

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Parole Administrative Appeal Briefs

Parole Administrative Appeal Documents

---

September 2022

### Administrative Appeal Brief - FUSL000130 (2021-06-02)

Follow this and additional works at: <https://ir.lawnet.fordham.edu/aab>

---

#### Recommended Citation

"Administrative Appeal Brief - FUSL000130 (2021-06-02)" (2022). Parole Information Project  
<https://ir.lawnet.fordham.edu/aab/19>

This Parole Document is brought to you for free and open access by the Parole Administrative Appeal Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Parole Administrative Appeal Briefs by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

**LAW OFFICE OF RONALD L. KUBY**ATTORNEYS AT LAW  
119 WEST 23<sup>RD</sup> STREET, SUITE 900  
NEW YORK, NEW YORK 10011TELEPHONE: (212) 529-0223  
FAX: (212) 529-0644  
WWW.KUBLAW.COMRONALD L. KUBY  
RHIYA TRIVEDI  
  
OF COUNSEL  
GEORGE WACHTEL  
LEAH BUSBYSTAFF  
SUSAN BAILEY  
PROCESS SERVER  
LUIS R. AYALA 1952-2012

June 2, 2021

New York State Board of Parole Appeals Unit  
Harriman State Campus  
Building #2  
1220 Washington Avenue  
Albany, NY 12226**Re: Administrative Appeal on behalf of [REDACTED]**  
**Hearing and Decision Date, 2/23/2021**

To Whom it May Concern,

Mr. [REDACTED] is currently serving a sentence of 25 to Life for second degree murder; he has appeared before the Board of Parole on 5 occasions and has accordingly been behind bars for more than 32 years. [REDACTED]'s COMPAS scores, achievements while incarcerated, and family and community support indicate that he presents the lowest possible risk of violence or recidivism. He is 63 years old; he has spent just over half of his life incarcerated, overcoming his drug addiction and building a career as a skilled laborer and technician. He has earned the trust of DOCCS such that he leaves the prison grounds every day to work in a sewage treatment plant under civilian supervision. His record of rehabilitation, demonstrated heartfelt remorse, and carefully organized plan for release make clear that to further incarcerate him would serve no discernible purpose. And yet, at Mr. [REDACTED]'s last appearance, he was denied parole, for another 18 months.

The Board's decision is the definition of irrational, ignoring all that Mr. [REDACTED] has done to achieve sobriety and rehabilitation, gain and use valuable skills while incarcerated, and express remorse, all the while fixating upon things utterly outside of Mr. [REDACTED]'s power to change: backward looking COMPAS scores and official opposition more than 28 years old, and that in part, opposes only *early* release, not release to parole now, 8 years after Mr. [REDACTED]'s minimum. The Board's most recent decision should thus be reversed, and a *de novo* hearing conducted.

**FACTUAL AND PROCEDURAL BACKGROUND****A. February 23, 2021 Interview**

On February 23, 2021, Mr. [REDACTED] appeared before Commissioners Corley and Samuels for his fifth appearance before the Parole Board. Commissioner Corley established from the outset that there was some "audio difficulty", and Mr. [REDACTED] confirmed that there was an echo. HT at 2. Commissioner Corley expressed hope that Mr. [REDACTED] could hear the commissioners clearly. *Id.*

The facts of Mr. [REDACTED]'s murder were then summarized, and Mr. [REDACTED] was asked why it happened. HT at 3. Mr. [REDACTED] prefaced his answer with an explanation that nothing he said was intended as an excuse; that he takes "100 percent" responsibility for his actions, sees his choices as horrible, and is aware of the extent to which his crime was a "culmination of a long line of [trauma and addiction]." *Id.*

Mr. [REDACTED] shared that he and Ms. [REDACTED] — his victim — had been together on and off for 13 years. HT at 4. He described his descent from attending school and playing sports into habitual drug use. *Id.*

Mr. [REDACTED] then asked the Commissioners whether they could hear him, and, even when they said he could, followed up asking about whether there was an echo. HT at 5.

Mr. [REDACTED] then resumed discussion of his childhood traumas — his parents' divorce, his abusive mother, her arrest and involvement with violent men, his ultimate exclusion from that family, and his resultant moving from home to home; city to city. HT at 5-6. When the extended family members upon whom he relied experienced various mental health crises, Mr. [REDACTED] explained, he moved in with the extended family of his extended family, where he was exposed to drugs for the first time. HT at 7. Mr. [REDACTED] described his first criminal conviction, for getting into a high-speed chase with the police for which he was placed on probation. HT at 7-8.

Turning to his relationship with Ms. [REDACTED] Mr. [REDACTED] explained that the relationship was "strained right from the beginning." HT at 8. He described [REDACTED]'s troubled relationship with her father, Mr. [REDACTED]'s confronting the father and [REDACTED] coming to live with Mr. [REDACTED] — he was forthright that he "helped put a wedge between her and her family", thus "isolate[ing] her." HT at 8.

The video feed was then interrupted, for several minutes. *Id.*

Resuming questioning, Commissioner Corley asked whether, once there was a wedge between Ms. [REDACTED] and her family, Mr. [REDACTED] and Ms. [REDACTED] began to have problems. Mr. [REDACTED] explained that it was only when their daughter [REDACTED] was born, four years later, that the relationship began to struggle. HT at 9. Mr. [REDACTED] described being hard on Ms. [REDACTED] for using drugs while pregnant — he owned up to lacking the appropriate "social and communication skills" and empathy. HT at 10. Commissioner Corley then asked whether something had built up that led to the instant offense — whether the two were arguing, fighting; whether things had gotten physical. *Id.*

Mr. [REDACTED] admitted to being physical with [REDACTED] on five or six occasions, stating that he understood that there was no excuse for that. HT at 11. He confirmed that there was an Order of Protection taken out against him on one occasion that Mr. [REDACTED] described — a New Year's Eve Party where he kissed another woman and ended up following [REDACTED] back to her house. HT at 11.

Describing the facts and circumstances surrounding the instant offense, Mr. [REDACTED] described the tumultuousness, drug use, drinking, and separation that preceded the murder. HT at 12-16. He described in detail how he came to acquire the rifle he ultimately used to kill Ms. [REDACTED] HT at 14-16. Mr. [REDACTED] described entering Ms. [REDACTED]'s place of employment, her immediately seeing him and running, and firing one shot, and then two more shots, into her body. HT at 17. Commissioner Corley confirmed that this was Mr. [REDACTED]'s first commitment to prison in the State of New York. *Id.*

Mr. [REDACTED] described his disciplinary history, recognizing the correlation between his history of fighting and drugs prior to establishing his sobriety in 1999. He described the **three** tickets he had received in the prior 17 years – one for not changing a garbage bag, one for talking too loud after 11 p.m., and one for being out of place. HT at 19.

When asked about his thoughts on taking [REDACTED]'s life, Mr. [REDACTED] replied that he “holds the greatest guilt and shame”; that he understands that he not only took [REDACTED]'s life but that he took his daughter's mother (and father) from her when she was 8. HT at 19.

Commissioner Corley then reviewed Mr. [REDACTED]'s COMPAS, acknowledging his high scores for criminal involvement, history of violence, and re-entry substance abuse. HT at 20. Commissioner Corley noted, however, that Mr. [REDACTED] had not had a drug ticket in 22 years, since 1999. *Id.* Mr. [REDACTED] explained in supplement that he understands his COMPAS score for substance abuse but that at this time, he not only has his sobriety, but he has built a support system, including a sponsor, his family, his cousin, and his wife. HT at 21. Commissioner Corley briefly acknowledged the letters from those individuals included in Mr. [REDACTED]'s parole packet. HT at 23.

Commissioner Corley then referenced the letter from Mr. [REDACTED]'s defense attorney, as well as the official opposition submitted by the Erie County District Attorney's Office and the Supreme Court of Buffalo. HT at 24.

The video feed was then interrupted for a second time, for several minutes. *Id.*

Mr. [REDACTED] was then given an opportunity to add anything. HT at 25. He described his patience with the parole process, as well as his respect and empathy for the victim's family. HT at 26.

## **B. February 23, 2021 Denial**

The Board issued their decision the same day, denying release and imposing an 18 month hold on Mr. [REDACTED]. They wrote that there was a “reasonable probability that [Mr. [REDACTED]] would not live and remain at liberty without again violating the law” and that Mr. [REDACTED]'s release to supervision was “incompatible with the public safety and welfare and would so deprecate the serious nature of the crime as to undermine respect for the law.” HT at 28. They stated that they had considered relevant statutory factors and summarized the facts leading to the instant offense. HT at 28-29.

The Commissioners then noted that the victim had an Order of Protection out against Mr. [REDACTED] and expressed concern about his “long history of violating probation.” HT at 29. They also highlighted as bases for their decision that Mr. [REDACTED] was “high for criminal involvement, high for history of violence, and highly probable for re-entry substance abuse”. They recognized that he had completed multiple programs and that his parole packet contained many letters of support. “However,” they write, “there is significant official and community opposition to your release.” HT at 29.

“Continue programming and remain ticket free”, concluded the Commissioners. *Id.*

## **STANDARD OF REVIEW**

Decisions of the Board of Parole are discretionary and will upheld so long as the Board complied with the statutory requirements. Executive Law § 259-i. Upon Article 78 petition, a Court

will only annul a denial of parole when it is “arbitrary and capricious” and “irrational bordering on impropriety.” *Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69 (1980). Case law dictates that the Parole Board’s written decision is improper if it fails to explain the reasons for denial of parole “in detail and not in conclusory terms.” N.Y. Exec. Law. 259-i(2)(a); *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep’t 2016); *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dep’t 2014). Though it need not discuss each factor in detail, a written decision “may not summarily itemize a petitioner’s achievements while incarcerated or render a conclusory decision parroting the statutory standard.” *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc.3d 661 (Sup. Ct. Bronx Cty. 2006).

### **ARGUMENT**

#### **I. Mr. [REDACTED] is entitled to a *de novo* because he cannot have said to have been “personally interview[ed]” within the meaning of Executive Law § 259-i(2)(a).**

At Mr. [REDACTED]’s latest hearing, severe technological difficulties impaired his ability to hear and communicate with Commissioners Corley and Samuels. Indeed, Commissioner Corley acknowledged at the opening of the hearing that they had been having “some audio difficulty”. HT at 2. Mr. [REDACTED] mentioned hearing an echo from the Commissioners’ stream from the beginning of the hearing, HT at 2, and asked the Commissioners minutes later whether they could “hear[] [him] okay?” and whether there was an echo. HT at 5. Two separate notions in Mr. [REDACTED]’s transcript reference “Video Interruptions”. HT at 8, 24.

After Mr. [REDACTED]’s hearing, the remaining parole applicants with scheduled appearances at Otisville were given the option of postponing, because of the gravity of the technological issues. Many elected to postpone. Mr. [REDACTED] promptly filed a grievance, leading to the attached letter from Deputy Superintendent of Programs A. Stevenson, apologizing for the disruption and distraction, and relaying the fact that there were “connection issues with the video and echoing sounds throughout the hearing.” Exhibit A, Stevenson Letter.

Mr. [REDACTED] was prejudiced greatly, such that he cannot have said to have been “personally interview[ed]” within the meaning of Executive Law § 259-i(2)(a). He heard an echo for the duration of the interview, heard Commissioner Samuels ask Commissioner Corley at least four times, “what did he say?”, and had to sit for approximately twenty minutes, randomly distributed throughout the interview, after the video feed spontaneously terminated. During these windows Mr. [REDACTED] did not know a) when the feed would return, b) what, if anything, the Commissioners had heard prior to the interruption, c) whether he should repeat himself, or d) whether the Commissioners were still talking to him. SORC Brooks — mentioned in Deputy Stevenson’s letter — was apologetic, in the room in which Mr. [REDACTED] was sitting, but an apology did not ease his nerves nor return the interview to its ordinary course.

The decision of the Board should thus be reversed and a *de novo* hearing with appropriate technology be conducted.

#### **II. The Board acted irrationally and arbitrarily when it a) relied upon an opposition letter from the District Attorney’s Office that is 28 years old and stale and b) when it characterized as official opposition a letter from Mr. [REDACTED]’s sentencing judge that simply opposes “early release.”**

In *Hopps v. New York State Div. of Parole*, Decision and Order Index No. 2553/18 (Sup. Ct. Orange Cnty. 2018), the Honorable Justice Onofry of Orange County Supreme Court wrote, when reversing a decision by the Board on Article 78 Petition,

The only evidence in the record or otherwise submitted to the Court that might be argued to constitute [official opposition] are statements made by the victim's sister at the time of sentencing (some 25 years ago), and documents generated around the same time...the Court finds no even relatively current information that would support a finding that there was 'official opposition and significant and persuasive community opposition on file'...it is irrationality bordering on impropriety for the Board to deny parole based on statements about the Petitioner's suitability for release at or around the time of the underlying offense, some 25 years ago.

The only evidence in the record or otherwise submitted *herein* that might be argued to constitute official opposition are two letters submitted to the Parole Board in **1993**, from the Erie County District Attorney's Office, and one from Mr. [REDACTED]'s sentencing judge. Exhibit B, "Official Opposition." As in *Hopps*, there is "no even relatively current information that would support a finding that there was official opposition...". The Board's characterization of the two letters from 1993 as "significant community opposition" in both the hearing and as a basis of their decision to deny release constitutes irrationality bordering on impropriety and must be reversed. HT at 24, 29.

Even a cursory review of the letter from Mr. [REDACTED]'s sentencing judge indicates that not only is it 28 years old, but that it opposes only "early release", and not release to supervision after Mr. [REDACTED] has already served **8 years over his minimum**. The District Attorney's letter, meanwhile, is stale.

For considering as community opposition a letter that does not in fact constitute opposition, and for considering community opposition 28 years old, this most recent decision of the Parole Board should be reversed, and a *de novo* hearing conducted.

**III. The Board acted irrationally and arbitrarily when it failed to consider or describe their departure from Mr. [REDACTED]'s low and unlikely prescriptive COMPAS scores and denied Mr. [REDACTED] release to parole supervision based on immovable COMPAS scores.**

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

(a) Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, "Department Risk and Needs Assessment"). **If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure.**

[N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2 (**emphasis added**)]

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

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

*[Id. at \*2 (emphasis added).]*

See also, *Comfort v. Stanford*, 2018/1445 (Sup. Ct. Dutchess Cty., 2018) (finding the Board did not comply with 8002.2(a) by failing to explain its departure from the lowest possible COMPAS risk score of felony violence, arrest and absconding yet concluding that where was a reasonable probability the petitioner would not live and remain at liberty without violating the law); *Friedgood v. New York State Bd. of Parole*, 22 A.D.3d 950, 951 (3d. Dep’t 2005) (absence of record support for its conclusion that petitioner is likely to reoffend cumulatively render the Board’s decision “so irrational under the circumstances as to border on impropriety”).

Here, the Board a) departed from Mr. [REDACTED]’s “low” and “unlikely” COMPAS scores in 9 of the 12 categories, b) fixated upon high scores in three categories that will never change, no matter what Mr. [REDACTED] does or does not do, and c) utterly failed to provide an individualized reason for their departure. The decision of the Board should thus be reversed, and a *de novo* hearing held.

At Mr. [REDACTED]’s hearing, the Board repeatedly acknowledged, and specifically cited in their decision, Mr. [REDACTED]’s three elevated COMPAS scores (Criminal Involvement, History of Violence, and ReEntry Substance Abuse). HT at 20, 29. At no point, in the hearing or in the decision, did they acknowledge Mr. [REDACTED]’s “low” and “unlikely” scores in the 9 remaining categories. To ignore **9 of the 12 categories** unquestionably constitutes a departure from COMPAS within the meaning of N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2; the Board was thus required to state an individualized reason for their decision to do so.

The Board stated no such reason. Even a cursory examination of the scores upon which the Board relied, in comparison with the scores from which they departed indicate that no rational, non-arbitrary explanation exists.

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

insight into the inmate's suitability for release. Mr. [REDACTED]'s scores prior to his last hearing were as follows:

Risk of Felony Violence – 1 – Low  
Arrest Risk – 1 – Low  
Abscond Risk – 2 – Low  
Criminal Involvement – 8 – High  
History of Violence – 8 – High  
Prison Misconduct – 1 – Low  
ReEntry Substance Abuse – 6 – Highly Probable  
Negative Social Cognitions – 1 – Unlikely  
Low Self-Efficacy/Optimism – 1 – Unlikely  
Low Family Support – 1 – Unlikely  
ReEntry Financial – 2 – Unlikely  
ReEntry Employment Expectations – 1 – Unlikely

[Exhibit C, COMPAS.]

Here, the Board departed dramatically from Mr. [REDACTED]'s COMPAS scores that predict **no risk in 8 of the 9 predictive categories**, when they found that there was a “reasonable probability” that Mr. [REDACTED] would not “live at liberty again without violating the law” and that his release was “incompatible with the welfare and safety of the community.” HT at 28.

Similarly, the Board's reliance upon Mr. [REDACTED]'s “highly probable” COMPAS score as to future risk of substance abuse was error warranting reversal. The Board recognized that Mr. [REDACTED] has not had a Tier III infraction for a failed drug test since 1999, HT at 20; Mr. [REDACTED] repeatedly asserted during the hearing that he had been sober for the 21 years since that very ticket. Mr. [REDACTED]'s COMPAS score is indicative of the fact that, given Mr. [REDACTED]'s history of addiction, his admissions to having abused not only alcohol but a wide array of drugs, and his incurring Tier III violations for drug abuse while incarcerated, that his COMPAS score for future substance abuse may remain high forever. The Board should consider instead the fact that Mr. [REDACTED] has been sober for 21 years, has been in ASAT, and is currently in his third cycle of Twelve Steps.

The Board's conclusions that Mr. [REDACTED] poses some future risk to others or of law-breaking are **forward-looking** determinations. And yet, instead of considering Mr. [REDACTED]'s universally low COMPAS scores in 8 of the 9 **predictive** categories, the Board relied upon backward looking, descriptive metrics which Mr. [REDACTED] **can do absolutely nothing to change** – his scores in the **History of Violence, Criminal Involvement, and Re-Entry Substance Abuse** categories.

Mr. [REDACTED] can do nothing to lower scores in categories that are inextricably and axiomatically linked to the past. He cannot go back in time and alter his pre-prison history of addiction and crime nor can he change the fundamental truth of his having committed the instant offense. He himself remorsefully admits this, at every single Board appearance; his COMPAS scores for criminal involvement and history of violence reflect this. And it is precisely because of the unchanging, unchangeable nature of Mr. [REDACTED]'s past that backward looking COMPAS scores do not constitute an “individualized reason” for departing from COMPAS scores that offer direct guidance as to Mr. [REDACTED]'s present-day fitness for release.

**IV. The Board acted irrationally when it failed to consider Mr. [REDACTED]'s extraordinary work release, denied release, and prescribed a course of conduct long completed: to “complete programming and remain ticket free.”**

The Board prescribed, when denying Mr. [REDACTED] release to parole supervision and imposing an 18-month hit, that he “[c]ontinue programming and remain ticket free”. HT at 29.

Mr. [REDACTED] has been sober for nearly two decades, without incident. His last Tier III infraction was in 1999 — the last time he failed a drug test. In fifteen years, Mr. [REDACTED] has received only three Tier II infractions: One for being out of place in 2004, one for speaking too loudly after 11pm in 2009, and once for failing to follow an order to change a trash bag in 2014. He has thus not received a single infraction in **seven years**.

Simultaneously, he possesses outside work clearance from DOCCS HQ in Albany to work at the waste water treatment (sewage) plant near Otisville Correctional Facility. Mr. [REDACTED] works every day at the plan from 8:30 am to 3:00 pm; he is a member of the only crew that lacks corrections supervision and is supervised instead by civilians; he is entrusted with all aspects of technical worxdk at the plant, including taking water samples. The Board had this information before them, and utterly failed to consider it.

For the Board to instruct Mr. [REDACTED] to “continue programming” when he has reached the high-water mark of DOCCS programming — an outside clearance job that requires great technical acumen and lacks supervision by corrections officers, is irrational and arbitrary. For the Board to instruct Mr. [REDACTED] to “remain ticket free” when he has already done with respect to Tier III infractions for 22 years, and with respect to Tier II infractions for 7 years, only adds to the irrationality and arbitrariness of the Board’s latest decision. The Board’s decision should be reversed, and a *de novo* hearing held.

Respectfully submitted,

/s/  
\_\_\_\_\_  
RHIDAYA TRIVEDI  
RONALD L. KUBY  
Law Office of Ronald. L. Kuby  
119 West 23<sup>rd</sup> Street, Suite 900  
New York, NY 10011  
212-529-0223  
[rhiyatrivedi@gmail.com](mailto:rhiyatrivedi@gmail.com)