Administrative Appeal Brief - FUSL000152 (2022-05-05)

[redacted]

NEW YORK STATE DIVISION OF PAROLE
EXECUTIVE BRANCH: ADMINISTRATIVE APPEAL

In the Matter of the Application of

[redacted]
Appellant

vs.

THE NEW YORK STATE DIVISION OF PAROLE
Respondent

Submitted by:

John R. Kelly
Attorney for Appellant
246 East Broadway
Monticello, NY 12701
(845) 794-0421

Table of Contents

STATEMENT OF FACTS

Appellant, [redacted] appeared in front of the Parole Board for a hearing on August 10, 2021 (annexed hereto as **Exhibit A** is a copy of the minutes from the hearing). He appeals from the decision rendered by the Board of Parole on that day, denying his release onto Parole supervision and directing that he be held for a further eighteen (18) months with his next appearance in front of the Board being in February 2023. Mr. [redacted] is currently serving twenty (20) years to life, fifteen (15) to life, and twenty-five (25) years for a conviction of two counts of murder, kidnapping, and rape in the first degree, respectively. Mr. [redacted] has served approximately fifty (50) years of incarceration based upon the aforementioned sentences. The crimes were committed in 1971 when Mr. [redacted] was 24 years old, having been born in 1947. The crimes occurred around the Bronx Zoo. Mr. [redacted] originally moved from Puerto Rico to live with his sister in New Jersey, but moved to the Bronx in 1969. The victim lived in the same building as Mr. [redacted] mother and the child and Mr. [redacted] knew each other.

On the day in question, Mr. [redacted] had been drinking and smoking marijuana, which may have impacted his actions on that day. Although not having an explanation for his actions, he did explain that he was physically abused numerous times by his stepfather, whom he believed to be his biological father, and his half-brother. Much to his credit, he however, has refused to use his own sexual and physical abuse as an excuse for his crimes. He has sought professional help to find the answers to the motivation for his crimes.

Mr. [redacted] has taken full responsibility for his actions on that day and is remorseful.

While incarcerated Mr. [redacted] earned his high school equivalency diploma, earned fifteen vocational titles, the primary of which is carpentry, and was an assistant teacher in

Franklin Correctional Facility. In addition, he completed the ASAT and ART programs as well as the sex offender program. Further, he has completed Transitional Services 1 and 3 and has not needed to take Transitional Services 2.

During his period of incarceration, he has had only 4 tickets with the last being in 2015. His risk assessment is low and with the unlikelihood to reoffend. He has presented a release plan which presents very positive goals and outlooks. In addition, he has strong family ties and relationships to assist with a smooth transition and lawful lifestyle. Both the Fortune Society and the Osbourne Society have expressed a willingness to assist Mr. [redacted] He also has the support of the Parole Participation Project.

Mr. [redacted] who is currently 75 years old with numerous health issues, is still willing to attempt employment and contribute to society as well as he is able.

ARGUMENT

I. THE PAROLE BOARD DID NOT ADEQUATELY CONSIDER THE FACTORS THEY MUST CONSIDER BY STATUTE

In Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982, 405 N.E.2d 225, the Court of Appeals stated that there is no inherent constitutional right to parole as a person's liberty interest is extinguished upon conviction, however, when a State adopts a sentencing scheme which creates a legitimate expectation of early release from prison there is a liberty interest deserving of constitutional protection. At stake in the parole-release decision is a return to freedom, albeit conditional freedom; liberty from bodily restraint is at the heart of the liberty protected by the Due Process Clause. At the very least an inmate is entitled to minimal due process with respect to a determination of the Parole Board, this helps to protect the inmate against abuse of discretion or wrongful

considerations on the part of the Board of Parole. Solari v. Vincent, 46 A.D. 2d 453 (2nd Dept. 1975), reversed on other grounds, 38 N.Y.2d 835; See also Williams v. Regan, 85 Misc.2d 325 (1975). The court in Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (U.S. Ct. of Appeals, 2nd Cir. 1974) stated: "that some degree of due process attaches to parole release proceedings as a minimum safeguard against arbitrary action" *Ibid* at 928.

"[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 94 S. Ct. 2963 at 2974 (Supreme Court of the United States) see also Sandin v. Conner et al., 515 U.S. 472 (Sup. Ct. of U.S. 1995).

New York State has adopted legislation that sets forth guidelines and criteria for sentencing that serve to create a legitimate expectation of early release from prison. As such, prisoners who have demonstrated clear indications of rehabilitation are entitled to a liberty interest. This liberty interest is protected by both the New York and United States' Constitutions. See Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982, 405 N.E.2d 225; People ex rel Herbert v. New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881.

In Greenholtz v. Nebraska Penal Inmates, 442 U.S.1, 99 S. Ct. 2100, 60 L.Ed.2d 668 the United States Supreme Court dealt with a statute similar to New York's statute concerning the discretionary release of an inmate onto parole supervision when their minimum term has been served. In Greenholtz, *supra*, the Court also recognized that when a State adopts a sentencing scheme which creates a legitimate expectation of early release from prison there exists a liberty interest deserving of constitutional protection.

In 1977 the New York legislature enacted a new parole statute, which in conjunction with its regulations, completely revised the old law, see New York Executive Law §259 *et seq.* Under the new statute and regulations, the legislature fixed a minimum range of imprisonment for every inmate which is based upon the severity of sentence and prior criminal record. Furthermore, the new statute created "a presumption in favor of parole once the minimum term has been served unless certain specific aspects of an inmate's record are found unsatisfactory." Cicero v. Olgiati 473 F.Supp.653 at 654 (District of NY, Southern District).

New York's Executive Law §259 *et seq.* and the regulations promulgated pursuant thereto, at 9 NYRCC 8000 *et seq.* provide the New York State Division of Parole with a comprehensive statutory and regulatory framework. Executive Law §259-c (1), provides sentencing guidelines by empowering the State Board of Parole the "duty of determining which inmate serving an indeterminate, or reformatory sentence of imprisonment may be released on parole, and when and under what conditions." The Board of Parole therefore has the discretion to determine which inmates would be eligible for parole. Newcomb v. New York State Division of Parole, 88 A.D.2d 1098, 452 N.Y.S.2d 912, cert. Den. 103 S. Ct. 828 Matter of Lynch v. New York State Division of Parole, 82 A.D.2nd 1012, 442 N.Y.S.2d 179; People ex rel Newomb v. Metz, 64 A.D.2d 219, 409 N.Y.S.2d 554; Collins v. Smith, 113 Misc. 2d 869, 450 N.Y.S.2d 787.

New York's Executive Law §259-i details the "Procedures for the conduct of the State Board of Parole" and places substantive limitations on the discretion of the same. Under Executive Law §259-i (2) (c) (A), the Parole Board is required to consider whether an inmate if he is released, whether he will live and remain at liberty without violating the

law, and that his release is not incompatible with the welfare of society and does not so deprecate the seriousness of the crime as to undermine respect for the law. In making this determination the Parole Board shall be required to consider the following factors when determining whether or not to release an inmate:

(i) The institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates.
(ii) Performance, if any, as a participant in a temporary release program.
(iii) Release plans including community resources, employment, education, and training support services available to the inmate.
(iv) Any deportation order issued by the Federal Government against the Inmate while in the custody of the Department of Correctional Services and any recommendation regarding deportation made by the Commissioner of the Department of Correctional Services pursuant to Section One Hundred and Forty-Seven of the Correction Law.
(v) Any statement made to the Board by the crime victim or the victim's representative...
(vi) The seriousness of the offense with due consideration to the type of the sentence, length of the sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement. [see §259-i(1)(a)(i)]
(vii) Prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. [see §259-i(1)(a)(ii)]

See Matter of Darryl King v. New York State Division of Parole, 190 A.D.2d 423 (1st Dept 1993); *See also* Canales v. Hammock, et al, 105 Misc.2d 71, 431 N.Y.S.2d 787 (1980) and Matter of Borcsok v. New York State Board of Parole, Index No. 1119-08 (Sup Ct. Albany County, 2008). It should be noted that the statute makes no reference to the facts and circumstances of the underlying offense as factors to be considered. (See Exhibit A, page 6 lines 23-25 and page 7, 1-2). In Johnson v New York State Division of Parole, 884 N.Y.S.2d 545, the court states that a mere reference to the violence of the crime, without elaboration, does not constitute the requisite aggravating circumstances sufficient to deny

parole. In the Matter of Gelsomino v New York State Board of Parole, 918 N.Y.S.2d 892 (N.Y. App. Div. 2011), the Court states that where the Parole Board denies release to an inmate solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstances, the Board acts irrationally. In the Matter of Ferrante v Stanford, 172 A.D.3d 31, the Supreme Court concluded that the Parole Board failed to properly apply the statutory criteria to the facts presented. Executive Law §259-i. Here, the Board denied Mr. [redacted] parole release exclusively on the basis of the underlying conviction without giving genuine consideration to the statutory factors, Matter of Banks v Stanford 159 A.D.3d 134. In the Matter of Coleman v New York State Department of Corrections and Community Supervision, et al., 157 A.D.3d 672, the Court held that the Parole Board's determination to deny Petitioner's release evinced irrationality bordering on impropriety, when parole was denied because, according to the Parole Board, the Petitioner distanced himself from the crimes. In that case, the record reflected that the Petitioner had accepted responsibility for his actions. Mr. [redacted] goes on to describe his offense in great detail, including his actions in kidnapping, raping, and murdering a nine-year-old girl (See Exhibit A, page. Mr. [redacted] expresses his remorse for his actions, (See Exhibit, page 16 at lines 15-18, page 20 at line 25 and page 21 at line 1, page 22 at line 24-25, page 31 lines 18-20, page 40 at line 24-25 and page 41 lines 1-4, page 45 lines 10-20). Unfortunately, Mr. [redacted] has been unable to articulate a motivation for the crime which the Board finds disturbing. However, without a true psychological investigation and interpretation, Mr. [redacted] may never be able to articulate his motivation. It is uncertain that any incarceration assists an individual to determine the motivation for the underlying crimes.

Since the late 1970's the historical trend has evidenced a significant narrowing of the broad powers of the Division of Parole. In 1977, the current structure of the Division of Parole was established as a separate entity from the Department of Correctional Services. At this time, the Division of Parole was responsible for the setting of minimum sentences for most categories of serious felonies upon the inmate's arrival at the facility. However, in 1980 the responsibility for setting minimum sentences was removed from the Division of Parole and placed back with the sentencing courts. New York's Penal Law §70.00(1) mandates that sentencing courts impose minimum terms on all indeterminate sentences imposed subsequent to 1980. See McKinney's Session Laws of N.Y., L.1980, ch 873, section 1. Furthermore, the Division of Parole's authority in deciding when an inmate should be released on an indeterminate sentence was limited by the enactment of the Earned Eligibility Program, see Correction Law §805 and 7 NYCRR §2100.

This shift evidences a significant narrowing of the powers of Division of Parole and therefore the Board of Parole's powers and shows that Division of Parole does not have unfettered discretion in the decision-making process. Indeed, the statutory framework provides the parameters of the Division of Parole's accountability. This curtailing of the Division of Parole's once broader discretionary powers demonstrates the Legislature's action in removing the Board is previous unfettered discretion when determining parole.

The statutory restrictions of the Board's discretion point towards the expectation of parole upon a satisfactory completion of an inmate's minimum term of incarceration as was implied intention of both the Court and Legislature in the creation and imposition of indeterminate sentences. Mr. [redacted] was sentenced to an aggregate sentence of 20 years to

life imprisonment for a conviction of kidnapping, rape, and murder in the first degrees and as such he has a constitutionally protected liberty interest in parole upon serving his minimum period of incarceration as determined by the sentencing court. Mr. [redacted] has served over fifty years and has satisfied the minimum sentence imposed by the sentencing judge, and has satisfied institutional requirements.

Further support for the contention that there is a reasonable expectation of being released on parole upon serving the minimum period of incarceration and thus creating a protected liberty interest, can be found in the legislative intent of the Legislature's actions of 1977. In Governor Carey's legislative memorandum L. 1977 c. 904, p. 2538, "Parole-State Division of Parole-Powers and Duties," dated August 11, 1977, he states:

> "Concomitantly, it permits a reasonable expectation of parole when a minimum sentence, fixed in accordance with the guidelines, has been served, provided the inmate fulfills the requirements of statute."

Support for the contention that New York State's laws create a constitutionally protected liberty interest in parole is evidenced in Cicero v. Olgiati, 473 F.Supp. 653 (U.S. District Court of N.Y., Southern District, 1979) the Court stated:

> "In the summer of 1977, the New York State Legislature enacted a new parole statute which, together with its regulations, thoroughly revised the old law. N.Y. Executive Sections 259 to 259-r (Supp. 1972-78). The new statute and regulations fix a minimum range of imprisonment for each inmate, based on severity of sentence and prior criminal record, and ***create a presumption in favor of parole once the minimum term has been served unless certain specific aspects of an inmate's record are found unsatisfactory***." (emphasis added).

All the above factors establish that New York's legislative intent is to favor parole at the expiration of an inmate's minimum sentence and thus establish that an inmate who

has served his minimum sentence possess a constitutionally protected liberty interest in being released on to parole.

For all intents and purposes [redacted] has fulfilled the requirements of the statute and as such has a legitimate expectation of being released onto parole supervision and therefore has a constitutionally protected liberty interest in the same.

The Appellant has served approximately fifty years of the sentence he received from the Courts. As detailed above imposition of a sentence upon conviction is a function for a judge only. The court must balance various factors in determining a sentence, such as the seriousness of the offense, mitigating and aggravating circumstances, and the particular circumstances of the individual before the Court amongst other considerations. See People v. McConnell, 49 N.Y. 2d 340 (1980), People v. Farrar, 52 N.Y.2d 302 (1981), People v. Selikoff, 35 N.Y.2d 277 (1974), People v. Notey, 72 A.D.2d 279 (1st Dept. 1980). All of these factors are considered at the time of sentencing. The Parole Board may consider these factors but they must also consider other factors demonstrating the inmate's ability to transition back to a law-abiding life on release.

The Court in the instant case sentenced the Appellant to 20 years to life. The Board has in effect, through its denial of granting parole to the Appellant, determined that the minimum sentence imposed by the Courts is inadequate, in effect re-sentencing Mr. [redacted] something it does not have the power to do. The Parole Board through its denials is implying that the New York State sentencing structure is flawed and that the terms for which the Appellant was sentenced inherently undermines respect for the law, this is not for the Parole Board to determine. Once the minimum term of a sentence has been served,

the Board should be concerned with the Appellant's rehabilitation not supplanting its own decision regarding sentencing for that of the sentencing court.

For the reasons stated herein, and all others presented hereto, the Parole Board's decision denying Appellant's parole should be reversed and the Appellant should be released onto parole supervision or in the alternate a *de novo* hearing should be granted.

II. THE PAROLE BOARD'S DECISION DENYING THE APPELLANT'S RELEASE ONTO PAROLE SUPERVISION WAS INSUFFICIENT UNDER THE LAW AND AN EXCESSIVE, ARBITRARY AND CAPRICIOUS DETERMINATION.

The Appellant, [redacted] having served approximately fifty years, appeared before the Parole Board on August 10, 2021 in Woodbourne Correctional Facility located in Fallsburg, New York. The purpose of his appearance was to seek release to parole supervision. The Appellant was denied release onto parole supervision despite the Appellant's many achievements while incarcerated, (see Exhibit A, page 32 at lines 10-25, page 33 at lines 1-8, and page 33 line 25 to page 34 lines 1-2). As such the Parole Board's decision was arbitrary, capricious, an abuse of discretion and irrational.

As detailed above the Board's determinations are governed by Executive Law §259-i, the Parole Board is required to consider whether an inmate, if released, will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and does not so deprecate the seriousness of the crime as to undermine respect for the law. In making this determination the Board is required to consider certain statutory factors, as enumerated in New York's Executive Law §259-i(2)(c)(A) (detailed above).

The above-mentioned mitigating factors may result in a decision to release an inmate although short of the actual minimum sentence. *See* 9 NYCRR 8001.*3*; Ganci v. Hammock, 99 A.D.2d 546, 471 N.Y.S.2d 630; Matter of Vuksanaj v. Hammock, 99 A.D.2d 958, 463 N.Y.S.2d 61; Matter of Pina v. Hammock, 89 A.D.2nd 799, 453 N.Y.S.2d 479; and Matter of Maciag v. Hammock, 88 A.D.2nd 1106, 453 N.Y.S.2d 56.

The Parole Board is required to state its grounds for denial with sufficient particularity to enable a reviewing Court to determine whether any inadmissible factors influenced the Board's decision and whether there has been an abuse of discretion. See Solari, *Supra.* The purpose of requiring a detailed written explanation is to enable intelligent review. Canales v. Hammock, 105 Misc.2d 71, 74 (Sup. Ct. Richmond 1980). The requirement of a detailed written explanation also serves as a helpful guide to an inmate's conduct while in prison and in his endeavoring to return to society as a productive citizen. Matter of Cummings v. Regan, 45 A.D.2d 222 (4th Dept 1974), *rev'd* 36 N.Y.2d 969 (1975) (reversed on grounds of mootness); Canales v. Hammock, *supra*; *see also*, United States ex rel. Johnson v. Chairman, 363 F.Supp. 416, 419, *aff'd* 500 F.2d 925 (stating that the failure to "inform prisoners of the reasons for the denial of parole can only instill frustration and bitterness in an already difficult environment").

In People ex rel Bermudez v. Kuhlman, 87 Misc.2d 975 (1976), the Court stated:

> "The Board of Parole may adequately explain the grounds for denial when they deem additional time is necessary for the inmate to participate in programs for rehabilitation."

See also: Odom v. Henderson, 57 A.D.2d 710 (4th Dept. 1977); the inmate's lack of remorse, Sturgis v. Coldwell, 57 A.D.2d 728 (4th Dept. 1977).

Pursuant to Executive Law §259-i (5), a determination of the Parole Board is "deemed a judicial function and shall not be subject to review if done in accordance with law," unless the determination is so irrational as to border on impropriety. Pike v. New York State Board of Parole, 148 Misc.2d 331, 560 N.Y.S.2d 271 Although the Board's decisions are discretionary, the record of the parole hearing must convincingly demonstrate that the Board adequately considered all of the statutory factors, in considering a candidate for parole. In view of the factors discussed herein and Mr. [redacted] institutional accomplishments it is without question that the decision was arbitrary and capricious and violates the applicant's right to due process of law. *See*, CPLR § 7803; Executive Law § 259-I (2) (c).

The Parole Board is required to review all factors relating to rehabilitation as that remains the major consideration as the gravity of the underlying offense will never differ. In Matter of King, (Kings County Supreme Court, NYJL January 20, 1993), the Court had observed that the Parole Board's automatic denial of parole was based upon the severity of the crime without consideration of all factors. This voided the entire concept of rehabilitation. A reference to the nature of Appellant's offense is insufficient since it is only conclusory. Executive Law 259-i (2) (a); Roger S. v. Hammock, 100 Misc.2d 280 (1979). In re-Rossakis, 41 N.Y.S. 3d 490 the Court held the Board violated §259-i[2][a] Executive Law's requirement that the reason for parole denial not be given in "conclusory terms" by summarily listing petitioner's institutional achievements and then denying parole without further analysis of such achievements. Furthermore §259 I (2)(a)(i) states:

"If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors for such denial of parole. Such reasons shall be given in detail and not in conclusory terms."

In Mr. [redacted] case the Board similarly listed his institutional achievements and denied parole without any analysis, explanation or details for the reasons of such denial.

In the instant case, the Parole Board's decision was arbitrary and capricious in denying the Appellant's release as it took into consideration only the seriousness of the crime that was committed giving little or no consideration to the other statutory factors. This is evidenced by the decision of the Parole Board dated August 10, 2021which states:

> **"CAREFUL REVIEW OF THE RECORD AND INTERVIEW LEAD THE PANEL TO DETERMINE THAT IF RELEASED AT THIS TIME THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND THAT RELEASE AT THIS TIME WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY."**
> (See Exhibit A, page 47, lines 4 –10).
>
> **"THE PANEL FINDS YOU UNCREDIBLE AND WITHOUT UNDERSTANDING OF YOUR BEHAVIORS, COPING MECHANISMS, AND MOTIVATION BEHIND YOU SEX OFFENDER AND HOMICIDAL BEHAVIOR."** (Exhibit A, page 48 at lines 23-25, and page 49 at line 1.)

There is no indication that the Board considered the required statutory factors as well as the COMPAS Risk Assessment Report. There is no indication that the penal system has provided or is even capable of providing the assistance Mr. [redacted] needs to achieve any insight into what motivated his behavior in 1971 which appears to be of major concern to the Board of Parole. Executive Law § 259 c states:

> "the Parole Board shall.... (4) establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and need principles to measure the rehabilitation of the person appearing before the board, the likelihood of the success of such person upon release and assist the

members of state board of parole in determining which inmates may be released to parole supervision".

According to DOCCS (Department of Corrections and Community Supervision) Directive # 8500 dated 5/23/2014 NY Reception COMPAS (Correctional Offender Management Profiling for alternative Sanctions) is defined as a research based clinical assessment instrument which is used to assist staff in assessing an inmate's risks and needs by gathering quality and consistent information to support decisions about supervision, treatment and other intervention. Re-Entry COMPAS is defined as a research based clinical assessment instrument which is used to assist staff in assessing a releasee's risk and needs in order to most effectively supervise the release. In Mr. [redacted] case the Board merely cited the COMPAS Report and that Mr. [redacted] had scored low across the board. (See Exhibit A, page 32 at lines 10-25, at page 33 at lines 1-18 and page 33 at line 25 to page 34 at lines 1-2). It appears that the Board simply ignored these factors. See People ex rel. Herbert v. New York State Board of Parole, 97 A.D. 2d 128. It is apparent that the past notoriety of Mr. [redacted] underlying conviction guided the Board's decision.

The Appellant did not receive a fair and impartial hearing; the tone and the questioning of the Board showed a clear bias. Their questioning predominately focused on the underlying offenses and the prior bad acts of the Appellant. The Board's tone was apparent as it glossed over the tremendous progress and achievements of this Appellant. Mr. [redacted] has taken part in all the therapeutic, educational and vocational programming which is required of him by the prison system.

Mr. [redacted] Board failed to consider the statutory factors, "it is insufficient for the Board to do no more than merely 'note' this petitioner's positive adjustment to

incarceration" see Matter of Chan v. Travis, (New York Law Journal, February 27, 2003, page 28, column 4.) the Parole Board's failure to follow statutory mandates caused his hearing to be insufficient under the law and therefore arbitrary and capricious.

Furthermore, the Board failed to state that the reason [redacted] was denied parole was due to the fact that he needs to complete any kind of programming in order to facilitate rehabilitation; see People ex rel Bermudez v. Kuhlman, *Supra,* and Odom v. Henderson, *Supra.*

In the Matter of Silmon v. Travis, *Supra,* Chief Judge Judith Kaye stated: "[T]he [Parole] Board is empowered to deny parole where it concludes that release is incompatible with the welfare of society." *Ibid.* at 477. Chief Judge Kaye furthered that the Parole Board should consider whether or not the inmate, if released, will be a danger to society and if such released inmate could "live at liberty without repeating his offense." *Ibid.* Thus, there is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight. (Citing Matter of Dudley v. Brown, 227 A.D.2d 863). In other words, the Board should determine whether or not the inmate can assimilate back into society without being a danger to the welfare of society. During the Appellant's hearing, there was no evidence brought forth to suggest that he would be a danger to society if released. The Appellant has made all efforts to rehabilitate himself, completing all programming as required and has supporters of his release to parole and a stable place to reside with his fiancé. Mr. [redacted] has achieved much in his approximately fifty years of incarceration. He has completed and received ASAT, ART, sex offender programming, and Transition Services 1 and 3 and has maintained a job of porter during incarceration. *(See previously submitted Parole Packet).*

In People v. ex rel. Bermudez v. Kuhlam, *Supra* at 977 the court states that:

> "Having served his minimum sentence, any punishment contemplated by the sentencing judge for the offense committed has been satisfied, and the attention of the Board thereafter should be directed to the relator's rehabilitation and his fitness to return to society."

The Appellant has served his minimum sentence as pronounced by the sentencing judge of twenty (20) years, and as such the Board of Parole's focus should be on his rehabilitation and fitness to return to society. In re Application of West, 980 N.Y.S.2d 279 the Court held:

> "specifically, the record demonstrates that the Board failed to consider & weigh relevant factors, which clearly supported the Petitioner's release on parole. These include but are not limited to Petitioner's lack of disciplinary infractions, his completion of programs while incarcerated, his remorse and acceptance of responsibility for his crime, and a COMPAS evaluation receiving a low overall risk for felony violence, to re-offend or abscond".

Similarly, in the instant case the Parole Board clearly failed to consider and weigh relevant factors, which supported Mr. [redacted] release to parole.

In their decision the Board predominantly describes the underlying crimes and does not further any legitimate or viable reason to deny parole. As such, to allow the Parole Board's decision to stand would "void the entire concept of rehabilitation" that is inherent in New York State's parole system. Matter of King, *Supra.* Executive Law 259-i (2) (a); Roger S. v. Hammock, *Supra.* See also In the Matter of Silmon v. Travis, *Supra.* (citing Matter of Dudley v. Brown, 227 A.D.2d 863). The Board is permitted to emphasize the seriousness of the offense (Matter of Little v. Travis, 15 A.D.3d 698 (2005)) so long as it takes into consideration the statutory factors articulated in Executive Law §259-i, Matter of Lue-Shing v. Pataki, 301 A.D.2d 827 (2003).

In the instant case, the Board's tone clearly gave only token consideration Mr. [redacted] impressive educational and therapeutic record. While it is not necessary for the Board to specifically refer to each and every one of these factors, or to give them equal weight, it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors. See In the Matter of King v. New York State Division of Parole (1st Dept 1993) 190 A.D.2d 423. The Board failed to give fair consideration to the statutory factors as is evidenced by the Board's inquiry and decision. In the Matter of King, *Supra.* the court stated 'where the record convincingly demonstrates that the Board did in fact fail to consider the proper standards, the courts must intervene." *Ibid.* at 431.

The Board of Parole must demonstrate that the inmate's release is incompatible with society's interest. The Board, in the instant case, has failed to demonstrate this. There was no evidence presented indicating that the Appellant will not be able to adjust and be a productive member of society. Such a determination by the Board is inappropriate and as such arbitrary and capricious.

Furthermore, under the law as written, imposition of a sentence upon conviction for an offense is a judicial function, based on careful consideration of the facts available at the time of sentencing, not at the time of parole eligibility. The Board in the instant case was acting outside of their purview by pronouncing their own sentence upon the Petitioner by requiring him to be held for eighteen (18) months, almost the maximum allowed under the law.

The hearing held on August 10, 2021, and the decision rendered pursuant to it, wherein the Appellant was denied release to parole supervision was insufficient under the

law and inherently arbitrary and capricious. As such the Appellant should be granted an open date or in the alternate a new hearing should be granted.

III. THE BOARD VIOLATED APPELLANT'S RIGHT TO DUE PROCESS

The Board violated Appellant's constitutional right to due process of the law when they denied his release onto parole supervision pursuant to an unconstitutionally vague statute that confers discretion that is absolute, unfettered and without standards upon the Parole Board, as well as allowing political pressure and public opinion to affect their decision. In Coates v. Cincinnati, 402 U.S. 611 (1971) the federal court stated:

> "It is a basic tenet of due process that a statute set forth a comprehensible, even if imprecise, standard of conduct. Language which is so vague that it provides no standard at all offends the notions of fairness embodied in the due process clause." *Ibid* at 614.

"[I]t is a basic principal of due process that an enactment is void for vagueness if its [provisions] are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104 (1973). In Kolender v. Lawson, 461 U.S. 352 (1983) the Court held that while the void-for-vagueness doctrine:

> "focuses both on actual notice to citizens and arbitrary enforcement, we have recognized that the more important aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal guidelines to govern … enforcement." *Ibid* at 357-358 *quoting* Smith v. Gogen, 415 U.S. 566 (1974).

In 1976 in Cicero v. Olgiati, 410 F.Supp. 1080, a group of inmates as part of an action challenged the statute of parole for being vague in the United States District Court, Southern District of New York. The Court however never ruled on whether or not the statute of parole was vague and as such unconstitutional. At that time, the statute for parole was under New York Correction Law, Correction Law §213. In 1977, after the decision

in this case, the statue governing parole moved into New York's Executive Law. Indeed, the State of New York transferred the language of Correction Law §213 into Executive Law §259, L.1977, ch 904. A close review of the two statutes shows that the language is predominantly still the same as it was when the inmates brought a challenge to Correction Law §213 in 1976. In Cicero v. Olgiati, *Supra* the argument was submitted to the effect that the statutory language in Correction Law §213 was so nebulous, vague, arbitrary and discriminatory that it grants uncontrolled power to the Parole Board and necessarily causes decision making on "an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Graynard v. City of Rockford, *Supra* at 109. Appellant respectfully contends that the same arguments still apply to Executive Law §259 now as applied to Correction Law §213 prior to 1977. See also Kolender v. Lawson, 103 S.Ct. 1855 at 1858 (1983); City of Chicago v. Morales, 119 S.Ct. 1849, 1860-1861 (1999).

The Board of Parole is required to determine whether or not a person who becomes eligible for parole is entitled to be released onto parole supervision, in Johnson v. Chairman of the New York State Board of Parole, *Supra* the court stated that the Board "In making these crucial decisions it is guided by statutory standards that are extremely vague." *Ibid* at 929. The Court in Johnson further commented on "the almost boundless authority vested in the Board and the nebulousness of the statutory standards governing release ... the Board, vested as it is with apparently unfettered discretion." *Ibid* at 929. Although this court is referring to the parole statute as it was under Correction Law §213 as noted herein the language now presented in Executive Law §259 is virtually identical to its predecessor, with the addition of another factor that 'release would so deprecate the seriousness of the

crime as to undermine respect for the law' which in essence only serves to make the statute vaguer, as such the same arguments still apply to the new parole statute.

The Board possess virtually unfettered discretion because its decisions are insulated from judicial review, see Executive Law §259-i (5), "Any action by the Board ... shall be deemed a judicial function and shall not be reviewable if done in accordance with the law." The New York Court of Appeals has held that the Parole Board's "discretion is absolute and beyond review in the courts" as long as it complies with the procedures required by statute. Briguglio v. New York State Board of Parole, 24 N.Y.2d 29 (1969) *quoting* Matter of Hines v. New York State Board of Parole, 293 N.Y. 254 (1944). While Executive Law §259-i(2)(c)(A) sets forth factors for determining whether a person should be released on parole, it also gives the Board discretion to decide when those criteria are not applicable.

The standard for review set forth in the Executive Law is three-fold, firstly the Board must be of the "opinion that there is a reasonable probability that, if such petitioner is released, he will live and remain at liberty without violating the law." Secondly, the Board must also determine whether the inmate's release is compatible with the welfare of society and finally the Board must determine whether the inmate's release will not so deprecate the seriousness of the crime as to undermine respect for the law. See Executive Law §259-i (2) (c).

This standard is susceptible to distinct, and sometimes inconsistent, interpretations; for example, release is only warranted when the Board holds an 'opinion' as to the factors listed for consideration. There is no explanation in the statute or in the regulations as to what constitutes an 'opinion', opinions without criteria on which to base them are inherently vague. Moreover, the foundation upon which an 'opinion' is based on differs

from one person to the next, it could be a belief based on faith, a judgment based on findings of fact, or an educated guess based on experience and intuitive responses. Furthermore, the statute and regulations fail to state how strenuously or not the Board needs to hold its 'opinion' in order to make a determination as to whether or not a particular inmate should be released onto parole supervision or not.

There is also no objective standard, enumerated within the statute or a regulation, as to what constitutes the welfare of society or what conduct is incompatible with the welfare of society. In reference to "is not incompatible with the welfare of society" the Court in Johnson v. Chariman of New York State Board of Parole, *Supra* at 930 stated:

> "[t]he very scope of this sweeping term demands that relevant factors and limits be established and observed by the Board in the deciding whether to grant or deny parole. Moreover, there is no guidance given to the Board in the statute or in the regulations as to making a determination that to release an inmate would seriously deprecate the seriousness of the crime so as to undermine respect for the law."

The Legislature in enacting the parole statute has left the Parole Board with the obligation to determine through its governing rules and interpretation the application of the statute. See Garner v. Louisiana, 368 U.S. 157 at 174 (1962). The Board is in effect making the final determination as to how long a particular inmate should spend in prison, something which should be a function of either the Legislature or the Judiciary Department.

Furthermore, with such a vague, nebulous and arbitrary statute "review for abuse of discretion" is more difficult where the statute's language does not provide a workable decision-making scheme, and the broad grant of discretion has not been structured for exercise in a fair, rational and non-discriminatory fashion." See Johnson v. Chairman of New York State Board of Parole, *Supra* at 929.

"[A] person subject to the power of the state is entitled to protections from improper impact of a vague statute even if the body administering it gives good reason for its action." See Cicero v. Olgiati, *Supra* at 1096

The Parole Board in the instant case relied on only the following criteria in denying Mr. [redacted] release. The commissioners in part stated:

> **"CAREFUL REVIEW OF THE RECORD AND INTERVEIW LEAD THE PANEL TO DETERMINE THAT, IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND THAT RELEASE AT THIS TIME WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY.** (See Exhibit A, page 47, lines 4-10).

Under such a measure, no inmate would ever be granted release to parole supervision as no rehabilitative programming or other accomplishments achieved during incarceration will ever change the fact that the instant offenses were committed. This very issue was addressed by Albany Supreme Court Justice Edward A. Sheridan in Matter of Chan v. Travis, (New York Law Journal, February 27, 2003, page 28, column 4.) He stated:

> "while the Board may place heavy emphasis upon the serious nature of petitioner's crime (citations omitted) it is error for the Board to conclude, as it did here, that the 'serious nature of the offense precludes early release.' By Legislative prescription, petitioner's crimes and indeterminate sentences are parole eligible...There is no exception for persons convicted of manslaughter, gang related crimes, weapons or other violent crimes. To deny parole exclusively on the seriousness of the petitioner's crimes, there must have been 'some significantly aggravated or egregious circumstances surrounding the commission of the particular crime.' (citations omitted).
>
> "Moreover, on this record, the Board's decision lacks the detail of factors and reasons required by Executive Law §259-i(2)(a), as it is insufficient for the Board to do no more than merely 'note' this petitioner's positive adjustment to incarceration. Petitioner's exemplary institutional record ... academic achievements and institutional adjustment, coupled with

> petitioner's repeated expressions of remorse – exemplifies the 'strong rehabilitative component' (citations omitted) underlying the statutory scheme and inherent in an indeterminate sentencing structure."

In the instant case, the Appellant is parole eligible; he was sentenced to an indeterminate sentence. The Board's decision in relation to the Appellant is insufficient as all the Board did was merely note the underlying offense, his criminal history, his inability to articulate a motivation, and his disciplinary record and denied parole on the basis that release would so deprecate the seriousness of the crime as to undermine respect for the law. Furthermore, in Matter of Rios v. N.Y.S. Division of Parole, 15 Misc. 3d 1107 and in the New York Law Journal, March 29, 2007, "The Court stated by focusing exclusively on Petitioner's crime as a reason to deny parole, in essence re-sentencing him to a sentence that excluded any possibility of parole, the Board exceeded its powers." The Court in, Matter of Rios, Supra, ordered a new hearing before a different panel. In Chester Almonor v. New York State Board of Parole, 2007 N.Y. Slip Op 515880; 2007 N.Y. Misc. LEXIS 5879, the Court overruled the Board's decision as it had relied exclusively on the severity of the crimes committed and did not consider the inmate's vocational education and rehabilitative efforts. In the instant case the Board is in effect re-sentencing the Appellant, by focusing almost exclusively on the crime committed by the Appellant by simply given token recognition to his achievements and rehabilitative efforts. If the Board had placed any weight at all on the other statutory factors their decision could have only resulted in the release of the Appellant, as in all respects the Appellant has completed all necessary programming as is required by the Department of Correctional Services.

"The Due Process Clause requires that laws be crafted with sufficient clarity to 'give the person of ordinary intelligence a reasonable opportunity to know what is

prohibited,' and to 'provide explicit standards for those who apply them.'" General Media Communication, Inc. v. Cohen, 131 F.3d 273 at 286 (1997). When this holding is applied to the statute governing parole determinations, we find that the due process clause requires the statute to give a person an opportunity to know what is required of him, what conduct is required to gain release onto parole supervision. Furthermore, the Due Process Clause requires that a law provide explicit standards for those who apply the law, there are no specific standards available to the Board of parole in making a parole determination, and instead the language of the statute is vague, nebulous and arbitrary.

Moreover, current political pressure and public opinion favors the elimination of parole completely for violent felons such as the Appellant. With such unfettered discretion created by the vague, nebulous and arbitrary statutory scheme governing parole release it is not surprising that the Board has succumbed to the political pressure being exerted over it to effectively end parole for violent felons through continuous denials. One does not have to look far for examples of political pressure being exerted in favor of the elimination of parole, for example the statements made by former Governor Pataki during his State of the State address: "We must end parole for violent felons." L. 1995, at 2274; "under our plan, criminals who commit one violent felony will not and cannot ever be released on parole." L.1996, at 1835-1836; "This year we must end parole for all violent felons." L. 1997, at 1887; "And it's time to end parole for all violent felons." L. 1998, at 1443; "Now we must take the next and last step in reforming our system of parole. We must end it." L.1999, at 1441; "Last year, I asked for your support in ending parole for all felons.... Today, I renew that call." L. 2000, at A-10. These are examples of esoteric messages a former governor is using and sending to the Parole Board, members of which are appointed

by the Governor. Furthermore, former Governor Pataki renewed these messages in 2004 in the Department of Corrections Newsletter by stating: "we abolished parole for violent felons."

Accordingly, the decision of the Parole Board which denied the Appellant's release to parole supervision should be reversed and Mr. [redacted] should be released to parole supervision. In the alternate Mr. [redacted] should receive a *De Novo* hearing in front of a new panel of Parole Board members.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE PAROLE BOARD'S DETERMINATION SHOULD BE REVERSED AND THE APPELLANT RELEASED ONTO PAROLE SUPERVISION. IN THE ALTERNATE A DE NOVO HEARING IN FRONT OF A NEW PANEL OF THE PAROLE BOARD SHOULD BE ORDERED.

Dated: Monticello, New York
May 5, 2022

Respectfully Submitted,

John R. Kelly
Attorney for the Appellant