February 2022

Art. 78 Petition - FUSL000055 (2020-12-03)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

[redacted]

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

[redacted]

PETITION

Index No. _____

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Mr. [redacted] worked with focus and determination during the past four years of his 12 to life sentence, to address his drug dependency and prepare for a successful reentry. He has been drug free and sober for four years,[1] he has attained positive work evaluations, merited entry into the Family Reunification Program, gained entry to the Bard Prison Initiative, a highly competitive college program, earned accolades from his professors, completed numerous voluntary programs, earned transfer from a maximum to a medium security prison, and married a stable and employed woman he has known since he was young. And, unlike the last time he was paroled from prison, 14 years ago, he came before the Board at age fifty-five, significantly older, more mature and with multiple supports in place, including his wife, and the comprehensive re-entry services of the Bard Prison Initiative and the Office of the Appellate Defender.[2]

Yet, the Board concluded that "release to supervision is incompatible with the public safety and welfare," and that "to grant release at this time would so deprecate the seriousness of the crimes as to undermine respect for the law." Ex. 1, Parole Interview and Decision, at 19-20. The Board's decision did not, however, explain why, after serving 12 years for a robbery with an imitation gun, and then establishing a record of change and rehabilitation for the past four years, release would clash with society's public safety and welfare and would undermine respect for the law. The Board's decision was irrational in [redacted] rehabilitation and society's changing attitudes toward incarceration, including the disproportionate impact on communities of color, [3] and society's shift in addressing drug

[1] *See* Ex. 8, Disciplinary History, which establishes no drug use despite standard periodic testing, and Mr. Byrdsong's participation the Family Reunification Program, Ex. 5, which requires testing the day before, the day of and the day of completion.
[2] The Office of the Appellate Defender assisted Mr. Byrdsong in preparing his submission to the Board. *See* Ex. 4, OAD Parole Packet. And, *see* https://oadnyc.org/client-services/
[3] *See 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds ("The

dependency as a crime problem to a public health problem.[4] [redacted] s the markers of a re-entry that will be consistent with public safety and welfare, yet the Board extended the duration of Mr. [redacted]'s incarceration claiming his release would be just the opposite.

The Board's denial of parole should be vacated and a *de novo* review should be held. The Board failed to explain in detail and in factually individualized and non-conclusory terms, how the applicable statutory parole decision-making principles and factors listed in 9 N.Y.C.R.R. § 8002.2 were considered by the Board. In addition, the Board's failure to *explain* how it considered numerous relevant factors establish its failure to *consider* those factors. The Board also failed to explain its departure from Mr. [redacted]'s low COMPAS scores. Instead, the Board focused exclusively on Mr. [redacted]'s past criminal record and disciplinary history. This tunnel vision prevented the Board from seeing the extraordinary accomplishments and solid pattern of rehabilitation that Mr. [redacted] established in the last four years. Rather than considering Mr. [redacted]'s accomplishments and evidence of sustained rehabilitation, the Board chastised Mr. [redacted] for not remembering that he had been on probation thirty-seven years ago, confronted Mr. [redacted] with words he had spoken fourteen years ago to a different Board that granted his release on a prior sentence, and intimidated Mr. [redacted] by raising the specter that he may never be released from prison. The Board's hostility coupled with its lack of

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majority of Americans recognize racial bias in the criminal justice system — only one in three agree that Black people are treated fairly by the criminal justice system."). The research included 1,003 telephone interviews with Americans across the US, with 41 percent identified as conservative, 31 percent as liberal, and 23 percent as moderate. *See also Crime Survivors Speak: The First Ever National Survey of Victims' Views on Safety and Justice*, ALLIANCE FOR SAFETY AND JUSTICE, http://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf ("Perhaps to the surprise of some, victims overwhelmingly prefer criminal justice approaches that prioritize rehabilitation over punishment and strongly prefer investments in crime prevention and treatment to more spending on prisons and jails.").

[4] *See Principles of Drug Abuse Treatment for Criminal Justice Populations – A Research-Based Guide, Why Should Drug Abuse Treatment Be Provided to Offenders*, NATIONAL INSTITUTE ON ADVANCING DRUG ABUSE (April 2014), https://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations-research-based-guide/why-should-drug-abuse-treatment-be-provided-to-offe

attention and failure to explain strongly indicate that the denial was a foregone conclusion. In addition, the Board did not have the sentencing minutes and did not establish the unavailability of the minutes. The Board failed to solicit and consider a contemporaneous recommendation from the current Bronx District Attorney, instead relying on a decade old letter from a prior administration.

VENUE

This action is properly commenced in Dutchess County because it is the county where the Board conducted the parole hearing and made the decision to deny parole. N.Y. C.P.L.R. § 506(b); Ex. 1 at 1 (establishing that on March 10, 2020, the parole interview was "[v]ideo-conferenced to the NYS DOCCS, 30 Manchester Road, Poughkeepsie, New York," which is in Dutchess County).

PROCEDURAL HISTORY

Petitioner [redacted] was denied parole on March 10, 2020, the same day the Board interviewed him via video conference. *See* [redacted] administrative appeal on April 10, 2020. *See* Ex. 2, April 10, 2020 Respondent Letter. Petitioner perfected the appeal on July 27, 2020. *See* Ex. 3 at 1, Petitioner's Administrative Appeal Brief. Respondents' Administrative Appeal Unit received Petitioner's administrative appeal brief on July 30, 2020. Over four months have passed and an administrative appeal decision has not been received; therefore, this matter is ripe for the instant Article 78 proceeding. *See* 9 N.Y.C.R.R. §8006.4(c) ("Should the appeals unit fail to issue its findings and recommendation within four months of the date that the perfected appeal was received, the appellant may deem this administrative remedy to have been exhausted, and thereupon seek judicial review…").

ARGUMENTS

I. THE BOARD VIOLATED ITS OWN REGULATION BY FAILING TO EXPLAIN HOW, IN FACTUALLY INDIVIDUALIZED AND NON-CONCLUSORY TERMS, IT CONSIDERED EACH APPLICABLE FACTOR

A. The Board's regulation, revised in 2017, requires an explanation of how it considered each applicable statutory factor

In determining parole, the Board must take into consideration a list of eight statutory factors. *See* N.Y. Exec. Law § 259-i(2)(c)(A). Pursuant to the Board's 2017 revision of §8002.3 of Title 9 of the NYCRR, if parole is denied, the Board must explain how it considered each applicable statutory factor. 2017 NY REG TEXT 437083 (NS), 2017 NY REG TEXT 437083 (NS). While the former §8002.3 required only a detailed explanation of the reasons *for* denial, the revised regulation requires the Board to explain how it addressed each applicable statutory factor, and to do so in factually individualized and non-conclusory terms. The revised regulation reads:

> If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview, of the decision denying him or her parole and the factors and reasons for such denial. Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case. The Board shall specify in its decision a date for reconsideration of the release decision and such date shall be not more than 24 months from the interview.

N.Y.C.R.R. §8002.3. Prior to this change, the regulation did not require the Board to explain how it applied the applicable statutory factors in making a parole decision. *Cf.* N.Y.C.R.R. §8002.3(b) ("If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview of the decision denying him or her parole and the factors and reasons for such denial. Such reasons shall be given in detail and not in conclusory terms.").

The Board, in promulgating this revised regulation, explained that it adopted this change to "clearly establish what the Board must consider when conducting an interview and rendering a

decision." 2017 NY REG TEXT 437083 (NS), 2017 NY REG TEXT 437083 (NS). Specifically addressing §8002.3 the Board further noted that "if the Board decides to deny release to Community Supervision, the Board shall provide individualized factual reasons stated in to detail as to why, addressing the applicable factors in §8002.2. The benefit of this will be that the Board will conduct more thorough interviews and produce more individualized, detailed decisions in instances where release to Community Supervision is denied." 2016 NY REG TEXT 437083 (NS), 2016 NY REG TEXT 437083 (NS). The Board, therefore, can no longer only explain the factors and reasons *for* denial, but must also explain how it considered all other factors as well.

Thus far, undersigned counsel is not aware of any published case that has construed the revised regulatory language, which plainly states the Board must explain how it addressed each applicable factor. Cases finding otherwise are not dispositive since they reviewed parole denials that took place before the Board's 2017 adoption of the §8002.3 regulation. *See e.g. King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (Finding that the Board "need not expressly discuss each" "guideline" found in Executive Law § 259-i [1] [a]; [2] [c]), which mirrors the factors found in regulation §8002.2.); *Matter of Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 672–73 (2d Dep't 2018) (Board "is not required to address each factor in its decision."); *Campbell v. Stanford*, 173 A.D.3d 1012, 1014 (2d Dep't 2019) (same).[5] In sum, an agency must obey its own rules. *See Frick v. Bahou*, 56 N.Y.2d 777,

[5] Although both *Coleman* and *Campbell* were decided after the 2017 regulation went into effect, the parole denials reviewed on appeal were made before the regulation came into effect. In *Coleman*, the denial decision on review was made in 2016, as was the decision in *Campbell*. There is no indication that the 2017 regulation was raised by either petitioner, nor examined by either court.

778 (1982) ("The rules of an administrative agency, duly promulgated, are binding upon the agency").

Therefore, the Board was required to explain how it considered *each* factor that applied to Mr. [redacted] in "*factually individualized and non-conclusory terms.*" N.Y.C.R.R. §8002.3(b). Additionally, binding precedent holds that the Board cannot "summarily list" an individual's achievements without explaining how those achievements were considered. *See Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 28 (1st Dep't 2016) (holding that the Board violated the statutory requirement that the reasons for denial not be conclusory when it "summarily listed petitioner's institutional achievements and then denied parole with no further analysis of them.").

The Board violated both the regulation and *Rossakis* in issuing a one paragraph denial that wholly ignored one set of applicable factors and perfunctorily listed another set of factors as merely "positive." The denial decision was as follows:

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

Ex. 1 at 19-20.

B. Applicable Factors Were Ignored or Not Explained

i. The Board did not explain how it considered Mr. [redacted]'s Institutional Record

The first factor that the Board must consider is "the institutional record, including program goals, accomplishments, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates." *See* N.Y.C.R.R. §8002.2(d)(1). Mr. [redacted] achieved significant accomplishments throughout his incarceration, especially during the last four years. However, the Board's decision did not mention any of Mr. [redacted]'s "vocational education training", "work assignments", or "therapy." Ex. 1 at 19-20. The decision merely listed Mr. [redacted]'s "Case Plan" and "educational accomplishments" in a one-sentence list of "positive factors." *Id.* In doing so the Board failed to explain in non-conclusory terms how it considered Mr. [redacted]'s institutional record.

As to "vocational education training or work assignments," Mr. [redacted] completed vocational programs, obtained a broad range of skills, and earned strong evaluations by his supervisors. Mr. [redacted] completed the National Center for Construction and Education Research's Craft Training Program, the Custodial Maintenance Program, and OSHA training. *See* Ex. 4, OAD Parole Packet, at 31-33; Ex. 5, Case Plan. He also participated in the heating and plumbing program and the electrical trade program. *See* Ex. 4 at 39-45. These programs provide Mr. [redacted] with a broad range of skills that will be valuable in obtaining employment upon release. The COMPAS report confirmed this in finding that Mr. [redacted] would have an easier time, compared to others, in finding a job that pays more than minimum wage, and would stand a good chance at being successful in that job. Ex. 6, COMPAS Report, at 10. The Board also received nine Inmate Status Reports, from 2014 to 2020, almost all of which evaluated Mr. [redacted]'s performance as "excellent" and "above average" in every category. *See* Ex. 4 at 47-

55. The reports also commended Mr. [redacted]'s attitude and work ethic. *Id.* The Board did not mention any of Mr. [redacted]'s vocational programming accomplishments in its decision.

As to "therapy," Mr. [redacted] successfully completed a therapeutic Alcohol and Substance Abuse Treatment ("ASAT") program in 2016 and has been sober since. *See* Ex. 4 at [redacted] abuse was a driving force behind his criminal history. During the parole interview, Mr. [redacted] told the Board how helpful the ASAT program had been for him. He acknowledged that the past substance abuse programming had not helped "in a way that [it should have]." Ex. 1 at 4. His participation in the nine month program this time was greatly beneficial because he "related" to the ASAT counselor, who had a substance abuse history, and was able to help Mr. [redacted] recognize the "triggers" that caused Mr. [redacted] to repeat past conduct over and over. *Id.*

Also as to therapy, Mr. [redacted] completed the Basic and Advanced Alternatives to Violence Project in 2016 and sought mental health services to gain insight and health. *See* Ex. 4 at 26-28; Ex. 1 at 10,12. In his personal statement, Mr. [redacted] explained that through therapy he had realized how childhood abuse had impacted him and "warped" his ability to become a moral and compassionate man. Ex. 4 at 15. He expressed remorse and empathy for the victim and acknowledged that the victim had suffered humiliation and emotional trauma as a result of his actions. *Id.* at 12. Though Mr. [redacted] raised his therapeutic programming and therapy in the interview, the Board did not further engage on the topic, nor did the Board address it in the denial decision.

As to "academic achievements," Mr. [redacted] was accepted into the Bard Prison Initiative ("BPI"), a highly selective and rigorous college program, where he maintains a 3.5 GPA, receives excellent feedback from his professors, and had completed two semesters towards

an Associate Degree at the time of the March, 2020 parole review. *Id*. at 57. Mr. Pearl, the BPI site director who met with Mr. [redacted] each week, described him as an "honest and sharp thinker who works hard to support his peers,…[and] sets a tone of quiet dedication and open dialogue." *Id*. at 71. Professor [redacted], who described his anthropology class as "rigorous," stated that Mr. [redacted] went over and above the class requirements and was "an excellent addition to the group, bringing enthusiasm, curiosity, positivity, and a collaborative work ethic to class each day." *Id.* at 72. Yet, the denial decision did not even mention Mr. [redacted]'s admission to [redacted] nor his completion of two semesters towards an Associate Degree. Nor does the interview provide an explanation into how the Board considered Mr. [redacted]'s education accomplishments. Although Mr. [redacted] raised the factor several times, the Board simply [redacted] *See* Ex. 1, at 9, 13, 14 and 17.

As to "program goals," Mr. [redacted] set out and accomplished numerous ambitious goals in his Case Plan. In 2017, Mr. [redacted] set a goal of obtaining a Custodial Maintenance Certificate, which he accomplished in 2019. *See* Ex. 5at 1. He set a goal of gaining admission to the [redacted] Prison Initiative and was admitted. *Id*. He set a goal of obtaining Student of the Month and attained that goal in 2018. *Id*. Mr. [redacted] sought to complete the Prison Rape Elimination Act ("PREA") Program; he did so in 2018. *Id.* at 2. He sought to obtain a NCCER-OSHA certificate and did so in 2019. *Id*. Mr. [redacted] tasked himself with completing a substance abuse program that he accomplished in 2017. *Id.* at 3. And, he set a goal to earn admission to the Family Reunification Program, which he attained in 2019. *Id*. The Case Plan documents that since 2017 Mr. [redacted] has consistently set and achieved these vocational and personal goals. Yet, there is no mention of the Case Plan in the interview, and the denial decision merely included the Case Plan in a list that deemed it "positive." Ex. 1 at 19.

ii. The Board did not explain how it considered Mr. [redacted]'s release plans

The Board also failed to address how it considered Mr. [redacted]'s "release plan, including community resources, employment, education and training and support services available to the inmate." *See* N.Y.C.R.R. §8002.2(d)(3). Mr. [redacted] provided a detailed release plan, which included stable housing, family support, and letters from well-established organizations with the resources to provide educational, employment and sobriety maintenance support. Yet, the Board's denial decision merely mentioned "family support" and unspecified "document submissions" as a "positive factor." Ex. 1 at 19.

[redacted] would have a home with her and she would provide financial, emotional, spiritual, and employment support. Ex. 4 at 68-69. In Mr. [redacted]'s interview, the Board acknowledged that his wife was committed to him. Ex. 1 at 16.

As to education and employment, the [redacted] Prison Initiative's Director of Re-Entry and Alumni Affairs, wrote that Mr. [redacted] was eligible for their re-entry services, which provides support for continuing education and employment. Ex. 4 at 57. The Director confirmed that "all BPI students leave with a draft resume, and several practice cover letters and 93% of such students are currently employed, mostly in full time positions." *Id.*

As to community resources, the Office of the Appellate Defender ("OAD") wrote that Mr. [redacted] would have the "full support" of their Client Services Program. *Id.* at 64. OAD explained that their program provides "comprehensive re-entry services," including substance abuse treatment and counseling. *Id.* Mr. [redacted] provided additional letters of assurance from CASES, Exodus Transitional Community, The Fortune Society, and the Osborne Association. *See id.* at 58-62.

Yet, the Board's decision did not explain how it considered Mr. [redacted]'s wife's support or any of the documented release plans. The decision did not explain how it considered the employment support Mr. [redacted] would receive from BPI and OAD. Nor did it explain how it considered the access to substance abuse counseling that Mr. [redacted] would receive through these programs. Instead, the Board simply listed "family support" and "document submissions" as "positive factors" without providing any additional analysis.

iii. The Parole Board did not explain how it considered the victim statement

The Board must also consider "any statement made or submitted to the Board by the crime victim…" but the Board failed to explain how it did so. *See* N.Y.C.R.R. §8002.2(d)(5). A victim statement was included in the Pre-Sentencing Investigation report, in which the victim stated that he was "very fearful" during the incident, but was "not physically hurt." Ex. 4 at 23-24. Mr. [redacted] has served 12 years for the fear he caused this victim and he has expressed remorse and empathy for his crime. *See id.* at 12. Yet the Board did not even mention the victim statement in the denial decision, nor raise it with Mr. [redacted] during the interview.

iv. The Parole Board did not explain how it considered the seriousness of the offense

The fourth applicable factor the Board failed to address was the "the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated, the pre-sentence probation report, as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to the inmate's current confinement." *See* N.Y.C.R.R. §8002.3(b)(7). The Board did not address any component part of this factor.

The Board had a recommendation from the District Attorney, which stated that Mr. [redacted]'s sentence "should not be altered in any way except for the usual allowance given to those who show good behavior while incarcerated." Ex. 7, Bronx District Attorney Letter. During the four years leading up to the instant parole review, as detailed above, Mr. [redacted] established a strong record of rehabilitation and readiness for release to community supervision. Yet, the Board did not address the DA's recommendation, nor discuss it in the parole interview.

Additionally, the pre-sentence probation report documented mitigating factors that were not addressed by the Board. It stated that Mr. [redacted] used an imitation pistol during the crime and acknowledged his guilt. Ex. 4 at 23. The pre-sentence report also included the victim statement, which states that, while the victim was fearful, he was not physically hurt. *Id*. at 24. However, the Board did not mention the pre-sentence probation report in the decision or interview.

The Board also did not address the mitigating facts of the crime [redacted] activities after arrest. Mr. [redacted]'s apologized to the victim in the midst of the crime and admitted he was the coward, not the victim, and used a fake, rather than real gun. Ex. 1 at 6 and 13; Ex. 4 at 23. In addition, Mr. [redacted] quickly pleaded guilty to the crime. Ex. 4 at 23.[6]

Lastly, the Board did not have the sentencing court's recommendation. *See infra* at V. By failing to discuss the District Attorney's recommendation, the pre-sentencing report, the mitigating factors, [redacted] activities after arrest, and the sentencing court's recommendation, the Board did not address how it considered this factor.

[6] [redacted] nth later, on September 11, 2008, Mr. [redacted] was first interviewed by probation for the purpose of preparing a pre-sentence report, confirming he pleaded guilty soon after his arrest. Ex. 4 at 23.

II. THE BOARD'S FAILURE TO EXPLAIN HOW IT CONSIDERED THE MANY FACTORS DETAILED ABOVE AND ITS EXCLUSIVE FOCUS ON CRIMINAL HISTORY AND DISCIPLINARY HISTORY ESTABLISH THAT THE BOARD FAILED TO CONSIDER THOSE FACTORS

The Board's failure to address how it considered the many factors explained in Argument I evinces the Board's failure to consider and weigh those factors, which it is required to do. *See King*, *v. New York State Div. of Parole*, 190 A.D. 423, 431-32 (1st Dep't 1993), affd. 83 N.Y.2d 788 (1994) ("In this case, the record clearly reveals that the denial of petitioner's application was a result of the Board's failure to weigh all of the relevant considerations and there is a strong indication that the denial of petitioner's application was a foregone conclusion."). The Board is not required to give each factor equal weight, *see Matter of Peralta v. N.Y. State Bd. of Parole*, 157 A.D.3d 1151, 1151 (3d Dep't 2018), but it must consider and weigh every applicable factor. It must give "genuine consideration to the statutory factors." *See Ferrante v. Stanford*, 172 A.D.3d 31, 39 (2d Dep't 2019); *Johnson v. N.Y. State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dep't 2009) ("The record is devoid of any indication that the Parole Board in fact considered the statutory factors that weighed in favor of petitioner's release …"); *Cappiello v. N.Y. State Bd. of Parole*, 2004 N.Y. Slip Op. 51762(U) (Sup. Ct., N.Y. Cty. 2004) ("When the record of the Parole hearing fails to convincingly demonstrate that the Parole Board … qualitatively weigh[ed] the relevant factors in light of the three statutorily acceptable standards for denying parole release, the decision is arbitrary and capricious."), attached as Ex. 9 at 40. The Board's failure to articulate *why* it denied parole despite the strong evidence of Mr. [redacted]'s "trajectory of change from 2016 to 2020" establishes that the Board did not actually consider and qualitatively weigh the relevant statutory factors. Ex. 1 at 13.

The failure to qualitatively consider the factors delineated above is also evinced by the Board's exclusive focus on criminal history and disciplinary record in the decision and interview.

Referencing Mr. [redacted]'s criminal history, the Board's decision stated:

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

Ex. 1 at 19. As to Mr. [redacted]'s disciplinary history, the Board stated:

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

Id. The one paragraph decision includes one, cursory and conclusory sentence not related to Mr. [redacted]'s criminal history or disciplinary record:

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

Id.

The interview followed the same pattern. The first two pages of the transcript, after introductions, focused on criminal history. Ex. 1 at 2-4. The Board then confronted Mr. [redacted] with a quote from a parole interview 14 years before, and then the Board went back to criminal history. *Id*. at 5. Mr. [redacted] tried to bring up his personal statement and the insight he gained through therapy and therapeutic programs, *id.* at 6-7, but the Board then moved to disciplinary history. *Id.* at 8. Mr. [redacted] then raised his completion of ASAT. In response, the Board raised the specter that Mr. [redacted] may never be released. *Id.* at 9. The Board [redacted] COMPAS scores, *id.* at 9, but then went back to disciplinary history. *Id.* at 10. Mr. [redacted] was then allowed to speak, *id.* at 11-13, but the Board then went right back to disciplinary

history. *Id.* at 14. As to Mr. [redacted]'s extensive and detailed parole submission, the only attention paid by the Board was to call it a "nice packet." *Id.*

III. THE BOARD FAILED TO EXPLAIN ITS DEPARTURE FROM COMPAS

The Board's conclusion that release would be "incompatible with the public safety and welfare" departed from Mr. [redacted]'s low COMPAS risk scores in Felony Violence, Arrest, and Absconding, as well as low needs scores, without providing an individualized explanation as required by the Board's 2017 regulation. Ex. 1 at 19-20; Ex. 6 at 1. As discussed in Point I, the Board revised its regulations in 2017 to require more individualized and detailed explanations when denying parole. This not only led to the revision of §8002.3, but also the promulgation and adoption of a new regulation, 9 N.Y.C.R.R. §8002.2(a), which requires the Board, when denying parole, to provide an individualized explanation for any departure from a COMPAS score:

> In making a release determination, the Board shall be guided by risk and need principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, 'Department of Risk and Needs Assessment'). *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.*

9 N.Y.C.R.R. §8002.2(a) (emphasis added). Case law reinforces this requirement. *See, e.g., Robinson v. Stanford*, No. 2392/2018, at 2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) (holding that the Board's determination that release was incompatible with the welfare of society departed from the low COMPAS scores in risk of felony violence, re-arrest, absconding and unlikelihood of issues with family support or significant financial problems, and thus the Board 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."), attached as Ex. 9 at 1; *Hill v. N.Y. State Bd. of Parole*, No. 100121/2020, at 1 (N.Y. Sup. Ct. Oct. 23, 2020) ("The Board's

decision, however, does not reflect the basis of its finding that Mr. Hill poses a danger to society. The Board failed to articulate the reasons for this determination with respect to Mr. Hill's low COMPAS Risks and Needs Assessment scores or to 'provide an individualized reason for this departure,' in accordance with 9 NYCRR 8002.2"), attached as Ex. 9 at 4.

The Board need not explicitly declare its departure from a COMPAS scale or explicitly use the word "departure," to trigger the requirement that the Board explain a denial that is not supported by COMPAS risk and needs scores. *See Matter of Coleman* 157 A.D.3d at 673 (Citing to low COMPAS risk scores as one factor that did not provide "support" for the Board's decision that "there was a reasonable probability that, if released, the petitioner would not remain at liberty without violating the law and that his release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law, are without support in the record."); *Phillips v. Stanford*, 52579/19, at 4 (Sup. Ct. Dutchess Cty. 2019) (Finding that low COMPAS risk and needs scores "directly contradicted" the Board's finding that discretionary release would not be compatible with the welfare of society, and thus the Board was "required to articulate with specificity the particular scores in petitioner's COMPAS assessment from which it was departing and provide an individualized reason for such departures."), attached as Ex. 9 at 18; *Voii v. Stanford*, No. 2020-50485, at 5-6 (Sup. Ct. Dutchess Cty. 2020) (rejecting as "flawed" the Board's argument that it need not explain its departure because it did not depart from a finding that the petitioner was likely to reoffend, only that petitioner's release was incompatible with the welfare of society and would deprecate the seriousness of the offense, and reiterating that the law "clearly indicates that a departure requires the Board to identify *any* scale from which it departs and provide an individualized reason" for the departure) (emphasis in original), attached as Ex. 9 at 23; *Stokes v. Stanford*, 2014 N.Y. Slip

Op. 50899(U), at 2 (Sup. Ct. Albany Cty. June 9, 2014) (In denying parole, the Board made no explicit mention of "departing" from petitioner's low COMPAS scores, but the inconsistency between low COMPAS scores and the Board's denial required an explanation. The court stated: "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.*") (emphasis added), attached as Ex. 9 at 32; *Miranda v. N.Y. State Parole Bd.*, 2020 N.Y. Slip Op. 33346(U), at 3 (Sup. Ct. N.Y. Cty. 2020) (finding that the Board "needs to explain, with particularity, its reasons for departing from a risk-assessment analysis"), attached as Ex. 9 at 35; *Robinson*, No. 2392/2018, at 1 (Board denied parole despite petitioner receiving "the lowest possible rating in categories for risk of felony violence, re-arrest, absconding and for criminal involvement," and finding the Board's citation to the welfare of society, "directly contradicts these scores in [petitioner's] COMPAS assessment."); *Hill*, No. 100121/2020, at 11 (holding that the Board's denial of parole for public safety reasons was inconsistent with low COMPAS scores and therefore required an explanation pursuant to 9 NYCRR §8002.2.).

COMPAS scored Mr. [redacted] low on numerous scales which directly contradict the Board's conclusion that release would be incompatible with public safety and welfare. First, the COMPAS evaluated Mr. [redacted] at low risk for reoffending, including engaging in felony violence, and at low risk for absconding from parole supervision. Ex. 6 at 1. Second, COMPAS [redacted] Ex. 6 at 5.[7] Third, as to financial

[7] Ryan Shanahan and Sandra Villalobos Agudelo, *The Family and Recidivism*, American Jails (2012) https://www.prisonpolicy.org/scans/vera/the-family-and-recidivism.pdf ("Research on people returning from prison shows that family members can be valuable resources of support during incarceration and after release. For example, prison inmates who had more contact with their families and who reported positive relationships overall are less likely to be re-incarcerated (Martinez & Christian, 2009)."); The Urban Institute, *Families and Reentry: Unpacking How Social Support Matters* (June 2012) https://www.urban.org/sites/default/files/publication/24921/1001630-

stability and employment, Mr. [redacted]'s COMPAS noted two things: first, if Mr. [redacted] were to "get a good job" his chance of being successful would be "good," the highest possible [redacted] that pays more than minimum wage. Ex. 6 at 10.[8] Contrary to these favorable scores that [redacted] social qualities that reduce recidivism, the Board found that Mr. [redacted]'s release was incompatible with public safety and welfare, yet offered no explanation for its conclusion. Ex. 1 at 19-20.

In denying parole, the Board failed to provide an individualized explanation for each departure from Mr. [redacted]'s relevant low COMPAS scores. *Id.* The Board's statements regarding Mr. [redacted]'s COMPAS scores read in their entirety:

> We have considered your COMPAS risk and needs assessment. Your high prison misconduct COMPAS score reflects your poor compliance with DOCCS rules. Your medium COMPAS, criminal involvement score and high score for history of violence is disturbing. Positive factors include your family support, document submissions, Case Plan, educational accomplishments and related low COMPAS scores.

Families-and-Reentry-Unpacking-How-Social-Support-Matters.PDF ("The research on family-inclusive reentry models has been promising. Case management techniques that are family-inclusive and family-focused have been shown to reduce the likelihood that an individual will return to criminal activity." (internal citations omitted)); COMPAS scores can be overridden where either mitigating or aggravating are present. *See* Northpointe, *Practioners Guide to COMPAS*, 45 (Aug. 17, 2012), http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf. .

[8] Kevin Schnepel, *Do post-prison job opportunities reduce recidivism?* IZA World of Labor (2017) https://wol.iza.org/uploads/articles/399/pdfs/do-post-prison-job-opportunities-reduce-recidivism.pdf ("Recent evidence suggests that increases in wages for low-skilled workers and opportunities in sectors that pay higher wages to low-skilled workers can reduce recidivism among individuals recently released from prison."); Tianyin Yu, *Employment and Recidivism*, EBPSociety, https://www.ebpsociety.org/blog/education/297-employment-recidivism ("Results from the bivariate analyses indicated that overall, unemployed ex-prisoners were more likely to re-offend than those employed. . .").

Ex. 1 at 19. The Board's statements regarding Mr. [redacted]'s COMPAS scores do not meet the standard set by N.Y.C.R.R. §8002.2(a).

First, although the Board's decision departs from the COMPAS risk and needs scores delineated above, the Board did not specify the COMPAS scales from which it was departing. Second, the Board did not explain why high prison misconduct, history of violence, and medium criminal involvement scores justify a departure from low COMPAS scores in risk for Felony Violence, Arrest, and Absconding, as well as positive scores as to family support and financial stability. The Board's mention of other high or medium scores does not explain departure from low scores since such high or medium scores did not result in commensurate high scores on the risk and needs scales. Put another way, despite high or medium scores in history of violence and prison misconduct, the COMPAS still scored Mr. [redacted] as low in risk and needs scores; therefore, the high scores do not, without more, explain why there is reason to question the accuracy, i.e. depart from, the low scores. *See Voii*, No. 2020/50485, at 6-7 (finding that that the Board's explanation that "it is departing from COMPAS because of the tragic reckless nature of the crimes themselves" was insufficient because it was "generic" and was not individualized because it did not identify the COMPAS score from which it departed.) (internal quotations omitted). Here, the Board did not even acknowledge that its basis for denial departed from Mr. [redacted]'s low risk and needs scales. Ex. 1 at 19-20. Furthermore, its comments about Mr. [redacted]'s high COMPAS scores were generic like those in *Voii*, and similarly not individualized. *Id.*

New York courts have reversed parole denials where the Parole Board, in denying parole, departed from a low COMPAS score without providing an individualized explanation. In *Hill*, the court reversed a denial of parole where petitioner had low COMPAS scores in the

aforementioned categories. No 100121/2020, at 2 ("Mr. Hill's recommended Supervision Status Level is low risk, which is the least intensive level of supervision and management that an individual can receive upon release, and reflects that he poses a low risk of future felony violence, arrest, and absconding. The record also indicates that Mr. Hill has supportive network of family and friends. . ."); *see also Voii*, No. 2020/50485, at 5 (Mr. Voii had low COMPAS scores, had undergone "personal growth, programmatic achievements, productive use of his time," and exhibited remorse); *Robinson*, 2392/2018; *Stokes*, 2014 N.Y. Slip Op. 50899(U), at 2; *Phillips*, 52579/19. Significantly, many of the accompanying mitigating circumstances in *Hill*, *Voii*, *Phillips* and *Robinson* [redacted] recommended Supervision Status, received low scores in Felony Violence, Arrest risk, and Absconding. His COMPAS scores reflect a supportive family, and above-average employment prospects. Ex. 6 at 9-10. For all of the above reasons, the denial should be reversed and a de novo parole review ordered.

IV. THE BOARD'S HOSTILITY TOWARD MR. [redacted] COUPLED WITH ITS FAILURE TO EXPLAIN AND CONSIDER APPLICABLE FACTORS STRONGLY INDICATES THE DECISION WAS PREDETERMINED

For all the reasons argued above and the Board's hostility detailed below, there is every indication that the Board's decision was pre-determined, which is a ground for a *de novo* review. *See King*, 190 A.D.2d at 431-32 ("In this case, the record clearly reveals that the denial of petitioner's application was a result of the Board's failure to weigh all of the relevant considerations and there is a strong indication that the denial of petitioner's application was a foregone conclusion.").

First, the Board's failure to consider and weigh the applicable statutory factors indicates a predetermined decision. *See Johnson*, 65 A.D.3d at 839 ("We therefore conclude on the record

before us that the Parole Board failed to weigh all of the relevant statutory factors and that there is 'a strong indication that the denial of petitioner's application was a foregone conclusion."). As stated in Part I and II, the Board failed to consider and weigh the applicable statutory factors, evinced by its failure to address the factors in the interview and its failure to explain how it considered the factor in the denial decision.

Second, The Board's predetermined decision is further evinced by the Board's almost exclusive focus on Mr. [redacted]'s criminal and disciplinary history. *See Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 40 Misc.3d 226, 233 (Sup. Ct. Columbia Cty. 2013) ("When, as here, the Parole Board focuses entirely on the nature of Petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion that does not comport with statutory requirements.") (emphasis added). As stated in Part II, the Board's focus on criminal history and disciplinary record from the starting gate of the interview through to the denial decision, prevented the Board from qualitatively considering other factors, which then led to a foregone denial of parole.

Finally, the Board's hostile and argumentative interview of Mr. [redacted] also from the starting gate, strongly indicates its decision to deny parole was predetermined. *See Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 46 Misc. 3d 603, 608 (Sup. Ct. Sullivan Cty. 2014) ("at least one Commissioner was argumentative and appeared to have made the decision prior to the parole interview."). Additionally, the Board may not argue with an inmate. *Id.* at 607. Early in the interview, the Board aggressively chastised Mr. [redacted] for not remembering a thirty-seven year old youthful offender sentence of three years probation. Ex. 1 at 3. Second, in response to Mr. [redacted] explaining to the Board that he had benefitted from programming during this incarceration term and better understood the reasons for his past criminal conduct, the

Board intimidated Mr. [redacted] by quoting a 14 year old parole interview transcript, in connection with a prior sentence, in which Mr. [redacted] stated he would never be back before a parole board again. *Id.* at 4-5. The Board also taunted Mr. [redacted] by asking "do you have a fascination with guns?" despite the Board being fully aware Mr. [redacted] never used a real gun in the commission of any of his crimes. *Id.* at 6. Finally, and most egregiously, the Board threatened Mr. [redacted] by stating that he may never be released. *Id.*at 9 ("I mean you're certainly pleading for your release. You know that you may never be released in the community again at this point, do you know that?"). Taken together, there is every indication that the Board approached this parole review with their minds already made up.

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

Per the January 24, 2020 Parole Board Report, the Board did not have or consider the sentencing minutes. *See* Ex. 10, Parole Board Report. The Parole Board Report appears to claim that a request for the minutes was made on November 13, 2019 and December 16, 2019, but does not provide any information as to the nature of such requests nor the responses received as to such requests. *Id.* No further information is provided as to the status of these requests. The Board makes no reference, either during the interview or in its decision, to the sentencing minutes. *See* Ex. 1.

The Parole Board is, however, required to obtain and consider the sentencing minutes. *See Matter of Smith v. New York State Div. of Parole,* 64 A.D.3d 1030, 1032 (3d Dep't 2009); *see also Matter of Carter v. Dennison,* 42 A.D.3d 779, 779 (3d Dep't 2007). The failure to do so requires a new parole review unless the Board established that the sentencing minutes were unavailable. *See Blasich v. New York State Bd. of Parole*, 68 A.D.3d 1339, 1340 (3d Dep't 2009) (Finding that a letter, dated several months before the parole review, from the Chief Court

Reporter for Nassau County Court to the Division of Parole at Orleans Correctional Facility indicating that the sentencing minutes were unavailable excused Board's failure to consider the sentencing minutes); *Freeman v. Alexander*, 65 A.D.3d 1429, 1430 (3d Dep't 2009) (Finding that correspondence in the record from the sentencing court stating that the sentencing minutes could not be found excused the Board's failure to consider the minutes). Or, the Board established a diligent effort to obtain the minutes. *Matul v. Chair of New York State Bd. of Parole*, 69 A.D.3d 1196, 1197 (3d Dep't 2010).

Although the Appellate Division, Second Department appears to require that the Board's failure to obtain the sentencing minutes cause prejudice to the parole applicant, *see Porter v. Alexander*, 63 A.D.3d 945, 946 (2d Dep't, 2009), the Third Department does not require such. *Smith v. New York State Div. of Parole*, 64 A.D.3d 1030, 1031–32 (3d Dep't 2009) (ordering a de novo review where unavailability of sentencing minutes was not adequately established without any inquiry as to prejudice).

The Parole Board Report's inclusion of two dates on which the sentencing minutes were ostensibly requested does not establish that the minutes were unavailable, nor does it establish that a diligent effort was made to obtain the minutes. The Board did not consider the sentencing minutes nor establish that they were unavailable or a diligent effort had been made to obtain them.

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

The Board's consideration of a 2010 letter from a member [name redacted] of a former Bronx District Attorney administration, does not constitute a consideration of the District Attorney recommendation, as is required by law. *See* N.Y.C.R.R. §8002.2(d)(7). Since the

parole decision must be based on a contemporary record, information that dates back ten years ago from a former DA should not constitute an official recommendation from the Bronx District Attorney. *See King*, 190 A.D.2d at 432 ("The role of the Parole Board is not to resentence 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.") (emphasis added).

At the time that the 2010 letter was submitted, Robert T. Johnson was the Bronx District Attorney. Since 2016, Darcel D. Clark has been the Bronx District Attorney and her policies are markedly different from that of her predecessor. District Attorney Clark has expressed a commitment to making "all decisions with any eye towards the least restrictive means of ensuring public safety."[9] She has also recognized that "treating substance use disorders punitively has led to mass incarceration and negative collateral consequences for too many of our community members ... [and that] [a] hard reduction approach and consideration of treatment options is more effective and enhances public safety." *Id*. Mr. [redacted] has struggled with substance abuse since adolescence, and his struggle with drug dependency is a core contributor to his involvement with the criminal justice system.

In light of the current Bronx DA's policies, that reflect the contemporary approach to ensuring public safety and addressing the link between crime and substance abuse, the recommendation included in the parole file was out dated and does not constitute the recommendation of *the* Bronx District Attorney.

The Board appears to have requested an official letter from the former Bronx DA in 2010, but did not request a recommendation from the current DA. *See* Ex. 11, Request for

[9] *A Safer Bronx Through Fair Justice*, Office of the Bronx County District Attorney, https://www.bronxda.nyc.gov/downloads/pdf/safer-bronx-through%20fair-justice.pdf.

Official Letters 2010. For the reasons stated above, a contemporary letter from the current DA should have been requested.

CONCLUSION

For these reasons, Mr. [redacted] respectfully requests that this Court grant the petition and order Respondents to hold a *de novo* parole interview before Commissioners who did not participate in the March 2020 denial decision or its affirmance, that such review be held within thirty days of entry of the order, and that parole be considered consistent with this Court's decision.

Dated: New York, New York
December 3, 2020

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

[redacted]

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

-against-

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

Index No. _____

ATTORNEY VERIFICATION

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

[redacted]

Martha Rayner, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

I am Of Counsel to Lincoln Square Legal Services, Fordham University School of Law's clinical law office, and counsel for Petitioner.

I have read the foregoing Petition and know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon facts, records, and other pertinent information contained in my files.

I make the foregoing affirmation pursuant to CPLR 3020(d)(3) because Petitioner is not in the County where I have my office.

Dated: December 3, 2020

Martha Rayner, Esq.