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ADMINISTRATIVE APPEAL OF
NEW YORK STATE PAROLE DECISION FOR
[redacted]

DIN: [redacted]
NYSID: [redacted]
Bare Hill Correctional Facility

Administrative Appeal #

Parole Hearing Date and Denial Date: September 29, 2020

Applicant's Parole Hearing Location: Bare Hill Correctional Facility

Submitted by:

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Submitted on February 23, 2021
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. PRELIMINARY STATEMENT

[redacted] respectfully submits this brief in support of his timely filed notice of administrative appeal of the September 29, 2020 decision denying him parole.

The facts on this appeal are not in dispute and they demonstrate the Parole Board (the "Board") erred in denying Mr. [redacted] parole. Mr. [redacted] is a 63-year-old man who has been incarcerated for 31 years—nearly half of his life. He has already served a lengthy term of incarceration for the crime for which he was convicted. He is not the same man who was sentenced decades ago to a prison term of 25 years to life. During his incarceration, Mr. [redacted] has demonstrated impressive growth and rehabilitation, evidenced by, among other things, the positive impact he has had on other inmates in his volunteer roles as a football coach, Jewish Facilitator and gardener. Throughout his imprisonment, he has thought about the underlying crime and its grave impact on the victim and her family, including her mother and son. He feels genuine empathy and remorse for their suffering.

The record is replete with evidence establishing that Mr. [redacted] will meaningfully contribute to society upon his release. The risk assessment tool used by the Board—the COMPAS Report—shows Mr. [redacted] has an overall low risk of committing future crimes if released. He was given low risk scores for risk of felony violence, arrest risk, abscond risk, criminal involvement, history of violence, prison misconduct, negative social cognitions, low self-efficacy/optimism, financial issues upon reentry and employment issues upon reentry. Exhibit A at 1. Significantly, he has been able to secure guaranteed housing and employment in the event of his release.

Notwithstanding these facts, on September 29, 2020, the Board denied Mr. [redacted] parole for the fourth time. In reaching this decision, the Board committed a number of reversible errors.

[redacted]

First, the Board failed to meaningfully consider all of the statutorily required factors as required by 9 NYCRR 8002.2(c) and the United States and the New York Constitutions. *Id.*; *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016). Instead, the Board's decision was based entirely on backward-looking factors that were relevant to Mr. [redacted]'s sentence more than three decades ago, but less so as to the question of his parole today: the nature of the instant offense, past criminal offenses and charges, and his claim of innocence. As to the other mandatory factors—including Mr. [redacted]'s institutional record, accomplishments, and his release plan—the Board simply "noted" these factors in perfunctory reference without giving them any meaningful consideration. This is improper as a matter of law.

Second, the Board's decision is conclusory, in direct violation of N.Y. Exec. Law § 259-i(a), and arbitrary and capricious because the Board recited conclusions that find no support in the record. The Board failed to even attempt to explain how facts that existed more than three decades ago outweighed the voluminous evidence of Mr. [redacted]'s rehabilitation and considered release plan, and did not justify its departure from the COMPAS Report that assessed Mr. [redacted] as having an overall low risk of recidivism.

Third, the Board exceeded its authority by substituting its judgment for that of the sentencing court by effectively deciding that the minimum sentence set by the sentencing court was not enough. In its decision, the Board could not identify a single improvement that Mr. [redacted] should make to his rehabilitation efforts or release plan so that he could be released on parole in the future. The Board based its decision solely on factors that existed at the time of sentencing, which the sentencing court duly considered. But by imposing a longer sentence than the minimum sentence imposed by the court only on those same factors, the Board has effectually re-sentenced Mr. [redacted] to a higher minimum sentence.

Fourth, the Board relied on a record that contained several pieces of inaccurate information, each of which warrants reversal. *See Matter of Lewis v. Travis,* 9 A.D.3d 800, 801 (3rd Dep't., 2004) ("Inasmuch as the Board relied on incorrect information in denying petitioner's request for parole release, the judgment must be reversed and a new hearing granted."). During the hearing, the Board discussed criminal charges for which there was no support and were dismissed, and appears to have relied on inaccurate assessments in Mr. [redacted]'s otherwise favorable COMPAS Report concerning risk of substance abuse and family support. The Board should not have relied on these inaccurate assessments, which are contradicted by other facts in the record.

Finally, the Board erroneously found that Mr. [redacted] failed to show any remorse—and could not show remorse—because he is maintaining his innocence on the underlying offense. The hearing transcript belies this finding. Mr. [redacted] explained he is not proud of his past and the person he was. He added that, while he maintains his innocence, he thinks about the victim's family all the time, including her mother and son for whom he has great empathy. The Board acknowledged that Mr. [redacted] got very emotional when speaking about the victim's family.

For all of these reasons, the Board's denial of Mr. [redacted]'s parole violated New York State Executive Law, Corrections Law, administrative regulations, and controlling New York case law. Accordingly, Mr. [redacted] seeks reversal of the Board's decision and immediate release especially given the unique risks posed by COVID-19 or, in the alternative, a *de novo* parole hearing conducted in compliance with controlling law.

II. FACTUAL BACKGROUND

Mr. [redacted] is currently incarcerated and under the supervision of the Department of Corrections and Community Supervision at Bare Hill Correctional Facility ("Bare Hill"). He

was sentenced to indeterminate prison term of 25 years to life for Murder in the Second Degree, and has served 31 years of his sentence. Exhibit B at 4. He is now 63 years old.

A. Mr. [redacted] Achieved Significant Accomplishments While Incarcerated

Mr. [redacted]'s record during his incarceration demonstrates not only that he has achieved impressive personal growth, but that he has also helped other inmates and has been a positive influence in the various facilities in which he has been incarcerated.

For over 20 years, Mr. [redacted] served as a football coach for other inmates. As a football coach, he helped bring together men who were part of different gangs to successfully play for the same team and attain a positive outlook. Exhibit C at 5, 12, 14, 46-47. Mr. [redacted] has received letters from former players thanking him for his service, and as far as he is aware, all of the men he coached have been successful after release. *Id.* at 5.

He has also worked as a Jewish Facilitator for many years at various facilities. *Id.* at 5-6, 12-13. His responsibilities in this role include organizing and leading prayer, services and study groups; planning holidays and celebrations; and performing other supportive tasks. *Id.* at 5. Although Mr. [redacted] is not Jewish, serving in this role has helped him bring together people of different faiths and beliefs, and allowed him to mentor other men. *Id.* at 6. For example, he was able to mentor [redacted] who Mr. [redacted] first met during religious services. *Id.* Mr. [redacted] submitted a letter to the Board in support of Mr. [redacted]'s parole application, which stated, "Our relationship started as a religious support system and our friendship grew from there…He has had a great impact on me. He is a great influence." *Id.* at 21. Mr. [redacted] noted that even since his release, he speaks with Mr. [redacted] "two times per week, not counting letters." *Id.*

Mr. [redacted] has also worked in the gardens of various facilities, including at Bare Hill. *Id.* at 6. Bare Hill's Garden Supervisor [redacted] submitted a letter to the Board, which

stated, "Mr. [redacted]'s knowledge and experience in vegetable gardening and greenhouse management was an asset to the program. Mr. [redacted] was timely and productive in this assignment. Mr. [redacted] displayed a positive and respectful attitude toward Staff members and inmate participants." *Id.* at 45.

Mr. [redacted] has also successfully completed a number of educational and self-improvement programs. He obtained his GED, and completed the required programs ART (Aggression Replacement Training), AVP (Alternative Violence), and Phase II. *Id.* at 6, 36-38.

B. Mr. [redacted] Has Guaranteed Housing And Employment Upon Release

Mr. [redacted] has been able to develop a significant support system for after his release. Importantly, he has been able to secure guaranteed housing and employment.

If released, Mr. [redacted] intends to seek a transfer to Rochester, NY where his friend Mr. [redacted]'s aunt has offered her home to him. *Id.* at 21. Mr. [redacted] also has guaranteed paid employment as a Recovery Peer Advocate with the Rochester Community Outreach and Recovery Enhancement Center, which will offer him additional skills and training and connections to other community agencies. *Id.* at 28.

If the transfer to Rochester is denied, Mr. [redacted] intends to return to Jefferson County, and has received a letter of assurance from Watertown Urban Mission which will be able to provide him with support. *Id.* at 34.

C. Mr. [redacted]'s 2020 COMPAS Report Indicates Low Risk for All Ratings, Except Where There Were Errors

On July 23, 2020, Bare Hill conducted a risk assessment of Mr. [redacted] and completed a COMPAS Report. The COMPAS Report scored Mr. [redacted] as having low risk of felony violence, arrest risk, abscond risk, criminal involvement, history of violence, and prison misconduct. Exhibit A at 1. It also scored him as having low risk of negative social cognitions,

low self-efficacy/optimism, financial issues upon reentry, and employment issues upon reentry. *Id.*

Mr. [redacted] received higher scores for risk of reentry substance abuse and low family support, but these scores are contradicted by documents in the record.

The COMPAS Report scored him as "probable" for reentry substance abuse. *Id.* But numerous documents show Mr. [redacted] has never had a substance abuse problem, and does not have any such problems now. In 2016, the Treatment Plan Review Committee assessed Mr. [redacted] and found that he did not require Alcohol and Substance Abuse Treatment (ASAT) because "no evidence suggest[s] a clinical diagnosis for a substance use disorder." Exhibit C at 58. Moreover, in the prior COMPAS report dated July 27, 2018, Mr. [redacted] was given the lowest score of 1 for risk of reentry substance abuse because, among other things, he did not undergo "any prior treatments for drug/alcohol abuse and did not indicate any history of failed drug/UA tests." Exhibit D at 1, 4. Given that Mr. [redacted] has not incurred any disciplinary infractions, nor has tested positive for any drugs since that 2018 report, there is simply no evidence to suggest that Mr. [redacted] has any substance abuse issues at this time or at any time in the past. *See* Exhibit A at 3-4 (noting that Mr. [redacted] had no infractions in the past 24 months, including for drugs). The substance abuse risk rating in the most recent COMPAS Report is, therefore, erroneous.

The COMPAS Report also scored Mr. [redacted] as "highly probable" for low family support. It notes that "[i]t is uncertain as to whether there is evidence of family support." *Id.* at 11. But Mr. [redacted]'s cousin [redacted] [redacted] wrote a support letter to the Board in August 2020, stating, "I have known [redacted] all my life…we communicated by phone or letters through the years. … I want to support him emotionally however I can." Exhibit C at 18. This letter

[redacted]

demonstrates that Mr. [redacted] has family support that he can rely on upon his release, contrary to the assessment that it is "uncertain as to whether there is evidence of family report." It appears the COMPAS Report simply failed to take this support into account.

D. Parole Hearing and Decision

On September 29, 2020, Mr. [redacted] appeared before Commissioners Drake and Mitchell via video conference at Bare Hill. That same day, the Board summarily denied parole and ordered Mr. [redacted] to be held for an additional 24 months. Exhibit E at 37-38. This was Mr. [redacted]'s fourth parole denial. *See generally* Exhibits E, F. In reaching its decision, the Board failed to examine the voluminous evidence concerning Mr. [redacted]'s rehabilitation and release plan in any meaningful way, and based its denial almost entirely on backward-looking factors that existed at the time of his sentencing, and which cannot be changed.

The Board's decision denied parole based on Mr. [redacted]'s instant offense, past criminal offenses and charges—many of which were dismissed and should not have been considered—and the unsupported claim that he could not demonstrate remorse because he was maintaining his innocence despite the fact that he expressed great emotion during the hearing and stated that he is "not proud of [his] past" and that he thinks about the victim's family "all the time" including the victim's mother and the victim's son who "had to grow up without a mother." Exhibit E at 35-36.

The Board also merely paid lip service to the copious amounts of evidence demonstrating Mr. [redacted]'s rehabilitation and release plan, stating simply that it "notes [his] disciplinary record and the single disciplinary infraction…program participation to date and the completion of required programs…results of your COMPAS risk assessment and the low scores indicated therein, with the exception of highly probable for low family support…[and] well-documented release plan and support letters." *Id.* at 38. The Board did not analyze any of the specific

[redacted]

accomplishments, program completions, or details of the release plan. It also did not examine how the backward-looking factors weighed against factors that demonstrate Mr. [redacted]'s rehabilitation and readiness for release. Instead, the Board perfunctorily concluded that "there is a reasonable probability that [Mr. [redacted]] would not live and remain at liberty again without violating the law and that your release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." *Id.*at 37.

After the parole denial, Mr. [redacted] timely submitted his Notice of Appeal of the Board's September 29, 2020 decision.

III. LEGAL FRAMEWORK

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 the factors listed in N.Y. Exec. 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;
>
> (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

[redacted]

> 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 interpreted the legislature's grant of administrative discretion in significant ways.

First, the Board cannot deny release based solely on the nature of the underlying offense. *Rios v. New York State Div. of Parole*, 836 N.Y.S.2d 503 (Sup. Ct., Kings Cnty. 2007).

Second, the Board may give different weight to the statutory factors, but must consider—and rationally weigh—all relevant factors and must not consider erroneous information in doing so. *King v. New York State Div. of Parole*, 190 A.D.2d 423, 598 N.Y.S.2d 245 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788, 632 N.E.2d 1277 (1994); *Johnson v. New York State Div. of Parole*, 884 N.Y.S.2d 545 (4th Dep't. 2009); *Thwaites v. New York State Div. of Parole*, 934 N.Y.S.2d 797 (Sup. Ct., Orange Cnty. 2011). The Board's decision must "incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board." Executive Law 259-c(4). "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." 9 NYCR 8002.2(a).

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)(A); *see Mitchell v. New York State Div. of Parole*, 871 N.Y.S.2d 688 (2d Dept. 2009). 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.

IV. ARGUMENT

A. The Board's Decision Did Not Reasonably or Meaningfully Consider All Relevant Factors and Was Virtually All Backward-Looking.

The Board failed to meaningfully consider the statutorily required factors. Executive Law 259-i(2)(c)(A) requires the Parole Board to meaningfully review and consider evidence of rehabilitation and suitability for release. The Parole Board may not deny release solely on the basis of the seriousness of the offense and in the absence of aggregating factors. *Matter of Mitchell v. NYS 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."). Notably, "a murder conviction *per se* should not preclude parole." *Rios*, 836 N.Y.S.2d 503. Rather, the Board must consider the dynamic factors of prisoner development and rehabilitation. *Id.* 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." *Johnson v. N.Y. Bd. of Parole*, 65 A.D.3d 838 (4th Dep't 2009); *see also King*, 190 A.D.2d at 431-332 (noting that failure to weigh all of the relevant factors strongly suggest that the denial was a "foregone conclusion"); *Morris v. New York State Dep't of Corr. & Cmty. Supervision*, 40 Misc. 3d 226, 233, 963 N.Y.S.2d 852, 858 (Sup. Ct. Columbia Cnty. 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.").

The record contains copious evidence demonstrating Mr. [redacted]'s rehabilitation and suitability for release, none of which was meaningfully considered by the Board.

During the more than three decades of his incarceration, Mr. [redacted] has exhibited ability to take on meaningful responsibilities, which have positively impacted the various facilities he had been at, as well as other inmates. In his role as a football coach, he was able to coach other inmates and bring together individuals who were part of different gangs so that they could work together for collective success. Exhibit C at 5, 12, 14, 46-47. He has also volunteered as a Jewish Facilitator, and sought to bring together people of different faiths as an individual who is not Jewish himself. *Id.* at 5-6, 12-13. In these roles, he was able to mentor other men. As a football coach, he was able to develop relationships with his players who have subsequently written to him, expressing thanks to Mr. [redacted] for his service. He also gained an important friendship in Mr. [redacted], whom he met through religious services. Although Mr. [redacted] is now released, they still speak to each other twice a week, not including letters, and Mr. [redacted] has written to the Board that Mr. [redacted] has "had a great impact on me. He is a great influence." *Id.* at 21. Lastly, Mr. [redacted] worked as a gardener at several facilities, including at Bare Hill. According to Bare Hill's Garden Supervisor Mr. [redacted], "Mr. [redacted]'s knowledge and experience in vegetable gardening and greenhouse management was an asset to the program. Mr. [redacted] was timely and productive in this assignment. Mr. [redacted] displayed a positive and respectful attitude toward Staff members and inmate participants." *Id.* at 45. There is no indication that the Board meaningfully took any of this into consideration.

Mr. [redacted] was also able to complete his GED, and the mandatory programs during his incarceration. He completed ART (Aggression Replacement Training), AVP (Alternative Violence), and Phase II. *Id.* at 6, 36-38. This too was only given a perfunctory mention by the Board.

And importantly, the record contains a considered release plan that includes guaranteed housing and employment. Mr. [redacted]'s aunt has offered to provide housing to Mr. [redacted] in Rochester NY, *id*. at 21, and Mr. [redacted] has awaiting him guaranteed paid employment as a Recovery Peer Advocate with the Rochester Community Outreach and Recovery Enhancement Center, which will offer him additional skills and training and connections to other community agencies, *id.* at 28. Once again, the Board failed to meaningfully consider this.

Indeed, the Board failed to meaningfully consider any of this highly relevant evidence. During the hearing, the Board did not do much more than list some of documents included in Mr. [redacted]'s parole packet. *See* Exhibit E at 29:6-18, 31:5-23, 32:14-33:10. And they did not ask any questions about Mr. [redacted]'s experience as a football coach, Jewish Facilitator or gardener, which are important experiences demonstrating the extent of Mr. [redacted]'s rehabilitation and ability to contribute to society if released. In the decision itself, Mr. [redacted]'s specific accomplishments, specific program participations or completions, and contents of his release plan were not even mentioned, despite the fact that these were all relevant to factors that the Board was required to consider under N.Y. Exec. Law § 259-i(2)(c)(A)(i) and N.Y. Exec. Law § 259-i(2)(c)(A)(iii). *Id.* at 37-38.

Instead, the Board's focus was exclusively backward-looking at facts that existed more than three decades ago. For most of the parole hearing, the Board questioned Mr. [redacted] at length about his relationship to the victim and what occurred around the time of the instant

offense. *Id.* at 2:10-19:14. The remainder of the Board's questions were nearly all devoted to his criminal history including criminal charges that were dismissed—which, as discussed below, should not have been considered. *Id.* at 19:15-28:6. In fact, the Board's decision was entirely based on the nature of the offense that led to Mr. [redacted]'s conviction and related factors, such as his purported criminal history and his continued claim of innocence. *Id.* at 37-38. In other words, the Board denied Mr. [redacted] parole based on the nature of his crime to the exclusion of other relevant factors, in abdication of the Board's responsibilities under applicable law.

Given that the Board failed to meaningfully consider the statutorily required factors and that a proper application of those factors warrants parole, the Board's decision should be reversed.

B. The Board's Denial of Parole Is Stated in Conclusory Terms and it Fails to Properly Explain or Justify its Denial.

The Board also erred in failing to properly explain and justify its denial. 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); *Rossakis v. N.Y. State Bd. Of Parole*, 146 A.D.3d 22 (1st Dep't 2016); *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dep't 2014). The Board cannot "summarily list[] petitioner's institutional achievements and then den[y] parole with no further analysis of them." *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dept. 2016); *Ruzas v. New York State Board of Parole*, No. 1456/2016, slip op. at 4 (Sup. Ct. Dutchess Cty. Oct. 18, 2017) (holding the Board in contempt for conducting defective *de novo* interview after the Court set aside the initial decision because "the Board summarily denied [petitioner's] application without any explanation other than by reiterating the laundry list of statutory factors. The

minimal attention, barely lip service, given to these factors and to the COMPAS Assessment cannot be justified given the amount of time already served.").

Moreover, Parole regulations require that "[i]f 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." 9 NYCRR 8002.2(a) (emphasis added). The Board's failure to provide an individualized reason for departing from the COMPAS Report—or to otherwise address the first prong of Executive Law 259-i(2)(A)—demonstrates reversible error. *Comfort v. Stanford*, 2018/1445 (Sup. Ct., Duchess Cnty, 2018) (finding the Board did not comply with 8002.2(a) when it failed explain its departure from the lowest possible COMPAS risk scores of felony violence, arrest, and absconding yet concluded that there was a reasonable probability the petitioner would not live and remain at liberty without violating the law).

In the Board's decision, the Board merely provided the following boilerplate language: the "[r]equired statutory factors have been considered together with your institutional assessment, including discipline and program participation, your risk and needs assessment and your need for successful reentry into the community." Exhibit E at 37. It then listed some facts in the record such as "participation to date and the completion of required programs" and "results of your Compas risk assessment." *Id.* at 38. The Board did not conduct any analysis of any of the factors demonstrating Mr. [redacted]'s rehabilitation and readiness for release, nor did it, in fact, apply the relevant evidence to the required factors to come to a proper decision. The mere rote recitation of only some of the evidence before the Board falls far short of what is required to substantiate a denial of parole.

The Board also failed to provide *any* justification for why it was departing from the COMPAS Report in finding that Mr. [redacted] would be at risk of recidivism despite his low COMPAS Report scores for felony violence, arrest, abscondment, criminal involvement, history of violence, and prison misconduct, let alone provide "individualized reasons for such departure" from each of those low scores as 9 NYCRR 8002.2(a) requires.

By failing to provide any analysis of the favorable factors, the Board likewise failed to explain how the facts that existed more than three decades ago outweigh the evidence demonstrating that Mr. [redacted] would be able to lead a crime-free and productive life now if released. New York courts have vacated parole denials on exactly this type of failure to explain how the Board has weighed the statutory factors. *See In re McBride v. Evans*, 42 Misc.3d 1230A (Sup. Ct. Dutchess Cnty, 2014) ("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."); *V. Sullivan v. NYS Bd of Parole*, 100865/18 (Sup. Ct., NY Cnty. 2019) ("There is no explanation why the 25 year old crime outweighed the voluminous evidence that indicates petitioner would presently be able to lead a quiet and crime-free life in society.").

Requiring a detailed explanation and justification of the Board's determination is not merely a technical requirement. Without a detailed explanation of this determination, and of how the Board considered the statutory factors in Mr. [redacted]'s case, Mr. [redacted] is unable to prepare for future parole hearings. *See 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

[redacted]

the prisoner in his endeavor to return to society as a useful citizen"). This harm is especially acute here because this was Mr. [redacted]'s fourth denial. And unlike in the prior denials, this instant denial contained no recommendations for what Mr. [redacted] could do to be paroled in the future. Given that the Board's decision is almost entirely based on the past—on things that cannot be changed—it is impossible to know what Mr. [redacted] can do in the future to demonstrate that he is ready to be released into society. The only inference that can be drawn from this record is that the Board will never meaningfully evaluate the full set of relevant considerations in determining whether Mr. [redacted] should be released, thereby converting his indeterminate sentence into a mandatory life sentence.

The Board's decision should be reversed for failure to properly explain and justify its decision.

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

The Board's single-minded focus on facts that existed three decades ago at Mr. [redacted]'s sentencing not only violates the applicable statutes, but also effectively re-sentences him to a longer minimum sentence—which under the Board's rational could be a mandatory life sentence.

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." *Rios*, 836 N.Y.S.2d 503. "[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 *King*, 190 A.D.2d at 432). Here, all of the facts on which the Board now bases its denial—the nature of the instant

offense, past criminal offenses and charges, and claim of innocence—were all before Mr. [redacted]'s sentencing judge. The sentencing judge noted each and every one of these factors in sentencing Mr. [redacted] to 25 years to life. Exhibit G at 5-8.

The Board's focus on facts that existed at the time of sentencing, coupled with a conclusion that Mr. [redacted] has not met the criteria for parole after serving the minimum number of years of his sentence and may not be reconsidered for parole for another two years, effectively constitutes a resentencing to a higher minimum sentence. It is further evidence of the Board's subjective views that the minimum sentence of 25 years is not enough time to serve for the offense. 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." *King*, 190 A.D.2d at 432.

Because the Board effectively re-sentenced Mr. [redacted] to a higher minimum sentence, the decision should be reversed.

D. The Board's Decision Relied On Inaccurate Facts

1. The Board's Improperly Relied on Dismissed Charges

As discussed above, the Parole Board cannot rely on erroneous information. This includes criminal charges that were dismissed. *Williams v. Travis*, 20 A.D.3d 622, 623, 798 N.Y.S.2d 535, 536 (3d Dept. 2005) ("Inasmuch as the criminal history explicitly relied upon by the Board as one of the factors justifying the 48–month time assessment included charges that were dismissed, the matter must be remitted to the Board for reconsideration of the appropriate time assessment without regard for the two dismissed charges") (citing *Kravetz v. New York State Div. of Parole*, 293 A.D.2d 843, 740 N.Y.S.2d 512 (3d Dept. 2002), *lv. denied* 98 N.Y.2d 610, 749 N.Y.S.2d 2, 778 N.E.2d 553 (2002)).

Here, the Board explicitly relied on a number of charges, which were all dismissed. At the hearing, the Board asked a number of questions about 1979 charges of sexual abuse in the first degree, rape in the first degree, unlawful imprisonment and criminal mischief; 1988 charges of rape in the third degree, two counts of endangering the welfare of a child and six counts of sexual abuse in the third degree; and a 1987 domestic violence allegation against Mr. [redacted]. Exhibit E at 20:9-12; 21:12-15; 25:17-20. As shown by Mr. [redacted]'s criminal record, none of these charges or allegations resulted in a conviction. *See* Exhibit B. As such, the Board was not permitted to consider these charges or allegations. *Williams*, 20 A.D.3d at 623.

The Board's improper consideration of unsubstantiated charges and allegations as part of Mr. [redacted]'s criminal history warrants reversal.

2. The Board's Improperly Relied on Erroneous Assessments in the COMPAS Report

Despite being otherwise very positive, the COMPAS Report contained erroneous assessments. The Board was not permitted to rely on any erroneous assessments contained in the COMPAS Report, and thus, their reliance thereof warrants reversal.

First, the COMPAS Report erroneously gave Mr. [redacted] a score of "Probable" for the risk of "ReEntry Substance Abuse" rating. Exhibit A at 1. But this is entirely unsupported by any facts, and indeed, is contradicted by the documents in the record. The record shows that in 2016, the Treatment Plan Review Committee assessed Mr. [redacted] and found that he did *not* require Alcohol and Substance Abuse Treatment (ASAT) because "*no evidence suggest[s] a clinical diagnosis for a substance use disorder*." Exhibit C at 58 (emphasis added). And in the COMPAS report dated July 27, 2018, Mr. [redacted] was given the lowest score of 1 for risk of reentry substance abuse because, among other things, he did not undergo "any prior treatments for drug/alcohol abuse and did not indicate any history of failed drug/UA tests." Exhibit D at 1,

4. Given that Mr. [redacted] has not incurred any disciplinary infractions, nor has he tested positive for any drugs since that 2018 report, there is simply no evidence to suggest that Mr. [redacted] has or ever has had any substance abuse issues that would warrant a "probably" rating on this risk factor. *See* Exhibit D at 1, 4. As Mr. [redacted] stated at the parole hearing, "I don't have a problem with drugs, sir. I hate them. I hate them." Exhibit E at 34:20-21. But the Board failed to clearly and expressly acknowledge that the COMPAS Report's assessment of Mr. [redacted]'s risk of substance abuse upon reentry was erroneous.[1]

Second, the COMPAS Report gave Mr. [redacted] a "Highly Probable" score on the low family support rating, a rating that the Board reiterated in its decision. *Id.* at 38. At the time, this assessment was based on the assessor's comment that although Mr. [redacted] "indicated that he believes that other relatives are supportive … [i]t is uncertain as to whether there is evidence of family support." *See* Exhibit A at 11. But Mr. [redacted]'s cousin [redacted] [redacted] submitted a support letter dated August 2020—after the COMPAS Report was prepared—stating that he "want[s] to support [Mr. [redacted]] emotionally however [he] can." Exhibit C at 18. This letter was before the Board and belied the COMPAS Report's finding in this regard. Indeed, because Mr. [redacted]'s letter demonstrates that Mr. [redacted] has family support, the COMPAS Report is erroneous in giving him a "Highly Probable" score on the Low Family Report Scale. At the hearing, the Board noted Mr. [redacted]'s letter and asked Mr. [redacted] about his children, who live a thousand miles away in Florida. But whether or not Mr. [redacted] is in regular contact with his children does not take away from the fact that he has the support of family members such as

[1] At the hearing, the Board responded to Mr. [redacted]'s statement that he doesn't have a problem with drugs by stating, "Yes. And that's only reason you would be waived from having the requirement of having to take the program. There's no evidence that you have." Exhibit E at 34:22-24. But it is unclear from this statement whether the Board accepted Mr. [redacted]'s explanation and excluded consideration of the substance abuse rating in the COMPAS Report as erroneous. The Board never clearly and expressly stated that it would not be taking this erroneous assessment into consideration, either at the hearing or in its decision.

Mr. [redacted], which warrants a lower risk score than "Highly Probable" on the low family support rating. The Board erred in this respect as well.

The Board's reliance on COMPAS Report assessments that are erroneous and unsupported by the record warrants reversal.

E. The Board Erroneously Concluded that Mr. [redacted] Could Not Express Remorse

In its decision, the Board stated, "You continued to claim innocence in the instant offense and, therefore, there could have been no remorse for the crime for which you were convicted and the family involved." Exhibit E at 38. But the hearing transcripts squarely demonstrates that Mr. [redacted] expressed deep remorse and empathy.

Although Mr. [redacted] maintains his innocence and is seeking to overturn his conviction— and has throughout his incarceration—he has also expressed deep remorse for the crimes he did commit in the past, as well as deep sorrow and concern for the victim's family. At the hearing, Mr. [redacted] stated:

> I'm not proud of my past. I'm not proud of it at all. An idiot. I was a bonehead…I'm not the same person today. …I am not proud of the past. I can't change it. … And I think above all that what goes through my body and mind all the time is the [redacted] Family. But it's not he [redacted] Family, it's really [redacted] It's [redacted] [redacted] was her mother. The [redacted] Family. And her son, [redacted] he used to climb all over me. They had to grow up without a mother, like, my son had to grow up without a dad. I think about that all the time.

Exhibit E at 35:4-36:11. The Board noted that when Mr. [redacted] was making this statement, he "got very emotional." *Id.* at 36:13-14.

Where the applicant showed insight and remorse for the victim and the victim's family, as here, the Board cannot base its decision on a lack of remorse. *Winchell v. Evans*, 27 Misc.3d 1232(A) (Sup. Ct. Sullivan Cnty. 2010) (finding that the Board's denial, which was based on the

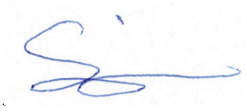
petitioner failing to show remorse for the victim or her family and not appearing to understand the seriousness of his crime, was contradicted by the record).

The Board apparently concluded that Mr. [redacted] is incapable of feeling remorse because he is maintaining his innocence. But the mere fact that Mr. [redacted] continues to maintain innocence for the instant offense—because he maintains he did not commit it—should not bar him from parole indefinitely, particularly when he continues to feel sorry for what happened to the victim and her family. Indeed, none of Mr. [redacted]'s prior parole denial decisions indicate that he lacked remorse for the instant offense and for the victim's family despite the fact that he maintained his innocence during each of those parole hearings. *See* Exhibit F.

V. CONCLUSION

For the foregoing reasons, the Parole Board's September 29, 2020 denial of parole should be reversed, and Mr. [redacted] should be granted immediate release especially given the unique risks posed by COVID-19 or, in the alternative, a *de novo* parole hearing conducted in compliance with controlling law.

Respectfully submitted,



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