Art. 78 Petition - FUSL000149 (2021-10-08)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of [redacted] Petitioner, For a judgment pursuant to Article 78 of the Civil Practice Law and Rules, -against- TINA M. STANFORD, Chairwoman of the New York State Board of Parole Respondent.	Index No. Judge:

VERIFIED PETITION PURSUANT TO ARTICLE 78

Petitioner [redacted], by his undersigned attorneys, for his petition against respondent, alleges as follows:

PRELIMINARY STATEMENT

1. Petitioner [redacted], a 64-year-old man who has been incarcerated for over 30 years—nearly half his life—brings this Article 78 petition to vacate the September 2020 decision of the New York State Board of Parole (the "Parole Board" or the "Board") denying him release on parole. Under governing law, the Board's decision was deficient as a matter of law: it was conclusory, vague, and failed to meaningfully address aspects of Mr. [redacted]'s record that the Board's own regulations require it to consider. Significantly, in making its decision, the Board focused exclusively on the details of the offense giving rise to the instant prison sentence and other unproven conduct predating that offense, and in doing so effectively resentenced Mr. [redacted] in violation of state law. Indeed, the Board's denial violates New York law and regulations. Since the Board's perfunctory denial of Mr. [redacted]'s request for parole failed to meaningfully assess evidence demonstrating Mr. [redacted]'s rehabilitation and

his suitability for release and reentry into society, this Court should vacate the Board's decision and order a properly conducted *de novo* parole release hearing.

VENUE

2. Venue is proper in this Court pursuant to CPLR §§ 506(b) and 7804(b) because Albany County is the county in which the parole determination was affirmed on administrative appeal, and is also the county in which the Respondent Tina M. Stanford has her principal office. An Article 78 petition may be filed in "any county within the judicial district where the respondent made the determination complained of." CPLR § 506(b) and § 7804(b).

FACTS

I. MR. [redacted]'S REHABILITATION AND READINESS FOR RELEASE

3. Mr. [redacted] is a 64-year-old man who has spent more than 30 years in prison. On March 8, 1991, Mr. [redacted] was sentenced to an indeterminate prison term of 25 years to life after being convicted of second-degree murder and petit larceny. Rudofsky Aff., Ex. A at 2-3. He has served over 30 years of his sentence, and is currently incarcerated and under the supervision of the Department of Corrections and Community Supervision at Bare Hill Correctional Facility ("Bare Hill").

4. [redacted]

maturity, and rehabilitation, as reflected by the Board of Parole's own risk assessment tool. *See* Rudofsky Aff., Ex. B. In over 30 years of imprisonment, Mr. [redacted] has only received one Tier II disciplinary infraction, which was the result of a misunderstanding. Rudofsky Aff., Ex. C at 6, 11. While incarcerated, Mr. [redacted] has also successfully completed a number of educational and self-improvement programs. He obtained his GED, and completed the required

programs ART (Aggression Replacement Training), AVP (Alternative Violence), and Phase II. Rudofsky Aff., Ex. C at 6, 36-38.

5. Mr. [redacted]'s record during his incarceration shows that not only has he achieved impressive personal growth, but he has helped other inmates and been a positive influence on others in the various facilities in which he has been incarcerated. For example, for over 20 years, Mr. [redacted] has served as a football coach for other inmates. In doing so, he has helped bring together men who were part of different gangs to successfully play for the same team and attain a positive outlook. Rudofsky Aff., Ex. C at 5, 12, 14, 46-47. Mr. [redacted] has received letters from former players thanking him for his service, and as far as he is aware, all of the men he coached have been successful after release. Rudofsky Aff., Ex. C at 5.

6. Mr. [redacted] has also worked as a Jewish Facilitator for many years at various facilities. Rudofsky Aff., Ex. C at 5-6, 12-13. His responsibilities in this role have included organizing and leading prayer, services and study groups; planning holidays and celebrations; and performing other supportive tasks. Rudofsky Aff., Ex. C at 5. Although Mr. [redacted] is not Jewish himself, serving as a Jewish Facilitator has helped him bring together people of different faiths and beliefs, and has allowed him to mentor other men. Rudofsky Aff., Ex. C at 6. For example, he was able to mentor [redacted] who Mr. [redacted] first met during religious services. Rudofsky Aff., Ex. C at 6. Mr. [redacted] submitted a letter to the Board in support of Mr. [redacted]'s parole application, stating, "Our relationship started as a religious support system and our friendship grew from there. . . . [Mr. [redacted]] has had a great impact on me. He is a great [redacted] speaks with Mr. [redacted] "two times per week, not counting letters." Rudofsky Aff., Ex. C at 21.

7. Mr. [redacted] has also worked in the gardens of various facilities, including at Bare Hill. Rudofsky Aff., Ex. C at 6. Bare Hill's Garden Supervisor [redacted] submitted a letter to the Board, stating, "Mr. [redacted]'s knowledge and experience in vegetable gardening and greenhouse management was an asset to the program. Mr. [redacted] was timely and productive in this assignment. Mr. [redacted] displayed a positive and respectful attitude toward Staff members and inmate participants." Rudofsky Aff., Ex. C at 45.

8. Additionally, Mr. [redacted] has been able to develop a significant support system that would be in place upon his release. Importantly, he has been able to secure guaranteed [redacted] York, where [redacted] aunt has offered her home to him. Rudofsky Aff., Ex. C at 21. Mr. [redacted] also has guaranteed paid employment as a Recovery Peer Advocate with the Rochester Community Outreach and Recovery Enhancement Center, which will offer him additional skills and training and connections to other community agencies. Rudofsky Aff., Ex. C at 28. If the transfer to Rochester is denied, Mr. [redacted] intends to return to Jefferson County, and has received a letter of assurance from the Watertown Urban Mission, which will likewise be able to provide him with support. Rudofsky Aff., Ex. C at 34.

9. Based on these facts, Mr. [redacted]'s most recent COMPAS report—an objective measure used by the New York Department of Corrections and Community Supervision to assess the risk associated with prospective parolees—correctly determined that, overall, Mr. [redacted] is at low risk of re-offense. In particular, the July 2020 COMPAS report scored Mr. [redacted] as having low risk for felony violence, arrest, absconding, criminal involvement, history of violence, and prison misconduct. Rudofsky Aff., Ex. B at 1. The Report also scored

him as having low risk for negative social cognitions, low self-efficacy/optimism, financial issues upon reentry, and employment issues upon reentry. Rudofsky Aff., Ex. B at 1.

10. Although Mr. [redacted] received higher scores for risk of substance abuse upon reentry and low family support, these scores are contradicted by documents in the record, and the Board erred in relying on them. In particular, although the most recent COMPAS report scored Mr. [redacted] as "probable" for reentry substance abuse, Rudofsky Aff., Ex. B at 1, numerous documents demonstrate that Mr. [redacted] has never had a substance abuse problem, and has no such problems now. In 2016, for instance, the Treatment Plan Review Committee assessed Mr. [redacted] and found that he did not require Alcohol and Substance Abuse Treatment (ASAT) because "no evidence suggest[s] a clinical diagnosis for a substance use disorder." Rudofsky Aff., Ex. C at 58. In his prior COMPAS reports from 2016 and 2018, Mr. [redacted] was given the lowest score of 1 for risk of reentry substance abuse because, among other things, he did not undergo "any prior treatments for drug/alcohol abuse and did not indicate any history of failed drug/UA tests." Rudofsky Aff., Ex. D at 1; Ex. E at 1, 4. And in his case plans from May 2018 through November 2019, Mr. [redacted]'s counselors consistently indicated that he had *no* need for a substance abuse program. Rudofsky Aff., Ex. F at 3, 6, 12, 17, 22. In over three decades of incarceration, Mr. [redacted] has not received any disciplinary infractions concerning substance abuse, nor has he tested positive for any drugs. There is, therefore, no basis for the most recent COMPAS report's score of "probable" for risk of reentry substance abuse.

11. The most recent COMPAS report also scored Mr. [redacted] as "highly probable" for low family support, noting that "[i]t is uncertain as to whether there is evidence of family [redacted] [redacted] [redacted] support letter to the Board in August 2020, stating, "I have known [redacted] all my life . . . we

[redacted]

communicated by phone or letters through the years. . . . I want to support him emotionally however I can." Rudofsky Aff., Ex. C at 18. This letter demonstrates that Mr. [redacted] indeed has family support on which he can rely upon his release, contrary to the assessment that it is "uncertain as to whether there is evidence of family support." Rudofsky Aff., Ex. B at 11.

II. MR. [redacted]'S PAROLE BOARD HEARING

12. On September 29, 2020, Mr. [redacted] appeared before Commissioners Drake and Mitchell via video conference at Bare Hill. This was Mr. [redacted]'s fourth parole hearing. At the hearing, Mr. [redacted] expressed that he is not proud of his past or the person he was 30 years ago. Rudofsky Aff., Ex. G at 35. With respect to the offense for which he was convicted, he added that—while he maintains his innocence—he thinks about the victim's family all the time, including her mother and son for whom he has great empathy. Rudofsky Aff., Ex. G at 36. The Board acknowledged that Mr. [redacted] got "very emotional" while speaking about the victim's family. Rudofsky Aff., Ex. G at 3 [redacted] ined his efforts to improve himself through educational and vocational programming. Rudofsky Aff., Ex. G at 28, 31, 33.

13. Additionally, in advance of the hearing, Mr. [redacted] submitted a packet of parole application materials. This packet includes an advocacy letter from the Parole Preparation Project, Mr. [redacted]'s personal statement, eight letters of support from friends and family, six letters of reasonable assurance that he will have employment and housing if released, evidence of programmatic achievements, evidence of volunteer achievements, Mr. [redacted]'s corrections records and resume, and evidence supporting Mr. [redacted]'s claim of innocence of the crime giving rise to his immediate sentence. Rudofsky Aff., Ex. C.

14. Despite this impressive record justifying parole, on the very same day as the hearing, the Commissioners summarily denied parole and ordered Mr. [redacted] to be held for an

additional 24 months. Rudofsky Aff., Ex. G. During the hearing and in their formulaic and conclusory order denying parole, the Commissioners focused almost entirely on the crime giving rise to Mr. [redacted]'s immediate sentence and his purported criminal history, much of which is contradicted by the record. They failed to consider Mr. [redacted]'s rehabilitation and release plan in any meaningful way. Nor did they explain why they departed from M [redacted] COMPAS scores. Rather, the Board resorted to boilerplate language as it listed off the statutory factors that it must—and that it claims it did—consider, without providing any analysis or explanation whatsoever as to how those factors affected its decision. Rudofsky Aff., Ex. G.

III. [redacted]

15. Mr. [redacted] timely submitted his Notice of Appeal of the Board's September 29, 2020 decision, and submitted a timely administrative appeal of the Board's order to the Appeals Unit of the Board of Parole on February 23, 2021. Rudofsky Aff., Ex. H. On June 10, 2021, the Board affirmed the denial of parole, and served the denial on Mr. [redacted] on June 15, 2021.

[redacted]

this matter is ripe for the instant Article 78 proceeding. Additionally, the instant petition is properly filed within the applicable four-month statute of limitations. *See* CPLR § 217(1).

CAUSES OF ACTION

I. FAILURE TO PROVIDE AN INDIVIDUALIZED AND NON-CONCLUSORY EXPLANATION FOR DENYING PAROLE

16. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 15.

17. The Board's regulations require the Board to give an individualized, detailed non-conclusory explanation for the reasons for the denial of parole release that addresses how the applicable parole factors were considered. 9 NYCRR 8002.3.

18. The Board failed to do so, instead providing brief, conclusory explanations for denying parole that do not explain why release would be incompatible with the safety of the community or undermine respect for the law.

19. These conclusory explanations also fail to meaningfully engage with the totality of Mr. [redacted]'s record—which includes a low COMPAS score, a strong institutional record leading up to his parole hearing, and a comprehensive release plan—and do not explain why those positive aspects of Mr. [redacted]'s record are outweighed by the negative aspects of his record.

20. The Board's explanations improperly emphasize *past* behavior, all of which was before the sentencing court when it set the minimum sentence already served by Mr. [redacted]. The Board did so despite the fact that the relevant inquiry for parole involves Mr. [redacted]'s *present* risk to society if released.

21. Since the Board's decision is contrary to the relevant law, it is arbitrary and capricious and merits vacatur.

II. FAILURE TO MEANINGFULLY CONSIDER ALL RELEVANT STATUTORY FACTORS

22. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 21.

23. N.Y. Exec. Law § 259-i(2)(c)(A) requires the Board to consider eight factors when making a parole decision, but the Board exclusively focused on the circumstances of the

offense for which Mr. [redacted] is now incarcerated. This failure to consider or rationally weigh the remaining statutory factors violates New York state law. *King v. N.Y. State Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1993), *aff'd*, 632 N.E.2d 1277 (N.Y. 1994).

24. Moreover, the Board's singular focus on facts that Mr. [redacted] cannot change—to the exclusion of evidence demonstrating his institutional achievements, rehabilitation, and plans for release—violates New York law as the Board cannot deny release based solely on the nature of the underlying offense. *Rios v. N.Y. State Div. of Parole*, 2007 WL 846561 (Sup. Ct., Kings Cnty. 2007).

25. The Board's rote recitation of the factors it should have considered, without any evidence that it did in fact consider those factors, is insufficient to meet its obligation under New York state law.

26. Since the Board's decision is contrary to the relevant law, it is arbitrary and capricious and should be vacated.

III. FAILURE TO JUSTIFY DEPARTURE FROM THE COMPAS ASSESSMENT SCORE

27. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 26.

28. Under Board regulations, "[i]f 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." 9 NYCRR 8002.2(a).

29. The Board failed to comply with its regulations in this case. While the Board acknowledged Mr. [redacted]'s "COMPAS risk assessment and the low scores indicated therein,

with the exception of highly probable for low family support," it nevertheless concluded that Mr. [redacted]'s release "would be incompatible with the welfare of society." Rudofsky Aff., Ex. G at 37-38. It did so without providing any reason for departing from the COMPAS results finding that he had low risk of felony violence, arrest, absconding, criminal involvement, history of violence, and prison misconduct. Rudofsky Aff., Ex. B.

30. The Board did not specify the particular COMPAS scales from which it was choosing to depart, and did not explain, in an individualized manner, why specific aspects of Mr. [redacted]'s record warranted departure from any of the COMPAS scales.

31. Since the Board failed to comply with its regulations in departing from Mr. [redacted]'s COMPAS assessment, vacatur is warranted.

IV. UNLAWFUL RESENTENCING BY FOCUSING EXCLUSIVELY ON MR. [redacted]'S BEHAVIOR 30 YEARS AGO AND RELYING ON EVIDENCE OF UNPROVEN CONDUCT

32. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 31.

33. In denying Mr. [redacted]'s application for parole on the basis of the instant offense—for which Mr. [redacted]'s sentencing court determined merited a minimum sentence of 25 years—the Board effectively concluded that the judicially-imposed minimum sentence is insufficient. In so doing, the Board was "in effect, re-sentencing petitioner to a sentence that excluded any possibility of parole since petitioner is powerless to change his past conduct." *Rios*, 2007 WL 846561, at *4. "[A]s the Appellate Division has admonished, under similar circumstances, such 're-sentencing' by the Parole Board 'reveal[s] a fundamental misunderstanding of the limitations of administrative power.'" *Id.* (citing *King*, 190 A.D.2d at 432).

34. The conduct on which the Board focused—the circumstances of the instant crime and his past criminal history—was properly before Mr. [redacted]'s sentencing judge, who had an opportunity to review Mr. [redacted]'s record and those facts when imposing a sentence. The Board's rejection of the sentencing judge's determination that a minimum sentence of 25 years was appropriate in light of the factors the Board now says compel Mr. [redacted]'s continued incarceration is contrary to law.

35. Moreover, in addition to focusing almost entirely on the conduct that was before Mr. [redacted]'s sentencing judge, the Board relied heavily on Mr. [redacted]'s purported criminal history, including behavior that has not been proven. Among other things, the Board asked numerous questions at the hearing about 1979 charges of sexual abuse in the first degree, rape in the first degree, unlawful imprisonment, and criminal mischief; 1988 charges of rape in the third degree, two counts of endangering the welfare of a child, and six counts of sexual abuse in the third degree; and a 1987 domestic violence allegation against Mr. [redacted]. Rudofsky Aff., Ex. G at 20:9-12, 21:12-15, 25:17-20. As shown by Mr. [redacted]'s criminal record, however, Mr. [redacted] was cleared of those charges and has never been convicted of those offenses. Rudofsky Aff., Ex. A. The Board improperly considered these charges and allegations. *Williams v. Travis*, 20 A.D.3d 622, 623 (3d Dep't 2005).

36. By relying on unproven conduct to deny parole, the Board effectively tried, convicted, and sentenced Mr. [redacted] for decades-old allegations for which he was never convicted. This effective resentencing is contrary to law and merits vacatur.

V. UNLAWFUL RELIANCE ON INACCURATE ASSESSMENTS AND INFORMATION

37. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 36.

38. The Board relied on inaccurate assessments and information in making its [redacted] released on parole. In particular, the Board appears to have relied on erroneous assessments in Mr. [redacted]'s otherwise favorable COMPAS report concerning his risk of substance abuse and low family support.

39. Despite there being no evidence in the record that Mr. [redacted] has—or ever had—any substance abuse issues, the most recent COMPAS report inexplicably scored him as "probable" for the risk of substance abuse upon reentry. Rudofsky Aff., Ex. B at 1. The Board acknowledged at the hearing that Mr. [redacted] does not have any drug-related problems, yet it failed to clearly and expressly acknowledge that the COMPAS report's assessment of Mr. [redacted]'s risk of substance abuse upon reentry was erroneous.

40. In contrast, the Board explicitly relied on the COMPAS report's inaccurate assessment of "highly probable" for low family support when making its decision. The "highly probable" score is contradicted by evidence in Mr. [redacted]'s file—namely, a letter of support [redacted]

41. The Board should not have relied on these inaccurate assessments—which are contradicted by other facts in the record—and its doing so merits vacatur.

42. Further, the Board erroneously found that Mr. [redacted] failed to show any remorse—and could not show any remorse—because he maintains his innocence with respect to the underlying offense. The parole hearing transcript, however, belies this finding.

43. Although he maintains his innocence for the crime for which he was convicted, Mr. [redacted] nonetheless expressed deep remorse and empathy at the hearing, including for the victim's family. Rudofsky Aff., Ex. G at 36:4-11. He also expressed remorse and sorrow for certain actions that he took in the past, over 30 years ago. Rudofsky Aff., Ex. G at 35:4-36:4. Where an applicant shows insight and remorse for the victim and the victim's family, as here, the Board cannot base its decision on a lack of remorse. *See Winchell v. Evans,* 27 Misc.3d 1232(A) (Sup. Ct., Sullivan Cnty. 2010).

44. The Board's reliance on a finding that Mr. [redacted] lacked remorse was improper and merits vacatur.

VI. FAILURE TO CONSIDER REENTRY PLANS

45. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 44.

46. The Board's governing statute explicitly requires the Board to consider "release plans including community resources, employment, education and training and support services available to the inmate" in making a release decision. N.Y. Exec. Law § 259-i(c)(A)(iii).

47. There is no indication that the Board actually considered Mr. [redacted]'s reentry plan—which included documented support from friends and family members, as well as a plan for housing and employment if released, Rudofsky Aff., Ex. C at 17-26, 28-30—in rendering its decision. Since the Board failed to consider a statutorily-required factor, the denial was arbitrary and capricious and must be vacated.

WHEREFORE, Petitioner respectfully requests that the Court enter an order:

1. Annulling the decision of Respondent, dated September 29, 2020, denying

[redacted]

2. Directing Respondent to immediately release Petitioner on parole or afford Mr. [redacted] a new, *de novo* parole release hearing before a new panel that does not include any commissioner who has previously denied Mr. [redacted] release, at which Respondent shall consider all appropriate statutory factors governing parole release determinations; and,
3. Granting such additional relief as the Court deems just and proper.

Dated: October 8, 2021
New York, New York

Respectfully submitted,

By: _____

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SUPREME COURT OF THE STATE OF NEW YORK
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In the Matter of the Application of [redacted] Petitioner, For a judgment pursuant to Article 78 of the Civil Practice Law and Rules, -against- TINA M. STANFORD, Chairwoman of the New York State Board of Parole Respondent.	Index No. Judge:

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR RELIEF PURSUANT TO ARTICLE 78 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES

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PRELIMINARY STATEMENT

Petitioner [redacted] brings this action pursuant to Article 78 of the New York Civil Practice Law and Rules to vacate the September 2020 decision of the New York State Board of Parole (the "Parole Board" or the "Board") denying him release on parole. [redacted] a 64-year-old man, has been incarcerated for nearly half his life, and has already served a lengthy term of incarceration for the underlying offense. Mr. [redacted] is not the same man who was sentenced decades ago to a prison term of 25 years to life. Over the past three decades of imprisonment, Mr. [redacted] has developed an impressive record of rehabilitative accomplishment. He has obtained his GED and completed required self-improvement programs. He has successfully served in volunteer roles as a football coach, Jewish Facilitator, and gardener at the various facilities in which he has been incarcerated, mentoring and having a positive impact on his fellow inmates through such roles. He has fostered relationships and established a significant support system for after his release, including by securing guaranteed housing and paid employment. Indeed, Mr. [redacted] growth, maturity, and rehabilitation are reflected by, among other things, the Board's own risk assessment tool finding Mr. [redacted] an overall low risk, including for felony violence, arrest, and absconding. Nonetheless, on September 29, 2020, the Board denied Mr. [redacted] parole in a cursory order. The Parole Board focused almost entirely on the offense Mr. [redacted] was convicted of three decades ago, rather than the many statutory factors that merit his release today. In doing so, the Parole Board ran afoul of statutory and constitutional law.

The Board's decision was contrary to law, arbitrary, and capricious for several reasons. First, the Board failed to provide Mr. [redacted] with the individualized and non-conclusory explanation for his parole denial that New York law requires. It instead issued a boilerplate

decision completely lacking in individualized analysis. Second, the Board failed to meaningfully address the factors it must consider and, instead, focused exclusively on the crime underlying his incarceration. Third, the Board failed to justify its departure from its own risk assessment tool. Fourth, the Board substituted its judgment as to the appropriate sentence for the offense for that of the sentencing court and improperly relied on alleged conduct for which Mr. [redacted] was never convicted as a basis for denying him parole. Fifth, the Board unlawfully relied on inaccurate information and assessments in making its determination. And finally, the Board failed to meaningfully consider Mr. [redacted] well-documented reentry plans. Each and every one of these errors merits vacatur, so that Mr. [redacted] can appear before a Parole Board that will comply with its legal obligations.

FACTS

Petitioner refers the Court to the facts set forth in his Verified Petition for Relief Pursuant to Article 78.

ARGUMENT

Under Article 78 of the New York Civil Practice Law and Rules, this Court may vacate a decision of the New York State Board of Parole when it is "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." N.Y. CPLR § 7803(3). Upon such a showing, "[t]he proper remedy is . . . a new hearing" before the Board. *Kellogg v. N.Y. State Bd. of Parole*, 159 A.D.3d 439, 442 (1st Dep't 2018). Because the Board's decision was contrary to law, arbitrary, and capricious, it must be vacated.

I. THE BOARD'S FAILURE TO PROVIDE AN INDIVIDUALIZED AND NON-CONCLUSORY EXPLANATION FOR DENYING PAROLE VIOLATED LAWFUL PROCEDURE

New York law directs the Board to grant parole if "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law." N.Y. Exec. Law § 259-i(2)(c)(A). If parole is denied, the Board must explain the reasons for denial "in detail and not in conclusory terms." N.Y. Exec. Law. § 259-i(2)(a). Under its own regulations, moreover, the Board must "address how the applicable parole decision-making principles and factors . . . were considered in the individual's case." 9 NYCRR 8002.3. In Mr. [redacted] case, however, the Board failed to comply with this standard.

The Board denied parole to Mr. [redacted] because it concluded that "release would be incompatible with the welfare of society and would so deprecate the serious nature of [Mr. [redacted] crime as to undermine respect for the law," and that, if released, "there is a reasonable probability that [Mr. [redacted] would not live and remain at liberty again without violating the law." Rudofsky Aff., Ex. G at 37. In denying Mr. [redacted] parole, the Board apparently relied on the nature of Mr. [redacted] offense of conviction, that his criminal history purportedly "reflects an escalation of criminal behavior, which [he] continually minimize[s]," and the fact that Mr. [redacted] maintains his innocence for the instant offense, which the Board concluded means that "there could have been no remorse for the crime for which [he was] convicted and the family involved." *Id.* at 37-38. These explanations, alone, do not explain why Mr. [redacted] release would be incompatible with the safety of the community or undermine respect for the law. *See V. Sullivan v. N.Y. State Bd of Parole*, 100865/18, slip op. at 9 (Sup. Ct. N.Y. Cnty. 2019) (ordering a *de novo* hearing and faulting Board for stating conclusions that

merely "track[ed] the statutory language, without explanation or context"). Nor do they explain why there is any reasonable basis for the Parole Board to conclude that Mr. [redacted] would violate the law if released.

These conclusory explanations also fail to meaningfully consider the totality of Mr. [redacted] record, which includes a lengthy record of accomplishments within prison, a low COMPAS score, a comprehensive release plan, and numerous letters of support attesting to his positive character. Indeed, Mr. [redacted] has a strong institutional record of accomplishment. While incarcerated, he has earned his GED and completed several self-improvement programs, including ART (Aggression Replacement Training), AVP (Alternative Violence), and Phase II. Rudofsky Aff., Ex. C at 6, 36-38. As discussed more below, he has served as a football coach, Jewish Facilitator, and gardener at various facilities, with praise from many for his commitment and support in each of these roles. Mr. [redacted] file contains numerous letters of support from friends and family members, including many individuals who have been positively impacted by him prior to their own release from prison. *Id.* at 17-26. Mr. [redacted] COMPAS report shows that he is at low risk of re-offense. Rudofsky Aff., Ex. B. Throughout the past three decades of imprisonment, Mr. [redacted] has only received one Tier II disciplinary infraction, which was the result of a misunderstanding. Rudofsky Aff., Ex. C at 6, 11. And Mr. [redacted] has a well-documented plan for housing and employment following his release. Rudofsky Aff., Ex. C at 17, 28-30.

Describing the Board's engagement with this record as "cursory" is an understatement. In fact, the Board did not meaningfully address any of this evidence. The Board merely "noted" Mr. [redacted] "disciplinary record and the single disciplinary infraction," as well as his "program participation to date and the completion of required programs." Rudofsky Aff., Ex. G

at 38. It asserted further that it had "weighed and considered the results of [Mr. [redacted] COMPAS risk assessment and the low scores indicated therein, with the exception of highly probable for low family support." *Id.* Without any reasoning or elaboration whatsoever, the Board also stated in a single sentence that it had "reviewed and considered" Mr. [redacted] "well-documented release plan and support letters included therein." *Id.* In reality, however, the Board did not address any of this evidence in any detail or weigh the evidence in reaching its decision. Rather, it summarily concluded that "discretionary release at this time is not appropriate" based on "all required factors in the file considered." *Id.*

The Board's rote recitation of the relevant standard and boilerplate language fall far short of what is required to substantiate a denial of parole. *See, e.g.*, *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22, 28 (1st Dep't 2016) (holding the Parole Board violated the statutory requirement that the reasons for denial not be conclusory when it "summarily listed petitioner's institutional achievements and then denied parole with no further analysis of them"). Notably, the Board's written decision here failed to provide a basis to determine *how* the statutory factors were weighed and why release was not warranted—deficiencies meriting vacatur. *See, e.g.*, *Platten v. N.Y. State Bd. of Parole*, 47 Misc. 3d 1059, 1064 (Sup. Ct. Sullivan Cnty. 2015) ("Based on the record and the lack of specificity in the decision, the court cannot determine what concern the Board had for the public safety and welfare, and why it had that concern at the time of the interview[.]"); *Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 40 Misc. 3d 226, 235 (Sup. Ct. Columbia Cnty. 2013) ("[T]he Board failed to explain, other than the facts of the crime, *why* petitioner's release was 'incompatible with the public safety and welfare' and *why* there was 'a reasonable probability [he] would not live and remain at liberty without violating

the law.' . . . [T]he Board 'should be well able to articulate the reasoning' for its decision, 'if it were come to reasonably, in a non-arbitrary, un-capricious manner.'").

By failing to provide any analysis of the favorable factors in the record, the Board likewise failed to explain how the facts that existed more than three decades ago outweigh the substantial evidence demonstrating that Mr. [redacted] would be able to lead a crime-free and productive life now if released. Courts have vacated parole denials on exactly this type of failure to explain how the Board has weighed the statutory factors. *See, e.g.*, *McBride v. Evans*, 2014 WL 815247, at *3 (Sup. Ct. Dutchess Cnty. 2014) ("While the Board discussed petitioner's positive activities and accomplishments at the hearing, it then concluded that his release was incompatible with 'public safety and welfare.' The Board gave no analysis as to how or why it reached this conclusion. It appears to have focused only on petitioner's past behavior without articulating a rational basis for reaching its conclusion that his release would be incompatible with the welfare of society at this time."); *V. Sullivan*, 100865/18, slip op. at 10 ("[T]here is no explanation why the 25 year old crime outweighed the voluminous evidence that indicates petitioner would presently be able to lead a quiet and crime-free life in society."); *Weinstein v. Dennison*, 2005 WL 856006, at *7 (Sup. Ct. N.Y. Cnty. 2005) ("[T]he Board is required to do more than merely mouth the statutory criteria, particularly where as [sic] here each factor recited and brought forth in the parole interview, other than the crime itself, militated in favor of release.").

Further, without a sufficiently detailed explanation of its determination denying parole, and of how the Board considered the statutory factors in his case, Mr. [redacted] is completely unable to prepare for future parole hearings. *See Greene v. Smith*, 52 A.D.2d 292, 294 (4th Dep't 1976) (explaining that "[t]he objective in requiring the board to furnish reasons is to guide

and to aid the prisoner in his endeavor to return to society as a useful citizen"). This harm is especially acute because this was Mr. [redacted] fourth denial. *See* Rudofsky Aff., Ex. J. And, the instant denial contained *no* recommendations for what Mr. [redacted] could do to be paroled in the future. Given that the Board's decision appears to be entirely based on the past—on things that cannot be changed—it is impossible to know what Mr. [redacted] can do in the future to demonstrate that he is ready to be released into society. Indeed, the only inference that can be drawn from this record is that the Board will never meaningfully evaluate the full set of relevant considerations in determining whether Mr. [redacted] should be released, thereby converting his indeterminate sentence into a mandatory life sentence.

The Board's failure to provide the requisite individualized consideration and explanation merits granting Mr. [redacted] petition.

II. THE BOARD'S FAILURE TO MEANINGFULLY CONSIDER ALL RELEVANT STATUTORY FACTORS VIOLATED LAWFUL PROCEDURE

To assess whether an incarcerated individual is likely to recidivise, and whether release is compatible with the welfare of society so as not to depreciate the seriousness of the crime, the Board is statutorily directed to consider eight factors:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
>
> (ii) performance, if any, as a participant in a temporary release program;
>
> (iii) release plans including community resources, employment, education and training and support services available to the inmate;
>
> (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;

> (v) any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
>
> (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;
>
> (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and
>
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.
>
> N.Y. Exec. Law § 259-i(2)(c)(A).

It is settled law that the enumeration of these factors means that the Board cannot deny release based solely on the nature of the underlying offense. *See, e.g.*, *Mitchell v. N.Y. State Div. of Parole*, 58 A.D.3d 742, 743 (2d Dep't 2009) (affirming grant of Article 78 petition where parole board "failed to take other relevant statutory factors into account" even though the "seriousness of the underlying offense [was] acutely relevant in determining whether the petitioner should be released on parole"); *Ferrante v. Stanford*, 172 A.D.3d 31, 37 (2d Dep't 2019) ("[T]he Board may not deny an inmate parole based solely on the seriousness of the offense[.]"); *Freidgood v. N.Y. State Bd. Of Parole*, 22 A.D.3d 950, 951 (3d Dep't 2005) (concluding that a parole denial that ignored factors such as the petitioner's expressions of remorse and disciplinary record on the basis that petitioner's offense was violent was "irrational under the circumstances as to border on impropriety."); *see also Rios v. N.Y. State Div. of Parole*, 2007 WL 846561, at *5 (Sup. Ct. Kings Cnty. 2007) ("[I]n affording the possibility of parole to

those convicted of murder, the legislature has made a determination that, despite the seriousness of that crime, rehabilitation is possible and desirable.").

Where the parole decision is based exclusively on the seriousness of the offense, and the parole denial was thus "a foregone conclusion," reversal is warranted. *See Johnson v. N.Y. Bd. of Parole*, 65 A.D.3d 838, 839 (4th Dep't 2009); *see also Morris*, 40 Misc.3d at 233 ("When, as here, the Parole Board focuses entirely on the nature of petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion that does not comport with statutory requirements."); *Pulinario v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 2014 WL 886955, at *4 (Sup. Ct. N.Y. Cnty. 2014) ("[T]he Parole Board's overwhelming emphasis was on the offense . . . . At the hearing, there were only passing references to the contents of petitioner's application. In the decision there was only a perfunctory mention of all the statutory factors that weighed in [his] favor."). Rather, the Board must consider the dynamic factors of prisoner development and rehabilitation. *See Rios*, 2007 WL 846561, at *5. Significantly, "a murder conviction *per se* should not preclude parole." *Id.*

While the Board may give different weight to the requisite statutory factors, it must consider—and rationally weigh—all of them. *See King v. N.Y. State Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1993), *aff'd*, 632 N.E.2d 1277 (N.Y. 1994); *Johnson v. N.Y. State Div. of Parole*, 884 N.Y.S.2d 545 (4th Dep't 2009). The Board failed to do so here. The Board focused almost exclusively on the circumstances of Mr. [redacted] instant offense and other backward-looking facts. At Mr. [redacted] parole hearing, the Commissioners interrogated him about the details surrounding the crime for which he was convicted. They questioned Mr. [redacted] at length about his relationship with the victim and his whereabouts on the night before and morning of her death. Rudofsky Aff., Ex. G at 3-19. The remainder of the Board's questions were almost

entirely devoted to Mr. [redacted] criminal history, including criminal charges that were dismissed and thus should not have been considered at all, as described more below. *Id.* at 19-28.

The written decision, too, focused heavily on the instant offense. The Board decided that "discretionary release at this time is not appropriate," stating that, if released, "there is a reasonable probability that [Mr. [redacted] would not live and remain at liberty again without violating the law," and that "release would be incompatible with the welfare of society and would so deprecate the serious nature of [Mr. [redacted] crime as to undermine respect for the law." *Id.* at 37-38. The Board then recounted the details of Mr. [redacted] instant offense, and concluded that Mr. [redacted] "criminal history reflects an escalation of criminal behavior, which [he] continually minimize[s]." *Id.* The Board paid brief lip service to the other factors required under Executive Law § 259-i(2)(c)(A), merely noting that "[r]equired statutory factors have been considered together with [Mr. [redacted] institutional assessment, including discipline and program participation, [his] risk and needs assessment and [his] need for successful reentry into the community." *Id.* at 37. The Board also listed some facts in the record such as Mr. [redacted] "participation to date and the completion of required programs," and the "results of [his] COMPAS risk assessment and the low scores indicated therein." *Id.* at 38. But it did not conduct any analysis whatsoever of any of the factors demonstrating Mr. [redacted] rehabilitation and readiness for release. Nor did it, in fact, apply the relevant evidence to the required factors to come to a proper decision.

In short, the Board gave no consideration to the forward-looking characteristics mandated by Executive Law § 259-i(2)(C)(A). *See King*, 190 A.D.2d at 432 ("The 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."). Its failure to do so demonstrates that the Board gave no meaningful consideration to Mr. [redacted] rehabilitation, strong institutional record, or his capacity to reenter society, and thus, that it failed to take statutorily-mandated factors into account.

Contrary to the Board's conclusions, the record is replete with evidence demonstrating Mr. [redacted] rehabilitation and suitability for release. Over more than three decades of incarceration, Mr. [redacted] has demonstrated his ability to take on meaningful responsibilities, which have positively impacted the various facilities he has been at, as well as other inmates. He has been praised for his roles as a football coach, Jewish facilitator, and gardener, including by men who have since been released and remain in touch. In his role as a football coach, Mr. [redacted] has coached other inmates and brought together individuals who were in different gangs so they could work together towards collective success. Rudofsky Aff., Ex. C at 5, 12, 14, 46-47. He has developed relationships with his players who have subsequently written to him, expressing thanks for his service. *Id.* at 5. As an individual who is not Jewish himself, Mr. [redacted] also volunteered as a Jewish Facilitator, and as such, has been able to bring together people of different faiths and serve as a mentor. *Id.* at 5-6, 12-13. In fact, through religious services, Mr. [redacted] gained an important friendship in Mr. [redacted] Although Mr. [redacted] has now been released, he and Mr. [redacted] still speak to each other regularly, and Mr. [redacted] has expressed to the Board the "great impact" and "great influence" that Mr. [redacted] has had on him. *Id.* at 21. Indeed, it is through Mr. [redacted] that Mr. [redacted] has secured guaranteed housing upon release. *Id.* Finally, Mr. [redacted] has worked as a gardener at several facilities, including at Bare Hill, and he has been commended for his contributions in his role. Mr. [redacted] Bare Hill's

Garden Supervisor, wrote that "Mr. [redacted] knowledge and experience in vegetable gardening and greenhouse management was an asset to the program," and that "Mr. [redacted] was timely and productive in this assignment" and "displayed a positive and respectful attitude toward Staff members and inmate participants." *Id.* at 45. Through all of these roles, Mr. [redacted] has demonstrated his immense growth, maturity, and readiness to reenter society.

In addition to the strong and positive relationships he has developed during his imprisonment, Mr. [redacted] institutional record reflects a virtually flawless disciplinary record and low COMPAS score. Rudofsky Aff., Ex. B; Ex. C at 6, 11. He has also shown that significant support—including in guaranteed housing and employment—awaits his release. Mr. Sylar's aunt has offered to provide housing to Mr. [redacted] in Rochester, New York. Rudofsky Aff., Ex. C at 21. And, Mr. [redacted] has secured guaranteed paid employment as a Recovery Peer Advocate with the Rochester Community Outreach and Recovery Enhancement Center, which will offer him additional skills and training, as well as connections to other community agencies. *Id.* at 28.

The Board failed to meaningfully consider any of the above highly relevant evidence of Mr. [redacted] rehabilitation and growth. During the hearing, the Board merely listed some of the documents included in Mr. [redacted] parole packet. Rudofsky Aff., Ex. G at 29:6-18, 31:5-23, 32:14-33:10. The Board did not, however, ask Mr. [redacted] any questions about his positive experiences as a football coach, Jewish Facilitator, or gardener—all of which demonstrate Mr. [redacted] ability to contribute to society if released. Nor did the Board ask about his comprehensive release plan, which further demonstrates his readiness for release.

Courts have granted Article 78 petitions where "[t]he Board summarily listed petitioner's institutional achievements, and then denied parole with no further analysis of them."

Rossakis, 146 A.D.3d at 28. Here, the Board did not even provide the "summar[y] list" held insufficient in *Rossakis*: it did not address Mr. [redacted] institutional achievements *at all*. In its decision, the Board did not even mention Mr. [redacted] specific accomplishments, specific program participation and completions, or the contents of his release plan, despite the fact that these were all relevant factors that the Board was required to consider under Executive Law § 259-i(2)(c)(A)(i) and § 259-i(2)(c)(A)(iii). Failing to do so rendered the Board's decision inadequate as a matter of law. *See, e.g.*, *Platten*, 47 Misc.3d at 1064-67 (granting an Article 78 petition where the Board's sole discussion of the petitioner's record while incarcerated was "[y]our institutional programming indicates progress and achievement which is noted to your credit"); *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc. 3d 661, 668 (Sup. Ct. Bronx Cnty. 2006) (holding that "actual consideration of factors means more than acknowledging that evidence of them was before the Board").

Moreover, the Board also failed to explain why Mr. [redacted] decades-old criminal history is more probative of his likely behavior upon release than his well-documented plan for release. Nor did it explain why Mr. [redacted] history of past conduct outweighs his institutional accomplishments from the past 30 years. As detailed above, the Board's rationale focused on Mr. [redacted] crime of conviction, his purported decades-old history of criminal conduct, and his claim of innocence with respect to the instant offense. At bottom, the Board's reasoning focuses on *past* behavior, when the relevant inquiry involves Mr. [redacted] *present* risk to society if released. Courts have held that this sort of backward-looking, incomplete analysis violates the Board's regulations. *See, e.g.*, *McBride*, 2014 WL 815247, at *3 (granting an Article 78 petition where the Board's written decision "focused only on petitioner's past

behavior *without articulating a rational basis for reaching its conclusion that his release would be incompatible with the welfare of society at this time*") (emphasis added).

By failing to address these important, forward-looking issues, the Board violated its governing laws and regulations.

III. THE BOARD'S FAILURE TO JUSTIFY DEPARTURE FROM MR. [redacted] COMPAS SCORE VIOLATED LAWFUL PROCEDURE

The Board's conclusion that release would be incompatible with the welfare of society and would undermine respect for the law directly conflicts with the results of Mr. [redacted] COMPAS assessment. State law and the Board's own regulations require it to implement and use a risk assessment tool in making parole release decisions. N.Y. Exec. Law. § 259-c(4). New York has developed such a tool in the form of a COMPAS 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." 9 NYCRR 8002.2(a).

The Board failed to provide *any* reason for its departure in Mr. [redacted] case, let alone any "individualized reason for such departure," as required. Mr. [redacted] COMPAS report clearly reflects an individual who presents a low risk for future criminal behavior and who will pose no risk to the welfare of society and is thus an ideal candidate for release. Rudofsky Aff., Ex. B. Among other things, it scores him at a low risk for felony violence, arrest, and absconding. *Id.* It scores him low for criminal involvement, history of violence, and prison misconduct. *Id.* It scores him as being unlikely to experience negative social cognitions or low self-efficacy upon release. *Id.* It scores him as unlikely to face social exclusion for financial or employment reasons upon reentry. *Id.* And while it scores him as "probable" for substance

abuse upon reentry, and "highly probable" for experiencing low family support, these scores are erroneous as discussed more below. *See infra* Part V.

Overall, while the Board acknowledged Mr. [redacted] "COMPAS risk assessment and the low scores indicated therein, with the exception of highly probable for low family support," Rudofsky Aff., Ex. G at 38, it nevertheless chose to depart from the COMPAS results without explanation. By doing so, the Board utterly failed to draw any conclusion from the favorable COMPAS report or to consider it in any meaningful way. In other words, the Board failed to explain *how* it weighed Mr. [redacted] COMPAS report against the circumstances of the instant offense, or how it concluded that Mr. [redacted] release would be "incompatible with the welfare of society" in light of the report. Among other things, it did not specify the particular COMPAS scales from which it was choosing to depart, and did not explain, in an individualized manner, why specific aspects of Mr. [redacted] record warranted departure from these specific scales. Rather, the Board ended its decision by stating in a conclusory fashion: "based on all required factors in the file considered, discretionary release at this time is not appropriate." Rudofsky Aff., Ex. G at 38.

The Board's failure to provide an individualized reason for departing from the COMPAS report merits granting Mr. [redacted] Article 78 petition. *See, e.g.*, *Coleman v. N.Y. State Dept. of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 673 (2d Dep't 2018) (holding that the lower court should have granted the Article 78 petition because the Board's findings were irrational in light of the record, which included a score of "'low' for all risk factors on [petitioner's COMPAS] risk assessment"). Because the Board failed to justify its departures from Mr. [redacted] low COMPAS scores, its decision must be reversed.

IV. THE BOARD UNLAWFULLY RESENTENCED MR. [redacted] BY RELYING ON EVIDENCE OF DISMISSED CHARGES AND FOCUSING EXCLUSIVELY ON BEHAVIOR THAT WAS PROPERLY BEFORE THE SENTENCING JUDGE

In denying Mr. [redacted] application for parole, the Board relied heavily on the details of the crime for which he was convicted, and its conclusion that the instant offense was an "escalation of criminal behavior" based on Mr. [redacted] purported criminal history. Rudofsky Aff., Ex. G at 38. During the hearing, the Board explicitly questioned Mr. [redacted] about past criminal charges unrelated to the instant offense, all of which were dismissed. *Id.* at 20:9-12, 21:12-15, 25:17-20. In particular, the Board asked numerous questions about unrelated 1979 charges of sexual abuse in the first degree, rape in the first degree, unlawful imprisonment and criminal mischief; 1988 charges of rape in the third degree, two counts of endangering the welfare of a child and six counts sexual abuse in the third degree; and a 1987 domestic violence allegation. *Id.* It then relied on these dismissed charges in denying parole. The Board erred in doing so, and its error merits granting this petition.

As shown by Mr. [redacted] criminal record, none of the aforementioned charges or allegations resulted in a conviction. Rudofsky Aff., Ex. A. By denying parole based on past criminal charges that were dismissed, the Board effectively—and unlawfully—tried, convicted, and sentenced Mr. [redacted] for decades-old allegations. *See Williams v. Travis*, 20 A.D.3d 622, 623 (3d Dep't 2005) ("Inasmuch as the criminal history explicitly relied upon by the Board as one of the factors justifying the 48–month time assessment included charges that were dismissed, the matter must be remitted to the Board for reconsideration of the appropriate time assessment without regard for the two dismissed charges.") (citing *Kravetz v. N.Y. State Div. of Parole*, 293 A.D.2d 843 (3d Dep't 2002)). It is well settled that the Board may not "resentence [applicants] according to the personal opinions of its members" regarding the appropriate penalty for the

applicant's offense of conviction. *King*, 190 A.D.2d at 432. The Board may disagree with the decisions of law enforcement that led to the non-prosecution of Mr. [redacted] in the 1970s and 1980s, but New York law does not permit the Board to use a parole hearing in 2020 to revisit those decisions.

Further, by denying Mr. [redacted] parole, the Board effectively made the determination that Mr. [redacted] judicially-imposed sentence was insufficient in light of the circumstances of the offense. This substitution of its judgment for that of Mr. [redacted] sentencing court is reversible error. The Board based its decision solely on factors that existed at the time of sentencing, which the sentencing court duly considered. *See* Rudofsky Aff., Ex. K at 5-8. By denying parole based on these factors, the Board imposed a longer sentence than the minimum sentence imposed by the sentencing court, thereby effectively resentencing Mr. [redacted] to a higher minimum sentence. That a petitioner was convicted of murder, however, is not sufficient grounds to deny release, particularly where a sentencing court has already determined the sufficient minimum sentence for the offense. "Certainly every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *King*, 190 A.D.2d at 433. The Board has pointed to no such aggravating circumstances here. Indeed, in the Board's June 10, 2021 decision affirming its denial, it merely states that "[a]ggravating factors do exist," without explaining that finding at all or listing a single aggravating factor. Rudofsky Aff., Ex. I at 3. The Board's determination that it is better suited to judge Mr. [redacted] then-culpability based on information that was available to the sentencing court "reveal[s] a fundamental misunderstanding

of the limitations of administrative power." *Rios*, 2007 WL 846561, at *4 (citing *King*, 190 A.D.2d at 432). The Board's decision should be reversed on this ground.

Because the Board effectively resentenced Mr. [redacted] to a higher minimum sentence, reversal is necessary.

V. THE BOARD UNLAWFULLY RELIED ON INACCURATE ASSESSMENTS AND INFORMATION

The Board's reliance on a record that contained several pieces of inaccurate information also warrants reversal. In particular, the Board appears to have relied on inaccurate assessments in Mr. [redacted] otherwise favorable COMPAS report concerning his risk of substance abuse and low family support. First, the COMPAS report's score of "probable" for the risk of substance abuse upon reentry, Rudofsky Aff., Ex. B at 1, is entirely unsupported by any facts and is, indeed, contradicted by the documents in the record. The record shows that in 2016, the Treatment Plan Review Committee assessed Mr. [redacted] and found that he did not require Alcohol and Substance Abuse Treatment (ASAT) because "*no evidence suggest[s] a clinical diagnosis for a substance use disorder*." Rudofsky Aff., Ex. C at 58 (emphasis added). Similarly, in his prior COMPAS reports dated September 15, 2016 and July 27, 2018, Mr. [redacted] was given the lowest score of 1 for risk of substance abuse upon reentry because, among other things, he did not undergo "any prior treatments for drug/alcohol abuse and did not indicate any history of failed drug/UA tests." Rudofsky Aff., Ex. D at 1; Ex. E at 1, 4. And in his case plans from May 2018 through November 2019, Mr. [redacted] counselors consistently indicated that he had *no* need for a substance abuse program. Rudofsky Aff., Ex. F at 3, 6, 12, 17, 22. Given that Mr. [redacted] has not incurred any disciplinary infractions related to drug use, nor tested positive for any drugs since the 2016, 2018, and 2019 case plans and reports, there is simply no evidence to suggest that Mr. [redacted] has—or ever has had—any substance abuse

issues that would warrant a "probable" rating on this risk factor. As Mr. [redacted] stated at the parole hearing, "I don't have a problem with drugs, sir. I hate them. I hate them." Rudofsky Aff., Ex. G at 34:20-21. The Board apparently agreed, *id.* at 34:22-24, but nevertheless failed to clearly and expressly acknowledge that the COMPAS report's assessment of Mr. [redacted] risk of substance abuse upon reentry was erroneous.

Second, the COMPAS report's score of "highly probable" for low family support—a rating the Board reiterated in its decision—is contradicted by evidence in Mr. [redacted] file. At the time, this score was based on the assessor's comment that although Mr. [redacted] "indicated that he believes that other relatives are supportive … [i]t is uncertain as to whether there is evidence of family support." Rudofsky Aff., Ex. B at 11. But Mr. [redacted] cousin [redacted] submitted a support letter dated August 2020—after the COMPAS report was prepared—stating that he "want[s] to support [Mr. [redacted] emotionally however [he] can." Rudofsky Aff., Ex. C at 18. This letter was before the Board and undermines the COMPAS report's finding in this regard. Indeed, because Mr. [redacted]'s letter demonstrates that Mr. [redacted] has family support, the COMPAS report is erroneous in giving him a "highly probable" score for low family support. At the hearing, the Board noted Mr. [redacted]s letter and asked Mr. [redacted] about his children, who live a thousand miles away in Florida. But whether or not Mr. [redacted] is in regular contact with his children does not undermine the fact that he has the support of family members such as Mr. [redacted] which warrants a lower risk score than "highly probable" with respect to low family support

The Board should not have relied on these inaccurate assessments, which are contradicted by other facts in the record, and its doing so merits vacatur. *See Lewis v. Travis*, 9 A.D.3d 800, 801 (3d Dep't 2004) ("Inasmuch as the Board relied on incorrect information in denying

petitioner's request for parole release, the judgment must be reversed and a new hearing granted.").[1]

Further, the Board erroneously found that Mr. [redacted] failed to show any remorse—and could not show any remorse—because he maintains his innocence with respect to the underlying offense. In its decision, the Board stated, "You continued to claim innocence in the instant offense and, therefore, there could have been no remorse for the crime for which you were convicted and the family involved." Rudofsky Aff., Ex. G at 38. But the parole hearing transcript belies this finding, and the Board's reliance on it constitutes reversable error. At the hearing, Mr. [redacted] expressed deep remorse and empathy. He explained that, while he maintains his innocence for the instant crime, he nonetheless thinks about the victim's family all the time, including her mother and son for whom he has great empathy. *Id.* at 36:4-11. In fact, the Board acknowledged that Mr. [redacted] got "very emotional" when speaking about the victim's family. *Id.* at 36:13-14. And although he does—and always has—maintained his innocence for the instant offense, Mr. [redacted] also admitted that he is not proud of his past or the person he was over 30 years ago, expressing remorse and sorrow for certain actions he took back then. *Id.* at 35:4-36:4.

Where an applicant shows insight and remorse for the victim and the victim's family, as here, the Board cannot base its decision on a lack of remorse. *See Winchell v. Evans,* 2010 WL 2293190 (Sup. Ct. Sullivan Cnty. 2010) (finding that the Board's denial, which was based on the

[1] The Board is also wrong that Mr. [redacted] "waiv[ed] the matter" by failing to raise the errors contained in his COMPAS report at his hearing. *See* Rudofsky Aff., Ex. I at 5. Contrary to the Board's assertion, Mr. [redacted] did indeed raise these errors at the hearing. Upon being asked whether there was "anything that [he] want[ed] to share with [the Board]" that they had not yet discussed, Mr. [redacted] immediately responded that he wanted to talk about "the drug thing" from his COMPAS report. Rudofsky Aff., Ex. G at 34:4-9. He explained that he does not "have a problem with drugs," which the Board acknowledged to be true. *Id.* at 34:8-35:2. The Board did not, however, clearly or expressly state—either at the hearing or in its decision—that it would not consider this incorrect assessment. And as to the erroneous family support score, Mr. [redacted] likewise discussed that issue at the hearing, including by responding to the Board's questions about his children, who live far away in Florida. *Id.* at 29:18-31:4.

petitioner failing to show remorse for the victim or her family and not appearing to understand the seriousness of his crime, was contradicted by the record). Here, the Board apparently concluded that Mr. [redacted] is incapable of feeling remorse because he maintains his innocence. But the mere fact that Mr. [redacted] continues to maintain his innocence for the instant offense—because he asserts he did not commit it—should not bar him from parole indefinitely, particularly when he expressed that he feels sorry for what happened to the victim and her family. Indeed, none of Mr. [redacted] prior parole denial decisions indicate that he lacked remorse for the instant offense and for the victim's family, despite the fact that he maintained his innocence during each of those hearings as well. Rudofsky Aff., Ex. J.

The Board relied on inaccurate assessments in the record and, separately, erroneously concluded that Mr. [redacted] could not express remorse. These errors further support granting the instant petition.

VI. THE BOARD ILLEGALLY DISREGARDED MR. [redacted] REENTRY PLAN

The Board's governing statute explicitly requires the Board to consider "release plans including community resources, employment, education and training and support services available to the inmate" in making a release decision. N.Y. Exec. Law § 259-i(c)(A)(iii). But here, the Board failed to meaningfully consider Mr. [redacted] reentry plan in rendering its decision. Since the Board failed to consider a statutorily-required factor, the denial was arbitrary and capricious and must be vacated.

Mr. [redacted] application for parole included a comprehensive reentry plan, including a plan for housing and employment if released, documented support from friends and family members, and six letters of reasonable assurance. Despite this extensive written record, it appears that the Board failed to consider Mr. [redacted] reentry plan at all. As detailed above,

the Board focused almost exclusively on the seriousness of the crime of conviction during the hearing, and failed to ask Mr. [redacted] any questions about his readiness for release. Moreover, the Board's written decision merely states—in its final paragraph—that it had "reviewed and considered" Mr. [redacted] "well-documented release plan." Rudofsky Aff., Ex. G at 38. Yet the Board did not mention a single aspect of Mr. [redacted] release plan.

Because the Board failed to give meaningful consideration to a factor it is statutorily required to consider, its decision was arbitrary and capricious. *See Mayfield v. Evans*, 93 A.D.3d 98, 110 (1st Dep't 2012) ("[T]he absence of a detailed decision inappropriately foreclosed the possibility of intelligent review of the Parole Board member's reasons."); *Coaxum*, 14 Misc. 3d at 668 (holding that "actual consideration of factors means more than acknowledging that evidence of them was before the Board"). Indeed, courts have granted Article 78 petitions seeking review of Board decisions that fail to consider all of the statutory parole factors. *See, e.g., Mitchell*, 58 A.D.3d at 743. Further, courts have held that, when the Board fails to consider all relevant statutory factors, as it did in Mr. [redacted] case, it is "a strong indication that the denial of petitioner's application was a foregone conclusion." *Johnson*, 65 A.D.3d at 839 (citing *King*, 190 A.D.2d at 431-32). When the Board prejudges an applicant's case, as it did here, vacatur is necessary. *King*, 190 A.D.2d at 434.

WHEREFORE, Petitioner respectfully requests that the Court enter an order:

1. Annulling the decision of Respondent, dated September 29, 2020, denying Petitioner [redacted] [redacted] parole release; and
2. Directing Respondent to immediately release Petitioner on parole or afford Mr. [redacted] a new, *de novo* parole release hearing before a new panel that does not include any commissioner who has previously denied Mr. [redacted] release, at

which Respondent shall consider all appropriate statutory factors governing parole release determinations; and

3. Granting such additional relief as the Court deems just and proper.

Dated: October 8, 2021
New York, New York

By: _____

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