# Administrative Appeal Brief - FUSL000148 (2021-07-20)

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FUSL000148

**ADMINISTRATIVE APPEAL OF**

**NEW YORK STATE BOARD OF PAROLE DECISION FOR**

[redacted]

[redacted]

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| Parole Interview Date: | November [redacted] 2020 |
| Denial Date: | November [redacted] 2020 |
| Parole Interview Location: | [redacted] Correctional Facility |
| Parole Panel Location: | DOCCS Buffalo Area Office |
| Notice of Appeal Filed: | December 7, 2020 |
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Submitted by:

Mark R. Hellerer, Esq.
Chris Fennell, Esq.
PILLSBURY WINTHROP SHAW PITTMAN LLP
31 West 52nd Street
New York, New York 10019
(212) 858-1121


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New York State DOCCS
Counsel's Office – Board of Parole
Harriman State Campus
Building # 2
1220 Washington Avenue
Albany, New York 12226
(518) 473-5671

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## INTRODUCTION

On November 20, 2020, Mr. [redacted] appeared via videoconference from Orleans Correctional Facility before Commissioners Crangle and Smith. The Commissioners denied him parole that same day. Mr. [redacted] timely filed a notice of administrative appeal and requested an extension to retain pro bono counsel. This brief is submitted to perfect that appeal.[1]

Having now been denied parole three times, Mr. [redacted] is currently approaching the end of his third decade of incarceration on a 25-to-life sentence. He is now 65 years old and suffering from Stage 2 lymphoma. Nevertheless, since entering state custody in 1994, Mr. [redacted] has educated himself, completing pre-college courses and going on to earn his Associate and Bachelor degrees, both *cum laude*. He has maintained an excellent disciplinary record (all Tier IIs, none for conduct related to violence or substances) and received his fourth and final ticket more than two decades ago. He was granted a Limited Credit Time Allowance in 2018 on the basis of his educational achievements and disciplinary record.

While incarcerated, he has also been qualified by the Department of Corrections and Community Supervision ("DOCCS") to perform more than two dozen specialized jobs. He has helped DOCCS maintain and improve the facilities where he has lived, helped produce school chairs in Corcraft's industry program, and helped mentally ill individuals with the activities of daily living and facilitated programs for them in the Immediate Care Program ("ICP").

Furthermore, he has facilitated a variety of therapeutic programs for other incarcerated men, including Aggression Replacement Training ("ART"), Integrated Dual Disorder Treatment ("IDDT"), Alternatives to Violence Project ("AVP"), a substance abuse program, and a domestic violence program, and has also taken on numerous volunteer roles within the Catholic

[1] Pro bono counsel appeared in April 2021 and appreciates the Appeals Unit's extension of time to perfect this appeal.

communities he has been part of. Over the years, a Deputy Superintendent of Administration, multiple Corrections Officers, numerous civilian supervisors, and many others submitted letters of recommendation, support, and Commendable Behavior Reports attesting to Mr. [redacted] character, work ethic, development, and acceptance of responsibility for his crime.

Mr. [redacted] will turn 66 this fall. His last three COMPAS Assessments have determined him to be low risk in all but one category, risk of reentry substance abuse. His well-developed comprehensive release plans provide him with the necessary support to successfully complete his third decade of sobriety, as well as to secure housing, employment, and benefit from family and social support. Among Mr. [redacted] medical issues, he was diagnosed with Stage 2 lymphoma last fall, and has since undergone a number of chemotherapy treatments. Because of his weakened immune system, he has still not received a COVID vaccine. Although he lived in honors housing at Sing Sing for a number of years, today he lives with 56 other men in congregate housing at Fishkill, more than a third of whom are also unvaccinated.

Mr. [redacted] has now served more than 27 years of incarceration for his actions on March 9, 1994. He was 38 years old at the time, had never been arrested for any violent offense, and had no prior convictions of any kind. That night, however, he was drunk, high on cocaine and marijuana, and was scraping by—essentially homeless since his ex-wife had received the house in their divorce. Mr. [redacted] was supposed to go to his former house, to once again discuss getting back together with his ex-wife over dinner. Instead, he avoided that meeting by going to a nearby bar. Although he had already been drinking beers at home, once at the bar he drank 4 or 5 double vodka tonics, smoked some marijuana, and snorted a half gram of cocaine acquired by a female friend who lived above the bar. He then returned to the house he had been temporarily living in while he worked to renovate it, arriving between 8 p.m. and 9 p.m.

None of these facts minimize or justify Mr. [redacted]'s subsequent actions that night. But they are necessary to understand the damaged and irrational state of mind Mr. [redacted] was in when he decided to enter the garage of the house next door. The owner of that house, Mr. [redacted], was traveling and had asked Mr. [redacted] to watch the house while he was gone. Mr. [redacted]'s adult daughter, Ms. [redacted] had come over to the house each day that week to let her father's Doberman Pinscher out, and had left the garage doors ajar several times after she left. Mr. [redacted] had twice gone over to shut the garage doors. When Mr. [redacted] returned from the bar that night, he saw that the garage doors were open again. In his intoxicated state, he inexcusably decided that he would shut off the electricity in the house (the electrical boxes in the houses in the development were all located in the garage, which Mr. [redacted] knew from his renovation work), and then try to scare Ms. [redacted] to "show" her why the garage doors needed to be shut.

As Mr. [redacted] described in the interview, after he shut off the power and knocked on the door to the house, he "received what he deserved." Ms. [redacted] opened the door and kicked him in the groin. Hurt, Mr. [redacted] became enraged, and the two of them began struggling. Mr. [redacted] touched Ms. [redacted]'s groin with his hand and, when she screamed, he strangled Ms. [redacted] and, believing he had killed her, he placed tape over her face because he couldn't bear to see her and taped her hands so he could move her more easily.[2] Mr. [redacted] moved her body to his house and went back to close up his neighbors' house. When he returned, Ms. [redacted] was making noises. Horrified, Mr. [redacted] strangled her again, this time killing her.

[2] As evidenced by both the record and Mr. [redacted]'s responses to the Board's questions during the interview, he touched Ms. [redacted] in a sexual manner with his hand, but did not engage in any kind of intercourse with her. *See, e.g.*, Ex. 1, pp. 10:19–11:7.

Mr. [redacted] has never claimed that he was justified in trying to attempting to get Ms. [redacted] to shut the garage doors, and described himself as immediately being "aghast" at what he had done when he saw her body. Early the next morning, he drove Ms. [redacted]'s body to nearby [redacted] Park and left her in a field. After committing his crime, Mr. [redacted] was wracked with guilt. He drank multiple six packs of beer every night to put himself to sleep. Several days after his crime, he prepared sleeping pills and a garden hose so he could kill himself in his vehicle, but could not go through with his plan. Later that week, he voluntarily drove with three detectives to show them the location of Ms. [redacted]'s body, and then confessed that same night to what he had done. He was subsequently indicted, quickly pled guilty to second degree homicide and first degree burglary, and was sentenced in August, less than six months after his offenses. The sentencing judge imposed concurrent sentences of 25 years to life for Mr. [redacted]'s killing of Ms. [redacted] and 5 to 15 years for his burglary,[3] despite the prosecution's requests that the sentences be consecutive.

The Board's denial last November was Mr. [redacted]'s third, following denials at his Limited Credit Time Interview ("LCTI") in 2018 and his initial appearance in 2019. In a cursory decision, the Board commended Mr. [redacted] on his personal growth, productive use of time, positive programming, and clean disciplinary record. Nonetheless, the Board denied parole, citing the nature of Mr. [redacted]'s crimes and official and unofficial opposition to his release, and finding that Mr. [redacted]'s release would be incompatible with the welfare of society and would deprecate the seriousness of the offense.[4]

[3] Although theft is not a necessary element of burglary, Mr. [redacted] did not take any possessions from Mr. [redacted]'s home. *See* N.Y. Penal Law § 140.30.
[4] The Board did not find in either its 2020 or 2019 decisions that Mr. [redacted] was likely to reoffend.

The Board's decision violated the Board's statutory and regulatory requirements in the following 4 ways:

*First,* the Board did not address how it considered the parole factors set forth in the Executive Law—as it is required to do under its own regulations—and instead ignored Mr. [redacted]s decades of varied and successful rehabilitative efforts in rendering a decision unsupported by the record. Instead, the Board improperly focused solely on the seriousness of the offense and otherwise just engaged in a check-the-box exercise.

*Second,* the Board did not explain the reason for its denial in detail, flouting the Executive Law requirement that it do so. It failed to explain how Mr. [redacted]'s release at this point in time would deprecate the seriousness of the crime or threaten the welfare of the community.

*Third,* the Board did not explain its departure from Mr. [redacted]s 11 favorable COMPAS categories, nor did the Board provide individualized reasons for its departure from each of those scales, in contravention of its revised regulations and numerous New York Court decisions interpreting those regulations.

*Fourth,* the Board improperly relied on the strident penal philosophy espoused by the district attorney and a new and erroneous claim that "community opposition" existed, when none had previously been raised and none was subsequently provided during this appeal.

Each error evinces the arbitrary nature of the decision and warrants annulment of the Board's November 2020 parole denial. The factual record supporting Mr. [redacted]'s release and demonstrating the deficiencies in the Board's interview and decision is clear. Accordingly, Mr. [redacted] respectfully requests that the Appeals Unit recommend that the Board modify its November 18, 2020 decision to grant him immediate parole release with such conditions as it deems necessary or, in the alternative, recommend that the Board grant him a properly conducted

*de novo* parole interview before an entirely new panel that does not include (1) Commissioners Crangle and Smith, who conducted Mr. [redacted]'s November 2020 reappearance interview, (2) Commissioners Coppola and Berliner, who conducted Mr. [redacted]'s January 2019 initial interview, (3) Commissioner Alexander who, along with Commissioner Coppola, conducted Mr. [redacted]'s May 2018 LCTI.

## I. THE BOARD VIOLATED THE LAW BY NOT EXPLAINING HOW IT CONSIDERED THE PAROLE DECISION MAKING FACTORS

When denying release, the Board must provide the "factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." N.Y. EXEC. LAW § 259-i(a)(2). The regulations also require that the Board, "in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered." 9 N.Y.C.R.R. § 8002.3(b). Here, the Board loosely referenced certain factors but did not apply them to Mr. [redacted]'s individual facts. Thus, the record does not support the Board's determination. Instead, the Board devoted much of its cursory decision to discussing Mr. [redacted]s offenses. When rendering its decision denying parole, the Board failed to explain how it considered the applicable parole factors.

### A. The Board's decision and interview impermissibly relied on the seriousness of the offenses

Here, the Board relied on a single statutory factor—the seriousness of the offense—to justify its decision denying parole. While the decision purported to rely on opposition from the district attorney and "community opposition," the former was based on the seriousness of the offenses and the latter apparently does not exist. *See infra* Argument IV. The Board's only reason for denial was thus the seriousness of the offenses. The Board cannot deny parole based solely on the nature of the offense. *See, e.g., Ramirez v. Evans*, 987 118 A.D.3d 707, 707 (2d Dep't 2014) (granting *de novo* interview because "it is clear that the Board denied release solely on the basis

of the seriousness of the offense") (citations omitted); *Perfetto v. Evans*, 112 A.D.3d 640, 641 (2d Dep't 2013) (affirming granting of *de novo* interview where the Board "mentioned the petitioner's institutional record, [but] it is clear that the Parole Board denied the petitioner's request to be released on parole solely on the basis of the seriousness of the offense") (citations omitted).

Most of the parole interview was devoted to the offenses, and not what Mr. [redacted] had done in the decades since. *See* Ex. 1, pp. 1–15 & 22. Much of the 1½ page decision similarly focused on the offense. *See* Ex. 1, pp. 31–32. Fixating on the offense to the exclusion of the other factors is insufficient under both the Executive Law and the Board's own rules. *See Huntley v. Evans*, 77 A.D.3d 945, 947 (2d Dep't 2010) ("Here, the Parole Board cited only the seriousness of the petitioner's crime, and failed to mention in its determination any of the other statutory factors. . . . Accordingly, the Parole Board's determination demonstrates that it failed to weigh the statutory factors, and a new parole hearing is warranted."); *Mitchell v. New York State Div. of Parole*, 58 A.D.3d 742 (2d Dep't 2009) (holding that the Board cannot focus solely on the offense to the exclusion of other statutory factors and affirming granting of *de novo* interview).

Further, under both the Executive Law and its own regulations, the Board must consider any "mitigating and aggravating factors." 9 N.Y.C.R.R. § 8002.3(d)(7). But the Board did not consider or mention Mr. [redacted]'s state-of-mind at the time he committed his offenses. That night, he was under the influence of a significant quantity of depressants (alcohol and marijuana) as well as a stimulant (cocaine) and was emotionally unstable, being essentially homeless and having just fled from a meeting with his ex-wife. Following his divorce and the loss of his home, Mr. [redacted] also felt a deep sense of shame within his community. These realities do not justify Mr. [redacted]'s actions, and Mr. [redacted] has never sought to use these facts as an excuse for

what he did. But Mr. [redacted] was in a profoundly damaged state-of-mind when he committed his irrational and irrevocable offense against Ms. [redacted].

Additionally, the Board did not consider Mr. [redacted]'s decades of consistent nonviolent behavior before and after March 9, 1994. Mr. [redacted] at the time was 38, had no prior convictions, and had never been arrested for a violent offense.[5] While in DOCCS custody for nearly three decades, Mr. [redacted] has received a total of four tickets, no tickets in more than two decades, and none for any kind of violent of substance-related conduct. Ex. 2, June 14, 2021 DOCCS Occupational Training, Program Assignment, and Disciplinary History, p. 11.

Finally, the Board did not seriously consider that Mr. [redacted] quickly admitted what he had done, waived his rights, and voluntarily provided a full confession. He subsequently pleaded guilty to both his offenses, even after being told that the homicide charge would carry the highest possible minimum sentence of 25 years.

Taken together, the Board improperly focused primarily on Mr. [redacted]'s crime and failed to consider as mitigating factors his compromised state of mind, his lifetime of nonviolence, and his swift and complete acceptance of responsibility for his conduct.

**B. The Board's decision and interview did not discuss how it considered required parole factors**

In its decision, the Board made the following conclusory statements, providing no explanation of whether it considered these parole factors to be positive, negative, or meaningless in Mr. [redacted]'s case:

- "Consideration has been given to your case plan and an assessment of your risk and needs for success on parole" (Ex. 1, p. 31:15–16);

[5] Mr. [redacted] had prior arrests for issuing a bad check in 1983 and driving while intoxicated in 1989, neither of which resulted in a conviction.

- "The panel has considered your release plans, education achievements, multiple letters of support and certificates of achievement" (*id.*, p. 31:23–25); and

- Your overall institution record has been considered" (*id.*, p. 31:23–25).

These conclusory statements provide no indication of how the Board considered—for instance—Mr. [redacted]'s case plan, or his goals contained therein; his performance in numerous mandatory and voluntary programs; his comprehensive and realistic release plans; his two college degrees, both earned *cum laude*; his many letters of support from Corrections Officers, DOCCS personnel, civilians in leadership roles, and family and friends; his numerous certificates; his overall institutional record; or his varied expressions of remorse over the years.[6] The decision merely recites a list of statutory factors with no explanation. Such conclusory boilerplate is contrary to the Board's statutory and regulatory requirements. *See* N.Y. EXEC. LAW § 259-i(a)(2); 9 N.Y.C.R.R. § 8002.3(b) (requiring the Board to "in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered.")

### C. The Board's decision and interview entirely ignored other required parole factors

The Board also failed to consider other required factors. The Board is required to consider specific elements of a parole candidate's institutional record. *See* 9 N.Y.C.R.R. § 8002.2(d)(1) (requiring the Board to consider "the institutional record, including program goals and accomplishments, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates.").

[6] The self-prepared parole packet Mr. [redacted] timely submitted contained more than 100 pages of relevant information relating to these and other factors.

But the Board did not consider Mr. [redacted]s extensive vocational history, even though DOCCS has deemed Mr. [redacted] qualified to perform more than two dozen highly technical jobs. *See* Ex. 2, pp. 1–2. Reflecting his competence and his supervisors' trust in him, Mr. [redacted]'s parole file contains numerous glowing assessments from DOCCS personnel in multiple facilities over the years. For instance, he diligently provided Elmira Correctional Facility and the surrounding community with the benefit of his master carpenter skills from 1994 to 2003:

- "[redacted] was instrumental in preparing a building into which the Brockway School moved. . . . Because of his effort, the Department of Corrections saved approximately $75,000 to $100,000. When you review his status for future decisions, please consider my recommendation." Ex. 3, Selected Letters of Recommendation and Progress Reports, p. 1.

- "[redacted] has provided invaluable carpentry skills during the renovation of the General Business Class, Shop 6, 1st Floor." *Id.*, p. 2.

- "Thank you for the four signs for our Compost Teaching Sites. We have waited seven years for the right way to identify our sites to the general public. Other signs have not held up to UV light, moisture, and temperature extremes. The signs you made are beautiful. . . . Mr. [redacted] you have helped our program immensely." Ex. 3, p. 3.

After his transfer to Great Meadow in 2003, Mr. [redacted] was quickly promoted in a matter of months to the position of Industry Worker Grade IV in the Corcraft Metal Furniture Shop, and gas metal arc welded thousands of metal school chairs in that position over the next four years. Mr. [redacted] even helped improve the assembly line's operation, with his supervisor noting that he "progressed to the tool room where he totally renovated the tool room so inventory can be done more efficiently." Ex. 3, p. 12.

When Mr. [redacted] was transferred to Sing Sing in 2008, he continued working in various maintenance roles, including as a plumber and electrician, into his 60s, and continued to be praised for his tangible contributions to DOCCS:

- Deputy Superintendent of Administration [redacted] wrote: "For the past eight years Mr. [redacted] has renovated several key areas throughout the prison. His ability to perform efficiently on several construction trades at one time, leaves no doubt in my mind that he truly is a master carpenter. His steadfast work ethic is tireless and one of the most reliable and proficient in the maintenance department. Thanks to his history of an extraordinary disciplinary record, I have felt comfortable entrusting him with difficult renovation projects. Thanks to Mr [redacted] three busy posts now have new booths that safe-guard officers at the facility from exposure to extreme weather, for they now have a safer environment to work in on a daily basis. I believe it is safe to say, that Mr [redacted] has made Sing Sing a more productive functioning facility for the department of corrections." *Id.*, p. 4.

- Corrections Officer [redacted] wrote that she was: "writing this in support of Carl Strawitch who will be appearing before the parole board in 2019. For the past eight years I have had the opportunity to observe Mr. [redacted] in several work environments through out the facility. His work ethic in the maintenance department has literally transformed countless areas of the prison. . . . On several occasions Mr. [redacted] has discussed his crime and is well aware of its consequences that affected so many hearts and souls. I truly believe he feels remorseful of his actions." *Id.*, p. 5.

- Corrections Officer [redacted] wrote that, based on her experience: "Over nine years ago I vividly remember Inmate [redacted] when he occupied a cell on my gallery in B-Block. He immediately asked me if he could do some clean up work to earn himself a shower. . . . All these years I have silently been observing Mr. [redacted] and have been impressed by his accomplishments. Not only working the maintenance department during the day, but enrolling in the pre-college program in preparation for the Hudson Link/Mercy College Program. This June, almost six years later, he is slated to graduate with a bachelors degree in human behavioral science. Personally, I believe it is great achievement while living in such a chaotic environment. I have talked to Mr. [redacted] about his crime, and he is fully aware of how many people he has let down, and the innocent life he has taken away forever. I feel he is remorseful and wants too somehow make amends for his actions, and for this reason I believe he deserves a second chance in life." *Id.*, p. 6.

- Corrections Officer [redacted] wrote that "[redacted] has worked under my direct supervision in the maintenance department here at Sing Sing Correctional Facility. We do various projects throughout the facility such as the building of structures for Officers to have shelter from the weather, putting down new flooring in various areas and renovations throughout the facility. [redacted] has demonstrated that he has a very proficient ability in carpentry skills. . . . He was always a person I could depend on to get

> projects done with minimal supervision. . . . I have had nothing but a positive experience with Carl." *Id.*, p. 7.

When Mr. [redacted] was transferred from Sing Sing in 2017, he again continued providing DOCCS with the benefit of his numerous maintenance skills while at Gowanda from 2017 to 2018, Livingston from 2018 to 2019, and Orleans from 2019 to 2020.[7] Yet the Board ignored Mr. [redacted]'s lengthy and accomplished vocational history and the resulting recommendations he earned.

Similarly, beyond Mr. [redacted]'s work with ICP,[8] the Board ignored Mr. [redacted]'s history of facilitating therapeutic programming for other incarcerated men, including facilitating ART, IDDT, AVP, a domestic violence program at Orleans, and an addiction program at Orleans. The Board instead apologized for the delay in the video connection before changing the topic during the interview, and again ignored the topic in its decision. Ex. 1, p. 17:14–21.

The also Board failed to consider Mr. [redacted]'s medical therapy needs. It was not until the end of the interview when Mr. [redacted] mentioned how he had developed release plans to address and treat the cancer he had been diagnosed with two months earlier that the Board asked about the status of his medical needs. Ex. 1, p. 24:10–15. Even after learning that Mr. [redacted]

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[7] Mr. [redacted] was diagnosed with cancer on his 65th birthday, and has not worked in any formal maintenance roles since shortly before that time.

[8] In his letter of recommendation, Mr. [redacted]'s ICP supervisor, Mr. [redacted] wrote that "Mr. [redacted]s role as an IPA [Inmate Program Assistant] was essential to the success of our program and the treatment that was provided to our patients. Throughout the year that I worked with Mr. [redacted] he demonstrated his skills and knowledge of working with the mentally ill population in our facility. Due to his dedication and commitment to the treatment of our patient[s] he was given multiple responsibilities that he was able to successfully accomplish. For example, he facilitates the following groups: Community Preparation, Work Skill Development, Dispute Resolution, MICA Courses and assist with the Global Awareness Program. Mr. [redacted] also worked with our patients in the housing area. Mr. [redacted] assisted our most chronically mentally ill patients with their Activities of Daily Living (ADL's) making sure that they maintained proper hygiene, maintained their cells/living area clean and to make sure that the patients were ready to attend their required programs/groups in the assigned areas on time. Mr. [redacted] developed a strong report with the patients, he become a mentor to some of them who were seeking to continue with their education." Ex. 3, pp. 8–9. While the Board did not discuss Mr. [redacted]s faith, he has also volunteered in a variety of roles and received numerous recommendations from priests and chaplains in several facilities that were included in his self-prepared parole packet.

had cancer, the Board failed to ask him—as a 65-year-old man with Stage 2 lymphoma who needed chemotherapy in November 2020, before COVID vaccines were available—whether he was comfortable with an SORC sitting directly behind him in a windowless and poorly ventilated room that measured approximately 6 feet by 10 feet, or what his housing situation was like given his compromised health.[9]

The Board is also required to consider the candidate's prior criminal history. *See* 9 N.Y.C.R.R. § 8002.2(d)(8) (requiring the Board to consider "prior criminal record, including the nature and pattern of the inmate's offenses"). Commissioner Crangle noted during the interview that "[t]his was really your only arrest and conviction" and "your record is pretty much clean before all of this and not even a misdemeanor conviction." Ex. 1, p. 7:23 & 13:15–17. But neither passing reference makes clear how the Board considered the fact that Mr. Strawitch had no criminal record before his actions on March 9, 1994.

In addition to these statutory factors that the Board ignored, the remaining statutory factors, to the extent the Board mentioned them, supported release:

- "The panel takes note of your low scores in the other COMPAS categories." (Ex. 1, p. 31:19–22);
- "your positive programming as well as your clean disciplinary record is also noted" (*id.*, p. 32:1–3); and

[9] Today, although Mr. [redacted] lives with 56 other men in congregate housing at Fishkill, more than a third of whom are unvaccinated, he has still not been able to receive a COVID vaccine because of his chemotherapy regime and weakened immune system. Further, despite having Stage 2 cancer and undergoing intensive chemotherapy, Mr. [redacted] has never been seen by a facility medical doctor in the months since he was transferred to Fishkill in February 2021, and has had no assigned medical care provider at all since the nurse practitioner who had been assigned to him was apparently transferred from the facility in June 2021. The prescriptions that Mr. [redacted]'s outside oncologist wrote that same month after his most recent chemotherapy treatment took weeks to be filled. Besides cancer and his acute risk for severe illness from COVID, Mr. [redacted] has other inadequately treated serious medical issues (having had skin removed several times from his face and scalp), but has not been able to have a dermatologist examine his numerous current skin conditions. Finally, because of problems with his feet, Mr. [redacted] was also prescribed medical boots/footwear, but still has not been provided care from a podiatrist nor the medical boots. *See* Ex. 4, Selected Medical Records.

- "The parole board commends your personal growth and productive use of time" (*id.*, 32:3–4).

The decision establishes that the Board effectively ignored all statutory factors but one—the seriousness of the first and only violent offense Mr. [redacted] committed in his life.

## II. THE BOARD FAILED TO EXPLAIN THE REASON FOR DENIAL IN DETAIL

### A. The Board did not explain how release after nearly three decades would deprecate the seriousness of the crime or be incompatible with the welfare of society

The Board concluded that "release would be incompatible with the welfare of society and would so deprecate the seriousness of your crime as to undermine respect for the law," but did not explain why. Ex. 1, p. 32. Contrary to law, the Board did not explain why the release of Mr. [redacted]—who at the time of the decision was 65 years old, had no prior convictions, and had served nearly 27 years in prison after fully accepting responsibility for his conduct and quickly pleading guilty—would clash with society's welfare and would undermine respect for the law. *See* N.Y. EXEC. LAW § 259-i(2)(a) ("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."); *see also* 9 N.Y.C.R.R. § 8002.3(b) ("Reasons for the denial of parole release shall be given in detail.").

The Board's general description of Mr. [redacted]s conduct nearly three decades ago does not explain how his release today will negatively impact society, nor how release today would undermine respect for the law. Mr. [redacted] was sentenced pursuant to New York's Penal Law and the law permits parole. *See Cappiello v. New York State Bd. of Parole*, 2004 N.Y. Slip. Op. 51762(U), at *6 (Sup. Ct. N.Y. Cty. Nov. 30, 2004) (granting *de novo* interview and noting that "in a system which is premised on the hope and possibility of rehabilitation, and a statutory system which mandates a serious, rational, and meaningful evaluation of the statutory criteria, we must

allow an individual who has taken advantage of opportunities to rehabilitate himself to move beyond a horrific act of many years ago and to rejoin society to contribute according to his ability. . . . [because] all the relevant facts were known to the sentencing judge at the time of sentencing. They did not change from hearing to hearing. In fact, they will never change.").

Moreover, the judge who imposed the aggregate sentence of 25 years to life chose not to sentence Mr. [redacted] to the maximum minimum sentence—25 years was deemed a sufficient retributive sentence. Mr. [redacted] pleaded guilty to second degree homicide and first degree burglary. The judge imposed concurrent sentences of 25 years to life and 5 to 15 years, despite the prosecution's repeated recommendation that the sentences be imposed consecutively for an effective sentence of 30 years to life. See Ex. 5, Aug. 30, 1994 Sentencing Minutes, pp. 2, 4 & 10–11.

Instead, the sentencing judge determined that Mr. [redacted] should be considered for parole 5 years sooner. Additionally, the judge did not recommend during sentencing against Mr. [redacted]'s release after completing 25 years of incarceration. Finally, the judge did not subsequently submit a letter recommending against release. *See* Ex. 6, Nov. 16, 2020 Parole Board Report (stating that there are no official statements from the sentencing judge).

Therefore, the Board's determination that Mr. [redacted]'s release after nearly 27 years of incarceration—years longer than the minimum sentence—would undermine respect for the law and convey a message that the crime was not serious is not supported by New York's Penal Law or the actual sentences imposed. The Board did not satisfy its obligations to explain these conclusions.

**B. The Board did not explain its reasons for denying parole**

The Board made two claims in denying parole, but explained neither in detail. Nor did the Board explain in detail why such claims led the Board to conclude that release would undermine

society's welfare and undermine respect for the law. *See* N.Y. EXEC. LAW § 259-i(2)(a) (requiring that the Board's reasons for denial "shall be given in detail and not in conclusory terms."); 9 N.Y.C.R.R. § 8002.3 (b) (requiring that the Board's reasons for denial "shall be given in detail."); *see also Matter of Rivera v. Stanford*, 172 A.D.3d 872, 874 (2d Dep't 2019) (finding that "the Parole Board's terse and conclusory decision did not explain the reason for the denial in details as required by the Executive Law" and granting a *de novo* interview.).

*First*, the Board stated that Mr. [redacted]s offenses were a basis for denial. But the Board did not explain why release after serving years more than the minimum sentence was insufficient. The Board's statement that "[y]our actions were heinous and a total disregard for human life," is a truism about any killing that provides no explanation. Ex. 1, p. 32. Mr. [redacted] was sentenced to spend 25 of the best years of his life in prison precisely because his actions were heinous and undertaken with total disregard for human life. The Board's statement does not explain why Mr. [redacted], now a much older man, should have been denied parole a third time.

Nor did the Board explain its purported concern over Mr. [redacted]'s "ongoing course of conduct that you engaged in before, during, and after the commission of your murder offenses." from his offense." Ex. 1, p. 32:8–11. Mr. [redacted] confessed to his offenses soon after he committed them, quickly pleaded guilty, and was sentenced within a few months. Further, Mr. [redacted] was not part of a group or engaged in any sort of conspiracy. And last, there is clearly no ongoing course of conduct today from Mr. [redacted]s offenses more than 27 years ago.

The Board's statement that "[t]he victim's family will forever be impacted by your actions" is similarly true, and meaningless as an explanation of whether Mr. [redacted] should be released to parole supervision. While the death of a loved one is painful—and permanent—for any family, New York's Penal Law still permits parole for offenses like Mr. [redacted]s. *See e.g., Cappiello*

*v. New York State Bd. of Parole*, 2004 N.Y. Slip. Op. 51762(U), at *6 (Sup. Ct. N.Y. Cty. Nov. 30, 2004) (granting *de novo* interview and noting that "in a system which is premised on the hope and possibility of rehabilitation, and a statutory system which mandates a serious, rational, and meaningful evaluation of the statutory criteria, we must allow an individual who has taken advantage of opportunities to rehabilitate himself to move beyond a horrific act of many years ago and to rejoin society to contribute according to his ability"). That Mr. [redacted] committed homicide is not an explanation for why he should have been denied parole a third time.

Similarly, the Board's statement that "[t]he panel has reviewed the comments stated at sentencing" does not explain its decision. The prosecutor, Mr. [redacted] defense attorney, and judge all spoke at sentencing. Mr. [redacted] explained during the parole interview how he had prepared to speak before deciding not to say anything after Mr. [redacted]'s powerful testimony. Ultimately, the judge declined to impose the maximum sentence requested by the prosecutor and Mr. [redacted] and instead imposed a sentence that permitted parole after 25 years. The Board's statement amounts to saying that it had reviewed the requisite sentencing minutes but made no specific determination as to the statements therein.[10]

*Second*, the Board cited opposition from the Suffolk County District Attorney, but did not state the nature of that opposition, did not explain why the Board decided to follow the so-called opposition, and did not explain which one of the two opposition letters it was considering. Ex. 1, p. 32; *see also infra* Argument IV. The Board also cited to so-called "community opposition" but did not identify the source of this unofficial "opposition," the extent or nature of such "opposition,"

[10] The Board's decision to deny Mr. [redacted] parole for two additional years was the latest rejection of the judge's imposition of a 25-year minimum sentence—less than the maximum minimum sentence of 30 years to life that the prosecution twice requested at sentencing and in its official statements. This amounted to an improper resentencing. *See, e.g., Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 27, 29 (1st Dep't 2016) (noting that the Board's role "is not to resentence petitioner" and granting *de novo* interview because "the Board's repeated denials to petitioner of parole have had the effect of undermining this [judicially imposed] sentencing reduction.").

or how this "opposition" established that release would undermine respect for the law or conflict with society's welfare as a whole. Ex. 1, p. 32:11–12.

## III. THE BOARD VIOLATED THE REGULATORY AND STATUTORY REQUIREMENTS BY FAILING TO EXPLAIN ITS DEPARTURE FROM THE COMPAS ASSESSMENT

The Board's conclusion that release would be incompatible with the welfare of society and would undermine respect for the law directly conflicts with the COMPAS Assessment.[11] The COMPAS evaluation determined that Mr. [redacted] was low risk in 11 of 12 categories, including risk of felony violence, being arrested, absconding, criminal involvement, prison misconduct, and history of violence. On the only non-low scale (reentry substance abuse), he was purportedly high risk,[12] although neither the interview nor the transcript explain how the Board considered that single score, if at all, in its decision. This was error, as the Board had a duty to explain why the release of a person who does not pose a danger to the public would be incompatible with society's welfare. Similarly, the Board had a duty to explain how the release of such a person after nearly three decades in prison would communicate that the law had not taken the crime seriously.

### A. The Board departed from the COMPAS scale without any explanation

Although Mr. [redacted] received favorable "low" or "unlikely" assessments in 11 of the 12 COMPAS risk categories, the Board still concluded that his release would be incompatible with the welfare of society and would undermine respect for the law. If, in denying release, "the Board

[11] Mr. [redacted] was never interviewed for an updated COMPAS Assessment between his January 2019 initial interview and his November 2020 reappearance. This is consistent with the first page of the August 25, 2020 COMPAS Assessment, which claims both that the screening occurred on August 25, 2020 and that the resulting assessment was also printed at 9:03 a.m. that day—three minutes after a counselor at Orleans could have had their first appointment. Ex. 7, Aug. 25, 2020 COMPAS Assessment. Mr. [redacted] was also never provided with a copy of this COMPAS Assessment prior to his November 2020 interview, and only received an incomplete version of the COMPAS Assessment (redacted, but also missing the Supervision Recommendation as well as the entire Criminogenic Needs Narrative Summary) a few weeks ago, in response to his 9 N.Y.C.R.R. § 8000.5 request for this appeal.

[12] Although portions of this scale are redacted, the unredacted portions contain numerous errors, including that Mr. [redacted] had "prior drug charges/convictions" (he had neither). Ex. 7, p. 5, #23. In addition to having no tickets related to any sort of substance abuse for more than 27 years, Mr. [redacted] has regularly attended and helped facilitate therapeutic programs to assist others with their addiction.

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 N.Y.C.R.R. § 8002.2(a). Because the Board's conclusion departs from 11 COMPAS scales, the Board had a duty to explain, but failed to do so.

Although the Supervision Recommendation from his most recent COMPAS Assessment has been improperly withheld from Mr. [redacted] presumably it is consistent with his two prior COMPAS Assessments, both of which determined that he should receive supervision status 4 upon release—the lowest possible level of parole supervision—a strong indication that Mr. [redacted] is ready to be reintegrated into society and presents minimal risk upon release. *See* Ex. 8, Dec. 24, 2018 COMPAS Assessment, p. 8; Ex. 9, Apr. 20, 2018 COMPAS Assessment, p. 8.

Despite the Board's statements during the interview that Mr. [redacted]'s COMPAS was "[p]retty much low scores across that board" and in its decision that "[t]he panel takes note of your low scores in the other COMPAS categories," the Board failed to explain how it decided that Mr. [redacted]'s release would be "incompatible with the welfare of society." Ex. 1, pp. 15:3, 31:19–20 & 32:17. Under its regulations, the Board must specify each scale within the risk assessment from which it departed. Here, Mr. [redacted] received ideal scores on 11 scales. Yet the Board's decision provided absolutely no explanation for its departure from any scale, let alone 11 of them.

In case after case, Board decisions that depart from COMPAS without explanation have been reversed:

- *Robinson v. Stanford*, Index No. 2392/2018, at *2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) (ordering *de novo* interview for man with two murder convictions and low COMPAS scores because "the Parole Board's finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores in his COMPAS assessment. *As the Board's determination denying release departed from these risks and needs assessment scores, pursuant to 9 NYCRR § 8002.2 it was required to articulate with specificity the particular scale in any needs and assessment from which it was departing and*

*provide an individualized reason for such departure.* The Board's conclusory statement that it considered statutory factors, including petitioner's risk to the community, rehabilitation efforts and needs for successful community re-entry in finding that discretionary release would not be compatible with the welfare of society fails to meet this standard. As such, its determination denying parole release was affected by an error of law.") (emphasis added);

- *Comfort v. New York State Bd. of Parole*, Index No. 1445/2018, at *5 (Sup. Ct. Dutchess Cty. Dec. 21, 2018) (ordering *de novo* interview for man incarcerated for murdering an undercover police officer because "Petitioner's COMPAS instrument clearly identifies Petitioner as the lowest possible risk (1) in the following three categories – risk of felony violence, arrest risk and abscond risk. Although Respondent's counsel baldly claims that the decision was not a departure from COMPAS, it is difficult to reconcile how the parole board's finding that Petitioner was likely to reoffend is not a departure from the COMPAS assessment rating Petitioner at the lowest possible risk for reoffending. Accordingly, the parole board's finding that it was likely that Petitioner would reoffend is a departure from the COMPAS instrument. *With such a departure 9 N.Y.C.R.R. § 8002.2(a) requires Respondent to specify the scale from which it departed and provide an individualized reason for such departure.*") (emphasis added);

- *Diaz v. Stanford*, Index No. 53088/2017, at *8 (Sup. Ct. Dutchess Cty. Apr. 4, 2018) (ordering *de novo* interview for man incarcerated for killing an assistant district attorney because "[w]hile a low COMPAS score does not entitle an inmate to parole release, the Board did not discuss why it completely discounted Mr. Diaz's COMPAS scores and concluded that there is a reasonable probability that he would not "live at liberty without violating the law". The Court cannot glean from the cursory nature of its decision how it utilized its own risk assessment procedures in concluding that petitioner's release is incompatible with the welfare of society at this time.");

- *Matter of Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 673 (2d Dep't 2018) (reversing denial of Art. 78 petition because "the petitioner . . . was assessed "low" for all risk factors on his COMPAS (Correctional Offender Management Profiling for Alternative Sanction) risk assessment. Thus, a review of the record demonstrates that in light of all of the factors, notwithstanding the seriousness of the underlying offense, the Parole Board's 'determination to deny the petitioner release on parole evinced irrationality bordering on impropriety.'");

- *Ruzas v. New York State Board of Parole*, Index No. 1456/2016, 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.");

- *Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 28–29 (1st Dep't 2016) (characterizing as "unsupported" the Board's assertions contradicting petitioner's COMPAS score, and affirming granting of *de novo* interview);

- *Matter of Rabenbauer v. New York State Dep't of Corr. & Cmty. Supervision*, 2014 N.Y. Slip Op. 24347, at *1 (Sup. Ct. Sullivan Cty. Nov. 12, 2014) (ordering *de novo* interview because "the Parole Board ignored the Correctional Offender Management Profiling for Alterative Sanction risk assessment and made only superficial inquiry into the statutory factors in Executive Law § 259-i (2)(c)(A)."); and

- *Stokes v. Stanford*, 2014 N.Y. Slip Op. 50899(U), at *2 (Sup. Ct. Albany Cty. June 9, 2014) (granting *de novo* interview after noting that petitioner's "COMPAS report found him at low risks in all categories it considered. . . . 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 low risk scores.").

Mr. [redacted]'s case is analogous to the cases cited above. The Board failed to explain how it reached the conclusion that Mr. [redacted]'s release was incompatible with the welfare of society if his COMPAS Assessment indicated "pretty much low scores across the board" and he has had no disciplinary tickets since 2000. Ex. 1, p. 15:3; Ex. 2, p. 11. Without such an explanation, the decision must be reversed.

**B. The Board failed to meaningfully consider the COMPAS Assessment**

The Board's decision stated that "these low scores do not dismiss the deviant and violent actions you committed on March [9th], 1994." Ex. 1, p. 31:21–22. This statement fundamentally misunderstands the role of COMPAS. COMPAS was implemented to provide greater objectivity, consistency, and transparency in the Board's decision making. Under the 2011 amendments to the Executive Law, the Board had to:

> establish written procedures for its use in making parole decisions as required by law. Such written procedures 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.

N.Y. EXEC. LAW § 259(c)(4). The Board adopted the COMPAS Risk and Needs Assessment tool in order to comply with its statutory mandate. According to DOCCS, COMPAS is an empirically validated "research based clinical assessment instrument" used to assess an incarcerated person's risks and needs by "gathering quality and consistent information to support decisions about supervision, treatment, and other interventions."[13]

COMPAS is not—and has never been—a mitigating factor for a person's crime. The tool has "criminal history" and "disciplinary history" sections to consider the persons prior acts, and the "history of violence" scale incorporate a person's criminal history. *See* Ex. 7, pp. 1–3. But COMPAS scores do not excuse a crime, nor are they meant to. COMPAS is a forward-looking risk assessment, not a backward-looking value judgment. COMPAS is meant to help the Board assess a person's risk if they are released, not the sufficiency of their sentence for the crime they committed decades ago. Mr. [redacted]'s COMPAS Assessment indicates that, if he were to reenter society today, he is "low" or "unlikely" risk for all but one scale. The Board's decision to disregard that assessment on the basis of Mr. [redacted]'s actions more than 27 years ago was irrational, made without explanation, and merits a properly conducted *de novo* interview. *See Voii v. Stanford*, No. 2020-50485, at *6–7 (Sup. Ct. Dutchess Cty. May 13, 2020) (ordering *de novo* interview for man convicted of homicide and manslaughter with low COMPAS scores and finding that the underlying crime "is unrelated to any scale contained in the COMPAS Assessment" and could not be validly cited by the Board as an explanation for any departure).

[13] DOCCS, Directive No. 8500: COMPAS Assessment/Case Plan, Nov. 19, 2015 http://www.doccs.ny.gov/Directives/8500.pdf.

## IV. THE BOARD RELIED ON IMPROPER PENAL PHILOSOPHY IN THE OFFICIAL OPPOSITION, AND AN ERRONEOUS CLAIM THAT THERE WAS "COMMUNITY OPPOSITION" TO THE RELEASE OF MR. STRAWITCH

The Board cited to "a district attorney's letter" and "community opposition" as a basis for denying parole: "[t]he panel notes that there is both official and community opposition to your release. Ex. 1, pp. 27:7–8, 29:1 & 32:12.

### A. Both district attorney letters contain improper penal philosophy

The Board made clear during Mr. [redacted]'s interview that it was only considering one of the two letters submitted by the Suffolk County District Attorney dated September 3, 2003 and May 18, 2018. *See* Ex. 1, p. 27:8–9 ("[W]e do have a district attorney's letter that's in your file that we consider.") Although the Board did not specify which letter it considered, both contain the same fundamental defects.

Each letter contains improper penal philosophy—the belief that anyone who committed Mr. [redacted]'s crime should never be paroled. The 2003 letter states that "[o]ur community must be protected from such evil predators. This defendant should spend every day of the rest of his life behind bars." *See* Ex. 10, Sept. 24, 2003 Letter from [redacted] The 2018 letter states that it is "written to express this Office's continuing opposition to the above-referenced inmate's release to parole at this or any other time." *See* Ex. 11, May 8, 2018 Letter from [redacted] The 2003 letter sets forth the belief that Mr. [redacted] is a "predator" who should never be released, while the 2018 letter sets forth the belief that Mr. [redacted] should never be released.

This is precisely the sort of consideration and guidance that the Court of Appeals has found to be "outside the scope of the applicable statute." *King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) ("There is evidence in the record that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder,

the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place."). The Court of Appeals deemed it inappropriate for a commissioner to be guided by his personal beliefs that killing a particular victim deserved the death penalty or life without parole. While Mr. [redacted] is not sentenced to life without parole, the Board allowed opposition material that endorsed life without parole to enter its decision-making. *King v. New York State Div. of Parole*, 190 A.D.2d 423, 432 (1st Dep't, 1993), *aff'd*, 83 N.Y.2d 788 ("Since neither the death penalty nor life imprisonment without the possibility of parole are part of the law of this State, they should clearly not have entered into the Board's consideration."). The opposition material relied on and cited in the Board's decision improperly told the Board to automatically deny parole to Mr. [redacted] because of the identify of his victim.

Additionally, the 2003 letter erroneously claims that Mr. [redacted] was convicted of a third crime, when in fact he pleaded guilty to the two offenses discussed above. The record fails to establish that the Board did not rely on the 2003 letter or the erroneous information contained therein. *See Lewis v. Travis*, 9 A.D.3d 800 (3d Dep't 2004) (ordering *de novo* interview because the Board erroneously referred to petitioner's conviction as first degree homicide, when the crime of conviction was second degree homicide).

**B. The Board erroneously relied on nonexistent unofficial opposition**

As an initial matter, so-called "community opposition" is not one of the enumerated factors set forth in the Executive Law that the Board may validly consider. *See Matter of Applewhite v. New York State Bd. of Parole*, 167 A.D.3d 1380, 1385 (3d Dep't 2018). Mr. [redacted]s parole file also contained no such opposition.[14] The Board had also not previously mentioned any such

[14] Despite a 9 N.Y.C.R.R. § 8000.5 request by undersigned counsel for such letters, none were provided. To the extent unofficial opposition exists but was withheld, the Board's regulations provide no basis to withhold such materials. *See* 9 N.Y.C.R.R. § 8000.5(c)(2)(i)(a).

unofficial opposition in the 2018 LCTI transcript or decision, nor in the 2019 initial transcript or decision. Thus the Board's decision based on non-existent "community opposition" amounts to reliance on erroneous information, and should be annulled. *See Matter of Garofolo*, Index No. 900093-19, at *5–6 (Sup. Ct. Albany Cty. July 8, 2019) (finding that Board's failure to provide "community opposition" for review entitled petitioner to a *de novo* interview); *see also Plevy v. Travis*, 17 A.D.3d 879 (3d Dep't 2005) (holding that denial of parole based in part on a prior violation of probation which was dismissed constituted reliance on erroneous information and required a *de novo* interview).

**CONCLUSION**

For all of the above reasons, Mr. [redacted] requests that the Appeals Unit recommend that the Board modify its November 18, 2020 decision to grant him immediate parole release with such conditions as it deems necessary or, in the alternative, recommend that the Board grant him a properly conducted *de novo* parole interview before an entirely new panel that does not include (1) Commissioners Crangle and Smith, who conducted Mr. [redacted]s November 2020 reappearance interview, (2) Commissioners Coppola and Berliner, who conducted Mr. [redacted]'s January 2019 initial interview, (3) Commissioner Alexander who, along with Commissioner Coppola, conducted Mr. [redacted]'s May 2018 LCTI.

Dated: New York, New York
July 20, 2020

Mark R. Hellerer
Chris Fennell
PILLSBURY WINTHROP SHAW PITTMAN LLP
31 West 52nd Street
New York, New York 10019

*Attorneys for Appellant* [redacted]

## EXHIBIT LIST

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|---|---|
| **EXHIBIT 1:** | November 18, 2020 Reappearance Transcript and Decision |
| **EXHIBIT 2:** | June 14, 2021 DOCCS Occupational Training System, Program Assignment, and Disciplinary History |
| **EXHIBIT 3:** | Selected Letters of Recommendation and Progress Reports |
| **EXHIBIT 4:** | Selected Medical Records |
| **EXHIBIT 5:** | August 30, 1994 Sentencing Minutes |
| **EXHIBIT 6:** | November 16, 2020 Parole Board Report |
| **EXHIBIT 7:** | August 25, 2020 COMPAS Assessment |
| **EXHIBIT 8:** | December 24, 2018 COMPAS Assessment |
| **EXHIBIT 9:** | April 20, 2018 COMPAS Assessment |
| **EXHIBIT 10:** | September 24, 2003 Letter from [redacted] |
| **EXHIBIT 11:** | May 8, 2018 Letter from [redacted] |