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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In The Matter of the Application of

[REDACTED]
Petitioner.

-against-

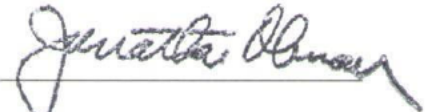
Verified Petition

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION, ANTHONY J.
ANNUCCI, ACTING COMMISSIONER
and TINA M. STANFORD,
CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE,
Respondents

Index No. [REDACTED]

ORAL ARGUMENT REQUESTED

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



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PRELIMINARY STATEMENT

When appearing before the Board, Mr. [REDACTED] had completed the 25th year of incarceration on the 25 years to life sentence that he received for his actions on June 6, 1996, when he was 24 years old.

Mr. [REDACTED] was convicted of murder in the second degree and sentenced to 25 years to life.¹ On May 13, 2021 the Parole Board denied parole. It was Mr. [REDACTED]'s first appearance before the Board. .

The Board commended Mr. [REDACTED] for the letters of support included in the packet of materials he provided to the Board, as well as positive behavior reports from DOCCS staff, letters of reasonable assurance, a certificate of achievement, Mr. [REDACTED]'s successful completion of programming including academics, vocational, and TS Phase 1, as well as his current participation in BPI, and his work assignment as a paralegal assistant in the law library.

The various accomplishments noted by the Board were significant and Mr. [REDACTED] had achieved them over an extended period of time leading to his parole interview. Nonetheless, Commissioners C. Davis and S. Samuels denied parole based on Mr. [REDACTED]'s prior disciplinary history at a previous institution, the confusion that had surrounded a request that he sign his case plan, his seeming failure to participate to completion in his COMPAS assessment, the “opposition” from the District Attorney, and the facts and seriousness of the underlying crime of conviction.

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

First, the Board violated its own regulations as revised in 2017, by failing to explain in factually individualized and non-conclusory terms how it considered each of the applicable statutorily mandated factors.² Here, the Board ignored various factors, and failed to explain how it had considered others. The Board failed to address with the requisite specificity Mr. [REDACTED]'s institutional history, including program goals and accomplishments, his academic achievements, vocational education training and his outstanding performance at his various work assignments. The Board also failed to consider that Mr. [REDACTED] had completed a mandated therapeutic program.

¹ Mr. [REDACTED] was also convicted of various charges associated with that conduct: arson in the first degree to which he was sentenced to 25 years to life, criminal possession of a weapon in the third degree on which he was sentenced to two and one third to seven years, reckless endangerment on which he was sentenced to two and a third to seven years, and arson in the fourth degree on which he was sentenced to one and a third to four years, all sentences to run concurrently.

² 8 NYCRR § 8002.3(b) reads, in part, “Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case.”

Next, the Board all but ignored Mr. [REDACTED]'s positive interpersonal relationships with staff and incarcerated people, especially in the *three* years prior to his parole interview as expressed by DOCCS staff in numerous letters they chose to provide to the Board. Finally, the Board failed to allow an opportunity for Mr. [REDACTED] to postpone his COMPAS interview so that he could resolve conflicts with it. Mr. [REDACTED] was thereby deprived of having an assessment critical to the Board's consideration.

Second, the Board assigned disproportionate adverse significance to a limited number of Tier 2 infractions and misbehavior reports from the years spent by Mr. [REDACTED] at Clinton Correctional Facility and all but trivialized the powerful evidence of Mr. [REDACTED]'s more recent and sustained positive conduct. In addition, the Parole Commissioners failed to place Mr. [REDACTED]'s Clinton violations in necessary historical context by ignoring the empiric evidence demonstrating that Black men incarcerated at Clinton were four times more likely to be written up for disciplinary violations.³ The Board compounded its oversight by ignoring that after being moved from Clinton Correctional to Fishkill Correctional Facility in 2019, Mr. [REDACTED] incurred no infractions of any kind. Finally, the Board failed to address and assign appropriate weight to letters of support and commendable behavior reports from DOCCS staff, all of which attest to qualities and characteristics of Mr. [REDACTED] that merit full consideration as they attest to his readiness to be released to parole supervision.

Third, the Board mischaracterized and placed disproportionate weight on Mr. [REDACTED]'s youthful offender adjudications, two attendant community supervision violations, and crime of conviction.

The Board placed outsized weight on what it characterized as Mr. [REDACTED]'s difficulty, while was still a teenager, complying with community-based supervision. In doing so, the Board highlighted behavior that had occurred thirty years before the parole interview and relegated to irrelevance recent Supreme Court jurisprudence mitigating death sentences and life-terms imposed on juvenile offenders based on conclusive neurological findings that the brain's frontal lobe does not develop fully until the age of twenty-three and that as a result, individuals in their teens and early 20s have substantial capacity to change. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).⁴

³ <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>

⁴ *Roper v. Simmons*, 543 U.S. 551, 569 (2005) [young offenders' moral character is not fully developed, and as such, their actions are not necessarily "evidence of irrebuttable depravity"]; *Graham v. Florida*, 560 U.S. 48, 79 (2010) ["Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation"];

Thus, while the Board acknowledged them it failed to discuss how they figured in the final decision and instead placed outsized weight on how Mr. [REDACTED] had responded to community-supervision some three decades earlier. In fact, when relegated to their proper historical place Mr. [REDACTED]'s prior difficulties when on community supervision lack predictive value of Mr. [REDACTED]'s present ability to adjust appropriately to community supervision.

Additionally, the Board assigned disproportionate weight to Mr. [REDACTED]'s crime of conviction, discussing it to the exclusion of anything in Mr. [REDACTED]'s institutional history that demonstrates his significant growth and development. The Board thereby revealed that it had in essence pre-judged the outcome of the interview.

The Board thereby ignored that Mr. [REDACTED] as his institutional history and the letters of support make clear, is a different person now than he was three decades ago when he was adjudicated a youthful offender, placed on community supervision, and later convicted. By failing to acknowledge that delayed brain maturation impacts a juvenile's ability to think clearly and make rational choices⁵, the Board reduced Mr. [REDACTED] to the sum of the worst aspects of his past conduct, ignoring the growth and change lauded in multiple letters, reports, and assessments prepared by DOCCS staff.

The factual record supporting Mr. [REDACTED]'s release is clear. That record similarly demonstrates the deficiencies in the Board's interview and decision. Accordingly, Mr. [REDACTED] respectfully asks this Court to vacate the Board's denial and order a *de novo* parole interview before a new panel that does not include Commissioners C. Davis and S. Samuels, who conducted his May 2021 interview.

VENUE

This action is properly commenced in Dutchess County because it is the county where the Board conducted the parole interview and made the decision to deny parole. An Article 78 petition may be filed in "any county within the judicial district where the respondent made the determination complained of." N.Y. C.P.L.R. § 506(b) and § 7804(b); see also *International Summit Equities Corp. vs. Van Schoor*, 166 A.D.2d 53, 532(2d Dep't 1990) (noting that venue is preferable in the specific county "in which the matter sought to be reviewed originated"). The Parole Board conducted the May 11, 2021 interview in Poughkeepsie, New York via

⁵ *Miller v. Alabama*, 567 U.S. 460, 480 (2012) [requires the sentencer to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"].

video-conference. Mr. [REDACTED] was at Fishkill Correctional Center. Thus, this action is properly commenced in Dutchess County.

PROCEDURAL HISTORY

On May 11, 2021, [REDACTED] [REDACTED] appeared before Commissioners Samuels and Davis at Fishkill Correctional Facility. The Commissioners denied parole on May 13, 2021. *See* Ex. A, May 13, 2021 Parole Decision. Mr. [REDACTED] filed a timely notice of administrative appeal on June 23, 2021 and subsequently perfected the appeal on November 17, 2021. *See* Ex. B, January 25, 2021 Administrative Appeal Decision. The Board's Appeals Unit belatedly affirmed the Board's denial of parole on January 25, 2022. *Id.* Accordingly, Mr. [REDACTED] has exhausted his administrative remedies and this matter is ripe for the instant Article 78 proceeding. Additionally, Mr. [REDACTED]'s petition is properly filed within the applicable four-month statute of limitations. *See* N.Y. C.P.L.R. § 217(1).

STATEMENT OF FACTS

1. Mr. [REDACTED] was born on [REDACTED] in Bronx, NY, the youngest of three children. By age three, Mr. [REDACTED] had moved to Queens, NY, where he lived in a two-family home with his parents, siblings, and eventually, his maternal grandmother and her partner, [REDACTED]. Mr. [REDACTED] lived with his grandmother in the upstairs portion, while his mother, sister, and brother lived downstairs. His grandmother and [REDACTED] raised him until he was 13, when his grandmother and her partner moved to Mississippi. Once they left, Mr. [REDACTED] lived in the upstairs unit alone and had no one looking after him. By the age of 14, Mr. [REDACTED]'s brother began beating him. His brother choked, hit, and threw books at him. In addition, his mother told him that his grandmother had assumed responsibility for raising him, because she, Mr. [REDACTED]'s mother, did not want him.
2. As a result of being a victim of domestic violence, Mr. [REDACTED] began to suffer from depression. The depression was so severe that the Bureau of Child Welfare ordered counseling for Mr. [REDACTED]'s family. Unfortunately, however, things only got worse.
3. By the time Mr. [REDACTED] was 16, his mother, insisting that she wouldn't support those she considered grown adults, stopped buying food for the house, despite her obligations to Mr. [REDACTED], who was still a minor. As a result, Mr. [REDACTED] suffered from hunger. To survive at the age of seventeen, Mr. [REDACTED] began selling drugs so he could afford to feed himself.

4. He was arrested and sentenced to six months of jail and five years of probation as a Youthful Offender.
5. At age nineteen as the result of continued emotional and physical abuse, as well as ongoing long-term exposure to his family and neighbors' crack addiction, Mr. [REDACTED] was admitted to the psychiatric unit of Queens General Hospital. He remained at Queens General for nine months of in-patient treatment.
6. While he was in the psychiatric unit, Mr. [REDACTED]'s childhood home went into foreclosure. As a consequence, on his release, the hospital arranged for him to be placed in his paternal grandmother's house as his mother had removed herself from the family.
7. There, Mr. [REDACTED] lived with his father and uncle in the basement even as his father struggled with his addiction to crack cocaine. His grandmother, Aunt [REDACTED] and her partner lived upstairs.
7. Mr. [REDACTED] was surrounded by family members who were drug dependent and unable to provide Mr. [REDACTED] with much care or support. There was constant arguing and fighting in the house, and Mr. [REDACTED] was the target of verbal abuse. He frequently went to bed hungry as the adults present were less focused on feeding him, and more concerned with feeding their drug habits.
8. In spite of these ongoing challenges, however, Mr. [REDACTED] tried, and tried hard. He worked to pursue his high school degree. He joined an organization called V.E.S.I.D. which enrolled him in a GED course at York College. And what may prove the most significant for his adjustment to life after release, he joined the church across the street and sought the stable and caring community there that sadly his own family had failed to provide for him.
9. The church afforded Mr. [REDACTED] a group of adults who functioned as adults and cared for one another and for him as well. That community's strength and faith provided the foundation for what would become a path towards Mr. [REDACTED]'s ultimate rehabilitation. Unfortunately, at that time, the chaos of his living environment and lack of adult support proved too debilitating.
10. In September of 1995, in an effort to move away from the turmoil of his household, Mr. [REDACTED] traveled by bus to Mississippi hoping to live there permanently with his grandmother who had moved there several years earlier. Once he arrived, he found that

the rules of her home health assistance program prevented anyone from living with her. Suddenly finding himself on his own, Mr. [REDACTED] tried to withdraw funds from a joint bank account he shared with his aunt, who lived in New York. However, the transaction was denied because his aunt had placed a block on the account. Left without funds of any kind and with no family in the area with whom he could stay, Mr. [REDACTED] spent a number of months undomiciled before deciding to return to New York.

11. Once back in New York, he found that in his time away, conditions with his family had further deteriorated. The household was in chaos: There was rampant drug use, not enough food to eat, and no functioning parents or adults.
12. Mr. [REDACTED] returned to New York with the hope of accessing his bank account so he could meet his most basic needs while securing a full-time job. He did not want much, just to live someplace clean and orderly. He was tired of “living rough,” of sleeping in parks, on benches and over heating-grates, and of foraging in garbage cans for scraps of food. He was simply hoping to no longer be homeless, to have a clean bed, and the proverbial roof over his head.
13. But on [REDACTED] 1996, he argued with his aunt over accessing the money he had deposited into their shared account. After retrieving the money and giving a portion of what was his to his aunt, he realized that to secure an apartment, he needed the amount he had given to her.
14. Mr. [REDACTED] came to his aunt and asked her to return the amount that he had given her, but she refused, and in anger and frustration, he threw a glass bottle filled with gasoline at her. The bottle erupted, causing a fire and his aunt was badly burned. His aunt was taken to the hospital, where she died thirty days later.

Transformation in Prison

15. When Mr. [REDACTED] entered DOCCS custody as a 26-year-old, he was terrified and could not picture what the next decades of his life would look like. He responded to being incarcerated with the negative coping mechanisms that he had thus far developed to that point in his life. In turn, he received disciplinary tickets for his behavior.
16. Furthermore, upon entering DOCCS, Mr. [REDACTED] lacked awareness and insight into his mental health, and lacked the support to address it.

17. But over the course of his incarceration, he came to a clear view of what he had done, felt horror and remorse at having caused his aunt's death, and he worked in various programs to develop, internalize, and practice various rehabilitative techniques that have allowed him to become the thoughtful, caring, and intelligent person he is today.
18. Mr. [REDACTED] has also come to understand the importance of working within the structure provided by various groups and programs as he seeks to address his mental health to ensure that he can be a productive person in society if he is released.
19. To start his process toward rehabilitation and accountability, he began at the most foundational level -- creating positive relationships with those around him. Throughout his childhood, there were few people he could trust or on whom he could rely. Mr. [REDACTED] recognized the importance of learning to trust others, and, through his words and behavior, to encourage others to trust in him.
20. Mentorship programs like Crossroads Prison Ministries (formerly Crossroad Bible Institute) provided Mr. [REDACTED] the opportunity to put his intention into practice. Making use of the support and structure that program provided, he engaged with people younger than himself in an effort to provide positive modeling, something from which he would have benefited in his earlier life.⁶
21. In addition to building positive relationships, Mr. [REDACTED] began to use writing as an outlet, channeling and expressing his feelings in language. In fact, one of his poems was one of fourteen pieces selected to be performed at the Prisoners' Legal Services of New York's Pro Bono Celebration.⁷ Mr. [REDACTED] continues to express himself through creative writing and recognizes how it has helped him become a more reflective and self-aware person.
22. Creative writing, mentorship and educational programs have given Mr. [REDACTED] the tools he needed to make sense of his past experiences and to understand and come to terms with the pain in his life, the harm he caused, and, most critically, to take responsibility for his past acts, and to take concrete steps toward healing himself and developing the ability to form positive and constructive relationships with those around him.

⁶ See [REDACTED] Crossroads Prison Ministries, Letter Recognizing Mr. [REDACTED]'s Involvement

⁷ See [REDACTED] Pro Bono Coordinator at Prisoners' Legal Services of New York, Letter about Work Selection; See also [REDACTED] Poem Ode To A Friend and A Stamp

Education and Program Accomplishments

23. While incarcerated, Mr. [REDACTED] has earned his High School Equivalency Diploma and received the second highest score of 290 on the High School Equivalency examination, administered on June 19, 2000.⁸
24. In addition to gaining his high school equivalency diploma, Mr. [REDACTED] successfully completed the vocational tailoring program which made him eligible to be programmed into the industrial tailor shops at Clinton Correctional Facility.⁹
25. In addition Mr. [REDACTED] developed an interest in the law, and as a result has worked in the law libraries of the facilities at which he has been placed and has participated in training programs focused on legal research and law library management. For example, he completed a ninety-six-hour course in Basic Legal Research and Law Library Management in March 2013¹⁰ as well as a thirty-eight-hour course in basic legal research and law library management at Sing Sing Correctional Facility in September 2016.¹¹
26. Through the many hours he has spent working as a Paralegal/Law Clerk, Mr. [REDACTED] has assisted other incarcerated people with their legal matters¹² and thereby demonstrated his commitment to helping individuals and his community.
27. He most recently demonstrated his commitment to service by volunteering to work in the law library from April 13th through April 17th, 2020 when it would otherwise have been left unattended when the people normally scheduled to work could not because of the COVID-19 pandemic.¹³
28. Throughout the period of his incarceration, Mr. [REDACTED] has participated in many transformative programs. For example, in May 2016, he successfully completed a basic course in nonviolent conflict resolution through the Alternatives to Violence Project, Inc. (AVP).
29. In addition, he makes use of the principles and techniques he learned in AVP with the new relationships he continues to form. The program helped him learn the importance of being honest and finding common ground with others, and also helped him to talk with

⁸See [REDACTED] Educ. Supervisor at Clinton Correctional Facility, Letter of High School Equivalency

⁹ See Certificate for Division of Industries Vocational Training Certificate

¹⁰ See Certificate of Merit, Great Meadow Correctional Facility

¹¹See Certificate of Merit, Sing Sing Correctional Facility

¹² See [REDACTED], Correction Officer, Letter in Support of Granting Parole

¹³ See Commendable Behavior Report, Fishkill Correctional Facility, 4/30/2020

his peers about his past and listen to them as they shared their past experiences and challenges.

30. Mr. [REDACTED] has also participated in the Bard Prison Initiative at Fishkill Correctional Facility. Through the program, Mr. [REDACTED] participates and engages in college coursework while building a supportive community among his peers. Throughout this program, Mr. [REDACTED] has excelled academically and continues to push himself to do more. He believes that his work in this program will help him with his reentry into society upon his release.
31. He has learned how to engage with challenging coursework while sharing supportive and intellectual conversations with fellow classmates. The program has taught him how to think creatively and be open-minded to others' opinions, which will help him in forming positive bonds in his community upon his release.
32. Most recently, in the Spring 2022 semester¹⁴, Mr. [REDACTED] is enrolled in Introduction to Public Health¹⁵, Grammar, Rhetoric, and Style¹⁶, Schooling in Colonial Africa¹⁷, and Islamic Art and Architecture¹⁸.

¹⁴ Mr. [REDACTED]'s midterm grades and professor comments were read to counsel via phone call between Mr. [REDACTED] and counsel on May 19, 2022. Counsel transcribed what Mr. [REDACTED] was reading contemporaneously.

¹⁵ In Introduction to Public Health, Mr. [REDACTED] along with everyone in the course, received an Incomplete for the midterm grade because of difficulties administering the course due to the COVID-19 pandemic. His Professor, [REDACTED] commented "It is a pleasure to have you in the class. I greatly appreciate your enthusiasm, as you constantly raise examples and make connections between our discussion and other related topics. Drawing these parallels is helpful for the whole class to deepen our understanding of the complex topics we are discussing. I encourage you to keep speaking up in class and contributing these ideas to our conversation. It's also clear that you are taking the end-of-semester assignments seriously and giving your topic due consideration, as evidenced by the drafts you handed in last week for feedback. As I wrote on the draft, you're off to a terrific start on the op-ed assignment. As the semester progresses, please make sure to incorporate evidence from articles into your writing to bolster your arguments. I look forward to reading future drafts of your work and continuing our class discussions!"

¹⁶ In Grammar, Rhetoric, and Style, Mr. [REDACTED] received a B+ for the midterm grade. His Professor, [REDACTED] commented "Your class participation helps lead the class forward and illustrates how to advocate for yourself. Since your understanding of simple and compound sentences are exemplary, work on adding the other two types naturally into your writings. The sense of knowing "naturally" often arrives in subsequent drafts. Also, find complex and compound-complex sentences in your course readings; then, write them in your notebook. In mid-March, you asked for advice about diagramming sentences. While I do think our individual 10-minute conference started to clear up some uncertainties, I think making generic drawings for these bugbears of grammar; then, go back to the ones we have done in class and do them again. If you mess up on, say, the third one, go back to the first and start again. The repetition will help. I look forward to assessing your revision of the Whitman imitation, your zites assignment, and your essay editing practice of chapters 23-25."

¹⁷ In Schooling in Colonial Africa, Mr. [REDACTED] received a B+ for the midterm grade. His Professor, [REDACTED] commented "[REDACTED]'s presence is engaged, lively, and lit up with a positive attitude. His most recent submissions of reading responses are showing deepened focus and improved attention to time, space, sourcing, and historical actors. I have encouraged him to illustrate his points with more vivid details drawn from the text but overall I have been excited to see how his written work has improved so far. The current grade of B+ will likely improve as he moves forward, since in the end the best 6 will be counted and the lowest scores or missed assignments can be dropped out of the formula."

¹⁸ In Islamic Art and Architecture, Mr. [REDACTED] received a C- for his midterm grade. He was unable to attend the first three classes of the course and was registered late for the class only after the three classes had already met.. His Professor, [REDACTED] commented "Mr. [REDACTED] attended the last three sessions. He registered late. Therefore he needs to catch up for the three last homeworks that we had. He submitted his midterm in which he earned 14% out of 20%. He had some technical errors in writing the visual analysis paper, which I'm sure with practice he will be able to improve. He engages in our discussion often."

Rehabilitation and Low Risk to Offend

33. Mr. [REDACTED] poses no risk to public safety.
34. Research has shown that rehabilitation is especially effective in cases involving people who were teenagers or young adults like Mr. [REDACTED] when they offended and who then served a sustained prison sentence.
35. Mr. [REDACTED] was 23 years old when he committed the crime of conviction. He has now served more than twenty-five years. Repeatedly throughout the quarter-century of his incarceration, Mr. [REDACTED] has actively sought out rehabilitation services.
36. Sustained research in the fields of psychology and neuroscience have established fundamental differences between adolescent and adult minds and reveal that the adolescent and emerging adult brain is not yet fully formed in areas such as impulse control, advance planning, and risk avoidance until after the age of 25.¹⁹
37. As most people pass through adolescence and into adulthood, they become less aggressive and their penchant for crime begins to decline. Thus, the vast majority of juvenile and young-adult offenders, including those who commit a “serious crime,” grow out of antisocial activity as they mature into adulthood.²⁰

¹⁹ See Alexi Jones, Reforms without Results (<https://www.prisonpolicy.org/reports/violence.html>) (People age out of violence, so long sentences are not necessary for public safety. Furthermore, researchers have consistently found that age is one of the main predictors of violence. “Violent” is not a static characteristic, rather one’s risk for violence is highly dependent on their age. As people change over time, their risk for violence also changes. Chart showing arrest rates for violent offenses by age group in 2018. There is a sharp increase from ages 10-14 to ages 20-24, when the arrest rate peaks at 300 per 100,000 people ages 20-24. Arrest rates then decline steadily among older groups. It’s a well-established fact that crime tends to peak in adolescence or early adulthood and then decline with age, yet we incarcerate people long after their risk for violence has diminished. The “age-crime curve” can be explained in part by the fact that brain development continues well into people’s twenties, particularly in the prefrontal cortex, which regulates impulse control and reasoning. As a paper by the Executive Sessions at Harvard Kennedy School explains, “Young adults are more likely to engage in risk-seeking behavior, have difficulty moderating their responses in emotionally charged situations, or have not fully developed a future-oriented method of decision-making.” It can also be explained by social and personal factors, such as finding a stable career, getting married, and overcoming past traumas. The age-crime curve is especially important because nearly 40% of people serving the longest prison terms were incarcerated before age 25. By issuing such lengthy sentences for young people convicted of violent crime, we are also ignoring their great potential for personal transformation and rehabilitation. Such excessive sentences have diminishing returns and, ultimately, opportunity costs to individuals, communities, and taxpayers.)

²⁰ Studies show that “[t]he relationship between age and crime is one of the most solid within the field of criminology.”[1] Furthermore, “[i]t is understood that crime increases throughout adolescence and then peaks at age 17 . . . and then begins to decrease over the life course moving forward.”[2] Moreover, developments in neuroscience have highlighted the connection between age, brain development, and logical decision making. “[S]everal major morphological and functional changes occur in the human brain during adolescence . . . [and] studies have indicated that the brain remains in an active state of development during adolescence.”[3] Of particular note is that “significant changes occur in the limbic system, which may impact self- control, decision making, emotions, and risk-taking behaviors. The brain also experiences a surge of myelin synthesis in the frontal lobe, which is implicated in cognitive processes during adolescence.”[4] The prefrontal cortex (“PFC”) acts “as the seat of our higher-order cognitive functions, [and] continues to develop into adulthood. It is among the latest brain regions to fully mature in humans. Higher order cognitive functions, in which PFC plays a prominent role, such as language and intelligence, continue to develop into adulthood.”[5] It is well accepted in the scientific and medical communities that the brain continues to develop well into a person’s mid-twenties, and “that various morphological and physiological changes occur in the human brain during adolescence.”[6] Notably: The prefrontal cortex offers an individual the capacity to exercise good judgment when presented with difficult life situations. The prefrontal cortex, the part of the frontal lobes lying just behind the forehead, is responsible for cognitive analysis, abstract thought, and the moderation of correct behavior in social situations. The prefrontal cortex acquires information from all of the senses and orchestrates thoughts and actions in order to achieve specific goals. The prefrontal cortex is one

38. Mr. [REDACTED] will utilize the skills he has learned in the Anti-Violence Program, and the daily outlet his writing provides, to respond to whatever challenging moments he may encounter on his release. We, and the numerous Corrections Officers who submitted letters on his behalf (see *nfra*), are confident that Mr. [REDACTED] poses no risk to public safety.

Correctional Officer Recommendations

39. Reflecting his competence and his supervisors' trust in him, Mr. [REDACTED] submitted four letters written to support his release by DOCCS personnel.

40. Correctional supervisors consistently describe Mr. [REDACTED] as professional, responsible, and fully ready and prepared to function in society.

- Correction Officer [REDACTED]
 - “ I believe that my input will shed light on [Mr. [REDACTED]'s] readiness to be returned to the community. During the time that I have known Mr. [REDACTED] he has been a polite, quiet and respectful person who spends his free time enrolled in college; (sic) working to obtain an Associate's Degree in Liberal Arts. He is also a devout Christian and tends to avoid negative people and/or situations. Mr. [REDACTED] works in the law library as a Paralegal/Law Clerk. He often helps other inmates in the housing unit with their legal matters by giving them advice. I believe this shows his willingness to help people. Mr. [REDACTED] has not caused any problems on the housing unit and he has always complied with any request that I have made in regard to the functioning of the housing unit. I hope this letter has given you a more in-depth look at Mr. [REDACTED]. I hope it proves helpful in your decision to return him to the community.”
- Correction Officer [REDACTED]
 - “Based on my observation and interactions with him, Mr. [REDACTED] is an intelligent, sincere man. I have read some of the essays he wrote while enrolled in Bard college's BPI (Bard Prison Initiative) program as he works towards obtaining an associate degree. Upon his release to the community, I believe Mr. [REDACTED] will make a positive contribution to society.”
- Correction Officer [REDACTED]
 - While working in the law library, I have taken notice of an inmate who has exhibited admirable qualities, his name is [REDACTED] [REDACTED] . . . Mr. [REDACTED] has worked under my supervision from September 19, until the present. Mr. [REDACTED] has an outstanding attendance record, and is always willing to help others, even if it

of the last regions of the brain to reach maturation, which explains why some adolescents exhibit behavioral immaturity. There are several executive functions of the human prefrontal cortex that remain under construction during adolescence The fact that brain development is not complete until near the age of 25 years refers specifically to the development of the prefrontal cortex. [7]

[1] Caitlin V. M. Cornelius, Christopher J. Lynch, *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling*, Society for Modeling & Simulation International

[2] *Id.*

[3] Mariam Arain et al., *Maturation of the Adolescent Brain*, *Neuropsychiatric Disease and Treatment* (2013) at 449.

[4] *Id.* at 450.

[5] Sharon M. Kolk et al., *Development of Prefrontal Cortex*, *American College of Neuropsychopharmacology* (2021) at 47.

[6] Arain *supra* note 27 at 451. (In fact, there are characteristic developmental changes that almost all adolescents experience during their transition from childhood to adulthood. It is well established that the brain undergoes a “rewiring” process that is not complete until approximately 25 years of age.)

[7] *Id.* at 452.

involves working on his days off, without compensation. Mr. [REDACTED] has a great disposition and has always been respectable, to myself and other staff. In my opinion, I believe Mr. [REDACTED] will be productive in society and I feel he will never resort to crime when released in society.”

- Deputy Superintendent for Programs [REDACTED] and Superintendent [REDACTED]
 - “This commendable behavior report is being given for volunteering to work in the Law Library from April 13th through April 17th due to lack of Law Library workers available due to the COVID-19 pandemic. You are commended for your willingness to assist the facility during the crisis. Your service is appreciated and noted. Keep up the good work!”

Release Plans

41. Under current DOCCS policy, as a result of Mr. [REDACTED] OMH Level 1S, should Mr. [REDACTED] be granted parole, DOCCS is required to provide him with a community re-entry program.
42. The Mental Health Community Reintegration Program (MHCRP) will provide specialized supervision in order to meet DOCCS’ concern with public safety, quickly engage Mr. [REDACTED], and connect him with appropriate services in the community, so as to address his needs, and work to ensure his successful re-entry.
43. Further, the Parole Preparation Project has secured support from local community organizations that are available to provide Mr. [REDACTED] with additional opportunities for engagement. Letters of Reasonable Assurance were provided to the Board in the packet that was submitted by the Cardozo Criminal Defense Clinic. *See* Ex. C, Letters of Reasonable Assurance.
44. Thus, for example, the Fortune Society, an organization dedicated to assisting individuals rebuilding their lives through access to innovative services, stands ready to provide Mr. [REDACTED] with a wide array of re-entry programming. Through their Better Living Center, Mr. [REDACTED] can be provided with any necessary evaluations, psychotherapy, access to psychiatric nurse practitioners, medication, individual and group therapy, as well as group programming including vocational training, job training, anger management, and social education. Additionally, The Fortune Society provides additional opportunities for housing, employment, education, health, nutrition, and the arts.
45. Additionally, the Osborne Association, an organization that is dedicated to serving people who have been involved with the criminal justice system by assisting them with transforming their lives and advocating for opportunities for them to contribute to their communities, is committed to assisting Mr. [REDACTED] upon his release. *Id.*

46. Specifically, the Osborne Association can provide Mr. [REDACTED] with workforce development programming as well as health services. The Association also focuses on providing support in reconnecting families, and will be able to assist Mr. [REDACTED], as he is committed to rebuilding relationships with his family.

Family and Community Support

47. Mr. [REDACTED] is dedicated to his faith. Upon his release, he looks forward to becoming actively involved in the religious community. In fact, for over 22 years, including throughout his time in prison, Mr. [REDACTED] has maintained a strong relationship with Deaconess [REDACTED] [REDACTED] in New York City.

48. Mr. [REDACTED] and Ms. [REDACTED] are committed to maintaining and growing their relationship, so that Mr. [REDACTED] can become an active member of the [REDACTED] community, where he will continue to receive spiritual and emotional support and practice his faith.

49. Additionally, both the Osborne Society and Fortune Society have committed to providing Mr. [REDACTED] support upon his release. They are ready to provide him with support in finding employment and housing, as well as providing him mental health treatment.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In The Matter of the Application of

[REDACTED] [REDACTED]

Petitioner,

-against-

Verified Petition

Index No. _____

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION, ANTHONY J.
ANNUCCI, ACTING COMMISSIONER
and TINA M. STANFORD,
CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE,
Respondents

**MEMORANDUM OF LAW IN
SUPPORT OF ARTICLE 78**

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

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Aleena Pasha, Student Attorney
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for Petitioner

ARGUMENT**I. THE BOARD VIOLATED ITS OWN REGULATION BY FAILING TO EXPLAIN IN FACTUALLY INDIVIDUALIZED AND NON-CONCLUSORY TERMS HOW IT CONSIDERED EACH APPLICABLE FACTOR****A. The Board's regulation, revised in 2017, requires the Interviewing Board Members to explain how it considered each applicable statutory factor when reaching its decision**

In determining whether to grant parole, the Board must base its decision on eight specifically enumerated statutory factors. *See* N.Y. Exec. Law § 259-i(2)(c)(A). Pursuant to the Board's 2017 revision of §8002.3 of Title 9 of the NYCRR, if parole is denied, the Board must do more than allude to those factors that were relevant to the decision and reference the materials pertinent to each of those factors. The Board *must* explain *how* it considered and weighed each of the applicable statutory factors. 2017 NY REG TEXT 437083 (NS), 2017 NY REG TEXT 437083 (NS). While §8002.3 had previously only required a detailed explanation of the reasons *for* denial, the revised regulation now requires the Board to explain in addition in factually individualized and non-conclusory terms how it assessed each of the applicable factors, and how they figured into their calculus and final decision.

The revised regulation reads:

If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview, of the decision denying him or her parole and the factors and reasons for such denial. Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case. The Board shall specify in its decision a date for reconsideration of the release decision and such date shall be not more than 24 months from the interview. N.Y.C.R.R. §8002.3.²¹

The Parole Board adopted this revision to “clearly establish what the Board must consider when conducting an interview and rendering a decision.” 2017 NY REG TEXT 437083 (NS), 2017 NY REG TEXT 437083 (NS). The Board further noted that “if the Board decides to deny release to Community Supervision, the Board shall provide **individualized factual reasons stated in detail** as to why, addressing the applicable factors in §8002.2.” The intended benefit of the amended regulation was to require the Board to conduct more thorough interviews oriented to the factors specified by the regulation and to provide individualized, factually detailed decisions in instances where release to Community Supervision is denied. 2016 NY REG TEXT 437083 (NS), 2016 NY REG TEXT 437083 (NS) (Emphasis supplied).

²¹ Prior to this change, the regulation did not require the Board to explain how and to what extent the applicable statutory factors contributed to the ultimate decision. *Cf.* N.Y.C.R.R. §8002.3(b) (“If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview of the decision denying him or her parole and the factors and reasons for such denial. Such reasons shall be given in detail and not in conclusory terms.”).

The Board, therefore, can no longer meet its legal obligation by simply alluding to, referencing, or enumerating the factors it had considered, or the materials pertaining to those factors, when announcing its denial. Now, the Board must discuss in a factually specific and non-conclusory way how it considered each of the required factors, and how the consideration of each of the applicable factors weighed in its ultimate decision.

Thus far, research has failed to disclose published authority that construes the revised regulatory language. Cases that address the pre-amendment regulation lack precedential value in as much as they reviewed parole denials that took place before the Board's 2017 adoption of the §8002.3 regulation.²² But any effort to rely on pre-amendment case law would be misplaced and at best inapposite, and at worst, disingenuous.

The controlling regulation is clear on its face and needs no construction beyond its explicit language. The Board is required to explain how it considered *each* factor that applied to Mr. [REDACTED] in "*factually individualized and non-conclusory terms.*" By failing to do so here, the Board violated N.Y.C.R.R. §8002.3(b) and the decision must be vacated and Mr. [REDACTED] should be granted a *de novo* hearing.

B. The Board did not explain how it considered Mr. [REDACTED]'s institutional record

The first factor that the Board must consider is "the institutional record, including program goals, accomplishments, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates." *See* N.Y.C.R.R. §8002.2(d)(1).

As the materials submitted in his packet make clear, Mr. [REDACTED] has attained significant accomplishments in the two and one-half decades of his incarceration. The Board's decision, however, merely acknowledged without discussing Mr. [REDACTED]'s "letters of support and commendable behavior report from DOCCs staff... programming, which includes completion of academics, vocational and T's phase I." *See* Ex. A, May 11, 2021 Parole Decision, pg. 5. The Board decision simply parrots, in a pro forma way, that Mr. [REDACTED]'s various accomplishments and achievements were "considered." *Id.* The decision says nothing, however, about *how* the Board

²² *See e.g. King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (Finding that the Board "need not expressly discuss each" "guideline" found in Executive Law § 259-i [1] [a]; [2] [c]), which mirrors the factors found in regulation §8002.2.); *Matter of Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 672-73 (2d Dep't 2018) (Board "is not required to address each factor in its decision."); *Campbell v. Stanford*, 173 A.D.3d 1012, 1014 (2d Dep't 2019) (same). In sum, an agency must obey its own rules. *See Frick v. Bahou*, 56 N.Y.2d 777, 778 (1982) ("The rules of an administrative agency, duly promulgated, are binding upon the agency").

considered the letters and reports, thus failing to meet its obligation of individual consideration based on factual specificity.

By sharp contrast, the decision offers a detailed recitation of what the Board characterizes as Mr. [REDACTED]'s "more compelling" disciplinary history. *Id.* By merely listing but not discussing Mr. [REDACTED]'s numerous academic, vocational, and program accomplishments the Board failed to explain in factually individualized and non-conclusory terms how its consideration of Mr. [REDACTED]'s positive institutional record factored in its denial. While all but ignoring the positive, the Board assigned disproportionate emphasis to an older and more limited number of disciplinary violations that had occurred at Mr. [REDACTED]'s prior facility—a facility whose disciplinary practices had been found by an independent audit to be infected by racism in impact if not animus, *see* Part II *infra*.

In addition, the Board entirely omitted any discussion of Mr. [REDACTED]'s overwhelmingly positive interpersonal interactions with staff and other incarcerated individuals, especially in the three years prior to his parole interview, as discussed in Part II *infra*. *Id.* The Board thereby seemingly deliberately misrepresented Mr. [REDACTED]'s institutional history, highlighting that which was negative, no matter how limited or stale, in favor of ignoring the voluminous evidence of the positive adjustment and contributions he has made that would merit release. The Board thereby ignored its statutory obligation to discuss everything that was statutorily relevant in favor of cherry-picking for discussion only the negative aspects of Mr. [REDACTED]'s record.

Thus, for example the Board failed to address that Mr. [REDACTED] has participated in several transformative programs throughout his incarceration. For example, in 2016, he successfully obtained two certifications in nonviolent conflict resolution through the Alternatives to Violence Project (AVP), Inc. *See* Ex. D, May 22, 2016 Alternatives to Violence Project, Inc. Certificate of Completion; Ex. E, June 26, 2016 Alternatives to Violence Project, Inc. Certificate of Completion. As, if not more, significant than his completion of the programs is the active use that Mr. [REDACTED] has made of the principles and techniques he learned in AVP in the relationships he establishes and maintains within his institution as is noted and described in the letters of support provided by members of the Corrections staff charged with his oversight and supervision, *see* Part II *infra*.

The AVP program helped Mr. [REDACTED] learn the importance of being honest and finding common ground with others, and also helped him to talk about his past with his peers and listen

to them as they shared their past experiences and the challenges that contributed to the conduct that led to their incarceration. While this transformative work was highlighted in his parole packet, the Board ignored the significant work Mr. [REDACTED] has done to internalize and practice the principles of nonviolent conflict resolution in favor of focusing all but exclusively on the difficulty he had had as a teenager prior to his incarnation in adjusting to community supervision albeit close to thirty years prior to the interview and also prior to his crime of conviction. *See Ex. A, May 11, 2021 Parole Decision, pg. 5.*

The Board also failed to discuss, and implicitly trivialized, Mr. [REDACTED]'s significant academic achievements. Since his incarceration, Mr. [REDACTED] has earned his High School Equivalency Diploma and received the second highest score of 290 on the High School Equivalency examination, administered on June 19, 2000. *See Ex. F, September 13, 2000 High School Equivalency Results Letter from [REDACTED] Clinton Correctional Facility Educational Supervisor.*

The Board also chose to ignore Mr. [REDACTED]'s participation in the Bard Prison Initiative at Fishkill Correctional Facility. Through this program, Mr. [REDACTED] participates and engages in college coursework while helping to build a supportive community among his peers. His performance in the BPI makes clear the commitment that Mr. [REDACTED] brings to tasks, his seriousness of purpose, and the contributions he makes to furthering discussion in his classes by offering respectful responses and insightful comments and questions both to his peers and teachers.

What the record makes clear is that Mr. [REDACTED] has excelled academically and continues to push himself to do more. During the hearing, the Board commissioners said that they would consider the letter submitted on behalf of the Bard Prison Initiative. Yet, despite Mr. [REDACTED] discussing his participation in Bard's program several times, the denial decision failed to address Mr. [REDACTED]'s admission to Bard, or the work he had done to date with that program. Neither do questions posed during the interview, nor the decision provide so much as an indication of how the Board considered and assigned weight to Mr. [REDACTED]'s other significant educational accomplishments. The Board simply made a passing and vague reference to Mr. [REDACTED]'s "completion of academics." *See Ex. A, May 11, 2021 Parole Decision, pg. 5.* But simply referencing "completion of academics" cannot be deemed to satisfy the Board's statutory obligation to discuss Mr. [REDACTED]'s academic achievements and factor them into its decision.

The Board similarly trivialized Mr. [REDACTED]'s work history.

As to vocational training and work assignments, Mr. [REDACTED] successfully completed the vocational tailoring program which made him eligible for admission to the industrial tailor shops at Clinton Correctional Facility. More significantly still, Mr. [REDACTED] has actively worked to learn to read and understand the law, skills that have been recognized by program administrators and earned Mr. [REDACTED] assignment to numerous law libraries and inclusion in training programs focused on legal research and law library management.

He completed a ninety-six-hour course in Basic Legal Research and Law Library Management in March 2013. *See* Ex. G, March 15, 2013 Law Library Management Certificate of Merit Great Meadow Correctional Facility and September 14, 2014 Law Library Management Certificate of Merit Sing Sing Correctional Facility. In addition, he also completed a thirty-eight-hour course in Basic Legal Research and Law Library Management at Sing Sing Correctional Facility in September 2016. *Id.*

Mr. [REDACTED] has put that training to good use as noted by Correction Officer [REDACTED] who described the many hours Mr. [REDACTED] has spent working as a Paralegal/Law Clerk assisting other incarcerated people with their legal matters. *See* Ex. H, April 10, 2020, Letter from Correction Officer [REDACTED]

Mr. [REDACTED]'s work in the law library in general, and the assistance he provides to his peers in specific, speak to his desire to live with purpose and make a positive contribution to whatever community of which he is a member. His work makes clear that Mr. [REDACTED] is committed and eager to help his community, and that he is capable of realizing that intention in concrete action, as, for example, by stepping in and staffing the law library when Covid first impacted his facility when the library would otherwise have been left unattended.

All of this information was presented to the Board but did not garner discussion during the interview or in the denial decision.

Although multiple letters of support from DOCCs staff commend Mr. [REDACTED]'s work in the law library and Mr. [REDACTED] communicated an interest in pursuing legal work upon release, the Board made no reference to this body of work, gave no thoughtful consideration to this factor and simply stated, “[w]e note... your work assignment as a paralegal assistant in the law library.” *See* Ex. A, May 11, 2021 Parole Decision, pg. 5. But, “Noting” work, letters of support, program participation and everything else that demonstrates that Mr. [REDACTED] has made and continues to

make a positive and favorable adjustment, however, in no way meets the Board's obligation to discuss in a factually specific way each of these factors and explain how they figured in the Board's ultimate decision denying Mr. [REDACTED] release.

C. The Board failed to allow Mr. [REDACTED] to postpone his COMPAS interview to resolve conflicts

Since Mr. [REDACTED] was not given an opportunity to postpone his COMPAS interview, he is entitled to a *de novo* parole hearing prior to which Mr. [REDACTED] may complete the essential COMPAS interview. In *Malerba v. Evans*, the Third Department recognized that "Failure to perform a risk and needs assessment, such as COMPAS, as required by the regulatory scheme, is grounds for a *de novo* interview." *Malerba v. Evans*, 109 A.D.3d 1067 (3d Dep't 2013); *see also In re Garfield v. Evans*, 108 A.D.3d 830 (3d Dep't 2013). This is true even where the failure to complete the COMPAS assessment may be attributed to the individual and not the facility. Thus, in *Kalawasinski v. Stanford*, the court held that a parole applicant can postpone his COMPAS interview to resolve any concerns or conflicts he may have and retain the right to complete their COMPAS assessment once the conflicts and/or concerns have been resolved. *See Kalawasinski v. Stanford*, Index No. 1083-14, Decision and Order/Judgment dates October 17, 2014 (Sup. Ct. Albany Co. (O'Connor A.J.S.C.)).

Here, Mr. [REDACTED] was in the midst of his COMPAS interview when he expressed some concern about some of the questions being posed, and confusion about which questions were being posed and which not. He asked to suspend, not terminate, the interview in order to have his questions resolved. Instead, the facility terminated the interview and when Mr. [REDACTED] asked for an opportunity to complete the assessment his request was denied. Mr. [REDACTED]'s intention was not to withhold his participation. He recognized the significance of his COMPAS assessment. His concern was to have it accurately reflect all of the pertinent information.

Instead of being afforded the opportunity to have his concerns resolved and the interview completed, Mr. [REDACTED]'s concerns were treated as a failure to cooperate. The non-completion of the COMPAS assessment assumed great significance for the Board which wrote in its denial, "Also concerning is your refusal to sign your Case Plan or to participate in completing the self-efficacy portion of the COMPAS assessment, which again demonstrates your poor judgment and inability or unwillingness to follow the rules." *See Ex. A*, May 11, 2021 Parole Decision.

During his parole hearing, Mr. [REDACTED] sought to explain why he had sought to suspend his COMPAS interview and why his effort was not a “failure to follow the rules” but, out of concern for the assessment’s importance, to do everything he could to comply by having its result be most accurate. *See* Ex. M, May 11, 2021 Parole Board Interview. He said:

In regard to the self-assessment, it's like 74 questions and they only gave me the questions from 30 to 70-something. They wanted me to sign off on this, and they only gave me half the questions, so I don't know the other half. When they presented me with that, I said there are inaccuracies in my DOCCS file, that I want to talk with somebody else about, and I said what about the other 30 questions. They said, well, these are questions we are going to answer based on your record. I said, well, I found inaccuracies in my record. I've been here since January, and I have yet to meet my counselor. **I didn't refuse it. I wanted some help in clarifying the inaccuracies in the record, because they are going to use my record to answer the questions from 1 to 30, and I didn't want to sign anything that was inaccurate (emphasis supplied).**

As Mr. [REDACTED] expressed during the interview, he did not refuse to be interviewed, but instead wanted to understand the nature of the interview and correct what he thought might be misinformation on which the interviewers might possibly rely. Mr. [REDACTED] was concerned that he was not being asked almost half of the COMPAS questions, and that he was being asked to sign off on his DOCCS record about which he had questions.

Mr. [REDACTED] was not refusing. He was not being non-compliant with DOCCS rules. Rather, understanding the significant weight the COMPAS assessment carries, he wanted to assure its accuracy. The Board pushed past Mr. [REDACTED]’s explanation and turned Mr. [REDACTED]’s concern to its own end, framing his expressed concerns as evidence of his unwillingness to abide by a regulation.

In doing so, the Board improperly characterized Mr. [REDACTED]’s concern about being given the full COMPAS assessment and inaccuracies in his record as recalcitrance. Mr. [REDACTED] should not have had his self-advocacy and attention to detail turned against him. Instead, he should have been given an opportunity to complete the COMPAS assessment after his reasonable questions had been answered. Since he was not, and the lack of his COMPAS interview factored into the Board’s denial, Mr. [REDACTED] is entitled to a *de novo* parole hearing. *Malerba v. Evans*, 109 A.D.3d 1067 (3d Dep’t 2013); *see also In re Garfield v. Evans*, 108 A.D.3d 830 (3d Dep’t 2013); *Kalawasinski v. Stanford*, Index No. 1083-14, Decision and Order/Judgment dates October 17, 2014 (Sup. Ct. Albany Co. (O’Connor A.J.S.C.)).

II. THE BOARD ASSIGNED DISPROPORTIONATE ADVERSE SIGNIFICANCE TO A LIMITED NUMBER OF TIER 2 AND MISBEHAVIOR REPORTS FROM CLINTON CORRECTIONAL FACILITY AND ALL BUT IGNORED APPLICABLE FACTORS THAT ARE EVIDENCE OF MR. [REDACTED]'S MORE RECENT SUSTAINED POSITIVE CONDUCT

A. The Parole Commissioners failed to place Mr. [REDACTED]'s Clinton violations in necessary historical context by ignoring the empiric evidence demonstrating that Black men incarcerated at Clinton were four times more likely to be written up for disciplinary violations

The Board erred by failing to contextualize the disciplinary tickets that Mr. [REDACTED] had received while he was housed at the Clinton Correctional facility, and implicitly dismissed as insignificant that they were remote in time and that since being transferred from Clinton to the Fishkill Correctional Facility in 2019, Mr. [REDACTED] has received no disciplinary infractions.

Mr. [REDACTED] was incarcerated at Clinton Correctional Facility from 2000 through 2009, and again from 2018 through 2019. In its decision the Board asserted “However, more compelling is your disciplinary history, which is replete with Tier 2 and misbehavior reports for infractions such as violent conduct, threats, direct order, and fighting.” *See* Ex. A, May 13, 2021 Parole Decision. In highlighting those infractions, the Board chose to ignore the troubling long-term evidence of anti-Black prejudice that has infected the Clinton Correctional Facility disciplinary process.

In 2016, The New York Times reported, “At Clinton, a prison near the Canadian border where only one of the 998 guards is African-American, black inmates were nearly four times as likely to be sent to isolation as whites, and they were held there for an average of 125 days, compared with 90 days for whites.”²³ Further, “Black men were punished seven times as often as white men for pat-frisk infractions,” The Times found that, “among inmates under 25, blacks received 185 disciplinary charges, while whites received only 14.” *Id.*

It is certainly possible that Mr. [REDACTED] may have merited one or more of the infractions in question, but it is all but impossible to consider them absent a concern about the problematic, racialized culture of punishment that operated at that institution—a culture that disproportionately punishes incarcerated people who are Black. The Board turned a blind eye to that documented history, and also failed to address the fact that Mr. [REDACTED] has had *no* disciplinary infractions in the more than two years prior to his Board interview at Fishkill Correctional Facility, a period that coincided with Mr. [REDACTED]'s transfer away from Clinton.

²³<https://www.nytimes.com/2016/12/05/nyregion/governor-cuomo-orders-investigation-of-racial-bias-in-ny-state-prisons.html>

B. The Board failed to address and assign appropriate weight to letters of support and commendable behavior reports from DOCCS staff all of which speak to qualities and characteristics of Mr. [REDACTED] that merits full consideration as they demonstrate his readiness to be released to parole supervision

A denial decision by the Parole Board is improper when it fails to explain the reasons for denial of parole “in detail and not in conclusory terms.” N.Y. Exec. Law. 259-i(2)(a). Even under the previous less-demanding requirements, denial-decisions were deemed inadequate where they “summarily itemize[d] a petitioner’s achievements while incarcerated or render[ed] a conclusory decision parroting the statutory standard.” *See for example Coaxum v. N.Y. State Bd. of Parole*, 14 Misc.3d 661 (Sup. Ct. Bronx Cty. 2006).

But that is precisely what this Board did.

Executive Law 259-i(2)(C)(A)) lists the factors the Parole Board must consider when deciding whether to release someone to parole supervision. *See* N.Y. Exec. Law § 259-i (Consol., Lexis Advance through 2021 released Chapters 1-451, 453-484). The first factor is “Achievements while incarcerated: “the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and **interactions with staff and inmates**” (Emphasis supplied). *Id.*

Mr. [REDACTED] received five exceedingly positive behavior reports from correctional officers and prison superintendents. Yet, the Board’s decision, while acknowledging the letters in the most perfunctory, general, and conclusory terms, ignored their substance and what they collectively said about Mr. [REDACTED]’s readiness for community-release. The Board only wrote, “Consideration has been given to your mental and parole packet, which was prepared on your behalf by the Criminal Defense Clinic at Cardozo Law School and included . . . letters of support and a commendable behavior report from DOCCS staff.” *See* Ex. A, May 13, 2021 Parole Decision.

The Board’s brief comment, limited to itemizing the contents of the packet submitted on Mr. [REDACTED]’s behalf while saying nothing about the content of the letters, reports and other documents noting Mr. [REDACTED]’s achievements, underscores the degree to which the Board “summarily itemize[d] [the] petitioner’s achievements while incarcerated or render[ed] a conclusory decision parroting the statutory standard.” *Id.* When the Board wrote, “consideration has been given,” it obfuscated that which the regulations make explicitly clear: Central to the Board's task is to explain in a detailed and non-conclusory way, precisely *how* the Board

considered each of the letters of support, and the commendable behavior report, and *how* that consideration figured in the Board's final decision. *See* Ex. A, May 13, 2021 Parole Decision.

The Board's failure to comply with its own regulations requires that Mr. [REDACTED] be remanded for a *de novo* hearing.

1. Letter in Support of Granting Parole from Correction Officer [REDACTED]

On April 10, 2020, Correction Officer [REDACTED] who works at Fishkill Correctional Facility, wrote a Letter in Support of Granting Parole for Mr. [REDACTED]. C.O. [REDACTED] has been the officer assigned to Housing Unit 9/1, where Mr. [REDACTED] has lived since July of 2019. *See* Ex. H, April 10, 2020, Letter from Correction Officer [REDACTED]

Officer [REDACTED] wrote:

I believe that my input will shed light on [Mr. [REDACTED]'s] readiness to be returned to the community. During the time that I have known Mr. [REDACTED] he has been a polite, quiet and respectful person who spends his free time enrolled in college; (sic) working to obtain an associate's degree in Liberal Arts. He is also a devout Christian and tends to avoid negative people and/or situations. Mr. [REDACTED] works in the law library as a Paralegal/Law Clerk. He often helps other inmates in the housing unit with their legal matters by giving them advice. I believe this shows his willingness to help people. Mr. [REDACTED] has not caused any problems on the housing unit and he has always complied with any request that I have made in regard to the functioning of the housing unit. I hope this letter has given you a more in-depth look at Mr. [REDACTED]. I hope it proves helpful in your decision to return him to the community.

In the Board's interview with Mr. [REDACTED], in response to a New York State Correction Officer who openly advocated for Mr. [REDACTED]'s parole, the Board summarily commented, "One [letter] is from Correction Officer [REDACTED] it was provided in 2020. Officer [REDACTED] is assigned to the housing unit. He talks about getting to know you, you being polite, quiet and respectful. He talks about you working in the law library as a paralegal and law clerk." *See* Ex. A, May 13, 2021 Parole Decision. What the Board singularly failed to acknowledge and address was that, after knowing Mr. [REDACTED] for almost two years, after watching Mr. [REDACTED] interact with his peers and people in authority, and after watching Mr. [REDACTED] abide by rules, regulations, and behavioral norms and standards, Officer [REDACTED] recommended that Mr. [REDACTED] be released back into the community on parole supervision.

Nowhere does the Board address or respond to that recommendation or its significance. Instead, as with all the favorable material submitted to the Board that recommends in favor of release, the Board ignored it. The Board, in essence, trivialized the opinion of a Corrections Officer who observed Mr. [REDACTED] for many hours every day over a two-year period, in favor of its

own assessment formed during a twenty-minute interview while glancing through the materials that had been collated and submitted on Mr. [REDACTED]'s behalf.

2. Commendable Behavior Report from Correction Officer [REDACTED]

On April 9, 2020, Correction Officer [REDACTED] who also works at Fishkill Correctional Facility, wrote a Commendable Behavior Report supporting Mr. [REDACTED] and recommending that he be released. *See Ex. I, April 9, 2020, Commendable Behavior Report from Correction Officer [REDACTED]*. Among other positive comments, C.O. [REDACTED] wrote that based on his observations and interactions with Mr. [REDACTED], C.O. [REDACTED] found him to be an “intelligent, sincere man.” C.O. [REDACTED] went on to note that “Upon his release to the community, I believe Mr. [REDACTED] will make a contribution to society.”

The interviewing commissioners also ignored this recommendation. Overlooking the letter's content, the decision simply recited, “We also have a Commendable Behavior Report from Correction Officer [REDACTED]” *See Ex. A, May 13, 2021 Parole Decision*. By summarily acknowledging the letter of support but refusing to take notice of or addressing its content, the Board erased from the record and its own decision-calculus, that Officer's assertion—based on hours of interactions and observed conduct—that Mr. [REDACTED] would make a positive contribution to society upon his release.

In essence, the Board paid passing lip service to its receipt of the letter, ignored the content of the recommendation, and most critically failed to discuss or explain why it chose to disregard the Officer's recommendation in favor of release.

3. Affirmation from Correction Officer [REDACTED]

On February 17, 2020, yet another Correction Officer who works at Fishkill, [REDACTED] wrote an Affirmation in support of Mr. [REDACTED] *See Ex. J, February 17, 2020 Affirmation from Correction Officer [REDACTED]*

C.O. [REDACTED] works as a supervisor in the law library. He wrote:

While working in the law library, I have taken notice of an inmate who has exhibited admirable qualities, his name is [REDACTED] . . . Mr. [REDACTED] has worked under my supervision from September 19, until the present. Mr. [REDACTED] has an outstanding attendance record, and is always willing to help others, even if it involves working on his days off, without compensation. Mr. [REDACTED] has a great disposition and has always been respectable, to myself and other staff. **In my opinion, I believe Mr. [REDACTED] will be productive in society and I feel he will never resort to crime when released in society.**” (Emphasis supplied).

In its interview with Mr. [REDACTED], in response to this affirmation describing Mr. [REDACTED]'s impressive work ethic, compassion, and more than helpful disposition, an assessment based on five months and what we can presume to have many hours of observations, an affirmation that concludes by asserting that Mr. [REDACTED] "will never resort to crime when released in society," the Board only stated "We have another letter from Correction Officer [REDACTED] who also talks about knowing you and your work in the law library." *See* Ex. A, May 13, 2021 Parole Decision.

The Board's pointed choice to ignore the content of this letter, and, absent discussion, dismiss, Officer [REDACTED]'s recommendation that Mr. [REDACTED] merits release and the Officer's assessment that Mr. [REDACTED] posed no risk of re-offending strongly suggests that the Board had predetermined to withhold release from Mr. [REDACTED] regardless of the information presented to it. At a minimum, however, the Board was obligated to discuss each of these letters or discuss them together in a factually specific way and then explain why their shared recommendation that Mr. [REDACTED] be released was insufficient to impact its ultimate decision.

4. Behavior Report from Deputy Superintendent for Programs, [REDACTED] and Superintendent, L. Fields

At the beginning of the COVID-19 crisis, notwithstanding the risk to himself, Mr. [REDACTED] continued to work in the law library without being required to. Indeed, at one point, he was the only person continuing to work in the law library. The Superintendents at Fishkill Correctional Facility took notice, writing Mr. [REDACTED] a Commendable Behavior Report on April 29, 2020. *See* Ex. K April 29, 2020 Commendable Behavior Report from Deputy Superintendent for Programs, [REDACTED] and Superintendent, [REDACTED]. The Superintendents wrote:

This commendable behavior report is being given for volunteering to work in the Law Library from April 13th through April 17th due to lack of Law Library workers available due to the COVID-19 pandemic. You are commended for your willingness to assist the facility during the crisis. Your service is appreciated and noted. Keep up the good work!

Despite Mr. [REDACTED]'s extreme dedication to his craft in the law library, even in the worst throes of the COVID-19 crisis, the Board only commented "It looks like there is another Commendable Behavior Report from Superintendent [REDACTED] also from 2020." *See* Ex. A, May 13, 2021 Parole Decision.

The degree to which the Board minimized this commendable behavior report, as it had trivialized each of the other letters of support from Corrections officers, belies any suggestion that the Board gave the mandated consideration to the enumerated factors, and makes clear that it

substituted its own subjective judgment based on the circumstances of Mr. [REDACTED]'s crime of conviction for the evidence and empiric, behavior-based assessments offered by those who had overseen him over the most recent years of his incarceration.²⁴

III. THE BOARD MISCHARACTERIZED AND PLACED DISPROPORTIONATE WEIGHT ON MR. [REDACTED]'S PAST OFFENSES

A. The Board assigned disproportionate weight to Mr. [REDACTED]'s youthful offender adjudications and two subsequent community supervision violations

Pursuant to §8002.2 of Title 9 of the NYCRR, in every release determination, the Board is required to consider an individual's, "prior criminal record, including the nature and pattern of the inmate's offenses, age at the time of commitment of any prior criminal offense, adjustment to any previous periods of probation, community supervision and institutional confinement."

Additionally, as mentioned *supra*, the Board must explain how it considered each applicable statutory factor in factually individualized and non-conclusory terms. 2017 NY REG TEXT 437083 (NS), 2017 NY REG TEXT 437083 (NS). While the Board is required to consider each applicable statutory factor, it need not weigh each factor equivalently and "may 'place...greater emphasis on the severity of the crimes than on the other statutory factors.'" *Peralta v. N.Y. State Bd. of Parole*, 157 A.D.3d 1151 (3d Dep't 2018); *Moore v. N.Y. State Bd. of Parole*, 137 A.D.3d 1375 (3d Dep't 2016); *Fischer v. Graziano*, 130 A.D.3d 1470 (4th Dep't 2015).

Considering the relevant statutory factors, however, requires more than a mere reference to "the record;" and allowing for "greater emphasis" on the severity of the crime of conviction does not permit the Board to relegate the other mandated factors to functional irrelevance.

In the present case, the Board's decision states in a conclusory manner, "[y]ou expressed your remorse, however, your Instant Offense, together with your prior criminal history and poor history on community supervision, represents a continuation of your criminal conduct and demonstrated your poor judgment." See Ex. A, May 11, 2021 Parole Decision, pg. 4.

²⁴ Mr. [REDACTED] received yet another Commendable Behavior Report from Officer [REDACTED]. Unfortunately, Superintendent [REDACTED] improperly withheld the letter from Mr. [REDACTED] writing "The submission of a Commendable Behavior Report is not the format for an officer to write his personal assessment of your preparedness to be considered for parole," even though Under DIR# 4006(II(B)(5)(a)), Dtd. 01/28/21, "Facility employees shall . . . [p]repare and sign a written report (in conformance Chapter V of Title 7 NYCRR). Written reports shall be written as follows: (a) Form #2167, "Commendable Behavior Report," to the Superintendent (and ultimately filed in the Chrono and Progress Reports section of the incarcerated individual's guidance file) **and a copy to incarcerated individual**; to be completed within 72 hours of its occurrence or the employee's return to duty" (Emphasis supplied). See Ex. L, Commendable Behavior Report from Correction Officer [REDACTED]. The decision to withhold the commendable behavior report was an error, resulting in yet another positive report from a Correction Officer which the Board could have considered being improperly removed from Mr. [REDACTED]'s file.

Here, the Board mischaracterized and placed disproportionate weight on Mr. [REDACTED]'s youthful offender adjudication and two subsequent community supervision violations which occurred more than thirty years prior to the Board interview and decision..

During Mr. [REDACTED]'s interview, the Board expressed concern about Mr. [REDACTED]'s capacity to live a law-abiding life in the community and meet conditions of his parole. The Board sought to justify its concerns by referring to Mr. [REDACTED]'s experience as a teenager when he was sentenced to probation following his adjudication as a youthful offender. *See* Ex. A, pg. 4. Mr. [REDACTED] was 18 years old at the time of his YO adjudication—a fact that the Board failed to take into consideration, contrary to §8002.2 of Title 9 of the NYCRR.

Mr. [REDACTED]'s difficulty with community-supervision more than thirty years ago at the age of 18, whatever it may have been, provides no legitimate predictive indication of his current ability to make a positive adjustment to release, meet the conditions of his parole, and live a law-abiding life.

Social science research demonstrates that long-term rehabilitation is especially effective where the person involved committed their antisocial acts while a teenager or in their early twenties. Sustained research in psychology and neuroscience have recognized fundamental differences between adolescent and adult minds and reveal that the adolescent and emerging adult brain is not yet fully formed in areas such as impulse control, advance planning, and risk avoidance until after the age of 25. As most people pass through adolescence and into adulthood, they become less aggressive and their penchant for crime begins to decline. Thus, the vast majority of juvenile and early-adult offenders, including those who commit a “serious crime,” grow out of antisocial activity as they mature into adulthood.²⁵

The United States Supreme Court, in a trilogy of cases starting in 2005, noted the necessity for courts to be mindful of an individual's youth at the time of an offense and to be guided in part by neuroscience research when sentencing youth who commit crimes. Thus, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court ruled that imposing the death penalty on juveniles who commit crimes when they are under age 18 violates the Eighth Amendment's prohibition against cruel and unusual punishment.

²⁵ Michael E. Antonio et al., *Capital Jurors as the Litmus Test of Community Conscience for the Juvenile Death Penalty*, 87 *Judicature* 275 (2004); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992); Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 *Am. Psychologist* 469 (2000); Donna Bishop & Charles Frazier, *Consequences of Transfer, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* 227 (Jeffrey Fagan & Franklin E. Zimring eds., 2000)

The Court based its ruling on the recognized differences between juveniles and adults, given juveniles' difficulty with impulse control, and their not-yet-developed capacity to appreciate in concrete terms the immediate and long-term consequences of their actions. *See Roper v. Simmons*, 543 U.S. 551, at 569 [young offenders' moral character is not fully developed, and as such, their actions are not necessarily "evidence of irrebuttable depravity."].²⁶

The concerns that inform the Supreme Court's jurisprudence apply with equal force to the decisions made by the Parole Board when assessing the growth, change, and maturation of someone who was an adolescent or late adolescent at the time of their crime of conviction. Section 8002.2's language all but requires the Board to consider the age, emotional, and cognitive development of the person at the time of their crime, and the ways in which they may have changed in the intervening years.

Mr. [REDACTED] was 18 years old at the time of his YO adjudication; 31 years later, he is now 49 years old. Repeatedly throughout the 25-year period of his sentence, Mr. [REDACTED] has actively sought out rehabilitation services and educational and work opportunities. He has impressed those responsible for overseeing and supervising him in his housing unit and work assignments with his maturity, and his ability to live within norms and meet all behavioral expectations. Who Mr. [REDACTED] was as an adolescent is not who he is now. An objective assessment of his full institutional record makes that clear.

The various letters of support provided by Corrections Officers at the Fishkill Correctional Facility present a clear picture of who Mr. [REDACTED] is today -- a responsible, caring and thoughtful member of his community. *See* Ex. H, I, J, K, L. Their collective assessment offers a finer and more grounded predictor of Mr. [REDACTED]'s capacity to meet the conditions of, and respond favorably to, community-based supervision than does Mr. [REDACTED]'s conduct when on probation following his youthful offender adjudication thirty-one years ago when he was only eighteen. But the Board ignored the shared evaluation offered in the letters in favor of looking back in time to Mr. [REDACTED]'s conduct when he was eighteen, some three decades earlier. *See* Ex. A, May 11, 2021 Parole Decision, pg. 4-5.

²⁶ Five years later, in *Graham v. Florida*, 560 U.S. 48 (2010) the Court extended its jurisprudence holding that when a sixteen-year-old violates the terms of their probation it cannot justify a resentencing to life without parole. The Court found that fundamental brain differences between adults and younger offenders allowed for better rehabilitative outcomes and lower likelihood of reoffending. The Court cemented its rejection of a one-size-fits-all approach to sentencing juvenile young adult offenders in *Miller v. Alabama*, 567 U.S. 460 (2012). There the Court insisted that younger offenders required a careful, case-by-case assessment based largely on the offender's level of cognitive and emotional development.

By turning away from the record of Mr. [REDACTED]'s sustained developmental achievements in favor of his past challenges, the Board failed to meet their obligation under §8002.2 and 8002.3 of Title 9 of the NYCRR. The Board's failure to comply with its own regulations requires that Mr. [REDACTED] be remanded for a *de novo* hearing.

B. The Board assigned disproportionate weight to Mr. [REDACTED]'s crime of conviction

The Board improperly focused on and assigned inordinate weight to Mr. [REDACTED]'s crime of conviction. While the Board may consider and discuss the underlying crime of conviction, it may not excessively rely on the nature of the underlying crime of conviction when denying parole but must give "fair consideration" to each of the applicable statutory factors and consider its relationship to and "fairly weigh" the crime of conviction against **all** of the information made available to the Board, including the petitioner's expression of remorse, personal growth and change, institutional achievements, and release plan. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, 432, 433 (1st Dept 1993), *aff'd*, 83 N.Y.2d 788 (1994) ("...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 inherent seriousness of the crime itself and must be considered in conjunction with all the other information known to the Board.)²⁷

Here, while the Board made a passing reference to Mr. [REDACTED]'s sustained accomplishments at Bard Prison Initiative, in the law library, and the letters of recommendation submitted by a number of Corrections Officers, both his interview with the Parole Board and the Parole Board's decision focused almost exclusively on Mr. [REDACTED]'s crime of conviction. *See Ex. M*, May 11, 2021 Parole Board Interview and *Ex. A*, May 11, 2021 Parole Decision. Indeed, while the Board acknowledged Mr. [REDACTED]'s various accomplishments, the only factor the Board discussed in detail was the crime of conviction and Mr. [REDACTED]'s failure on community supervision as a teenager. The Board thereby ignored its obligation to consider the crime of conviction in relation to Mr. [REDACTED]'s

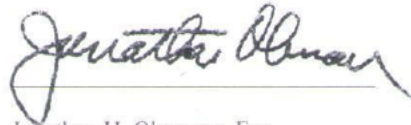
²⁷ *See also Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 27 (1st Dept 2016) (Holding the Board acted irrationally in focusing exclusively on the seriousness of petitioner's conviction and the decedent's family's victim impact statements...without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and her lack of any prior violent criminal history.); *V. Sullivan v. NYS Bd of Parole*, 2018/100865 (S. Ct., NY Cnty, 2019) (finding Board relied almost exclusively on the seriousness of the crime and statements petitioner made at time of sentence); *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dept 2014); *Perfetto v. Evans*, 112 A.D.3d 640 (2d Dep't 2013); *Gelsomino v. N.Y. State Bd. of Parole*, 82 A.D.3d 1097 (2d Dep't 2011) ("Here, in denying the petitioner's application for release on parole, the Parole Board cited only the circumstances of the underlying crimes and failed to mention any of the other statutory factors, including his excellent disciplinary record, his record of achievements while incarcerated, as well as positive statements made by the sentencing court."); *Huntley v. Evans*, 77 A.D.3d 945 (2d Dep't 2011) ("Where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally."); *Mitchell v. N.Y. State Div. of Parole*, 58 A.D.3d 742 (2d Dep't 2009) (While the seriousness of the underlying offense remains acutely relevant in determining whether the petitioner should be released on parole, the record supports the petitioner's contention that the Parole Board failed to take other relevant statutory factors into account.); *Johnson v. New York State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dept 2009).

demonstrated growth and change, his acknowledgment of responsibility, expression of remorse, and the sustained record of positive educational and social achievements he has achieved while incarcerated. As a result, Mr. [REDACTED] is entitled to a *de novo* parole hearing.

CONCLUSION

For all of the above reasons, Mr. [REDACTED] petitions this Court to order Respondents to release Mr. Clay to parole supervision. In the alternative, Mr. [REDACTED] petitions this court to annul the May 2021 parole denial and order a properly conducted *de novo* parole interview before a new panel that does not include Commissioners Samuels and Davis.

Dated: New York, NY
May 24, 2022



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