Art. 78 Petition - FUSL000135 (2022-04-01)

[redacted]

FUSL000135

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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 respondents, alleges as follows:

PRELIMINARY STATEMENT

1. Petitioner [redacted] a 34-year-old man who has been incarcerated for 18 years—more than half his life—based on a single regrettable act he committed while just 16 years old, brings this Article 78 petition to vacate the January 2021 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 hopelessly deficient: it was conclusory, vague, and among other things failed to address Mr. [redacted] youth at the time of the offense, as required by law. Significantly, in making its decision, the Board focused predominantly on the details of the offense giving rise to the instant prison sentence and failed to meaningfully consider aspects of Mr. [redacted] record that the Board's own regulations require it to address. The Board's denial violates New York law and regulations, and the Constitutions of the State of New York and the United States. Since the Board's perfunctory denial of Mr. [redacted] request for parole failed to

meaningfully assess evidence demonstrating Mr. [redacted] rehabilitation, this Court should vacate the Board's decision and order a properly conducted *de novo* parole release interview.

VENUE

2. Venue is proper in this Court pursuant to CPLR §§ 506(b) and 7804(b) because Westchester County is the county where Mr. [redacted] was located when the Board conducted Mr. [redacted] parole interview and made the decision to deny parole, and both Westchester and Dutchess Counties are in the Ninth Judicial District. An Article 78 petition may be filed in "any county within the judicial district where the respondent made the determination complained of" and "where the material events otherwise took place." CPLR § 506(b) and § 7804(b). Thus, this action is properly commenced in Dutchess County.

FACTS

3. Mr. [redacted] has spent the past 18 years in prison. On December 20, 2004, Mr. [redacted] was sentenced to a term of fifteen years to life in prison, the minimum possible sentence, after he pled guilty to a single count of second-degree murder for an offense that occurred when Mr. [redacted] was 16 years old. Lash Aff., Ex. 1 at 19:7-25; Ex. 2.

4. Mr. [redacted] experienced a traumatic childhood prior to his arrest. Mr. [redacted] mother was diagnosed with Hodgkin's lymphoma when he was 13 years old, and she passed away when he was 15 years old. Lash Aff., Ex. 3 at 1. After his mother's death, Mr. [redacted] was left under the supervision of his drug-addicted father, and Mr. [redacted] became homeless after the [redacted] family was evicted from their apartment. *Id.* Mr. [redacted] then suffered a brain aneurysm, for which he had surgery. *Id.* It was in these circumstances that Mr. [redacted] committed the instant offense, shooting and killing someone who had made Mr. [redacted] feel that he was in fear for his life. *Id.* at 2. Mr. [redacted] had never been arrested for nor convicted of any crime previously, and he regrets his crime on a daily basis. Lash Aff., Ex. 3 at 3; Ex. 4 at 2.

5. When Mr. [redacted] was incarcerated, he, admittedly, was "young, naive, and wanted acceptance." Lash Aff., Ex. 3 at 2. Because he "wanted to be loved and embraced," he was convinced by older inmates to join a gang. *Id.* As he matured into adulthood, however, Mr. [redacted] realized that the "prison notoriety" he had been chasing "means absolutely nothing." *Id.* Mr. [redacted] then decided to turn his life around and removed himself from the gang. Lash Aff., Ex. 1 at 22:24-23:11. He also referred himself for mental health services and began counseling. Lash Aff., Ex. 3 at 2. Since then, his behavior in prison has greatly improved. Lash Aff., Ex. 1 at 23:19; 8:6-13.

6. Mr. [redacted] has also taken advantage of numerous programs to better himself while he has been incarcerated. He has completed vocational training in custodial maintenance. Lash Aff., Ex. 5 at 1-4. Mr. [redacted] also earned his GED in 2008. *Id.* at 5. And he has participated in the Aggression Replacement Training Program and the Alternative to Violence Program, in which he has learned to handle his emotions in a healthy manner. Lash Aff., Ex. 3 at 2; Ex. 1 at 14:14-23.

7. On January 5, 2021, Mr. [redacted] appeared before Commissioners Samuels and Lee of the Board of Parole. Lash Aff., Ex. 1. The hearing was conducted via videoconference, and Mr. [redacted] was located at Sing Sing Correctional Facility. *Id.* At the hearing, Mr. [redacted] expressed his genuine remorse for the crime he committed as a juvenile, and he explained his efforts to improve himself, including his work with his mental health counselor. *Id.*

8. He also submitted a personal statement, a letter of reasonable assurance of employment, documentation of completion of various prison programs, and 4 letters attesting to his good character. Lash Aff., Exs. 3, 5, 6.

9. Nevertheless, during the hearing and in their formulaic and conclusory order denying parole, the Board fixated on the details of Mr. [redacted] offense. Lash Aff., Ex. 1. In expressing concern about Mr. [redacted] "judgment," *id.*, the Commissioners focused singularly the details of the instant offense—a historical fact that Mr. [redacted] cannot change—and failed to "carefully consider youth and its attendant characteristics in relationship to the commission of the crime" as required by law. *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34 (3rd Dep't 2016). By focusing its inquiry on Mr. [redacted] behavior as a juvenile, and not on his "demonstrated maturity and rehabilitation" since that time, the Board failed to provide Mr. [redacted] a "meaningful opportunity for release," thus violating his rights under the Eighth Amendment to the United States Constitution. *Hawkins*, 140 A.D.3d at 34 (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

10. The Board resorted to canned language as it listed off the additional factors it must—and that it claims it did—consider. But the record shows that in reaching is decision it failed to actually analyze or apply those statutorily required factors—including Mr. [redacted] capacity for maturation and reform—as required by 9 NYCRR 8002.2(c) and the United States and the New York Constitutions. *Id.*; *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

11. Moreover, the Board's decision is conclusory, in direct violation of N.Y. Exec. Law §259-i(a), and is arbitrary and capricious as its stated conclusions find no support in the record. The Board failed to conduct any analysis 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.

12. Finally, the Board exceeded its authority by substituting its judgment for that of the sentencing court in deciding that the minimum sentence set by the sentencing court was not

enough. By focusing predominantly on details of the instant offense, the Board's denial amounted to a decision that the sentencing court erred in imposing the minimum sentence for Mr. [redacted] actions.

13. The Board's denial of Mr. [redacted] parole thereby violated New York State Executive Law, Corrections Law, administrative regulations, controlling state and federal case law, the Eighth and Fourteenth Amendments to the U.S. Constitution, and the cruel and unusual punishment clause of the New York Constitution, N.Y. Const., art. I, §5.

14. Mr. [redacted] timely filed a notice of administrative appeal and submitted a timely administrative appeal of the Board's order to the Appeals Unit of the Board of Parole on September 22, 2021. Lash Aff., Ex. 9. On December 3, 2021, the Board affirmed the denial of parole. Lash Aff., Ex. 10. Accordingly, Mr. [redacted] has exhausted his administrative remedies and this matter is ripe for the instant Article 78 proceeding. Additionally, this instant petition is properly filed within the applicable four-month statute of limitations. *See* CPLR § 217(1).

CAUSES OF ACTION

I. FAILURE TO MEANINGFULLY CONSIDER ALL REELVANT STATUTORY FACTORS

15. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 14.

16. N.Y. Exec. Law § 259-i(2)(c)(A) requires the Board to consider eight factors when making a parole decision, but it exclusively focused on just one: 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. New York State Div. of Parole*, 598 N.Y.S.2d 245 (1st Dep't. 1993), *aff'd*, 632 N.E.2d 1277 (N.Y. 1994).

17. Moreover, the Board's singular focus on facts which Mr. [redacted] cannot change—at 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. New York State Div. of Parole*, 836 N.Y.S.2d 503 (Sup. Ct., Kings Cnty. 2007).

18. 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.

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

II. FAILURE TO CONSUDER MR. [redacted] YOUTHFULNESS OR ITS ATTENDANT CIRCUMSTANCES

20. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 19.

21. The United States Supreme Court has held that that life sentences without the possibility of parole for people convicted of crimes as juveniles violate the Eighth Amendment. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). This is because "children are constitutionally different from adults for purposes of sentencing," and that "[b]ecause juveniles have diminished culpability and greater prospects for reform[,]... 'they are less deserving of the most severe punishments.'" *Id.* Accordingly, an individual serving an indeterminate sentence for a crime committed as a juvenile must be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller*, 132 S. Ct. at 2466; *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

22. New York courts recognize this as well. The Third Department found it "axiomatic that [a juvenile offender] still has a substantive constitutional right not to be punished with life imprisonment for a crime 'reflect[ing] transient immaturity'" and held that "[a] parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 38 (3d Dep't 2016). Indeed, "for those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison," the Board of Parole has a "constitutional obligation to consider petitioner's youth and its attendant characteristics in relationship to the commission of the crime." *Id.* at 39-40.

23. Further, the Board must provide a "meaningful opportunity to obtain release" in order to comply with its constitutional obligations. *Id.* at 43 (citing *Graham*, 560 U.S. at 75). The United States Supreme Court defines a "meaningful opportunity for release" as a review and determination that takes into account "demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 50; see also *Montgomery*, 136 S. Ct. at 734 (clarifying this is a substantive right).

24. The Board's regulations incorporate this caselaw: they require the Board to consider, when presented with an individual "serving a maximum sentence of life imprisonment for a crime committed prior to the individual attaining 18 years of age," "the diminished culpability of youth" and its "hallmark features," as well as the individual's "growth and maturity since the time of the commitment offense." 9 NYCRR 8002.2(c).

25. The Board failed to do so. It questioned Mr. [redacted] "judgment and disregard[] for the law" based upon his actions at age 16 without making any attempt to determine whether Mr. [redacted] behavior at the time demonstrated "hallmark features of youth." Exs. 1, 7.

26. The Commission chastised Mr. [redacted] for his poor decision-making at age 16 without making any attempt to determine whether Mr. [redacted] behavior at the time demonstrated his youth and its attendant circumstances. Exs.1, 7.

27. The Board made no mention of having evaluated the ample record evidence of Mr. [redacted] growth or maturity. While the Board made a passing reference to Mr. [redacted] "age at the time of the instant offense," the record is devoid of any evidence that Mr. [redacted] age or any of the other relevant factors were actually considered. Lash Aff., Exs. 1, 7.

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

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

29. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through 28.

30. 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.

31. 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.

32. These conclusory explanations also fail to meaningfully engage with the totality of Mr. [redacted] record, which demonstrates significant maturity and personal growth, and do not explain why those positive aspects of Mr. [redacted] record are outweighed by the negative aspects of Mr. [redacted] record.

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

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

IV. UNLAWFUL RESENTENCING BY FOCUSING EXCLUSIVELY ON MR. [redacted] BEHAVIOR 18 YEARS AGO

35. Petitioner repeats and realleges each and every allegation previously set forth in this petition in paragraphs 1 through **Error! Reference source not found.**4.

36. In denying Mr. [redacted] application for parole on the basis of the of the instant offense—for which Mr. [redacted] sentencing court determined merited a minimum sentence of 15 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 v. New York State Div. of Parole*, 836 N.Y.S.2d 503 (Sup. Ct., Kings Cnty. 2007). "[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 v. NY State Div. of Parole*, 190 A.D.2d 423, 432 (1st Dept. 1993)).

37. Moreover, the conduct on which the Board focused—the circumstances of the instant offense as well as conduct in the hours, days, and months leading up to the offense—was properly before Mr. [redacted] sentencing judge, who had an opportunity to review Mr. [redacted] record and those facts when imposing a sentence. The Board's rejection of the sentencing judge's determination that a minimum sentence of 15 years was appropriate in light of the factors the Board now says compel Mr. [redacted] continued incarceration, is contrary to law.

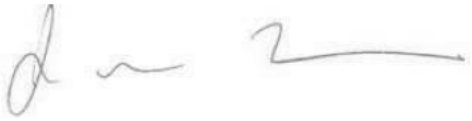
38. This effective resentencing is contrary to law and merits vacatur.

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

1. Annulling the decision of Respondent, dated December 3, 2021, denying Petitioner [redacted] parole release; and
2. Directing Respondent to immediately afford Petitioner 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: April 1, 2022
New York, New York

Respectfully submitted,



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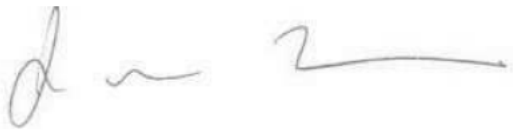
ATTORNEY VERIFICATION

I, Jacqueline Lash, an attorney admitted to practice before the Courts of the State of New York, affirm the following to be true under penalty of perjury:

I am attorney at Patterson Belknap Webb & Tyler LLP and am counsel for the Petitioner. I have read the foregoing Verified Petition and know the contents thereof. The statements therein are true to my own knowledge, or upon information and belief, and that as to those matters I believe those statements 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.



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FUSL000135

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of [redacted] [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 January 2021 decision of the New York State Board of Parole (the "Board") denying him release on parole. Mr. [redacted] a 34-year-old man, has been incarcerated for 18 years—more than half his life—based on a single regrettable act he committed while just 16 years old. Since then, he has expressed remorse, and has demonstrated growth, maturity, and rehabilitation, including by removing himself from the gang he joined when he began his incarceration and by seeking mental health counseling. Nonetheless, the Board denied him parole in a cursory order. The Board's focus on Mr. [redacted] as the 16-year-old boy who committed the instant offense, rather than as the 33-year-old man who appeared before them, runs 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 meaningfully address the factors it must consider and focused exclusively on the crime at issue. The Board also failed to address Mr. [redacted] youth at the time of the instant offense and its attendant characteristics, as well as his growth and maturity in the past 18 years. In addition, the Board issued a boilerplate decision completely lacking in individualized analysis. And it substituted its judgment as to the appropriate sentence for the offense for that of the sentencing court. Each and every one of these errors merits vacatur, so that the Board can conduct a new hearing in a manner that complies 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. New York State Board 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 should be vacated.

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

The Board failed to meaningfully consider the statutorily required factors in deciding to deny Mr. [redacted] parole. Executive Law 259-i(2)(c)(A) requires the Board to meaningfully review and consider evidence of rehabilitation and suitability for release. Specifically, 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 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 Board may not deny release solely on the basis of the seriousness of the offense and in the absence of aggregating factors. *Matter of Mitchell v. NYS Div. of Parole*, 58 A.D.3d 742, 743 (2d Dep't 2009); *Matter of Freidgood v. NYS Bd. Of Parole*, 22 A.D.3d 950, 951 (3rd Dep't 2005) (concluding that a parole denial that ignored factors such as the petitioner's expressions of remorse and rehabilitation on the basis that petitioner's instant offense was violent was "irrational under the circumstances as to border on impropriety."). Notably, "a murder conviction *per se* should not preclude parole." *Rios v. New York State Div. of Parole*, 836 N.Y.S.2d 503 (Sup. Ct., Kings Cnty. 2007). Rather, the Board must consider the dynamic factors of prisoner development and rehabilitation. *Id.* Indeed, indications that the parole decision is based exclusively on the seriousness of the offense will support a finding that the parole denial was "a foregone conclusion." *Johnson v. N.Y. Bd. of Parole*, 65 A.D.3d 838 (4th Dep't 2009); *see also King v. New York State Div. of Parole*, 190 A.D.2d 423, 431-32 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994) (noting that failure to weigh all of the relevant factors strongly suggest that the denial was a "foregone conclusion"); *Morris v. New York State Dep't of Corr. & Cmty. Supervision*, 40 Misc. 3d 226, 233 (Sup. Ct. Columbia Cnty. 2013) ("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."); *West v. New York State Bd. of Parole*, 980 N.Y.S.2d 279 (Sup. Ct. Westchester Cnty. 2013) (remanding case for a new Board hearing when "the Board's decision focused

exclusively on Petitioner's crime and prior criminal record" and "the record demonstrates that the Board failed to consider and weigh relevant factors, which clearly supported Petitioner's release on parole.").

While the Board may give different weight to the statutory factors, it must consider—and rationally weigh—all of them. *King*, 190 A.D.2d at 431; *Johnson v. New York State Div. of Parole*, 884 N.Y.S.2d 545 (4th Dep't 2009).

The Board failed to do so here. In fact, the record contains significant evidence demonstrating Mr. [redacted] rehabilitation and suitability for release. The record also makes clear that none of this was meaningfully considered by the Board.

During his incarceration, Mr. [redacted] has shown substantial personal growth, proving that he is not the same person who committed the instant offense and became involved in a gang at the beginning of his incarceration. Most notably, Mr. [redacted] made the decision to remove himself from his gang—an act that represented the transformation of Mr. [redacted] mindset from "chasing [] prison notoriety" to realizing that it "means absolutely nothing." Lash Aff., Ex. 3 at 2. In addition, Mr. [redacted] referred himself for mental health services and began counseling. *Id.* And Mr. [redacted] behavior in prison has greatly improved. Indeed, at the time of his parole hearing in January 2021, Mr. [redacted] had not received a misbehavior ticket since October 2019. Lash Aff., Ex. 1 at 8:6-13. Moreover, Mr. [redacted] has expressed remorse, not only for his crime, but also for the choices he made during his time in as a gang member while incarcerated. *Id.* at 9:20-10:1; Lash Aff., Ex. 3 at 3. There is no indication that the Board meaningfully took any of this into consideration.

In addition, Mr. [redacted] has participated in the Aggression Replacement Training Program and the Alternative to Violence Program, which have taught him how to deal with his emotions

in a healthy and productive way. Lash Aff., Ex. 3 at 2; Ex. 1 at 14:14-23. He has also completed his GED and vocational training in custodial maintenance. Lash Aff., Ex. 5. These accomplishments, too, were not meaningfully considered by the Board.

Similarly, the Board failed to properly consider Mr. [redacted] release plan and his letters of support, which demonstrate that Mr. [redacted] will be well-positioned to successfully reenter society. Mr. [redacted] has received a letter of reasonable assurance for employment from the Fortune Society, where he may also be able to find housing. Lash Aff., Ex. 6 He also has the support of his family and friends, including his grandmother. *Id.* And Mr. [redacted] good friend [redacted], who was previously incarcerated and is now a successful member of society, has offered to mentor Mr. [redacted] upon his release and help him obtain employment in the electrical field. Indeed, Mr. [redacted] explained that he can help Mr. [redacted] financially and "also show him the steps he has to take to get help f[ro]m the same program that paid for my trade school and at the same time help him get into my Union and start off as an apprentice." *Id.*

The Board ignored all of this highly relevant evidence. Instead, it did little more than recite some of documents included in Mr. [redacted] parole packet. *See* Lash Aff., Ex. 1 at 15:3-10. In the decision itself, Mr. [redacted] specific accomplishments and specific program completions were not even mentioned, despite the fact that these are all relevant to factors the Board was required to consider under N.Y. Exec. Law § 259-i(2)(c)(A)(i) and N.Y. Exec. Law § 259-i(2)(c)(A)(iii). *See* Lash Aff., Ex. 7.

Instead of considering these relevant facts, the Board focused almost entirely on backward-looking facts that existed almost two decades ago. For most of the hearing, the Board questioned Mr. [redacted] at length about his interactions with the victim, the nature of the instant offense, and his sentencing. Lash Aff., Ex. 1 at 2:12-6:24; 10:8-14:11; 19:8-20:23. Indeed, the

Board's decision was mostly based on the nature of the offense that led to Mr. [redacted] conviction. Lash Aff., Ex. 7. In other words, the Board denied Mr. [redacted] parole based on the nature of his crime to the exclusion of other relevant factors, in abdication of the Board's responsibilities under applicable law.

Courts have granted Article 78 petitions when "[t]he Board summarily list[s] petitioner's institutional achievements, and then denied parole with no further analysis of them." *Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 28 (1st Dep't 2016). 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*. This rendered the Board's decision inadequate as a matter of law. *See Platten v. N.Y. State Board of Parole*, 47 Misc.3d 1059 (Sup. Ct., Sullivan Cty. 2015) (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."). Since the Board did not even minimally address Mr. [redacted] institutional achievements, the Board does not explain why Mr. [redacted] childhood behavior outweighs his recent accomplishments. The Board's reasoning focused predominantly on *past* behavior, when the relevant inquiry involves Mr. [redacted] *present* risk to society if released. *Cf. McBride v. Evans*, 42 Misc.3d 1230A (Sup. Ct., Dutchess Cty, 2014) (granting an Article 78 petition when 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."). By failing to address these issues, the Board violated its governing laws and regulations.

II. THE BOARD'S FAILURE TO CONSIDER MR. [redacted] YOUTHFULNESS AT THE TIME OF THE OFFENSE VIOLATED FEDERAL AND STATE LAW AND APPLICABLE REGULATIONS

The Board of Parole fundamentally erred in failing to consider Mr. [redacted] youthfulness at the time of the offense, in violation of 9 NYCRR 8002.2(c) and the United States and New York Constitutions. In cases such as Mr. [redacted] the Board has a "constitutional obligation to consider [Mr. [redacted] youth and its attendant characteristics in relationship to the commission of the crime." *Hawkins v. New York State Dep't of Corr. & Cnty. Supervision*, 140 A.D.3d 34, 39-40 (3d Dep't 2016); see also *Putland v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 158 A.D.3d 633 (2d Dep't 2018) ("The petitioner is entitled to a meaningful opportunity for release in which the Parole Board considers, *inter alia*, his youth at the time of the commission of the crimes and its attendant circumstances."); *Rivera v. Stanford*, 172 A.D.3d 872 (2d Dep't 2019).

The parole interview transcript and decision make clear that Mr. [redacted] administrative and constitutional rights were denied. In its decision, the Board denied Mr. [redacted] parole because it concluded that "release is incompatible with the welfare and safety of community" and would "so deprecate the seriousness nature of [Mr. [redacted] crime as to undermine respect for the law." Lash Aff., Ex. 7 at 2, 3. The Board recounted the details of the crime for which Mr. [redacted] is now incarcerated, and concluded that Mr. [redacted] crime "demonstrates poor judgment." *Id.* at 2. Yet, despite passing reference to considering Mr. [redacted] "age at the time of the instant offense," the Board utterly failed to consider how his youth and its attendant circumstances affected his judgment, his ability to appreciate risk, or his general culpability—and how circumstances have changed now that Mr. [redacted] is more than twice as old and has shown demonstrable maturation. *Id.* at 3.

The Board had ample evidence of Mr. [redacted] youthfulness and its attendant immaturity at the time of the offense. During his interview and in the personal statement he submitted as part of his parole packet, Mr. [redacted] explained that at the time of the instant offense he was "homeless" since his family had been evicted from their apartment because his "mother had died of cancer and father wasn't around." Lash Aff., Ex. 1 at 4:15, 17-18; Ex. 2 at 1. He also explained that he had brain surgery for an aneurism. Lash Aff., Ex. 1 at 16:59; Ex. 2 at 1. He told the Board that he procured the gun he used in the instant offense from "[s]ome guy in the neighborhood" because he "was going through a lot of bullying and stuff in high school and getting jumped on by gangs and stuff" but that he had never fired the gun before the instant offense. Lash Aff., Ex. 1 at 3:2-8. And he further explained that even though he was a teenager, he was not in school at the time. *Id.* at 4:12-13. In fact, Mr. [redacted] repeatedly emphasized that his youth at the time of the instant offense influenced his decision making, explaining that "I was very young. I didn't think about consequences" and that "[a]t the age of 16 years old, I took [the victim's threat to me] completely serious." *Id.* at 5:21-22; 11:17-18.

These insights into the 16-year-old Mr. [redacted] do not suggest incorrigibility. Rather, they demonstrate the hallmarks of youth—immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures—recognized by the Parole regulations. But the Board ignored all of these facts in reaching its decision. In violation of 9 NYCRR 8002.2(c)(2), the Board failed to consider that at the time of the crime, Mr. [redacted] a homeless 16-year-old mourning his mother, was operating with an adolescent brain that had not yet fully developed impulse control and risk analysis and was operating in a constant state of duress. And, as discussed above, the Board also failed to consider the maturity and personal growth that Mr. [redacted] has exhibited since the instant offense. *See* 9 NYCRR 8002.2(c)(1). The

Board's utter failure to address Mr. [redacted] diminished culpability at the time of the offense, or his growth and maturity in the years since, as required under the Parole regulations and the United States and New York Constitutions, renders its decision arbitrary and capacious such that this Court should vacate it.

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

The Board also erred in failing to properly explain and justify its denial. When the Board declines to grant parole, it is required by statute to provide a decision "in writing . . . of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms." N.Y. Exec. Law 259-i(2)(a); *Rossakis*, 146 A.D.3d 22; *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dep't 2014). In addition, the Board must "address how the applicable parole decision-making principles and factors . . . were considered in the individual's case." 9 NYCRR 8002.3. Therefore, the Board cannot "summarily list[] petitioner's institutional achievements and then den[y] parole with no further analysis of them." *Rossakis* 146 A.D.3d 22; *Ruzas v. New York State Board of Parole*, No. 1456/2016, slip op. at 4 (Sup. Ct. Dutchess Cty. Oct. 18, 2017) (holding the Board in contempt for conducting defective *de novo* interview after the Court set aside the initial decision because "the Board summarily denied [petitioner's] application without any explanation other than by reiterating the laundry list of statutory factors. The minimal attention, barely lip service, given to these factors and to the COMPAS Assessment cannot be justified given the amount of time already served.").

In the Board's decision, the Board merely provided the following boilerplate language: "[t]he panel considered your parole packet . . . which [in]cluded a letter from the Parole Preparation Project, personal statement, letters of support from family members and friends,

vocational and programming achievements and letter of reasonable assurance from the Fortune Society." Lash Aff., Ex. 1 at 26:8-14. The Board furthered that "[c]onsideration was also given to your age the time of the instant offense, sentencing transcript, PSI, case plan. COMPAS risk and needs assessment." *Id.* at 26:14-17. The Board then concluded that "discretionary release at this time is not appropriate and [Mr. [redacted] release would so deprecate the seriousness nature of your crime as to undermine respect for the law." *Id.* at 26:24-27:2. The Board did not conduct any analysis 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. The mere rote recitation of only some of the evidence before the Board falls far short of what is required to substantiate a denial of parole.

By failing to provide any analysis of the factors in favor of Mr. [redacted] release, the Board likewise failed to explain how the facts that existed at the time of the offense outweigh the evidence demonstrating that Mr. [redacted] would be able to lead a crime-free and productive life now if released. New York courts have vacated parole denials on exactly this type of failure to explain how the Board has weighed the statutory factors. *See In re McBride v. Evans*, 42 Misc.3d 1230A (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 v. NYS Bd of Parole*, 100865/18 (Sup. Ct., NY Cnty. 2019) ("There 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."). The Board's failure to provide the requisite individualized consideration and explanation merits granting Mr. [redacted] petition.

IV. THE BOARD UNLAWFULLY RESENTENCED MR. [redacted] BY RELYING ON CONDUCT THAT WAS PROPERLY BEFORE MR. [redacted] SENTENCING JUDGE

The Board's narrow focus on the facts of the instant offense not only violated the applicable statutes, but also effectively re-sentenced Mr. [redacted] to a longer minimum sentence—which under the Board's rational could be a mandatory life sentence.

New York courts have held that "in focusing exclusively on the petitioner's crime as a reason for denying parole" a Parole Board is "in effect, re-sentencing petitioner to a sentence that excluded any possibility of parole since petitioner is powerless to change his past conduct." *Rios*, 836 N.Y.S.2d 503. "[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). Here, much of the Board's decision was based on the very facts that were before Mr. [redacted] sentencing judge.

The Board's focus on facts that existed at the time of sentencing, coupled with a conclusion that Mr. [redacted] has not met the criteria for parole after serving the minimum number of years of his sentence and may not be reconsidered for parole for another two years, effectively constitutes a resentencing to a higher minimum sentence. It is evidence of the Board's subjective views that the minimum sentence of 15 years is not enough time to serve for the offense. But "[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." *King*, 190 A.D.2d at 432.

Because the Board effectively re-sentenced Mr. [redacted] to a higher minimum sentence, its decision cannot stand.

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

1. Annulling the decision of Respondent, dated December 3, 2021, denying Petitioner [redacted] parole release; and
2. Directing Respondent to immediately afford Petitioner 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: April 1, 2022
New York, New York

Respectfully submitted,

By: _____

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