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PRELIMINARY STATEMENT

respectfully submits this brief in support of her appeal of the Board of Parole decision dated September 5, 2019, that denied her parole release for the fourth time. before New York State Board of Parole Commissioners on September 3, 2019 via videoconference at Taconic Correctional Facility. The brief interview focused almost exclusively on a tragic crime that committed more than 24 years ago. On January 14, 1995, she caused the death of two-year old She has spent more than two decades focusing on her actions and on her failure to act to save his life. Living every day with the knowledge of the irreparable pain she caused his family, and her own family, has repeatedly and explicitly accepted responsibility and expressed both sincere and deep remorse.

The Board interview did not evidence meaningful consideration of required statutory factors. The Commissioners failed entirely to identify which COMPAS scales they deviated from and to provide reasons for their departure from absolute lowest risk of recidivism. They made only passing reference to isolated examples of her stellar record of rehabilitation, growth and achievement. Indeed, they only briefly mentioned statutory factors they must consider, including her impressive academic record, her spotless disciplinary record, and her outstanding institutional record of participation in, and leadership of, numerous programming and volunteer activities. Commissioner asked questions solely about the crime and the circumstances of life 24 years ago (Tr. 18-24),[1] much of which Commissioner had already explored.

[1] The transcript of the interview and decision is attached hereto as Exhibit 1 and referred to throughout as "Tr."

Furthermore, the Commissioners both mentioned "continued community opposition" during the interview and relied on it in their decision. In referring to unexplained and unarticulated "opposition," the Board identified alleged evidence that is not identified as a factor for consideration under N.Y. Exec Law §259-i(c)(A). Moreover, the Board refused to disclose such opposition, pursuant to 9 NYCRR 8000.5, despite explicit and repeated requests by counsel.[2]

As she explained during the interview, [redacted] has pursued a path towards rehabilitation during her entire period of incarceration. In her heartfelt words, she "is responsible for this terrible crime" and accepts that, but she has also "become responsible, intends to do good in [her] life and create peace for those around her. . . . [redacted] stays in the forefront" of all that she does (Tr. 24). As the former Superintendent of Bedford Hills Correctional Facility, [redacted] wrote in support of [redacted] release, "[k]eeping her in prison cannot change the circumstances of her crime" but "to deny her parole is to send the message that what one does to rehabilitate while in prison does not matter, and we know this is not what we believe."[3]

[redacted] seeks reversal of the Board's decision and a new parole interview conducted in compliance with the amended N.Y. Exec. Law § 259-c(4) and governing regulations.

PROCEDURAL AND FACTUAL BACKGROUND

[redacted] is now 49 years old. She is serving an indeterminate sentence of twenty years to life for murder in the second degree and has been imprisoned in New York State correctional institutions for almost half of her life. She appeared before the Board for her fourth parole hearing on September 3, 2019. The Board again summarily denied parole and ordered her

[2] See Ex. 2, correspondence with [redacted] dated December 23, 2019 and December 29, 2019.
[3] Letter from [redacted] to the Board of Parole dated August 20, 2019, attached as Exhibit 81 to the Parole Packet which is attached to this appeal as Ex. 3.

held for an additional 24 months. The undersigned filed a timely Notice of Appeal that the Board received on September 18, 2019 and requested a copy of the transcript. [redacted] did not receive a transcript of her interview until mid-November, 2019.[4]

The Crime

The facts and circumstances surrounding [redacted] crime are well-established. She has confirmed these facts at each of her four parole interviews, in response to extensive questioning by each panel of parole commissioners. [5]

On January 14, 1995, [redacted] who was living with [redacted] at the time—arrived home with his two-year old son, [redacted]. He then went to work the night shift at his job. [redacted] served the children dinner and put them to bed. Later that night, [redacted] was suddenly awakened by an unknown noise. She went to the room where [redacted] and her daughter were sleeping to investigate. The door was blocked and [redacted] fell into the bedroom as she pushed it open. She fell on to [redacted], who was unexpectedly laying on the floor rather than in the bed where [redacted] had put him. Upset by her fall and, with her "mind flooded with chaotic thoughts of everything that" she "perceived was wrong in [her] life" at the time, she "lashed out, hitting and punching" [redacted].[6] [redacted] stopped when she realized what she was doing, put [redacted] back to bed, left the room, and returned to her own room. She thought that he was all right the next morning and attributed his vomiting to the fact that he had been sick

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[4] Counsel has never received a copy of the transcript from the Board but paid the invoice for transcription in correspondence dated December 11, 2019.

[5] Although they did not mention it during the interview, each Commissioner had conducted an earlier interview with [redacted]. Commissioner [redacted] interviewed [redacted] on September 5, 2015; Commissioner [redacted] interviewed [redacted] on September 12, 2017. Those interviews also focused almost exclusively on the crime and [redacted] was asked about many of the same facts and asked many of the same questions during those interviews. Her answers remain the same.

[6] Letter to Board, Ex. 1 to Parole Packet.

before coming to her house. She did not get him medical attention and did not report that she had fallen on him and hit him. [redacted] left later that morning to take [redacted] to his mother.

That night, [redacted] called [redacted] and told her that [redacted] had died. She was shocked and remained unable to accept that she had caused his death. Her denial continued through her decision to take her case to trial. With the help of intense rehabilitative programming and self-examination, [redacted] has taken full responsibility for her offense and has come to terms with its tragic consequences.

Institutional Programming that Successfully Addressed Personal History

Through her exhaustive programming regime, [redacted] has developed insights into her tumultuous childhood and collapsing personal life in the months preceding her offense.[7] [redacted] is adamant that her identification of these factors in no way excuses her serious offense, for which she alone is responsible.[8] Rather, she has worked to develop tools so that she will react to life's challenges in a positive and constructive manner.

In the months leading up to her offense, [redacted] saw everything in the modest life she had built collapse. With two young children, [redacted] and her husband were forced to declare bankruptcy, despite both working full-time. His infidelity led to divorce. Without the tools to process her growing financial and emotional insecurity, [redacted] sought solace by rushing into a whirlwind new relationship with [redacted] who was also recently divorced and had limited visitation rights with [redacted].

Today, [redacted] is a very different person; her time in prison has been transformative. She has spent her entire incarceration learning to understand and addressing the factors that led to her tragic crime. She now understands how to cope constructively with crumbling personal

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[7] *Id.* at 2.
[8] *Id.* at 1.

relationships, financial distress, and feelings of abandonment. In light of her determined approach to rehabilitation, it is unsurprising that the COMPAS risk and needs assessment administered by DOCCS evaluated her to pose the very lowest risk of recidivism.

Education has been central to her evolution into a determined, generous and engaged member of her community. Prior to her conviction, ████ had a high school degree and no intention of pursuing higher education. But soon after she began serving her sentence, she discovered her love for learning—ultimately graduating from the Marymount Manhattan College Program with a bachelor's degree, as valedictorian of her class. ████ exemplifies the value of education as a tool for rehabilitation and self-improvement. In her letter of support for ██ ██ ████ who was the Superintendent of Bedford Hills for much of ████ time there—writes that she and ████ "had several deep discussions about education: why it means so much to people in prison, how it can open new ways of looking at the world, and the way it can impact a person's view of themselves."[9]

████ also engaged in extracurricular activities that further enriched the academic community at Bedford. One of her proudest achievements was becoming managing editor of Bedford's newsletter, *The Insider*. ████ thrived in this editorial role, encouraging her peers to write articles, editing submissions, helping with layout design, and writing articles herself—enhancing both her academic and journalistic writing skills.[10] ████ used the newsletter to amplify the voices of her peers and to tell unique stories about the work of her peers and the staff at Bedford.[11] By the end of ████ four-year tenure as managing editor, *The Insider* had published eight issues—a direct result of ████ instrumental role as managing editor.[12]

[9] Exhibit 81 to Parole Packet.
[10] *See* Exhibit 54 to Parole Packet, *The Insider* Articles (10).
[11] *See id.*
[12] *See* Exhibit 80 to Parole Packet, 2015 Baumgartner Letter, at 1.

Since her graduation, [redacted] has become an "essential" and "invaluable" leader in the college programs at Bedford Hills and Taconic correctional facilities. She learned to express herself in essays,[13] letters, and as the managing editor of Bedford Hills's newsletter.[14] She also received numerous awards recognizing her outstanding academic achievements and service to the college program.[15] Motivated by a passion for learning, she has found service rewarding.

Staff and volunteers who worked with [redacted] rave about her strong work ethic, warm and encouraging demeanor, and her unparalleled "dedication to the welfare and success of her fellow students."[16] It is no wonder that a large number of her former teachers have written in support of her release. [redacted] is supported by a wide range of community members who understand that her remarkable progress in prison will inspire other women. They look forward to working with her after her release.

Parole Interview and Written Decision

On September 3, 2019, the Board panel used the interview almost exclusively to ask [redacted] 96 separate and pointed questions about her underlying crime and the circumstances of her life at the time. After introductory comments, Commissioner Alexander spent 9 pages of the 24-page transcript asking questions about the crime (Tr. 2–11). After stopping to eliminate background noise at the institution, he asked 5 questions about [redacted] decision to create a parole packet, about how she got involved with legal counsel, and why she had written a letter to the Apology Bank (Tr. 10–11) before returning to questions about the crime.

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[13] *See* Exhibit 64 to Parole Packet, Letter from [redacted] to the Board of Parole dated May 15, 2019.
[14] *See* Exhibit 54 to Parole Packet, Articles Written by [redacted] for Bedford Hills Correctional Facility's *The Insider* Newsletter (10).
[15] *See* Exhibits 17, 19, 20-21, 25, 49, 50 to Parole Packet; *see also* Exhibit 80, 2015 Baumgartner Letter, at 1.
[16] *Id.*

It was not until page 12 of the transcript that Commissioner [redacted] asked [redacted] about other topics. He asked her what she thought was "the most important thing you have been able to accomplish in prison.?" (Tr. 12: ll. 18–19.) [redacted] eloquently described programming that had enabled her to come to terms with her crime and to accept responsibility for it. (Tr. 12: l. 20 – Tr. 13: l. 9.) She identified the Alternative to Violence Program (AVP) as the program with the biggest impact on her. After a few more generic questions, Commissioner [redacted] reverted to asking pointed questions about the crime (Tr. 16-18).

The panel virtually ignored [redacted] remarkable rehabilitative transformation that is reflected in her institutional record and exemplified by the packet she prepared with the assistance of Morningside Legal Services, Inc.[17] She has maintained a spotless disciplinary record for twenty-four years.[18] She also has a virtually perfect COMPAS score. Although Commissioner [redacted] acknowledged that risk and needs assessment to be a "positive document," he failed to explain why the Board's decision deviated from every risk and needs score in reaching its decision. (Tr. 16.) Over the course of her rehabilitative journey, [redacted] has touched the lives of many people, ranging from educational staff to those with whom she is incarcerated. Many of these individuals wrote letters on her behalf. Oddly, Commissioner [redacted] chose only to question [redacted] motivation for including testaments from her professors to her academic achievement. (Tr. 14: ll.13-15.) [redacted] explained the mentorship they had provided.

[redacted] presented the Board with a cogent and comprehensive release plan that included housing, employment and further education. For long-term support, [redacted] has commitments from an armada of large organizations—including the Fortune Society, the Women's Prison Association, Hudson Link, Columbia University's Center for Justice, and John

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[17] Commissioner Alexander asked [redacted] troubling questions about her decision to create the packet and how she became involved with the legal clinic, Morningside Heights Legal Services, Inc. (Tr. 10-11).
[18] *See* Exhibit 6 to Parole Packet, Employment and Disciplinary History dated July 24, 2019, at 11.

Jay's College Initiative—to support her housing, employment, educational, and social service needs. The Commissioners overlooked all of this material and asked simply: "if you were released, where would you live and how would you support yourself?" After described the Hope House, a re-entry organization that is focused on women, and its offer to house her, Commissioner asked what the organization did and whether would live there. (Tr. 15.)

After confronting with a long recitation of statements made by the sentencing judge, (Tr. 16: l. 19–Tr. 18, l. 5), Commissioner turned the interview over to Commissioner , who asked another 6 pages of questions about the crime and asked no other questions, (Tr. 18-24). In all, the panel asked 96 questions about the crime, (Tr. 2–13, 16–24), and only 13 questions about any other topic, (Tr. 13–16). Twenty pages of the twenty-four page transcript are devoted to questions about the crime.

In its decision, the Board noted rehabilitation, her completion of all recommended programs, her educational accomplishments, her institutional work and her clean disciplinary record. It also claimed to have reviewed her case plan and COMPAS score, indicating her "overall low risk and needs" and the "extensive packet that was put together with Morningside Heights Legal Services, Inc." (Tr. 19.) Nevertheless, after noting "personal growth and productive use of time after 24 years in prison," the Board concluded "discretionary release shall not be granted." (Tr. 26.) The Board justified its decision by describing the circumstances of the crime and statements made by the sentencing judge. (Tr. 27.)[19] The panel then stated, without specification, that it departed from the low COMPAS risk scores based on "the jury's verdict and judge's comments." (*Id.*) Finally, the decision concluded that "continued opposition

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[19] These statements were all made at the time of sentencing as the Parole Board Reports have consistently noted that the Board did not receive Official Statements from the Judge or the DA.

by the community indicates your release would not be compatible with the welfare of society," and that in light of "the years of harm to the community" release would "therefore deprecate the serious nature of this crime as to undermine respect for the law." (*Id.*)

Denial of Access to Community Opposition Evidence

Pursuant to 9 NYCRR § 8000.5, the undersigned counsel formally requested documents necessary to the preparation of this appeal in a letter dated December 19, 2019.[20] In light of panel references to "community opposition" in both the parole interview and in its decision, that letter specifically requested "[a]ll letters or documents labeled 'community opposition.'" On December 23, 2019, ████ responded to that request on behalf of Taconic Correctional Facility and disclosed responsive documents.[21] After reviewing that disclosure and finding no evidence of community opposition, counsel renewed the previous request for "any community opposition material that was available to the commissioners."[22] On December 29, 2019, ██ ███ acknowledged receipt of both requests and confirmed that "[a]ll records that are releasable pursuant to 8000.5 have been provided. Records that are not releasable have been withheld."[23] It is unclear from this response whether the Commissioners did not have community opposition material or whether the Board is withholding community opposition material considered by the panel.

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[20] Ex.2.
[21] Email dated December 23, 2019, attached as Ex. 2.
[22] Email dated December 29, 2019, attached as Ex. 2.
[23] *Id.*

LEGAL FRAMEWORK

While the Parole Board may exercise its discretion in deciding whether or not to grant release on parole, its discretion is limited by statute. Pursuant to Executive Law § 259-i(2)(c)(A), discretionary release shall be granted:

> [A]fter considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.

N.Y. Exec. Law § 259-i(2)(c)(A). In making its release decision, the Parole Board is required to consider defined factors, including:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
> (ii) performance, if any, as a participant in a temporary release program;
> (iii) release plans including community resources, employment, education and training and support services available to the inmate….
> (iv) any deportation order issues by the federal government against the inmate while in the custody of the department…..
> (vii) 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, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement;
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

N.Y. Exec. Law § 259-i(2)(c)(A).

New York courts have interpreted the legislature's delimited grant of administrative discretion in significant ways. First, the Board cannot deny release based solely on the nature of the underlying offense. *Rios v. N.Y. State Div. of Parole*, 836 N.Y.S.2d 503 (Sup. Ct. Kings Cty. 2007). Second, the Board may give different weight to the statutory factors, but must consider—and rationally weigh—all relevant factors and must not consider erroneous information in doing so. *King v. N.Y. State Div. of Parole*, 598 N.Y.S.2d 245 (1st Dep't 1993), *aff'd* 632 N.E.2d 1277

(N.Y. 1994); *Johnson v. N.Y. State Div. of Parole*, 884 N.Y.S.2d 545 (4th Dep't 2009*); Thwaites v. N.Y. State Div. of Parole*, 934 N.Y.S.2d 797 (Sup. Ct. Orange Cty. 2011). Third, by statute, the Board must set forth its reasons for denying parole in a written decision "in detail and not in conclusory terms." N.Y. Exec. Law 259-i(2)(A); *see Mitchell v. N.Y. Div. of Parole*, 871 N.Y.S.2d 688 (2d Dep't 2009).

Due to changes in New York law made in 2011, the Parole Board must now evaluate "whether an inmate is rehabilitated and ready for release." *Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 995 N.Y.S.2d 490, 493 (Sup. Ct. Sullivan Cty. 2014); *Menard v. N.Y. State Bd. of Parole*, No. 159376-17 (Sup. Ct. N.Y. Cty. 2019); *see* N.Y. Exec. Law § 259-c(4). By enacting these amendments to the Executive Law, the legislature directed the Board to base its release determinations on a forward-looking paradigm, rather than a backward-looking approach that focuses on the severity of the crime. *See Platten v N.Y. State Bd. of Parole,* 47 Misc 3d 1059, 1062 (Sup Ct. Sullivan Cty. 2015). Thus, the Board may not deny parole based solely on the seriousness of the offense. *See Rossakis v N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016); *Ramirez v Evans*, 118 A.D.3d 707 (2d Dep't 2014); *Gelsomino v N.Y. State Bd. of Parole*, 82 A.D.3d 1097, 1098 (2d Dep't 2011).

In 2017, the Board adopted significant regulations that now govern the Parole Release Decision-Making process. 9 N.Y.C.R.R. § 8002.2. These changes strengthened the Board's focus on rehabiliation efforts and reinforced that its decisions must "be guided by risk and needs principles, including the inmate's risk and needs scores." *Id.* During the parole interview, the Board is required to discuss "each applicable factor in section 8002.2 of this Part, excluding confidential information." 9 N.Y.C.R.R. § 8002.1. Significantly, if a denial does not conform to the Risk and Needs Assesment Scores, the Board must "*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).

In the Notice of Adoption announcing the final regulations, the Board responded to public comments received in response to earlier proposed regulations and explained how it would apply risk and needs assessments, such as the COMPAS:

> The new regulation is also intended to increase transparency in the Board's decision making by providing an explanation *when the Board departs from any scale in denying an inmate release*. . . .
>
> In response to concerns regarding the meaning of "departs from" scores on a periodically-validated risk assessment instrument, *the Board has clarified that it will specify any scale within the assessment from which it departed that impacted its decision*.

Notice of Adoption, Parole Board decision making, 39 N.Y. Reg 1 (Sept. 27, 2017).

Decisions of the Parole Board denying an inmate release on parole may be appealed. An appeal may be brought to consider "whether the proceeding and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or was otherwise unlawful" N.Y.C.C.R.R. 9, § 8006.3(a).

A determination violates lawful procedure when: the Board fails to provide the inmate with a proper hearing in which only the relevant guidelines are considered, *King v. N.Y. State Div. of Parole*, 632 N.E.2d 1277, 1278 (N.Y. 1994); the Board fails to give fair consideration to each of the applicable statutory factors, *Johnson v. N.Y. State Div. of Parole*, 884 N.Y.S.2d 545, 547 (4th Dep't 2009); and when the Board does not inform the inmate of the factors and reasons for denial in detail and in non-conclusory terms, *Mitchell v. N.Y. State Div. of Parole*, 871 N.Y.S.2d 688 (2d Dep't 2009).

Courts have found determinations to be arbitrary and capricious when: the Board did not adequately weigh other statutory factors against the seriousness of an inmate's crime, *see e.g.*

Rios, *supra*; and where the Board failed to articulate a rational basis why weighing the factors led it to find "there is a reasonable probability that if petitioner is released, he would live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law," *Thwaites, supra* at 802 (citing N.Y. Exec. L. § 259-i(2)(c)).

ARGUMENT

I. THE BOARD'S RELEASE DETERMINATION WAS NOT GUIDED BY FUTURE-LOOKING RISK AND NEEDS PRINCIPLES, AS NEW YORK LAW REQUIRES.

The Board's decision was driven by a punitive, backward-looking fixation with the crime that [redacted] committed 23 years ago, rather than focusing on the person she has become in the decades since and the objectively low risk she poses today. That approach violated New York law.

The rules governing parole release determinations have fundamentally changed since the Legislature amended the Executive Law in 2011. *Supra* at 11-12; *see Clark* v. *N.Y. State Bd. Of Parole,* No. 160965/2017, 2018 WL 1988851, at *6 (Sup. Ct. N.Y. Cty. Apr, 27, 2018) ("The legislative intent behind the Executive Law is to base parole board determinations on a forward-looking paradigm, rather than a backward- looking approach that focuses on the severity of the crime."), *aff'd as modified on other grounds*, 166 A.D.3d 531 (1st Dep't 2018); *Platten*, *supra* at 1062 (Sup. Ct. Sullivan Cty. 2015) ("The changes were intended to shift the focus of parole boards away from focusing on the severity or heinous nature of the instant office, to a forward-thinking paradigm to evaluate whether an inmate is rehabilitated and ready for release."); *Bruetsch v. N.Y. State Dep't of Corr, & Cmty. Supervision,* 43 Misc. 3d 1223(A), at *2 (Sup. Ct. Sullivan Cty. 2014) (same).

With the adoption of the 2017 amendments to the Regulations, the Board finally and formally recognized that paradigm shift. Today, there is no colorable argument that a release determination directed at the circumstances that led to a person's incarceration rather than that person's present risk complies with the law. *See* 9 NYCRR § 8002.2(a) (stating that release determinations *"shall be guided by risk and needs principles")* (emphasis added); *see also* Ex. 4, *Diaz* v. *Sanford,* Index No. 2017/53088, Decision & Order, at 8-9 (Sup. Ct. Dutchess Cty. Apr. 4, 2018) (describing rehabilitation as the only factor an individual can change and the importance of risk assessments under the 2017 Regulations).

In the case of [redacted] the Board's focus was plainly misdirected. The Board denied her parole based almost exclusively on conduct from over two decades ago. *See supra*, pp. 6-8. The Board's near singular focus on the underlying offense has always been legally improper. *Rossakis*, *supra* at 27; *Rios v. N.Y. State Div. of Parole*, *supra*. But it is in particular conflict with the risk and needs based approach that is the *"fundamental basis* for release decisions" today. N.Y. State Assembly Comm. on Corr., *2016 Annual Report* 3 (Dec. 15, 2015) (emphasis added), https://nyassembly.gov/co1mn/Correct/2016Annual/index.pdf; *see* N.Y. Exec. L. § 259-c(4); N.Y. Exec. L. § 259-i(2)(a) (release determinations must be "made in accordance with" the risk and needs based procedures adopted pursuant to § 259-c(4)); 9 NYCRR § 8002.2(a). As such, the Board's decision cannot stand.

II. THE PANEL'S DECISION WAS ARBITRARY AND CAPRICIOUS AND VIOLATED LAWFUL PROCEDURE BECAUSE IT GAVE IMPERMISSIBLE WEIGHT TO THE SERIOUSNESS OF THE CRIME AND DID NOT CONSIDER REQUIRED STATUTORY FACTORS.

The Board must give meaningful consideration to each relevant factor in its parole determinations. The seriousness of the underlying crime, while relevant, cannot be the only

reason for denying release, as the Board must actually consider statutory factors encompassing an inmate's institutional record and achievements, release plan, and criminal record.

Considering relevant statutory factors requires more than a mere reference to them. *Cappiello v. N.Y. State Bd. of Parole*, 6 Misc.3d 1010(A) (Sup. Ct. N.Y. Cty. 2004) (granting *de novo* hearing where decision listed details of the offense and concluded that release could pose a threat to public safety). In *Cappiello*, eight of ten transcript pages of parole interview transcript were dedicated to details of a murder that occurred more than two decades before the interview. Similarly, the panel here devoted twenty of twenty-four pages of the transcript to sharp questions about the crime (Tr. 2-12; 16-24).

"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." *Id.*; *see also Pulinario v. N.Y. State Dep't of Corr. & Cmty Supervision*, 42 Misc. 3d 1232(A) (Sup. Ct. N.Y. Cty. 2014) ("[T]he Parole Board's overwhelming emphasis was on the offense…At the hearing, there were only passing references to the contents of petitioner's application. In the decision there was only a perfunctory mention of all the statutory factors that weighed in [applicant's] favor."); *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc. 3d 661 (Sup. Ct. Bronx Cty 2006) ("[A]ctual consideration of factors means more than acknowledging that evidence of them was before the Board"); *V. Sullivan v. N.Y. State Bd of Parole*, Index No. 100865/18 (Sup.Ct. N.Y. Cty. 2019) ("There is no explanation why the 25 year old crime outweighed the voluminous evidence that indicates petitioner would presently be able to lead a quiet and crime-free life in society").[24]

[24] A copy of the decision is attached as Ex. 5.

A. The Board impermissibly placed excessive weight on the serious nature of the crime in denying release.

In deciding whether parole is appropriate, the Board must confine its decision-making to the three statutorily acceptable standards listed in Exec. Law § 259-i(2)(c)(A). *Cappiello*, 800 N.Y.S.2d 343 at *4. [redacted] September 2019 decision, the Board summarily denied release. The decision focused almost entirely on the crime. The sole focus of the explanation confirms that the Board deemed the question of whether her release would "so deprecate the seriousness of h[er] crime as to undermine respect for law" to be the only relevant inquiry. § 259-i(2)(c)(A); Tr. at 13-14. The Board's decision failed to address why [redacted] should not be released today other than to state that unspecified "continued opposition by the community indicates your release would not be compatible with the welfare of society." (Tr. 27.)

Although the Board may consider the seriousness of the offense in deciding whether to grant an inmate release, it cannot be the sole basis for a denial. The Board must consider all relevant factors. *Rabenbauer v. N.Y. State DOCCS*, 995 N.Y.S.2d 490 (Sup. Ct. Sullivan Cty 2014); *King*, *supra* at 246 (holding that Board could not deny release to petitioner, who had served 22 years for felony murder of a police officer, solely based on the facts of his crime); *see also Huntley v. Evans*, 910 N.Y.S.2d 112, 113-114 (2d Dep't 2010) (granting new hearing where Board only cited the seriousness of inmate's murder in the second degree of his ex-girlfriend's brother-in-law by shooting him twice in the chest, concluding "where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstances, it acts irrationally").

The Board acts irrationally when it focuses exclusively on the seriousness of conviction and the decedent's family's victim impact statements "without giving genuine consideration to [the applicant's] remorse, institutional achievements, release plan, and her lack of any prior

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violent criminal history." *Rossakis v. N.Y. State Bd of Parole*, 146 A.D.3d 22, 27 (1st Dept 2016).

In denying [redacted] parole, the Board unlawfully relied exclusively on the seriousness of her crime to irrationally conclude:

> The continued opposition by the community indicates your release would not be compatible with the welfare of society. Further, your release would trivialize the tragic loss of a toddler's life and the years of harm to the community and would therefore deprecate the serious nature [of] this crime as to undermine respect for the law.

(Tr. 27.) In arriving at this conclusion, the Board entirely ignored [redacted] consistent and repeated acceptance of responsibility, as evidenced by answers to every question about the offense during four parole interviews and the letters she wrote both to the Board and to [redacted] parents, through the Apology Bank.[25] The facts of the crime will not, and [redacted] can do nothing to make them, change.

Instead of considering the statutory factors, the panel repeatedly characterized the seriousness of the crime by relying on the jury verdict and statements made at sentencing to justify its decision to deny release. The decision followed the pattern established by the panel during the interview. Neither commissioner asked [redacted] any meaningful questions about her "institutional record, program goals and accomplishments, academic achievements,[26] vocational education, training or work assignments, or therapy and interactions with staff and inmates" as the statute requires. Had they done so, they would have learned of [redacted] remarkable accomplishments, including her academic

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[25] Commissioner [redacted] oddly asked why [redacted] had written the apology letter (Tr. 11). This process is governed by DOCCS Directive 0510 and provides a mechanism for incarcerated individuals to communicate accountability, genuine remorse and acknowledge the pain caused by their criminal actions.
[26] Commissioner [redacted] did ascertain that [redacted] had a high school diploma when she entered prison and noted that she has earned a B.A. in Sociology. He asked one question about why she thought that was important and later asked why she had provided letters from professors. (Tr. 13, 14.)

achievements, and her impressive transformation from the person who committed that tragic crime to the person who sat before them.

As explained in her parole packet, has become a mentor to struggling classmates and a leader among her peers. She has been repeatedly singled out for leadership positions, serving as a program aide and administrative clerk, among other positions.[27] In the words of the former Administrative Assistant to Bedford's college program, "positive attitude made her one of the staff members to whom the inmates could go with confidence, knowing all questions and concerns would be received without judgement."[28]

While the seriousness of the crime is undoubtedly a relevant factor, it cannot be the sole consideration. This is particularly true in cases like , where the relevance of the crime is outweighed by the many other applicable factors favoring release. When, as here, the Board single-mindedly considers the seriousness of the crime, "there is a strong indication that the denial of petitioner's application was a foregone conclusion." *King*, 598 N.Y.S.2d at 250-251.

B. The Board failed to meaningfully consider the other required statutory factors, all of which weigh in favor of release on parole.

As delineated in Exec. Law § 259-i(2)(c)(A), the Board is required to consider a number of statutory factors in deciding whether to grant release. As applied to these include an inmate's institutional record, program accomplishments, academic achievements, vocational and work experiences, therapy and interactions with staff and inmates, and release plans. After the legislature amended §259-c in 2011, the Board must also consider an inmate's COMPAS Risk Assessment. 9 NYCRR 8002.2.

[27] *See* Parole Packet Exhibit 6, Employment and Disciplinary History, at 2, 5-8.
[28] *See* Parole Packet Exhibit 68, Letter from to the Board of Parole dated April 20, 2019, at 1.

[redacted] provided the Board with an extensive packet that provided documented evidence that all these factors weigh strongly in her favor. Not only has she excelled in her own studies, she has become a role model for others and has contributed to the community in numerous different capacities. *See supra*, at 4-7. Her institutional record is replete with program goals and accomplishments.

Having arrived in prison with only a high school diploma, [redacted] quickly identified education as a primary goal. She has met and exceeded every benchmark she set, earning a B.A. in Sociology and graduating at the top of her class. But she has not stopped. A former Superintendent at Bedford Hills Correctional Facility, her professors and college administrators have all written of her passion and academic achievements.

[redacted] has also developed other skills, and has pursued vocational as well as academic education. As editor of *The Insider*, she learned how to construct and lay out a publication. She has worked as an administrative clerk in the school, in the Children's Center, and in Chaplain Services. She has also been an IPA, and has worked in various state shops, including as an industries worker, at the sign shop and the metal painting shop. She has trained for each of these assignments.

Therapy has been another central focus of her rehabilitation. She has engaged in intensive guided reflection in order to understand the dynamics that led her to commit her crime. Through programs such as Alternatives to Violence ("AVP"), she has learned how to think critically about her actions. As a result, she has developed skills and techniques that help her to identify and exercise positive choices. As described by AVP Facilitator Margaret Lechner, she has now become a "leader and played a key role in the first AVP workshop at Taconic CF in more than 10 years." Ex. 6. Another letter available to the commissioners documented [redacted] earlier

work at Albion Correctional Facility with the Osborne Association's Longtermers Responsibility Project. Executive Vice President Susan Gottesfeld wrote of [redacted] "deep desire to engage in this very difficult work and a strong commitment to fully understanding her behavior, her responsibility and the impact of her crime." Ex. 7. She has had consistently positive interactions with staff and inmates. For example, the Board had a Commendable Behavior Report dated May 3, 2019 from a School Teacher noted [redacted] "exemplary behavior" and "strong sense of responsibility." (Ex. 8.)

Information gathered at Taconic Correctional Facility in July, 2019 and made available to the commissioners also documents the breadth and depth of [redacted] rehabilitation.[29] The Board's disregard of the statutory factors, particularly in light of the wealth of information presented to the Board that supported [redacted] fitness for release under these criteria, demonstrates that its decision lacked a rational basis.

Although "parole is not to be granted merely as a reward for petitioner's positive conduct and rehabilitative achievements while incarcerated, these factors are to be considered." *Coaxum v. N.Y. State Bd. of Parole*, 827 N.Y.S.2d 489, 492 (Sup. Ct. 2006) (holding that Board abused its discretion by giving no weight to factors other than the heinous nature of crime, i.e. murder in the second degree and robbery in the first degree). Most importantly, mere "passing mention" of an inmate's accomplishments or institutional record cannot remedy or disguise an otherwise arbitrary denial that is based solely on the severity of the crime. *Morris v. N.Y. State Dept. of Corrections and Community Supervision*, 963 N.Y.S.2d 852, 855 (finding that Board's denial was arbitrary and capricious despite its "conclusory statement" that required factors had been considered where it only actually took into account petitioner's crime of fraud). "Actual

[29] For example, Taconic printed eight pages of Program Assignments that document a wide array of employment, training and education placements.

consideration" of required statutory factors "means more than just acknowledging that evidence of them was before the Board." *Coaxum*, 827 N.Y.S.2d at 492.

After stating the bare facts of the crime, the panel decision summarily stated that it had considered:

> your rehabilitation, including your completion of all recommended programs, your IPA training and your work as an administrative clerk and clean disciplinary record. We have reviewed your case plan and your risk and needs assessment which indicates your overall low risk and needs.

It then stated that it had "considered your extensive packet that was put together with Morningside Heights Legal Services" and, without identifying any of its contents but simply noting "your personal growth and productive use of time after 24 years in prison," stated that "discretionary release shall not be granted merely as a reward for good conduct of efficient performance of duties." (Tr. 26.) The Board did not fulfill its statutory obligation with this perfunctory characterization of [redacted] remarkable and transformative rehabilitation, as documented by her extensive parole packet.

C. The Board improperly relied on purported community opposition that it failed to identify or disclose to [redacted]

The Board has taken the position that it is entitled to rely on letters in opposition to a parole application and has admitted that its refusal to provide an applicant with access to any of those letters in connection with her administrative appeal is improper. *Clark v. N.Y. State Bd of Parole*, 166 A.D.3d 531 (1st Dep't 2018). However, here, the panel relied on "community opposition" to justify its decision that releasing [redacted] would not be compatible with the welfare of society and would deprecate the seriousness of the underlying crime as to undermine respect for the law (Tr. 26) and did not produce or identify the nature of that opposition. If the Board had no evidence of such opposition,

its decision was arbitrary and capricious. If it had such evidence and improperly refused to provide [redacted] access to it, the Board violated her right to due process of law.

When "the Parole Board expressly relie[s] on the opposition to justify its departure from petitioner's low COMPAS scores and support its finding that petitioner's release at this time would not be compatible with the welfare of society, [a] Court cannot presume that the Board acted properly in accordance with the statutory requirements without the complete administrative record, which includes the opposition." *Garofolo v. N.Y. State. Bd. of Parole*, Index No. 900093/19, pp. 5-6 (Sup.Ct. Albany Cty., July 8, 2019)(ordering *de novo* parole release hearing and review before a panel of the Board consisting of members who were not involved with challenged interview or prior interviews of petitioner), attached as Ex. 9.

Moreover, although the term "community opposition" appears in many Board decisions and interview transcripts, the Legislature did not include it in the list of specific factors to be considered in making a parole release decision, such as the views of a crime victim. Exec. Law § 259-i(2)(c)(A). The Board is required to consider views of the "crime victim" or the "victim's representative," but only when the victim is "deceased or is mentally or physically unable." Exec. Law § 259-i(2)(c)(A)(2)(5). The legislature also narrowly defined a "victim's representative" as "the crime victim's closest surviving relative, the committee or guardian of such person, or the legal representative of any such person." The term "community" or "community opposition" does not appear in the statutory list, thereby creating an irrefutable inference that it was intentionally excluded. *Mayfield v. Evans*, 93 A.D.3d 98, 106 (1st Dep't 2012) ("An enumerated list warrants an irrefutable inference that omitted items were intentionally excluded.").

In any event, the Board appears to have extended a much broader interpretation to the phrase "community opposition" than the Legislature accorded to crime victims—those most directly affected by the conduct.[30] For example, documents characterized as "community opposition" and reviewed in the context of a contempt proceeding included "several out of state letters and 46 letters with 'identical "boilerplate" opposition language.'" *Ruzas v. N.Y. State Bd of Parole, et al*,. Index No. 1456/2016 (Sup. Ct. Dutchess Cty. 2017) (ordering *de novo* hearing and ordering Commissioners who conducted that hearing not to utilize, review, or consider any submissions by third parties not specified in Executive Law § 259-i).

The Board should grant [redacted] request for a *de novo* interview and provide any evidence of community opposition in advance of that interview.

III. THE PANEL FAILED TO PROVIDE INDIVIDUALIZED REASONS FOR ITS DECISION, AS EXECUTIVE LAW AND GOVERNING REGULATIONS REQUIRE

A. The Panel Failed to Provide Individualized Reasons for Its Decision as the Executive Law Requires.

Where the Board denies parole, the "[r]easons for the denial . . . shall be given in detail, and shall, in factually detailed 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." § 8002.3(b); *see also* Exec. Law. § 259.i(2)(a). Where a panel merely lists an applicant's selected achievements without explaining why they do not justify granting parole, that decision violates the Executive Law and the Regulations.

[30] DOCCS provides a fillable electronic form that allows anyone who resides in any of the 50 states to file an opposition to an applicant's release. *See* https://doccs.ny.gov/office-victim-assistance#letters-in-opposition-or-support-of-release.

Here, the Board essentially parrots the language of the Executive Law, adding only selected details of the crime on which it based its decision. That is insufficient. *See Rossakis*, 149 A.D.3d at 28; *Evans v. Ramirez*, 118 A.D.3d 701 (2d Dep't 2014); *Platten v. N.Y. State Bd of Parole*, 47 Misc. 3d 1059 (Sup. Ct. Sullivan Cty. 2015) (vacating and remanding decision where decision lacked specificity beyond reciting facts of the crime and "reads more or less like the decision from Petitioner's previous parole denials"); *Stokes v. Stanford*, 43 Misc. 3d 1231(A) (Sup. Ct. Albany Cty. 2014) (vacating and remanding parole denial where the Board merely "parrots the applicable statutory language [and] does not even attempt to explain the disconnect between its conclusion and petitioner's rehabilitation efforts and his low risk scores").

B. The Panel Violated Its Own Regulations When it Failed to Explain Its Departure from [redacted]'s Perfect COMPAS Scores.

The Regulations describe the detailed explanation that the Executive Law requires. They command: "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 NYCRR § 8002.2(a)(emphasis added); *see also*, *Comfort*, Index No. 1145/2018 (Sup. Ct. Dutchess Cty. Dec. 21, 2018).

During [redacted] parole interview, after reciting the details of the underlying offense for 15 pages of the transcript, Commissioner [redacted] tersely mentioned her excellent COMPAS Risk Assessment:

> I have your COMPAS risk assessment. We do use the COMPAS as a tool to see what your needs might be out in the community if you were released. Your scores are all low. I'm [sic] not having any needs out in the community, so that's a positive document.

In addition to assessing needs following release, the COMPAS assesses risk of reoffending. Neither commissioner asked a single question about that assessment or ever mentioned that was assessed to pose the *lowest possible risk of recidivism*.

In its decision, the panel acknowledged that it was departing from the COMPAS but did not explain "how the applicable parole decision-making principles and factors listed in 8002.2 were considered in]'s case," as § 8002.3(b) requires. Instead, it relied on historical descriptions of the crime:

> The panel departs from the low COMPAS risk scores, as the jury's verdict and judge's comment point to the vulnerability of the young victim who was punched and stomped resulting in severing his small intestine. The fact that you never disclosed your actions or sought medical attention was cruel and heartless.

(Tr. 27.) This purported explanation does not, as the regulations require, "specify any scale within the Department Risk and Needs Assessment from which [the Board] departed and provide an individualized reason for such departure." Rather, the Board merely reiterated facts of the offense that provided and has been confronted with repeatedly for 24 years. These cryptic references do not elucidate the panel's evaluation, flout the "forward looking" paradigm of the 2011 statutory amendments and leave without any guidance about how she might improve her chances of parole.

This cursory and conclusory decision to deny release, where the Board had before it an analysis conducted by its own Department concluding that there *was not* a reasonable probability that she would reoffend, is inherently arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the determination of the Parole Board to deny release must be vacated, [redacted] must be granted a *de novo* interview before different commissioners, and any community opposition material that was available to the Board must be provided to her in advance of that interview.

Respectfully submitted,

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