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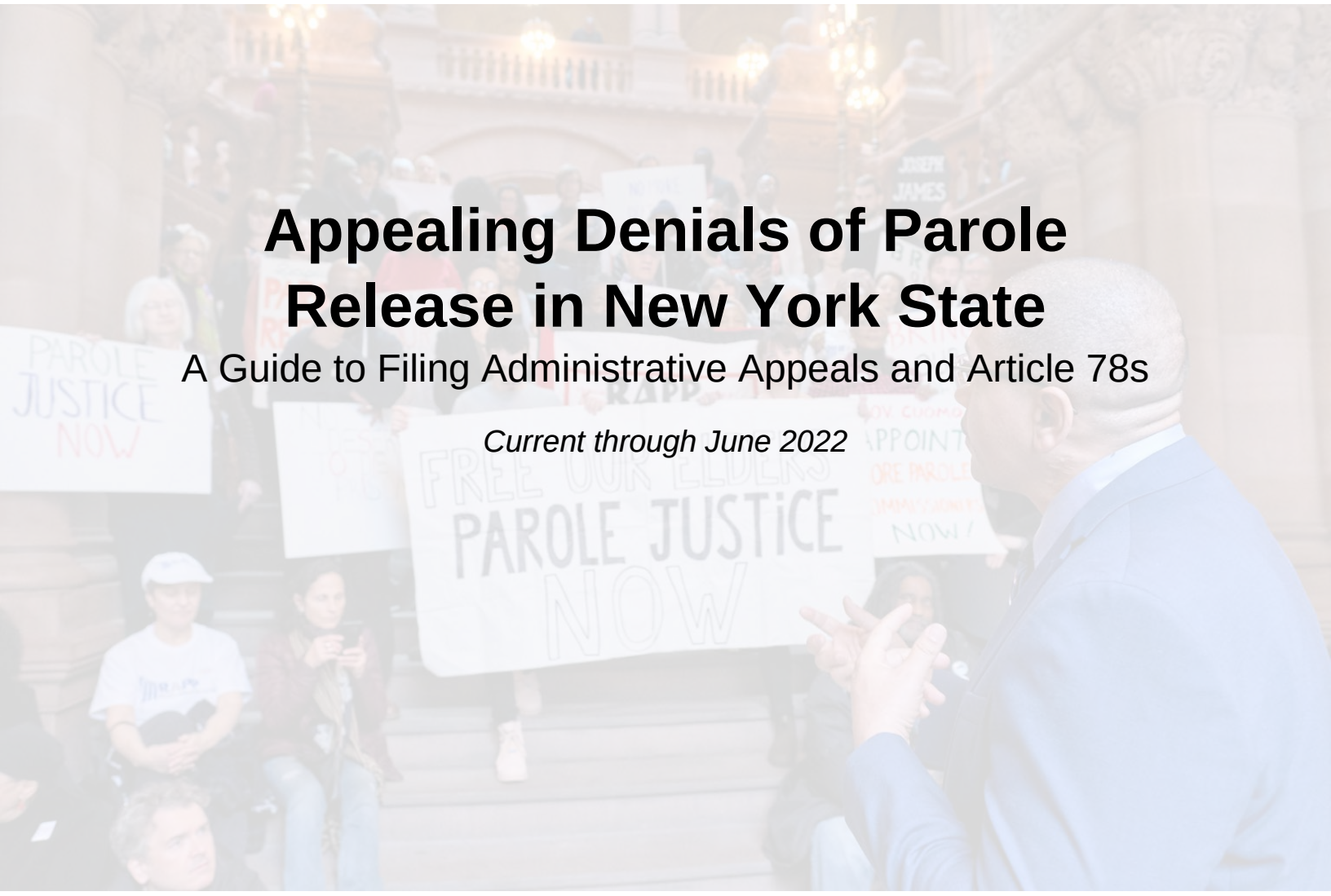

Appealing Denials of Parole Release in New York State

A Guide to Filing Administrative Appeals and Article 78s

Current through June 2022

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Introduction

This manual is a resource for attorneys representing incarcerated people who are challenging denials of release to parole supervision by the NYS Parole Board. We hope it is also useful for incarcerated people representing themselves pro se in parole appeals.

While primarily drafted by Lincoln Square Legal Services, Inc. and the Parole Preparation Project, this manual reflects the work, knowledge and expertise of lawyers, advocates and the many pro se incarcerated people who have favorably developed this area of the law through litigation under difficult circumstances.

Further Resources

There is a statewide community where advocates working on parole litigation pose questions and offer suggestions. Attorneys who attend our volunteer training will be automatically added to this listserv. All others, please email Natasha Vedananda at nvedananda@fordham.edu to find out how you can participate. In addressing the latest issues and trends, the community benefits from a variety of legal and non-legal disciplines, across all levels of experience.

Fordham University School of Law maintains the Parole Information Project, a searchable database of unpublished judicial decisions, sample administrative appeals and Article 78s, and a host of other relevant documents.

Disclaimer

Nothing in this manual constitutes legal advice, and providing this manual does not create, in any form or capacity, an attorney-client relationship between the sender and recipient.

Overview of Parole and Parole Appeals

Parole is a system of discretionary release for people serving indeterminate sentences. An indeterminate sentence is a prison term imposed by a sentencing court that does not specify the exact number of years to be served within the range imposed (for example, 2 to 4 years, or 25 years to life). Those serving indeterminate sentences are eligible for parole after serving the minimum number of years imposed (2 years on a sentence of 2-4, and 25 years on a sentence of 25 to life). New York Executive Law requires the Parole Board to review parole-eligible people at least one month before the parole eligibility date (the “initial”) and, should parole be denied, to set the next review (“reappearance”) no later than 24 months.

The Board of Parole decides who may be released on parole. Members of the Board of Parole, also called Commissioners, are appointed by the Governor and confirmed by the New York State Senate. The Executive Law, which governs the Parole Board, allows for 19 Commissioners. As of February 2022, there were 15 seated Commissioners and four vacancies. *See* DOCCS About The Board.

Parole is the only path to freedom for individuals serving indeterminate sentences with a maximum of life.[1] As of January 2019, 8,150 people were serving a sentence with a maximum of life in New York State (representing almost 17.2 % of the prison population).

A core component of the parole decision making process is the applicant's "interview" before two or three commissioners of the Parole Board. Though it would be preferable if such interviews took place in-person, most are conducted via video conferencing, a practice that pre-dates the COVID-19 pandemic.

Commissioners typically interview all applicants at a given facility on the same day or days each month (e.g., first Tuesday/Wednesday), although holidays or other issues may alter the normal schedule. With a three-commissioner panel, a majority (2-1) grants or denies release. In two-person panels, there must be a unanimous decision, otherwise the interview is void and the applicant must reappear the following month for a new interview before an additional or different commissioner.

Parole interviews last from a few minutes to several hours (though most tend to be on the shorter side), during which Commissioners typically spend most of the time questioning the applicant about the crime(s) of conviction. Commissioners sometimes note, though rarely discuss, some of the relevant statutory requirements (detailed in full below), such as the applicant's institutional achievements and risk assessment scores. The Board has two weeks from the interview to issue its written decision. Executive Law § 259-i(2)(a) & 9 NYCRR 8002.3(b).

If parole is denied, the commissioners place a "hold" of up to 24 months before the next parole review. Executive Law § 259-i(2)(a). Before 2017, two-year holds were routine, but the Board now, more frequently, sets holds of 12-18 months.[2]

The first parole review is called an "initial," and those thereafter are called "reappearances." Pending eligibility, parole applicants with life sentences can receive a Limited Credit Time Allowance (LCTA) which affords them early parole review. Correction Law § 803-b. The resulting Limited Credit Time Interview (LCTI) takes place six months before service of the minimum sentence. In terms of interview structure and format, the LCTI is conducted essentially as a regular parole interview. Denial at an LCTI will be followed by an initial review six months later.

The Parole Board has wide discretion to grant or deny parole, but it must follow the statutory and regulatory requirements discussed below and spelled out in New York's Executive Law which authorizes the Parole Board to promulgate regulations. Regulations have the force of law if properly promulgated and consistent with the Executive Law. The governing statutes are found at NY Exec. Law §§ 259-i to 259-s, with the most relevant portion found at NY Exec. Law § 259-i. The regulations are codified at 9 NYCRR §§ 8000-8011.

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[1] While the Governor has virtually unfettered power to grant executive clemency, including commuting a person's sentence, that power has historically been seldom used in New York.

[2] This practice may be designed to moot appellate challenges to parole denials since an appeal can take longer than the next scheduled parole appearance. Mootness is a frequent obstacle to obtaining appellate relief. For example, if parole is denied on January 14, 2021, and the Board sets the next parole interview at 12 months (January 2022), then an appeal not decided by January 2022 risks being dismissed as moot. This is because the Board and the courts, so far, take the position that the only remedy on appeal is a new parole review (called a "de novo" parole interview). Thus, the Board's provision of the January 2022 parole review, which is the remedy sought in the appeal, risks rendering the current litigation academic. For more on mootness, see Need for Speed--Risk of Dismissal on Mootness Ground.

Applicants denied parole release have a right to appeal. There are two steps to the appeals process. First, the appellant must file an administrative appeal with the Parole Board in which the Board reviews its own decision via its Appeals Unit. The Appeals Unit evaluates whether the Parole Board interview and subsequent decision met the requirements of the Executive Law and sends its determination to three members of the Parole Board (none of whom should have been part of the parole interview/decision) who then decide whether to accept or reject the findings of the Appeals Unit. The administrative appeal also allows for "modification" of the duration of the hold. If, as is usually the case, the administrative appeal is denied, the applicant has "exhausted" administrative remedies and may now file a CPLR Article 78 petition in a county Supreme Court, challenging the lawfulness of the parole denial.

This manual presents important considerations for advocates working with clients seeking release. It provides a detailed breakdown of the Executive Law and regulations governing parole, offers a procedural and substantive look at the parole appeals process, provides relevant case law, and flags issues to raise on appeal. It also provides forms, resources, and logistical information about how to communicate with clients who have been deprived of their liberty. It invites advocates to identify additional ways of advancing their clients' interests in this important and developing area of law.

Working With and on Behalf of Incarcerated People

Many of our readers who are representing people on a pro bono basis have had little contact with people in prison. We offer the following to guide your representation, and as important context for your work.

Regulation of Body and Mind

Every aspect of the lives of people in prison is regulated by the state. The state limits people's contact with the outside world, their access to resources and vital services, their mobility throughout the prison, and every part of their daily life. Many of these restrictions have tightened further during the COVID-19 pandemic. Norms that exist on the inside (economies, values, things you can and can't do) are not always intuitive for people who do not have experience in prison. People cannot receive calls. The calls they can make are recorded and catalogued. Their mail is scrutinized and searched. People cannot turn off their own lights or lock their own doors. Access to food, utensils, showers, and more is highly regulated. Privacy is non-existent.

People inside are also often deprived of food, therapeutic and medical services, social interaction, physical contact, and time outdoors. Isolation is an inherent part of incarceration. Many people are placed in solitary confinement, sometimes for months or years.

High Stakes and Serious Consequences

To ensure that people in prison conform to this culture of control, the state uses a multitude of tactics to force compliance. Physical, emotional and psychological abuse by officers and prison staff is commonplace. People inside are regularly subjected to brutality and neglect, sometimes sustaining disabling, life-threatening and fatal injuries. There are numerous cases within the last few years of people who have been killed by correctional officers inside New York State facilities. Officers and staff frequently use strip searches, cell searches and other intrusive practices to

humiliate and dehumanize people. Fear of retaliation sometimes prevents those inside from reporting such conduct.

The state has also created an elaborate system of disciplinary codes and rules, which regulate even the most basic activities. Forgetting to turn off a hot plate, or being “out of order” in a line, can result in extreme punishment. Time in solitary confinement, deprivation of mail or commissary rights are all potential consequences for even the smallest infractions.

Because of the high stakes, advocates and attorneys must be hyper-vigilant and aware of the potential consequences our actions may have on the people we work with. If you go for a visit, remember the person you are seeing may be strip-searched before and after. Also remember that all social phone calls are recorded and JPay emails are monitored; therefore, discussing something by phone or email may have consequences later on. Mis-addressing an envelope, or accidentally sending contraband in the mail, could result in a cell search, a meeting with the prison Superintendent, a loss of commissary or even solitary confinement.

Clarity is Key

It is important to make sure the person you are working with knows who you are, what organization you are affiliated with, what you can offer, whether you are a volunteer or paid staff, and that you are or are not their attorney. Make sure to explain your role repeatedly and in detail. Also make the scope of your advocacy clear. It is important to establish your capacity upfront. This allows people to create realistic expectations, and to understand your limitations and capabilities.

Conversations About Capacity are Key

Because of the conditions of their confinement, people in prison often have extensive needs, whether it’s assistance with filing a parole appeal, suing the Department of Corrections for medical neglect, or just getting access to their commissary funds.

It is vital to tell someone you’re working with if/when you don’t have the capacity to do something that they’ve asked of you. This ensures realistic expectations and prevents future disappointment and miscommunication. It also ensures that you don’t use your position to convey the “no” in other ways, such as distancing yourself, ignoring the ask or simply not doing the thing requested.

It is important to reconsider what your capacity might be in any given situation. The goal is not to exert predetermined boundaries, but to listen and take in what the person is asking for. It’s always better to say something like, “I don’t know if that’s something I can do, but let me think about it and get back to you on our next call/in a letter this week/etc.”

Additionally, this approach allows for collaborative thinking. Although you may not be able to do the exact thing that is asked of you, you can generate another solution together. By doing so, you are recognizing another person’s humanity, and acknowledging that you are two people trying to build a successful relationship. Stating your needs and establishing boundaries also indicates that the other person has the capacity to appreciate and respect your wishes, and even reciprocate with their own.

This process of negotiation can also reduce some of the power dynamics present in your relationship and is an important alternative to a common historical dynamic in which the incarcerated person comes up with ideas for support and the person on the outside has the final word on the terms of the relationship.

Assume Knowledge but Also Recognize Limitations

Many people inside are experts and scholars in a variety of academic fields, including the law. Jailhouse lawyers are some of the most talented attorneys in the state and have the capacity to make significant contributions to their own legal cases and to criminal legal policy. Conversely, people in prison are exposed to a lot of misinformation, whether it is about legal issues, or other topics. Talking about these issues without judgment or condescension is crucial to a relationship based on solidarity.

Although an immense amount of self-education happens inside, it's important not to assume that everyone has had access to that experience. Many people were deprived of formal education from a young age, or had a learning disability that went undiagnosed, and therefore struggle with even basic literacy skills. It is about meeting people where they are at.

It's also important to recognize people's vast knowledge of the details and decades of their own lives, and to explore how their expertise can inform the representation. People inside also understand the carceral environment and many of its dynamics in ways that you will not. You will need to learn, appreciate, and be sensitive to these.

Recognize Dynamics of Power and Privilege

The criminal legal system and prison systems reflect and reinforce hierarchies of power, privilege, and oppression. All of us in the free world come from a place of power and privilege by virtue of living with far fewer restrictions on our freedom and far greater access to information and resources. Many of us also have socially assigned power and privilege (such as white privilege, class privilege, citizenship status, male privilege or privilege from being gender conforming) and often simultaneously have experiences of oppression (based on gender identity or expression, homophobia or transphobia, Islamophobia, xenophobia, classism, ageism, ableism, or others).

Building relationships with and representing people inside across differences in race, class, gender, sexual orientation, religion, language access, age, experiences of incarceration, and other differences, requires careful attention to recognizing how dynamics of power, privilege, and oppression unfold. It also requires a commitment to examining those dynamics, striving always to share power, and taking responsibility and apologizing when we act or respond in oppressive ways.

A Note on Language

This section was adopted from an open letter from The Center for NuLeadership on Urban Solutions, a human justice policy, advocacy and training center founded, directed and staffed by academics and activists who were formerly incarcerated. An Open Letter to Our Friends on the Question of Language.

> One of our first initiatives is to respond to the negative public perception about our population as expressed in the language and concepts used to describe us...We are referred to as inmates, convicts, prisoners and felons. All terms devoid of humanness which identify us as "things" rather than as people. These terms are accepted as the 'official' language of the media, law enforcement, prison industrial complex and public policy agencies. However, they are no longer acceptable for us and we are asking people to stop using them.

> In an effort to assist our transition from prison to our communities as responsible citizens and to create a more positive human image of ourselves, we are asking everyone to stop using negative terms and to simply refer to us as **PEOPLE**. People currently or formerly incarcerated**, PEOPLE** on parole, **PEOPLE** recently released from prison, **PEOPLE** in prison, **PEOPLE** with criminal convictions, but **PEOPLE**.
>
> We habitually underestimate the power of language. The bible says, 'Death and life are in the power of the tongue.' In fact, all of the faith traditions recognize the power of words and, in particular, names that we are given or give ourselves. Ancient traditions considered the 'naming ceremony' one of the most important rites of passage. Your name indicated not only who you were and where you belonged, but also who you could be. The worst part of repeatedly hearing your negative definition of me, is that I begin to believe it myself 'for as a man thinketh in his heart, so is he.' It follows then, that calling me inmate, convict, prisoner, felon, or offender indicates a lack of understanding of who I am, but more importantly what I can be. I can be and am much more than an 'ex-con,' or an 'ex-offender,' or an 'ex-felon.'
>
> The Center for Nuleadership on Urban Solutions believes that if we can get progressive publications, organizations and individuals like you to stop using the old offensive language and simply refer to us as 'people,' we will have achieved a significant step forward in our life-giving struggle to be recognized as the human beings we are. We have made our mistakes, yes, but we have also paid or are paying our debts to society.
>
> We believe we have the right to be called by a name we choose, rather than one someone else decides to use. We think that by insisting on being called 'people' we reaffirm our right to be recognized as human beings, not animals, inmates, prisoners or offenders.

For more on language used by journalists covering incarcerated people, see News Inside Issue 8. See also Preferred Terms for Select Population Groups & Communities.

Reading for Understanding

Mass Incarceration: The Whole Pie 2020
The Trauma of the Incarceration Experience
Life Behind the Wall
Restorative Justice in Prisons
Trauma and Loss During Reentry
From prisons to communities: Confronting re-entry challenges and social inequality

Communication With Clients

Attorneys may communicate with clients via letters, legal calls, non-legal calls, JPay emails, legal and non-legal in-person visits. The attorney and client should decide together how to communicate.

Phone Calls

Setting up a regularly scheduled call, whether it's weekly or monthly, can help ease communication. Because phone time is limited, strive to strike a balance between listening empathically to the stories the person is sharing and ensuring that you get the information that you need to best advocate for them. Equally important, you should recognize that prison is an incredibly violent and traumatic place and the person you're working with might be calling you to receive a few minutes of respite and connection. Also remember that every person is different in terms of what they are willing to discuss on the phone. Some people would rather not talk on the phone at all for fear of surveillance, while others feel comfortable speaking very freely about their thoughts and feelings.

Legal Calls

Legal calls are designed to provide a secure, unmonitored line for attorneys and their representatives to talk privately and confidentiality with clients. In the recent past legal calls were limited to one 30-minute call per month. DOCCS Directive 4423 (at page 9 to 11). Based on advocacy by pro bono advocates (*see* **Appendix**, 2021.09.22 Request for Immediate Expansion of Legal Calls) DOCCS has formally changed this directive via a memo sent to all prison superintendents that increases the duration of legal calls to one hour and no longer limits frequency to once a month. *See* **Appendix**, 2021.11.29 DOCCS Attorney Legal Calls Memorandum.

The memo states that requests for legal calls should be directed to the prison's Senior Offender Rehabilitation Coordinator ("SORC") or designee. The memo requires that a telephone request be followed-up with a written request and include at least two suggested dates and times for the call. Prison staff are required to provide clients with a confidential location for these calls, although adherence to this rule varies pending the facility. When determining whether to discuss particularly sensitive topics, take into consideration that many people believe that even these phone calls are recorded and monitored.

Non-Legal Calls

Non-legal or "social" calls are calls made directly by people in prison to people on the outside. These calls are recorded and monitored, and the calls often have a time limit (usually 15 or 30 minutes). The calls are also made from phones in more public locations like the gym, dorm room, law library or "yard." There is no limit on the number of social calls people in prison may make, although many prisons have strict rules about when people are able to access the phones.

Remember that you cannot make a "social" call to your client. The only way to have a non-legal call is if your client calls you directly. These calls are controlled by DOCCS Directive 4423 (at page 1 to 9).

Incarcerated people may only call people on their approved "telephone list." The list is limited to 15 people. To have phone communication with your client, they will need to add you to their list, which may mean someone on your client's list must be deleted.

To receive calls from prisons, you need to set up an account at: Securus Technologies. The service requires a minimum balance to start an account. Once you've set up an account, you may receive calls from prisons in New York State. Multiple phone numbers may be associated with

one account and you may receive calls on your cell phone. For more information, see DOCCS Telephone Calls.

JPay Emails

Most facilities now have JPay email which permits incarcerated people to communicate with family, friends and advocates. This is not a secure mode of communication; DOCCS monitors JPay. But, it is faster than mail and could be used for exchanging non-sensitive, logistical information. It is easy to sign-up and costs 33 cents per email and the attorney may include a "stamp" for a response. See JPay.com.

Legal Mail

Letter writing is a very important part of communicating with people in prison. When sending letters to people in prison, you can send both legal and non-legal mail.

Also known as "privileged correspondence," legal mail offers opportunities for attorneys and their representatives, law offices, and legal services providers to communicate confidentially with people in prison but great care should nevertheless be taken regarding what you write and what you ask from the person you are assisting. DOCCS Directive 4421.

A "legal mail" designation is based on the identity of the sender (attorneys, law firms, etc.), not the content of the mail itself. Legal mail is preferred for all communications containing sensitive or confidential information, and for relevant communications that are more than five pages (such as a long article about parole). Legal mail is delivered more quickly than non-legal mail and it affords greater privacy since it can only be opened in the presence of the person to whom it is addressed (as opposed to non-legal mail that is opened and read in the package room by prison staff before it reaches the recipient). Beware, however, that legal mail is still opened and visually scanned for "contraband."

Steps to Send Legal Mail:

1. At the top of your letter underneath the letterhead, include "LEGAL, PRIVILEGED AND CONFIDENTIAL MAIL."

2. Address the envelope by writing the client's full DOCCS name (not their preferred name, if there is a difference), and Department Identification Number (DIN). If you do not include their DIN, the letter can be handed over to the warden, opened and read, causing a serious breach of confidentiality and putting the client at risk for retribution.

3. Include the address of the facility where the person is located. Make sure to use the address meant for "inmate" mail, as DOCCS calls it, and not the general administrative address for the prison. See DOCCS Find a Facility for facility addresses.

4. The return address field should have your name, the name of your firm and your return address.

5. Prominently write in red "CONFIDENTIAL LEGAL MAIL" along the bottom of the front of the envelope and on the back.

Sending Packages

Consult with your client before sending a package and review the applicable rules: DOCCS Family Guide: Allowable Items and DOCCS Directive 4911. In April 2022, DOCCS issued a memorandum limiting the number of non-food packages an incarcerated person may receive to two per year. *See* **Appendix** 2022.04.25 DOCCS Package Directive Memorandum. Note that DOCCS rarely accepts food packages or other items such as books from law firms. Send the package from your law firm's address, but use just your name and not the law firm title. Bulky legal mail should be sent as legal mail and does not count as a package.

Legal and Non-Legal Visits

Social/Non-Legal Visits

Social visits are open to anyone, whether family, friends or advocates. They are not confidential in nature and take place in the large visiting rooms. Visitors cannot bring in pen, paper or advocacy materials. However, no pre-approval or permission is required for a social visit. Just show up on the day-of.

Visiting hours, as well as policies, vary from prison to prison, and it's important to get all the information you need before going on a social visit. Call the facility to determine:

- Visitation days/times: Are there general visitation hours? Are the days scheduled based on the person's name or DIN? When does "count" take place? (Incarcerated people cannot move from place to place when the prison is physically counting the population; therefore, arriving or leaving at the time of count will cause delay)
- Special procedures/requirements for visitation, such as restrictions on certain clothing DOCCS Dress Code.
- How many people can visit at once?
- Procedures for leaving documents or packages
- Any special COVID-19 rules or restrictions

Consult your client before planning a visit to determine whether there are certain days or times they would prefer, and if there are any dates that others are planning to visit to avoid a conflict.

Legal Visits

Legal visits are with "an attorney, an approved legal representative, or attorney's authorized representative for the purpose of discussing confidential legal matters." See DOCCS Directive 4404. Most legal visits are in a small room with a door and/or window, although some prisons have only one large visiting room and little space for private visits. Legal visits are often only permitted on weekdays, although some prisons permit them on weekends. Legal visits must be scheduled 24 hours in advance (although seven days is preferable).

During legal visits, attorneys may bring in legal papers and other advocacy materials, as well as a pen, as long as they request permission to bring these items in beforehand. Although some facilities wrongly prohibit this, legal materials may be left with your client and your client may provide you with legal documents. See DOCCS Directive 4404 at G, page 3.

To arrange a legal visit, follow these steps carefully:

1. Call the prison and ask to arrange a legal visit. The operator will transfer you to the appropriate person. Often this person is in the Inmate Records Department or is the client's Offender Rehabilitation Coordinator (ORC).

2. Legal visit days and times vary from prison to prison. Many prisons end visits at 2:30pm.

3. Generally scheduling a legal visit requires sending a written request to the prison and/or legal visit coordinator.

4. Include in the request special permission to bring in and/or leave legal paperwork for the client.

5. Make sure your client is aware of your visit, as facilities do not always inform clients of legal visits in advance.

6. Call the prison the day before to confirm there is a "gate clearance" for your visit and bring a copy of the legal visit request with you.

7. You may also want to call THE DAY OF THE VISIT to confirm that the client is present at the facility and not on an outside medical appointment.

8. Call the facility to determine if there are any special COVID-19 rules or restrictions.

Tips for All Visits

Wear clothes that are comfortable and modest. DOCCS does not permit sandals or open-toed shoes, tank tops, exposed shoulders or knees, or leggings or "jeggings." Underwire bras and binders may set off the metal detectors. If they do, the prison staff may ask you to remove those undergarments, inspect them, and have you walk through the detectors without them on.

You will need to leave most of your belongings in your car (including your phone, wallet, etc.). If you take public transportation, there will be lockers. Some lockers require quarters to access. You can and should bring inside with you:

- Your client's name and DIN
- Legal visit request and paperwork, if going on a legal visit
- Quarters to obtain access to lockers for storing car keys, winter jackets, cell phones, or other items that can't be stored in your car or if you arrived by public transportation.
- Cash or credit card for the vending machines (quarters and singles may be preferable, but some prisons allow you to bring in larger denominations and some permit credit cards)
- An ID, which can be either:
  - A driver's license with photo
  - A Department of Motor Vehicles non-driver photo identification
  - Government-issued photo identification
  - Armed Services I.D. with photo
  - Employment identification with a photo
  - NYS Unified Court System Secure Pass

**Be sure to check with the prison as to any special COVID-19 rules, e.g. whether proof of vaccine/booster is required and if so, in what form. Also note that many prisons now require a negative COVID-19 rapid test for visitation, which is supplied immediately on entry.

Retainer Agreements/Letters of Engagement

The first step in your representation is to send your client an engagement/retainer letter to be signed and returned to you as quickly as possible. *See* **Appendix**, Sample Engagement Letter. The letter should specify who you are, the scope of your representation, what you can and cannot do as this person's attorney, and any other details you wish to include. Make sure to relay that you are a pro bono attorney through the Parole Advocacy Initiative, that your services are free and that you will cover all related filing costs. For more on filing fees and how to seek waiver, see Filing fee/In Forma Pauperis Motion/No Fee Authorization Affirmation.

Client Release Forms

Along with the retainer agreement, your letter should include several release forms to obtain relevant documents that you may not have. Include with your letter the following releases:

- Authorization for Release of Health Information Pursuant to HIPAA
- General Release of Confidential Information from DOCCS, *see* **Appendix,** DOCCS General Release.
- Office of Mental Health (OMH) Authorization for Release of Information, Form OMH 11C. This form is needed to obtain records of psychiatric treatment while in DOCCS custody. Use this form to request psychiatric records only if it is clear that the client has mental health concerns or that the client wants you to request these records.

Obtain several copies of each form, since your client may have received medical or mental health treatment outside of a DOCCS facility. Pending relevancy, ask your client to list all outside facilities where he received treatment.

Governing Statutes and Regulations

The parole process is governed by New York's Executive Law, which authorizes the Parole Board to promulgate regulations. Regulations have the force of law, if properly promulgated and consistent with the Executive Law. The statutes are codified at N.Y. Exec. Law §259 and the regulations are codified at 9 NYCRR §§8000-8011. It's worthwhile reviewing the full statute and regulations to get a sense of the scope of law relating to parole.

Standard The Board Must Apply in Determining Parole

Exec. Law §259-i(2)(C)(A) establishes the standard of review by the Board:

> Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering 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.

Factors The Board Must Consider In Determining Parole

Executive Law Section 259-i(2)(C)(A) then lists the factors the Parole Board must consider when deciding whether to grant release to parole supervision.[3] These factors are:

(1) **Achievements while incarcerated**: "the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates"

(2) **Temporary work release**: "performance, if any, as a participant in a temporary release program"

(3) **Post-release plans**: "release plans including community resources, employment, education and training and support services available to the inmate"

(4) **Immigration issues**: "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"

(5) **Victim statements**: "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"

(6) **Type/length of sentence**: "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"

(7) **Seriousness of the offense and [statutory/"official"] statements**: "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 presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement"

(8) **Criminal history**: "prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement."[4]

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[3] These factors are essentially the same as those in regulation 9 NYCRR § 8002.2 (d), except regulation #8 includes "age at time of commitment of any prior criminal offense."

[4] This section of the statute ends with the following:

> The board shall provide toll free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of section 440.50 of the criminal procedure law, the parole board member shall present a written report of the statement to the parole board. A crime victim's representative shall mean the crime victim's closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim's representative may include information concerning threatening or intimidating conduct toward the victim, the victim's representative, or the victim's family, made by the person sentenced and occurring

In 2011, legislation was passed requiring the Board to:

> establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which incarcerated individuals may be released to parole supervision

N.Y. Exec. Law §259-c (4).[5]

To meet the 2011 legislation's risk and needs requirement, DOCCS pays a private company, Northpointe, for a risk assessment instrument called COMPAS. More on COMPAS at COMPAS Risk Assessment.

In addition, there are additional factors that must be considered pursuant to regulations adopted in 2017.

Adopted in 2017, 9 NYCRR §8002.2 reads:

> **(a) Risk and needs principles.**
>
> In making a release determination, the board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision (collectively, department risk and needs assessment). If a board determination, denying release, departs from the department risk and needs assessment's scores, the board shall specify any scale within the department risk and needs assessment from which it departed and provide an individualized reason for such departure. If other risk and need assessments or evaluations are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending, and such assessments or evaluations are made available for review at the time of the interview, the board may consider these as well.
>
> **(b) Transitional accountability plan**.

> after the sentencing. Such information may include, but need not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced.

[5] *Platten v. NYS Bd. of Parole*, 47 Misc. 3d 1059, 1062 (Sup. Ct. Sullivan Cnty. 2015) ("In 2011, the legislature made changes to Executive Law § 259 et seq. The changes to Executive Law § 259-c (4) became effective on October 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in conjunction with the other factors enumerated in the statute (Executive Law § 259-i [2]), and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. (Executive Law § 259-c [4].) The changes were intended to shift the focus of parole boards away from focusing on the severity or heinous nature of the instant office, to a forward-thinking paradigm to evaluate whether an inmate is rehabilitated and ready for release.")

The board also shall consider the most current case plan that may have been developed by the New York State Department of Corrections and Community Supervision pursuant to section 71-a of the Correction Law.[6]

(c) Minor offenders: guiding principles.

Minor offenders are inmates serving a maximum sentence of life imprisonment for a crime committed prior to the individual attaining 18 years of age.

(1) When making any parole release decision pursuant to section 259-i(2)(c)(A) of the Executive Law for a minor offender, the board shall consider the following:
   (i) the diminished culpability of youth; and
   (ii) growth and maturity since the time of the commitment offense.
(2) Information presented that the hallmark features of youth were causative of, or contributing factors to, a minor offender's commitment offense, should not, in itself, be construed to demonstrate lack of insight or minimization of the minor offender's role in the commitment offense. The hallmark features of youth include immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures.

Factors The Board May Consider

Remorse

The Parole Board is permitted to consider parole applicants' remorse (or lack thereof) and insight into their crime. *Silmon v. Travis*, 95 N.Y.2d 470 (2000) ("We conclude that it was neither arbitrary nor capricious for the Board to consider remorse and insight into the offense following petitioner's *Alford* plea. These factors, we recognize, are not enumerated in the statute. However, the Board is empowered to deny parole where it concludes that release is incompatible with the welfare of society. Thus, there is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight."); *Dudley v. Travis*, 227 A.D.2d 863 (3d Dep't 1996). ("Petitioner contends that the Board's determination constituted an abuse of discretion because it was based on the … petitioner's lack of remorse, the brutality and depravity of the offense and petitioner's prior history of mental illness. We disagree. We find the consideration of these matters to be entirely appropriate in a determination denying parole taken together, they directly relate to the statutory standards that govern the Board's decision.") *See also Bockeno v. New York State Parole Bd*., 227 A.D.2d 751 (3d Dep't 1996*); Walker v. New York State Div. of Parole*, 203 A.D.2d 757 (3d Dep't 1994).

However, when the interview transcript indicates that the parole applicant repeatedly demonstrated remorse, the Board cannot base their decision to deny on "lack of remorse." *Wallman v. Travis*, 18 A.D.3d 304 (1st Dep't 2005). ("[T]he Board's perfunctory discussion of petitioner's alleged lack of insight is contrary to the Court of Appeals' decision … which held that a petitioner's remorse and insight into his crimes are highly relevant in evaluating an inmate's rehabilitative progress … Despite the critical significance of these factors in evaluating an inmate … the Board's decision in this case offers no supportive facts justifying its finding of lack of insight and remorse … [Thus] the court's conclusions regarding lack of insight and remorse were based on an inaccurate reading of the record."); *Winchell v. Evans*, 27 Misc.3d 1232(A) (Sup. Ct. Sullivan Cty, 2010) (Board's denial, which was based on the petitioner failing to show remorse for the

[6] The Transitional Accountability Plan is known as the Case Plan.

victim or her family and not appearing to understand the seriousness of his crime was contradicted by the record).

Opposition Material

The Appellate Division 3d Department holds that the Board may consider opposition material from individuals and associations that do not fall within the strict statutory definition of victim or victim representative in Executive Law 259-i. The 1st Department arguably states the same, but there is still room for litigation on this front.

In *Applewhite v. New York State Bd. of Parole*, 167 A.D.3d 1380 (3d Dep't 2018), appeal dismissed, 32 N.Y.3d 1219 (2019), the 3d Department stated:

> Contrary to petitioner's contention, we do not find that respondent's consideration of certain unspecified "consistent community opposition" to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination (see Executive Law § 259–i). Executive Law § 259–i specifically contemplates that community members are free to express their opinion to respondent regarding the potential release of inmates on parole (see Executive Law § 259–i[2][c][B]; 9 NYCRR 8000.5[c][2]). Specifically, Executive Law § 259–i(2)(c)(B) provides, in relevant part, that "[w]here a crime victim or victim's representative ... or other person submits to [respondent] a written statement concerning the release of an inmate, [respondent] shall keep that individual's name and address confidential" (emphasis added). The corresponding regulation governing parole records demonstrates why limiting access to information and protecting confidentiality in such a manner is paramount; such limitations are essential in order to, among other things, "protect the internal process by which division [of parole] personnel assist [respondent] in formulating individual decisions with respect to inmates and releasees" and "to permit private citizens to express freely their opinions for or against an individual's parole" (9 NYCRR 8000.5[c][2]; see *Matter of Jordan v. Hammock*, 86 A.D.2d 725, 725 (3d Dep't 1982), appeal dismissed 57 N.Y.2d 674 (1982)
>
> By statutorily protecting the confidentiality of those members of the community – in addition to the crime victim or victim's representative – who choose to express their opinion, either for or against, an inmate's bid to obtain parole release, the Legislature demonstrated a clear intent that such opinions are a factor that may be considered by respondent in rendering its ultimate parole release decision. Significantly, such statements and opinions are germane to respondent's determination as to whether an inmate will live and remain at liberty without violating the law, whether such release is compatible with the welfare of society and whether an inmate's release will deprecate the seriousness of the underlying crime as to undermine respect for the law – statutory factors that respondent must consider in rendering its parole release determinations.

See also:
Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852-53 (3d Dep't 2004) ("By statutorily protecting the confidentiality of those members of the community – in addition to the crime victim or victim's representative – who choose to express their opinion, either for or against, an inmate's bid to obtain parole release, the Legislature demonstrated a clear intent that such

opinions are a factor that may be considered by respondent in rendering its ultimate parole release decision.")

Clark v. New York State Bd. of Parole, 166 A.D.3d 531, 531–32 (1st Dep't 2018) ("…in the initial consideration of petitioner's request for parole, the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community…") , the Board admitted that its refusal to provide petitioner with access to any of the those letters in connection with her administrative appeal was improper."

Note that the *contents* of the opposition material is not specified in the *Clark* and *Applewhite* decisions; therefore, pending the content of opposition material in the parole file, this may provide a ground for appeal.

For example, if the opposition material conveys "penal philosophy" then it should not be considered. *King v. New York State Div. of Parole*, 190 A.D.2d 423, 433 (1st Dep't 1993), aff'd, 83 N.Y.2d 788 (1994).

The "opposition" material may also be stale. See *Hopps v. N.Y. State Bd. of Parole*, Sup. Ct. Orange Cty. June 25, 2018, Onofry, J., index No. 2553/18 ("the only evidence in the record or otherwise submitted to the Court that might be argued to constitute [official opposition] are statements made by the victim's sister at the time of sentencing (some 25 years ago), and documents generated around the same time … the Court finds no even relatively current information that would support a finding that there was 'official opposition and significant and persuasive community opposition on file.' … it is irrationality bordering on impropriety for the Board to deny parole based on statements about the Petitioner's suitability for release at or around the time of the underlying offense, some 25 years ago.").

Opposition material may contain inaccurate information about the person who is incarcerated (e.g., suggesting a lengthy or different history of prior convictions), the offense for which they are incarcerated (e.g., describing a manslaughter conviction as "murder"), the nature of their sentence, etc. Depending on the nature of the inaccurate information and the record in your case, you may consider arguing that the Board's consideration of this opposition material was equivalent to improper reliance on inaccurate information. *See, e.g., Lewis v. Travis*, 9 A.D.3d 800, 780 N.Y.S.2d 243 (2004) (ordering de novo interview because the Board erroneously referred to petitioner's conviction as first degree murder, when the crime of conviction was second degree murder). For more on this see Reliance on Inaccurate Information.

Another argument may be that "community opposition" only indicates the organizing abilities and resources of one sector of society.[7] That parole applicants do not have the resources to organize an on-line campaign to solicit letters of support does not mean that an equal number of society members would not support release. Therefore, is it inaccurate for the Board to state that there is "community opposition" when such opposition emanates from a narrow sector of the New York "community" and the majority of a wider community may very likely support release if polled.

Relatedly, there may be an argument that since the law does not permit "community" pressure at the sentencing stage, why should such information be considered at the parole stage. See

[7] *See e.g.* the NYC Police Benevolent Association's website, which permits anyone to write one or more form letters to the Board opposing release of "cop killers." For more on law enforcement opposition, see The NYPD Union's War Against Parole Reform.

Criminal Procedure Law §380.50 (limiting those who can speak at sentence to victims or their family, legal guardian or representatives with personal knowledge of and relationship with the victim) and CPL §390.30 (limiting scope of pre-sentence investigation report).

In addition, reliance on "opposition" that is generated by efforts akin to political campaigning, reduces the Board to counting votes and succumbing to political pressure. Therefore, such "opposition" may be beyond the statutory factors delineated in Exec. L. 259-i et seq and the Board's consideration of such requires reversal. *But see Krebs v. New York State Div. of Parole*, 2009 WL 2567779, at 12 (N.D.N.Y. Aug. 17, 2009) ("Plaintiff's claim that denial of parole based on adverse public and political pressure violates the equal protection clause is equally unavailing. These pressures are permissible factors which parole officials may properly consider as they relate to 'whether release is not incompatible with the welfare of society and will not so deprecate the seriousness of the offense as to undermine respect for the law.'" citing *Seltzer v. Thomas*, 2003 WL 21744084, at 4 (S.D.N.Y. 2003) (quoting *Morel*, 2003 WL 21488017 at *5).)

In addition, there may be an argument that the Board inappropriately considered opposition from outside New York State. When the Board cites to "community opposition," it sometimes claims "the community still suffers from your crime," or words to that effect. But is the opinion of a non-New York state resident relevant? *In re Clark* provides an instance where "community opposition" was unreasonable. There, the Parole Board "considered a strong letter in opposition from a legislative body that sits more than 300 miles away from both the place of the crime and the current location of [the applicant's] incarceration." The Art. 78 court held "[s]uch a letter, sent to the Parole Board … should fall outside the scope of reasonable community opposition; yet, the Parole Board read it into the record and appeared to have given it serious weight, nonetheless." *Clark v. New York State Bd. of Parole*, 2018 WL 1988851 (N.Y.Sup.) (Sup. Ct. New York Cnty 2018), affm'g as modified 16AD3d 531 (1st Dep't 2018).[8]

Finally, there is a strong argument that consideration of opposition material is not permitted under the governing statute.[9] *Clark v. NYS Bd. of Parole*, 166 A.D.3d 531 (1st Dep't 2018) offered no rationale for its finding. A divided panel in *Applewhite v. NYS Bd. of Parole*, 167 A.D.3d 1380 (3d Dept. 2018) found support for its holding in a relatively minor amendment to Executive Law § 259-i (c) (2) enacted in 1999. The 1999 amendment authorized the Board to keep confidential the names and addresses of a "crime victim or victim's representative . . . or other person [who] submits to the parole board a written statement concerning the release of an inmate" (emphasis added). Seizing upon the reference to "other person," the court concluded that "[b]y statutorily protecting the confidentiality of these members of the community – in addition the crime victim or victim's representative – who choose to express their opinion, either for or against an inmate's bid to obtain parole release, the Legislature demonstrated a clear intent that such opinions are a factor that may be considered by [the Board] in rendering its ultimate parole release decision" (emphasis added).

The two dissenting justices disagreed, relying on the plain language of Executive Law § 259-i (2)(C)(A), which includes a detailed list of the factors that may be considered in the parole release

[8] Though the 1st Dep't affirmed the decision below, does its finding that "…the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community…" overrule this portion of the lower court decision?

[9] In contrast, letters from members of the public in support of an individual's release can be properly considered if relevant to "release plans, including community resources, employment, education and training and support services available to the incarcerated individual." *See* Exec. Law 259-i(2)(C)(A).

decision-making process. The statute authorizes the Board to consider statements of crime victims and their representatives, but notably fails to mention statements expressing "community opposition" to a parole candidate's release. The dissenting justices stressed that the statute "includes detailed language defining the specific, limited circumstances in which non- victims may make statements to [the Board] solely as victim's representatives, describes information that may be included in victim impact statements, and directs [the Board] to maintain such statements on file, but includes no mention of statements from anyone other than a victim or a representative." Thus, "[u]nder well-established rules of statutory construction," the dissent concluded, "the Legislature's failure to include materials provided by community members among the factors to be considered by [the Board] must be understood to reveal that the exclusion was intentional." 167 A.D.3d at 1385.

Applewhite was granted parole release a few weeks after the Appellate Division's decision and his appeal as-of-right to the Court of Appeals was later dismissed as moot. Therefore, until the Court of Appeals rules otherwise, *Applewhite* is controlling law in the Third Department and Clark is controlling in the First Department. (While *Clark* held that "community opposition" material can properly be considered by the Board, the court importantly ruled that it was error to deny the petitioner access to these letters in connection with her administrative appeal from the denial of parole.)

Standing alone, the *Applewhite* majority's reliance on the 1999 amendment concerning the confidentiality of names and addresses of "other person[s]" who submit letters in opposition to a parole candidate's release would appear to be a logically thin basis on which to conclude that the legislature intended "community opposition" to be weighed in the parole decision-making process. After all, the Legislature expressly amended the Executive Law in 1985 in order to authorize consideration of the statements of crime victims and their representatives, and the Board later promulgated detailed conforming regulations regarding submission and consideration of such material in the parole release decision-making process. *See* 9 NYCRR 8002.4. But the legislature has never taken similar action with respect to "community opposition" material, and the Board's regulations include no direct references to it.

But the *Applewhite* majority reasoned that legislative intent was bolstered and made plain by a "corresponding regulation governing [restricted access to] parole records" (emphasis added). The majority concluded that 9 NYCRR 8000.5 (c) (2) demonstrates "why limiting access to information and protecting confidentiality is paramount." The regulation states that restricting access to certain parole records is necessary, among other reasons, "to permit private citizens to express freely their opinions for or against an individual's parole." Here, the majority concluded, was a clear indication that the legislature intended the Board to review and consider "community opposition" material in the parole release decision-making process.

The flaw in the *Applewhite* majority's legal analysis is that the quoted regulation [9 NYCRR 8005 (2)] was adopted in 1978 – some twenty years before the 1999 amendment under consideration. And the 1978 regulation merely expressed the Board's unwritten policy to consider "community opposition" letters in the decision-making process. It was not enacted in response to any legislative direction concerning the type of information that should be considered at parole hearings. In fact, before 1985 the Board of Parole had no statutory authority to consider victim impact submissions in the parole decision-making process. Only unwritten agency policy supported the Board's consideration of such statements.

That situation changed in 1985 when the legislature amended Executive Law § 259-i (2)(C) to add "the written statement of the crime victim or the victim's representative" to the list of factors

that must be considered in the parole release decision-making process. The governor's bill memo in support of the legislation noted that the amendment supplied legislative authorization for what had been a longstanding policy of the Board:

> The Division of Parole has long had a policy of considering the views of crime victims in rendering its decisions. Nevertheless, it is now appropriate to formalize that policy by granting crime victims a statutory right to express their views concerning the parole release of an inmate.
>
> This bill would permit crime victims, or their representatives, to provide the Board of Parole with a written expression of their views and would require that the Board consider those views, together with other factors enumerated in the Executive Law, when rendering a decision to grant or deny release.[10]

Voicing support for the bill, J. Marc Hannibal, counsel to the Division of Parole, pointed out that Board policy was, in fact, broader than the legislative enactment and more generally included consideration of the "views of persons in the community" (i.e., "community opposition") in the decision-making process:

> Please be advised that the Division supports this bill and urges the Governor to sign it. The Board of Parole has historically maintained a policy of considering the written view of persons in the community when rendering a decision to grant or deny parole release. Therefore, the proposed statutory amendment is fully in conformity with that policy and is welcomed by the Board.[11]

Thus, while the legislature acted in 1985 to provide statutory authorization for the Board's policy of considering the views of crime victims in the decision-making process, it did not authorize or otherwise endorse the Board's broader policy of considering "community opposition" material. To this day, the Board considers such material according to its own internal policy – not pursuant to any grant of authority from the legislature.

The 1999 amendment making confidential the names and addresses of crime victims and "other persons" was uncontroversial. The bill passed unanimously in the Assembly and Senate (S.1126/99, A.5515/99 – L.1999, chap. 40). Nothing in the bill text gave any hint that its purpose was to broaden the list of factors that may be considered in the parole release decision-making process. The bill memo stated its straightforward purpose was to "provide a necessary protection to crime victims, their representatives and others potentially affected by the release of an inmate" (emphasis added). The bill was likely proposed by the Division of Parole itself and so the vague reference to "other persons" may have been a quiet nod to the Board's longstanding policy of considering "community opposition material." Or perhaps it wasn't. The statute is unclear.

What is clear is that the majority decision in *Matter of Applewhite v. NYS Bd. of Parole*, 167 A.D.3d 1380 (3d Dept. 2018), was based, in part, on a faulty premise: that a 1978 regulation expressing the Board's unwritten policy regarding "community opposition" somehow establishes the "clear intent" of the legislature to authorize consideration of such material. As the dissenting justices

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[10] Governor's memo in support Program Bill #12 (L.1985, chap. 78).

[11] Letter from J. Marc Hannibal to Gerald C. Crotty, Counsel to the Governor, dated April 30, 1985, Bill Jacket to L.1985, chap. 78 (emphasis added).

correctly observed, the clearest indication of legislative intent are the words of a statute. And Executive Law §259-i (2)(C)(A) fails to include "community opposition" among the factors to be considered in the parole release decision-making process. Fuller consideration and proper resolution of this important question will have to await review by the New York State Court of Appeals.[12]

The Board's Obligations When Parole Is Denied

Executive Law 259-i(2)(a) reads:

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

In addition, in 2017 the Board amended 9 NYCRR § 8002.3(b) to require:

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

And, as adopted in 2017, 9 NYCRR § 8002.2(a) was revised to require:

> 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.[13]

Appealing Parole Denials—Procedures and Logistics

Appealing a parole denial is a two-step process. First, an administrative appeal must be filed with the Board of Parole and is reviewed by the Board's internal Appeals Unit. An analysis of

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[12] Thank you to Al O'Connor for this statutory analysis.

[13] The full regulation:

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

administrative appeal decisions filed in 2019 revealed that only 7% of administrative appeals were granted and most of those were for technical defects such as the Board's failure to obtain the "case plan" or "TAP." It is not until the administrative appeal is denied or 4 months have passed since the appeal was perfected that the exhaustion of administrative remedies requirement has been met, which then permits the second step: filing an Article 78 petition in a county Supreme Court.

Exhaustion Requirement and Futility

Appellants must exhaust administrative remedies before filing an Article 78 petition. This requirement causes delay in getting into court since administrative appeals are denied more than 90% of the time.

An exception to the exhaustion requirement exists where an "administrative challenge would be futile or where the issue to be determined is purely a question of law" *Matter of Hudson Riv. Val., LLC v. Empire Zone Designation Bd.* 115 A.D.3d 1035, 1038 (3d Dep't 2014); *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978).

But courts to date have summarily rejected futility in the context of administrative appeals of parole denials. *Toro v. Evans*, 95 A.D.3d 1573 (3rd Dep't 2012); *People ex rel. Martinez v. Beaver*, 8 A.D.3d 1095 (4th Dep't 2004). Still, it may be worth making the argument pending unique facts and issues.

Futility has been found in other contexts. *See e.g. Police Benevolent Ass'n of New York State, Inc. v. State*, 150 A.D.3d 1375 (3d Dep't 2017); *Lown v. Annucci*, 183 A.D.3d 1246, 1248 (4th Dept 2020), leave to appeal dismissed, 36 N.Y.3d 960, 161 N.E.3d 478 (2021) (rescinding merit time parole release date without conducting a hearing was ripe for review finding that exhaustion would be futile and the issue was purely a question of law).

Need for Speed--Risk of Dismissal on Mootness Ground

A reappearance before the Board while an appeal of the prior denial is pending (whether administrative appeal, Art. 78 or appeal of an Art. 78 denial) risks being dismissed on mootness grounds.[14] Courts, other than the exceptions discussed below, routinely dismiss pending appeals when there has been an intervening reappearance reasoning that the relief sought in the appeal, a de novo parole review, has been provided by the reappearance. This is classic mootness analysis—since the relief sought has been provided during the pendency of the litigation, the litigation is academic.[15]

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[14]*Moissett v. Travis*, 97 N.Y.2d 673 (2001) (Appellate Division's dismissal of appeal of Article 78 determination denying petitioner prisoner's request for early parole release, was properly dismissed as moot since petitioner was denied parole at reappearance while appeal was pending.); *See e.g. Gourdine v.New York State Bd. of Parole,* 150 A.D.3d 1491, 1492 (3d Dept., 2017) ("Petitioner's reappearance before respondent in May 2015, at which his request for parole was denied, rendered moot his challenge to respondent's denial of his prior request for parole in May 2013); *Schwartz v. Dennison*, 40 A.D.3d 218, 218 (1st Dep't 2007).

[15] The doctrine of mootness derives from the Constitutional requirement that a court hear "cases and controversies." U.S. Const. art. III, § 2, cl. 1. Appellate jurisdiction requires that courts only decide controversies that involve actual disputes. The requirement of an actual dispute avoids the court's issuance of an advisory opinion on issues that are academic, hypothetical, or abstract. *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980).

This risk frequently arises since the administrative appeal exhaustion requirement typically takes a minimum of 6 months, and often more, which means a reappearance scheduled 12 to 18 months from the denial at issue may occur before an Art. 78 can be filed or decided.

There are, however, two grounds under which, despite an intervening reappearance, an appeal may not be moot.

The first is that the relief provided at the reappearance may not be the relief requested in the litigation and thus there is nothing academic about the appeal. *See e.g. Abrams v. Stanford*, 150 A.D.3d 846, 847 (2d Dep't 2017) (holding that an appeal of Board's recission of conditional parole for deportation was not rendered moot by a subsequent denial of general parole release); *Rivera v. Stanford*, 2019 WL 2030503, at *1 (2d Dept, 2019) (finding appeal was not moot since an intervening denial of parole was vacated by the Board's Appeals Unit and thus the challenge to the prior denial was not academic); *Matter of McAllister v. New York State Div. of Parole*, 78 A.D.3d 1413 (3d Dep't 2010) ("... in light of the administrative reversal of the [subsequent] April 2010 parole determination, the determination at issue is not moot and we need not consider whether it falls within the exception to the mootness doctrine..."); *Bolarinwa, Senora v. NYS DOCCS*, Sup. Ct. New York County, May 15, 2020, James, J., index No. 451231/2020.(finding subsequent grant of parole at initial parole review did not moot appeal of denial of LCTA parole).

Or, the intervening reappearance suffers from the same error that is currently on appeal and thus there is nothing academic about the appeal. *See McLaurin v. New York State Board of Parole*, 27 A.D.3d 565 (2d Dept. 2006) (finding case not moot because the substantial issue in the current litigation recurred at the intervening review); *Andrews v. Board of Parole*, Sup. Ct. New York County, Jan. 13, 2015, Schlesinger, J., index No. 400897/2014 ("Respondents insist that the law is clear that when an individual obtains a new parole hearing before another Board while an Article 78 proceeding is pending, the Article 78 is rendered moot because the sole relief a court can give is to grant another hearing. Respondent cites for this principle cases such as *Matter of Siao-Pao v Travis*, 5 AD3d 150 (1st Dep't 2004), lv denied 3 NY3d 603, and *Matter of Hall v NYS Division of Parole*, 18 AD3d 1036 (3rd Dep't 2005), lv denied 5 NY3d 843. However, a second hearing arguably must be one sufficiently different from the first so that the new opportunity to be heard is indeed a new opportunity, not one encumbered by the same problems.").

The second way to avoid dismissal based on mootness is that the matter may raise issues that meet the exception to the mootness doctrine. Where an issue is rendered moot but is of public importance and capable of repetition yet evading review, the court may deliver an opinion on the question. This exception requires the existence of three factors: 1) a likelihood the issue will repeat, either between the same parties or others; 2) an issue or phenomenon typically evading appellate review; and 3) a showing of significant or important questions not previously passed upon. *See Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15 (1980); *Marino v. Travis*, 13 A.D.3d 453, 454–55, 787 N.Y.S.2d 54 (2d Dep't, 2004) ("...during the pendency of this appeal, the petitioner was released to parole on a subsequent application. Thus, because any determination by this Court will not affect the rights of the parties with respect to this controversy, the appeal would ordinarily be dismissed as academic. However, because the substantial issues presented are likely to recur, constituting an exception to the mootness doctrine, we reach the merits."); *Hill v. New York State Bd. Of Parole*, Sup Ct, New York County, Oct. 23, 2020, Madden, J., index No. 100121/2021 ("There can be no clearer indication that this case presents substantial and recurring issues than the fact that the April 14, 2020 interview was a rerun of the January 2019 interview. Just as they did in January 2019, the Board issued another perfunctory decision, impermissibly relying on the seriousness of the offense, disregarded settled law that they must explain why they

departed from a positive COMPAS assessment, and again failed to provide Mr. Hill with the opposition he is entitled to pursuant to 9 NYCRR 8000.5(c)(1)(i)..."); *Miranda v. NYS Parole Board*, Sup. Ct. New York County, Oct. 13, 2020, Crane, J., index No. 150995/2020 (Finding Art. 78 not moot despite intervening reappearance because to find otherwise the issue would evade review since an Art. 78 cannot be litigated within the 18 months time frame between the review under appeal and the next reappearance).

Exceptions to Mootness in Other Contexts

In re Melinda, 31 A.D.3d 24, 28 (2d Dep't 2006) (finding all three factors met and applying the exception in a child custody case where the mother had surrendered her parental rights), citing Hearst Corp., 50 N.Y.2d at 714-15.

People ex rel. Rosario v. Superintendent, Fishkill Correctional Facility, 180 A.D.3d 920, 921 (2d Dep't 2020) (finding the issue of whether the Sexual Assault Reform Act school ground condition applies to all incarcerated people adjudicated to be level-three sex offenders even if they are not serving a sentence for an offense enumerated in Executive Law § 259-c(14) at the time they become eligible for conditional release or parole to fall within the exception).

People ex rel. Maxian on behalf of Roundtree v. Brown, 164 A.D.2d 56, 58 (1st Dep't 1990) (finding that, despite having been released, petitioners who had been arrested without warrants and held in custody for over 24 hours in contravention of state law prearraignment detention laws could move forward with appeal due to the novel issues and temporary nature of the detention).

People ex rel. Frisbie v. Hammock, 112 A.D.2d 721, 721 (4th Dep't 1985) (finding that although petitioner had been released on parole and reincarcerated on an unrelated charge, his appeal of a habeas corpus dismissal was not moot because the issue on appeal was important, likely to recur, and often incapable of timely review).

In the Matter of Doe v. Coughlin, 71 N.Y.2d 48 (1987). While waiting for litigation, the petitioner was transferred to another prison that did not participate in the program. The Court of Appeals held that the challenge was not moot because the petitioner might be transferred again to a participating prison and was seeking a declaration of his rights. The Court held that the case remains adversarial and the differences between [petitioners] and [respondents] give rise to a 'justiciable controversy', for which a declaratory judgment would be an appropriate remedy." Id. at 49. Prison transfers are always a possibility and having a precedent like this is crucial.

Record on Appeal and How to Obtain It

The record on the administrative appeal is the contents of the parole file, the parole interview transcript and denial decision. The contents of each and how to obtain each is explained below.

Decision and Interview Transcript

The Parole Board's written decision is often very brief, conclusory and not supported by what was actually stated during the interview. Do not focus solely on the decision itself. Be sure to comb the interview transcript carefully for reasons to argue that the Board's decision should be set aside. For example, the Board's decision may state in conclusory fashion that the commissioners considered the person's achievements, but review of the transcript reveals no questions of that nature were asked, or that the questions took up one page of a thirty-page transcript. *Banks v. Stanford*, 159 A.D.3d 134, 144 (2d Dep't 2018) ("a parole 'interview' cannot be understood as

merely consisting of a mere face-to-face appearance by the inmate before the parole board. The term has broader application, as it speaks to a process that statutorily requires consideration of a panoply of materials including the inmate's institutional record of goals, accomplishments, academic achievements, vocational education, training, or work assignments; performance evaluations from any temporary release program; available post-release community resources, employment, education, training, and support services; crime victim statements; the considerations relevant at the time of sentencing; and the inmate's criminal history.").

In addition, the transcript may provide grounds to challenge the Board's decision even if those issues were not mentioned in the Board's decision (i.e., if a Board member showed bias of some kind or asked questions that reflect a misunderstanding of the law or the facts of the underlying conviction).

In addition, if there are past decisions and interview transcripts, be sure to read and analyze them closely. Such records may reveal issues and facts that are not obvious from the current decision and transcript. They may provide evidence that inappropriate information was considered in prior reviews, which almost guarantees the same information was considered in connection with the current denial. Prior decisions and transcripts may provide evidence of irrationality as to the denial at issue. For example, acknowledgement of a fact by a commissioner at a past interview that contradicts the basis for the current denial may support an argument that the basis for the denial is not supported by the record (i.e., at a previous interview, a commissioner acknowledged sincere remorse, but in the present interview or decision cite a lack of remorse). And, analysis of multiple denials may reveal patterns of bases for denial that are internally inconsistent thus rendering the current denial irrational. Or, past statements by commissioners can support a current claim that the same commissioners applied their personal penal philosophy. *See King v. New York State Div. of Parole*, 83 N.Y.2d 788 (1994) (holding that a Commissioner's consideration of factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place warranted a new parole review).

Note that the Board creates at least two versions of its decision, the so-called "inmate copy" that the person receives within two weeks of the interview, and a subsequent "transcript copy" that is prepared if a transcript of the interview is requested. There are sometimes significant and helpful differences between these two versions. You should also be aware that while the Executive Law requires the Board to create a "verbatim" transcript of the interview, parole applicants routinely report that the actual contents of their interview are different than what is reflected in the resulting transcript. To date, challenging such inaccuracies has been difficult.

The denial decision and transcript will have been obtained from the Board at the administrative appeal stage, see Notice of Appeal and Request for Decision and Interview Transcript. If you are entering the matter at the Art. 78 stage, your client should be able to provide you with both.

Parole File

The Board is required to "obtain and file" records pertaining to parole applicants pursuant to 9 NYCRR § 8000.5 (a).[16] These records, commonly called the "parole file," are provided to the Board when it considers parole and should serve as the sole factual basis for its decisions.

[16] 9 NYCRR § 8000.5(a):

The parole applicant's access to the parole file is governed by 9 NYCRR § 8000.5(c)(2)(i).[17] In general, the applicant or their attorney "shall be granted access only to those portions of the case records which will be considered by the board…at a hearing or pursuant to an administrative appeal of a final decision of the board." While there are exceptions listed under (2)(a)(b), the Board routinely withholds portions of the parole file inappropriately.

> (a) The division shall cause to be obtained and filed, as soon as practicable, information as complete as may be obtainable with regard to each inmate who is received in an institution under the jurisdiction of the State Department of Correctional Services, including a complete statement of the crime for which the inmate has been sentenced, the circumstances of such crime, all presentence memoranda, the nature of the sentence, the court in which he was sentenced, the name of the judge and district attorney, and copies of such probation reports as may have been made, as well as reports as to the inmate's social, physical, mental and psychiatric condition and history.

[17] 9 NYCRR § 8000.5(c):

> (c) Access to case records maintained by the Division of Parole.
> (1) An inmate, a releasee or counsel for either may have access to information contained in the parole case record:
> (i) prior to a scheduled appearance before the board;
> (ii) prior to a scheduled appearance before an authorized hearing officer of the division; or
> (iii) prior to the timely perfecting of an administrative appeal of a final decision of the board.
> (2) In that it is essential to protect the internal process by which division personnel assist the board in formulating individual decisions with respect to inmates and releasees; to prevent disclosures of information to inmates and releasees that would jeopardize legitimate correctional interests of security, custody, supervision or rehabilitation; to permit receipt of relevant information regarding such persons from other Federal, State and local law enforcement agencies, and Federal and State probation and judicial offices; to permit private citizens to express freely their opinions for or against an individual's parole; to allow relevant criminal history type information of codefendants to be kept; to allow medical, psychiatric and sociological material to be available to professional staff; and to permit a candid process of factual analysis, opinion formulation, evaluation and recommendation to be continued by professional staff: the following conditions and limitations are imposed regarding access to information in the parole case record pursuant to paragraph (1) of this subdivision.
> (i) Access shall be granted only to those portions of the case record which will be considered by the board or authorized hearing officer at a hearing or pursuant to an administrative appeal of a final decision of the board, except:
> (a) access shall not be granted to those portions of the case record to the extent that they contain:
> (1) diagnostic opinions which, if known to the inmate/releasee, could lead to a serious disruption of his institutional program or supervision;
> (2) materials which would reveal sources of information obtained upon a promise of confidentiality;
> (3) any information which if disclosed might result in harm, physical or otherwise, to any person;
> (b) access by the Division of Parole shall not be granted to reports, documents and materials of other agencies, including but not limited to probation reports, drug abuse and alcoholism rehabilitation records, and the DCJS report.
> (ii) Any record of the Division of Parole not made available pursuant to this section shall not be released, except by the chairman upon good cause shown.

It is critical to obtain the file for the administrative appeal and Article 78. If your client requested their parole file before the parole interview, they can provide you with copies. It may be, however, that your client was not provided access to the parole file or was provided only viewing access because they did not have the money to pay the required copying fee.

For more on how to obtain the parole file, see DOCCS Directive 2014.

If your client requested the parole file before their interview but was not given access or copies of it (or portions of it), this may be an issue to raise in the administrative appeal and subsequent Article 78. *See* Remedies for Board's Failure to Disclose Parole File.

If counsel is entering the representation at the Art. 78 stage of the litigation or after the perfection of the administrative appeal, and your client does not have the parole file, DOCCS will likely refuse access via 8000.5 because this regulation limits access to before a scheduled Board appearance, or prior to the perfecting of the administrative appeal. 9 NYCRR § 8000.5 c (1). You may be able to obtain the parole file via Answer and Discovery, *see* Respondent's Answer and Discovery.

Historically DOCCS and the Parole Board have treated requests for the parole file pursuant to 9 NYCRR § 8000.5 as FOIL requests, which is incorrect. FOIL requests are governed by 9 NYCRR § 8008.5. FOIL governs public access to records, not parole applicants' access to their parole files. Access to records pursuant to FOIL is subject to many exceptions which do not apply to requests made by parole applicants pursuant to section 8000.5.

For example, a parole applicant's medical and mental health evaluations which are part of parole files should be withheld under FOIL as an "unwarranted invasion of personal privacy." N.Y. Pub. Off. Law, Art. 6, § 87(2)(b). Such reports might also be appropriately withheld under the applicable regulation, § 8000.5(c)(2)(a), if they contain "diagnostic opinions which, if known to the inmate/releasee, could lead to a serious disruption of his institutional program or supervision." But, such assessment should take place on a case by case basis, not categorically as is the Board's present practice*. See e.g., Justice v. Comm'r of New York State Dep't of Corr. & Cmty. Supervision*, 130 A.D.3d 1342, 1343 (3d Dep't 2015) ("We find no basis to disturb Supreme Court's denial of petitioner's request for discovery of the confidential material relied on by DOCCS. The Board of Parole is authorized to treat records as confidential if their release 'could endanger the life or safety of any person' (Public Officers Law § 87[2][a], [f]; see Executive Law § 259–k[2]; 9 NYCRR 8000.5[c] [2][i][a][3]). Given petitioner's violent crimes, ongoing mental health issues and previous threats to staff at his prior residence while he was on parole, we find no abuse of discretion in Supreme Court's denial of petitioner's request for access to the confidential documents."); *see also Andrews v. Board of Parole*, Sup. Ct. New York County, Jan. 13, 2015, Schlesinger, J., index No. 400897/2014.

In general, however, the Board withholds portions of the parole file on a reflexive basis without a case by case analysis. And, the Board will usually not identify the documents they are withholding, though on occasion, a person will be given a form entitled "Rules and Procedures for Review of Your Parole File," see **Appendix**.

To the extent it is necessary to obtain documents not included in the parole file, see Obtaining Records Not Included in the Parole File.

Process to Obtain the Parole File

The process to request the parole file is outlined in 9 NYCRR §8000.5 and DOCCS Directive 2014 dated June, 2019, but it is only sometimes followed.[18] The best practice is to request the parole file as soon as possible in the context of an administrative appeal.

1. Contact the facility where your client is incarcerated to determine the person to whom the record request should be sent (usually the Senior Offender Rehabilitation Coordinator or Senior Parole Officer).

2. Draft the request, *see* **Appendix**, Request for Parole File.

3. Include client's "DIN", current facility, and the nature of the proceeding for which you are requesting the parole file, in this case the administrative appeal.

4. Request the parole file pursuant to the regulations governing parole reviews, §8000.5. MAKE CLEAR THIS IS NOT A FOIL REQUEST AND OBJECT TO DOCCS TREATING IT AS SUCH.

5. Include a demand that any documents withheld should be individually identified and the specific basis under §8000.5 for withholding should be stated.

6. Include an authorization signed by your client, *see* **Appendix**, DOCCS General Release.

7. Include a HIPAA form signed by your client if you are requesting the medical information in the parole file.

8. Send the request electronically. All prisons should now accept requests for these files electronically.

The Parole File may also be requested before an upcoming parole review. The rules governing this are also found in Directive 2014. Although the directive states that the records should be provided as soon as possible after being requested, and requests can be made up to four months before the scheduled review, the only mandatory requirement is that the records be provided at least one day before the day of the proceeding. See DOCCS Directive 2014 III and IV (A)(2).

Contents of the Parole File and How to Obtain Each

Pre-Sentence Investigation Report (aka PSI, PSR, and "Probation Report")

In the vast majority of cases, the Board has the Pre-Sentencing Investigation Report and relies heavily on it. Whether a conviction is by verdict or plea, the Criminal Procedure Law § 390.20(1) requires an investigation be conducted before sentence is imposed. The County Probation Department conducts the investigation and writes a report, commonly referred to as Pre-Sentence Report (PSR), Pre-Sentence Investigation (PSI) or Probation Report. The PSR is supposed to detail the defendant's criminal history, level of involvement in the crime, remorse, information from the victim, and also mitigating factors and information about the defendant's background.

[18] Contact michelle.liberty@doccs.ny.gov in Parole Board counsel's office to troubleshoot issues regarding obtaining the parole file.

PSRs often contain inaccurate information. This is a difficult problem since case law takes the position that absent an objection at the time of sentencing, the PSR cannot be changed. CPL § 390.50; *Sciaraffo v. New Your City Dept. of Probation*, 248 A.D.2d 277 (2nd Dept. 198); *Matter of Gayle v. Lewis*, 212 A.D.2d 919, 622 N.Y.S.2d 626 (3d Dept. 1995); *People v. Blanches-Rivera*, 168 Misc. 2d 72, 643 N.Y.S.2d 330 (Monroe Co. Ct. 1996).

The Board deems the PSR as confidential and will not provide the PSR to the parole applicant. Access to the PSR is governed by Criminal Procedure Law §390.50(2). If your client was not provided with the report at the time of sentence, which was rarely done in decades past, then a "written request" must be made to the sentencing court per the CPL. Some counties require an application by motion, in others a letter will suffice. Contact the Supreme Court clerk in the county of conviction and inquire as to the method employed in that county. The indictment number of the case in which the sentence was imposed is necessary. Incarcerated persons and attorneys have experienced heavy logistical and bureaucratic barriers to obtaining the PSR, despite the statute's requirement that: "The court shall respond to the defendant's written request within twenty days from receipt of the defendant's written request." *See* **Appendix**, Motion for PSR.

Another avenue is to reach out to counsel on the direct appeal or trial-level defense counsel to see if they may have the PSR.

Alternatively or additionally, prison staff are required to assist applicants in obtaining their PSR. This avenue should be utilized pending strategic considerations and the potential risk of surfacing negative facts. This is a relatively new directive and therefore its implementation is spotty. Speak with your client about contacting their Offender Rehabilitation Coordinator (ORC) regarding the PSR. See DOCCS Directive 8370.

Prior Parole Decisions and Interview Transcripts

Parole files will often, but not always, contain prior denial decisions and interview transcripts, but it is important to obtain these for the purpose of appeal. Prior transcripts, when compared with the current decision and transcript at issue may reveal appealable issues. For example, irrationality might be documented if the Board did not deny based on public safety two years ago but cites that basis in the current denial (assuming no intervening events).

If prior interviews and decisions are not in the parole file, you may request them via FOIL. DOCCS provides a portal for such requests here: DOCCS Freedom of Information Law (FOIL) . Absent a release from your client, DOCCS will produce the transcript and decision with redactions.

Document requests via FOIL may also be done via mail directed to:

NYS Dept. of Corrections & Community Supervision
Attn. FOIL Unit, Room 316
1220 Washington Avenue, Bldg. 2
Albany, NY 12226-2050

Criminal History Report

The parole file includes a criminal history report, which DOCCS routinely withholds from disclosure. Citing 9 NYCRR § 8000.5, DOCCS Directive 2014 enumerates 8 types of records requests that will not be granted; item #8 is the Criminal History Record Information. While none of the exceptions listed under § 8000.5 explicitly reference a "criminal history" report, and the

DOCCS directive does not specify the exception on which DOCCS relies, the directive is likely relying on the following carve-out, which states:

> (b) access by the Division of Parole shall not be granted to reports, documents and materials of other agencies, including but not limited to probation reports, drug abuse and alcoholism rehabilitation records, and the DCJS [NYS Division of Criminal Justice Services] report.

9 NYCRR § 8000.5(c)(2)(a).

As an alternative to seeking the criminal history report from the Board, any individual may submit a request to New York State Division of Criminal Justice Services (DCJS) to obtain criminal history record information maintained by DCJS. *See* 9 NYCRR §6050.1. The process for a person who is detained or incarcerated in a local or state correctional facility is different, but such a person retains the right to view the same information on an annual basis, without fee, upon identification deemed satisfactory by DCJS. *See id.*

Upon a written request to send a criminal history record directly to a requestor's agent, an incarcerated person can request their own criminal history from DCJS in a signed letter containing identifying information (i.e., name, DOB, DIN, NYSID) and ask that it be forwarded directly to their legal representative. *See* **Appendix**, Request to DCJS for Criminal History Report.

Note that the copy of the report provided to the individual may contain additional information (e.g. proceedings that were adjudicated in the person's favor and sealed) compared to the version of the report that is available to DOCCS, and care should be taken to avoid unnecessary disclosure.

Sentencing Transcript

The Board is required to consider the sentencing transcript. Such will usually be in the parole file and will be provided to the parole applicant or counsel. The Board's failure to consider such may be sufficient to reverse a denial and obtain a de novo review. Failure to Consider Sentencing Transcript

Parole Board Report

The Parole Board Report, aka "Inmate Status Report," is an unnumbered multi page report that DOCCS produces for parole commissioners. It is in essence a summary of your client's parole file and includes a short description of the crime of conviction, the most recent and serious disciplinary infractions, top programming achievements, possible reentry plans and community contacts. The full report is not provided to the parole applicant or counsel, so its full contents are unknown. Subsequent pages may contain "confidential" information, for example, allegations of gang affiliations and other "intelligence information." Another part of the report may be a mental health assessment, which is provided to counsel with an appropriate client waiver.

Comprehensive Medical Summary and Mental Health Status Report

The Comprehensive Medical Summary reports physical health information. We believe it is part of the Parole Board Report. It will be disclosed as part of the parole file with the appropriate releases, though as mentioned in the preceding section, whether this results in full disclosure of the medical health summary is unknown.

The Mental Health Status Report reports mental health status and designates a mental health level.[19]

See DOCCS Directive 2014 II D to obtain medical, mental health and substance treatment records:

> 2. Medical Records: The Board of Parole may consider the medical and mental health of inmates eligible for release to community supervision. Copies of medical records included in the file reviewed by the Board of Parole or at a revocation proceeding may only be accessed if the request is accompanied by a valid signed Health Insurance Portability and Accountability Act (HIPAA) authorization (see 45 C.F.R. §164.524, NYS Public Health Law §18).
>
> 3. Mental Health Records: Typically, mental health records must be requested from the Office of Mental Health. However, when such records or information are provided to the Board of Parole or to a Hearing Officer in revocation proceedings, they may be accessed if a valid signed HIPAA authorization is provided (see NYS Mental Hygiene Law §33.16(b)).
>
> 4. Substance Abuse Treatment Records: Federal law prohibits the release of substance abuse treatment records (see 42 U.S.C. §290dd-2). Access to such records may be granted only if a signed authorization accompanies the request and such authorization conforms with 42 C.F.R. §2.31. DOCCS Form #1080,"Release of Drug and Alcohol Abuse Records," may be utilized.

Also see DOCCS Authorization of Health Release Form.

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[19] DOCCS Directive 4302 explains Mental Health Service Levels:

> Correctional facilities are classified as Mental Health Service Levels 1, 2, 3, 4, or 6 depending on the amount of mental health services and resources available at the facility.
>
> **Level 1:** OMH staff are assigned on a full-time basis and able to provide treatment to incarcerated individuals with a major mental illness or in acute crisis. The array of available specialized services includes: RCTP, residential/day treatment, and medication monitoring by psychiatric nursing staff.
> **Level 2:** OMH staff are assigned on a full-time basis and able to provide treatment to incarcerated individuals with a major mental illness, but such disorder is not as acute as that of incarcerated individuals who require placement at Level 1 facility.
> **Level 3:** OMH staff are assigned on a part-time basis and able to provide treatment and medication to incarcerated individuals who have moderate mental health concerns.
> **Level 4:** OMH staff are assigned on a part-time basis and able to provide treatment to incarcerated individuals who may require limited intervention, excluding psychotic medications.
> **Level 6:** No assigned OMH staff.
>
> Upon reception into DOCCS and throughout incarceration, incarcerated individuals can be referred and assess by OMH staff to determine the amount of mental health services required and are then assigned to facilities where that level of service is available.

"Official Statements" (recommendations from Sentencing Court, DA and Trial Defense Counsel)

Pursuant to Exec. Law 259-i, the Board is required to consider the recommendations of the sentencing court, the District Attorney, and trial defense counsel. *See also* 9 N.Y.C.R.R. §8002.2(d)(7). The Board typically requests recommendations when your client is first received into state DOCCS custody and/or near in time to the first Board review. Therefore, some recommendations will be stale--dating back decades ago, and others will be stale if there have been multiple denials since the first parole review. Usually, the Board never again solicits a recommendation, but sometimes the Board reaches out to these officials leading up to each parole review. The Board refers to the DA and sentencing court recommendations as "official letters" or sometimes "official opposition." The Parole Board Report indicates whether any one or more of these recommendations are in the file. *See* **Appendix**, Parole Board Report.

Until recently, the Board refused to disclose such "official letters," but DOCCS issued a directive in June of 2019 requiring that this material be provided to the parole applicant. Though most prisons appear to be complying, there are still times when disclosure is denied. DOCCS Directive 2014 II (D)(7). If so, contact the deputy superintendent of the facility to enforce compliance with the directive.

Pending the procedural posture of your client's case and facts, and the risk of poking the bear, consider reaching out to the current District Attorney to seek a letter of support. There has been some success with the Brooklyn and Bronx DAs. District Attorney Recommendations | Parole Information Project. The recent change in Manhattan DA may create opportunities as well. Remember that reaching out to any DA office may result in staff pulling a stale file and determining another letter of opposition to the parole board is necessary.

Similarly, pending individual facts and strategy, consider soliciting a letter of support from defense counsel or the trial judge. *See* **Appendix**, Sample Defense Counsel Letter.

Separatee Information

This information is likely part of the "confidential" portion of the Parole Board Report. According to DOCCS' Office of Counsel, "separatee information is essentially an enemy list—it includes the names of inmates who cannot be housed near or with an individual, [and] …any separatee information/list will be withheld in every 8000.5 case for serious safety concerns."

Offender Rehabilitation Coordinator (ORC) Recommended Special Conditions

This multipage document contains a list of conditions the ORC is recommending should the client be granted parole. See **Appendix**, ORC Recommended Special Conditions.

Case Plans--Current and Past

Case Plans are developed by the Offender Rehabilitation Coordinator in "conjunction with the inmate" and are based on the needs indicated by the COMPAS assessment. See DOCCS Directive 8500, IV A (2). Case plans are reviewed in face-to-face meetings quarterly, except when release is more than four years away, a review takes place every other quarter. See IV A (4).

COMPAS Risk Assessment

In 2011, the New York State legislature amended the Executive Law governing parole to require the Board to:

> establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which incarcerated individuals may be released to parole supervision.

N.Y. Exec. Law § 259-c (4). The amendment requires the Board to adopt and utilize an empirically validated risk assessment and to develop procedures for how to use such a tool. To fulfill the requirement set out by the legislature, the Board selected a product called Correctional Offender Management Profiling for Alternative Sanction ("COMPAS") developed by Northpointe Institute for Public Management Inc. COMPAS is administered by an applicant's Offender Rehabilitation Coordinator and currently consists of 74 questions. Answers are tallied and applicants are given a final score of low, medium, or high, supposedly indicating the level of risk they pose to public safety upon release.

Many applicants report that the ORCs who administer the evaluations frequently make mistakes and misreport information, especially regarding an applicant's prior criminal history, disciplinary record, and family support. As ORCs often only give applicants their COMPAS reports days before their Parole Board interviews, there is little time and no formal process for correcting errors. A COMPAS is prepared for every parole review except if the next review is within one year. For more from DOCCS regarding COMPAS, see DOCCS Directive 8500.

For critical evaluations of COMPAS, see A Popular Algorithm Is No Better at Predicting Crimes Than Random People. COMPAS has also been found to be racially biased. Machine Bias — ProPublica; How We Analyzed the COMPAS Recidivism Algorithm

Pursuant to 9 NYCRR 8000.5, DOCCS provides the current and past COMPAS reports to applicants and counsel, but redacts the same portions in every COMPAS, including, for example, questions 29 and 30 under the "Work and Financial" section. It is likely DOCCS is relying on this disclosure exception: "diagnostic opinions which, if known to the inmate/releasee, could lead to a serious disruption of his institutional program or supervision." 9 NYCCRR § 8000.5-c (2)(i)(a)(1). But, that exception requires an individualized assessment that is not taking place.

To identify the category of information that is being redacted, *see* **Appendix**, blank COMPAS obtained via FOIL. Though it was obtained in 2012, it appears to still map onto the COMPAS in use today.

Victim Impact Statements

The Board is required to consider "victim statements," which are "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." Exec. Law §259-i(2)(C)(A). The Executive Law does not prohibit the disclosure of victim impact statements, only the names and addresses. N.Y. Exec. Law § 259-i (2)(c)(B)("Where a crime victim or victim's representative as defined in subparagraph (A) of this paragraph, or other person submits to the parole board a written statement concerning the release of an incarcerated individual, the parole board shall keep that individual's name and address confidential.") Rather than redact such identifying information, however, the Board prohibits disclosure of any portion of victim statements and routinely withholds whether such statements are in the parole file.

The Board relies on 9 NYCCRR 8002.4 to withhold victim statements, which reads: "A written victim impact statement or written report of an oral statement shall be maintained in confidence by the division, unless disclosure to the inmate is expressly authorized by the victim or by court order." It may also rely on 9 NYCCRR 8000.5(2)(i)(a), which reads: "access shall not be granted to those portions of the case record to the extent that they contain... (2) materials which would reveal sources of information obtained upon a promise of confidentiality." The Board promises confidentiality to crime victims. See Office of Victim Assistance - Request for Victim Notification Form.

There is an argument that these regulations are inconsistent with the statute and therefore exceed the Board's authority to promulgate rules pertaining to the confidentiality of records. See Executive Law 259-k(2) ("The board shall make rules for the purpose of maintaining the confidentiality of records, information contained therein and information obtained in an official capacity by officers, employees or members of the board of parole."). An executive agency may not promulgate a regulation that falls outside the scope of the rule making power delegated by the legislature. *See Juarez v New York State Off. of Victim Services*, 169 A.D.3d 52 (3d Dep't 2019) ("an administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute"); *Greater New York Taxi Ass'n v New York City Taxi and Limousine Com'n*, 121 A.D.3d 21 (1st Dep't 2014), affd, 25 N.Y.3d 600 (2015) ("an agency may not act or promulgate rules in contravention of its enabling statute or charter"); *Matter of New York Const. Materials Ass'n, Inc. v New York State Dept. of Envtl. Conservation*, 83 A.D.3d 1323 (3d Dep't 2011) ("an administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute"; *Jones v Berman*, 37 N.Y.2d 42 (1975) ("administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute"). *See also Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) ("We hold that the Public Health Council overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public. While the Legislature has given the Council broad authority to promulgate regulations on matters concerning the public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body. In this instance, the Council usurped the latter role and thereby exceeded its legislative mandate, when, following the Legislature's inability to reach an acceptable balance, the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests. In view of the political, social and economic, rather than technical, focus of the resulting regulatory scheme, we conclude that the Council's actions were ultra vires and that the order and judgment of the courts below, which declared the Council's regulations invalid, should be affirmed."); *New York State Superfund Coalition, Inc. v. New York State Dep't of Environmental Conservation*, 75 N.Y.2d 88 (1989) (finding that a DEC regulation invalid because it "would allow remedial programs to be ordered for all inactive hazardous waste disposal sites, not just those which pose a "significant threat" as targeted by the Legislature.").

In addition to challenging the lawfulness of the Board's practice of not disclosing victim statements, consider moving the Article 78 court for access to the so-called "confidential material." Counsel have had some limited success obtaining such material, which each time revealed that the Board had considered inappropriate information. In the alternative, consider pressing the Article 78 court to review "confidential information" in camera to determine whether it was appropriately included in the parole file. Also note that if the Board relies on confidential information in denying parole, it should be stated in the parole decision. *See* Failure to Disclose Reliance on Confidential Information.

The Board frequently relies on several cases in support of its non-disclosure of victim statements. None are on point. In *Justice v. NYS DOCCS*, 130 A.D.3d 1342, 1343 (3d Dep't 2015), the court upheld a denial of petitioner's request for discovery of the confidential material based on individualized risk factor finding "given petitioner's violent crimes, ongoing mental health issues and previous threats to staff at his prior residence while he was on parole, we find no abuse of discretion in Supreme Court's denial of petitioner's request for access to the confidential documents." And in *Wade v. Stanford*, 148 A.D.3d 1487, 1489 (3d Dep't 2017), the court simply found that the "Board is entitled to designate certain parole records as confidential," without specifying which records.

Opposition Letters and Material

Some clients' cases garner attention from the public, usually generated by victims or their families, or organizational affiliations. This material may include petitions, forms and letters. *See e.g.* NYC PBA - Keep Cop-Killers in Jail.

The Board must disclose such material. *See* DOCCS Directive 2014 II D:

> 6. Community Support/Opposition: Identifying information, such as names and addresses, must be redacted prior to release of such records (see NYS Executive Law §259-i(2)(c)(B)). Any content which identifies the individual or is covered by Section II-B above must be redacted.

The Board's failure to disclose such material to the parole applicant or counsel may result in a reversal. *See* Failure to Disclose the Parole File.

Additional Documents Sometimes in the Parole File

The following forms may be found in parole files and should be disclosed:

- "Inmate Progress Reports" (Work assignment evaluations)
- Past administrative appeal briefs/letters and decisions
- Grievance Reports challenging disciplinary tickets
- Apology Bank Letter(s) DIRECTIVE Apology Letter Bank I. PURPOSE: By policy, the Department does not allow an incarcerated individual to correspond wit
- Program certificates
- Work and Program History ("Inmate Program Assignment History")
- Disciplinary History ("Inmate Disciplinary History")
- Prior Parole Board decisions
- Prior Parole Board interview transcripts
- Proposed Residence Form
- Pre-Release Screening Worksheet
- Commissioner's Worksheet (form filled in by hand by commissioners, then transcribed into a written decision)
- Prior Parole Packet/Submissions (i.e. documents and letters provided by the client, if applicable)
- SORA and SARA forms if applicable
- Domestic Violence Checklist, if applicable
- "Noteworthy Case" Designation

According to an undated Parole Board Training Manual prepared by former Commissioners Lisa Elovich and James Ferguson, then-Transitional Services Director Jennifer Arena, then-Guidance and Counseling Director Joanne Nigro, and then-SORC Laurie Fisher, noteworthy cases are:

> [1] Noteworthy cases included inmates whose instant offense caused the death of a victim who was: Law enforcement (employees of any criminal justice authority); 18 years of age or younger; 65 years of age or older; Tortured; [2] Inmates with multiple victims ("serial killers"); [3] Assault cases involving torture; [3] Assaults on law enforcement employees resulting in SPI; [4] Inmates whose [instant offense] is a sex offense and whose victim was: 18 years of age or younger; 65 years of age or older; Tortured; [5] Sex offenders with a history of repeated sex crimes – "serial rapists or offenders"; [and 6] CMC[20] and non-CMC cases that are noted in the file as generating widespread media attention at the time of the [instant offense].

Remedies for Board's Failure to Disclose Parole File

It is important to preserve inappropriate withholding of portions of the parole file for the administrative appeal and possible Article 78. Pending strategic considerations, these are important issues to litigate. *See* Failure to Disclose the Parole File.

In addition, pending strategic considerations and the procedural posture of the client's matter, the Board's failure to disclose portions of the parole file could be challenged immediately and directly via an Article 78. For example, if the Board withholds portions of the parole file in the context of an administrative appeal, a challenge could be brought immediately via an Article 78 as to that issue only, contending that the "body or officer failed to perform a duty enjoined upon it by law." See CPLR Art 7803(1). And, filing the petition via an order to show cause, *see* CPLR § 403(d), may shorten the Board's time to answer and result in a more rapid decision.

Step One: Administrative Appeal

9 NYCRR § 8006 et seq. governs the standards and procedural requirements for filing an administrative appeal. *See also* DOCCS Directive 8360.

Standard on Appeal

The following questions may be raised on appeal:

> (1) Whether the proceeding and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or was otherwise unlawful;
> (2) Whether the board member or members making the determination relied on erroneous information as shown in the record of the proceeding, or relevant information was not available for consideration;
> (3) Whether the determination made was excessive [i.e. the duration of the hold until the next reappearance was excessive].

[20] According to DOCCS Directive 0701 and 7 NYCRR § 1000, DOCCS designates certain incarcerated persons as Central Monitoring Cases (CMC).

9 NYCRR § 8006.3 (a).

Notice of Appeal and Request for Decision and Interview Transcript

To appeal a parole denial, a "Notice of Appeal" must be filed with the Parole Board's Appeals Unit within 30 calendar days of the applicant's receipt of the decision denying parole. A copy of the Notice of Appeal will most likely be included with the parole decision given to the parole applicant. 9 NYCRR §8006.1(b).

There is no requirement that the form be used; a letter will suffice so long as it meets the requirements of 9 NYCRR §8006.1(d), Be sure to request the parole interview transcript in the letter as well--this is a critical part of the record on appeal. Your notice of appearance can be included in the notice of appeal as well. *See* **Appendix**, Sample Notice of Appearance/Notice of Appeal.

The Board's Appeals Unit does not accept filings via email. Notices of Appeal must be sent to the following address within 30 days of receiving the denial:

New York State Board of Parole, Appeals Unit
Department of Corrections and Community Supervision
Harriman State Campus – Building #2
1220 Washington Avenue, Albany, NY 12226

Note: some clients may complete and send the notice of appeal on their own before assignment of counsel. Also, since there is an ostensible right to representation at the administrative appeal level, some clients may have also requested counsel from the county court in which the correctional facility is located before you receive the case[21]. If 18-B counsel has been assigned, pro bono counsel should notify 18-B counsel that a notice of appearance has been filed and you are taking over the matter.

Notice of Appearance

Counsel is required to file a notice of appearance with the Appeals Unit, which must include the appellant's name and Department Identification Number (DIN) and other information. 9 NYCRR 8006.1(d). The notice of appeal and the notice of appearance may be included in one letter. See **Appendix**, Sample Notice of Appearance/Notice of Appeal.

Once the appearance has been entered, the Appeals Unit takes the position that it will not entertain correspondence from the client. 9 NYCRR §8006.2(d)(e).

Confirming Receipt of Notice of Appeal

Upon receipt of a Notice of Appeal (NOA), the Parole Appeals Unit will send a letter acknowledging receipt, which will include the deadline by which the appeal should be "perfected." If you do not receive this acknowledgment letter within 2-3 weeks after filing the Notice, contact the Appeals Unit at once, to confirm receipt. Do not let 30 days elapse without confirming receipt. 9 NYCRR 8006.1(f).

[21] We say ostensible because access to the right is onerous and results in excessive delay in the filing of the administrative appeal. See DOCCS Directive 8360 III (B).

Request the Parole File and Preserve Non-Disclosure

See Process to Obtain the Parole File for governing law and logistics of how to request the contents of the parole file.

"Perfecting" the Administrative Appeal

Filing Requirements

After the Notice of Appeal has been filed, the appeal must be perfected within four months of filing. NYCRR 9 §8006.2 at (a). This date will be specified in the Appeals Unit's letter acknowledging receipt of the NOA. *Id*. at (b) ("An appeal is perfected by the filing with the appeals unit of an original and two copies of a brief, letter or other written document that shall state the rulings challenged and shall explain the basis for the appeal.").

If an extension of time to perfect the appeal is needed, write the Appeals Unit before the deadline and explain the reason(s) why an extension is needed. *Id*. at (a) (allowing extensions "for good cause shown."). But, before requesting an extension consider that time is of the essence in parole appeals to avoid the risk that the next reappearance will moot the appeal process. It has been our experience that extensions are granted liberally.

"The appeal is perfected by the filing with the Appeals Unit of an original and two copies of a brief, letter or other written document that shall state the rulings challenged and shall explain the basis of the appeal." *Id*. at (b)

"Each appeal will be reviewed and decided on the basis of the written record. A personal appearance and/or oral argument is expressly prohibited." *Id*. at (c)

Exhaustion Requirement

Any issue not raised in the administrative appeal risks being dismissed in a subsequent Article 78 for failure to exhaust administrative remedies. *See, e.g., Matter of Rodriguez v. Coughlin*, 219 A.D.2d 876 (4th Dep't 1995) (holding "this Court has no discretionary power to reach" a Due Process claim not raised in administrative appeal). It is therefore critical that all grounds for appeal and relevant facts are included in the administrative appeal brief. Some courts have gone so far as to hold that an applicant's failure to raise an issue at the parole interview precludes Article 78 review. *Partee v. Evans*, 40 Misc. 3d 896, 901 (Sup. Ct., Albany Cnty, 2013), aff'd, 117 A.D.3d 1258 (3d Dep't 2014) ("Petitioner failed to raise a timely objection during the hearing, and has thus failed to preserve the issue for review."); *Matter of Shaffer v Leonardo*, 179 A.D.2d 980 (3d Dept. 1992) (Petitioner's failure to raise COMPAS error during the interview waived the matter); *Matter of Cox v Stanford*, Index # 228-14 (Sup. Ct. Albany Co. April 18, 2014) (failure to raise alleged COMPAS error at the interview, when the matter could have been corrected, waives the issue).

Strategic Considerations

Pending individual facts and issues, it is worth considering whether taking undue time to prepare an administrative appeal brief makes strategic sense. Few administrative appeals are granted. Therefore, delaying perfection of the administrative appeal delays the filing of the Art. 78 where there may be better odds of obtaining relief. Pending individual circumstances, a "letter" raising "the ruling challenged" and "explaining the basis for appeal" may be sufficient to meet the exhaustion standard. 9 NYCRR §8006.2(b)

Administrative Appeal Remedies and Decisions

After the perfected appeal is submitted, the Board's Appeals Unit reviews the case and issues a "Statement of Appeals Unit's Findings and Recommendation." NYCRR § 8006.4.

The Appeals Unit then sends the paperwork to an "Appellate Panel" of three Parole Board Commissioners who should not have participated in the original decision. Id. at (b) and (d). The Appellate Panel then decides whether to affirm, modify or reverse the parole denial, and will send a final "Administrative Appeal Decision Notice" to both the parole applicant and their attorney. Id. at (i).

If the final decision is at "variance" with the Appeals Unit's findings or recommendation, a statement of reasons for the decision must be annexed. *Id.* at (g), When the determination is reversed or modified, the reviewing commissioners "shall direct the action to be taken." Id. at (h). Except if the commissioners determine that "the time assessment imposed at a release proceeding was excessive, they shall direct a rehearing." *Id.*

If the appeal is successful, meaning three parole commissioners or two out of three reverse the parole denial, a "de novo" or "special consideration" interview will be ordered. The regulations do not speak to whether the de novo should be before commissioners other than those who participated in the defective denial decision. Nor do the regulations specify a time by which a de novo interview must take place, but the authors are not aware of instances of undue delay. The appeal may also result in a reduction in the duration of the "hold" until the next reappearance. The governing regulations do not authorize the Appeals Unit or the Appellate Panel to grant parole at this juncture.

There is no stated deadline for the Appellate Panel to render its final decision. See 9 NYCRR §8006.4(b) (stating that appeals will be considered by three Board members "as soon as practicable"). If, however, the final decision is not made within four months of receipt of the perfected appeal, the appeal decision is "deemed adverse," the administrative remedy is considered "exhausted," and an applicant may move forward with the next phase of the appeal, an Article 78 petition. 9 NYCRR §8006.4(c) ("Should the appeals unit fail to issue its findings and recommendation within four months of the date that the perfected appeal was received, the appellant may deem this administrative remedy to have been exhausted, and thereupon seek judicial review of the underlying determination from which the appeal was taken. In that circumstance, the division will not raise the doctrine of exhaustion of administrative remedy as a defense to such litigation.").

Publishing of Administrative Appeal Decisions

As of November 1, 2018, the Board must publish all administrative appeal decisions online in a searchable database. The Board has slowly begun to comply with the mandate and currently publishes decisions online. But, for reasons unknown, the statute, New York Executive Law Section 259-i (4)(c), requires the public posting of only the administrative Appeals Unit's recommendation, not the actual decision.[22] Recently, the Board has started publishing the recommendations and corresponding decisions.

[22] 259-i (4)(c):

> All board of parole administrative appeal findings and recommendations shall be published within one hundred twenty days of the determination on a publicly accessible website that

Although the proposed legislative bills numbers A. 3053 and S. 3982 required the publishing of "decisions," the language was changed to read "findings and recommendations" in the version that was passed. *See* 2018 Sess. Law News of N.Y. Ch. 44 (S. 7333).

The Parole Information Project has FOIL'd administrative appeal decisions for the years 2019 and 2020, matched them with the corresponding recommendation: Administrative Appeal Decisions | Parole Information Project.

Step Two: Article 78 Petition

The following information is designed to provide you with the broad contours of how to file an Art. 78. The particulars will vary from county to county and, as in all areas of practice, you must consult the law and local court rules carefully. Familiarize yourself with CPLR 7801 et seq., and CPLR Art. 4, CPLR Art. 30 and Art. 22. Siegel's New York Practice is an excellent procedural guide.

In general, Art. 78 (Proceeding Against Body or Officer) is the first level of authority, then Art. 4 (Special Proceedings). Should a procedural issue not be covered by either, then generally the applicable section of the CPLR applies. For example, Art. 78 requires the filing of a petition; Art. 4 states that a petition shall comply with the requirements for a complaint in an action, which brings in Art. 30 (Remedies and Pleadings).

The Art. 78 challenges the parole denial decision, not the administrative appeal decision. Pending individual circumstances and strategy, it is important to frame the 78 as such to avoid a win that results in a remand for a de novo administrative appeal, rather than a de novo parole review. *Matter of Clark v. New York State Bd. of Parole*, 166 A.D.3d 531, 531–32 (1st Dept, 2018).

The grounds for appeal are detailed below, but in general the Art. 78 proceeding raises the "question" whether "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR §7803(3).

Time for Filing--Statute of Limitations

An Article 78 claim may be brought only after the Appeals Unit of the Parole Board denies an administrative appeal or fails to make a final determination within four months. As discussed *supra*, failure of the Board's Appeals Unit to timely render its findings will be treated as a conclusive denial of the appeal for the purposes of filing an Article 78 petition. 9 NYCRR §8006.4(c).

An Article 78 petition must be "commenced" within four months of the date of the administrative appeal final decision. CPLR § 217(1). Commencement is when the petition is filed in court, but it alone is not sufficient to meet the statute of limitations. Service on Respondent and the Attorney

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includes a word-searchable database. The department of corrections and community supervision shall provide electronic or print copies of such findings and recommendations to all correctional facility law libraries on a quarterly basis. Copies of such individual findings and recommendations shall also be made available upon written request to the department of corrections and community supervision. Information which would reveal confidential material that may not be released pursuant to federal or state law shall be redacted from any such website or findings and recommendations.

General, discussed more below, "shall be made not later than fifteen days after the date on which the applicable statute of limitations expires." CPLR 306-b. This is a hard statute of limitations; no extensions or postponements are available.

Although there is no law on this issue, it is probably best to assume that when there is no administrative appeal decision, the 78 statute of limitation clock begins ticking four months after perfecting the administrative appeal. *See* *Ransom v. New York State Division of Parole* 2010-601 (Sup. Ct. Franklin County, J. Feldstein, 2010) (Finding that the SOL runs from 4 months after perfection date, but the petitioner must be accorded some additional time to have known that no administrative decision would be forthcoming).

Strategic consideration: though there is a four-month statute of limitations, as mentioned repeatedly in this manual, time is of essence to avoid the risk of an upcoming reappearance mooting the 78. Therefore, the 78 should be filed as soon after the administrative appeal denial or, in the case of no decision, the four-month mark, as is practicable.

Venue

An Article 78 proceeding is "brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides." CPLR 7804(b). CPLR § 506(b) provides, in relevant part:

> A proceeding against a body or officer shall be commenced in any county within the judicial district where [i] the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or [ii] where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or [iii] where the material events otherwise took place, or [iv] where the principal office of the respondent is located . . . .

Multiple venues may be proper under CPLR §506(b) and strategic thought should be given to determining the optimal venue. For example, to the extent there is a choice as to venue, consider whether binding precedent differs from county to county. For example, *see* Exclusive Reliance on the Nature of the Crime, regarding the split in the appellate division departments as to reliance solely on the nature of the crime.

Article 78 petitions may be filed in any county within the judicial district in which the administrative appeal was decided, *Vigilante v. Dennison*, 36 A.D.3d 620 (2nd Dep't 2007). Or, the district wherein the original parole denial was decided (the commissioners' location during the parole interview or the parole applicant's location at the time of the interview), *Howard v. New York State Bd. of Parole*, 5 A.D.3d 271 (1st Dep't 2004); *Philips v. Dennison*, 41 A.D.3d 17, 23 (1st Dep't 2007); *see also Hines v. State Board of Parole*, 181 Misc 277 (Sup. Ct. 1943), aff'd, 267 A.D. 99 (3d Dep't 1943). Or, the district where the principal office of the respondent is located (Albany), *Vigilante*, *supra*. Or, the district wherein the material events took place.[23]

Thus, any county within the judicial district wherein any of the above events occurred is proper. For example, if the commissioners conducted the parole interview from their office in Poughkeepsie, which is in the 9th judicial district, then Dutchess, Orange, Putnam, Rockland and

[23] Pro se litigants report that despite filing in proper venues, in some counties, clerks automatically send *pro se* Art. 78 petitions to Albany County.

Westchester are proper venues. If your client was in another county at the time of the interview, then there will be other venue options.

The First and Second Appellate Divisions hold that the county of the underlying conviction does not qualify as a "material event." Instead, both courts regard "material events" as the "decision-making process leading to the determination under review." *See Philips v. Dennison*, 41 A.D.3d 17, 23–24 (1st Dep't 2007) (citing *Vigilante v. Dennison*, 36 A.D.3d 620, 622 (2nd Dep't 2007)). Lower court cases holding otherwise pre-date this precedent. *See e.g.* *Crimmins v. Dennison*, 12 Misc.3d 725, 730 (Sup. Ct. N.Y. Cty., Mar. 29, 2006) (finding proper venue in the county of the crime and sentence).

In New York, a defect in venue selection will not result in dismissal; transfer is the common remedy.[24] In Article 78 proceedings, a change of venue is permissible not only when the venue is procedurally incorrect but also for a variety of "discretionary" reasons (i.e., to ensure an impartial trial, to offer convenience for witnesses). Therefore, the Board may move to change venue on several grounds per CPLR §510,[25] but it must first serve, upon petitioner, a demand. See CPLR §511.[26] The Board has on occasion argued that Albany is the only proper venue since the final decision being appealed is the administrative appeal denial. This position has no case law support.[27]

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[24] Siegel § 116.

[25] CPLR §510 reads:

> The court, upon motion, may change the place of trial of an action where:
> 1. the county designated for that purpose is not a proper county; or
> 2. there is reason to believe that an impartial trial cannot be had in the proper county; or
> 3. the convenience of material witnesses and the ends of justice will be promoted by the change.

[26] CPLR §511 reads in part:

> Demand for change of place of trial upon ground of improper venue, where motion made. The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

[27] *Cooper, v. New York State Division of Parole*, No. 0400576/2007, 2007 WL 2175515 (N.Y. Sup. Ct. May 25, 2007) ("The court notes, however, that many courts have accepted the argument Petitioner currently propounds: that Respondent is forum shopping by attempting to transfer venue in all Article 78 parole denial cases to Albany County, where it has received overwhelmingly favorable decisions. *See Crimmins v. Dennison*, 12 Misc. 3d 726 (Sup. Ct. N.Y. County 2006); *see also* Caher, John, "Decisions Split on Right Venue for Parole Cases," 5/15/2006 N.Y.L.J. p. 1, col. 3 (noting that "at a recent hearing (*Matter of William R. Phillips*, 103509/06,) Justice Marcy S. Friedman referred to the 'recent spate of decisions to transfer Article 78 proceedings challenging parole board determinations to Albany' and said that to the extent that they 'reflect an attempt to judge shop, that attempt should not be condoned by the Court.' ") *See also*, *Bros. of Mercy Nursing & Rehab. Ctr. v. De Buono*, 237 A.D.2d 907, 908, 654 N.Y.S.2d 921 (1997) ("With respect to respondents' contention that, as a matter of public policy, the proceeding should be in Albany County,

Petition Filing Documents

An Art. 78 petition may be filed by notice of petition or by order to show cause (OTSC). The OTSC method is used if there is a need for expedited review. The filing requirements vary from county to county. For example, some counties require NYSCEF. The information below provides the broad contours of the process but do consult the court rules and clerks as to county specifics.

In general, certain documents must be filed with the court to obtain an index number. Upon assignment of an index number, respondent (the Board) and the Attorney General must be timely served. Assignment of an index number may take one or more days after the filing of a petition, pending the county.

The list of required documents includes:

Notice of Petition

A Notice of Petition advises the respondent that an Article 78 petition is being filed and identifies all papers upon which the Article 78 challenge is based.

The Notice includes a return date. Petitioner selects a return date at least 20 days after service which provides respondent 15 days to answer and petitioner one day to reply. CPLR §7804(c).

Order to Show Cause

When time is of the essence, an Art. 78 may be brought on by an Order to Show Cause.

An OTSC seeks an order, usually ex parte, that specifies a form of service[28] or time of service that varies from the general rule governing a Notice of Petition. It is often used to shorten the time within which the Board must answer. An Order to Show Cause must include an "Affidavit in Support of Order to Show Cause." *See* CPLR §7804(c); §2214(d); Seigel at §248

If the OTSC is signed by the 78 court, then it serves as a notice of petition and is served on the respondent with the verified petition and all filings in support.

Verified Petition

A petition is a pleading and thus must conform to a complaint in an action. CPLR §402. A pleading must conform to CPLR §3013 and §3014.

§3013 requires that "statements in a pleading shall be sufficiently particular to give the court and parties notice of transactions, occurrences...intended to be proved and the material elements of each cause of action or defense."

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we note that numerous Medicaid reimbursement cases have been litigated in counties other than Albany during the past 20 years, including counties within the Fourth Judicial Department. Additionally, there is no proof that an evidentiary hearing will be required in this proceeding and thus the convenience of witnesses is not a factor.").

[28] *People ex rel. Williams v Smith*, 2015 WL 10793930, at *1 (Sup Ct, NY County 2015) (citing *Alevras v. Chairman of New York Bd. of Parole*, 118 AD2d 1020, 1021 (3d Dept 1986)) (holding that courts are "afforded some flexibility regarding service" and recognizing that "relaxation of the rules respecting service of process to enable prison inmates to obtain jurisdiction" may be appropriate.").

§3014 requires, in part, that "every pleading shall consist of plain and concise statements in consecutively numbered paragraphs, and each paragraph shall contain, as far as practicable, a single allegation."

Since the Board is required to answer each single allegation, and its failure to do so may have consequences, adherence to this rule has strategic advantages. *See e.g. Dahlstrom v. Gemunder*, 198 N.Y. 449, 454 (1910) (Respondent may not "close his eyes and ears for the purpose of avoiding knowledge and information."); Practice Commentary CPLR 3018:3 (Where "the fact alleged is something the court feels the defendant must know first-hand, one way or the other, a denial upon information and belief will not do."); 84 N.Y. Jur. 2d Pleading § 138 ("Where the defendant has personal knowledge of the facts alleged, however, a denial based on lack of information or knowledge is inappropriate."); *Gilberg v. Lennon*, 193 A.D.2d 646 (2d Dep't 1993) ("to the extent the portions of the answer constitute improper denials, they may be deemed admissions"); Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 544 (1975) ("Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted").

An Article 78 petition must be verified and it must conform to "a complaint in an action identifying the parties, the basis for the location that was selected, the facts of the case, the legal claims, and the relief sought. CPLR § 3017. Either petitioner must verify the truth of the contents of the petition via a signed and notarized verification CPLR §3020 (a)(d) *See* **Appendix**, Sample Client Verification; or, in the alternative, the petition may be verified by counsel if petitioner and counsel do not live in the same county. CPLR §3020(d)(3). *See* **Appendix**, Sample Attorney Verification.

Exhibits may support the petition. CPLR §3014 ("A copy of any writing which is attached to a pleading is a part thereof for all purposes.")

Memorandum of Law in Support

A memorandum of law may be filed separately, or as a designated legal argument section of the petition.

Filing fee/In Forma Pauperis Motion/No Fee Authorization Affirmation

There is a filing fee of $305. If petitioner is unable to afford the filing fee, counsel may move for petitioner to proceed as a "poor person." CPLR §1101(a). This may result in an order permitting a reduced filing fee between $15- $50 or zero pending the county of filing. Some counties require a notarized client statement as to assets; others accept an attorney statement pursuant to CPLR §1101(b).

In the alternative, if counsel is part of a "nonprofit organization which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such ...organization all fees...shall be waived without the necessity of a motion…" CPLR §1101(e). *See* **Appendix**, CPLR 1101(e) Affirmation.

Request for Judicial Intervention (RJI)

A judge will not be assigned to the case unless an RJI is submitted with the filing of the Notice of Petition/OTSC, petition and supporting documents. Counties apply different rules regarding RJIs, so check that all requirements have been met with the court clerk. A fillable PDF may be found here: RJI Forms (Request for Judicial Intervention)

Service on Respondent (Parole Board) and Attorney General

To meet the four-month statute of limitation, service must be completed within four months and 15 days of the administrative appeal decision. CPLR §306-b.

After filing the necessary documents with the supreme court, within a day or longer a court clerk will assign an index number (and may assign a judge at the same time). The notice of petition (or signed OTSC), verified petition and supporting documents may now be served on respondent and the Attorney General with the inclusion of the index number.

Article 78 requires service on respondent and "upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which of the proceeding is designated, or if there is not an office of the attorney general within such county, at the office of the attorney general nearest such county." CPLR §7804-c. The index number, filing date and return date must be present on the front page of each document for proper service.

If the petition was filed by notice of petition, then service must be completed 20 days before the return date, CPLR §7804, and the mode of service is governed by CPLR Art. 3. As to the Attorney General, *see* CPLR § 312-A.

If the petition was filed by OTSC, service must be completed by the manner and date on the Order to Show Cause.

Filing Proof of Service

Once service is made, proof of that service must be filed with the court. *See* CPLR §306.

Respondent's Answer

The Board, through its counsel, the Attorney General, is required to file and serve an answer and all attached documentary evidence no later than five days before the scheduled return date. CPLR §7804(e).[29] The Attorney General may seek petitioner's consent for additional time to answer. While it is very likely the court will grant such a request with or without petitioner's consent, we recommend you oppose the first request unless the AG will stipulate that no further requests for extension of time will be made and push back on any extension more than a few weeks. Otherwise, long extensions and successive requests will cause delays that risk an upcoming reappearance mooting the petition.

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[29] CPLR §7804(e) reads:

> (e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. The court may order the body or officer to supply any defect or omission in the answer, transcript or an answering affidavit. Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted

The Board is required to file with its answer "a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court." CPLR §7804 (e). Therefore, there is an argument that the Board should include the entire parole file with its answer. *See Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp*., 30 Misc. 3d 616, 627, (Sup. Ct. NY Cty. 2010) (finding respondent ESDC had an obligation to furnish the court with a complete and accurate record of the proceedings.); *Matter of Bellman v McGuire*, 140 AD2d 262, 265 (1st Dept 1988) (holding that "CPLR §7804 (e) . . . requires the respondent in an article 78 proceeding to submit a complete record of all evidentiary facts").

If the Board does not include a complete record, consider demanding such in the reply. Alternatively, consider moving for discovery, though disclosure in special proceedings is by leave of court for good cause pursuant to CLPR § 408. *See* Discovery.

Should the Board fail to adequately answer any one or more of the petition's statement of facts, there is an argument that such statements should be deemed admitted. *See* Gilberg v. Lennon, 193 A.D.2d 646 (2d Dep't 1993) ("to the extent the portions of the answer constitute improper denials, they may be deemed admissions"); Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 544 (1975) ("Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted"); Sellitti v. Acrish, 580 N.Y.S.2d 503, 505 (3d Dep't 1992); Seigel's New York Practice, 6th Ed. § 221, 532 ("Denials must be made in good faith.").

Respondent may move to dismiss in lieu of an answer. *See* CPLR §7804(f)'s (allowing a motion to dismiss to be made "within the time allowed for an answer.").

Petitioner's Reply

Petitioner's reply must be submitted to the court and served on the respondent no later than one day before the return date. CPLR §7804(c). Since the Board is known to answer with outlandish claims and arguments, a reply is usually necessary. If the answer contains allegations of fact not addressed in the petition, they should be addressed or risk the court deeming such facts as true. Although time is of the essence, consider seeking an extension of time to file a reply if necessary to properly address the Board's answer.

Discovery

A request for discovery in a special proceeding is governed by CPLR § 408.[30] Discovery is permitted only upon leave of court and a showing of need.

> Because special proceedings are summary in nature, discovery should not be granted unless the movant's need for discovery outweighs opposing interests in

[30] CPLR 408 reads:

> Leave of court shall be required for disclosure except for a notice under section 3123. A notice under section 3123 may be served at any time not later than three days before the petition is noticed to be heard and the statement denying or setting forth the reasons for failing to admit or deny shall be served not later than one day before the petition is noticed to be heard, unless the court orders otherwise on motion made without notice. This section shall not be applicable to proceedings in a surrogate's court, nor to proceedings relating to express trusts pursuant to article 77, both of which shall be governed by article 31.

> expediency and confidentiality. The discovery, therefore, must be necessary and must not cause undue delay.

Practice Commentary, McKinney's N.Y. C.P.L.R. 408, citing *Bramble v. New York City Dep't of Education*, 2015, 125 A.D.3d 856, 4 N.Y.S.3d 238 (2d Dep't). The standard is as follows:

> In a summary proceeding in which a petitioner moves for disclosure under CPLR 408, the pertinent criteria for consideration include, inter alia: (1) whether the petitioner has asserted facts to establish a cause of action; (2) whether a need to determine information directly related to the cause of action has been demonstrated; (3) whether the requested disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice.

Lonray, Inc. v. Newhouse, 229 A.D.2d 440, 440–41, 644 N.Y.S.2d 900, 901 (1996) citing *New York Univ. v. Farkas*, 121 Misc.2d 643, 468 N.Y.S.2d 808; *Plaza Operating Partners v. IRM [U.S.A.], Inc*., 143 Misc.2d 22, 539 N.Y.S.2d 671.

Requesting discovery in the Art. 78 is not typical and Respondents will likely oppose the motion. Therefore, in addition to requesting the entire parole file, consider arguing for disclosure of specific documents based on your client's facts. For example, if the Board cited opposition material, discovery of this material is necessary to determine whether it contains penal philosophy or inaccurate information and to determine the extent to which the Board relied on same.

Discovery is also an avenue to requesting documents that are not in the parole file, such as victim impact statements. If disclosed, victim impact statements are generally only reviewable by counsel and cannot be shared with your client.

Consider that a demand for discovery will delay the resolution of the case. If the Art. 78 case is pending at the time of your client's parole reappearance, respondent will likely move to dismiss the appeal as moot. *See* Need for Speed--Risk of Dismissal on Mootness Ground for more on this issue.

Article 78 Remedies

If an Article 78 petition is successful, the judge will grant a de novo or new interview, also known as a "special consideration" interview. Judges may, and typically do, order the date by which the next interview must take place and whether certain commissioners are to be excluded. The judge may set other conditions in line with the decision, but typically Art. 78 courts issue a general order requiring that the de novo review be conducted in compliance with the applicable statutes and regulations. Strategically, consider whether to advocate more specificity in the decision and order.

Pending client-specific strategy, consider including a proposed order when filing your petition to better assure that should the petition be granted, a new review is ordered under specific conditions that will remedy the prior errors. It has been our experience that some Art. 78 decisions granting a de novo review are less than clear as to how the review should be conducted. This will avoid ambiguity and provide a stronger record should it be necessary to move for contempt if the Board fails to abide by the de novo review conditions.

There are, unfortunately, numerous decisions holding that an Article 78 court does not have the power to order release and its power is limited to ordering annulment of the denial and a new review. Yet, the reasoning for such holdings is scant. *See Kellogg v. New York State Bd. of Parole*, 159 A.D.3d 439, 442 (1st Dep't, 2018) (affirming Art. 78 court's grant of the petition, but reversing order to release); *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016) ("[w]hile the court is empowered to determine whether the administrative body acted arbitrarily, it may not usurp the administrative function by directing the agency to proceed in a specific manner, which is within the jurisdiction and discretion of the administrative body in the first instance.")

When, however, a denial is annulled as arbitrary and capricious– rather than annulled based on a violation of positive law, wherein the court orders a remand to go back and do it the right way– release should be a remedy. *See Marino v. Travis*, 13 A.D.3d 453, 454 (2nd Dep't 2004) ("The petitioner has now appeared before the Parole Board on three subsequent occasions. Each time, release on parole has been denied for the reasons stated above, without new or additional relevant evidence, or any other submission in support of the determination. There was evidence that the petitioner was placed in a work release program in which he successfully participated. The petitioner commenced this proceeding pursuant to CPLR article 78 to challenge the Parole Board's latest denial of release on parole. The Supreme Court, finding the determination was irrational bordering on impropriety, directed that the petitioner be released on parole. We affirm… As noted, we previously found that the Parole Board's determination was irrational bordering on impropriety. Consequently, the Parole Board should not thereafter have denied the petitioner release on parole based on the same reason without specifying new or additional relevant evidence in support of the determination. Rather, by the plain language and mandate of Correction Law § 805, the petitioner should have been released to parole.").

In *Ruzas v. DOCCS*, an unpublished Dutchess County Article 78 decision, Judge Grossman called for a reexamination of the Article 78 court's power to fashion a remedy other than de novo review. *See* *Ruzas v. Stanford*, No. 1456/2016, at *7 (Sup. Ct. Dutchess Cty., Oct. 18, 2017) (unpublished op.).

There are cases upholding an Art. 78 court's power to grant the relief sought at the administrative level, albeit in non-parole contexts. *See e.g. Pantelidis v. NYC Board of Standards and Appeals*, 10 N.Y.3d 846 (2008).

This is an area of administrative law that could use some careful research to determine if there are bases to challenge this long-held conclusion. Might deference to the administrative agency not apply in the context of deprivation of liberty? Applicable case law could include: *Matter of Hines v. State Board of Parole*, 293 NY 254 (1944); *Matter of King v. New York State Div. of Parole,* 83 N.Y.2d 788 (1994); *Friedgood v. New York State Bd. of Parole*, 22 A.D.3d 950, 802 N.Y.S.2d 268 (3d Dep't,2005*); Quartararo v. New York State Div. of Parole*, 224 A.D.2d 266 (1st Dep't 1996); *Brunner v.. Russi*, 182 A.D.2d 1136 (4th Dep't 1992); *Matter of Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 29 (1st Dept. 2016); *Matter of Newton v. Dennison*, 47 A.D.3d 538 (1st Dept. 2008).

For additional arguments in support of an Art. 78 court's power to order release *see* Art. 78 Petition - FUSL000094 (2021-05-27) | Parole Information Project.

Step Three: Appellate Division Appeal of Article 78 Decision

Appeal by Petitioner

Denials of Article 78 petitions are relatively common at the Supreme Court level. An adverse ruling may be appealed to the appropriate appellate division. To appeal, a Notice of Appeal must be served upon the New York State Attorney General and filed with the Supreme Court that decided the case within thirty days of the entry of judgment denying the Article 78 petition.

Petitioner has an appeal as of right since the denial or dismissal of an Art. 78 is a judgment, not an order. *See* §CPLR 5701 (a)(1) and §7806. An order in an Art. 78 proceeding is a ruling that does not finally determine the merits.

In general, if the appeal challenges factual findings of the lower court, those factual findings are reviewed for clear error, but if the material facts are not disputed and the appeal challenges the Art. 78 Court's legal rulings based on those facts, the legal rulings are reviewed de novo, without deference to the lower court's findings. For the most part, appeals to the Appellate Divisions from Article 78s are challenging legal conclusions made by the lower court, and so it is rarely appropriate for the Appellate Division to afford any deference to the lower court's Article 78 decision.

The next reappearance may be scheduled while the Appellate Division appeal is pending, in which case, Respondent will likely file a motion to dismiss on mootness grounds. For guidance on opposing such a motion, *see* Need for Speed--Risk of Dismissal on Mootness Ground.

Appeal by Respondent

Should the Art. 78 be granted, the Board may appeal. If so, the Board's practice is to file a notice of appeal as of right and invoke an automatic stay pursuant to CPLR §5519(a). Unlike an appeal by Petitioner, however, there is an issue whether the Board may appeal as of right or must seek leave to appeal. The relevant inquiry is whether the Article 78 decision is a "final judgment" of the kind described in CPLR §5701 (a)(1) and §7806, and accordingly appealable as of right to the Appellate Division. Or, is it a CPLR §5701 (b)(1) intermediate order in an article 78 proceeding, in which case the Board must seek leave to appeal. There is precedent in other contexts strongly supporting the argument that an Art. 78 order annulling the Board denial and ordering a de novo parole review is not a final decision since it does not grant or deny parole. *See* **Appendix,** Memorandum of Law in Support of Motion to Dismiss Respondent's Appeal. But, to date no appellate division has directly determined this issue in the parole context.

Should the Board appeal a favorable Article 78 decision and invoke the automatic stay, consider moving to dismiss the appeal for failure to seek leave and/or seek an expedited appeal. But, even an expedited appeal will be difficult to litigate before the next reappearance before the Board.

In addition, should the Board appeal, consider engaging in negotiations with Solicitor General attorneys, who represent the Board in an appeal, to determine which conditions of the decision are of concern to the Board. On occasion, the Board may be convinced to withdraw the notice of appeal if petitioner agrees to a de novo with modified conditions. *See* **Appendix,** Settlement Agreement for Dismissal of Respondent's Appeal.

Each department of the appellate division has its own procedural rules, which are often quite complicated and will not be further explored in this manual.

Common Grounds for Appeal of a Parole Denial

Returning to the original appeal, this section discusses the grounds that can be raised in the appeal. What follows is not an exhaustive list, and you may raise additional grounds in your appeal.

Standard of Review in General

As with most administrative agencies, the courts are highly deferential to the Parole Board, and require much to disturb their findings. Given this discretion, a Court will only annul a denial of parole when it is "arbitrary and capricious," and "irrational bordering on impropriety." *Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69 (1980) ("In light of the board's expertise and the fact that responsibility for a difficult and complex function has been committed to it, there would have to be a showing of irrationality bordering on impropriety before intervention would be warranted.") Decisions of the Board of Parole are discretionary and will be upheld so long as the Board complied with the statutory requirements. Executive Law § 259–i. *Perea v. Stanford*, 149 A.D.3d 1392, 53 N.Y.S.3d 231 (3d Dep't 2017). ("Here, the Board considered the proper statutory factors, including the serious nature of petitioner's crime and his criminal history, prison disciplinary record, program accomplishments and post-release plan, as well as the COMPAS Risk and Needs Assessment instrument and the sentencing minutes … the Board also considered the order of deportation issued against him in rendering its decision."); *Campbell v. Stanford*, 173 AD3d 1012, 1015 [2d Dept. 2019], leave to appeal dismissed, 35 NY3d 963 (2020) ("It is well settled that judicial review of a determination of the Parole Board is narrowly circumscribed. A Parole Board determination to deny early release may only be set aside where it evinces irrationality bordering on impropriety. Although the Parole Board is required to consider the relevant statutory factors as identified in Executive Law §259- i(2)(c)(A), it is not required to address each factor in its decision or accord all the factors equal weight. Whether the Parole Board considered the proper factors and followed the proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript.").

The Board frequently cites to *Hamilton v New York State Div. of Parole* (119 AD3d 1268 [3d Dept 2014]), which held, "so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts." (quoting *Matter of Hines v State Bd. of Parole*, 293 NY 254 [1944].)

Despite this difficult standard, courts grant Art. 78 challenges, and there are numerous grounds, and more to be developed, to challenge parole denials.

Failure to Explain Denial of Parole in Detail

The Board has certain obligations if it denies parole. First, pursuant to Executive Law 259-i(2)(a):

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

Therefore, a decision that "summarily listed petitioner's institutional achievements and then denied parole with no further analysis of them," is not sufficient. *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016). Boilerplate language will not suffice. *See In re Ciaprazi v. Evans*, 52 Misc.3d 1212(A) (Sup. Ct., NY Cnty, 2016) ("A plain and fair reading of the

respondent's decision to deny parole leads to the inescapable conclusion that it is a simple regurgitation of standard boilerplate parole board denial language.").

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 a 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.")

Lackwood v. NYS Board of Parole (Sup. Ct. Dutchess Cnty, 2018) (finding that Board failed to give any explanation how it balanced the crime and criminal history against other statutory factors).

The Board must provide insight into how it reached its decision, instead of merely listing the factors it considered. *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").

Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision, 40 Misc.3d 226 (Sup. Ct. Columbia Cnty, 2013) ("the 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.' … the 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.'"); Matter of Mitchell v New York State Div. of Parole, 58 AD3d 742, 742-43 (2d Dept 2009 (must give statutory factors adequate consideration).

Sullivan v. NYS Bd of Parole, 100865/18 (S. Ct., NY Cnty, 2019) "Decision in CPLR Article 78 proceedings - Sullivan, Veronica (2019-01-" ("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.").

Platten v. NYS Bd. of Parole, 47 Misc. 3d 1059, 1064 (Sup. Ct. Sullivan Cnty. 2015) (finding failure to explain reason for denial in detail: "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 in 2014.")

Rivera v. Stanford, 172 A.D.3d 872, 874(3d Dep't 2019) ("While the Parole Board noted that the petitioner had incurred more than 30 disciplinary violations while imprisoned since the 1980's, the Parole Board did not discuss the history of these violations or explain how these violations, many of which were decades old, had a bearing upon its determination that the petitioner's request for release was not compatible with the welfare of society.").

O'Connor v. Stanford, 54/2021 (Sup. Ct., Dutchess Cnty, J. Rosa, 2021) ("Although the Decision herein is lengthy and contains information about the factors that the Board considered, the reasons for its denial are not set out with sufficient detail to allow for intelligent appellate review.")

Phillips v. Stanford, 52579/19 (Sup. Ct., Dutchess Cnty, 2019 J. Rosa) ("It is not the function of this court to review the record to determine whether or not it, taken as a whole, would lend rational support to the Board's final determination. The Board is obligated to articulate facts underlying its ultimate determination to enable this court to review whether it rationally applied those facts to the requisite statutory factors. The Board in this case failed to articulate such facts and thus its decision lacks a rational basis While there may be factors in the record supporting its ultimate determination, it is the obligation of the Board to state those facts and its reliance thereon in its decision.")

Failure to Explain Departure from COMPAS Score(s)

In 2011, the New York State legislature mandated that the Board establish a more forward-looking approach to parole by requiring the Board to:

> establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which incarcerated individuals may be released to parole supervision

N.Y. Exec. Law § 259-c (4).

DOCCS purports to fulfill this requirement by use of a risk assessment product called COMPAS, which is explained at COMPAS Risk Assessment.

In 2017, the Board adopted regulations that require:

> 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). These revisions became effective in September of 2017.

Failure to perform a risk and needs assessment, such as COMPAS, as required by the regulatory scheme, is grounds for a de novo interview. *Malerba v. Evans*, 109 A.D.3d 1067 (3d Dep't 2013); *In re Garfield v. Evans*, 108 A.D.3d 830 (3d Dep't 2013).

The Board must also qualitatively consider the risk and needs assessment, and there must be evidence of consideration. *Diaz v. New York State Bd. of Parole*, 42 Misc.3d 532 (Sup. Ct. Cayuga Cnty. 2013) ("[T]here is no indication in the parole hearing minutes, the Board's decision, or anywhere else in the record that the commissioners charged with weighing Petitioner's release even viewed, much less considered, the COMPAS risk assessment in making their determination … The mere existence of a COMPAS risk assessment in an inmate's file, as here, is not enough. There must be some indication that the Board complied with the statute by considering the results of the COMPAS in reaching its decision.")

George Hill v. New York State Board of Parole, 2020 WL 6393881 (N.Y.Sup.) (Finding "the Board failed to articulate the reasons for this determination with respect to Mr. Hill's low COMPAS Risks

and Needs Assessment scores or to 'provide an individualized reason for this departure,' in accordance with 9 NYCRR 8002.2.5 The Board's failure to consider this assessment is relevant in light of petitioner's remorse, accomplishments in prison, his skills, release plans and positive scores on his COMPAS Risk Assessment.")

Comfort v. Stanford, 2018/1445 (Sup. Ct. Dutchess Cnty) (finding the Board did not comply with 8002.2(a) by failing to explain its departure from the lowest possible COMPAS risk scores of felony violence, arrest and absconding yet concluding that there was a reasonable probability the petitioner would not live and remain at liberty without violating the law.)

Diaz v. Stanford, 2017/53088 (Sup. Ct. Dutchess Cnty 2018) (noting the upcoming changes in the regulations and finding the denial decision did not explain the stark contrast between the COMPAS scores and the Board's conclusion.)

Miranda, Javier v. NYS Parole Board, 150995/2020 (Sup. Ct., NY Cnty. 2020) (finding Board's departure from COMPAS was adequately explained).

Voii v. Stanford, Index No. 50485/2020, at 6-7 (Sup. Ct. Dutchess Cty. May 13, 2020) (holding that the Board's identification of the scale from which it departed as being due to the "tragic reckless nature of the crimes themselves" did not satisfy the requirement for "individualized reason" under 9 NYCRR § 8002.2.)

Robinson v. Stanford, No. 2392/2018, at *2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) (ordering de novo interview for man with two murder convictions and low COMPAS scores because "the Parole Board's finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores in his COMPAS assessment. As the Board's determination denying release departed from these risks and needs assessment scores, pursuant to 9 NYCRR § 8002.2 it was required to articulate with specificity the particular scale in any needs and assessment from which it was departing and provide an individualized reason for such departure. The Board's conclusory statement that it considered statutory factors, including petitioner's risk to the community, rehabilitation efforts and needs for successful community re- entry in finding that discretionary release would not be compatible with the welfare of society fails to meet this standard. As such, its determination denying parole release was affected by an error of law.")

Phillips v. Stanford, 52579/19 (Sup. Ct., Dutchess Cnty, 2019 (J. Rosa) (Finding that Board's decision that release would be incompatible with the welfare of society directly contradicted lowest COMPAS scores in risk of felony violence, re-arrest, absconding, criminal involvement and unlikelihood of issues with family support or significant financial problems upon release. "The Board was thus required to articulate with specificity the particular scales in petitioner's COMPAS assessment from which it was departing and provide an individualized reason for such departures. The Board's conclusory statement that it considered statutory factors, including his institutional adjustment, discipline, program participation and needs for successful re-entry in finding that the discretionary release would not be compatible with the welfare of society fails to meet this standard.")

Stokes v. Stanford, Slip Op. 50899(U), at *2 (Sup. Ct. Albany Cty. June 9, 2014) ("In petitioner's interview with the Board, it made note that there were no negatives in his prison disciplinary history since his last appearance, he has made positive efforts towards his rehabilitation, including obtaining his GED, done vocational training, ART, ASAT, Phase I, II and III, would be living with his wife if released, and that his COMPAS risk reveals he is at low risk for violence, re-arrest or absconding. However, and in stark contrast, in its determination the Board denied parole release

based only upon the finding that petitioner committed murder during a robbery, and that his plea to the murder charge resolved three pending robberies. The determination simply fails to make any analysis of the steps toward rehabilitation, or his post-release plans, and why and how those factors were dismissed.")

Rossakis v. N.Y. State Bd. of Parole, 146 A.D.3d 22 (1st Dep't 2016). ("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.")

But see *Bailey v. New York State Dep't of Corr. and Cmty. Supervision*, Index No. 53704/2019, at 8-9 (Sup. Ct. Dutchess Cty. 2020) ("Nothing in 9 NYCRR §8002.2(a) requires a Board, in denying parole, to explain each COMPAS category where a petitioner receives a low score. Otherwise, every Board that denies parole would have to provide an individualized reason for every low COMPAS score. The plain language of the regulation requires an explanation for a departure from a scale. For example, if the COMPAS instrument has a low score on "abscond risk" and the Board disagrees, then the Board must provide an individualized reason.") The court in *Bailey* also held that despite having scored low on 11 out of 12 COMPAS categories, because the petitioner scored "highly probable" for re-entry substance abuse, there was no departure from the scale and therefore denied the petition. *Bailey*, at 9, n. 7.

Failure to Consider Statutory Factors

Although the Board is "not required to give equal weight to each of the statutory factors" it must consider every factor. *Fischer v. Graziano*, 130 A.D.3d 1470 (4th Dep't 2015) (While the Board is required to consider each applicable statutory factor, "the Board is 'not required to give equal weight to each of the statutory factors' but, rather, may 'place...greater emphasis on the severity of the crimes than on the other statutory factors.'"); *Peralta v. N.Y. State Bd. of Parole*, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dep't 2018); *Moore v. N.Y. State Bd. of Parole*, 137 A.D.3d 1375 (3d Dep't 2016).

Cappiello v. N.Y. State Bd. of Parole, 6 Misc.3d 1010A (Sup. Ct., NY Cnty, 2004) (finding there was no indication in the record as to whether the commissioners had read materials supporting parole release or considered them in any way, and holding: "When the record of the Parole hearing fails to convincingly demonstrate that the Parole Board … qualitatively weigh[ed] the relevant factors in light of the three statutorily acceptable standards for denying parole release, the decision is arbitrary and capricious.")

Johnson v. N.Y. State Div. of Parole, 65 A.D.3d 838 (4th Dep't 2009) ("the record is devoid of any indication that the Parole Board in fact considered the statutory factors that weighed in favor of petitioner's release … In fact, during the notably truncated hearing, the Parole Board focused on matters unrelated to any statutory factor.")

Pulinario v. N.Y. State Dep't of Corr. & Cmty. Supervision, 42 Misc.3d 1232(A) (Sup. Ct. NY Cty, 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 Pulinario's favor.")

Coaxum v. N.Y. State Bd. of Parole, 14 Misc.3d 661 (2006) holding "actual consideration of factors means more than acknowledging that evidence of them was before the Board."

Sullivan v. NYS Bd of Parole, 100865/18 (Sup. Ct., NY Cty, 2019) ("The decision refers only fleetingly to petitioner's overwhelmingly positive submissions, her plans upon release, and her COMPAS score, the latter of which predicted a low probability of recidivism; and, it doesn't explain how these factors weighed in the parole denial decision.")

Failure to Explain How Applicable Factors were Considered

The Board must do more than explain its reasons for denial of parole in detail. Pursuant to a 2017 revision of the regulations the Board, when denying parole, must comply with the following:

> Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual's case.

9 NYCRR 8002.3 (b).

The prior regulation limited the obligation of explanation to the reasons for the denial. *See* 9 NYCRR 8002.3 (d) ("Reasons for denial. If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview of the decision denying him or her parole and the factors and reasons for such denial. Such reasons shall be given in detail and not in conclusory terms."). Thus, in the prior iteration of the regulation, the Board needed only to explain the factors that explained the denial—i.e. the factors and reasons for such denial. In contrast, the 2017 revision requires an explanation of the applicable factors, whether or not the factor was used to deny parole.[31]

Precedent finding otherwise arguably does not control. *See e.g. King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) ("…a Parole Board need not expressly discuss each of these guidelines in its determination."); *Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 672–73 (2d Dep't 2018) (Board "is not required to address each factor in its decision."); *Campbell v. Stanford*, 173 A.D.3d 1012, 1014, 105 N.Y.S.3d 461, 463 (2d Dep't 2019) (same). Although both *Coleman* and *Campbell* were decided after the 2017 revisions became effective, the denial decisions on appeal were made before the regulation came into effect. In *Coleman*, the denial decision on review was made in 2016, as was the decision appealed from in *Campbell*. And, in each decision, the 2017 regulation was not raised by the petitioner nor examined by the court. By the plain language of the Board's own regulation, parole denial decisions made after September 2017 require the Board to address how it considered the applicable factors.

But see *Byrdsong v. Board*, 2020-54062 (Sup. Ct. Dutchess Cnty, J. Acker, 2021), which finds otherwise:

> Although the 2017 Amendment clearly requires that additional detail be provided in any parole denial, as discussed below, said amendment does not otherwise

[31] *See also* the Parole Board's 2016 Proposed Rule Making: "Finally, in 8002.3, if the Board decides to deny release to Community Supervision, the Board shall provide individualized factual reasons stated in detail as to why, addressing the applicable factors in 8002.2. The benefit of this will be that the Board will conduct more thorough interviews and produce more individualized, detailed decisions in instances where release to Community Supervision is denied."

> mandate that this Court abandon long standing precedent as to parole release denials. This Court is unaware of reported decisions directly addressing the 2017 Amendment, but other courts have certainly rendered decisions upon parole denials that were made after said amendment. In fact, Respondents cite Matter of Schendel v. Stanford, 185 AD3d 1365 [3d Dept. 2020], in which the Third Department determined that a Board is not required to give equal weight to - or expressly discuss - each of the statutory factors. Id. at 1366. While this holding relies in part upon a decision in which the parole denial pre-dated the 2017 Amendment, the parole denial in Matter of Schendel was made in October 2018, which post-dates the Amendment. More importantly, the standard of review established by the case law is not in conflict with the new language in the regulation. Although the 2017 Amendment requires that the Board address how certain factors were considered in the individual's case, it does not require the Board to 'expressly discuss' each of the statutory factors. It remains well settled that the Parole Board is required to consider the "applicable" statutory factors; the Board is not required to address each factor in its decision or accord all the factors equal weight. Campbell, supra at 1015.

It is worth noting that *Schendel v. Stanford*, 185 A.D.3d 1365, 1365–66 (3d Dept 2020), brought by petitioner pro se, relied on *Espinal v. New York State Bd. of Parole*, 172 A.D.3d 1816, 1817 (3d Dept 2019), which reviewed a denial that took place before adoption of the 2017 regulation (9 N.Y.C.R.R. §8002.3 became effective on September 27, 2017– denial at issue in *Espinal* was in June of 2017). In addition, there is no indication in the Schendel decision that the pro se petition raised or the court addressed the 2017 revision to 9 N.Y.C.R.R. §8002.3.

As of February 2022, it appears there are no cases other than *Byrdsong*, cited above, construing the 2017 revision, but this is an area of parole litigation in development that will likely generate additional case law in the future.

Exclusive Reliance on the Nature of the Crime

There is a split in the departments of the appellate division of New York State as to whether denial of parole may be based solely on the nature of the crime. If this is a potential issue on appeal, consider this in determining venue.

1st, 2nd and 4th Departments

There is good authority in the 1st, 2nd and 4th Departments that the Board may not deny parole based solely on the seriousness of the crime.

1st Department

See King v. New York State Div. of Parole, 190 A.D.2d 423, 433 (1st Dept 1993), aff'd, 83 N.Y.2d 788 (1994) ("…the legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself.).

Rossakis v. New York State Bd. of Parole, 146 A.D.3d 22, 27 (1st Dept 2016) (Holding the Board acted irrationally in focusing exclusively on the seriousness of petitioner's conviction and the decedent's family's victim impact statements…without giving genuine consideration to petitioner's

remorse, institutional achievements, release plan, and her lack of any prior violent criminal history.).

Wallman v Travis, 18 AD3d 304, 307 (1st Dept 2005) (Where the petitioner makes "a convincing showing" that the board reached its determination "based almost exclusively on the nature and seriousness of the offense," the decision may be overturned).

Sullivan v. NYS Bd of Parole, 2018/100865 (S. Ct., NY Cnty, 2019) (finding Board relied almost exclusively on the seriousness of the crime and statements petitioner made at time of sentence).

2d Department

Ferrante v. Stanford, 172 AD3d 31 (2d Dep't 2019) ("the Board may not deny an inmate parole based solely on the seriousness of the offense."); *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dept 2014); *Perfetto v. Evans*, 112 A.D.3d 640 (2d Dep't 2013); *Gelsomino v. N.Y. State Bd. of Parole*, 82 A.D.3d 1097 (2d Dep't 2011) ("Here, in denying the petitioner's application for release on parole, the Parole Board cited only the circumstances of the underlying crimes and failed to mention any of the other statutory factors, including his excellent disciplinary record, his record of achievements while incarcerated, as well as positive statements made by the sentencing court."); *Huntley v. Evans*, 77 A.D.3d 945 (2d Dep't 2011) ("Where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally."); *Mitchell v. N.Y. State Div. of Parole*, 58 A.D.3d 742 (2d Dep't 2009)(While the seriousness of the underlying offense remains acutely relevant in determining whether the petitioner should be released on parole, the record supports the petitioner's contention that the Parole Board failed to take other relevant statutory factors into account.); *O'Connor v. Stanford*, 54/2021 (Dutchess Cnty, J. Rosa, 2021).

4th Department

Johnson v. New York State Div. of Parole, 65 A.D.3d 838, 839 (4th Dept 2009) ("Indeed, the only reason for the Parole Board's denial of parole that is discernible from the perfunctory reference to '[t]he violence associated with this terrible crime' is that the determination was based solely upon the seriousness of the crime. 'The Legislature, however, has not defined 'seriousness of [the] crime' in terms of specific categories of either crimes or victims and it is apparent that in order to preclude the granting of parole exclusively on this ground there must have been some significantly aggravating or egregious circumstances surrounding the commission of the particular crime.' Here, the mere reference to the violence of the crime, without elaboration, does not constitute the requisite "aggravating circumstances beyond the inherent seriousness of the crime itself" (citing *King*, 190 AD2d at 433)).

3d Department

The 3rd Dept takes a different position. *See Hamilton v. New York State Div. of Parole*, 119 A.D.3d 1268 (3d Dept 2014) ("This Court has repeatedly held—both recently and historically— that, so long as the Board considers the factors enumerated in the statute, it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime,'" and stating that the 1st Department's holding in King that the Board may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime to be "in conflict" with 3d Department precedent.)

But some lower court decisions in the 3d Department have interpreted the holding of *Hamilton* otherwise. *See* *Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 46 Misc.3d 603 (Sup. Ct. Sullivan Cnty. 2014) (The holding in Hamilton "…does not mean administrative parole decisions are virtually un-reviewable."); *Platten v. N.Y. State Bd. of Parole*, 47 Misc. 3d 1059 (Sup. Ct. Sullivan Cnty. 2015) ("A parole board cannot base its decision to deny parole release solely on the serious nature of the underlying crime. The *Hamilton* decision did not affect this prohibition.") (citations omitted); *but see* *Torres v. Stanford*, 50 Misc. 3d 1207A (Sup. Ct. Franklin Cnty 2015) (finding that *Hamilton* effectively determined that the "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department.)

Aggravating Factors

The *King* court appears to permit a denial of parole based on the crime if there is an aggravating circumstance. *King v. N.Y. State Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1993), affd. 83 N.Y.2d 788 (1994) ("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.")

Also note that aggravating factors may be considered by the Board pursuant to the Executive Law:

> 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 presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement

Exec. L. § 259-i(2)(C)(A).

The scant authority construing an aggravating factor are the following:

Guzman v. Dennison, 32 A.D.3d 798 (1st Dept 2016) (upholding denial finding that "[r]espondent did find 'some aggravating circumstances beyond the inherent seriousness of the crime itself' … e.g., that petitioner was on parole when he committed the crime.")

Phillips v. Dennison, 41 A.D.3d 17, 22 (1st Dept 2007) ("As to the seriousness of the crime, we strongly disagree with petitioner's implication that the nature of his crime was no more heinous than any other murder, the implication being that the denial of his application is inconsistent with the grant of parole to others convicted of murder…. petitioner's crimes went well beyond the "unjustifiable taking and tragic loss of human life that describes every murder…Petitioner, while employed as a police officer, corruptly embarked on a pattern of extortion, in the course of which he committed a cold-blooded double homicide and shot a witness. His crimes were committed through the use and perversion of the power of his position as a New York City police officer, and, as such, violated the very fabric of our system of law and justice. Given this context, the Board's concession that petitioner was an exemplary inmate who is now unlikely to pose a danger to the community did not necessarily outweigh the horrifying nature of the acts surrounding his crimes.")

Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 240 (1st Dept 1997) ("…in light of the truly dreadful facts of this crime, there is no question that the record supports a determination that the extremely serious nature of the crime so outweighs petitioner's impressive accomplishments while in prison as to warrant a denial of parole.").

Platten v. NYS Bd. of Parole, 47 Misc. 3d 1059, 1067 (Sup. Ct. Sullivan Cnty. 2015) (describing the petitioner's crime as "heinous," yet finding "the Board failed to cite to any aggravating factors…").

Reliance on Personal Bias or "Penal Philosophy"

Both personal bias and the infusion of "penal philosophy" into the decision-making process should require annulment of a denial. *King v. New York State Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1994) (1993), aff'd, 83 N.Y.2d 788, 791 (1994).

As to penal philosophy, the Court of Appeal in *King* stated: "There is evidence in the record that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law § 259–i."

As to personal bias, *King* stated: "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."

Platten v. NYS Bd. of Parole, 47 Misc. 3d 1059, 1063 (Sup. Ct. Sullivan Cty. 2015) ("Last, a parole board cannot retry an inmate, harass, badger or argue with an inmate, second-guess the findings of competent experts involved in the inmate's trial, or infuse their own personal beliefs into the proceeding." citing *King* at 432.)

Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cty. 2014) ("The Commissioners based their decision to deny parole release to petitioner solely on their personal opinions of the nature of the instant offense and improper characterizations of petitioner's actions immediately following the murder . . . and at least one Commissioner was argumentative and appeared to have made the decision prior to the parole interview. … There is no additional rationale, other than the Board's opinion of the heinous nature of the instant offense, and personal beliefs and speculations, to justify the denial of parole release.") (emphasis added.)

A commissioner's statement of his own opinion about the appropriate sentence violates Executive Law §259-i. *Almonor v. New York State Bd. of Parole*, 16 Misc.3d 1126(A) (Sup. Ct. New York Cty. 2007) ("the Court notes the short length of the parole hearing, the Commissioners' unwillingness to discuss petitioner's letters in support of his application and, in particular, Commissioner Rodriguez's comment suggesting that he thought petitioner's sentence for manslaughter was too short.")

Mischaracterization of the instant offense and comments indicating no amount of punishment would be enough render the decisions denying parole irrational. *Bruetsch v. New York State Dep't of Corrections and Community Supervision*, 43 Misc.3d 1223(A) (Sup. Ct. Sullivan Cty. 2014) ("[S]everal passages in the transcript … suggest that the board viewed this crime as premeditated,

completely mischaracterizing the incident as understood by the trial court and jury. Another comment indicates the board was of the opinion that Petitioner could never make amends for killing his wife.")

Reliance on Inaccurate Information

When the Board bases its decision on commissioner assertions not supported by the record, or an inaccurate record, these are grounds for annulling the denial and granting a de novo interview.

Rivera v. Stanford, 2019 WL 2030503, at *2 (2d Dep't 2019) (Board's finding that release was not compatible with the welfare of society based upon prison disciplinary record was without support in the record).

Coleman v. New York State Dep't of Corr. & Cmty. Supervision, 157 A.D.3d 672, 673 (2d Dep't 2018) ("Contrary to the Parole Board's determination that the petitioner 'distance[d]' himself from the crime, the record demonstrates that the petitioner took full responsibility for his actions…").

Rossakis v. N.Y. State Bd. of Parole, 146 A.D.3d 22 (1st Dep't 2016). The Board is required to rely on a "fair view" of the record. In Rossakis, the Board "inappropriately relied on claims in decedent's family's victim impact statements that were affirmatively rebutted by the objective evidence supporting petitioner's release, such as their claim that the petitioner would have nowhere to go when released when the record makes clear that petitioner had secured a job offer and was taking concrete steps to secure housing."

Lewis v. Travis, 9 A.D.3d 800 (3d Dep't 2004). ("Board incorrectly referred to petitioner's conviction as murder in the first degree, when, in fact, petitioner was convicted of murder in the second degree. In as much 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.").

Hawthorne v. Stanford, 135 A.D.3d. 1036 (3d Dep't 2016) (Granting a de novo interview based on the Board's "characterization of the petitioner's disciplinary history as showing 'marginal compliance with DOCCS rules,' which it strongly relied upon in denying parole, lacked support in the record." There, petitioner's only DOCCS violation occurred "during a period in which, through no fault of his own and due to the recommendation of a prison physician, the petitioner was deprived of medication for his mental illness." The court ultimately held that "for the Board to . . . rely upon petitioner's conduct during [a] psychotic crisis . . . as a primary ground for denying his release is so inherently unfair and unreasonable that it meets the high standard . . . warranting our intervention.")

There is diverging case law as to whether inaccurate information is subject to a harmless analysis test, though a recent Third Department case required annulment and remand without harmless error analysis where the misstatement was clear.

See Karimzada v. New York State Bd. of Parole, 176 A.D.3d 1555, 1556 (3d Dep't 2019) (reversing denial of administrative appeal, finding that appeals unit erroneously stated two COMPAS scores and granting a de novo "because of the likelihood that such error may have affected the decision to affirm denial of petitioner's request for parole release…").

Rodriguez v Stanford, Sup. Ct. Franklin Cty. Aug. 18, 2021, Cuevas, J., index No. E2021-107 ("This Court will not speculate whether the misstated facts were the proverbial 'straw that broke the camel's back' that led the Board to decide as it did, and we need not so find. It is enough that

the erroneous facts were stated in the Board's reasoning and were likely to have influenced the outcome.").

But see *Booth v. Stanford*, 2014/570 (Sup. Ct. Franklin Cty 2015) ("Based upon the foregoing, the Court concludes that any possible error in the COMPAS numerical scoring of petitioner's 'Prison Misconduct' record was harmless in view of the Board's obvious familiarity with petitioner's disciplinary record.")

Rossney v. New York State Bd. of Parole, 267 A.D.2d 648, 649 (3d Dep't 1999) ("...we do not agree that the alleged inaccuracies resulted in a violation of petitioner's constitutional rights or involved matters that would have affected respondent's decision to deny parole.").

Also, *see* Failure to Request or Consider "Official" Recommendations discussing the need for a contemporary DA recommendation. Pending specific facts on the ground, the failure to obtain an up-to-date recommendation and instead rely on an outdated recommendation may constitute reliance on inaccurate information.

Denial of Parole is Unlawful Resentencing

The role of determining sentences is left to the legislature that enacted the minimum and maximum permissible sentence for the crime of conviction, and by the judge who imposed the sentence. In considering whether to grant parole, the Parole Board is limited to determining whether release at the present time is appropriate under the statutory standards. *King v. N.Y. State Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1994) ("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.").

Nevertheless, many courts have been reluctant to find that multiple parole denials amount to unlawful resentencing, even when the person seeking parole was sentenced by the judge to a term of imprisonment that was less than the maximum permitted by law (e.g. a person facing a maximum of 25 to life was sentenced to 15 to life and yet is repeatedly denied parole based primarily on the seriousness of the crime). *See e.g. Marsh v. New York State Div. of Parole*, 31 A.D.3d 898 (3d Dep't 2006) (We also reject petitioner's contention that the Board's decision amounted to a resentencing. Inasmuch as the determination resulted from an exercise of the Board's discretion following consideration of relevant statutory factors, and there being no "showing of irrationality bordering on impropriety", further judicial review is precluded.) (citations omitted); *Hamilton v. New York State Div. of Parole*, 36 Misc. 3d 440, 446 (Sup. Ct. Albany Cty 2012) (Finding no resentencing: "While review of the sentencing minutes, which were before the Board, demonstrate that the sentencing judge exercised his discretion to allow petitioner to be considered for parole on the murder conviction after only 18 years, it was not a guarantee that the responsible parole officials would grant discretionary parole at any point prior to the maximum expiration date.").

This is an area ripe for continued litigation. *Ely v. Bd of Parole*, Sup. Ct. NY Cnty, Jan. 20, 2017, Jaffe, J., index No. 100407/16 ("Petitioner's COMPAS Assessment, lack of a prior criminal record, age, infirmity, lengthy imprisonment to date, clear expression of remorse, acceptance of responsibility for her crime, post-release plans, the many letters submitted by corrections professionals in support of her release, and the many positive initiatives she undertook during her incarceration, indicate that respondent's denial of release was more in the nature of a re-

sentencing, and that no amount of evidence of rehabilitation would have outweighed its interest in retribution.").

Be especially attuned to this issue if your client was convicted at trial of one or some crimes but acquitted of others; a parole denial may in effect be the imposition of more time because the Board believes your client was guilty of all the charged conduct.

Failure to Disclose Reliance on Confidential Information

Until recently and contrary to law, the Board withheld from the parole applicant many portions of the parole file. Although that has changed to some extent, there are still significant parts of the parole file that are withheld in their entirety, e.g. "victim statements," portions of the COMPAS report, and portions of the Parole Board Report. At a minimum, however, the Board's consideration of such secret information should be disclosed in the interview or decision.

In re West v. New York State Bd. of Parole, 41 Misc.3d 1214(A) (Sup. Ct. Albany Cty. 2013) ("The mandate that a victim impact statement 'shall be maintained in confidence' (9 N.Y.C.R.R. § 8002.4(e)) certainly should not trump the statutory requirement that the Board's decision reveal the factors and reasons it considered in reaching its decision, particularly when such consideration is mandated by statute.")

Almonor v. New York State Bd. of Parole, 16 Misc.3d 1126(A) (Sup. Ct., N.Y. Cty. 2007) ("[E]ven though, on some occasions, 9 NYCRR 8000.5 allows respondent to consider materials. . . protected from a parole applicant's review, respondent would not have the right to keep the fact of their consideration secret from the applicant.").

Clark v. New York State Bd. of Parole, No. 160965/2017, 2018 WL 1988851, at f.n.1 (Sup. Ct. N.Y. Cnty. 2018) ("Even if the information that the Parole Board relied on could have been properly designated as confidential, the Parole Board still was required by Division of Parole Regulations § 8000.5 to notify Ms. Clark of its intent to rely on such information.")

For law on obtaining the parole file, *see* Parole File

Failure to Consider Youth and Attendant Circumstances

Based on neurological evidence showing that teenagers are more impulsive, more lacking in foresight, and more susceptible to social pressure than adults, the US Supreme Court held that life sentences without the possibility for parole for people convicted of crimes as juveniles violates the Eighth Amendment. A person serving an indeterminate sentence for a crime committed as a juvenile is therefore constitutionally required to be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

As applied to juveniles sentenced to maximum life sentences who have served their minimum sentences, the Appellate Division, 3d Department, found that it is "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." *In re Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 140 A.D.3d 34 (3d Dept 2016). ("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 must consider youth and its attendant characteristics in relationship to the commission of the crime at issue.") *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, 875-6 (2d Dep't 2019) ("Neither the transcript of the September 2016 interview nor the Parole Board's September 2016 determination shows that the Parole Board considered the petitioner's youth at the time and 'its attendant characteristics' in relationship to the crimes he committed. Instead, the record reflects that the Parole Board did not factor in the petitioner's age at the time and the impact that his age had on his decisions and actions during the commission of these crimes when it decided to deny him parole release based on 'the serious nature of the instant offenses.'")

Matter of Martin v. Stanford, 58 Misc.3d 345 (Sup. Ct. Cayuga Cty. 2017) (at the 2016 interview, "...the Board merely asked petitioner how old he was at the time of the crime, and was aware of petitioner's prior criminal history as a juvenile in another state. Beyond that, there is nothing that shows the Board considered petitioner's youth and its attendant characteristics in relation to the commission of the instant crime. This limited attention does not satisfy the Eighth Amendment, which requires 'inquiry into and careful consideration of whether the 'crime reflects transient immaturity.'")

The Board codified this jurisprudence by adopting the following 2017 regulation at 9 NYCRR § 8002.2(c):

> Minor offenders: Guiding Principles. Minor offenders are inmates serving a maximum sentence of life imprisonment for a crime committed prior to the individual attaining 18 years of age.
> 1. When making any parole release decision pursuant to section 259- i(2)(c)(A) of the Executive Law for a minor offender, the Board shall, consider the following:
> i. The diminished culpability of youth; and
> ii. Growth and maturity since the time of the commitment offense.
> 2. Information presented that the hallmark features of youth were causative of, or contributing factors to, a minor offender's commitment offense, should not, in itself, be construed to demonstrate lack of insight or minimization of the minor offender's role in the commitment offense. The hallmark features of youth include immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures.

Although the law applies to people under the age of 18 at the time of their offense, attorneys across the country are pushing courts to extend the reasoning of *Roper et al* to people convicted of crimes committed in their late teens and early 20s.

Failure to Consider Immigration Status

Immigration status, including an impending deportation order, must be considered by the Board. N.Y. Exec. Law. 259-i(2)(C)(A)(4). Failure to consider an impending deportation order is grounds for a de novo interview and review.

Thwaites v. N.Y. State Bd. of Parole, 34 Misc. 3d 694 (Sup. Ct. Orange Cnty, 2011) ("The Parole Board's determination also failed to indicate whether consideration was given to whether release

to the deportation order with mandatory removal was appropriate under the circumstances of this case. Such consideration is required by the parole statute. (Executive Law § 259-i [2] [c] [A].").

Ciaprazi v. Evans, 52 Misc.3d 1212(A) (Sup. Ct. Dutchess Cnty, 2016) ("It is settled that the Board of Parole is required to review and consider certain statutory factors. One of the factors is petitioner's immediate deportation upon release from incarceration pursuant to a CPDO. The record in this matter reveals that Romania is ready to receive him and provide services to enable him to integrate back into Romanian society. Noticeably absent from the respondent's decision was any mention of the deportation factor.") (citation omitted).

Menard v. New York State Bd. of Parole, Sup. Ct. New York County, March 3, 2011, Hagler, J., index No. 159376/2017. ("the Board decision failed to adequately consider the statutory factors. The decision merely states in a perfunctory fashion that "statutory factors have been considered including Petitioner's 'risk to the community, rehabilitation efforts, and [Petitioner's] need[ ] for successful community reintegration' without articulating any explanation for how these factors were applied … In particular here, the Board failed to discuss various factors such as Petitioner's overall low COMP AS score, her rehabilitative efforts, her community engagement and leadership, positive institutional record, her remorse, her release plans and deportation order.")

Lackwood v. New York State Bd. of Parole, Sup. Ct. Dutchess County, July 6, 2018, Acker, J., index No. 2464/2017. (Board failed to consider deportation order).

Cf. Delrosario v. Stanford, 140 A.D.3d 1515 (3d Dep't, 2016) ("Board was fully aware of...deportation status. The existence of the deportation order does not require that parole be granted, but is a factor for the Board to consider.")

Although convictions and incarceration have a significant impact on immigration status, some people in prison may still have a path to citizenship or temporary status. Unless the client is absolutely certain and clear that they wish to be deported back to their home country, attorneys should work with immigration specialists to determine what, if any, avenues clients may have to challenge orders of deportation.

Failure to Consider Sentencing Transcript

The Parole Board is required to obtain and consider the sentencing minutes. *Matter of Smith v. New York State Div. of Parole*, 64 A.D.3d 1030, 1032 (3d Dep't, 2009); *Matter of Carter v. Dennison*, 42 A.D.3d 779, 779 (3d Dep't, 2007).

The failure to do so requires a new parole review unless the Board established that the sentencing minutes were unavailable. *Blasich v. New York State Bd. of Parole*, 68 A.D.3d 1339, 1340 (3d Dep't, 2009) (Finding that a letter, dated several months before the parole review, from the Chief Court Reporter indicating the sentencing minutes were unavailable excused Board's failure to consider the sentencing minutes); *Freeman v. Alexander*, 65 A.D.3d 1429, 1430 (3d Dep't, 2009) (Finding that correspondence in the record from the sentencing court stating that the sentencing minutes could not be found excused the Board's failure to consider the minutes). Or, the Board established a diligent effort to obtain the minutes. *Matul v. Chair of New York State Bd. of Parole*, 69 A.D.3d 1196, 1197 (3d Dep't, 2010).

The Appellate Division, Second Department appears to require that the Board's failure to obtain the sentencing minutes cause prejudice to the parole applicant, *see Porter v. Alexande*r, 63 A.D.3d 945, 946 (2d Dep't, 2009). The Third Department appears not to require such. *Smith v.*

New York State Div. of Parole, 64 A.D.3d 1030, 1031–32 (3d Dep't, 2009) (ordering a de novo review where unavailability of sentencing minutes was not adequately established without any inquiry as to prejudice).
When sentencing minutes are obtained during the appeal process and "do not disclose that the sentencing court made any recommendations concerning parole," failure to consider is harmless error. *In re Matos v. New York State Bd. of Parole*, 87 A.D.3d 1193 (3d Dep't 2011).

In re Duffy v. N.Y. State Dep't of Corr. & Cmty. Supervision, 132 A.D.3d 1207 (3d Dep't 2015)" ("the failure to timely locate available sentencing minutes" in which "the sentencing judge nonetheless implicitly addressed [parole] by discussing in some detail his discomfort with the required maximum range of the sentence (i.e., life in prison) and then imposing less than the maximum on the lower range where he had discretion," was a violation of Executive Law § 259-i and grounds for a de novo hearing. Such factors, together with the failure to timely locate available sentencing minutes and the fact that the Board's determination rested primarily upon the serious nature of the crime, provide a narrow path for distinguishing this case from those where we have found harmless the Board's failure to consider the sentencing minutes.") (citation omitted).

Phifer v. New York State Bd. of Parole, 154183/2019, 2019 WL 5066881, at *2 (Sup. Ct. NY Cty. 2019) ("The sentencing minutes show that the sentencing court made no recommendations as to parole. The sentencing judge reduced Petitioner's sentence from 25 years to life to 24 years to life and ran her Murder in the Second Degree, Burglary in the First Degree, Grand Larceny in the Third Degree and Grand Larceny in the Fourth Degree sentences concurrently. There is no indication that this was intended as a parole recommendation. Respondent's failure to obtain and consider the sentencing minutes…is therefore deemed to be a harmless error.").

Failure to Request or Consider "Official" Recommendations

Exec. Law 259-i requires the Board to consider the recommendations of the sentencing court, the District Attorney, and trial defense counsel. It appears DOCCS requests such recommendations when a person is first received into state DOCCS custody and/or near in time to the first parole review, though sometimes there is evidence in the parole file that DOCCS has solicited letters for reappearances. *See also* 9 N.Y.C.R.R. §8002.2(d)(7).

If the Board does not attempt to obtain a recommendation from trial defense counsel, the DA or the sentencing judge, it is likely grounds for a de novo review.

As to DA recommendations, there may be an argument that it must be a current recommendation, not one that dates back many years or decades. *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.") (emphasis added). Just as the Board requires a contemporaneous COMPAS evaluation and disciplinary record, the statute should be interpreted to require consideration of a contemporaneous DA recommendation.

This is particularly important in light of the election of "progressive" prosecutors in some NY counties. For example, Kings County DA Eric Gonzalez has a policy as to parole recommendations: "For cases that ended in a guilty plea, our default position will now be that the defendant generally should be released at his or her first parole opportunity subject to his or her record in prison and other considerations." And, calls for special consideration of those who committed their crimes as juveniles and up to age 23. Brooklyn DA Post-Conviction Justice Bureau.

But see *Byrdsong v. Board*, Sup. Ct. Dutchess Cnty, April 8, 2021, Acker, J., index No. 2020-54062 ("...nothing in the Executive Law, nor in the associated regulation (9 NYCRR 8002.2 (7))'requires that the letter be from the current district attorney and Petitioner provides no case law in support of this argument. Instead, Petitioner maintains that the policies of the current District Attorney are "markedly different" from her predecessor, rendering the recommendation currently in the parole file "outdated." Regardless, the record before the Board included a recommendation from the district attorney, which complies with the statute.").

As to defense attorney recommendations, the Board appears to neglect its obligation to solicit such recommendations. The Board's neglect has resulted in a few known administrative reversals. *See* Administrative Appeal Decision - Watson, Kyle (2020-04-14); Administrative Appeal Decision - Santiago, Vanessa (2020-01-16). Pending individual circumstances and strategy, attorneys may want to consider reaching out to defense attorneys to inquire whether the Board requested their recommendation. An affidavit from defense counsel may be sufficient to obtain a de novo review.

Failure to Consider Victim Statements

The Board is statutorily required to consider victim statements. Executive Law § 259-i(2)(c)(A)(2)(v) (The Board shall consider "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 unable."). A "victim's representative" is defined as "the crime victim's closest surviving relative, the committee or guardian of such person, or the legal representative of any such person." Executive Law § 259-i(2)(c)(A)(2)(viii).

Bottom v. N.Y. State Bd. of Parole, 30 A.D.3d 657, 658 (3d Dep't 2006). The adult son of one of the slain victims appeared at a victim impact meeting and spoke at length in favor of release, but "respondent's subsequent decision makes no mention of that statement … In fact, respondent affirmatively cited the negative impact of petitioner's actions upon the victims' families as one justification for denying him parole." The Third Department held that, "[w]hile we appreciate that respondent may weigh the relevant factors … as it sees fit and need not discuss each factor in its decision where, as here, it is provided with a compelling victim impact statement which advocates for the release of the prospective parolee, explicit reference to such an exceptional submission would facilitate 'intelligent appellate review' of respondent's required compliance with the Executive Law…"

Failure to Consider Reentry Plan

The Board must consider an applicant's release and reentry plan. *See* Executive Law 259-i(c)(A)(iii) ("release plans including community resources, employment, education and training and support services available to the inmate…shall be considered."). Often, when the Board focuses during the interview almost exclusively on the seriousness of the crime of conviction, there is virtually no reference to the person's reentry plan, or a Board member merely says something like "We note your reentry plan." Either situation presents grounds for a de novo.

Predetermined Decision

Indications that the parole denial was predetermined is a ground for a de novo interview. *See King v. New York State Div. of Parole*, 190 A.D.2d 423, affd. 83 N.Y.2d 788. *See Johnson v. N.Y. Bd. of Parole*, 65 A.D.3d 838 (4th Dep't 2009) ("We therefore conclude on the record before us

that the Parole Board failed to weigh all of the relevant statutory factors and that there is 'a strong indication that the denial of petitioner's application was a foregone conclusion.'")

Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cty. 2014) ("at least one Commissioner was argumentative and appeared to have made the decision prior to the parole interview.")

Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision, 40 Misc.3d 226 (Sup. Ct. Columbia Cty. 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*.") (emphasis added.)

Commissioner Bias or Appearance of Bias

People ex rel. Pyclik v. Smith, 81 A.D.2d 1016 (4th Dep't 1981) ("Petitioner's right to a parole revocation hearing before a "'neutral and detached' hearing body" (*Morrissey v Brewer*, 408 U.S. 471, 489), was denied by virtue of the fact that the hearing officer had appeared as an attorney for the State at a prior proceeding in which petitioner's underlying conviction had been challenged. It is not necessary to decide whether the revocation hearing was affected by actual prejudice inasmuch as even the appearance of impropriety should be avoided.")

Failure to Disclose the Parole File

This is a critical issue in which litigation may make a difference. The Board routinely withholds portions of the parole file from the parole applicant. Barring strategic reasons for not doing so, administrative appeals and Article 78 petitions should challenge the Board's withholding from the applicant any portions of the parole file that were considered by the Board.

Part 8000.5 of the regulations governing the "Division of Parole" requires the Board to keep and disclose certain records to parole applicants. 9 N.Y.C.R.R. 8000.5 et. seq. Specifically, the Board is required to "obtain and file" records pertaining to parole applicants, including, among other records, the nature and circumstances of the crime for which each applicant was sentenced, copies of such probation reports as may have been made, and reports on each applicant's social, physical, mental, and psychiatric condition. 8000.5 (a)(b). These records, commonly called the "parole file," are provided to the Board when it considers parole and serve as an important basis for its decisions.

A parole applicant's access to the parole file is governed by the same regulation. In general, the applicant or their attorney "shall be granted access only to those portions of the case records which will be considered by the board…at a hearing or pursuant to an administrative appeal of a final decision of the board." While there are exceptions listed under 8000.5 (c)(2)(a)(b), the Board withholds many portions of the parole file inappropriately. For more on which portions of the parole file must be disclosed, *see* Parole File.

If the Board withheld a portion of the parole file before the parole interview, in violation of the governing regulations, this should be a ground for reversal. There are, however, currently no cases directly on point.

However, in *Matter of Clark v. New York State Bd. of Parole*, 166 A.D.3d 531, 531–32 (1st Dept, 2018), the First Department held that the Board's failure to disclose letters in opposition during the administrative appeal process was improper, and "the correct remedy for this procedural error

in the conduct of the administrative appeal...is the annulment of the result of that appeal and remand for new administrative appellate proceedings, in which the Board should turn over the requested material." Thus, in Clark the procedural error of failure to disclose took place in the administrative appeal process and thus warranted a de novo appeal. It should follow, that same procedural error prior to the parole interview should warrant a de novo review. But, at least two lower courts have determined otherwise.

See *Hill v. New York State Bd. of Parole*, Sup. Ct. New York County, October 23, 2020, Madden, J. index No. 100121/2020 at 13-14 (Finding that "opposition material" in the parole file should have been provided to the petitioner prior to the parole interview. Yet, citing to *Clark*, finding the failure to disclose was a "procedural error, which would generally not require a new interview but remand for administrative appellate review, under the circumstances here, where a new parole interview is being ordered and in view of respondent's repeated failure to provide such opposition letters, exhaustion of administrative remedies would be futile, and the correct remedy is to direct the Board to provide petitioner with the opposition letters prior to his new parole interview.")

See also, *Bailey v. Board, Sup. Ct. Dutchess County, April 16, 2020, Acker, J., index No. 53704/2019* ("*Clark* is not applicable to the facts of this case because Petitioner was provided with redacted opposition documents during his administrative appeal. Petitioner fails to cite any case that holds that the failure to turn over documents, regardless of their relevance or type, prior to the parole interview warrants a de novo interview. Based on the foregoing and, as Petitioner has not demonstrated any prejudice in not receiving these documents before his parole interview, the Court does not grant a new interview on this ground.")

Aspirational Litigation / On the Horizon

Deprecate Standard is Unconstitutionally Vague

For those serving a maximum of life, the statutory standard most often invoked as the basis for denial is that release at this time would "so deprecate the seriousness of the crime as to undermine respect for the law." Exec Law 259-i. Neither the Board nor case law has construed the meaning of this standard. As is, there are no contours to its application. Might there be grounds to challenge the statute on its face or as applied on vagueness grounds? Undoubtedly, there are obstacles.

Vagueness is usually considered a due process argument, but there is precedent barring due process claims in the context of parole. *Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69, 75–76 (1980) ("Petitioner has demonstrated no protected liberty interest which would implicate the due process guarantee."). But, commentators have queried whether the Supreme Court's recent decision in *Sessions v. Dimaya* may have broadened the void for the vagueness doctrine. *See* More on Dimaya ("Gorsuch's concurrence... includes a strong defense of the void-for-vagueness doctrine under originalist principles as a 'faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty.'").

Alternatively, there is an argument that the standard is so vague and inexplicable that its application is inherently arbitrary and capricious. Or relatedly, for the same reason, its application is inherently an abuse of discretion. *See* CPLR §7803(3) ("…whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.").

A vagueness, arbitrary and capricious or abuse of discretion argument may be especially compelling when a denial occurs after service of a minimum sentence set below the statutory minimum. If, for example, the sentencing judge determined that parole consideration would be appropriate after service of 15 years (when the law permitted up to a 25-year minimum sentence), then how does the Board explain why release after service of the minimum (or multiple years past the minimum) undermines respect for the law? Similarly, the Board should be required to explain why release after service of the maximum minimum would undermine respect for the law when the legislature has determined that release to parole supervision at that point is lawful.

Criminal History

The law requires the Board to consider "prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." Executive Law 259-i(2)(c)(A)(viii). In denying parole, the Board often cites to an applicant's violation of a prior probationary sentence, or commission of the instant offense while on parole. Without stating so, the Board appears to infer that the applicant is therefore incorrigible and unworthy of parole. This conduct, however, has taken place decades ago. The Board does not consider the many intervening years in prison and good disciplinary records indicate adjustment and capacity to succeed on parole now. The Board should be required to state in detail and with specificity the inference they are drawing from criminal histories that occurred long ago.

Consideration of criminal history closer in time to the instant offense may be rational, and therefore, this consideration has applicability as to lower indeterminate sentences. For example, prior criminal history may be relevant as to a person sentenced to probation, who then reoffends while on probation and is given an indeterminate sentence of 2 to 4 years. At the parole review, after service of two years, consideration of failure to benefit from probation may have some relevance. But, since passage of the statute requiring the Board to consider this factor, far fewer indeterminate sentences are meted out. The majority of people serving indeterminate sentences have life on the top and many years on the bottom. Giving undue weight to criminal history is irrational when there have been many intervening years and indications of change.

Irrationality of a Short Hold Followed by Another Denial

Until recently, denials of parole almost always resulted in a "hold" of 24 months until the next review, though the Board has discretion to set a shorter time frame. Recently, for some applicants, the Board has set the hold at 18 and sometimes 12 months, without explanation. The exercise of discretion in setting a shorter time for the next review has to indicate, at the very least, that the Board has determined that this person is nearing "readiness for release."

Therefore, when the next review 12 or 18 months later results in a denial, assuming the record is the same or better, there is a basis to argue irrationality, or that a more detailed and specific reason for denial is necessary to explain the setting of the shorter hold that resulted in yet another denial.

Contempt

If an applicant successfully appeals a parole denial through an Article 78 petition, but is again denied release at the de novo review, there are two remedies. If the Board repeated the same

error(s) at the de novo as those raised in the Art. 78 or violated the Art. 78 court's decision and order, then a motion for contempt may be effective. Otherwise, an applicant is relegated to starting the appeals process all over again at step one: the administrative level. Civil contempt may be a promising strategy to combat the Board's resistance to providing meaningful relief to parole applicants who have filed successful Article 78 claims.

In a civil contempt motion, the petitioner alleges that the Board failed to follow the Article 78 Court's order to hold a de novo review free of the unlawfulness that infected the prior review. The crux of this claim is that the Board has provided a "de novo" interview in name only, while ignoring the heart of the court order and failing to rectify its prior impropriety in any meaningful way.

Trial judges have demonstrated willingness to grant contempt motions and some have been upheld on appeal. *See Ferrante v. Stanford*, 2019 WL 1925915 (2d Dept 2019) ("Even though the Board purported to comply with its responsibilities to consider the requisite statutory factors, we agree with the Supreme Court's conclusion, made after a hearing, that the record in this particular case demonstrates that the Board again denied parole release exclusively on the basis of the underlying conviction without having given genuine consideration to the statutory factors.").

Ferrante is the appeal of *Mackenzie v. Stanford*, 2016 WL 11690588, at *1 (Sup. Ct. Dutchess Cty, May 24, 2016), wherein Judge Maria Rosa held the Parole Board in contempt of her order that followed a successful Article 78 challenge by applicant John MacKenzie. In the de novo interview ordered by Judge Rosa, the Board again denied parole based solely on the crime. Petitioner MacKenzie brought a second contempt motion, which was granted upon a finding that the Board's second de novo decision was "virtually the same " as its earlier decision, and was based once again solely upon the crime. Judge Rosa's contempt finding ordered yet another de novo interview, but MacKenzie was again denied parole. Ten days later Mr. MacKenzie died by suicide. False Hope and a Needless Death Behind Bars - The New York Times; Parole News: Auschwitz to Attica - Methodologies of Psychological Abuse, by John MacKenzie

In *Ruzas v. Stanford*, Judge Grossman, Dutchess County Supreme Court granted a motion for civil contempt. The court found that the de novo interview was not held within the ordered 60- day timeframe, the Board failed to focus on rehabilitation as ordered, and considered opposition from persons and entities not statutorily authorized to be considered in violation of the order. A de novo review was ordered at which Ruzas was granted parole. Although the Board filed a notice of appeal, it never perfected the appeal.

Legal Standard

If the Board, after a grant of an Art. 78 ordering a de novo review, fails to conduct the de novo in compliance with the court's decision and order, rather than appealing the denial, a motion to hold the Board in contempt may lie.

The contempt motion is filed in the original Article 78 case, before the judge that granted the Article 78 petition. The petitioner bears the burden of proving, by clear and convincing evidence, that the Parole Board "violated a clear and unequivocal court order thereby prejudicing his rights." *Cassidy v. New York State Bd. of Parole*, 140 A.D.3d 953 (2d Dep't 2016) (reversing Article 78 court's finding of contempt holding the underlying order was not clear and unambiguous); *Banks v. Stanford*, 159 A.D.3d 134, 145 (2d Dep't 2018) ("Applying our well-established contempt jurisprudence, it cannot be said that the language employed in the judgment…was clear and unambiguous since the Board could have reasonably understood and interpreted the judgment as directing it to conduct a de novo interview consistent with the requirements of the controlling

statutory language. Contempt findings are inappropriate where, as here, there can be a legitimate disagreement about what the terms of an order or judgment actually mean.")

The elements of civil contempt are often-cited as follows:

> First, there must be a lawful order of the court in effect clearly expressing an unequivocal mandate. Second it must appear with reasonable certainty that the court's mandate has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court's order. And fourth, the violation of the court's order must be shown to impede, impair, or prejudice the rights of another party.

Matter of Banks v. Stanford, 159 AD3d 134 (2d Dep't, 2018) (citing *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574 (Ct. App. 1983), amended on other grounds 60 N.Y.2d 652 (Ct. App. 1983)).

Petitioner has the burden of establishing each element by clear and convincing evidence. *Ferrante*, *supra* at 39 ("...petitioner established, by clear and convincing evidence, that the Board was fully aware of the judgment…; that the judgment was a lawful and unequivocal mandate of the court; that the Board, by failing to give consideration to the requisite statutory factors set forth in Executive Law § 259–i(2)(c)(A), disobeyed that mandate; and that prejudice to the petitioner resulted. The appellant failed to meet her burden of rebutting the evidence establishing the elements of civil contempt.").

As mentioned in Article 78 Remedies, pending client-specific strategy, consider including a proposed order when filing your petition to avoid ambiguity as to how the new review should be conducted and provide a cleaner record for contempt should the Board fail to abide by the de novo review conditions. *See e.g. Banks v. Stanford*, 159 A.D.3d 134, 145 (2d Dep't 2018) ("Applying our well-established contempt jurisprudence, it cannot be said that the language employed in the judgment dated May 14, 2015, was clear and unambiguous since the Board could have reasonably understood and interpreted the judgment as directing it to conduct a de novo interview consistent with the requirements of the controlling statutory language. Contempt findings are inappropriate where, as here, there can be a legitimate disagreement about what the terms of an order or judgment actually mean.").

Remedy for Contempt

A finding of contempt may lead to the imposition of fines or imprisonment. As to fines, see Judiciary Law §773. To date, we are unaware of any judge ordering imprisonment of the Parole Board Commissioner as a remedy for a finding of contempt.

The Second Department has stated that, upon a finding of contempt, "the fixing of an appropriate remedy[] is addressed to the sound discretion of the motion court upon consideration of the surrounding circumstances." *Banks*, 2018 WL 736148, at 6. But, the Banks court further held that the Article 78 court was without jurisdiction to annul the denial of parole that resulted from the de novo review. *Banks v. Stanford*, 159 A.D.3d 134, 147 (2d Dep't 2018) ("There is nothing in the record to indicate that the petitioner either administratively appealed from the denial, Board determination, or commenced a separate CPLR article 78 proceeding seeking judicial review of the determination. The only application before the court was the petitioner's motion seeking statutory remedies for contempt (see Judiciary Law § 753[A]). The remedies for contempt differ from the equitable mandamus remedies available in CPLR article 78 proceedings.").

In the parole context, at least one Article 78 judge ordered costs and attorneys fees. In *Ferrante*, *supra*, the Art. 78 court ordered the Board to pay $500 for every day it remained in contempt, but this portion of the decision was reversed by the 2d Dep't, but did order: "…where actual damages were not established, the petitioner may recover reasonable costs and expenses, including attorney's fees, plus a statutory fine in the sum of $250."

See also *Ruzas v. Stanford*, Sup. Ct. Dutchess Cty., Oct. 18, 2017, Grossman, J., index No. 1456/2016, at *7 (finding the Board in contempt and ordering "reasonable fees and costs" associated with the contempt motion.).

Conditional Release for Deportation Only (CPDO)

Executive Law § 259-i(2)(d)(i), contains two clauses to describe eligibility for conditional parole for deportation only, i.e., (1) "after the inmate has served his [or her] minimum period of imprisonment imposed by the court" and (2) "or at any time after the inmate's period of imprisonment has commenced for an inmate serving a determinate or indeterminate term of imprisonment, provided that the inmate has had a final order of deportation issued against him [or her] and provided further that the inmate is not convicted of . . . an A-I felony offense other than an A-I felony offense as defined in article two hundred twenty of the penal law."

"An inmate or their attorney who believes they meet the criteria for ECPDO eligibility should contact the facility SORC/ORC who will verify their eligibility and calendar them for a Board appearance." DOCCS Community Supervision Handbook at 10.

For more on CPDO, see Immigrant Defense Project, Step-by-Step Guide to ECPDO & CPDO.

Medical Parole

Medical parole in New York State is governed by Exec. Law §§ 259-r and 259-s. The process for obtaining medical parole begins with a request to DOCCS for medical parole certification. Then, DOCCS must conduct an evaluation and certify the incarcerated person as medical parole eligible or not. Some information about the DOCCS evaluation is found in DOCCS Directive 4304; however, the evaluation process remains opaque. If the applicant is certified, a medical parole interview before the Board is held. The medical parole interview does not replace the regularly scheduled parole review. Medical parole applicants who are not certified typically receive a form letter which fails to state the reason for the denial of certification.

While the statutes cover individuals "suffering significant debilitating" or terminal illnesses (with some restrictions around underlying convictions and time served), very few people are certified for medical parole each year. In 2021, 15 people were certified as medical parole eligible and granted medical parole interviews. Of those, 6 died in custody.

DOCCS is statutorily required to report data around medical parole to the state legislature annually, but has not done so since 2017. Adding to the lack of transparency around this issue is that DOCCS begins counting medical parole applications *after* the certification stage. Thus, it remains a mystery how many people are applying for medical parole certification and being denied each year.

Thus far, Article 78 litigation concerning denials of medical parole certification have been limited. However, this is an area ripe for litigation.

For more on medical parole in New York, *see* Examining Medical Parole in New York State | Vera Institute of Justice.

Rescission of Parole Grant

In rare cases after a grant of parole, in the time between the decision and expected release date, "situations may arise which would cause the board to reconsider its decision to grant parole release." See 9 N.Y.C.R.R. § 8002.5(a). The process and procedures for reconsideration are governed by 9 N.Y.C.R.R. § 8002.5.

Grounds For Reconsideration

The grounds for reconsideration are at 9 N.Y.C.R.R. § 8002.5(b)(2):

> (2) Events which may cause the temporary suspension and rescission of a parole release date shall include, but not be limited to:
>
> (i) significant information which existed, or significant misbehavior which occurred prior to the rendition of the parole release decision, where such information was not known by the board; or
>
> (ii) case developments which occur subsequent to the board's rendition of its decision to grant release:
>
> (a) significant misbehavior or a major violation of facility rules;
>
> (b) escape or absconding or removal from temporary release;
>
> (c) substantial change in the inmate's mental and/or emotional condition which results in commitment to a psychiatric center;
>
> (d) imposition of an additional definite sentence;
>
> (e) imposition of an additional indeterminate sentence or the resentence of the inmate on the underlying indictment or superior court information to an indeterminate term where the minimum period of imprisonment of such term exceeds that of the pre-existing minimum term; and
>
> (f) substantial change in the inmate's status in relation to any of the factors for consideration denoted in Executive Law, section 259-i(2)(c).

The Board has broad discretion to rescind parole. *Pugh v. New York State Bd. of Parole*, 19 A.D.3d 991, 992 (3d Dep't 2005)("...the Board's broad discretion to rescind parole was limited only by the requirement that there be substantial evidence of significant information not previously known by the Board.") (citations omitted).

For what may constitute significant information not previously known, in the context of victim impact statements, *see*:

Costello v. New York State Bd. Of Parole, 23 N.Y.3d 1002 (2014), holding that victim impact statements received after parole is granted are not a valid basis to rescind parole even when the Board failed to notify the victim or victim family.

Duffy v. New York State Bd. of Parole, 163 A.D.3d 1123, 1123–24 (3d Dept, 2018) ("...respondent was authorized to rescind petitioner's parole only if there was substantial evidence revealing 'significant information' that existed before respondent made the parole release decision but "was not known by [respondent]" (9 NYCRR 8002.5[b][2][i]; see 9 NYCRR 8002.5[d][1]; *Matter of Thorn v. New York State Bd. of Parole*, 156 A.D.3d 980, 981, 66 N.Y.S.3d 712 [2017], lv denied 31 N.Y.3d 902, 2018 WL 1474020 [2018]). It is undisputed that, as part of the 2016 parole release decision, respondent took into account the traumatic impact of the crime upon the victim's family members and, considering all factors, granted him parole. The record does not support a finding that either of the DVDs contains any information that was not known to respondent before it granted parole to petitioner. For these reasons, we find that the decision to rescind parole was not supported by substantial evidence.")

But see Benson v. New York State Bd. of Parole, 176 A.D.3d 1548, 1552 (3d Dep't 2019), aff'd, 35 N.Y.3d 1007 (2020) distinguishing *Costello*. ("...although we recognize that the better practice is for respondent to consider victim impact statements prior to granting a conditional release, 'so that the effect of a crime on the victim and his or her family can be considered fully before a decision is made' (*Matter of Costello v. New York State Bd. of Parole*, 23 N.Y.3d at 1004, 994 N.Y.S.2d 39, 18 N.E.3d 739), we do not interpret the Court of Appeals' decision in Matter of Costello as having established an exclusionary rule triggered by a belated submission, especially when it appears from the record that it was not the fault of the victim's family that their request to be heard was made after the granting of parole. To the contrary, respondent's analysis should be inclusive to ensure that those most harmed have an opportunity to be heard and considered when deciding the profound question of whether parole should be granted. To hold otherwise would inure only to the benefit of those who have committed serious crimes. Granting the privilege of parole, as well as its rescission, must be done carefully, on a complete record, and only after due deliberation.").

Diaz v. Evans, 90 A.D.3d 1371, 1372 (3d Dep't 2011) ("Here, the victim impact statements taken following the original parole release decision and letters from the victim's family members contain detailed descriptions of the ongoing devastating impacts of petitioner's crime, far beyond any information contained in petitioner's sentencing minutes or the presentence investigation report. These statements and letters thus constituted significant information not previously known by the Board and provide substantial evidence to support rescission.")

Procedure Due

9 N.Y.C.R.R. § 8002.5 governs the procedures due upon a reconsideration of a parole grant.

The regulations includes "the right to be represented by counsel," but the Board interprets this regulation to mean by retained or pro bono counsel, not a right to appointed counsel.

A petitioner possesses a liberty interest in parole release after a grant of parole, and thus rescission procedures must comport with the Constitution. *See Rizo v. New York State Bd. of Parole*, 251 A.D.2d 997, 997, 674 N.Y.S.2d 180, 181 (4th Dep't 1998) (finding that the procedures provided comported with due process); *Abrams v. Stanford*, 150 A.D.3d 846, 848 (2d Dep't 2017) ("The Parole Board was not required to grant conditional parole for deportation only solely because the petitioner was eligible for such relief. However, the rescission of conditional parole for deportation only, once granted, requires due process of law, pursuant to the procedure for rescission set forth in the regulations which govern the Parole Board." (citations omitted).

Thorn v. New York State Bd. of Parole, 156 A.D.3d 980, 982–83, 66 N.Y.S.3d 712, 715 (2017) ("Finally, we reject petitioner's contention that his due process rights were violated. Although it appears from the record that petitioner was not given a copy of the rescission report until the day of the rescission hearing, in violation of ***983** 9 NYCRR 8002.5(b)(5), respondent provided petitioner an opportunity to postpone the hearing and obtain counsel. Petitioner declined the offered postponement and waived his right to counsel, and we are satisfied that the rescission proceedings were constitutionally sufficient (*see Matter of Brooks v. Travis*, 19 A.D.3d 901, 901, 797 N.Y.S.2d 183 [2005]).").

Delay of Release After Parole Grant

Rejection Of Proposed Residency

The grant of parole is contingent on a residency approved by Parole. *See* DOCCS Community Supervision Handbook at 15. (An "Open Date" is "the earliest possible release date . . . contingent upon the inmate receiving an approved residence in accordance with established residency restrictions and local laws."). Per the Handbook, "the assigned field team must approve the release program (supervision plan) before an inmate can be released." "The approval occurs after the PO has completed an investigation of the release program and submitted the results of the community preparation investigation to the SPO and the Bureau Chief (BC). It is DOCCS general practice to parole people to their county of conviction. To be paroled to a different county, one must generally have family or friends and a residence in that county (as opposed to a shelter). The ORC will process the release upon being notified of the approved supervision plan. The supervision plan typically consists of the residence verification, employment confirmation or reasonable assurance of employment, educational or vocational training program, chemical dependence treatment, or other case-specific treatment need." *Id*.

On occasion proposed residences are not approved. If so, as a first step, reach out to some higher-ups. The contact for releases outside NYC is Don Arras, Donald.arras@doccs.ny.gov. For releases inside NYC contact Nigel Joseph, Nigel.Joseph@doccs.ny.gov.

In addition, rejection of a proposed residence may be challenged via an Art. 78. *See Telford v. McCartney*, 155 A.D.3d 1052, 1054 (2d Dep't 2017) ("Pursuant to Executive Law § 259-c (2) and 9 NYCRR 8003.3, special conditions may be imposed upon a parolee's right to release. The courts routinely uphold these conditions as long as they are rationally related to the inmate's past conduct and future chance of recidivism. Acceptable parole restrictions have included geographical restrictions and restrictions requiring that parolees refrain from contact with certain individuals or classes of individuals" (*Matter of Williams v Department of Corr. & Community Supervision*, 136 AD3d 147, 159 [2016]; *see e.g. Matter of Boss v New York State Div. of Parole*, 89 AD3d 1265, 1266 [2011]; *Matter of Moller v Dennison*, 47 AD3d 818, 819 [2008]; *Matter of Gerena v Rodriguez*, 192 AD2d 606, 606-607 [1993]).

Under the circumstances of this case, speculation by DOCCS about possible community efforts to exclude the petitioner from otherwise suitable housing and about the petitioner's potential response to such efforts is not a rational basis for denial of otherwise suitable housing (*see e.g. Matter of Brown v Commissioner of N.Y. State Dept. of Correctional Servs.*, 70 AD2d 1039 [1979]; *People ex rel. Howland v Henderson*, 54 AD2d 614 [1976]; *Matter of Ebbs v Regan*, 54 AD2d 611 [1976]; *see also People v Diack*, 24 NY3d 674, 677 [2015]). As the respondents have articulated no other basis for denying approval of the proposed residence, the respondents' refusal to

approve the *Telford* home as a suitable post release residence was arbitrary and capricious, as the determination bears no rational relation to the petitioner's past conduct or likelihood that he will re-offend.).

Miller v. Smith, 2021 WL 5416624 (E.D.N.Y. 2021), reconsideration denied sub nom (finding decision to reject mother's residency was not arbitrary or capricious since it was the home wherein the petitioner "committed sexual crimes and where he would be the caretaker for his elderly, disabled mother from whom he had previously stolen $34,000.").

SORA–Sex Offender Registration Act

Made law in 1996, the Sex Offender Registration Act requires the registration of individuals convicted in New York State of certain sex offenses as well as the registration of those individuals convicted in another jurisdiction if the offense is equivalent to a New York State registerable sex offense. Registration obligations vary pending the whether the person is deemed low, moderate or high risk. About the New York State Sex Offender Registration Act (SORA).

The leveling decision is made by the sentencing court and counsel will be appointed. *See e.g.* https://oadnyc.org/sex-offenses/

See Defense Attorneys' Guide to SORA: https://www.ocbaacp.org/wp-content/uploads/2022/02/SORA-Manual-Second-Edition-Final.pdf

SARA–Sex Assault Reform Act

Made law in 2000, the Sex Assault Reform Act regulates where those deemed level III "sex offenders," or convicted of certain designated offenses may live. Generally, SARA prohibits individuals from living within 1000 feet of a school, day care, park and other locations where young people congregate, regardless of whether the original crime involved children. *See*:

A map showing areas of NYC that are off limits

DOCCS Directive 8305 regarding SARA.

For synopsis of current problem *see* Reasons for Support section of NYC Bar Committee Report: The New York State Commission on Sex Offender Supervision and Management.

SOMTA--Sex Offender Management and Treatment Act–2007

Enacted in 2007 as part of the Sex Offender Management and Treatment Act ("SOMTA," L. 2007, ch. 7), Article 10 of the Mental Hygiene Law, M.H.L. §§ 10.01–17, "sets out procedures for determining whether a 'detained sex offender' is a 'sex offender requiring civil management'"—essentially, requiring commitment "to mental hospitals, rather than release, when their prison terms expire." *People ex rel. Joseph II. v. Superintendent of Southport Corr. Facility*, 15 N.Y.3d 126, 130, 132 (2010). To subject a person to civil detention the State must establish, at trial and by clear and convincing evidence, that the person "suffers from a mental abnormality as defined in that statute" and should be civilly managed instead of released. *State v. Floyd Y.*, 22 N.Y.3d 95, 99 (2013).

This statute goes beyond targeting so called “sex offenders” and includes “a person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article.” M.H.L. § 10.03(g)(4).

DOCCS takes the position that it may continue detention after a grant of parole, without any due process or court order, if a SOMTA “investigation” by the NYS Office of Mental Health is in process. This violates due process and is not authorized by the SOMTA statute. “[A] New York inmate who has been granted an open parole release date,” unlike a “mere applicant for parole,” has “a legitimate expectancy of release that is grounded in New York’s regulatory scheme,” and therefore possesses a “protectable liberty interest that entitled him to due process.” *Victory v. Pataki*, 814 F.3d 47, 60 (2d Cir. 2016) (internal quotation marks and citation omitted). This practice is unconstitutional and should be responded to with a habeas petition. Habeas petitions in this context will soon be available on the Parole Information Project.

Obtaining Records Not Included in the Parole File

Separate from the documents contained in the parole file, it is good practice to obtain a release from your client and request your client’s medical and mental health records (if relevant), disciplinary history and programming records. The client may already have these and some may be in the parole file, but you may want to obtain complete records.

These documents may be obtained through an informal request (via letter, phone or sometimes even email) with an accompanying release sent to the client’s Offender Rehabilitation Coordinator or staff in “Inmate Records.” Call the prison to identify from whom to request these documents. These requests are not made pursuant to the Criminal Procedure Law or the parole regulations. If an informal request is unsuccessful, then file a formal FOIL request with an accompanying release.

Mental and physical health records require special releases and procedures for obtaining them:

Mental Health Records: The Office of Mental Health (OMH) is the NYS agency that provides mental health treatment within prisons. Your client must sign an OMH release authorization for you to obtain records on her/his/their mental health treatment, which is included in XVII below (HIPPA will not suffice). To obtain the records, call New York Central Psychiatric Center (315-765-3600) and explain that you are looking to obtain mental health records for someone in prison. The Center will let you know whether the applicant has had in-patient or out-patient treatment, which will dictate where (and to whom) to send the request(s). Typically, in-patient requests are addressed to the prison’s Mental Health Unit, and out-patient requests are addressed to the New York Central Psychiatric Center.

Physical Health Records: Health Insurance Portability & Accountability Act (HIPAA) is the federal law that establishes strict requirements for maintaining the privacy of medical and health- related information. A HIPAA release form is required to get any documents on your applicant’s physical health. To obtain these records, call the "Medical Records Unit" at the prison where the person is incarcerated.

Resources

Parole Information Project

NYS DOCCS Incarcerated Individual Lookup

Parole Board Calendar

Parole Board Administrative Appeal Decisions

DOCCS Directives

DOCCS Facilities

Appendix

Via Electronic Mail Only

September 22, 2021

Anthony J. Annucci
Acting Commissioner
NYS Department of Corrections and Community Supervision
1220 Washington Avenue
Albany, NY 12226-2050

Cathy Sheehan
Acting Deputy Commissioner and Counsel
NYS Department of Corrections and Community Supervision
1220 Washington Avenue
Albany, NY 12226-2050

Re: Request for Immediate Expansion of Legal Calls

Acting Commissioner Annucci and Acting Deputy Commissioner and Counsel Sheehan,

We are a coalition of legal service providers, law school clinics and institutions that serve individuals incarcerated in New York State DOCCS facilities. We write to request changes to the guidelines and procedures for legal calls, which we respectfully assert are in urgent need of modernization. The current regulations severely limit our abilities to communicate confidentially with our clients about life-altering legal matters and undermine our clients' constitutional rights to counsel and access to the courts.

DOCCS Directive #4423 "Inmate Telephone Calls" specifies that confidential legal calls are available when the matter cannot be resolved via confidential letters and a legal visit would be unduly burdensome. However, unlike legal visits,[1] only attorneys registered with the Office of Court Administration (OCA) in New York State may schedule and conduct legal calls. These calls are limited to 30 minutes every 30 days, with few exceptions. Attorneys must also call the

[1] As outlined in DOCCS Directive #4404, for the purpose of legal visits, an attorney "need not be formally retained or be the Attorney-of-record" in order to have a legal visit with an incarcerated individual, as long as the visit is to discuss confidential legal matters. Furthermore, an attorney's authorized representative, including paralegals, investigators, or other individuals under the supervision of an attorney, may conduct legal visits if the attorney certifies that the legal visit is necessary regarding a specific and unresolved legal matter. According to the law and Constitution, the same parameters must apply to confidential legal phone calls. See e.g., Smith v. Coughlin, 748 F.2d 783, 789 (2d Cir. 1984) (holding that refusing to allow a paralegal to conduct a legal visit violated the Constitution).

facility from the number listed on their profile in the OCA attorney database, regardless of where the attorney is located or currently practicing.

In addition to the rules specified in Directive #4423, DOCCS staff at several correctional facilities also require attorneys to disclose the nature of the legal matter before scheduling a legal call, allegedly to assist staff in prioritizing the call schedule. Clients also frequently report that prison staff fail to provide private locations for these calls, forcing clients to confer with their attorneys in hallways, open-doored rooms and other public locations. Lastly, several of our agencies have received reports that DOCCS is recording and/or monitoring conversations between incarcerated people and their lawyers. These practices must end.

In Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), the Supreme Court explained the importance of confidential legal communications:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

The restrictions outlined in DOCCS Directive #4423, along with the failures of DOCCS staff to protect the confidentiality of legal calls, substantially inhibit our ability to provide effective representation, compromise the sanctity of the attorney-client relationship, and deprive our incarcerated clients of one of their few rights—access to counsel.

We urgently call on DOCCS to revise legal call directive #4423 and develop new protocols and training for DOCCS staff that include the following:

1. Unrestricted access to weekly legal calls of one hour or more.

As attorneys we are bound by ethical obligations and codes of conduct, the most important of which is zealous representation of our clients. Such representation requires competent, prompt and diligent communication with those we represent,[2] as well as strident advocacy on their behalf. The rules are clear that incarceration cannot and should not undermine this fundamental

[2] American Bar Association Model Rules of Professional Conduct Preamble: A Lawyer's Responsibilities. Available at: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/

duty.[3] To effectively and ethically represent our clients we require access to weekly legal calls of at least one hour or more.

Our clients also require regular legal calls in order to fully exercise their constitutional rights to counsel and access to the courts. Given that their liberty is at issue, our clients are active participants in their cases, giving input and making crucial decisions about the trajectory of litigation. These conversations take time and are delicate, especially when the stakes involve prolonged and even lifelong incarceration. Litigation is rarely short in duration, court filing deadlines are generally outside an attorney's power to modify, and the speed of modern law practice requires quick decision-making. Thus, we need ongoing—not sporadic—access to our clients. Correspondence by confidential legal mail or infrequent in-person visits are simply not viable alternatives to confidential phone conversations.

As justification for the current policy, DOCCS argues that more frequent and lengthier calls will burden correctional staff and consume facility resources. However, during the height of the global pandemic in 2020, DOCCS demonstrated it has the capacity and infrastructure to accommodate an expansion of legal calls. DOCCS suspended their normal procedures and temporarily authorized attorneys to make more frequent and longer legal calls. Prison staff, recognizing the predicament posed to incarcerated people and their attorneys, began scheduling biweekly and sometimes weekly legal calls.

DOCCS also maintains that in-person legal visits and confidential legal mail should be the primary form of communication between attorneys and their clients and legal calls should be reserved for the most urgent matters. However, correctional facilities are located in nearly every corner of the state and most attorneys in the organizations that form our coalition have neither the capacity nor financial resources to travel hundreds of miles for a confidential visit of only a few hours.[4] Confidential mail, which now moves slower than the pace of the modern world,[5] is also not a viable alternative to in-depth dialogue. We cannot adequately assist our clients in understanding their legal options or the consequences of those choices nor can we adequately prepare clients for hearings or other legal proceedings through written correspondence.

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[3] American Bar Association Standards for the Defense 4-3.1 states "Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody." Available at: https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

[4] In recognition of this obstacle, jails across the state, including those on Rikers Island, have policies and procedures that offer unlimited, confidential calls or televisits between attorneys and clients. Information available at: https://www1.nyc.gov/site/doc/inmate-info/video-teleconferencing-scheduling-form.page

[5] Attorneys and their staff have few good options when mailing confidential correspondence to our clients. As widely reported, the United States Postal Service is experiencing unprecedented delays and many alternatives such as FedEx do not deliver mail to prison PO Boxes.

We request DOCCS authorize at least weekly legal calls of one hour or more in order for us to fulfill our ethical duties as attorneys and ensure our clients' access to counsel and the courts.

2. Formally authorize paralegals, administrative support staff and other representatives to schedule and conduct legal calls.

DOCCS Directive #4423 specifies that only attorneys admitted to practice law in New York State may schedule and conduct legal calls. It also requires that attorneys initiate the legal call from the phone number listed in their profile in the Office of Court Administration database. These restrictions severely limit our ability to effectively represent our clients, and once again, are desperately in need of modernization.

By the very nature of legal practice, attorneys rely on support staff to help them manage their caseloads and provide efficient and effective client representation. This is particularly true for the vast majority of attorneys who serve incarcerated individuals, including solo practitioners, nonprofit staff attorneys and clinical law professors. They rely heavily on paralegals, students, and interns to assist in the representation of their clients. In most offices, attorney caseloads are high and paralegals and other authorized representatives are the primary point of contact for incarcerated people. Paralegals conduct intakes, evaluations, and interviews with clients, and give vital status updates. These conversations, even without the presence of the primary attorney, are part of formal legal representation and protected by attorney-client privilege. The law, the Constitution and the rules of professional conduct do not distinguish between an attorney and their authorized representatives in these circumstances and neither should DOCCS.[6]

Notably, DOCCS Directive #4404 governing legal visits correctly permits an attorney's authorized representative, including paralegals, investigators, or other individuals under the supervision of an attorney, to conduct confidential visits.[7] In line with this policy, and in order for attorneys to effectively represent their clients, DOCCS must formally authorize paralegals, administrative support staff and other representatives to schedule and conduct legal calls.

Further, DOCCS should permit paralegals and attorneys to initiate legal calls from numbers other than what is listed in the OCA database. This requirement is antiquated and fails to recognize

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[6] See, e.g., Procunier v. Martinez, 416 U.S. 396, 419-22 (1974), overruled in part on other grounds by Thornburgh v. Abbott, 490 U.S. 401 (1989) (extending privilege to law students and paralegals); Smith v. Coughlin, 748 F.2d 783, 789 (2d Cir. 1984) (holding that refusing to allow a paralegal to conduct a legal visit violated the Constitution).

[7] DOCCS Directive #4421 "Privileged Correspondence" outlines the parameters for sending and receiving confidential legal mail. The directive also correctly states that any "approved legal representative" or a "representative employed or supervised by an attorney" may send confidential legal mail to an incarcerated individual in New York State. The same basic entitlements should be extended to non-attorney staff in the context of legal calls.

that attorneys and their staff are working from a variety of locations, both due to the pandemic and also shifting organizational cultures.

3. Cease all inquiries into the nature of the matter necessitating a legal call.

The purpose of legal calls is for attorneys and their representatives to have confidential conversations with current and potential future clients. During recent attempts to schedule legal calls, DOCCS staff asked several attorneys from the undersigned organizations about the nature of their representation and the legal matter at hand. One attorney was told that the nature of the legal matter to be discussed with their client—preparation for an upcoming parole release interview—did not warrant a legal call and it was therefore denied.

Attorney-client privilege is a bedrock principle of the American legal system. Accordingly, DOCCS must not and should not inquire into the nature of a client's legal matter or the purpose and necessity of a legal call, nor should such information be the basis for granting or denying access to a confidential call. The legal team and the incarcerated person, not DOCCS staff, is the appropriate arbiter of when a call is necessary. Moreover, predicating access to confidential calls on the nature or posture of a legal matter undermines attorney-client privilege and violates basic tenets of the U.S. and New York State constitutions.

We call upon DOCCS to cease all inquiries into the nature of the matter necessitating a legal call and inform all DOCCS staff that such inquiries are prohibited.

4. Ensure confidentiality of legal calls, notify all whose confidential attorney-client communications have been recorded, and sequester all illegal recordings of past confidential conversations.

Over the past year, several of our agencies have received reports that legal calls, in numerous instances and at numerous facilities, have been listened to, recorded, or otherwise monitored by DOCCS personnel. Despite our attempts to bring discrete instances of legal call monitoring to your attention, the problem persists and the reports grow. Based on the breadth of facilities and individuals involved, it appears legal call monitoring is a widespread practice at DOCCS facilities rather than an aberration.

Although they have been deprived of their physical freedom, "[i]ncarcerated or detained individuals do retain the attorney-client privilege." United States v. DeFonte, 441 F.3d 92, 94 (2d Cir. 2006). When DOCCS personnel refuse to preserve auditory confidentiality, our clients are placed "in the untenable position of having to either forego providing [their] attorney[s] with information essential to the advice sought, or waive [their] Fifth Amendment right against self incrimination in order to exercise [their] fundamental right to counsel. [Their] Federal Sixth

Amendment and New York State Art. 1 § 6 right to counsel is entitled to more than [] lip service." People v. O'Neil, 43 Misc. 3d 693, 704 (Nassau Cty Dist. Ct. 2014).

The necessity of confidential, non-recorded calls with counsel is plain. At a minimum, DOCCS must: (1) investigate the auditory confidentiality of legal call booths (or substitute facilities) and phone lines used for legal calls at all DOCCS facilities; (2) remove all recording devices from phones and phone lines in designated legal call booths and cure all other potential threats to confidentiality; (3) notify, in writing, all persons--those in DOCCS custody and, where known, their attorneys--whose confidential attorney-client communications have been monitored or recorded by DOCCS that such monitoring or recording occurred, when it occurred, and how they can obtain a copy of the illegal recording or other details of the monitoring; (4) identify, securely preserve, and sequester from routine or broad access any existing legal call recordings or fruits from such illegal recordings, including preventing the importing of any legal calls or data about them into any database; and (5) cease all present and future monitoring, surveillance or recording of legal calls[8] and ensure all legal calls are conducted over confidential phone lines in confidential locations.

In sum, we urgently request that DOCCS revise Legal Call Directive #4423 and promulgate new regulations for correctional staff that:

1. **Provide unrestricted access to weekly legal calls of one hour or more;**
2. **Formally authorize paralegals, administrative support staff and other representatives to schedule and conduct legal calls;**
3. **Cease all inquiries into the nature of the matter necessitating a legal call; and**
4. **Ensure confidentiality of legal calls and prevent future monitoring or surveillance of confidential conversations.**

Thank you for your attention to these matters.

Respectfully,

Appellate Advocates
Bronx Defenders
Brooklyn Defender Services
Brooklyn Law School Criminal Defense & Advocacy Clinic

[8] While the focus of this letter is solely on legal calls, the recording of attorney-client calls is but one element of expanding surveillance of the people we represent that threatens fundamental civil liberties and basic human rights. People in prison routinely face abject isolation and phone calls are often a critical lifeline to survival. To subject these calls, and the people we serve, to uniform surveillance by recording and monitoring calls is damaging for not only the incarcerated person but also their loved ones on the other end of the line.

Cardozo Law Criminal Defense Clinic
Center for Appellate Litigation
Center on Race, Inequality and the Law at NYU Law
Chief Defenders Association of New York
Correctional Association of New York
CUNY School of Law Defenders Clinic
Fordham Law Criminal Defense Clinic
Incarcerated Gender Violence Survivors Initiative
Innocence Project
Legal Aid Society
Legal Aid Society of Suffolk County
Legal Aid Society of Westchester County
Mental Hygiene Legal Services, Appellate Division, All Departments
New York County Defender Services
NYU Law Racial Justice Clinic
Office of the Appellate Defender
Parole Preparation Project
University at Buffalo School of Law Criminal Justice Advocacy Clinic
University at Buffalo School of Law Advocacy Institute
Youth Represent

cc:

Acting Executive Deputy Commissioner Daniel F. Martuscello
NYS Department of Corrections and Community Supervision
1220 Washington Avenue
Albany, NY 12226-2050

Governor Kathy Hochul
New York State Capitol Building
Albany, New York 12224

Lieutenant Governor Brian Benjamin
New York State Capitol Building
Albany, New York 12224

Senator Julia Salazar
172 State Street
State Capitol Building, Room 514
Albany, NY 12247

Assembly Member David Weprin
198 State Street
Legislative Office Building, Room 526
Albany, NY 12248

NEW YORK STATE | **Corrections and Community Supervision**

KATHY HOCHUL
Governor

ANTHONY J. ANNUCCI
Acting Commissioner

November 29, 2021

VIA US MAIL AND E-MAIL (mlewin@paroleprepny.org)

Michelle Lewin, Esq.
Executive Director
Parole Preparation Project
135 West 20th Street, Suite 401
New York, NY 10011

Re: Legal Calls

Dear Ms. Lewin:

Thank you for your patience while we discuss the operational changes that you proposed to our legal call process. We reviewed our current policy, considered your suggestions, and after thoughtful debate and consideration, we have adopted several of your suggestions. The attached November 29, 2021 Department memorandum recites the changes that we will make to the legal call section of Directive #4423. The effect of issuing the memo is that the changes will take effect immediately. We are pleased that the interactive process between us has resulted a positive result.

Please share with the other organizations that joined in your September 22, 2021 correspondence.

Sincerely,

Cathy Y. Sheehan
Deputy Commissioner and Counsel

Enc.

NEW YORK STATE | **Corrections and Community Supervision**

KATHY HOCHUL
Governor

ANTHONY J. ANNUCCI
Acting Commissioner

MEMORANDUM

TO: All Superintendents

FROM: Cathy Y. Sheehan
Deputy Commissioner and Counsel

DATE: November 29, 2021

SUBJECT: Attorney Legal Calls

I. ATTORNEY LEGAL CALLS

A. Generally, attorneys communicate with their incarcerated clients through privileged correspondence in accordance with Part 721 of Title 22 NYCRR or during legal visits (see Directive #4404, "Inmate Legal Visits"). There may, however, be certain circumstances where an attorney will need to communicate confidentially with their incarcerated client by telephone.

B. In the absence of specific court order or written direction from the Department's Counsel to the contrary, the following protocols shall apply to confidential attorney legal calls:

1. The call must be requested in writing or over the telephone by an attorney or the attorney's behalf by a paralegal, administrative staff employed by the attorney or a law student (hereinafter the requestor).

   a. Attorney Requirements: Admitted to practice law, in good standing, and registered with the Office of Court Administration in accordance with Section 468-a of the Judiciary Law or the equivalent organization from the state in which they are admitted. The Office of Court Administration provides an on-line NYS attorney search function at http://iapps.courts.state.ny.us/attorney/AttorneySearch, other states provide the same online attorney search function;

   b. Paralegal Requirement: An attorney admitted to practice law and in good standing, must certify in writing to the department that the individual is a paralegal and that the attorney has direct supervisory authority over the paralegal.

   c. Law Student Requirement: An attorney member of the law school's facility must certify to the Department, in writing, that the faculty member has direct supervisory authority over the student, shall make reasonable efforts to ensure that the student's conduct is compatible with the professional obligations of a lawyer, and provide the faculty member's contact information through the school's publicly listed business phone number and school issued email address.

2. Requests must be directed to a Supervising Offender Rehabilitation Coordinator or designee. If the request is made by telephone, it must be followed by a written request sent to the email address or fax number designated by the facility at the time of the call;

3. The requester must provide at least two suggested dates and times (excluding weekends, evenings, and holidays) when he or she will be available to call into the facility to speak with their client;
4. The requestor must initiate the call using the business telephone number listed on the attorney registration statement filed with the Office of Court Administration or in the case of a law student a number provided by the facility member referenced in Section (I)(B)(1)(b) above; and
5. The call must not exceed one hour in duration. In the event of exigent circumstances, a request for an extension of time shall be made to Counsel's Office. Approvals will be subject to the facility's ability to accommodate the request.

C. An incarcerated individual shall receive the legal call at one of the following locations as determined by the correctional facility:
   1. An incarcerated individual phone booth that was constructed at the facility for the purpose of accommodating legal calls;
   2. A disciplinary hearing room, when not reserved for a hearing or other purpose; or
   3. Any other location where the telephone is not (absent a court order or the written consent of a party to the call) monitored or recorded and where there exists auditory confidentiality.

D. In response to the requestor's application made in accordance with this subdivision, the correctional facility shall, in a period no greater than three business days from the request, contact the requestor by telephone, e-mail or fax and inform them of the date and time of the call, as well as the name and telephone number of the facility staff member the requestor is to ask for when initiating the call;

E. If the correctional facility denies a requestor's application for a legal call, they can call or write to Counsel's Office using the contact information provided by the correctional facility;

F. A record of the legal call shall be noted in the Guidance folder.

NEW YORK STATE | Corrections and Community Supervision

KATHY HOCHUL
Governor

ANTHONY J. ANNUCCI
Acting Commissioner

MEMORANDUM

TO: Incarcerated Individual Population

FROM: Anthony J. Annucci, Acting Commissioner

SUBJECT: Incarcerated Individual Packages

DATE: April 25, 2022

As a result of an increase in violence and overdoses due to the introduction of contraband through the package room, specifically, illicit drugs and weapons, the Department is in the process of revising its policy concerning packages and articles that are received through facility package rooms. Upon complete implementation, packages, and articles will only be allowed to be received directly from vendors via U.S. Postal Service, FedEx, UPS, etc. Packages will no longer be allowed to be brought to the facility during visits or mailed directly to the facility from family or friends. While crafting the updated policy, we considered the concerns raised by the families of incarcerated individuals and advocate organizations regarding the availability and price of products under the previously discontinued pilot Secure Vendor Program. This change is expected to make the system safer and aid in reducing overdoses, violence and overall rehabilitation of the population.

Department Directive #4911, "Packages & Articles Sent or Brought to Facilities" is being renamed to "Packages & Articles Sent to Facilities" with the following additional modifications:

- Only packages received via mail directly from a vendor will be permitted, except:
  - Family and/or Friends will be permitted to send two (2) non-food packages per year, via mail
- The number of food packages allowed will be increased from two (2) to three (3) per month and the total weight increased from 35 to 40 lbs.
- There will be no limit on non-food packages received from vendors, whether ordered by the incarcerated individual or family/friends
- The "Receipt Value Record" will be increased from $20 to $30
- Similar to what we did in our commissaries, all cans will be eliminated
- The maximum value of an allowable item of clothing will be increased from $80 to $90
- The mini-calculator max value will be increased from $30 to $50
- The typewriter max value will be increased from $350 to $370

Incarcerated individuals who are not serving a Loss of Packages sanction will continue to order packages and articles utilizing disbursement forms and ordering from vendor catalogs. An incarcerated individual's family members and friends will also be able to order packages and articles from vendors to be delivered via U.S. Postal Service, FedEx, UPS, etc. The only vendors that cannot be ordered from are those that are on the disapproved vendor list. This list will be published on the Departmental web page. Directive #4913,

"Incarcerated Individual Property", sets forth incarcerated individual property limits; these limits remain unchanged.

The new method of how packages and articles are received through facility package rooms will be piloted in a HUB identified by Central Office, beginning on May 9, 2022. The pilot program in the initial HUB will continue for at least one month, to provide the Department an opportunity to adequately address any unforeseen issues that may arise. Following the initial rollout, two (2) additional Hubs' will be added every two weeks, until the program is fully implemented. Based on the success of the program, the implementation schedule may be accelerated. Upon, the program becoming fully implemented, these changes will become permanent.

For facilities that have a Family Reunion Program (FRP), the FRP will continue to operate in accordance with Directive #4500 "Family Reunion Program" and the Facility's local policy at this time.

In addition, while fresh vegetables will not be eliminated if shipped directly from a vendor, we recognize providing access to fresh fruits and vegetables is important. While most facilities offer this via the commissary, DOCCS will direct all facilities with a commissary to offer fresh fruits and vegetables, with the types of produce being identified through discussions with the Incarcerated Liaison Committee. In addition, DOCCS will explore options to standardize commissary offerings across the state, resulting in an increase in items available to the population

The goals of the Department's Packages & Articles Sent to Facilities program are to maximize the availability of food and articles for incarcerated individuals from vendors that offer a variety of items at competitive pricing for incarcerated individuals, their families and their friends, while maintaining security, safety, and aiding in achieving the Department's overall mission.

[LAW FIRM LETTERHEAD]

DATE

Via first-class mail
Appeals Unit
New York State Board of Parole
Harriman State Campus
Building #2
1220 Washington Avenue
Albany, NY 12226

Re: [CLIENT NAME, DIN]

Dear Madam or Sir:

This letter serves as Notice of Administrative Appeal on behalf of [CLIENT NAME, DIN] of the Board of Parole's denial of [CLIENT'S] application for release on parole. [CLIENT] was interviewed by Commissioners of the Board on October 12, 2021 at [FACILITY]; the board's decision denied parole.

I represent [CLIENT] in connection with this appeal and this letter serves as my notice of appearance, as well. Therefore, please direct all correspondence in this matter to my attention.

Please provide to this office a transcript of the October 12, 2021 hearing in which [CLIENT] was interviewed.

Finally, please confirm receipt of this letter and indicate the deadline by which the appeal must be perfected.

Sincerely,

Attorney

LAW FIRM LETTERHEAD

LEGAL, PRIVILEGED, AND CONFIDENTIAL MAIL

DATE

NAME
DIN:
FACILITY
ADDRESS

Dear Mr./Ms. Client:

I am a volunteer attorney with the Parole Advocacy Initiative. I write to confirm that [law firm] would be pleased to represent you in the administrative appeal of the October 2021 denial of parole. Should the administrative appeal be denied, [law firm] will represent you in the Article 78 proceeding. As I am representing you on a pro bono basis, my services are free and [law firm] will cover any filing fees associated with the representation.

I am enclosing a retainer agreement which sets out the scope of the representation. If it meets with your approval, please sign and return it to my office. I am enclosing a second copy for your records.

To represent you, I will likely need to request various records, some of which require your permission to acquire. To avoid delay, please sign and return all three copies of each enclosed release form. I am enclosing an extra copy of each form for your records.

1. General Release (sign and date 3 copies and return)

2. HIPAA Form (please sign and date three copies, provide social security number; also **initial request for HIV, mental health and drug/alcohol records on each copy**.) This form is needed as there is sometimes medical information contained in the parole file.

3. OMH 11C Authorization Form. (please sign and date three copies; also **initial request for HIV, mental health and drug/alcohol records on each copy**.) This form requires a facility staff member's signature at the bottom of the form.

I am scheduling a legal call with you so that we can meet one another and discuss your parole case. If there is a need to contact me via phone, my office number is 555-555-5555. I look forward to working with you.

Sincerely,

Attorney

Senior Offender Rehabilitation Counselor

Dear Madam or Sir:

I, DIN write to give my consent to having any and all records, including those in my parole file, kept by the New York State Department of Corrections and Community Supervision released to my lawyer

I request these records in connection with my administrative appeal of the denial of parole.

Thank you for your attention to this matter.

Sincerely,

_____

DIN

LAW FIRM LETTERHEAD

DATE

Via e-mail
Attn: Parole
FACILITY ADDRESS
EMAIL

RE: Request for Parole File of [CLIENT NAME] DIN 00-A-0000 pursuant to 9 N.Y.C.R.R. 8000.5

Dear Madam or Sir:

I represent **[CLIENT, DIN]**. I write to request disclosure of all documents and records, pursuant to 9 N.Y.C.R.R. 8000.5, which were provided to the Parole Board that presided over [CLIENT'S] October 12, 2021 parole review, which resulted in a denial. We have filed a timely notice of administrative appeal.

Please note this is not a FOIL request. Therefore, exceptions to disclosure pursuant to the Public Officer's Law are not relevant.

Pursuant to the DOCCS Directive #2014, included in this disclosure should be all official statements, "opposition materials", and any support or opposition letters. In addition, letters from the victim(s) or the victim's representative must be disclosed pursuant to Executive Law 259-i(c)(B) and 259-k.

Should DOCCS withhold any portions of the file that were provided to the Parole Commissioners presiding at the October 12, 2021 parole review, please identify the nature of the document(s) withheld and the regulatory basis, under NYCRR 8000.5, for non-disclosure.

Attached please find a copy of [CLIENT'S] signed consent and waiver for the release of records and information, pursuant to 9 N.Y.C.R.R. 8000.5(c)(4), and a HIPAA release form for the medical summaries contained in the parole file.

If the requested records are available electronically, kindly send them via email to [ATTORNEY EMAIL]. Otherwise, please send an invoice for copying fees and we will promptly remit payment.

Thank you for your anticipated cooperation and courtesy in this regard.

Sincerely,

Attorney

PEOPLE OF THE STATE OF NEW YORK v. Defendant.	NOTICE OF MOTION FOR ACCESS TO PRESENTENCE REPORT INDICTMENT NO:

PLEASE TAKE NOTICE, that upon the annexed affirmation of

duly affirmed on , undersigned counsel hereby moves this court for an order, pursuant to N.Y. Crim. Proc. Law § 390.50, granting the defendant and his undersigned counsel an opportunity to view and receive photocopies of the presentence report prepared by the Department of Probation in connection with the sentencing proceedings in the above-referenced case.

DATED: _____ Respectfully Submitted,

_____

TO: County District Attorney

Department of Probation

PEOPLE OF THE STATE OF NEW YORK v. Defendant.	AFFIRMATIONIN SUPPORT OF MOTION FOR ACCESS TO PRESENTENCE REPORT INDICTMENT NO:

, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

1. I am an attorney at

2. I represent the defendant, , DIN , in his appeal of the decision of the New York State Board of Parole to deny parole on .

3. As the attorney in parole denial appeal, I am fully familiar with the facts and records.

4. was sentenced on to a sentence of under indictment number .

5. is currently in the custody of the Department of Corrections and Community Supervision (DOCCS) and incarcerated at Correctional Facility.

6. appeared before the Board of Parole on and was subsequently denied parole.

7. is currently appealing this denial of parole.

8. Pursuant to N.Y. Crim. Proc. Law § 390.50(2)(a), I am requesting a copy of the pre-sentence report to properly represent in the pending appeal.

WHEREFORE, it is requested that the court grant and undersigned counsel access to the presentence investigation report prepared in the above referenced matter for copying.

DATED: _____ Respectfully Submitted,

_____

TO: County District Attorney

Department of Probation

PEOPLE OF THE STATE OF NEW YORK v. Defendant.	AFFIRMATION OF SERVICE INDICTMENT NO:

I, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirm under penalty of perjury that:

1. I am an attorney at

2. On , I served the annexed Notice of Motion and Affidavit in Support of Motion on the County District Attorney and the Department of Probation via

DATED: _____

Respectfully Submitted,

_____

DIN

Record Review Unit, Sixth Floor
New York State Division of Criminal Justice Services
Gov. Alfred E. Smith State Office Building
80 South Swan Street
Albany, NY 12210

To Whom It May Concern:

I, request that the New York State Division of Criminal Justice

Services provide my unsuppressed personal record review to my attorney

Please forward my unsuppressed personal record review directly to:

I have listed additional identifying information below to assist you in your records search.

Name:

DOB:

NYSID:

DIN:

Sincerely,

RULES AND PROCEDURES FOR THE REVIEW OF YOUR GUIDANCE AND PAROLE FILE

Name/DIN: [redacted] Date: [redacted] 08/24/2018

You have requested to review your GUIDANCE AND PAROLE Files

This will be a REVIEW only, not a case discussion

The following records WILL NOT be made available for review

- Pre-Sentence / Probation Reports
- RAP Sheets
- Psychiatric Reports
- Confidential Reports
- Separatee Information
- Evaluative Reports / Evaluative comments in Chronos
- ASAT and treatment information
- Letters of support or against inmate's release
- Crime Victim information
- Parole Board Reports Parts II & III (inmate status reports)

You will need to send a signed disbursement for copies of any documents that will require redaction prior to your review.

Absolutely nothing may be removed or added to the file.

You will be permitted to bring a pad and pen/pencil and may make notes on the pad only – Nothing may be written on any item in the file.

You may request copies of any of these documents, in writing, to the FOIL Office. Once a disbursement has been processed, the copies will be sent to you.

YOU MUST REVIEW THE MATERIAL IN AN ORDERLY AND EXPEDITIOUS FASHION. DISRUPTIVE BEHAVIOR WILL NECESSITATE AN IMMEDIATE HALT TO THE REVIEW

PLEASE SIGN BELOW TO ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTAND AND WILL COMPLOY WITH THE RULES STATED ABOVE. THEN RETURN TO THE FOIL OFFICE WITH THE SIGNED DISBURSEMENT

[redacted] 8-21-18

Inmate name / DIN Date

PLEASE SIGN BELOW TO ACKNOWLEDGE THAT YOU HAVE COMPLETED THE REVIEW OF YOUR GUIDANCE AND PAROLE FILES.

[redacted] 8-30-18

Inmate name/DIN Date

STATE OF NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION
PAROLE BOARD REPORT

COLLINS CORRECTIONAL FACILITY

PAROLE BOARD TYPE/ DATE: INITIAL DECEMBER 2014

NAME: [redacted]	RECEIVED DATE: [redacted]	CMC: A ☐	B ☐
DOB: [redacted]	DIN: [redacted]	NYSID: [redacted]	FBI: [redacted]
PE DATE: 04/27/2015	CR DATE: None	ME DATE: Life	

PRS: 0 years **PV NT:** Yes☐ No☒ **TIME ON PAROLE:** N/A **TIME SERVED:** 300 months

CRIMES OF COMMITMENT, FELONY CLASSES, SENTENCE, PLEA OR VERDICT, COMMIT COUNTY

MURDER 2ND A1 25-0-0/99-0-0 V [redacted]
Aggregate Sentence: 25-0-0/99-0-0

EEC: ISSUED☐ DENIED☐ NON-CERTIFIABLE☐ INELIGIBLE / N/A☒

OFFICIAL STATEMENTS: JUDGE - Yes☒ No☐ DA - Yes☒ No☐ DEF ATTY - Yes☐ No☒

SENTENCING MINUTES: Yes☒ No☐ IF NO, DATE(S) REQUESTED:

CO-DEFENDANT: NAME/NYSID STATUS
None

DETAILED PRESENT OFFENSE: According to the PSI, the subject [redacted], was charged with two counts of murder in the 2nd degree, in that on [redacted], the subject, under circumstances evidencing a depraved indifference to human life, and with intent, caused the death of [redacted], by stabbing her five times with a knife. [redacted] was stabbed on both sides of her neck, once in her chest and twice in her back. The defendant broke the knife blade in the victims back. Nevertheless, after stabbing [redacted], the defendant ran from the area with their daughter in his arms. The victim was bleeding profusely from a cut in the jugular. A man stopped to assist her. The victim uttered, "He got me.", and collapsed. In the meantime, the defendant ran through the woods and entered a residential area. He entered a brown car which was idling in a driveway, which turned out to be an unmarked state police car. The defendant drove away, and the officer fired numerous rounds in an attempt to stop him. Later on, the defendant abandoned the car and went to a phone booth where he called a minister to pick him up. A minister complied and took him to the defendants house, where at that point, he revealed what had transpired. Shortly after that, the defendant surrendered at the [redacted]. On [redacted] 1, the subject was found guilty of Murder, 2nd degree, as to count 1, a class A-1 felony.

OFFENDER STATEMENT: "On [redacted] I regrettably took the life of [redacted] who was a precious soul and a devoted mothter. I express deep contrition and sincere remorse over my crime of murdering [redacted] In taking her life I -prived [redacted] presence from her loved ones including our daughte[redacted]who was 15 months old when I killed her mother. If I could go back in time and change the past and right the awful tragic wrong I did that day I certainly would. I hurt daily knowing that I killed the one I love and mother of my only child. I deeply regret that my daughter never got to know her mother, was forced to live without her mother and father, and grew up with the knowledge that he father killed her mother. I am profoundly greived because of the severe anguish and permanent separation my actions has caused for [redacted] family and loved ones. I deeply regret taking [redacted]s life because of my education and training as a Paramedic (E.M.T) and the resultant respect I have of human life due to that educational background. It greives me to know that instead of being a life saving health professional, I took a life. Similarly, I am sorrowful beyond description in being responsible for the horrific act of murder because it violates everything I believe in as a Bora Again Evangelical Christian. Life is to be held sacred and I violated the tenets of my faith by taking [redacted] life. May God forgive me. [redacted] [redacted] eldest daughet, has expressed forgiveness to me. I don't' know if I'll ever be able to forgive myself."

CRIMINAL HISTORY: Warrant: Yes☐ No☒ ICE: Yes☐ No☒
IF YES, EXPLAIN:

NEW YORK STATE – SEE ATTACHED PBCHR

JUVENILE: Yes☐ No☒ OUT OF STATE: Yes☐ No☒ FEDERAL: Yes☐ No☒
IF YES, EXPLAIN:

CERTIFICATE OF RELIEF: Eligible☒ Ineligible☐ Youthful Offender☐

INTERPRETER NEEDED: Yes☐ No☒ IF YES, LANGUAGE: N/A

PROPOSED RESIDENCES:
PRIMARY: [redacted] ALTERNATE: [redacted]

PROPOSED EMPLOYMENT: The subject is interested in employment in the couseling field. Before he was incarcerated, he had employment experience as an E.M.T and ambulance driver. He stated that he enjoys helping others and that he would like

to turn a negative situation into a positive situation. He also stated that he has experience in DV awareness, substance abuse, math tutoring, is educated in the core curriclum, and has experience as a health educator. Subject stated that he feels as though his age could be a hinderance to him gaining employment, as most people his age are ready for retirement [redacted] stated that he has compassion and ability to break things down in a simpler form for students to better understand him. His strenghts are that he does not get frustrated, has patience, and gives encouragement. The subject has a letter of assurance for employment at [redacted]

C.Jakubik, ORC — Date: 11/25/14

S.Gault, SORC — Date: 11/26/14

ORC RECOMMENDED SPECIAL CONDITIONS

INMATE NAME: [redacted]	DIN: [redacted]	NYSID: [redacted]

SUMMARY OF SCs: 1-6, 8, 10, 16, 18, 20 and 27

- ☒ **SC1** – I will seek, obtain, and maintain employment and/or an academic/vocational program.
- ☒ **SC2** – I will submit to Substance Abuse Testing, as directed by the PAROLE OFFICER.
- ☒ **SC3** – I will participate in a Substance Abuse Treatment program, as directed by the PAROLE OFFICER.
- ☒ **SC4** – I will participate in an Alcohol Abuse Treatment program, as directed by the PAROLE OFFICER.
- ☒ **SC5** – I will NOT consume alcoholic beverages.
- ☒ **SC6** – I will NOT frequent any establishment where alcohol is sold or served as its main business without the permission of the PAROLE OFFICER.
- ☐ **SC7** – I will NOT operate any motor vehicle, apply for, renew, or possess any drivers' license, without the written permission of the PAROLE OFFICER.
- ☒ **SC8** – I will abide by a curfew established by the PAROLE OFFICER.
- ☐ **SC9** – I will support my dependent children.
- ☒ **SC10** – I will participate in anti-aggression/anti-violence counseling, as directed by the PAROLE OFFICER.
- ☐ **SC11** – I will cooperate with a mental health evaluation referral and follow up treatment as directed by the PAROLE OFFICER.
- ☐ **SC12** – I will participate in Sex Offender Counseling/Treatment, as directed by the PAROLE OFFICER.
- ☐ **SC13** – I will have NO contact with any person under the age of eighteen, without written permission of the PAROLE OFFICER.
- ☐ **SC14** – I will comply with all case specific sex offender conditions to be imposed by the PAROLE OFFICER.
- ☐ **SC15** – I will NOT associate in any way or communicate by any means with victim(s) _____ without the permission of the PAROLE OFFICER.
- ☒ **SC16** – I will NOT associate in any way or communicate by any means with associate(s) [redacted] without the permission of the PAROLE OFFICER.
- ☐ **SC17** – I will NOT associate in any way or communicate by any means with other(s) _____ without the permission of the PAROLE OFFICER.
- ☒ **SC18** – I will cooperate with all medical referrals and treatment recommendations.
- ☐ **SC19** – I will participate in Domestic Violence counseling, as directed by the PAROLE OFFICER.
- ☒ **SC20** – I will comply with all court orders including those ordering fines, surcharges, and/or restitution.
- ☐ **SC21** – I will NOT be a member of any gang or associate with any known gang member or attend any gang activity or function. I will not wear, display, possess, distribute, or use any gang insignia or material.
- ☐ **SC22** – I will NOT act in any fiduciary capacity without the permission of the PAROLE OFFICER.
- ☐ **SC23** – I will NOT have a checking, savings, debit, or credit card account, without the permission of the PAROLE OFFICER.
- ☐ **SC24** – I will NOT be involved in any gambling or gambling related activity without the permission of the PAROLE OFFICER.
- ☐ **SC25** – I will participate in a D.W.I. Victim Impact Panel as directed by the PAROLE OFFICER.
- ☐ **SC26** – I will comply with all Orders of Protections.
- ☒ **SC27** – OTHER: Geographic Restrictions
- ☐ **SC28** – I will abide by the mandatory condition imposed by the Sexual Assault Reform Act.
- ☐ **SC29** – I will propose a residence to be approved by the NYS Department of Corrections and Community Supervision and will assist the Department in any efforts it may make on my behalf to develop an approved residence.
- ☐ **SC30** – I will reside only in the residence approved by the NYS Department of Corrections and Community Supervision.
- ☐ **SC31A** – I will proceed directly to the I.C.E. Warrant and if released prior to the maximum expiration date of my sentence or if released prior to the post-release supervision maximum expiration (P.R.S.M.E.) date, I will within 24 hours of my release, report to the area office as noted on my Certificate of Release. If deported, I understand that I cannot re-enter the United States unless my re-entry is authorized under 8 U.S.C. 1326. If I am convicted of illegally re-entering the United States, 8 U.S. C. 1326 authorizes the United States District Court to impose a fine, period of imprisonment up to ten (10) years, or both.
- ☐ **SC31B** - I further understand that I cannot re-enter the United States prior to the maximum expiration of my sentence, unless I receive prior written permission from the NYS Board of Parole. Also, I fully understand that re-entry to the United States, prior to the maximum expiration of my sentence, may be the basis for a revocation of my release.
- ☐ **SC32** – I will NOT use or possess any medication or supplements designed or intended for the purpose of enhancing sexual performance or treating erectile dysfunction without the written permission of the PAROLE OFFICER and the approval of his or her area supervisor.
- ☐ **SC33** – I will participate in the Department of Corrections and Community Supervision's Polygraph Program, as directed by the PAROLE OFFICER. I understand that this will include periodic polygraph sessions consisting of a pre-examination interview, polygraph examination and post-test interview with the polygraph examiner or the PAROLE OFFICER.
- ☐ **SC34** – Prior to release, I shall provide a sample, appropriate for D.N.A. testing, to be included in the NYS D.N.A. Index, pursuant to 9 N.Y.C.R.R. 6192.1 (W).
- ☐ **SC35** – I will NOT use the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen unless I receive written permission from the NYS Board of Parole to use the internet to communicate with a minor child under eighteen years of age, who I am the parent of and who I am not otherwise prohibited from communicating with.
- ☐ **SC36** – I shall NOT be released until such time as any residence that has been or may be approved on my behalf can be evaluated by the NYS Department of Corrections and Community Supervision to determine its appropriateness in light of any determinations made by a court of competent jurisdiction pursuant to Article 10 of the Mental Hygiene Law.

ORC RECOMMENDED SPECIAL CONDITIONS

INMATE NAME : [redacted]	DIN: [redacted]	NYSID: [redacted]

☐ **SC37** – Pursuant to the authority conferred upon the NYS Board of Parole, under Section 70.45(3) of the NYS Penal Law, to impose conditions of release upon an individual serving a determinate sentence who is to be released to the jurisdiction of the NYS Department of Corrections and Community Supervision, to serve a period of post-release supervision, it is hereby determined that as a condition of my post-release supervision, I shall be transferred to and participate in the programs of a residential treatment facility, as the term is defined by NY Correction Law, Section 2(6), for a period of time deemed appropriate by the NYS Board of Parole, but in no event shall such period exceed six months from the date of my entrance into said residential treatment facility.

☐ **SC38** – I shall NOT be released until the NYS Board of Parole and NYS Department of Corrections and Community Supervision are informed of the Sex Offender Risk Level that has been or will be established by a court of competent jurisdiction pursuant to Correction Law 168 – N.

☐ **SC39A** – I will have no contact, directly or indirectly, through third party, electronically, or by initiation or response, with _____. I will only have contact with any minor children in common with _____ with approval and supervision of a Family Court Order of the permission of the PAROLE OFFICER.
I will enter, complete, and comply with a Domestic Violence Offenders program, as directed by the PAROLE OFFICER.
I will enter, complete, and comply with a Parenting Course, as directed by the PAROLE OFFICER.

☐ **SC39B** – I will NOT reside with any partner without prior written permission of the PAROLE OFFICER.
I will immediately provide the PAROLE OFFICER of the contact information for any and all relationships I become involved in.
I will provide a copy of any active Order of Protection issued against me or for my protection to the PAROLE OFFICER within 48 hours of being served with the order.
I will comply with any and all "active" Orders of Protection.

☐ **SC40A** – I will NOT own, use, possess, purchase or have control of any computer, computer related material, electronic storage devices, communication devices, and/or the internet, unless I obtain prior written permission from the PAROLE OFFICER. Furthermore, if approved: If I am permitted by the PAROLE OFFICER to possess a computer at my residence, permission will be granted for only one computer.
I will provide all personal, business, phone, internet service provider, and/or cable records, to the PAROLE OFFICER upon request.

☐ **SC40B** – I will provide copies of financial documents to the PAROLE OFFICER upon request. These documents may include, but are not limited to, all credit cards bills, bank statements, and income tax returns.
I will provide all user id's and passwords required to access the computer, my C.M.O.S. and BIOS, internet service provider, any/all email accounts, instant messaging accounts, any removable electronic media, including, but not limited to, media such as smart cards, cell phones, thumb drives and web virtual storage.

☐ **SC40C** – I will provide the PAROLE OFFICER with my password and user I.D. for any approved device. I acknowledge that individuals who have access to my computer system and/or other communication or electronic storage devices will also be subject to monitoring and/or search and seizure.
I agree to be fully responsible for all material, data, images and information found on my computer and/or other communication or electronic storage devices at all times.

☐ **SC40D** – I will NOT create or assist directly, or indirectly, in the creation of any electronic bulletin board system, services that provide access to the internet, or any public or private computer network without prior written approval from the PAROLE OFFICER.
I will NOT use any form of encryption, cryptography, steganography, compression and/or other method that might limit access to, or change the appearance of, data and/or images without prior written approval from the PAROLE OFFICER.

☐ **SC40E** – I will NOT attempt to circumvent, alter, inhibit, or prevent the functioning of any monitoring or limiting equipment, device or software that has been installed by or at the behest of, or is being utilized by, the Department of Corrections and Community Supervision for the purposes of recording, monitoring or limiting my computer or internet use and access, nor will I tamper with such equipment, device or software in any way.

☐ **SC40F** – I will cooperate with unannounced examinations directed by the PAROLE OFFICER of any and all computer(s) and/or other electronic device(s) to which I have access. This includes access to all data and/or images stored on hard disk drives, floppy diskettes, cd roms, optical disks, magnetic tape, cell phones, and/or any other storage media whether installed within a device or removable.
I will install or allow to be installed, at my own expense, equipment and/or software to monitor or limit computer use.

☐ **SC41A** – I shall install and maintain, in accordance with the provisions of Section 1198 of the NYS Vehicle and Traffic Law, an Ignition Interlock Device in any motor vehicle owned or operated by me during the period of my community supervision. This condition does not authorize me to operate a motor vehicle in the event my license or privilege to operate a motor vehicle has been revoked or suspended.

☐ **SC41B** – Pursuant to the provisions of the Vehicle and Traffic Law or the Laws of any other State, I may obtain a license to operate a motor vehicle only with the prior written permission of the PAROLE OFFICER. If I possess a license to operate a motor vehicle, I may operate a motor vehicle with the prior written permission of the PAROLE OFFICER, and in accordance with this condition of release.

☐ **SC42** – I will submit to photo imaging every 90 days or whenever directed by the PAROLE OFFICER or other representative of the NYS Department of Corrections and Community Supervision.

ORC RECOMMENDED SPECIAL CONDITIONS

INMATE NAME : [redacted]	DIN: [redacted]	NYSID: [redacted]

☐ **SC45** – I understand that I shall not download, access, or otherwise engage in any Internet enabled gaming activities to include Pokémon Go. I further understand that I shall not be in the company of any person who is engaged in any Internet enabled gaming activities nor will I have any gaming software on any Internet enabled device that I am permitted to access or otherwise possess.

☐ **SC46** – I will not use the internet to access pornographic material, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen unless I receive written permission from the Board of Parole to use the internet to communicate with a minor child under eighteen years of age who I am the parent of and who I am not otherwise prohibited from communicating with.

☐ **FC01 A, B, C, D** – Sex Offender Housing Condition (SOH220) - I will propose a residence to be investigated by the Department of Corrections and Community Supervision and will assist the Department in any efforts it may make on my behalf to develop a residence.

If I am deemed a Level 3 risk pursuant to Article 6-c of the Correction Law - or - I am serving one or more sentences for committing or attempting to commit one or more offense(s) under Articles 130, 135 or 263 of the Penal Law or sections 255.25, 255.26 or 255.27 of the Penal Law and the victim of such offense(s) was under 18 years of age at the time of the offense(s), and as such I must comply with section 259-c(14) of the Executive Law, I will not be released until a residence is developed and it is verified that such address is located outside the penal law definition of school grounds and is approved by the Department. In pertinent part, Executive Law §259-c(14) provides: *"the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00, or the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while on or more of such persons under the age of eighteen are present,..."* Penal Law §220.(14).

"School grounds" means (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.

☐ **FC02 A, B** – Sex Offender Residential Treatment Facility program conditions (RTF220) - Pursuant to the authority conferred upon the New York State Board of Parole under section 70.45(3) of the penal law to impose conditions of release upon an individual serving a determinate sentence who is to be released to serve a period of post-release supervision, as a condition of your post-release supervision you shall be transferred to and participate in the programs of a residential treatment facility, as that term is defined by Correction Law section 2(6) until such time as a residence has been approved and such address has been verified to be located outside of the penal law definition of school grounds.

COMPAS REENTRY ASSESSMENT - OFFICIAL RECORDS

Offender Name: _____ Screening Date: _____

NYSID: _____ DOB: _____

Gender: _____ Ethnicity: _____

Scale Set: NY State Parole Risk (v. 2: Arrest, VFO, Absc)

Screener Name: _____

Agency: _____

Current Offenses

Note to Officer: Please reference the software Help Menu regarding any clarification to questions in this section.

- ☐ Homicide
- ☐ Assault
- ☐ Sex Offense with Force
- ☐ Robbery
- ☐ Burglary
- ☐ Arson
- ☐ Weapons
- ☐ Drug Trafficking/Sales
- ☐ Drug Possession/Use
- ☐ Property/Larceny
- ☐ Fraud
- ☐ DUI/OUIL
- ☐ Other
- ☐ Sex without Force

1. Was this person on probation or parole at the time of the current offense?

○ Probation ○ Parole ○ Both ○ Neither

Criminal History

Exclude the current case for these questions. See the 'Help' tab for further clarification.

2. How many total times has this person had a criminal arrest and/or juvenile delinquency petition action prior to the current offense (count each arrest or petition date once, no matter the number of arrest charges or level, each time)?

   ____

3. What was the age of this person when he/she was first petitioned or arrested for a criminal offense as an adult or juvenile delinquent for the very first time?

   ____

4. How many prior petitions or charges for a felony type violent action as a juvenile delinquent?
   ○ 0 ○ 1 ○ 2+

5. How many times has this person been arrested for a felony property offense that includes an element of violence?

   ○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5+

Note to Officer: The following Criminal History Summary questions require you to add up the total number of specific kinds of offenses in the offender's criminal history.

For each of the questions below, record the number of arrests or convictions (felony or misdemeanors). Record whichever is higher, the number of arrests or convictions.

Do not include the current case.

---

6. How many prior murder/voluntary manslaughter offense arrests as an adult?
   ○ 0 ○ 1 ○ 2 ○ 3+

7. How many prior felony assault offense (not murder, sex, or domestic violence) arrests as an adult?

   ○ 0 ○ 1 ○ 2 ○ 3+

8. How many prior misdemeanor assault offense (not sex, or domestic violence) arrests as an adult?
○ 0 ○ 1 ○ 2 ○ 3+

9. How many prior family violence offense arrests as an adult?
○ 0 ○ 1 ○ 2 ○ 3+

10. How many prior sex offense (with force) arrests as an adult?
○ 0 ○ 1 ○ 2 ○ 3+

11. How many prior weapons offense arrests as an adult?
○ 0 ○ 1 ○ 2 ○ 3+

12. How many times has this person been sentenced to jail for 30 days or more?
○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5+

13. How many times has this person been sentenced (new commitment) to state or federal prison?
○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5+

14. Has this person ever received Tier 2 or 3 disciplinary infractions for fighting/threatening other inmates or staff?

○ No ○ Yes

Include the current case for these questions.

15. How many times has this person been sentenced to probation as an adult?
○ 0 ○ 1 ○ 2 ○ 3 ○ 4 ○ 5+

Disciplinary History

16. Total # of Tier 3 infractions during in the last 24 months of incarceration:
_____

17. Total # of Tier 2 infractions in the last 24 months of incarceration:
_____

18. Total # of infractions in the past 24 months for:

Assaults (involving physical injury) on staff

Assaults (involving physical injury) on inmates

Sexual Assault

Weapons

Fights

Drugs

Escape

Sexual Misconduct

Other

19. Does this person appear to have notable disciplinary issues?
○ No ◎ Yes ○ Unsure

Classification History

20. During this incarceration (for all active cases) was this person ever reclassified from a lower to a higher security classification level for reasons other than programming or medical needs?

○ No ○ Yes

If answered yes to above (number of times for each):

Minimum to Medium

_____

Medium to Maximum

_____

Minimum to Maximum

_____

Family/Social Support

21. Anticipated family support upon release:

Intends to stay with family when released	O No	O Yes	O Unsure
Estranged from family	O No	O Yes	O Unsure
Family members visited periodically during incarceration	O No	O Yes	O Unsure
Inmate believes other relatives are supportive	O No	O Yes	O Unsure

22. Is there evidence of positive family support?
O No O Yes O Unsure

Substance Use

23. Substance Abuse Background:

Committed offenses while high/drunk	O No	O Yes	O Unsure
Prior drug charges/convictions	O No	O Yes	O Unsure
History of drug problems	O No	O Yes	O Unsure
History of alcohol problems	O No	O Yes	O Unsure
Prior treatments for drug/alcohol abuse	O No	O Yes	O Unsure
Any history of failed drug/UA tests	O No	O Yes	O Unsure

24. Is this person at risk for substance abuse problems?
O No O Yes O Unsure

Education

25. Did this person earn a high school diploma or GED?
O No O Yes

26. Does this person have basic educational needs that need to be addressed?
O No O Yes O Unsure

Work and Financial

27. Is this person job ready (skilled, semi-skilled, or professionally skilled)?
O No O Yes O Unsure

28. What are the current plans for employment?
- O No employment plan
- O Return to previous employer
- O Has firm job offer (other than previous employer)
- O Has employment assurance letter
- O Unable to work or retired
- O Other

29. Does this person face employability problems upon release?
O No O Yes O Unsure

30. Will this person have any financial problems upon release?
O No O Yes O Unsure

31. Does this person currently have a skill, trade or profession at which they usually find work?
O No O Yes

32. Right now, does this person feel they need more training in a new job or career skill?
O No O Yes

33. Looking ahead to their release from prison, if this person were to get a good job, how would they rate their chance of being successful?

O Good O Fair O Poor

34. Thinking of their financial situation prior to this incarceration, how hard was it for the inmate to find a job ABOVE minimum wage compared to others?

O Easier O Same O Harder O Much Harder

Self Efficacy

Please answer the following as either No, Yes or Don't Know

35. Will it be difficult for you to find a steady job?
O No O Yes O Don't Know

36. Will money be a problem for you when released?
O No O Yes O Don't Know

How difficult will it be for you to...

37. manage your money?
O Not Difficult O Somewhat Difficult O Very Difficult

38. keep a job once you have found one?
O Not Difficult O Somewhat Difficult O Very Difficult

39. have enough money to get by?
O Not Difficult O Somewhat Difficult O Very Difficult

40. find people that you can trust?
O Not Difficult O Somewhat Difficult O Very Difficult

41. find friends who will be a good influence on you?
O Not Difficult O Somewhat Difficult O Very Difficult

42. avoid risky situations?
O Not Difficult O Somewhat Difficult O Very Difficult

43. learn to control your temper?
O Not Difficult O Somewhat Difficult O Very Difficult

44. learn better skills to get a job?
O Not Difficult O Somewhat Difficult O Very Difficult

45. support yourself financially without using illegal ways to get money?
O Not Difficult O Somewhat Difficult O Very Difficult

46. get along with people?
O Not Difficult O Somewhat Difficult O Very Difficult

47. avoid spending too much time with people that could get you into trouble?
O Not Difficult O Somewhat Difficult O Very Difficult

48. avoid risky sexual behavior?
O Not Difficult O Somewhat Difficult O Very Difficult

49. keep control of yourself when other people make you mad?
O Not Difficult O Somewhat Difficult O Very Difficult

50. avoid slipping back into illegal activities?
O Not Difficult O Somewhat Difficult O Very Difficult

51. deal with loneliness?
O Not Difficult O Somewhat Difficult O Very Difficult

52. avoid places or situations that may get you into trouble?
O Not Difficult O Somewhat Difficult O Very Difficult

53. learn to be careful about choices you make?
O Not Difficult O Somewhat Difficult O Very Difficult

54. find people to do things with?
O Not Difficult O Somewhat Difficult O Very Difficult

55. learn to avoid saying things to people that you later regret?
O Not Difficult O Somewhat Difficult O Very Difficult

Anger

How do you feel about the following?

56. I feel other people get more breaks than me.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

57. People have let me down or disappointed me.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

58. I like to be in control in most situations.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

59. I will argue to win with other people even over unimportant things.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

60. When I get angry, I say unkind or hurtful things to people.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

61. I feel that people are talking about me behind my back.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

62. I feel it is best to trust no one.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

63. I prefer to be the one who is in charge in my relationships with other people.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

64. I often lose my temper.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

65. I get angry at other people easily.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

66. I feel I have been mistreated by other people.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

67. I often feel that I have enemies that are out to hurt me in some way.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

68. When dealing with new people, I quickly figure out whether they are strong or weak.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

69. I often feel a lot of anger inside myself.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

70. I feel that life has given me a raw deal.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

71. When people are being nice, I worry about what they really want.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

72. When other people tell me what to do I get angry.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

73. I notice that other people seem afraid of me.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

74. I often get angry quickly, but then get over it quickly.
O Mostly Disagree O Uncertain Don't Know O Mostly Agree

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted],
Petitioner,

-against-

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

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

Index No. _____

ATTORNEY VERIFICATION

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

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

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

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

Dated: December 3, 2020

Martha Rayner, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

----------x

In the Matter of the Application of

[redacted],

Petitioner

-against-

VERIFICATION

Index No.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and TERRY BARNARD, CHAIRMAN, BOARD OF PAROLE,

Respondents

For Judgement Pursuant to Article 78 of The Civil Practice Law and Rules

----------x

STATE OF NEW YORK
COUNTY OF NEW YORK: ss:

[redacted], being duly sworn, deposes and says that: I am the petitioner in this proceeding; I have read the foregoing petition and know the contents thereof, that the same are true to my own knowledge, except as to matters therein stated to be alleged on information and belief; and as to those matters I believe them to be true.

[redacted]

Sworn before me this 1st st of MAY, 2020.

NOTARY PUBLIC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

In the Matter of the Application of

Petitioner

v.

TINA STANFORD,
CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE

Respondent.

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

PRO BONO AFFIRMATION
PURSUANT TO CPLR 1101(E)
IN SUPPORT OF APPLICATION

Index No.

, an attorney duly admitted to practice in the State of New York, hereby affirms the following under penalty of perjury:

1. I am an attorney at the firm of , which serves as counsel for the Petitioner

2. represents the Petitioner on a pro bono basis and has undertaken this representation under the auspices of the Parole Advocacy Initiative of Lincoln Square Legal Services, Inc., a nonprofit organization which has as its primary purpose the furnishing of legal services to indigent persons.

3. is unable to pay the costs, fees and expenses necessary to prosecute this action.

4. Under these circumstances, pursuant to CPLR 1101(e), Petitioner may proceed as a poor person.

Dated:

_____

[redacted]
The Bronx Defenders
360 E. 161 Street
Bronx, NY 10451

July 26, 2021

To: NYS Board of Parole
NYS Division of Parole

Re: [redacted]; DIN 98[redacted]
Parole Hearing Date: [redacted]2021
Location: [redacted] C.R.

Dear Sirs/Ms:

I write to the NYS Board of Parole as the trial attorney for Mr. [redacted]. I believe that I have important information for the Board to consider as it decides whether to release Mr. [redacted] after his 25 years of incarceration. I ask that this letter be included in the information that will be given to the Board members who will consider his case.

I first met Mr. [redacted] shortly after his arrest in 1997, now almost 25 years ago, when I was assigned to be his public defender. As you know, Mr. [redacted] was convicted of [redacted], thus causing her death.

I recently re-read the notes of my original interview with my client, which occurred within days of the incident. As I had long recalled, Mr. [redacted] was immediately cooperative and forthcoming with me. He made it abundantly clear that he understood his responsibility for this terrible act of violence. While he spoke about the drugs and alcohol being consumed around the time of the incident, he also made clear that he understood that there was no possible justification for what he had done.

As soon as I entered the case I began to communicate with his [redacted]. I was trying to understand why Mr. [redacted], at age, 48, would engage in such an uncharacteristic violent act. After all, his 'record' at the time of this incident consisted of one class B non-violent misdemeanor from 23 years before, and a loitering violation from 15 years before. [redacted] explained to me that he also was shocked that [redacted] had done what he was accused of, as his memory [redacted] was of a loving, peaceful man. [redacted] was quoted in a newspaper article concerning the incident as stating, "[redacted] never had trouble with the law; he was a mild man. I don't believe he would have done this intentionally."

While Mr. [redacted] immediately confessed his involvement to the responding police officers, he also stated that in no way did he expect such a conflagration to occur. Furthermore, as the court records showed, Mr. [redacted] made no attempt to flee the scene of his crime, and was arrested at the door of the couple's apartment. A neighbor who knew both Mr. [redacted] and [redacted] stated she was stunned by what had occurred, noting, [redacted]

Now, 25 years after the crime and subsequent trial, I still find myself haunted by my representation of Mr [redacted], and thought it would make sense to share the following comments with those who will now consider whether to grant him parole. I learned recently that he will soon be coming up for parole consideration, and two weeks ago I went to speak with him at [redacted] C.F. Therefore, I want to share my reflections concerning the elderly man that I talked with. I will detail these thoughts at the end of this letter. I also write for two additional reasons: first, because I question the advice that I gave him when I represented him 25 years ago; secondly, because a law that would have more accurately reflected Mr. [redacted] culpability changed since he was convicted.

At the time of Mr. [redacted] case I was a relatively inexperienced public defender, and his case was one of the first homicide cases I handled. I have long wondered if my advice to him was correct, and feel more than a little responsible for his ultimate decision to take this case to trial. From the

first time I met Mr. [redacted], shortly after his arrest back in 1997, he demonstrated remorse for what he had done, and was willing to take responsibility. I recall that he was offered a plea to Manslaughter 1, with a large number of years, as a determinate sentence. I remember advising him that I believed it was a relatively high offer for what he was accused of doing, and that I thought he had a reasonable possibility of receiving a more appropriate sentence after a jury trial. Obviously, I believed that he would be convicted of a reckless, but not depraved, killing, and thus be convicted of Manslaughter in the second degree. I think that, given my inexperience, I failed to adequately understand- or to convey to Mr. [redacted]- the danger that the jury would convict him of depraved indifference murder. While I appreciate that the ultimate decision as to whether to go to trial, or to accept a plea, was his, I also recall that Mr. [redacted] leaned heavily on me for advice in making this consequential decision. For the past 25 years, on a daily basis, I wonder whether I gave this advice in an educated, dispassionate, and appropriate manner. It is an issue which has haunted me for my entire legal career.

I also recall that as I learned the facts of Mr. [redacted] case and prepared the case for trial I thought long and hard about the fact that the police reports stated that he had been intoxicated during the incident. Indeed, the first police report filled out that evening, the pedigree sheet, prepared by the police officer who apprehended Mr. [redacted] at the door to his apartment, indicated that he was intoxicated. Furthermore, during my interviews with my client it had become clear to me that his act of throwing alcohol on [redacted] had occurred during an evening of a lot of drinking and drug use.

While it was clear to me that his apparent intoxication did not in any manner excuse his violent act, it did seem to me that it *had* to be relevant in some manner that he had done this in such a state. After all, most of us have done things while intoxicated which we would not do while sober, whether because we lose some kind of impulse control and/or because our judgment becomes impaired. Many, unfortunately, engage in more risky, reckless and irresponsible behavior when they drink too much… and over my many years of criminal defense practice I have seen far too many individuals engage in criminal acts while intoxicated which are out of character with their general manner of going through life. Given that Mr.

[redacted] had never engaged in such violent activity in the past, and seemed to have a loving relationship with [redacted], it seemed obvious that alcohol had played a major role in this tragedy.

As I examined the two most serious charges Mr. [redacted] was facing- both intentional murder and depraved indifference murder- two equally serious class A Murder in the second degree charges- it soon became clear that we were faced with an unusual legal situation with regard to intoxication. On the one hand, with regard to the charge of 'intentional murder" it was clear that a jury would be permitted to consider the effect of alcohol when determining if he had an intent to actually kill [redacted]. (And as the record makes clear, Mr. [redacted] was acquitted of this charge). However, with regard to the "depraved indifference" charge, the issue was quite different.

On [redacted], 1997, the date of [redacted] crime, the issue of whether intoxication could be considered in determining whether one had acted with "depraved indifference to human life" was controlled by the 1983 Court of Appeals decision People v. Register (60 N.Y.2d 270). In that 4-3 split decision, the Court held that intoxication was no defense to this charge, as depraved indifference, the Court stated, did not refer to the mental state of the actor but rather to an objective evaluation of the dangerousness of the factual setting in which the conduct occurred. Given that Mr. [redacted] crime occurred in 1997, the Rogers ruling was the law which controlled his trial, and thus the jury was not permitted to engage in any consideration of the effect of intoxication in determining if he was guilty of 'depraved indifference' murder.

I remain convinced that this rule was one of the leading reasons why the jury convicted him of this crime, while acquitting him on 'intentional murder.' I always thought- and still believe - that had the jury been permitted to consider his intoxication it would have never thought that he was thinking in a depraved manner, even though his reckless act was egregiously dangerous to human life.

Unfortunately for Mr. [redacted], the Court of Appeals finally changed its point of view with regard to this legal anomaly eight years after his

conviction… far too late to do him any good. In 2006, in People v. Feingold, (7 N.Y.3d 288), the Court overruled Register. In this 2006 decision, the Court noted that a defendant acts with depravity when he acts with a depraved kind of wantonness, and decides to do something akin to shooting into a crowd, or placing a time bomb in a public place. The Court stated that this criminal charge clearly mandated that a jury consider whether someone had a depraved mental state. Therefore, the Court opened the way for intoxication to be considered, now, for the first time, as a relevant factor when determining if an individual was guilty of this most serious charge.

Of course, this change in the law, coming long after Mr. [redacted] conviction and sentence, had no impact on his situation. On the other hand, had his jury been instructed on intoxication- per the Feingold ruling- there is a reasonable possibility that, instead of being convicted of murder in the second degree as "depraved indifference murder," he would have been convicted of the less serious offense of manslaughter in the second degree, which is defined as recklessly causing a death. Had the jury been permitted to consider his intoxicated state, and had the jury convicted him of this lesser charge of manslaughter in the second degree, the maximum sentence exposure would have been five to fifteen years.

I should also note that my trial strategy was, in fact, to urge the jury to convict Mr. [redacted] of this lesser manslaughter charge. However, my task was, I believe, made all but impossible by the then controlling Rogers rule which meant that the jury was not to consider his intoxicated state when determining if he was guilty of this lesser charge as opposed to the greater charge. I firmly believe that had the Feingold rule already been in effect-- a common sense rule which simply said that a jury could consider what was really going on inside Mr. [redacted] mind when he did what he did-- my client would have prevailed, and that justice would have been done. Mr [redacted] would have been convicted of a serious homicide charge, manslaughter in the second degree, and faced a substantial prison sentence, but he would not have been considered a depraved murderer, and thus not convicted of murder in the second degree.

I write this legal history not to argue in any manner that Mr. [redacted] conviction was unjust, or that he was treated unfairly. The law which

guided his trial was the law which applied at that time. However, it does seem appropriate, when considering what to do with Mr. [redacted] situation *now*, in 2021, when the then-prevalent definition of the crime he was convicted under has been drastically modified, to take this change into consideration. His criminal acts and punishment, while occurring long in the past, should be viewed, today, with today's understanding of the severity of his crime.

As I noted above, there is an additional reason why I write this letter. Two weeks ago I visited with Mr. [redacted] at [redacted] Correctional Facility. It was the first time I had seen Mr. [redacted] since the trial 25 years ago… and it was a meeting between two now older men. Although, as I have made clear above, I have never found full peace with the experience of representing him, and always wondered whether I was up to the task, I saw that he had long since made peace with what had occurred during my representation of him. He seemed genuinely surprised that I was still wondering about my advice, and stated that he held no ill-will, no anger, no resentment, no doubt… that what had occurred at trial was what had to be… and there was no point in dwelling upon it.

Here was a man who had found peace with himself and the world. He had become an Ordained Minister in the Universal Life Church in 2012, and bore no bitterness towards anything or anyone. Although he was walking with a cane, and obviously afflicted with advanced diabetes, he considered this his cross to bear. Although he had been looking forward to, and enjoyed, his transfer from [redacted] C.F. to [redacted] C.F.- after his reclassification to a medium security prison finally came through- he did not complain that [redacted] could not keep him due to his medical condition and that he had to be transferred after a short time to [redacted], and thus back to a max. He told me that he spends most of his time in his cell, singing 'up to the Father in Heaven.'

Although Mr. [redacted] is now 73 years old, suffers from illness, had rods installed in his back due to spinal issues, and has difficulty walking, I was glad to see he still has an optimistic outlook. When I asked him what he was planning to do if released, he said that in addition to trying to get back into 'security work,' he hoped to 'preach the word and tell others what the Lord had done for him.' When I asked him to explain to me what the Lord

had done for him, he recounted how, at the time of his crime, he had been a ‘drug addict and a drunk,’ but how prison had straightened him out.

Mr. [redacted] expressed enormous contrition for what he had done to [redacted]. This pain and responsibility will obviously never leave him. But it does seem that he has now done his time. And deserves release. And thus I hope the members of the parole board will seriously consider this as a realistic possibility, after 25 years.

Sincerely,

[redacted], Esq.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of the Application of XXXXX XXXXXXXX,	:	
Petitioner-Respondent,	:	
-against-	:	
	:	Index No. XXXXXX
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and TINA M. STANFORD, CHAIRWOMAN OF THE NEW YORK STATE BOARD OF PAROLE	:	
Respondent-Appellants	:	

PETITIONER-RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS APPEAL AND, IN THE ALTERNATIVE, VACATE ANY STAY

Martha Rayner, Esq.
Lincoln Square Legal Services, Inc.
Fordham University School of Law
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New York, NY 10023
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PRELIMINARY STATEMENT

The Article 78 court's court decision ordering Respondents-Appellants, the New York State Parole Board [hereinafter "Parole Board"], a division of the New York State Department of Corrections and Community Supervision [hereinafter "DOCCS"], to provide Petitioner-Respondent, Ms. XXXX XXXXXXXX, with a new parole hearing did not deprive the Parole Board of its power to take new evidence, produce an independent record and exercise its full discretion to grant or deny release to parole supervision. Therefore, the Article 78 Court's decision was non-final and there is no appeal as of right. Since the Parole Board did not seek leave to appeal, this appeal should be dismissed. If the appeal is not dismissed, the automatic stay noticed by Respondents-Appellants should be vacated. The vast weight of authority, from the Court of Appeals and this Court, reject appeals as of right when the Article 78 decision remands the ultimate decision to the administrative agency for further proceedings and the exercise of discretion. This is true here. The Article 78 court's decision ordered no more than to hold a new hearing in accordance with governing law; it did not dictate the result of that hearing nor order the Parole Board to exercise its discretion in such a way that would inevitably compel a particular result.

PROCEDURAL HISTORY

Petitioner-Respondent, Ms. XXXXXXXX XXXXXXXX, has been incarcerated for over 19 years pursuant to a sentence of eighteen years to life imposed by Judge Rene Uviller, Supreme Court, New York County, upon conviction for felony murder and robbery in the first degree after pleading guilty. Ex. 2 at 1. Ms. XXXXXXXX appeared before the Parole Board on December 3, 2013; parole was denied. Ex. 2 at 1 and 17. After timely perfecting an administrative appeal and not receiving a decision from the Parole Board within four months, thus exhausting administrative remedies, 9 NYCRR §8006.4(c), Ms. XXXXXXXX commenced an Article 78 seeking a new

hearing in compliance with the governing law. On April 20, 2015, Judge Alice Schlesinger, Supreme Court New York County, issued her decision granting the petition in part and ordering a new parole hearing be held consistent with the terms of the decision. Id.

Judge Schlesinger annulled the Parole Board's denial of parole for three reasons. First, the Judge held that the Board had paid lip service to statutory factors to which it was required to give due consideration Id. at 12. Second, Judge Schlesinger found the Parole Board's decision was conclusory and failed to state its reasons for denial "in detail and not in conclusory terms" as is required by Executive Law 259-i(2)(a). Id. Finally, Judge Schlesinger held that the Parole Board erred by focusing so exclusively on the nature of the victims. Id. at 14-16.

Ultimately, however, Judge Schlesinger's decision was limited and circumscribed. She ordered a de novo hearing at which "…[c]are be taken to ensure that all documents of support from whatever source be considered by the Board and that the Board state on the record what they specifically reviewed." Id. At 16. She also ordered that "the review must be a serious one, with no concentration on the status of the victims and a true analysis of the petitioner's COMPAS." Id. In addition, Judge Schlesinger directed that "the [Parole] Commissioners should adhere to the rationale behind the amendment made to the Executive Law, which is to prevent the re-sentencing of an inmate by the Parole Board to a longer term than the one selected by the Judge, and promote the evaluation of factors such as the inmate's achievement in prison, her risk assessments, outside and family support, and whether she has become a different person, one who has rehabilitated herself many years after a crime committed in her youth." Id.

The decision does not direct Respondents-Appellants to grant parole. Nor does the decision require Respondent-Appellants to proceed in a manner that would render the result of a

new hearing inevitable. It does not make a final determination as to whether Ms. Gonzales should be paroled and thus does not relegate the Parole Board to perform a mere ministerial duty.

Yet, Respondents-Appellants filed a notice of appeal without seeking leave to appeal. Ex. 3. An appeal as of right does not lie from an Art. 78 decision which results in remand to the body or officer for it to exercise discretion. Such a decision is non-final and requires Respondent-Appellants to seek leave to appeal.

ARGUMENT

I. THERE IS NO APPEAL AS OF RIGHT WHEN THE ARTICLE 78 DECISION APPEALED FROM REMITS THE MATTER TO THE RESPECTIVE AGENCY FOR A FURTHER HEARING AND PRESERVES THE AGENCY'S POWER TO EXERCISE DISCRETION

There is no appeal as of right from a decision issued in an Art 78 special proceeding, unless the decision meets the requirements to be deemed a "final judgment." Mid-Island Hosp. v. Wyman, 15 N.Y.2d 374 (1965). The relevant inquiry is whether the Article 78 decision is "a 'final judgment' of the kind described in CPLR 5701 (a)(1) and 7806 and accordingly appealable as of right to the Appellate Division, or [is] it a CPLR 5701 (b)(1) intermediate order in an article 78 proceeding?" Id. Despite the CPLR's reference to "final judgment" in §5701(a) and "order" in §5701(b), the distinction between an intermediate order and a final judgment is not determined by the label, title or characterization of the Art. 78 court's decision. See Cirasole v. Simins, 48 A.D.2d 795 (1st Dep't 1975) (Article 78 court's order, "erroneously designated as a judgment," remanding the matter to the Department of Public Works for further proceedings for the taking of additional proofs and the Department's exercise of "residual discretion" is not appealable as of right.); de Paula v. Memory Gardens, Inc., 90 A.D.2d 886, 524 (3d Dep't 1982) (Grant of an Article 78 petition seeking disclosure of documents from a not-for-profit cemetery corporation, although designated an "order," could be appealed as of right because the order to disclose the documents

was final, not intermediate.); Bri-Mar Corp. v. Town Bd. of Town of Knox, 145 A.D.2d 704 (3d Dep't 1988) rev'd on other grounds, 74 N.Y.2d 826 (1989) ("Notwithstanding the language and designation used by Supreme Court in the document ["order"], it is clear that the petition's dismissal by Supreme Court was a final disposition on the merits and is a final judgment."). In the context of an Article 78 special proceeding, whether a decision is final and thus appealable as of right, or non-final and thus leave to appeal must be sought, is not determined by form; it is the substance of the decision that controls.

In a special proceeding, a decision is a final judgment against an administrative agency if it is absolute as to the ultimate decision that rests with the agency and thus relegates the agency to purely "ministerial" duties. See Mid-Island Hosp. v. Wyman, 15 N.Y.2d 374, 379 (1965). In Mid-Island Hosp., the Court of Appeals held there was an appeal as of right where the Article 78 court had, despite remanding the matter for a hearing to make new findings, "unmistakably commanded the Commissioner [of Social Services] to make specified findings," thereby rendering further action by the administrative agency as "purely ministerial." Id. The Article 78 court's decision wholly deprived the Commissioner of any discretion and directed him to reach a specific decision. Similarly, in Skorin-Kapov v. State Univ. of New York at Stony Brook, 281 A.D.2d 632, 633 (2d Dep't 2001), an appeal as of right was found where the Article 78 court annulled the University's decision denying tenure and directed it to promote petitioner to associate professor with tenure, rather than remit the matter to the University to "further review" petitioner's tenure application. See also Russo v. Prendergast, 239 A.D.2d 423, 423, 658 N.Y.S.2d 331, 331-32 (2d Dep't 1997) (An Article 78 decision annulling Commissioner of Personnel's determination that petitioners

were not qualified to take civil service examination and finding petitioners were qualified was appealable as of right.)[1]

An Article 78 decision is *not* final if it retains the administrative agency's power, duty or authority to exercise discretion and does not bind the "body or officer" to a final decision that is within its discretion to make. See Schreck v. Wyman, 39 A.D.2d 809, 809, (3d Dep't 1972). In Schreck, a county agency's appeal of an Article 78 decision, which ordered the agency to provide a public assistance recipient with her full grant pending an ultimate decision by the agency, denied the agency's motion to dismiss, denied the recipient's counterclaim for prior lost grants of assistance, but also remitted the matter to the administrative agency for further review, was deemed non-final and thus not appealable as of right. Id. Following the reasoning applied by the Court of Appeals in Mid-Island Hosp., supra, the Schreck court held that an Article 78 decision is not appealable as of right where the "…matter is remitted to an administrative agency for further action and the agency has the power and duty to exercise discretion or to make an independent record, its function remains quasi-judicial and the order is not final."

This Court has found that remand to an administrative agency, even when only "residual discretion" remains, is a non-final order. See Tenants Comm. of 425 E. 86th St. (Elec. Matter) v. Joy, 58 A.D.2d 797, 798 (1st Dep't 1977). In Tenants Comm., this Court found that an order remitting the matter to the Commissioner of the Department of Rent and Housing Maintenance for further proceedings wherein "…the agency still has the power and the duty to exercise residual discretion, to take proof, or to make an independent record, its function remains quasi-judicial and

[1] Had Judge Schlesinger denied Ms. XXXXXXXX's Article 78 petition, it *would be* appealable as of right because as to the relief she sought —a new hearing at which the Parole Board exercise it discretion pursuant to law--it would be final. See Bri-Mar Corp. v. Town Bd. of Town of Knox, 145 A.D.2d 704, 705 (3d Dep't 1988), rev'd on other grounds, 74 N.Y.2d 826 (1989) (Appeal as of right lies where Art 78 court dismissed petition for failure to state a cause of action and on the merits).

the order is not final." Id. See also Cirasole v. Simins, 48 A.D.2d 795 (1st Dep't 1975) (Article 78 court's order, "erroneously designated as a judgment," remanding the matter to the Department of Public Works for further proceedings for the taking of additional proofs and the Department's exercise of "residual discretion" is not appealable as of right.).

Although the above cited precedent does not arise in the parole context, an Article 78 decision annulling a denial of parole and directing that a new hearing be held absent the errors found is wholly analogous. Notably, this Court held that an Article 78 decision vacating the administrative agency's decision denying petitioner's building application and "remand[ing] the matter for further proceedings" before the agency "not inconsistent with the decision" was not a final decision in which an appeal lies as of right. See Exxon Corp. v. Bd. of Standards & Appeals of City of New York, 128 A.D.2d 289, 293, n. 3 (1st Dep't 1987). In Exxon, this Court considered whether the Article 78 court's decision, despite the remand for further proceedings, deprived the municipal agency of "…any latitude for the exercise of discretion." Id. This Court noted it did not read the lower court's decision "so expansively," and thus found the Art. 78 decision was not final and thus not appealable as of right. Id. Although the Art. 78 decision at issue in Exxon did not order a "de novo" hearing as is the custom in the parole context, the denial of the building application was annulled just as the denial of parole was annulled here. And in both contexts, a new hearing had to take place. Exxon's reference to "further proceedings," compared to the instant Article 78 decision's reference to a "new hearing," Ex. 2 at 17, is a distinction without a difference. In both contexts, the administrative agency was vested with the ultimate decision whether to grant the relief requested by the petitioner in Exxon—whether to grant or deny a building permit-- and here, whether to grant or deny parole. This Court held the same in Am. Holding Corp. v. Murdock, 6 A.D.2d 596, 600 (1st Dep't 1958) aff'd sub nom. N. Am. Holding Corp. v. Murdock, 6 N.Y.2d

902 (1959), wherein an Art. 78 decision which "set aside" denial of an application for a variance and ordered a "rehearing in accordance with the views set forth in the opinion" was deemed non-final and thus not appealable as of right.

The Appellate Division, Second Department is in accord. See Soros v. Bd. of Appeals, Vill. of Southampton, Suffolk Cnty., 24 A.D.2d 705, 706, 263 N.Y.S.2d 44, 46 (2d Dep't 1965); Mulhern v. Town of Mount Pleasant Zoning Bd. of Appeals, 270 A.D.2d 423 (2d Dep't 2000). In Mulhern, an Article 78 decision "annulling" a town zoning board's denial of petitioner's application for a variance and "remitting for further proceedings" was deemed not appealable as of right. Id. The Soros court held that since the Art. 78 decision did no more than permit the petitioner to reapply for a variance and "…in point of fact remits the proceeding to the Board for further consideration, for further hearings and for its determination *de novo* upon the basis of all the facts which may be adduced upon the new hearings," the decision was not appealable as of right. The Soros court emphasized that the decision "…in no way circumscribes the Board's future action or decision" and "[c]learly envisages new hearings and additional proof, as well as discretionary action *de novo* by the Board upon the basis of all the proof." Id. The context of both Soros and Mulhern stands on all fours with the context here. An applicant was denied the relief sought from an administrative agency empowered to grant such relief, and the special proceeding challenging such decision resulted in an annulment of the agency's decision and an order instructing the agency to conduct further proceedings or a new hearing.

This Court's lone decision, Matter of Kozlowski v. N.Y. State Bd. of Parole, 2013 N.Y. Slip Op. 71706(U) (1st Dep't Apr. 25, 2013), addressing this issue in the context of parole is contrary to Court of Appeals precedent, see Mid-Island Hosp. v. Wyman, supra, this Court's prior precedent, supra, and Second Department precedent, supra. Although impossible to discern from

the Kozlowski order denying Petitioner-Respondent's motion to dismiss the appeal, a review of the moving papers and the underlying Article 78 decision at issue, see Ex. 4, indicates the motion argued that the Parole Board had no appeal as of right wherein an Article 78 court annuls a parole denial and remits for a new hearing consistent with the remainder of the decision. This Court's order denying the motion contains no reasoning and thus its precedential value is questionable.

Here, Judge Schlesinger's decision is non-final because, despite ordering a new hearing, it permits the Parole Board abundant discretion to make the decision it has the sole power to make: whether to grant or deny parole. Judge Schlesinger granted the petition in part and did no more than order the Board to conduct a new hearing and render a new decision in accordance with law. See Rehab v. New York City Comm'n on Human Rights, 238 A.D.2d 289, 290, 657 N.Y.S.2d 547 (1st Dep't 1997) (Article 78 decision denying agency's motion to vacate default judgment and partially granting petition to extent of remanding to agency for a hearing is not appealable as of right).

The decision annulled the Board's denial of parole and ordered a new hearing based on three reasons. Ex. 2. First, Judge Schlesinger determined the Board had paid lip service to the factors enumerated in Executive Law §259-c rather than give them the consideration they were due. Judge Schlesinger raised several examples, including a misuse of portions of the COMPAS assessment combined with ignoring the significant efforts Ms. XXXXXXXX had made to diminish the significance of some portions of the COMPAS, no mention of support letters from the sentencing judge, a former parole commissioner, a former chaplain of Bedford Hills Correctional Facility and an agency assuring that Ms. XXXXXXXX would be "provided with full comprehensive care" if released. Id. at 8-12. Second, the decision found that the Board did not provide a detailed explanation for the denial as is required by Executive Law § 259-i(2)(a). Id. at

12-14. Finally, the decision found that the most "egregious error" was the Board's singular focus on the nature of the victims. Id. 14-16. This conforms fully with this Court's jurisprudence which forbids Parole Boards to value one victim's life over that of another and then use such inappropriate valuation to deny parole. See King v. N.Y. State Div. of Parole, 190 A.D.2d 423 (1st Dep't 1993, aff'd 83 N.Y. 2d 788 (1994).

In response to these deviations from the law governing parole consideration, Judge Schlesinger essentially ordered the Board to proceed with more care at a new hearing. First, to remedy the Board's prior failure to consider a host of positive information supporting Ms. XXXXXXXX's application for parole, she ordered that "care be taken to ensure that all documents of support from whatever source be considered by the Board and that the Board state on the record what they specifically reviewed." Ex. 2 at 16. This directive does not bind the Board to reaching any particular ultimate decision. Second, Judge Schlesinger ordered that the "review must be a serious one, with no concentration on the status of the victims and a true analysis of petitioner's COMPAS." Again, this directive does not order a specific result. It does not prohibit the Board from considering the level of severity of the crimes nor does it order the Board to ignore the victims. Finally, the decision directed the Board "to adhere to the rationale behind the amendment made to the Executive Law, which is to prevent the re-sentencing of an inmate by the Parole Board to a longer term than the one selected by the Judge and promote the evaluation of factors such as the inmate's achievements in prison, her risk assessments, outside and family support, and whether she has become a different person, one who has rehabilitated herself many years after a crime committed in her youth." Id. This portion of the decision does not direct the Parole Board to do more than that which it must: give due consideration to all statutory factors, including rehabilitation. But, it does not direct the Board to give more weight to one factor than another.

Judge Schlesinger's decision does not direct the Board to grant parole, nor does the decision dictate the Board to make specific findings that would inextricably lead to a grant of parole. Therefore, it is a non-final decision.

Requiring an Article 78 party to seek leave to appeal when the decision is non-final accords with the statute's design to "implement a right" through a plenary action that is expeditious. David D. Siegel, New York Practice, 5th Ed. at 973. This is all the more so in the context of Article 78 proceedings challenging the denial of parole, where the requirement of exhaustion of administrative remedies, combined with the time required to litigate the Article 78, means a decision will not be rendered for over one year after the parole denial. Here, as stated in Judge Schlesinger's decision, "through no one's fault," it took sixteen months from the date of the flawed hearing to obtain the decision at issue. Ex. 2 at 16. The decision then afforded the Parole Board sixty days to conduct the new hearing, id., which was never scheduled because the Board filed the instant Notice of Appeal thirty (30) days after the decision was entered and invoked an "automatic" stay. Since parole hearings are held every two years, see CITE, and Ms. XXXXXXXX's last hearing was December 3, 2013, her next regularly scheduled hearing will take place the first week of December, 2015. And, since even an expedited appeal is unlikely to be decided within six months, a regularly scheduled hearing will take place before the merits of this appeal can be decided. The Parole Board will then contend this appeal is moot since a "new hearing" was provided. See, e.g., Siao-Pao v. Travis, 5 A.D.3d 150 (1st Dep't 2004) (Appeal of Article 78 decision issued in October, 2002 deemed moot in March, 2004 because intervening reappearance held in 2003); Till v. Chair of Div. of Parole, 71 A.D.3d 1321(3d Dep't 2010) (Appeal of August, 2009 decision annulling July, 2007 denial of parole deemed moot in March, 2010 because intervening hearing held in April of 2009). Therefore, by the mere filing of a one

page "Notice of Appeal" that purports to invoke an "automatic stay," the Parole Board has, absent any judicial intervention, fully and permanently avoided having to comply with Judge Schlesinger's decision.[2]

A finding that in this instance the Parole Board does not have an appeal as of right does not deprive the Board of the ability to appeal. The Board may seek leave to appeal, at which time it must make a showing on the merits of the appeal. 22 NYCRR §600.3(b). And the petitioner-appellant is afforded an opportunity to respond and oppose. Id. at §600.2(a)(5). This is precisely why decisions arising from Article 78 proceedings may not be appealed as of right. When the decision is not final—when it does not bind the administrative agency to a particular outcome—the onus is on the appealing party to establish why an appeal should be permitted.

II. A STAY HERE IS NOT AUTOMATIC OR, IN THE ALTERNATIVE, SHOULD BE VACATED

By serving its notice of appeal on Petitioner-Appellant, Respondents-Appellants seek to invoke the so-called "automatic" stay provision, CPLR § 5519(a), for appeals by governmental entities.

CPLR § 5519(a) states in relevant part:

> **Stay without court order.** Service upon the adverse party of a notice of appeal. . . *stays all proceedings to enforce the judgment or order* appealed from pending the appeal. . . where: 1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state….

CPLR § 5519(a)(1) (emphasis added).

[2] The Parole Board need not even file a pre-argument statement that would require it to state the grounds for seeking reversal, annulment, or modification pursuant to 22 NYCRR § 600.17(b). See Ex. 3, October 8, 1993 App. Div. First Dep't Deputy Clerk letter releasing the Attorney General from the requirement to file a pre-argument statement. Ex. 3.

That provision, however, is not implicated here because its express terms only stay "proceedings to enforce the judgment or order appealed from." But in the words of Section 5519(a), no "proceedings to enforce" are necessary for the Article 78 court's order to take effect – Ms. XXXXXXXX's future parole hearing is not a *proceeding to enforce* the Article 78 court's order.

Relatedly, § 5519 does not automatically stay acts that "are the sequelae of granting or denying relief." Id. See also Ocasio v. City of New York, 13 Misc. 3d 161 (Sup. Ct. Bronx Co. 2006). For example, the commencement of a trial is not stayed by § 5519 when a court denies summary judgment and the governmental agency that lost the summary judgment motion appeals. The trial is not a "proceeding to enforce" the order. Instead, it is a "natural consequence" of the denial of summary judgment. Schwartz v. New York City Housing Authority, 219 A.D.2d 47 (2d Dep't 1996); see also Baker v. Board of Education of West Irondequoit School District, 152 A.D. 2d 1014 (2d Dep't 1989); Pokoik v. Dept. of Health Services of County of Suffolk, 220 A.D.2d 13, 15 (2d Dep't 1996); Walker v. Delaware & Hudson R.R. Co., 120 A.D.2d 919 (3d Dep't 1986); Ocasio, 13 Misc. 3d at 163.

Similarly, the new parole hearing ordered by Justice Schlesinger is the "natural consequence," or "sequelae," of her order annulling the parole denial and remanding to the Parole Board. Like the trials that were not stayed in the cases cited above, a new parole hearing is "self-executing and… effective immediately upon the promulgation of the order." Pokoik, 220 A.D.2d at 17.

In other words, the reason a new parole hearing is required is that when, as here, a court concludes that the previous parole hearing did not comply with the statutory

requirements of law and its result must be vacated, a new hearing must follow, automatically, whether or not the order invalidating the previous hearing points out that the requirement of a new hearing flows automatically from the order. Any other conclusion would mean that a court decision annulling a parole denial would leave the invalidly made determination in place. This cannot be.

Moreover, the public policy underlying the automatic stay provision is not served by the issuance of a stay in this context. The reason for the automatic stay provision is "to stabilize the effect of adverse determinations on governmental entities and prevent the disbursement of public funds pending an appeal that might result in a ruling in the government's favor." Summerville v. City of New York, 97 NY2d 427, 434 (2002). Here, the Article 78 court's decision ordering the Parole Board to conduct a new parole hearing, of the kind it conducts each year, by the thousands, does not have an "adverse" effect on any governmental entity or require the "disbursement of public funds."

Accordingly, Ms. XXXXXXXX respectfully requests that any stay be lifted and that she be afforded the new hearing before the Parole Board that she is entitled to by law.

CONCLUSION

For the reasons stated above, XXXXXXXX XXXXXXXX requests that this Court dismiss Respondents-Appellants appeal and its invocation of an “automatic” stay, without prejudice to Respondents-Appellants moving for leave to appeal should they so decide. In the alternative, Ms. XXXXXXXX requests that the any stay be vacated.

Dated: New York, New York
June 2, 2015

Respectfully submitted,

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SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by the following entities (collectively, "the Parties"): (i) the New York State Department of Corrections and Community Supervision, Anthony J. Annucci, and Tina M. Stanford (collectively, "DOCCS"); and (ii) XXXXXXXX XXXXXXXX ("XXXXXXXX").

WHEREAS XXXXXXXX is currently serving an indeterminate term of incarceration of eighteen years to life in prison;

WHEREAS XXXXXXXX first became eligible for parole release in 2013;

WHEREAS the New York State Board of Parole ("the Board") conducted a parole interview of XXXXXXXX on December 3, 2013 ("the First Parole Interview"), and subsequently denied her request for parole release;

WHEREAS XXXXXXXX filed a petition in Supreme Court, New York County, bearing the caption *XXXXXXXX v. N.Y. State Department of Corrections and Community Supervision et al.*, Index Number 401130/2014 ("the Article 78 Petition"), naming DOCCS as respondents and seeking an order annulling the Board's denial of her request for parole release and directing the Board to conduct a new parole interview;

WHEREAS Supreme Court granted the Article 78 Petition in an April 20, 2015 order ("the Order") that required the Board to conduct a new parole interview of XXXXXXXX by members of the Parole Board who did not participate in the First Parole Interview;

WHEREAS the Order directed that: (i) "all documents of support from whatever source be considered by the Board and that the Board state on the record what they specifically reviewed," (ii) the Board's review "must be a serious one with no concentration on the victims and a true analysis of petitioner's COMPAS," and (iii) the members of the Parole Board "should adhere to the rationale behind the amendment made to the Executive Law";

WHEREAS DOCCS timely filed a notice of appeal from the Order ("the Appeal") and stayed the Order pursuant to CPLR 5519(a)(1);

WHEREAS DOCCS will assert in the Appeal non-frivolous arguments that the Order should be reversed;

WHEREAS, XXXXXXXX has moved for an order from the Supreme Court, Appellate Division for the First Judicial Department, that dismisses the Appeal, or in the alternative, vacates the automatic stay under CPLR 5519(a)(1); and

WHEREAS the Parties wish to resolve this dispute without further litigation;

NOW THEREFORE, in consideration for the mutual promises made below, the Parties agree as follows:

1. The Effective Date of this Settlement Agreement shall be July ___, 2015.

2. DOCCS shall withdraw its notice of appeal in the Appeal within five (5) business days after the Effective Date.

3. DOCCS shall direct the Board to conduct a parole interview of XXXXXXXX, at which parole will be determined based on a contemporary record ("the Second Parole Interview"), as soon as practicable after the Effective Date, but in any event no later than August ___, 2015.

4. DOCCS shall direct the Board to determine parole based on the contemporary record before the Board.

5. DOCCS shall supply to XXXXXXXX, or her counsel, a document certifying that:

    a. an appropriate DOCCS employee has received a packet of materials from XXXXXXXX's counsel that XXXXXXXX's counsel requests be considered by the Board during the Second Parole Interview ("the Packet"); and

    b. an appropriate DOCCS employee has placed, or caused to be placed, the Packet into the file that DOCCS maintains related to

XXXXXXXX and that will be provided to the Board prior to the Second Parole Interview.

c. the Packet will be included in materials that are supplied to the Board prior to the Second Parole Interview.

6. DOCCS and XXXXXXXX agree that the Second Parole Interview shall be governed by, and conducted in accordance with, all applicable statutes and regulations.

7. For the purposes of clarity, the Parties agree that the Second Parole Interview shall not be governed by the standards set forth in the Order, and XXXXXXXX hereby absolutely and unconditionally waives any claim whatsoever that the Second Parole Interview is or shall be governed by the standards set forth in the Order.

8. DOCCS's agreement to conduct the Second Parole Interview is not, and shall not be construed to constitute: an admission of any error or flaw with the First Parole Interview; or a ratification or endorsement of the Order.

9. XXXXXXXX shall not, and absolutely and unconditionally waives all right she may have now or in the future to:

a. challenge the Second Interview on any ground in any forum, and

b. prosecute any proceeding to hold the Board or DOCCS, or any person or entity associated with the Board or DOCCS, in contempt for failure to comply with the Order.

10. XXXXXXXX acknowledges and agrees that she:

a. has been adequately advised by competent legal counsel in connection with her decision to enter into this Settlement Agreement,

b. fully understands the terms of this Settlement Agreement and the rights that she waives by entering into this Settlement Agreement, and

c. enters into this Settlement Agreement and waives her rights as set forth herein knowingly and voluntarily and without compulsion.

11. XXXXXXXX shall not, and absolutely and unconditionally waives all right she may have now or in the future to, challenge the validity of any waiver of rights by her contained in this Settlement Agreement.

12. This Settlement Agreement was drafted by both Parties and shall not be construed against any Party.

13. This is the entire agreement between the Parties.

14. This Settlement Agreement shall be governed by the laws of the State of New York.

Dated: July ___, 2015

For DOCCS:	For XXXXXXXX:
_____	_____
Philip V. Tisne	Martha Rayner