whether the wounds were caused by two bullets or three, but his testimony firmly established that the victim was not shot six times. Ex. L at 1348.

⁴ It is unclear where this erroneous claim that Mr. ██████ fired six times and the victim was shot six times originated.

Moreover, if defense counsel Stalonas' January 24, 2017 letter, which was contained in Mr. ██████ parole file, had been reviewed, the Board would have been apprised of this error. Mr. Stalonas' letter stated, "it is patently obvious that PO ██████ was hit by 2 or 3 bullets rather than the 6 that are referred to in the Probation Report. It is not unusual to find erroneous information in a Probation Report. The Minutes that reflect Dr. ██████ testimony are clear and unambiguous. (2 or 3 bullets that struck the officer)." Ex. K. In addition, Mr. ██████ refers to "the sentencing minutes at P.40-41, [which] show that Officer ██████ gun was fully discharged (6 bullets)." *Id.* Even when directed to the correct information contained in both the trial transcript and the sentencing minutes,⁵ the Board erroneously asserted that the victim was shot six times. This error is a ground for reversal.

B. The Parole Board Based Its Decision on an Inaccurate Criminal Conviction Not Contained in Mr. ██████ Criminal Record

The Board based its denial on an incorrect understanding of Mr. ██████ criminal history. In its November 15, 2018 decision denying parole, the Board stated that "[y]our history reflects a prior firearms conviction. . . among your drug and gambling convictions commencing in 1974. "You were on a bad path long before you shot your victim." Ex. G at 21:20-22. Mr. ██████ criminal history began in 1977, not 1974. Ex. A. Although there is a record of an arrest in 1975 and another in 1976, neither case resulted in a criminal conviction. *Id.* Thus, the Board relied on inaccurate information in denying parole.

C. The Parole Board Relied on COMPAS Information Which Was Based on Erroneous and Unsubstantiated Information

The 2018 COMPAS report contains multiple errors and is internally inconsistent. Ex. M. First, the COMPAS report reflects a high risk of substance abuse that is not supported by Mr.

⁵ It is unclear whether the sentencing minutes were in the case record. If not, this is a ground for reversal as well.

██████ case record or medical summary. Second, the COMPAS report incorrectly reflects that Mr. ██████ has no prospective employment. Third, Mr. ██████ COMPAS report states, without supporting evidence, that Mr. ██████ would face financial difficulty. Each error is a ground for reversal.

1. The COMPAS Report Contains an Unsubstantiated Claim of a Propensity for Drug Abuse

The Court of Appeals has held that, “[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009). Mr. ██████ was scored low in every category of the 2018 COMPAS except for substance abuse. Despite his thirty years of clean urinalyses, Mr. ██████ has been arbitrarily rated high for substance abuse upon release for the last seven (7) years. Ex. M. (unredacted 2018 COMPAS report; Ex. N (unredacted 2016 COMPAS report; Ex. O (unredacted 2014 COMPAS report); and Ex. P (unredacted 2012 COMPAS report). Yet, high COMPAS scores in the area of substance abuse are not supported by the information contained in Mr. ██████ case record.

The 2018 COMPAS score for “ReEntry Substance Abuse” was seven (7). Ex. M at 1/1, Risk Assessment, Criminogenic Need Scales Section. The 2016 COMPAS score for “ReEntry Substance Abuse” was nine (9). Ex. N at 1/1, Risk Assessment, Criminogenic Need Scales Section. The 2014 COMPAS score for “ReEntry Substance Abuse” was a seven (7). Ex. O at 1/1, Risk Assessment, Criminogenic Need Scales Section. Last, the 2012 COMPAS score for “ReEntry Substance Abuse” was a nine (9). Ex. P at 1/1, COMPAS ReEntry Risk Assessment.

In the last seven years, Mr. ██████ COMPAS scores have fluctuated despite there being little to no differences in the answers to the substance abuse questions and no change in the language of the narrative to suggest any reason for the change in score. The

Criminogenic Needs Narrative Summary in the 2018, 2016, 2014 and 2012, all contain nearly the same word for word boilerplate language. This together with the arbitrary volatility in the substance abuse scores suggest an unreliable assessment of Mr. [REDACTED] substance abuse risk. None of these narratives explain why Mr. [REDACTED] presents as someone likely to have a drug or alcohol problem. Moreover, the 2018 COMPAS report states that “it is not clear to the interviewer whether Mr. [REDACTED] was at risk for substance abuse problems,” in the Criminogenic Needs Narrative Summary. Additionally, under the section titled, Substance Use, question number 24 reads, “Is this person at risk for substance abuse problems?” The checked response states “Unsure.” Yet, Mr. [REDACTED] is rated with a seven (7), placing him in the highly probable range..

The only document that suggests Mr. [REDACTED] has a drug problem does so by conflating possession and abuse. Ex. Q (November 2012 Reappearance Inmate Status Report). Mr. [REDACTED] 2012 Parole Board Appearance Report states, “the instant offense involves possessing a large quantity of Heroin and he would benefit from drug testing and treatment.” The document never states that Mr. [REDACTED] used or abused drugs but correlates possession with abuse. However, correlation does not imply causation.

Additionally, in 2018, 2016, and 2012, the question as to whether Mr. [REDACTED] committed offenses while high/drunk, was answered as “unsure” despite medical reports that confirm Mr. [REDACTED] was not under the influence during the crime. Ex. R (April 15, 1980 Toxicology Exam Showing Mr. [REDACTED] Tested Negative for PCP). The 2014 COMPAS is the only report that accurately indicates that Mr. [REDACTED] was not high/drunk when he committed the offenses. The COMPAS substance abuse scores are based on inaccurate information and vary inexplicably over the years; therefore, reliance on such scores was arbitrary and capricious.

2. *The COMPAS Report Erroneously Stated that Mr. [REDACTED] Had No Employment Plans*

In preparation for his November 2018 Parole interview, Mr. [REDACTED] submitted a parole packet which contained an offer of employment and three interviews should he be released, yet his 2018 COMPAS report erroneously stated Mr. [REDACTED] had no employment offers. Ex. M, at Pg. 4 of 6, Work and Financial, #28.

Mr. [REDACTED] has earned his high school diploma, two associate degrees and acquired a number of vocational skills during his tenure. As a result of his achievements, several organizations extended offers for interviews or employment. Yet, the 2018 COMPAS report stated “Mr. [REDACTED] did not appear to have an employment plan and appeared likely to face employability problems upon release”. Ex. M at 5/5, Re-Entry Employment Expectations. In the Work and Financial Section, question number 28 reads, “What are the current employment plans?” The checked response states “No employment plan.” It should be noted that these statements were redacted from the copy provided to Mr. [REDACTED] Ex. C, at 4/6, Work and Financial section.

Specifically, Mr. [REDACTED] had a letter from [REDACTED] Enterprise to interview for a job to do community outreach, administrative work, gallery painting and maintenance. See Parole Packet at 23. [REDACTED], the director of [REDACTED], committed to interview Mr. [REDACTED] for an “open position handling gallery operations, if released.” See Parole Packet at 24. Furthermore, Dr. [REDACTED], faculty at [REDACTED] committed to interview Mr. [REDACTED] for any number of the open administrative, maintenance, or janitorial positions. See Parole Packet at 25.⁶

⁶ Mr. [REDACTED] with the assistance of volunteers from the Parole Preparation Project submitted a parole packet, which contained community support and employment (and interview) letters. The entire parole packet is not included with this brief because it is voluminous and is part of the case record/parole file.

Finally, Mr. [REDACTED] offered Mr. [REDACTED] a position working for [REDACTED] [REDACTED]. Mr. Burns states, “[n]ot only can I offer [Mr. [REDACTED]] employment, but I can provide him with training programs that I direct and hold regularly that include the 30-hour OSHA requirement, Non-Union Apprenticeship Trades Training and Job Placement for construction work.” See Parole Packet at 26. Although the parole board made mention of Mr. [REDACTED] employment offers in the interview, there is no evidence that the parole board considered the offer for employment extended to Mr. [REDACTED]. Ex. G at 14:7-9. Therefore, question twenty-eight of the 2018 COMPAS report inaccurately reflects that Mr. [REDACTED] had no employment plans.

3. *The COMPAS Report Erroneously Reflects an Unsubstantiated Claim that Mr. [REDACTED] Would Incur Financial Difficulties Upon Release*

The July 2018 COMPAS report is internally inconsistent with regard to financial difficulty. The COMPAS report states that Mr. [REDACTED] would incur financial difficulties upon release. This assertion is not supported by the case record or Mr. [REDACTED] parole packet. Therefore, because the Board relied on inconsistent information without a sound basis in fact, the decision cannot stand.

In preparation for his November 2018 parole hearing, Mr. [REDACTED] had his parole packet professionally prepared by the Parole Preparation Project. Contained within this 122 page document were letters of community support, letters of support from family and friends, and Mr. [REDACTED] institutional accomplishment. See Parole Packet at 16-20, 28-69, 71-87. In addition, as stated above, Mr. [REDACTED] most recent parole packet contained three offers for job interviews and one firm offer of employment upon release. See Parole Packet at 23-26. Despite the overwhelming communal and family support and employment opportunities, however, Mr. [REDACTED] 2018 COMPAS report reflected, without evidence,

that he would face financial difficulty upon release. Ex. M at 4/5, Re-entry Financial and 5/5, Re-Entry Employment Expectations.

Moreover, on page 5/5 of the Re-entry Financial section, after Mr. [REDACTED] stated that (1) “money will not be a problem when he is released,” (2) “it will not be difficult to manage his money,” (3) “it would not be difficult to have enough money to get by,” and (4) “that supporting himself without illegal means would not be difficult,” the 2018 COMPAS reported that “Mr. [REDACTED] expected to have financial problems upon release.” Additionally, under the Work and Financial Section, question number 30 reads “Does this person face employability problems upon release?” The checked response states, “Yes.” Further, question number 30 reads, “Will this person have financial problems upon release?” The checked response states, “Yes.” Ex.. M at 5/5, Re-entry Financial section. Again, it should be noted that these statements were redacted from the copy provided to Mr. [REDACTED]. These statements are inaccurate and disproven by the documents contained in Mr. [REDACTED] case record. These statements also incorrectly suggest, contrary to the case record, that Mr. [REDACTED] would suffer financial difficulties upon release.

III. THE PAROLE BOARD’S DECISION VIOLATES THE POSITIVE STATUTORY REQUIREMENTS SET FORTH BY THE LEGISLATURE

The Board’s decision must be “in accordance with and not violative of any positive statutory requirement, lest it be subject to review. *See, In the Matter of Rabenbauer v. New York State Department of Corrections and Community Supervision*, 46 Misc.3d 603,606-07 (Sup. Ct. Sullivan Cnty, 2014). Here, the Board: (1) considered community opposition that expressed penal philosophy in violation of Exec. L. 259-i et seq; *see also King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (the Board must provide the inmate with a proper hearing in which only the relevant guidelines are considered; (2) rendered its decision conclusory terms in violation

of Exec. L. 259-i(2)(a); (3) failed to consider the statement from Mr. [REDACTED] defense attorney, Mr. Micheal Stalonas in violation of Exec. L. 259-i(2)(c)(A)(vii); (4) failed to advise Mr. [REDACTED] of its consideration of separate information in violation of 9 NYCRR 8000.5(c)(1); *see also*, *Matter of Almonor v. NYS Bd. of Parole*, 16 Misc.3d 1126 [A] (Sup. Ct., N.Y. Cnty, 2007); and (5) based its denial solely on the seriousness of the instant offense in violation of Exec. L. 259-i(2)(a); *see also King*, 190 A.D.2d 423 (1st Dept. 1993), *aff'd*, 83 N.Y.2d 788 (1994) (“it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it.”) As discussed below, each one of these violations is a separate ground for reversal.

A. The Board considered “Community Opposition” that Expressed Penal Philosophy

The Board relied on “opposition” letters that conveyed penal philosophy, which is contrary to law. *See King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (“There is evidence in the record that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy”). Pending the content, “opposition” letters received from public officials and members of the community may be considered by the Parole Board when making a parole decision. *See Clark v. New York State Bd. Of Parole*, 166 A.D.3d 531 (1st Dep’t., 2018) (“the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community”). Here, however, the Board considered and relied upon “community opposition” letters that conveyed penal philosophy, all of it from persons who appear to have had no personal knowledge of Mr. [REDACTED] or the victim and some from persons who do not reside in New York State. This kind of opposition material should not have been considered by the Board.

The vast majority of the letters considered by the Board were identical and conveyed the opinion that anyone who kills a police officer should never be released—this is penal philosophy. See Exs. S, T (sample portions of opposition letters contained in case record). See *King v. New York State Div. of Parole*, 190 A.D.2d 423 (1st Dept. 1993), *aff'd*, 83 N.Y.2d 788 (1994) (“The role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder...”). Of the 82 opposition letters that can be directly connected to the 2018 parole hearing, 80 focus on what Mr. [REDACTED] “proper punishment” should be. Seventy-six (76) of the 80 aforementioned letters contain the following statement word for word: “Justice demands that he be made to spend every remaining day of his full sentence in prison.” Ex. S, T. In addition, each of the 76 identical letters premise the opposition to release on the status of the victim. Each letter states that the victim was a veteran of the United States Army and New York Police Department, and that he was a husband and father. Ex. S. The Board is not permitted to value the life of a police officer over that of other crime victims and therefore, should not consider opposition material that conveys this kind of penal philosophy. See *King*, 190 A.D.2d at 433, 434 (stating that the Board may not have an automatic denial of parole because the victim was a police officer).

Furthermore, of the remaining 4 opposition letters that convey penal philosophy, one is from an organization that has sent three identical “opposition letters” that vary in date only. Ex. T (December 29, 2014, December 28, 2016 and September 25, 2018). The letters are from a police union whose interest in Mr. [REDACTED] case is premised on keeping all persons convicted of killing of police officers in prison.⁷ Each letter advocates denial of parole because the victim was a police officer. Thus, the Board impermissibly relied on penal philosophy.

⁷ The Detectives Endowment Association states in relation to another parole applicant’s hearing “the DEA sent an anti-parole letter, *as always*.” (emphasis added) <https://www.nycdetectives.org/news/keep-cop-killer-herman-bell-prison/>

“Opposition letters” should only be considered if the author conveys specific knowledge of the case at hand rather than spouting personal opinions. A letter from a self-proclaimed “ex-convict” from Texas,⁸ who established his “credentials” based on his experience with “savage criminals who have no respect for law enforcement” illustrates the irrationality of considering “opposition letters” that convey penal philosophy. The author opposes release because, even though he will “never reoffend,” he is one of “the minorities.” This writer demonstrates no knowledge of Mr. ██████ conduct or achievements since being incarcerated, yet he assumes Mr. ██████ has not been rehabilitated and is at risk for reoffending. Ex. S at 1.

In contrast, the 28 letters written on behalf of Mr. ██████ that were in his parole packet, were unique letters that conveyed personal knowledge of Mr. ██████. *See Parole Packet* at 28-60. Furthermore, 18 of these letters speak to the role the author will play in supporting Mr. ██████ re-entry into society, an integral statutory factor when considering a person for parole. *See id.* at 28-31, 34, 37, 39-44, 48, 50-52, 54-57, 59, 60.

Some letters were impermissibly considered because they appear to have been sent from states other than New York State. Although the Board redacted the address of each sender, on several letters the state of origin is still visible.⁹ One came from Wisconsin, another from Illinois. Ex. S at 2, 4. Residents of other states should not be considered to be part of the relevant “members of the community” for the purpose of determining whether a person should be released to parole supervision in New York State. And, it should be explained how residents of other states are part of the “community which still suffers from your crime.” Ex. G at 23. Furthermore, due to

⁸ Due to the excessive redaction, the current location of the author cannot be confirmed but the body of the letter attests to incarceration in the state of Texas.

⁹ In *Clark v. New York State Bd. Of Parole*, 2018 N.Y. Slip. Op. 30745 (U) (Trial Order), aff’d., 166 A.D.3d 531 (1st Dept. 2018), the Court held that while the parole board has the authority to maintain the confidentiality of records, it also places limits on said restrictions as stated above. *Id.* at *6. The Court further held “that while the regulations provide a basis to redact or withhold records . . . there must be an appropriate analysis to determine whether disclosing the information would harm anyone, let alone the community at large.” The city and state of origin as well as the date received does not provide enough information about the sender to allow harm to occur to them; therefore redaction is unnecessary and not consistent with the regulations. *See 9 NYCRR 8000.5(a)(2)(a)(2)*.

redactions, it is impossible to determine whether many more “opposition letters” were sent from outside New York State. Ex. S.

Beyond the inclusion of penal philosophy, the verbiage of 90% of the opposition letters is word for word the same letter. Ex. S. The use of a boilerplate letter indicates that an individual or an organization is organizing opposition to the release of Mr. [REDACTED]. Therefore the number of letters received reflected the organizing ability of the law enforcement community rather than the “community.” Lastly, the boilerplate opposition letter is antithetical to the Board’s claim that there was “significant” opposition to Mr. [REDACTED] release. Ex. G at 22. If the board were to consider only unique letters of opposition the total would be approximately six letters which is a far cry from “significant opposition.” *Id.*

Moreover, even if there were thousands of identical letters, this may only indicate the organizing abilities and resources of one sector of society—in this case the law enforcement community. That Mr. [REDACTED] does not have the resources to organize an on-line campaign to solicit letters of support does not mean that an equal number of members of society would not support his release. Reliance on “opposition” that is generated by efforts akin to political campaigning, reduces the Board to counting votes and succumbing to political pressure. As such “opposition” is beyond the statutory factors delineated in Exec. L. 259-i et seq and the Board’s consideration of such requires reversal.

B. The Board Failed to Explain the Reason for Denial in Detail

The Board’s decision cited two of three statutory standards it must consider in determining parole but failed to explain in detail why, in applying Mr. [REDACTED] facts to those two standards, parole was not appropriate. In determining parole, the Board was required to consider whether, if released, Mr. [REDACTED] (1) “will live and remain at liberty without violating the law,” (2) whether “his release is not incompatible with the welfare of society,” and (3) he “will not so deprecate the

seriousness of his crime as to undermine respect for law.” Exec. L. 259-i(c)(A). The Board was also required to inform Mr. [REDACTED] “...of the factors and reasons for such denial of parole,” and “[s]uch reasons *shall be given in detail and not in conclusory terms.*” Exec. L. 259-i (a) (emphasis added). *See also In re Ciaprazi v. Evans*, 52 Misc.3d 1212(A) (Sup. Ct. Dutchess Co., 2016) (concluding that the use of boilerplate terms do not effectively provide the details necessary to allow for judicial review and reversal of a parole denial). Here, the Board cited statutory language rather than provide a detailed explanation as to why two out of the three commissioners denied parole.

As to the first standard, the Board appears to have determined that Mr. [REDACTED] would live and remain at liberty without violating the law since the commissioners did not cite that standard as a basis for denying parole. Ex. G at 21. Therefore, despite the Board noting that Mr. [REDACTED] 2018 COMPAS score was probable for risk of substance abuse, it determined there was no reasonable probability that Mr. [REDACTED] would violate the law. Ex. G at 22.

As to the second standard, whether release would be incompatible with the welfare of society, the Board did not explain why, if Mr. [REDACTED] were to be released to parole supervision, it would be incompatible with the welfare of society. First, the Board applied the wrong standard. The Board stated: “Given the magnitude of your crime...release is incompatible with the welfare of the community which still suffers from your crime.” Ex. G at 23. The Board did not consider the welfare of society as a whole; instead, the Board considered the welfare of only a portion of society—that “which still suffers from the crime.” Second, even if the Board were permitted to consider only the welfare of a fraction of society, the Board does not specify the community to which it refers. Third, even if the Board were permitted to consider only a specified community within society, the Board did not identify the sub-section of society to which it referred nor explain how the release of Mr. [REDACTED] would be incompatible with that portion of society’s welfare.

The Board must explain why it reached its decision. See *In re McBride v. Evans*, 42 Misc.3d 1230(A) (Sup. Ct. Dutchess Co. 2014) (“The Board gave no analysis as to how or why it reached this conclusion. It appears to have focused only on petitioner’s past behavior without articulating a rational basis for reaching its conclusion that his release would be incompatible with the welfare of society at this time.”). This is all the more true, when all other factors strongly establish that release would not be incompatible with the welfare of society. Ex. G at 22 (demonstrating positive factors such as a low overall compass score, detailed case plan with goals achieved and in progress, multiple commendations, awards and certificates for completion of voluntary programs, two Associate’s Degrees, a variety of vocational skills, and participation in a variety of therapeutic programs and cultural organizations). The Board’s decision does not explain why release would be detrimental to the “good fortune, happiness, well-being, or prosperity” of society as a whole. See *Welfare*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/welfare> (last visited Feb. 12, 2019) (defining welfare as “the state of doing well especially in respect to good fortune, happiness, well-being, or prosperity.”).

As to the third standard, the Board failed to explain why Mr. [REDACTED] release to parole supervision would so deprecate the seriousness of the offense as to undermine respect for the law. The board described the victim: he was “a father, a son and husband,” and was “loved, respected and [h]eld in high regard.” Ex. G at 22. The Board also focused on the number of times the victim was shot.¹⁰ *Id.* But, these facts do not, without more, explain why release would undermine respect for the law. First, the characteristics of a victim are not valid reasons for denying parole because the Board is not permitted to value the life of one victim more than another. *King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (stating that the parole board must conduct a parole hearing using only the relevant guidelines listed at N.Y. Exec. Law. 259-i(2)(c)(A)).

¹⁰ The Board inaccurately inflated the number of times the victim was shot. See Section III(A) above.

Whether a victim is loved or un-loved, a father or childless is not a reason for denying parole. Any one person or even society as a whole may mourn more deeply when a young person, a police officer, or revered public figure is murdered, but the applicable law does not permit the Parole Board to deny parole based on the nature of the victim. Second, the law set a minimum penalty of 31 years. Mr. [REDACTED] has served eight years beyond the minimum. Therefore, release at this time is permitted by law. Since the law permits release at this time, the Board failed to explain in detail why release at this time would undermine respect for the law.

Moreover, the Board's reference to "significant community opposition" does not explain why release would be incompatible with the welfare of society nor why release would undermine respect for the law. Ex. G at 22. The Board does not explain the source nor the nature of the community opposition it relied upon. The vast majority of the opposition was seventy-six carbon copy letters that voiced penal philosophy. See Ex. S. In addition, whether to grant parole should not be a popularity contest in which the Board weighs opposition versus support. The Board's failure to explain beyond the conclusory statement of "significant community opposition" completely contradicts the statute's express declaration that "[s]uch reasons shall be given in detail and not in conclusory terms." Exec. L. § 259-i(a). *See also West v New York State Bd. Of Parole*, 41 Misc. 3D 1214(A) (Sup. Ct. Albany Co. 2013) (holding that the Parole Board must provide a "detailed written explanation [which] is necessary to enable intelligent judicial review of the Board's decision.")

The Board's failure to explain in detail risks that the Board may have considered factors outside the scope of the statute. *See King v. New York State Div. of Parole*, 83 N.Y.2d 788 (1994) (affirming the appellate division's decision "that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute."). The Board's failure to explain in detail requires reversal.

C. The Board Failed to Consider Mr. ██████ Defense Attorney's Statement

The Board is statutorily required to review letters from the parole applicant's defense attorney. Exec. L. 259-i(c)(A)(vii) (Stating "recommendations of the sentencing court, the district attorney, the attorney for the inmate" shall be considered.); *see also, In re King v. N.Y. State Div. of Parole*, 190 A.D.2d 423, 431 (1st Dep't 1993), *aff'd.* 83 N.Y.2d 788 (1994) ("[I]t is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the board did in fact fail to consider the proper standards, the courts must intervene."). Because the Board failed to consider a January 24, 2017 letter from Mr. ██████ trial attorney, a new parole review should be granted.

The November 2018 Parole Board Report does not indicate that a letter was requested or received from Mr. ██████ defense attorney. Ex. L (November 2018 Parole Board report). Yet, Mr. ██████ Parole Packet, submitted to the Board in advance of Mr. ██████ November 7, 2018 interview date, included a letter from Mr. ██████ trial counsel, Michael D. Stalonas.¹¹ Ex. L (Stalonas letter included in Parole Packet at 69).

Mr. Stalonas' letter commends Mr. ██████ institutional progress and achievements and corrects the erroneous assertion that Mr. ██████ shot the victim six times. *Id.* The Board was required to review Mr. ██████ January 24, 2017 letter, but there is no indication it did so. Ex. G. While there was mention of a D.A. letter, there is absolutely no mention of Mr. ██████ January 24, 2017 letter nor is receipt of it indicated on the parole board report. Ex. D. The Board's failure to consider trial counsel's letter is evidenced by the Board's continued erroneous assertion that Mr. ██████ shot the victim six times. Ex. G at 23:10-13. Had the Board considered Mr.

¹¹ Mr. ██████ with the assistance of volunteers from the Parole Preparation Project submitted a parole packet, which contained Mr. Stalonas' January 24, 2017 letter at page 69. The entire parole packet is not included with this brief because it is voluminous and is part of the case record.

January 24, 2017 letter, it would have learned that the victim was “hit by 2 or 3 bullets rather than the six that are referred to in the Probation Report.” Ex. L. This fact is also corroborated by the trial transcript of the prosecution’s witness Dr. Gross. Ex. K. at 1336. Failure to consider defense counsel’s letter is a statutory violation of Exec. L. 259-i(2)(c)(A)(vii) and requires the denial be reversed.

D. The Board Failed to Provide An Individualized Reason for Departing from Eleven Out of Twelve COMPAS Scores

Mr. ██████████ COMPAS scored him as low risk in eleven out of twelve categories, yet the Board denied parole and failed to explain why it departed from each score. As to “Risk for Felony Violence,” “Arrest Risk,” and “Abscond Risk,” Mr. ██████████ was deemed to be at the lowest level of risk, scoring a one on a scale of ten on the COMPAS. Ex. C. He also scored low in “Criminal Involvement,” “History of Violence” and “Prison Misconduct.” *Id.* And, the COMPAS determined Mr. ██████████ was unlikely to have “Negative Social Cognitions,” Low Self-Efficacy/Optimism,” and “Low Family Support,” and unlikely to have problems with “ReEntry Financial” and “ReEntry Employment Expectations.” Yet, the Board denied ██████████ release to parole supervision.

The regulations governing parole decision-making require that:

“In making a release determination, the Board shall be guided by risk and needs principles, including the inmate’s risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, ‘Department of Risk and Needs Assessment’). If a Board determination, denying release, departs from the Department Risk and Needs Assessment’s scores, the Board shall specify any scale within the Department Risk and

Needs Assessment from which it departed and provide an individualized reason for such departure.”

9 NYCCRR §8002.2(a). In denying parole to Mr. [REDACTED], the Board departed from all the scales in which Mr. [REDACTED] received a low risk score. But, the Board failed to specify any scale from which it departed, and failed to provide an individualized reason for doing so as to each scale.

E. The Parole Board Impermissibly Considered “Separatee Information” Without Informing Mr. [REDACTED].

It is not clear whether or not Mr. [REDACTED] case record contained “separatee information,” but if so, the Board failed to state its consideration of such. On August 24, 2018, four months prior to his November 2018 parole hearing, Mr. [REDACTED] submitted a written request to review his case record pursuant to 9 NYCRR 8000.5(c)(1). Ex. A. On August 27, 2018, Mr. [REDACTED] received what appears to be a form letter advising him that “separatee information would be withheld.” Ex. A (indicating that “the following records WILL NOT be made available for review. . . separatee information.”). If separatee information was in the file, the Board had an obligation to disclose its consideration of such material. *See Matter of Almonor v. NYS Bd. of Parole*, 16 Misc.3d 1126 [A] (Sup. Ct., N.Y. Cnty, 2007) (“even though, on some occasions, 9 NYCRR 8000.5 allows respondent to consider materials. . . protected from a parole applicant’s review, respondent would not have the right to keep the fact of their consideration secret from the applicant.”). As the Board’s decision did not disclose consideration of such information in connection with Mr. [REDACTED] parole application, the non-disclosure violates 9 NYCRR 8000.5 by keeping the fact of consideration of separatee information a secret from Mr. [REDACTED] and is grounds for reversal.

F. The Parole Board Based Its Denial Solely on the Seriousness of the Instant Offense

In 2011, the legislature made changes to Executive Law 259(c)(4). “The changes were intended to focus the parole boards away from focusing on the severity or heinous nature of the

instant offense, to a forward-thinking paradigm to evaluate whether an inmate is rehabilitated and ready for release.” *Platten v. NYS Bd. Of Parole*, 47 Misc.3d 1059, 1062 (Sup. Ct. Sullivan Cnty, 2015). While the parole board has wide discretion, a parole board cannot base its decision solely on the serious nature of the underlying offense. *Id.* at 1063. Additionally, a parole board cannot retry an inmate, harass, badger or argue with an inmate, second guess the findings of competent experts involved in the inmate’s trial or infuse their own personal beliefs into the proceeding. *Id.* (citing *King v. New York State Div. of Parole*, 190 A.D.2d 423, 432 (1st Dept. 1993) aff’d 83 N.Y.2d 1277 (1994). It is not the role of the parole board to resentence the 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. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, 432 (1st Dept. 1993), aff’d 83 N.Y.2d 1277 (1994) (emphasis added). Likewise, the Board cannot unduly focus on the nature of the crime, for it is but one factor; the board must assess the applicant as [he] is today and how he has prepared [himself] for release back into society. *See Matter of Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 26 (1st Dept. 2016).

Furthermore, “the legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself.” *King v. New York State Div. of Parole*, 190 A.D.2d 423, 433 (1st Dept. 1993), aff’d 83 N.Y.2d 1277 (1994). A decision by the parole board to deny parole solely because the case involves the death of a police officer is a breach of the obligation legislatively imposed upon it to render a qualitative judgment based upon a review of all the relevant factors. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, 434 (1st Dept. 1993), aff’d 83 N.Y.2d 1277 (1994). Thus, a decision that is not in accord with the statutory requirements cannot stand. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, 430 (1st Dept. 1993), aff’d 83 N.Y.2d

1277 (1994); see also, *In the Matter of Rabenbauer v. New York State Department of Corrections and Community Supervision*, 46 Misc.3d 603,606-08, (Sup. Ct. Sullivan Cnty, 2014).

On February 12, 1980, Mr. ██████ caused the death of a police officer. Ex. G at 7:6-8. Mr. ██████ was convicted of second degree murder and sentenced to 25 years to life, plus an additional 6 years for drug possession. After exercising his direct appeal, instead of continuing to appeal his conviction, Mr. ██████ accepted responsibility for his actions and decided to work on himself. *Id.* at 5:10-13. Over the course of the next thirty-eight years Mr. ██████ amassed “multiple commendations, awards and certificates for completion of voluntary programs.” *Id.* at 22:6-8). Additionally, Mr. ██████ earned two Associate degrees, a variety of vocational skills and participated in therapeutic programs and cultural organizations.¹²

Here, as in *King*, the Board focused solely on the nature of Mr. ██████ offense and mentioned his institutional achievements in passing, without analysis and only to dismiss them. Further, the board’s review of Mr. ██████ did not determine “whether as of this moment, given all the relevant statutory facts, he should be released,” but seeks to resentence him for the shooting of a police officer. *King v. New York State Div. of Parole*, 190 A.D.2d 423, 432 (1st Dept. 1993), *aff’d* 83 N.Y.2d 1277 (1994). The Board’s decision stated that Mr. ██████ “was on a bad path,” and that his behavior over thirty (30) years ago, “speaks to your selfishness, poor judgment, and callous disregard.” These statement do not reflect the forward-looking approach the Board is statutorily mandated to apply, the man Mr. ██████ is today, nor do they comport with the board’s own statement that “we believe your remorse is sincere and genuine and that you are a better man today.” Ex. G at 22:15-16).

¹² Mr. ██████ with the assistance of volunteers from the Parole Preparation Project submitted a parole packet, which contained letters of organizational support, pgs. 16-20 and past commendations awards and program certificates, pgs. 71-87. The entire parole packet is not included with this brief because it is part of the case record.

Despite every indication that Mr. [REDACTED] is ready for parole and has served eight years more than his minimum sentence, the Board denied parole because of the “magnitude” of the crime. The Board stated: “given the magnitude of your crime, the majority of this panel believes that your discretionary release at this time remains incompatible with the welfare of the community which still suffers from your crime.” Ex. G at 23:7-10. The Board appears to have determined that the murder at issue here is of a greater magnitude than other murders because of the number of times the victim was shot and because the victim was a police officer. As to the nature of the victim, the *King* Court, in which the murder victim was a police officer, found that the nature of the victim did not alone establish an aggravating factor that would permit denial of parole based solely upon the crime.

The Board appears to stress the number of times the victim was shot in order to establish that the murder was unjustified. Ex. F. at 23:10-13 (“shooting PO [REDACTED] six times causing his most painful death was so unnecessary”). Yet the Board’s claim that the victim was shot six is inaccurate. *See supra* Section III(A). First, as stated above, the victim was only shot two to three times. *See, Id.* Second, every murder conviction is an unjustified killing, otherwise it is not murder. Therefore, the number of times the victim was shot does not establish an aggravating factor that would permit denial based solely on the nature of the crime. However, even if it did, that factor would not be applicable in Mr. [REDACTED] case as he did not shoot the victim six times.

Therefore, because the parole board focused solely on the nature of the instant offense, disregarded factual information regarding same and failed to establish any aggravating factors to justify such in violation of Exec. L. 259-i(2)(a) and *King*, the denial should be reversed.

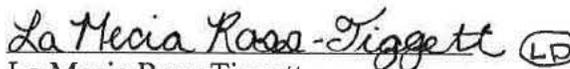
CONCLUSION

Therefore, because Mr. [REDACTED] was denied access to portions of his case record, the Board based its denial on inaccurate information, and the Board's decision violated positive statutory requirements, Mr. [REDACTED] should be granted a new parole hearing before a panel that does not include the commissioners who denied parole.

Respectfully submitted,



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