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

[REDACTED]

DIN: [REDACTED]
NYSID: [REDACTED]

Parole Interview Date: March 20, 2019
Denial Date: March 20, 2019
Parole Interview Location: Fishkill Correctional Facility
Parole Panel Location: Fishkill Correctional Facility
Notice of Appeal Filed: April 2, 2019
Deadline to Perfect Appeal: July 31, 2019

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INTRODUCTION

On March 20, 2019, Mr. [REDACTED] appeared before Commissioners Berliner, Davis, and Shapiro at Fishkill Correctional Facility. Commissioners Davis and Berliner denied parole on that same day; Commissioner Shapiro dissented. Mr. [REDACTED] filed a timely notice of administrative appeal on April 2, 2019. This brief is submitted to perfect that appeal.

Next month, Mr. [REDACTED] will begin his 40th year of incarceration on a 32 years to life sentence that he received for his actions on August 2, 1979, when he was an 18-year-old with no prior record. In late June of 1979, Mr. [REDACTED] bought an unlawful revolver after being robbed and beaten up multiple times. On August 2, it was raining when Mr. [REDACTED] was returning home from taking a civil service exam in Manhattan. He and several other pedestrians took a neighborhood shortcut through a Brooklyn field where a softball game was about to resume. The softball game was between a neighborhood team and off-duty officers from the local precinct. Since the rain had stopped and play had not yet resumed, the umpire, a local priest, waved Mr. [REDACTED] and the other pedestrians through. The softball players were returning to the field as the pedestrians walked through it, and an argument between the two groups began.

In the ensuing physical altercation, Mr. [REDACTED] fired a single shot that killed Mr. [REDACTED]. He then fled. He was chased by a group of players that included at least one off-duty police officer and probably others; Mr. [REDACTED] shot several times behind himself as he ran. After several blocks, off-duty Police Officer [REDACTED] [REDACTED] caught up and tackled Mr. [REDACTED] knocking him face first into the sidewalk and breaking his teeth. While they tussled on the ground over the gun, Mr. [REDACTED] pulled the trigger once, shooting Officer [REDACTED] in the stomach.

Mr. [REDACTED] was apprehended right away, when the rest of the crowd arrived. He was then hit on the head several times, with one blow rendering him unconscious. When he awoke at the

hospital, he had been shot three times in the front of his legs, his arm was broken, his skull was fractured, his arm and hand had knife wounds, and he had a ruptured spleen.

After three trials,¹ Mr. [REDACTED] was convicted of second degree murder as to Mr. [REDACTED] first degree manslaughter as to off-duty Officer [REDACTED] second degree criminal possession of a weapon, and first degree reckless endangerment. He was sentenced to 2 to 6 years for each of the weapon and endangerment convictions, to run concurrently. Mr. [REDACTED] was later sentenced to 7 to 21 years for the manslaughter of Officer [REDACTED] and 25 years to life for the murder of Mr. [REDACTED] to run consecutively, but concurrently with the 2 to 6 year sentences. Mr. [REDACTED] was acquitted of murder as to Officer [REDACTED] he is not serving a life sentence for that conduct. Although Mr. [REDACTED] was sent to prison to serve four sentences that totaled 32 years to life, the sentence of 25 years to life for the murder of Mr. [REDACTED] is the *only* sentence Mr. [REDACTED] is serving today.

The Board's denial in March was Mr. [REDACTED] fifth, following denials in 2011, 2013, 2015, and 2017. The Board commended Mr. [REDACTED] on his personal growth, programmatic achievements, and productive use of time and stated that his institutional adjustment had been good for the past 30 years. The Board also deemed his disciplinary history to be good, his case plan goals appropriately focused, and noted Mr. [REDACTED] completion of all required programming and his engagement in volunteer programing. The Board also acknowledged that Mr. [REDACTED] had strong support from family members, friends, and from supervisory DOCCS staff and recognized that his COMPAS risk assessment indicated low risk in every single category. Finally, the Board

¹ Mr. [REDACTED] first trial resulted in a mistrial when the presiding judge became ill. At the second trial, the jury deadlocked on the two murder charges as to Mr. [REDACTED] and Officer [REDACTED] but convicted Mr. [REDACTED] of second degree criminal possession of a weapon and first degree reckless endangerment for shooting behind him as he ran away from the softball field. At the third trial, he was convicted of second degree murder for the death of Mr. [REDACTED] and first degree manslaughter for the death of Officer [REDACTED]

commended Mr. [REDACTED] for his remorse for his crimes and the work he has done to understand the consequences of his actions.

Nonetheless, two of the three commissioners denied parole based on Mr. [REDACTED] crimes, “opposition” from the District Attorney, and “community opposition.” The majority’s decision violated the Board’s statutory and regulatory requirements in the following ways:

First, the Board effectively resentenced Mr. [REDACTED] because one of his victim’s was an off-duty police officer. The Board ignored that Mr. [REDACTED] has already completed his full 21-year sentence for the unintentional death of Officer [REDACTED] effectively in August 2000—and instead denied parole for a fifth time. In doing so, the Board improperly relied on a penal philosophy that reflexively opposes release for any crime that results in the death of a police officer, regardless of intent or knowledge of the officer’s identity—and even where the maximum sentence has already been served.

Second, the Board relied on erroneous information. The Board claimed that the Brooklyn District Attorney opposed Mr. [REDACTED] release. But Brooklyn District Attorney Eric Gonzalez did not submit a statement opposing Mr. [REDACTED] release. In fact, the Brooklyn District Attorney’s Office has not opposed Mr. [REDACTED] release since his 2011 parole interview.

Third, the Board failed to request a recommendation from the current Brooklyn District Attorney, and instead relied on opposition from the administration of Charles Hynes—who lost reelection in 2013. Thus, that stale opposition letter did not reflect the views of the District Attorney who has since been chosen by Mr. [REDACTED] community to enforce the law and make parole recommendations.

Fourth, the Board again relied on erroneous information when it cited to “community opposition” against Mr. [REDACTED] release. The “community opposition” cited by the Board was

exclusively regarding Mr. [REDACTED] manslaughter conviction for Officer [REDACTED] death, a crime for which Mr. [REDACTED] has already completed his sentence. There was no “community opposition” to Mr. [REDACTED] release for the murder conviction for which he is currently serving his sentence.

Fifth, the “community opposition” that the Board relied on impermissibly reflected the penal philosophy of a single organization that automatically opposes release for any crime that results in the death of a police officer. This “community opposition” is not a statutory factor that the Board may validly consider.

Sixth, the Board did not explain the reason for its denial in detail, flouting the Executive Law requirement that it do so.

Seventh, the Board did not address how it considered the parole factors set forth in the Executive Law—as it is required to do under its own regulations—and instead ignored Mr. [REDACTED] decades of varied and successful rehabilitative efforts.

Eighth, the Board did not explain its departure from *all twelve* COMPAS categories, nor did it provide individualized reasons for its departure from each of those scales, in contravention of its recently revised regulations.

Ninth, the Board failed to identify any aggravating factor that justified denying Mr. [REDACTED] parole for a fifth time, denials that have imposed nearly an additional decade of incarceration for a crime he committed as an 18-year-old with no prior criminal record.

Tenth, the Board violated Mr. [REDACTED] Sixth Amendment rights to a trial by jury by relying on an unproven assertion that Mr. [REDACTED] intentionally killed Officer [REDACTED] to evade arrest. Additionally, the Board’s repeated denials of parole have failed to give Mr. [REDACTED] an adolescent offender, a constitutionally meaningful opportunity for parole.

The factual record supporting Mr. [REDACTED] release and demonstrating the deficiencies in the Board's interview and decision is clear. Accordingly, Mr. [REDACTED] respectfully requests that the Appeals Unit recommend that the Board modify its March 20, 2019 decision to grant him immediate parole release with such conditions as it deems necessary. In the alternative, Mr. [REDACTED] respectfully requests that the Appeals Unit recommend that the Board grant him a properly conducted *de novo* parole interview before a new panel that does not include Commissioners Berliner and Davis, who conducted his March 2019 interview, nor Commissioner Shapiro, who dissented from the decision following that interview.

I. THE BOARD'S DENIAL EFFECTIVELY RESENTENCED MR. [REDACTED] FOR THE CRIME AGAINST OFFICER [REDACTED]

Mr. [REDACTED] did *not* receive a maximum of life sentence for the crime against Officer [REDACTED] and has already completed the maximum sentence imposed for that crime. Yet, the Board denied parole and extended Mr. [REDACTED] incarceration based on that crime. This amounted to a resentencing. *See, e.g., Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 27, 29 (1st Dep't 2016) (noting that the Board's role "is not to resentence petitioner" and granting *de novo* interview because "the Board's repeated denials to petitioner of parole have had the effect of undermining this [judicially imposed] sentencing reduction.").

Forty years ago, Mr. [REDACTED] was charged with murder for the intentional killing of an off-duty police officer. Despite two trials, he was never convicted of this charge. More importantly, the second jury acquitted him of the murder charges against Officer [REDACTED] finding him not guilty of the intentional killing of Officer [REDACTED]²

² *See* N.Y. CRIM. PROC. LAW § 300.40(3)(b) ("A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted.")

Because of the partial mistrial in his second trial, two judges sentenced Mr. [REDACTED]. The first judge rejected the prosecutor's recommendation of 5 to 15 years on each of the criminal possession of a weapon and reckless endangerment convictions, and instead imposed concurrent sentences of 2 to 6 years. The second judge imposed an indeterminate sentence of 25 years to life for the murder conviction of Mr. [REDACTED] and an indeterminate sentence of 7 to 21 years for the manslaughter conviction of Officer [REDACTED] (less than the maximum), to run consecutive with each other but concurrent with the 2 to 6 year sentences.

By operation of law, the minimums of consecutive indeterminate sentences are added to create an aggregate minimum (here, 32 years) and the maximums are added to create an aggregate maximum (here, life). *See* N.Y. PENAL LAW § 70.30(1)(b) ("If the defendant is serving two or more indeterminate sentences which run consecutively, the minimum periods of imprisonment are added to arrive at an aggregate minimum period of imprisonment equal to the sum of all the minimum periods, and the maximum terms are added to arrive at an aggregated maximum term equal to the sum of all maximum periods."). Thus, the only sentence that Mr. [REDACTED] is currently serving is the 25 years to life sentence for the murder conviction, not the 7 to 21 year sentence for the manslaughter conviction.

Under New York law, Mr. [REDACTED] was deemed to have satisfied both sentences after 32 years, and he has been eligible for parole since that time. Instead of adhering to the statutory sentencing scheme or the jury's determination, the Board effectively resentenced Mr. [REDACTED] for the death of a police officer. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, 434 (1st Dep't, 1993), *aff'd*, 83 N.Y.2d 788 (1994) ("For the Board to simply decide that any case which involves the death of a police officer, regardless of all of the other circumstances surrounding the crime, automatically necessitates the denial of parole is a breach of the obligation legislatively imposed

upon it to render a qualitative judgment based upon a review of all the relevant factors.”). Under these facts, denial of parole was an imposition of additional incarceration beyond that imposed by the judge pursuant to the jury’s verdict for the crime against Officer ██████³ *See Rossakis*, 146 A.D.3d 22 at 29 (granting *de novo* interview because “the Board’s repeated denials to petitioner of parole have had the effect of undermining this [judicially imposed] sentencing reduction.”).

II. IN DENYING PAROLE, THE BOARD RELIED ON AN ERRONEOUS CLAIM THAT THE KINGS COUNTY DISTRICT ATTORNEY OPPOSED RELEASE

In denying parole, the Board claimed that the Kings County District Attorney opposed release. *See* Ex. 1, March 20, 2019 Parole Decision, pg. 39:21-22. But, the file only contains a February 3, 2011 letter submitted by a former Brooklyn assistant district attorney when Mr. ██████ was first eligible for parole.⁴ *See* Ex. 2, February 3, 2011 Letter from ██████ There has been no opposition from the Brooklyn District Attorney during Mr. ██████ subsequent four parole interviews.

Notably, there was no opposition to release from the current, duly elected Brooklyn District Attorney. The 2011 letter was submitted by a former assistant district attorney in a prior administration. Since each parole review is a “fresh” review,⁵ a letter that is more than 8 years old and does not reflect the recommendation of the current District Attorney—nor anyone in his

³ In addition, the Board’s denial of parole based on the crime against Officer ██████ extends his sentence as to that crime in violation of the Sixth Amendment. *See United States v. Haymond*, 139 S. Ct. 2369 (2019). And, the Board’s denial of parole based on the assistant district attorney’s inference that the crime against Officer ██████ was intentional also violates the Sixth Amendment prohibition against enhancing a sentence based on facts not found beyond a reasonable doubt by a jury. *See* Ex. 2 (stating “One jury was unable to reach a verdict while the second convicted him of murder for the ██████ killing and manslaughter for the killing of ██████ The latter verdict may be a reflection of the lack of eyewitnesses and the fact that the single shot was fired during a struggle.”).

⁴ The letter was signed by ADA ██████ who has not been a Brooklyn Assistant District Attorney for several years. *See Acting Brooklyn District Attorney Eric Gonzalez Announces Promotions to Key Leadership Positions*, BROOKLYN DISTRICT ATTORNEY’S OFFICE (Feb. 3, 2017), <http://brooklynda.org/2017/02/03/acting-brooklyn-district-attorney-eric-gonzalez-announces-promotions-to-key-leadership-positions/>.

⁵ *See* Ex. 3, Excerpts from 2017 & 2013 Parole Interview Transcripts, pgs. 2:22-3:10 (explaining that each parole review requires the commissioners to “deliberate fresh.”).

administration—does not constitute a District Attorney recommendation within the meaning of Executive Law § 259-i. *See* N.Y. EXEC. LAW § 259-i(2)(c)(A)(vii). It also does not reflect the views of the public official the people of Kings County have chosen to represent them.

Finally, the 2011 letter did not oppose release in 2019. Rather, the letter recommended that Mr. [REDACTED] not be paroled at the “first possible opportunity” nor in the “foreseeable future,” but it did not oppose parole forever. *See* Ex. 2, pg. 2. The 2011 District Attorney letter does not convey opposition to release after 8 more years of incarceration. Therefore, the Board’s claim that the Kings County District Attorney opposed Mr. [REDACTED] release at the time of the 2019 parole review was erroneous.

The Board’s reliance on a stale, outdated District Attorney letter was improper. *See Hopps v. N.Y. State Bd. of Parole*, No. 2553/18 (Sup. Ct. Orange Cty. 2018) (granting *de novo* interview after finding that the Board, in denying parole based on a District Attorney letter written years before the interview, had acted with “irrationality bordering on impropriety”).

III. THE BOARD FAILURE TO REQUEST AND CONSIDER THE RECOMMENDATION OF THE KINGS COUNTY DISTRICT ATTORNEY WAS FUNDAMENTALLY UNFAIR

The Board failed to request a current recommendation from the Kings County District Attorney. *See* N.Y. EXEC. LAW § 259-i(2)(c)(A)(vii) (requiring the Board to consider the “recommendations” of the District Attorney). Instead, the Board relied on a letter that was submitted by a former Brooklyn assistant district attorney two administrations and more than 8 years ago, when Mr. [REDACTED] was first eligible for parole. *See* Ex. 2. In fact, the Board has not requested an updated letter since 2007. *See* Ex. 4, June 19, 2007 Letters from [REDACTED] pg. 2 (requesting official statement from District Attorney); *see also* Ex. 3, pgs. 21:25-22:8 (“Letters

were sent out . . . in 2007, by, then, the Division of Parole, and we got one response back. . . . All we have is this letter from 2011, from the Kings County DA’s office.”⁶

The failure to request an updated letter for Mr. [REDACTED] March 2019 parole interview was fundamentally unfair. The only request for a recommendation from the District Attorney was made over a decade ago and addressed to Charles Hynes, who lost both the 2013 Democratic primary and general elections. That year, Mr. [REDACTED] community instead elected Kenneth Thompson as Brooklyn’s District Attorney. Following District Attorney Thompson’s passing, Governor Cuomo appointed Eric Gonzalez to serve the remainder of his term. Less than a year later, in November 2017, Brooklyn voters elected Gonzalez as Brooklyn’s District Attorney.⁷ The Board’s failure to request updated recommendations from either District Attorney during Mr. [REDACTED] 2015, 2017, and 2019 parole reviews unfairly favors the views of a former administration over those of the current, duly-elected District Attorney. This is especially unfair in light of District Attorney Gonzalez’s Justice 2020 Initiative, which he announced in January 2018.⁸ Since that time—and prior to Mr. [REDACTED] March 2019 parole interview—District Attorney Gonzalez has committed his Office to implementing seventeen action items, including to “[c]onsider recommending parole when the minimum sentence is complete and participate more robustly in parole proceedings.”⁹ Yet the Board failed to request the recommendation of his Office.

⁶ Additionally, Mr. [REDACTED] received portions of his parole file following his May 1, 2019 request pursuant to 9 N.Y.C.R.R. § 8000.5. The parole file included only four requests for official statements—to the District Attorney, defense attorney, and both sentencing judges—all made in 2007. If there were subsequent requests, these should also have been provided pursuant to DOCCS’ June 3, 2019 Directive No. 2014, which requires that all “records available to, or considered by, the Board of Parole” for “a scheduled appearance before the Board” be made available to an incarcerated person prior to the perfection of their administrative appeal.

⁷ *Brooklyn DA Eric Gonzalez*, BROOKLYN DISTRICT ATTORNEY’S OFFICE, <http://www.brooklynda.org/eric-gonzalez/>.

⁸ *DA Eric Gonzalez Announces Justice 2020 Initiative*, BROOKLYN DISTRICT ATTORNEY’S OFFICE (Jan. 24, 2018), <http://www.brooklynda.org/2018/01/24/da-eric-gonzalez-announces-justice-2020-initiative/>.

⁹ *Justice 2020 Action Plan*, BROOKLYN DISTRICT ATTORNEY’S OFFICE (Mar. 11, 2019), <http://www.brooklynda.org/justice2020/>.

IV. THE BOARD RELIED ON AN ERRONEOUS CLAIM THAT THERE WAS “COMMUNITY OPPOSITION” TO THE RELEASE OF MR. [REDACTED] FOR THE CRIME AGAINST MR. [REDACTED]

In denying parole as to the 25 years to life sentence that Mr. [REDACTED] is serving for the crime against Mr. [REDACTED] the Board relied on “community opposition” and cited to such opposition as a basis for denial. Ex. 1, pg. 39:22-23. That opposition, however, focused solely on Officer [REDACTED]. See Ex. 5, Sample Parole File Opposition Letter.

Mr. [REDACTED] parole file contains no “community opposition” to Mr. [REDACTED] release for the death of Mr. [REDACTED]¹⁰ and the Board cited no such opposition during the interview or in its decision. Mr. [REDACTED] parole file contained only sequentially-numbered, single-sentence form letters, auto-generated by unauthenticated users—or potentially a computer program—from a police union’s website¹¹ stating simply “I vehemently oppose parole for [REDACTED] killer of P.O. [REDACTED] [REDACTED] on 8/2/1979.” See Ex. 5.

The “community opposition” did not address the crime for which Mr. [REDACTED] is currently incarcerated. Thus, the Board’s claim that there was “community opposition” to the release of Mr. [REDACTED] for the murder of Mr. [REDACTED] is wrong and amounts to reliance on erroneous information. See *Plevy v. Travis*, 17 A.D.3d 879 (3d Dep’t, 2005) (holding that denial of parole based in part on a prior violation of probation which was dismissed constituted reliance on erroneous information and required a *de novo* interview); *Lewis v. Travis*, 9 A.D.3d 800 (3d Dep’t 2004) (ordering *de novo* interview because the Board erroneously referred to petitioner’s conviction as first degree murder, when the crime of conviction was second degree murder).

¹⁰ In response to undersigned counsel’s request for disclosure of the parole file pursuant to 9 N.Y.C.R.R. § 8000.5, the Board confirmed to counsel that all of the letters in Mr. [REDACTED] parole file reference Officer [REDACTED]. See Ex. 6, July 3, 2019 E-mail from [REDACTED].

¹¹ NYCPBA, <https://www.nycpba.org/community/keep-cop-killers-in-jail/> (last visited July 19, 2019).

V. THE PAROLE BOARD VIOLATED THE STATUTORY REQUIREMENTS BY CONSIDERING AND RELYING UPON “COMMUNITY OPPOSITION” THAT REFLECTED ONLY A GENERAL PENAL PHILOSOPHY AND NOT THE CIRCUMSTANCES IN THIS CASE

The Board considered and relied on “community opposition” in the form of thousands of identical letters originating from the New York City Police Benevolent Association (“PBA”) website that permits any entity supplying any sort of name or zip code to generate a letter that endorses the PBA’s philosophy that any person who kills a law enforcement officer should never be paroled. Although the First and Third Departments have sanctioned consideration of opposition from members of the public,¹² here, the material considered and relied on reflected a general penal philosophy, not the specific circumstances of this case, which is not appropriate. *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”).

The “community opposition” in Mr. ██████ parole file consisted of approximately 21,000 form letters that were auto-generated from the PBA’s website, which holds and endorses the viewpoint that any person who kills a police officer should not be released—ever.¹³ The PBA home page includes a tab titled: “Cop Killers” that links to a page announcing: “Keep Cop-Killers in Jail for Life.”¹⁴ Any user may then “CLICK HERE to send letters to the Parole Board,” or click,

¹² *See Clark v. New York State Bd. of Parole*, 166 A.D.3d 531 (1st Dep’t 2018); *Matter of Applewhite v. New York State Bd. of Parole*, 167 A.D.3d 1380 (3d Dep’t 2018). The definition of “community opposition” has not been precisely defined by the Appellate Division, but appears to include any communication from any person or entity, wherever they are located. In *Applewhite*, a divided panel held that the Board may consider these materials. Without offering a legal rationale, the First Department reached the same conclusion in *Clark*. The *Applewhite* majority decision was based, in part, on incomplete legislative history and a faulty premise: that 9 N.Y.C.R.R. § 8005(2), a regulation promulgated in 1978 to express the Board’s unwritten policy regarding “community opposition,” somehow established the “clear intent” of the legislature to authorize consideration of such material. As the dissenting justices correctly observed, the clearest indication of legislative intent are the words of a statute. *Applewhite*, 167 A.D.3d 1385. And Executive Law §259-i (2)(c)(A) clearly does not include “community opposition” as one of the factors that may be considered by the Board. Accordingly, the Board’s March 20, 2019 determination should be reversed because “community opposition” is not a factor that the Board should consider or rely upon.

¹³ NYCPBA, <https://www.nycpba.org/community/keep-cop-killers-in-jail/> (last visited July 19, 2019).

¹⁴ NYCPBA, <https://www.nycpba.org/> (last visited July 19, 2019).



“Keep Cop-Killers Behind Bars Forever,”¹⁵ which links to a list of officers. Clicking on any officer or checking the box titled, “Send a letter for all cop killers,” links to a window that provides the “Perp” name. To submit a one sentence form letter to the Board, only name and zip code need be provided.¹⁶ There appears to be no limit to the number of submissions the same entity can generate and any zip code can be input, including a fake zip code. Ex. 7, PBA Test Letter Submissions.¹⁷ Each generated form letter states: “I vehemently oppose parole for [REDACTED] killer of P.O. [REDACTED] [REDACTED] on 8/2/1979.”¹⁸ These generated form letters are identical to those in Mr. [REDACTED] parole file. See Ex. 5.

This opposition material conveyed purely penal philosophy—the belief that anyone who has killed a police officer should never be released. This is precisely the sort of consideration and guidance that the Court of Appeals has found to be “outside the scope of the applicable statute.” *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, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place.”). The Court of Appeals deemed it inappropriate for a commissioner to be guided by his personal beliefs that

¹⁵ This link includes: “Working together, we can keep cop-killers right where they should be... behind bars. Click the button, below, to send your opinion on an individual killer — or all — to the Parole Board.”

¹⁶ NYCPBA, <https://www.nycpba.org/community/keep-cop-killers-in-jail/cop-killers-form/?id=25886> (last visited July 19, 2019).

¹⁷ Undersigned counsel used the PBA website to make five separate submissions over the course of three days. All submissions were accepted despite inputting “test” as first and last name in all submissions, inputting 00000 as a zip code in one submission and 84101, which is Salt Lake City Utah, in another, and submitting three identical submissions on three successive days. Residents of other states should not be considered members of the relevant “community” for the purpose of determining whether a person should be released to parole supervision in New York State.

¹⁸ There is an option to add “remarks,” but DOCCS represented that all letters were identical to the three examples provided, which did not include more than the stock sentence. See Ex. 6.

killing a police officer deserved the death penalty or life without parole. Similarly, thousands of form letters generated from the PBA calling for life without parole is not a “relevant guideline” to be considered by the Board. *Id.* (“[The Board] must provide the inmate with a proper hearing in which only the relevant guidelines are considered.”)

The opposition material relied on and cited in the Board’s decision told the Board to automatically deny parole to Mr. [REDACTED] because he “killed” a police officer. That viewpoint should have been disregarded by the Board, but instead it was considered, relied on, and cited during both the interview¹⁹ and in the Board’s decision. *See* Ex. 1, pg. 39:21-23 (noting “community opposition to your release”); *but see King v. New York State Div. of Parole*, 190 A.D.2d 423, 434 (1st Dep’t, 1993), *aff’d*, 83 N.Y.2d 788 (1994) (“For the Board to simply decide that any case which involves the death of a police officer, regardless of all of the other circumstances surrounding the crime, automatically necessitates the denial of parole is a breach of the obligation legislatively imposed upon it to render a qualitative judgment based upon a review of all the relevant factors.”).

Mr. [REDACTED] is not sentenced to life without parole—he is not even sentenced to life with the possibility of parole for the crime against Officer [REDACTED] but the Board allowed opposition material that endorsed life without parole to enter its decision-making. *Id.* at 432 (“Since neither the death penalty nor life imprisonment without the possibility of parole are part of the law of this State, they should clearly not have entered into the Board's consideration.”).²⁰

¹⁹ Commissioner Davis made his reliance on this penal philosophy clear during the interview, stating: “I just find it interesting that the police officer, although he was off duty, you shot and killed this individual who was charged with protecting that same community that you were terrorizing. He was assigned to the [REDACTED]th Precinct. He was the person in New York City protecting that community that you covered [sic] with an illegal firearm, yet he was shot and killed protecting that community. . . . You’ve taken a police officer who provides safety and security to the community, and he’s now removed.” Ex. 8, March 20, 2019 Parole Interview Transcript, pgs. 30:17-24 and 37:23.

²⁰ Since there were no official letters (despite the Board erroneously taking note of opposition by the District Attorney, discussed in Section II, *supra*) nor opposition from the victims’ families, it appears that the Board used “community opposition” as a central determinate for denial. DOCCS has stated that the only part of the parole file that withheld from Mr. [REDACTED] was his Presentence Report, pursuant to statute. *See* Ex. 9, July 18, 2019 E-mail from [REDACTED]

Consideration and reliance on this material is also inappropriate because the volume of letters only indicates the organizing abilities and resources of a single organization—in this case the PBA. 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, or greater, number of members of society would not support his release.²¹ Reliance on this sort of “opposition”—or this kind of support—reduces the Board to counting votes, which is not its mandate. Such “opposition” is beyond the statutory factors delineated in Executive Law § 259-i and the Board’s consideration and reliance of this material requires reversal.

VI. THE BOARD FAILED TO EXPLAIN THE REASON FOR DENIAL IN DETAIL

A. The Board did not explain how release after 40 years would deprecate the seriousness of the crime or be incompatible with the welfare of society

The Board concluded that “release would so deprecate the serious nature of the crime and undermine respect for the law” and that “release at this time is incompatible with the welfare of society.” Ex. 1, pgs. 40:12-14 and 38:12-13. The Board’s decision does not explain why. Contrary to law, the Board did not explain why release of a fifty-eight-year-old who has served 40 years in prison for committing crimes when he was 18 years old would clash with society’s welfare and would undermine respect for the law. *See* N.Y. EXEC. LAW § 259-i(2)(a) (“If parole is not granted upon such review, 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.”); *see also* 9 N.Y.C.R.R. § 8002.3(b) (“Reasons for the denial of parole release shall be given in detail.”).

²¹ Mr. [REDACTED] parole file contained at least one letter from [a stranger] in support of his release. *See* Ex. 10, February 24, 2011 Letter from [REDACTED] (“Mr. [REDACTED] is not alone in these world, and there are those, like myself, who believe that he has earned the right to be paroled. . . . As a law abiding citizen of New York, I feel that after serving 32 years for the crimes he was convicted of . . . that Mr. [REDACTED] release would not so deprecate the seriousness of the crime as to undermine respect for the law. . . . [REDACTED] has been punished for what he did, in so much as what the law says. The law makes him eligible for parole now.”)

The Board's general description of Mr. [REDACTED] conduct four decades ago does not explain how his release today will negatively impact society, nor how release today would undermine respect for the law. Mr. [REDACTED] was sentenced pursuant to New York's Penal Law and the law permits parole. *See also Cappiello v. New York State Bd. of Parole*, 2004 N.Y. Slip. Op. 51762(U), at *6 (Sup. Ct. N.Y. Cty. Nov. 30, 2004) (granting *de novo* interview and noting that "in a system which is premised on the hope and possibility of rehabilitation, and a statutory system which mandates a serious, rational, and meaningful evaluation of the statutory criteria, we must allow an individual who has taken advantage of opportunities to rehabilitate himself to move beyond a horrific act of many years ago and to rejoin society to contribute according to his ability. . . . [because] all the relevant facts were known to the sentencing judge at the time of sentencing. They did not change from hearing to hearing. In fact, they will never change.").

Moreover, the judges who imposed the aggregate sentence of 32 to life each chose not to sentence Mr. [REDACTED] to the maximum minimum sentence, which indicates 32 years was deemed a sufficient retributive sentence. After the first completed trial, at which the jury convicted Mr. [REDACTED] of second degree criminal possession of a weapon and first degree reckless endangerment, and deadlocked on the other charges, Mr. [REDACTED] was sentenced to 2 to 6 years for each conviction, to run concurrently, despite the prosecution's recommendation of 5 to 15 years on each conviction. *See Ex. 11, October 1, 1981 Sentencing Transcript Excerpts*, pgs. 11-12. The judge could have run the sentences consecutively, instead of concurrently, for an effective sentence as long as 10 to 30 years, but imposed a far lower sentence of 2 to 6 years.

Similarly, the judge who sentenced Mr. [REDACTED] after his second completed trial that resulted in a conviction for second degree murder and first degree manslaughter, could have run the sentence imposed—32 years to life—consecutive to the 2 to 6 year sentences, but chose not to. In

addition, the judge imposed a sentence of 7 to 21 years for the manslaughter conviction, but could have instead imposed as many as 6 to 25 years. Ex. 12, 1978 Laws of New York, pgs. 2-3.

Had each judge imposed the maximum sentences, Mr. [REDACTED] could have been sentenced to as many as 43 1/3 years to life. Instead, the ultimate sentencing judge determined that Mr. [REDACTED] should be considered for parole after 32 years, more than a decade sooner. In addition, neither judge recommended at sentence against Mr. [REDACTED] release after serving the minimum sentences imposed. Further, neither judge subsequently submitted a letter recommending against release. *See* Ex. 13, December 31, 2018 Parole Board Report (stating that there are no official statements from the judges); *see also* Ex. 4, pgs. 3-4 (requesting official statements from both judges).

Therefore, the Board's determination that Mr. [REDACTED] release after 40 years of imprisonment—8 years more than the minimum sentence—would undermine respect for the law and convey a message that the crime was not serious is not supported by New York's Penal Law or the actual sentences imposed.

B. The Board did not explain its reasons for denying parole

The Board cited three bases for the denial of parole, yet none are explained in detail. Nor did the Board explain in detail why such bases led the Board to conclude that release would undermine society's welfare and undermine respect for the law. *See* N.Y. EXEC. LAW § 259-i(2)(a) (requiring that the Board's reasons for denial "shall be given in detail and not in conclusory terms."); *see also* 9 N.Y.C.R.R. § 8002.3 (b) (requiring that the Board's reasons for denial "shall be given in detail.").

First, the Board described the crimes of conviction as a basis for denial. But Mr. [REDACTED] has already completed his sentences for all those crimes, except the crime of murder, which is the only sentence currently being served. The Board may consider Mr. [REDACTED] other criminal conduct for risk-assessment purposes, but not as a factor in determining whether Mr. [REDACTED] has received enough

punishment as to the crime against Mr. [REDACTED]. The Board did not explain why release after serving more than 8 years beyond the minimum for the crime against Mr. [REDACTED] was insufficient. Second, the Board cited the opposition of the Brooklyn District Attorney, but did not state the nature of that opposition, did not explain why the Board decided to follow the so-called “opposition,” and did not explain why “opposition” years ago from the *former* Brooklyn District Attorney was relevant to whether release at this time was appropriate. Ex. 1, pg. 39:21-22.

Third, the Board cited to “community opposition” but did not identify the source of the “opposition,” the extent or nature of such “opposition,” or how this “opposition” established that release would undermine respect for the law or conflict with society’s welfare as a whole. Ex. 1, pg. 39:21-23. Fourth, the “community opposition” is comprised of thousands of copies of the same exact letter, which “vehemently oppose[s] parole for [REDACTED] killer of P.O. [REDACTED] [REDACTED] on 8/2/1979.”²² *Not one of those identical letters mentions Mr. [REDACTED]* Therefore, the opposition to release based on the crime as to Officer [REDACTED] does not explain why release after 40 years for the murder of Mr. [REDACTED] would undermine social welfare and respect for the law.

VII. THE BOARD VIOLATED THE PAROLE REGULATIONS BY NOT EXPLAINING HOW IT CONSIDERED THE PAROLE DECISION MAKING FACTORS WERE CONSIDERED IN VIOLATION OF THE PAROLE REGULATIONS.

In order to deny release, the Board must provide 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(a)(2). When rendering its decision denying parole, the Board failed to explain how it considered the applicable parole factors. The regulations require that the Board, “in factually individualized and non-conclusory terms, address how the applicable parole decision-making

²² In response to undersigned counsel’s request for disclosure of the parole file pursuant to 9 N.Y.C.R.R. § 8000.5, the Board informed counsel that there are six boxes containing approximately 21,000 letters in Mr. [REDACTED] parole file, all identical in form, except for the name and zip code of the purported signatory. *See* Ex. 6.

principles and factors listed in 8002.2 were considered.” 9 N.Y.C.R.R. § 8002.3(b). The Board loosely referenced certain factors but did not apply them to Mr. [REDACTED] individual facts. Instead, the Board devoted the majority of its decision to discussing his crime.

A. The Board’s decision and interview impermissibly relied on the seriousness of the offense

Here, the Board relied on a single statutory factor—the seriousness of the offense—to justify its decision denying parole. The decision provided no other reason for denying parole to Mr. [REDACTED]. The Board cannot deny parole based solely on the nature of the offense. *See, e.g., Ramirez v. Evans*, 987 118 A.D.3d 707, 707 (2d Dep’t 2014) (granting *de novo* interview because “it is clear that the Board denied release solely on the basis of the seriousness of the offense”) (citations omitted); *Perfetto v. Evans*, 112 A.D.3d 640, 641 (2d Dep’t 2013) (affirming granting of *de novo* interview where the Board “mentioned the petitioner’s institutional record, [but] it is clear that the Parole Board denied the petitioner’s request to be released on parole solely on the basis of the seriousness of the offense”) (citations omitted).

Of the 37 pages of transcript of Mr. [REDACTED] interview, 26—the vast majority—contain discussion of the crime and subsequent trial. *See Ex. 8*, pgs. 1-37. And much of the 2 1/2 page decision is similarly focused only on the crime. *See Ex. 1*, pgs. 39-40. Focusing on the crime at the expense of the other factors is clearly insufficient under both the law and the Board’s own rules. *See Huntley v. Evans*, 77 A.D.3d 945, 947 (2d Dep’t 2010) (“Here, the Parole Board cited only the seriousness of the petitioner’s crime, and failed to mention in its determination any of the other statutory factors. . . . Accordingly, the Parole Board’s determination demonstrates that it failed to weigh the statutory factors, and a new parole hearing is warranted.”); *Mitchell v. New York State Div. of Parole*, 58 A.D.3d 742 (2d Dep’t 2009) (holding that the Board cannot focus

solely on the offense to the exclusion of other statutory factors and affirming granting of *de novo* interview).

Further, under its regulations, the Board must consider any “mitigating and aggravating factors.” 9 N.Y.C.R.R. § 8002.3(d)(7). But the Board did not consider that Mr. [REDACTED] response on August 2—to the crowd of players on the softball field, to the crowd as they pursued Mr. [REDACTED] and to Officer [REDACTED] when he tackled Mr. [REDACTED] was driven by fear: the fear of seeing players hit other pedestrians on the field and the fear of what those players might do if they caught him. That fear does not justify Mr. [REDACTED] actions, and Mr. [REDACTED] has never sought to use his fear as an excuse for what he did. But his fear was not misplaced. When the crowd reached Mr. [REDACTED] he suffered serious, unexplained injuries. By the time Mr. [REDACTED] arrived at the hospital, he had a fractured skull, three gunshot wounds to his legs, a broken arm, knife wounds to his hand and arm, and a ruptured spleen. *See* Ex. 8, pg. 7:7-9 (“I did not understand how I got to the hospital, and I have three bullet wounds in the fronts of my legs and my arm was cut and my hand was cut”); *id.*, pg. 17:12-20 (“Q: You said you had been shot a couple of times, right?” A: Twice in my left leg and once in my right leg. Q: And there were some stab wounds? A: One in my upper arm, and the webbing of my hand between my forefinger and thumb was sliced open. Q: And you have no idea how any of that came to be? A: I don’t recall any of this happening.”); Ex. 14, January 25, 1982 Sentencing Transcript Excerpts, pg. 24 (listing Mr. [REDACTED] injuries).

Additionally, the Board did not consider Mr. [REDACTED] age 40 years ago as a mitigating factor to the seriousness of his offense. He was 18. While the Board did consider that Mr. [REDACTED] was carrying an unlawful revolver, it did not consider that he was doing so because he had previously been assaulted and robbed, and was once beaten so severely that his attackers left him lying unconscious on the sidewalk. *See* Ex. 8, pg. 30:7-12 (“I’ve been robbed a couple of times before

that so I thought I needed [the gun] for my protection, but I didn't realize that having it made me dangerous, made everybody need to be protected from me, made me the victimizer of everyone else."); Ex. 3, pg. 11:6-9 (describing being left unconscious during a robbery); Ex. 14, pg. 22 (describing assault during robberies).

Taken together, not only did the Board improperly focus primarily on Mr. [REDACTED] crime, but it also failed to consider Mr. [REDACTED] significant injuries before his arrest, his immaturity at the time of his offense, and his prior beatings as mitigating factors.

B. The Board's decision and interview ignored other required parole factors

The Board also failed to consider three other required factors. First, the Board is required to consider post-release plans. *See* 9 N.Y.C.R.R. § 8002(d)(3) (requiring the Board to consider "release plans including community resources, employment, education and training and support services available to the inmate."). The interview does not demonstrate how the Board considered Mr. [REDACTED] release plans, and the Board's same-day decision also does not explain how it considered his release plans. Mr. [REDACTED] has developed extensive re-entry plans. His parole file contains numerous letters from family and friends—several of whom are military veterans—that describe how they will support him as he returns to society. Mr. [REDACTED] has obtained three letters of reasonable assurance from employers in North Carolina, where members of his family have lived for five generations. He also has letters of reasonable assurance from the Osborne Association and the Redemption Center in New York.

Second, the Board is required to consider the candidate's institutional record. *See* 9 N.Y.C.R.R. § 8002.2(d)(1) (requiring the Board to consider "the institutional record, including program goals and accomplishments, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates."). The Board did not consider Mr. [REDACTED] extensive vocational history. He was an exemplary participant in Corcraft's industry

program at Greenhaven Correctional Facility and in 2010, shortly after his arrival at Fishkill, was recruited to be the lead clerk for manufacturing and production inventory control for Corcraft Specialty Steel. In this role, Mr. [REDACTED] is responsible for ensuring that each of the five shops on the one hundred person assembly line have the materials they need—at the time they need them—to produce a variety of steel goods, including desks, tables, chairs, and custom fabrications for use throughout New York state. As the lead clerks in each of the five shops have gone home over the past decade, Mr. [REDACTED] supervisors have asked him to temporarily lead those shops until they are able to hire a new lead clerk. Mr. [REDACTED] learned the operations of each shop during these periods of expanded responsibilities, including teaching himself how to operate AutoCAD while in the shop responsible for manufacturing chairs. Reflecting his competence and his supervisors' trust in him, Mr. [REDACTED] parole file contains numerous glowing assessments from his DOCCS supervisors.

Third, the Board is required to consider the candidate's prior criminal history. *See* 9 N.Y.C.R.R. § 8002.2(d)(8) (requiring the Board to consider “prior criminal record, including the nature and pattern of the inmate's offenses”). The interview and decision state that Mr. [REDACTED] had “no prior criminal history.” Ex. 1, pg. 38:19; *see also* Ex. 8, pg. 18:5-6 & 22-23. But neither passing reference makes clear how the Board considered the fact that Mr. [REDACTED] despite growing up in Brownsville and East New York during the 1970s—had no criminal record before his actions on August 2, 1979.

In addition to the three factors that the Board ignored, all other statutory factors, to the extent the Board mentioned them, supported release:

- “The Board of Parole commends your personal growth, programmatic achievements and productive use of time” (Ex. 1, pg. 38:8-9);
- “Your institutional adjustment has been good since [1989]” (*id.*, pg. 38:22);
- “Your last disciplinary violation was a Tier III in 2009” (*id.*, pg. 38:23-24);
- “Your case plan goals are appropriately focused” (*id.*, pg. 38:25);

- “You have satisfied the programs required of you by DOCCS” (*id.*, pg. 39:1-2);
- “You have also engaged in volunteer programs, including Puppies Behind Bars, which is also to your credit” (*id.*, pg. 39:2-4);
- “The panel makes note of your strong support, as evidenced by a number of letters from family and friends as well as from supervisory staff at DOCCS” (*id.*, pgs. 39:24-40:2); and
- “You are also commended for your seemingly remorse for the victim of your crime and their families and the work you have done over many years you have been incarcerated to understand your actions and their affects [sic]” (*id.*, 40:3-7).

VIII. THE BOARD VIOLATED THE REGULATORY AND STATUTORY REQUIREMENTS BY FAILING TO EXPLAIN ITS DEPARTURE FROM THE COMPAS ASSESSMENT

The Board’s conclusion that release would be incompatible with the welfare of society and would undermine respect for the law directly conflicts with each scale of the COMPAS Assessment and the overall COMPAS Assessment. The COMPAS evaluation determined that Mr. [REDACTED] was at the lowest risk of—for instance—committing a violent felony, being arrested, absconding from parole supervision, and abusing substances. Therefore, the Board had a duty to explain why the release of a person who does not pose a danger to the public would be incompatible with society’s welfare. Similarly, the Board had a duty to explain how the release of such a person after more than 40 years in prison would communicate that the crime was not serious and that the law had not taken the crime seriously.

The Board also departed from COMPAS when despite an evaluation that concluded Mr. [REDACTED] would have family and financial support and solid employment options upon release, the Board still determined that release would clash with the welfare of society and undermine the law.

A. The Board departed from every COMPAS scale without any explanation

Although Mr. [REDACTED] received the lowest risk score possible on each of the twelve COMPAS risk categories, the Board still concluded that his release would be incompatible with the welfare of society and would undermine respect for the law. If, in denying release, “the Board 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 N.Y.C.R.R. § 8002.2(a). Because the Board's conclusion departs from each COMPAS scale, the Board had a duty to explain, but failed to do so.

Mr. ██████ 2017 COMPAS Assessment²³ concluded that he presented the lowest possible risk—"1" out of "10"—in all twelve categories, including risk of felony violence, arrest risk, and abscond risk. The assessment recommended that upon release he receive supervision status 4—the lowest possible level of parole supervision—a strong indication that Mr. ██████ is ready to be reintegrated into society and presents minimal risk upon release. Ex. 15, pgs. 1-2.

Despite the Board's recognition that Mr. ██████ COMPAS was "low risk in every category," during the interview, the Board failed to explain how it made the decision that Mr. ██████ release would be "incompatible with the welfare of society." Ex. 8, pg. 23:4-5; Ex. 1, pg. 39:12-13. Under its regulations, the Board must specify each scale within the risk assessment from which it departed. Here, Mr. ██████ received the best possible score on every single scale. Yet the Board's decision provided absolutely no explanation for its departure from any scale, let alone all of them.

In case after case, Board decisions that depart from COMPAS without explanation have been reversed:

²³ Mr. ██████ 2017 COMPAS Assessment is outdated. DOCCS requires that the COMPAS Assessment be completed "at the time of the pre-Board interview." DOCCS, Directive No. 8500: COMPAS Assessment/Case Plan, Nov. 19, 2015 <http://www.doccs.ny.gov/Directives/8500.pdf>. Although Mr. ██████ pre-Board interview occurred on December 31, 2018, his COMPAS Assessment had previously been completed nearly 2 years earlier, on March 3, 2017. *See* Ex. 1; Ex. 15, March 3, 2017 COMPAS Assessment, pg. 1 (showing "Date of Screening" as March 3, 2017 and the "Printed on" date as December 31, 2018). The Board reprinted Mr. ██████ March 2017 COMPAS Assessment at his December 2018 pre-Board interview, but did not conduct a new COMPAS Assessment at that time, as it is required to do. *See* Directive No. 8500, Section V.A.4 (requiring the assessment instrument "to be completed once in a 12 month period for cases reappearing before the Board.").

- *Robinson v. Stanford*, No. 2392/2018, at *2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) (ordering *de novo* interview for man with two murder convictions and low COMPAS scores because “the Parole Board’s finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores in his COMPAS assessment. *As the Board’s determination denying release departed from these risks and needs assessment scores, pursuant to 9 NYCRR § 8002.2 it was required to articulate with specificity the particular scale in any needs and assessment from which it was departing and provide an individualized reason for such departure.* The Board’s conclusory statement that it considered statutory factors, including petitioner’s risk to the community, rehabilitation efforts and needs for successful community re-entry in finding that discretionary release would not be compatible with the welfare of society fails to meet this standard. As such, its determination denying parole release was affected by an error of law.”) (emphasis added);
- *Comfort v. New York State Bd. of Parole*, No. 1445/2018, at *5 (Sup. Ct. Dutchess Cty. Dec. 21, 2018) (ordering *de novo* interview for man incarcerated for murdering an undercover police officer because “Petitioner’s COMPAS instrument clearly identifies Petitioner as the lowest possible risk (1) in the following three categories – risk of felony violence, arrest risk and abscond risk. Although Respondent’s counsel baldly claims that the decision was not a departure from COMPAS, it is difficult to reconcile how the parole board’s finding that Petitioner was likely to reoffend is not a departure from the COMPAS assessment rating Petitioner at the lowest possible risk for reoffending. Accordingly, the parole board’s finding that it was likely that Petitioner would reoffend is a departure from the COMPAS instrument. *With such a departure 9 N.Y.C.R.R. § 8002.2(a) requires Respondent to specify the scale from which it departed and provide an individualized reason for such departure.*”) (emphasis added);
- *Diaz v. Stanford*, No. 53088/2017, at *8 (Sup. Ct. Dutchess Cty. Apr. 4, 2018) (ordering *de novo* interview for man incarcerated for killing an assistant district attorney because “[w]hile a low COMPAS score does not entitle an inmate to parole release, the Board did not discuss why it completely discounted Mr. Diaz’s COMPAS scores and concluded that there is a reasonable probability that he would not “live at liberty without violating the law”. The Court cannot glean from the cursory nature of its decision how it utilized its own risk assessment procedures in concluding that petitioner’s release is incompatible with the welfare of society at this time.”);
- *Matter of Coleman v. New York State Dep’t of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 673 (2d Dep’t 2018) (reversing denial of Art. 78 petition because “the petitioner . . . was assessed “low” for all risk factors on his COMPAS (Correctional Offender Management Profiling for Alternative Sanction) risk assessment. Thus, a review of the record demonstrates that in light of all of the factors, notwithstanding the seriousness of the underlying offense, the Parole Board’s ‘determination to deny the petitioner release on parole evinced irrationality bordering on impropriety.’”);
- *Ruzas v. New York State Board of Parole*, No. 1456/2016, slip op. at 4 (Sup. Ct. Dutchess Cty. Oct. 18, 2017) (holding the Board in contempt for conducting defective *de novo*

interview after the Court set aside the initial decision because “the Board summarily denied [petitioner’s] application without any explanation other than by reiterating the laundry list of statutory factors. The minimal attention, barely lip service, given to these factors and to the COMPAS Assessment cannot be justified given the amount of time already served.”);

- *Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 28-29 (1st Dep’t 2016) (characterizing as “unsupported” the Board’s assertions contradicting petitioner’s COMPAS score, and affirming granting of *de novo* interview);
- *Matter of Rabenbauer v. New York State Dep’t of Corr. & Cmty. Supervision*, 2014 N.Y. Slip Op. 24347, at *1 (Sup. Ct. Sullivan Cty. Nov. 12, 2014) (ordering *de novo* interview because “the Parole Board ignored the Correctional Offender Management Profiling for Alternative Sanction risk assessment and made only superficial inquiry into the statutory factors in Executive Law § 259-i (2)(c)(A).”); and
- *Stokes v. Stanford*, 2014 N.Y. Slip Op. 50899(U), at *2 (Sup. Ct. Albany Cty. June 9, 2014) (granting *de novo* interview after noting that petitioner’s “COMPAS report found him at low risks in all categories it considered. . . . Although the determination parrots the applicable statutory language, the Board does not even attempt to explain the disconnect between its conclusion and petitioner’s rehabilitation efforts and his low risk scores.”).

Mr. █████ case is analogous to the cases cited above. The Board failed to explain how it reached the conclusion that Mr. █████ release was incompatible with the welfare of society if (1) his “COMPAS risk assessment indicate[d] low risk in every category” and (2) he has had no disciplinary infractions since 2009. Ex. 1, pg. 39:8-9; Ex. 8, pg. 19:21-23. Without such an explanation, the decision must be reversed.

B. The Board failed to meaningfully consider the COMPAS Assessment

The Board’s decision states that “[t]he majority of the panel departs from the COMPAS due to the tragic reckless nature of the crimes themselves.” Ex. 1, pg. 39:9-11. This statement fundamentally misunderstands the role of COMPAS. COMPAS was implemented to provide greater objectivity, consistency, and transparency in the Board’s decision making. Under the 2011 amendments to the Executive Law, the Board had to “establish 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.” N.Y. EXEC. LAW § 259(c)(4). The Board adopted the COMPAS Risk and Needs Assessment tool in order to comply with its statutory mandate. According to DOCCS, COMPAS is an empirically validated “research based clinical assessment instrument” used to assess an incarcerated person’s risks and needs by “gathering quality and consistent information to support decisions about supervision, treatment, and other interventions.”²⁴

COMPAS is not—and has never been—a mitigating factor for a person’s crime. The tool has “criminal history” and “disciplinary history” sections to consider the persons prior acts, and the “history of violence” scale incorporate a person’s criminal history. *See* Ex. 15, pgs, 1-3. But COMPAS scores do not excuse a crime, nor are they meant to. COMPAS is a forward-looking risk assessment, not a backward-looking value judgment. COMPAS is meant to help the Board assess a person’s risk if they are released, not the sufficiency of their sentence for the crime they committed decades ago. Mr. ██████ COMPAS Assessment indicates that he has the lowest possible risk as he re-enters society today. The Board’s decision to disregard that assessment on the basis of Mr. ██████ actions 40 years ago is irrational and was made without explanation.

IX. THE BOARD DID NOT IDENTIFY AN AGGRAVATING FACTOR THAT WOULD PERMIT DENIAL BASED SOLELY ON THE CRIME.

The loss of two lives is not to be minimized, but the incident that led to Mr. ██████ crimes does not establish aggravating circumstances. There was no evil intent or plan. Mr. ██████ was an adolescent who, as he states, out of stupidity and ignorance obtained an illegal gun for self-defense. On his way home from a civil service exam—he aspired to a job with the Post Office maintaining

²⁴ DOCCS, Directive No. 8500: COMPAS Assessment/Case Plan, Nov. 19, 2015 <http://www.doccs.ny.gov/Directives/8500.pdf>.

vehicles—he encountered what he perceived to be a dangerous situation and used the gun. His conduct was not justified legally or morally—that is why he was convicted and sentenced to a multi-decade sentence, and why he has spent 40 of his 58 years in prison—but Mr. [REDACTED] young age, lack of any prior criminal record, and his serious, unexplained injuries after he was apprehended by the police establish mitigation. The aggravating circumstance cited by the Board is the nature of the victim, Officer [REDACTED]. But Mr. [REDACTED] was not convicted of murdering Officer [REDACTED] and was not given a life sentence for his crime against Officer [REDACTED]. A separate sentence was imposed as to that crime and has been completed. Therefore, it would be a resentencing to use the nature of one of the victims as an aggravating factor justifying denial of parole based on the crime.

X. THE BOARD RELIED ON TWO UNPROVEN FACTUAL FINDINGS IN VIOLATION OF MR. [REDACTED] SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY

The Board has extended the length of Mr. [REDACTED] minimum and maximum sentence based on two separate factual findings not found beyond a reasonable doubt by a jury. Each finding is a violation of Mr. [REDACTED] Sixth Amendment right to trial by jury. *See United States v. Haymond*, 139 S. Ct. 2369 (2019).

First, the Board relied on an assistant district attorney letter that asserted a fact not found by a jury beyond a reasonable doubt. The letter asserted that Mr. [REDACTED] “used that weapon to kill a police officer in an attempt to avoid arrest.” Mr. [REDACTED] stated during the March 2019 parole interview that he never knew Officer [REDACTED] was a police officer trying to arrest him. Ex. 8, pg. 14:9-19. Additionally, two juries found that Mr. [REDACTED] did not intentionally kill Officer [REDACTED].

Second, a juvenile life sentence without a meaningful opportunity to obtain release violates the Eighth Amendment’s prohibition against cruel and unusual punishment. The maximum sentence allowable for juvenile offenders who are not irreparably corrupt is one that provides a

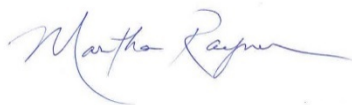
“meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Miller v. Alabama*, 567 U.S. 460, 479 (2012). As an adolescent offender,²⁵ [REDACTED] is entitled to a meaningful opportunity for parole upon demonstration of maturity and rehabilitation. *Id.* This establishes a liberty interest in parole. By repeatedly denying parole, claiming release would be incompatible with the welfare of society and would so deprecate the seriousness of the offense so as to undermine respect for the law, the Board is not providing a meaningful opportunity for parole. Instead, the Board is increasing the minimum sentence imposed based on a finding that Mr. [REDACTED] has not served sufficient time for his crimes and is deserving of more punishment. This sentence enhancement violates Mr. [REDACTED] Sixth Amendment rights.

CONCLUSION

For all of the above reasons, Mr. [REDACTED] requests that the Appeals Unit recommend that the Board modify its March 20, 2019 decision to grant him immediate parole release with such conditions as it deems necessary or, in the alternative, recommend that the Board grant him a properly conducted *de novo* parole interview before a new panel that does not include Commissioners Berliner and Davis, who conducted his March 2019 interview, nor Commissioner Shapiro, who dissented from the decision following that interview.

²⁵ Since the attendant circumstances of youth extend beyond age 17 and [REDACTED] was just 18, *Miller et al.* should be equally applicable. *See, e.g., Cruz v. United States*, No. 11-CV-787 (JCH), 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018) (holding that *Miller* applies to 18-year-olds and thus that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole” for offenders who were 18 years old at the time of their crimes); *Post-Conviction Justice Bureau*, BROOKLYN DISTRICT ATTORNEY’S OFFICE, <http://www.brooklynda.org/post-conviction-justice-bureau/> (stating Brooklyn District Attorney’s policy regarding parole recommendations: “For cases in which juveniles (defined as age 23 or younger at the time of the offense) were sentenced to an indeterminate life sentence, special considerations must go into their parole determinations so that there can be a meaningful inquiry into whether they have matured into appropriate candidates for release.”).

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EXHIBIT LIST

- EXHIBIT 1:** March 20, 2019 Parole Decision
- EXHIBIT 2:** February 3, 2011 Letter from [REDACTED]
- EXHIBIT 3:** Excerpts from 2017 & 2013 Parole Interview Transcripts
- EXHIBIT 4:** June 19, 2007 Letters from [REDACTED]
- EXHIBIT 5:** Sample Parole File Opposition Letter
- EXHIBIT 6:** July 3, 2019 E-mail from [REDACTED]
- EXHIBIT 7:** July 2019 PBA Test Opposition Letter Submissions
- EXHIBIT 8:** March 20, 2019 Parole Interview Transcript
- EXHIBIT 9:** July 18, 2019 E-mail from [REDACTED]
- EXHIBIT 10:** February 24, 2011 Letter from [REDACTED]
- EXHIBIT 11:** October 1, 1981 Sentencing Transcript Excerpts
- EXHIBIT 12:** 1978 Laws of New York
- EXHIBIT 13:** December 31, 2018 Parole Board Report
- EXHIBIT 14:** January 25, 1982 Sentencing Transcript Excerpts
- EXHIBIT 15:** March 3, 2017 COMPAS Assessment