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NYS DEPARTMENT OF CORRECTIONS AND COMMUNITY SERVICE

IN THE MATTER OF

APPELLANT'S BRIEF

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JAN 19 2022

STATEMENT OF FACTS

APPEALS UNIT
Board of Parole

Mr. [REDACTED] is currently sentence to nineteen (19) years to life for conviction upon a plea of guilty to Attempted Murder Second, Assault First, Criminal Possession of Weapon Second, and Criminal Possession of Weapon Third in New York County and Attempted Murder in the First Degree in Kings County. The offenses took place in 2001. Mr. [REDACTED] acknowledges his guilt to assaulting and attempting to murder a woman. This occurred while Mr. [REDACTED] was attempting to speak with her. He has expressed his deep remorse for the crime. He explained that he was under severe stress caused by personal problems at the time of the incident. Mr. [REDACTED] also acknowledges his guilt in attempting to murder a police officer. This occurred while officers were attempting to arrest Mr. [REDACTED] in a friend's residence.

Mr. [REDACTED] presented a resume containing a full work history as well as the programs in which he participated. In the fifteen years Mr. [REDACTED] has been married, he has spent thirteen of them participating in the Family Re-Union Program which requires a good disciplinary record as prerequisite. Additionally, Mr. [REDACTED] has several letters of support, including one from Mr.

the [REDACTED] This information was virtually ignored by the Board.

Furthermore, a Release Plan was submitted and ignored by the Board as was the fact that his COMPAS report indicated that he was a low risk. (See Exhibit 3) Mr. [REDACTED]'s Release Plan is attached hereto and made a part hereof as Exhibit 4.

Mr. [REDACTED]'s institutional record reveals a limited number of infractions over the course of his confinement. He received one Tier III and three Tier II infractions during his incarceration, and for the last twelve years has remained ticket free. Again, the Board made no effort to address these issues or question Mr. [REDACTED] concerning these positive steps he has taken. The Board merely noted his low risk in a very *pro forma* manner.

Although the Board should have considered the more positive aspects of Mr. [REDACTED] history, as well as his remorse; instead, it appears from the Parole Board Minutes that they denied parole chiefly, if not exclusively, because of nature of the crime. The Board concluded that, "release would be incompatible with the welfare of society and would so deprecate the nature of the crime as to undermine respect for the law," but their decision is purely based on the nature of the crime. It appears from the record of the hearing before the Board that they gave little weight to Mr. [REDACTED] remorse or his present ability to live and remain at liberty without violating the law. The commissioner denied that Mr. [REDACTED] demonstrated remorse despite Mr. [REDACTED] having done so numerous times. Also, the Board appears not to have considered the programs and training that Mr. [REDACTED] has undertaken while in the facility. All of Mr. [REDACTED] achievements were merely mentioned and no analysis was performed, nor any consideration given to his achievements. Likewise, little weight was given to his low COMPAS Risk Assessment score

which is the only objective tool the Board has to measure Mr. [REDACTED] risk of recidivism. (See Exhibit 3) Further, the Board failed to consider Mr. [REDACTED] plans for his future.

POINT ONE

THE PAROLE BOARD DID NOT CONSIDER THE FACTORS THEY MUST CONSIDER BY STATUTE

Executive Law § 259-I (2)(c) sets forth various considerations to guide the Board in making its decision, including the inmate's vocational training, work record, program goals, accomplishments, work assignments, and interpersonal relationships with staff and other inmates. The transcripts show that the Board did not even question Mr. [REDACTED] about these factors they must consider by statute. Failure to do so denies the individual minimal due process Matter of Watkins v Caldwell, 54 A.D 2d 42. Since there is a strong rehabilitation component in the statutory parole scheme, the Board is mandated to consider the institutional record including academic achievements, release plans as well as prior criminal history Matter of Weinstein v Dennison 7 Misc. 3d 1009(A) [April 13, 2005]. It appears that the Board simply ignored these factors that the statute requires it to consider. See People ex rel. Herbert v. New York State Board of Parole, 97 AD2d 128. Merely reciting the statutory requirements does not demonstrate their consideration by the Board or their impact on its decision. No consideration was given to positive factors, or accomplishments or their impact on Mr. [REDACTED] success on parole despite the fact that the Board is statutorily mandated to consider and weigh these factors.

The Board never considered or questioned Mr. [REDACTED] plans for his future and his preparations for adjustment to life outside of the institution. Only cursory mention was made of his future plans thereby demonstrating that the statutory mandate remained unfulfilled. The

Board spent seventy percent of the thirty-two page interview questioning Mr. [REDACTED] about the instant offenses. (See Exhibit 1 page 1-14 and pages 20, 21, 25-28) Furthermore, Executive Law Section 259-c (4) requires the establishment of written procedures for use during the Board's decision-making process. Incorporated within those procedures is a risk and needs assessment measuring the rehabilitation undergone by the individual and the likelihood of his/her success upon release. This amendment has placed on the Board the obligation to ascertain the steps taken by the individual to increase their likelihood of success upon release. Further, the statute requires the Board to perform a probing analysis of the actual steps taken and accomplishments made and to discuss them with the inmate. Here, the Board makes only passing remarks about Mr. [REDACTED] programming. (See Exhibit 1, page 15, line 12) Although the rehabilitative component of Executive Law Section 259-I was mentioned it was never explored or considered as noted in Silman v Travis, 95 NY2d 470 (2000). In fact, the Board merely asks Mr. [REDACTED] which program assisted him the most. (See Exhibit 1, page 15, lines 10-11) These failures on the part of the Parole Board to follow the mandates of the statute requires a reversal of their decision.

POINT TWO

THE PAROLE BOARD'S DECISION TO DENY PAROLE TO MR. [REDACTED] WAS ARBITRARY AND CAPRICIOUS

The Parole Board has the duty to fully consider each of the statutory factors and failure to convincingly demonstrate adequate consideration or qualitatively weigh relevant factors, the decision is arbitrary and capricious and violates due process. Cappiello v New York State Board of Parole 6 Misc3d 1010(A) [November 30, 2004]. The Board may not deny parole for arbitrary and capricious reasons. 9 NYCRR § 8006.3(a)(1).

In People ex rel. Bermudez v. Kuhlman, 87 Misc.2d 975, the court said the Parole Board did not show that the relator has been unable to conform to the requirements of prison conduct, which would be a minimum consideration in determining whether he can lawfully participate in the activities of society, and by implication, one can assume that he has. In the instant case, Mr. [REDACTED] has shown that he has learned the value of compliance with rules and regulations both while incarcerated and as a life lesson. Therefore, the only factor the Board cited for the denial of parole is the seriousness of the instant offense. However, the only objective proof, the COMPAS tool, reveals that Mr. [REDACTED] is in fact a good risk not to re-offend.

Despite Mr. [REDACTED] positive achievements in those areas established by statute as criteria for release on parole, the Board ruled against him. The Board did not appear to give any weight or consideration to the recommendations and evaluations by counselors of the correctional facility. The Board based its denial of parole solely upon the nature of the crime while overlooking Mr. [REDACTED] overall positive record. They thus ignored the standards set forth by law for making parole determinations. Telefarro v. Hammock, 84 AD2d 790. Clearly, the Board's decision reflects only a consideration of Mr. [REDACTED] behavior at the time of the commission of the crime rather than his current state of mind or behavioral improvement (In Matter of Stern v Fischer, 29 Misc. 3d 1236(A)).

Moreover, the Board only cursorily mentions these factors in its written decision. There must be a fair consideration of each of the applicable statutory factors with a statement evidencing the Board's consideration of the factors and grounds for denial King v Division of Parole 190 AD2d 423, *aff'd* 83 NY2d 788; Matter of Watkins v Caldwell 54 AD2d 42, appeal dismissed 40 NY2d 807.

Thus, it appears the Board's decision was arbitrary and capricious.

POINT THREE

THE BOARD'S DECISION WAS BASED UPON ERRONEOUS RELIANCE ON INACCURATE INFORMATION

When the Board bases its decision on assertions not supported by the record, or an inaccurate record, these are grounds for annulling the denial and granting a de novo interview. Matter of Rivera v. Stanford, 2019 NY Slip OP 03601. Here, the Board stated in the minutes that Mr. [REDACTED] failed to address his sentencing court and in their decision the Board stated, "that the Panel remains concerned about your shallow remorse and self-absorption." To the contrary, Mr. [REDACTED] clearly and unequivocally stated his remorse in his sentencing minutes and throughout the Board minutes. (See Exhibit 2, page 4, lines 8-11) The Board is required to rely on a "fair view" of the record. Rossakis v. N.Y. State Bd. Of Parole, 146 A.D. 3d 22 (1st Dept. 2016). Here, the Board relied on assertions which are not supported by the record and which are not based on a fair reading of the entire record. Therefore, the Board's decision should be reversed.

POINT FOUR

THE PAROLE BOARD'S DECISION WAS EXCESSIVE.

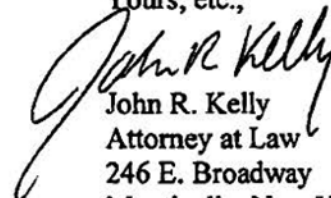
The Board not only denied Mr. [REDACTED] release under parole supervision, but it also denied him another hearing for 24 months. Considering his exemplary efforts to prepare himself for life within society, this determination was excessive. Even if Mr. [REDACTED] institutional record was less than perfect, the Board should not have assessed such a long period before review.

CONCLUSION

The Panel failed to follow the requirements of the executive law while deciding. It did not consider Mr. [REDACTED] present institutional record. The Panel based its decision on inaccurate and erroneous information. The Panel's decision to hold Mr. [REDACTED] for 24 months before reevaluation is excessive. The panel made the decision denying Mr. [REDACTED] parole without adequate determination; therefore, it was arbitrary and capricious and should be reversed. For the foregoing reasons the Board's decision should be reversed and Mr. [REDACTED] should be released or a new hearing should be ordered.

Dated: Monticello, New York
January 15, 2022

Yours, etc.,


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