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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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.	VERIFIED PETITION PURSUANT TO CPLR ARTICLE 78 Index No.:

BRETT DIGNAM, ESQ., an attorney duly admitted to practice in the State of New York, on behalf of Petitioner [redacted], hereby alleges:

1. This is an application pursuant to Article 78 of the Civil Practice Law and Rules seeking an order vacating a determination of Respondent NEW YORK STATE BOARD OF PAROLE, rendered on January 10, 2017, denying [redacted] release on parole, and ordering a new hearing conducted in accordance with law.[1]

2. Petitioner [redacted] is currently incarcerated at Taconic Correctional Facility.

3. In May 2017, Ms. [redacted] filed an administrative appeal of the Board's adverse determination.[2]

4. On May 21, 2017, the Board denied Ms. [redacted]'s administrative appeal.[3] [redacted] has therefore exhausted her administrative remedy and may now challenge the Board's unlawful, arbitrary and capricious decision denying her parole.

[1] Exhibit A, Parole Board Decision.
[2] Exhibit B, Administrative Appeal.
[3] Exhibit C, Administrative Appeal Decision.

5. No prior application has been made to any court for the relief sought herein.

PARTIES

6. Petitioner [redacted] is currently serving an indeterminate sentence of twenty years to life at Taconic Correctional Facility, Bedford Hills, NY. She has been incarcerated for twenty-seven years.

7. Respondent NEW YORK STATE BOARD OF PAROLE is a state body charged with, *inter alia*, conducting parole release hearings in accordance with the provisions of the Correction Law, Executive Law and Penal Law. Respondent conducted a parole release hearing in the case of Ms. [redacted] on January 10, 2017. The Board issued a decision denying her parole on the very same day.

VENUE

8. New York County is a proper venue for this action pursuant to Section 506(b) of the Civil Practice Law and Rules because Ms. [redacted]'s parole release hearing was held in New York County. The members of the Parole Board were sitting in New York County, at 314 West 40th Street, New York, New York, as noted in the hearing transcript.[4] Lastly, the Parole Board made its determination denying Ms. [redacted] release in New York County, thus making this court the proper venue.[5]

INTRODUCTION

9. [redacted] is fifty-one years old. She is serving an indeterminate sentence of twenty years to life for murder in the second degree and burglary in the first degree. During her twenty-seven years of confinement, Ms. [redacted] has positively transformed into a different person. She has invested in her rehabilitation and has earned an exemplary

[4] Exhibit K at B-153, Parole Hearing Transcript.
[5] Exhibit K at B-153; Exhibit A.

institutional record.

10. Ms. [redacted] first appeared before the Board for release consideration on January 29, 2009. The Board denied release on the very same day.

11. Ms. [redacted] appeared before the Parole Board again in 2011, 2013, and 2015. Each time, she was denied release and ordered to wait for the maximum statutory two-year period before receiving another hearing.

12. On January 10, 2017, Ms. [redacted] appeared before the Board for a hearing conducted by Commissioners W. Smith, Sharkey, and Cruse. The Board denied release for a fifth time on January 10, 2017.[6]

13. In this petition, Ms. [redacted] challenges the Board's determination on the grounds that: (1) the Board violated lawful procedure by failing to meaningfully consider the relevant factors required by N.Y. Exec. Law § 259-i(2)(c)(A); (2) the Board violated the law mandated by N.Y. Exec. Law § 259-c(4) and 9 N.Y.C.R.R. § 8002.2 by denying release based solely on the seriousness of her crime; (3) the Board unlawfully considered non-statutory criteria; and (4) the Board violated lawful procedure by failing to provide a detailed, non-conclusory written decision.

FACTUAL ALLEGATIONS

A. Personal History

14. [redacted] is fifty-one years old. She is serving an indeterminate sentence for second-degree murder and first-degree burglary. The underlying offenses occurred when [redacted] was only twenty-three years old. Having now been incarcerated for twenty-seven years, she has spent the majority of her life in prison.

[6] Exhibit K at B-153.

15. [redacted] appeared before the Parole Board for the fifth time on January 10, 2017 and was, yet again, denied parole.

16. [redacted] was born on February 14, 1966. She was born in and is a citizen of Haiti[7] but moved frequently during her chaotic childhood. She lived with her grandmother in Haiti until she was 6 years old, when she was reunited with her mother and began living with her full time.

17. Her mother had two other daughters when they reunited, and eventually had a total of seven children. Her household was exceptionally strict; both her mother and brother regularly physically abused [redacted] from a young age.

18. At age 14, she ran away from home. As a teenage runaway, [redacted] lacked support and stability. She lived in a "violent, physical world"[8] and turned to abusive relationships and prostitution in order to survive. The Parole Board entirely ignored this traumatic history and failed to consider its impact.

19. [redacted] began drinking as a coping mechanism and, as a result, struggled with alcohol dependence during her teenage years. She frequently drank to a point where she suffered total blackouts and memory loss. In fact, [redacted] has only a partial memory of the night of the offense, due to her extremely high level of intoxication at the time. She now understands that she was "a teenage alcoholic whose habitual drinking . . . reinforce[ed her] tendency to ignore the dangers of [her] behaviors."[9]

20. Throughout these early tumultuous years, [redacted] had minor interactions with the law. She was convicted of trespassing and prostitution, and once sentenced to a

[7] See Exhibits D at B-027, Release Plan; Exhibit E at B-036, Deportation Order.
[8] See Exhibit F at B-037, Personal Statement.
[9] See Exhibit F at B-037.

week in county jail.[10] She had never been convicted of a violent crime prior to the instant offense.

21. On the day of the crime, May 29, 1989, [redacted] began drinking alcohol with her boyfriend early in the morning. They went to Long Beach, New York together to spend time there. At some time that morning, the couple had an argument. Her boyfriend threw her out of his car and abandoned her. [redacted] went to a bus station in an effort to find a way home. There, she ran into her co-defendant, [redacted]. [redacted], who [redacted] knew slightly, initially took [redacted] to her mother's house where the two continued drinking heavily. After spending some time together, [redacted] suggested that her friend, [redacted], would give [redacted] a ride home to Queens, New York. [redacted] was a young woman and [redacted], being stranded and alone, felt like she could trust her.

22. [redacted] took [redacted] to [redacted]'s house and let them both inside. Although [redacted] had been drinking heavily and does not remember the details of her crime, she has reviewed the record and believes that [redacted] intended to rob [redacted].[11] [redacted], who had no prior history of violence, now understands and accepts responsibility for the fact that she killed [redacted] and that she and [redacted] took a pellet gun, a fur coat, and family jewelry from the house.

23. [redacted] has been committed to understanding the factors that led to the tragic loss of [redacted]'s life.[12] She has the "profoundest remorse"[13] for her conduct and has spent the last twenty-seven years learning how to control her anger and addiction to alcohol. Furthermore, she has gained an understanding of the dynamics of abuse, anger, and violence,

[10] Exhibit K at B-156-57.
[11] See Exhibit J at B-134, Parole Packet.
[12] See Exhibit F at B-038.
[13] See Exhibit F at B-037.

and has learned strategies to avoid those situations.[14] She has additionally identified a connection between her experiences of childhood trauma and her self-medication that led to alcohol abuse.

24. [redacted] has worked on her own rehabilitation throughout her sentence.[15] Through her extensive participation in therapy and institutional programs, she has developed skills and strategies that have not only helped her to confront her past, but also allowed her to take positive steps toward building her future and controlling her addiction.

B. Early Incarceration and Disciplinary History

25. [redacted] has made tremendous progress. During the early years of her incarceration, she responded to stress and challenge in the ways she had learned on the street. As a result, she had received several disciplinary infractions, all of which date from before 2008.

26. Through programming and self-reflection, she realized that she needed to take responsibility for her actions and developed strategies to avoid conflict. For the past ten years, she has been a model of good behavior and has not received one disciplinary infraction. As evidenced by her letters of support, she has transformed herself into a responsible, giving, reflective and highly reliable woman.[16] Her COMPAS Risk Assessment places her in the lowest possible risk in each category for risk of violence, absconding, or re-arrest.[17] The Board entirely failed to recognize the extensive efforts [redacted] has made to address the factors that led to her crime and that her COMPAS Risk Assessment scores demonstrate that she has a low risk of re-offending.

[14] See Exhibit F at B-038.
[15] Exhibit F at B-037.
[16] Exhibit G, Letters of Support.
[17] Exhibit H, COMPAS Risk Assessment.

C. Acceptance of Responsibility and Rehabilitation

27. [redacted] has taken responsibility for and expressed deep regret and sadness about the crime she committed. In her written statement to the Parole Board, she explained "I have spent 27 years in prison and have had been plenty of time to reflect on and gain insight into my past behavior and unjustifiable actions that led to my committing this horrible crime. [redacted] did not deserve to die."[18]

28. During her time in prison, [redacted] has sought therapy and assistance from both professional therapists and clergy members. [redacted] describes in her personal statement: "It took me sometime, a lot of education, and many programs all of which were responsible for my transcendence [away from] violence and negativity."[19] [redacted] notes that she "grew up in prison and true maturity dedicated that I take responsibility for the bad that I've done"[20] and "I am no longer [a] young, pernicious girl."[21] [redacted] is now a practicing Jehovah's Witness. She takes great solace from prayer and this has had a profound impact on her ability to understand the seriousness of her crime and to ensure that she deals with her prior history of anger, drug abuse, and emotional issues.

29. It is significant that, in January 2017, [redacted] gained substantial personal insight about her role in her crime since her last appearance before the Board. After her appearance in January 2015, with the assistance of counsel, [redacted] gained access to the criminal court record. For the first time, she has been able to review and put extensive work into trying to understand the facts of the offense. This work allowed her to counter the

[18] Exhibit F at B-037.
[19] Exhibit F at B-037.
[20] Exhibit F at B-038.
[21] Exhibit F at B-038.

deficiencies in her memory, and to fully comprehend and take responsibility for her own actions. In her personal statement she acknowledges, "Taking [redacted]'s life was not a deliberate forethought and in retrospect I see that the human part of me was connected to the violent, physical world that I live in. [redacted] did not deserve to die for my violent actions that caused so many people's pain especially his wife and family, to hurt so badly.[22]"

30. She continued to express regret and take ownership for her negative actions when she spoke to the Board during her parole hearing, stating "I take full responsibility," and later, "I no longer live and deny the part that I have played in [redacted]'s death."[23]

31. [redacted] has progressed from denial of her role in the crime to recognition and full acceptance of her responsibility. Never before has she attained such a level of personal awareness about her offense. She now knows, understands, and fully accepts the gravity of her offense. She will spend the rest of her life with that knowledge and is determined to devote her life to helping others avoid her path. Her sincere remorse and demonstrated rehabilitation warrants release on parole.

D. Educational and Vocational Achievements

32. [redacted] has also built an exemplary programing and vocational achievement record that further demonstrates her commitment to rehabilitation. Well beyond the mandatory programming required by the institution, [redacted] actively pursued numerous opportunities to equip herself with the right skills and mindset for a successful re-entry. The cumulative impact of these efforts is that [redacted] presents as a parole candidate who is highly likely to contribute positively to any community to which she is released.

[22] Exhibit F at B-037.
[23] Exhibit K at B-161.

33. [redacted] invested in her education by completing high school after she entered state custody. [redacted] completed preparatory courses in Math[24] and English[25] and then completed her GED High School Certificate in custody.[26]

34. [redacted] gained vocational skills with numerous courses in horticulture,[27] cooking, and food preparation.[28] These courses allowed her to develop supervisory skills working in the Taconic Facility kitchen.[29] Successive evaluations in Inmate Progress Reports demonstrate that [redacted] is an excellent employee in prison.[30] Her supervisors describe her as someone who produces high-quality work, and as a person who is "efficient, innovative, and responsive."[31] In addition to preparing food, she handles a myriad of administrative tasks and deals regularly with civilian cooks. These skills are highly transferrable to life outside prison.

E. Substance Abuse and Alternatives to Violence Programming Achievements

35. The Board entirely failed to recognize that [redacted] has committed herself to a life of abstinence and instead exclusively focused on her prior substance abuse. She has attended and completed completed Alcoholics Anonymous programs for decades, as well as the Comprehensive Alcohol and Substance Abuse Treatment Program (ASAT)[32] and the My Sister's Place substance abuse and domestic violence workshop.[33] As a result of her efforts, she has abstained from alcohol throughout her time in custody. [redacted] is fully dedicated to remaining abstinent after she is released.

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[24] Exhibit I at B-120-21, Program Accomplishments.
[25] Exhibit I at B-118.
[26] Exhibit I at B-096.
[27] Exhibit I at B-082.
[28] Exhibit I at B-085, B-095, B-112.
[29] Exhibit I at B-088.
[30] Exhibit G.
[31] Exhibit. G B-049.
[32] Exhibit I at B-085.
[33] Exhibit I at B-121.

36. [redacted] completed a number of courses designed to deal with anger, violence, and emotional issues, including the Alternatives to Violence program,[34] Houses of Healing Emotional Awareness/Healing course,[35] Down on Violence,[36] Anger and You,[37] Writing to Set My Spirit Free: Journaling Our Grief,[38] and Social Thinking Skills Program for Non-Aggressive Problem Solving.[39] She has completed training to work as a facilitator for workshop sessions of the Alternatives to Violence Project (AVP)[40] and has been a volunteer facilitator assisting other young inmates in the prison for more than 16 years.[41] During those sessions, inmates gather to support each other emotionally and they openly discuss issues that led to their incarceration. These programs allowed [redacted] to work through much of the childhood trauma that she experienced and to deal with her emotions. She has learned to make calmer and more reasoned choices and to avoid violence.[42]

37. [redacted] has earned extensive support both inside the institution and in the community. Clinical Social Worker [redacted] has written a letter of support. She notes that [redacted] has been a wonderful asset to the Female Trauma Recovery Program. In particular, she writes that [redacted] is "an articulate communicator with great interpersonal skills and a role model to others. She demonstrates strong leadership skills and an in-depth knowledge of individual growth."[43] Importantly, [redacted] refers to the

[34] Exhibit I at B-093.
[35] Exhibit at B-123.
[36] Exhibit at B-094.
[37] Exhibit at B-102.
[38] Exhibit I at B-122.
[39] Exhibit I at B-101.
[40] Exhibits I at B-097–100, B103-111, B-113–117.
[41] Exhibits I at B 097- 100, B103-111, and B113-117.
[42] Exhibits F.
[43] Exhibit G at B-066.

specific rehabilitation that [redacted] has undertaken including "addressing issues such as the effects of PTSD, battery and sexual abuse…[and] good decision making skills."[44]

38. The insight and personal awareness [redacted] developed through these programs demonstrates that she has accepted responsibility for her crime and that she understands she is accountable for her actions.[45] This is extremely important in reducing her chances of re-offending.

F. Community Engagement and Leadership

39. [redacted] has consistently given back to the community as part of her rehabilitation, and has proven herself to be a mentor to fellow inmates and an asset to the staff.

40. [redacted] played a leading role in a number of major prison initiatives in order to assist other incarcerated women and younger inmates who are newer to the custodial environment.[46] As noted above, [redacted] impressed the Taconic staff to such an extent that they asked her to train to become a workshop facilitator. [redacted] has participated in over 185 hours as a facilitator for the Alternatives to Violence program.[47] This is strong evidence of [redacted]'s position at Taconic. She is a well-respected and trusted prisoner who has been given considerable responsibility. This role reflects her maturity, insight, and ability to help other inmates.

41. Further, [redacted] has been employed as a senior member of the Taconic kitchen staff for a number of years. She successfully completed the 16 Week Consolidated

[44] Exhibit G at B-066.
[45] Exhibit F.
[46] Exhibit G at B-097–100, B-103–111, B-113–117.
[47] Exhibit G at B-097–100, B-103–111, B-113–117.

Food Service Course in 1996[48] and became a Program Associate for the course in 2002.[49] In this role, she has been responsible for training inmates in a group environment. [redacted] has access to all of the kitchen utensils, including knives, and she is considered to be a reliable and trustworthy person by the prison administrators.[50] The Acting Food Service Administrator commented: "After working with [redacted] closely on a daily basis, I can strongly affirm that she has worked very hard to achieve her goals. Her conscientious effort and cooperation in doing professional, high-quality work are appreciated."[51]

42. [redacted]'s dedicated engagement has made her an inspiration to inmates and staff alike. In fact, more than a dozen correctional officers have submitted letters attesting to their belief that [redacted] should be released.[52] [redacted], also a licensed pastor, writes that "there were many inmates [she has] seen leave prison and return. This will not befall [redacted]... [redacted] will give back to the community she lives in..." and she asks the Board to release [redacted].[53] [redacted] describes her as "dependable and trustworthy,"[54] and Officer Brown calls her a "respectful, dependable, and hardworking" woman who will "succeed in her goals upon release."[55]

43. [redacted] says that his "decades as a Corrections Officer... [puts him] in a good position to be able to judge that [redacted]... stands out as someone who has taken herself in hand and made strides to become a woman who will be an asset to her family, to her community, and to society in general."[56]

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[48] Exhibit G at B-095.
[49] Exhibit G at B-112.
[50] Exhibits G at B-050, B-068.
[51] Exhibit G at B-049.
[52] Exhibit G.
[53] Exhibit G at B-047.
[54] Exhibit G at B-042.
[55] Exhibit G at B-043.
[56] Exhibit G at B-044.

44. [redacted] attests that she is "mature, thoughtful, and considerate… ready to give back to society, and to return to her family as a loving, law-abiding member."[57]

45. [redacted] agrees that she "will be an asset to her community and to society in general after her release,...[she] goes out of her way to be helpful to others," and is "consistently respectful in her dealings with staff and with her peers."[58]

46. Food Service Administrator [redacted] wants "to see [redacted] be granted her freedom so she could go out into society and utilize all that she has learned" during her years of incarceration,[59] and Officer [redacted] hopes the Board "allow[s] her the opportunity to show that she can be a respectable member of society."

47. In summary, [redacted] is an exemplary inmate who has spent 27 years improving herself and giving back to others through education, therapy, counseling, and employment. Experienced corrections officers who work with [redacted] on a daily basis find her to be a consistently responsible and respectful inmate, and believe that she should be released. The Board should take their opinions into account and grant her parole.

G. Community Support & Post-Release Plans

48. [redacted] was born in Haiti, has a final removal order to that country, and is looking forward to contributing to her homeland's recovery. Although she was estranged from her family at the time of the crime, she re-established those connections and has many letters of support from family members.[60] They are prepared to support her during her transition.

[57] Exhibit G at B-045.
[58] Exhibit G at B-046.
[59] Exhibit G at B-050.
[60] Exhibit G at B-054-64.

49. Many friends have also written about [redacted]'s rehabilitation, generosity, and determination to be of service. [redacted] describes a food service job at a Haitian school run by her cousin, which will be offered to [redacted] upon her release.[61] She describes [redacted] as a woman who has learned from her past and has become a "devoted, dedicated woman with clear priorities and goals" who is determined to help the orphans of Haiti.[62]

50. [redacted], who knows [redacted]'s family and their willingness to provide support also writes of her friends and family in Haiti who will welcome her with "jobs, housing, emotional support, and love."[63]

51. [redacted] describes the "complete transformation" [redacted] has undergone and of her plans to use her experience as an example to redirect young people who are "on the verge of making the same or similar mistake" onto a path of faith.[64]

52. [redacted]'s family supports her transition and release back into the community. Her mother, [redacted], writes of the "bad choices" her daughter made but also of her "full dedication" to God.[65] Her sister, [redacted], also acknowledges her sister's "terrible choice," how she has "changed and bettered herself," and the inspiration that her rehabilitation has provided.[66] [redacted] describes his sister as his "best advisor" who he goes to when he is "tempted to put [his] own pleasures first."[67] [redacted], her cousin, describes [redacted]'s "strongest desire to help those in need." [redacted], another cousin, describes the extended family's willingness to help her

[61] Exhibit G at B-057.
[62] Exhibit G at B-057.
[63] Exhibit G at B-055.
[64] Exhibit G at B-061.
[65] Exhibit G at B-062.
[66] Exhibit G at B-064.
[67] Exhibit G at B-059.

reintegration back into society.[68] [redacted], who has visited her frequently in prison, comments on her deep spirituality and the willingness of her extended family to provide support during her re-entry.[69]

53. [redacted]'s release plan is thoughtful and sets her up to succeed in the Haitian community upon release. She will have a job, family, a stable living situation, and will continue to receive support and counseling for her addiction through AA or similar programs.[70]

54. [redacted] will use her skills to work in hospitality and food service upon her release and return to Haiti; she already has a job offer in her native country.[71] In her goal statement, [redacted] says, "I am not afraid of hard work, or of long hours. I plan to work in the kitchen of the school, to cook, to ensure sanitary and healthy conditions, and to keep the children well fed and satisfied so they have the right frame of mind to be able to study and learn. I can already envision my role in the school kitchen, and my responsibilities there."[72]

55. [redacted] developed thoughtful, realistic plans for her release, which speak to her readiness to return to her community in Haiti and live as a productive, compassionate member of society.

The Parole Packet

56. In advance of her hearing, [redacted] submitted an extensive parole packet to the Board demonstrating her rehabilitation, release plans, and support from the community.[73]

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[68] Exhibit G at B-056.
[69] Exhibit G at B-058.
[70] Exhibit D.
[71] Exhibit F at B-037, Exhibit D at B-027.
[72] Exhibit F at B-039.
[73] Exhibit J.

57. The packet contained the following: a personal statement from [redacted] reflecting on her growth throughout prison and expressing her profound remorse and responsibility for the crime; her goals and a detailed action plan upon release which includes a concrete job offer in food service in Haiti; her deportation order to Haiti; her COMPAS Risk Assessment; twenty-seven letters of support, including thirteen letters of support from correctional officers, four letters of support from educators and staff, and ten letters of support from family and friends; a training achievement and potential employment report; a four-page resume detailing her array of employment, and educational accomplishments; thirty-four certificates and awards for each of her successful programmatic and educational endeavors; and an academic status report.[74]

[74] These are now separate exhibits: Exhibit F; Exhibit D, Exhibit E, Exhibit H, Exhibit G, Exhibit I.

WHEREFORE, As discussed more fully in the accompanying Memorandum of Law, [redacted] should be afforded a *de novo* parole release hearing before a different panel because the Parole Board's decision to deny her parole was unlawful, arbitrary and capricious, and an abuse of discretion. Petitioner respectfully requests that the Court grant the relief requested herein and any further relief that the Court deems just and proper.

Dated: New York, NY

October 20, 2017

BRETT DIGNAM, ESQ.

Counsel for Petitioner

MORNINGSIDE HEIGHTS LEGAL SERVICES
Columbia Law School
435 West 116th Street, Room 831
New York, NY 10027
Tel: 212-854-4291
Fax: 212-854-3554
bdigna@law.columbia.edu

Law Student Interns

Chloe Bootstaylor '18
Shane Rogers '19
Katherine Simon '18

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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.

MEMORANDUM OF LAW IN SUPPORT OF PETITION

BRETT DIGNAM, ESQ.
Counsel for Petitioner

MORNINGSIDE HEIGHTS LEGAL SERVICES
Columbia Law School
435 West 116th Street, Room 831
New York, NY 10027
Tel: 212-854-4291
Fax: 212-854-3554
bdigna@law.columbia.edu

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INTRODUCTION

[redacted] is fifty-one years old and serving an indeterminate sentence of twenty years to life for second-degree murder and first-degree burglary. During her twenty-seven-year confinement, [redacted] has found stability, invested heavily in her rehabilitation, and developed an exemplary institutional record. She has transformed her life by participating in a tremendous number of programs, with a focus on those that deal with substance abuse, anger, and remorse. See Ex. I. She "had plenty of time to reflect on and gain insight into [her] past behavior and unjustifiable actions," and, as a result, takes full responsibility for her crime and has deep remorse for her actions. See Ex. F at B-037.

On January 10, 2017, [redacted] had a hearing before Board of Parole Commissioners W. Smith, Sharkey, and Cruse. See Ex. K. That day, the Board, which had six vacancies and consisted of only thirteen commissioners, held 145 hearings.[1] Despite the wealth of information the Board had establishing [redacted]'s commitment to rehabilitation, the Board focused exclusively on twenty-seven year old facts that [redacted] cannot change and denied her parole for the fifth time.[2]

[redacted] challenges the Board's determination in this petition on the grounds that: (1) the Board violated lawful procedure by failing to meaningfully consider the relevant factors required by Exec. Law § 259-i(2)(c)(A); (2) the Board violated the law mandated by N.Y. Exec.

[1] This information was collected from the Parole Board's public calendar, which lists parole interview information by month and last name for each inmate scheduled to appear before the Board. See Parole Board Interview Calendar, Dep't of Corrections and Community Supervision, http://www.doccs.ny.gov/calendar.html (last visited Sept. 18, 2017); see also NEW YORK STATE ASSEMBLY STANDING COMMITTEE ON CORRECTION, ANNUAL REPORT OF THE 2016 LEGISLATIVE SESSION, at 7 (2016), http://nyassembly.gov/comm/Correct/2016Annual/index.pdf. The Board is statutorily allowed to have 19 commissioners, but at the end of 2016, it only had 13 commissioners sitting and possibly only 10 or 11 that were active. Governor Cuomo appointed several commissioners by the end of 2016 to bring the current number to 17 commissioners, but they were not confirmed until June of 2017. See N.Y. State Corrections and Community Supervision (July 2017), http://www.doccs.ny.gov/ParoleBoardMembers.pdf (listing current commissioners).

[2] Her previous appearances were in 2009, 2011, 2013, and 2015

Law § 259-c(4), and was therefore arbitrary and capricious, by denying release based solely on the seriousness of her crime; (3) the Board unlawfully considered non-statutory criteria; and (4) the Board violated lawful procedure by failing to provide a detailed, non-conclusory written decision. The decision is irrational, arbitrary and capricious, and it is the duty of the court to step in to correct such injustice. Matter of King v. New York State Div. of Parole, 598 N.Y.S.2d 245, 251 (1st Dep't 1993), aff'd, 632 N.E.2d 1277 (N.Y. 1994) [I]t is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors . . . and where the record convincingly demonstrates that the board did in fact fail to consider the proper factors, the courts must intervene.").

LEGAL FRAMEWORK

The New York State Parole Board is instructed to grant an inmate parole upon determining that:

> [T]here 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.

N.Y. Exec. Law § 259-i(2)(c)(A).

In making that determination, the Parole Board must consider the following factors:

(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates [...]
(iii) release plans including community resources, employment, education and training and support services available to the inmate [...]
(iv) any deportation order issued by the federal government [...]
(v) any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased [...]
(vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement;

> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

Id. § 259-i(2)(c)(A)(i)-(viii); see also 9 N.Y.C.R.R. § 8002.2.

Due to changes in New York law in 2011, the Parole Board must now evaluate "whether an inmate is rehabilitated and ready for release." Rabenbauer v. New York State Dep't of Corr. & Cmty. Supervision, 995 N.Y.S.2d 490, 493 (Sup. Ct. 2014); see N.Y. Exec. Law § 259-c(4). The Board recently strengthened its mandate to focus on the applicant's rehabilitation. Specifically, in September of 2016, before [redacted]'s hearing, there were proposed changes to 9 N.Y.C.R.R. § 8002.2. See N.Y. PAROLE BOARD DECISION MAKING, I.D. No. CCS-39-16-00004-P, proposing changes to 9 N.Y.C.R.R. § 8002.2(a). The proposal suggested three significant changes: the panel conducting the parole release interview must (1) "discuss with the inmate each applicable factor set forth in § 8002.2;" (2) "be guided by the COMPAS score," rather than consider the COMPAS score as a factor; and (3) give an "individualized reason" for any departure from the COMPAS score resulting in the petitioner's denial of release.[3] Id. On September 27, 2017, these significant proposed changes were adopted.[4] 9 N.Y.C.R.R. § 8002.2(a).

When reviewing parole applications, the Board has discretion to weigh the statutory factors, but several requirements constrain its decision-making. First, the Board cannot base its decision to deny release solely on the severity of the inmate's underlying offense. See, e.g., Rios v. New York State Div. of Parole, 836 N.Y.S.2d 503 *4–*5 (Sup. Ct. 2007) (holding that the Board acted arbitrarily because it failed to rationally explain its parole denial when all factors

[3] The proposed regulations further expanded on the type of assessment that the Board must consider. Now, "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." 9 N.Y.C.R.R. § 8002.2(a). A COMPAS score is considered a validated risk assessment instrument and the Board must still give factually individualized reasons for departing from this standard. Id.

[4] The regulations were adopted after [redacted]'s hearing, but the crux of the new legislation was proposed and being debated when [redacted] went in front of the board. Therefore, the new regulations are no surprise.

weighed in favor of release except the underlying offense of murder). While one of the permissible statutory bases for denying release is that doing so would "deprecate the seriousness of [the crime]," the Board must explicitly show that an inmate's crime goes "well beyond the 'unjustifiable taking and tragic loss of human life' that describes every murder." Matter of Phillips v. Dennison, 834 N.Y.S.2d 121, 125 (1st Dep't 2007); see also King v. New York State Div. of Parole, 598 N.Y.S.2d 245, 251 (1st Dep't 1993), aff'd, 632 N.E.2d 1277 (N.Y. 1994) (holding that there must be a showing of "significantly aggravating or egregious circumstances").

Second, while the Board does not need to weigh each factor equally, it must consider all relevant factors. King, 598 N.Y.S.2d at 250 (noting that the Board must "give fair consideration to each of the applicable statutory factors as to every person who comes before it"). The relevant factors include a petitioner's institutional record, prior criminal history, release plans, deportation order, COMPAS scores, and seriousness of the crime. N.Y. Exec. Law § 259-i(2)(c)(A)(i)-(viii); 9 N.Y.C.R.R. § 8002.2(a), (d). Furthermore, when the Board considers the statutory factors, it must center its analysis around the time the inmate appears before the Board. See Platten v. New York State Bd. of Parole, 5 N.Y.S.3d 702, 706 (Sup. Ct. 2015) ("The role of the Parole Board is . . . to determine whether, as of this moment, given all the relevant statutory factors, [an inmate] should be released.") (citing King, 598 N.Y.S.2d at 251).

Third, in making its decision, the Board must confine itself to the statutory factors. Courts have found that using factors or guidelines that are not provided in N.Y. Exec. Law § 259 is an improper interpretation of the guidelines. Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788, 791 (1994) (finding that the Board acted improperly in denying parole release to the petitioner when it considered non-statutory factors).

Finally, the Board must explain its reasons for denial in a written decision "in detail and not in conclusory terms." N.Y. Exec. Law § 259-i(2)(a). At a minimum, "the statement of reasons should enable the reviewing body to determine whether parole has been denied for an impermissible reason." Matter of Watkins v. Caldwell, 387 N.Y.S.2d 177, 179 (4th Dep't 1976); see also Prout v. Dennison, 809 N.Y.S. 2d 261, 262 (3d Dep't 2006) (holding that "the Board's terse decision, lacking any analysis of statutory and regulatory criteria, makes it impossible for this Court to give meaning to the language used by the Board") (internal citations omitted).

Section § 7801 of the New York Civil Practice Law and Rules (C.P.L.R.) authorizes an Article 78 petition that seeks review of a Parole Board determination. Section 7803 sets out the only questions that may be raised in a proceeding under this article:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

N.Y.C.P.L.R. § 7803. A determination violates lawful procedure and is therefore arbitrary and capricious when the Board: (1) failed to give fair consideration to each of the applicable statutory factors, Matter of Johnson v. New York State Div. of Parole, 884 N.Y.S.2d 545, 547 (4th Dep't 2009); (2) did not adequately weigh every other applicable statutory factor against the seriousness of the petitioner's crime, Rios, 836 N.Y.S.2d at *3; (3) considered non-statutory factors, King, 83 N.Y.2d at 791; (4) focused on distant history rather than present suitability for release, Platten, 5 N.Y.S.3d at 705-08; 5) failed to articulate a rational basis why weighing the

factors led it to find that "there is a reasonable probability that if petitioner is released, he would [not] live and remain at liberty without violating the law, and that his release is [...] incompatible with the welfare of society and will [...] so deprecate the seriousness of his crime as to undermine respect for law;" Thwaites v. New York State Bd. of Parole, 934 N.Y.S.2d 797, 802 (Sup. Ct. 2011) (citing N.Y. Exec. Law § 259-i(2)(c)(A)); or 6) did not inform the inmate of the factors and reasons for denial in detail and in non-conclusory terms, Mitchell v. New York State Div. of Parole, 871 N.Y.S.2d 688–89 (2d Dep't 2009).

ARGUMENT

I. THE PAROLE BOARD'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO PROPERLY WEIGH THE RELEVANT STATUTORY FACTORS.

The Parole Board had ample evidence establishing [redacted]'s rich record of accomplishments and profound growth in prison. See Ex. I. As demonstrated by her parole packet, she has taken advantage of a tremendous number of rehabilitative opportunities, including therapy, counseling, and group programs, and has received no disciplinary infractions in the last decade. The Board also had evidence that she gained valuable, transferable skills by maintaining various food service jobs, and that she plans to use those skills to help Haiti, a country that is still recovering from an earthquake in 2010, when she is mandatorily deported there. However, it merely listed a few items in a perfunctory manner and cursorily concluded the crime was too serious to grant parole. The Board's failure to adequately consider the mandated statutory factors is irrational and unlawful.

A. The Board acted arbitrarily and capriciously when it failed to consider statutory factors favoring [redacted]'s release.

While the Board has discretion to weigh the statutory factors under Exec. Law § 259-i(2)(c)(A) and § 259-c, "it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors." King, 598 N.Y.S.2d at 250; Coaxum v. New York State Bd. of Parole, 827 N.Y.S.2d 489, 494 (Sup. Ct. 2006) (overturning the Board's summary denial of a parole application because the statutory guidelines of "actual consideration of factors means more than acknowledging that evidence of them was before the Board"). In [redacted]'s case, these factors include her low COMPAS scores, remarkable institutional record, extensive programmatic accomplishments, dedicated rehabilitative initiatives, vocational and work experiences, therapy, documented positive interactions with staff and inmates, final deportation order to Haiti and detailed release plans there, and no prior violent criminal history. N.Y. Exec. Law § 259-i(2)(c)(A)(i)-(viii).

[redacted] embodies a rehabilitated offender. As exemplified by her parole packet, every statutory factor other than the underlying offense weighs in [redacted]'s favor and she in no way poses "a current danger to society." See Cappiello v. New York State Bd. Of Parole, 800 N.Y.S.2d 343 at *5 (2004) ("The Parole Board's failure to qualitatively determine whether petitioner presented a current danger to society, based on all of the relevant statutory factors, was a clear abdication of its statutory duty.").

First, [redacted]'s overall low COMPAS score demonstrates her extremely low likelihood of reoffending. See Ex. H. Her 3 out of 10 score for re-entry substance abuse, relied on by the Board in its denial, indicates that she will not pose a substantial risk of re-entry substance abuse. See Matter of Hawthorne v. Stanford, 22 N.Y.S.3d 640, *4 (3d Dep't 2016) (finding the Board's parole denial irrational and noting that a score of three out of ten in a COMPAS assessment is low). [redacted]'s COMPAS score was a 2 for criminal involvement

and reentry financial, and a 1 for history of violence, prison misconduct, risk for committing felony violence, arrest risk, abscond risk, negative social cognitions, low self-efficacy/optimism, low family support, and entry employment expectations. [redacted]'s overall low COMPAS score is one of many factors supporting her release. See Cappiello, 800 N.Y.S.2d at * 5; King, 598 N.Y.S.2d at 433.

Second, [redacted] took advantage of countless opportunities to rehabilitate herself throughout the past twenty-seven years. She completed numerous courses designed to deal with anger, violence, and emotional issues, including therapy and assistance, Alternatives to Violence (AVP), Houses of Healing Emotional Awareness/Healing course, Down on Violence, Anger and You, Writing to Set My Spirit Free: Journaling Our Grief, and Social Thinking Skills Program for Non-Aggressive Problem Solving. See Ex. I at B-093, 094, 101, 102, 122, 123.

[redacted] impressed the Taconic staff to such an extent that they asked her to train to become a workshop facilitator. She participated in over 185 hours as a facilitator for the Alternatives to Violence program, and has been a volunteer facilitator assisting other young inmates in the prison for more than sixteen years. Ex. I B-097–100, B103–111, and B113–117. Her participation in these rehabilitative programs has been transformative and [redacted] has not had any disciplinary infraction in the past decade.

Third, [redacted] filled in gaps that existed in her early education due to her chaotic childhood and extended her education into vocational areas. She completed preparatory courses in Math and English and completed her GED High School Certificate in custody. Ex. I at B-096, 118, 120-21. [redacted] then gained vocational skills by taking numerous courses in horticulture, cooking and food preparation. Ex. I at B-082, 85, 95, 112. These courses allowed her to develop supervisory skills, which she uses while working in the Taconic Facility kitchen.

See Ex. I at B-088. Her supervisors describe her as "dependable . . . timely and responsible." Ex. G at B-043. In addition to preparing food, she handles a myriad of administrative tasks and deals regularly with civilian cooks.

Fourth, [redacted] amassed an impressive record of peer support. Her respectful and professional interactions are exemplified in the glowing support letters from correctional officers, educators and staff, as well as family and friends. Ex. G; see Cappiello, 800 N.Y.S.2d at *5, *12 (ordering a de novo hearing when the Parole Board's decision only mentioned Cappiello's "merciless assault on two vulnerable victims" despite his numerous "impressive" support letters); King, 598 N.Y.S.2d at 433.

Fifth, [redacted]'s minor prior criminal history also weighs in her favor. Courts have repeatedly overturned parole denials when the Board did not adequately consider the petitioner's lack of prior violent criminal history. See, e.g., Rossakis v. New York State Bd. of Parole, 41 N.Y.S.3d 490, 492-93 (1st Dep't 2016) (finding parole denial arbitrary and capricious when the Board did not consider, among other factors, "her lack of any prior violent criminal history"); Platten, 5 N.Y.S.3d at 707 (granting a de novo parole hearing when the petitioner did not have "any type of escalating history of violence leading up to the instant offense, nor any propensity to commit violent behavior"); Rabenbauer, 995 N.Y.S.2d at 495 (remanding for a new parole hearing when the petitioner had an "unremarkable" non-felony youthful offender history and no indication of "any type of escalating history of violence leading up to the instant offense").

As the hearing transcript indicates, [redacted] had never been convicted of a felony or a violent crime prior to the instant offense. Ex. K at 4:14-5:1. Her minor prior criminal history, instead, consists of non-violent misdemeanors. Specifically, [redacted] was convicted only of trespassing and prostitution, incidents that resulted in her confinement in county jail for

approximately one week. Id. Her past criminal history is, therefore, yet another factor favoring her release.

Finally, the Parole Board failed to sufficiently weigh [redacted]'s final order of deportation to Haiti, her birthplace, which will be executed upon her release. See Ex. E at B-035. While a deportation order does not require release on parole, the Board is nonetheless required to genuinely consider this fact under N.Y. Exec. Law § 259-i(2)(c)(A). See Matter of Delrosario v. Stanford, 34 N.Y.S.3d 696 (3d Dep't 2016); Thwaites, 934 N.Y.S.2d at 797.

Courts have ordered new parole hearings when Parole Boards inadequately considered a petitioner's deportation order. See Thwaites, 934 N.Y.S.2d at 802 (ordering new hearing when the Board did not specify "whether consideration was given to whether release to the deportation order with mandatory removal was appropriate under the circumstances of this case. Such consideration is required by the parole statute"); Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 41 N.Y.S.3d 449 (Sup. Ct. 2015), aff'd on other grounds, 140 A.D.3d 34 (3d Dep't 2016). In Hawkins, the court found no rationale, other than the severity of the underlying offense, to justify the Board's denial of parole. Id. at *4. In so finding, the Hawkins court pointed to the petitioner's "final order of deportation to the United Kingdom, where authorities are aware of his status and prepared to assist him with housing and other opportunities. His extended family in London is prepared to house and assist him upon his return to London." Id. at *5.

[redacted] is similar to Hawkins. She has a highly detailed release plan that includes her mandatory deportation and the full support of a strong network of family and friends who are committed to assisting with her re-entry. Ex. G at B-055-58. She has offers of housing in Haiti that will be available to her upon release and thoughtful plans to develop nutrition programs for victims of the earthquake in Haiti. Ex. D at B-027-28. Although the commissioners

acknowledged the mandatory deportation order during the hearing, they failed to engage her in any discussion about her plans after deportation. Rather, Commissioner Smith admonished her, albeit incorrectly, on the penalty that she would face should she decide to illegally re-enter the country.[5] Ex. K at B-155.

In fact, [redacted]'s deportation order illustrates that the Board's decision is more irrational than those that this court has overturned. In Rossakis, for example, the court granted the petitioner a new parole hearing when the Parole Board failed to give genuine consideration to "petitioner's remorse, institutional achievements, release plan, and her lack of any prior violent crime." 41 N.Y.S.3d 490 at 494. Here, not only does [redacted] have deep remorse for her crime that she has repeatedly expressed, a remarkable record of institutional achievements, a detailed release plan, and no prior violent criminal background, but she also has a final deportation order. In light of these positive facts, there is at least a reasonable probability that, if released, [redacted] "will live and remain at liberty without violating the law." N.Y. Exec. Law § 259-i(2)(c)(A). The Board did not give genuine consideration to her deportation order or plans upon release and, therefore, its decision was arbitrary and capricious.

As every statutorily required factor other than seriousness of the crime weighs in [redacted]'s favor, the Board's cannot reasonably explain its determination that [redacted]'s release would be incompatible with the welfare of society. Cappiello, 800 N.Y.S.2d at *4. By denying [redacted] parole release, the Board therefore "made clear that those factors no matter how impressive, could not justify . . . release from prison when weighed against the seriousness of [her] crime." Rios, 836 N.Y.S.2d at *3. The Parole Board did not identify one thing that [redacted]

[5] In response to Commissioner Smith's question about how long [redacted] would be sentenced to prison should she return to the United States illegally, [redacted] correctly stated 20 years. See 8 U.S.C. § 1326(B)(2) (the maximum sentence is twenty years for reentry of an individual whose removal was subsequent to a conviction for commission of an aggravated offense). Nonetheless, Commissioner Smith stated she was incorrect.

could do in order to improve her chances of release at her next parole hearing. McBride v. Evans, 988 N.Y.S.2d 523 at *3 (Sup. Ct. Jan. 13, 2014). The Board's denial of parole was arbitrary, unsupported by the record, and violated lawful procedure. It must therefore be reversed and [redacted] must be granted a de novo hearing.

B. **The Board failed to consider [redacted]'s rehabilitation and readiness for re-entry.**

As mentioned, the Executive Law was amended in 2011 to modernize the work of the Board of Parole. See N.Y. Laws 2011, Ch. 62, Part C, Subpart A, § 38-b. Pursuant to that legislation, Executive Law § 259-c(4) required the Parole Board to promulgate new procedures, which "shall incorporate risk and needs assessment instrument 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." Id. This pivot demonstrates a forward looking mentality of the legislature on the issue of parole. See Rabenbauer, 995 N.Y.S.2d at 493 ("The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release."). Professor Phillip M. Genty commented on these significant changes by noting:

> [The 2011 amendments] modernize the work of the Parole Board by requiring the board to adopt procedures that incorporate a growing body of social science research about assessing post-release needs and recidivism risks. These procedures will be designed to measure rehabilitation and facilitate better informed parole release decisions.
>
> [T]he most important change is the replacement of static, past-focused "guidelines" with more dynamic present and future-focused risk assessment "procedures" to guide the Parole Board. . . This addition of an explicit requirement that the Parole Board adopt and be guided by procedures that require it to evaluate "rehabilitation" and "the likelihood of success . . . upon release"

> signals a critical reform and modernization of parole practices. Such procedures . . . will rationalize parole decision- making by placing the focus primarily on who the person appearing before the Parole Board is today and on whether that person can succeed in the community after release, rather than – as under the previous "guidelines" – on who the person was many years earlier when she or he committed the crime. This is a shift in policy of potentially sweeping significance.

Phillip M. Genty, "Changes to Parole Laws Signal Potentially Sweeping Policy Shift," N.Y. Law Journal, September 1, 2011. The Parole Board has now taken important steps in this direction by promulgating new regulations that mandate, inter alia, consideration of validated risk assessment tools.

[redacted] exemplifies the rehabilitative focus that the amendment created and that courts have recognized. See generally McBride, 988 N.Y.S.2d at *2 (recognizing that the Legislature determined that "rehabilitation is possible and desirable" and remanding parole denial when petitioner participated in positive activities while incarcerated, had a low COMPAS risk assessment, and agreed to substance treatment upon re-entry); Stokes v. Stanford, 993 N.Y.S.2d 646 at *2 (Sup. Ct. June 9, 2014) (finding that the Board's parole denial failed to consider the petitioner's rehabilitation because the petitioner had a positive prison disciplinary history and made efforts toward rehabilitation, such as obtaining a GED).

[redacted]'s program accomplishments demonstrate that she is rehabilitated and will be a law-abiding citizen of Haiti upon release. She has focused on her rehabilitation by regularly attending Alcoholics Anonymous and completing Comprehensive Alcohol and Substance Abuse Treatment Program (ASAT), as well as the My Sister's Place substance abuse and domestic violence workshop. Ex. I at B-085, B-121. As a result of her efforts, she has been and still is abstinent from alcohol for the past twenty-seven years. See Ex. F.

The Parole Board noted that [redacted]'s re-entry substance abuse COMPAS score (three out of ten) places her at a probable risk for re-entry substance abuse and relied on this score as a reason to deny her parole. See Ex. B. The Board did not, however, consider the COMPAS wording in context: "[redacted]'s substance abuse scale score suggest that she may have a substance abuse problem and that substance abuse treatment intervention . . . upon release may be warranted." Ex. H at B-077 (emphasis added). The Board's reliance on her re-entry substance abuse score of three does not reflect her successful completion of programs to combat her alcohol dependency or her plans to continue such programming after her release. See Hawthorne, 22 N.Y.S.3d 640 at *4 (finding that a three out of ten COMPAS score is low). Indeed, there is no indication that [redacted] will suddenly use substances once she is released. [redacted] has not only abstained from alcohol for more than twenty-seven years, but also has never received an alcohol-related disciplinary infraction. [redacted]'s actions, therefore, truly demonstrate the rehabilitative spirit of the 2011 statutory amendments.

Lastly, even if there is a genuine concern about substance abuse after re-entry, the Board could issue release conditions, such as requiring the inmate to attend substance abuse programs. See N.Y. Exec. Law § 259-i(2)(a). Significantly, DOCCS did not even conduct an in-depth substance abuse assessment, as recommended by the COMPAS report, to determine what type of treatment, if any, would be appropriate after release. See Ex. H.

In summary, the Parole Board failed to apply the rehabilitative aspect of the 2011 amendments, as reinforced by the 2017 regulatory changes, to [redacted]'s parole decision. Instead, the Parole Board attempted to set bad precedent by fixating and stigmatizing substance abuse for those serving long sentences as if substance abuse cannot be controlled or administratively monitored when released. Taking advantage of as many programs as possible

while incarcerated should be encouraged for those with prior substance abuse problems; however, the Parole Board's decision demonstrates that parole is unlikely despite extensive efforts to address substance abuse issues. Ultimately, because the Parole Board failed to consider [redacted]'s rehabilitation and readiness for re-entry, the decision is arbitrary and capricious and thus warrants judicial intervention.

II. THE BOARD ACTED UNLAWFULLY WHEN IT FOCUSED SOLELY ON THE SERIOUSNESS OF THE CRIME.

The Board's discretion is further limited in that it cannot deny an inmate parole based solely on the seriousness of the offense. Courts have repeatedly found it irrational to base a decision exclusively on the seriousness of the offense — even serious, violent crimes — if the petitioner's record otherwise shows significant rehabilitation and likely success upon re-entry. See Rossakis, 41 N.Y.S.3d 490 at 491 (holding that the Board improperly denied parole to a petitioner who was convicted of second degree murder of her husband); Ely v. New York State Bd. of Parole Index, No. 100407/16 (Sup. Ct. Jan. 20, 2017) (holding that a denial of parole was arbitrary and capricious when the Board solely focused on petitioner's murder of her husband); Rabenbauer, 995 N.Y.S.2d at 493 (finding the Board acted arbitrarily and capriciously by denying parole solely on the basis of the offense where petitioner was convicted of strangling his 25-year old wife and burying her body out of state); Bruetsch v. New York State Dep't of Corr. & Cmty. Supervision, 992 N.Y.S.2d 157 (Sup. Ct. May 11, 2014) (ordering de novo hearing where petitioner was denied parole solely on the basis of shooting and killing his estranged wife, a New York City police officer).

As the First Department explained in King:

> Certainly, every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of human life. Since, however, the Legislature has determined that a murder conviction per se

> should not preclude parole, there must be a showing of some aggravating circumstances beyond the seriousness of the crime itself.

King, 598 N.Y.S.2d at 251.

When the Board summarily mentions that every statutorily enumerated factor weighs in the petitioner's favor and nonetheless denies parole, this suggests that the Board unlawfully focused exclusively on the petitioner's offense. Rabenbauer, 995 N.Y.S.2d at 495 (concluding that the Board must have only looked at the seriousness of the crime when the Board "discussed other factors and Petitioner's achievements while in prison in a very perfunctory manner, and in fact never discussed anything other than the instant offense in detail"); see also Rossakis, 41 N.Y.S.3d 490 at 493 (remanding for a de novo hearing because "[t]he Board summarily listed petitioner's institutional achievements, and then denied parole with no further analysis"); Cappiello, 800 N.Y.S.2d at *5 (ordering a de novo hearing when the Board's decision only referred to petitioner's "merciless assault on two vulnerable victims" to justify its denial); Coaxum 827 N.Y.S.2d at 494 ("actual consideration of factors means more than acknowledging that evidence of them was before the Board."). In Pulinario, the Board denied parole to the petitioner, who was convicted for second degree murder, and perfunctorily dismissed the factors that weighed in the petitioner's favor in its written decision:

> The panel has considered your many accomplishments, your good conduct, your letters of support, the risk assessment and all factors required by law. However, the scenario and your conduct during the instant offense are concerning and describe a deviated and dangerous person who could impose a threat to the community. Parole at this time is denied.

Pulinario v. New York State Dept. of Corrections and Community Supervision, 988 N.Y.S.2d 525 at *2 (Sup. Ct. Feb. 11, 2014). The Court vacated this decision and held that the Board irrationally denied the petitioner's parole application. Id.

Courts look to the Board's written decision and parole hearing transcript to determine whether the Board placed impermissible weight on the severity of the crime. See Fraser v. Evans, 971 N.Y.S.2d 332, 333 (2d Dep't 2013). Here, the Board failed to adhere to its statutory duty to look beyond the seriousness of [redacted]'s crime. While the Board did list the required statutory factors, it did so in a perfunctory manner. This superficial reference demonstrates that the Board did not meaningfully consider all relevant factors but rather relied exclusively on the seriousness of the crime. See Rabenbauer, 995 N.Y.S.2d at 493.

In its written decision, the Board perfunctorily mentioned the other statutory factors. Ex. A; see Rios, 386 N.Y.S.2d at *3. Just as in Rabenbauer, 995 N.Y.S.2d at 495, the Board here made cursory reference to [redacted]'s "improved" behavior, case plan, programming, letters of support, immigration status, as well as the comments made by the district attorney's office and community opposition, "if any." Using similarly vague language, the Board also asserted that her record of alcohol abuse prior to the instant offenses is "of significant concern" and that her COMPAS score "is 'probable' for reentry substance abuse." The Board's passing reference to the mandated statutory factors reveals that such factors served a limited role, if any, in the Board's analysis.

Further, the newly promulgated regulations require the Parole Board to "specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure" for denials. N.Y.C.R.R. § 8002.2(a). Given [redacted]'s impressively low COMPAS score, the Board must substantiate any departure from that assessment. Because the Board failed to put forth an individualized reason for its departure, its decision was irrational.

The hearing transcript further establishes that the Board unlawfully relied solely on the seriousness of [redacted]'s crime. See Ex. K; see also Fraser, 971 N.Y.S.2d at 333. The transcript shows that every other factor was discussed in merely a perfunctory manner, while the underlying crime was intimately discussed. See Rossakis, 41 N.Y.S. 490 at 494; Pulinario, 988 N.Y.S.2d at *4 (contrasting the "overwhelming emphasis" on the offense and events leading up to it with the "passing references" and "perfunctory mention" of factors that favored petitioner's release). For example, Commissioner Smith, who led the questioning, mentioned [redacted]'s deportation order, but then only asked whether she knew the penalty for illegal re-entry, should she return to the United States illegally after being deported. Ex. K at B-154. Commissioner Smith further pointed to the fact that she has no disciplinary infraction since 2008, Ex. K at B-158, but did not engage in any analysis that explains why the seriousness of [redacted]'s original crime still outweighed her exceptional institutional record.

Moreover, [redacted]'s consistently low COMPAS scores, as discussed above, were only briefly mentioned during the hearing. Ex. K at B-157. While Commissioner Smith stated that [redacted] scored low "in many areas," he did not mention that she received the lowest possible score (1 out of 10) for nine of the twelve factors and the second lowest score (2 out of 10) for two. Ex. K at B-157; Ex. H. Rather, he expressed a "concern" about [redacted]'s re-entry substance abuse score—"probable". Ex. K at B-157. He then proceeded to ask about how alcohol affected her crime. At no point did the Board ask about or consider [redacted]'s long institutional record of Alcoholics Anonymous attendance, substance abuse treatment, and sobriety.

In stark contrast to the ten lines devoted to [redacted]'s COMPAS scores, the Board laboriously pored over the details of the underlying crime—for fifty-one lines. See Ex. K.

Commissioner Smith asked about her sentence, whom she was living with at the time, how old she was, her alcohol consumption the day of the crime, the number of times she stabbed the victim, and whether the police found her with blood on her clothing. Commissioner Smith did not discuss any other statutory factor in detail.

The Board need not give each factor equal weight; perfunctory mention of each factor during the hearing is insufficient because "actual consideration of factors means more than acknowledging that evidence of them was before the Board." Coaxum, 827 N.Y.S.2d at 494. The transcript and decision provide evidence that the Board "actually considered" only the seriousness of the crime and superficially acknowledged the other statutorily mandated factors.

III. THE BOARD UNLAWFULLY CONSIDERED NON-STATUTORY CRITERIA.

Courts have found that using factors or guidelines that are not provided in Exec. Law § 259 is an improper interpretation of the guidelines. King, 83 N.Y.2d at 791 (overturning Parole Board's decision when "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"); see also King, 598 N.Y.S.2d at 250 (finding that the Parole Board acted improperly in denying parole release to petitioner because the decision of the Board was based on a fundamental misunderstanding of its role and its power, and was not in accord with statutory requirements). By making a decision not in accordance with the law, the Parole Board's decision is arbitrary and capricious. Morris v. New York State Dept. of Corr. & Community Supervision, 963 N.Y.S.2d 852, 854 (Sup. Ct. 2013).

There are only a few Parole Board decision hearings, which are at least two decades old, where the Board relied on the petitioner's prior substance abuse as a reason for denial. McLain v. New York Sate Dept. of Parole, 611 N.Y.S.2d 629, 630 (2d Dep't 1994) (affirming the Board's

written statement setting forth its reasons for denying parole, i.e., the petitioner's "pattern of offenses, history of alcohol abuse and the seriousness of the present offense"), People ex rel. Herbert v. New York State Bd. Of Parole, 468 N.Y.S.2d 881 (1st Dep't 1983) (finding that denial of parole was justified when the decision was based on addiction to drugs). However, courts since then have not followed this precedent, and for good reason. Statutory guidelines do not list pre-incarceration behavior as criteria; the only mention of pre-incarceration activity refer to "activities following arrest prior to the inmate's current confinement" and "prior criminal record." N.Y. Executive Law § 259. The statutory guidelines and rehabilitative nature of the 2011 amended guidelines, as well as the newly promulgated regulations, clearly demonstrate that the Parole Board should not deny parole based on pre-incarceration history of substance use.

The Parole Board incorrectly considered [redacted]'s pre-incarceration history of substance abuse when making their decision. Despite receiving extensive documentation that pertained to the guideline factors, one of the reasons the Parole Board denied parole was because of a "significant concern" of [redacted]'s alcohol abuse prior to her instant offenses. Specifically, the Board stated that "of significant concern is your record of alcohol abuse that includes prior to your instant offenses." Ex. A at B-002. However, abusing alcohol is not a prior criminal activity or activity following her arrest but prior to confinement.

Because substance abuse prior to an inmate's current offense is not a factor included in N.Y. Exec. Law § 259, the Board's decision was unlawful and a clear misunderstanding of its amount of discretion. Moreover, allowing the Parole Board's rationale to set precedent is dangerous and not aligned with the legislative intent of the guidelines. This rationale stigmatizes recovering alcoholics as well as indicates to those incarcerated with prior substance abuse that they cannot be released even if they take exceptional steps to recover while incarcerated.

In summary, the Parole Board acted impermissibly in denying [redacted] release because it strayed from appropriate criteria and instead inquired into pre-incarceration substance abuse use prior to the current offense. It is clear that the Parole Board evaluated [redacted]'s application for release on parole not on the appropriate statutory criteria, but on a misguided view of its role, and a usurpation of the legislative intent of the guidelines. Judicial intervention is warranted because there is a showing of irrationality bordering on impropriety; therefore, the Parole Board's decision to deny parole was arbitrary or capricious.

IV. THE BOARD'S DECISION VIOLATED LAWFUL PROCEDURE BECAUSE IT FAILED TO EXPLAIN ITS DENIAL IN DETAILED OR NON-CONCLUSORY TERMS.

The Parole Board's written decision failed to explain its denial "in detail and not in conclusory terms" as required by Exec. Law § 259-i(2)(a). In doing so, the Board violated lawful procedure and failed to articulate a rational basis for its determination. Vaello v. Parole Bd. Div. of State of New York, 851 N.Y.S.2d 745, 747 (3d Dep't 2008) (ordering a new hearing because the written determination did not comply with the statutory requirements); Prout, 809 N.Y.S.2d at 262 (granting a new hearing because the Board's "terse decision" did not explain its denial); Bruetsch, 992 N.Y.S.2d at *1 (concluding the Board issued an inadequate decision that "simply restated the usual and predictable language contained in so many parole release denial decisions, with no specificity or other explanation to justify parole denial").

Courts find parole decisions unlawfully conclusory when they cannot figure out the basis of the denial. As the court explained in Vaello,

> Inasmuch as "judicial review of [an] administrative determination is limited solely to the legitimacy of the grounds invoked by [the administrative body] as the basis for its decision," we run the risk of impermissibly relying on a ground not intended by the Board if we are left in the position to glean its intent from vague, inconclusive language.

851 N.Y.S.2d at 747. The new regulations reinforce the Board's lawful duty to articulate detailed reasons for denials of release. N.Y.C.R.R. § 8002.2(a). Further, in light of the fact that every factor other than the severity of the crime favors [redacted]'s release, the Board has a heightened burden to state its decision in non-conclusory terms. See Rios, 836 N.Y.S.2d at *3 (given that "almost all of the statutory factors . . . weigh in petitioner's favor . . . the court would expect a rational explanation by the Parole Board for its decision as to why parole was nonetheless denied").

The Board failed to fulfill its obligation. Its decision does not articulate any legitimate explanation of its rationale for denying [redacted] release, and was therefore unlawfully conclusory and vague. See Vaello, 851 N.Y.S.2d at 747; Exec. Law § 259-i(2)(a). The opinion states what the Board found as positive factors, lists what else it considered, and concludes that "release would deprecate the seriousness of the crime." See Ex. A at B-002. Troublingly, the Board did not even clearly say whether one statutory factor—community opposition—applied to [redacted]'s case in the first place. Ex. A at B-002 ("[W]e have considered comments made by the district attorney's office and community opposition, if any") (emphasis added). This lack of detail leaves the decision vague and unreviewable.

Additionally, the Board is obligated to provide guidance to [redacted] on how she may achieve parole in the future. See Cappiello, 800 N.Y.S.2d at *6 (noting that "[t]he requirement of a detailed written explanation also serves as a helpful guide to an inmate's conduct while in prison and in [her] endeavor to return to society as a useful citizen"). In light of the recently enacted regulations, the Board "anticipate[s] that future denial decisions will help inmates to better understand the decision and what more, if anything, they can do to facilitate a legally appropriate release." See Ex. M., RULE MAKING ACTIVITIES, 9 N.Y.C.R.R. § 8002.2(a).

However, the Board's decision does not provide any type of guidance on what more [redacted] can do to be released, and thus thwarts the rehabilitative goals animating the statutory scheme for parole in New York. Because the Board's conclusory written denial gave an unsatisfactory explanation for how it reached its decision, it violated lawful procedure and did not demonstrate that the decision was grounded in any rational basis. Accordingly, the decision must be overturned and [redacted] must be given a new hearing.

CONCLUSION

For all of the above reasons, the Parole Board's decision to deny release to [redacted] must be vacated and [redacted] must be afforded a de novo parole release hearing with a different panel forthwith.

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Respectfully submitted,

Brett Digna

BRETT DIGNAM, Esq.
Counsel for petitioner, [redacted]

Morningside Heights Legal Services, Inc.
Columbia Law School
435 West 116th Street, Room 831
New York, NY 10027
Tel: 212-854-4291
Fax: 212-854-3554
bdigna@law.columbia.edu

On the memorandum:
Law Student Interns

Chloe Bootstaylor '18
Shane Rogers '19
Kathleen Simon '18