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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA
---x
In the Matter of the Application of

Petitioner

-against-

REPLY

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and TINA M. STANFORD, CHAIRWOMAN, BOARD OF PAROLE,

Respondents

For Judgement Pursuant to Article 78 of The Civil Practice Law and Rules
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ARGUMENT IN REPLY

In mid-2019, after careful review of a parole packet prepared by an Assistant District Attorney from the Kings County District Attorney's Office traveled the 100 miles to Ulster Correctional Facility with the specific purpose of meeting with That ADA reviewed latest COMPAS report, and discussed with him in detail his crime, as well as his trajectory since. **Based upon that meeting — upon those specific discussions, with the specific person in question — District Attorney Eric Gonzalez submitted a letter to the Parole Board affirmatively supporting release to parole supervision.**

At [redacted] hearing, the Parole Board merely "noted" the *existence* of the DA's letter; they made no mention of its particular recommendation. Of course, the Board is **required** to **consider** the "recommendations of…the district attorney". 9 CRR 8002.2(d)(7). Attempting a runaround of these regulations that were clearly violated, the State now seeks to not only dismiss the letter as a usurpation of power not rightfully the District Attorney's, but to dismiss the District Attorney himself. Resp. Br. At ¶ 22 ("Public policy does not permit excesses by a prosecutor to divest an independent body of its lawful discretion."); *see also,* ¶ 23 ("his favorable parole recommendations are part of his political policy to decrease **what he calls** mass incarceration. His parole board recommendations are clearly tainted by political policy.") (**emphasis added**) (internal citations omitted).[1]

Disagreement is axiomatic to adversarial process. But shamelessness — bald-faced hypocrisy — is not. The State's appalling position should be recognized by this Court for what it is. Indeed, if [redacted] Parole file bore the familiar District Attorney *opposition* to release, we would not be here discussing "excesses" by a prosecutor or accusing that prosecutor of having an agenda; instead, the State would abide by the regulations and enthusiastically cite the letter as further support that the Board acted rationally in continuing to deny freedom to a man who has done everything one can do to change; to

[1] Public and political pressure have explicitly been recognized as "permissible factors which parole officials may properly consider as they relate to whether release is not incompatible with the welfare of society and will not so deprecate the seriousness of the offense as to undermine respect for the law." Krebs v. New York State Div. of Parole, No. 9:08-CV-255NAMDEP, 2009 WL 2567779, at *12 (N.D.N.Y. Aug. 17, 2009). Indeed, the State knows this – they regularly cite Krebs to condone consideration of "community opposition." *See* Exhibit 1, Resp. Br. in *Rodney Bailey v. Board of Parole,* [redacted] 53704/2019 (Sup. Ct., Dutchess Cty.) at ¶ 22.

grow; to repent. *See, e.g.*, Exhibit 2, Resp. Br. in *Christina Illenberg v. Board of Parole*, 160879/2019 (Sup. Ct., New York Cty.), at 11 ("The Board could consider the negative recommendation of the District Attorney in denying release to parole supervision.") (internal citations omitted).

Fundamentally, the State's opposition here reflects a familiar cherry-picking of facts. They state that showed "no remorse" and was "nonchalant" during his pre-sentence interview, Resp. Br. At ¶ 7 — an event that took place 31 years ago — while dismissing heartfelt expressions of remorse at the interview and the District Attorney's finding that was "honest…forthcoming….sincere…thoughtful in his unequivocal expressions of remorse and acceptance of responsibility"; that he "presented a complete and credible narrative of his journey from a hopeless young inmate full of denial and self-loathing into a changed, compassionate man committed to positive thinking and acts of service." They cite apparent "agitation" as proof that release is "not compatible with the welfare of society", Resp. Br. at ¶ 15, and make repeated reference to one elevated COMPAS score in the Criminal Involvement Category, all the while ignoring the **11 out of 12 COMPAS categories** in which scores are as low and unlikely as possible, **9 of which are predictive** as to future risk (all of which are low/unlikely for *See* Pet. Br. at 9.

Indeed, beyond the State's pounding recitation of the notion that the Board has absolute power to deny release to even the most obviously rehabilitated of individuals,[2] the

[2] The State's repeated assertion that the Board may ignore a Petitioner's various accomplishments and accolades and rely instead upon the nature of the instant offense and/or criminal history is

State utterly fails to respond to [REDACTED] core arguments: **that his one medium COMPAS score in the criminal involvement category is forever beyond his power to change and therefore that the Board's decision as a whole is an unexplained and irrational departure from COMPAS.**

This Court has already recognized that where a Petitioner's COMPAS bears low risks of felony violence, arrest and absconding, the Board's argument that a determination that the Petitioner poses a risk and endangers the welfare of society is a departure from COMPAS. *See Eric Benson v. New York State Board of Parole,* [REDACTED] 978/2019 (Apr. 27, 2020, Sup. Ct., Dutchess Cty., Forman, J.) (ordering a *de novo* hearing because the Board's departure was unexplained and therefore in violation of 9 NYCRR § 8002.2(a)). Nothing in the State's opposition dictates a different result here; the Board was clear that [REDACTED] poses some future risk, while COMPAS makes clear that no such thing is true. The decision of the Appeals Unit must be reversed, and a *de novo* hearing conducted.

Respectfully submitted,

________/s/_____________

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based solely upon Third Department law. *See* Resp. Br. at ¶ 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 24, 26, 28, 29, 31. The Third Department is the only Appellate Division to hold that the Board may penalize a parole applicant based solely upon the things they can never change; the First, Second and Fourth have all held differently. We remind the State that this case is not brought in the Third Department, but in the Second.