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OFFICE OF COUNSEL
BOARD OF PAROLE

STATE OF NEW YORK
EXECUTIVE DEPARTMENT, DIVISION OF PAROLE

--x

In the Matter of

[REDACTED],

-against-

THE NEW YORK STATE PAROLE BOARD.

--x

Administrative Appeal

Appeals Unit #[REDACTED]

Hearing Date: **10/09/2018**

I. INTRODUCTION

Appellant [REDACTED] is currently imprisoned within the New York State Department of Corrections and Community Supervision ("DOCCS") at the Woodbourne Correctional Facility located at 99 Prison Road, Woodbourne, New York 12788. He hereby appeals the New York State Parole Board's October 9, 2018 decision denying his application for release to parole supervision.

II. BACKGROUND

A. The Instant Offense

[REDACTED] is currently serving his 22 nd year of an aggregate prison term of 20 to 40 years for a series of 1997 sexual assaults in Queens and Nassau Counties. His conditional release date is April 29, 2024.

Notably, [REDACTED] has maintained his actual innocence during the underlying criminal proceedings and throughout his imprisonment. By all accounts, there has always been substantial doubt about his guilt, as borne out by the history of the case. Indeed, his first trial in Queens County ended in a hung jury. [1] At the retrial, the trial judge dismissed six counts of the

[1] After the hung jury, [REDACTED] was offered a plea-bargain of 8-13 years in full satisfaction of all charges in both Queens and Nassau Counties. He rejected that offer. *See*, Parole Packet of [REDACTED] at 21 (Letter of November 7, 2016 from trial-and-appellate attorney, [REDACTED]

indictment, and the jury acquitted him on fourteen other counts. In the Nassau County case, entered a special *Alford/Serrano* plea in which he was permitted to accept punishment for the charged crimes without admitting to any wrongdoing.

has also passed a polygraph examination, lending even more support to his claims of actual innocence. *See*, Parole Packet of at 6 (Polygraph results from Certified Polygraph Examiner dated December 16, 1997).

Lastly, during post-conviction proceedings it was discovered that the DNA evidence at the foundation of his conviction not only contradicted alibi and other medical evidence in the case, but additionally, the DNA test results themselves were tainted during testing performed by the Nassau County Crime Lab and Labcorp. [2] As of the filing date of the instant appeal, a *pro bono* attorney who champions wrongful conviction cases and a private investigator are conducting a re-investigation of the case. is also working with the Innocence Project to have new DNA testing performed.

B. ' Prison Record

Prior to arrest and imprisonment, he had earned a college degree, and had been a successful businessman who owned his own commercial real estate company. He has no history of alcohol or drug abuse. Accordingly, he was not required to complete any academic ("ACAD") or substance abuse ("ABUSE") programs while in prison. *See*, Exhibit A (Inmate Program Overview dated 09/24/18). He has successfully completed most of DOCCS' other mandatory rehabilitative programs, including Aggression Replacement Training ("ART"), and a

[2] Both labs were unaccredited at the time the DNA tests were performed in case. Moreover, the Nassau County Police Crime Lab was shut down by the State in 2011 due to systemic dysfunction and because it was "plagued with significant and pervasive problems." Labcorp's shoddy work and unreliable testing was noted in post-conviction motion.

series of Transitional Services ("TSV") programs designed to prepare inmates for release. *See*, Exhibit A (Inmate Program Overview dated 09/24/18). He is currently on the waiting list for the mandatory Sex Offender Counseling and Treatment Program ("SOCTP"), as indicated by the "RPL" notation under "SEX" on his Inmate Program Overview. *Id.*[3]

[REDACTED] has also successfully completed several voluntary prison programs, including Advanced Bible Study and the Free at Last! Program sponsored by the Prison Fellowship Ministries. *See*, Parole Packet of [REDACTED] at 56-57.[4]

In addition, [REDACTED] has worked for nearly all of his years of imprisonment, often as a Group Leader or Inmate Assistant, in various jobs including the Shop Hall Squad, the Large Print vocational program, and as a clerk for the prison Chaplain. *See*, Parole Packet of [REDACTED] at 57.

During the course of his 22 years in prison, [REDACTED] has incurred only five Tier II disciplinary infractions, for which he served a total of only 3 days of pre-hearing keeplock. *See*, Exhibit B (Inmate Disciplinary History dated 09/24/18).

[3] During the hearing there was a discussion about whether an inmate who claims to be innocent can successfully participate in the SOCTP. According to the applicable statutes, there is no requirement that an inmate must confess to any conduct, criminal or otherwise, in order to complete the program. *See*, Correction Law §622(1); Mental Hygiene Law §10.03(a); Mental Hygiene Law §10.05(b).

[4] Prior to his parole hearing, [REDACTED] submitted a "Parole Packet" containing documentary evidence of, *inter alia*, his prison accomplishments, letters of support, promises of housing and employment upon his release, and statements from prison officials regarding his character and work ethic.

C. **The May 2017 Parole Hearing**

On May 8, 2017, [redacted] appeared before the Parole Board for the first time. In its decision, the panel found:

> DENIED – HOLD FOR 18 MONTHS, NEXT APPEARANCE DATE: 10/2018.
>
> THE PANEL COMMENDS YOUR PERSONAL GROWTH AND PRODUCTIVE USE OF TIME, HOWEVER, DISCRETIONARY RELEASE SHALL NOT BE GRANTED MERELY AS A REWARD FOR GOOD CONDUCT OR EFFICIENT PERFORMANCE OF DUTIES WHILE INCARCERATED. AFTER CAREFUL REVIEW OF THE RECORD, PERSONAL INTERVIEW AND DELIBERATION, PAROLE IS DENIED. YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY AND WOULD SO DEPRECATE THE SERIOUS NATURE OF THE OFFENSE AS TO UNDERMINE RESPECT FOR THE LAW. YOUR CONVICTIONS OF RAPE 1, SODOMY 1, SEXUAL ABUSE 2 AND ATT. SODOMY 1 WHEREBY, RECORDS INDICATE YOU APPROACHED THESE FEMALE VICTIMS BETWEEN THE APPROXIMATE AGES OF 16 AND 19, THREATENED THEM WITH A FIREARM AND ENGAGED IN SEXUAL CONTACT BY FORCIBLE COMPULSION FOR YOUR SELF GRATIFICATION. YOU INCURRED SEVERAL TIER 2 DISCIPLINARY INFRACTIONS AND REFUSED THE SOP PROGRAM IN THE PAST. DURING INTERVIEW YOU MAINTAINED YOUR INNOCENCE AND DESPITE NUMEROUS ATTEMPTS TO FOCUS ON THE INTERVIEW AND YOUR READINESS FOR PAROLE. YOU CONTINUE TO PERSUADE THE PANEL OF YOUR INNOCENCE AND MANIPULATE THE PANEL FOR YOUR SELF INTEREST. YOU BLAME OTHERS FOR YOUR INCARCERATION. YOUR LACK OF INSIGHT INTO YOUR NEGATIVE BEHAVIOR, INCLUDING A PRIOR CONVICTION FOR PUBLIC LEWDNESS. YOUR LOW COMPAS SCORES, SATISFACTORY INSTITUTIONAL ADJUSTMENT AND PAROLE PACKET ARE ALL DULY NOTED. HOWEVER, ALL FACTORS CONSIDERED, DISCRETIONARY RELEASE IS INAPPROPRIATE AT THIS TIME.

Exhibit C (Parole Board Decision dated 05/10/17).

D. The October 2018 Parole Hearing

On October 9, 2018, [redacted] appeared before the Parole Board for the second time. The Board once again denied parole release, this time finding the following:

> DENIED – HOLD FOR 24 MONTHS, NEXT APPEARANCE DATE: 10/2020.
>
> AFTER A REVIEW OF THE RECORD, INTERVIEW, AND DELIBERATION, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND THAT YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE AND SAFETY OF SOCIETY AND WOULD SO DEPRECATE THE SERIOUS NATURE OF THE CRIME AS TO UNDERMINE RESPECT FOR THE LAW. PAROLE IS DENIED. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, TOGETHER WITH YOUR INSTITUTIONAL ADJUSTMENT INCLUDING DISCIPLINE AND PROGRAM PARTICIPATION, YOUR RISK AND NEEDS ASSESSMENT, AND YOUR NEEDS FOR SUCCESSFUL RE-ENTRY INTO THE COMMUNITY. ALSO CONSIDERED ARE ANY LETTERS OR STATEMENTS IN SUPPORT OF YOUR RELEASE AND ANY OPPOSED. MORE COMPELLING, HOWEVER, ARE THE FOLLOWING: YOUR SERIOUS IOS OF RAPE 1ST 2 COUNTS, SODOMY 1ST, RAPE 1ST, SEXUAL ABUSE 1ST 3 COUNTS, RAPE 1ST, SODOMY 1ST 2 COUNTS, AND ATT. SODOMY 1ST DEGREES WHICH INVOLVED YOU SEXUAL ASSAULTING MULTIPLE FEMALE VICTIMS IN 1997. YOUR CRIMINAL HISTORY REPORT IS LIMITED TO A DISORDERLY CONDUCT IN 1981 AND PUBLIC LEWDNESS IN 1996, YET THE IOS REPRESENT A SERIOUS ESCALATION OF VIOLENT AND CRIMINAL BEHAVIORS THAT REMAIN A CONCERN TO THIS PANEL. YOUR POSITIVE PROGRAMMING AND LIMITED DISCIPLINARY RECORD TO DATE ARE BOTH NOTED. ALSO NOTED IS YOUR CLAIM OF INNOCENCE AND NUMEROUS APPEALS, YET YOU WERE FOUND GUILTY BY A JURY AND THE PANEL IS BOUND BY THAT DECISION. THE PANEL HAS WEIGHED AND CONSIDERED THE RESULTS OF YOUR RISK AND NEEDS ASSESSMENT AND THE LOW SCORES INDICATED THEREIN. THE PANEL HOWEVER DEPARTS WITH THE

> COMPAS IN THE AREA OF HISTORY OF VIOLENCE BASED ON THE VIOLENT NATURE OF THE IOS. NONETHELESS. NONE OF WHICH OUTWEIGHS THE GRAVITY OF YOUR ACTIONS OR THE SERIOUS AND LIFELONG PAIN AND SUFFERING YOU CAUSED YOUR MANY FEMALE VICTIMS. THEY WERE ABDUCTED FROM THE STREET, FORCED INTO YOUR VEHICLE, THREATENED WITH A WEAPON AND/OR PHYSICAL HARM, AND THEN SEXUALLY ASSAULTED. IN DOING SO YOU DEMONSTRATED CALLOUSNESS BEYOND COMPREHENSION. THEREFORE, BASED ON ALL REQUIRED FACTORS IN THE FILE CONSIDERED, DISCRETIONARY RELEASE, AT THIS TIME, IS NOT APPROPRIATE.

Exhibit D (Parole Board Decision dated 10/10/18).

III. ARGUMENT

A. The Panel Acted Arbitrarily and Capriciously and Contrary to Law by Basing Its Decision, in Part, on Erroneous Information from an Outdated COMPAS/Risk Assessment

Prior to his first parole hearing on May 8, 2017, a COMPAS Risk Assessment was administered to ████. *See*, Exhibit E (COMPAS/Risk Assessment dated 01/13/17). An updated COMPAS/Risk Assessment was administered on June 28, 2018 in preparation for his second parole hearing, which took place on October 9, 2018. *See*, Exhibit F (COMPAS/Risk Assessment dated 06/28/18).

In the first COMPAS/Risk Assessment dated 01/13/17, ████ was assessed the lowest score possible of "1" in every category on the criminogenic needs scale. *See*, Exhibit E (COMPAS/Risk Assessment dated 01/13/17). However, in the COMPAS/Risk Assessment dated 06/28/18, several of ████' numerical scores changed, even though he was still deemed a "Low" risk on the criminogenic needs scale:

Criminogenic Needs	COMPAS/Risk Assessment Score	
	01/13/2017	06/28/2018
Criminal Involvement	1	2
History of Violence	1	3
Prison Misconduct	1	5

Compare, Exhibit E (COMPAS/Risk Assessment dated 01/13/17) *with* Exhibit F (COMPAS/Risk Assessment dated 06/28/18).

Inexplicably, [redacted] "Criminal Involvement" risk doubled from "1" to "2," even though he has not been involved in any criminal activity since his first COMPAS/Risk Assessment on 01/13/17. Similarly, his "History of Violence" risk tripled from "1" to "3," even though he has not engaged in any violent conduct since his first COMPAS/Risk Assessment on 01/13/17. And lastly, his "Prison Misconduct" risk score quintupled from "1" to "5," despite the fact that his only "misconduct" since 01/13/17 was a 04/24/17 minor Tier II disciplinary infraction for the non-violent conduct of engaging in an "unauthorized phone call" to an attorney fighting his wrongful conviction, for which he received a 30-day loss of phone privileges as punishment, with no keeplock time at all.

Clearly, either the COMPAS/Risk Assessment dated 01/13/17 is incorrect, or the COMPAS/Risk Assessment dated 06/28/18 is incorrect, or perhaps both are incorrect, given the drastic discrepancies in the numerical scores with no intervening events to account for them.

Making matters worse, it appears that the panel erroneously utilized the COMPAS/Risk Assessment from 01/13/17 at [redacted] October 9, 2018 hearing, rather than the updated COMPAS/Risk Assessment from 06/28/18. At one point during the hearing, one of the commissioners stated:

> Okay. Now, I personally, considering the fact that you were convicted of this crime, I would somewhat disagree with the category of history of violence because of the violent nature of the crimes. I would think that would have been high. But that's the history of violence, a little bit different than risk of future violence, right? That's different.
> Nonetheless, *I rarely see all ones across the board.* So that's a benefit to you.

Exhibit G (Transcript of Hearing Dated 10/09/18) at 21, L 7-15 (emphasis added).

Clearly, the commissioner was utilizing the wrong, outdated COMPAS/Risk Assessment dated 01/13/17, since that is the only COMPAS/Risk Assessment containing "all ones across the board." The commissioner should have been utilizing the updated COMPAS/Risk Assessment from 06/28/18, which does not contain "all ones across the board." *Compare*, Exhibit E (COMPAS/Risk Assessment dated 01/13/17) *with* Exhibit F (COMPAS/Risk Assessment dated 06/28/18).

The commissioner was correct in explaining to [REDACTED] that "all ones across the board" is "a benefit to you." *See*, Exhibit G (Transcript of Hearing Dated 10/09/18) at 21, L 15. However, it is clear that the panel relied on outdated, and therefore erroneous, information when it utilized the COMPAS/Risk Assessment dated 01/13/17, despite having access to the updated COMPAS/Risk Assessment dated 06/28/18.[5]

Where erroneous information serves as a basis for a parole denial determination, such determination must be vacated and a new hearing ordered. *Matter of Hughes v. New York State Division of Parole*, 21 AD 3d 1176 (3d Dep't 2005) (granting *de novo* hearing where parole board erroneously relied on a youthful offender adjudication as though it were a prior felony);

[5] It remains unclear as to which COMPAS/Risk Assessment accurately reflects [REDACTED] risk scores, or if both are inaccurate.

Matter of Smith v. New York State Board of Parole, 34 AD 3d 1156 (3d Dep't 2006) (granting *de novo* hearing where parole board erroneously found that petitioner had four prior felonies rather than only three); *Matter of Plevy v. Travis*, No. 96105 (3d Dep't April 21, 2005) (granting *de novo* hearing where parole board erroneously relied on a probation violation that had been previously dismissed).

This is true even where, as here, the erroneous information relied upon actually benefits the prisoner. *See*, *Administrative Appeal of Paul Cox*, Appeal Control No. 02-260-11-B (November 8, 2011) (granting *de novo* hearing where parole board relied on erroneous information concerning "weapon involvement, forcible contact, and guideline ranges" even though the errors were "in [the prisoner's] favor") (decision attached hereto as Exhibit H).

B. The Panel Acted Arbitrarily and Capriciously and Contrary to Law by Interpreting the Efficacy of the COMPAS/Risk Assessment Using Unsupported Opinions that Are *Dehors* the Record

One of the commissioners explained his own interpretation of the efficacy of the COMPAS/Risk Assessment when it is administered to prisoners convicted of sex offenses:

> Now, we also have been told that it's not totally geared for people who have been convicted of sex offenses, but all of the other categories would apply to you as they would have as to any other parole applicants.

Exhibit G (Transcript of Hearing Dated 10/09/18) at 21, L 15-19.

The commissioner did not explain which specific "other categories would apply to" [redacted] and which categories would not. Nor is there any evidence in the record to support the commissioner's claim that the COMPAS/Risk Assessment is "not totally geared for people who have been convicted of sex offenses."

Indeed, Executive Law § 259-i *et seq.* does not contain any language that would even suggest that the COMPAS/Risk Assessment "is not totally geared for people who have been convicted of sex offenses." And although 9 NYCRR § 8002.2(a) specifically describes how the Parole Board shall utilize the "department risk and needs assessment" tool, there is absolutely nothing in the statute to suggest that the tool is somehow "not totally geared for people who have been convicted of sex offenses." After a thorough search of the case law governing parole release hearings, [REDACTED] counsel has found no authority that discusses the commissioner's claim that the COMPAS/Risk Assessment is "not totally geared for people who have been convicted of sex offenses."

There appears to be no statutory authority, case law, or record support for the commissioner's opinions about the efficacy of the COMPAS/Risk Assessment for those convicted of sex offenses, and therefore the panel should not have unilaterally decided which categories of the COMPAS they would follow and which they would ignore. In order to comport with the applicable statute (9 NYCRR § 8002.2(a)) the panel was supposed to incorporate the whole COMPAS/Risk Assessment into its decision making process, not pick and choose which categories to follow based on what they "have been told." In short, the panel did not properly consider [REDACTED]' COMPAS/Risk Assessment, as required by law. *See*, 9 NYCRR § 8002.2(a) ("In making a release determination, the board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision.").

Because the panel failed to properly consider the COMPAS/Risk Assessment, [redacted] must be granted a *de novo* hearing. *See, Diaz v. New York State Board of Parole*, 42 Misc.3d 532, 534 (Sup. Ct. Cayuga Cty. 2013) ("There must be some indication that the Board complied with the statute by considering the results of the COMPAS in reaching its decision."); *Matter of Gonzalez v. New York State Department of Corrections and Community Supervision*, 401130/14, NYLJ 1202727210613, at *1 (Sup., NY, Decided April 20, 2015) published in NYLJ May 26, 2015 (requiring "a true analysis of petitioner's COMPAS.").

C. The Panel Acted Arbitrarily and Capriciously and Contrary to Law by Inverting the Words of the Statute and Applying an Improper Standard of Review

Executive Law § 259-i(2)(c)(A) sets forth the proper standard to be applied in making parole release determinations. The Parole Board must determine whether

> there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law.

Executive Law § 259-i(2)(c)(A).

In [redacted] case, however, the Parole Board inverted the words of the statute and concluded that, if released at this time:

> there is a reasonable probability that you would not live and remain at liberty without again violating the law.

Exhibit D (Parole Board Decision dated 10/10/18).

As an initial matter, the very fact that the Parole Board inverted the clear language of the statute and then misapplied the standard of proof in this case is sufficient grounds to warrant a *de novo* hearing. After all, if the Parole Board does not apply the "reasonable probability" standard in the manner proscribed by law, then the words of the statute have no meaning.

In addition, the panel's misapplication of the "reasonable probability" standard reflects a fundamental misunderstanding of the degree of certainty required to release a prisoner to parole supervision. The "reasonable probability" standard is a relatively modest hurdle to overcome, although the panel in [redacted] case has treated it as though it were an extremely high hurdle.

The United States Supreme Court has found that the "reasonable probability" standard is something less than a preponderance of the evidence. *See*, *Williams v. Taylor*, 529 U.S. 362, 405-406 (O'Connor, J., writing for the majority) (explaining that the "reasonable probability" standard is not as demanding as the "preponderance of the evidence" standard); *Morris v. Matthews*, 475 U.S. 237, 254 n. 3 (Blackmun, J., concurring in the judgment) (cautioning against confusing "reasonable probability" with "more likely than not").

The panel was supposed to determine whether there is a reasonable probability that [redacted] *will* live at liberty without violating the law – not whether there is a reasonable probability that [redacted] *will not* live at liberty without violating the law. By inverting the plain language of the statute, the panel applied a completely erroneous standard in reaching its decision and turned the entire law on its head, thus warranting a *de novo* hearing before a new panel.

D. The Panel Acted Arbitrarily and Capriciously and Contrary to Law by Denying Parole Release Based Solely on the Nature of the Crime

In 2011, Executive Law § 259-c(4) was amended to require the Parole Board to promulgate new procedures in making parole release decisions. The revised statute requires that the Board "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." *See*, Executive Law § 259-c (4).

The legislative intent behind these changes in the law was "to modernize the work of the Parole Board by requiring the Board to adopt procedures that incorporate social science research in assessing post-release and recidivism risks." *See*, *Matter of Rabenbauer v. NYS Department of Corrections and Community Supervision*, 2013 NY Slip Op 51982(U); *Matter of Thwaites v. New York State Bd. of Parole*, 34 Misc.3d 694, 699 (Orange Cty. Ct. 2011), *citing* Genty, *Changes to Parole Laws Signal Potentially Sweeping Policy Shift*, NYLJ, Sept. 1, 2011. Indeed, the amended parole statute replaced "static, past-focused 'guidelines' with more dynamic present and future-focused risk-assessment 'procedures.'" *Thwaites* 34 Misc.3d at 699.

It is presumed that "[t]he Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law." *See*, *Matter of Stein*, 131 A.D.3d 68, 71 (2d Dep't 1987). However, in practice the Parole Board is failing to implement these material changes in the law.

In [redacted]' case, rather than perform a "dynamic present- and future-focused risk assessment" (*Thwaites*, 34 Misc.3d at 699), the panel focused almost exclusively on the nature of the crime and gave minimal attention to the past 22 years of [redacted] prison record and dedication to rehabilitation, thus rendering this hearing fundamentally unfair and in contravention of the legislative intent behind the amended parole statutes.

In 2013, Justice LaBuda of the Sullivan County Court explained the revised statute's purpose:

> In 2011, the legislature made changes to Executive Law, §259. The changes to Executive Law, §259-c(4) became effective on October 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in

> conjunction with the other factors enumerated in the statute, Executive Law, §259-i(2), and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. Executive Law, §259-(c)(4). The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release.

Matter of Rabenbauer v. NYS Department of Corrections and Community Supervision, 2013 NY Slip Op 51982(U) at *4.

[REDACTED] has spent nearly 22 years in prison for crimes he claims he did not commit. After his hearing on May 8, 2017, the Parole Board imposed an *18-month hold*, which is six months less than the statutory maximum 24-month hold. With no intervening events that would materially alter [REDACTED] preparedness for parole release (other than a minor Tier II disciplinary infraction for unauthorized telephone use), the panel at the October 9, 2018 hearing not only denied parole release, but also imposed the statutory maximum *24-month hold.*

Although an 18-month hold does not necessarily mean that an inmate should plan on being released after his next hearing, it is difficult to imagine why the first panel would impose an 18-month hold, but the second panel then imposed a 24-month hold. Moreover, one can only imagine the psychological toll it would take on a prisoner being given an 18-month hold, only to be informed after 18 months that parole is denied for yet an additional 24 months.

Under these circumstances, the panel has not given any particular reason why it believes [REDACTED] is not prepared for release, other than the boilerplate language taken from Executive Law §259-i. The Parole Board has overlooked the "forward-thinking paradigm" mandated by the amended Executive Law §259-(c)(4), and instead relied on the "backward looking approach" of focusing solely on the nature of the crime, which is prohibited by Executive Law §259-(c)(4). *Matter of Rabenbauer* at *4.

IV. CONCLUSION

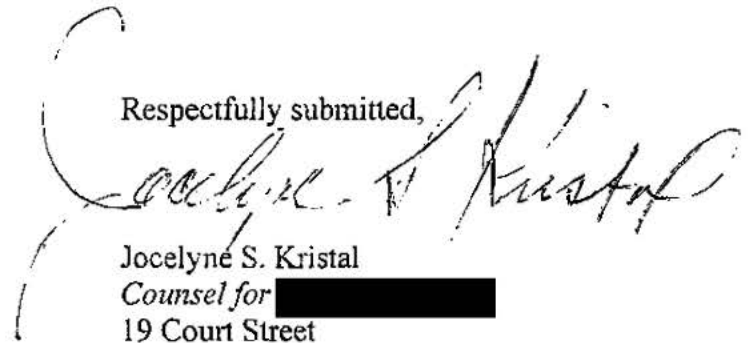
[redacted] has been denied parole twice, and has now been punished for nearly twenty-two years for crimes he claims he did not commit. He has presented compelling evidence of his innocence, including passing a polygraph exam. *See*, Parole Packet of [redacted] at 6 (Polygraph results from Certified Polygraph Examiner [redacted] dated December 16, 1997).

The Parole Board has historically been free to utilize unsworn statements, hearsay, and even rumors that *negatively* impact a prisoner's application for parole release, as long as such statements come from crime victims or their advocates, or even from concerned citizens. But in this case, [redacted] presented extensive evidence of his actual innocence that should *positively* impact his application. And yet it appears this evidence did not even move the scales in favor of parole release. As a matter of sound public policy and in the interests of justice, the Parole Board should be free to consider both positive and negative evidence at a parole hearing. The public is not served, and justice suffers where, as here, the Parole Board only considers evidence that negatively impacts a prisoner, yet simultaneously does not consider evidence of a prisoner's innocence that would positively impact his application.

V. PRAYER FOR RELIEF

WHEREFORE, for all of the foregoing reasons, [redacted] respectfully submits that the Parole Board's October 10, 2018 decision denying him parole release should be annulled in all respects, and respectfully requests that the Appeals Unit **GRANT** him a *de novo* hearing before a new panel with all due speed.

Dated: January 25, 2019
White Plains, New York



Respectfully submitted,

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