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Appealing Denials of Parole Release in New York State: A Guide to Filing Administrative Appeals and Article 78s

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PAROLE PREPARATION PROJECT



A PROJECT OF
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Appealing Denials of Parole Release in New York State *A Guide to Filing Administrative Appeals and Article 78s*

Current through September 2019

Michelle L. Lewin, Martha Rayner and Steven Zeidman¹

¹ Thank you to CUNY School of Law summer intern, Zachory Nowosadzki, and our broader community of jailhouse and pro bono lawyers who have shared their brilliance and expertise, and expanded access to justice for those unfairly and unlawfully denied parole.

Appealing Denials of Parole in New York State
A Guide to Filing Administrative Appeals and Article 78s

TABLE OF CONTENTS

I. INTRODUCTION.....	4
II. DISCLAIMER.....	4
III. OVERVIEW OF PAROLE AND PAROLE APPEALS	4
IV. NOTES ABOUT WORKING WITH AND ON BEHALF OF INCARCERATED PEOPLE.....	5
A. GENERAL THOUGHTS.....	5
B. A NOTE ON LANGUAGE	8
V. COMMUNICATION WITH CLIENTS	9
A. LEGAL CALLS	9
B. NON-LEGAL CALLS	9
C. LEGAL MAIL	10
D. SENDING PACKAGES.....	11
E. LEGAL AND NON-LEGAL VISITS.....	11
F. TIPS FOR ALL VISITS	13
VI. LETTER OF ENGAGEMENT AND RELEASES	13
VII. PROCEDURAL GUIDELINES AND FILING INSTRUCTIONS	14
A. ADMINISTRATIVE APPEAL	14
B. STEPS TO FILING AN ADMINISTRATIVE APPEAL	14
C. PUBLICATION OF ADMINISTRATIVE APPEAL DECISIONS	16
D. EXHAUSTION.....	16
E. PRESERVATION.....	16
F. FILING AN ARTICLE 78 PROCEEDING	17
G. BOARD’S ANSWER AND PETITIONER’S REPLY	20
H. REMEDIES	20
I. APPEALING AN ADVERSE ARTICLE 78 RULING.....	20
VIII. THE EXECUTIVE LAW AND PAROLE REGULATIONS	21
A. EXECUTIVE LAW AND THE PAROLE DECISION	21
B. PAROLE REGULATIONS	23
C. STANDARD OF REVIEW	24
D. THE DECISION AND TRANSCRIPT.....	25
E. REMEDIES AVAILABLE.....	25
IX. GENERAL ISSUES TO RAISE	26
A. DENIAL CONTAINED CONCLUSORY STATEMENTS AND BOILERPLATE LANGUAGE.....	26
B. FAILURE TO CONSIDER FULL RECORD / BOARD FAILED TO “QUALITATIVELY WEIGH” THE APPLICABLE FACTORS.....	29
C. RELYING ON AN INACCURATE RECORD, OR A DECISION UNSUPPORTED BY THE RECORD.....	29
D. THE DENIAL OF PAROLE AMOUNTED TO AN ILLEGAL RESENTENCING.....	31
E. THE BOARD’S CONSIDERATION/RELIANCE ON CONFIDENTIAL INFORMATION WAS NOT DISCLOSED IN ITS DECISION.....	31
X. FAILURE TO CONSIDER STATUTORY FACTORS	32
A. EXCLUSIVE FOCUS ON NATURE OF THE INSTANT OFFENSE.....	32
B. AGGRAVATING FACTORS	33

C.	FAILURE TO CONSIDER YOUTHFULNESS AT THE TIME OF CRIME.....	34
D.	FAILURE TO CONSIDER IMMIGRATION STATUS OR IMPENDING DEPORTATION.....	35
E.	FAILURE TO CONSIDER SENTENCING MINUTES	35
F.	LACK OF CONSIDERATION OF OR FAILURE TO JUSTIFY DEPARTURE FROM COMPAS	35
G.	FAILURE TO CONSIDER OR REQUEST A STATEMENT FROM DEFENSE COUNSEL	36
H.	FAILURE TO CONSIDER VICTIM STATEMENTS	37
I.	FAILURE TO CONSIDER REENTRY PLAN	37
XI.	NON-STATUTORY FACTOR ISSUES	37
A.	LACK OF REMORSE.....	37
B.	PENAL PHILOSOPHY	38
C.	IMPROPER CONSIDERATION OF LETTERS IN OPPOSITION TO RELEASE.....	38
D.	PERSONAL OPINION OR BIAS OF COMMISSIONERS.....	44
E.	PREDETERMINED DECISION.....	44
XII.	ASPIRATIONAL LITIGATION / ON THE HORIZON.....	45
A.	JUDICIAL POWER TO GRANT RELEASE.....	45
C.	RIGHT TO DISCLOSURE OF FULL RECORD CONSIDERED BY THE BOARD.....	45
D.	DEPRECATE STANDARD IS UNCONSTITUTIONALLY VAGUE	46
E.	CRIMINAL HISTORY.....	46
F.	IRRATIONALITY OF SHORT ADJOURNMENT AND A SUBSEQUENT DENIAL	47
G.	6 TH AMENDMENT VIOLATIONS.....	47
XIII.	OTHER LITIGATION STRATEGIES	48
A.	CONTEMPT CASES FOLLOWING SUCCESSFUL ARTICLE 78 PETITIONS.....	48
XIV.	RESCISSION.....	50
XV.	THE PAROLE BOARD FILE, OTHER DOCUMENTS AND HOW TO GET THEM	51
A.	PAROLE FILE CONTENTS	51
B.	LAW RE: OBTAINING THE PAROLE FILE	52
C.	PROCESS FOR OBTAINING THE PAROLE FILE.....	52
A.	PRESERVATION OF ISSUE FOR APPEAL AND ALTERNATIVE AVENUE TO LITIGATE NON-DISCLOSURE	53
B.	PORTIONS OF THE PAROLE FILE THE BOARD ROUTINELY WITHHOLDS	53
C.	DA AND SENTENCING COURT LETTERS.....	55
D.	VICTIM STATEMENTS.....	55
E.	OPPOSITION MATERIAL	55
F.	PRE-SENTENCING INVESTIGATION REPORTS (PSIs OR PSRs).....	55
G.	PRIOR PAROLE INTERVIEW TRANSCRIPTS.....	56
H.	RECORDS HELD BY DOCCS OUTSIDE THE PAROLE FILE.....	56
I.	OTHER RESOURCES	57
XVI.	SAMPLES FORMS.....	58

I. INTRODUCTION

This manual is a resource for attorneys representing incarcerated clients in appeals of parole release denials. It may also be useful for incarcerated people representing themselves *pro se* in the parole appeals process.

II. 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.

III. 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). 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 June 1, 2019, there are 16 seated Commissioners.

Parole is the only path to freedom for individuals serving indeterminate sentences with a maximum of life.² As of January 2018, 8,625 people (representing almost 18% of the prison population) were serving a sentence with a maximum of life in New York State.³

When individuals appear for an “interview”⁴ before the Parole Board, they generally are heard via video conference by three parole commissioners.⁵

Interviews last from a few minutes to an hour (though most tend to be brief), during which Commissioners typically spend most of the time questioning the applicant about the crime(s) of

² While the Governor has virtually unfettered power to grant clemency and commute a person’s sentence, it is a power that is seldom used.

³ See, Kim Dworakowski, N.Y. State Dep’t Of Corr. & Cmty. Supervision, Under Custody Report: Profile of Under Custody Population As Of January 1, 2018 (2018), <http://www.doccs.ny.gov/Research/Reports/2018/Under%20Custody%20Report%202018.pdf>

⁴ An applicant’s appearance (live or via video conference) before parole commissioners was commonly referred to as a “hearing,” but this implies that the Board engages in a quasi-judicial evidentiary hearing, which it, unfortunately, does not. Also, the statute provides for an “interview,” not a hearing. See Exec. Law sec 259-i(6)(a)(i).

⁵ Ideally, parole interviews would take place face-to-face but that is increasingly rare. Similarly, two-person panels are common. 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.

conviction. Commissioners also note, though rarely discuss, the relevant statutory requirements (detailed 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. 9 NYCRR 8002.3(b).

In parole interviews with three commissioners, a majority (2-1) grants an applicant freedom or denies release. If parole is denied, the Commissioners can place a “hold” of up to 24 months before the next parole interview. Executive Law 259-i(2)(a). Before 2017, two-year holds were routine, but the Board now more regularly holds applicants for 12-18 months.⁶

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 Regulations are codified in 9 NYCRR 8000-8011.** The relevant part of the **Executive Law is Section 259-i** (N.Y. Exec. Law § 259-i).

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 were part of the person’s parole interview/decision) who then decide whether to accept or reject the findings of the Appeals Unit.

If, as is usually the case, the administrative appeal is denied, the applicant has “exhausted” administrative remedies and may now file an Article 78 petition in Supreme Court, again challenging the lawfulness of the parole denial.

This manual provides a detailed breakdown of the Executive Law and regulations governing parole, offers a procedural and substantive look at the parole appeals process, provides some relevant case law, and flags issues to raise on appeal.

IV. NOTES ABOUT WORKING WITH AND ON BEHALF OF INCARCERATED PEOPLE

A. General Thoughts

⁶ Some people believe this practice is designed to moot appellate challenges to parole denials since an appeal can take longer than the next scheduled parole appearance. Mootness is a recurring issue with parole appeals. For example, a person has their parole interview January 1, 2019, parole is denied on January 14, 2019, and the Board sets the next parole interview for 12 months (January 14, 2020). If the appeal is not decided prior to January 14, 2020, the Board will likely argue that the parole interview of January 14, 2020 renders the parole appeal moot since the only currently available remedy for a winning appeal is a new parole interview (called a “de novo” parole interview). As a result, it is critical that the appeal process is carried out as fast as possible. See e.g. *Gourdine v. New York State Bd. of Parole*, 150 A.D.3d 1491, 1492 (3d Dep’t, 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). But see *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).

Many of our readers who are representing people in a pro bono setting have had little contact with people in prison. We offer the following to guide you in 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. 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. They must eat at a certain time, with specific utensils, and bathe at a certain time. Privacy is non-existent. 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 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 stories 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 attorney 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 will be strip-searched before and after. Also remember that all social phone calls are recorded, and that discussing something on the phone might 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 the 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 justice policy.

Conversely, people in prison hear 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 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.

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.

B. 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.

“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.”

V. COMMUNICATION WITH CLIENTS

Attorneys can communicate with clients via letters, phone calls and in-person visits. The attorney and client should decide together how to communicate.

A. Legal Calls

Legal calls are designed to provide a secure, unmonitored line for attorneys and their representatives to talk privately and confidentially with clients. *Legal calls are limited to one per month, and last only 30 minutes. See DOCCS Directive 4423 for more details.* Prison staff are required to provide clients with a confidential location for these calls, although this rule is seldom followed. Many people believe that even these phone calls are recorded and monitored and it is best to avoid discussing matters that present any potential liability.

Legal calls are arranged in advance, with at least 24 hours’ notice, by the attorney or their representative with the client’s Offender Rehabilitation Coordinator, or “ORC.” The ORCs work in the Guidance department at the prison where the client is located. Attorneys should call the prison and request to speak with staff in Guidance, who can then locate your client’s ORC.

B. 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, or law library. 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 call your clients. The only way to talk by phone is if your client calls you directly.

i. Telephone list and phone procedures

Incarcerated people may only call people on their approved “telephone list.” The list is usually limited to 10 people. In order to have phone communication with your client, they will need to add you to their list, which may mean the person must delete someone else off their list in order to include you.

To receive calls from prisons, you need to set up an account at: <https://securustech.net>. Once you've set up an account, you can receive calls from prisons in New York State. The service requires a minimum balance to start an account. Multiple phone numbers can be associated with one account and you can receive calls on your cell phone.

When you receive a call from a prison, the number will often be blocked. When you answer, there will be an automated message. Follow the instructions. Also note that people inside cannot leave you messages.

Note that the Department of Corrections & Community Supervision sets forth rules regarding phone calls, which you can read at: <http://www.doccs.ny.gov/Directives/4423.pdf>.

Also note that DOCCS prohibits three-person calls. Only the client and the person they've called directly from their phone can be on the line.

ii. Other tips for 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.

C. 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.

A "legal mail" designation is based on the identity of the sender (aka 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.”

i. Procedures for Sending 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. You can find a list of prison addresses here: <http://www.doccs.ny.gov/faclist.html>.
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.

The “to” field should look like this:

Client Name (DIN 00-0-000)
Name of Correctional Facility
Address of Facility (including P.O Box if necessary)

The “from” field should look like this:

Your Name
Your Firm or Organization
Your Address

D. Sending packages

Review <http://www.doccs.ny.gov/FamilyGuide/AllowableItems.html> thoroughly before sending packages. At some facilities, people are only allowed four packages per year. Note that DOCCS rarely accepts food packages or other items such as books from law firms. You can simply send the package from your law firm’s address, but use just your name and not the law firm title.

E. Legal and Non-Legal Visits

i. Social Visits/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 to do a social visit. You just show up on the day-of.

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

- 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)
- Special procedures/requirements for visitation, such as restrictions on certain clothing
- How many people can visit at once?
- Procedures for leaving documents or packages

Remember to talk to the person you plan to visit about whether there are certain days or times that they would prefer, and if there are any dates that family members, friends, or anyone else is planning to visit, so that you don't conflict with those visits.

ii. Legal Visits

Legal visits are confidential visits where attorneys can discuss legal matters with their clients. Most legal visits happen 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.

Legal visits are governed by DOCCS Director 4404, which can be found at:
<http://www.doccs.ny.gov/Directives/4404.pdf>

iii. Scheduling a Legal Visit

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. Note that 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. Remember to request special permission to bring in and/or leave legal paperwork for the client.

4. Call the prison to re-confirm your visit the day before and bring a copy of the legal visit request with you.
5. You may also want to try and call to confirm THE DAY OF THE VISIT, that the person you're visiting is present at the facility and not on an outside medical appointment.

F. 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 for you to use (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
- 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)
- Your ID, which can be:
 - 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

VI. LETTER OF ENGAGEMENT AND RELEASES

The first step in your representation is to send your client an engagement and/or retainer letter to be signed and returned to you as quickly as possible. 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 your services are free and that you will cover all related filing costs.

Enclosed with your letter you should include several release forms that you may need to retrieve any relevant documents that you do not already have. Include with your letter the following releases:

- Office of Mental Health (OMH) Authorization for Release of Information
- Authorization for Release of Health Information Pursuant to HIPPA
- General Release of Confidential Information from DOCCS (Dept. of Corrections and Community Supervision)

Sample forms can be found at the back of this guide and both the OMH and HIPPA forms are available online.

VII. PROCEDURAL GUIDELINES AND FILING INSTRUCTIONS

A. Administrative Appeal

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 administrative appeal decisions reveals that less than 11% of administrative appeals are granted and most of those are for technical defects such as the Board's failure to obtain the "case plan" or "TAP."⁷

If the administrative appeal is unsuccessful, then applicants may file an Article 78 petition in state Supreme Court, *See People ex. rel Martinez v. Beaver*, 8 A.D.3d 1095 (4th Dep't 2004) (dismissing an Article 78 petition filed while an administrative appeal was still pending).

B. Steps to Filing an Administrative Appeal

DOCCS Directive 8360, <http://www.doccs.ny.gov/Directives/8360.pdf>, outlines the procedural requirements for filing an administrative appeal. In addition, be sure to familiarize yourself with the regulations governing administrative appeals of parole denials, see 9 NYCRR 8006 et seq.

1. Notice of Appeal:

To appeal a parole denial, a "Notice of Appeal" must be filed with the Board of Parole'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).

On the notice, check the appropriate box in order to request a transcript of the parole interview, so that you can review it and reference it in the appeal. There is no requirement that the form be used; a letter will suffice, but be sure to request the parole interview transcript in the letter as well. 9 NYCRR 8006.1(d).

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 behalf before assignment of counsel. As people are entitled to representation at the administrative appeal level, some clients may also request counsel from the local court before you receive the case. If 18-B counsel has been assigned, pro bono should communicate with 18-B counsel to notify them of your plan to represent the client.

⁷ TAP is a transitional accountability plan which is only applicable to those entering the system after 2011. Few of the clients you represent will have such plans.

2. Confirming Receipt of Notice:

Upon receipt of a Notice of Appeal (NOA), the Parole Appeals Unit will send a letter acknowledging receipt. **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.** Id. at (f).

3. Filing a Notice of Appearance (NOA):

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). A sample NOA is attached. Only one individual may be named as counsel in the notice of appearance. Once the appearance has been entered, the Appeals Unit will not entertain correspondence from the client. 9 NYCRR §8006.2(d)(e). The notice of appeal and the notice of appearance may be included in one letter.

4. Request the Parole File

As soon as possible, request all documents relied on by the Board in making the parole determination. See below for a detailed explanation of the documents relied on and the law governing disclosure to the parole applicant and counsel.

5. Perfecting the Appeal:

After the Notice of Appeal has been filed, the appeal must be **perfected within 120 calendar days of filing. This date will be specified in the Appeal Unit's letter acknowledging receipt of the NOA.** An appeal is perfected by filing an original and two copies of a written brief and all documents relied on with the Appeals Unit. §8006.2(b).

If you need an extension of time to perfect the appeal, write to the Appeals Unit before the deadline and explain the reason(s) why an extension is needed. *See* 9 NYCRR §8006.2(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 next regularly scheduled parole review mooting out the appeal process. Extensions are granted liberally.

6. Final Administrative Appeal Decision and Remedies:

The administrative appeal will be reviewed and decided on the basis of the written record alone—appearances and oral argument are prohibited. 9 NYCRR §8006.2(c).

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.”

The Appeals Unit then sends the paperwork to an “Appellate Panel” of three Parole Board Commissioners who did not participate in the original decision. The Appellate Panel will then decide 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.

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. The administrative appeal process can

only result in a new interview or reduce the duration of the “hold” until the next interview; the Appeals Unit and the Appellate Panel do not have the authority to grant parole at this juncture.

There is no stated deadline for the Appellate Panel to render this 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 after 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).

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 before a different set of Commissioners. Here there is no specified time by which this *de novo* interview must take place, and the Board may use its discretion to schedule a new appearance.

C. Publication 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 at http://www.doccs.ny.gov/parole_board_appeal_decisions.html.

D. Exhaustion

All applicants must exhaust their administrative remedies before filing an Article 78 petition in Supreme Court. This requirement is especially frustrating given that administrative appeals are denied more than 90% of the time, and in most cases the ultimate goal is to get before a judge via an Article 78 petition. An exception to the exhaustion requirement exists where it is demonstrated that “further pursuit of an administrative appeal would have been futile,” but courts to date have summarily rejected this defense 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 that the Parole Board’s internal appeals process is futile pending unique circumstances and the issues raised.

E. Preservation

Any issue not raised in the Administrative Appeal risks being dismissed in a subsequent Article 78 for failure to preserve. *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 on administrative appeal). It is therefore critical that all grounds for appeal and relevant facts are included in your brief perfecting the Administrative Appeal. Any issue omitted in this brief will not be considered later in the appeals process. Note that some courts have held that the applicant’s failure to preserve the issue at the interview stage also 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.”)

F. Filing an Article 78 Proceeding

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 Siegel's New York Practice is an excellent procedural guide.

The Art. 78 challenges the parole denial itself, not merely the administrative appeal process and decision. One reason not to make an issue of the fairness of the administrative parole appeal process (other than to say that it resulted in an erroneous administrative affirmance) is that a win would result in a remand for a new administrative appeal – likely a waste of time and not the path to your client's liberty.

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:

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 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.)

An Article 78 petition must be brought within 120 days of the date of the administrative appeal final decision. CPLR 217(1). And, although there is no law on this issue, it is safer to assume that the same statute of limitations is triggered when there is no administrative decision four months after perfecting the appeal. This is a hard statute of limitations; no extensions or postponements are available.

Venue:

In many cases, multiple venues will be proper under CPLR §506(b). Attorneys should first ascertain all available venues, and then determine the optimal venue.⁸ To the extent there is a choice as to venue, consider whether binding precedent differs from county to county. For example, *see XII A*, 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 the county where the administrative appeal was decided, where the original parole denial was decided (often the Commissioners' location during the parole interview), the county where the parole applicant currently resides (the county where the prison is located), or the county where the Attorney General has her main office (Albany

⁸ The relevant statute reads, in part: “A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located” CPLR § 506(b)

County).⁹

In some instances, petitioners have been successful in filing Article 78s in their county of conviction, but New York courts are split on whether the crime of conviction qualifies as a “material event” under the CPLR§ 506(b), thus allowing for proper venue. *Compare Coaxum v. New York State Bd. of Parole*, 14 Misc.3d 661, 664–66 (Sup. Ct. Bx. Cty., Sept. 8, 2006) (holding that the crime of conviction was a “material event” in petitioner’s parole determination, “[p]articularly where the Board’s determination relied so extensively on that offense”); *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); *with Philips v. Dennison*, 41 A.D.3d 17, 23–24 (1st Dep’t 2007) (“Under CPLR 506(b), the ‘material events’ leading to the subject parole determination were not the crime and sentence, but ‘the decision-making process leading to the determination under review.’”) (citing *Vigilante v. Dennison*, 36 A.D.3d 620, 622 (2nd Dep’t 2007)). *See also Wallace v. New York State Bd. of Parole*, 14 Misc.3d 372, 374–75 (Sup. Ct. N.Y. Cty. May 10, 2006) (highlighting the conflicting opinions before ultimately deciding that venue is improper in the county of conviction).

Necessary 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 e-filing. The information below provides the broad contours of the process but you must 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, Respondents must be timely served. Obtaining an index number can take several days or longer depending on the county.

The list of required documents includes:

- Notice of Petition
 - Advising the respondent (the Parole Board) about the Article 78 petition, and identifying all papers upon which the Article 78 challenge is based.
 - You select a return date
 - Respondents must be served at least 20 days before the return date.

- *OR* Order to Show Cause and accompanying affidavit (if bringing case in that manner)
 - Advising the respondent (the Parole Board) about the Article 78 petition, and identifying all papers upon which the Article 78 challenge is based.
 - The Order must first be presented to a judge and signed before it is served on the respondent.
 - An Order to Show Cause must include an “Affidavit in Support of Order to Show Cause.”

⁹ Pro se litigants have reported that all Supreme Court clerks across the state, no matter where the Art. 78 petition is filed and regardless of the language in the CPLR, send their appeals directly to Albany County.

- A Verified Petition
 - Identifying the parties, the basis for the location that was selected, the facts of the case, the legal claims, the relief you are seeking, and other relevant information.
 - A verification that swears to the truth of the statements in the petition, must be included, and the petition must be signed in front of a notary.
- All exhibits and affidavits that support the petition
- A filing fee of \$305
 - If an applicant is unable to afford the filing fee of \$305, counsel should file an “in forma pauperis” application and pay 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(e).
- “Request for Judicial Intervention” (RJI)
 - A judge will not be assigned to the case unless an RJI is submitted with the application. Counties apply different rules regarding RJIs, so check that all requirements have been met with the court clerk.
- “Request for an Index Number”
 - Once the court provides an index number, this number must be written on all documents that are served on respondents or submitted to the court, or the court may dismiss the entire proceeding.

Service:

When filing an Article 78 petition, you should serve respondents—including the Parole Board, DOCCS and the Attorney General (the Attorney General represents the Parole Board in these proceedings)—each document and exhibit that was filed with the court. The index number and filing date must be present on the front page of each document for proper service. The name of the Judge and the return date should also be included if provided by the Clerk.

If the petition was filed by OTSC, instructions for service are included in the Order to Show Cause and must be followed exactly **Service must be completed by the date given on the Order to Show Cause and proof of service must be submitted to the court Clerk without delay within four months and fifteen days after the final decision from the administrative appeal.** Therefore, service should be made as soon as possible after the index number is received.

If the petition is filed by Notice of Petition, then service must be completed 20 days before the return date. CPLR §7804.

Service is governed by CPLR §308.

Affidavit of Service:

Once service is made, proof of that service must be filed with the court **within four months and 15 days of receiving the final decision from the administrative appeal**. Proof of service is made through an affidavit of service filed with the court. *See* CPLR §306

G. Board's Answer and Petitioner's Reply

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). The Attorney General will likely seek your 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. Otherwise, successive requests will cause delays that risk an upcoming regularly scheduled parole review mooting the petition.

If the answer contains new allegations that were not included in the original petition, you will need to address those in a reply, by either denying them or saying you do not know if they are true or not. If you do not respond to those issues, the court may view those facts as true. The reply must be submitted to the court and served to the respondent **no later than one day before the return date**. CPLR §7804(c).

H. 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. Courts currently do not have the power to grant parole, even if the Board of Parole was found to have violated the law.¹⁰ However, Judges can order the date by which the next interview must take place, whether certain commissioners are to be excluded from the new interview, whether certain documents can be considered by the Board, among other things.

I. Appealing an Adverse Article 78 Ruling

Unfortunately, denial of Article 78 petitions is 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**.

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 Supreme Court's legal rulings based on those facts, the legal rulings are reviewed de novo, not with any deference. 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.¹¹

¹⁰ *See Kellogg v. N.Y. State Bd. of Parole*, 159 A.D.3d 439 (1st Dep't 2018).

¹¹ For this summary, thanks goes to Alan Lewis.

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

The Board may appeal the grant of an Art. 78, but 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. The Board’s practice is to file a notice of appeal as of right and invoke an automatic stay pursuant to CPLR § 5519(a). There is a question whether this stay provision should be applicable to Article 78 grants in the parole context, but there is no precedent to date.

Should the Board appeal a favorable Article 78 decision and invoke the automatic stay, you could move 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 regularly scheduled parole review.

Pending the issues on appeal and client-specific strategy, it is important to think through and discuss the pros and cons of forgoing the regularly scheduled parole review to avoid mooting the appeal.

Should the Board appeal, consider engaging in negotiation with your adversary to determine which aspects of the decision are of concern to the Board. On occasion, the Board can be convinced to withdraw the notice of appeal and enter into a stipulation modifying the conditions under which the *de novo* review must be conducted.

VIII. THE EXECUTIVE LAW AND PAROLE REGULATIONS

A. Executive Law and the Parole Decision

The Parole Board 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 Regulations are codified in 9 NYCRR 8000-8011.**

The relevant part of the **Executive Law which governs the Parole Board is Section 259-i** (N.Y. Exec. Law § 259-i).

Executive Law 259-i covers many of the functions of the Parole Board, such as when parole interviews should be conducted, what factors the Parole Board must consider when determining whether to grant parole, the obligations of the Parole Board if there is a denial, what happens when someone released to parole supervision has immigration issues, the procedures for revoking parole, and the procedures for handling parole appeals.

It is critical to familiarize yourself with **Executive Law 259-i(2)(a)** and **Executive Law 259-i(2)(C)(A)** and the Parole Regulations before writing the administrative appeal brief.

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

This section of the Executive Law requires the Parole Board to interview parole-eligible people at least one month before the parole eligibility date, and to set the next interview/review (“hold”) no later than 24 months from then if parole is denied.

The important part of this section when writing an appeal is:

*“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.**”*

This part of the law requires the Parole Board to inform an applicant who has been denied parole of the reasons for the denial, in writing. The reasons must be explained in detail in the written decision, and cannot be “conclusory,” which means that evidence supporting the decision must be provided.

If the Parole Board issues a decision that does not sufficiently explain the reasons for the parole denial, or does not refer to evidence in support of the decision, there is a basis for challenging that decision on appeal.

Executive Law 259-i(2)(C)(A):

Section 259-i(2)(C)(A) begins with:

*“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.**”*

Section 259-i(2)(C)(A) then lists the factors the Parole Board must consider when deciding whether to release someone to parole supervision.¹² 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”*

¹² While case law provides that the Board need not give equal weight to each factor, it does mandate that each factor be considered. Much parole litigation has centered around whether the Board actually considered, or merely paid lip service to, each factor.

(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:** “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.

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 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.”

B. Parole Regulations

Guided by the Executive Law, the Parole Board has promulgated a host of regulations that have the force of law. It is critical to familiarize yourself with the relevant regulations. They cover, inter alia, the interview, post interview requirements and victim impact statements. See **9 NYCRR 8000-8011**.

In 2017, the Parole Board made several important amendments to the regulations.

8 NYCRR § 8002.2(a) reads, in part, “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.”

8 NYCRR § 8002.2(c) reads:

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.**

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

Notably, the regulation has removed the phrase “*Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined,*” however this language remains in the Executive Law.

Given these new additions to the Regulation, we believe that the Parole Board now has a higher standard to meet when making parole decisions.

C. Standard of Review

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.”)

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.”)

D. The Decision and Transcript

The Parole Board’s written decision is most often very brief, conclusory and not supported by what was actually said at the interview. Do not focus solely on the decision itself. Be sure to comb the transcript carefully for reasons to argue that the Board’s decision should be set aside. For example, the Board’s decision might state in conclusory fashion that the commissioners considered the person’s achievements, but review of the transcript reveals that no questions of that nature were actually asked, or that the questions took up one page of a thirty-page transcript.

It is also likely the case that the transcript provides many 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 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 the Commissioners commented on the person’s sincere remorse, but in the present interview they suggest the person is not sufficiently remorseful). 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 that 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).

E. Remedies Available

The remedy for a finding of “irrationality bordering on impropriety” is a *de novo* parole interview. *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.”); see also *Kellogg v. N.Y. State Bd. of Parole*, 159 A.D.3d 439 (1st Dep’t 2018) (“The proper remedy is, however, not release, but a new hearing.”)

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 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.

IX. GENERAL ISSUES TO RAISE

A. Denial Contained Conclusory Statements and Boilerplate Language

The statute requires the Board to apply three standards of assessment:

1. Is there “*a reasonable probability that, if released, he will live and remain at liberty without violating the law,*
2. *and that his release is not incompatible with the welfare of society and*
3. *Release will not so deprecate the seriousness of his crime as to undermine respect for law.*”

The statute also requires:

“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” EL §259-i(2)(a).

Yet, parole denial decisions routinely parrot the statutory language rather than explain in detail the reason for denial. For example, parole denials often state “Discretionary release is denied because release at this time would so deprecate the seriousness of the crime as to undermine respect for the law.” The Board’s reference to the statutory standard does not explain the denial.

The Board’s failure to explain in detail why release would be incompatible with the welfare of society, OR explain in detail why release would so deprecate the seriousness of the offense as to undermine respect for the law, OR to explain in detail why if released there is a reasonable probability that the parole applicant would violate the law, are each grounds for annulling the denial and granting a *de novo* interview/review.

Case law dictates that the Parole Board’s written decision is improper if it fails to explain the reasons for denial of parole “in detail and not in conclusory terms.” N.Y. Exec. Law. 259-i(2)(a); *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep’t 2016); *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dep’t 2014). Though it need not discuss each factor in detail, a written decision “may not summarily itemize a petitioner’s achievements while incarcerated or render a conclusory decision parroting the statutory standard.” *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc.3d 661 (Sup. Ct. Bronx Cty. 2006).

The written decision must provide some basis to determine how the factors were weighed and why release was not warranted. *See Coaxum*, 14 Misc.3d at 662 (“The decision making is a

process of determining which factors outweigh others: a balancing process.”). *See also Platten v. N.Y. State Bd. of Parole*, 47 Misc. 3d 1059 (Sup. Ct. Sullivan Cnty. 2015). (“Based on the record and the lack of specificity in the decision, the Court cannot determine what concern the board had for the public safety and welfare, and why it had that concern at the time of the interview in 2014.”); *Weinstein v. Dennison*, 7 Misc. 3d 1009A (Sup. Ct. NY Cnty, 2005) (“...the Board is required to do more than merely mouth the statutory criteria, particularly whereas here each factor recited and brought forth in the parole interview, other than the crime itself, militated in favor of release.”); *V. Sullivan v. NYS Bd of Parole*, 100865/18 (Sup. Ct., NY Cnty, 2019) (Board’s conclusions that petitioner’s release would be incompatible with welfare of society and would deprecate the seriousness of the crime and therefore undermine respect for the law merely track the statutory language, without explanation or context...thus, the Court cannot evaluate their rationality.”)

In addition, the Parole Board Regulations 9 NYCRR 8002.3 were revised in 2017 to state:

“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.**”

This is a significant change because arguably the Board must now explain more than the reason for denial, it must explain in detail how each “principle and factor” was factored into that decision.

And, the Regulations were revised in 2017 to also state:

“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. Case law construing the new regulations include:

Comfort v. Stanford, 2018/1445 (Sup. Ct. Dutchess Cnty, 2018) (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.);

Matter of Coleman v. New York State Dep’t of Corr. & Cmty. Supervision, 157 A.D.3d 672, 673 (2d Dep’t 2018) (reversing denial of Art. 78 petition because “the petitioner . . . was assessed “low” for all risk factors on his COMPAS (Correctional Offender Management Profiling for

Alternative Sanction) risk assessment. Thus, a review of the record demonstrates that in light of all of the factors, notwithstanding the seriousness of the underlying offense, the Parole Board's 'determination to deny the petitioner release on parole evinced irrationality bordering on impropriety.'");

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.") (emphasis added)

Even before revision of the regulations, the First Department held that the Parole Board violated the statutory requirement that the reasons for denial not be conclusory when they "summarily listed petitioner's institutional achievements and then denied parole with no further analysis of them." *Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016). A court will look at the plain text of the parole denial to determine if it is merely boilerplate language. *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 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.");

The Board must provide insight into how it reached its decision, instead of merely listing the factors it considered. *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.*") (emphasis added.) *See 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.'") (emphasis added.) *Stokes v. Stanford*, 2014 N.Y.

Slip Op. 50899(U), at *2 (Sup. Ct. Albany Cty. June 9, 2014) (granting *de novo* interview after noting that petitioner’s “COMPAS report found him at low risks in all categories it considered. . . . Although the determination parrots the applicable statutory language, the Board does not even attempt to explain the disconnect between its conclusion and petitioner’s rehabilitation efforts and his low risk scores.”).

B. Failure to Consider Full Record / Board Failed to “Qualitatively Weigh” the Applicable Factors

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.’” *Fischer v. Graziano*, 130 A.D.3d 1470 (4th Dep’t 2015); *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).

Considering relevant statutory factors requires more than a mere reference to “the record.” For example, a categorical dismissal of achievements is grounds for overturning the Board’s decisions. In *Cappiello*, eight out of ten pages of the applicant’s interview transcript were dedicated to the details of the applicant’s instant offense, a murder that occurred in 1976. While the applicant directed the Board’s attention to the numerous factors supporting parole release, “there is no indication in the record as to whether the commissioners read those materials or considered them in any way.” *Cappiello v. N.Y. State Bd. of Parole*, 6 Misc.3d 1010A (Sup. Ct., NY Cnty, 2004). The parole denial merely stated “After a review of the record and this interview parole is again denied” before listing the details of the instant offense and concluding that “your release at this time would pose a threat to public safety.” *Cappiello*, 6 Misc.3d 1010(A). (“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.”)

See 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.”) *See also Pulinario v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 42 Misc.3d 1232(A) (Sup. Ct. NY Cnty, 2014) (“[T]he Parole Board’s overwhelming emphasis was on the offense . . . At the hearing, there were only passing references to the contents of petitioner’s application. In the decision there was only a perfunctory mention of all the statutory factors that weighed in 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.”; *V. Sullivan v. NYS Bd of Parole*, 100865/18 (S. Ct., NY Cnty, 2019) (“There is no explanation why the 25 year old crime outweighed the voluminous evidence that indicates petitioner would presently be able to lead a quiet and crime-free life in society.”).

C. Relying on an Inaccurate Record, or a Decision Unsupported by the Record

When the Board bases its decision on 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...”).

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

In *Hawthorne*, the court granted petitioner 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.” *Hawthorne v. Stanford*, 135 A.D.3d. 1036 (3d Dep't 2016).

If the Board based its decision on erroneous information, this is grounds for a de novo hearing. See *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. *Inasmuch as the Board relied on incorrect information in denying petitioner's request for parole release, the judgment must be reversed and a new hearing granted.*”) (emphasis added.)

See *Edge v. Hammock*, 80 A.D.2d 953 (3d Dep't 1981). (“Because Parole Board based its determination of petitioner's minimum period of imprisonment (MPI) on rape and sodomy, *crimes he had not been convicted of and which he denied committing*, Special Term properly annulled board's determination.”)

But see *Booth v. Stanford*, 2014/570 (Sup. Ct. Franklin Cnty 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.”)

A common inaccuracy, though not litigated as yet, is a claim by the Board that there is “official opposition” from the DA and/or sentencing court, when in fact the opposition is dated and does not represent a current recommendation from the current DA or a current recommendation from

the sentencing court. The Board solicits a letter from the DA, defense counsel (at trial) and the sentencing judge at the time of first parole eligibility. *See* 259-i. Typically, the Board relies on that letter at each subsequent parole review and frequently cites to such opposition. But, that is often inaccurate because the opposition is dated and may, as to the DA, reflect the views of a past administration. For example, recently elected Kings County DA Eric Gonzalez has committed to a policy that includes the following: “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 23.¹³

Note that if the Board does not contact trial defense counsel, the DA or the sentencing Judge, it is likely grounds for a de novo interview.

D. The Denial of Parole Amounted to an Illegal 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.”) (emphasis added.). 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). This is an area ripe for continued litigation. *Ely v. Bd of Parole*, 2016/100407 (Sup. Ct. NY Cnty, 2017) (“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 multiple 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.

E. The Board’s Consideration/Reliance on Confidential Information was Not Disclosed in its Decision

Until recently and contrary to law, the Board withheld from the parole applicant many portions of the parole case record. Although that has changed, there are still significant parts of the parole file that are withheld in their entirety, e.g. “victim” statements, portions of the COMPAS report

¹³ <http://www.brooklynda.org/post-conviction-justice-bureau/>

and medical summaries. 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 Cnty. 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."). For more on obtaining the full parole case record, see below.

X. FAILURE TO CONSIDER STATUTORY FACTORS

A. Exclusive Focus on Nature of the Instant Offense

The 1st, 2nd and 4th Departments hold that the Board must consider all statutory requirements and cannot base the decision to deny solely on the nature of the crime. 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.); *V. Sullivan v. NYS Bd of Parole*, 2018/100865 (S. Ct., NY Cnty, 2019) (finding Board relied almost exclusively on the seriousness of the crime and statements petitioner made at time of sentence); *Ramirez v. Evans*, 118 A.D.3d 707 (2d Dept 2014); *Perfetto v. Evans*, 112 A.D.3d 640 (2d Dep't 2013); *Gelsomino v. N.Y. State Bd. of Parole*, 82 A.D.3d 1097 (2d Dep't 2011) ("Here, in denying the petitioner's application for release on parole, the Parole Board cited only the circumstances of the underlying crimes and failed to mention any of the other statutory factors, including his excellent disciplinary record, his record of achievements while incarcerated, as well as positive statements made by the sentencing court."); *Huntley v. Evans*, 77 A.D.3d 945 (2d Dep't 2011) ("Where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally."); *Mitchell v. N.Y. State Div. of Parole*, 58 A.D.3d 742 (2d Dep't 2009) (While the seriousness of the underlying offense remains acutely relevant in determining whether the petitioner should be released on parole, the record supports the petitioner's contention that the Parole Board failed to take other relevant statutory factors into account.); *Johnson v. New York State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dept 2009)

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, 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.)

B. Aggravating Factors

Among the factors the Executive Law requires the Board to consider is the following:

"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"

In *King*, the First Department held that "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.*" *In re King v. N.Y. State Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1993), *affd.* 83 N.Y.2d 788 (1994).

In *Guzman*, the First Department upheld a parole denial after concluding 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." *In re Guzman v. Dennison*, 32 A.D.3d 798 (1st Dept 2016). See also *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."). But, see *Platten*, 47 Misc. 3d, at 1067 (describing the petitioner's crime as

“heinous,” yet still holding that denial of parole was arbitrary and capricious because the Board’s decision did not explain *why* release would be inconsistent with the welfare of society or deprecate the seriousness of the offense).

C. Failure to Consider Youthfulness at the Time of Crime

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.

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*, 2019 WL 2030503 (2d Dep’t 2019).

The Board attempted to codify this holding in 2017 at 8 NYCRR § 8002.2(c) which reads:

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 specifically applies to people under the age of 18 at the time of their offense, attorneys across the country are pushing courts to extend the logic of *Roper et al* to people convicted of crimes committed in their early 20s. We similarly encourage attorneys in New York State to make these arguments even if the person was over 17.

D. Failure to Consider Immigration Status or Impending Deportation

Immigration status, including an impending deportation order is a statutorily required factor for the Board of Parole to consider. 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. *See Thwaites v. N.Y. State Bd. of Parole*, 34 Misc. 3d 694 (Sup. Ct. Orange Cnty, 2011); *Ciaprazi v. Evans*, 52 Misc.3d 1212(A) (Sup. Ct. Dutchess Cnty, 2016).

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.

E. Failure to Consider Sentencing Minutes

The Third Department held harmless the Board’s failure to consider available sentencing minutes “given that the sentencing minutes do not disclose that the sentencing court made any recommendations concerning parole.” *In re Matos v. New York State Bd. of Parole*, 87 A.D.3d 1193 (3d Dep’t 2011).

However, the Third Department also held that “the failure to timely locate available sentencing minutes” by the Board, 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. *In re Duffy v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 132 A.D.3d 1207 (3d Dep’t 2015). *See also Matter of Phifer v. New York State Bd. of Parole*, 2019 N.Y. Slip Op. 32462(U), at *6 (Sup. Ct. NY Cty. Aug. 21, 2019) where the Board failed to consider the sentencing minutes and the court ordered a de novo interview.

F. Lack of Consideration of or Failure to Justify Departure From COMPAS

In 2011, the New York State legislature mandated that the Board establish a more forward-looking approach to parole consideration by amending the statute to require “written procedures...incorporat[ing] risk and needs principles...” *People v. Brown*, 25 N.Y.3d 247 (2015). In response, the Board adopted a risk assessment instrument and developed procedures for how to use the tool.

The instrument, the Correctional Offender Management Profiling for Alternative Sanction (“COMPAS”), was developed by Northpointe Institute for Public Management Inc.¹⁴ It is administered by an applicant’s Offender Rehabilitation Counselor (ORC) and currently consists of 74 questions. Answers are tallied and applicants are given a score of low, medium, or high, indicating the levels of risk as to an array of factors bearing upon public safety if released.

In line with the 2011 legislative changes, the parole regulations were revised to read: “in making a release determination, **the Board shall be guided by risk and needs principles.**” 9 NYCRR 8002.2.

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*, 976 N.Y.S. 2d 838 (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.”)

In September 2017, additional amendments to the Parole regulations require that “If a Board determination, denying release, departs from the Department Risk and Needs Assessment 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.**”

In the above section “Denial Contained Conclusory Statements and Boilerplate Language,” we list emerging case law, including *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.)

G. Failure to Consider or Request a Statement from Defense Counsel

The Executive Law requires that the Board consider “the seriousness of the offense with due consideration to ...the recommendations of the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated.”

¹⁴ For some background on COMPAS and questions regarding its validity see <https://www.theatlantic.com/technology/archive/2018/01/equivant-compas-algorithm/550646/>

Not uncommonly, the Board will fail to effectively reach out to a client's criminal defense attorney in the underlying case. Such a failure has resulted in more than a few administrative reversals. Attorneys should try to contact defense attorneys to inquire whether the Board requested their opinion about the former client's parole appearance. If the defense attorney received nothing from the Board, persuade the attorney to write something supportive and then raise the issue on administrative appeal.

H. Failure to Consider Victim Statements

The Board is statutorily required to consider victim statements. In *Bottom*, though the adult son of one of the slain victims appeared at a victim impact meeting and spoke, at length, in favor of release, "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." *Bottom v. N.Y. State Bd. of Parole*, 30 A.D.3d 657, 658 (3d Dep't 2006). 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. *In re Bottom*, 30 A.D.3d at 658.

For more information, see below at XIII-C regarding consideration of opposition material.

I. Failure to consider reentry plan

The Board must consider 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.

XI. NON-STATUTORY FACTOR ISSUES

Whether the Board may consider information outside the statutory factors varies depending on the category of information. The Third Department suggests that so long as the information directly relates to an enumerated factor, then consideration is appropriate. The First Department has held that information "outside the scope" of the statutory factors may not be considered.

A. Lack of Remorse

The Parole Board is allowed to consider parole applicants' remorse (or lack thereof) and insight into their crime in their decision. *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 Cnty, 2010) (Board’s denial, which was based on the petitioner failing to show remorse for the victim or her family and not appearing to understand the seriousness of his crime was contradicted by the record).

B. Penal Philosophy

A Parole decision is invalid when “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.*” *In re King v. New York State Div. of Parole*, 83 N.Y.2d 788 (1994). (emphasis added.) Executive Law § 259-i does not authorize Commissioners to consider such factors. Be creative when thinking about whether any commissioner questions or comments during the interview, or any material considered by the Board (i.e., see below re: “Community Opposition”), constitutes consideration of “penal philosophy.”

C. Improper Consideration of Letters in Opposition to Release

In denying parole, many transcripts and decisions cite to so-called “community opposition.”¹⁵ Consideration of such information can be challenged.

¹⁵ The use of the term “community opposition” is misleading and not a term parole applicant lawyers should adopt. Community suggests that the opposition reflects a consensus of a relevant group of persons that the Board is statutorily required or authorized to consider. Based on the limited documents falling within this category that lawyers for parole applicants have been permitted to view, such information consists of petitions signed by random people, letters containing inaccurate information and letters from those without any knowledge relevant to the factors the Board must consider. In some cases, upon special review, no “community opposition” existed in the file, despite multiple references to it.

Under the Executive Law, the Parole 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. Executive Law § 259-i(2)(c)(A)(2)(v). The Executive Law goes on to define “victim’s representative” 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).

The issue is whether the Board may consider opposition from individuals and associations that do not fall within the definition of a victim representative. A recent 3d Department decision held that the Board may and 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, 447 N.Y.S.2d 44 [1982], *appeal dismissed* 57 N.Y.2d 674, — N.Y.S.2d —, — N.E.2d — [1982]; *see also Matter of Grigger v. New York State Div. of Parole*, 11 A.D.3d at 852–853, 783 N.Y.S.2d 689). 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* Executive Law § 259-i[2][c][A]; *Matter of Clark v. New York State*

Bd. of Parole, 166 A.D.3d 531, 531–32, 89 N.Y.S.3d 134, 2018 N.Y. Slip Op. 08071, *1 [2018]).”

In 2018 the 1st Department stated that “...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.” *Clark v. New York State Bd. of Parole*, 166 A.D.3d 531 (1st Dept 2018).

The contents of the opposition material is not specified in the *Clark* and *Applewhite* decisions; therefore pending the content of the material in your clients’ parole files, this may provide a ground for appeal.¹⁶

For example, if the opposition material is limited to conveying “penal philosophy” then it should not be considered. *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 “opposition” material may also be stale. *See Hopps v. N.Y. State Bd. of Parole*, Decision and Order Index No. 2553/18 (Sup. Ct. Orange Cnty. 2018) (“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.”).

Another argument may be that so called “community opposition” may only indicate the organizing abilities and resources of one sector of society.¹⁷ 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 members of society would not support release. Therefore, is it accurate for the Board to state that there is “community opposition” when such opposition emanates from a select sector of the New York “community?”

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

¹⁶ See e.g. New York City Police Benevolent Association website advocating that “cop killers” should never be released and soliciting opposition letters advocating such. <https://www.nycpba.org/>

¹⁷ For example, the NYC PBA’s website permits anyone to write a form letter to the Board opposing release of “cop killers.” <http://www.nycpba.org/>. For more on law enforcement opposition, see <https://www.thenation.com/article/nypd-parole-lynch-herman-bell/>.

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 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).¹⁸

Finally, there is a strong argument that consideration of opposition material is not permitted under the governing statute. In *Matter of Applewhite v. NYS Bd. of Parole*, 167 A.D.3d 1380 (3d Dept. 2018), a divided panel held that the Board of Parole may consider community opposition to a parole candidate's release. Without offering a legal rationale, the First Department reached the same conclusion in *Matter of Clark v. NYS Bd. of Parole*, 166 A.D.3d 531 (1st Dept. 2018). The *Applewhite* majority found support for this 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 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

¹⁸ There is a question whether the 1st Department's affirmance that included the statement: "... the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community..." overrules this portion of the lower court decision.

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 8005 (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 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.¹⁹

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.²⁰

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.

¹⁹ Governor's memo in support Program Bill #12 (L.1985, chap. 78).

²⁰ 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).

What is clear is that 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 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.²¹

D. Personal Opinion or Bias of Commissioners

Commissioners may not base their decision on personal opinion or bias. *Rabenbauer v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cnty. 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.)

In considering whether to grant parole, the Parole Board is limited to determining whether the person is a *present* danger to society. *King v. New York 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.”) (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 Cnty. 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 Cnty. 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.”)

E. Predetermined Decision

²¹ Credit for this argument goes to Al O’Connor.

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.’”)

See Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cnty. 2014) (“at least one Commissioner was argumentative and appeared to have made the decision prior to the parole interview.”) *See also Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 40 Misc.3d 226 (Sup. Ct. Columbia Cnty. 2013) (“When, as here, the Parole Board focuses entirely on the nature of Petitioner's crime, there is a strong indication that the denial of parole is a *foregone conclusion that does not comport with statutory requirements.*”) (emphasis added.)

XII. ASPIRATIONAL LITIGATION / ON THE HORIZON

A. Judicial Power to Grant Release

There are 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.

In *Ruzas v. DOCCS*, an unpublished Dutchess County Article 78 decision, Judge Grossman all but begged for a reexamination of the Article 78 judge'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.). Judge Engoron, New York County, in granting an Article 78, went so far as to order release but was reversed by the Appellate Division. *Kellogg v. New York State Bd. of Parole*, 159 A.D.3d 439, 442 (1st Dep't, 2018). 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); *Quartararov. 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).

C. Right to Disclosure of Full Record Considered by the Board

This is a critical issue in which litigation may make a difference. As explained in more detail in sections below, 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. Bona fide “victim's statements” are probably the only

category of information that is lawfully withheld, and even as to this category, the law may support only the withholding of the author's name and address.

D. 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 <http://blog.federaldefendersny.org/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 minimum set at the statutory maximum would undermine respect for the law when the legislature has determined that release to parole supervision at that point is lawful.

E. 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 relevancy. 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. According undue weight to criminal history is irrational when there has been many intervening years and indicia of change.

F. Irrationality of Short Adjournment and a Subsequent 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 a person is nearing what the Board consider “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 period and yet another denial.

G. 6th Amendment Violations

Pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, including the Supreme Court’s recent decision, *United States v. Haymond*, 139 S. Ct. 2369 (2019), there may be a basis to challenge a parole denial on a 6th Amendment ground, especially if your client was a juvenile at the time of the crime.

Clients who were juveniles at the time of the crime must be given a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham v. Florida*, 560 U.S. 48 (2010). A parole denial concluding that release would deprecate the seriousness of the offense as to undermine respect for the law or be incompatible with societal welfare, imposes a greater sentence by finding facts that such clients are among the rarest juveniles whose crimes reflect permanent incorrigibility—facts not found beyond a doubt by a jury nor admitted by plea. *See Apprendi*, 530 U.S. at 490.

For others, findings of fact by the Board about the commitment offense that were not elements of the crime found beyond a reasonable doubt by a jury or admitted to at plea, upon which the

Board relies to conclude that release would undermine respect for the law or be incompatible with societal welfare raises the minimum sentence in violation of the 6th Amendment.

As argued by counsel representing Mr. Flores in *Flores v. Stanford*, No. 7:18-cv-02468 (VB) (S.D.N.Y.):

“In *Haymond*, the Supreme Court held that a supervised release statute that requires imposition of a minimum sentence, above the minimum for the crime for which the jury convicted the defendant, upon a judicial finding under a preponderance of the evidence standard without a jury, violated the Sixth Amendment. *Id.*, slip op. at 1, 10-11 (plurality opinion). The Court rejected the argument that, because this sentence enhancement arose in the posture of “postjudgment sentence-administration proceedings”, the Sixth Amendment was inapplicable. *Id.* at 11-12. The Court explicitly stated: “[A]ny increase in a defendant’s authorized punishment contingent on the finding of a fact requires a jury and proof beyond a reasonable doubt no matter what the government chooses to call the exercise.” *Id.* at 12 (citation omitted).

For juvenile lifers, the legally prescribed floor for the original conviction is a term of years set by New York State law together with the entitlement, under the Court’s Eighth Amendment cases, to a meaningful opportunity for parole upon demonstration of maturity and rehabilitation. It is unconstitutional for the Parole Board to deny parole based on new fact-finding about the original offense because, as the Court reaffirmed last week, that “remove[s] from the jury the assessment of facts that increase the prescribed range of penalties.” *Id.* at 9 (citation omitted). Unlike parole revocation hearings, which the Court distinguished because the sentence “could not exceed the remaining balance of the term of imprisonment already authorized by the jury’s verdict”, *id.* at 7, denial of parole to juvenile lifers based on fact-finding about the original offense is an enhancement to the sentencing floor to which the Sixth Amendment applies.”

XIII. OTHER LITIGATION STRATEGIES

A. Contempt Cases Following Successful Article 78 Petitions

If an applicant successfully appeals a parole denial through an Article 78 petition, but is again denied release at the *de novo* interview, limited remedies are available. An applicant may begin the appeals process again from the administrative level, or file a contempt motion against the Board of Parole.²²

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.

²² A seemingly cut and dry civil contempt claim could be made if the Board refuses to grant a new interview whatsoever, after a judge has so ordered. There do not seem to be any cases in which it is alleged that the Board refused to reschedule an interview after a successful Article 78 filing, although the Board has certainly taken its time in many cases.

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.”).

Therefore, civil contempt may be a promising strategy to combat the Board’s exhibited resistance to providing meaningful relief to parole applicants who have filed successful Article 78 claims—or at least to begin to apply increased pressure on the Board.

i. Legal Standard

A motion to hold the Board in contempt is filed in the original Article 78 case and before the judge that granted the Article 78 petition. The movant 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 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.”)

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)).

ii. Remedy for Contempt

A finding of contempt may lead to the imposition of fines or imprisonment. 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, Article 78 judges have ordered monetary fines upon making their findings. For example, in *Ferrante, supra*, the Art. 78 judge 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. Instead, the 2d Dept ordered, “...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.”

Judges may also order reimbursement of “reasonable fees and costs” associated with the contempt motion. *See Ruzas v. Stanford*, No. 1456/2016, at *7 (Sup. Ct. Dutchess Cty., Oct. 18, 2017) (unpublished op.). To date, no judge has ordered imprisonment of the Parole Board Commissioner as a remedy for a finding of contempt.

iii. *Contempt Cases in the Parole Context*

In May 2016, Judge Maria Rosa, Dutchess County Supreme Court, 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 in a brief, boilerplate decision. After the denial, the court granted a contempt motion, finding that the Board’s second decision was “virtually the same” as its earlier decision, which in turn had been “entirely unsupported by the factual record.” Judge Rosa’s contempt finding ordered yet another *de novo* interview, but MacKenzie was again denied parole. He committed suicide in August 2016 after 10 parole denials.

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. *Ruzas v. Stanford*, No. 1456/2016, at *7 (Sup. Ct. Dutchess Cty., Oct. 18, 2017) (unpublished op.)

XIV. RESCISSION

In rare cases, a client may be granted parole, but in the time between the interview and release, a new fact or intervening cause arises and the Board may suspend the release date. The Board will then hold a rescission hearing to determine whether to reinstate the open date for release, or rescind the grant of parole and hold the client for an addition term.

In order to hold a rescission hearing, the Board must provide the client with a Notice of Temporary Suspension of Parole Release and Notice of Rescission Hearing. If a rescission

hearing is held, the Board must also produce and provide a Rescission Hearing Report and any supporting documents.

Causes of rescission can include: new information not previously known to the Board (such as newly submitted letter from the district attorney), a new disciplinary ticket or conviction, removal from a program, changes in mental health, etc. Except see *Costello v. New York State Bd. Of Parole*, 23 N.Y.3d 1002 (2014), in which the Court of Appeals clarified that victim impact statements received after parole is granted are not a valid basis to rescind parole (i.e., they must be considered before the initial decision).

Contact the authors of this guide for more guidance on rescission hearings.

XV. THE PAROLE BOARD FILE, OTHER DOCUMENTS AND HOW TO GET THEM

The Parole Board maintains a file for every applicant who appears before it. If your client requested their parole file before the parole interview, they can provide you with copies. If not (and it is unlikely that they did), it is important to obtain the file for the administrative appeal and Article 78. If your client requested the parole file before their interview/review and did not receive it or portions of it, this may be an issue to raise in the administrative appeal and Article 78.

A. Parole File Contents

- Pre-sentence report
- Sentencing minutes
- Programming history
- All Program certificates and evaluation forms
- Disciplinary records
- Grievance Reports challenging disciplinary tickets
- COMPAS (portions are routinely redacted)²³
- Current and prior Parole Board decisions
- Current and prior transcripts of Parole Board interviews
- ORC recommended Special Conditions
- Current and past Case Plans
- Comprehensive Medical Summary Form

²³ In 2011, the New York State legislature amended the Executive Law governing parole to require the Board to “establish written procedures . . . incorporat[ing] risk and needs principles” The amendment required 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 an evaluative instrument 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 Counselor and currently consists of 74 questions. Answers are tallied and applicants are given a final score of low, medium, or high, 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 viable process for correcting errors. COMPAS has also been found to be racially biased.

- Parole Board Medical Summary
- Proposed Residence Form
- Pre-Release Screening Worksheet
- Parole Board Report (aka Inmate Status Report)²⁴
- Commissioner’s Worksheet
- Parole Packet (i.e. client’s submission, if applicable)
- Letter(s) from trial level defense attorney
- Letter(s) from the District Attorney
- Letters/statements from victims and their families
- “Community Opposition” letters
- Letter(s) from Sentencing Court
- Past administrative appeal decisions

B. Law re: Obtaining the Parole File

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 commanded 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, known commonly as 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.

C. Process for Obtaining the Parole File

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

- i. 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 Counselor or Senior Parole Officer)
- ii. Draft the request
 1. See attached for a sample request

²⁴ An unnumbered three-page report; one page, designated “confidential report,” which may contain “intelligence information” and mental health level, for example, is routinely withheld.

2. Include your client's "DIN" number, current facility, and the nature of the proceeding for which you are requesting the parole file, in this case the administrative appeal.
 3. 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.
 4. In addition, the request should include a demand that any documents withheld should be individually identified and the specific basis under §8000.5 for withholding should be stated. If the applicant is aware of support letters submitted by DOCCS employees, a request for confirmation of their receipt should be included as well.
- iii. Include a Signed Authorization
 1. Include an authorization for disclose signed by your client. See attached for sample.
 - iv. Send the request electronically
 1. All prisons should now accept requests for these files electronically. If they do not, please contact the authors.

A. Preservation of Issue for Appeal and Alternative Avenue to Litigate Non-Disclosure

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.

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.

B. Portions of the Parole File the Board Routinely Withholds

The Board routinely provides certain documents, such as portions of the Parole Board Report, prior denials and interview transcripts, COMPAS and case plans. But, the Board routinely redacts portions of the COMPAS and Parole Board Report, and does not provide medical and mental health assessments, letters from the prosecuting district attorney, letters from the sentencing court, victim impact statements, and redacts the names and addresses from documents deemed "community opposition," which ranges from petitions and letters opposing release. The June, 2019 Directive should reduce some of these improper withholdings, but we anticipate it will take advocacy to assure that DOCCS follows the directive.

There are four bases for withholding portions of the parole file:

- (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 person²⁵;
- (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. 9 NYCRR 8000.5(c)(2)(a).

The Board's routine withholding may derive from DOCCS' entrenched practice of treating applicants' requests for their parole files as FOIL requests, which is governed by 9 NYCRR 8008.5 (not to be confused with 8000.5).²⁶

FOIL governs *public* access to records, not parole applicants' access to their own 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 categorically 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."

An unpublished Article 78 decision by J. Schlesinger, *Andrews v. NYS DOCCS* (Sup Ct., 2015), discusses these issues.

²⁵ *John D. Justice v. DOCCS*, 130 A.D.3d 1342 (3d Dep't 2015) (finding disclosure to petitioner of rejection records from potential post-release residences "could endanger the life or safety of any person" in light of petitioner's violent crimes, ongoing mental health issues and previous threats to staff at his prior residence while he was on parole).

²⁶ The Board appears to now understand that FOIL is not applicable in connection with applicants' requests for their parole file, but confusion as to the controlling law persists and disclosure of parole files varies from facility to facility. Should you run into a problem, contact the authors of this report and we will direct you to our contacts in DOCCS counsel's office.

C. DA and Sentencing Court Letters

Pursuant to Exec. Law 259-i, the Board is required to consider the recommendations of defense counsel, the District Attorney and sentencing court. Until recently, the Board refused to disclose such “official letters,” but the recent DOCCS directive finally recognizes that this material must be provided to the parole applicant. *See* June 3, 2019 Directive #2014.

D. Victim Statements

The Board is required to consider current and prior victim statements or statements by “the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated.” Exec. Law 259-i (2)(c). The Board will not provide victim statements to the applicant or counsel unless under court order. The Board sometimes, but not always, submits the “confidential” portion of the parole file to the Article 78 judge *in camera*. Consider moving the Article 78 court for access to this so-called “confidential material.”

Counsel have had some limited success obtaining such material, which each time revealed that the Board had considered inappropriate information. At the very least, 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.

E. Opposition Material

A category of the parole file commonly referred to as “community opposition” by the Board does not constitute victim statements and therefore should be provided to the parole applicant and counsel. *Clark v. New York State Bd. of Parole*, 166 A.D.3d 531 (2d Dept 2018). Per Directive #14 the Board is beginning to disclose release “opposition” material. The Board, however, routinely redacts the name and address of the writer. Counsel may want to object to such redactions pending the particulars of the client’s case. For example, since the Board is required to consider whether release would be incompatible with the welfare of society, there is a question whether opposition originating from out of state should be relevant.

F. Pre-Sentencing Investigation Reports (PSIs Or PSRs)

The Board heavily relies on the Pre-Sentencing Investigation Report, but will not provide it to the parole applicant. Sentencing in felony cases is preceded by an investigation by the county Department of Probation called a Pre-Sentence Investigation. During the “investigation,” the Department of Probation writes a report called the Pre-Sentence Report (PSR) or sometimes called the Pre-Sentence Investigation (PSI). The report is required in all felony cases per Criminal Procedure Law 390.20(1).

The PSR details 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 family/educational background. Access to the PSR is governed by Criminal Procedure Law

§390.50(2). If your client did not obtain 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. Call the relevant Supreme Court county clerk 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.”

Prison staff are also technically required to assist applicants in obtaining their PSR, although this is rarely done. Speak with your client about contacting their Offender Rehabilitation Coordinator (ORC) regarding the PSR. Also review DOCCS Directive #8370 (<http://www.doccs.ny.gov/Directives/8370.pdf>).

Attorneys may have success obtaining the PSR from appellate or even trial-level counsel.

G. Prior Parole Interview Transcripts

Parole files will often, but not always contain prior interview transcripts, but it is important to obtain these for the purpose of appeal. Prior transcripts, when compared with the current 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).

Prior transcripts can be obtained through a formal FOIL request directed to:

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

Clients may have more success requesting the transcripts themselves. Some transcripts requested through the FOIL process are redacted.

H. Records Held by DOCCS Outside 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, so verify before submitting any requests.

These documents can 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 a formal FOIL request with an accompanying release will ensure you receive the records. See attached for a sample request and 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 (HIPAA 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.

I. Other Resources

Fordham University School of Law is currently compiling a searchable database of unpublished judicial decisions, sample administrative appeals and Article 78s, COMPAS reports, and other relevant documents. Notice will be sent when the database becomes available to the public.

There is also a statewide listserv where attorneys working on parole litigation pose questions and offer suggestions. Email Michelle Lewin at mlewin@paroleprepny.org to join.

XVI. SAMPLES FORMS

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

NOTICE OF APPEAL

I hereby appeal from the decision of the Board of Parole or the Administrative Law Judge in my case:

Inmate Name _____
NYSID Number and DIN _____
Current Place of Incarceration _____
Place of Interview/Hearing _____
Date of Interview/Hearing _____
Scheduled Reconsideration Date _____

A transcript of the interview or hearing may be requested by an inmate/violator, or their attorney, by checking the appropriate box below. Transcripts provided by the Appeals Unit will be billed at a rate of twenty-five cents (25¢) per page. It normally takes between four to eight weeks from the filing of the Notice of Appeal until the transcript is prepared.

Check appropriate box:

- I request a transcript of the minutes of my interview/hearing as I believe it is necessary for the preparation of my appeal.
- I shall not require a transcript of the minutes of my interview/hearing to prepare my appeal; however, I reserve the right to alter this decision at a later date.

(Date)

(Signature)

**Form #8360ACS (Rev 01/15)
FRONT**

NOTICE OF RIGHT TO APPEAL

You have the right to appeal any decision of the Board of Parole or an Administrative Law Judge and you have the right to the assistance of counsel in perfecting your appeal.

To appeal a decision of the Board or an Administrative Law Judge, you must file a Notice of Appeal within 30 calendar days of your receipt of the decision notice by sending the Notice of Appeal to:

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

You have four months from the date your Notice of Appeal is filed to perfect your appeal, unless an extension is granted for good cause upon written request within the four month filing period. Your appeal may be perfected by submitting two copies of your brief on appeal or two copies of a letter which sets forth the specific grounds for setting aside the challenged decision. The brief or letter should contain a section which must include all pertinent documents if they are necessary to the determination of your appeal. Please only send your brief or letter when it is completed. DO NOT send portions of your appeal at different times or addendums to an initial filing. Failure to submit your perfected appeal within the initial four months, or during any extended period of time, will result in the dismissal of your appeal with prejudice.

Once your appeal is perfected, it will be reviewed and a statement of findings prepared. You can expect that it will take approximately four months to prepare the statement of findings. Once the statement of findings is prepared by the Appeals Unit, it will be submitted to the Board of Parole for a final decision. Once a final decision is rendered by the Board, a copy of the decision and the Appeals Unit's findings will be forwarded to you and your attorney, if applicable.

Questions on Appeal:

A. Release Denial, Rescission or Final Revocation Determination:

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 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 was excessive.

B. Final Revocation or Rescission Determination – Additional Ground for Appeal:

Whether the determination was supported by a preponderance of the evidence subject to the limitation that evidentiary rulings will be considered only if a timely objective was made at the hearing.

Form #8360ACS (Rev 01/15)

BACK

Sample Notice of Appearance

[Letterhead]

[Date]

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

Re: [Client] [DIN #]
[Facility where incarcerated]
[Date of interview and date of decision]
[Where the interview occurred]

Notice of Appearance of Counsel
Request for Parole Interview Transcript

To Whom It May Concern:

[Client] was denied parole on [date]. S/He filed a notice of administrative appeal in a timely manner.

[Attorney/Firm] represents [Client] in connection with the administrative appeal of the [date] denial of parole and this letter serves as a notice of appearance. Therefore, please direct all correspondence in this matter to [attorney], at [address].

In addition, please provide a transcript of the [date] parole interview.

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

Thank you for your attention to this matter.

Sincerely,

Sample Pre-Sentence Report Request

Applicant's Name
DIN XX-X-XXXX
X Correctional Facility
Address

Date

[County and Clerk Where Sentencing Took Place]

Example:

Queens County Clerk
Queens Supreme Court Building
88-11 Sutphin Boulevard
Queens, NY 11435

[Same County as Above, Probation Dept.]

Example:

Queens County Department of Probation
125-01 Queens Boulevard
Queens, NY 11415

To Whom it May Concern,

My name is [NAME] (DIN XX-X-XXXX; NYSID XXXXXXXX). I am writing to request a copy of my pre-sentencing report ("PSR") that was issued in connection with case number XXXX-XX, for which I was sentenced on [DATE] in Queens County.

I am scheduled to appear before the Board of Parole for consideration for release on [DATE] or earlier. As such, I am entitled to a copy of my PSR under New York Criminal Procedure Law § 390.50(2), which makes specific reference to individuals in my situation (in relevant part):

Upon written request, the court shall make a copy of the presentence report, other than a part or parts of the report redacted by the court pursuant to this paragraph, available to the defendant for use before the parole board for release consideration or an appeal of a parole board determination. In his or her written request to the court the defendant shall affirm that he or she anticipates an appearance before the parole board or intends to file an administrative appeal of a parole board determination. The court shall respond to the defendant's written request within twenty days from receipt of the defendant's written request.

I am copying the Queens County Department of Probation on this letter in hopes that it may expedite the process of retrieving my PSR and ensure that a copy is promptly sent to me. Thank you for your attention in this matter.

Respectfully,
[Applicant's Name]

FREEDOM OF INFORMATION LAW (FOIL) REQUEST

[Date]

To: [Name of Contact], Inmate Records
[Name of Correctional Facility]
[Address of Correctional Facility]

RE: FOIL Request for Documents of [Full Name of Applicant], [DIN]

Dear [Name of Contact],

This letter is a formal FOIL request for the following documents of [Full Name of Applicant], [DIN]. I/we are representing [Full Name of Applicant] in an appeal of their most recent parole denial. Enclosed with this letter please find a release signed by [Full Name of Applicant] requesting and consenting to the disclosure of the following documents:

1. **Entire record of program participation**, including any and all programs, classes, or activities, included but not limited to therapy or counseling, vocational training, education, and transitional services;
2. All **certificates of completion from any program**, class, or activity.
3. All **evaluations from any program**, class, or activity, and any and all progress notes, report cards, reviews, and evaluations;
4. All **quarterly inmate progress reports**, both general and final evaluations, all inmate progress reports related to wages or pay, and all other progress reports in the central file;
5. All **Case Plans**;
6. All **COMPAS Re-Entry assessments** and related records;
7. All **disciplinary records**, including misbehavior reports, disciplinary sheets, records of any investigations, records of any preliminary and final dispositions or adjudications, hearing records including transcripts or minutes of all proceedings, records related to any appeal of a disciplinary action, and records related to the discretionary review of any disciplinary actions;
8. All previous **Parole Board Reports**, Inmate Status Reports, Commissioner Worksheets and any other materials generated for or by the Board of Parole in preparation for or after the completion of the applicant's parole interview.
9. All previous materials submitted to the Board of Parole including the **parole packet**, letters of support or opposition, pictures, certificates, GED scores, and other paperwork.

We request all documents in electronic format pursuant to Public Officers Law § 89(3)(a). To the extent that the requested materials are not available in electronic format, we request an estimate of any and all fees, including the charges for reproducing records, before the documents are processed, copied or sent. We are willing to pay any reasonable fees for this request upon an advance estimate. Please direct all future written responses to our attention at the address below.

Sincerely,
[Your Full Name]
[Affiliation]
[Your Phone number]
[Your Email address]

REQUEST FOR PAROLE FILE PURSUANT TO 9 NYCRR § 8000.5

[Date]

To: Senior Offender Rehabilitation Counselor [NAME]
[Name of Correctional Facility]
[Address of Correctional Facility]

RE: Request for Documents of [Full Name of Applicant], [DIN] Pursuant to 9 NYCRR § 8000.5

Dear SORC [Last Name],

I am representing [Full Name of Applicant] in the appeal of their most recent parole denial. Pursuant to 9 NYCRR § 8000.5, I am requesting the documents listed below. Enclosed with this letter please find a release signed by [Full Name of Client] requesting and consenting to the disclosure of the following documents. Please note that this request is made pursuant to 9 NYCRR § 8000.5(c)(3) and is NOT a Freedom of Information Law (FOIL) request.

1. All prior Parole Board Reports and Inmate Status Reports;
2. All prior transcripts of Parole Board interviews;
3. All written decisions from the Parole Board;
4. All Commissioner's worksheets;
5. All submissions made by [Full Name of Applicant], informally known as the "parole packet";
6. All prior COMPAS Re-Entry assessments;
7. All letters from defense counsel;
8. All letters from the district attorney;
9. All letters from the sentencing court/judge;
10. All letters and statements from the victims and/or their families and/or representatives
11. All letters of support or opposition to the applicant's release
12. All letters labeled "community opposition"
13. Past administrative parole appeal decisions

We request all documents in electronic format. To the extent that the requested materials are not available in electronic format, we request an estimate of any and all fees, including the charges for reproducing records, before the documents are processed, copied or sent. We are willing to pay any reasonable fees for this request upon an advance estimate. Please direct all future written responses to our attention at the address below.

Sincerely,
[Your Full Name]
[Affiliation]
[Your Phone number]
[Your Email address]

RELEASE OF PRIVILEGED OR CONFIDENTIAL INFORMATION
AUTHORIZATION FORM

To: Senior Offender Rehabilitation Counselor/Inmate Records
[Name of Correctional Facility]
[Address of Correctional Facility]

RE: Release of Documents of [Full Name of Applicant], [DIN]

To Whom It May Concern:

I, [First and Last Name of Applicant], the undersigned, hereby authorize the New York State Department of Corrections and Community Supervision (hereinafter, "DOCCS") to release and to give to [Your First and Last Name or Names], any and all information and records pertaining to me, from any period of incarceration in a New York State Prison or Correctional Facility, or any institution under the authority of DOCCS, including the Board of Parole under the DIN number [DIN].

I hereby waive any privileges that I may have concerning this information, including any right of privacy created by statute or common law. This release is effective until you are notified by me that it is revoked.

Signature

Name

Date

Sworn before me this
_____ day of _____ 2019

NOTARY PUBLIC



AUTHORIZATION FOR RELEASE OF HEALTH INFORMATION PURSUANT TO HIPAA

[This form has been approved by the New York State Department of Health]

Patient Name	Date of Birth	Social Security Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form: In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), I understand that:



1. This authorization may include disclosure of information relating to **ALCOHOL and DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV* RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
2. If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
3. I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
4. I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
5. Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
6. **THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**

7. Name and address of health provider or entity to release this information:	
8. Name and address of person(s) or category of person to whom this information will be sent:	
9(a). Specific information to be released: <input type="checkbox"/> Medical Record from (insert date) _____ to (insert date) _____ <input type="checkbox"/> Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers. <input type="checkbox"/> Other: _____ Include: <i>(Indicate by Initialing)</i> _____ Alcohol/Drug Treatment _____ Mental Health Information _____ HIV-Related Information	
Authorization to Discuss Health Information	
(b) <input type="checkbox"/> By initialing here _____ I authorize _____ Initials Name of individual health care provider to discuss my health information with my attorney, or a governmental agency, listed here: _____ (Attorney/Firm Name or Governmental Agency Name)	
10. Reason for release of information: <input type="checkbox"/> At request of individual <input type="checkbox"/> Other:	11. Date or event on which this authorization will expire:
12. If not the patient, name of person signing form:	13. Authority to sign on behalf of patient:

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

Signature of patient or representative authorized by law. Date: _____

* **Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.**

 NEW YORK STATE Corrections and Community Supervision DIRECTIVE	TITLE Access to Records for Parole Interviews, Hearings, or Appeals		NO. 2014
			DATE 06/03/2019
SUPERSEDES	DISTRIBUTION A B	PAGES PAGE 1 OF 5	DATE LAST REVISED
REFERENCES (Include but are not limited to) NYS Executive Law §259-i(2)(c)(B); NYS Public Health Law §18; NYS Mental Hygiene Law §33.16(b); 9 NYCRR §§ 000.5, 8002.4(e); 7 NYCRR §§5.50, 5.51, 5.52; 42 U.S.C. §290dd-2; 42 C.F.R. §2.31; 45 C.F.R. §164.524; Directive #2010		APPROVING AUTHORITY 	

INTRODUCTION: This directive outlines the responsibilities and procedures for access to and release of the Department of Corrections and Community Supervision's (DOCCS) records in accordance with 9 NYCRR §8000.5, "Parole Records." This regulation does not require the Department to provide records that will not be reviewed by the Board or Hearing Officer. The Freedom of Information Law (FOIL), as discussed in Directive #2010, "FOIL/Access to Departmental Records," does not apply to requests made pursuant to 9 NYCRR §8000.5.

I. DESIGNATION

- A. The Supervising Offender Rehabilitation Coordinator (SORC) responsible for overseeing an inmate's counseling at a correctional facility, or the Senior Parole Officer (SPO) at a parole Area Office serving the locale where the parolee is confined in a city or county jail or correctional facility, is responsible for requests for that individual's records made under 9 NYCRR §8000.5. The SORC or SPO is designated the records "Custodian" for the purposes of this directive.
- B. Processing and responding to requests may be delegated to any individual within the facility or area office by the Superintendent or Bureau Chief as, necessary, so long as such designation does not delay a timely response. The SORC or SPO will remain responsible for answering any inquiries about the status of a request, regardless of delegation.

II. RECORDS COVERED

- A. Only those records available to, or considered by, the Board of Parole or Hearing Officer for the following proceedings may be provided, subject to section III-B. Such records shall be requested:
 - 1. Prior to a scheduled appearance before the Board;
 - 2. Prior to a scheduled appearance before an authorized Hearing Officer for a revocation proceeding; or
 - 3. Prior to the timely perfection of an administrative appeal of a final decision of the Board.
- B. Access shall not be granted to the following records, whether or not they were considered in the above proceedings:
 - 1. Diagnostic opinions which, if known to the subject, could lead to a serious disruption of his or her 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;
 4. Any information which may be used, alone or in conjunction with other information, to identify a private individual who has submitted a statement regarding the release of an individual;
 5. Any victim impact statement for which disclosure is not authorized pursuant to 9 NYCRR §8002.4;
 6. Reports, documents, and materials provided by other agencies, including but not limited to, probation reports, drug abuse and alcoholism rehabilitation records, psychiatric materials, and the Division of Criminal Justice Services (DCJS) report;
 7. Any information for which the administrative burden of providing access would be unreasonable in comparison to the potential benefit of disclosure; and
 8. Records of information prohibited from release by State or Federal law. This includes Criminal History Record Information (CHRI), Pre-Sentence Reports (PSR), personnel records of Correction Officers, and information which could identify the victim of a sex crime, among others.
- C. Access to any record or information not made available pursuant to this directive may be granted at the discretion of the Commissioner, Board of Parole Chairperson, or designee, upon good cause shown.
- D. Special Considerations
1. Authorizations: All requests submitted by an attorney on behalf of an inmate or parolee seeking access to records covered under this directive must be accompanied by a signed authorization from such inmate or parolee, in which a waiver of his or her privacy interest is clearly stated.
 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.

5. **Victim Impact Statements:** Records of victim impact meetings or victim impact statements are confidential, unless expressly authorized by the victim or a court order (see 9 NYCRR §8002.4(e)). This encompasses all submissions by a deceased victim's family members. DOCCS staff may contact the Office of Victim Assistance with questions regarding what records qualify in a particular case.
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 III-B above must be redacted.
7. **District Attorney/Judge:** Submissions from the District Attorney or sentencing Judge should be released unless explicitly stated within the letter or noted on the record that the writer requested confidentiality. Information within a letter that is otherwise exempt pursuant to this section should be redacted (such a victim statements).
8. **Parole Board Report (PBR) and Parole Board Criminal History Report (PBCHR):** The Confidential section of the PBR and the PBCHR are not accessible, unless access is granted pursuant to Section III-C.
9. **Inmate Submissions:** Any records submitted by the inmate, parolee, or an attorney for either may be accessed regardless of whether information contained would otherwise not be accessible.

NOTE: Records signed by the inmate or records, such as prior transcripts, where the inmate was present for the proceeding do not require redaction.

III. REQUEST/ACCESS PROCEDURES: Generally, requests must be made in writing to the Custodian no later than ten days before the scheduled proceeding and no earlier than one day after notice of the interview or revocation hearing is issued. Requests prior to Parole Board interviews are considered timely if they are submitted within four months of a scheduled interview. Requests in relation to an administrative appeal are considered timely if they are submitted after or with a notice of appeal and prior to the timely perfection of such appeal. Untimely or premature requests will not be processed. Requests must provide Custodians a reasonable amount of time to produce the records.

NOTE: If records for Parole Board interviews have not been compiled or completed when a request is received, the response may be delayed or records may be provided on a rolling basis. Email submissions qualify as "in writing," and requests should be sent only by one medium (email, letter, or fax).

- A. Requests must include the following information:
 1. Name and Department Identification Number (DIN) of the inmate or parolee;
 2. The proceeding for which records are sought;
 3. The scheduled date of the proceeding;
 4. That the request is made pursuant to 9 NYCRR §8000.5 or for a proceeding outlined in Section III-A;
 5. The records sought (access will be granted only to those records within the scope of Section III);

6. A signed authorization for release of records, including appropriate HIPAA or substance abuse treatment record authorizations, if necessary; and
7. Whether the access sought is for copies or for review of the records.
 - a. If a request seeks copies of records, it must also include either a maximum fee, a page count, or an acknowledgment that fees will be paid upon receipt of records.
 - b. If a request seeks to review records, it must state a preferred date and time and any dates (within business hours) that the requester is not available. The request should also specify the name of everyone that will be present for the review.
- B. Copies: Requesters may obtain copies of records at a cost not to exceed 25 cents per page. Records will be provided with an invoice for payment, when applicable (see Section V-B-5). Failure to submit payment within a reasonable amount of time will result in the refusal to process future requests under 9 NYCRR §8000.5, regardless of whether such requests require copies.
- C. Review: Requesters may request to review records at no cost. Review of records will take place no later than the day of the proceeding. Review will take place Monday through Friday, excluding public holidays, between the hours of 8:30 a.m. and 3:30 p.m. at the correctional facility or area office. Only attorneys licensed in the State of New York and in good standing and acting in an attorney/client relationship with the inmate or parolee; or a staff member of such attorney; or a student, under a student practice order, practicing under such attorney will be allowed to review records. Arrangements must be made in advance with the correctional facility or area office. Records which require redaction are not available for review, unless the appropriate copying fee is paid in advance.

IV. DUTIES OF CUSTODIAN OR DESIGNEE

- A. Processing Requests: Upon the receipt of a complete and timely request made in accordance with Section IV, the Custodian should acknowledge receipt of the request as soon as practical. All requests should be logged into the Case Management System (CMS) when they are received, and another entry should be made when access to records is provided. Each entry should include who made the request, the proceeding for which records were sought, and whether the request seeks copies or a review of the records. Any complications, such as a requester not appearing for a scheduled review, a request made by an unauthorized individual, an untimely request, or a failure to submit payment, should be noted in CMS.
 1. If a request is made to review records and the Custodian cannot accommodate the requested date and time, the Custodian must schedule a date and time as close to the preferred time as possible, and submit a gate pass for the individuals identified in the request. The Custodian may request verification of an attorney's admission status or the employment status of any individual listed in the request.
 - a. Review of records may take place in a private space, as available, and the Custodian may remain present. However, security of the correctional facility or area office remains the highest priority and privacy accommodations are not required.

- b. No records that require redaction shall be made available for review. However, records that have been properly redacted may be made available if appropriate payment has been received.
 2. If a request seeks copies of records, the Custodian must prepare records and deliver them in a manner that will provide receipt of records no later than one day before the proceeding is scheduled to take place, however, every effort should be made to fulfill a request as soon as possible. Only final drafts of records should be provided. Redactions must be made to ensure that the protected information is not accessible. Whenever possible, the requester should be notified that delivery has been completed. If records are mailed, they should be sent via certified mail and receipt of delivery should be logged in CMS.
- B. Fees
 1. If records are stored electronically and may be provided electronically without printing, the Custodian may not charge a fee for records.
 2. Where the Custodian or designee chooses to provide records electronically (even if they must be scanned in), no fees may be charged. It is the Custodian's discretion whether records will be scanned or photocopied.
 3. If records must be photocopied, the Custodian may charge no more than 25 cents per page for pages not to exceed 9" by 14". The Custodian may waive fees at his or her discretion.
 4. No fees may be charged for postage or staff time taken to prepare a record.
 5. When copies of records are sent to an attorney, payment will be requested with delivery of the records by enclosing an invoice for any fees associated with production costs. If records exceed the maximum cost or page count stated in the request for access, the Custodian should contact the requester prior to copying the records, when possible, to discuss production and cost and provide an opportunity for the requester to revise their request.
 - a. If payment is not received within a reasonable amount of time (approximately 45 days), the Custodian may refuse to process any subsequent requests until payment is made.
 - b. The Department's Records Access Officer should be notified of any refusal to submit payment or refusal to process a request for prior non-payment. Such notification should be logged into CMS.
- C. Challenge to Accuracy: If the completeness or accuracy of any item of information contained in the personal history or correctional supervision history portion of the record of an inmate is disputed by the inmate, the inmate or their attorney shall follow the procedures outlined in 7 NYCRR §§5.50, 5.51, and 5.52.