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March 27, 2017

By Overnight Mail

Department of Corrections & Community Supervision

Board of Parole – Counsel's Office

The Harriman State Campus - Building 2

1220 Washington Avenue

Albany, New York 12226-2050

Re: [REDACTED]
[REDACTED](November 2016 – Fishkill Correctional Facility)

Dear Counsel:

I am counsel to [REDACTED], DIN [REDACTED]. This administrative appeal-letter brief serves as [REDACTED] perfection of his appeal of the November 2016 decision of the New York Board of Parole (the "Board") to deny [REDACTED] release to parole supervision. Mr. [REDACTED] is a 58-year-old man with an almost spotless disciplinary record in over 35 peaceful and productive years in prison. [REDACTED] has been eligible for parole release consideration since 2007 on a controlling conviction of murder in the second degree. This appeal is from a seventh (7th) denial of parole and the panel's direction that [REDACTED] be held two more years before reconsideration. Along with this original letter, two copies are enclosed.

Background Facts

[REDACTED] appeared before the Board for reconsideration of release on November 15, 2016. It was his seventh appearance before the Board. He was denied once again on the grounds that his release "would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." The Board made no finding that he was likely to reoffend if at liberty, thus calling into question how [REDACTED] release would not be compatible with the welfare of society (Transcript, Exhibit A). In fact, the Board has repeatedly failed to find that [REDACTED] is likely to reoffend if at liberty, indicating that the Board has decided that the minimum sentence imposed by the Court of 25 years, pursuant to statute, is insufficient punishment for [REDACTED] crime of conviction.

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POINT I

The Board Has Not Complied with Executive Law § 259-c(4). The Board was required to establish written procedures pursuant to Executive Law § 259-c(4) by October 1, 2011 for the conduct of its work. The Board did not establish written procedures until July 30, 2014. The written procedures are defective in that they do not specify how to utilize the COMPAS and under what circumstances it can be deviated from. The Procedures are also lacking in that they do not specify how the Board is to utilize the Case Plan. The Board's utilization of the COMPAS and the Case Plan as merely factors in a laundry list of factors to consider under 9 N.Y.C.R.R. § 8002.3 is unlawful and violated [REDACTED] due process rights.

The regulation it adopted on July 30, 2014 [9 NYCRR § 8002.3(a)(11)-(12)] fails to "establish written procedures" that "incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be release to parole supervision." NY Executive Law § 259-c(4).

In 2011 the legislature directed the Board of Parole to revise its practice and procedure for deciding which inmates should be released to parole supervision. In place of the former "guidelines for parole release decision-making" the legislature directed the Board to "establish written procedures for its use in making parole decisions." "Such written procedures," the legislature directed, "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision." The effective date for this part of the law was October 1, 2011. Executive Law § 259-c(4).

The regulation adopted by the Board on July 30, 2014 fails to qualify as the written procedures required by Executive Law § 259-c(4). The rule is structurally at-odds with the enabling legislation. The regulation incongruously lists the risk and needs assessment and case plan as "factors" board members must consider along with the eight statutorily-prescribed factors listed in Executive Law § 259-i(2)(c). But the legislature did not instruct the Board to consider additional factors; it directed the Board to adopt written procedures incorporating risk and needs principles to "measure" an inmate's "rehabilitation" and "likelihood of success ... upon release."

In the years between the 2011 amendment to Executive Law § 259-c(4) and the July 2014 procedures, the Board took the position that it was not obligated to consider a risk and needs instrument, pointing to the proposed legislation and the final legislative language. The Board was then directed by the Courts to consider the COMPAS in cases such as *Matter of Garfield v. Evans* (3d Dep't 2013). The Board also did not propose and adopt rules in accordance with the State Administrative Procedures Act.

In the 2014 procedures, the Board added COMPAS and the TAP/case plan to the list of factors to consider. The Board did not establish any written procedures on how the

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COMPAS and the TAP/case plan were to be considered.

By mischaracterizing COMPAS as a "factor" to be reviewed along with many others, the rule [9 NYCRR § 8002.3(a)(11)-(12)] nullifies the COMPAS risk and needs assessment instrument as the agency-wide organizing scheme for assessing rehabilitation that the legislature intended it to be. Under the rule, Board members are free to give COMPAS as much or as little weight as they wish, with no obligation to explain their rejection of evidence-based risk assessments, even ones, as in [REDACTED] case, on the lowest end of COMPAS's ten-point risk scale.

No matter what Board members do with COMPAS, by merely mentioning it, the Board members are never in violation of agency procedure. This is not a procedure: "a series of steps followed in a regular orderly definite way," as defined by Webster's Third New International Dictionary. It is carte blanche for board members to do whatever they wish. And Board members are free to dismiss COMPAS results out of hand without revealing that they are doing so or explaining why.

The regulation achieves this meaningless outcome through an obvious stratagem. The regulation falsely treats COMPAS as if it were one of the legislatively-mandated "factors" that must be considered in the parole-release decision-making process. By mischaracterizing COMPAS as a parole factor, the regulation seeks refuge in a long-established line of authority that holds board members are free to give as much or as little weight as they see fit to any individual parole factor, and need not address that factor in their written decisions denying parole release. See *Matter of King v. NYS Board of Parole*, 83 N.Y.2d 788 (1994); *Matter of Siao-Pao v. Dennison*, 51 A.D.3d 105 (1st Dept. 2008), *aff'd* 11 N.Y.3d 777 (2008); *Matter of Thomches v. Evans*, 108 A.D.2d 724 (2d Dept. 2013); *Matter of Shark v. NYS Div. of Parole*, 110 A.D.3d 1134 (3d Dept. 2013); *Matter of Patterson v. Evans*, 106 A.D.2d 1456 (4th Dept. 2013).

The legislature did not amend the statutory parole factors and add COMPAS to the list. It directed the Board to replace the 1978 parole release guidelines -- an agency-wide organizing scheme for parole release decision-making -- with written procedures that "incorporate risk and needs principles to measure the rehabilitation" of parole release candidates. The COMPAS risk and needs assessment instrument is a new methodology for determining an inmate's risk of re-offending. It is not a parole release factor. Rather, it is a means of determining two of the three overarching statutory criteria for parole release determinations: whether there is a "reasonable probability" a parole candidate "will live and remain at liberty without violating the law," and whether his or her release is compatible with the welfare of society. Executive Law § 259-i(2)(c)(A).

Thus, under the July 2014 procedures, the Board is free to give the COMPAS no weight and is not required to disclose his or her reasoning in deviating from its empirically-based calculation of likelihood to reoffend and compatibility with the welfare of society. A Board member who believes COMPAS generally produces valid results but thinks a departure is warranted based on the unique facts of a case is similarly under no duty to explain. This complete lack of transparency assures that COMPAS will be inconsistently applied by the Board

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and that similarly-situated inmates will be treated differently. It guarantees that no one, including judges, will ever be in a position to scrutinize the Board's use of COMPAS. This is not consistent with the legislature's mandate.

For these reasons, 9 NYCRR § 8002.3(a)(11)-(12) fails to comply with Executive Law § 259-c(4). A *de novo* hearing governed by rules that conform to the enabling legislation is required.

Moreover, on September 28, 2016, and before [REDACTED] 7th hearing, the Board published in the New York State Register proposed revisions to the July 2014 procedures.

It is obvious, thus, that the Board has not yet identified and specified in its previously-published rules how it should be making its decisions. The major purpose of the newly-proposed rules is to remove the COMPAS as a mere factor for consideration, and instead propel the COMPAS to the framework of the Board's decision-making process. Under the proposed revised rules, the Board is obligated to use the COMPAS as its guiding document, and if the Board decides to deviate from the COMPAS's recommendations, the Commissioners must explicitly explain why it does not comply with the recommendations.

The Board's proposal to further clarify its procedures demonstrates unequivocally that the July 2014 procedures were inadequate to comply with the 2011 amendment to Executive Law § 259-c(4).

Because the panel's rejection of the COMPAS result is unexplained, the determination lacks an articulated rational basis and is conclusory. Consequently, a *de novo* hearing is warranted. See *Matter of Stokes v. Stanford*, 43 Misc.3d 1231(A) (Sup. Ct., Albany Co. June 9, 2014) (although the determination parrots the applicable statutory language, the Board does not even attempt to explain the disconnect between its conclusion and petitioner's rehabilitation efforts and his [COMPAS] low risk scores" - new hearing ordered); *Matter of McBride v. Evans*, 42 Misc.3d 1230 [A] (Sup. Ct. Dutchess Co., Dec. 12, 2013) (new hearing ordered where "[a]lthough the Board discussed the petitioner's COMPAS scores at the hearing, it is unclear from the cursory nature of its decision how the Board utilized its risk assessment procedures in concluding that petitioner's release is incompatible with the welfare of society at this time.").

POINT II

The Decision to Deny Parole Is Irrational Bordering on Impropriety and Was Made in Consideration of Inaccurate Information. The November 2016 panel's conclusion that [REDACTED] release would not be compatible with the welfare of society is contradicted by the COMPAS, which ranks the 58 year-old [REDACTED] as posing the lowest possible risk to reoffend, be arrested, or to abscond. The Board's decision to

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deny parole is illogical and irrational. The Board, in its decision to deny parole, noted only positive factors in [REDACTED] file, including his disciplinary history and institutional programming.

Given [REDACTED] age and his no prior criminal history, the panel's conclusion that Mr. [REDACTED] release is not warranted due to concern for the public safety is irrational. Moreover, it is irrational to deny parole when not all of the statutorily and regulatorily-required factors have been considered, including the inmate's institutional disciplinary history and interaction with staff. It is also irrational to continue to hold [REDACTED] in custody where there is no indication that anything will change in the future – other than [REDACTED] age. There are no programs that require completion, he has served well beyond the minimum sentence, he has achieved job training and has a desire to continue his education, and he has family support and a home to go to. The Board has acted irrationally, bordering on impropriety, to continue to hold [REDACTED] and by failing to consider statutorily required factors.

POINT III

The Decision Is Vague and Conclusory and Ignores Supporting Information. The language of the Decision is vague and conclusory and does not in any way state how Mr. [REDACTED] release to the community would raise a concern for the public safety and welfare. Mr. [REDACTED] was offered three times a plea of 20 years to life (another factor that the Board did not consider), below the maximum sentence permitted by law. He has now served 35 years. He is 58 years old. There is no basis whatsoever to conclude that he is likely to reoffend if at liberty. The Board made no effort to justify its decision to continue to hold [REDACTED]. Releasing him now cannot be said to be a deprecation of the seriousness of the offense, because he has served well beyond the minimum sentence imposed by law and even more than the plea offered by the State three (3) times.

In addition, the decision to deny parole was made without consideration or even reference to letters in support of release and commendations provided by DOCCS staff. NY Executive Law § 259-i(2)(c)(A)(i), without consideration of [REDACTED] disciplinary history and lack of a previous criminal history.

In fact, the Board made no mention of the letters of support in [REDACTED] file until he raised them, including letters for former Commissioner Dennison. The Board also ignored letters of commendation that [REDACTED] had received from DOCCS staff, along with other positive factors that would lend support of [REDACTED] release.

POINT IV

The Board Cannot Continue to Deny Parole Based on the Same Grounds and Cannot Act as a Sentencing Court or a Legislature. [REDACTED] has appeared before the Board seven (7) times. Each time, the Board has denied parole based exclusively upon the underlying crime. There is no other factor that supports [REDACTED] continued incarceration. He has completed all programming, he has achieved job training and an education, he has a

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place to live, he has served 10 years beyond his minimum sentence, he has no prior convictions, he maintains a clean disciplinary history, and he has family support, and he has received commendations for his work. Continuing to deny parole based exclusively upon the crime of conviction is a violation of [REDACTED] statutory, regulatory, and constitutional rights.

The decision denying [REDACTED] parole release focused exclusively on the seriousness of the offense to the exclusion of other factors required to be considered. The panel's determination disregarded critical factors such as [REDACTED] excellent institutional record, low risk to reoffend, and post-release plans. The Board "cannot base its determination solely on the serious nature of the crime." *Matter of King v. NYS Div. of Parole*, 190 A.D.2d 423 (1st Dept. 1993), *aff'd*, 83 N.Y.2d 788 (1994); *Almonor v. NYS Board of Parole*, 16 Misc.3d 1126(A)(Sup. Ct. New York Co. 2007).

The Board is required to consider all of the factors set forth in Executive Law §259-i. Focus on the serious nature of the crime coupled with a passing reference to all of the factors that militate in favor of parole release is not sufficient. *See Rios v. NYS Div. of Parole*, 15 Misc.3d 1107(A) (Sup. Ct. Kings Co. 2007); *Winchell v. Evans*, 32 Misc.3d 1217(A) (Sup. Ct. Sullivan Co. 2011); *Coaxum v. NYS Board of Parole*, 2006 NY Misc. Lexis 2466 (Sup. Ct. Bronx Co. 2006); *Matter of Rossakis v. NY State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016) (the Board cannot base denial of parole exclusively on the seriousness of the offense). A *de novo* hearing should be ordered.

It is clear that the Board has determined that a 25-year term for Murder in the Second Degree is insufficient punishment and has determined that [REDACTED] should remain incarcerated for a longer period of time.

POINT V

The case plan was inadequate, warranting a *de novo* hearing. The case plan is inadequate. Correction Law § 71-a, Executive Law § 259-c(4) and 9 NYCRR § 8002.3(12) require that a "case plan" be considered in parole release determinations. Correction Law § 71-a defines a case management plan as "a comprehensive, dynamic and individualized ... plan based on the programming and treatment needs of the inmate." There is nothing comprehensive, dynamic or individualized about the case plan prepared in connection with [REDACTED] November 2016 parole release appearance, particularly since [REDACTED] had completed all programming available to him, that he has no need for treatment, and that he has achieved the goals contained therein. A new hearing, to be preceded by preparation of a proper case plan, should be ordered.

POINT VI

The Board Relied on Improper Information. At the hearing, the Board concluded its questioning by stating "We also need to consider whether or not there is official opposition or community opposition to your release, that is something that we

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factor in as well in making our decision.” (Transcript at 9). This is an incorrect statement of the law. Community opposition is not a factor to be considered by the Board. Rather, the Board is permitted and required to consider any official statements by either the sentencing Court, the prosecution, or the defense counsel. Upon information and belief, the only official statement was from [REDACTED] defense counsel, who supports [REDACTED] release.

According to the statute, another factors to be considered is “any statement made to the board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated.” The crime victim’s representative is defined as the crime victim’s closest living relative, the committee or guardian of such person, or the legal representative of such person.” NY Executive Law § 259-i(c)(A). Upon information and belief, no crime victim’s representative opposed [REDACTED] release.

In [REDACTED] previous six parole hearings, there was never any mention of community opposition. Yet at the November 2016 hearing, the Board mentioned the possibility of community opposition, but did not state that there was any opposition until the Decision mentioned current community opposition. Upon information and belief, there is no community opposition that the Board could have considered, and relying upon any purported community opposition was in error and mandates a new hearing. *See Matter of Ruzas v. Stanford*, Index No. 1456/2016 (Dutchess County, Jan. 30, 2017).

POINT VII

[REDACTED] Was Not Provided the Opportunity to Review the COMPAS in Advance of the Hearing. It is the Board’s and DOCCS’s policy to provide an inmate with the opportunity to review their parole file in advance of their parole hearing. [REDACTED] was provided with only an incomplete copy of his COMPAS report and other material. Mr. [REDACTED] previous COMPAS contained inaccurate information that falsely stated that Mr. [REDACTED] committed the crime while high or drunk. Mr. [REDACTED] raised the issue of the incomplete COMPAS at his hearing, but the hearing continued without the Board providing Mr. [REDACTED] with the opportunity to review his file. Mr. [REDACTED] does not know whether the information contained in the documentation was accurate. A commissioner’s asking of whether [REDACTED] agreed with the conclusion of the COMPAS is insufficient to satisfy the regulatory requirement. Therefore, a *de novo* hearing should be provided.

POINT VIII

The Board Will Not Release [REDACTED] Because He Is Maintaining His Innocence. [REDACTED] has maintained his innocence since the day that he was arrested. The People needed to try his case three times before they were able to obtain a conviction that was affirmed on appeal. There is no law that requires someone to admit to committing a crime, most importantly the Fifth Amendment to the Constitution. There is no requirement under the State’s parole scheme that an inmate admit responsibility for the crime. While the Board has stated in the past that it will not penalize [REDACTED] for his proclaimed innocence, it clearly does.

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The Board is denying parole because [REDACTED] will not admit that he committed the crime. It is clear that the Board is maintaining an unwritten policy of denying parole to people that will not admit that they committed the crime. The Board's statutory power does not include denying parole to an individual that has completed all programming, maintained a stellar disciplinary history, and has an adequate plan for release. The Board is acting in excess of its delegated powers. The Board is acting irrationally bordering on impropriety for denying Mr. [REDACTED] release.

POINT IX

The Board Misstated [REDACTED] Crime. The Board stated in its decision "The crime involved you striking a female victim in the head, face, neck, and abdomen with an causing her death. You then place her body in a field. An aggravating factor is that you placed her body in a field to evade responsibility for the crime as well as the brutal nature of the crime which involved you slashing her over 20 times in an explosive rage." (Transcript at 12).

This recitation is a misstatement of the record, and is not supported by either the pre-sentence report or the sentencing minutes. The Board's depiction of the crime was that the victim's body was placed in a field in order to evade responsibility after the victim had been murdered. There is absolutely no support in the record for this reading of the description of the crime, either in the evidence that was adduced during any of the 3 trials required by the State to secure a conviction, the presentence report(s) and the sentencing minutes. The Board cannot deny parole based upon a false statement of the record.

Moreover, the crime of conviction itself cannot be an aggravating factor in considering readiness for release to parole. The crime of conviction is the basis for the sentence.

POINT X

The Decision to Deny Parole Is Conclusory. The Board's decision to deny parole is conclusory. The fact is that [REDACTED] has arrested, imprisoned, and convicted of a crime that occurred 35 years ago. He has led an exemplary life in prison, and has made the most of his life in New York State's custody. The Board's decision noted only his crime of conviction and his positive efforts in prison. The final statement in the decision that "All factors considered, the release at this time is not appropriate" makes no sense. It indicates that the only reason for [REDACTED] continued incarceration is his crime of conviction. The decision does not include any aggravating factors beyond the crime. It does not indicate any information of what the Board would like [REDACTED] to do or to achieve before his next hearing in order to qualify for parole. The decision lacks any detail to support [REDACTED] continued incarceration or that any continued incarceration would change [REDACTED] candidacy for parole release.

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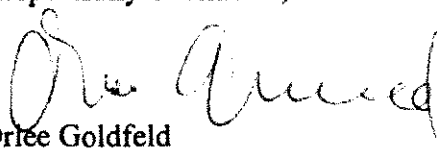
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Conclusion

For the reasons set forth herein, a *de novo* hearing should be held.

Respectfully Submitted,



Orlee Goldfeld

Counsel for [REDACTED]

Cc: [REDACTED]