Administrative Appeal Brief - FUSL000144 (2021-08-12)

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FUSL000144

ADMINISTRATIVE APPEAL OF
NEW YORK STATE PAROLE DECISION FOR

[redacted]

Woodbourne Correctional Facility

Administrative Appeal # [redacted]

Parole Hearing Date and Denial Date: February [redacted] 2021

Applicant's Parole Hearing Location: Woodbourne Correctional Facility (video-conferenced to Poughkeepsie Area Office, 20 Manchester Road., Poughkeepsie, NY 12603)

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TABLE OF CONTENTS

I. FACTUAL AND PROCEDURAL BACKGROUND

[redacted] submits this brief in support of a timely filed notice of administrative appeal. Mr. [redacted] is a 52-year-old man who has been incarcerated for 30 years—over half of his life—based on criminal acts for which he was convicted, but over which he has maintained his innocence for three decades. He is serving an indeterminate term for two counts of attempted murder in the first degree and criminal possession of a weapon in the second and third degrees—a minimum sentence of thirty years and a maximum of life—for a crime he was convicted of when he was just 23 years old. For thirty years, Mr. [redacted] has maintained that he was wrongfully arrested while standing at a corner of Amsterdam Avenue in Manhattan while a shooting took place over a mile away between Amsterdam and Broadway. (**Exhibit K**, *Pro Se* Parole Appeal at 4.)

In February 2021, he became eligible for release on parole. Prior to appearing before the panel, Mr. [redacted] filed a C.P.L. § 440.10 action challenging his underlying conviction. He appeared before a panel of commissioners who summarily denied him release in a conclusory decision. In addition, the Board committed reversible errors. *First,* the Board erred when it issued its decision on the basis of an incomplete record. The Board failed to consider that the record before them was incomplete as it lacked: (i) sentencing minutes from Justice Failla in Mr. [redacted] underlying conviction (*Id.* (box checked "No" next to "Sentencing Minutes")); (ii) an incomplete institutional report (*e.g.* Mr. [redacted] New York birth certificate was not included, which would put into dispute his deportation order); and (iii) letters from the police, district attorney, and sentencing court (*see* **Exhibit B,** Parole Board Report (box checked "No" next to "Official Statements")); among other missing records.[1]

[1] The undersigned has filed a FOIL and a 9 NYCRR § 8000.5 request with Woodbourne Correctional Facility for the missing documents.

Second, the Board erred when it issued its decision in reliance upon a flawed COMPAS assessment. To the extent the Board gave a reason for its decision, they relied upon a flawed COMPAS assessment that misjudged Mr. [redacted] propensity for prison misconduct based on an erroneous notation that Mr. [redacted] had a Tier 3 infraction, when he in fact did not. In their written decision the Board "heavily weighed" Mr. [redacted] incorrect "High" prison misconduct score and used it as their primary reason for determining that Mr. [redacted] would be unable or unwilling to follow the law if released. (*Compare* **Exhibit C**, COMPAS Report in Parole File, *with* **Exhibit J**, Corrected COMPAS Report.) Mr. [redacted] filed a timely Notice of Appeal and retained Patterson Belknap Webb & Tyler LLP to serve as his appellate counsel. The undersigned filed a Notice of Appearance with the Appeals Unit on June 2, 2021. This appeal followed.

The Board's denial of Mr. [redacted] parole violated (a) New York State Executive Law, (b) Corrections Law, (c) administrative regulations, and (d) controlling state case law. Accordingly, Mr. [redacted] seeks reversal of the Board's decision and immediate release or, in the alternative, a *de novo* parole hearing conducted in compliance with controlling law.

II. LEGAL FRAMEWORK

The Board of Parole's discretion in deciding parole release is limited by statute. Executive Law § 259-i(2)(c)(A) states that release shall be granted 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 is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." In reaching its release decision, the Board must consider all factors relevant to that standard, including (but not limited to) the factors listed in Executive Law § 259-i(2)(c)(A):

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
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> (ii) performance, if any, as a participant in a temporary release program;
>
> (iii) release plans including community resources, employment, education and training and support services available to the inmate;
>
> (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;
>
> (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
>
> (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;
>
> (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and
>
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

New York courts have identified several principles that limit the Board's discretion. *First*, the Board cannot deny release based solely on the nature of the underlying offense. *In Re Rios v. N.Y. State Div. of Parole*, 836 N.Y.S.2d 503, 2007 WL 846561, at *4–5 (Sup. Ct., Kings Cty. 2007). *Second*, the Board may give different weight to the statutory factors, but *must* consider—and rationally weigh—*all* relevant factors and may ***not*** give weight to irrelevant

factors. *See In Re King v. N.Y. State Div. of Parole*, 190 A.D.2d 423, 432 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (N.Y. 1994); *In re Johnson v. N.Y. State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dep't 2009*); In Re Thwaites v. N.Y. State Bd. of Parole*, 934 N.Y.S.2d 797, 799 (Sup. Ct., Orange Cty. 2011). *Third*, by statute, the Board must set forth its reasons for denying parole in a written decision "***in detail and not in conclusory terms***." N.Y. Exec. Law § 259-i(2)(ii)(a); *see Mitchell v. New York State Div. of Parole*, 58 A.D.3d 742, 743 (2d Dep't 2009).

Further, if the Board does not grant parole, it must provide written documentation of its reasons for reaching that decision. "Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in section 8002.2 of this Part were considered in the individual's case." 9 NYCRR § 8002.3. "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 [COMPAS]. . ." 9 NYCRR § 8002.2(a). "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." *Id.*

III. ARGUMENT

A. The Board's Decision Was Arbitrary and Capricious Because (i) It Failed To Consider Mr. [redacted] Age, (ii) It Improperly Considered His Refusal to Take a Plea Deal in 1992, and (iii) It Gave Impermissible Weight to the Seriousness of the Offense

The Board's decision was arbitrary and capricious and, thus, unlawful in at least three respects. *First*, the Board did not consider that Mr. [redacted] age makes him unlikely to commit violent crimes in the future. *Second*, Commissioner Cruse improperly held Mr. [redacted]

decision not to take a plea deal during his 1992 trial against him. *Third*, the Board gave impermissible weight to the seriousness of Mr. [redacted] offense, which took place 30 years ago.

1. The Board Did Not Reasonably or Meaningfully Consider Mr. [redacted] Age

The Board must consider whether "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 is not incompatible with the welfare of society . . . ." Executive Law § 259-i(2)(c)(A). This assessment must be forward-looking, focusing "primarily on who the person appearing before the Parole Board is today and on whether that person can succeed in the community after release." *Thwaites*, 934 N.Y.S.2d at 699 (quoting Professor Phillip M. Genty, Columbia Law School, "Changes to Parole Laws Signal Potentially Sweeping Policy Shift," NYLJ, September 1, 2011).

Mr. [redacted] age is undeniably relevant to that inquiry. There is significant evidence of a strong correlation between age and crime. *See, e.g.*, Dana, Goldstein, The Marshall Project, *Too Old to Commit Crime?* (March 20, 2015 at 1:00 p.m.), *available at* https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime. As many studies have shown, individuals are far less likely to commit violent crimes or drug crimes after their 30s. *See id.* Put simply, older people with health problems, *see* **Exhibit I** at 14-18 (documenting Mr. [redacted] health problems) are less physically capable of representing a threat to anyone. Indeed, as the Board correctly identified (even in the incorrect COMPAS report before them, *see infra* Section D), Mr. [redacted] COMPAS report demonstrated that for his "risk and certain behaviors upon being released to the community…Everything is either low or unlikely."[2] (**Exhibit A** at

[2] The full quote from Commissioner Cruse reads: "[COMPAS] measures your risk and certain behaviors upon being released to the community. One is low risk, 10 is high risk, your risk of felony violence is low, two, arrest risk is low, absconding risk is low. Everything is either low or unlikely except your prison misconduct which

10.) Mr. [redacted] *corrected* COMPAS report demonstrates that ***all*** of his risk and behavioral factors are Low or Unlikely (**Exhibit J** at 5), which would qualify him for the lowest level of parole supervision, which is an indication of minimal risk to society and minimal risk of reoffending, *Matter of Ciaprazi v Evans*, 52 Misc. 3d 1211(A), slip op. at *2, , 2016 N.Y. Misc. LEXIS 2741, at *3 (Sup. Ct., Duchess Cty. 2016).

Given the statutory factors they were mandated to consider, this issue should have been top of mind for the Board, since they held a discussion about Mr. [redacted] age, but only a cursory and conclusory discussion of his growth. (*See* **Exhibit A** 8-9.) Instead of recognizing the many courses and letters of commendation and recommendation he received during his time in prison, the Board focused on the infractions he gained over a lifetime of growing up in a correctional facility, from his early 20s to his 50s, for which Mr. [redacted] takes responsibility, and acknowledges that he was a different man when he was younger. (*Id.* at 8 (regarding his infractions, Mr. [redacted] notes "I can't give an excuse, I was arrested young, I wasn't thinking correctly at that time"); *see also* **Exhibit I** at 12 (letter from Lifers & Long Termers Organization Reconciliation Workshop, confirming Mr. [redacted] completion of a sixteen-week workshop "developed to address and understand the internal and external steps that lead to reconciliation" and stating that "Mr. [redacted] has displayed a willingness, with insight about his past toxic behaviors and engaged in ways to repair damage[] inflicted internally and externally"); **Exhibit I** at 5-13 (documenting Mr. [redacted] myriad rehabilitative programs and educational achievements gained during a lifetime of confinement).) The Board did not consider Mr. [redacted] age as it related to his likelihood for recidivism. (**Exhibit A** at 10.) The Board's only reference to Mr.

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we just talked about, your discipline, that's high, 8 of 10. You understand that?" (**Exhibit A** at 10.) The Commissioners were reading from an *inaccurate* COMPAS report (later corrected, *see* **Exhibit J**) that contained an input that mischaracterized a protective custody as an offense, taking Mr. [redacted] prison misconduct score from Low to High. *See infra*, Section D.

[redacted] coursework and growth is cursory and incorrect, stating that "I see letters of the leaders of the Otisville Lifers and Long Termers Organization, they're speaking to your training regarding COVID-19 as well as a range of personal and emotional workshops." (*Id.* at 12.) In fact, Mr. [redacted] did not receive "training regarding COVID-19." Instead, the letter the Board referenced simply offered an apology for the delay due to COVID-19 in their producing a letter of completion of Mr. [redacted] "Why Forgive" course, where Mr. [redacted] demonstrated an "understanding of the transformative powers of reconciliation, displayed victim centered awareness, and empathy," not COVID-19 training. (*Compare* **Exhibit A** at 12 *with* **Exhibit I** at 12-13.)

These are critical facts that the Board overlooked, making its decision arbitrary and capricious. *See Thwaites*, 934 N.Y.S.2d at 699.

2. The Board Improperly Considered That Mr. [redacted] Did Not Take a Plea Deal For the Underlying Conviction

A Parole decision is invalid when "one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy" or the Commissioner's personal opinion. *In re King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994); *see also Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 46 Misc. 3d 603, 608 (Sup. Ct., Sullivan Cty. 2014) ("This court has been unable to find any statutory or case law that authorizes parole board commissioners to infuse their own personal opinions or speculations into the parole interview or process."). In this case, Mr. [redacted] decision to maintain his innocence and not take the plea deal that was offered to him in the underlying offense *30 years earlier* was not relevant to any of the factors listed in Executive Law § 259-i(2)(c)(A). Yet, the parole hearing transcript shows that Commissioner Cruse held Mr. [redacted] refusal to take a plea deal 30 years ago, and to admit guilt, against him.

At the hearing, Commissioner Cruse offered a brief description of the underlying offense, and asked Mr. [redacted] if his description is true. However, Mr. [redacted] having already explained that he has a § 440 motion pending, declined to state whether Commissioner Cruse's description is "true," as the perceived veracity of Mr. [redacted] innocence was actively being litigated in New York State court. (*See* **Exhibit A** at 3.) After discussing Mr. [redacted] aggregate term of imprisonment of 30 years, Commissioner Cruse proceeded to ask Mr. [redacted] whether he was offered a plea. Mr. [redacted] explained that he was offered a plea but maintains his innocence, as demonstrated by the § 440 motion. Commissioner Cruse proceeded to offer a telling opinion regarding the plea deal Mr. [redacted] was offered 30 years ago. (*See* **Exhibit A** at 3 ("Three to nine, I guess you wish you had taken it, yes?").) Commissioner Cruse's inappropriate focus on this topic at the hearing, despite Mr. [redacted] argument maintaining his innocence, indicates that it may have affected his decision. To the extent that Commissioner Cruse believed that Mr. [redacted] should have taken the plea deal that was offered, and the admission of guilt that such a plea required, it was reversible error for Commissioner Cruse to consider that personal opinion in deciding whether to support release.

Because Commissioner Cruse considered a factor that is "outside the scope of the applicable statute," the Board's decision must be reversed, and Mr. [redacted] must be either released immediately or given a *de novo* hearing. *See In re King*, 83 N.Y.2d at 791.

3. The Board Gave Impermissible Weight to the Seriousness of the Past Offense

It is settled law that the Board of Parole may not deny release solely on the basis of the seriousness of the past offense that resulted in the person's incarceration, and in the absence of aggregating factors. *Matter of Mitchell v. N.Y. State Div. of Parole*, 58 A.D.3d 742, 743 (2d Dep't 2009); *Matter of Freidgood v. NYS Bd. Of Parole*, 22 A.D.3d 950, 951 (3rd Dep't 2005)

(concluding that a parole denial that ignored factors such as the petitioner's expressions of remorse and disciplinary record on the basis that petitioner's instant offense was violent was "irrational under the circumstances as to border on impropriety."). Indeed, indications that the parole decision is based exclusively on the seriousness of the offense will support a finding that the parole denial was "a foregone conclusion." *In re Johnson v. N.Y. State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dep't 2009); *see also In Re King*, 190 A.D.2d at 432; *In re Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 40 Misc. 3d 226, 233, 963 N.Y.S.2d 852 (Sup. Ct., Columbia Cty. 2013) ("When, as here, the Parole Board focuses entirely on the nature of petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion that does not comport with statutory requirements.").

Rather, the Board must consider the dynamic factors of prisoner development and rehabilitation. *In re Rios*, 2007 WL 846561, at *4–5. Moreover, even "a murder conviction *per se* should not preclude parole." *Id.* Executive Law § 259-i(2)(c)(A) requires the Board to meaningfully review and consider evidence of rehabilitation and suitability for release. The record contains such evidence: despite maintaining his innocence, Mr. [redacted] has expressed remorse for the last 30 years. (*See* **Exhibit I** at 47, Victim Apology Letter.) His institutional records demonstrate that he has positively affected the people around him in many ways, including by completing training to be an Alternatives to Violence Project Facilitator. (*Id.* at 9.) He has demonstrated that extensive family support awaits him upon release. (*Id.* at 22-32.) He has developed career goals based upon the skills he has gained in DOCCS custody and has a position at an insurance company waiting for him upon his release. (*Id.* at 20-21.) And, given his age and health, he is no longer a threat to commit violent crimes.

Despite this evidence, the Board's focus was backwards-looking. The Board focused extensively on the details surrounding the instant offense. Despite asserting his desire to act on the advice of previously retained counsel and not say anything at the hearing which could compromise his § 440 motion, the Board questioned Mr. [redacted] at length about his offense, and about why he did not take a plea deal 30 years ago, and the written decision itself states that: "In your interview you denied your guilt in the instant offense and repeated your pending motion to appeal your conviction. Despite your limitations in discussing the instant offense, what you did discuss was ingenuine and confusing. When questioned, you provided vague explanation [sic] and repeated yourself[,] standing on your denial of the instant offense." In fact, in framing its analysis of Mr. [redacted] case, the Board placed Mr. [redacted] in an impossible bind, where to meet their standard of contrition he would have to reject the arguments of innocence put forward in his § 440 appeal. With no meaningful discussion of Mr. [redacted] growth, and with an extensive focus on Mr. [redacted] instant offence, all premised on an invalid COMPAS report that demonstrated an incorrect risk weighting, the Board gave no meaningful consideration to Mr. [redacted] rehabilitation or to his capacity to reenter society. It is a stark admission that the Board failed to take statutorily mandated factors into account. As such, Mr. [redacted] was denied a meaningful opportunity to secure his release, requiring reversal of the Board's decision.

B. The Board's Denial of Parole Is Stated in Conclusory Terms and Boilerplate Language, And Fails to Address The Three Prongs of Executive Law § 259-i(2)(c)(A), Violating the Executive Law and Administrative Regulations

When the Board declines to grant parole, it is required by statute to provide a decision "in writing . . . of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." Executive Law § 259-i(2)(a); *see In re Rossakis v. N.Y. State Bd. Of Parole*, 146 A.D.3d 22, 28 (1st Dep't 2016); *In re Ramirez*, 118 A.D.3d 707, 707

(2d Dep't 2014). Specifically, the Board must explain its decision with reference to the factors for parole set forth in Executive Law § 259-i(2)(c)(A), *i.e.*, (1) why there is a reasonable probability that the parole applicant would violate the law if released, (2) why release would be incompatible with the welfare of society, *and* (3) why release would so deprecate the seriousness of the offense as to undermine respect for the law. A failure to address *each* of these factors—as occurred here—is cause to reverse the denial and grant release, or in the alternative, a *de novo* hearing.

The Board's decision contains only a cursory reference to the first two prongs, and omits any reference to the third prong of Executive Law § 259-i(2)(c)(A), which requires it to consider why release would so deprecate the seriousness of the offense as to undermine respect for the law. The Board's failure to explain how, or if, it considered this prong also violates its own regulations. *See* 9 § NYCRR 8002.3. Section 8002.3 states that "[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." *Id.* This oversight is reversible error.

Next, the Board's decision in this matter is akin to the one vacated by the court in *In re McBride v. Evans*, 42 Misc.3d 1230(A), slip op. at *3 (Sup. Ct., Dutchess Cty, 2014). As the court explained in that case:

> While the Board discussed petitioner's positive activities and accomplishments at the hearing, it then concluded that his release was incompatible with "public safety and welfare." The Board gave no analysis as to how or why it reached this conclusion. ***It appears to have focused only on petitioner's past behavior*** without articulating a rational basis for reaching its conclusion that his release would be incompatible with the welfare of society at this time.

Id. (emphasis added)

While the Board purported to consider the first and second prongs it must address under Executive Law § 259-i(2)(A), it summarily concluded that Mr. [redacted] release "would be incompatible with the welfare and safety of society." (**Exhibit D** at 1.) The third prong is not considered even cursorily. The Board's reliance on such boilerplate language without providing any explanation about how it reached this cursory conclusion is insufficient to demonstrate that it meaningfully balanced these factors. *See Coaxum v. N.Y. State Bd. of Parole*, 14 Misc. 3d 661, 668, 827 N.Y.S.2d 489 (Sup. Ct. Bronx Cty., 2006) ("The decision making is a process of determining which factors outweigh others: a balancing process."); *Weinstein v. Dennison*, 7 Misc. 3d 1009(A), slip op. at *8 (Sup. Ct. N.Y. Cty., 2005) ("[T]he Board is required to do more than merely mouth the statutory criteria . . .").

The remainder of the Board's decision likewise lacked sufficient detail, in violation of controlling statutes and caselaw. The Board summarily noted Mr. [redacted] "Case Plan, institutional adjustment, release plans, your discipline and your COMPAS Risk Assessment" and did not address these factors in detail but instead summarily concluded that they were outweighed by Mr. [redacted] "disciplinary history," and erroneous, *see infra* Section C, "high risk for prison misconduct." (*See* **Exhibit A** at 15.) This rote recitation falls short of what is required to substantiate a denial of parole. *See In Re Rossakis*, 146 A.D.3d at 28 (holding that the Parole Board violated the statutory requirement that the reasons for denial not be conclusory when it "summarily listed petitioner's institutional achievements, and then denied parole with no further analysis of them").

Similar to *In re McBride v. Evans*, the Board's decision here did not address or explain its conclusion that Mr. [redacted] many positive factors were outweighed by crimes Mr. [redacted] was found to have committed 30 years ago. Furthermore, without a detailed explanation of this

determination and of how the Board considered the statutory factors in Mr. [redacted] case, Mr. [redacted] is unable to prepare sufficiently for future parole hearings, beyond cursory advice to "spend…time cleaning up your discipline, adhering to facility rules, and clarifying your release plans." *See In re Greene v. Smith*, 52 A.D.2d 292, 294 (4th Dep't. 1976) (explaining that "[t]he objective in requiring the board to furnish reasons is to guide and to aid the prisoner in his endeavor to return to society as a useful citizen").

C. The Board's Denial Amounted to an Illegal Resentencing Based on the Board's Own Concept of Justice

Moreover, the Board's subjective evaluation of Mr. [redacted] contention that he was in the "wrong place at the wrong time" 30 years ago, claiming that such an innocence claim "[d]oesn't make sense" (**Exhibit A** at 7), amounts to an illegal resentencing. New York courts have held that, "in focusing exclusively on the petitioner's crime as a reason for denying parole," a Parole Board is "in effect, re-sentencing petitioner to a sentence that excluded any possibility of parole since petitioner is powerless to change his past conduct." *In re Rios*, 2007 WL 846561, at *4-5. "[A]s the Appellate Division has admonished, under similar circumstances, such 're-sentencing' by the Parole Board 'reveal[s] a fundamental misunderstanding of the limitations of administrative power.'" *Id.* (citing *In re King*, 190 A.D.2d at 432). While the Board may consider criminal history during parole determinations, its heavy focus—almost half of the decision is committed to a description of such acts—on the acts Mr. [redacted] was convicted of committing in his 20s is improper. This conduct would have been properly before Mr. [redacted] sentencing judge, Justice Failla, who chose to impose a sentence of to two consecutive terms of 15 years to life for each attempted murder conviction, to run concurrently with concurrent terms of 5 to 15 years and 2 ⅓ to 7 years, respectively, for the weapons convictions, *see People v.*

[redacted] 205 A.D.2d 404, 404, 613 N.Y.S.2d 879, 880 (1994), for an aggregated sentence of 30-years-to life.

The Board's focus on conduct that existed at the time of sentencing effectively constitutes a resentencing to a higher minimum sentence. The Board's rejection of Justice Failla's sentence evinces the Commissioners' subjective views that a minimum sentence of 30 years—the term imposed by the sentencing court in full light of the facts of the crime, criminal history, and after careful deliberation at the conclusion of which the sentencing court believed he should be eligible for parole—is not enough time to serve for the offense. The Commissioners repeatedly expressed their opinion regarding Mr. [redacted] responses to their description of the events that transpired during the crime for which he was found guilty, including, for example, stating: "I'm sorry, if somebody's shooting in the middle of the block I'm not gonna [sic] be on the block. I'm not gonna [sic] be on the corner . . . I mean, were you taking photographs or maybe you were on the corner just having refreshments?" (**Exhibit A** at 6). But "[t]he role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all the relevant statutory factors, he should be released." *In re King v. New York State Div. of Parole*, 190 A.D.2d at 432. Here, the personal opinions of the Commissioners, including their obvious incredulity, clearly guided their consideration of what penalty was appropriate for the crimes Mr. [redacted] was convicted of. Thus, the Board committed reversible error and its decision should be vacated and reversed.

D. The Board Relied on an Inaccurate COMPAS Assessment to Justify its Denial

Decision

The Board's decision should be vacated for the additional and significant reason that it was premised on a flawed COMPAS risk assessment report. The corrected COMPAS risk report scores Mr. [redacted] at a ***low risk for every factor, significantly including prison misconduct.*** The Board cited the erroneous report multiple times in reaching its decision, specifically giving higher weight to an incorrect "High" prison misconduct weighting in explaining its rationale for denying Mr. [redacted] parole.

The Board wrote that it considered "…[Mr. [redacted] discipline and [his] COMPAS Risk Assessment…[Mr. [redacted] disciplinary history is a concern to the Panel. ***The Panel does not depart from [his] low/unlikely COMPAS risk scores, however weighs heavily the high risk score for prison misconduct***." (**Exhibit A** at 15 (emphasis added).) The COMPAS report before the Commissioners erroneously showed his Prison Misconduct score to be "High – 8." (**Exhibit C,** Erroneous COMPAS.**)** However, the *corrected* COMPAS score shows that it is actually a "Low – 1." (**Exhibit J**, Corrected COMPAS.**)** While the Board noted Mr. [redacted] institutional accomplishments, the Board expressed concern that these accomplishments were outweighed specifically by "the high risk score for prison misconduct." That is, the Board's decision hinged on Mr. [redacted] high score for prison misconduct—but this score appears to be based on inaccurate information.

In advance of Mr. [redacted] interview before the Board, a COMPAS report was prepared on December 14, 2020. This report rated Mr. [redacted] low risk for felony violence, arrest, or abscondment. (**Exhibit C**, Erroneous COMPAS.**)**. It scored him low for criminal involvement, low for history of violence, ***but high for prison misconduct***. *Id.* It also rated him as being

unlikely to experience negative social cognitions or low self-efficacy upon release, and scores him as unlikely to experience low family support. *Id.*

However, as Mr. [redacted] explained at his hearing, this high rating for prison misconduct was the result of his Counselor incorrectly entering his involuntary protective custody (IPC) as a Tier III infraction, answering "1" to Question 16, which asks "Total # of Tier 3 infractions during the past 24 months of incarceration." (**Exhibit C**, Erroneous COMPAS at 3.) Mr. [redacted] attempted to explain the incident to the Board:

> Q: . . . [Y]our last Tier III was in 2016 but in August of 2020 you were placed in confinement. Protective custody, I'm sorry. Right, protective custody?
>
> A: That's correct.
>
> Q: What were you in protective custody for?
>
> A: I was doing exercise and one of the cables broke and the cable hit me so I went to the officers and I reported it, the next day an informant said that somebody had hit me so they put me in protective custody.
>
> [Describes that the informant is "of the facility."]
>
> Q: Why would the informant say that if you were exercising and you hit yourself in the head with a cable?
>
> A: I don't know.
>
> Q: And you never questioned it?
>
> A: Of course I questioned it.
>
> Q: And what did they say?
>
> A: They said that since the informant said I was involved in a fight they didn't want to take the chance of putting me back into the population for three or four days.

(**Exhibit A** at 9.)

Mr. [redacted] requested a corrected COMPAS Assessment and one was provided to him on March 9, 2021, with a cover letter drafted by a Senior Offender Rehabilitation Coordinator ("SORC") that reads, "Enclosed please find your corrected COMPAS Risk Assessment." (**Exhibit J**, Corrected COMPAS at 4.) While this corrected COMPAS report again scores him low risk for felony violence, arrest and abscondment, and scores him low for criminal involvement and history of violence, it now rates him at ***low risk for prison misconduct***. (*Id*. at 5.) A comparison of the two COMPAS reports shows that this decreased rating is due to Question No. 16: in the erroneous COMPAS report, Mr. [redacted] social worker reported that Mr. [redacted] had one previous Tier 3 infraction in the past 24 months of incarceration. This was incorrect. In the updated report, Mr. [redacted] SORC corrects his COMPAS and reports that Mr. [redacted] had ***zero*** previous Tier 3 infractions in the past 24 months of incarceration. Mr. [redacted] was placed into IPC only for his safety, and not for an infraction. (Exhibit A at 9.) ***The social worker incorrectly recorded a Tier 3 infraction in the past 24 months in the erroneous COMPAS before the board, and it served as the centerpiece for the Board's decision to place "heavy weight" on Mr. [redacted] prison misconduct as evidence that he could not "***live and remain at liberty without violating the law." Executive Law § 259-i(2)(c)(A); **(Exhibit A** at 15 ("The Panel does not depart from your low/unlikely COMPAS risk scores, however weighs heavily the high risk score for prison misconduct. Your inability to follow rules while confined leads the Panel to question your ability to follow the law.") It was an error to report that Mr. [redacted] had one such prior offense before updating his COMPAS assessment during his initial hearing.

This error appears to be the ***sole basis*** for the increase in Mr. [redacted] score from low risk for prison misconduct to high risk of prison misconduct. Indeed, aside from Question No. 16, no

other answers to the screening questions changed between the two reports. (*Compare* **Exhibit J**, Corrected COMPAS *to* **Exhibit C**, Erroneous COMPAS.)

In short, the increase in Mr. [redacted] reported risk of prison misconduct between his 2019 COMPAS report and 2021 COMPAS report appears to be based on his new social worker erroneously stating that he had a prior Tier 3 offense. That is not true, as his corrected COMPAS report and testimony before the Board accurately reported, and is a historical fact that could not change in the interim. Because the Board explicitly stated that it was relying on that COMPAS score to deny parole release, and because that score was derived as a result of error, the Board's decision must be annulled.

E. The Board Did Not Consider Mr. [redacted] Sentencing Minutes, and Failed to Consider Statements from Mr. [redacted] Defense Counsel or the District Attorney

When making a parole decision, the Board must consider "the recommendations of the sentencing court, the district attorney and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated." 9 NYCRR 8002.2(d)(7). The Board failed to consider those recommendations here.

The Board briefly, and confusingly, addressed the absence of letters from Mr. [redacted] trial defense counsel, the trial judge, and the New York County District Attorney. The Board stated: "It's customary that we write judges, defense attorneys and the DA regarding the possibility of your release, we did not get any response from them so we will continue without their input." (**Exhibit A** at 10.) The Board simply noted the practice that was customary—it did not state anywhere in the transcript or decision that it affirmatively attempted reaching out to any of the necessary parties. The Parole Board Report supports the fact that the Board conducted no such outreach. After checking the "No" box after both Official Statements from the judge,

District Attorney, and defense counsel, and also after Sentencing Minutes, it states that the last time such statements and minutes were requested was on December 19, 2013, and that at the time of request, such statements were "Unavailable." (**Exhibit B** at 1.) According to the Parole Board Report, the last time statements and sentencing minutes were requested was *almost 8 years ago*. There is nothing on the report to indicate that the Board requested the statements at issue in the lead up to the hearing. Because the Board apparently declined to contact the judge, district attorney, or defense counsel, and, thus, did not consider any statement they might have made regarding Mr. [redacted] it failed to consider a required factor in reaching the decision at issue.

Additionally, the Board appears not to have considered the minutes from Mr. [redacted] 1992 sentencing hearing. (**Exhibit B,** Parole Board Report (box checked "No" next to "Sentencing Minutes").) These minutes would demonstrate that Justice Failla chose to give Mr. [redacted] a sentence range below the statutory minimum—15-years-to-life on each attempted murder charge instead of 20-to-life, for an aggregate sentence of 30-years-to-life, *a considerable departure* from the statutory minimum sentence of 40-years-to-life. The transcript of Mr. [redacted] parole hearing and the Board's written decision are devoid of any reference to Justice Failla's decision or to any other aspect of the sentencing minutes. The Board has committed reversible error by neglecting to consider sentencing minutes in which the judge "implicitly addressed" parole by, for example, "imposing less than the maximum on the lower range where [the judge] had discretion," as Justice Failla did here. *See Matter of Duffy v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 132 A.D.3d 1207, 1208 (3d Dep't 2015); *Canales v. Hammock*, 105 Misc. 2d 71, 74, 431 N.Y.S.2d 787, 790 (Sup. Ct. 1980) (Board committed reversible error in failing to review sentencing judge's minutes).

Because the Board failed to consider statutorily required factors, its decision must be reversed.

F. The Board Failed to Meaningfully Consider Mr. [redacted] Reentry Plans

The Board must consider an applicant's release and reentry plan when rendering a parole decision. Executive Law § 259-i(2)(c)(A) (iii) ("release plans including community resources, employment, education and training and support services available to the inmate...shall be considered."). In this instance, the Board focused mostly on the seriousness of the crime of conviction during the interview. It paid little attention to Mr. [redacted] reentry plan.

To the extent the Board considered Mr. [redacted] plan, the Board's decision improperly relies on a prison counselor's scrivener's error that it failed to remedy at the hearing, despite Mr. [redacted] raising of the issue. The Board states that "[Y]our release plan warrants attention. In the interview you provided a proposed residence other than that noted in the record. Your employment assurance letter was well noted." (**Exhibit A** at 15.) Mr. [redacted] attempted to raise with the Board that his proposed residence was incorrectly recorded by his Counselor, during the following back and forth:

> Q: . . . If you're released today, where are you gonna [sic] live?
>
> A: I will live with my wife.
>
> Q: And who is [redacted] (phonetic)?
>
> A: That's my aunt.
>
> Q: What happened to her?
>
> A: When they did this they did this wrong, that was the alternative address, the other one isn't put there.
>
> Q: Did you bring that to the attention of your counselor?
>
> A: Yes.

Q: And your counselor said?

A: My counselor said to fix it here when I arrived here but it was too late to fix it.

(**Exhibit A** at 6-7.)

As documented in subsequent formal and informal grievance reports, Mr. [redacted] raised with his counselor that the correct release address would need to be changed in his formal Parole File to his wife's, Ms. [redacted], address in [redacted] NY. (**Exhibit E**, Informal Grievance; **Exhibit F,** Formal Complaint.) After questioning him regarding the change in release address from his aunt to his wife, the Board did not conduct any further inquiry into this error, instead moving on to questions regarding the type of work he would be doing upon release. (**Exhibit A** at 7.) However, in its decision, the Board relied on the prison counselor's scrivener's error to demonstrate that Mr. [redacted] release address was incorrectly noted, without asking any further questions about the discrepancy or offering an opportunity to correct the record.

Because the Board failed to meaningfully consider a factor that it is statutorily required to consider, insofar as it considered as true a disputed fact, its decision must be reversed.

G. The Board Failed to Meaningfully Consider Mr. [redacted] Deportation Order

The Board must consider an applicant's release and reentry plan when rendering a parole decision. Executive Law § 259-i(2)(c)(A) (iv) ("any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department...shall be considered."). In this instance, the Board focused mostly on the seriousness of the crime of conviction during the interview. It paid little attention to Mr. [redacted] well-supported claim that he was in fact a citizen of the United States, born in [redacted], NY.

The Board decision states: "The record notes an order of deportation. You have asserted being born in [redacted] New York however have yet to provide proof." (**Exhibit A** at 15.) Again, due to an error committed by his Counselor, the Board was not provided with the entire record, including Mr. [redacted] birth certificate. Mr. [redacted] provides two pieces of evidence that demonstrate that DOCCS was in possession of his birth certificate but did not provide it to the panel. First, he provides a Chronological Entry Sheet demonstrating that a request was filed for his birth certificate on July 25, 2017. (**Exhibit G**.) He also provides a Inmate Personal Property record that indicates that, as of February 5, 2018, his birth certificate was part of his personal property, alongside his marriage license and current high school diploma. (**Exhibit H.**) The Board relied on an inaccurate record instead of considering the entire inmate record, including Mr. [redacted] birth certificate.

Because the Board failed to meaningfully consider a factor that it is statutorily required to consider, its decision must be reversed.

IV. CONCLUSION

For the reasons set forth in detail above, the Parole Board's decision should be reversed because it (1) failed to consider that Mr. [redacted] age makes him highly unlikely to commit weapon-related crimes in the future, (2) improperly considered Mr. [redacted] decision not to take a plea deal—a factor irrelevant to the Board's inquiry, (3) improperly relied on an erroneous COMPAS assessment to justify its denial decision, (4) placed too much emphasis on the seriousness of crimes Mr. [redacted] committed nearly 30 years ago, making its decision an illegal resentencing based on its own concept of justice, (5) issued a boilerplate decision that lacked sufficient individualized analysis and didn't address the third of Executive Law § 259-i(2)(A)'s three prongs, (6) failed, in the past 8 years, to request or consider statements from Mr. [redacted] defense counsel or the District Attorney, or Mr. [redacted] sentencing minutes, (7) did not

meaningfully consider Mr. [redacted] reentry plans, putting too much weight on the counselor's failure to update the file as Mr. [redacted] requested, and (8) did not meaningfully consider Mr. [redacted] United States citizenship.

For the foregoing reasons, the Board's denial of Mr. [redacted] release should be vacated. Mr. [redacted] either should be immediately released or granted a *de novo* parole hearing that both complies with and provides Mr. [redacted] the rights afforded to him by the laws and regulations of New York.

Respectfully submitted,

/s/ Rhick Bose

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Dated: August 12, 2021