Art. 78 Petition - FUSL000097 (2020-11-17)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of [redacted]

Petitioner, INDEX NO.:

-against-

TINA M. STANFORD, Chairwoman of the New York State Board of Parole, and THE NEW YORK STATE BOARD OF PAROLE,

Respondent.

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VERIFIED PETITION SEEKING ARTICLE 78 REVIEW OF DENIAL OF PAROLE TO PETITIONER AND ANNULLMENT OF DENIAL

Petitioner [redacted], by his attorneys Heller, Horowitz & Feit, P.C., as and for his Verified Petition, alleges as follows:

Introduction

1. Petitioner brings this Special Proceeding to review, and upon such review to annul, the October 9, 2019 Denial of Parole to Petitioner by the Board of Parole Commissioners, which was affirmed in the August 24, 2020 Decision of the Appeals Unit of the New York State Board of Parole ("the Appeals Unit") (collectively, "the Parole Denial"), and upon the record presented to the Commissioners, to grant this Petition and reverse the Parole Denial and (A) direct that the Petitioner's Parole Application be granted; or, in the alternative, (B) direct that a prompt *de novo* hearing on the Parole Application be held before Commissioners who did not sit on Petitioner's prior hearings. A copy of the Commissioners' Decision is annexed hereto as Exhibit A; a copy of the Appeals Unit's Decision is annexed hereto as Exhibit B.

2. Petitioner, who is currently fifty-eight years old and in poor health, has been in prison for approximaely twenty-five years, having been convicted of murder in 1996. In a lengthy (albeit boilerplate) Decision citing dozens of cases but making no genuine effort to apply those cases to Petitioner's situation, the Appeals Unit affirmed the Commissioner's equally uninformative and conclusory initial denial of parole to Petitioner. In doing so, the Commissioners (as well as the Appeals Unit) effectively ignored a number of undisputed facts which, we respectfully submit, rendered Petitioner a textbook example of an individual for whom continued incarceration serves no legitimate penal or societal purpose--especially in light of the "forward looking paradigm" embodied in Section 259-c of the Executive Law and the Amendments to the Board's Regulations following a 2011 change to the law and to the entire approach to parole decisions. *See generally People v. Brown*, 25 N.Y.3d 247 (2015); 9 N.Y.C.R.R., Sections 8002.2(a), 8002.3.

3. Perhaps the most important of these facts—but by no means the only factor militating strongly in favor of Petitioner's release -- is that Petitioner is subject to an immediate deportation order ("CPDO") to his native Jamaica, meaning that *the day he is released from prison* he will be placed in Immigration and Customs Enforcement (ICE) custody until they transport him from the United States to Jamaica (where a large and loving family awaits him). Thus, the danger that Petitioner will pose a future risk of committing a crime in the State of New York or the United States is, not to put too fine a point on it, *zero*.

4. It is well settled that the discretion of the Board in denying parole is not unlimited. As the First Department has recognized, "the Board's discretion is not unbridled and must be exercised in accordance with law." *King v. N.Y.S. Div. of Parole*, 190 A.D.2d 423, 430 (1st Dept. 1993). Moreover, where "there is a showing of irrationality bordering on impropriety", it is the duty

of the reviewing court, on an Article 78 proceeding, to intervene and to correct the error. *Matter of Weinstein v. Dennison,* 7 Misc.3d 1009(A) (Sup. Ct. N.Y. Cty. 2005).

5. As will be demonstrated below, when measured against these legal principles, the Parole Denial cannot stand in this case. *The Commissioners did not even mention the CPDO in their initial denial* and, while the Appeals Panel paid lip service to the CPDO, made no meaningful attempt to do what the law requires—to explain in *non-conclusory* terms why, standing alone, the mere "seriousness of the crime" trumped the deportation order and all of the other factors (Petitioner's low COMPAS score, his excellent record in prison, a welcoming family to ease his post-release transition, etc.) that supported the granting of parole to Petitioner based on any reasonable view of the record.

6. When all is said and done, this Court has no choice but to conclude that the Parole Denial was, for all intents and purposes and notwithstanding a passing and thoroughly conclusory reference to the Petitioner's alleged "lack of remorse", entirely "*backward looking*"; that is, it started, proceeded and ended with the fact that Petitioner committed a murder in 1996. The Parole Denial thus violated the First Department's admonition that in light of the Legislature's determination that the parole decision should be "guided by risk and needs principles", parole cannot be denied solely based on the seriousness of the offense. Matter of *Rossakis v. N.Y.S. Board of Parole*, 146 A.D.3d 22, 27 (1st Dept. 2016). *See Matter of Miranda v. New York State Parole Board*, 2020 NY Slip Op. 33346(U) (Sup. Ct. N.Y. Cty. 2020). That is precisely what has occurred here, and the Petition should accordingly be granted.

Timeliness of Petition and Venue

7. This special proceeding is timely under CPLR 217 because it is filed within four months of the issuance of the Decision of the Appeals Unit affirming the denial of parole to

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Petitioner by the Commissioners. Venue is proper in this Court under CPLR 506(b) because the Commissioners conducted the remote parole hearing for Petitioner, which gave rise to the Parole Denial, in New York County.

Summary of Argument

8. In the Parole Denial, the Commissioners recognized that the murder conviction was [redacted] first serious infraction, and that during his two and one-half decades of incarceration, he has "made significant strides in [his] academic and educational pursuits", that his "disciplinary record reflects satisfactory adjustments to DOCCS rules and regulations", and that his "Risk and Needs assessment…reveals low scores." The Parole Denial also stated that the Board "considered [redacted] certificates, educational attainments, letters of support and reasonable assurance."

9. Nevertheless, the Board denied parole to Petitioner on the purported grounds that the original crime—in which [redacted] shot the victim in connection with a dispute involving the sale of a car and a few days after the victim had attacked [redacted] with a knife—"was violent, heinous and shows a total disregard in conduct, which caused the death of the victim." Accordingly—and apparently based solely (or, at the very least, primarily) upon the nature of the original crime—the Parole Board found that [redacted] release after twenty-five years in prison "would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." The Appeals Unit affirmed, finding no error in the Commissioners' exercise of discretion and purported "weighing" of all of the statutory factors.

10. The Parole Denial was "affected by an error of law [and] was arbitrary and capricious" (CPLR 7803(3)) for the following reasons.

11. *First*, the Board is obligated "to give fair consideration to each of the statutory factors as to every person who comes before it." *Matter of Rossakis v. New York State Board of Parole*, 146

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A.D.3d 22 (1st Dept. 2016). Indeed, the Regulations require that "reason for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in Section 8002.2 were considered in the individual's case." Here, while the Parole Denial *mentioned* and paid lip service to a number of the statutory factors that *favored* the parole of [redacted] there is no indication that the Board engaged in any serious weighing or analysis to support its thoroughly conclusory statement, parroting the statutory language of Executive Law Sec. 259, that [redacted] release would somehow be "incompatible with the welfare of society." The Parole Denial, in short, is the paradigmatic written decision that "summarily itemize[s] a petitioner's achievements while incarcerated or render[s] a conclusory decision parroting the statutory standard." *Coaxum v. New York State Board of Parole*, 14 Misc.3s 661 (Sup. Ct. Bronx Cty. 2006).

12. To take one example, [redacted] COMPAS score indicated that he would be a "low risk" to commit a future crime if released, and he was given a mental health status of Level 6, meaning that there is no mental health issue that should concern the Board. (The COMPAS score is consistent with the many letters of recommendation and other assessments from persons who know [redacted] and how he has behaved and matured while in prison.) The Regulations recognize the importance of a COMPAS score to the parole decision, and require that the Board "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., Sec. 8002.2(a))

13. In other words, while the Board is certainly entitled to conclude that other statutory factors outweigh the COMPAS score, the Parole Denial must, at the very least, explain *why* that is so. With respect, a conclusory reference to the "needs of society", the underlying crime and the purported "superficial" nature of [redacted] "expression of remorse", does not come close to

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complying with the legal mandate. *See Matter of Coleman v. New York State Department of Corrections*, 157 A.D.3d 672 (2d Dept. 2018).

14. Indeed, both the questions asked by the Commissioners during the hearing and the Parole Denial itself leave absolutely no doubt that the essential predicate for the denial of parole—and the justification for ignoring [redacted] stellar record in prison, his educational achievements, his extremely positive COMPAS score and the many positive letters of support and recommendation—was the Board's view as to the "callous[ness]" of the original offense. (While the Parole Denial might give the impression otherwise, [redacted] has *never* attempted to justify or minimize the seriousness and wrongfulness of what he did in 1996 in taking the life of another human being. *See infra.*)

15. The Board's focus on the nature of the crime to the exclusion of everything else is, we respectfully submit, impossible to reconcile with the statutory mandate-- made clear by a 2011 Amendment to the Executive Law, *see People v. Brown*, 25 N.Y.3d 247 (2015) -- that "the focus of parole boards [must be] a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release." *Matter of Bruetsch v. New York State Dept. of Corrections*, 43 Misc.3d 1223(A) (Sup. Ct. Sull. Cty. 2016). By giving dispositive weight to a portion of one factor in Section 259(i)(2)(c)(a)(vii) ("the seriousness of the offense"), the Parole Denial was arbitrary and capricious *as a matter of law*. *Capiello v. New York State Board of Parole*, 6 Misc.3d 1010(A) (Sup. Ct. N.Y. Cty. 2004). Indeed, we think it no exaggeration to state that to deny [redacted] parole would, in effect, be to endorse a *per se* rule that no person convicted of murder should ever be released. In this regard, any doubt that the nature of the offense was the beginning, middle and end of the Board's analysis is put to rest by the very language of the

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Commissioners' Decision, which stated that "the instant offense was violent" so "*therefore*...discretionary release...is not appropriate" (emphasis supplied).

16. *Second,* the Parole Denial was also arbitrary because it failed to make any mention of the overwhelmingly important fact that [redacted] *is subject to a deportation order which will result in his transfer to the custody of Immigration and Customs Enforcement (ICE) the minute he is released from prison; ICE officials will then transport him to Jamaica.* The apparent failure to even consider the outstanding deportation order—which is a statutory factor under sub-section (iv) and which was extensively addressed during the hearing by the Commissioners—is completely baffling; a Board's failure to consider a pending deportation order, standing alone, has been held to require a new hearing. *Thwaites v. New York State Board of Parole,* 34 Misc.3d 694 (Sup. Ct. Orange Cty. 2011). [1]

17. While [redacted] does not contend that the deportation order operates as a *per se* get out of jail free card, it was, at the very least, incumbent on the Board to at least explain in some coherent fashion why it was being ignored and/or was presumably trumped by the other reasons for continued incarceration upon which the Board presumably relied. This is particularly the case because at the hearing [redacted] explained that upon his return to Jamaica, he had a stable home, a loving family and a job waiting for him.

18. *Third*, the Commissioners never explained the basis for the conclusion that [redacted] remorse for shooting [redacted]'s in 1992 was not sincere. [redacted] expressed remorse at least *six times* during the hearing, as well as in his personal statement and in his letter of apology. That [redacted] in response to questions from the Commissioners, *explained the circumstances*

[1] The statement in the Parole Board Report that [redacted]'s "primary residence" after release would be the Bronx (with a "secondary residence" in Jamaica) was, of course, completely erroneous and demonstrates that the Board failed to comprehend the deportation order.

surrounding the shooting does not, by any reasonable measure, make his regret and remorse any less genuine. We (and, respectfully, this Court) are, in short, left with the unmistakable impression that the "superficiality of remorse" is just another way of saying that the crime itself justified the denial of parole to [redacted]. *See Wallman v. Travis*, 18 A.D.3d 304 (1st Dept. 2005) (rejecting Board's "conclusions regarding lack of insight and remorse", which was based on "no supportive facts", as "an inaccurate reading of the record").

The Crime

19. On July 24, 1996 [redacted], after a jury trial, was sentenced to twenty-five years to life for murder in the second degree and to four-and-a-half to fifteen years for criminal possession of a weapon in the second degree to run concurrently. [redacted] was convicted for the shooting death of [redacted] on November 19, 1992. [2]

20. As [redacted] explained in his Personal Statement and in his testimony at the parole hearing, [redacted] had purchased a used car from [redacted], and had a disagreement about its condition and responsibility for certain parking tickets that had been issued on the car. During one of their discussions about the car problems, [redacted] was attacked by [redacted] with a knife, resulting in fifteen stiches to [redacted] face. Thereafter, and learning that the word out on the street was that [redacted] was going to kill [redacted], [redacted] bought a gun. A few days later, the two men again encountered each other, and [redacted] shot [redacted] to death. [redacted] was later arrested, convicted and sentenced.

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[2] The facts set forth herein are taken from the materials that were submitted by [redacted] to the Board, and which form the record upon which the Commissioners and the Appeals Unit founded their respective Decisions denying parole. A copy of the "Parole Packet" is annexed hereto as Exhibit C. A copy of the transcript of the hearing before the Commissioners is annexed hereto as Exhibit D. A copy of the COMPAS score is annexed hereto as Exhibit E.

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21. At the time of the incident, and at the time of his arrest, [redacted] was employed at [redacted] and his only other brush with the law was a misdemeanor conviction for marijuana possession. He had several young children, and was a devoted father. In attempting to explain (but in no way to justify) why he acted as he did, [redacted] has (in his Personal Statement and at the parole hearing) pointed to (i) his childhood in the [redacted] area of Jamaica, an extremely violent center of drug activity and gun violence; (ii) the prevalence of guns in the Bronx at the time; (iii) the need to preserve one's "standing in the street" and "street honor"; and (iv) the genuine fear, based on the earlier assault by [redacted] and what he had heard on the street, that [redacted] was going to kill him.

22. The Record also establishes that notwithstanding his difficult childhood of poverty and a culture of violence in Jamaica, [redacted] graduated from high school, was awarded and completed a four-year government apprenticeship scholarship, moved to New York City, was continually employed in union jobs, and brought his partner and children to New York City to live with him when he was financially able to do so. And as noted above, prior to his arrest for the murder of [redacted], he had no serious criminal record.

[redacted]'s Twenty-Five Years in Prison and His Plans if Released

23. [redacted] has been incarcerated since 1996. During his twenty-five years in prison, he has had an exemplary disciplinary record, which record has been recognized by his placement in the prison [redacted], where he currently resides. He has not had a disciplinary infraction since 2012 (when he was found with an unauthorized book), and his only infraction for violence was twenty years ago.

24. While in prison, [redacted] has earned his GED, attended a pre-college program and is now working on a Bachelor's degree from [redacted]. He has also completed and received

commendation in many therapeutic programs, involving counseling other prisoners and nonviolent conflict resolution. He has also consistently received positive evaluations (and promotions) for his work in the infirmary, mattress factory, stock room and laundry. [redacted] has demonstrated leadership skills in his community and religious organizations and instructional programs. He has been the executive director of the [redacted] through which he has organized financial support and food packages for Caribbean organizations providing hurricane relief. And, he is an active church member, attending services on a regular basis.

25. [redacted] who is now 58 years old and had major back surgery approximately five years ago, has been assessed at Level 4 on the COMPAS risk assessment tool, which means that he presents an extremely low risk of reoffending. [redacted] if released, will live in his sister's home in Jamaica, and has a job (and many family members) waiting for him. Indeed, he has no choice but to go to Jamaica because there is a pending deportation order against him, which will require upon his release from prison his immediate transfer to ICE custody who will subsequently transport him from the United States to Jamaica.

The Evidence Before the Board and the Parole Denial

26. The Board was presented with [redacted] Personal Statement, the COMPAS evaluation, the Parole Board Packet for Conditional Parole for Deportation Only (CPDO), as well as no fewer than thirty letters from family members, educational officials and others asking that he be granted parole. The Board also heard, of course, from [redacted] directly at the hearing. During his testimony, [redacted] explained how he had matured and developed during his years in prison, and his plans for the future if he was released. He also repeatedly expressed remorse and regret for the decision he made twenty-five years earlier to get a gun and use it to kill [redacted] On at least six separate occasions, [redacted] expressed remorse for his actions and the murder of [redacted] and

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his awareness of the pain that he had caused [redacted]' family. While the Commissioners stated that they understood and appreciated [redacted]'s accomplishments in prison, they spent much of the hearing eliciting and commenting upon the facts of the crime, and concluding that "you [redacted] committed a heinous act of the murder of [redacted]."

27. As noted above, in the Parole Denial, the Board focused substantially upon the nature of the underlying crime; and that the ADA stated at the sentencing hearing that "this is a case, clearly, of cold-blooded, premeditated and calculated murder." The Board said that it took note of [redacted]s "institutional record and case plan…your efforts toward rehabilitation which shows that you are program satisfied and have made significant strides in your academic and vocational pursuits [and] satisfactory adjustment to DOCCS rules and regulations", as well as the numerous "certificates, educational attainments, letters of support and reasonable insurance", and the COMPAS assessment "which revealed low scores." But according to the Board, all of that was outweighed—and "the welfare of society" required that he remain behind bars-- "due to your criminal involvement commencing with acquiring an illegal handgun days before the instant offense" and because "the instant offense was violent, heinous and shows a total disregard in conduct…" The Board also stated that [redacted]s "expression of remorse for the crime was superficial…"

The Decision of the Appeals Unit

28. Petitioner took a timely administrative appeal from the Commissioner's denial of his parole application. In a Decision dated August 24, 2020, the Appeals Unit affirmed the Commissioners' denial. The Appeals Unit devoted most of its Decision to a justification for the Commissioners' emphasis on the nature of the crime as a basis for denying Petitioner parole, despite the admittedly favorable COMPAS scores. The Appeals Unit acknowledged that the Commissioners

"did not specifically reference the deportation order", but excused that omission on the grounds that they were "plainly aware of its existence and, in any event, was not required to assign equal weight to or discuss every factor it considered in making its determination." The Appeals Unit also noted that "insight and remorse are permissible factors" to be considered in the denial of parole, but made no effort to explain how the Commissioners could have rationally concluded that Petitioner *failed* to display such "insight and remorse."

The Parole Denial Should be Reversed and [redacted] Should be Granted a Prompt Hearing de Novo

29. The Board, like any administrative agency, is required to follow its own Regulations and the applicable law. *Matter of Bryant v. Coughlin*, 77 N.Y.2d 642 (1991). This means, at a minimum, that the Board does not have unlimited discretion in making a parole decision, but must consider all the factors enumerated in the Executive Law and the Regulations. *Matter of King, supra.* As the First Department has put it, "it is unquestionably the duty of the Board to give fair consideration to each of the statutory factors as to ever person who comes before it." *Matter of Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22 (1st Dept. 2016), *quoting Matter of King, supra.* We explain below why the Parole Denial fails to pass muster, and why Petitioner was denied the "fair consideration" to which he was entitled.

A.

The Board Gave Conclusive Weight to the Nature of the Crime, and Accorded No Real Consideration to the Other Statutory Factors That Warranted [redacted] Parole

30. A review of the transcript of the hearing and the Parole Denial leaves little doubt that the principal basis for the Commissioners' initial Decision was their determination that the underlying crime was a heinous act of deliberate murder on the part of [redacted] and that no real consideration was given to the other statutory factors that militated strongly in favor of [redacted]'s

release on parole. Both the statements of the Commissioners at the hearing and the Parole Denial indicate that the Panel concluded that no matter how minimal the risk of reoffending, and no matter how much [redacted] has changed and accomplished during the twenty-five years he has been imprisoned, his decision to buy a gun and use it against [redacted] that day in 1992 was so evil as to mandate [redacted]'s continued incarceration. *See Pulinario v. N.Y. State Dep't of Corrections*, 42 Misc.3d 1232(A) (Sup. Ct. N.Y. Cty. 2014) ("the Parole Board's overwhelming emphasis was on the offense...At the hearing, there was only passing references to the contents of petitioner's application...").

31. This was fundamental error because it is well settled that the "seriousness" of a parole applicant's offense is not, by itself, a rational or sufficient basis to deny parole. Indeed, this is the controlling law in the First, Second and Fourth Departments. In *Matter of Rossakis, supra,* for example, the First Department held that the Board acted irrationally in focusing exclusively on the seriousness of petitioner's conviction and the decedent's family's victim impact statements without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and her lack of any prior violent petitioner's remorse, institution achievements, release plan, and her lack of any prior violent criminal history. Accord, *Matter of King, supra* ("...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.); *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dept. 2014); *Perfetto v. Evans*, 112 A.D.3d 640 (2d Dept. 2013); *Huntley v. Evans*, 77 A.D.3d 945 (2d Dept. 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."); *Mitchell v. N.Y. State Div. of Parole*, 58 A.D.3d 742 (2d Dept. 2009) (While the seriousness of the underlying offense remains acutely relevant in determining whether the

petitioner should be released on parole, the record supports the petitioner's contention that the Parole Board failed to take other relevant statutory factors into account.); *Johnson v. New York State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dept. 2009) ("violence associated with this terrible crime" not itself a sufficient basis for denying parole); *V. Sullivan v. NYS Bd of Parole*, 2018/100865 (Sup. Ct., N.Y. Cty. 2019) (finding Board relied almost exclusively on the seriousness of the crime and statements petitioner made at time of sentence). [3]

32. While nodding to the other statutory factors that it was required to consider, the only way to reasonably read and understand the Parole Denial is that, *standing alone and without consideration of anything else*, the crime committed by [redacted] requires his parole to be denied. Because that is inconsistent with applicable law, he is entitled, at the very least, to a new hearing. *See Ely v. N.Y. State Board of Parole*, No. 100407/16 (Sup. Ct. N.Y. Cty. 2017) (denial of parole arbitrary and capricious when Board focused unduly on petitioner's murder of her husband to exclusion of other statutory factors); *Rabenbauer v. N.Y. State Dep't of Corrections*, 46 Misc.3d 603, 607 (Sup. Ct. Sull. Cty. 2014) (undue focus on nature of crime improper basis for denying parole); *Platten v. New York State Bd. of Parole,* 47 Misc.3d 1059, 1063 (Sup. Ct. Sull. Cty. 2015) (board "cannot base its decision to deny parole solely on the serious nature of the underlying crime").

33. In this regard, there is one obvious but absolutely critical point, which is that a parole denial is not insulated from review by the Court merely because the Decision recites that it has

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[3] The Third Department apparently takes a different view. *Hamilton v. New York State Division of Parole*, 119 A.D.3d 1268 (3d Dept. 2014). But lower court decisions in the Third Department have interpreted the holding of *Hamilton* otherwise. *See Rabenbauer v. N.Y. State Dept of Corr. & Cmty. Supervision,* 46 Misc.3d 603 (Sup. Ct Sullivan Cty. 2014) (The holding in *Hamilton* "...does not mean administrative parole decisions are virtually un-reviewable."); *Platten v. N.Y. State Bd. Of Parole,* 47 Misc. 3d 1059 (Sup. Ct. Sullivan Cty. 2015) ("A parole board cannot base its decision to deny parole release *solely* on the serious nature of the underlying crime. The *Hamilton* decision did not affect this prohibition.")

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considered other factors besides the underlying crime. It is therefore hardly surprising that courts have annulled the denial of parole where, as here, it is apparent that the actual sole reason was the alleged seriousness of the petitioner's crime. *See, e.g., Menard v. N.Y. State Board of Parole*, 2019 WL 1115731 (Sup. Ct. N.Y. Cty. 2019) (annulling parole denial because the Board "focused heavily on the underlying offense without giving sufficient consideration to the statutory factors"); *Phillips v. Stanford*, No. 52579/19 (Sup. Ct. Dutchess Cty. 2019). [4]

B.

The Parole Denial's Central Predicate—that [redacted]s Release Would Be "Contrary to the Welfare of Society"—Was Conclusory and Did No More than Parrot the Statutory Language

34. It is well-settled that the Board does not discharge its obligation to fairly consider all of the statutory factors by merely incorporating the boilerplate language into its denial decision. *See in re Ciaprazi v. Evans*, 52 Misc.3d 1212(A) (Sup. Ct. Dutchess Cty. 2017); *Ruzas v. New York State Board of Parole,* No. 1456/2016 slip op. at 4 (Sup. Ct. Dutchess Cty. Oct. 18, 2017) (holding the Board in contempt for conducting defective *de novo* interview after the Court set aside the initial decision because "the Board summarily denied [petitioner's] application without any explanation other than by reiterating the laundry list of statutory factors. The minimal attention, barely lip service, given to these factors and to the COMPAS Assessment cannot be justified given the amount of time already served."). Put simply, "the Board's determination must be stated in non-conclusory terms." *Wallman v. Travis*, *supra*; *see Matter of Rossakis, supra*; Executive Law § 259-I (2) (a).

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[4] The importance of the principle that parole cannot be denied based solely upon the seriousness of the underlying offense is illustrated by *Ferrante v. Sanford*, 172 A.D.3d 331 (2d Dept. 2019), where the Second Department, after reversing the first parole denial on the grounds that the Board had focused exclusively on the underlying crime, went so far as to hold the Board in contempt for denying parole to the petitioner in a subsequent de novo hearing again based solely on the seriousness of the crime.

35. In this case, the Board failed to articulate any rational, non-conclusory basis, other than its reliance on the seriousness of the crime, explaining why the Board had determined that "your [redacted]'s] release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine the respect for the law." That conclusion, of course, is a word-for-word lifting of the language of Executive Law § 259. The Board makes no attempt to reconcile its conclusion with [redacted]'s favorable risk assessment, which rates him at the *lowest* risk of re-offending. It just says that none of that matters due to his criminal involvement acquiring an illegal handgun days before the instant offense and more than twenty-five years ago.

36. In *in re McBride v. Evans,* 42 Misc.3d 1230A (Sup. Ct. Dutchess Cty., 2014), the Court annulled a parole denial because it found that "while the Board discussed petitioner's positive activities and accomplishments at the hearing, it then concluded that his release was incompatible with 'public safety and welfare.' *The Board gave no analysis as to how or why it reached this conclusion. It appears to have focused only on petitioner's past behavior without articulating a rational basis for reaching its conclusion that his release would be incompatible with the welfare of society at this time.")* (emphasis supplied).

37. To the same effect is the Second Department's recent decision in *Rivera v. Standford,* 172 A.D.3d 872 (2d Dept. 2019). There, the Appellate Division reversed the dismissal of an Article 78 petition challenging parole denial on the grounds that the petitioner's "release was not compatible with the welfare of society" as "without support in the record."

38. Precisely the same is true in our case. In the absence of any indication that the Board gave serious consideration to the statutory factors, its Parole Denial cannot be sustained. *See Morris v. N.Y. State Dept of Corr. & Cmty Supervision,* 40 Misc.3d 226 (Sup. Ct. Columbia Cty., 2013) ("the Board failed to explain, other than the facts of the crime, *why* petitioner's release was

'incompatible with the public safety and welfare' and *why* there was 'a reasonable probability [he] would not live and remain at liberty without violating the law.'...the Board 'should be well able to articulate the reasoning' for its decision, 'if it were come to reasonably, in a non-arbitrary, un-capricious manner.'").

39. In *Hill v. New York State Board of Parole*, 2020 WL 6259551 (Sup. Ct. N.Y. Cty. 2020), decided just a few weeks ago, this Court annulled a parole denial on the grounds that, even though "the decision reflects the Board's careful consideration of [the seriousness of the crime and the "tragic effects" on the victim]", "the Board failed to articulate the reasons for the determination with respect to Mr. Hill's low COMPAS Risks and Needs Assessment Scores or 'to provide an individualized reason for this departure' in accordance with 9 NYCRR 8002.2." As a result, the Court found that "the Board's determination was arbitrary and capricious and irrational bordering on impropriety"; and that "its decision...lacks a foundation for its determination that Mr. Hill, at present, poses a danger to society, and demonstrates that the Board, while referring to the statutory factors, did not consider all statutory factors, but focused solely on the underlying crime." (*Id.* at *6-7). The Parole Denial here exhibits precisely the same fatal flaws and, as in *Hill*, should be annulled by this Court.

C.

The Parole Decision Indicates that the Commissioners Failed to Consider [redacted]'s Immigration Status for Impending Deportation

40. Immigration status, including an impending deportation order, is a statutorily required factor that the Board is obligated to consider. N.Y. Exec Law, 259-i(2)(C)(A)(4). The Board's failure to consider a deportation order as part of its decision to deny parole is grounds for a *de novo*

interview and review. See *Thwaites v. NYS Board of Parole*, 34 Misc. 3d 694 (Sup. Ct. Orange Cty. 2011): *Ciaprazi v. Evan, supra.*

41. To be sure, mention was made of the pending deportation in the transcript, and it is not unreasonable to assume that the Commissioners *may have* been aware of it when they rendered their Decision. However, the Commissioners were apparently of the (*absolutely incorrect*) view that the deportation order was somehow not absolute, and that there was a possibility that [redacted] could remain in the United States after his release. This is the only way to explain the Commissioner's question/comment at the hearing to the effect that "So, I want you to talk about both *your plans here*, and *if you are deported* what your plans are if you are to be returned to Jamaica?" (emphasis supplied).

42. We frankly have no way of knowing whether and to what extent that mistake of fact in understanding the absolute nature of the deportation order contributed to the ultimate decision to deny parole to [redacted]. But what we *do* know is that reliance on inaccurate information by the Board is itself a basis for a new hearing. *Lewis v. Travis*, 9 A.D.3d 800 (3d Dept. 2004); *Edge v. Hammock*, 80 A.D.2d 953 (3d Dept. 1981) (denial of parole must be annulled when it is based on erroneous information). And given the stakes for Petitioner (another two years until the next parole hearing that he will be forced to remain incarcerated), the very distinct possibility (if not likelihood) that this error infected the result is not something that should be borne by Petitioner. [5]

43. But even more baffling, the pending deportation order against [redacted]—which means that if released he will not spend a single day as a free person in New York-- *is not even mentioned in the actual Parole Denial!* There is absolutely no indication that in reaching its

[5] [redacted]'s appeal from the deportation order was denied, meaning that it is now final.

decision, the Board even considered the import of the deportation order and, more specifically, how [redacted]'s removal from the United States upon release could be squared with its (boilerplate) conclusion that "your release would be incompatible with the welfare of society." And this egregious failure is in no way cured by (i) the supposition that the Board was "aware" of the Deportation Order (maybe yes and maybe no); and (ii) *could have* found it outweighed by other factors *if* it had conducted a "weighing" analysis. *See Galan-Martinez v. N.Y. S. Div. of Parole*, 2010 WL 3613152 (Sup. Ct. N.Y. Cty. 2010) (annulling parole denial because Board did not consider pending deportation order).

D.

The Parole Denial Failed to Explain in any Meaningful Fashion Why the Board was Departing from [redacted]'s COMPAS Scores

44. In both the hearing and in the Parole Denial, the Board recognized that [redacted]'s COMPAS scores indicated an extremely low risk of recidivism. Nevertheless, the Board, in deciding that [redacted] must remain in prison, effectively gave the scores no weight. The Parole Denial states: "We have reviewed the results of your Risk and Needs assessment which revealed low scores, but we depart from it due to your criminal involvement commencing with acquiring an illegal handgun days before the instant offense." In other words, the fact that [redacted] would not commit any future crimes, had no mental health problems and had a loving family, a stable living arrangement and a job waiting for him in Jamaica counted for nothing because in 1996 he made a terrible decision and committed a murder.

45. This demonstrates a profound misunderstanding of when a COMPAS departure is appropriate and, more broadly, the "forward looking" purposes of parole. First of all, the panel violated the requirement in the regulations that the Board must state *why* they are departing from "any scale" of the risk assessment tool. 9 NYCRR § 8002.2 (a) ("…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.") The scales include risk of felony violence, risk of absconding, etc. In [redacted]'s case, the Board failed to note which scales were low risk and were being departed from and why, instead making one sweeping statement about the COMPAS as a whole. And, in this case, the COMPAS departure bears no relationship to risk to the community, which shows that the Board was not "guided by risk and needs principles," as required.

46. As courts have held, the Board may not adopt the COMPAS tool and then effectively disregard its findings. *Comfort v. NYS Board of Parole*, Index No. 1445/2018 (Dec. 21, 2018) (Acker, J.) (*de novo* granted where COMPAS score was low risk but the Board's decision said the individual was unlikely to live at liberty without violating the law); *Diaz v. NYS Board of Parole*, 42 Misc.3d 532, 535, 536 (Sup. Ct., Cayuga Cty.. 2013) (COMPAS administered but no indication Board considered it). It is, we submit, completely at odds with the Regulation for the Board to disregard COMPAS because of the nature of the prior offense instant offense (as the Board did here). Rather, the discretion to depart from the COMPAS recommendation relates to whether the person can live and remain at liberty without violating the law. As the Commissioners themselves seemed to recognize, the factual record on *that issue* required an answer in the affirmative in the case of [redacted].

47. Separate and apart from the inconsistency of the Board's decision-making process with the mandate set forth in the Regulations, the virtually exclusive focus of the Board on the nature of the crime cannot be squared with what the Court of Appeals has stated is the prospective approach to parole. In 2011, the Legislature mandated that the Board establish a forward looking approach to parole consideration by amending the statute to require "written procedures…incorporate [ing] risk and needs principles…" *People v Brown*, 25 N.Y.3d 247 (2015). By definition, such an approach—

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while by no means requiring the Board to ignore and not consider the seriousness of the crime committed—forecloses the back of the hand dismissal of [redacted]'s COMPAS scores and his other achievements during his twenty-five years in prison, which including minimizing his excellent disciplinary record (no infractions since 2012); his educational achievements (received GED and two years into his Bachelor's degree); prison work history that includes receiving promotions and excellent evaluations; strong letters of support from family, friends, organizations and DOCSS employees; expressed remorse; low risk of recidivism posing no risk to community; a comprehensive release Plan with all components in place and no known objections from the victim's family or community to [redacted]'s parole.

48. We do not dispute that the COMPAS score is not required to be "the fundamental basis for release decisions", that it "cannot mandate a particular result", and that it "did not eliminate the requirement that the Board conduct a case by case review of each inmate by considering the statutory factors, including the instant offense." The point, however, is that for the parole denial decision to comport with applicable law, the Commissioners must explain—with specificity and without generalities, platitudes or boilerplate—why they have chosen to depart from the COMPAS indicators. They utterly failed to do so here.

49. In *Matter of Coleman, supra*, the Appellate Division reversed the Supreme Court's denial of an Article 78 proceeding challenging the denial of parole where, as here, the COMPAS scores strongly favored release. The Court held that "notwithstanding the seriousness of the underlying offense, the parole board's determination to deny the petitioner release on parole evinced irrationality bordering on impropriety." The same is true here.

E.

The Board's Denial of Parole Based on [redacted]'s Alleged "Superficial Expression of Remorse" Ignored Overwhelming Objective Evidence

50. In the Parole Denial, the Commissioners stated that [redacted]'s "expression of remorse for the crime was superficial with little regard for the victim's family and the seriousness of your crime... The panel recommends you continue to gain insight into your behavior and respect for the law."

51. It is difficult to know what to make of this, and we believe that the "superficiality of remorse" ground was, in reality, just another way of saying that the seriousness of the crime, standing alone, was enough to deny parole to [redacted]. In any event, and with all due respect to the Commissioners, their subjective views of his alleged "superficial remorse" (not supported by any reference to a statement by [redacted] at the hearing or in anything contained in any of his other submissions) should not be allowed to override objective evidence of the last 25 years. *See Kellogg v. NYS Board of Parole*, 159 A.D.3d 439 (1st Dept. 2018) (affirming supreme court's annulment of parole denial based on board's subjective finding of lack of remorse, and stating that denial of parole on those grounds was "irrationality bordering on impropriety"); *Matter of Wallman, supra* ("the Board's perfunctory discussion of petitioner's alleged lack of insight" is insufficient to justify denial of parole); *Winchell v. Evans*, 27 Misc.3d 1232(A) (Sup. Ct. Sull. Cty. 2010) (board's finding of alleged lack of remorse is contradicted by the actual record).

52. The objective evidence of [redacted]'s genuine contrition and remorse—*completely ignored by both the Commissioners and the Appeals Unit*-- is as follows:

1. [redacted] at least *six times* (p. 9, p.16, p.21, p. 22, p.23, p.27) during the parole hearing expressed his remorse. "I am very remorseful for taking [redacted]'s life. The pain I have caused his family. Saying sorry is not enough, it will never be enough." (p. 27)

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2. Commissioner Mitchell indicated during the hearing: "I see you have written a letter of apology to the apology bank" (p.21 of Parole Board Interview). [redacted] responded: "there was no word or justification that I can use to justify my irrational action by taking [redacted]'s life. I wrote that letter to the family express my remorse what I have done, the pain I have caused this family, and I humbly express my remorse, and ask for their forgiveness." (p.22)

3. In his Personal Statement submitted in his Parole Board Packet, [redacted] expresses his remorse: "My actions not only affected his family and my own but the community as a whole, and I know and truly understand the depth of my actions and the harm that I have caused…I am truly remorseful for my destructive action, and I realize that the stitches in my face are nothing in comparison to taking his life.

4. Commissioner Mitchell indicates "we reached out to the DA, and the Courts and we have not gotten any correspondence back from them that's been negative, so that is in your favor" (p.26)

5. As far as is known the family and community did not submit any letters requesting his continued incarceration.

6. In the eighteen letters of support from family and friends (in Parole Board Packet), fifteen explicitly state that [redacted] has expressed his remorse to them.

7. In a Letter of Support from [redacted] Executive Vice President of [redacted] she expressed that in their sixteen-week Longtermers Responsibility Project, "[redacted] expressed his deep remorse and the other participants appreciated his openness…There was not a session when [redacted] did not express his profound remorse and an increased understanding of himself and the poor judgment that led to his actions" (in Parole Board Packet).

8. In a Letter of Support from [redacted], Director of Program Marketing at the [redacted] (in Parole Board Packet) an anti-gang anti-violence program which [redacted] facilitated their evening class at Sing Sing, he wrote: "I do not make such a recommendation lightly. To warrant such consideration I need to be assured that the inmate has shown remorse for his actions, that he has prepared himself for release by taking advantage of educational, vocational and cultural opportunities while incarcerated."

9. The advocacy letter from his volunteers at the [redacted] (in the Parole Board Packet) indicates that "[redacted] told us that when his granddaughter expressed the loss she experienced from not knowing her father, who was murdered, it brought home to him in a very personal way the tragedy he inflicted on [redacted]' child."

53. How the Board could have, in light of this overwhelming evidence, concluded that [redacted] should remain in prison because his remorse was "superficial" is, in the words of the First Department in *Kellogg*, "irrationality bordering on impropriety."

Conclusion

53. In Cappiello v. N.Y. State Board of Parole, 6 Misc.3d 1010(A), 2004 WL 3112629 (Sup. Ct. N.Y. Cty. 2004), at *3, the Court stated that "the Parole Board's failure to qualitatively determine whether petitioner presented a current danger to society, based on all of the relevant statutory factors, was a clear abdication of its statutory duty." (emphasis supplied). Here, it is simply impossible for any rational fact finder to conclude that Petitioner "present[s] a current danger to society." Rather, [redacted] is an excellent candidate for Conditional Parole for Deportation Only (CPDO). Furthermore, even putting to one side the deportation order, the Parole Denial directing that he remain in prison was flatly inconsistent with the applicable Statute and Regulations, and failed to give meaningful consideration to all of the mandatory factors, instead giving dispositive weight to the offense and ignoring all of the other factors (COMPAS scores, achievements in prison, health and age) that strongly indicate that parole is appropriate.

54. Under these circumstances, the Parole Denial should be reversed and, on this record, [redacted] should be granted parole. At the very least, the matter should be remanded for a new hearing before a different panel of Commissioners. [6]

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[6] We recognize that the generally accepted remedy for the Board's wrongful denial of parole is a new hearing before a different panel of Commissioners, rather than release. *Kellogg, supra; Newton v. Dennison*, 47 A.D.3d 538 (1st Dept. 2008). But where, as here, the facts supporting parole are essentially undisputed, we urge this Court to consider whether the most appropriate remedy should be an order directing Petitioner's release; otherwise, Petitioner is likely to remain in prison for a longer period of time than warranted by the law and the facts while a new hearing is scheduled and held. We note that the Courts have, in appropriate cases involving prisoners (but, concededly not denials of parole by the Board), determined that the most appropriate remedy was not a remand for a

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. WHEREFORE, it is respectfully requested that this Court grant the relief requested in the Petition, together with such other and further relief as to the Court may seem just and proper.

Dated: [redacted]
November 17, 2020

HELLER, HOROWITZ & FEIT, P.C.

By: _____
Stuart A. Blander

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new hearing, but rather the granting of the substantive relief rquested by the prisoner. *See Wyehe v. N.Y.S. Board of Parole*, 66 A.D.3d 541 (1st Dept. 2009) (parole revocation hearing); *Nance v. Arinucci,* 147 A.D.3d 1180 (3d Dept. 2017) (prison disciplinary hearing); Delgado v. Fischer, 100 A.D.3d 1171 (same). We would analogize the situation to an appellate court's authority to "search the record" and grant summary judgment to even a non-movant. *See Commissioner v. Weissman*, 90 A.D.3d 417 (1st Dept. 2011).

VERIFICATION

STATE OF NEW YORK)
ss.:
COUNTY OF KINGS

STUART A. BLANDER, being duly affirmed, deposes and says:

I am a member of Heller, Horowitz & Feit, PC, attorneys for Petitioner. I have read the annexed Petition, and know the contents thereof and the same is true to the best of my knowledge, except as to those matters therein which are alleged upon information and belief, and as to those matters, I believe them to be true. The basis of my knowledge is my review of the underlying file and the decisions under review, as well as my conversations with Petitioner's parole advocate. I make this Verification because my office is located in a County other than the County in which the petitioner currently resides.

STUART A. BLANDER

Sworn to before me this
17 day of November, 2020

Carmela F. D'Amante
Notary Public

CARMELA F. D'AMANTE
Notary Public, State of New York
No. 43-4865020
Qualified in Richmond County
Term Expires July 7, 2022

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