August 2021

# Art. 78 Petition - FUSL000019 (2020-02-05)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted]
Petitioner,

-against-

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

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Verified Petition

Index No. _____

**ORAL ARGUMENT REQUESTED**

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## PRELIMINARY STATEMENT

Mr. [redacted] now 59, is in his 41st year of incarceration for 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.

The New York State Board of Parole ("Board") denied Mr. [redacted] parole for the fifth time in March 2019, 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 since 1989. 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 Mr. [redacted] COMPAS risk assessment indicated low risk in every single category. Finally, the Board 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." Ex. 1 at 38-40; Ex. 16, Mr. [redacted] Parole Submission; Ex. 17 Support Letters from Family and Friends; Ex. 18 March, 2019 [redacted] Letter; Ex. 19 DOCCS Work History.

The Board's denial decision violated the Board's statutory and regulatory requirements in the following ways:

*First*, 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 and numerous Supreme Court decisions interpreting those regulations.

*Second*, 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.

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

*Fourth*, the "community opposition" that the Board relied on conveyed penal philosophy based on erroneous information—that Mr. [redacted] was convicted of two murders, that he remains a danger to society—and contained offensive and highly inflammatory rhetoric. The vast majority of the opposition came from and impermissibly reflected the penal philosophy of a single organization, the New York City Police Benevolent Association, a police union that automatically opposes release for any crime that results in the death of a police officer. This kind of "community opposition" is not a factor the Board may validly consider.

*Fifth*, 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.

*Sixth*, 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. That stale 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.

*Seventh*, the Board failed to identify an 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 [redacted] committed as an 18-year-old adolescent with no prior criminal record.

*Eighth*, the Board violated Mr. [redacted] Sixth Amendment right 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.

Each error warrants annulment of the Board's March 2019 parole denial.

**VENUE**

This action is properly commenced in Dutchess County because it is the county where the Board conducted the parole interview and made the decision to deny parole. An Article 78 petition may be filed in "any county within the judicial district where the respondent made the determination complained of." N.Y. C.P.L.R. § 506(b) and § 7804(b); see also *International Summit Equities Corp. vs. Van Schoor*, 560 N.Y.S.2d 811, 812 (2d Dep't 1990) (noting that venue is preferable in the specific county "in which the matter sought to be reviewed originated"). The Parole Board conducted the March 20, 2019 interview in Fishkill, New York. *See* Ex. 1, at 1. Thus, this action is properly commenced in Dutchess County.

**PROCEDURAL HISTORY**

Petitioner [redacted] was denied parole on March 20, 2019, after an interview conducted at Fishkill Correctional Facility on the same day. *See* Ex. 1. Commissioners Davis and Berliner denied parole; Commissioner Shapiro dissented. Mr. [redacted] filed a timely notice of administrative appeal on April 2, 2019 and subsequently perfected the appeal on July 31, 2019. *See* Ex. 8 Administrative Appeal Decision at 1. The Board's Appeals Unit belatedly affirmed the Board's denial of parole on January 16, 2020. *Id.* Accordingly, Mr. [redacted] has exhausted his administrative remedies and this matter is ripe for the instant Article 78 proceeding. Additionally, Mr. [redacted]

petition is properly filed within the applicable four-month statute of limitations. *See* N.Y. C.P.L.R. § 217(1).

## STATEMENT OF FACTS

In late June of 1979, Mr. [redacted] bought an unlawful revolver after being robbed and beaten up multiple times. Ex. 1 at 30; Ex. 14, January 25, 1982 Sentencing Transcript Excerpts at 22. On August 2, the rain was slowing as Mr. [redacted] got off the subway, returning to Brooklyn from taking a civil service exam in Manhattan. Ex. 1 at 9. As Mr. [redacted] walked home, he and several other pedestrians took a neighborhood shortcut through a 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. *Id.* at 10. Softball players, many unaware of the priest's invitation, 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; Mr. [redacted] shot the gun several times as he ran. *Id.* 4-5. After several blocks, off-duty Police Officer [redacted] caught up and tackled Mr. [redacted] knocking him face first into the ground, breaking his teeth. Id. at 5. While they tussled on the ground over the gun, Mr. [redacted] pulled the trigger once, shooting Officer [redacted] in the stomach. *Id.* at 6.

Mr. [redacted] was apprehended right away, when the rest of the off-duty officers and civilian players arrived. He was hit on the head several times, with one blow rendering him unconscious. *Id.* When Mr. [redacted] awoke at the hospital, he learned 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. *Id.* at 7:7-9 and 17:12-20; Ex. 14 at 24.

**Trials and Sentences**

Mr. [redacted] first trial ended 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. At the third trial, Mr. [redacted] was convicted of second degree murder for the death of Mr. [redacted] and first degree manslaughter for the death of Officer [redacted]

Mr. [redacted] 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. By operation of law, the manslaughter and murder sentences merged into a combined sentence of 32 years to life. *See* N.Y. PENAL LAW § 70.30(1)(b).

**Parole History**

Mr. [redacted] became eligible for parole in 2011. The Board denied him at his initial appearance in March 2011 and subsequently denied him at his reappearances in March 2013, March 2015, March 2017, and March 2019.

Following the Board's fifth denial, Mr. [redacted] submitted a notice of appeal on April 2, 2019 and, on May 1, a request pursuant to 9 N.Y.C.R.R. § 8000.5 for all materials on which the Board relied in making its determination. The Board subsequently produced certain materials and represented that the only item withheld was the pre-sentence report. *See* Ex. 9, email from S. Koolen, DOCCS Office of Counsel. Mr. [redacted] timely perfected the appeal on July 31, 2019. *See* Ex. 8. Respondents subsequently failed to issue a decision within 120 days, as required by the

regulations. *See* 9 N.Y.C.R.R. § 8006.4(c). Several weeks after the Board failed to issue a decision, the Board notified counsel for Mr. [redacted] that it had failed to disclose an unspecified number of additional records on which the commissioners had relied. Ex. 20, December 16, 2019 DOCCS Counsel's letter and subsequent email thread. After several more weeks, the Board produced two categories of previously undisclosed materials and advised counsel that additional categories of undisclosed materials existed, but would not be disclosed. Ex. 21, January 6, 2020 letter from J. Baumann, SORC, and subsequent email thread. More than five months after receiving the perfected appeal—but within hours of correspondence from Mr. [redacted] counsel regarding the Board's failure to properly disclose the parole file materials—the Appeals Unit issued a decision denying the appeal. *See* Ex. 21 at 3, January 15, 2020 email and Ex. 8, January 16, 2020 Administrative Appeal Decision.

**COMPAS Risk Assessment**

Mr. [redacted] most recent COMPAS assessment was completed in 2017 and reused by DOCCS for the 2019 parole interview. The assessment reports that Mr. [redacted] is the lowest possible risk in all twelve categories—"1" out of "10"—and DOCCS recommends that he receive the lowest level of parole supervision upon release. Ex. 15, COMPAS.

**Disciplinary History**

Mr. [redacted] has received a total of six tickets in more than forty years and only one in the past two decades. Two of his six tickets (received in 1999 and 2009) are Tier IIIs. Neither involve drugs or violence. Ex. 10, Disciplinary History.

Thirty years ago, Mr. [redacted] pleaded guilty to assaulting another incarcerated man who made unwanted sexual advances. This offense did not result in a disciplinary ticket and is therefore not reflected on the attached disciplinary history; however, it did result in a misdemeanor conviction

for third degree assault. Mr. [redacted] guilty plea demonstrates his acceptance of responsibility and the personal statement he submitted to the Board articulates the lessons he learned from his conduct. Ex. 16 at 2, Personal Statement.

**Remorse and Acceptance of Responsibility**

For decades, Mr. [redacted] has thought deeply and with difficultly about what he did in 1979. His written and oral statements to the Board over the years illustrate his reflection. In Mr. [redacted] 2017 written submission (which the Board again considered as part of his parole file in 2019), he describes how his "short-sighted belief" and "morally deficient mindset" led him to think he needed an illegal gun for his protection, but actually made him the "victimizer" of others. Mr. [redacted] writes that:

> Each day, and on sleepless nights, I dwell on the ripple of loss that my past actions are causing now. Not only have I taken the life of Mr. [redacted] an innocent, aspiring member of society, I am also responsible for the death of Police Officer [redacted] taking one of New York's Heroes. . . . Each day I am truly ashamed and disgusted at myself for my ignorant, self-centered, irrational behavior, and my lack of respect for, and failure to acknowledge the rights of others. I have caused two families a level of anguish and emotional pain that *no* family should *ever* be subject to. Resorting to violence as a reflexive action showed emotional immaturity, moral weakness and especially, a failure to understand the *consequences and finality* of my actions. . . I apologize to the family of Police Officer [redacted] and the family of Mr. [redacted] for the pain and loss I have brought into their lives.

Ex. 16, Personal Statement (emphasis in original).

**Rehabilitation and Programmatic History**

Mr. [redacted] programmatic history has been—and continues to be—extensive and meaningful. Mr. [redacted] completed all mandatory programs, and pursued higher-level, voluntary opportunities. The following is a selected list of the many programs that Mr. [redacted] has completed.

- Lifers and Long Termers Organization (2000-Present)

- Volunteer organization run by and for fellow incarcerated men serving long-term sentences that provides services, support, and events to promote reflection and remorse.

- Osborne Association's Long Termers Responsibility Project: "Coming to Terms" (2018)
  - This project highlighted concepts of self-insight, responsibility, the experience of victims of crime, remorse, and apology by having victims of violent crimes met with incarcerated men.

- Road to Redemption: Victim Awareness Program (2014)
  - A twelve-week program where participants take responsibility for the impact of their crimes on others and identify the many victims ultimately affected by their actions.

- Thinking for Change Program (2011)
  - This program incorporated research from cognitive restructuring theory, social skills development, and the learning and use of problem-solving skills.

- Puppies Behind Bars (2007-2012)
  - Mr. [redacted] was one of 150 incarcerated persons across 7 prisons to participate in this program, which prepares service dogs for use by wounded veterans, first responders, and law enforcement. Each human participant is carefully screened by the staff of the correctional facility and Puppies Behind Bars personnel. In order to qualify, the individual has to have a satisfactory disciplinary record and must be considered reliable and trustworthy by prison officials.

  - In addition to completing an eighteen-month animal caretaker training and certificate, Mr. [redacted] trained, cared for, and prepared three service dogs for placement.

- Aggression Replacement Training (2007)
  - This program provided group training sessions targeting social skills, anger control, and moral reasoning.

- Alternatives to Violence Project *Basic* (1994)
  - A Lifers and Long Termers program that teaches conflict management and resolution skills.

- Alternatives to Violence Project *Advanced* (1999)
  - Continuation of the basic course that teaches people to lead non-violent lives through affirmation, respect for all, and cooperation.

- Legal Research Certification (1990)

- Commercial Art Teacher's Aide (1984-1989, 1993-1995) and Certification (1994)

- Corrections on Canvas Art Shows (1984-1993)
    - Mr. [redacted] submitted artwork for the annual exhibition and art sale where proceeds go to the New York Crime Victims Board, which provides financial and other assistance to victims of crime throughout the State.

- Chaplin's Clerk (1989-1993)

**Employment History**

For twenty years, first at Greenhaven Correctional Facility and now at Fishkill Correctional Facility, Mr. [redacted] has worked for [redacted] Industries. When Mr. [redacted] arrived at Fishkill, his former supervisor from Greenhaven quickly sought him out and recruited him to be the lead clerk for manufacturing and production inventory control for [redacted] a reflection of the diligence and care with which Mr. [redacted] approaches work. Ex. 18; Ex. 19.

During his years with [redacted] Mr. [redacted] has served as a welder, porter, and clerk. He is currently an "Industry Worker V," the highest supervisory level available for an incarcerated person. 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. He directly manages dozens of other incarcerated men, instructs the leadsmen, acts as liaison between the civilian supervisors and the incarcerated workers, oversees shipping and receiving, and conducts quality inspection. Ex. 19.

**Employability and Work Recommendations**

Reflecting his competence and his supervisors' trust in him, Mr. [redacted] is praised by DOCCS personnel in nine letters of recommendation. Ex. 18. Correctional supervisors consistently describe Mr. [redacted] as professional, responsible and an asset to [redacted] Industries:

- 2019
    - Sergeant [redacted] (Industry Sergeant, Fishkill C.F.)

- "Mr. [redacted] always displays professionalism, self-control, and is respectful as he works well with Civilian staff, Security staff, and his inmate peers…Inmate [redacted] is an asset to [redacted] Industry and has always respected Security working in Industry."

- 2017
  - Mr. [redacted] (Industrial Superintendent, Fishkill C.F.)
    - "His diverse abilities, ranging from blue print interpretation, material takeoff, inventory management and material knowledge are essential in helping train new inmate employees in production procedures."
  - Mr. [redacted] (Quality Control Supervisor, Fishkill C.F.)
    - "He consistently displays a work ethic that is above the average worker, to the extent that he is the lead man for all clerks, responsible for everything relating to production."
  - Mr. [redacted] (General Industrial Training Supervisor, Fishkill C.F.)
    - "He has a strong and consistent work ethic and is always willing to help others…Any employer will be pleased to have him as a worker."
- 2015
  - Mr. [redacted] (Industrial Training Supervisor, Fishkill C.F.)
    - "He has met and exceeded our expectations in his performance. He has displayed an extremely strong work ethic, coupled with an excellent attitude and demeanor with both staff and peers alike."
- 2013
  - Mr. [redacted] (Industrial Superintendent, Fishkill C.F.)
    - "His capacity as a grade five inmate supervisor has set a high work standard for all other industry inmate employees to strive for here at Fishkill."
  - Mr. [redacted] (Quality Control Supervisor, Fishkill C.F.)
    - "He remains a dedicated, hardworking, respectful member of Fishkill [redacted]…Again I have to stress the fact that Mr. [redacted] is a definite asset to this program."
  - Mr. [redacted] (Industrial Superintendent, Fishkill C.F.)
    - "Along with his normal job duties, he is also a critical element of offender training, which is one of the core values of [redacted] He is constantly mentoring other offenders imparting his knowledge of Fishkill products and manufacturing processes."
- 2011
  - Mr. [redacted] (Quality Control Supervisor, Fishkill C.F.)

- When he interviewed for the position he now holds I remembered his face and the fact that he was a motivated individual…I spoke to him and hired him on the spot."

**Re-Entry Plans**

Mr. [redacted] has comprehensive re-entry plans with strong family and community support, including support letters from several veterans. Ex. 16. These plans and support have expanded over the years and have repeatedly been submitted to the Board. In addition to his personal support network, Mr. [redacted] has obtained multiple letters of reasonable assurance from re-entry providers, including the Osborne Association, the Doe Fund, and Housing Works. *Id.*

Mr. [redacted] has maintained positive relationships with his maternal cousins and extended family, as well as several friends who live in the Brooklyn community. His social support system is prepared to provide financial and emotional support to Mr. [redacted] throughout his re-entry process, a reality recognized by several of his COMPAS scores. Ex. 15.

## ARGUMENT

### I. The Board Violated Its 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. The Board's own regulations are quite clear that 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 departed from each COMPAS scale, the Board had a duty to explain, but failed to do so.

Mr. [redacted] 2017 COMPAS assessment 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. [redacted] presents minimal risk and is ready to be reintegrated into society. Ex. 15 at 1-2.

Despite the Board's recognition that Mr. [redacted] COMPAS was "low risk in every category," during the interview, the Board failed to explain how it made the decision that Mr. [redacted] release would be "incompatible with the welfare of society." Ex. 1 at 23:4-5 and 39:12-13. Under its regulations, the Board must specify each scale within the risk assessment from which it departed. Here, Mr. [redacted] 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:

- *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 Alterative 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.").

- *Phillips v. Stanford*, 52579/19 (Sup. Ct. Dutchess Cnty, 2019 (J. Rosa) (holding that the Board did not explain departure from low COMPAS scores).

Mr. [redacted] case is analogous to the cases cited above. The Board failed to explain how it reached the conclusion that Mr. [redacted] release was incompatible with the welfare of society if (1) his "COMPAS risk assessment indicate[d] low risk in every category;" (2) he has had no disciplinary infractions since 2009; and (3) his "institutional adjustment has been good since" 1989. Ex. 1 at 19:21-23; 38:21-24. Without such an explanation, the decision must be reversed.

**B. The Board failed to meaningfully consider the COMPAS Assessment**

The Board's acknowledgement that it was departing from the COMPAS and its citation to Mr. [redacted] conduct over 40 years ago to justify its departure displays a fundamental misunderstanding of the Board's obligation to 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 at 39:9-11. By "departing" from the COMPAS scores in this manner, the Board determined that no matter the COMPAS scores, the crimes outweighed them. But the purpose of COMPAS is not to "excuse" a person's crime—it is to determine whether the person who committed a crime decades ago still presents the same risks to society today.

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."[1]

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 person's prior acts, and the "history of violence" scale incorporate a person's criminal history. *See* Ex. 15 at 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

[1] DOCCS, Directive No. 8500: COMPAS Assessment/Case Plan, Nov. 19, 2015 http://www.doccs ny.gov/Directives/8500.pdf.

assess a person's risk if they are released, not the sufficiency of their sentence for the crime they committed decades ago. The Board disregarded Mr. [redacted] demonstrably low risk and clear rehabilitation because it deemed his decades of incarceration insufficient for his crimes. *See, e.g.*, *Ely v. Bd of Parole*, 2016/100407 (Sup. Ct. N.Y. Cty. 2017) ("Petitioner's COMPAS Assessment, lack of a prior criminal record, age, infirmity, lengthy imprisonment to date, clear expression of remorse, acceptance of responsibility for her crime, post-release plans, the many letters submitted by corrections professionals in support of her release, and the many positive initiatives she undertook during her incarceration, indicate . . . that no amount of evidence of rehabilitation would have outweighed [Respondent's] interest in retribution."). Mr. [redacted] 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. [redacted] actions more than 40 years ago is irrational and was made without explanation.

## II. The Board Violated The Regulations By Not Explaining How It Considered All The Parole Decision Making Factors

When denying 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 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 the offenses.

### 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 offenses—to justify its decision denying parole. While the decision purported to rely on opposition from the Brooklyn district attorney and "community opposition," those materials were similarly based on the seriousness of the offense. *See infra* Argument IV and V. The Board's only reason for denial was thus the seriousness of the offenses. 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).

The vast majority of the parole interview was devoted to the crimes and trial—26 pages out of 37. *See* Ex. 1 at 1-37. Much of the 2 1/2 page decision is similarly focused on the crime. *See* Ex. 1 at 39-40. Focusing on the crime at the expense of the other factors is 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 the adolescent Mr. [redacted] response in 1979—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] does not seek 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 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. 1 at 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.* at 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, at 24 (listing Mr. [redacted] injuries).

Additionally, the Board did not consider Mr. [redacted] age more than 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. 1 at 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 at 11:6-9 (describing being left unconscious during a robbery); Ex. 14 at 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 contained numerous letters from family and friends—several of whom are military veterans—that described how they would have supported him should he have been released. Mr. [redacted] obtained three letters of reasonable assurance from employers in North Carolina, where members of his family have lived for five generations. He also had letters of reasonable assurance from the Osborne Association and the Redemption Center in New York. *See* Ex. 16.

Second, the Board is required to consider a parole 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 [redacted] 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 [redacted]

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. Ex. 1 at 20-21. Reflecting his competence and his supervisors' trust in him, Mr. [redacted] parole file contains numerous glowing assessments from his DOCCS supervisors. Ex. 18.

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 at 18:5-6, 22-23 and 38:19. But neither passing reference makes clear how the Board considered the fact that Mr. [redacted] despite growing up in [redacted] and [redacted] during the [redacted] s—had no criminal record before his actions on August 2, 1979.

In addition to the three factors that the Board ignored, the remaining 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 at 38:8-9);
- "Your institutional adjustment has been good since [1989]" (*id. at* 38:22);
- "Your last disciplinary violation was a Tier III in 2009" (*id. at* 38:23-24);
- "Your case plan goals are appropriately focused" (*id. at* 38:25);
- "You have satisfied the programs required of you by DOCCS" (*id. at* 39:1-2);
- "You have also engaged in volunteer programs, including Puppies Behind Bars, which is also to your credit" (*id. at* 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. at* 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. at* 40:3-7).

The decision establishes that the Board effectively ignored all statutory factors but one—the seriousness of the offenses Mr. [redacted] committed in 1979 as an 18-year-old.

## III. The Board Violated the Executive Law By Failing To Explain The Reason For Denial In Detail

### A. The Board did not explain how release after more than 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," but did not explain why. Ex. 1 at 40:12-14 and 38:12-13. Contrary to law, the Board did not explain why release of a now 59-year-old man who has served more than 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.").

The Board's general description of Mr. [redacted] conduct more than 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; 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, at 11-12. The judge could have imposed the sentences to run consecutively, instead of concurrently, for an effective sentence as long as 10 to 30 years, but instead 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 imposed a sentence as high as 8 1/3 to 25 years. Ex. 12, 1978 Laws of New York, at 2-3.

Had each judge imposed the maximum sentences, Mr. [redacted] would 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, at 3-4 (requesting official statements from both judges).

Therefore, the Board's determination that Mr. [redacted] release after more than 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. In light of this, the Board had an obligation to explain its conclusion.

**B. The Board did not explain its claims for denying parole**

The Board made three claims in denying parole, but explained none in detail. Nor did the Board explain in detail why such claims 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 stated the crimes were a basis for denial. But 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" originating eight years ago from a *former* assistant Brooklyn district attorney was relevant to whether release at this time was appropriate. Ex. 1 at 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, after commending Mr. [redacted] for his "personal growth" and his remorse and the work he has done to understand his actions and their affects, the Board stated: "There is more to do, and this panel encourages you to continue on this path as you continue your rehabilitation." Ex. 1, pgs. 38:8-9; 40:3-9. This cryptic statement does not explain in detail a reason for denying parole. It is unclear what the Board is conveying, but if the Board is suggesting Mr. [redacted] is not fully rehabilitated, it is required to explain in detail. *See supra* Argument III.B. An ambiguous sentence such as this does not suffice.

## IV. 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." The Board initially provided only one category of this "community opposition" to Mr. [redacted] approximately 21,000 identical form letters that originated from the New York City Police Benevolent Association ("PBA") website. Ex. 5 at 1. In January 2020, the Board disclosed for the first time two additional categories of "community opposition:" template letters and miscellaneous letters. *Id.* at 2-

These three categories—the PBA letters, template letters, and miscellaneous letters—all contain the penal philosophy that anyone who takes the life of a police office should not be paroled. Additionally, the template letters and the miscellaneous letters are based in large part on erroneous information, namely, that Mr. [redacted] was convicted of murder as to Officer [redacted] and that Mr. [redacted] remains a danger to society. Finally, the miscellaneous letters contain rhetoric that cannot be validly considered by the Board.

### A. The Board Cannot Consider and Rely on the Penal Philosophy of Individuals

The vast majority of the "community opposition" in Mr. [redacted] parole file consisted of approximately 21,000 PBA letters that were auto-generated from the organization's website, which holds and endorses the viewpoint that any person who kills a police officer should not be released—ever.[2] The PBA website enables 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 permitted consideration of opposition from members of the public,[3] *all* these form PBA letters considered and relied on reflected general penal philosophy, 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 PBA home page includes a tab titled: "Cop Killers" that links to a page announcing: "Keep Cop-Killers in Jail for Life."[4] Any user may then "CLICK HERE to send letters to the Parole Board," or click, "Keep Cop-Killers Behind Bars Forever,"[5] 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

[2] NYCPBA, https://www.nycpba.org/community/keep-cop-killers-in-jail/ (last visited February 5, 2020).
[3] *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). In *Applewhite*, a divided panel held that the Board may consider "community opposition." Without offering a legal rational, 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.
[4] NYCPBA, https://www.nycpba.org/ (last visited February 5, 2020).
[5] This link includes the statement that: "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."

window that provides the "Perp" name. To submit a pre-written one sentence form to the Board, only name and zip code need be provided.[6] 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, Rayner Affirmation and PBA Test Letter Submissions.[7] Each generated form letter states: "I vehemently oppose parole for [redacted] killer of P.O. [redacted] [redacted] on 8/2/1979."[8] These generated form letters are identical to those in Mr. [redacted] parole file. *See* Exs. 5 and 7.

The second category of "community opposition" included approximately 2,000 copies of 10 template letters espousing the same penal philosophy: that taking the life of Officer [redacted] [redacted] "should preclude [Mr. [redacted] from ever being paroled." *See, e.g.*, Ex. 5 at 2-11.[9] The third category of "community opposition" included approximately 350 miscellaneous letters, espousing largely the same penal philosophy: that someone who kills a police officer should never be allowed parole. *See, e.g.*, Ex. 5, at 17, 20,22 and 24.[10]

These three categories of opposition material conveyed 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

[6] NYCPBA, https://www nycpba.org/community/keep-cop-killers-in-jail/cop-killers-form/?id=25886 (last visited February 5, 2020).

[7] 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. Ex. 7.

[8] There is an option to add "remarks," but DOCCS represented that all letters were identical to the one sample DOCCS disclosed, which did not include more than the stock sentence. *See* Exs. 5 and 6.

[9] All 10 template letters are included at Ex. 5 at 2-11. Per DOCCS, the number in the upper left-hand corner of each letter designates the approximate number of identical letters received. *See* Ex. 21.

[10] Of the approximately 350 miscellaneous letters, select examples are included in Ex. 5 at 11-26.

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 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 interview[11] and in the Board's decision. *See* Ex. 1 at 39:21-23 (noting "community opposition to your release"); *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.").

The "opposition material" urging life without parole was a central determinant in the Board's decision. There was no opposition from the current Brooklyn District Attorney and no opposition from either sentencing judge. Although Mr. [redacted] is not sentenced to life without parole,

[11] 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. 1 at 30:17-24 and 37:23.

the Board allowed opposition material that endorsed life without parole to enter its decision-making. *King* 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.").

Consideration and reliance on this kind of opposition material is also inappropriate because approximately 90% of the letters indicated only the organizing abilities and resources of a single organization—in this case a police union—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. Reliance on this sort of "opposition"—or this kind of support—would reduce 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.

### B. The Board Also Improperly Relied on Erroneous Information Contained in the "Community Opposition"

Both the template letters and the miscellaneous letters repeatedly urge the Board to deny parole on the basis of two inaccurate facts: first, that Mr. [redacted] was convicted for the intentional killing of Officer [redacted] something that two separate juries considered, but neither convicted him of— and second, that Mr. [redacted] still poses a danger to society. *See e.g.* Ex. 5 at 2-6, 8-17. Police Commissioners over the years repeatedly wrote the same letter objecting to parole, erroneously stating that Mr. [redacted] was convicted of "first-degree murder in the slaying of Officer [redacted] and claiming, without evidence, that Mr. [redacted] "would pose a significant risk to both the general public and law enforcement personnel." *Id.* at 12-16. The Detectives' Endowment Association asserts that Mr. [redacted] is a "dangerous thug." *Id.* at 17.

Mr. [redacted] was convicted of manslaughter for Officer [redacted] death and is not serving a life sentence for his murder. Further, as indicated by Mr. [redacted] disciplinary history, institutional adjustment, and COMPAS scores, he presents the lowest possible risk to society on every measure that COMPAS assesses. Accordingly, the Board's decision based on this "community opposition" amounts to reliance on erroneous information, and should be annulled. *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).

**C. The Board Improperly Considered Inflammatory Rhetoric Contained in the "Community Opposition"**

The miscellaneous letters that the Board relied on describe Mr. [redacted] as an "animal," a "beast," and assert that he "should already have been executed," "in a perfect world he would have been executed years ago," that "[t]he only fair justice would have been execution," and that he needs to "burn in hell." Ex. 5 at 20, 23, 24, 25, 26.

This is not the situation in which the Board can be presumed to have ignored the improper matter contained within these submissions. Here, the opposition material conveyed penal philosophy, inaccurate information and inflammatory rhetoric and the Board's citation to "community opposition" in denying parole establishes that the Board considered, relied upon, and was influenced by it. *Cf. Duffy v. New York State Dep't of Corr. & Cmty. Supervision*, 132 A.D.3d 1207, 1209 (3d Dep't 2015) (noting that even though inappropriate matters may have been included in victim submissions, there was "nothing in the Board's decision indicating that it was

influenced by, placed weight upon, or relied upon any improper matter, whether in the victim's family statements or otherwise."). The opposition material in Mr. [redacted] file is filled with penal philosophy, highly inflammatory, and therefore beyond the statutory factors and guidance delineated in Executive Law § 259-i.

## V. In Denying Parole, The Board Relied On An Outdated Claim That The Kings County District Attorney Opposed Release

In denying parole, the Board claimed that the Kings County District Attorney opposed release. Ex. 1 at 39:21-22. But, the parole file only contained a letter submitted by a former Brooklyn assistant district attorney when Mr. [redacted] was first eligible for parole.[12] Ex. 2, February 3, 2011 Letter from ADA Kenneth Taub. There has been no opposition from the Brooklyn District Attorney during Mr. [redacted] subsequent four parole interviews.

### A. The Current Kings County District Attorney Did Not Oppose Release

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 "new opportunity"[13] and "fresh" review,[14] a letter that is more than 8 years old and does not reflect the recommendation of the current District Attorney—nor anyone in his administration—does not constitute a district attorney recommendation within the meaning of Executive Law § 259-i. *See* N.Y. EXEC. LAW § 259-

[12] The letter was signed by ADA Kenneth Taub, 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/.

[13] *See* Ex. 1 at 2 in which one commissioner stated: "Today is a new day and new opportunity for you. We're not bound by any prior decisions of the Board."

[14] *See* Ex. 3, Excerpts from 2017 and 2013 Parole Interview Transcripts at 2:22-3:10 (explaining that each parole review requires the commissioners to "deliberate fresh.").

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.

The Board's reliance on a stale, outdated assistant district attorney letter was improper. The Board would not rely on an outdated disciplinary record or COMPAS report or an eight-year-old letter confirming re-entry plans—such information would no longer be relevant on the question of whether parole *at this time* should be granted. Similarly, the assistant district attorney letter relied on did not reflect a current recommendation from the current District Attorney. *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 "official opposition" written years before the interview, had acted with "irrationality bordering on impropriety"). *See Matter of Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 26 (1st Dep't 2016) ("It is not the role of the parole board to resentence the petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, *as of this moment*, given all the relevant statutory factors, he should be released. . . . Likewise, the Board cannot unduly focus on the nature of the crime, for it is but one factor; the board *must assess the applicant as [he] is today* and how he has prepared [himself] for release back into society.") (emphasis added) (citation omitted).

Moreover, the 2011 assistant district attorney 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. Ex. 2 at 2. The 2011 letter does not convey opposition to release after 8 more years of incarceration.

### B. The Board Failed To Request An Updated Recommendation From The Kings County District Attorney

The Board failed to request and thus consider a recommendation from the current Kings County District Attorney. *See* N.Y. EXEC. LAW § 259-i(2)(c)(A)(vii) (requiring the Board to

consider the "recommendations of the sentencing court, the district attorney, the attorney for the inmate…" ) and *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 "official opposition" written years before the interview, had acted with "irrationality bordering on impropriety").

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. The Board has not requested an updated letter since 2007. *See* Ex. 4, June 19, 2007 Letters from James Cassel, at 2 (requesting official "statement and/or recommendation from District Attorney); *see also* Ex. 3 at 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.").[15] This was apparently inconsistent with the Parole Board's customary practice of soliciting letters from the Brooklyn District Attorney throughout the year. *See*, April 3, 2019 Letter from Eric Gonzalez to Anthony Annucci, https://www.themarshallproject.org/documents/5926343-Eric-Gonzalez-letter-to-Anthony-Annucci (noting that "[a]lthough customarily parole letters are sent to this Office [by the Board] on a rolling basis throughout the year, we are requesting an advance list of all inmates sentenced out of Kings County who are scheduled to appear before the Parole Board.").

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

[15] Additionally, the portions of the parole file were received following the May 1, 2019 request pursuant to 9 N.Y.C.R.R. § 8000.5 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.

elections.[16] 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.[17] The Board's failure to request and consider updated recommendations from either District Attorney during Mr. [redacted] 2013, 2015, 2017, and 2019 parole reviews deprived Mr. [redacted] of the recommendation from the current, duly-elected District Attorney. This is especially prejudicial in light of District Attorney Gonzalez's Justice 2020 Initiative, which he announced in January 2018.[18] Since that time—and prior to Mr. [redacted] March 2019 parole interview—District Attorney Gonzalez 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."[19] And, District Attorney Gonzalez has singled out those serving life sentences who committed their crimes at age 23 or younger for special consideration.[20] Yet the Board failed to request the recommendation of his Office.

## VI. 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. [redacted] crimes does not establish aggravating circumstances. There was no evil intent or plan. Mr. [redacted] was an adolescent who, as he states, out of stupidity and ignorance obtained an illegal gun for self-defense.

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[16] *See* https://www nytimes.com/2019/01/30/obituaries/charles-j-hynes-dies.html

[17] *Brooklyn DA Eric Gonzalez*, BROOKLYN DISTRICT ATTORNEY'S OFFICE, http://www.brooklynda.org/eric-gonzalez/.

[18] *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/.

[19] *Justice 2020 Action Plan*, BROOKLYN DISTRICT ATTORNEY'S OFFICE (Mar. 11, 2019), http://www.brooklynda.org/justice2020/.

[20] *Post-Conviction Justice Bureau*, BROOKLYN DISTRICT ATTORNEY'S OFFICE, http://www.brooklynda.org/post-conviction-justice-bureau/ ("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.").

On his way home from a civil service exam—he aspired to a job with the Post Office maintaining 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 more than 40 of his 59 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]

**VII. 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. Second, the letter also inferred that Mr. [redacted] intentionally killed Officer [redacted] but Mr. [redacted] was acquitted of intentional murder. Two juries considered the question and neither jury convicted.

In addition, 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,[21] [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 and Eighth Amendment rights.

## CONCLUSION

For all of the above reasons, Mr. [redacted] petitions this Court to order Respondents to release Mr. [redacted] to parole supervision. In the alternative, Mr. [redacted] petitions this Court to annul the March 2019 parole denial and order a properly conducted *de novo* parole interview before a new panel that does not include Commissioners Berliner and Davis, nor any other commissioner who has previously denied parole.

[21] 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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