September 2019

Administrative Appeal Brief - FUSL000029 (2017-08-14)

STATE OF NEW YORK
DIVISION OF PAROLE: APPEALS UNIT

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In the Matter of the Appeal of :
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[redacted] :
DIN: [redacted] :
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Appellant :
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APPELLANT'S BRIEF
Appeal from April 17, 2017 Denial of Parole

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PRELIMINARY STATEMENT

Attorneys Martha Rayner and Avery Gilbert, on behalf of Mr. [redacted], submit this brief in support of the timely filed notice of administrative appeal. Mr. [redacted] appeared before Chairwoman Tina Stanford and Commissioners William Smith and Marc Coppola of the Board of Parole on April 17, 2017, via video-conference, at Eastern Correctional Facility. Commissioners denied parole based solely on the crimes Mr. [redacted] committed as a juvenile 23 years ago in 1994 and thereby violated New York State Executive Law, Corrections Law, administrative regulations, controlling state and federal case law, the Due Process Clauses of the state and federal constitutions, Eighth and Fourteenth Amendments to the U.S. Constitution and the cruel and unusual punishment clause of the New York Constitution, N.Y. Const., art. I, §5.

First, Commissioners failed to afford Mr. [redacted] his constitutional rights under the Eighth Amendment as recognized by *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34 (3rd Dep't 2016) which require the Board to provide Mr. [redacted] a "meaningful opportunity for release" by focusing their inquiry not on a juvenile's crime but on "demonstrated maturity and rehabilitation" since that time. After a short interview of Mr. [redacted], commissioners summarily denied parole on the stated basis that release "would be incompatible with the welfare and safety of society" despite the Board of Parole's own risk assessment tool finding Mr. [redacted], 17 years old at the time of conviction, now low risk on all measures including felony violence, arrest or absconding. Ex. C (COMPAS Report)

Mr. [redacted] parole hearing made a mockery of the constitutional mandate to provide persons incarcerated under life sentences for crimes committed as juveniles a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). The written decision makes no mention whatsoever of the fact that Mr. [redacted] was an adolescent at the time of the crime and has now matured, by the parole

board's own measures-- as reflected by his COMPAS assessment and an institutional record of no violent incidents in 18 years - into a law-abiding non-violent adult. Exs. C and F (Disciplinary History). The Commissioners relied solely on the seriousness of the crime of conviction. The crime of conviction cannot change. It is a historical fact. Reliance on the crime to deny release is *de facto* denial of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

At no time during the hearing or in the parole decision did the Commissioners "carefully consider youth and its attendant characteristics in relationship to the commission of the crime" as required by law. *Hawkins*, 140 A.D.3d at 34. Nor did they consider Mr. [redacted] capacity for maturation and reform as required by the United States Constitution and the New York State Constitution. *Id.*; *Montgomery v. Louisiana,* 136 S. Ct. 718, 733 (2016).

In addition, the decision is conclusory, in direct violation of N.Y. Exec. Law §259-i(a) and is arbitrary and capricious as its stated conclusions find no support in the record. The Board instead exceeds its authority by substituting its judgment for that of the sentencing court by deciding that the minimum sentence set by the sentencing court, in the full light of the facts surrounding the crime of conviction, was not enough. The Board also uses the canned language "also considered are letters and statements in support of your release and letters and statements opposed" – such undefined "opposition" to release –is not a permitted factor under N.Y. Exec Law §259-i(c)(A). Nor do we even know if this undescribed "opposition" actually exists or, since the exact language appears in all decisions, is a holdover from the Commissioners use of a pre-drafted decision template.

In order to comply provide Mr. [redacted] an inmate serving an indeterminate life sentence for a crime he committed as a juvenile, the due process protections required by the United States

Constitution, New York State Constitution, and controlling Supreme Court and Third department case law on the Eighth and Fourteenth Amendment by, the Board must:

1. Appoint him counsel one year before the parole hearing to help him prepare for the hearing.

2. Agree that his hearing will be conducted in person and counsel can give opening and closing remarks.

3. Place the hearing on a special calendar and provide more time for consideration in recognition of the weighty constitutional issues at stake and the likelihood of a more extensive record and evidence.

4. Omit from materials provided to Commissioners any and all information as to the crime of conviction and prevent Commissioners from inquiring at the hearing into the crime of conviction as the only job of the Commissioners, once a juvenile offender has served the minimum sentence, is to determine whether or not the record of rehabilitation as an adult demonstrates growth and maturity such that release would not pose an unreasonable threat to public safety.

5. Require Commissioners to attest, under penalty of law, that they have read the materials submitted in support of his application prior to his interview.

6. Ensure that his application will be heard on a day in which commissioners are hearing no more than four other hearings in order to allow for full review of the extensive evidence and to allow all three Board members to fully read the materials and to be involved in the questioning instead of only the "lead" Board member.

7. Insofar as the Board relies on psychological assessments and a risk and needs tool, these tools must consider the diminished culpability of juveniles and the hallmark features of youth. Specifically, the Board should re-evaluate the COMPAS instrument to assure that youth is not being treated as an aggravating factor—for example, by counting as negative not having a job prior to incarceration, not being married, and the age of first offense. The Board should also ensure that the tool has actually been validated for (a) juvenile offenders and (b) those serving very long sentences. Consideration should be given to the use of a risk assessment specifically designed to be used for juvenile offenders.

8. Institute a regulation that acknowledges a presumption of release after serving the minimum sentence upon a substantive showing of maturity and rehabilitation and stating that the central inquiry for the Board in a release hearing shall focus on a person's record of rehabilitation as an adult. A person shall be found suitable for parole if, after serving the minimum term of imprisonment imposed by the sentencing judge, the record of rehabilitation as an adult demonstrates growth and maturity such that release would not pose an unreasonable threat to public safety.

9. If parole is denied, the Board will state in detailed, non-conclusory fashion the exhaustive list of reasons for denial. The decision must point to specific evidence in the record to support its conclusions. Namely, the Board must specify which of the parole release criteria the petitioner does not meet and render specific findings of fact in support of its decision. If parole is denied, the written decision must specifically show *why* the Board has determined that, if an inmate is released, he will not live and remain at liberty without violating the law, that his release is incompatible with the welfare of society, or that his release will so deprecate the seriousness of his crime as to undermine respect for law. A written copy of the decision shall be available to the inmate and his attorney within thirty days after the hearing.

10. If parole is denied, the Board shall, in addition, offer recommendations to the petitioner of what he or she can do between the current hearing and the next hearing to meet the release criteria.

11. The Board must evaluate the parole petitioner's disciplinary record in light of fact that juveniles develop psychologically and neurologically through the mid-twenties and that the prison environment hampers development.[1] In recognition that the hallmark features of youth continue to exert an influence after age eighteen, and that this is especially the case among those incarcerated at a young age, misconduct in early adulthood does not tend to demonstrate parole unsuitability for youth offenders. Additionally, infractions should be evaluated for the hallmarks of adolescent behavior and should be weighted with less significance.

12. Make funds available for appointed attorneys to conduct psychological assessments and social history investigation.

13. Recognize in regulations that developmental disabilities, such as intellectual disabilities, specific learning disabilities, and attention deficit/hyperactivity disorder; autism spectrum disorder; and mental disorders, such as post-traumatic-stress-disorder, emotional disturbances, or childhood depression, tend to exacerbate the hallmark features of youth, especially by increasing susceptibility to influence and peer pressure, and decreasing the ability to consider consequences. Insofar as parole petitioners continue to suffer from mental disabilities at the time of parole eligibility, accommodation must be made, at a minimum to comply with the ADA, to assure that the hearing is a "meaningful opportunity to obtain to release" and is not prejudiced by mental disabilities.

14. Allocate resources for trainings of institutional actors playing a role in the proceedings, including but not limited to Board members, ORCs, and appointed parole attorneys. These trainings will assure a minimum understanding of the *Miller* line of cases, both as a

[1] *See generally*, Julia Dmitrieva, et. al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity* (2012) Development and Psychopathology 24, 1073-1090; Elizabeth P. Shulman and Elizabeth Cauffman, *Coping While Incarcerated: A Study of Male Juvenile Offenders* (2011) Journal of Research on Adolescence 21.4, 818-26.

general matter and as they apply to the particular actor's role. Trainings should be required on an annual basis.

15. DOCCS will make every effort to assure that programming viewed favorably at the parole release hearing is equally available to persons serving indeterminate life sentences as to the general correctional population.

16. Appoint members to the Board of Parole with backgrounds in forensic or developmental psychology, social work, re-entry, and education.

17. Report, on a quarterly basis, the number of youth parole hearings that have been scheduled at each prison as well as the number of people who are granted and who are denied parole. On an annual basis, the Board shall report annual totals and provide aggregate information that includes but is not limited to the age, race, the number of years served, and comparison to adult offenders.

To ensure that procedures for the parole hearing are constitutionally adequate, regulations should be regularly reviewed and revised as necessary to ensure that the hearing does in fact provide a "meaningful opportunity to obtain release."

Mr. [redacted] seeks reversal of the Board's decision and immediate release or, in the alternative, a new parole hearing conducted in compliance with statute, controlling constitutional law, regulations adopted to conform to the amended N.Y. Exec. Law § 259-c(4), and the dictates of the United States Constitution, New York State Constitution, and controlling Supreme Court and Third department case law on the Eighth Amendment, and the adoption of regulations to provide adequate due process protections as specified above.

PROCEDURAL AND FACTUAL BACKGROUND

[redacted] is currently incarcerated under the supervision of the Department of Corrections and Community Supervision ("DOCCS") at Eastern Correctional Facility and has been imprisoned in New York State correctional institutions for 23 years. He is serving an indeterminate term for felony murder in the second degree—a minimum sentence of fifteen years and a maximum of life—for a crime he committed when he was 17 years old. Mr. [redacted] is now 40 years old. He appeared before the Board for his fifth parole hearing on April 17, 2017.

The Board summarily denied parole and ordered him held for an additional 24 months. Mr. [redacted] filed a timely Notice of Appeal.

As the transcript of the hearing before the Parole Board demonstrates, Mr. [redacted] continues to take full responsibility for the crime. Ex B at 7-8 (Hearing Transcript). He is remorseful for his crime and deeply mindful of the damage it has caused. Ex. A (Personal Statement). Having spent his entire adult life in prison, Mr. [redacted] has made concerted efforts over the past 23 years to rehabilitate himself. Ex. D (Educational Achievements) and Ex. E, (Programming Certificates).

Mr. [redacted] maturation and reform while in custody is a shining success story of which New York Corrections should be proud and indeed Commissioners have raised no question as to his fitness for release. His institutional record, as the COMPAS Reentry Risk Assessment report confirms, shows that his impulse control and executive function capacities matured while under the supervision of DOCCS: he has had no disciplinary tickets in over six years and that was for smoking. Ex. F (Disciplinary History). He has completed his GED and theology coursework and obtained job skills. Ex. D. In addition, he provided the Parole Board with many letters of support, acknowledgement and character references from Correction Officers. Ex. K (noting willingness to help others, a reliable and consistent work ethic as well as growth, maturity and humility).

Despite a strong record in prison, spotless since the last hearing, clear evidence of rehabilitation over the past 23 years, low risk of violence or reoffending, and a plan for release that includes family support, Ex. G (Family Support Letters), a stable residence with his wife, Ex. H (Parole Board Report), and a realistic plan to obtain employment, Ex. I (Release Plan and Assurance Letter from the Osborne Association to assist with obtaining employment), the Board

denied parole release. Shortly after the April, 17 2017 hearing and subsequent denial of parole release, Mr. [redacted] filed a Notice of Appeal. This brief perfects that appeal.

LEGAL FRAMEWORK

The discretion granted the Board of Parole, an administrative agency, in deciding parole release is limited by statute. Executive Law 259-i(2)(c)(A) states that release shall be granted if "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." However, in reaching its release decision, the Board must consider the factors listed in N.Y. Exec. Law § 259-i(2)(c)(A):

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

(ii) performance, if any, as a participant in a temporary release program;

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

(iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;

(v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;

(vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;

(vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and

> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

New York courts have interpreted the legislature's delimited grant of administrative discretion in significant ways. First, the Board cannot deny release based solely on the nature of the underlying offense. *Rios v. New York State Div. of Parole*, 836 N.Y.S.2d 503 (Sup. Ct. 2007). Second, the Board may give different weight to the statutory factors, but must consider—and rationally weigh—all relevant factors and must not consider erroneous information in doing so. *King v. New York State Div. of Parole*, 598 NYS2d 245 (1st Dept. 1993), aff'd, 632 N.E.2d 1277 (N.Y. 1994); *Johnson v. New York State Div. of Parole*, 884 N.Y.S.2d 545 (4th Dept. 2009*); Thwaites v. New York State Div. of Parole*, 934 N.Y.S.2d 797 (Sup. Ct. 2011). Third, by statute, the Board must set forth its reasons for denying parole in a written decision "in detail and not in conclusory terms." N.Y. Exec. Law 259-i(2)(A); *see Mitchell v. New York State Div. of Parole*, 871 N.Y.S.2d 688 (2d Dept. 2009).

Further, the amendment to Executive Law 259-c(4), effective October 1, 2011, requires that the Board:

> [E]stablish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision.

Correction Law 112(4) also requires DOCCS and the Board of Parole to jointly develop and implement an empirically validated risk and needs assessment tools "designed to facilitate the successful integration of inmates into the community" and Correction Law 71-a requires the Board of Parole to develop and implement a Transitional Accountability Plan, "a comprehensive, dynamic and individualized case management plan based on the programming and treatment

needs of the inmate," for each prisoner seeking parole. The Board of Parole is an administrative agency subject to the New York State Administrative Procedure Act (see NY SAPA § 102(1), including DOCCS in the definition of "Agency" for purposes of Article 2) and New York Constitution Article IV § 8.

The Board's current regulation codifying the Board's policy subsequent to the 2011 amendments, 9 NYCRR 8002.3, violates the Executive law because it fails to adequately "incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release" in making its decisions. The Board is currently carrying out its duties in a method not authorized by the Legislature and the Constitution. New regulations have been proposed which make clear that the Board must be guided by risk and needs principles in making release determinations. *See* Parole Board Decision Making, 38 N.Y. Reg. 7 (proposed Sept. 28, 2016) (to be codified at 9 N.Y.C.R.R. § 8002) (hereinafter "Proposed Regulation"). Mr. [redacted] would unquestionably be granted parole under such guidelines.

The Board must also conduct its hearings in accordance with the United States and New York State constitutions and applicable case law. As the United States Supreme Court has made clear, "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). More specifically, "[b]ecause juveniles have diminished culpability and greater prospects for reform[,]… 'they are less deserving of the most severe punishments.'" *Id.* at 2464. Accordingly, the Third Department's recent decision in *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, No. 521536, 2016 WL 1689740 (3d Dept. April 28, 2016) held that the United States and New York constitutions require the Board of Parole to meaningfully consider the decreased culpability and increased capacity for

rehabilitation of people incarcerated for crimes committed as juveniles: "A parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." *Hawkins* at 5.

Accordingly, "for those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison," the Board of Parole has a "constitutional obligation to consider petitioner's youth and its attendant characteristics in relationship to the commission of the crime." *Hawkins* at 3,6. In short, the Board violates the Constitution when it fails to provide a "meaningful opportunity to obtain release." *Id.* (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010); see *Miller*, 132 S. Ct. at 2469; *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016)). The United States Supreme Court defines a "meaningful opportunity for release" as a review and determination that takes into account "demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 50; see also *Montgomery*, 136 S. Ct. at 734 (clarifying this is a substantive right).

ARGUMENT

I. The Board's Decision was Unlawful, Arbitrary and Capricious Because (a) It Did Not Reasonably or Meaningfully Consider All Relevant Factors that Weighed in Favor of Mr. [redacted] Release on Parole and (b) It Gave Impermissible Weight to the Seriousness of the Offense.

The Board of Parole's decision dated April 10, 2017 denied Mr. [redacted] parole for the fifth time with the following unsubstantiated statement:

> "[T]he panel has determined that your release would be incompatible with the welfare and safety of society and would so deprecate the serious nature of the crime as to undermine respect for the law."

The statement and decision followed an inmate record demonstrating rehabilitation, a COMPAS risk assessment concluding that Mr. [redacted] is "low risk" for felony violence, arrest and absconding. The Board instead denied parole based on its *own* view of the crime of conviction in

violation of the legislative determination that "a murder conviction *per se* should not preclude parole," and that the Board must consider the dynamic factors of prisoner development and rehabilitation. *Rios v. New York State Div. of Parole*, 15 Misc. 3d 1107(A), (N.Y. Sup. Ct. 2007). Mr. [redacted] presented very strong institutional records—he hasn't had a disciplinary infraction in six years, and that was for smoking, has received his GED and a certificate in theology from Boricua, and participated in prison programming. Ex. D, E and F. He also has strong family support from his wife and siblings. Ex. C ("Mr. [redacted] [redacted] Family Support Scale score suggests that he has supportive family.") and Ex. G (" and know that my family and I will sincerely support him and his adjustment to society.")

Section 259-i(2)(c)(A) requires the Board to meaningfully review and take into account this evidence of rehabilitation and suitability for release. While during the hearing Commissioner Coppola observes that Mr. [redacted] has "accomplished a lot while you've been here" (Hr. Tr. at 15:20-23) the written decision, however, states no more than the following with respect to this evidence:

> Required statutory factors have been considered, together with your institutional adjustment including discipline and program participation, your risk and needs assessment, and your needs for successful re-entry into the community.

This decision reads like the formulaic decisions issued in hundreds of other cases and reflects zero meaningful consideration on the part of Commissioners. The Board utterly fails in its decision to address in any meaningful or specific way Mr. [redacted] rehabilitation and in what way releasing him would be a threat to society. And it does not address or explain *why* its own recent COMPAS assessment indicating that Mr. [redacted] is at low risk of re-offense was outweighed by a crime committed twenty-three years ago when Mr. [redacted] was a teenager with an undeveloped hippocampus. The Board opines that the murder conviction was "an escalation

of violent behavior" when in fact it was Mr. [redacted] first violent act and was followed, not preceded by, a later incident in which he "didn't know what was going on but jumped in" to a situation where his peers, people whose social approval was, to his teenage mind, important, were robbing someone. See Hearing Transcript at 4:5-10.

In *Coaxum v. New York State Bd. Of Parole*, 827 N.Y.S.2d 489, 492 (Sup. Ct. 2006), the court noted that "[a]ctual consideration [of the required statutory factors] means more than just acknowledging that evidence of them was before the Board." Merely mentioning in passing an inmate's accomplishments or institutional record or bald assertion that "the required statutory factors have been properly considered"—is not sufficient to disguise a decision that is, in fact, a denial based on the circumstances of the crime. In *King v. NY State Div. of Parole,* 190 A.D.2d 423, 598 N.Y.S.2d 245, 252 (1st Dept. 1993), aff'd, 83 N.Y.2d 788 (1994), the Appellate Division First Department noted that "[w]hile mention was made in the Board's decision of other factors relevant to petitioner's release, these factors, all of which weighed in favor of petitioner's application, were mentioned only to dismiss them in light of the [circumstances of the offense]." That is precisely what the Board did here.

II. The Board's Hearing and Decision Violates the United States and New York State Constitutions

The Chairwoman and Commissioners treatment of Mr [redacted] juvenile status at the time of the crime of conviction during the interview and in the decision evince outright contempt of the Board's legal obligations under the Eighth Amendment. The U.S. Supreme Court has established constitutional protections that *must* be applied to sentencing and release procedures for juveniles facing ultimate sentences, even those convicted of the most serious crimes. *Roper v. Simmons*, 543 U.S. 551 (2005), held that the Eighth Amendment bars death sentences for juvenile offenders under the age of eighteen. *Graham v. Florida,* 560 U.S. 48 (2009), held that a

sentence of life imprisonment without the possibility of parole imposed upon a juvenile for a non-homicide offense was cruel and unusual punishment in violation of the United States Constitution. *Miller v. Alabama*, 132 S. Ct. 2455 (2012), extends the reasoning of *Roper* and *Graham* to bar mandatory life without parole sentences imposed on juveniles convicted of homicide offenses. *Montgomery v. Louisiana*, decided just this year, made clear that the proportionality holdings of *Roper*, *Graham* and *Miller* are substantive constitutional rules that "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." 136 S. Ct. 718, 729, 193 L. Ed. 2d 599 (2016), as revised (Jan. 27, 2016). The Court stated that, "The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles…. Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *Montgomery*, 136 S. Ct. at 732-33.

Interpreting that line of cases, the Third Department recently held that the "Board [of Parole], as the entity charged with determining whether petitioner will serve a life sentence, was required to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime before making a parole determination. *Hawkins*, 30 N.Y.S.3d at 398. This substantive right must be reflected in Board procedures: "For those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue." *Id*., at 400.

The parole hearing transcript and decision make clear these substantive and procedural guarantees were denied Mr. [redacted]. During the hearing Mr. [redacted] described his youth and the

fact that at age 14 his drug-addicted mother was released from prison and pulled him out of school and the security of his grandmother's home in [redacted] and took him to [redacted] where she was unable to support him financially or emotionally due to her own drug addiction. Hr. Tr. 9:12-10: 12:3. As a result, with no father or mother to support him, he began selling drugs to survive. *Id*. Having a gun, Mr. [redacted] further explained, gave him "a false sense of power and control" in an otherwise violent and out of control world in which he was living. Hr. Tr. at 7:21- 8:2. Mr. [redacted] explained to the Commissioners that at the time of the crime of the conviction he "was in a dark place, My mother and I were going through some issues and I just, I had a lot of anger and a lot of hatred and leading up to [the crime] I got high and said I was going to rob somebody," Hr. Tr. at 5:16-22, because "in my neighborhood growing up we didn't know better." Hr. Tr. at 5:7-8. Mr. [redacted] explained to Commissioners "I was a child and I didn't know how to deal with that anger. I didn't know what to do." Hr. Tr. 12:21-23.

Commissioners ignored all of these facts that explain how Mr. [redacted] youth and its attendant characteristics as it bears on mitigation of culpability, such as an adolescent brain at the time of the crime that had not yet fully developed impulse control and was operating in a constant state of duress, and was susceptible to peer pressure, in order to understand Mr. [redacted] crime. Neither the hearing nor the decision evidence a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as required by the state and federal constitutions and relevant case law. *Graham*, 560 U.S. at 50; see also *Montgomery*, 136 S. Ct. at 734 (clarifying this is a substantive right). The commissioners mentioned relevant factors such as a clean disciplinary record and academic achievements only to dismiss the weight of those factors entirely and the decision made no mention of the fact that Mr. [redacted] brain was adolescent at the time of the crime and has now matured into its full capacity for impulse

control and risk analysis. His achievements while incarcerated were mentioned only to be dismissed out of hand in comparison to the crime of conviction. But as recent cases have made clear, the Board may not give controlling weight to the crime of conviction especially when the crime was committed by a juvenile because "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. First, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; second, they "are more vulnerable or susceptible to negative influences and pressures"; and third, they possess a "character [that] is not as well formed as that of an adult." *Id.* (quoting *Roper*, 543 U.S. at 569-70). The Board's decision makes no mention whatsoever of Mr. [redacted] adolescent brain at the time of the crime or in relation to his capacity for reform and rehabilitation.

III. The Board's Denial of Parole Is Stated in Conclusory Terms In Violation of the Executive Law and Administrative Regulations and Is Not Supported By the Record.

The Legislature, through explicit statutory enactment, demands that the reasons for denying parole be set forth in clear and detailed fashion. The Executive Law expressly directs that if the Board denies parole release "the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." N.Y. Exec. Law § 259-I (2)(a) (emphasis added). Furthermore, the Board's own regulations require that "detailed reason for such decision, including the fact or factors relied on, shall be provided to the inmate in writing." 9 NYCRR § 8001.3(c). One reason, deeply established in all of administrative law, for requiring a clear statement of reasons in making parole decisions is "to enable intelligent review." *Canales v. Hammock*, 105 Misc. 2d 71, 74 (N.Y. Sup. Ct. 1980). Another reason for requiring the board to furnish reasons is "to guide and to aid the prisoner in his endeavor to return to society as a useful citizen." *Greene v. Smith*, 52 A.D.2d 292, 294 (4th Dep't. 1976).

In this case, the Board of Parole's decision of April 10, 2017, denying Mr. [redacted] parole for the fifth time, does not provide any detail or reasoning and instead states, in conclusory terms: "release would be incompatible with the welfare and safety of society" and that it would "so deprecate the serious nature of the crime as to undermine respect for the law." The Board gives absolutely *no* justification for its conclusion that Mr. [redacted] poses a risk to pubic safety. In fact, the conclusion is contradicted by the State's own COMPAS tool which scores him at "low risk, across the board": low risk for violence, low risk for arrest, low risk to abscond, and low on the prison misconduct scale. The decision gives *no* reason *why* his release would not be compatible with the "welfare [] of society," much less in what way precisely his release would harm general social welfare.

The Parole Board's cryptic conclusion that the petitioner must be denied parole, on the basis of his crime of conviction alone, finds no support in the record. *See Friedgood v. New York State Bd. of Parole,* 22 A.D.3d 950, 951 (3rd Dep't. 2005) (finding the Board's conclusion that petitioner was prone to engage in violence "without any support in the record and so irrational under the circumstances as to border on impropriety.") As discussed above, the only factual material in the decision refers to crimes Mr. [redacted] committed when he was a teenager.

Marc Coppola and William Smith attempt to couch their reason for denial in terms of an "escalation of criminal behavior," but both offenses occurred over a two-day period when Mr. [redacted] was 17 and these facts were well known to the sentencing judge – who imposed a minimum sentence of 15 years rather than 25 years. More importantly, these commissioners completely disregard the constitutional requirement to consider how the hallmark features of youth were causative of these two incidents of ill-considered activity. For example, in one of the Supreme Court's landmark Eighth Amendment cases, the juvenile offender was also on felony

probation at the time of the offenses for which he was sentenced to a life sentence and the Court explicitly rejected the state's reference to "escalation" as a basis to impose a life sentence. *Graham v. Florida*, 560 U.S. 48, 73 (2010) (finding that, "Graham deserved to be separated from society for some time in order to prevent what the trial court described as an 'escalating pattern of criminal conduct,' but it does not follow that he would be a risk to society for the rest of his life.) (internal citations omitted).

No reviewing court can ascertain whether the Board reached its decision after having undertaken the statutorily and constitutionally mandated inquiry and considerations. The Board's decision must be overturned.

IV. The Board's Denial Relied on Impermissible Factors and Non-Statutory Standards.

The Board's decision seems to rest fully on the Commissioners' subjective views that the minimum sentence of 15 years—the term imposed by the sentencing court in full light of the facts of the crime, criminal history, and after careful deliberation at the conclusion of which the sentencing court believed he should be eligible for parole—is not enough time to serve for his offense. However, "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, but to determine whether, as of this moment, given all the relevant statutory factors, he should be released." *King v. New York State Div. of Parole*, 190 A.D.2d 423, 432, 598 N.Y.S.2d 245, 251 (1993), aff'd, 83 N.Y.2d 788, 632 N.E.2d 1277 (1994). *See also Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 51 Misc. 3d 1218(A) (N.Y. Sup. Ct. 2015) ("This Court has been unable to find any statutory or case law that authorizes parole board commissioners to infuse their own personal opinions or speculations into the parole interview or process."). The Board writes in its decision that "the elements of your crimes and behaviors demonstrated a callous disregard to human life and remain a concern to this panel." It is decidedly not the job of the Board to decide

whether or not a crime committed 23 years ago is "concerning" – indeed it was concerning, and that was why Mr. [redacted] has been incarcerated for the past 23 years. The job of the Board, today, is to decide if Mr. [redacted] is now safe to be released. The record contains no facts on which the Board can rest a decision that Mr. [redacted] is not safe to be released today. He has served his sentence, demonstrated maturity and rehabilitation, and must be released.

Second, the Board's conclusion that "release would be incompatible with the welfare and safety of society," is unjustified given the low risk, across the board findings of its own risk-assessment tool. The Board's decision must be reversed. *Prout v. Dennison*, 26 A.D.3d 540, 541, 809 N.Y.S.2d 261 (2006) (Holding that, "the Board's terse decision, lacking any analysis of statutory and regulatory criteria (*see* Executive Law § 259-i [2] [c]), makes it impossible for this Court to give meaning to the language used by the Board.").

V. The Board's Decision Must Be Reversed Because the Board Failed To Consider the Sentencing Court's Recommendation and Conducted Its Own Resentencing.

After taking into consideration the grievous loss suffered by the victim's family, the sentencing judge, James Cowhey, determined that release to parole supervision would be appropriate after 15 years--the minimum authorized sentence. Ex. J. The judge sentenced Mr. [redacted] to a 15 year minimum sentence, ten years less than the maximum allowable term for murder. N.Y. Penal § 70.02. Where the record establishes that the "Board repeatedly failed to consider the sentencing minutes and recommendations of the sentencing court when it reviewed petitioner's requests for parole," then "the judgment must be reversed and the matter remitted to the Board for a de novo hearing during which the sentencing minutes and recommendations of the sentencing court shall be considered by the Board." *Standley v. New York State Div. of Parole*, 34 A.D.3d 1169, 1170 (3d Dep't. 2006); *see also*, *Lovell v. New York State Div. of Parole*, 40 A.D.3d 1166 (3d Dep't. 2007).

In fact, in this case, by weighting only the fact of the crime of conviction in its decision, the Board of Parole has exceeded the bounds of its power and re-sentenced Mr. [redacted]

> [I]n focusing exclusively on the petitioner's crime as a reason for denying parole the Parole Board was, in effect, re-sentencing petitioner to a sentence that excluded any possibility of parole since petitioner is powerless to change his past conduct. And, as the Appellate Division has admonished, under similar circumstances, such 're-sentencing' by the Parole Board "reveal[s] a fundamental misunderstanding of the limitations of administrative power."

Rios v. New York State Div. of Parole, 836 N.Y.S.2d 503 (N.Y. Sup. Ct. 2007) (citing *King*, 190 A.D.2d at 432).

Further, as discussed in Point V below, because Mr. [redacted] was originally sentenced as a juvenile and is serving a maximum term of life, and Mr. [redacted] will never be able to change the facts of the crime of conviction to which the Board gives sole weight, this resentencing effectively amounts to a juvenile sentence of life without the possibility of parole: a violation of the Eighth Amendment. Because the Board failed to consider the recommendations of the sentencing court, the judgment must be reversed.

VI. The Board's Use of the Risk and Needs Assessment Was Arbitrary and Capricious and In Direct Conflict with Legislative Amendments to Executive Law § 259.

The Parole Board's regulation 9 NYCRR § 8002.3 is in direct violation of the Executive Law and the Board's actual use of the COMPAS tool violates the letter and spirit of the 2011 amendments, rendering its recent parole denial of Mr. [redacted] arbitrary and capricious.

In 2011, the Legislature amended Executive Law § 259 to make clear that the goal of the parole board should be rehabilitation and re-entry. Consistent with the overall goal of rehabilitation and release, the amended N.Y. Exec. Law § 259-c(4) required the Board of Parole to "establish written procedures for its use in making parole decisions" that "incorporate risk and needs principles to measure the rehabilitation of such persons appearing before the board and the likelihood of success of such persons upon release." N.Y. Exec. Law § 259-i(2)(c), 259-c(4); see

generally Phillip M. Genty, "Changes to Parole Laws Signal Potentially Sweeping Policy Shift," N.Y. Law Journal, September 1, 2011. It further required that the Board adopt and implement those procedures, and file a copy of its rules and any amendments with the chairman of the secretary of state. Exec. Law § 259-c(11).

In December 2013, two years after the passage of the new legislation, the Board of Parole initiated a rule making process, to "memorialize in regulation the Parole Board's written procedures of October 5, 2011 under Executive Law § 259-c(4)." New York State Register, Rule Making Activities, December 18, 2013/Volume XXXV, Issue 51.[2] Rather than incorporate a risk-assessment tool as a *method* for assessing whether the inmate has been rehabilitated and met the standard for release, as the Legislature intended, the amended 9 NYCRR § 8002.3 simply tacks on consideration of the findings of the risk-assessment tool as one of twelve factors it "considers" when making parole decisions. The current regulation treats the risk and needs assessment as additional, undifferentiated information to which the Board is free to assign any weight—including no weight whatsoever—in its evaluation of the case to the standard. Yet, the structure of the statute makes clear that the validated COMPAS instrument must be a point of departure for the release assessment and only then the Board may consider the listed statutory factors in deciding whether the findings from the risk and needs instrument ought to be disturbed.

An administrative agency is authorized "to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation," *Kahn*, 47 N.Y.2d at 31. It "is without power to promulgate rules in contravention of will of Legislature, but is imbued with such powers as are conferred by Legislature by specific terms of its enabling act." *Finger*

[2] Available at: http://docs.dos ny.gov/info/register/2013/dec18/pdf/rulemaking.pdf.

Lakes Racing v. New York State Racing, 45 N.Y.2d 471, 480 (1978). The Board *must* now use the COMPAS risk and needs instrument, the tool adopted by the Board subsequent to the 2011 amendments. *Linares v. Evans*, 112 A.D.3d 1056, 1057 (3d Dep't 2013) *aff'd*, No. 124, 2015 WL 6180966 (2015). The Board's regulation is unlawful and therefore its use of COMPAS and resultant decision are arbitrary and irrational bordering on improper.

At the time of Mr. [redacted] April 2017 hearing the Board of Parole was operating without the mandated "written procedures" "that incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board [and] the likelihood of success of such persons upon release," N.Y. Exec. Law § 259-c(4), and is in violation of the law. Instead, because the Board ignored the COMPAS risk assessment findings entirely in coming to its decision it failed to "incorporate risk and needs principles" in its analysis as required by statute; thus its determination was arbitrary and capricious and in violation of the Executive Law. The arbitrary and irrational way the Board "uses" the COMPAS assessment is evidenced by the fact that the decision twice notes COMPAS, once averring that the commissioners have "noted and considered…the low scores reflected in your risk assessment," yet somehow inexplicably come to the conclusion that release would be a threat to pubic safety. Commissioners offer absolutely zero reasoning as to how they reached that manifestly irrational conclusion and therefore failed to be guided by "risk and needs principles" in their decision-making.

The Executive Law amendment also required that the Board of Parole develop, put in writing, and implement a procedure for preparing a TAP for every inmate. To our knowledge, no such plan was prepared for Mr. [redacted].

VII. The Board's Hearing and Decision Violates the Due Process Clauses of the New York State Constitution and the United States Constitution

Mr. [redacted] has been deprived of liberty without due process in violation of the New York State Constitution and the United States Constitution. New York Executive Law was amended in 2011 to confer a limited liberty interest in parole release. The current New York statute *requires* release if the statutory standard is met: "Discretionary release on parole *shall* [be granted] after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law." N.Y. Exec. Law § 259-i (emphasis added). The legislative memo introducing the reforms is worth quoting at length:

> Under current law, the Parole Board appears to deny an inmate release simply due to the nature of his or her crime. The courts have found that the statute does not specify how the release criteria must be considered, how an inmate should be evaluated, what weight, if any, should be given each of the criteria required, nor that the board is required to enumerate the criteria it did consider or explain how it arrived at its decision. Thus, no matter how successful an inmate has been in his or her rehabilitation and educational programs, this loophole has permitted the denial of parole to such inmates otherwise eligible for release. This is evinced by the 50 [%] reduction in the release rate of such offenders since 1996, without a characteristic change in the nature of such inmates or any revision in legislative authorization.
>
> In order to ensure that the purpose of the indeterminate sentencing scheme and its corollary release to parole supervision is not diminished, this bill proposes to modernize and revitalize the board of parole by providing specific criteria for consideration and improving the procedures utilized in the parole hearing process.…
>
> This bill [] proposes to modernize and revitalize the parole board *by providing specific criteria and procedural requirements to determine whether or not an inmate is rehabilitated and safe to release*.

Legislative Memo for Bill No. A07939, amending Exec. Law § 259-i (emphasis added).

In turn, the Due Process protections of the State and Federal Constitution require the Board of Parole to specifically designate *reasons* for not crediting the COMPAS assessment. The

Parole Board may not substitute its own judgment for that of the sentencing court in determining that, where an inmate has been found fit for release by all other criteria, a fifteen year period of incarceration- the period set by the sentencing judge at which time the judge expected the inmate to be eligible for parole- is not "enough" of a sentence in relation to the crime.

In addition, all persons, including Mr. [redacted], serving an indeterminate life sentence for a crime committed as a juvenile are constitutionally entitled to a parole release hearing substantively focused on demonstrated maturity and rehabilitation. The holdings in *Graham* and *Miller* are founded on the *substantive principles of proportionality* in punishment for juvenile offenders based on their diminished culpability and enhanced capacity for reform. The Court reasoned, "The 'foundation stone' for Miller's analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles…. Protection against disproportionate punishment is the *central substantive guarantee of the Eighth Amendment* and goes far beyond the manner of determining a defendant's sentence." *Montgomery v. Louisiana*, 136 S. Ct. 718, 732-33 (2016) (emphasis added). The Supreme Court held that proceedings bearing on life sentences for juvenile offenders must, in order to avoid being categorically unconstitutional, "afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 724.

What follows from this constitutional guarantee is that all persons serving an indeterminate life sentence for a crime committed as a juvenile are also constitutionally entitled to heightened *procedural* protections at their parole release hearing. Persons serving an indeterminate life sentence for crimes committed as juveniles have a limited liberty interest in

parole release because the Supreme Court has held that the Eight Amendment requires that this class of inmates be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). They hold out more than "a mere hope" of parole release, but rather an expectancy of release if the applicant can demonstrate maturity and rehabilitation, this expectancy is a liberty interest that demands protection under the Due Process Clause. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987). Currently, New York's statutes and Board of Parole do not provide procedural protections for juveniles during the parole decision-making process nor do they require additional resources and attention for hearings of persons serving an indeterminate life sentence for a crime committed as a juvenile in violation. This lack of procedural protections violates the Due Process Clause.

Courts and legislatures have extended a wide range of procedural safeguards to ensure that individuals serving indeterminate life sentences for crimes committed as juveniles are afforded a meaningful opportunity for release, including the right to counsel and the right to psychiatric experts. See, e.g., *Hayden v. Keller,* 134 F.Supp.3d 1000, 1010–1011 (E.D.N.C.2015); *Greiman v. Hodges*, 79 F.Supp.3d 933, 944 (S.D.Iowa 2015); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 471 Mass. 12, 19, 27 N.E.3d 349, 357 (2015). The due process protections enumerated in the Preliminary Statement (supra at p. 4-6) are required here to ensure that Mr. [redacted] is afforded a meaningful opportunity for release.

CONCLUSION

For the foregoing reasons, the determination of the Board of Parole following the April 10 2017 hearing, which denied Mr. [redacted] release, must be reversed. Mr. [redacted] must be

immediately released or granted a new parole hearing that complies with and affords Mr. [redacted] the due process protections of the law.

Respectfully submitted, August 14, 2017

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