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APPEALS UNIT
Board of Parole

January 5, 2020

New York State Board of Parole Appeals Unit
Harriman State Campus
Building #2
1220 Washington Avenue
Albany, NY 12226

Re: Administrative Appeal on behalf of [REDACTED]
Re-appearance 10/9/2019, Denied 10/22/2019

To Whom it May Concern,

Mr. [REDACTED] is currently 69 years old and in his 49th year of incarceration, for murdering two on-duty police officers in 1971. Mr. [REDACTED] became parole eligible in 2002 and has appeared before the Board thirteen times. Mr. [REDACTED] COMPAS scores, achievements while incarcerated, and family and community support indicate that he presents the lowest possible risk of violence or recidivism. He has never engaged in violent prison misconduct of any kind, has only tickets for minor infractions, and has not had a ticket in several years. He has, through programming, therapy, and education, garnered tremendous insight into his youth and the social, political, familial and psychological underpinnings to his having joined the Black Liberation Army and participated in the heinous taking of life that constitutes the instant offense. He wants, more than anything, to enjoy whatever time he has left with his mother, siblings, children and grandchildren and, if possible, contribute to constructive police-community relations. Fundamentally, everything that Mr. [REDACTED] could do to demonstrate rehabilitation, remorse, and the potential for successful release, he has done.

The Board's latest hearing and decision indicate that Mr. [REDACTED] is being denied parole not because of any founded determination that he poses a risk to others or that he lacks insight into or remorse regarding the damage he caused. Instead, the Board repeatedly, improperly, and impermissibly contorts both the law and the record to support their pre-determined conclusion that because Mr. [REDACTED] murdered two police officers, he should die in prison.

Instead of offering individualized reasons for departing from Mr. [REDACTED]'s universally positive COMPAS scores, or identifying aggravating circumstances that warrant further

incarceration, the Board improperly and erroneously weighed COMPAS criteria against each other, and improperly and erroneously used factors from outside COMPAS to do so. Without basis in the record, the Board contorted Mr. [REDACTED]'s expressions of remorse and demonstrations of insight into his crime into a finding that he was without remorse and inappropriately righteous. Instead of considering Mr. [REDACTED]'s widespread community support, the urgent request by one of the victim's family members that Mr. [REDACTED] be released, or the type and length of his sentence, the Board improperly relied upon the impersonal deluge of community opposition; instead of taking into consideration all that he has done to grow and change, they fixate upon that which is immutable. The Board's most recent decision should thus be reversed, and a *de novo* hearing conducted.

FACTUAL AND PROCEDURAL BACKGROUND

A. September 2019 Split Decision

On September 10, 2019, Mr. [REDACTED] appeared before Commissioners Drake and Davis. He had appeared before Commissioner Drake at his appearance immediately prior, on December 11, 2018, when Commissioner Drake had voted to deny him parole and impose a fifteen-month hold. ST¹ at 3 (Commissioner Shapiro dissenting). The September hearing yielded a split decision (leading to the inference that Commissioner Drake had changed his position and come to support Mr. [REDACTED]'s release), and as such, Mr. [REDACTED] re-appeared before Commissioners Agostini, Davis, and Corley on October 9, 2019.

B. October Denial

On October 22, 2019, the Board issued their thirteenth denial of parole, with a one-year hold. The Board did so after a more than four-hour long hearing. The Board wrote that "release at this time remains incompatible with the welfare and safety of society and would **still** so deprecate your offense as to undermine respect for the law." (**emphasis added**). The decision went on to extensively recite the facts of the instant offense. Then, the decision recognized that Mr. [REDACTED] now acknowledges his role in the instant offense. "However," the decision reads, "your criminal engagements in California are extensive and also includes crimes against law enforcement. You have demonstrated a continuation of negative behaviors that began during adolescence and escalated quickly thereafter." Noting Mr. [REDACTED]'s age, "adverse challenges" he endured during his formative years, and low COMPAS scores, the decision nonetheless departed from COMPAS

because you come across as still believing in the righteousness of your crime and because your remorse lacks the depth that is necessary to give your low risk of re-offending the necessary weight to overcome the remaining standards that this panel finds you still fall short of.

¹ ST denotes the transcript of the September appearance that yielded a split decision. HT denotes the hearing transcript of the October 2019 re-appearance. Because the October re-appearance lasted more than four hours, it is not summarized here; instead, citations to relevant portions are made throughout the Argument.

The decision went on to note Mr. [REDACTED]'s "appropriate case plan", achievements while incarcerated, and widespread community support. However, the Board then noted receipt of "many or more letters in opposition", which have been considered as well.

The decision then stated that Mr. [REDACTED]'s criminal history concerned them, and that while he appeared to have "gained insight into the factors that contributed to [his] feelings, thoughts, and behaviors that fueled [his] reaction to [his] environment and subsequent negative behaviors", not received misbehavior reports, and achieving a great deal while incarcerated, that discretionary release "shall not be granted merely as a reward for good conduct or efficient performance of duties while confined." The decision wrote in conclusion, that release is "not appropriate", and "release at this time would so deprecate the seriousness of the offense as to undermine respect for the law."

STANDARD OF REVIEW

Decisions of the Board of Parole are discretionary and will upheld so long as the Board complied with the statutory requirements. Executive Law § 259-i. Upon Article 78 petition, a Court will only annul a denial of parole when it is "arbitrary and capricious" and "irrational bordering on impropriety." *Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69 (1980). Case law dictates that the Parole Board's written decision is improper if it fails to explain the reasons for denial of parole "in detail and not in conclusory terms." N.Y. Exec. Law. 259-i(2)(a); *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). Though it need not discuss each factor in detail, a written decision "may not summarily itemize a petitioner's achievements while incarcerated or render a conclusory decision parroting the statutory standard." *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc.3d 661 (Sup. Ct. Bronx Cty. 2006).

ARGUMENT

- I. **The Board erred when, instead of independently considering COMPAS, remorse, insight into the crime, and the instant offense as is required by law, it applied an arbitrary, improper, and opaque weighted scheme.**

Though the Board noted the existence various factors—community opposition, criminal history, the facts of the instant offense—and offered stock language as to Mr. [REDACTED]'s release not being "compatible" with the welfare of safety and society and the "deprecation" his release would constitute as to undermine respect for the law, they offered little, in their multi-page decision, in the way of specific justification for their decision to deny parole. And what was offered specifically manifested a failure to properly apply the correct legal standard. The Board wrote that they had decided to depart from [Mr. [REDACTED]'s universally laudatory] COMPAS:

because you come across as still believing in the righteousness of your crime and because your remorse lacks the depth that is necessary to give your low risk of re-offending the necessary weight to overcome the remaining standards that this panel finds you still fall short of.

As a preliminary matter, the Board was clear, both during the hearing and in their decision, that Mr. [REDACTED]'s COMPAS scores were universally "low" and "unlikely", and in every category. HT at 76-82. There is not a single instance, in the record, of the Board identifying a single COMPAS criterion which indicated that Mr. [REDACTED] presents any risk to others or to himself. As such, there simply exist no "standards" that he "still fall[s] short of." The Board's reference to any such standards or shortcomings was thus irrational, improper, arbitrary and capricious. *See Lewis v. Travis*, 9 A.D.3d 800 (3d Dep't 2004) ("Board incorrectly referred to petitioner's conviction as murder in the first degree, when, in fact, petitioner was convicted of murder in the second degree. *Inasmuch as the Board relied on incorrect information in denying petitioner's request for parole release, the judgment must be reversed, and a new hearing granted.*").

Moreover, as argued *herein*, the Board's 'weighing' so-called shortfalls against Mr. [REDACTED]'s low risk of re-offending, *and* that the assigned weight to his risk of re-offending was informed in part by Mr. [REDACTED]'s righteousness and remorse constituted an arbitrary, improper, and unauthorized legal standard. Review of relevant regulations, statutes and common law is clear that the Board was a) required to consider Mr. [REDACTED]'s COMPAS and both identify any category from which they wished to depart *and* individualized reasons justifying the departure, b) authorized to consider remorse and insight into the crime as *generally* relevant to evaluating Mr. [REDACTED]'s rehabilitation, and c) only entitled to rely upon the instant offense to deny parole inasmuch as there remained aggravating circumstances warranting further incarceration. For failure to apply this correct legal standard and relying instead upon an arbitrary and random weighted scheme, the Board's decision should be reversed, and a *de novo* hearing conducted.

- a. **The correct legal standard required the Board to consider COMPAS and justify any departures from it, authorized them to consider remorse and insight into the crime, and limited reliance upon the instant offense to any aggravating circumstances warranting further incarceration.**

The Parole Board is governed by New York's Executive Law. Executive Law § 259-i(2)(C)(A), begins:

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined by after 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 the law.

§ 259-i(2)(C)(A) then lists the factors the Parole Board *must* consider when deciding whether to release someone to parole supervision.

The factors are achievements while incarcerated, temporary work release, post-release plans, immigration issues, victim statements, the type and length of sentence, the seriousness of the offense and criminal history. *Id.* Within the seriousness of the offense, the Board is authorized to consider any aggravating circumstances warranting further incarceration. *In re King v. N.Y. State Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994) ("[C]ertainly

every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, 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"). While the Board need not give equal weight to each factor, there is no legal mandate that the Board give specific weight to any particular factor or that they be weighed against each other in any specific fashion.

Guided by the Executive Law, the Parole Board has promulgated a host of regulations that have the force of law. In 2011, the regulations were amended to read: "in making a release determination, the Board shall be guided by risk and needs principles." 9 N.Y.C.R.R. § 8002.2. Accordingly, the Board must, at the very least, review and consider the COMPAS results in order to fulfill the statutory requirements of "measur[ing] the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist[ing] members of the state board of parole in determining which inmates may be released to parole supervision." *Diaz v. New York State Bd. of Parole*, 42 Misc. 3d 532, 536 (Sup. Ct., Cayuga Cty., 2013) (citing Executive Law § 259-c(4)). In 2017, the Board went further, enacting 8 NYCRR § 8002.2(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 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 offer individualized reasons for departing from COMPAS will constitute error warranting reversal and a *de novo* hearing. *Robinson v. Stanford*, No. 2392-2018 at *2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) ("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 [the requirement of an individualized reason.>"). *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 there 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").

While the Board may consider remorse and insight into one's crime, despite the absence of statutory authorization, *Silmon v. Travis*, 95 N.Y.2d 470 (2000), when the interview transcript, as here, indicates that Mr. [REDACTED] repeatedly articulated and demonstrated remorse, the Board cannot base their decision to deny on lack of remorse. *Wallman v. Travis*, 18 A.D.3d 304 (1st Dep't 2005) ("[T]he Board's perfunctory discussion of petitioner's alleged lack of insight is

contrary to the Court of Appeals' decisions...which held that a petitioner's remorse and insight into his crimes are highly relevant in evaluating an inmate's rehabilitative progress...Despite the critical significance of these factors in evaluating an inmate...the Board's decision in this case offers no supportive facts justifying its finding of lack of insight and remorse...[Thus] the court's conclusions regarding lack of insight and remorse were based on an inaccurate reading of the record."); *Winchell v. Evans*, 27 Misc. 3d 1232(A) (Sup. Ct. Sullivan Cnty, 2010) (Board's denial, which was based on the petitioner failing to show remorse for the victim or her family and not appearing to understand the seriousness of his crime was contradicted by the record).

The Board was thus required to consider COMPAS, in and of itself, and to offer individualized reasons for departing from it. If they wanted to depart from Mr. [REDACTED]'s low COMPAS score for risk of re-offending, based upon insufficient remorse or righteousness or other so-called "standards", they needed to explain the causal connection. If they deemed COMPAS scores in some categories to be more important than Mr. [REDACTED]'s low score for risk of re-offending, they needed to identify the categories and explain why. Additionally, if they wanted to consider the *general* relevance of remorse and righteousness to Mr. [REDACTED]'s rehabilitation, the Board was authorized make specific findings based upon the record. And thirdly, if they intended to identify aggravating circumstances related to the instant offense that would warrant further incarceration, they were required to identify them and explain their reasoning. *See In re Guzman v. Dennison*, 32 A.D.3d 798 (1st Dep't 2016) (finding that the fact of petitioner being on parole when he committed the crime was an aggravating factor); *see also Phillips v. Dennison*, 41 A.D.3d 17, 22 (1st Dep't 2007) ("petitioner's crimes went well beyond the unjustifiable taking and tragic loss of human life that describes every murder...he corruptly embarked on a pattern of extortion..."); *Platten v. N.Y. State Bd. of Parole*, 47 Misc. 3d 1059 (Sup. Ct. Sullivan Cnty. 2015) (describing the petitioner's crime as "heinous" yet still holding that denial of parole was arbitrary and capricious because the Board's decision did not explain why release would be inconsistent with the welfare of society or deprecate the seriousness of the offense.").

b. The Board categorically did not apply the correct legal standard, imposing instead a random, opaque and unauthorized system of weights.

The Board stated, in their decision, that Mr. [REDACTED]'s remorse and attitude towards his crime were insufficient to give his COMPAS risk of re-offending sufficient weight to *overcome* remaining standards in which he fell short. To be clear, they reasoned that factors *outside* COMPAS—remorse and attitude—were relevant to a category *within* COMPAS—risk of re-offending—as weighed against other, unspecified "standards" in which Mr. [REDACTED] fell short. As already argued and as demonstrated by his universally low and unlikely COMPAS scores, there were no such "standards" in which Mr. [REDACTED] was deficient. Additionally, the analysis employed by the Board is categorically *not* that which is authorized by the Executive Law and accompanying regulations and common law decisions. Perfunctory conclusions that Mr. [REDACTED] lacked remorse or expressed righteousness and that, in doing so, failed to adequately bolster one COMPAS score weighed against other unspecified "standards" was not authorized by law. Moreover, the Board's own conclusion was contradicted both by his universally low and unlikely COMPAS scores that indicate his fitness for release, and their decision that Mr. [REDACTED] had "gained insight into the factors that contributed" to the instant offense, which the panel applauded. Dec. at 4. For failure

to correctly apply the operative legal standards, the Board's decision should be reversed, and a *de novo* hearing conducted.

II. The Board's arbitrary, improper and opaque weighted scheme incorporated a finding that is utterly belied by the record: that Mr. [REDACTED] lacked remorse and expressed righteousness as to his crime.

As already argued *supra* at I, the Board employed a patently incorrect legal standard when they deemed Mr. [REDACTED] unfit for release. That incorrect legal standard also incorporated a factual finding that is utterly belied by the record — that Mr. [REDACTED] expressed inadequate remorse and inappropriate righteousness. This erroneous factual determination itself warrants reversal and a *de novo* hearing. *See Rivera v. Stanford*, 2019 WL 2030503, at *2 (2d Dep't 2019) (Board's finding that release was not compatible with the welfare of society based upon prison disciplinary record was without support in the record); *Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 673 (2d Dep't 2018) (“Contrary to the Parole Board's determination that the petitioner ‘distance[d]’ himself from the crime, the record demonstrates that the petitioner took full responsibility for his actions...”).

Mr. [REDACTED] repeatedly referred to his crime in intensely negative terms. *See, e.g.*, HT at 41 (describing the crime as “horrible”); *see also*, HT at 61 (describing the taking of life as “tragic”). He unambiguously disavowed the militant ideology that led him to commit such a heinous act. HT at 94. He clearly considers police officers heroes and expresses profound desire to contribute to constructive community-police relations. HT at 96-97. He breaks down into tears when he tries to describe the damage that he had done. HT at 98.²

To whatever extent Mr. [REDACTED] described his own “righteousness”, he described it as a *historical* occurrence — a thing of the past — and one that was inextricably linked to the story of the crimes themselves. Indeed, for Mr. [REDACTED] to even attempt to take responsibility or express remorse for his crime without communicating his adolescent adoption of the “righteous” ideology of the Black Panther Party and the Black Liberation Army would be laughable to any parole commissioner; the ideology was part and parcel of his crime and no amount of revisionism or avoidance will ever change that.

As such, Mr. [REDACTED] repeatedly described his emergence as a militant as being the result of *his reaction* to his home life *and* the goings-on in the civil rights and black power movements. *See* HT at 12 (describing his grief at the death of his uncle at the hands of the police); *see also*, HT at 14 (describing John Carlos and other black radical influences in his life); HT at 19-20 (describing becoming homeless as a teenager and finding belonging and purpose with high school friends who had joined the Black Panther Party); HT at 22 (describing his problem with authority as a result of

² Mr. [REDACTED]'s articulation of remorse was just as heartfelt at his original appearance at which Commissioner Davis was present in September 2019. There, he was open and honest that he needed therapy to process his early childhood trauma, ST at 3011, his articulation that the political and social context of the 1960's and 70's fed his predisposition to militancy, ST at 19-21, his deep regret at taking the lives of Officers [REDACTED] and [REDACTED], ST at 21, his gratitude for [REDACTED] for supporting his release, ST at 41, his commitment to avoiding being triggered both within and without prison, ST at 67-71, and his desire to contribute to positive community-police relations. ST at 79-92.

both his relationship with his stepfather and negative interactions with the police); HT at 32 (attributing his criminal activity to leaving home too early and needing to survive on the streets); HT at 34 (describing being tantalized by the regalia and militancy of the BPP); HT at 69 (describing the crime as a misguided attempt at retaliation and one where he was trying to prove himself to elders in the Black Liberation Army).

He did not attempt to lay blame at the feet of his parents *or* of law enforcement; he did not seek to excuse his behavior as either the result of trauma *or* history. Instead, he simply sought to communicate the intertwining influences of his adolescence and take responsibility for the horrendous action he took as a result. Mr. [REDACTED] was clear that he could not describe his ideology without describing the social and political conditions of the time, HT at 23-24, but in no way communicated an enduring righteousness about his historical beliefs and actions. At no point when discussing the details of the crime did he attempt to hide from or justify the fact that his intention, on the night of the murder, was to shoot to kill both Officers [REDACTED] and [REDACTED]. HT at 49.

Moreover, and perhaps most significantly, Mr. [REDACTED] was clear that he does not espouse these ideas today. To whatever extent he viewed the police in the 1970's as an occupying force, HT at 35, he now sees them as heroes. HT at 94. To whatever extent he thought that African American communities needed to defend themselves from the police, he now believes that that thinking was "bad", HT at 44, "and based on a lack of maturity and lack of understanding", HT at 61, and wants to contribute to constructive community-police relations. HT at 96-98 And to whatever extent he was ambivalent about taking the life of a member of law enforcement, he is now full of sorrow and remorse at the damage he has done. HT at 59, 89, 98, 99, 100.

His remorse and *historic* righteousness are clear on the face of the record. Had the Board properly considered all of the evidence of remorse and recognized that Mr. [REDACTED] expressed righteousness only inasmuch as it was necessary to take responsibility for his crime, there would have been no basis for a departure from his COMPAS scores, a finding that there existed any aggravating circumstance warranting further incarceration, or a determination that he was unfit for release to parole supervision. While an utterly unrepentant and persistently militant parole applicant might be one for whom a departure from COMPAS and/or determination that there existed an aggravating circumstances might be warranted, Mr. [REDACTED] is no such person. The Board's decision should be reversed, and a *de novo* hearing held.

III. The Board erred when it gave greater weight to qualitative and unauthorized criteria — so-called "community opposition" and cherry-picked facts from Mr. [REDACTED]'s criminal history — than quantitative and authorized criteria: the type and length of Mr. [REDACTED]'s sentence, Mr. [REDACTED]'s COMPAS scores, release plan, achievements while incarcerated, widespread community support, and the recommendation of one of his victims.

In two significant areas, the Board elected to rely upon qualitative criteria for which they lacked authorization, instead of focusing upon quantitative and authorized criteria plainly before them. Indeed, the Board, throughout their multi-page decision denying Mr. [REDACTED]'s release, referenced random, cherry-picked facts from his criminal history, but was utterly silent as to his "low" COMPAS scores for Criminal Involvement and History of Violence. Similarly, instead of

explicitly considering the type and length of his sentence, the recommendation of one of Mr. [REDACTED]'s victims — [REDACTED] — or Mr. [REDACTED]'s numerous accomplishments, the Board instead improperly relied upon the penal philosophy expressed in “community opposition”. As argued, *herein*, and *infra* at IV, the Board not only erred when they failed, again, to meaningfully consider factors required by statute, but when they revealed the pre-determined and pre-textual nature of their decision.

A. Criminal History and History of Violence

The Board’s decision should be reversed because of their failure to properly consider Mr. [REDACTED]'s COMPAS scores in the Criminal History and History of Violence categories, and elect to, instead, rely upon random references to related facts. Indeed, the Board noted, in their decision, Mr. [REDACTED]'s “criminal engagements in California” as “extensive and also include[ing] crimes against law enforcement.” They continued, that he “ha[d] demonstrated a continuation of negative behaviors that began during adolescence and escalated quickly thereafter” and went on to note his “course of conduct in targeting law enforcement officers across several jurisdictions” and “other criminal engagements and violent crimes.”

An individual’s Criminal Involvement and History of Violence are two COMPAS categories that consider, perhaps obviously, one’s criminal history and history of violence, and emit a numerical score that can then be deemed “low”, “medium” or “high”. Undoubtedly, COMPAS was developed and statutorily mandated to provide some consistency and regularity to the otherwise qualitative task of weighing numerous factors, over time. If the Board sought to depart from Mr. [REDACTED]'s “low” scores in these categories, they were statutorily obligated to explain their departure. If the Board sought to identify some aggravating circumstance or factor related to the instant offense, they were required to explain their intention as such. Otherwise, however, they were required to consider Mr. [REDACTED]'s quantitatively calculated “low” COMPAS score in the categories of Criminal History and History of Violence, and not random related qualitative cherry-picked facts.

B. Community Opposition and Penal Philosophy

In its decision the Board not only considered and relied on “significant community opposition” that conveyed purely penal philosophy, but they gave it greater weight than Mr. [REDACTED]'s accolades and achievements. The Board was clear in their decision that though the presence of an “appropriate case plan, achievements while incarcerated, and community support were noted, the “many or more letters in opposition” were of greater significance.

This was contrary to law. *King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (“There is evidence in the record that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy”); Exec. L. 259-i et seq. Pending the content, “opposition” letters received from “members of the community” may be considered by the Parole Board when making a parole decision. *See Clark v. New York State Bd. Of Parole*, 166 A.D.3d 531 (1st Dep’t., 2018) (“the Board permissibly considered letters in opposition to the parole application submitted by public

officials and members of the community”); *Matter of Applewhite v. New York State Bd. of Parole*, 167 A.D.3d 1380 (3d Dep’t 2018).

Here, the Board considered and relied upon “community opposition” that exclusively came from law enforcement organizations or was generated from law enforcement websites, which categorically advocated for life without parole for anyone who has killed a police officer (“Justice demands that he be made to spend every remaining day of his full sentence in prison”). All are from persons who appear to have no personal knowledge of Mr. [REDACTED].

This is precisely the sort of consideration and guidance the Court of Appeals found to be “outside the scope of the applicable statute.” *King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (“There is evidence in the record that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place.”). *King* deemed it inappropriate for a commissioner to be guided by his personal beliefs that killing a police officer deserved the death penalty or life without parole. *See King v. New York State Div. of Parole*, 190 A.D.2d 423 (1st Dept. 1993), *aff’d*, 83 N.Y.2d 788 (1994) (“The role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder...”). Similarly, the opposition material considered and relied on by the Board which espoused opinions calling for the death penalty and life without parole is not a “relevant guideline” to be considered by the Board. *Id.* (“[The Board] must provide the inmate with a proper hearing in which only the relevant guidelines are considered.”).

In addition, the opposition material relied on and cited in the Board’s decision advocated for the preclusion of anyone who was ‘involved’ in the ‘murder’ of a police officer from “any consideration for parole.” That penal philosophy should have been disregarded by the Board, but instead it was considered, relied on, and cited in the Board’s decision. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, 434 (1st Dep’t, 1993), *aff’d*, 83 N.Y.2d 788 (1994) (“For the Board to simply decide that any case which involves the death of a police officer, regardless of all of the other circumstances surrounding the crime, automatically necessitates the denial of parole is a breach of the obligation legislatively imposed upon it to render a qualitative judgment based upon a review of all the relevant factors.”).³

Significantly, the Board *was* required to consider the type and length of Mr. [REDACTED]’s sentence. 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

³ Commissioner Davis’ decision to ask Mr. [REDACTED] whether he thought “justice had been served” in this case manifests similar concerning, unauthorized penal philosophy. Indeed, Commissioner Davis stated that he could not assess Mr. [REDACTED]’s “emotional state as it relates to whether or not [he] believe[s] that justice has been served.” HT at 89. For the Board to rely upon a parole applicant’s emotional state as it relates to subjective, amorphous notions of justice is contrary to law. *See Platten v. N.Y.S. Board of Parole*, 47 Misc. 3d 1059 (Sup. Ct., Sullivan Cty., 2015).

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.*

[(emphases added).]

Not only was Mr. [REDACTED] sentenced to *concurrent* terms of 25 to Life, when consecutive sentencing was more than available, but he was definitively sentenced to a term of imprisonment that made him eligible for parole consideration, every two years (after his minimum). Mr. [REDACTED] was not sentenced to life without parole, but the Board allowed opposition material that endorsed life without parole to enter into its decision-making. *King* at 432 (“Since neither the death penalty nor life imprisonment without the possibility of parole are part of the law of this state, they should clearly not have entered into the Board’s consideration.”).

Perhaps most significantly, the Board’s decision was silent as to the explicit recommendation of one of Mr. [REDACTED]’s victims — [REDACTED] who has written a letter to the Board affirmatively supporting Mr. [REDACTED]’s release. Under the Executive Law, the Parole Board shall consider “any current or prior statement made to the board by the crime victim or the victim’s representative...” Executive Law § 359-i(2)(c)(A)(2)(v). Here, instead of considering the explicit recommendation of [REDACTED] that Mr. [REDACTED] be released, the Board instead relied upon the penal philosophy contained within “community opposition” for which they lacked authorization. The Board’s decision should be reversed and a *de novo* hearing at which the Board properly considers the relevant, authorized, statutory criteria, held. *See, e.g., Bottom v. N.Y. State Bd. of Parole*, 30 A.D.3d 657, 658 (3d Dep’t 2006).

- IV. The Board’s twice-stated conclusion that Mr. [REDACTED]’s release would still deprecate the seriousness of the crime and undermine respect for the law is irrational, improper, arbitrary, and capricious because it is predicated upon a fixation upon that which Mr. [REDACTED] can never change, and a willful ignorance as to his having changed everything he can.**

The Board wrote at the outset of their decision: “release at this time **remains** incompatible with the welfare and safety of society and would **still** so deprecate your offense as to undermine respect for the law.” (**emphasis added**). They concluded with:

Discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. Further, the panel concludes that a release is not appropriate. A release at this time would so deprecate the seriousness of the offense as to undermine respect for the law.

One has to ask — if after 49 years of incarceration, achieving what he has achieved and developing the insight and emotional maturity he has developed, Mr. [REDACTED]’s release **remains** incompatible with the welfare of others, and would **still** so deprecate the offense as to undermine respect for the law, whether he will ever be fit for release in the Board’s eyes? All that Mr. [REDACTED] can do to demonstrate his rehabilitation — to address the underlying psychological, social, political, and emotional underpinnings of his crime and to commit himself to a set of goals and

values devoid of criminal deviance — he has done. All that remains is that which can never be changed: the fact that he took the lives of two New York City Police Officers.⁴

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 irrationally 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).

Indeed, there is nothing more irrational — more improper — than conducting *periodic* review of an individual when the ultimate decision continues to rest upon things that *will never change*. Of course, the presence of certain ‘aggravating circumstances’ will, at times, justify prolonged incarceration. But here, as demonstrated *herein*, the Board's determination that Mr. [REDACTED] lacked remorse and was righteous, that community opposition deserved greater weight than any positive factor, and that his historic hostility to law enforcement was of “concern”, was pretextual, and simply do not constitute present-day aggravating circumstances warranting further incarceration or justifying departures from COMPAS.

Indications that the parole denial was predetermined is a ground for a *de novo* interview. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, *aff'd*. 83 N.Y.2d 788. *See Johnson v. N.Y. Bd. of Parole*, 65 A.D.3d 838 (4th Dep't 2009) (“We therefore conclude on the record before us that the Parole Board failed to weigh all of the relevant statutory factors and that there is ‘a strong indication that the denial of petitioner's application was a foregone conclusion.’”); *see also, Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cnty. 2014) (“at least one Commissioner was argumentative and appeared to have made the decision prior to the parole interview.”); *Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 40 Misc.3d 226 (Sup. Ct. Columbia Cnty. 2013) (“When, as here, the Parole Board focuses entirely on the nature of Petitioner's crime, there is a strong indication that the denial of parole is a *foregone conclusion that does not comport with statutory requirements.*”) (emphasis added.).

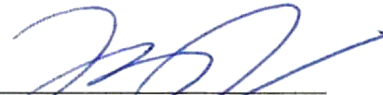
The Board's decision should be reversed, and a *de novo* hearing held.

⁴ It is worth noting that the fact that continues to justify Mr. [REDACTED]'s incarceration — the instant offense — did not prevent the Board's release of Mr. [REDACTED]'s co-defendant, Mr. [REDACTED], in 2018. Like Mr. [REDACTED], Mr. [REDACTED] had evolved into a mature, disciplined and remorseful person, and was deemed to present no risk of future harm to others. Disparate treatment of similarly situated individuals no doubt violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See* cons. Amend. XIV.

CONCLUSION

There was a time when parole review in New York was defined by greater concern for the instant offense than even the most tremendous rehabilitation and remorse. Due to changes in statute, prevailing attitudes, and the profiles of Parole Commissioners, that time is largely past. And yet, in the case of individuals who have caused the death of police officers, such antiquated thinking continues to rule the day. It does so not because it is permissible under law, but because of the special place, that the police occupy in society, and because of the enduring vitriol and unique influence of police-aligned associations. This exceptionalism, however, does not redeem the Board's continued denial of release to those who have killed police officers; instead, it makes the case for careful, individualized administrative and appellate review where the correct legal standard is employed. Mr. [REDACTED] deserves such review, and as such, reversal and a *de novo* hearing.

Respectfully submitted,



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