February 2022

Art. 78 Petition - FUSL000095 (2020-05-26)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
----------x
In the Matter of the Application of

[redacted]

Petitioner

-against-

ARTICLE 78 PETITION

[redacted]

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

Respondents

For Judgement Pursuant to Article 78 of The Civil Practice Law and Rules
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PRELIMINARY STATEMENT

[redacted] is currently serving a sentence of 25 to Life for second degree murder; he has appeared before the Board of Parole on 5 occasions and has accordingly been behind bars for more than 31 years. [redacted] COMPAS scores, achievements while incarcerated, and family and community support indicate that he presents the lowest possible risk of violence or recidivism. His record of rehabilitation, demonstrated remorse, and carefully organized plan for release are such that the Kings County District Attorney submitted an extraordinary letter to the Parole Board on August 12, 2019, affirmatively supporting [redacted] release to supervision and arguing that to further incarcerate him would serve no discernible purpose. And yet, at [redacted] last appearance, he was denied parole, for another 18 months.

[redacted] filed a timely administrative appeal on November 13, 2019; on April 1, 2020, the Appeals Unit affirmed the Board's decision. *See* Exhibit 1. Though 5 pages in length, the decision of the Appeals Unit recites a great deal of law, but bears only **two sentences** applying the relevant law to the facts of [redacted] parole hearing and decision, erroneously concluding that the Board did not depart from COMPAS because of a single "medium" score in [redacted] COMPAS assessment and utterly failing to respond to [redacted] argument that the Board failed to consider the District Attorney's letter advocating for his release. The

decision of the Appeals Unit must be reversed, and a *de novo* hearing conducted.

VENUE

Under C.P.L.R § 506(b), venue is proper where the Commissioners were located during the parole interview and original decision, to wit, 20 Manchester Road, Poughkeepsie, New York, located in Dutchess County. *See* Ex. 2.

FACTUAL AND PROCEDURAL HISTORY

On June 5, 1990, Mr. [redacted] was sentenced to 25 to Life, after being acquitted by a jury of intentional murder and convicted of felony murder, for the gas station robbery-turned-killing of one [redacted] a taxi driver. [redacted] was, at the time, a cocaine addict; the attempted robbery was motivated by his need for money to fuel his addiction and was made possible by his prior purchase of a shotgun.

He has appeared before the Board on five separate occasions. [redacted] fifth appearance took place before Commissioners Coppola, Smith[1] and Demosthenes, on August 14, 2019. The following

[1] Over the course of [redacted] five appearances, including the one relevant here, he has appeared before Commissioner Coppola **three** times – in 2013, 2017, and 2019. Commissioner Coppola has a reputation for routinely denying parole to individuals with exceptional records of rehabilitation because of the nature of their crimes. Given [redacted] tremendous record of remorse, rehabilitation, sobriety, and community and family support, and given [redacted] four denials that turned almost exclusively upon his pre-prison conduct, it is clear that [redacted] will never be released should he continue to appear before Commissioners—Coppola.

materials were submitted to the Board in support of [redacted] release:

- A submission by King's County District Attorney Eric Gonzalez, affirmatively supporting [redacted] release given the purposelessness of future incarceration in light of [redacted] record of rehabilitation, Exhibit 3
- [redacted] statement of remorse, Exhibit 4
- [redacted] letter to the family of the deceased, Exhibit 3
- Dozens of commendable behavior reports and inmate progress reports, Exhibit 4
- [redacted] release plan, whereby he would live with his stepbrother in New York City, register with the Fortune Society, work for Chef David Coleman at a restaurant, seek training in the culinary arts, and maintain his sobriety, Exhibit 4
- A formal job offer from Chef David Coleman, Exhibit 4
- Letters of support from [redacted] brother, nieces, cousin and friends, Exhibit 4

The Board denied release, stating that "your release to supervision is incompatible with the public safety and welfare", citing [redacted] "record of unlawful conduct, including your instant offense" and his history of prison misconduct. The decision noted positive factors including his document submissions, case plan, program accomplishments and low COMPAS scores, and "noted" the District Attorney's submission. The decision concluded: "to grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law." Exhibit 2 at 18-19.

Relevant portions of the hearing before and decision by Commissioners Coppola, Smith and Demosthenes are excerpted below.[2]

[2] All references to [redacted] hearing transcript will be cited as Exhibit 2 followed by the page number.

Commissioner Demosthenes dissented from the decision to deny release, though without written opinion.

On November 11, 2019, [redacted] filed an administrative appeal challenging the Board's denial on two primary bases:

1) That the Board violated the Executive Law when it departed from [redacted] low COMPAS scores when it found that [redacted] release was incompatible with the public safety and welfare and would undermine respect for the law without the requisite individualized reasons; and,

2) That the Board failed to consider the recommendation of the District Attorney and evinced a profound misunderstanding of the statements of the sentencing court.

[redacted] specifically argued that the fact of the instant offense, his criminal history, and his history of prison misconduct **did not** constitute individualized reasons for departing from COMPAS.

On April 1, 2020, the Appeals Unit issued their decision, affirming the Board's denial. The overwhelming majority of the decision was composed of the following boilerplate statements of law:

1) That discretionary release is not to be granted as a reward for good conduct;

2) That the Board need not give all factors equal weight;

3) That the Board may place greater weight on criminal history than on other factors;

4) That the Board may consider negative aspects of a COMPAS instrument;

5) That the Board may consider an individual's history of prison misconduct without illegally resentencing an individual[3];

6) That the Board need not recite the precise language of the Executive Law in order to render a rational decision;

7) That the Board may place greater weight on the nature of the crime without any aggravating factors;

8) That the District Attorney's recommendation is but one factor for the Board to consider;

9) That in the absence of a demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty; and,

10) That COMPAS is an additional consideration that the Board must weigh along with other factors.

Exhibit 1. The Appeals Unit made only two applications of the law to the facts of [redacted] hearing. First, the Board found that [redacted] grew "agitated" during the hearing, which fell within the Board's purview for consideration, and second, the Appeals Unit stated that "the decision did not depart from the COMPAS, as appellant received a medium grade in the criminal involvement category. So, the Board was relying upon the COMPAS." *Id.*

[redacted] comes now, arguing that the decision of the Appeals Unit was fundamentally arbitrary and irrational, and must be reversed and a *de novo* hearing conducted.

[3] Importantly, [redacted] **never** argued that the Board had illegally resentenced him based upon a Tier III ticket; instead, [redacted] argued that the Tier III ticket did not constitute an "individualized reason" justifying departure from COMPAS.

STANDARD OF REVIEW

Parole release decisions are discretionary and will not be disturbed as long as the Board of Parole complied with statutory requirements. N.Y. Executive Law § 259-i. Discretionary release to parole supervision is not to be granted as a reward for good behavior while in prison; rather, the Board of Parole must consider whether there is a reasonable probability that, if such inmate is released, he or she will live and remain at liberty without violating the law, and that his or her release is not incompatible with the welfare of society and will not so deprecate the seriousness of his or her crime as to undermine respect for law. N.Y. Executive Law § 259-i(2)(c)(A). The Court of Appeals has long interpreted the language—in both current and prior statutes—to mean that "so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts". *Matter of Hines v. State Bd. of Parole,* 293 N.Y. 254, 257 (1944).

In a proceeding pursuant to Article 78 challenging a determination by the state Board of Parole, the Supreme Court, Appellate Division, is limited to considering whether the Board's determination to revoke parole is supported by substantial evidence. McKinney's CPLR 7801 et seq. In *all* CPLR Article 78 proceedings to review determinations that are not made after a quasi-judicial hearing mandated by law, including this one, "the

proper standard for judicial review ... is whether the Board's determination was arbitrary and capricious or an abuse of discretion." *Matter of Beck–Nichols v. Bianco,* 20 N.Y.3d 540, 559 (2013).

Whether the Parole Board considered the proper factors and followed the proper guidelines are questions that should be assessed based on the "written determination ... evaluated *in the context of the parole hearing transcript.*" *Fraser v. Evans*, 109 A.D.3d 913, 914–15, 971 N.Y.S.2d 332, 333 (2013) (*emphasis in original*) (internal citations omitted).

ARGUMENT

I. The decision of the appeals unit must be reversed because of the erroneous, arbitrary, irrational, and unsupported conclusion that the Board did not depart from COMPAS because the Board relied upon [redacted] one and only elevated COMPAS score to deny his release.

As demonstrated *herein*, [redacted] argued, in his administrative appeal, that the Board both departed from COMPAS **and** failed to provide the requisite reasons. The Appeals Unit, found, however, that

> … the Board decision did not depart from the COMPAS, as appellant received a medium grade in the criminal involvement category. So, the Board was relying upon the COMPAS.
>
> [Exhibit 1 at 5.]

The argument that because the Board relied upon [redacted] criminal involvement score – his only elevated score out of 12

COMPAS categories — that they did not depart from COMPAS is fundamentally irrational and must be reversed. Even a cursory examination of COMPAS and its various categories indicates why.

The 12 categories contained within COMPAS can be generally grouped into two buckets: those that are backward looking and descriptive, and those that are forward looking and predictive. **Criminal Involvement, History of Violence and Prison Misconduct** are the three that fall into the former camp, describing immutable aspects of a parole applicant's historical record; **Risk of Felony Violence, Arrest Risk, Abscond Risk, Re-Entry Substance Abuse, ReEntry Financial, ReEntry Employment Expectations, Negative Social Cognitions, Optimism and Family Support** most notably fall into the latter, seeking to offer some insight into the inmate's suitability for future release.

[redacted] [redacted] COMPAS Risk and Needs Assessment ("the Assessment") prepared on August 2, 2019, indicates "Low" or "Unlikely" scores for 11 of the 12 COMPAS categories:

> Risk of Felony Violence — 1 — Low
> Arrest Risk — 1 — Low
> Abscond Risk — 1 — Low
> Criminal Involvement — 6 — Medium
> History of Violence — 3 — Low
> Prison Misconduct — 5 — Low
> ReEntry Substance Abuse — 2 — Unlikely
> Negative Social Cognitions — 1 — Unlikely
> Low Self-Efficacy/Optimism — 1 — Unlikely
> Low Family Support — 1 — Unlikely
> ReEntry Financial — 1 — Unlikely
> ReEntry Employment Expectations — 1 — Unlikely
>
> [Exhibit 5]

Fundamentally, as to both to risks — of violence, arrest, and absconding — and their sources — financial scarcity, lack of family support and employment, substance abuse and destructive self-image — the Assessment thus assigned the lowest possible scores to [redacted] His only elevated score was a "medium." And yet, the Board was clear in their decision that "release to supervision is incompatible with the public safety and welfare", Exhibit 2 at 18.

The Board's conclusion that [redacted] poses some future risk to others is a **forward-looking** determination, and one that the Appeals Unit deemed to be in accordance with COMPAS because of [redacted] medium criminal involvement score. But this simply cannot be said to be true. The Board, in determining that [redacted] posed some **future risk**, ignored the **9 predictive categories, all of which indicate that [redacted] presents no risk**, and relied upon one, backward looking, descriptive metric which [redacted] **can do absolutely nothing to change** — his score in the **Criminal Involvement** category. *See infra* at II c.

The Board's decision is the definition of arbitrary and cannot be said to be in accordance with [redacted] COMPAS, but instead, a gross and irrational departure from it. For their specious, unsupported, and erroneous conclusion that the Board's decision did not constitute a departure from COMPAS because of their reliance upon a single cherry-picked category (not to mention one

he can do nothing to change), the decision of the Appeals Unit should be reversed.

II. [redacted] must be given a *de novo* hearing because the Board violated the Executive Law when they rendered a decision based upon gross departures from [redacted] COMPAS without providing the requisite individualized justifications.

The decision of the Appeals Unit is utterly unresponsive to [redacted] argument that instead of offering individualized reasons for their departure from [redacted] COMPAS, as is required by law, the Board improperly, irrationally and arbitrarily fixated upon three immutable aspects of [redacted] past: the instant offense, his criminal history, and his history of prison misconduct.

Indeed, the Board, in their decision, placed "significant weight" on [redacted] record of unlawful conduct, specifically the "instant offenses where [he] committed a gunpoint planned robbery and shot and killed a cab driver", Exhibit 2 at 18-19. The Board stated: "you failed to be deterred from committing those offenses despite prior sanctions to local jail. Your inability or unwillingness to fully comply with the law is an aggravating factor against your release". *Id.* To be clear, the Board did not cite any lack of remorse or acceptance of responsibility upon [redacted] part for either the instant offense or his criminal history, nor did the Board derive from [redacted] history of criminal involvement some future risk posed by him; instead, their decision

turned merely upon the interlocking *fact* of [redacted] instant offense having been committed after being convicted of six prior misdemeanors.

The Board also specifically noted [redacted] "marginal behavior" as "troubling", characterized his failure to accrue a ticket since April 2014 as only "improvement", highlighted his "agitation" when confronted with tickets he incurred prior to doing intervention work with at-risk youth, and concluded with a prescription that he "use this time to maintain clean disciplinary record to better demonstrate [his] ability to live crime free." Exhibit 2 at 18-19.

Ultimately, however, none of the Board's three 'reasons' for departing from [redacted] COMPAS scores pass muster; they are not 'reasons' that explain the findings that [redacted] release would present some risk to others or to the rule of law, but instead, empty conclusions drawn from immutable facts.

a. The Board may not depart from an individual's COMPAS scores without identifying the particular scale from which they are departing and offering an individualized reason for such a departure.

The Regulations governing the Board of Parole were revised in 2017 to require "individualized reasons" for departing from an individual's COMPAS scores:

> (a) Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs 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 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.**
>
> [N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2 **(emphasis added)**]

Failure to do so will constitute error warranting reversal and a *de novo* hearing. In *Robinson v. Stanford*, No. 2392-2018 at *2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019), Supreme Court ordered a *de novo* interview for man with two murder convictions and low COMPAS scores because "the Parole Board's finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores in his COMPAS assessment." The court in *Robinson* continued,

> *[a]s the Board's determination denying release departed from these risks and needs assessment scores, pursuant to 9 N.Y. C.R.R. § 8002.2 it was required to articulate with specificity the particular scale in any needs and assessment from which it was departing and provide an individualized reason for such departure.* The Board's conclusory statement that it considered statutory factors, including petitioner's risk to the community, rehabilitation efforts and need for successful community re-entry in finding that discretionary release would not be compatible with the welfare of society fails to meet this standard. As such, its determination denying parole release was effected by an error of law."
>
> [*Id.* at *2 (*emphasis added*).]

See also, Comfort v. Stanford, 2018/1445 (Sup. Ct. Dutchess Cty., 2018) (finding the Board did not comply with 8002.2(a) by failing

to explain its departure from the lowest possible COMPAS risk score of felony violence, arrest and absconding yet concluding that where was a reasonable probability the petitioner would not live and remain at liberty without violating the law); *Friedgood v. New York State Bd. of Parole*, 22 A.D.3d 950, 951 (3d. Dep't 2005) (absence of record support for its conclusion that petitioner is likely to reoffend cumulatively render the Board's decision "so irrational under the circumstances as to border on impropriety").

b. The facts of the instant offense do not constitute an "individualized reason" justifying the Board's departure from [redacted] COMPAS scores.

At [redacted] hearing, Commissioner Smith asked [redacted] to summarize the circumstances surrounding the instant offense. [redacted] described hiding a gun across the street before unsuccessfully attempting to rob someone at a gas station, going to get the gun ("the worst decision of my life"), thinking that all he was going to do was brandish the gun and ending up pulling the trigger and killing the deceased. Exhibit 2 at 13-14. [redacted] further described running away from the scene and lying to a police officer who stopped him. *Id.* at 14. He repeatedly expressed awareness that if he had not made the decision to bring the gun, the deceased would still be alive. *Id.*

Commissioner Coppola then inquired of [redacted] "Did you ever give any thought to when you weren't successful just to give

up, don't go get the gun?" *Id.* at 14. [redacted] answered in the negative, reiterating that he had hoped to only brandish it. *Id.* at 15. Commissioner Coppola then continued: "It's unfortunate for everybody that you did not just do what a lot of people do when their robbery attempt is foiled. They just take off and that's it. You actually went back. Unfortunately, this guy was just fighting for his property, money he earned to support his family." *Id.* at 15.

[redacted] did not disagree with anything Commissioner Coppola was saying, instead emphasizing his written statement of remorse in which he agreed and admitted responsibility for taking money he did not earn. *Id.* When given an opportunity at the conclusion of the hearing to add anything, [redacted] made, as he has at every prior hearing, a heartfelt extended, statement of remorse, comparing the loss of his parents, grandmother, sister, and nephew during his incarceration to the loss he caused to the deceased's family; expressing awareness that his rehabilitation does not detract from the harm he has caused; describing the efforts he has put into formulating a release plan with enough built-in community support to help him cope with the struggles of readjusting to life after prison. Exhibit 2 at 16.

Fundamentally, at [redacted] hearing, there was no aspect of the instant offense for which he did not take responsibility or express deep and heartfelt remorse. He did not deny, as the Board

reiterates over and over again at his hearing, and again in their decision, that he "committed a gunpoint planned robbery and shot and killed a cab driver." Exhibit 2 at 19. He expressed tremendous insight into why and how he committed the crime, evincing a commitment to avoiding re-creating those circumstances so that he may never harm another individual. Failure to accept responsibility for, or express remorse for, or demonstrate insight into the instant offense would, of course, provide legitimate, individualized reasons for departing from otherwise positive COMPAS scores. But here, there was no such evidence, of any kind. The Board's reliance upon the instant offense in light of [redacted] COMPAS scores, was, thus, error requiring reversal and a *de novo* hearing.[4]

c. [redacted] criminal involvement score does not constitute an "individualized" reason justifying the Board's departure from [redacted] COMPAS scores.

[4] Importantly, the First, Second, and Fourth Departments have held that the Board must consider all statutory requirements and cannot base the decision to deny solely on the nature of the crime. *See King v. New York State Div. of Parole,* 190 A.D.2d 423, 433 (1st Dep't 1993), *aff'd* 83 N.Y.2d 788 (1994) ("…the legislature has determined that a murder conviction *per se* should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself.); *Rossakis v. New York State Bd. Of Parole*, 146 A.D. 3d 22, 27 (1st Dep't 2016) (Holding the Board acted irrationality in focusing exclusively on the seriousness of petitioner's conviction and the decedent's family victim impact statements…without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and her lack of any prior criminal history.); *V. Sullivan v. NYS Bd of Parole*, 2018-100865 (Sup. Ct., NY Cty., 2019) (finding Board relied almost exclusively on the seriousness of the crime and statements petitioner made at time of sentence); *Huntley v. Evans*, 77 A.D.3d 945 (2d Dep't 2011) ("Where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally."); *Johnson v. New York State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dep't 2009).

Though relied upon by both the Board and the Appeals Unit, [redacted] Criminal Involvement score does not constitute an individualized reason for departing from COMPAS.

The Board's original decision highlighted [redacted] "record of unlawful conduct", finding that he "failed to be deterred from committing [the instant offense] despite prior sanctions to local jail." HT at 18. They continued that "[his] inability or unwillingness to fully comply with the law is an aggravating factor against [his] release." HT at 16. The Appeals Unit found that because the Board considered [redacted] medium score in the Criminal Involvement category, that they considered COMPAS. Exhibit 1 at 5.

It is true that 'despite' being previously convicted of six petty misdemeanors, and being sentenced, in some of those occasions, to jail, that [redacted] still committed the instant offense. [redacted] himself attributes his lack of specific deterrence in 1990 to his cocaine addiction, and his wrongheaded decision to both purchase and carry a gun. But fundamentally, where [redacted] COMPAS assigns, in the present time, the **lowest possible** scores to his risk of future arrest, absconding, or violence, as well as the **lowest possible** scores to the kinds of instabilities or vulnerabilities that make one pre-disposed to crime — self-image, family and financial support, substance abuse, etc. — after 29 years of incarceration, reliance upon [redacted]

record *prior* to the instant offense cannot be said to constitute an "individualized reason" for departing from his otherwise laudatory COMAPS.

COMPAS itself indicates why an individual's criminal history cannot provide helpful guidance as to future risk. A look-back at [redacted] trajectory of COMPAS scores in the criminal involvement category indicate that once an individual arrives in prison with a particular criminal history and having committed the instant offense, their scores will *never change.* [redacted] COMPAS trajectory as to criminal involvement is as follows:

5/22/2015 – 6 ("Medium")
3/30/2016 – 6 ("Medium")
7/25/2017 – 6 ("Medium")
8/2/2019 – 6 ("Medium")

It indicates a fixedness that follows from the unchanging and unchangeable nature of one's criminal record – of [redacted] having committed six petty misdemeanors and the instant offense.[5] Ultimately, [redacted] can do nothing to lower these numbers. He cannot go back in time and alter his pre-prison history of addiction and petty crime nor can he change the fundamental truth of his having committed the instant offense. He himself remorsefully admits this, at every single Board appearance; his

[5] The argument that his history of violence score is predicated in part, upon [redacted] history of prison misconduct (and that prison misconduct *is* within his control) is unavailable; while his prison misconduct score has fluctuated as he has received various tickets, discussed *infra,* his history of violence score has remained unchanged in more than six years, reflecting its exclusive relationship to his history of misdemeanors and the instant offense.

COMPAS scores for criminal involvement reflect this. As such, the Board's repeated reliance upon his criminal history to deny him release is fundamentally arbitrary and irrational and cannot be said to constitute an individualized reason for departing from COMPAS.

d. [redacted] history of prison misconduct does not constitute an "individualized reason" justifying the Board's departure from [redacted] COMPAS scores.

[redacted] 2019 COMPAS scores included a score of 5, deemed "low" for prison misconduct. Exhibit 5. For the Board to emphasize repeatedly his "marginal conduct" and prescribe that he "maintain a clean record" prior to his next Board appearance thus represented a departure from [redacted] "low" 2019 COMPAS prison misconduct score, and one that they cannot adequately justify.

First and foremost, [redacted] COMPAS score for prison misconduct was deemed "low", taking into account his historic pattern of Tier II and Tier III tickets. The Board thus appears, in discussions during the hearing, to have conducted their own *qualitative* analysis of [redacted] history of prison misconduct in lieu of COMPAS' *quantitative* analysis. At the hearing, the Board first fixated upon [redacted] April 2014 Tier III ticket – the ticket specifically cited in their decision, and his last infraction prior to his August 2019 hearing. Commissioner Smith asked [redacted] about the underlying facts, to which [redacted] responded: "That was totally my fault, I got involved in a debate

that turned into an argument and next thing you know I was fighting." Exhibit 2 at 8.

A copy of the relevant ticket is included here, and indicates that the incident was a simple fistfight, involving no weapons, and one that [redacted] ceased to participate in *the moment he was instructed to stop.* Exhibit 7 ("I gave him a direct order to break, and he complied without further incident.").

Commissioner Smith then asked [redacted] about three Tier III violations, dated August 2007 (12 years prior to the hearing), June 1991 (28 years prior to the hearing), and October 1990 (29 years prior to the hearing). Exhibit 2 at 9. [redacted] proceeded to explain his history of prison misconduct as follows:

> The weapons and the fighting, that was earlier in my incarceration. And yes, I believe at that time I was angry and lashing out at anything that confronted me. So I would have to agree with you, yes, at that time I was angry.
>
> [Exhibit 2 at 9.]

[redacted] did not deny responsibility for his past; instead, he agreed with Commissioner Smith that he has historically struggled with managing his temper, particularly when he was first received into DOCCS custody in 1990. He continued to explain his efforts to address his underlying substance abuse problems and his need for rehabilitation, specifically around the acceptance of responsibility for the instant offense. *Id.* at 10. In this vein, [redacted] highlighted the Alternative Value program, where he was

able to meet with other people who committed violent crimes but were able to turn their lives around, and the Delinquents Intervention Program, where he was able to attempt to intervene in the lives of at-risk young people. *Id.* at 11. That [redacted] had participated in the latter program in 2004, 2005, and 2006, then became the subject of a detailed discussion. Commissioner Smith stated:

> The difficulty is if I look at those years, after that you assaulted staff and had urinalysis[6] Tier III's, violent conduct, so I mean you might be a great presenter but you didn't get a chance to tell the students about what you were gonna do in the future, which was negative, right?
>
> [Exhibit 2 at 11.]

Commissioner Smith appeared to be insinuating that [redacted] participation in the youth intervention program – a program from which he had derived tremendous meaning – was disingenuous given his subsequent prison misconduct. [redacted] responded with a clear and calm articulation regarding a fact of all recovery – the inevitability of ***setbacks***. *Id.* ("I mean, I definitely talk about the negative stuff, I was able to talk about *the setbacks.*" (***emphasis added***). He did not reject the Commissioners assertions,

[6] [redacted] explained this June 2013 Tier III ticket at his first appearance – the ticket arose from [redacted] shy bladder; his inability to provide a urine sample while supervised. Setting aside the fact that this ticket was more than six years old when it was dredged up by Commissioner Smith, the underlying facts demonstrate no intransigence, violence, or impulse control problems on [redacted] part, and should never have been made the basis of any prejudice against [redacted]

instead incorporating them into a larger (and more realistic) narrative of his rehabilitation over time.

Accordingly, [redacted] then explained that at every program in which he has participated he tries to discuss his setbacks and his failings, admitting that he had not been perfect since his early 2000's participation with young people. Without responding directly, Commissioner Smith continued to emphasize *the fact* of [redacted] having committed infractions after engaging in a youth intervention program. *Id.* at 12. This discussion would provide the basis for the Board's determination in their decision that [redacted] demonstrated "agitation" when confronted with his record of prison misconduct; no agitation, however, is apparent on the face of the record. All that is clear is that [redacted] was attempting to respond to an inference Commissioner Smith was drawing from his timeline of programming and prison misconduct, with a realistic confession as to his susceptibility to stumble. Exhibit 2 at 18-19.

It is undeniable that over the course of [redacted] incarceration, he has incurred numerous Tier II and Tier III tickets. [redacted] Prison Misconduct COMPAS score has fluctuated accordingly:

5/14/2013 – 5 ("Low")
5/22/2015 – 10 ("High")
3/30/2016 – 10 ("High")
7/25/2017 – 8 ("High")
8/2/2019 – 5 ("Low")

[*See* Exhibits 5, 6]

To identify tickets close in time to Board hearings is, accordingly, appropriate. Indeed, at [redacted] first appearance subsequent to his April 5, 2014 Tier III ticket (when his COMPAS score jumped from 5 to 10), the Board made note of it both during the hearing and in their decision. But the Board, at the subsequent April 26, 2016 *de novo* hearing and August 17, 2017 reappearance, made no note of [redacted] 2014 Tier III, recognizing that [redacted] had had no disciplinary infractions since his last appearance.

But when [redacted] has gone *five years* without incurring a single infraction, restoring his COMPAS prison misconduct score to 5 ("Low"), the Board's renewed focus on [redacted] five-year-old Tier III infraction at his August 14, 2019 re-appearance is fundamentally without basis and represents an unexplained and unexplainable departure from [redacted] Risk Assessment. *See Rivera v. Stanford*, 172 A.D.3d 872, 874 (2d. Dep't 2019) (internal citations omitted) (finding that the Parole Board's determination that petitioner's release was not compatible with the welfare of society based upon his disciplinary record while imprisoned is without support in the record…The Parole Board determination stated that "[o]f significant concern is [the petitioner's] poor behavior during this term." Yet, from the time of the petitioner's 2014 appearance before the Parole Board until the time of his 2016

appearance before the Parole Board, the petitioner had *no* disciplinary infractions. Moreover, the petitioner's only disciplinary infractions since 2011 related to failing to report an assault upon him; having excess stamps, cigarettes, and prescribed medication in his cell; and possessing contact information of a prison employee, who was his fiancé at the time of his 2016 application.). Here, more significantly than *Rivera,* [redacted] last disciplinary infraction was three Parole Board appearances, or five years, prior, to his hearing.

Ultimately, the Board's decision evinces irrationality bordering on impropriety, in light of [redacted] universally low COMPAS scores regarding **everything that is within his power to change, and everything that indicates his future risk to others:** his risk of felony violence, re-arrest, absconding and prison misconduct, his relationships, personality, family, self-image, and future employment and financial prospects. *See, e.g, Matter of Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 673 (2d. Dep't 2018) (reversing denial of Art. 78 petition because the "petitioner…was assessed "low" for all risk factors on his COMPAS risk assessment. Thus, a review of the record demonstrates that in light of all the factors, *notwithstanding the seriousness of the underlying offense*, the Parole Board's 'determination to deny the petitioner release on parole evinced irrationality bordering on impropriety.'") (*emphasis added*).

Nothing the Board cited as arguable bases for these departures actually constitute individualized reasons, and as such, each and every departure constituted arbitrary and capricious error warning reversal and a new hearing. That the Board also disregarded the District Attorney's recommendation and misunderstood the sentencing court's statements further underscores the need for a *de novo* hearing.

III. The Board evinced a profound misunderstanding of the statements of the sentencing court and a total disregard for the recommendation of the District Attorney in violation of the Executive Law.

N.Y. Exec. Law § 259-i (McKinney) states, in relevant part,

> In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall *require* that the following be considered…
>
> (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 pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement
>
> [(*emphases added*).]

In this vein, Kings County District Attorney Eric Gonzalez wrote a letter for [redacted] parole packet explicitly supporting his release to parole supervision. Exhibit 3. DA Gonzalez did so because of [redacted] COMPAS score, his "honest and forthcoming" demeanor during a meeting with a representative ADA, and his "complete and credible narrative of his journey from a hopeless

young inmate full of denial and self-loathing into a changed, compassionate man committed to positive thinking and acts of service." *Id.* The Board was *required* to *consider* this extraordinary recommendation — instead, however, they failed to mention the letter during [redacted] hearing and merely noted the existence of these "comments" in their decision. Exhibit 2 at 18 ("We also note comments from the Kings County District Attorney…."). The Appeals Unit's conclusion that the Board "considered" the DA's submission is utterly without support in the record; all that is in the record is that they noted its existence.

Failure to give more than lip service to the DA's submission, in and of itself, constituted error. Electing to consider, instead, at great length, the imposition by the sentencing court of a 25 to Life sentence, was further error. The relevant exchange is excerpted in full here.

> Q: Your areas where the scores rise some include history of violence, which makes sense if we review your criminal history. Your criminal involvement is a medium, even higher, where it's starting to give the volume itself, as well as prison misconduct which for you is a score of five, basically right in the middle of the one to 10. The reality is we look at the facts and I think there were like approximately eight Tier III's, nine Tier II's, the most recently Tier III was in 2014 so a little bit more than five years ago. ***When you have a 25 to life sentence there's some concept you ought to have 25 good years and then you get to leave because that's the minimum, right?***
>
> A: Yeah.
>
> Q: ***That's what they call it, the minimum. The maximum is life, so if you're misbehaving and breaking rules and***

> ***not programming, doing whatever negative, then you work towards life. So why have 15 plus violations, which half of those are serious Tier III's, why the struggles?***
>
> A: A lot of the struggles came were in the beginning of my incarceration when I was still not following rules or regulations, I didn't care, didn't think I would be able to make it towards this 25 years, so that was the reason why I was lashing out and I still didn't come to grips with what I had done where I was able to start rehabilitating. That was one of the reasons I was catching these misbehavior reports early on in my incarceration.
>
> ***Q: Again, that's why we have the minimum and the maximum. We want you to come in and be — there's nothing that Commissioner Smith or Coppola or Demosthenes can say that's got more power than when the judge imposed a life sentence. Judge Starky doing that, that's more profound than anything we can say. You did have a violent conduct back in 2014, that's your most recent Tier III violation, fighting, creating a disturbance and violent conduct, what happened in that matter?***
>
> [Exhibit 2 at 7-8 (***emphasis added***).]

Commissioner Smith thus intertwined a theory where one "work[s] towards life" from a minimum of 25 years with a quantitative analysis of [redacted] history of Tier II and Tier III tickets *specifically because of the sentencing judge's decision to impose a sentence of 25 to Life*. Exhibit 2 at 15 ("there's nothing that Commissioner Smith or Coppola or Demosthenes can say that's got more power than when the judge imposed a life sentence. Judge Starky doing that, that's more profound than anything we can say."). Ultimately, Commissioner Smith appears to have engaged in an analysis whereby [redacted] tickets added some — albeit unknown — period of time to his minimum of 25 years, at some

unknown time, after some unknown aggregate of tickets (and perhaps other failings), arriving at a Life sentence — a consequence specifically contemplated by the sentencing judge, according to Commissioner Smith.

Commissioner Smith appears not to know that for second degree murder in the state of New York, **the only authorized sentence end in the words "to Life."** Penal Law § 70.00(3)(a)(i)(1). Undisputedly, Judge Starkey had no option but to impose a sentence that contemplates the *possibility* of life imprisonment. And as such, the sentence did not have specific significance in the case of [redacted] Of course, the decision by Judge Starkey to impose a full 25 year minimum (when anything from 15 to 25 was statutorily authorized) was a recommendation for the Board to consider. Similarly, Judge Starkey could have made a recommendation, at sentencing or before the Parole Board, as to [redacted] fitness or lack thereof for parole supervision. The words "to Life", however, were categorically **not** a "recommendation" warranting the Board's consideration.[7]

The implications of Commissioner Smith's understanding of the sentencing court's recommendations are devastating, and draconian:

[7] Fundamentally, the presence of the words "to Life" are irrelevant to the Parole Board's duties and obligations. The Parole Board has a duty to conduct meaningful review as to whether a particular individual is fit for release, and if not, to revisit that question within two years. Put another way, the Board only has the authority to add another two years to an individual's period of incarceration. They do not and cannot elect, at any time, to impose or not impose a "life sentence."

they invite a world whereby an infraction adds time to an individual's sentence, but without any competing consideration; without any recognition, that, commensurately, rehabilitation, remorse, and release planning *detract* from a sentence. DA Gonzalez specifically wrote his letter to avoid this outcome — this perversion of the parole system:

> *My position is that justice includes mercy and the possibility of redemption, and that our parole system should be a meaningful one that focuses not only on the circumstances of the crime itself, forever unchangeable, but on the individual seeking parole today and the efforts he or she has undertaken since the crime to reflect, grow, contribute, and atone.*

And yet, the Board elected to ignore his specific guidance — a guidance specifically contemplated by statute — and hit [redacted] with another 18 months based upon an erroneous understanding of the sentencing court.

CONCLUSION

Thirty-one years ago, [redacted] attempted to rob a taxi driver at a gas station, and when he failed, killed that very taxi driver and fled the scene. Not a day goes by where [redacted] does not feel remorse for the life he callously and pointlessly took; not a day goes by where he does not try to be a better man. To continue to deny [redacted] his freedom is to render meaningless recent changes to parole in New York State — to disregard new regulations that require the Board to judge an inmate less by the crime they committed and more by the person they have become since.

In the District Attorney's own words, "justice is not served" by keeping in prison a person like [redacted]. [redacted]; "a longer period of incarceration…would be excessive." The Board of Parole's most recent denial of [redacted]. [redacted]'s release must be reversed, and a *de novo* hearing held.

Respectfully submitted,

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EXHIBIT LIST

Exhibit 1	April 1, 2020 Decision of the Parole Board Appeals Unit Affirming the Board's Denial
Exhibit 2	Transcript of August 14, 2019 Parole Hearing and Decision
Exhibit 3	Submission of King's County District Attorney Eric Gonzalez supporting [redacted] release
Exhibit 4	[redacted] Parole Prep Submission
Exhibit 5	COMPAS Risk and Needs Assessment, August 2, 2019
Exhibit 6	Prior COMPAS Risk and Needs Assessments, dated May 14, 2013, May 22, 2015, March 30, 2016, July 25, 2017, August 2, 2019
Exhibit 7	April 2014 Tier III ticket