

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Parole Administrative Appeal Briefs

Parole Administrative Appeal Documents

---

August 2021

### Administrative Appeal Brief - FUSL000055 (2020-07-27)

Follow this and additional works at: <https://ir.lawnet.fordham.edu/aab>

---

#### Recommended Citation

"Administrative Appeal Brief - FUSL000055 (2020-07-27)" (2021). Parole Information Project  
<https://ir.lawnet.fordham.edu/aab/7>

This Parole Document is brought to you for free and open access by the Parole Administrative Appeal Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Parole Administrative Appeal Briefs by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

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

[REDACTED]

DIN: [REDACTED]  
Parole Admin Appeal [REDACTED]

Parole Interview Date: March 10, 2020

Denial Date: March 10, 2020

[REDACTED] Parole Hearing Location: Woodbourne Correctional Facility  
Parole Panel Location: Poughkeepsie, New York

Submitted by:

[REDACTED]

PRO BONO COUNSEL

Lincoln Square Legal Services, Inc.  
Fordham University School of Law  
150 West 62<sup>th</sup> Street, 9th Floor  
New York, New York 10023  
212-636-6934

Submitted on July 27, 2020

Appeals Unit  
New York State Board of Parole  
Harriman State Campus  
Building # 2  
1220 Washington Avenue  
Albany, NY 12226

Two copies submitted via overnight mail

## TABLE OF CONTENTS

<b>INTRODUCTION.....</b>		<b>4</b>
<b>I.</b>	<b>THE BOARD FAILED TO EXPLAIN THE REASONS FOR DENIAL IN DETAIL AND DID NOT EXPLAIN HOW EACH APPLICABLE FACTOR WAS CONSIDERED.....</b>	<b>5</b>
<b>A.</b>	<b>THE BOARD DID NOT ADDRESS HOW IT CONSIDERED [REDACTED] INSTITUTIONAL RECORD.....</b>	<b>10</b>
<b>i.</b>	<b>VOCATIONAL TRAINING AND WORK ASSIGNMENTS.....</b>	<b>10</b>
<b>ii.</b>	<b>EDUCATIONAL ACCOMPLISHMENTS.....</b>	<b>11</b>
<b>iii.</b>	<b>CASE PLAN.....</b>	<b>12</b>
<b>iv.</b>	<b>THERAPEUTIC PROGRAMMING AND THERAPY .....</b>	<b>12</b>
<b>B.</b>	<b>THE BOARD DID NOT EXPLAIN HOW IT CONSIDERED RELEASE PLANS.....</b>	<b>14</b>
<b>C.</b>	<b>THE BOARD DID NOT EXPLAIN HOW IT CONSIDERED THE VICTIM STATEMENT.....</b>	<b>15</b>
<b>D.</b>	<b>THE BOARD DID NOT EXPLAIN HOW IT CONSIDERED SERIOUSNESS OF THE OFFENSE.....</b>	<b>15</b>
<b>II.</b>	<b>THE BOARD’S FAILURE TO EXPLAIN HOW IT CONSIDERED THE MANY FACTORS DETAILED ABOVE ESTABLISH THAT THE BOARD FAILED TO CONSIDER THOSE FACTORS.....</b>	<b>16</b>
<b>III.</b>	<b>THE BOARD ONLY CONSIDERED PAST CRIMINAL HISTORY AND DISCIPLINARY RECORD.....</b>	<b>17</b>
<b>IV.</b>	<b>THE BOARD FAILED TO EXPLAIN ITS DEPARTURE FROM COMPAS.....</b>	<b>19</b>
<b>V.</b>	<b>THE BOARD FAILED TO OBTAIN THE SENTENCING MINUTES OR ESTABLISH THAT THEY WERE NOT AVAILABLE.....</b>	<b>20</b>
<b>VI.</b>	<b>THE BOARD DID NOT REQUEST NOR CONSIDER A CONTEMPORANEOUS LETTER FROM THE CURRENT BRONX DISTRICT ATTORNEY.....</b>	<b>21</b>
<b>VII.</b>	<b>THE BOARD INAPPROPRIATELY CONFRONTED AND INTIMIDATED [REDACTED] [REDACTED].....</b>	<b>22</b>
<b>VIII.</b>	<b>THE BOARD RELIED ON INCORRECT INFORMATION.....</b>	<b>23</b>
<b>CONCLUSION.....</b>		<b>23</b>

## INTRODUCTION

██████████ has worked with focus and determination during the past four years of his 12 to life sentence, to address his drug dependency and prepare for a successful reentry. He has been drug free and sober for four years,<sup>1</sup> he has attained positive work evaluations, merited entry into the Family Reunification Program, gained entry to the Bard Prison Initiative, earned accolades from his professors, completed numerous voluntary programs, earned transfer from a maximum security prison to a medium, and married a stable and employed woman he has known since he was young. And, unlike the last time he was paroled from prison, 14 years ago, he came before the Board significantly older, more mature and had multiple supports in place, including his wife, and the comprehensive re-entry services of the Bard Prison Initiative and the Office of the Appellate Defender. Yet, the Board denied parole because it did not consider this record of steady and consistent rehabilitation that took place over the last four years.

The Board's denial of parole should be vacated and a *de novo* review should be held. The Board failed to explain the reason for its denial in detail. The Board also violated its own regulation which requires the Board, when denying parole, to explain in detail and in factually individualized and non-conclusory terms, how the applicable statutory parole decision-making principles and factors listed in 8002.2 were considered by the Board. In addition, the Board's failure to *explain* how multiple factors were considered, established its failure to *consider* those factors. Instead, the Board focused exclusively on ██████████ past criminal record and disciplinary history. This tunnel vision prevented the Board from seeing the extraordinary

---

<sup>1</sup> See Ex. 6, Disciplinary History, which establishes no drug use despite standard periodic testing, and ██████████ participation the Family Reunification Program, Ex. 4, which requires testing the day before, the day of and the day of completion.

accomplishments and solid pattern of rehabilitation that [REDACTED] established in the last four years. Rather than considering [REDACTED] accomplishments and evidence of sustained rehabilitation, the Board chastised [REDACTED] for not remembering that he had been on probation thirty seven years ago, confronted [REDACTED] with words he had spoken fourteen years ago to a different Board that granted his release on a prior sentence, and intimidated [REDACTED] by raising the specter that he may never be released from prison. In addition, the Board did not have the sentencing minutes and did not establish the unavailability of the minutes. The Board failed to solicit and consider a contemporaneous official statement from the current Bronx District Attorney, instead relying on a decade old letter from a prior administration. And, the Board relied on a COMPAS risk score that was based on incorrect information. [REDACTED] relies on the entire contents of the parole file in making this administrative appeal.

**I. THE BOARD FAILED TO EXPLAIN THE REASONS FOR DENIAL IN DETAIL AND DID NOT EXPLAIN HOW EACH APPLICABLE FACTOR WAS CONSIDERED**

The Board did not explain in detail its conclusion that “release to supervision is incompatible with the public safety and welfare,” and that “to grant release at this time would so deprecate the seriousness of the crimes as to undermine respect for the law.” Ex. 1 at 19-20. The Board’s decision did not explain why, after serving 12 years for a robbery with an imitation gun, and then establishing a record of change and rehabilitation for the past four years, release would clash with society’s public safety and 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.”).

A detailed explanation was required in light of not only [REDACTED] strong record of rehabilitation, but also in light of society's changing attitudes toward crime and incarceration. The crime was moderately serious; no real weapon was used, no one was hurt and [REDACTED] accepted responsibility right away. [REDACTED] has served a long and severe term of twelve years incarceration. Next month he will be fifty-five years old. This is a society that is ever more aware of the ill effects of incarceration on society and the disproportionate impact on communities of color. <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> (The majority of Americans recognize racial bias in the criminal justice system — only one in three agree that Black people are treated fairly by the criminal justice system.”).<sup>2</sup> In addition, Studies show that victims prefer rehabilitation over punishment. <http://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> (“Perhaps to the surprise of some, victims overwhelmingly prefer criminal justice approaches that prioritize rehabilitation over punishment and strongly prefer investments in crime prevention and treatment to more spending on prisons and jails.”). This is also a society that has shifted its understanding of drug dependency as a crime to an illness that should be treated rather than criminalized. <https://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations-research-based-guide/why-should-drug-abuse-treatment-be-provided-to-offe>. Yet, despite [REDACTED] having all the markers of a successful reentry, the Board extended the duration of [REDACTED] punishment.

---

<sup>2</sup> The research, conducted by Benenson Strategy Group between October 5 and October 11, included 1,003 telephone interviews with Americans across the US. Forty-one percent of participants identified as conservative, 31 percent as liberal, and 23 percent as moderate.

In addition, the Board is required to explain in detail how each applicable factor that must be considered, was actually considered. *See* 9 N.Y.C.R.R. § 8002.3(b) (“Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual’s case.”). This was not done.

The denial decision was a mere paragraph. *Id.* The decision included one, seventeen word sentence listing “positive factors,” one of which, “documents submissions,” was wholly ambiguous. The remainder of the short decision, focused exclusively on *past* criminal history and *past* disciplinary history.

The decision was as follows:

“Following a personal interview, record review, and deliberation, this panel finds that your release to supervision is incompatible with the public safety and welfare. Therefore parole at this time is denied. We have considered your COMPAS risk and needs assessment. Significant weight has been placed on your poor behavior during this term. You have incurred multiple Tier II and Tier III disciplinary reports. Your high prison misconduct COMPAS score reflects your poor compliance with DOCCS rules. This is a crucial aggravating factor against your release on parole at this time. Your instant offense of attempted robbery second occurred while you were on parole for attempted robbery in the first degree. Prior probation, local jail and multiple prior state sentences failed to deter you from committing the instant offense. Your medium COMPAS, criminal involvement score and high score for history of violence is disturbing. Positive factors include your family support, document submissions, Case Plan, educational accomplishments and related low COMPAS scores. Most compelling we find your pattern of crime, poor record on parole and negative behavior troublesome. To grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law.” *Id.*

The Board violated its own regulation by simply listing some “positive factors” and wholly ignoring others. *See* 9 N.Y.C.R.R. § 8002.3(b) (“Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were

considered in the individual's case."); see also *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016) (holding that the Parole Board violated the statutory requirement that the reasons for denial not be conclusory when they "summarily listed petitioner's institutional achievements and then denied parole with no further analysis of them."); *Ferrante v. Stanford*, 172 A.D.3d 31, 38, 100 N.Y.S.3d 44, 50 (2d Dep't, 2019) (The Board is required to give "genuine consideration to the statutory factors."); *In re McBride v. Evans*, 42 Misc. 3d 1230A (N.Y. Sup. Ct. Dutchess Cnty. 2014) ("While the Board discussed petitioner's positive activities and accomplishments at the hearing, it then concluded that his release was incompatible with 'public safety and welfare.' The Board gave no analysis as to how or why it reached this conclusion. It appears to have focused only on petitioners past behavior without articulating a rational basis for reaching its conclusion that his release would be incompatible with the welfare of society at this time.").

Prior practices by the Board of only explaining the factors for the denial of parole are no longer permitted because the revised regulation, which became effective in September of 2017, requires otherwise. The prior applicable regulation did not require the Board, in its denial decision, to address each statutory factor it is required to consider. See 9 NYCRR 8002.3 (d) ("*Reasons for denial*. If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview of the decision denying him or her parole and the factors and reasons for such denial. Such reasons shall be given in detail and not in conclusory terms.") (2014 NY REG TEXT 346181 (NS), 2014 NY REG TEXT 346181 (NS)). But, with the adoption of the 2017 revision, the Board, in its denial decision, "shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors



listed in 8002.2 were considered in the individual's case.”<sup>3</sup> Thus, in the prior iteration of the regulation, the Board needed only to explain the factors that explained the denial—i.e. the factors and reasons *for* such denial. In contrast, the 2107 revision requires an explanation of each applicable factor, whether or not the factor was used to deny parole.

Therefore, precedent finding otherwise does not control. *See e.g. King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (“...a Parole Board need not expressly discuss each of these guidelines in its determination.”); *Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 672–73 (2d Dep't 2018) (Board “is not required to address each factor in its decision.”); *Campbell v. Stanford*, 173 A.D.3d 1012, 1014, 105 N.Y.S.3d 461, 463 (2d Dep't 2019) (same). Although both *Coleman* and *Campbell* were decided after the 2017 revisions came into effect, the denial decisions on appeal were made before the regulation came into effect. In *Coleman*, the denial decision on review was made in 2016, as was the decision appealed from in *Campbell*. And, in neither decision, was the 2017 regulation raised by the petitioner nor examined by the court. And, thus far, there are no published cases construing the 2017 regulation. By the plain language of the Board's own regulation, parole denial decisions made after September 2017 require the Board to address how it considered the applicable factors.

The following statutory factors were applicable to [REDACTED] yet they were not addressed at all, never mind in factually individualized and non-conclusory terms.

---

<sup>3</sup> *See also* the Parole Board's 2016 Proposed Rule Making: “Finally, in 8002.3, if the Board decides to deny release to Community Supervision, the Board shall provide individualized factual reasons stated in detail as to why, addressing the applicable factors in 8002.2. The benefit of this will be that the Board will conduct more thorough interviews and produce more individualized, detailed decisions in instances where release to Community Supervision is denied.” 2016 NY REG TEXT 437083 (NS), 2016 NY REG TEXT 437083 (NS)

**A. THE BOARD DID NOT ADDRESS HOW IT CONSIDERED [REDACTED] INSTITUTIONAL RECORD**

As to the first factor the Board must consider, [REDACTED] institutional record, the Board did not explain how it considered this factor or any of its component parts. *See* 8002.2 (d)(1) (“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’s decision listed the “Case Plan” and “educational accomplishments” as “positive factors,” but did not explain, in “factually individualized and non-conclusory terms,” how it considered these positive factors. Ex. 1 at 19-20. The Board’s decision did not even mention [REDACTED] “vocational education training” and “work assignments” as it was required to do. And, the Board did not address how it considered [REDACTED] [REDACTED] program accomplishments and therapeutic programming.

**i. VOCATIONAL TRAINING AND WORK ASSIGNMENTS**

The Board’s decision did not address how it considered [REDACTED] vocational training and work assignments. The Board had nine Inmate Status Reports, from 2014 to 2020, that evaluated [REDACTED] as “excellent” in most, and not less than “above average,” in every category.<sup>4</sup> The most recent evaluation, from January of 2020, which summarized Mr. Brydsong’s work in the Custodial Maintenance Program (before he entered Bard College), stated that [REDACTED] had been promoted to tool clerk and “worked directly with the special needs students...and demonstrated great patience, integrity and dedication towards them.” Ex. 2 (OAD submission, Ex. F). The evaluation also stated: “[REDACTED] positive outlook, attitude, and [illegible] to others was a great asset to the custodial maintenance program.” *Id.* [REDACTED]

---

<sup>4</sup> Evaluative categories include: attendance/punctuality, attitude toward peers and authority figures, follows rules and safety practices, ability to follow directions, quality of work, displays self-control, effort and initiative, dependability.

successfully completed the entire Custodial Maintenance Program which trained him in a broad array of cleaning operations, all of which would have positioned him to obtain employment upon release in light of the high demand for cleaning services in the midst of the COVID pandemic.

In addition, [REDACTED] earned a NCCER-OSHA certificate in 2019. Ex. 4. The denial decision includes “other document submissions” in the list of “positive factors,” but this does not explain how the Board considered strong evidence of excellent work habits, stability, consistency and responsibility. Nor was there any mention of the [REDACTED] vocational achievements or excellent work evaluations in the interview.

## ii. EDUCATIONAL ACCOMPLISHMENTS

In the same way, the Board did not explain how it considered [REDACTED] educational accomplishments, which were formidable during the last four years of his incarceration. Again, the Board merely listed it as a “positive factor.” This is not a detailed explanation. [REDACTED] distinguished himself from 100 other applicants to obtain admission to the Bard Prison Initiative. Ex. 3 (OAD Submission, Ex. I). The Bard site director, Mr. Pearl, who held one on one meetings with [REDACTED] one to two times per week, described him as an “honest and sharp thinker who works hard and supports his peers,...who sets a tone of quiet dedication and open dialogue.” Mr. Pearl also described how reflective and mature [REDACTED] is and noted his “ability to look at his own experiences with both emotional force and critical distance.” Prof. Korsant, who described his anthropology class as “rigorous,” stated that [REDACTED] went over and above the class requirements. He also stated the [REDACTED] was “an excellent addition to the group, bringing enthusiasm, curiosity, positivity, and a collaborative work ethic to class each day.” Yet, in the denial decision, the Board did not even mention [REDACTED] admission to Bard, and his completion of three semesters towards an Associate Degree.

Nor does the interview provide insight or explanation into how the Board considered [REDACTED] education accomplishments. Although [REDACTED] raised the factor several times, the Board simply acknowledged [REDACTED] participation. *See* Ex. 1, at 9, 13, 14 and 17.

### iii. CASE PLAN

The Board also did not explain in detail how it considered the Case Plan, which is required. [REDACTED] Case Plan set out numerous ambitious goals, all of which [REDACTED] took on voluntarily, and most of which [REDACTED] completed by the March, 2020 parole review. *See* Ex. 4. In 2017, [REDACTED] set himself the goal of obtaining a Custodial Maintenance Certificate, which he obtained in 2019. *Id.* He set out a goal of gaining admission to the Bard Prison Initiative and was admitted. Ex. 3. He set a goal of obtaining Student of the Month and attained that goal in 2018. Ex. 4. [REDACTED] sought to complete the PREA Program<sup>5</sup> and he did so in 2018. Ex. 4 at 2. He sought to obtain a NCCER-OSHA certificate and he did so in 2019. *Id.* [REDACTED] tasked himself with completing a substance abuse program that he accomplished in 2017. *See* Ex. 5. And, he tasked himself with applying and earning admission to the Family Reunification Program, which he attained in 2019. Ex. 4. Yet, in its denial decision, the Board merely included the Case Plan in a list that is deemed “positive.” Ex. 1 at 19. Nor is there any mention of [REDACTED] Case Plan in the interview, and the character traits it took to establish such ambitious goals and attain those goals.

### iv. THERAPEUTIC PROGRAMMING AND THERAPY

The Board did not explain in detail how it considered [REDACTED] participation in the therapeutic Alcohol and Substance Abuse Treatment (ASAT) program, which [REDACTED] described during the interview as a profound game changer. Ex. 1 at 4 and 12. [REDACTED]

---

<sup>5</sup> PREA is the Prison Rape Elimination Act; the program, often facilitated by members of the LGBTQ community, is a twelve week awareness program.

conveyed to the Board that his participation in substance abuse programming during his *past* incarceration had not “benefit[ted]” him “in a way that [it] should have.” *Id.* at 4. His participation in the nine month program this time was greatly beneficial because he “related” to the ASAT counselor, who had a substance abuse history, and was able to help ██████████ recognize the “triggers” that caused ██████████ to repeat past conduct over and over. *Id.* ██████████ started the ASAT Program in August, 2016, and has not used drugs since.<sup>6</sup> *See* Ex. 5 at 2 (OAD submission, Ex. E).

In addition, ██████████ completed the Basic and Advanced Alternatives to Violence Project in 2016. *See* OAD submission, Ex. D. Relatedly, the Board also did not question ██████████ about his mental health or explain how it considered ██████████ engagement with mental health services to gain insight and health. Ex. 1 at 10 and 12. In ██████████ personal statement he credited therapy with providing him insight into the reasons for his repeated criminal behavior. Ex. 7 at 3 (OAD Submission, Ex. A). Over the course of his seven page statement, ██████████ explained how his engagement in voluntary therapy helped him see how the childhood abuse and neglect he suffered “warped” his ability to become a moral and compassionate man. *Id.* at 4. ██████████ expressed remorse and empathy for the victim of his crime; he displayed insight by admitting that although the gun used was but a toy, the victim did not know that and suffered humiliation and emotional trauma. *Id.* at 1. The Board did not seek information about therapy, though ██████████ raised it in the interview, nor did the Board address it in the denial decision.

---

<sup>6</sup> ██████████ last disciplinary ticket for drug use (marijuana) was in February of 2016. *See* Ex. 6.

## B. THE BOARD DID NOT EXPLAIN HOW IT CONSIDERED RELEASE PLANS

As to the second factor the Board must consider, the Board did not explain in detail how it considered [REDACTED] “release plans, including community resources, employment, education and training and support services available to the inmate,” which is a required factor. 9 NYCRR 8002.2(d)(3). Although [REDACTED] had detailed release plans, individualized letters pledging re-entry support and numerous letters of assurance, the Board’s denial decision merely mentioned “family support” and unspecified “document submissions” as a “positive factor.” Ex. 1 at 19. Jed Tucker, Director of Bard’s Re-Entry and Alumni Affairs, explained that having completed three semesters of college, [REDACTED] would have access to Bard’s re-entry services that included housing, continuing education and employment. Mr. Tucker confirmed that “all BPI students leave with a draft resume and several practice cover letters and 93% of such students are currently employed, mostly in full time positions.” Ex. 3 (OAD submission Ex. G). The Board also had a letter from the Office of the Appellate Defender, which stated that [REDACTED] would have the “full support” of their Client Services Program, which provides “comprehensive re-entry services,” including ensuring connection to the “most appropriate services including substance abuse treatment and counseling.” Ex. 8 (OAD Submission, Ex. I). The Board never explained how it considered these individualized, firm commitments of comprehensive support that it was required to consider.<sup>7</sup>

In addition, the Board acknowledged during the interview that it was “clear” that [REDACTED] [REDACTED] wife was committed to him. Ex. 1 at 16. And his wife, a social worker, provided a letter in support confirming that [REDACTED] had a home with her and she would provide

---

<sup>7</sup> [REDACTED] also had letters of assurance from CASES, Exodus Transitional Community, The Fortune Society and the Osborne Association. See OAD Submission, Ex. G. The Board did not address how it considered this additional re-entry planning.

financial, emotional, spiritual, and employment support. Ex. 9 (OAD Submission, Ex. I). This support was critical because as ██████████ explained to the Board, “There’s a lot of support for me when I’m waiting out there and I won’t have those same problems and I won’t get tripped up.” Ex. 1 at 17. Yet, the Board did not explain how it factored in this strong reentry plan and support.

### **C. THE BOARD DID NOT EXPLAIN HOW IT CONSIDERED THE VICTIM STATEMENT**

The Board must also consider any victim statement, but the Board failed to explain how it did so. 9 NYCRR 8002.2(d)(5) (“any statement made or submitted to the Board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated.”). A victim statement was included in the Pre-Sentencing Investigation report, Ex. 10 (OAD, Ex. C), but the Board did not explain how it considered this statement, nor does the Board state whether it considered any subsequent victim statement.<sup>8</sup>

### **D. THE BOARD DID NOT EXPLAIN HOW IT CONSIDERED THE SERIOUSNESS OF THE OFFENSE**

The fourth applicable factor the Board failed to address was the “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 and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated, the pre-sentence probation report, as well as consideration of any mitigating and aggravating factors, and

---

<sup>8</sup> Although the Board takes the position that victim statements may not be disclosed to the parole applicant, this does not mean the Board is relieved from explaining how it considers such statements or whether there were such statements to consider. *In re West v. New York State Bd. of Parole*, 41 Misc.3d 1214(A) (Sup. Ct. Albany Cnty. 2013). (“The mandate that a victim impact statement ‘shall be maintained in confidence’ (9 N.Y.C.R.R. § 8002.4(e)) certainly should not trump the statutory requirement that the Board’s decision reveal the factors and reasons it considered in reaching its decision, particularly when such consideration is mandated by statute.”).

activities following arrest prior to the inmate's current confinement.” N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2(d)(7). The Board did not address the September 8, 2010 District Attorney recommendation. The Board did not address the pre-sentence probation report. The Board did not have the sentencing court’s recommendation. *See infra* at VI. The Board did not address the mitigating facts of the crime, of which there were many. ██████████ apologized to the victim in the midst of the crime and admitted he was the coward, not the victim, and used a fake, rather than real gun. Ex. 1 at 6 and 13; Ex. 10 at 2. In addition, ██████████ quickly pleaded guilty to the crime. Ex. 10.<sup>9</sup> The Board’s denial decision simply named the “instant offense” as “attempted robbery in the second degree.” Ex. 1 at 19. The Board did not address any component part of this factor.

**II. THE BOARD’S FAILURE TO EXPLAIN HOW IT CONSIDERED THE MANY FACTORS DETAILED ABOVE ESTABLISH THAT THE BOARD FAILED TO CONSIDER THOSE FACTORS**

The Board did not explain how it considered ██████████ educational accomplishments, Case Plan, vocational achievements, work assignments, engagement with therapy, release plans, nor did the Board explain how it considered the victim statement and all the component parts within the seriousness-of-the-offense-factor, which establishes that the Board did not consider or weigh those factors. The Board must weigh each factor. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, 431–32 (1<sup>st</sup> Dep’t, 1993), *aff’d*, 83 N.Y.2d 788 (1994) (“In this case, the record clearly reveals that the denial of petitioner's application was a result of the Board's failure to weigh all of the relevant considerations and there is a strong indication that the denial of petitioner's application was a foregone conclusion.”). The Board is

---

<sup>9</sup> The crime took place at the end of July, 2008; ██████████ was arrested the same day. Just over a month later, on September 11, 2008, ██████████ was first interviewed by probation for the purpose of preparing a pre-sentence report, confirming he pleaded guilty soon after his arrest. Ex. 10.



not required to give each factor equal weight, *see Peralta v. N.Y. State Bd. of Parole*, 157 A.D.3d 1151 (3d Dep't 2018), but it must consider and weigh every applicable factor. And it must give “genuine consideration to the statutory factors.” *See Ferrante v. Stanford*, 172 A.D.3d 31, 38 (2d Dep't, 2019); *Johnson v. N.Y. State Div. of Parole*, 65 A.D.3d 838 (4th Dep't 2009) (“The record is devoid of any indication that the Parole Board in fact considered the statutory factors that weighed in favor of petitioner's release ...”); *Cappiello v. N.Y. State Bd. of Parole*, 6 Misc.3d 1010A (Sup. Ct., NY Cnty, 2004) (“When the record of the Parole hearing fails to convincingly demonstrate that the Parole Board ... qualitatively weigh[ed] the relevant factors in light of the three statutorily acceptable standards for denying parole release, the decision is arbitrary and capricious.”).

The Board's failure to consider all the applicable factors resulted in the Board missing or ignoring the strong evidence of [REDACTED] “trajectory of change from 2016 to 2020.” Ex. 1 at 13. *See Pulinario v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 42 Misc.3d 1232(A) (Sup. Ct. NY Cnty, 2014) (“At the hearing, there were only passing references to the contents of petitioner's application. In the decision there was only a perfunctory mention of all the statutory factors that weighed in Pulinario's favor.”); *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc.3d 661 (Sup. Ct. Bronx Cnty, 2006) (Holding that “actual consideration of factors means more than acknowledging that evidence of them was before the Board.”).

### **III. THE BOARD ONLY CONSIDERED PAST CRIMINAL HISTORY AND DISCIPLINARY RECORD**

Although the Board is not required to give equal weight to each statutory factor, it must weigh all factors. *See supra* at II. Here, the Board's denial decision focused exclusively on [REDACTED] criminal history and disciplinary history. By doing so, the Board failed to consider the exceptional record [REDACTED] had established in the last four years.

Except for one perfunctory sentence, the denial decision focused exclusively on criminal history and disciplinary history.

As to disciplinary history, the Board stated:

“Significant weight has been placed on your poor behavior during this term. You have incurred multiple Tier II and Tier III disciplinary reports.<sup>10</sup> Your high prison misconduct COMPAS score reflects your poor compliance with DOCCS rules. This is a crucial aggravating factor against your release on parole at this time.”

As to criminal history, the Board stated:

“Your instant offense of attempted robbery second occurred while you were on parole for attempted robbery in the first degree. Prior probation, local jail and multiple prior state sentences failed to deter you from committing the instant offense. Your medium COMPAS, criminal involvement score and high score for history of violence is disturbing...Most compelling we find your pattern of crime, poor record on parole and negative behavior troublesome.”

One sentence in the denial decision was devoted to anything other than criminal or disciplinary history:

“Positive factors include your family support, document submissions, Case Plan, educational accomplishments and related low COMPAS scores.”

The interview followed the same pattern. The first two pages of the transcript, after introductions, focused on criminal history. Ex. 1 at 2-4. The Board then confronted [REDACTED] with a quote from a prior parole interview, and then the Board went back to criminal history. Id. at 5. [REDACTED] tried to bring up his personal statement and the insight he has gained through therapy and therapeutic programs, *id.* at 6-7, but the Board then moved to disciplinary history. *Id.* at 8. [REDACTED] then raised his completion of ASAT. In response,

---

<sup>10</sup> [REDACTED] has not had a Tier III infraction in four years. *See* Ex. 6. All Tier III infractions were for using marijuana, none were for violence. *Id.*

the Board raised the specter that [REDACTED] may never be released. *Id.* at 9. The Board acknowledged [REDACTED] participation in Bard, his wife and her support, and some positive COMPAS scores, *id.* at 9, but then went back to disciplinary history. *Id.* at 10. [REDACTED] was then allowed to speak, *id.* at 11-13, but the Board then went right back to disciplinary history. *Id.* at 14. As to [REDACTED] extensive and detailed parole submission, the only attention paid by the Board was to call it a “nice packet.” *Id.*

#### **IV. THE BOARD FAILED TO EXPLAIN ITS DEPARTURE FROM COMPAS**

Although [REDACTED] scored low in risk for felony violence, arrest and absconding, the Board concluded that release would be incompatible with public safety and welfare. This is a departure from those scores and therefore requires an explanation. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2 (“If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure.”); *see also Robinson v. Stanford*, No. 2392/2018, at \*2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) (“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”).

**V. THE BOARD FAILED TO OBTAIN THE SENTENCING MINUTES OR ESTABLISH THAT THEY WERE NOT AVAILABLE**

Per the January 24, 2020 Parole Board Report, the Board did not have or consider the sentencing minutes. Ex. 11. The Parole Board Report appears to claim that a request for the minutes was made on November 13, 2019 and December 16, 2019, but does not provide any information as to the nature of such requests nor the responses received as to such requests. *Id.*

The Parole Board is required to obtain and consider the sentencing minutes. *Matter of Smith v. New York State Div. of Parole*, 64 A.D.3d 1030, 1032 (3d Dep’t, 2009); *Matter of Carter v. Dennison*, 42 A.D.3d 779, 779 (3d Dep’t, 2007). The failure to do so requires a new parole review unless the Board established that the sentencing minutes were unavailable. *Blasich v. New York State Bd. of Parole*, 68 A.D.3d 1339, 1340 (3d Dep’t, 2009) (Finding that a letter, dated several months before the parole review, from the Chief Court Reporter for Nassau County Court to the Division of Parole at Orleans Correctional Facility indicating that the sentencing minutes were unavailable excused Board’s failure to consider the sentencing minutes); *Freeman v. Alexander*, 65 A.D.3d 1429, 1430 (3d Dep’t, 2009) (Finding that correspondence in the record from the sentencing court stating that the sentencing minutes could not be found excused the Board’s failure to consider the minutes). Or, the Board established a diligent effort to obtain the minutes. *Matul v. Chair of New York State Bd. of Parole*, 69 A.D.3d 1196, 1197 (3d Dep’t, 2010).

Although the Appellate Division, Second Department appears to require that the Board’s failure to obtain the sentencing minutes cause prejudice to the parole applicant, *see Porter v. Alexander*, 63 A.D.3d 945, 946 (2d Dep’t, 2009), the Third Department does not require such.

Smith v. New York State Div. of Parole, 64 A.D.3d 1030, 1031–32 (3d Dep’t, 2009) (ordering a de novo review where unavailability of sentencing minutes was not adequately established without any inquiry as to prejudice).

The Parole Board Report inclusion of two dates on which the minutes were ostensibly requested did not establish that the minutes were unavailable, nor did it establish that a diligent effort was made to obtain the minutes.

#### **VI. THE BOARD DID NOT REQUEST NOR CONSIDER A CONTEMPORANEOUS LETTER FROM THE CURRENT BRONX DISTRICT ATTORNEY**

The 2010 letter from a member [name redacted] of a former Bronx DA’s administration, which was included in the parole file, does not constitute consideration of the District Attorney’s recommendation, as is required by law. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2(d)(7). Since the parole decision must be based on a contemporary record, information that dates back ten years ago from a former DA should not constitute an official recommendation from the District Attorney.

The Bronx DA is no longer Robert T. Johnson. Darcel D. Clark has been the Bronx District Attorney since 2016 and was reelected in 2019. DA Clark has expressed commitment to making “all decisions with an eye towards the least restrictive means of ensuring public safety.” <https://www.bronxda.nyc.gov/downloads/pdf/safer-bronx-through%20fair-justice.pdf>. She has also recognized that “treating substance use disorders punitively has led to mass incarceration and negative collateral consequences for too many of our community members. A harm reduction approach and consideration of treatment options is more effective and enhances public safety.” *Id.* In light of the current Bronx DA’s policies, that reflect the contemporary approach to ensuring public safety and addressing the link between crime and substance abuse, the

recommendation included in the parole file was not relevant and does not constitute the recommendation of *the* Bronx District Attorney.

The Board appears to have requested an official letter from the former Bronx DA in 2010, but did not request an updated recommendation from the current DA. Ex. 12. For the reasons stated above, a contemporary letter from the current DA should have been requested.

## **VII. THE BOARD INAPPROPRIATELY CONFRONTED AND INTIMIDATED**

First, early in the interview, the Board chastised [REDACTED] for not remembering that he had been sentenced, as a youthful offender, to three years of probation. Ex. 1 at 3. This was needlessly confrontational since [REDACTED] failure to remember a thirty seven year old sentence seems particularly understandable.

Second, in response to [REDACTED] explaining to the Board that he had benefitted from programming during this incarceration term and better understood the reasons for his past criminal conduct, the Board intimidated [REDACTED] by quoting a transcript of a parole interview from 14 years before. *Id.* at 5. At that parole interview, in connection with a prior sentence, [REDACTED] stated he would never be back before a parole board again. *Id.* The Board named the parole commissioners who had granted the release fourteen years ago and inferred it was a personal affront that [REDACTED] was back before the Board.

Finally, and most egregiously, the Board threatened [REDACTED] by stating that he may never be released. Ex. 1 at 9 (“I mean you're certainly pleading for your release. You know that you may never be released in the community again at this point, do you know that?”). This statement was not only threatening, it evinced that the Board had already decided it would not grant parole.

### VIII. THE BOARD RELIED ON INCORRECT INFORMATION

During the parole interview, the Board made a point of noting that “re-entry substance abuse is probable.” Ex. 1 at 16. Yet, that score was based on incorrect information. Question 23 of the COMPAS evaluation queries whether [REDACTED] “committed offense while high/drunk.” The answer filled in was “unsure.” Ex. 13. The pre-sentence report, however, confirms that the offense was not committed while high or drunk. *See* Ex. 10 at 2 (In response to “Defendant influenced by substance at time of offense, a “no” is indicated.).

### CONCLUSION

[REDACTED] has a history of recidivism and his disciplinary history was not perfect during this current term, but the Board’s singular focus on these negatives blinded it to the sustained evidence—four years and counting-- of genuine change.<sup>11</sup> This is why the law requires that the Board explain how it considered every applicable factor—to prevent tunnel vision of this kind. [REDACTED] short childhood, filled with abuse and parental neglect, led him from an early age to a life cycle of drug dependency, crime and imprisonment. The factors the Board was required to consider demonstrated that [REDACTED] has broken that pattern. At the very least, the Board was required to explain why, after serving twelve years for a robbery with a fake gun and spending the last four years of that sentence demonstrating sustained sobriety, a future orientation, commitment to work and education, responsibility, stability, insight and a solid re-entry plan that included strong, individualized support, he should be denied release to parole supervision. [REDACTED]

---

<sup>11</sup> The two disciplinary tickets [REDACTED] received in the past four years—both Tier II--did not involve violence or drug use. Ex. 6.

Byrdsong should be granted a new parole review before a panel that does not include the commissioners who denied parole.

Respectfully submitted,



LINCOLN SQUARE LEGAL SERVICES  
33 West 60<sup>th</sup> Street, Third Floor  
New York, New York 10023  
Phone: [REDACTED]  
*Pro Bono Counsel to* [REDACTED]