Art. 78 Petition - FUSL000119 (2017-10-20)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of [redacted]

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

NEW YORK STATE BOARD OF PAROLE,

Respondent.

Index No. _____

VERIFIED PETITION

To : NEW YORK STATE BOARD OF PAROLE
Building 2
1220 Washington Avenue
Albany, New York 12226-2050

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL
Office of the Attorney General of the State of New York
One Civic Center Plaza, Suite 401
Poughkeepsie, New York 12601

PLEASE TAKE NOTICE that upon the annexed petition of [redacted] ("Petitioner"), verified on the 20th day of October 2017, and the annexed affirmation of Orlee Goldfeld, executed on the 20th day of October 2017, Petitioner will apply to this Court on the 20th day of November 2017, or as soon thereafter as counsel may be heard, for a judgment granting the relief requested in the annexed Petition.

PLEASE TAKE FURTHER NOTICE that you must serve a verified answer and any supporting affidavits and documents, at least five days before the Petition is noticed to be heard.

Petitioner designates Dutchess County as the place of trial. The basis of venue is that the parole hearing and the Respondents' determination and other material events took place in this county.

Dated: New York, New York
October 20, 2017

/s/ Orlee Goldfeld

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SUPREME COURT OF THE STATE OF NEW YORK
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VERIFIED PETITION

Petitioner, [redacted], by and through his undersigned attorneys, LAW OFFICES OF ORLEE GOLDFELD, upon information and belief, respectfully alleges as follows:

1. On November 15, 2016 Petitioner [redacted] appeared for the seventh (7th) time before Respondent New York State Board of Parole (the "Board") at a hearing to consider his release to parole supervision (the "Hearing"). The Board once again denied his release, without finding a reasonable probability that Mr. [redacted] would not live and remain at liberty without violating the law (the "Decision") (Exhibit A).[1] Instead, the Board parroted statutory language and said Mr. [redacted]' release would be incompatible with the welfare of society and would deprecate the seriousness of the offense.

2. Mr. [redacted] respectfully submits this Verified Petition requesting that the Court enter judgment pursuant to CPLR § 7806 vacating the Decision, ordering the Board to hold a *de novo* hearing in accordance with the law within 10 days, ordering the Board to disclose any

[1] Exhibits referenced herein are to the accompanying Affirmation of Orlee Goldfeld, executed on the 20th day of October 2017.

"community opposition," and granting such other and further relief as this Court deems appropriate.

PARTIES, JURISDICTION & VENUE

3. Petitioner [redacted], DIN [redacted], is an inmate currently incarcerated at Fishkill Correctional Facility, 18 Strack Drive, Beacon, New York 12508. Mr. [redacted] became eligible for parole on March 23, 2007.

4. Upon information and belief, the New York State Board of Parole ("Board") is an administrative agency housed within the New York State Department of Corrections and Community Supervision ("DOCCS") that maintains some independent decision-making authority regarding, among other things, parole release. The Board's principal office is located at Building 2, 1220 Washington Avenue, Albany, New York 12226-2050.

5. Jurisdiction lies in this Court pursuant to Section 7803(3) of the Civil Practice Law and Rules to determine whether the Board acted lawfully in denying Mr. [redacted]'s parole application.

6. Venue lies in this Court pursuant to C.P.L.R. 506(b) because Dutchess County is the County in which Mr. [redacted] was located when the Board held the Hearing and where Mr. [redacted] received the Decision.

BACKGROUND FACTS

7. On April 17, 1982, Mr. [redacted] was at a bar. An acquaintance asked him to give [redacted] a ride home. Once in the car, Ms. [redacted] instead asked to be driven to another bar. Mr. [redacted] drove her, went in for a drink, and left. On his way out, he heard her arguing with two men in a parking lot. Three days later, Ms. [redacted]'s body was found in a field off the Mannix Road Extension in East Greenbush, New York. The

autopsy revealed the main cause of death was a severed carotid artery and a severed spinal cord. She had been repeated struck by an axe.

8. Approximately one week later, Mr. [redacted] was arrested and charged with Ms. [redacted] murder. He was the last person known to have been seen with the victim prior to her death. At the time of his arrest, Mr. [redacted] was 23-years old. He had no prior criminal history. He was married and was a father to a newborn son.

9. Mr. [redacted] professed his innocence and has maintained his innocence since that time and to this day. [redacted] he heard her arguing with two others. No physical evidence tied him to the murder. His conviction was based upon the testimony of witnesses that had seen them together at the bar and based upon the arresting police officers' oral [redacted] to the crime.[2]

10. Mr. [redacted] was tried and convicted at three separate trials. His first two convictions were overturned on appeal, first for admission of evidence obtained on an invalid search warrant, *see People v.* [redacted] 137 A.D.2d 227 (3d Dep't 1988), and second for the trial court's error that admission of exculpatory evidence would "open the door" to introduction of the murder weapon, *see People v.* [redacted] 179 A.D.2d 48 (3d Dep't 1992).

11. His third conviction for murder in the second degree was affirmed on appeal, *People v.* [redacted], 221 A.D.2d 770 (3d Dep't 1995). Mr. [redacted] was sentenced to 25 years to life.

12. Mr. [redacted] became eligible for parole on March 23, 2007. He has now served more than 35 years in DOCCS's custody for his conviction and has been denied parole for more than 10 years.

[2] Mr. [redacted]'s purported written confession was thrown out at a *Huntley* hearing. *People v.* [redacted], 103 A.D.2d 994 (1984).

Model Behavior in Prison

13. During his incarceration, Mr. [redacted] has maintained a virtually spotless disciplinary record, with only one Tier II infraction in July 2002 and one Tier III infraction in December 2005.

14. Mr. [redacted] has been productive with his time. He obtained a GED and completed all mandated programs years ago. He has worked as a Maintenance Carpenter, Utility Gang Worker, Maintenance Plumber, Barber, Storeroom Laborer, Food Service Worker, Porter, and in the Tailor Shop, and he has completed Phases 1, 2, and 3 of Transitional Services. He has also completed ART, ASAT, and personal enhancement counseling. Mr. [redacted] has worked as a program aide in ART and in the law library. He has obtained certificates for the programs that he completed and also obtained a plumbing certificate and a certificate for working as a law clerk (Exhibit B). He has also received his license for asbestos handling (Exhibit C at 5).

COMPAS, Parole Board Report, and Parole Plan

15. In advance of his seventh parole hearing, DOCCS administered a COMPAS[3] to Mr. [redacted] The COMPAS showed a low overall risk of felony violence, arrest, and absconding. It also showed that he had no criminal history, family support, no substance abuse issues, no notable disciplinary history in the previous 24 months, an education, job readiness, strong self-efficacy skills, no anger issues, and that he could support himself financially upon release (Exhibit D). DOCCS also prepared an updated Parole Board Report (Exhibit E).

[3] The COMPAS is a fourth-generation risk and needs assessment instrument first developed in 1998 by Northpointe Public Institute for Public Management to assess offenders' crimogenic needs and risk of recidivism. Northpointe, *Practitioners Guide to COMPAS* (2011) at 1. Empirically developed, COMPAS focuses on predictors known to affect recidivism. The COMPAS instrument provided to the Board in each case they consider was specifically designed by Northpointe for New York State.

16. [redacted] parole plan, which he presented to the Board. He proposed to reside with his mother in the Town of Nassau, in Rensselaer County, New York. He also indicated that he wanted to go back to school to further his education to become a paralegal and work at a law firm and that his brother would assist him in sending out resumes (Exhibit C at 7). He presented the Board with letters of support from family and friends.

Seventh Parole Hearing

17. Mr. [redacted] appeared for his seventh parole hearing in November 2016. At the Hearing, the Board spent about 10 minutes with Mr[redacted] before deciding that he should spend another 2 years in prison.

18. The Board commissioners asked about the crime, and Mr. [redacted] expressed his innocence and recounted the events of the evening at which he had left the victim at a bar and saw her arguing with 2 men in the parking lot. Mr. [redacted] also described the prosecution's use of Mr. [redacted]' purported "spontaneous statement" of confessing to the crime. The Board then discussed Mr[redacted] efforts at rehabilitation in prison. He told the Commissioners that he had achieved his asbestos license since the time he saw them last. Exhibit C at 5.

19. Notwithstanding all of the positive factors favoring release, the Board denied Mr. [redacted]s parole application again:

> Denied. Hold 24 months. Next appearance 11/2018.
>
> Despite your low COMPAS risk score, after review of the record and interview, the panel has determined that if released at this time 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. This decision is based on the following factors: Your instant offense is murder second degree for which you are serving 25 to life. The crime involved you striking a female victim in the head, face, neck, and abdomen with an ax causing her death. You then placed her body in a field. An aggravating factor is that you placed her body in a field to evade responsibility for the crime as well as the brutal nature of the crime which involved you slashing her over 20 times in an explosive rage. You continue to deny

> responsibility for this crime. Moreover, there is current community opposition to your release. The panel notes your letters of support, letter from your defense attorney, A.R.T., IGRC, ASAT, and vocational accomplishments. The panel also notes your plans to become a paralegal and attend school as well as your asbestos skill and desire to pursue that field. All factors considered, our release at this time is not appropriate.
>
> (All Commissioners concur.)

(Exhibit A). The Decision included no explanation as to how Mr. [redacted]'s release would not be compatible with the public's safety and welfare. Notably, the Board did not find that Mr. [redacted] was likely to reoffend if at liberty. Instead, the Board relied on the underlying crime and a newly fabricated aggravating factor th [redacted] had placed the victim's body in a field after her murder in order to evade responsibility. The Board also noted for the first time in 10 years that there was community opposition to his release (Exhibit A).[4]

Exhaustion of Administrative Appeal

20. On or about March 30, 2017, Mr. [redacted] perfected his appeal of the Decision (Exhibit F). On or about June 21, 2017, the Board's Appeals Unit served by mail a copy of the Administrative Appeal Decision Notice, which affirmed the Decision (Exhibit G). This Article 78 is timely brought pursuant to CPLR 217(1).

ARGUMENT

POINT I

The Board's Decision Is Conclusory and Irrational Bordering on Impropriety

21. Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law, *see* Executive Law § 259-i(5), absent a showing of irrationality bordering on impropriety. *See, e.g.*, *Russo v. New York State Parole*, 50 N.Y.2d 69, 77, 427 N.Y.S.2d 982 (1980); *Matter of Marino v. Travis*, 13 A.D.3d 453,

[4] No community opposition had ever been mentioned in previous parole board hearings or denials.

787 N.Y.S.2d 54 (2d Dep't 2004) (holding that denial of inmate's release was irrational when not based upon any relevant evidence).

22. New York Courts routinely find irrationality where the Board denies parole without evidence or in a conclusory fashion. The language of the Decision is vague and conclusory and does not in any way state how Mr. [redacted]'s release to the community would raise a concern for the public safety and welfare. The Appellate Division has ruled that a Board decision that summarily lists a petitioner's institutional achievements and then directly cites the language of Executive Law § 259-i(2)(c) as the basis for denial violates the Executive Law's ban on the Board making conclusory assertions. *Matter of Rossakis v. New York State Board of Parole*, 146 A.D.3d 22, 28 (1st Dep't 2016).

23. Mr. [redacted] was offered three times a plea of 20 years to life (another factor that the Board did not consider or even ask about), below the maximum sentence permitted by law. He has now served 35 years. He is 5- years old. He has demonstrated excellent institutional behavior over the past 35 years. He has achieved an education and gained valuable job skills. Releasing him now cannot be said to be a deprecation of the seriousness of the offense, because he has served well beyond the minimum sentence imposed by law and even more than the plea offered by the State three (3) times.

24. The November 2016 panel's conclusion that Mr. [redacted]s release would not be compatible with the welfare of society is contradicted by the COMPAS, which ranks the 58 year-old [redacted] [redacted] as posing the lowest possible risk to reoffend, be arrested, or to abscond. The Board's decision to deny parole is illogical and irrational. *See, e.g.*, *Morris v. NYS Dep't of Corrections & Community Supervision*, 963 N.Y.S.2d 852, 858 (Sup. Ct., Columbia County) (holding that the Board's denial of parole with passing reference to the statutory requirements was

woefully inadequate and demonstrated that the Board fairly considered the statutory requirements); *Coaxum v. New York State Board of Parole*, 14 Misc. 3d 661 (Sup. Ct. Bronx County 2006); *Weinstein v. Dennison*, 7 Misc. 3d 1009(A) (Sup. Ct. N.Y. County 2005).

25. Moreover, it is irrational to deny parole when not all of the statutorily and regulatorily-required factors have been considered, including the inmate's institutional disciplinary history and interaction with staff. *See* NY Executive Law § 259-i(2)(c)(A)(i). It is also irrational to continue to hold Mr[redacted] in custody where there is no indication that anything will change in the future – other than Mr. [redacted]'s age. There are no programs that require completion; he has served well beyond the minimum sentence; he has achieved job training and has a desire to continue his education; and he has family support and a home to go to. The Board has acted irrationally, bordering on impropriety, to continue to hold Mr[redacted] and by failing to consider statutorily required factors.

26. The Board based Mr[redacted]s parole denial on the following aggravating factors: (a) the crime itself, (b) evading responsibility for the crime, (c) current community opposition, and (d) his continued denial of the crime.

A. <u>The Instant Offense Cannot Be the Basis for Parole Denial.</u>

27. The crime of conviction itself cannot be an aggravating factor in considering readiness for release to parole. The Board is charged with considering the inmate today and his present risk and needs, not 35 years ago. The crime of conviction was the basis for the lengthy sentence, not a parole denial.

28. The Board is required to consider all of the factors set forth in Executive Law §259-i. Focus on the serious nature of the crime coupled with a passing reference to all of the factors that militate in favor of parole release is not sufficient. *See Rios v. NYS Div. of Parole*, 15 Misc.3d

1107(A) (Sup. Ct. Kings Co. 2007); *Winchell v. Evans*, 32 Misc.3d 1217(A) (Sup. Ct. Sullivan Co. 2011); *Coaxum v. NYS Board of Parole*, 2006 NY Misc. Lexis 2466 (Sup. Ct. Bronx Co. 2006); *Matter of Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016) (the Board cannot base denial of parole exclusively on the seriousness of the offense). A *de novo* hearing should be ordered.

29. The Board's denial of release based on the underlying crime while excluding Mr. [redacted]s behavior, rehabilitation, programming, growth, development, experience, disciplinary history, and lack of previous criminal history is irrational.

30. Exclusive reliance on the underlying offense as a basis for denying parole release has been held improper and warrants reversal. The Board "cannot base its determination solely on the serious nature of the crime." *Matter of King v. N.Y.S. Div. of Parole*, 190 A.D.2d 423 (1st Dept. 1993), *aff'd*, 83 N.Y.2d 788 (1994); *Almonor v. NYS Board of Parole*, 16 Misc.3d 1 1 26(A) (Sup. Ct. New York Co. 2007). The Supreme Court, Albany County, held in nearly identical circumstances:

> The 2011 amendment to Executive Law § 259-c(4) requires the Parole Board to give adequate consideration to an inmate's efforts at rehabilitation. It's [SIC] determination must be sufficiently detailed so as to apprise petitioner of the reasons for the denial of his parole release (*Matter of Davis v. Travis*, 292 A.D.2d 742, 739 N.Y.S.2d 300 [3d Dept 2002]). In petitioner's interview with the Board, it made note that there were no negatives in his prison disciplinary history since his last appearance, he has made positive efforts towards his rehabilitation, including obtaining his GED, done vocational training, ART, ASAT, Phase I, II and III, would be living with his wife if released, and that his COMPAS risk reveals he is at low risk for violence, re-arrest or absconding. However, and in stark contrast, in its determination the Board denied parole release based only upon the finding that petitioner committed murder during a robbery, and that his plea to the murder charge resolved three pending robberies. The determination simply fails to make any analysis of the steps toward rehabilitation, or his post-release plans, and why and how those factors were dismissed. Absent any discussion of what petitioner needs to do to improve his chances at of [SIC] release at the next parole release hearing, the determination lacks a rational basis in the record.

Matter of Stokes v. Stanford, 2014 NY Slip Op 50899[U], 2014 N.Y. Misc. LEXIS 2506 (Sup. Ct., Albany County, June 9, 2014); *see also Matter of Morris v. NYS DOCCS*, 963 N.Y.S.2d 852 (Sup. Ct., Columbia County 2013).

31. Similarly, in *Matter of McBride v. Evans*, 42 Misc.3d 1230[A], 2014 NY Slip Op 50286[U] (Sup. Ct., Dutchess County 2014), the court ruled that the Board's decision to deny parole without an articulated basis in non-conclusory terms was arbitrary, capricious and improper. The court held that the Board failed to state how and why it determined that the petitioner's release was incompatible with the public safety and welfare, relying exclusively on the underlying crimes as a ground for parole denial, which was improper.

B. The Board Fabricated Details of the Crime.

32. The Board stated in its decision "The crime involved you striking a female victim in the head, face, neck, and abdomen with an a causing her death. You **then** place her body in a field. An aggravating factor is that you placed her body in a field to evade responsibility for the crime as well was the brutal nature of the crime which involved you slashing her over 20 times in an explosive rage." (Exhibit C at 12 (emphasis added)).

33. The Board's depiction of the crime that the victim's body was placed in a field in order to evade responsibility after the victim had been murdered is completely false and misstates of the record. It is not supported by either the evidence was adduced during any of the three criminal trials required by the State to secure a conviction, the presentence report(s), or the sentencing minutes. The Board cannot deny parole based upon a false statement of the record as a purported aggravating factor, and the Board has no authority or discretion to make inferences based on the Commissioners' imagination.

34. Moreover, the Board is not entitled to a presumption that it acted properly in accordance with the law when there is a complete dearth of any evidentiary support for the Board's made-up statement that after the victim's death, Mr[redacted] "then placed her body in a field … to evade responsibility for the crime." (Exhibit A).

35. None of the cases cited by the Board in its Administrative Decision stand for the proposition that the Board can reimagine the crime and use it as a basis for denial of parole release. (Exhibit G at 4).

C. The Board Cannot Rely on "Community Opposition"

36. The Board concluded its questioning at the Hearing by stating "We also need to consider whether or not there is official opposition or community opposition to your release, that is something that we factor in as well in making our decision." (Exhibit C at 9). This is an incorrect statement of the law. "Community opposition" is not a factor to be considered by the Board. *See* N.Y. Executive Law § 259-i(2)(c)(A). Rather, the Board is permitted and required to consider any official statements by either the sentencing Court, the prosecution, or the defense counsel. Upon information and belief, the only official statement was from Mr. [redacted]'s defense counsel, who supports Mr. [redacted]'s release. ("There is a letter from you defense attorney in the file … he asks that you be granted parole, he has kept in contact with you since the beginning of his representation. He says you have never been anything but polite, calm, and it is his understanding you've been a model prisoner. He calls you an excellent candidate for parole.") (Exhibit C at 8).

37. Another factor to be considered is "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." *See* N.Y. Executive Law § 259-i(2)(c)(A)(v). The crime victim's representative is defined as the crime victim's closest living relative, the committee or guardian of such person, or the legal representative of such person." NY Executive Law § 259-i(c)(A).

38. There has never been any mention of community opposition to Mr. [redacted]'s release in all of the prior parole hearings, nor mention of any victim's representative's statement. Yet at the November 2016 hearing, the Board mentioned the possibility of community opposition, but did not state that there was any opposition until the Decision mentioned current community opposition.

39. If there were such a statement, basing the Board's Decision focusing exclusively on the victim's representative's statement as the basis of the Board's Decision is error. *See Matter of Rossakis v. New York State Board of Parole*, 146 A.D.3d 22 (1st Dep't 2016) (holding that the Board acted irrationally in focusing exclusively on the seriousness of the petitioner's conviction and the decedent's family's victim impact statements (described as community opposition to release)).

40. Upon information and belief, there is no community opposition that the Board could have considered, and relying upon any purported community opposition was in error and mandates a new hearing. *See Matter of Duffy v. New York State Department of Corrections & Community Supervision*, 132 A.D.3d 1207 (3d Dep't 2015) ("The Board cannot, however, rely on factors outside the scope of the statute in reaching its decision."). *See also Matter of Ruzas v. Stanford*, Index No. 1456/2016 (Dutchess County, Jan. 30, 2017) ("[T]he statute does not provide for "community opposition"); Executive Law §§ 259-i(c)(A) (indicating the factors to be considered). Therefore, it was error for the Board to consider letters opposing parole from any person or organization that did not fall under the definition of the victim's representative.

41. If the Board is considering opinions or recommendations of the members of the public that have no connection to the crime or the prosecution, the Board's reliance of such opinion is likewise in error. "To the extent that the board's determination here is based upon

letters of community opposition, such letters object to release based upon penal philosophy. As members of the parole board are not permitted to apply their own penal philosophy in determining whether release is appropriate, it necessarily follows that they may not deny parole release based upon letters from third parties expressing their penal philosophies. As the board improperly injected penal philosophy in rendering the challenged determination (*see King v. NYS Division of Parole*, 83 N.Y.2d 788 (1994)) (petitioner is entitled to a *de novo* hearing)." *Matter of Ramirez v. Stanford*, Index No. 1928/2016 (Sup. Ct. Dutchess County, Feb. 17, 2017); *see also Matter of Platten v. NYS Board of Parole*, 47 Misc.3d 1059, 1063 (Sup. Ct. Sullivan County 2015) ("parole board cannot re-try an inmate, harass, badger or argue with an inmate, second guess the findings of competent experts involved in the inmate's trial, or infuse their own personal beliefs into the proceeding.").

42. This court should direct the Board to turn over to Mr. [redacted] the letters in the context of this Article 78 proceeding. Notably, the Board had no legal authority to withhold these [redacted] t instance. Executive Law § 259-i(2)(C) requires the Board to keep the names and addresses of "crime victims or victim's representative" or "other person" who submits a written statement concerning and inmate's parole release confidential. But it does not authorize the withholding of the statements themselves. With no access to the opposition letters, Mr. [redacted] cannot refute any false or misleading information contained within them. Alternatively, this court should direct the Board to submit the opposition letters for the court's *in camera* inspection to determine whether they included inflammatory, erroneous or otherwise improper material the Board should not have relied in denying parole release.

D. <u>The Board Will Not Release Mr. [redacted] Because He Maintains His Innocence</u>

43. Mr. [redacted] has maintained his innocence since the day that he was arrested in 1982. The People needed to try his case three times before they were able to obtain a conviction that stuck. There is no requirement under the State's parole scheme that requires an inmate to admit responsibility for the crime in order to be paroled. While the Board has stated in the past that it will not penalize Mr. [redacted]'s for his proclaimed innocence (Exhibit H at 3, it clearly does.

44. The Board is denying parole because Mr. [redacted] will not admit that he committed the crime. It is clear that the Board is maintaining an unwritten policy of denying parole to people that will not admit that they committed the crime. The Board also is not permitted to interject its own penal philosophy that a person that maintains his innocence should not be paroled. The Board's imposition of its own penal philosophy is in excess of its delegated powers. *See e.g.*, *King v. NYS Board of Parole*, 83 N.Y.2d 788 (1994). The Board is acting irrationally bordering on impropriety for denying Mr. [redacted]s release, and a *de novo* hearing should be granted.

POINT II

The Board Has Still Not Complied with Executive Law § 259-c(4)

45. In 2011 the legislature directed the Board to revise its practice and procedure for deciding which inmates should be released to parole supervision. In place of the former "guidelines for parole release decision-making" the legislature directed the Board to "establish written procedures for its use in making parole decisions." "Such written procedures," the legislature directed, "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision." The effective date for this part of the law was October 1, 2011. Executive Law § 259-c(4).

46. Following the 2011 amendment to Executive Law § 259-c(4), the Board took the position that it was not obligated to consider a risk and needs instrument at all, pointing to the proposed legislation and the final legislative language and a Memorandum written by the Board's former Chairwoman that did not specify the use of any risk assessment instrument (Exhibit I).

47. The Board was then directed to consider a risk assessment instrument by the Courts. *See, e.g.*, *Matter of Garfield v. Evans* (3d Dep't 2013). The Board then started to require the use of a COMPAS as a factor at its hearings.

48. On July 30, 2014, the Board finally established written procedures, 9 NYCRR § 8002.3(a)(11)-(12) (the "2014 Procedures").

A. The 2014 Procedures Were Defective.

49. The Board's 2014 Procedures did not specify how to utilize the COMPAS and under what circumstances the Board could deviated from its analysis of an inmate's risks and needs. The 2014 Procedures were also lacking in that they did not specify how the Board was to utilize the Case Plan under NY Correction Law § 71-a. Instead, the 2014 Procedures made the COMPAS and Case Plan additional factors in a laundry list of factors to consider under 9 N.Y.C.R.R. § 8002.3. This was not what the Legislature intended. It was unlawful and violated Mr[redacted]s due process rights.

50. The 2014 Procedures failed to "establish written procedures" that "incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be release to parole supervision." NY Executive Law § 259-c(4). The 2014 Procedures failed to qualify as the written procedures required by Executive Law § 259-c(4), because they were structurally at-odds with the enabling legislation. The 2014

Procedures incongruously listed the risk and needs assessment and case plan as "factors" board members must consider along with the eight statutorily-prescribed factors listed in Executive Law § 259-i(2)(c). But the legislature did not instruct the Board to consider additional factors; it directed the Board to adopt written procedures incorporating risk and needs principles to "measure" an inmate's "rehabilitation" and "likelihood of success ... upon release." There was no explanation as to how the Board was to utilize the COMPAS and the Case Plan.

51. By mischaracterizing the COMPAS and Case Plan as "factors" to be reviewed along with many others, the 2014 Procedures nullified the COMPAS as the agency-wide organizing scheme for assessing rehabilitation that the Legislature intended it to be. Under the 2014 Procedures, Board members were free to give the COMPAS and Case Plan as much or as little weight as they wish, with no obligation to explain their rejection of evidence-based risk assessments that, like Mr. [redacted]s, show the lowest possible likelihood to abscond, reoffend, or be arrested.

52. This was not a procedure: "a series of steps followed in a regular orderly definite way," as defined by Webster's Third New International Dictionary. It was *carte blanche* for Board members to do whatever they wish. And Board members are free to dismiss COMPAS results out of hand without revealing that they are doing so or explaining why.

53. By mischaracterizing the COMPAS as a parole factor, the 2014 Procedures sought refuge in a long-established line of authority that holds Board members are free to give as much or as little weight as they see fit to any individual parole factor, and need not address that factor in their written decisions denying parole release. *See Matter of King v. NYS Board of Parole*, 83 N.Y.2d 788 (1994); *Matter of Siao-Pao v. Dennison*, 51 A.D.3d 105 (1st Dept. 2008), *aff'd* 11 N.Y.3d 777 (2008); *Matter of Thomches v. Evans*, 108 A.D.2d 724 (2d Dept. 2013); *Matter of*

Shark v. NYS Div. of Parole, 110 A.D.3d 1134 (3d Dept. 2013); *Matter of Patterson v. Evans*, 106 A.D.2d 1456 (4th Dept. 2013).

54. The legislature did not amend the statutory parole factors to add the COMPAS to the list. It directed the Board to replace the 1978 parole release guidelines -- an agency-wide organizing scheme for parole release decision-making -- with written procedures that "incorporate risk and needs principles to measure the rehabilitation" of parole release candidates. The COMPAS risk and needs assessment instrument is a new methodology for determining an inmate's risk of reoffending. It is not a parole release factor. Rather, it is a means of determining two of the three overarching statutory criteria for parole release determinations: whether there is a "reasonable probability" a parole candidate "will live and remain at liberty without violating the law," and whether his or her release is compatible with the welfare of society. Executive Law § 259-i(2)(c)(A).

55. Thus, under the 2014 Procedures, the Board was free to give the COMPAS no weigh whatsoever and the Commissioners were not required to disclose their reasoning in deviating from the COMPAS's empirically-based calculation of likelihood to reoffend and compatibility with the welfare of society. A Board member who believes COMPAS generally produces valid results but thinks a departure is warranted based on the unique facts of a case is similarly under no duty to explain. This complete lack of transparency assures that COMPAS will be inconsistently applied by the Board and that similarly-situated inmates will be treated differently. It guarantees that no one, including judges, will ever be in a position to scrutinize the Board's use of COMPAS. This is not consistent with the Legislature's mandate.

56. For these reasons, the 2014 Procedures that were applied at Mr. [redacted] 2016 Hearing failed to comply with Executive Law § 259-c(4). A *de novo* hearing governed by rules that conform to the enabling legislation is required.

B. Revised Regulations.

57. On September 28, 2016, and before Mr. [redacted]'s Hearing, the Board published in the New York State Register proposed revisions to the 2014 Procedures. There had not been any change to the Board's enabling legislation in the Executive Law. Yet, the Board unilaterally chose to revise the very structure of its decision-making responsibilities. The revised procedures were adopted on September 27, 2017 (the "2017 Procedures").

58. The 2017 Procedures remove the COMPAS as a mere factor for consideration, and instead propel the COMPAS to the framework of the Board's decision-making process. The Board is now obligated to use the COMPAS as its guiding document, and if the Board decides to deviate from the COMPAS's recommendations, the Commissioners must explicitly explain why it does not comply with the recommendations.

59. The 2017 Procedures provide, in part:

> Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, "Department Risk and Needs Assessment"). If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. If other risk and need assessments or evaluations are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending, and such assessments or evaluations are made available for review at the time of the interview, the Board may consider these as well.

60. The Board's proposal to further clarify its procedures demonstrates unequivocally that the 2014 Procedures were inadequate to comply with the 2011 amendment to Executive Law § 259-c(4). Because the panel's rejection of the COMPAS at Mr. [redacted] Hearing was unexplained, the determination lacked an articulated rational basis and is conclusory. Consequently, a *de novo* hearing is warranted. *See Matter of Stokes v. Stanford*, 43 Misc.3d 1231(A) (Sup. Ct., Albany Co. June 9, 2014) (although the determination parrots the applicable statutory language, the Board does not even attempt to explain the disconnect between its conclusion and petitioner's rehabilitation efforts and his [COMPAS] low risk scores" - new hearing ordered); *Matter of McBride v. Evans*, 42 Misc.3d 1230 [A] (Sup. Ct. Dutchess Co., Dec. 12, 2013) (new hearing ordered where "[a]lthough the Board discussed the petitioner's COMPAS scores at the hearing, it is unclear from the cursory nature of its decision how the Board utilized its risk assessment procedures in concluding that petitioner's release is incompatible with the welfare of society at this time.").

POINT III

The Board's Denial of Parole Release Based on the Crime of Conviction Violated Mr. [redacted]'s Due Process Rights

61. The Board deprived Mr. [redacted] of his due process rights. Due process requires that the Board provide an inmate with an opportunity to be heard and a substantive explanation of the reasons for denial of parole. *See Schwartz v. Dennison*, 518 F. Supp. 2d 560, 573 (S.D.N.Y. 2007). Due process also requires that the reasons for denial cannot be conclusory, arbitrary, impermissible, or a mere regurgitation of the statutory language. *Id.* at 574.

62. Executive Law § 259-i(2)(a) provides in relevant part: "If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of

the *factors and reasons* for such denial of parole. *Such reasons shall be given in detail and not in conclusory terms*." (Emphasis added).

63. The statutory requirement is reinforced by 9 N.Y.C.R.R. § 8002.3(d), which provides that if parole is not granted "the inmate shall be informed in writing . . . of the factors and details for such denial."

64. The New York courts' interpretation and application of the above-cited sections in general, and the requirement that reasons be "given in detail and not in conclusory terms" in particular, demonstrates that the Board's Decision for Mr. [redacted] must be vacated. Indeed, *pro forma* denials undermine the rehabilitative ideal. *Ek v. Travis*, 7 Misc.3d 1031 (Sup. Ct. Albany Co. 2005). In that context, generic one paragraph determinations denying parole do not meet the requirements that reasons be "given in detail and not in conclusory terms." *Matter of Boudin v. Travis*, 6 Misc.3d 1005 (Sup. Ct. Albany Co. 2003).

65. The Decision includes no meaningful elaboration as to the stated reason for denial, only a perfunctory recitation of the factors purportedly considered. Mouthing the statutory factors without providing any substance is insufficient. *See, e.g.*, *In re Winchell*, 32 Misc. 3d 1217(A), at *5 (Sup. Ct. Sullivan Cty. 2011) ("The Board cannot deny parole merely repeating the statutory criteria."); *Weinstein v. Dennison* ("[T]he Board is required to do more than merely mouth the statutory criteria, particularly whereas here each factor recited and brought forth in the parole interview, other than the crime itself, militated in favor of release."); *see also Morris*, 963 N.Y.S.2d at 859 ("[T]he Board's mere recitation of the materials it purportedly considered that were favorable to Petitioner, provides no assurance whatsoever to this court that the Board indeed fairly considered such materials, particularly since the only reason articulated therefor was Petitioner's crime."), *amended* 975 N.Y.S.2d 363.

66. In *Canales v. Hammock*, 105 Misc.2d 71, 74, 431 N.Y.S.2d 787, 789 (Sup. Ct. Richmond County 1980), the Court explained that detailed and non-conclusory reasons must be provided because they "enable intelligent review," and provide "guidelines to the petitioner with respect to his future conduct as a prison inmate." The *Canales* Court also pointed out that a "paucity of detailed reasons" would not suffice, 105 Misc.2d at 74, 431 N.Y.S.2d at 790.

67. A generalized reasoning of the "seriousness of the crime," without more, was deemed insufficient, and the Board's decision was vacated. *Id.* at 76, 431 N.Y.S.2d at 790; *see also MacKenzie v. Stanford*, Index No. 2789/15 (Sup. Ct. Dutchess County, Oct. 2, 2015) (Rosa, J.); *Matter of Rabenbauer v. NYS DOCCS*, 41 Misc.3d 1235(A) (Sup. Ct., Sullivan County 2013).

68. The Board's conclusory determination that Mr. [redacted]'s release would "not be compatible with the welfare of society at large and would tend to deprecate the seriousness of the instant offense and undermine respect for the law" is likewise not sufficiently detailed (Exhibit A).

POINT IV

Unlawful Re-Sentencing

69. The New York State sentencing and parole scheme is well-established. The Legislature sets the sentencing law and ranges, and Justices implement the sentencing ranges. The Legislature sets the parole standards, and the Board's job is to implement those standards – not to undermine them or usurp them.

70. While the Board has wide discretion within the statutory framework for parole decisions, the Board does not have unfettered discretion, and clearly no authority to resentence. The Board's role is to evaluate an inmate's **current danger**, not to resentence him for a past crime. *See, e.g.*, *Winchell v. Evans*, 32 Misc. 3d 1217(A), at *2 ("Parole may not be denied solely based on the offense itself.… Re-sentencing is not the purview of the Parole Board."); *Johnson v. NY*

State Division of Parole, 65 A.D.3d 838, 65 A.D.3d 838 (4th Dep't 2009); *Patterson v. Cully*, Index No. I-2011-4748 (Sup. Ct. Erie County Feb. 29, 2011); *Wallman v. Travis*, 18 A.D.3d at 307-08; *Weinstein v. Dennison*, 7 Misc.3d 1009(A).

71. The mission of the Board is to ensure public safety by granting parole when appropriate under the governing standards. Here, there is no evidence that Mr. [redacted] poses a threat to public safety.

72. Rather, it is clear that the Board has determined that a 25-year term for Murder in the Second Degree is an insufficient punishment and has determined that Mr. [redacted] should remain incarcerated for a longer period of time. When will be enough for the Board is unknown.

73. By ignoring the sentence that the trial Court imposed, the Board effectively undertook an unauthorized resentencing, substituting its own opinion of the appropriate sentence for that of the Court and the Legislature. *See Wallman v. Travis*, 18 A.D.3d 304, 307, 311 (1st Dep't 2005); *Silmon v. Travis*, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000); *Weinstein*, 7 Misc. 3d 1009(A) (Sup. Ct. N.Y. County 2005).

74. In the *Matter of King v. N.Y.S. Division of Parole*, 190 A.D.2d 423, 432, 598 N.Y.S.2d 245 (1st Dep't 1993), *aff'd*, 83 N.Y.S. 788 (1994), the Court held that the Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized re-sentencing. That is precisely what occurred here, and the Decision must be vacated.

POINT V

The Board Failed to Comply with Executive Law § 259-i(2)(c)(A)

75. The Board asks for a presumption that it fulfilled its duty to consider statutory factors (Exhibit G at 2). The Board is required by statute to make a determination whether to grant discretionary release on parole "**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 is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law." NY Executive Law § 259-i(2)(c)(A) (emphasis added).

76. The Board utterly failed to make a finding that there is a reasonable probability that if [redacted] would reoffend if at liberty (*See* Exhibit A), and the empirically validated COMPAS supports that conclusion (Exhibit D).

77. In fact, nothing in Mr. [redacted]' 35-year history in New York State's custody could lead to a rational conclusion that there is a reasonable probability that Mr. [redacted] would violate the law when at liberty.

78. Thus, Mr. [redacted] should have been granted parole release, and the Decision to deny him release was not only unlawful for failing to comply with Executive Law and the Board's regulations, but also is irrational bordering on impropriety. The Decision should be reversed.

POINT VI

The Case Plan Was Inadequate, Warranting a *De Novo* Hearing

79. The Case Plan is inadequate. Correction Law § 71-a, Executive Law § 259-c(4) and 9 NYCRR § 8002.3(12) require that a "case plan" be considered in parole release determinations. Correction Law § 71-a defines a case management plan as "a comprehensive, dynamic and individualized ... plan based on the programming and treatment needs of the inmate."

80. There is nothing comprehensive, dynamic or individualized about the case plan prepared in connection with Mr. [redacted]s 2016 Hearing, particularly since Mr. [redacted] had completed all programming available to him, that he has no need for treatment, and that he has

achieved the goals contained therein including obtaining his asbestos license. A new hearing, to be preceded by preparation of a proper case plan, should be ordered.

POINT VII

Mr. [redacted] Was Not Provided the Opportunity to Review the COMPAS in Advance of the Hearing

81. It is the DOCCS's policy to provide an inmate with the opportunity to review his parole file in advance of a parole hearing. *See* DOCCS Directive 8500 at page 7, ¶ 5 (Exhibit J). Mr. [redacted] was provided with only an incomplete copy of his COMPAS report and other material. (Exhibit C at 10-11). Mr. [redacted]s previous COMPAS contained inaccurate information that falsely stated that Mr. [redacted] committed the crime while high or drunk. Mr. [redacted] raised the issue of the incomplete COMPAS at his hearing, but the hearing continued without the Board providing Mr. [redacted] with the opportunity to review his file. Mr. [redacted] does not know whether the information contained in the documentation was accurate. A commissioner's asking of whether Mr. [redacted]'s agreed with the conclusion of the COMPAS is insufficient to satisfy the regulatory requirement that Mr. [redacted] be able to review his file prior to the hearing. Therefore, a *de novo* hearing should be provided.

CONCLUSION

82. Based on the foregoing, the Board's Decision should be vacated and a *de novo* parole hearing conducted in accordance with the laws.

83. No previous application has been filed for the relief sought herein.

WHEREFORE, Mr. [redacted] respectfully requests that this Court enter Judgment pursuant to Article 78 of the Civil Practice Law and Rules:

A. Vacating the Decision; and

B. Directing the Board to hold a *de novo* hearing before a new panel of Commissioners in accordance with the laws and regulations of the State of New York within 10 days;

C. [redacted]

opposition" letters with the names and addresses of the authors redacted and his complete COMPAS; and

D. Granting such other and further relief as is just and proper, including Mr. [redacted]s reasonable legal fees and expenses.

Dated: New York, New York
October 20, 2017

Respectfully Submitted,

/s/ Orlee Goldfeld
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Rule 130-1.1 Certification:

To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers of the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22NYCRR).

s/ Orlee Goldfeld
Orlee Goldfeld

ATTORNEY VERIFICATION

Orlee Goldfeld, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

I am counsel for Petitioner [redacted] I have read the foregoing Petition and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon facts, records, and other pertinent information contained in my files.

I make the foregoing affirmation pursuant to CPLR 3020(d)(3) because Petitioner is not in the County where I have my office.

s/ Orlee Goldfeld
Orlee Goldfeld