Art. 78 Petition - FUSL000115 (2019-11-02)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of [redacted] Petitioner,	:	Index No.:
-against-	:	**VERIFIED PETITION**
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and TINA M. STANFORD, CHAIRWOMAN, BOARD OF PAROLE, Respondents	:	
For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	:	

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PRELIMINARY STATEMENT

This Article 78 Petition seeks a *de novo* parole hearing for Petitioner [redacted]. The Parole Board's combined errors, and its failure to provide a legally sufficient explanation for its denial of Mr. [redacted]'s parole demonstrate that the Board did not apply the requisite legal standards governing parole decision-making and that its denial was arbitrary and capricious.

In 1984, Justice John A. Dillon sentenced Mr. [redacted] to a minimum term of 25 years to life, and thus determined that Mr. [redacted] must be considered for parole under the law. Mr. [redacted] has focused the last three and a half decades of his life on improving himself and preparing to be a contributing member of society upon his release. Yet despite Mr. [redacted]'s efforts, the Board of Parole has now denied Mr. [redacted]'s application for parole for a tenth time.

The New York State Department of Corrections and Community Supervision's Parole Board ("the Board") summarily denied Mr. [redacted]'s release in four short paragraphs. The decision and the process by which the Board arrived at its decision are plagued with myriad errors, the most egregious of which being the Board's failure to meaningfully address Mr. [redacted]'s minor status during the commission of the underlying offense, and the Board's refusal to provide Mr. [redacted], as required by law, with the materials the Board relied on in coming to its decision.

The Board failed to support its denial of release and did not sufficiently discuss specific issues and statutory factors as required by controlling law, including Mr. [redacted]'s youth and its attendant circumstances at the time of the crime. Instead, the Board summarily concluded that releasing Mr. [redacted] would so deprecate the seriousness of the offense so as to undermine respect for the law. The Board also summarily concluded that release would be incompatible with the welfare of society, but did not explain how, in light of definitive evidence of Mr. [redacted]'s rehabilitation by the New York State Department of Corrections and Community Supervision's ("DOCCs") own metrics, Mr. [redacted] would pose a danger to society. In addition, the Board's

conclusion that Mr. [redacted] would pose a risk to community safety is inconsistent with the evidence of rehabilitation, as confirmed by the COMPAS Risk Assessment. The Board failed to explain its departure from Mr. [redacted]'s COMPAS assessment, and thus failed to meet its statutory obligations.

During his incarceration, Mr. [redacted] addressed the underlying substance abuse issues that contributed to his crime and participated in various programs not only to better himself, but to help others. He reflected on his crime, gained insight, and worked tirelessly on self-improvement. Mr. [redacted] also works hard to maintain close relationships with individuals who support his efforts for release and who have repeatedly assured DOCCS that his release will be stable and successful.

Mr. [redacted] merits due consideration of his release to parole supervision. The Board's summary decision does not evince that he received the consideration to which he was legally entitled.

Mr. [redacted] appeals his denial of parole and is entitled to a *de novo* parole hearing on the following grounds: (A) the Board did not sufficiently consider the required statutory and Constitutional factors in reaching its decision, namely Mr. [redacted]'s minor status at the time of the offense and his achievements during the period of his incarceration; (B) the Board did not provide Mr. [redacted] with a complete record such that he could prepare and address the record during his interview; (C) the Board did not sufficiently explain its decision to deny Mr. [redacted] parole, and did not explain its departure from Mr. [redacted]'s COMPAS report; (D) the Board improperly considered factors outside of the statute and regulations, such as an amorphous "continual mistrust of authority" and an "official" letter of opposition from an Assistant District Attorney who did not prosecute Mr. [redacted]'s offense, and had an inaccurate understanding of the underlying facts; (E) the Board placed undue weight on Mr. [redacted]'s underlying offense; (F) the repeated denial of Mr. [redacted]'s

parole amounts to illegal resentencing; and (G) the "deprecate the seriousness of the crime" standard is unconstitutionally vague.

Each ground warrants reversal. For these reasons, individually and cumulatively, the Board's decision should be reversed and Mr. [redacted] granted immediate release or, in the alternative, afforded a *de novo* hearing within 30 days.

VENUE

This action is properly commenced in Albany County because it is the county where Respondent, the Attorney General of New York State, maintains her principal office and where the parole decision was made. *See* CPLR § 506(b).

PROCEDURAL HISTORY

Mr. [redacted] has been denied parole ten times. This petition challenges the most recent parole denial on November 13, 2018, after a hearing with the Board of Parole the same day. *See* Ex. 1, Parole Decision, November 13, 2018. Mr. [redacted]'s timely notice of administrative appeal was filed on November 20, 2018. *See* Ex. 18, Petitioner's Administrative Appeal of Parole Denial. On July 25, 2019, the Board of Parole Appeals Unit ("Appeals Unit") affirmed the Board's denial of parole. *See* Ex. 19, Respondents' Administrative Appeal Decision, July 25, 2019. Mr. [redacted] has exhausted his administrative remedies and this matter is ripe for the instant Article 78 proceeding.

STATEMENT OF FACTS

Mr. [redacted]'s incarceration began more than three decades ago. At the time of the underlying crime, Mr. [redacted] was 17 years old, living on his own without familial support, and suffering from substance abuse. Under the influence of drugs and alcohol, Mr. [redacted] and an acquaintance confronted the victim, [redacted], whom Mr. [redacted] believed was responsible for a series of crimes in the neighborhood, and the two ultimately killed Mr. [redacted]. Mr. [redacted] was arrested at 17 years old and, in 1984, Mr. [redacted] was convicted of second-degree murder. After a thorough review of his record, the trial court sentenced him to 25 years to life with the possibility of parole.

Since the time that Mr. [redacted] began his sentence, and through programs offered by DOCCS, Mr. [redacted] has focused on his rehabilitation and his future after confinement.

Mr. [redacted]'s record shows that he has volunteered in numerous programs, completed vocational training, earned certificates and excellent evaluations, and has maintained a job during his incarceration. Mr. [redacted] has held positions as an administrative clerk, a dining room attendant, an electrician's assistant, a food assembler, a grounds maintenance laborer, an inmate mobility assistant, a level-two porter, a level-two industries worker, a level-two salvage laborer, and a painter's assistant. He performed these duties while also participating in the institutional programs listed below.

During his incarceration, and although he was shuffled from institution to institution, Mr. [redacted] remained actively involved in DOCCS programs. For example, Mr. [redacted] earned his GED and received college credits; has taken courses in legal research, bible study, wood craft, leather craft, machinery, shoe repair, art, and medical services; and has attended multiple non-aggression

workshops, alternatives to violence programming, aggression replacement training, and Alcoholics Anonymous and Narcotics Anonymous meetings.[1]

Mr. [redacted] has also worked hard to maintain his relationships with supportive figures in the community who have repeatedly pledged to help him upon his release. Mr. [redacted] received assurances from Pastor [redacted],[2] [redacted] and [redacted] and [redacted] that he will have a place to reside upon his release. He has separately received authorization to reside at HUD-funded housing, specifically the Cephus House. Mr. [redacted] has also received assurances for employment from Pastor [redacted] and [redacted]. Several other relatives and friends both within and outside of New York State have also offered him employment. They are all looking forward to Mr. [redacted]'s return to society and will provide a stable support system for Mr. [redacted]

Finally, Mr. [redacted]s COMPAS report shows that he is low-risk. Mr. [redacted] was scored as "low risk" for felony violence, arrest, and absconding. *See* Ex. 13, COMPAS 2018. Furthermore, Mr. [redacted]'s COMPAS report also reflects that he is "job ready" and his "educational needs were met." *See id.* Mr. [redacted] worked hard to developed a comprehensive release plan, including multiple options for housing arrangements and job opportunities upon his supervised release. He has taken responsibility for his offense and is prepared to return to society and maintain a law-abiding life, and his COMPAS Risk Assessment reflects this.

Despite Mr. [redacted]'s accomplishments and his plans for the future, at Mr. [redacted]'s most recent hearing, the Commissioners asked only six questions about his plans for reentry, and spent over

[1] In early September 2019, Mr. [redacted] was transferred to Auburn Correctional Facility, where has already immersed himself in the programs and offerings available to him. For example, he has completed orientation, has been assigned a job as a hospital porter (morning and afternoon module), visits regularly with parole support systems available to him, and participates in Inmate Tablet related to JP5S, a new inmate program focused on education, computer skills, literature, and organizational planning. He participates in the Native American spirituality.
[2] Since his transfer to Auburn, Mr. [redacted] as been able to visit with Pastor [redacted]

half the hearing discussing the circumstances surrounding Mr. [redacted]'s underlying offenses without any attention paid to how Mr. [redacted] youth played a role. Although Mr. [redacted] tried to express how his young age and immature mentality contributed to his action, the Board only asked two questions about Mr. [redacted]'s age – one regarding how old he was when he left home to escape his abusive father, and a second question inquiring as to whether Mr. [redacted] had friends his own age after he explained he spent most of his time working with adults. *See* Ex. 2, Nov. 2018 Interview Transcript, at 7, 8. With these questions, the Board merely established Mr. [redacted]'s age at the time of the underlying offense, but did nothing further to analyze the impact of Mr. [redacted]'s youth and his inability to fully understand the consequences of his actions at that time. The Board asked no questions about Mr. [redacted]'s thought-process at the time, how long he had been abusing alcohol and drugs and how this may have impacted his development, or if he had adult resources he could turn to for help. The Board merely listed Mr. [redacted]'s "young age when [he] committed [the] crime" as a factor the Board "also considered." Ex. 1, at 2.

A review of Mr. [redacted]'s parole file also shows that the Board never provided Mr. [redacted] the materials that he is entitled by law to receive – namely, the community opposition and an unredacted COMPAS report. This is still the subject of ongoing litigation, because the State has refused to turn over a letter by an Assistant District Attorney that was referenced in connection with Mr. [redacted]'s most recent hearing.[3] Remarkably, Mr. [redacted] has never received this letter. In addition to – and likely, in part, because of – the lack of information provided to Mr. [redacted] before his hearing, the Commissioners based their decision on information that was either erroneous or outside of the factors set by law.

[3] *Matter of* [redacted] *v. NY DOCCS*, (3d Dep't App. Div. No [redacted]).

ARGUMENT

The standard of review for an Article 78 Petition is whether the Board's decision was "arbitrary and capricious," and "irrational bordering on impropriety." *Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69 (1980). Thus, the Board's decision should be reversed where (1) "the proceedings and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or was otherwise unlawful"; (2) a Board member or members making the determination "relied on erroneous information as shown in the record of the proceeding, or relevant information was not available for consideration"; or (3) where "the determination made was excessive." *See* 9 NYCRR § 8006.3(a). In this case, the Board's decision was made and the parole interview conducted in violation of law based on erroneous information, and was arbitrary and capricious.

Specifically, Mr. [redacted] is entitled to a *de novo* parole hearing because (A) the Board did not sufficiently consider the required statutory and Constitutional factors in reaching its decision, namely Mr. [redacted]'s minor status at the time of the offense and his achievements during the period of his incarceration; (B) the Board did not provide Mr. [redacted] with a complete record, including letter of community opposition, such that he could prepare and address the record during his interview; (C) the Board did not explain its decision to deny Mr. [redacted] parole, and did not explain its departure from Mr. [redacted]'s COMPAS report; (D) the Board improperly considered factors outside of the statute and regulations, such as an amorphous "continual mistrust of authority" and an "official" letter of opposition from an Assistant District Attorney who did not prosecute Mr. [redacted]'s offense, and did so based on an inaccurate understanding of the underlying facts; (E) the Board placed improper weight on Mr. [redacted]'s underlying offense; (F) the repeated denial of Mr.

[redacted]'s parole amounts to illegal resentencing; and (G) the "deprecate the seriousness of the crime" standard is unconstitutionally vague.

A. The Board Did Not Consider Mr. [redacted]'s Minor Status as Required by Law

Under Executive Law § 259-i(2)(c)(A), the Board is required to consider eight statutory factors and issue determinations that include individualized reasons for its conclusions, including Mr. [redacted]'s institutional record, release plans, and the seriousness of the offense and Mr. [redacted]'s activities following arrest prior to confinement. Exec. Law § 259-i (2)(c)(A). In addition, the Board is required to consider the significance of a parole applicant's youth and its attendant circumstances at the time of the commission of the crime before making a parole determination under the Eighth Amendment and the relevant regulations. *See Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 36 (3d Dep't 2016); *see also Miller v. Alabama*, 567 U.S. 460, 479 (2012); *Graham v. Florida*, 560 U.S. 48, 75 (2010). 9 NYCRR § 8002.2(c) requires the Board to consider "the diminished culpability of youth" and the applicant's "growth and maturity since the time of the commitment offense".

Here, neither the parole interview transcript nor the Board's written determination reflect that the Board met its constitutional or statutory obligations to consider Mr. [redacted]'s youth in relation to the commission of the crime. Mr. [redacted] was only 17 years old when he committed the underlying crime, for which he was sentenced to 25 years to life in prison.[4] *See* Ex. 2 at 2. During Mr. [redacted]'s interview, and in the decision itself, the Board failed to mention any Eighth Amendment or regulatory factors. *See generally* Ex. 1. The Board repeatedly failed to account for Mr. [redacted]'s

[4] Understanding that youth under the age of 18 are not fully developed as adults, and that youthful offenders should receive rehabilitation services and have the opportunity to reintegrate into their communities, New York State legislators have passed the Raise the Age law, which no longer automatically charges 16- and 17-year-olds as adults. *See, e.g.* New York State Raise the Age, NYLS, Chapter 59, Part WWW (enacted April 10, 2017). Although Mr. [redacted] is not eligible under the Raise the Age law, his age nevertheless played a factor in his crimes, and he deserves to be reintegrated into his community.

minor status when it questioned his relationship with the victim and Mr. [redacted]'s past reluctance to go to the authorities. *See* Ex. 2 at 8, 10; *Rivera v. Stanford*, 172 A.D.3d 872, 875 (2d Dep't 2019) ("[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the [Parole] Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue."). The Board's failure to account for Mr. [redacted]'s age at the time of the underlying offense is a violation of 9 NYCRR § 8002.2(c) and of the minimal procedural requirement to protect an individual's rights under the Eighth Amendment and to ensure that juvenile offenders receive "a meaningful opportunity to obtain release" at some point in the process. *See Graham*, 560 U.S. at 75. The Appeals Unit inexplicably asserts that the Board's minimalist approach fully satisfied this factor and that "all required youth matters were addressed." Ex. 19 at 4. However, both the Board and the Appeals Unit failed to consider the practical effects Mr. [redacted]'s age had on his mental state and his actions at the time of the crime.

Had the Board fairly considered that Mr. [redacted] was only 17 years old, and living on his own at the time, they would have better understood why Mr. [redacted] was frightened, had no one to turn to, and made an impulsive decision without recognizing the full repercussions of his conduct. *See* Ex. 2 at 8-9. Yet the Board's decision only skeptically notes that Mr. [redacted] was intimidated by Mr. [redacted]. *See* Ex. 1 at 2 ("…your victim, *who you claimed you were scared of* and was a criminal in the neighborhood.") (emphasis added). Similarly, the Board suggested that Mr. [redacted]'s previous efforts at age 17 to alert the police through his employer of Mr. [redacted]'s criminal activity were insufficient, and failed to address completely Mr. [redacted]'s "susceptibility to peer and familial pressures." *See* Ex. 2 at 10, 12; 9 NYCRR § 8002.2(c)(2). Finally, the Board's decision makes

no mention of Mr. [redacted]'s demonstrated maturity and rehabilitation in the three decades since the crime took place.

Although the Board is not obligated to refer to each statutory factor, or to give every factor equal weight, as the Appeals Unit reiterated, the Board is nevertheless required "to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Board did in fact fail to consider the proper standards, the courts must intervene." *See Matter of King v. New York State Div. of Parole*, 190 A.D.2d 423, 431 (1st Dep't 1993), *aff'd* 83 N.Y.2d 788 (1994).

Here, the Board failed to give fair consideration to Mr. [redacted]'s institutional record, his release plans, and his age of at the time of the offense; accordingly, a *de novo* hearing, or Mr. [redacted]'s immediate release, should be granted.

B. The Board Did Not Provide Mr. [redacted] with Necessary Information to Prepare for His Parole Hearing

Parole applicants have the right to access their own case records and the materials considered by the Board. *See Clark v. New York State Bd. of Parole*, 2018 WL 1988851, at *3 (N.Y. Sup. Ct. 2018) (finding that the Board's refusal to disclose the existence of statements of opposition to an applicant violated the Executive Law and Parole Board Regulations). The Board may only restrict or withhold this information to the extent that the materials may contain "any information which if disclosed might result in harm, physical or otherwise, to any person." *See* 9 NYCRR § 8000.5(c)(2)(i)(a)(3). This does not allow the Board to deny an applicant's access to these materials, but rather means the Board may redact the "individual's name and address [to keep them] confidential." *See id*; *In re Mullins v. NYS Board of Parole*, Index No. 52682-2017 (N.Y. Sup. Ct. April 22, 2019) (holding that "if Respondent elects to consider the 'community

opposition' in making its parole release decision, then it must provide copies of that documentation to the Petitioner").

1. Failure to provide letters.

In its November 2018 decision, the Board states that it received letters of support and opposition and considered these letters in coming to its decision to deny Mr. [redacted]'s release. *See* Ex. 1 at 2 ("We have reviewed…official letters in support and opposition…."). Notably, the only opposition letter believed to exist was one written by an Assistant District Attorney who has no firsthand knowledge of the case. *See* Ex. 2 at 29; Section D.2. However, the Board failed to provide any official letter of opposition to Mr. [redacted], redacted or otherwise. Mr. [redacted] has a right to the substance of any letter of opposition, albeit with the necessary redactions. The Appeals Unit asserts that Mr. [redacted] "already has this letter" and therefore the "issue of non-disclosure is moot." *See* Ex. 19, at 3. This is inaccurate. Mr. [redacted] does not have the letter; he simply knows of its existence. Therefore, the issue is not moot and cannot be swept away so neatly. The Board's failure to provide Mr. [redacted] all letters submitted in his case, redacted or otherwise, violated Parole Board Regulations and necessitates a new hearing.

2. Failure to provide full COMPAS assessment.

Additionally, portions of Mr. [redacted]'s COMPAS assessment were inappropriately redacted. *See* Ex. 13. Questions 24, 29, and 30 were redacted from the COMPAS assessment that was provided to Mr. [redacted] before his parole interview. *See id.* at 5. When Mr. [redacted] requested the full COMPAS report, he did not receive a response from DOCCS until after both his parole interview and the Board's decision. *See* Ex. 14, DOCCS Response, December 24, 2018 at 1. In its response, DOCCS asserted that the redacted questions were "evaluative in nature, and therefore the answers to those questions [were] not released to [redacted] under the F.O.I.L." *See id.* The New York Freedom of Information Law ("F.O.I.L.") governs public access to records, not parole applicants'

access *to their own files*. An applicant's access to his own COMPAS report—which is part of the parole file—cannot be categorically withheld. The Appeals Unit's assertion that "an inmate has no constitutional right to the information in his parole file" is beside the point. Mr. [redacted] has the right to access his own case records and the materials considered by the Board. *See* Division of Parole Regulations § 8000.5; *Clark*, 2018 WL 1988851, at *3. This is an improper application of the Parole Board Regulations, 9 NYCRR § 8000.5, and is grounds for granting a *de novo* hearing.

C. The Board's Decision Denies Parole in Conclusory Terms and Fails to Identify Reasons for Denial in Violation of Executive Law 259-i and Its Regulations

The Board's decision is deficient on its face because it fails to explain the Board's application of the statutory factors in non-conclusory terms, and fails to explain its departure from the COMPAS assessment, pointing to Mr. [redacted]'s "presentation," which is vague and, in any case, not a statutory factor for consideration. The Court should therefore grant Mr. [redacted] a *de novo* hearing, or immediate release to Community Supervision.

1. Failure to explain decision in non-conclusory terms.

Under the Parole Board regulations, "[r]easons 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 8002.2 were considered in the individual's case." 9 NYCRR § 8002.3(b). The Board's decision must consist of more than a "simple regurgitation of standard boilerplate [] language," *Ciaprazi v. Evans*, 52 Misc. 3d 1212(A) (N.Y. Sup. Ct. 2016), and must contain enough detail "to permit intelligent judicial review." *West v. New York State Bd. of Parole*, 41 Misc. 3d 1214(A) (N.Y. Sup. Ct. 2013). The Board must articulate the reasons for its decisions in a reasonable manner to enable a court to reconstruct the rationale behind the Board's decision. *See id.*

The Board's November 2018 decision denying Mr. [redacted] parole consists primarily of standard, boilerplate language and provides no clarity as to how it reached its decision. The decision lists the materials the Board members reviewed, but provides no substantive analysis, in violation of Executive Law and Parole Board regulations. *See* Ex. 1, Nov. 2018 Decision, at 2 ("We have reviewed your case plan, your release plans, official letters in support and opposition, and your risk and needs assessment which indicates your lower risk and needs."); *see also* Exec. Law § 259-i(2)(c)(A); *Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 28 (1st Dep't 2016) ("The Board summarily listed petitioner's institutional achievements, and then denied parole with no further analysis of them, in violation of the Executive Law's requirement that the reasons for denial not be given in 'conclusory terms'").

A third of the decision consists almost entirely of the statutory language of Executive Law § 259-i(2)(c)(A). In the November 2018 decision, the Board states:

> Despite your low risk scores and improved discipline, the panel is concerned that based on your presentation you have not developed the tools to live a law abiding life. As such this panel is not convinced that you would live and remain at liberty without violating the law. Your release remains incompatible with the welfare of society and would deprecate the heinous nature of these crimes as to undermine respect for the law.

Ex. 1 at 3. The Board's decision does not include the required "individualized" rationale or demonstrate any consideration or weighing of the statutory factors. Without any explanation or application of the facts to the legal standard, the Board's decision contains nothing but "conclusory assertions" that fail to provide a basis upon which the court could review the Board's decision. *See Rossakis*, 146 A.D.3d at 28. The decision "merely states in a perfunctory fashion" information considered, "without articulating any explanation for how [that information was] applied." *Menard v. New York State Bd. of Parole*, 2019 WL 1115731, at *3 (N.Y. Sup. Ct. 2019).

The Appeals Unit decision states only that "[t]he Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole." *See* Ex. 19 at 2. The Appeals Unit does not address the Board's inappropriate usage of statutory language or lack of engagement with the facts of Mr. [redacted]'s case.

Mr. [redacted] is therefore entitled to a *de novo* interview on this basis alone. *See id.*; *see also West*, 41 Misc. 3d at *4 (awarding a *de novo* hearing where the Parole Board's decision was insufficiently detailed to permit "intelligent" judicial review of the Board's rationale).

2. Failure to explain departure from COMPAS.

Moreover, Parole Board Regulations require that, where a "Board determination, denying release, departs from the Department Risk and Needs Assessment scores, *the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provided an individualized reason for such departure.*" 9 NYCRR § 8002.2 (emphasis added). The mere existence of a COMPAS report in an applicant's file is not enough – the Board must actually consider the substance of an applicant's COMPAS report to properly assess the likelihood of the applicant's success upon release. *See Diaz v. New York State Bd. of Parole*, 42 Misc. 3d 532, 536 (N.Y. Sup. Ct. 2013) ("There must be some indication that the Board complied with the statute by considering the results of the COMPAS in reaching its decision."). On Mr. [redacted]'s 2018 COMPAS report, Mr. [redacted] was scored as "low risk" for felony violence, arrest, and absconding, scores consistent with those of his prior three assessments. *See* Ex. 13, COMPAS 2018; Ex. 12, COMPAS 2017; Ex. 11, COMPAS 2015; Ex. 10, COMPAS 2013. In both the November 2018 decision and the parole interview, the Board acknowledged that Mr. [redacted]'s COMPAS Risk Assessment scores were "on the lower end." *See* Ex. 1 at 3; Ex. 2, Nov. 2018 Interview Transcript, at 24. Mr. [redacted]'s application for release was nonetheless denied, without the Board identifying

the portions of the COMPAS reports from which it diverged or explaining why it was departing from the assessment.

The Board's rationale refers only vaguely to Mr. [redacted]'s "presentation," without explaining what about Mr. [redacted]'s presentation – the substance of what he said, the way he appeared, or something else – led the Board to believe he has "not developed the tools to live a law abiding life." This does not permit intelligent review of the Board's decision to deny parole, and shows "irrationality bordering on impropriety."[5] *See Comfort v. New York State Div. of Parole*, 68 A.D.3d 1295, 1297 (3d Dep't 2009) (requiring a new hearing where the Board's actions and ultimate decision were so irrational under the circumstances they bordered on misconduct).

The Appeals Unit claims that the Board's decision did provide an explanation: that the Board "believes the appellant is likely to reoffend, and his distrust of law enforcement." *See* Ex 19, at 5. First, one of those reasons is simply a departure from Mr. [redacted]'s Risk Assessment. The assertion that Mr. [redacted] is "likely to reoffend" stands in direct contradiction with his COMPAS report. *See* Ex. 13. The Board's decision does not provide any rationale as to *why* the Board believes Mr. [redacted]'s COMPAS assessment is inaccurate; it only states that it is. This is not an explanation that permits intelligent review of the Board's decision, as Mr. [redacted] is entitled to by law. *See West*, 41 Misc. 3d 1214(A) (N.Y. Sup. Ct. 2013). Second, as discussed in greater detail below, the Board's assertion that Mr. [redacted] "distrust[s] law enforcement authority" is (a) contrary to the record; and (b) not an appropriate factor or single reason to deny release.

The Appeals Unit cites to no case law that actually supports its assertion that "[m]istrust of authority is a factor the Board is allowed to consider." *See* Ex. 19, at 2. Instead, the Appeals Unit cites to *Hamilton v. New York State Div. of Parole*, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (2014),

[5] To the extent that the Board believed that Mr. [redacted] had exhibited in his presentation a "continual mistrust of authority," Ex. 1 at 3, that determination is contrary to Mr. [redacted]s statements, *see infra* Section D.1.

which makes no mention of the Board's ability to consider an applicant's distrust of authority and in fact upholds the Board's decision because the Board had *not* – unlike the case here – "considered factors outside the score of the applicable statute." *Id.* at 1273.

Here, in its original decision, the Board either considered the COMPAS Risk Assessment and departed from it without providing individualized reasons, as required by law, or the Board noted that the COMPAS Risk Assessment existed but failed to use it in making its determination – in either case, Mr. [redacted] is entitled to a *de novo* parole hearing. *See* 9 NYCRR § 8002.2(a); *Diaz*, 42 Misc. 3d 532; *Matter of Garfield v. Evans*, 108 A.D.3d 830 (3d Dep't 2013) (Board's failure to use a COMPAS Risk Assessment entitles a parole applicant to a new hearing).

D. The Board Improperly Considered Factors Outside of the Record Based on Misapprehended Facts

Furthermore, the Executive Law, the Parole Board's regulations, and New York courts are clear that a decision denying release cannot be based upon inaccurate information. *See* 9 NYCRR § 8006.3(a)(2); *Smith v. New York State Bd. of Parole*, 34 A.D.3d 1156, 1157 (3d Dep't 2006); *Lewis v. Travis*, 9 A.D.3d 800, 801 (3d Dep't 2004); *Brazil v. New York State Bd. of Parole*, 76 A.D.2d 864, 864 (2d Dep't 1980). In this case, because the Board relied on inaccurate information and considered factors outside of those set forth by law, a *de novo* interview is required.

1. The Board relied on its characterizations of [redacted]'s statements that was both improperly considered and factually incorrect

The Board's conclusions about Mr. [redacted]'s "continual mistrust of authority" went beyond the scope of the statutory factors outlined in Section 259 of the Executive Law but, more importantly, inaccurately characterize Mr. [redacted]'s statements during his interview. First, although the Board has wide discretion, it is not authorized to consider extraneous factors or insert additional expectations about what a parole applicant must do to deserve parole. *See In re King v. New York State Div. of Parole*, 83 N.Y. 2d 788 (1994); *see also Duffy v. New York State Dep't of Corr. &*

Cmty. Supervision, 132 A.D.3d 1207, 1209 (3d Dep't 2015) ("The Board cannot [] rely on factors outside the scope of the statute in reaching its decision."). "Trust in law enforcement" and "mistrust of authority" are not included in or related to the statutory factors relevant to deciding whether an applicant should be release to parole supervision. *See* Executive Law § 259-i(2)(c)(A).

Even if it were proper for the Board to consider Mr. [redacted]'s beliefs about law enforcement and authority, as the Appeals Unit suggests, the Board's "concern[]" about Mr. [redacted]'s "statements concerning law enforcement and continual mistrust of authority," *see* Ex. 1 at 2-3, contradicts Mr. [redacted]'s statements during his interview and his record of utilizing the judicial system. Throughout his November 2018 interview, the Board questioned Mr. [redacted]'s reluctance to contact the authorities in the past. *See* Ex. 2 at 10, 12. In response to these questions, Mr. [redacted] assured the Board that he would call the police for any reason in the future. *See id.* at 34 ("[I]t's for real. It's a good system, I finally learned that I can call 911 . . . I can still establish it and use it and try to help."). In addition, Mr. [redacted] has repeatedly sought relief from administrative and judicial authorities by filing appeals of his parole hearings, *see* Ex. 9, Ex. 14, and by filing judicial actions based on his mistreatment in prison at the hands of correctional officers. Still, the Board concluded that Mr. [redacted]'s "presentation" at his interview suggested he did not trust law enforcement and would be unable to lead a law-abiding life. *See* Ex. 1 at 3.

Mistakes and reliance on mischaracterizations or distortions of an interview record necessitate a *de novo* hearing. *See Wallman v. Travis*, 18 A.D.3d 304, 309 (1st Dep't 2005) (Board's reasons for denial were flawed because of inaccuracies in Board's conclusions regarding petitioner's remorse expressed at his hearing); *Hughes v. NYS Div. of Parole*, 21 A.D.3d 1176, 1177 (3d Dep't 2005) (*de novo* interview granted where the Board erroneously referred to the petitioner's youthful offender adjudication as a prior felony); *Plevy v. Travis*, 17 A.D.3d 879, 880

(3d Dep't 2005) (Board erroneously cited to a prior probation violation which had been dismissed).[6]

2. The Board relied on a letter of opposition from an Assistant District Attorney who did not prosecute Mr. [redacted]

In this case, the Board relied on a letter of opposition submitted by an Assistant District Attorney who was not involved in Mr. [redacted]'s trial. In 2015, DOCCS solicited letters from Mr. [redacted]'s sentencing judge, Judge John A. Dillon and Mr. [redacted]'s defense attorney, [redacted]. *See* Ex. 15, DOCCS Solicitation Letters 2015, at 1, 3. There is no evidence in Mr. [redacted]s parole file that any of the prosecutors of Mr. [redacted]'s trial, D.A. [redacted], A.D.A. [redacted], and A.D.A. [redacted], were ever contacted by DOCCS. However, during Mr. [redacted]'s November 2018 interview, the Board acknowledged that it reviewed "the statement from the district attorney." Ex. 2 at 29. On information and belief, the letter relied on by the Board was submitted by a different Assistant District Attorney who did not prosecute Mr. [redacted].[7] That Assistant District Attorney's name does not appear in the sentencing minutes or any other document in Mr. [redacted]'s parole file.

Contrary to the Appeals Unit's assertion, the Board cannot consider an official letter of opposition submitted by an Assistant District Attorney who did not participate in the original trial or sentencing. *See Clark*, 2018 WL 1988851, at *4-5 (finding that the Board's reliance an official

[6] The Board's decision also appears skeptical of Mr. [redacted]'s statements taking responsibility for the crimes committed as a teenager who was influenced by drugs and alcohol. Ex. 1 at 2 ("You stated you take responsibility for his death although you disagree with the medical evidence."). This is also a mistake or mischaracterization of Mr. [redacted]s statements. The hearing transcript reveals that Mr. [redacted] has recognized that his actions led to the death of Mr. [redacted] for which he takes full responsibility, notwithstanding medical evidence. *See* Ex. 2 at 21- ("I've been saying it since when I found out and realized and became mature that it doesn't matter how the individual had expired. It doesn't matter what our medical science puts forth . . . the individual is deceased. I take full responsibility for that.")

[7] This letter was not in the parole file released to Mr. [redacted]'s undersigned attorney. However, Mr. [redacted] was given one-time access to his file since the time of his parole hearing at which time he saw the unredacted letter from the district attorney. He never received the letter, and only saw it one time. This information is therefore based on Mr. [redacted]s representations about the letter.

statement submitted by a judge who was not the original sentencing judge was improper). The relevant language in the statute governing the Board of Parole states that the Board may give due consideration of the "recommendations of the sentencing court, the district attorney, [and] the attorney for the inmate…" N.Y. Exec. Law § 259-i (c)(A). There is no express allowance in the regulation that permits Assistant District Attorneys who are "not personally involved in the case" to submit recommendations as the Appeals Unit suggests. In fact, the Appeals Unit cites no authorities that would allow for such a submission or where the Board is permitted to give it due consideration. This letter, submitted by an Assistant District Attorney with no direct connection to the case or special knowledge of the underlying facts, consists of nothing more than general opposition disguised as an official statement by a government official.

E. The Board Placed Improper Weight on the Underlying Offense to the Exclusion of Other Statutory Factors

The Board cannot base its decision to deny an applicant's release solely on the nature or seriousness of the crime. *See, e.g., Matter of Ramirez v. Evans*, 118 A.D.3d 707, 707 (2d Dep't 2014); *Matter of Gelsomino v. New York State Bd. of Parole*, 82 A.D.3d 1097, 1098 (2d Dep't 2011); *Rossakis*, 146 A.D.3d at 27; *In re Perfetto v. Evans*, 112 A.D.3d 640, 641 (2d Dep't 2013).

Where there is evidence the Parole Board placed undue emphasis on the nature or seriousness of the applicant's crime, at the expense of genuine consideration of other aspects of the applicant's case for parole, the Board's decision does not comport with the statutory requirements. *See Menard*, 2019 WL 1115731, at *4; *Morris v. New York State Dep't of Corr. & Cmty. Supervision*, 40 Misc. 3d 226, 233 (N.Y. Sup. Ct. 2013).

The only detailed and particularized section of the Board's November 2018 decision refers exclusively to the underlying offense and Mr. [redacted]'s actions 35 years ago. The decision characterizes the underlying offense as a "brutal murder and assault of [the] victim" and also

includes that the "victim was beaten, slashed, and then marched to a location and dumped in a manhole." *See* Ex. 1 at 3. By contrast, there is no substantive discussion regarding Mr. [redacted]'s rehabilitation, his many accomplishments during his incarceration, the multiple letters of support Mr. [redacted] has received, or his thorough release and re-entry plan. The transcript of the underlying November 2018 interview shows that the Board members focused on the decades-old crime, asking Mr. [redacted] questions about how Mr. [redacted] knew the victim, the particulars regarding the victim's death, and Mr. [redacted]'s interpretation of the medical autopsy report, which amount to half of the transcript. *See* Ex. 2 at 8-24.[8]

The Appeals Unit's decision followed suit. Two of the first three sentences are graphic descriptions of the offense, used to support yet another denial for Mr. [redacted]'s release. Ex. 19, at 1. There is no discussion related to Mr. [redacted]s accomplishments and rehabilitation. The Appeals Unit correctly recites that the Board "is permitted to consider, and place greater emphasis on, the brutal and heinous nature of the offense." Ex. 19, at 2. However, the Appeals Unit refuses to acknowledge that this was the only statutory factor the Board emphasized in Mr. [redacted]'s case and that while the weight given to every statutory factor is within the Board's discretion, the Board cannot deny release solely on the basis of the petitioner's offense. *See Cappiello v. New York State Bd. of Parole*, 2004 WL 3112629 (N.Y. Sup. Ct. 2004).

The contrast between the Board's interest in Mr. [redacted]'s historical actions, and the short shrift the Board gave to Mr. [redacted]'s rehabilitation and future plans to live a law-abiding life, demonstrate that the Board acted improperly. *See Menard*, 2019 WL 1115731, at *4 (parole

[8] Mr. [redacted]'s parole interviews regularly consist of long discussions regarding the underlying offense and, because Mr. [redacted] has already completed all required programming, discussions about his plans for release have gotten shorter over time. Therefore, each subsequent interview improperly focuses on a different aspect of the crime rather than on Mr. [redacted]'s future. *See, e.g.*, Ex. 3, Nov. 2011 Parole Hearing Transcript; Ex. 4, Sept. 2013 Parole Hearing Transcript; Ex. 5, Jan. 2014 Parole Hearing Transcript; Ex. 6, Nov. 2015 Parole Hearing Transcript; Ex. 7, May 2017 Parole Hearing Transcript; Ex. 8, Jan. 2018 Parole Hearing Transcript. Counsel did not receive copies of the 2008 or 2009 Parole Hearing transcripts as part of Mr. [redacted]'s parole file.

applicant entitled to *de novo* hearing where "Board focused on the seriousness of [the] crime without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and [] lack of any prior violent criminal history") (internal marks and citations omitted); *Perfetto*, 112 A.D.3d at 640 (parole applicant was entitled to a new interview where despite mentioning the applicant's institutional record, the Board denied release solely on the basis of the seriousness of the underlying offense); *Cappiello*, 2004 WL 3112629 (Board's unjustifiable reliance solely on the severity of the crime exceeded its administrative discretion and was contrary to law). For example, the Board should take into account that Mr. [redacted] is involved in many activities at Auburn Correctional Facility that demonstrate both institutional achievements, such as participation in a new inmate program called the Inmate Tablet Program-JP5S, and release plan, based on his regular visits with parole support system staff. Mr. [redacted] is entitled to *de novo* interview so that all of the statutory factors can be genuinely and fairly considered.

F. The Board's Denial of Mr. [redacted]'s Parole was Excessive, Contrary to Law, and Amounts to Illegal Resentencing

The Board's repeated denial of Mr. [redacted]'s parole amounts to unlawful resentencing. Mr. [redacted] was sentenced by a judge to 25 years to life in prison *with the possibility of parole*. Mr. [redacted] has been imprisoned for a total of 36 years, more than two-thirds of his life. The role of the Parole Board is not to resentence the petitioner, but to determine whether, at the time petitioner is before the Board, given all the statutory factors, he should be released. *See King*, 190 A.D.2d at 598. For the judge's sentence to be given meaning, the Board should provide an articulable reason for Mr. [redacted]'s continued confinement such that Mr. [redacted] was not afforded parole. Instead, the Board has given no reasons for its denial and has offered no guidance as to how Mr. [redacted] can improve his chances of being released to parole supervision. The Appeals Unit contests that the Board has any

obligation to tell a petitioner how to "improve his changes for parole in the future." *See* Ex. 19, at 4. But this stance leaves Mr. [redacted] with no path forward.

Mr. [redacted] has completed all of the available programs and has maintained a job in prison during his 35-year confinement. He complied with every requirement the Board set forth and was still denied ten times. Because the Board has deviated from the statutory scheme by disregarding the significant work and resultant success in rehabilitation and Mr. [redacted]'s low-risk assessment for release (as explained above), the Board's decision amounts to illegal resentencing. In effect, the Parole Board has unlawfully transformed Mr. [redacted]'s sentence to 25 years to life in prison *with no possibility of parole – subverting the plain decision of the original sentencing judge.* Mr. [redacted] must now remain incarcerated an additional 18 months in prison before his next opportunity for release.[9] *See Wallman*, 18 A.D.3d at 307–08; *Cappiello*, 2004 WL 3112629 at *8.

G. The "Deprecate the Seriousness of His Crime" Standard Is Unconstitutionally Vague

The Executive Law states that discretionary release on parole shall only be granted "after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release . . . *will not so deprecate the seriousness of his crime as to undermine respect for law*." Exec. Law § 259-i(2)(c)(A) (emphasis added). Neither the Parole Board Regulations nor case law has construed the meaning of this standard and the "deprecate the seriousness of his crime" standard is unconstitutionally vague.

Vagueness is evaluated using a two-part test. *People v. Nelson*, 69 N.Y.2d 302, 307 (1987). First, one must determine "whether the statute in question is sufficiently definite to give a person

[9] For 11 years, the Board has repeatedly denied Mr. [redacted]'s release, thereby extending his sentence far beyond the minimum of that to which he was sentenced by a judge. Twice before, Mr. [redacted] has proven that Board failed to properly fulfill its obligations and received two *de novo* hearings—once for the Board's failure to conduct a COMPAS assessment for Mr. [redacted], and a second for its failure to properly address his age at the time of the offense in violation of the Eighth Amendment. *See* Ex. 9; Ex. 17, 2013 Article 78 Decision Requiring *De Novo* Interview for Failure to Conduct COMPAS Assessment.

of ordinary intelligence fair notice that his contemplated conduct is forbidden." *People v. Stuart*, 100 N.Y.2d 412, 420 (2003). Second, the statute must "provide officials with clear standards for enforcement" so as to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Stuart*, 100 N.Y.2d at 421 (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972)). The "deprecate the seriousness of his crime" standard is unconstitutionally vague because it fails to give fair notice to prisoners of what behavior will result in denial of parole, and leaves the Board with no guidance so as to avoid arbitrary enforcement; its application is inherently arbitrary and capricious. *People v. Bright*, 71 N.Y.2d 376, 379 (1988) (a statute is "unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions [where] it fails to give fair notice to the ordinary citizen that the prohibited conduct is illegal, [and] it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement").

Mr. [redacted]'s denial is an unreasonable result generated by this unconstitutionally vague standard, because there are no explanations as to why granting Mr. [redacted] parole would "so deprecate the seriousness of his crime as to undermine respect for law." Ex. 1 at 3. Mr. [redacted] was sentenced, by law, to a 25-year sentence with the possibility of parole, and he has been in prison for more than 35 years. It is unreasonable and irrational for the Parole Board to conclude that parole itself would undermine respect for the law or minimize the seriousness of the offense when Mr. [redacted] has served the minimum sentence required before being eligible for parole and has completed all programing recommended by DOCCS and the Board of Parole.

CONCLUSION

For each reason stated above, and the combination of those reasons, Mr. [redacted] respectfully requests that this Court grant his Petition and reverse the denial of parole, order Respondents to hold a *de novo* parole hearing according to law and based on a current and complete record, within

thirty days of this Court's decision, *Rabenbauer v. New York State Dep't of Corr. & Cmty. Supervision*, 41 Misc. 3d 1235(A), 983, N.Y.S.2d 206 (Sup. Ct. 2013)), or in the alternative, grant Mr. [redacted] immediate release to Community Supervision and to grant any other relief as this Court may deem appropriate.

Dated: New York, New York
November 2, 2019

Respectfully submitted,

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