Art. 78 Petition - FUSL000139 (2021-12-13)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
[redacted],

Petitioner,

-against-

TINA M. STANFORD,
CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE,

Respondent.

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

Amended Verified Petition

Index No. [redacted]

Oral Argument Requested

The Petition of [redacted] respectfully alleges that:

1. Petitioner [redacted], currently incarcerated at Wende Correctional Facility brings this petition for a judgment pursuant to CPLR Article 78 seeking to annul respondent's November 10, 2020 denial of parole and directing the Parole Board to conduct a *de novo* parole review.
2. Undersigned counsel did not represent [redacted] in preparation for the November 10, 2020 parole review at issue here, nor in the administrative appeal, which [redacted] filed *pro se*.
3. Respondent, New York State Parole Board [hereinafter the "Board"], has not provided petitioner with the full record of the proceedings below, specifically the full parole file relied on by the Board in denying parole. Therefore, the facts alleged herein are based upon the limited portions of the parole file that the Board has provided to [redacted].

4. Petitioner requests that the Board, as part of its answer to this petition, file with this Court and serve on petitioner all records, documents and material provided to the Board for the November 10, 2020 parole review.

5. The Parole Board's denial of parole was improper for four reasons:

    a. The Board departed from [redacted] low COMPAS risk scores without providing individualized reasons for doing so;

    b. The Board considered, referred to, and placed weight upon the sentencing judge and prosecutor's penal philosophy expressed at [redacted] sentencing, which recommended [redacted] never be considered for release on parole;

    c. The Board's repeated focus on the high profile nature of the underlying case as well as the parole decision at issue prevented the Board from considering the relevant statutory factors and thus the decision was predetermined; and

    d. Parole commissioner W. William Smith did not consider granting [redacted] release to parole supervision based on his personal beliefs.

6. Based on the facts and law, the denial of parole was arbitrary, capricious and irrational constituting an abuse of discretion. Therefore, the Court should vacate the Board's improper denial of parole to [redacted] and grant a *de novo* parole review. *See* Memorandum of Law in Support of Petition.

JURISDICTION

7. Article 78 confers jurisdiction over this matter upon this Court. CPLR §§ 306-b, 307 (2), and 7804(c).

8. This Court has ruled that Petitioner established personal jurisdiction over Respondent. NYSEF Doc. No. 34.

9. Petitioner has exhausted all administrative remedies before seeking judicial review of the administrative determinations of the Board.

10. This Court has jurisdiction over the matter because the Board's denial of [redacted] appeal cannot be further "reviewed by appeal to a court or to some other body of officer." CPLR § 7801(1).

VENUE

11. This action is properly commenced in Albany County because it is the county in which the New York State Parole Board has its principal office. CPLR § 506(b).

PARTIES

A. Petitioner

12. [redacted], fifty-five years old, has been imprisoned for over thirty-three years. He was denied parole on November 10, 2020.

B. Respondent

13. Tina Stanford is the Chairwoman of the New York State Board of Parole.

14. The Board of Parole is the sole entity that considers and determines parole eligibility, sets conditions of release, and revokes parole when the conditions are violated.

PROCEDURAL HISTORY

15. Parole Commissioners Smith and Coppola denied parole to Petitioner [redacted] on November 10, 2020, after an interview conducted at Wende Correctional Facility via videoconference on the same date. Ex. 1.

16. [redacted] filed, *pro se*, a timely notice of administrative appeal. [redacted] then perfected his appeal *pro se* on February 24, 2021. Respondent received it March 2, 2021;

thus, the appeal was timely. Respondents denied [redacted] *pro se* appeal in a decision dated June 10, 2021. Ex. 9.

17. [redacted] has exhausted his administrative remedies and this matter is ripe for the instant Article 78 proceeding. 9 NYCRR §8006.4(c); Ex. 9.

STATEMENT OF FACTS

18. In 1989, [redacted] was convicted of criminal possession of a weapon and murder in the second degree for the murder of New York City Police Officer [redacted] in 1988. He was sentenced to a custodial term of twenty-five years to life. [redacted] first became eligible for parole in 2012.

19. [redacted] was age twenty-two at the time of the crime; he had no prior criminal convictions.

20. [redacted] has been denied parole five times, serving eight years beyond the minimum sentence of twenty-five years.

21. [redacted] has a positive disciplinary record, having only received five tickets, all but one within the first ten years of his incarceration. Ex. 3.

22. The Board conceded during the interview at issue that [redacted] has a good disciplinary record and acknowledged that the most recent ticket was "small," and that the last violent ticket he had was back in 1990, over three decades ago. Ex. 1 at 15, 16, 17 ("your disciplinary record is good... while you've been inside you've been doing well").

23. Respondent's risk assessment instrument, COMPAS, scored [redacted] low in eleven of twelve categories. Ex. 4.

24. While incarcerated, [redacted] acquired a GED and engaged in significant programming, including extensive work in the law library. Ex. 7; Ex. 5. He has started teaching a legal research class to his peers. He has attended braille classes. *See* Ex. 6 at 1.

25. [redacted] completed programs in printing, appliance repair, teaching, and legal research law library management. Ex. 7 at 8-11.

26. [redacted] has received high marks in his work progress reports. One report notes "[b]ecause [redacted] is such a good worker, RMU staff calls upon him a lot when the building is short porters," while another states that in the Soap Factory "[h]is work ethic is commendable and his relationship with staff and other offenders is excellent." Ex. 5; Ex. 7.

27. [redacted] successfully completed a 100-hour Aggression Replacement Training and has received certificates of completion for a Nonviolent Conflict Resolution program from the Alternatives to Violence Project, Inc., and a 70-hour course in Basic Legal Research and Law Library Management. Ex. 6 at 1–2.

28. While incarcerated, [redacted] has counseled young men convicted of crimes on how to improve their lives through education and hard work. Ex. 1 at 18.

29. If released, he intends to use his experience to continue mentoring young people to help them avoid taking the path he did as a young person, and to become productive members of society. *Id*.

30. [redacted] ability to work diligently towards his goals is reflected in the letters of recommendation he received from correctional staff members who have worked with him daily for extended periods of time and in progress reports detailing the high quality of his work. *See* Ex. 7.

31. [redacted] strives to stay out of trouble and continue to "better [him]self," regardless of when he is released. *See* Ex. 1 at 19.

32. The Commissioners at the November 10, 2020 interview remarked that "things are bad" inside, making it that much more difficult to stay on track. *See* Ex. 1 at 18. Nevertheless, [redacted] has done so.

33. [redacted] contracted COVID-19, for which he was hospitalized. In the November, 2020 interview he thanked the medical providers and acknowledged that the nurse who cared for him "saved [his] life." *See* Ex. 1 at 16, 20 ("you have to thank God and the first responders and everybody that participated in making sure that you were all right").

34. If granted parole, [redacted] will seek to transfer parole to either New Jersey where one sister lives, or North Carolina, where his other sister lives. He plans to earn a living using the skills he acquired through training programs while incarcerated and seeks to live a quiet life. *See* Ex. 2 at 21-23.

35. Board commissioners Marc Coppola and W. William Smith conducted the interview and rendered the denial decision on November 10, 2020. The transcript of the interview is attached as Ex. 1.

36. The Board's decision, issued on November 10, 2020, reads as follows:

> "After a review of the record, interview and deliberation, the panel has determined that your release would be incompatible with the welfare and safety of society and would be [sic] so deprecate the serious nature of the crime as to undermine respect for the law. Parole is denied
>
> Required statutory factors have been considered, together with your institutional adjustment, including discipline and program participation, your Risk and Needs Assessment and your needs for successful reentry into the community. Also considered are letters of support for your release and letters or statements opposed. More compelling however, are the following: Your serious IOs of murder second and CPW second degrees which involved you and your co-defendants causing the death of a police officer, officer [redacted], while he sat in his patrol car. It is stated in the record that this act was committed as retaliation against law enforcement form a drug dealing organization and it's [sic] leader. In fact, a further aggravating factor is that Officer [redacted] was guarding the home of a witness because of this

> organization, one that you admit being a part of. Members of this organization have attempted to intimidate the witness due to his complaints about drug activity around his home. Therefore this crime represented an attack not only on Officer [redacted], but the rule of law as a whole. While the IOs appear to be your only felony convictions of record and this is your only state term of incarceration, it in no way mitigates the role that you played in committing this terrible crime.
>
> The panel notes your positive programming and relatively clean disciplinary record since 2000, despite your Tier II ticket March of this year However, discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. Also weighed and considered are the results of your Risk and Needs Assessment and the low scores indicated therein. As discussed during your interview, your claim of innocence was also considered. However, the panel does not intent [sic] to, nor have the authority to, undermine the jury's verdict. In playing a role in the murder of Officer [redacted] you demonstrated a callous disregard for human life and a complete lack of respect for the law.
>
> Therefore based on all required factors, in the file considered, discretionary release at this time, is not appropriate."

Ex. 1.

The Board Failed to Adequately Explain Its Departure From Low COMPAS Scores

37. [redacted] had low COMPAS scores in eleven out of twelve categories. Ex. 4 at 2. As to risk of "felony violence," "arrest risk" and "abscond risk," [redacted] had the lowest score of "1" on a scale of one to ten. *Id.*

38. As to "prison misconduct," which was scored high, the Board stated the score should not have been high. Ex. 1 at 24 (Commissioner Coppola: "I think it's obvious that your misconduct is not high.").

39. Despite these low, positive scores, the Board, in denying parole, claimed that release at this time would be incompatible with the welfare of society and would so deprecate the seriousness of the offense as to undermine respect for the law. The Board, however, failed to either specify the scales from which it was departing or provide individualized reasons

from such departures, both of which the law requires. *See* Argument I, Memorandum in Support of Petition.

The Board Considered and Relied on Penal Philosophy

40. The murder of Police Officer [redacted] conviction, and [redacted] parole eligibility has elicited overwhelming attention and strong opinions from the sentencing judge, the trial prosecutor, victim representatives, the law enforcement community, and the media.

41. In 1989, when [redacted] was sentenced, the law did not permit the sentencing judge to impose life without parole.

42. At sentence, the judge and prosecutor criticized the law's proscription of this sentence and recommended that future parole boards never consider releasing [redacted]. At sentencing, the prosecutor and judge expressed their staunch beliefs that the law should allow for a sentence of life without parole in response to the crime for which [redacted] was convicted. To remedy this, both recommended that future parole boards never consider release. Ex. 10.

43. At sentence, the trial prosecutor lamented that [redacted] could not be sentenced to life without parole or death:

> … unfortunately at the present time unlike 40 other states, New York does not have a death penalty, nor do we have life without parole. However, we are going to ask the Court at this time to impose the sentence of the maximum the law allows, and we would ask that the Court, as part of its sentencing recommendation, to recommend that this defendant never be paroled or walk the streets as a free man. Id. at 3–4.

44. The sentencing judge then expressed his dismay that the law restricted him from sentencing [redacted] to life without parole:

> Now I have received a multitude of letters asking that I impose a life sentence without parole, and under our law, I cannot do that. However, what I can and will do is to promise you that I intend to make a recommendation to the parole board that you are never to be paroled. I know I will no longer be sitting on the bench twenty-five years from now, but rest assured, my last judicial function before I retire from the judiciary will be to write to the parole board to remind them of my strong feeling that I have expressed to you today.

Ex. 10 at 7.

45. Like the prosecutor, the sentencing judge recommended to the Board that it follow his personal penal philosophy: to impose life without parole by never considering release to parole supervision.

46. At the November 10, 2020 interview, the Board directly referenced the sentencing court's expression of penal philosophy:

> "I'll be honest with you, you know, and I know in sentencing minutes, he said [referring to the judge] – they [referring to the judge and prosecutor] talked about the death penalty. He said that you should never be released and his last day in office, he was going to make sure he wrote to the parole board."

Ex. 1 at 12.

47. The parole file contains additional recommendations by the trial prosecutor and sentencing judge, that likely contain additional expressions of penal philosophy. Ex. 8 (indicating "official statements" from the "DA" and "JUDGE" are in the parole file).

48. The New York City Police Benevolent Association ("PBA") has an established campaign with resources dedicated to opposing the release of individuals convicted of killing police officers.

49. This PBA campaign asserts that all people who are convicted of killing police officers should never be released.

50. The PBA's website permits anyone to fill in a form to be sent to the Board opposing the release of "cop killers."

51. On information and belief, [redacted] parole file likely contains thousands of these PBA forms.

52. On information and belief, the parole file contains "significant opposition" expressing penal philosophy. Ex. 1 at 24, 28 (the Board stating the parole "file is huge, [sic] we have a lot of information."); Ex. 14 at 17 (In 2015, the Board referred to "thousands" of letters—namely "letters from judges, DAs, U.S. attorneys, police officers, politicians, mayors, senators, thousands of police officers and citizens.").

53. The Board relied on and gave weight to the opposition material that expressed personal opinions and penal philosophy which is not permitted. *See* Argument II, Memorandum in Support of Petition.

The Board's Focus on the High-Profile Nature of the Case Pre-Determined the Decision

54. The Board twice referred to the high-profile nature of the case during the instant November 10, 2020 interview.

55. The first such reference occurs near the beginning of the hearing:

> [redacted]: …as you know it's a political case.
> COMMISSIONER COPPOLA: It's a highly charged media case, there's no doubt about that.
> Ex. 1 at 7.

56. Then, near the end of the interview, Commissioner Coppola, unprompted, injects the public profile of [redacted] case:

> COMMISSIONER COPPOLA: We all have a bad day. When you go 20 years without anything, I think that's a different story. So with that low family support, everything is low and unlikely. Of course this doesn't take in other factors with regard to the crime but it does take in a number of other factors, your age, things like that. Your healthy [sic] might play a role in there. I'm trying to cover the areas that I wanted to cover. Again, there are—you're not the only one but there are other cases that whether they're high profile or not. Your case is what we would consider for lack of a better term high profile and this is not a secret. You have support for your release and significant opposition.

[redacted]: I understand that.
COMMISSIONER COPPOLA: It's never been a secret for you…
Ex. 1 at 24.

57. When [redacted] was convicted, it was headline news. Since [redacted] first became eligible for parole in 2012, intense media coverage of his case has resumed leading up to and following each parole review.

58. At [redacted] first parole review, in 2012, a commissioner spoke at length about the widespread attention [redacted] case received:

> COMMISSIONER ELOVICH: Now, in addition to the family, there is also a tremendous amount of opposition from law enforcement who felt a tremendous amount of loss, not only in the City of New York at the time, but across the entire nation. This was the most highly attended funeral for a police officer in the whole nation. People came to this funeral from other countries, all ethe elected officials were there, community members, people from local elementary schools, this case had a tremendous impact on the entire nation, and still from the letters of opposition continues to have a tremendous impact on law enforcement and many members of New York City, including all of the officials who remember this case and the way that it completely shocked and terrified members of the community.
> [redacted]: Yes, ma'am.
> Ex. 13 at 10.

59. In 2017, the Board returned to the subject of the "extremely high profile" nature of Mr. [redacted]s case. Ex. 15 at 19. The Board questioned [redacted] about the possibility that negative sentiments held by law enforcement, and the related media attention directed towards [redacted] case, would make it harder for him to function as a productive member of society:

> COMMISSIONER BERLINER: Let's say we parole you and you go back to the community, right?
> [redacted]: Yes, sir.
> COMMISSIONER BERLINER: This is an extremely high-profile case.
> [redacted]: Yes.
> COMMISSIONER BERLINER: Regardless of what happens with your judicial appeal process and your maintenance of innocence.
> [redacted]: Yes, sir.

COMMISSIONER BERLINER: It's not a secret that the police department is absolutely opposed to the release of anybody who is convicted of killing a cop.

[redacted]: I understand.

COMMISSIONER BERLINER: So we talked about your plan to go back to the community. We talked about your readiness to go back to the community, but I want to get a sense from you of your confidence level of being able to integrate back into a community that seems like it might be incredibly hostile to you.

Ex. 15 at 19.

60. Taken together, the repeated emphasis on the public profile of [redacted] case in the 2020 interview and past interviews strongly indicates that the denial was predetermined. *See* Argument III, Memorandum in Support of Petition.

Commissioner Smith Did Not Consider the Possibility of Release to Parole Supervision

61. Commissioner Smith, who recently left the Board, was the longest serving Commissioner on the Parole Board at the time of [redacted] hearing.
62. Commissioner Smith was appointed by Governor Pataki in 1996.
63. Governor Pataki, first inaugurated in 1995, campaigned on a promise to reinstate the death penalty, and three months after taking office, signed legislation authorizing the death penalty and life without parole.
64. Commissioner Smith has strong ties to state Senator Patrick Gallivan who avidly opposes the release of people convicted of killing police officers.
65. Before being elected to the state senate, Senator Gallivan was also appointed to the Parole Board by Governor Pataki and served on the Board with Mr. Smith for a number of years.
66. Commissioner Smith has supported the candidacy of Senator Gallivan by donating to Senator Gallivan's election and reelection campaigns at least eight times since 2010.

67. Senator Gallivan has been an outspoken critic of granting parole to those convicted of murdering police officers, demonstrated by multiple campaigns opposing the release of so-called "cop killers."

68. When [redacted]—who was convicted of killing two police officers—was released on parole, Sen. Gallivan sent a letter to the Governor questioning the legitimacy of the Board's decision and requested an investigation into the Board's decision-making practices. *See* Patrick M. Gallivan, Letter to Governor Andrew M. Cuomo, July 29, 2019, *available at* https://www.nysenate.gov/sites/default/files/press-release/attachment/gallivan_parole_letter_2019.pdf.

69. Senator Gallivan rallied against the release of [redacted], who, in 1971 at age 19, killed a police officer and had served over 45 years on a 25 to life sentence. Press Release, *Senator Gallivan Calls On Parole Board to Deny Parole for Convicted Cop Killer*, https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-calls-parole-board-deny-parole-convitced.

70. Senator Gallivan expressed the same position in a series of press conferences urging the Parole Board to deny parole to [redacted]. He presented a petition to the Board "signed by nearly 10,000 concerned citizens" urging them "to deny the release from prison of [redacted], the driver of a getaway car in a 1981 robbery of a Brink's armored car in Rockland County, N.Y. The robbery left a security guard and two police officers dead." Patrick Gallivan, Senator Gallivan Presents Petition Calling on NYS Board of Parole to Deny Release of Judith Clark, 29 March 2018, https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-presents-petition-calling-nys-board.

71. Senator Gallivan keeps a close watch on the Board's decisions, particularly those in the cases of so-called "cop killers." Just this past June, he noted that "[s]ince 2017, the state Parole Board has released at least 20 cop-killers." Patrick Gallivan, Senator Gallivan Joins Colleagues in Unveiling Parole Reform Bills, https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-joins-colleagues-unveiling-parole-reform.

72. Commissioner Smith's sustained support for a politician who continuously fights to block the release of "cop-killers" suggests that he supports that political position as well.

73. Upon information and belief, Commissioner Smith has never voted to grant parole to a person convicted of killing a police officer.

74. Commissioner Smith's refusal to consider parole for those convicted of killing police officers is illustrated by his participation in the last two denials of parole to [redacted] each violating a court order.

75. [redacted], convicted of murdering a police officer, successfully appealed his 2014 denial of parole, with the court finding the Board had relied exclusively on the severity of the offense. *See Mackenzie v. Stanford*, No. 2789/2015, 2015 WL 13872810, at 3 (Sup. Ct., Dutchess Cnty, 2015). The court ordered a *de novo* review to be conducted in compliance with the law.

76. At the 2015 *de* no*vo* appearance, the panel, which included Commissioner Smith, issued a denial decision. Ex. 22 at 1.

77. [redacted] moved for contempt. The Art. 78 court held the Board in contempt finding that the Board had once again denied parole based solely on the nature of the crime. *See MacKenzie v. Stanford*, No. 2789/2015, 2016 WL 11690588, at 3 (Sup. Ct. Dutchess Cnty, 2016), *aff'd*, *Ferrante v. Stanford*, 172 A.D.3d 31 (2d Dept 2019).

78. The court ordered a second *de novo* review and ordered that "none of the members of either the 2014 or 2015 parole boards that denied parole shall participate in the DE NOVO hearing," which included Commissioner Smith. *MacKenzie*, No. 2789/2015 at *3

79. In violation of the court's order Commissioner Smith sat as lead on what was now a second *de novo* review that took place in 2016. Ex. 21, at 1.

80. At the 2016 review, Commissioner Smith again denied release based solely on the nature of the crime. *Id.* at 31

81. Ten days later, [redacted], then 70 years old, was found dead by suicide.

82. In 2019, [redacted] was denied parole. He was convicted of killing a police officer and a civilian when he was eighteen years old, had served over 40 years, and been denied parole five times. Ex. 16 at 2–3. After filing an Art. 78 challenging the legality the denial, the court granted the petition, ordered a *de novo* review, and found, among other reasons, that the Board denied solely based on the seriousness of the crimes. *Id.* at 7

83. At [redacted] 2020 *de novo* review, two out of the three commissioners on the penal voted to grant parole. The two commissioners noted that "[t]he opposition of your release was duly considered" but nevertheless granted his parole "[b]ased on the legal standards this panel must apply." Ex. 12 at 81–82. Commissioner Smith, however, dissented stating, "[t]he senseless deaths of the two men you shot and killed continue to impact the victims' family, friends and the community." Ex. 12 at 83.

84. On October 20, 2015, Commissioner Smith denied parole to a person convicted of murdering a police officer. *See, e.g.*, "Parole Interview Transcript/Decision - FUSL000002 (2015-10-20)" (2019). Parole Information Project https://ir.lawnet.fordham.edu/trans/6.

85. On December 15, 2015, Commissioner Smith denied parole to a person convicted of murdering a police officer. Parole Interview Transcript/Decision - FUSL000069 (2015-12-15)" (2021). Parole Information Project https://ir.lawnet.fordham.edu/trans/102.

86. On July 28, 2016, Commissioner Smith denied parole to a person convicted of murdering a police officer and reads into the record at the interview the words of the sentencing judge: "There probably is no crime in our society that society condemns more than the killing of a policeman in the performance of his duties."). "Parole Interview Transcript/Decision - FUSL000069 (2016-07-28)" (2021). Parole Information Project https://ir.lawnet.fordham.edu/trans/103.

87. On May 16, 2012, Commissioner Smith denied parole to a person convicted of murder and attempted murder of a police officer. "Parole Interview Transcript/Decision - FUSL000077 (2012-05-16)" (2021). Parole Information Project https://ir.lawnet.fordham.edu/trans/118.

88. Commissioner Smith did not consider releasing [redacted] to parole supervision based on his personal opposition to granting parole to persons convicted of killing police officers. *See* Argument IV, Memorandum in Support of Petition.

CAUSE OF ACTION:
ARTICLE 78 REVIEW OF IMPROPER DENIAL OF PAROLE
(For Judgment Pursuant to CPLR §§ 7801-7806 and Executive Law §259-i(c)(a)(2))

89. Petitioner repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

90. Article 78 is the appropriate method of review of final agency determinations concerning parole reviews.

91. The Board's November 10, 2020 denial decision violated its statutory and regulatory duties in four ways.

92. *First*, the Board functionally departed from [redacted] across the board low COMPAS scores by denying him parole. This departure required the Board to provide an individualized reason for each such departure. The Board's citation to the nature of the crime does not meet the requirement.

93. *Second*, the Board improperly considered, referenced, and placed weight upon penal philosophy, a factor specifically delineated as improper by the Court of Appeals. .

94. *Third*, the interview transcript indicates that the Board improperly considered the high-profile nature of [redacted] case and public pressure to deny him parole. The Board's decision was thus predetermined, and an abdication of its duty to give genuine consideration to the statutory factors articulated in Executive Law §259-i(c)(a)(2) when making a parole determination.

95. *Fourth*, Commissioner Walter William Smith's known political ties and past voting record evince a personal belief that no person convicted of killing a police officer should ever be released from prison. Commissioner Smith, one of a two-judge panel, based his decision on his own personal belief, rendering the decision improper.

96. Petitioner has exhausted administrative remedies and has no other remedy at law.

CLAIM FOR RELIEF

In light of the above errors, Petitioner respectfully requests that this Court enter judgment, pursuant to CPLR 7806, and:

a. vacate the Board's November 10, 2020 denial of parole;

b. grant a *de novo* parole review before a different Board panel than that which presided at the November 10, 2021 interview and at the June 10, 2021 denial of the administrative appeal, and that such take place within 30 days of this order;

c. order Respondents, as part of the answer to this petition, to file with this Court and serve on Petitioner all records and all victim impact statements provided to the Board for the November 10, 2020 parole review; and

d. grant Petitioner such other and further relief as this Court deems necessary and equitable.

Dated: New York, New York
December 13, 2021

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SUPREME COURT OF THE STATE OF NEW YORK
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For Judgment Pursuant to Article 78
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ATTORNEY VERIFICATION

Index No. [redacted]

Martha Rayner, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

I am Of Counsel to Lincoln Square Legal Services, Fordham University School of Law's clinical law office, and counsel for Petitioner.

I have read the foregoing Petition and know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters, I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon facts, records, and other pertinent information contained in my files.

I make the foregoing affirmation pursuant to CPLR 3020(d)(3) because Petitioner is not in the County where I have my office.

Dated: December 13, 2021

Martha Rayner, Esq.

STATEMENT PURSUANT TO 22 NYCRR 202.8-B

I, Martha Rayner, affirm under penalty of perjury pursuant to CPLR 2106, that the total number of words in the foregoing Amended Petition, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is 4843 words. The foregoing Memorandum of Law complies with the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

/s/ Martha Rayner_____
MARTHA RAYNER
Lincoln Square Legal Services, Inc.

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In Support of Petition

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ARGUMENT

I. The Board Failed to Explain It's Departure from Low COMPAS Scores

A. The Board's Denial Decision Departed from Low COMPAS scores.

When the Board's denial decision "departs" from COMPAS scores, the Board is required to "specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure." See *9 NYCRR 8002.2(a).*[1] The requirement to provide such reasoning is not dependent on the Board's admission of "departure," or use of the word "depart" in the decision; it is enough that the denial contradicts or is inconsistent with low COMPAS scores. *See* Ex. 19 at 4 (*Phillips v. Stanford* (Sup. Ct. Dutchess Cnty. 2019)) (finding low COMPAS risk and needs scores "directly contradicted" the Board's finding that discretionary release would not be incompatible with the welfare of society, and thus the Board was "required to articulate with specificity the particular scores in petitioner's COMPAS assessment from which it was departing and provide an individualized reason for such departures"); Ex. 18 at 4 (*Miranda v. N.Y. State Parole Bd.* (Sup. Ct. N.Y. Cnty. 2020)) (finding that the Board "needs to explain, with particularity, its reasons for departing from a risk-assessment analysis" when the Board denied parole despite low risk COMPAS scores); Ex. 17 at 11 (*Hill v. New York State Bd. Of Parole* (Sup. Ct. N.Y. Cnty. 2020)) (holding that the Board's denial, which

[1] "Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, "Department Risk and Needs Assessment"). If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. If other risk and need assessments or evaluations are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending, and such assessments or evaluations are made available for review at the time of the interview, the Board may consider these as well."[2] Unpublished County Supreme Court decisions are provided as exhibits as indicated.

did not include the word "depart," nor acknowledge departure from low COMPAS scores, required the Board to "articulate the reasons for this determination with respect to Mr. Hill's low COMPAS Risks and Needs Assessment scores or to 'provide an individualized reason for this departure,' in accordance with 9 NYCRR 8002.2").[2] Here, the Board's decision to deny parole despite low COMPAS scores amounted to a functional departure.

[redacted] had low COMPAS scores in eleven out of twelve categories. Ex. 4 at 2. As to risk of "felony violence," "arrest risk" and "abscond risk," [redacted] scored the lowest of "1" on a scale of one to ten. *Id.* As to "prison misconduct, which was the only high score, the Board stated the score should not have been high. Ex. 1 at 24 (Commissioner Coppola: "I think it's obvious that your misconduct is not high.").

Despite these scores, the Board concluded that release at would be incompatible with the welfare of society and would so deprecate the seriousness of his offense as to undermine respect for the law; therefore, the Board's decision departed from the COMPAS scores. Ex. 12 at 5–6 (*Voii v. Stanford* (Sup. Ct. Dutchess Cnty. 2020) (rejecting as "flawed" the Board's argument that it need not explain its departure because it did not depart from a finding that the petitioner was likely to reoffend, only that petitioner's release was incompatible with the welfare of society and would deprecate the seriousness of the offense, and reiterating that the law "clearly indicates that a departure requires the Board to identify any scale from which it departs and provide an individualized reason" for the departure) (emphasis in original); Ex. 20 at 1 (*Robinson v. Stanford* (Sup. Ct. Dutchess Cnty. 2019)) (finding the Board's denial citing to incompatibility with the welfare of society, "directly contradicts these scores in [petitioner's] COMPAS assessment," which were "the lowest possible rating in categories for risk of felony violence, re-arrest,

[2] Unpublished County Supreme Court decisions are provided as exhibits as indicated.

absconding and for criminal involvement,"; Ex. 17 at 1 (*Hill*) (finding that the Board had an obligation to explain departure from low COMPAS score when denial was based on the conclusion that "Mr. Hill would not live and remain at liberty without again violating the law and Mr. Hill's release would be incompatible with the welfare of society, and would so deprecate the serious nature of the crime as to undermine respect for the law.") Therefore, the Board cannot evade the obligations of the regulation even though the denial here did not rely on the standard of a reasonable probability of reoffending in denying parole. Ex. 12 at 1 (*Voii)* (referring to the standards of incompatibility with social welfare and deprecate the seriousness of the offense so as to undermine respect for the law, the *Voii* court found: "[t]he fact that Respondent Board here relied upon the other two standards in denying release does not excuse the Board's from complying with 9 N.Y.C.R.R. §8002.2(a).")

B. The Board's Citation to the Nature of the Crime Does Not Meet Its Obligation to Provide an Individualized Reason for Departure from Low COMPAS Scores

Since the basis for the Board's decision was inconsistent with the low COMPAS scores, the Board was required to "specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure." 9 NYCCRR § 8002.2(a). Yet, the only basis for denial cited by the Board was the nature of the crime, which is not a sufficient reason for departure from across-the-board low COMPAS scores. Ex. 12 at 5–6 (*Voii*). In *Voii*, all the COMPAS scores were low, yet the Board denied parole finding that release would be incompatible with the welfare of society and would deprecate the seriousness of the crime so as to undermine respect for the law. *Id*. at 4–5. The *Voii* court held that the Board's reason for departure, which was the nature of the crime, was "unrelated to any score contained in the COMPAS assessment," and held that "judicial intervention is warranted because this departure from the regulations evinces irrationality bordering on impropriety." *Id*. at 6–7.

The same is true here. [redacted] scored low in 11 of 12 categories and the Board stated he should have scored low in the one category he did not, yet the Board denied based on a finding that release would be incompatible with the welfare of society and would deprecate the seriousness of the crime so as to undermine respect for the law. Ex. 1 at 30. The only reason given for this conclusion was the nature of the crime. Ex. 1 at 30–31. As in *Voii*, the Board's citation to the nature of the crime does not explain the denial's inconsistency with low COMPAS scores because "…the departure is unrelated to any scale contained in the COMPAS Assessment." Ex. 12 at 6–7 (*Voii*). In addition, the Board's perfunctory mention of the statutory factors does not meet the requirement to specify the particular scale from which it departed and provide an individualized reason for such departure. *See* Ex. 20 at 2 (*Robinson*) (finding that the Board's denial of parole departed from petitioner's low COMPAS scores and: "The Board's conclusory statement that it considered statutory factors, including petitioner's risk to the community, rehabilitation efforts and needs for successful community reentry to the community in finding that discretionary release would not be compatible with the welfare of society fails to meet this [9 NYCCRR § 8002.2(a)] standard.")

The Board's failure to adhere to its own regulation is sufficient to grant a *de novo* review. Ex. 12 at 2 (*Voii);* Ex 20. At 2 (*Robinson*).

II. The Parole Board Unlawfully Considered, Referred to and Placed Weight Upon Penal Philosophy Expressed by the Sentencing Judge and Prosecutor

The Board must not consider political or personal beliefs, their own or others', as to the appropriate punishment for any particular crime in considering whether a person should be paroled under the standards and factors the law dictates. *See In re King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (holding that "penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to

society if those sentences are not in place" may not be considered because each factor is outside the scope of Executive Law § 259-i); N.Y Exec. Law § 259-i. Here, the Board, in denying release to parole supervision for the fifth time considered, referenced and placed weight upon penal philosophy that asserted [redacted] should never be considered for release to parole supervision because he was convicted of killing a police officer.

A. The Trial Prosecutor and Sentencing Judge's Recommendations to the Parole Board were Pure Expressions of Penal Philosophy.

Penal philosophy is one's individual belief as to the appropriate moral, philosophical or criminological response to certain crimes—essentially one's personal sense of what is a just response to those who engage in criminal conduct. The Board, however, is obligated to consider the law as the correct measure of what "society" by way of the legislature has deemed the appropriate response to those convicted of criminal conduct. In 1989 when [redacted] was sentenced, the law did not permit imposition of the death penalty or life without parole. At sentencing, however, the prosecutor and judge expressed their staunch beliefs that the law should allow for a sentence of life without parole in response to the crime for which [redacted] was convicted. To remedy this, both recommended that future parole boards never consider release.

The trial prosecutor lamented that [redacted] could not be sentenced to life without parole:

> … unfortunately at the present time unlike 40 other states, New York does not have a death penalty, nor do we have life without parole. However, we are going to ask the Court at this time to impose the sentence of the maximum the law allows, and we would ask that the Court, as part of its sentencing recommendation, to recommend that this defendant never be paroled or walk the streets as a free man.

Ex. 10 at 3–4. The prosecutor's statements sought to achieve that which the law did not permit — imposition of the death penalty or at the very least life without parole.

The sentencing judge then expressed his dismay that the law restricted him from sentencing [redacted] to life without parole:

> Now I have received a multitude of letters asking that I impose a life sentence without parole, and under our law, I cannot do that. However, what I can and will do is to promise you that I intend to make a recommendation to the parole board that you are never to be paroled. I know I will no longer be sitting on the bench twenty-five years from now, but rest assured, my last judicial function before I retire from the judiciary will be to write to the parole board to remind them of my strong feeling that I have expressed to you today.

Ex. 10 at 5, 7. Like the prosecutor, the judge recommended to the Board that they follow his personal penal philosophy: to impose life without parole by never considering release to parole supervision.

These are pure expressions of penal philosophy, in direct conflict with the law since Mr. [redacted]s sentence requires the Board to genuinely consider parole every time [redacted] is eligible. The First Department in *King* explained "penal philosophy" by stating,

> Commissioner Burke's extensive remarks at the hearing demonstrate that the Board was proceeding on the assumption that its primary duty was to determine, in the abstract, the appropriate penalty for murder in today's society. Indeed, Commissioner Burke's remarks made quite clear his belief that his own personal attitudes toward the propriety of punishing murder with the death penalty or with life imprisonment without the possibility of parole had some relevance to the question of how long petitioner should spend in prison. It is, in fact, difficult to avoid the inference that Commissioner Burke felt some regret that petitioner had not been executed, thereby eliminating the dilemma caused by his rehabilitation, and that he considered petitioner's rehabilitation to be a dilemma for the very reason that he believed that petitioner should not be eligible for parole. Since neither the death penalty nor life imprisonment without the possibility of parole are part of the law of this state, they should clearly not have entered into the Board's consideration.

King v. New York State Div. of Parole, 598 N.Y.S.2d 245, 251 (1993), *aff'd*, 632 N.E.2d 1277 (1994). Like the commissioner in *King*, the sentencing judge and prosecutor expressed regret that [redacted] could not be given a harsher sentence; this was their personal sense of the appropriate penalty for the crime of conviction.

B. Penal Philosophy Expressed by the Trial Prosecutor and Sentencing Judge in the Sentencing Transcript was Considered and Weighed by the Board

The Board explicitly considered this penal philosophy. First, the sentencing judge and prosecutor expressed their penal philosophy as recommendations to the Board, and the Board is required to consider a recommendation by the sentencing court and prosecutor. *See* N.Y. Exec. Law § 259-i (c)(A)(vii). Second, the Board directly referenced the sentencing court's expression of penal philosophy during the interview:

> I'll be honest with you, you know, and I know in sentencing minutes, he said [referring to the judge] – they [referring to the judge and prosecutor] talked about the death penalty. He said that you should never be released and his last day in office, he was going to make sure he wrote to the parole board.

Ex. 1 at 12. Just as in *King*, the Board's injection of the sentencing judge and prosecutor's penal philosophy into the interview "made quite clear" that the Board believed their "…own personal attitudes toward the propriety of punishing murder with the death penalty or with life imprisonment without the possibility of parole had some relevance to the question of how long [redacted] should spend in prison." *King v. New York State Div of Parole*, 190 A.D.2d 423, 426-429 (1st Dept. 1993), *aff'd*, 83 N.Y.2d 788 (1994). Whether the inappropriate matter originated with a commissioner, as was the case in *King*, or with the sentencing judge and prosecutor, as was the case here, either way a commissioner raised and discussed penal philosophy during the interview which establishes that the Board determined it was relevant to the parole decision.

This is not a case in which there is no indication the Board considered inappropriate matter in the parole file; here, the Board's specific reference to the sentencing court's recommendation which espoused penal philosophy establishes that the Board improperly considered penal philosophy. *See e.g.* Ex. 11 at 5–6 (*Bailey v. Stanford*, 53704/2019 (Sup. Ct. Dutchess Cnty. 2019)). In *Bailey*, petitioner's claim that the Board had considered penal philosophy was denied

because there was "no indication in the record that the Board *referenced* or considered the specific content of the community opposition in rendering its Decision," and therefore "contrary to the *King* case … [petitioner] failed to demonstrate that the Board considered factors outside the scope of the statute." *Id.* (emphasis added). Here, in contrast, the record establishes that the Board referenced the sentencing judge's recommendation which conveyed pure penal philosophy. Ex. 1 at 12.

Further, the record indicates the Board was influenced by or placed weight on the penal philosophy expressed by the sentencing judge. *Cf. Duffy v. New York State Dep't of Corr. & Cmty. Supervision*, 132 A.D.3d 1207, 1209 (3d Dep't 2015). In *Duffy*, the Third Department held that "improper matter" in victim impact statements was not a ground for reversal when there was "nothing in the Board's decision indicating that it was influenced by, placed weight upon, or relied upon any improper matter, whether in the victim's family statements or otherwise." *Id.* at 1209. Here, the improper matter at issue is the recommendation of the sentencing judge and prosecutor, not improper matter contained within victim statements. The difference is significant. The Board must consider the "*recommendations* of the sentencing court [and] the district attorney" (emphasis added). *See* N.Y. Exec. Law § 259-i (c)(A). But the Board need only consider a "*statement* made to the parole board by the crime victim or the victim's representative." *Id*. Therefore, in *Duffy*, the Board was not required to consider recommendations in victim statements that espoused penal philosophy. Here, the law required the Board to consider the recommendations of the sentencing judge and prosecutor, which espoused penal philosophy.

Yet, rather than consider and then disavow such recommendations as penal philosophy, the Board specifically raised the sentencing court and prosecutor's personal sense of justice during the interview. This indicates the Board gave weight to the judge and prosecution's penal philosophy.

Duffy, 132 A.D.3d at 1209. The *Duffy* court found there was no need for the Board to disavow inappropriate content in victim impact statement reasoning that the Legislature anticipated victim statement would be emotional and contain such content. *Cf id*. The same reasoning cannot be applied here wherein the inappropriate content is the sentencing court and prosecutor's recommendations. Where the record indicates the Board explicitly invoked inappropriate content emanating from a judge and prosecutor by referencing it in the interview, absent an explicit disavowal, the record should be deemed to indicate the Board gave significance and weight to it.

C. Other Sources of Penal Philosophy are Likely Contained in the Parole File

The record establishes that the Board considered, referred to and gave weight to penal philosophy expressed by the sentencing court and trial prosecutor; this alone requires the denial decision be annulled, but there is more. According to the Board, there is "significant opposition" in [redacted] parole file. *See* Ex. 1 at 24. In addition, there are numerous indicators to show that [redacted] file is very likely brimming with penal philosophy. *See* Petition ¶¶48-53. Petitioner can more fully argue this pending receipt of the Board's provision of the record in its answer. *See* CPLR 7804-e.

III. The Parole Board's Decision Was Predetermined and Thus the Board Did Not Consider All Relevant Statutory Factors

The Board's reference to the "high profile" nature of the case and assertion that it is a "high charged media case," which it raised in the instant 2020 parole interview, indicates that genuine consideration of parole was not possible under such intense public and media scrutiny; thus, denial was inevitable. *See* Ex. 1 at 7-8.24. See *Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 27 (1st Dep't 2016) (granting a *de novo* based on the Board's failure to give "genuine consideration" to the entirety of the petitioner's case for release). Rather than genuinely consider whether [redacted] should be paroled based on the statutory standards and factors for release

articulated in Executive Law §259-i(2)(c)(A), the Board repeatedly injected the "highly charged" nature of the case, which indicates there was not even the possibility of parole. *See* Ex. 1 at 7-8, 24.

Indications that the parole denial was predetermined is a ground for a *de novo* interview. *See King*, 190 A.D.2d at 423 *affd*. 83 N.Y.2d 788; *Johnson v. New York State Bd. of Parole*, 65 A.D.3d 838 (4th Dep't 2009) ("We therefore conclude on the record before us that the Parole Board failed to weigh all of the relevant statutory factors and that there is 'a strong indication that the denial of petitioner's application was a foregone conclusion.'"). While the Board's work is discretionary in nature, "it is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it…" *King*, 190 A.D.2d at 423. When the Board predetermines its decision, prior to conducting the parole interview and deliberating thereafter, it abdicates its duty to consider and weigh all of the relevant statutory factors. *See Johnson* 65 A.D.3d at 839. Indeed, "the whole purpose of New York's parole system is, at minimum, to hold out 'the possibility of parole.'" *See Coaxum* 14 Misc.3d at 669, quoting *Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69, 75 (1980). When the board fails to provide such a possibility because it has predetermined the outcome of the hearing, a *de novo* hearing is warranted. *See King*, 190 A.D.2d at 435.

To determine whether the Parole Board properly considered the appropriate guidelines and factors when issuing a parole decision, the Court should evaluate the decision in "the context of the parole hearing transcript." *See Fraser v. Evans*, 109 A.D.3d 913, 914 (2d Dep't 2013). When the record demonstrates a failure to consider the appropriate standards, "the courts must intervene." *See Johnson*, 65 A.D.3d at 839; *In re Winchell*, 32 Misc.3d 1217(A) (Sup. Ct. Sullivan Cnty. 2011) ("What occurred [at the parole interview] was...willful disobedience to the law. Through its own

conduct, as reflected in the transcript, it is obvious that before the petitioner even appeared, the members of this Parole Board had no intention of entertaining even the slightest thought of his parole.") A court need not find explicit evidence of predetermination or a prefabricated written decision to grant a *de novo* review on these grounds and may grant a new review based on "a strong indication that the denial of parole is a foregone conclusion that does not comport with statutory requirements." *Morris v. New York State Dep't of Cor. & Cnty. Supervision*, 40 Misc.3d 226 (Sup. Ct. Columbia Cnty. 2013).

The Board's 2020 interview and decision indicates that denial was inevitable due to the Board's consideration of the non-statutory, irrelevant, and prejudicial factor of the "high profile" nature of [redacted] case, and all that implies, including the public and political pressures associated with cases involving the killing of police officers. Transcripts of Mr. [redacted] previous parole hearings demonstrate that the Board has considered the public profile of Mr. [redacted]'s case ever since he became eligible for parole. *See e.g.* Ex. 13 at 10 (Board stating "this case had a tremendous impact on the entire nation"); Ex. 15 at 19 (Board stating "[t]his is an extremely high-profile case").

There is no statutory basis for the Board to consider the level of publicity associated with an individual's case when determining whether to grant parole. N.Y. Exec. Law § 259-i(2)(I)(A) enumerates eight factors which the Board is to consider when determining parole, none of which include consideration of the level of public and media attention on the crime or the Board's parole decision-making. *See* N.Y. Exec. Law § 259-i(2)(c)(A)(i)-(viii).

Notably, seven of eight articulated statutory factors allow for the possibility of change over time, while the high public profile of [redacted] case is fixed.[3] For example, an individual seeking parole may demonstrate an increasing level of rehabilitation and readiness for re-entry from review to review. *See* N.Y. Exec. Law § 259-i(2)(c)(A)(i)-(iii); *see also Mistretta v. U.S.* 488 U.S. 361, 363 (1989) ("[b]oth indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society."). A crime victim, or their representative, may make comments to the Board that change over time as old wounds heal or intensify. *See* N.Y. Exec. Law § 259-i(2)(c)(A)(v). The only factor which is inherently fixed can be found in Executive Law § 259-i(2)(c)(A)(viii), which allows the Board to consider the nature of the crime itself. Indeed, the prospective parolee's crime remains relevant even decades after its occurrence because it provides an evaluative reference point against which the Board can make its parole determination. The level of media coverage a case receives, however, provides no such context to the Board's evaluation. When that media coverage remains a constant, as it has in [redacted] case, it serves only to preserve sentiments about what the prospective parolee did in the past and sheds no light on who he is today relative to the version of himself that committed the crime. When the Board considers the public profile of a case, it factors in prejudicial, irrelevant, and unchanging information despite the statute's structure emphasizing factors which reflect the prospective parolee's rehabilitation and readiness to reenter society. Consideration of the public profile of the

[3] As discussed *infra*, [redacted] case has always attracted significant media attention. It will likely continue to due to the law enforcement community and the PBA's relentless campaign to pressure the Board to deny [redacted] parole, in part by ensuring that his parole reviews are covered by major news outlets.

case is therefore outside of the Board's statutory dictate and irrelevant in evaluating any of the eight factors carefully laid out in Executive Law § 259-i(2)(c)(A)(i)-(viii).

Yet, the Board repeatedly referred to the high-profile nature of [redacted] case in his parole interviews. In the 2020 parole interview, the Board referred to the public profile of the case twice. The first such reference occurs near the beginning of the hearing:

> [redacted]: …as you know it's a political case.
> COMMISSIONER COPPOLA: It's a highly charged media case, there's no doubt about that.

Ex. 1 at 7.

Then, near the end of the interview, Commissioner Coppola, unprompted, injects the public profile of [redacted] case. Ex. 1 at 24-29. Critically, he does so while identifying some of the factors the Board will consider under Executive Law §259-i(2)(c)(A) and related considerations, such as [redacted] age:

> COMMISSIONER COPPOLA: We all have a bad day. When you go 20 years without anything, I think that's a different story. So with that low family support, everything is low and unlikely. Of course this doesn't take in other factors with regard to the crime but it does take in a number of other factors, your age, things like that. Your healthy [sic] might play a role in there. I'm trying to cover the areas that I wanted to cover. Again, there are—you're not the only one but there are other cases that whether they're high profile or not. Your case is what we would consider for lack of a better term high profile and this is not a secret. You have support for your release and significant opposition.
> [redacted]: I understand that.
> COMMISSIONER COPPOLA: It's never been a secret for you…

Ex. 1 at 24. This exchange indicates that the Board improperly distinguishes high profile cases from others and implies that the Board is permitted or compelled to do so. There is no basis, in statute or caselaw, for such consideration.

The Board's attention to the high-profile nature of the parole decision was a central factor at [redacted] initial parole review and subsequent reviews. In 2012, the Board noted the widespread attention [redacted] case received:

> COMMISSIONER ELOVICH: Now, in addition to the family, there is also a tremendous amount of opposition from law enforcement who felt a tremendous amount of loss, not only in the City of New York at the time, but across the entire nation. This was the most highly attended funeral for a police officer in the whole nation. People came to this funeral from other countries, all ethe elected officials were there, community members, people from local elementary schools, this case had a tremendous impact on the entire nation, and still from the letters of opposition continues to have a tremendous impact on law enforcement and many members of New York City, including all of the officials who remember this case and the way that it completely shocked and terrified members of the community.

Ex. 13 at 10.

In 2017, the Board returned to the subject of the "extremely high profile" nature of [redacted]'s case. Ex. 15 at 19. The Board's concerns about the "extremely high profile" nature of [redacted] case and law enforcement's opposition to his parole are captured in the following exchange:

> COMMISSIONER BERLINER: Let's say we parole you and you go back to the community, right?
> [redacted]: Yes, sir.
> COMMISSIONER BERLINER: This is an extremely high-profile case.
> [redacted]: Yes.
> COMMISSIONER BERLINER: Regardless of what happens with your judicial appeal process and your maintenance of innocence.
> [redacted]: Yes, sir.
> COMMISSIONER BERLINER: It's not a secret that the police department is absolutely opposed to the release of anybody who is convicted of killing a cop.
> [redacted]: I understand.
> COMMISSIONER BERLINER: So we talked about your plan to go back to the community. We talked about your readiness to go back to the community, but I want to get a sense from you of your confidence level of being able to integrate back into a community that seems like it might be incredibly hostile to you.

Ex. 15 at 19.

[redacted] case always has been, and will likely continue to be "high profile;" thus, the Board's decisions will continue to be predetermined so long as the Board improperly considers this factor in its assessment of his eligibility for parole. When the Board injects media attention to signal how impossible it would be for the Board to grant parole, denial becomes a "foregone conclusion that does not comport with statutory requirements." *Morris v. New York State Dep't of Cor. & Cnty. Supervision*, 40 Misc.3d 226 (Sup. Ct. Columbia Cnty. 2013). And, while the Police Benevolent Association ("PBA") has directly pressured the Board "to make sure that [redacted] merciless assassins leave prison only in coffins," the Board's mandate is to genuinely consider the factors and standards articulated in Executive Law § 259-i(2)(c)(A) and genuinely consider the possibility of granting parole.[4] Because that was not done here, and the Board has predetermined that this case is too "high profile" and too much of a "highly charged media case" to grant parole, a *de novo* hearing in front of a different panel is warranted. *See King*, 190 A.D.2d at 435; *see also* Ex. 1 at 7, 24.

IV. Commissioner Smith's Personal Views Indicate that He Abdicated his Responsibility to Fairly Consider [redacted] Release to Parole Supervision

In *King*, the Court of Appeals found that a single commissioner's "own personal attitudes" alone were enough to render the decision improper. *See, King*, 598 N.Y.S.2d at 251 ("Commissioner Burke's remarks made quite clear his belief that his own personal attitudes toward the propriety of punishing murder with the death penalty or with life imprisonment without the possibility of parole had some relevance to the question of how long petitioner should spend in prison. … Since neither the death penalty nor life imprisonment without the possibility of parole

[4] *PBA: No Mercy For [redacted]'s Killers*, QUEENS CHRONICLE (Oct. 27, 2016), https://www.qchron.com/editions/queenswide/pba-no-mercy-for[redacted]-s-killers/article_74730f5b-83ce-5875-ab06-5088b699176f.html.

are part of the law of this state, they should clearly not have entered into the Board's consideration."). *See also Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cnty. 2014) ("There is no additional rationale, other than the Board's opinion of the heinous nature of the instant offense, and personal beliefs and speculations, to justify the denial of parole release."). Commissioner Smith's known political ties and past voting record evince a personal belief that no person convicted of killing a police officer should ever be released from prison.

Commissioner Smith's ties to politicians who support the death penalty and life without parole is strong. Commissioner Smith, who recently left the Board, was the longest serving Commissioner on the Parole Board at the time of [redacted] hearing. He was appointed by Governor Pataki in 1996.[5] Governor Pataki campaigned on a promise to reinstate the death penalty, and three months after taking office, signed legislation authorizing the death penalty and life without parole.[6] In addition, Commissioner Smith has strong ties to state Senator Patrick Gallivan who opposes the release of people convicted of killing police officers. Before becoming a state senator, Senator Gallivan was also appointed to the Parole Board by Governor Pataki and served on the Board with Mr. Smith for many years. Commissioner Smith has consistently supported the candidacy of Senator Gallivan who, as the former chair and current member of the Crime Victims, Crime, and Correction Committee in the Senate,[7] has amplified his opposition to

[5] Josefa Velasquez, *State Senate Approves Parole Board Nominees*, N.Y. L. J. (June 22, 2017), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/06/22/state-senate-approves-parole-board-nominees/

[6] Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 J. L. & POL'Y 81, 81 (1995).

[7] *See About*, https://www.nysenate.gov/ senators/patrick-m-gallivan/about.

parole for "cop killers," by donating to Senator Gallivan's election and reelection campaigns at least eight times since 2010.[8]

Senator Gallivan has been an outspoken critic of granting parole to those convicted of murdering police officers, demonstrated by multiple campaigns opposing the release of so-called "cop killers." When [redacted]—who was convicted of killing two police officers—was released on parole, Sen. Gallivan sent a letter to the Governor questioning the Board's decision and requesting an investigation into the Board's decision-making practices. *See* Patrick M. Gallivan, Letter to Governor Andrew M. Cuomo, July 29, 2019, *available at* https://www.nysenate.gov/sites/default/files/press-release/attachment/gallivan_parole_letter_2019.pdf.[9] The senator also rallied against the release of [redacted], who, in 1971 at age 19, killed a police officer and had served over 45 years on a 25 to life sentence.[10] In 2018, the first link on Senator Gallivan's homepage read "No Parole for [redacted]" *See* "New York State Parole Board: Failures in Staffing and Performance" at n.20, and accompanying text, https://ir.lawnet.fordham.edu/pp/9. Senator Gallivan expressed the same position in a series of press conferences urging the Parole Board to deny parole to [redacted]. He presented a petition to the Board "signed by nearly 10,000 concerned citizens" urging them "to deny the release from prison of [redacted], the driver of a getaway car in a 1981 robbery of a Brink's armored car in Rockland County, N.Y. The robbery left a security guard and two

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[8] *See* New York State Board of Elections Campaign Finance Disclosure Database, https://publicreporting.elections.ny.gov/Contributions/ Contributions (indicating donations by Mr. Smith to "Gallivan for Senate" in 2010, 2012, 2017, 2018, and three times in 2019).

[9] *See, also*, Maria Enea, *Senate Republicans Demand Cop Killer Stay in Jail*, THE LEGISLATIVE GAZETTE, (Feb. 8, 2018), https://legislativegazette.com/senate-republicans-demand-cop-killer-stays-in-jail/; Rick Karlin, *GOP Senators, Police Unions Oppose Cop Killer Parole*, TIMES UNION (Jan. 30, 2018), https://www.timesunion.com/news/article/GOP-Senators-police-unions-oppose-cop-killer-12537368.php.

[10] Press Release, *Senator Gallivan Calls On Parole Board to Deny Parole for Convicted Cop Killer*, https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-calls-parole-board-deny-parole-convitced.

police officers dead."[11] Senator Gallivan keeps a close watch on the Board's decisions, particularly those in the cases of so-called "cop killers." Just this past June, he noted that "[s]ince 2017, the state Parole Board has released at least 20 cop-killers."[12] Commissioner Smith's sustained support for a politician who continuously fights to block the release of "cop-killers" suggests that he supports that political position as well.

Commissioner Smith's conduct as a commissioner also suggests his personal attitude towards those convicted of killing police officers. Although only the Board can answer this question, upon information and belief, Commissioner Smith has never voted to grant parole to a person convicted of killing a police officer.[13]

The following parole decision illustrates former Commissioner Smith's steadfast refusal to grant parole in cases involving the death of a police officer. [redacted], convicted of killing a police officer and a civilian when he was eighteen years old, was denied parole five times and served over 40 years. Ex. 16 at 2–3 (*Voii*). In 2020, at a court-ordered *de novo* review (Ex. 16), two commissioners on a three-commissioner panel voted to release [redacted], noting that "[t]he

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[11] Patrick Gallivan, Senator Gallivan Presents Petition Calling on NYS Board of Parole to Deny Release of [redacted], 29 March 2018, https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-presents-petition-calling-nys-board. *See also* Patrick Gallivan, Senator Gallivan Issues Statement on Parole of [redacted] https://www nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-issues-statement-parole-[redacted] ("The Parole Board's decision to release convicted cop killer [redacted] is an affront to law-abiding citizens and to the families of her victims. Time does not diminish the seriousness of her crime or the lack of respect she showed for law enforcement and the rules of society that the rest of us follow.").

[12] Patrick Gallivan, Senator Gallivan Joins Colleagues in Unveiling Parole Reform Bills, https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senator-gallivan-joins-colleagues-unveiling-parole-reform

[13] *See, e.g.*, "Parole Interview Transcript/Decision - FUSL000002 (2015-10-20)" (2019). Parole Information Project https://ir.lawnet.fordham.edu/trans/6 (denying parole for man convicted of murdering a police officer); "Parole Interview Transcript/Decision - FUSL000069 (2015-12-15)" (2021). Parole Information Project https://ir.lawnet.fordham.edu/trans/102 (same); "Parole Interview Transcript/Decision - FUSL000069 (2016-07-28)" (2021). Parole Information Project https://ir.lawnet.fordham.edu/trans/103 (Commissioner Smith reads into the record at the interview the words of the sentencing judge: "There probably is no crime in our society that society condemns more than the killing of a policeman in the performance of his duties."); "Parole Interview Transcript/Decision - FUSL000077 (2012-05-16)" (2021). Parole Information Project https://ir.lawnet.fordham.edu/trans/118 (denial of man convicted of murder and attempted murder of a police officer).

opposition of your release was duly considered" but nevertheless granted parole "[b]ased on the legal standards this panel must apply." Ex. 12 at 81–82. Yet, Commissioner Smith dissented stating, "[t]he senseless deaths of the two men you shot and killed continue to impact the victims' family, friends and the community." *Id.* at 83. Despite two Commissioners determining that the "legal standards" required a grant of parole, Commissioner Smith refused to apply such legal standards.

Commissioner Smith's refusal to consider parole for those convicted of killing police officers is starkly illustrated by his participation in the last two denials of parole to [redacted], each violating a court order. [redacted], convicted of murdering a police officer, successfully appealed a 2014 denial of parole, with the court finding the Board had relied exclusively on the severity of the offense. *See Mackenzie v. Stanford*, No. 2789/2015, 2015 WL 13872810, at 3 (Sup. Ct., Dutchess Cnty, 2015) ("A parole board is not entitled to exclusively rely on the severity of an offense to deny parole, as such a determination contravenes the discretionary scheme mandated by statute and constitutes an unauthorized re-sentencing of the defendant."). The court ordered a *de novo* review in compliance with the law.

Yet, at the 2015 *de* no*vo* appearance, the panel, which included Commissioner Smith, issued a denial decision almost identical to the one from 2014. Ex. 22 at 1. In response, the court held the Board in contempt finding that the Board had once again denied parole based solely on the nature of the crime. *See MacKenzie v. Stanford*, No. 2789/2015, 2016 WL 11690588, at 3 (Sup. Ct. Dutchess Cnty, 2016), *aff'd, Ferrante v. Stanford*, 172 A.D.3d 31 (2d Dept 2019) ("…we agree with the Supreme Court's conclusion, made after a hearing, that the record in this particular case demonstrates that the Board again denied parole release exclusively on the basis of the underlying conviction without having given genuine consideration to the statutory factors.")

(citations omitted). The court ordered another *de novo* review and that "none of the members of either the 2014 or 2015 parole boards that denied parole shall participate in the *de novo* hearing." *MacKenzie*, No. 2789/2015 at *3.

In direct contravention of the court's order, Commissioner Smith sat as lead on the second *de novo* review in 2016. Ex. 21 at 1. And, then, also in direct violation of the court's contempt order, Commissioner Smith denied again based solely on the nature of the crime. *Id.* at 31 ("This panel remains concerned about your violent conduct in the instant offenses, shooting and killing a uniformed police officer, reflecting a callous indifference to human life, your history of negative behavior and your willingness to transport guns over state lines. You have demonstrated a willingness to place your own self-interest above those of society."). Ten days later, Mr. [redacted], then 70 years old, was found dead by suicide.[14]

Even after being held in contempt and likely to have been held in contempt again had Mr. [redacted] not died by suicide, Commissioner Smith was not deterred from denying Mr. [redacted]'s release based solely on the nature of the crime.

Commissioner Smith's strongly held beliefs regarding police victims—which he has every right to—have, however, caused him to abdicate his responsibility to fairly consider all relevant factors. *King*, 190 A.D.2d at 432 ("[t]he role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all the relevant statutory factors, he should be released."); *see also Coaxum v. New York State Bd. of Parole*, 827 N.Y.S.2d 489, 497 (Sup. Ct. 2006) ("the Board's conclusion is thus nothing more than its disagreement with the court's

[14] *See* Jesse Wegman, *False Hope and a Needless Death Behind Bars*, N.Y. Times (Sept. 6, 2016), https://perma.cc/45ZD-JMTUl; *see also* Richard Rivera, *Traumatized to Death: The Cumulative Effects of Serial Parole Denials*, 23 CUNY L. REV. F. 25 (2020).

sentence"). Here, former Commissioner Smith based his decision on his own personal belief as to the sentence [redacted] deserved. This is precisely what the *King* Court condemned. Accordingly, a *de novo* hearing should be granted.

CONCLUSION

For these reasons, [redacted] respectfully requests that this Court grant the petition and order Respondents to hold a *de novo* parole interview before Commissioners who did not participate in the November 2020 denial decision or its administrative affirmance, that such review be held within thirty days of entry of the order, and that parole be considered consistent with this Court's decision.

Dated: New York, New York
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STATEMENT PURSUANT TO 22 NYCRR 202.8-B

I, Martha Rayner, affirm under penalty of perjury pursuant to CPLR 2106, that the total number of words in the foregoing Memorandum of Law, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is 6945 words. The foregoing Memorandum of Law complies with the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

/s/ Martha Rayner_____
MARTHA RAYNER
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