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

██████████ ██████████

NYSID: ██████████  
DIN: ██████████  
AC # ██████████

Parole Interview Date: October 12, 2021  
Denial Date: October 13, 2021  
Inmate Parole Hearing Location: Attica Correctional Facility  
Parole Panel Location: Buffalo, New York  
Notice of Appeal Filed: November 8, 2021

Submitted by:

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Submitted on Dec. 22, 2021 to:

Appeals unit  
New York State Board of Parole  
Harriman State Campus  
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Albany, NY 12226

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## I. INTRODUCTION

This brief is submitted on behalf of Mr. [REDACTED], in support of the timely filed notice of administrative appeal. Mr. [REDACTED] appeared before a panel of Parole Board Commissioners for a reappearance interview on October 12, 2021 via videoconference at Attica Correctional Facility. Parole was denied.

As discussed below, the decision should be vacated and a *de novo* review held because: 1) the Board failed to provide detailed reasons for the denial of parole; 2) parole was denied based solely on the seriousness of the offense; 3) the Board failed to consider the full institutional record and inappropriately considered the “limited” time spent in DOCCS custody; 4) the Board failed to consider Mr. [REDACTED]’s release plans; 5) the Board failed to provide individualized reasons for its departure from each scale of the COMPAS Risk and Needs Assessment; and 6) portions of the parole file were withheld.

## II. BACKGROUND

Mr. [REDACTED], 68 years old, has been incarcerated for over 42 years for crimes committed when he was 24 years old and addicted to drugs. In 1982, Mr. [REDACTED] was sentenced to 25 years to life in New York, to run concurrent with a life sentence he was serving in New Jersey. Under New Jersey law, an individual serving a life sentence with no minimum sentence is parole eligible after 25 years. N.J. Stat. § 30:4-123.51. After being incarcerated for 40 years in New Jersey, Mr. [REDACTED] was granted parole on September 10, 2019. See Exhibit A. He entered DOCCS custody on October 31, 2019. See Parole Board Report in Parole File.

Mr. [REDACTED] has been parole-eligible in New York since November 11, 2004. See Parole Board Report. Therefore, upon entering DOCCS custody in 2019, Mr. [REDACTED] was Parole Immediately Eligible. His initial parole review was held on January 21, 2020. At that time, the

Board denied parole and placed a two-year hold. Following Mr. ██████ October 2021 reappearance, the Board again denied parole and placed a two-year hold.<sup>1</sup>

### III. INSTITUTIONAL RECORD

#### A. NEW JERSEY

During 40 years of New Jersey incarceration, Mr. ██████ earned an overwhelmingly positive and exceptional institutional record. Mr. ██████ took advantage of every opportunity to gain insight into his past conduct; improve himself; and contribute, ultimately participating in and facilitating over 200 programs. See Exhibit B. Mr. ██████ also completed a course of one-to-one counseling, and in 2002, was deemed to have no further issues which required counseling. See Exhibit C.

In addition, Mr. ██████ held numerous jobs while incarcerated. See Exhibit D. Between 1980 and 1986, he worked as a construction manager, constructing new offices and restoring furniture throughout the facility. His work garnered him respect and appreciation from numerous prison officials. See Exhibit E. From 1990 to 2006, Mr. ██████ worked as a hospital porter on the Medical Unit, caring for incarcerated people with acute and terminal illnesses, work for which he has been characterized as a “one man hospice.” See Exhibit F and Exhibit M at 26. Between 1983 and 2011, he worked as a tutor in the L.I.F.E. program, teaching literacy skills to incarcerated men. See Exhibit G. And from 1996 through 2019, he worked as a grief counselor. See Exhibit H.

Between 1981 and 1988, Mr. ██████ took courses through Mercer College, until the program was discontinued. See Exhibit I. Throughout his 42 years in prison, Mr. ██████

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<sup>1</sup> Mr. ██████ began working with the Parole Preparation Project in February 2021. The volunteer team planned to submit Mr. ██████ parole packet to the Board prior to the parole interview scheduled for October 19; however, the reappearance was moved up to October 12, and the parole packet did not make it on time. The whole submission is included hereto as Exhibit M.

maintained a clean disciplinary record, with only six disciplinary infractions during the early years of his incarceration. His last disciplinary infraction was in 1990. See Exhibit J. He has not had a single infraction in the past 31 years.

## **B. NEW YORK**

Mr. [REDACTED] was transferred to DOCCS custody in October 2019 after being paroled in New Jersey. On March 2, 2020, Mr. [REDACTED] was assessed by ASAT staff at Attica, who completed a Substance Abuse Treatment Admission & Comprehensive Evaluation. The evaluation states:

Collateral reports indicate and substantiate no use of substance in forty plus years. Inmate has also completed numerous substance abuse related programs while incarcerated in New Jersey and presents in the maintenance phase of change as he is active in self-help. Inmate not recommended to ASAT at this time.

See Exhibit K at *Application Toward Treatment Plan Goals*.

In a letter dated May 20, 2021, Jeff McKoy, DOCCS Deputy Commissioner for Program Services, confirmed that due to his advanced age, Mr. [REDACTED] is “not required to take Educational and Vocational Programming”; that he does not need to take ASAT, and that he has completed Aggression Replacement Therapy (ART). See Exhibit L. Mr. [REDACTED] has completed training in custodial maintenance and currently works in this area. He has not received a single disciplinary ticket in New York.

Mr. [REDACTED] COMPAS Risk and Needs Assessment is dated September 29, 2021. Mr. [REDACTED] received low scores in all but one category. He received a 1, the lowest risk, in the categories of Risk of Felony Violence; Arrest Risk; and Abscond Risk. See COMPAS Risk and Needs Assessment in Parole File. His other scores are as follows: Criminal Involvement, Low (2); History of Violence, Low (3); Prison Misconduct, Low (1); ReEntry Substance Abuse, Highly Probable (6); Negative Social Cognitions, Unlikely (1); Low Self-Efficacy/Optimism, Unlikely

(1); Low Family Support, Unlikely (1); ReEntry Financial, Unlikely (2); ReEntry Employment Expectations, Unlikely (4). See COMPAS. Per the COMPAS, Mr. [REDACTED] requires the lowest level of post-release supervision, 4. See COMPAS.

#### IV. ARGUMENT

For the following reasons, the Board's decision should be vacated and a *de novo* parole review held before a different panel of commissioners:

##### A. THE BOARD FAILED TO PROVIDE DETAILED REASONS FOR THE DENIAL.

Pursuant to N.Y. Exec. Law 259-i(a) "If parole is not granted...the incarcerated individual shall be informed in writing within two weeks...of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." In its October 2021 decision, the Board denied parole on the following grounds:

[I]f released at this time, there's a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society and so deprecate the serious nature of the crime as to undermine respect for the law.

This bare recitation of the statute fails to provide non conclusory reasons for the denial. The Board fails to explain why Mr. [REDACTED] release would be incompatible with the welfare of society where his programming record illustrates his commitment to his rehabilitation, and his work as a facilitator, tutor, and more demonstrates his concern for others. Likewise, the Board fails to explain why there is a risk of reoffending where Mr. [REDACTED] has not had a single disciplinary infraction in over three decades and has low COMPAS scores.

As to how these positive factors were considered, the decision merely states in conclusory terms that "[r]equired statutory factors have been considered together with your institutional adjustment, including disciplinary and program participation, your Risk and Needs Assessment and your need for successful reentry into the community." See 2021 Transcript and Decision in

Parole File at 23:13-17. The decision concludes as follows: “The parole board commends your personal growth and productive use of time, however, discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined.” See Id. at 24:9-13.

Aside from the description of the crime, the decision is otherwise conclusory and boilerplate language. Such language is insufficient to explain the Board’s reasons for denying parole. Thus, the decision fails to provide the required level of detail. See Pulinario v. New York State Dep’t of Corr. & Cmty. Supervision, 42 Misc 3d 1232[A] [Sup Ct New York County 2014] (“[T]o demonstrate that it has properly considered and weighed applicable statutory factors, the Parole Board must do more than make a ‘passing reference’ to such factors.” quoting Rios v. New York State Division of Parole, 15 Misc 3d 1107[A] [Sup Ct Kings County 2007]).

**B. THE DENIAL WAS BASED SOLELY ON THE SERIOUSNESS OF THE OFFENSE.**

The Board may not deny parole based solely on the seriousness of the offense. See Wallman v. Travis, 18 AD3d 304, 307 [1st Dept 2005] (“A Parole Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized resentencing of the defendant,” citing King v. New York State Division of Parole, 190 AD2d 423, 431 [1st Dept 1993], *affd* 632 NE2d 1277 [1994] and Cappiello v. New York State Bd. of Parole, 6 Misc 3d 1010[A] [Sup Ct, New York County 2004]).

The instant decision is comprised of boilerplate language, except for the description of the crime. In addition, during the interview, the Board spent excessive time questioning Mr. [REDACTED] about the crime. Thirteen of the twenty-one pages of the transcript focus on the crime, with the



last five pages dedicated to an inappropriate line of questioning about one commissioner's interpretation of a single remark Mr. ██████ made over forty-two years ago at a bar.

That the Board devoted most of the interview and decision to discussion of the crime, with only passing mention of the other factors, demonstrates that the Board unlawfully denied parole based solely on the seriousness of the crime. See Cappiello, 6 Misc 3d 1010[A] at \*4 (“When the record of the Parole hearing fails to convincingly demonstrate that the Parole Board adequately considered all of the statutory factors, or to qualitatively weigh the relevant factors in light of the three statutorily acceptable standards for denying parole release, the decision is arbitrary and capricious and violates the applicant's right to due process of law.”)

**C. THE BOARD FAILED TO CONSIDER THE FULL INSTITUTIONAL RECORD AND INAPPROPRIATELY DENIED PAROLE BASED ON “LIMITED” TIME IN DOCCS CUSTODY.**

In determining whether to grant parole, the Board is required to consider “the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and incarcerated individuals.” N.Y. Exec. Law 259-i(c)(A)(i). The Board did not do so.

First, the Board did not give due consideration to the New Jersey record. The Board's fleeting mention of “...the time you spent in New Jersey prison and programs you completed...” does not establish that the Board gave meaningful consideration to over forty years of incarceration.

Second, the Board's repeated reference to time in DOCCS custody as “limited” establishes that the Board is not taking into consideration the over forty years of New Jersey incarceration or believes that Mr. ██████ is required to establish an institutional record in New York for a certain

number of years before parole should be considered. This is reflected in the following portion of the interview transcript:

Q: When you were – have you done any programs?

A: In New York or New Jersey?

Q: I know New Jersey I see there was a number of programs you did, correct?

A: 230.

Q: I see there's a big list of several programs that you took. How about in New York, any completed programs?

A: ASAT, ART, custodial maintenance, Phase 1, Phase 2. I just got my job back in custodial maintenance. I reapplied and got the job back. I start on Monday.

See 2021 Transcript and Decision at 11:12-21. This short exchange was the only time the Board inquired into Mr. [REDACTED]'s forty-year institutional record in New Jersey. The line of questioning implies that though Mr. [REDACTED] has a strong institutional record in New Jersey, he now needs to demonstrate the same in New York. That is irrational.

Here, in considering parole, the Board was required to consider Mr. [REDACTED] institutional record in New Jersey, yet the Board made only slight reference to it in the decision: “The panel notes the time you spent in New Jersey prison and programs you completed, however your time in New York State DOCCS custody has been limited.” See 2021 Transcript and Decision at 24:7-9. Similarly, in its decision two years earlier, the Board stated “The Panel takes note of your limited time in New York State prison. However, it is noted that you participated in many programs in New Jersey state prison.” See 2020 Transcript and Decision in Parole File at 24:25-25:1-2.

That Mr. [REDACTED] time in DOCCS custody has been “limited” is irrelevant to the consideration of parole release. He has been parole-eligible in New York for 15 years, having now served 42 years on a sentence of 25 years to life. The Board had an obligation to consider parole release at the parole review, and in doing so, to consider Mr. [REDACTED]'s full institutional record.

The statute does not limit the institutional record the Board must consider to that established in DOCCS custody. Here, where Mr. ██████ served his New York sentence concurrent with his New Jersey sentence in a New Jersey state prison, the institutional record is largely comprised of Mr. ██████ accomplishments in New Jersey. Mr. ██████'s record in New Jersey state prison establishes over four decades of retributive punishment and an overwhelmingly positive disciplinary, programming and work history. This evinces his unwavering commitment to rehabilitation.

The Board's conclusory reference to Mr. ██████ exceptional institutional record fails to explain how it considered the record in its decision. That the Board has repeatedly characterized Mr. ██████'s time in DOCCS custody as "limited" and imposed a series of two year holds suggests its determination to deny parole on this basis. In doing so, the Board is not only considering a factor that is outside of the statutory factors, but it is effectively resentencing Mr. ██████ to a second sentence to be served in New York. See Serrano v. Travis, Sup Ct, Albany County, Sept. 22, 2003, Sheridan, J., index No. 541-03 ("the Parole Board is not a resentencing authority; [...] sentencing is a function of the Court pursuant to legislatively enacted sentence ranges as approved and enacted into law by the Executive; and [...] the role of the Parole Board is to decide when an inmate may safely and appropriately be returned to society [...]. In an indeterminate sentencing structure, this requires a due regard for the views of the sentencing judge, clearly ignored here, whose minimum sentence presumptively has established a threshold release date assuming appropriate institutional adjustment and rehabilitative effort.")

**D. THE BOARD FAILED TO CONSIDER MR. [REDACTED]'S RELEASE PLANS.**

At the conclusion of the decision, the Board advised Mr. [REDACTED] to “[c]ontinue programming and strengthen your release plan.” See 2021 Transcript and Decision at 24:15. This remark is not grounded in the record.

As to his release plan, upon arriving in New York, Mr. [REDACTED] has consistently planned to reside in Osborne Society housing upon release. See 2020 Transcript and Decision at 14:4-6; Exhibit K at 3; 2021 Transcript and Decision at 12:14-15; and Exhibit M at 28-33. During the interview, Mr. [REDACTED] also explained that he plans to continue his college education. See 2021 Transcript and Decision at 14:21-22. As to programming, Mr. [REDACTED] has gone beyond recommended programming to complete well over two hundred programs and is not required to complete any additional programs. See Exhibit B and Exhibit L.

**E. THE BOARD FAILED TO PROVIDE INDIVIDUALIZED REASONS FOR ITS DEPARTURE FROM EACH COMPAS RISK ASSESSMENT SCALE.**

Under the regulations, “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.” NYCRR 8002.2.

Mr. [REDACTED] recommended supervision level is 4, the lowest level of supervision. See COMPAS. Mr. [REDACTED]'s COMPAS Risk and Needs Assessment reflects low scores in every category except ReEntry Substance Abuse, in which he scored a 6. While Mr. [REDACTED] admits to a history of substance use disorder and its role in his crime, he has not used any drugs for the past 42 years. See Exhibit K; 2021 Transcript and Decision at transcript at 13:19-24. Even so, Mr. [REDACTED] consistently acknowledges that maintaining sobriety is a lifelong undertaking to which he remains steadfastly committed. See Exhibit K; 2020 Transcript and Decision at 17:7-11

Given Mr. [REDACTED] low COMPAS scores, which support release, the Board was obligated to explain in detail why it departed from these scores in denying parole. While the Board acknowledged the low COMPAS scores during the interview (See 2021 Transcript and Decision at 13:17-20), the decision merely states in conclusory fashion that the “Risk and Needs Assessment” has “been considered.” See 2021 Transcript and Decision at 23:13-17. This is insufficient to meet the regulatory standard. When the Board denies based on a claim that there is a risk of reoffending and release would be incompatible with the welfare of society, the Board is required to explain its departure from low risk assessment scores. See e.g. Hill v. New York State Bd. Of Parole, Sup Ct, New York County, October 23, 2020, Madden, J., index No. 100121/2021 at 11-12 (“The Board's failure to consider this assessment is relevant in light of petitioner's remorse, accomplishments in prison, his skills, release plans and positive scores on his COMPAS Risk Assessment”); Robinson v. Stanford, Sup Ct, Dutchess County, March 13, 2019, Rosa, J., index No. 2392/2018 at 2 (finding an error of law where the Board failed to explain its departure from low COMPAS scores).

**F. MR. [REDACTED] WAS DENIED ACCESS TO PORTIONS OF THE PAROLE FILE.**

In connection with this administrative appeal, undersigned counsel for Mr. [REDACTED] timely requested his parole file pursuant to 9 NYCRR 8000.5(c). The responsive documents consisted of 26 pages of records that did not include any New Jersey records, even though such records were before the Board during the parole review. See 2021 Transcript and Decision at 11:17, 13:7-11.

While 9 NYCRR 8000.5(b) provides that “access by the Division of Parole shall not be granted to reports, documents and materials of other agencies, including but not limited to probation reports, drug abuse and alcoholism rehabilitation records, and the DCJS report,” DOCCS

Directive #2014(II)(D)(9) provides that “[a]ny records submitted by the inmate...may be accessed regardless of whether information contained would otherwise not be accessible.”

When Mr. [REDACTED] first entered DOCCS custody, he provided substantial New Jersey records to an ORC at Downstate Correctional Facility. These documents should have been included in the parole file. As of the date of this appeal, the complete parole file has not been provided; therefore, Mr. [REDACTED] was denied access to portions of the record which were considered by the Board, in violation of 9 NYCRR 8000.5(c).

## **V. CONCLUSION**

For the above reasons, the Board’s decision should be vacated and a *de novo* parole review held before a different panel of commissioners.

DATED: December 22, 2021

Respectfully Submitted,

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Natasha Vedananda, Esq.