To be argued by: [redacted]

[redacted]

NEW YORK SUPREME COURT

APPELLATE DIVISION: FIRST DEPARTMENT

IN THE MATTER OF THE APPLICATION OF [redacted]

Petitioner,

against-

[redacted]

Respondent,

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

BRIEF FOR PETITIONER-APPELLANT

NEW YORK COUNTY CLERK INDEX NO. [redacted]

[redacted]

[redacted]

Of Counsel
July 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This is an appeal from a decision and judgment of the Supreme Court, New York County dismissing on the merits, appellant [redacted] petition under Article 78 of the New York Civil Practice Law and Rules (CPLR). The Article 78 proceeding was brought after revocation of appellant's parole, following exhaustion of all available administrative remedies. An administrative appeal was filed by letter brief on November 27, 2009. Respondent denied the appeal on July 21, 2010.

The Article 78 petition sought to annul Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York, (9 NYCRR) § 8005.20(c)(6) on the grounds that it violates the constitutional guarantee of due process of law and is contrary to New York State Executive Law § 259-i (3)(f)(x). Appellant's petition also sought to review and modify respondent's decision made pursuant to 9 NYCRR § 8005.20 (c)(6), whereby a single member of the board of parole imposed a 36 month time assessment without hearing from appellant or his counsel in person or in writing. Appellant also challenged respondent's determination as arbitrary and capricious. In a decision and judgment dated March 7, 2011, New York County Supreme Court Justice [redacted] denied the application in all respects and dismissed the Article 78 petition on the merits.

On March 28, 2011, petitioner filed a motion to reargue pursuant to CPLR 2221 (d)(2) asserting that the court had misapprehended Executive Law § 259-i (3)(f)(x). On June 24,

2011, the court granted the motion to reargue, withdrew its statutory analysis, and upon re-argument, again denied the petition.

Before this Court, appellant seeks a reversal of the decision of the court below denying the petition, and an order annulling 9 NYCRR § 8005.20 (c)(6) and/or imposing a time assessment of 18 months.

Timely notice of appeal was filed. Appellant is represented on appeal by [redacted] Esq., of counsel.

QUESTIONS PRESENTED

1. Whether due process was violated when a single parole board member unilaterally fixed a date for consideration by the board for appellant's re-release, without guidance or constraint by legal procedure and without hearing from appellant or his counsel, in person or in writing. Morrissey v. Brewer, 408 U.S. 471 (1972); U.S. CONST., AMEND. XIV; N.Y. CONST., ART I. §6.

2. Whether the Executive Law was violated, when a single parole board member fixed a date for consideration by the board for appellant's re-release, even though the Executive Law vested that authority exclusively in the officer who presided at appellant's revocation hearing. NY CLS Exec § 259-i (3).

3. Whether a single parole board member acted arbitrarily when he unilaterally rejected the carefully negotiated and jointly agreed upon recommendation that appellant be eligible for re-release by the board after 18 months, and instead fixed appellant's date for consideration for re-release at 36 months.

STATEMENT OF FACTS

Appellant was convicted of Manslaughter in the First Degree in 1998 and sentenced to between six and eighteen years. This sentence ran concurrently to 1992 convictions for Robbery in the First Degree and Attempted Murder in the Second Degree. Appellant committed these acts at the age of 16. He was conditionally released to parole supervision on October 16, 2008.[1] He was thirty-four upon his release (R.5).[2]

On January 27, 2009, appellant contacted the New York City Police Department asserting that his ex-girlfriend, [redacted] had harassed him by making repeated unwanted phone calls. AT&T phone records show that more than 50 calls had been placed from Ms. [redacted] phone to appellant's phone in the late evening and early morning hours of January 26, 2009 and January 27, 2009 (R.5).

After appellant filed a complaint against [redacted] authored a letter addressed to the New York State Division of Parole, accusing appellant of conspiring to kill her in

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1 Appellant was conditionally released to parole supervision and is therefore a conditional releasee. Unless otherwise specified, appellant's brief will use the term "parolee" to refer presumptive releasees, parolees, conditional releasees, and persons released to a period of post-release supervision.

2 Numbers in parentheses preceded by R refer to the Record on Appeal.

November 2008 and early January 2009. [redacted] dated the letter January 29, 2009, two days after appellant had filed his harassment complaint. Prior to appellant's complaint, [redacted] had made no complaints against appellant (R.6).

In response to her accusations, the New York State Division of Parole issued a parole violation warrant and charged appellant with violating the conditions of his parole. On the same day - January 29, 2009 - when appellant made his scheduled office report, he was taken into custody without incident (R.6).

Despite Ms. [redacted] complaint, the New York City Police Department did not arrest appellant and the New York County District Attorney's Office did not charge appellant with a crime. On May 5, 2009, the Division of Parole also concluded that Ms. [redacted] accusations were "unfounded" and dismissed the charges (R.6).

Appellant asserted his innocence throughout the violation process. Each day that appellant appeared before a presiding officer - February 9, February 25, March 17, and April 17, 2009 - he denied wrongdoing. However, on April 17, more than two months after the Division initially charged appellant with grave behavior, and just weeks shy of the Division's ninety day statutory deadline for proceeding against appellant, the

Division supplemented appellant's parole violation report and added charge #7, alleging that appellant had cell phone contact "with a person known to him to have a criminal record." Off the record, appellant and his attorney acknowledged his violation of this technical condition (R.6).

From April 17, 2009 until May 6, 2009, appellant's counsel negotiated with Deputy Parole Violation Unit (PVU) Chief Del Rio and Administrative Law Judge (ALJ) Porter as to an appropriate disposition.[3] The specter of 9 NYCRR § 8005.20(c)(6) played prominently in the parties' negotiations. Whereas Executive Law § 259-i (3)(f)(x) vested ALJ Porter with final authority to determine the appropriate disposition, 9 NYCRR § 8005.20 (c)(6) seized that authority from ALJ Porter and transferred it to an anonymous board member whom appellant could not address.

Deputy PVU Chief Del Rio offered appellant a recommendation to the board member of an 18 month time assessment in exchange for a guilty plea to charge #7: having cell phone contact with a person known to him to have a criminal record. Off the record, Deputy PVU Chief Del Rio explained that he would recommend that the board member hold appellant to the maximum expiration of his

3 The Parole Violation Unit is an arm of the New York State Division of Parole. It is charged with prosecuting parole violation matters.

sentence if appellant pled not guilty and required the Division to prove the technical charge at a contested hearing (R.6-7).

During plea negotiations, neither ALJ Porter nor Deputy Chief Del Rio could explain the mechanics of a board member's review and unilateral authority to impose a time assessment. They did not know whether the anonymous board member would review the record created by the parties. Nor did they know how to eliminate the unfounded charges from the anonymous board member's consideration. It was not clear to the parties whether the anonymous board member would have access to related documents not entered into evidence (R.7).

Off the record, the parties discussed redacting the unfounded charges so as to prevent prejudicial consideration by the anonymous board member. Deputy PVU Chief Del Rio said that this would not aid appellant because a board member could simply obtain the original violation of release report from Del Rio or another PVU representative. The terms of 9 NYCRR § 8005.20 (c)(6) itself offered no guidance because the regulation is silent as to the details of an anonymous board member's review and unilateral authority to impose a time assessment (R.7).

Defense counsel considered an 18 month time assessment to be an unreasonably harsh sanction for appellant's fraternizing

violation. However, the specter of 9 NYCRR § 8005.20 (c)(6) distorted appellant's options. Without an opportunity to address the anonymous board member - the individual vested with control of appellant's liberty - defense counsel reasoned that the 18 month time assessment, jointly recommended by all parties would satisfy the anonymous board member and best enhance the probability of approval. Accepting the joint recommendation would also prevent a more uncertain outcome: a split recommendation in which Deputy PVU Chief Del Rio would recommend to the board member a hold to the maximum expiration of appellant's sentence. Because he could not address the anonymous board member in person or in writing, appellant and defense counsel negotiated a plea agreement with Deputy PVU Chief Del Rio and ALJ Porter and agreed to a recommendation that appellant believed excessive given the nature of the violation (R.7-8).

Deputy PVU Chief Del Rio dismissed the initial violation charges before the plea was finalized. He did not dismiss for a lack of cooperation by Ms. [redacted] but because his thorough investigation concluded that those charges were unfounded. Appellant then pled guilty to having cell phone contact with a person known to him to have a criminal record. He accepted a

recommendation to the anonymous board member, agreed upon by all parties, of an 18-month time assessment (R.8).

New York State Board of Parole Commissioner James Ferguson rejected the carefully negotiated, and jointly agreed upon, recommendation of an 18-month time assessment. Instead, on May 14, 2009, in a ten-word decision, he doubled the time assessment, fixing appellant's date for consideration by the board for re-release at 36 months (R.8). Ferguson wrote: "Violent I/O, prior att murder, prior rob out for only 1 ½ months."

Appellant filed an administrative appeal challenging the summary procedure created by 9 NYCRR § 8005.20 (c)(6) and the 36-month time assessment. The board received the appeal on November 27, 2009. On July 21, 2010, respondent made a final determination rejecting appellant's administrative appeal on the grounds that 1) appellant waived his rights by failing to object at appellant's hearing before ALJ Porter and 2) that the New York State Board of Parole retained exclusive authority to impose punishment against parole violators (R.74-75).

Appellant filed a petition pursuant to Article 78 of the CPLR challenging respondent's decision. Appellant argued that respondent's decision made pursuant to 9 NYCRR § 8005.20 (c)(6)

was arbitrary, violated Executive Law § 259-i(3)(f)(x), and denied appellant due process of law. Appellant petitioned to have the court annul 9 NYCRR § 8005.20 (c)(6) and/or to direct respondent to reduce the time assessment to 18 months. (R.11-32). In its answer, the Attorney General, on behalf of respondent, asserted that due process does not apply to parole revocation determinations, once a violation has been found, and that the Executive Law permitted the summary procedure created 9 NYCRR § 8005.20 (c)(6) (R.79-93).

The court denied the petition. The court rejected appellant's constitutional argument holding: "The crux of petitioner's argument is that because he was not afforded the requirements of due process outlined above when the parole board member doubled his time assessment, his due process rights were violated...Under Morrissey, parolees are entitled to the due process protections outlined above only with regard to the board's determination to revoke petitioner's parole. These due process requirements do not extend to the parole board's determination of the time assessment, which is made after the parole revocation hearing." (R.137).

The court also rejected appellant's statutory argument. Appellant moved to reargue. The court granted the motion to

reargue, withdrew its statutory analysis, and upon re-argument, again denied the petition. The court ruled: "In most cases the presiding officer's decision is final and binding. However, § 8005.20 (c)(6) specifies that when the parole violator is serving a sentence for a felony offense under articles 125, 130, 135, or 263 of the Penal Law, all decisions must be reviewed by a member or members of the Board of Parole (the 'parole board') and a single member of the parole board must make the final decision that imposes a time assessment. Therefore, for violators who are serving sentences for the felony offenses enumerated above, such as petitioner in this action, the final determination that imposes a time assessment is made by a single member of the parole board who is not bound by the presiding officer's recommendation." (R.171-172).

The court further said: "In the instant action, the court finds that § 8005.20 (c)(6) is not in violation of Executive Law §259-i(3)(f)(x) as there is no language in that regulation that is out of harmony with the governing statute." (R.172).

The court further said: "As the removal of the clause 'when the presiding officer is a hearing officer, he may recommend to the board the dispositions in clauses (A), (B) and (C) of this subparagraph,' from the law has no effect on the clause

permitting the presiding officer to direct the violator's reincarceration and fix a date for *consideration by the board*, the violator's re-release date has been and remains merely a date for the board to consider." (R.173).

Appellant appeals from the decision and judgment denying the petition.

ARGUMENT

INTRODUCTORY EXPLANATION OF PAROLE REVOCATION PROCEDURE

New York State Executive Law § 259-i(3) enshrines the parole revocation procedure constitutionally mandated by Morrissey v. Brewer, 408 U.S. 471 (1972). It provides alleged violators with notice of the charges against them, a timely preliminary hearing, and a final revocation hearing where they have an opportunity to be heard in person by a neutral and detached hearing body with final authority to exercise discretion in response to a parole violation. Exec. Law § 259-i(3)(c)(iii), (f)(i), (f)(x).

The statutory procedure requires that a parolee have an opportunity to confront and cross-examine witnesses, an opportunity to present witnesses and evidence, and a written statement by the presiding officer as to the evidence relied upon, including reasons for its exercise of discretion. Exec. Law § 259-i(3)(f)(v), (x), (xi).

The statutory procedure enables the presiding officer to marshal all relevant information including evidence against the parolee, a detailed description of the felony offense, and the parolee's explanation offered in mitigation and to make an informed exercise of discretion in response to the violation.

The presiding officer has an arsenal of options at the conclusion of the hearing. These options include, but are not limited to, restoring a violator to the community, or, if necessary, fixing a date upon which a violator becomes eligible for consideration for re-release by the board. Exec. Law § 259-i(3)(f)(x).

When the presiding officer fixes a date for consideration by the board for re-release, it is referred to as a time assessment. 9 NYCRR § 8002.6 (a). At the conclusion of the time assessment, the parole violator is afforded a personal interview where the board considers whether the parole violator should be re-released. Id.

Respondent applies the statutory protections to nearly all parolees. However, for a subset of parolees, 9 NYCRR § 8005.20 (c)(6) creates a review power that violates the express terms of Executive Law § 259-i(3)(f)(x) and radically departs from Morrissey. This regulation exempts parolees convicted of crimes involving homicide, sex, and kidnapping from certain of the Executive Law's protections - an exemption never contemplated by the Executive Law or Morrissey - and severs the hearing from the parole authority's exercise of discretion.

9 NYCRR § 8005.20 (c)(6) wrests authority from the officer

who hears evidence, considers the gravity of the felony offense, and is addressed by the parolee in person. The regulation transfers that authority to a single board member who does not preside at the hearing and can modify the presiding officer's decision at will.

POINT I

RESPONDENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS BECAUSE A SINGLE PAROLE BOARD MEMBER UNILATERALLY FIXED A DATE FOR CONSIDERATION BY THE BOARD FOR APPELLANT'S RE-RELEASE WITHOUT GUIDANCE OR CONSTRAINT BY LEGAL PROCEDURE AND WITHOUT HEARING FROM APPELLANT OR HIS COUNSEL, IN PERSON OR IN WRITING. MORRISSEY V. BREWER, 408 U.S. 471 (1972); U.S. CONST., AMEND. XIV; N.Y. CONST., ART I. §6

Due process compels the state to afford an alleged parole violator a meaningful opportunity to be heard. Morrissey at 484. This hearing must serve as the basis for the parole authority's exercise of discretion in response to a violation of parole: "What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."

Id. at 484.

On May 5, 2009, respondent provided appellant a hearing before ALJ Porter. However, pursuant to 9 NYCRR § 8005.20 (c)(6), respondent severed appellant's hearing from the final exercise of discretion. The regulation gave a single board member, who did not preside at, and was not even present at the hearing, unconditional authority to exercise final discretion. The regulation circumvented the protections erected by Morrissey and rendered appellant's hearing meaningless.

The regulation permits a final hearing for nearly all parolees, but denies finality to a specific group. It reads:

> A decision within these guidelines may be made by the presiding officer as a final and binding decision for all categories of violators other than those serving sentences for felony offenses under articles 125, 130, 135 or 263 of the Penal Law or section 255.25 thereof. All decisions within these guidelines regarding alleged or adjudicated violators serving sentences for felony offenses under articles 125, 130, 135 or 263 or 255.25 thereof must be reviewed by a member or members of the board of parole and shall be decided as follows:
>
> **(i): a single member of the board shall make the decision that imposes a time assessment.**
>
> (ii): a decision to restore a violator to supervision serving a sentence for a felony offense under articles 125, 130, 135, or 263 of the Penal Law or section 255.25 thereof to supervision under paragraph (4) of this subdivision or to the Willard drug treatment campus program under paragraph (1) of this subdivision

> shall not become final and binding until and unless two members of the board concur with the presiding officer's recommendation to restore the violator to supervision. A single member of the board may review a recommendation to restore such a violator to supervision and may modify the recommendation and impose a time assessment that is within the board member's discretion.
>
> 9 NYCRR § 8005.20 (c)(6) (emphasis added).

The regulation states that a presiding officer's decision must be "reviewed" by a member of the board only for alleged parole violators serving sentences for felony offenses under articles 125, 130, 135, or 263 of the Penal Law or section 255.25 thereof. The regulation fails to set forth content, procedures, or guidelines for such review. The regulation fails to establish any standard under which the board member would be authorized to modify a recommendation of the presiding officer who heard from both parties and weighed the relevant information in imposing the time assessment. The regulation fails to require the board member to read, much less review, the record created at a revocation hearing. The regulation fails to even require the board member to detail the reasons for the modification. Finally, the regulation fails to give appellant or his counsel an opportunity to be heard by the board member in person or in writing. Thus, by any measure, the regulation's

sweeping grant of unconditional authority to a single board member whom appellant could not address violated appellant's right to due process of law.

Due process requires consideration of three factors: 1) the private interest that will be affected by the official action 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the function involved and the financial and administrative burdens that additional or substitute procedural requirements would entail. See e.g., Matthews v. Eldrige, 424 U.S. 319, 335 (1976); (holding that); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); People v. Davis, 13 N.Y.3d 17, 27 (2009). Appellant possessed a liberty interest even after he admitted to violating his parole; the regulation's sweeping grant of unconditional authority failed to protect that interest; basic safeguards would have posed no administrative burden.

A. APPELLANT POSSESSED A LIBERTY INTEREST AFTER HE PLED GUILTY TO VIOLATING A CONDITION OF HIS RELEASE

Appellant possessed a liberty interest when he was released

from prison. Morrissey, 408 U.S. at 481. "We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and others." Id. at 482. Appellant continued to possess that interest when the Division of Parole took him into custody. Id. Appellant's admission that he had committed a technical violation of his parole by having cell phone contact with an individual known to him to have a criminal record did not extinguish his liberty interest.[4] Id. at 483-484.

Even after admitting that he had cell phone contact with another parolee, appellant's time assessment had not been determined. The single board member could have, exercising authority granted by 9 NYCRR §8005.20 (c)(6), restored appellant to supervision or held appellant for a time assessment less than, identical to, or in excess of, the time assessment jointly recommended by all parties on May 5, 2009. Therefore, even after appellant admitted to violating parole, the extent to which he would suffer grievous loss remained unanswered. Id.

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4 A decision to revoke parole does not equate to a decision to re-incarcerate. In New York State, when a presiding officer "revokes" parole, he or she finds that the parolee has, in fact, violated one or more conditions of his release. A presiding officer possesses authority to "revoke" parole and restore the violator to supervision. §259-i (3)(f)(x)(A),(B). This regular exercise of discretion is commonly referred to as a "revoke and restore."

The court below erroneously reasoned to the contrary. It concluded: "Under Morrissey parolees are entitled to the due process protections outlined above only with regard to the board's determination to revoke parole. These due process requirements do not extend to the parole board's determination of the time assessment". (R.137). The court concluded that due process strictly applies to *whether* a parolee violated the conditions of his release. According to this logic, once a presiding officer finds a violation, or a parolee admits to one, the extent to which a parolee loses liberty is irrelevant because the parolee enters a realm where due process does not apply.

The court's reasoning is inconsistent with bedrock principles of due process. Just as, "conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration," admission of a parole violation does not render a parolee a nonperson subject to the whim of a single board member. Wolff v. McDonnell, 418 U.S. 539, 594 (1974) (Douglas, J., dissenting).

The Morrissey Court recited: "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' The question is

not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property language' of the Fourteenth Amendment." Morrissey, 408 U.S. at 481 (internal citations omitted). See also, Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Bell v. Burson, 402 U.S. 535, 539 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, (1971); Laureano v. Kuhlman, 75 N.Y.2d 141, 146 (N.Y. 1990); Doe v. Coughlin, 71 N.Y.2d 48, 53 (N.Y. 1987). Insofar as appellant stood to lose liberty when the joint recommendation was reviewed by the single board member, the court below fatally erred in holding that appellant did not have an interest in safeguarding it.

The court below also disregarded the Morrissey Court's conclusion that the goal of a parole revocation proceeding is to secure an informed exercise of discretion in curtailing a liberty interest, not simply to find facts that establish a violation.

> The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken

> to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. *This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were.* Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.

Morrissey at 479 - 480 (emphasis added).

As the Morrissey Court established, finding a violation is only one component of a revocation proceeding, the "relatively simple" component. Id. at 480. This is particularly true where parole can be revoked for a range of non-criminal behavior: violating curfew, failing to report, leaving a geographic area, using the internet, using drugs, or having cell phone contact with a person known to have a criminal record. The second part of a revocation decision involves exercising informed discretion to decide whether, and to what extent, liberty will be taken away from the parolee as a consequence of the violation.

Morrissey did not erect due process protections to merely ensure accuracy in the fact finding necessary to establish a violation. It found that fact-finding and the parole

authority's exercise of discretion are inextricably bound: "What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Morrissey, 408 U.S. at 484. In so doing, the Morrissey Court held that a parolee's liberty interest extended to the exercise of discretion in "deciding what to do about the violation once it is identified," not strictly *whether* a parolee violated his parole. Morrissey at 480.

In Rodriguez v. Illinois Prisoner Review Board, the Appellate Court of Illinois squarely concluded that an individual seeking release from prison possesses a liberty interest. 876 N.E.2d 659 (5th Dist. 2007). Rodriguez, an inmate in custody of the Illinois Department of Corrections (Department) was afforded a good-time credit revocation hearing. At the conclusion of the hearing, the Department recommended that the Illinois Prisoner Review Board (Board) revoke a portion of Rodriguez's good time credit. The Board was authorized to ratify or reduce - but not increase - the recommendation made by the Department. Rodriguez sought mandamus relief, asserting that, after his opportunity to be heard at the good-time credit

revocation hearing, he had no opportunity to be heard by the Illinois Prisoner Review Board.

The court rejected Rodriguez's claim, and concluded:

> Because the Board can only reduce or ratify the recommended amount of revoked credit and is without power to extend or expand the amount of time that an inmate may be incarcerated, it cannot deprive him of his liberty interest in good-conduct credit by approving the (Department's) recommendation. The Board "merely provides an 'extra layer of procedural protection' appended to the constitutionally sufficient Department disciplinary proceedings and appeals process."

Rodriguez, 876 N.E.2d at 666 (quoting U.S. ex rel. Duane v. Illinois Prisoner Review Board, 1990 WL 103608).

Illinois' review procedure clearly acted as a shield, providing Rodriguez an "extra layer of procedural protection." Rodriguez at 666. Rodriguez could not lose any additional good time credits. Id. By contrast, 9 NYCRR § 8005.20 (c)(6) allows a single board member to extend and expand the deprivation of a parolee's liberty. Indeed, 9 NYCRR § 8005.20 (c)(6), placed a sword in the hands of a single individual, deaf to any explanation made by appellant or his counsel and blind to the record created at appellant's hearing.

B. 9 NYCRR § 8005.20 (c)(6) Creates A Grave Risk That A Parolee's Liberty Will Be Erroneously Deprived

"The touchstone of due process is protection of the individual against arbitrary action of government." Wolff at 558. However, 9 NYCRR § 8005.20 (c)(6) invites arbitrary decision-making by a single board member. The regulation's grant of authority is terse, sweeping, and unconditional: "a single member of the board shall make the decision that imposes a time assessment." 9 NYCRR § 8005.20(c)(6). The regulation creates a grave risk of erroneous deprivation for two reasons: 1) it creates no procedure whatsoever for imposition of a time assessment and 2) it denies a parolee an opportunity to address the single board member in any manner.

i. 9 NYCRR § 8005.20 (c)(6) Contains No Legal Procedure, Standard, Content, Or Guideline To Govern A Single Board Member's Exercise of Authority

"It is procedure that marks much of the difference between rule of law and rule by fiat." Wisconsin v. Constantineau, 400 U.S. 433, 436 '1971). Yet 9 NYCRR § 8005.20 (c)(6) contains no semblance of procedure: the regulation creates no legal standard, content, or guideline to constrain a board member's unilateral imposition of a time assessment. Indeed, this void effectively

eviscerates the protections erected by Morrissey and codified in Executive Law 259-i (3).

Courts have proscribed sweeping grants of unconditional authority for centuries. In Yick Wo v. Hopkins, the Supreme Court struck down a San Francisco ordinance that granted unconditional authority to a city board of supervisors to refuse permission to businesspersons to operate laundries. 118 U.S. 356, 373 (1889). The Yick Wo Court concluded: "The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." Yick Wo at 366-367. Similarly, in City of Baltimore v. Radecke, the Court of Appeals of Maryland held: "It commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine...to cease to do so...But if he should not choose to do this, but only act in particular cases, there is nothing in the Ordinance to guide or control his action." 49 Md. 217, 6 (Md. 1878).

9 NYCRR § 8005.20 (c)(6) commits to the unconstrained will of a single board member the power to upend the determination of a presiding officer. Whereas Executive Law § 259-i (3) guides a presiding officer with extensive procedure, the regulation

permits a single board member to impose a time assessment without regard for, much less deference to, the presiding officer's informed decision. See POINT II supra. Indeed, 9 NYCRR § 8005.20 (c)(6) is an outlier among parole regulations because it fails to create any guidelines or standard for modification of a time assessment. Compare Exec. Law § 259-i (2)(c)(A) (establishing guidelines for initial parole release decisions); 9 NYCRR § 8001.3 (establishing guidelines for minimum period of imprisonment (MPI) determinations); 9 NYCRR § 8005.20 (c) 1-5 (establishing guidelines for a presiding officer's imposition of a time assessment); 9 NYCRR § 8002.6 (c)(1) (establishing guidelines for consideration of parole violator re-release).

By permitting a single board member to upend the informed decision of a presiding officer at will, the regulation tacitly permits the board member to ignore the proceedings at the revocation hearing altogether. This creates a grave risk that the single board member will make an uninformed decision, precisely what occurred in appellant's case.

9 NYCRR § 8005.20 (c)(6) creates an even greater risk of erroneous deprivation by failing to require the board member to read, much less review, the record created at a revocation hearing. This absence of explicit instruction contravenes a

fundamental principle of administrative law: that determinations must be made on the basis of an established record. See, e.g., 5 USCS § 556(e); NY CLS St Admin P Act § 302; NY CLS St Admin P Act § 307; 18 NYCRR § 519.22 (2011).

In appellant's case, it is not at all clear what the single board member relied on to unilaterally modify the joint recommendation. The single board member was not present on May 5, 2009, when Del Rio dismissed the serious threat charges. The board member was not present at the four hearing dates prior to the dismissal where appellant had asserted his innocence. He was not present when Del Rio acknowledged that he had dismissed the charges, not for a lack of cooperation by Ms. Fung, but because her allegations were entirely unfounded. Nor was the single board member present on April 17, 2009, when, in the face of a deteriorating case and an otherwise innocent parolee, Del Rio supplemented appellant's violation report to include a technical violation. Absent a regulatory requirement to actually rely on the record, and given the sparsity of the board member's ten-word decision, it remains unclear whether the board member, in fact, assumed that appellant pled guilty *in satisfaction* of the more serious charges.

The regulation's constitutional failings are compounded by

its failure to require a board member to detail the reasons for rejection of a presiding officer's informed decision. The absence of a detailed decision requirement allows a board member to act without thorough reasoning, or conceal his reasoning, and forecloses intelligent review. See Capiello v. New York State Board of Parole, 6 Misc.3d 1010(A), 6 (NY Sup. Ct. 2004); Canales v. Hammock, 105 Misc.2d 71, 74 (NY Sup. Ct. 1980).

The regulation's failure to require a detailed decision is contrary to a statutory and administrative scheme that otherwise mandates detailed reasoning. See e.g., Exec. Law § 259-i 2 (parole denials require detailed decision: "Such reasons shall be given in detail and not in conclusory terms."); 9 NYCRR § 8001.3 (c)(minimum period of imprisonment (MPI) determinations outside guidelines must be detailed: "In any case were the decision rendered is outside the guidelines, the detailed reason for such decision including the fact or factors relied on, shall be provided to the inmate in writing.").

The board member's handwritten decision, rejecting the joint recommendation and committing appellant to prison for 36 months, complied with 9 NYCRR § 8005.20 (c)(6) even though it was notably terse: "Violent I/O, prior att murder, prior rob out for only 1 ½ months." The summary decision provides no indication that the

joint recommendation, much less the record, was seriously reviewed. It focused almost exclusively on appellant's felony conviction. See Stanley v. New York State Board of Parole, Sup Ct. Orange County, April 13, 2011, Ecker J., slip op at 8 (near exclusive focus on nature of crime strongly indicates that denial of parole is a foregone conclusion); King v. New York State Division of Parole, 190 A.D.2d 423, 433 ("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.").

ii. 9 NYCRR § 8005.20 (c)(6) Denies A Parolee An Opportunity To Address The Single Board Member In Any Manner

The "fundamental pre-requisite of due process is an opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). 9 NYCRR § 8005.20 (c)(6) eviscerates this fundamental pre-requisite: it circumvents the Morrissey protections by severing a parolee's revocation hearing from the board member's exercise of authority to take liberty. The regulation invites an erroneous deprivation because it provides no vehicle for addressing the board member in any manner.

Goldberg v. Kelly underscored the importance of an opportunity to be heard before the final decision-maker:

> It is not enough that a welfare recipient may present his position to the decision-maker in writing or second-hand through his caseworker...written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be made to him. Therefore a recipient must be allowed to state his position orally.

Goldberg, 397 U.S. at 269.

Unlike the petitioner in Goldberg, appellant could not even address, much less address in person, the board member who had final control over his liberty.

Appellant could not focus his testimony to the issues that the board member may have deemed important because he did not know, and could not know, the board member's particular concerns. See Green v. U.S., 365 U.S. 301, 304 (1961) (stating that, "modern innovations" do not "lessen[] the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation...[t]he most persuasive counsel may

not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). See also C.P.L. 380.50 (1) and (3) (allowing defense counsel and defendant the opportunity to address the sentencing court at sentencing proceeding); People v. McClain 35 N.Y.2d 483, 490 (1974) (the right to personally address the court as to one's sentence "has long been regarded as substantial.").

If the board member had concerns about appellant's behavior while on parole, the reasons for appellant's having contact with another parolee or questions about appellant's contributions to the community, appellant could not address them. The single board member could not gauge appellant's veracity or credibility without hearing from him.

If the board member desired more information, 9 NYCRR § 8005.20 (c)(6) offers no method for the parolee to provide it. Because the board member is not present at the revocation hearing, he does not have a formal opportunity to ask the PVU representative, defense counsel, or the parolee why an agreed upon disposition is appropriate. This absence isolates the revocation hearing from the board member and prevents an informed exercise of discretion. Even more troubling, where a board member desires more information, his absence at the revocation

hearing tempts him to engage in exparte communications and seek information outside the record. As Deputy PVU Chief Del Rio made clear during a discussion regarding redaction of unfounded charges, if the board member wanted more information Del Rio was at the ready to provide it.

The regulation's failure to permit a parolee the opportunity to address the board member in any manner also creates a perverse incentive for parolees to accept a joint recommendation to a harsh time assessment. Because a parolee is unable to address the anonymous board member, the parolee can only hope that the board member will approve the recommendation. Parolees and their counsel reason that a board member will be more likely to agree to a recommended time assessment where the PVU representative jointly recommends the assessment.

Seeking a joint recommendation became the goal of appellant's hearing instead of accurate and truthful fact-finding regarding the circumstances of his violation. Appellant accepted a joint recommendation to 18 months so as to avoid a split recommendation where Deputy PVU Chief Del Rio would recommend to the board a hold to the maximum expiration of appellant's sentence. Clearly, the specter of a single board member's 9 NYCRR § 8005.20 (c)(6) authority stifled the parole

authority to take account of "how many, and how serious the violations are" and left the board member to make an uninformed exercise of discretion. Morrissey, 408 U.S. at 479-80. Thus, without hearing from appellant, the board member doubled the recommendation and imposed 36 months.

C. Safeguarding Appellant's Liberty Interest Poses No Administrative Burdens

Nothing impedes respondent from protecting appellant's liberty interest.[5] The Morrissey Court held: "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey at 481.

First, respondent could have complied with the revocation procedure detailed in Executive Law § 259-i (3). That process vests the presiding officer - whom the parolee has an opportunity to address - with final authority to impose a time assessment. By granting the parolee access to the presiding officer, the parolee can offer his explanation in mitigation of any violations. It also guarantees that the decision-maker

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5 The court below incorrectly asserted that appellant requested a second revocation hearing before the single board member where appellant could have exercised the fully panoply of rights afforded him before ALJ Porter. Kern J., slip op at 6. Appellant did not make this argument. Appellant asserts what due process requires, supra.

possess all relevant information, strategically positioning the presiding officer to make an informed exercise of discretion on behalf of the parole authority.

Alternatively, if respondent asserts that board member review is necessary, respondent should provide: 1) guidelines for overturning the recommendation of a presiding officer 2) an opportunity to address the deciding board member(s) and 3) a requirement that deciding board member(s) state the reasons for final decisions in detail. This combination of basic protections would prevent an erroneous deprivation and ensure an informed exercise of discretion.

POINT II

9 NYCRR § 8005.20 (C)(6) VIOLATES THE EXECUTIVE LAW BY GRANTING TO A SINGLE PAROLE BOARD MEMBER THE AUTHORITY TO FIX A DATE FOR CONSIDERATION BY THE BOARD FOR A PAROLEE'S RE-RELEASE, EVEN THOUGH THE EXECUTIVE LAW VESTS THAT AUTHORITY EXCLUSIVELY IN THE OFFICER WHO PRESIDED OVER A PAROLEE'S REVOCATION HEARING; RESPONDENT VIOLATED APPELLANT'S STATUTORY RIGHTS WHEN IT EXERCISED AUTHORITY PURSUANT TO 9 NYCRR § 8005.20 (C)(6). NY CLS EXEC § 259-i(3).

New York State Executive Law § 259-i(3)(f) directs a presiding officer to conduct a parolee's revocation proceeding.

It grants the presiding officer exclusive authority to hear from the parolee and counsel, consider evidence, sustain or dismiss a violation, and release a parolee or fix a date for consideration of a parolee's re-release. 9 NYCRR § 8005.20 (c)(6) squarely conflicts with the Executive Law. It grants unconditional authority to deprive liberty to a class of parolees, including appellant, to a single board member who does not preside at, and is not even present at the hearing, and is not in any other way mandated to hear from the parolee.

A. 9 NYCRR § 8005.20 (c)(6) Is In Direct Conflict With The Executive Law

It is a fundamental principle of administrative law that an agency cannot promulgate rules or regulations that contravene the will of the Legislature and the express terms of the authorizing statute. Weiss v. City of New York, 95 N.Y.2d 1, 4-5 (2000). See also, Finger Lakes Racing Assn. v. New York State Racing & Wagering Bd., 45 N.Y.2d 471 (1978); Matter of Beer Garden v. New York State Liquor Authority, 79 N.Y.2d 266, 276-77 (1992); Brian L. v. Administration for Children's Services, 51 A.D.3d 488, 498 (1st Dept. 2008); Melendez v. Wing 21 A.D.3d 129, 133 (1st Dept. 2005). If an agency regulation is out of harmony with an

applicable statute, the statute must prevail. See e.g., Weiss, 95 N.Y. 2d 1, 5 (striking down administrative regulation for expanding liability in a manner inconsistent with New York State Labor Law); Finger Lakes Racing Assn., 45 N.Y.2d at 480 (holding that "[o]f course," an administrative body "is without power to promulgate rules in contravention of the will of the Legislature.").

Section 259-i(3)(f) governs revocation proceedings. It states in relevant part:

> (ii) The revocation hearing shall be conducted by a **presiding officer** who may be a member or a hearing officer designated by the board in accordance with rules of the board.
>
> (iii) If a local revocation hearing is not ordered pursuant to subparagraph (i) of this paragraph the alleged violator shall be given a revocation hearing upon his or her return to a state correctional facility.
>
> (vi) At the revocation hearing, the charges shall be read and the alleged violator shall be permitted to plead not guilty, guilty, guilty with an explanation or to stand mute. As to each charge, evidence shall be introduced through witnesses and documents, if any, in support of that charge. At the conclusion of each witness's direct testimony, he shall be made available for cross-examination. If the alleged violator intends to present a defense to the charges or to present evidence of mitigating circumstances, the alleged violator shall do so after presentation of all the evidence in support of a violation of presumptive release, parole, conditional release or post-release supervision.

(vii) At the conclusion of the hearing the **presiding officer** may sustain any or all of the violation charges or may dismiss any or all violation charges. He may sustain a violation charge only if the charge is supported by a preponderance of the evidence adduced.

(ix) If the **presiding officer** is not satisfied that there is a preponderance of evidence in support of the violation, he shall dismiss the violation, cancel the delinquency and restore the person to presumptive release, parole, conditional release, or post-release supervision.

(x) If the **presiding officer** is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he or she shall so find.

For each violation so found, the **presiding officer** may

(A) direct that the presumptive releasee, parolee, conditional releasee or person serving a period of post-release supervision be restored to supervision;

(B) as an alternative to reincarceration, direct the presumptive releasee, parolee, conditional releasee or person serving a period of post-release supervision be placed in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision;

(C) in the case of presumptive releasees, parolees, or conditional releasees, **direct the violator's reincarceration and fix a date for consideration by the board for re-release** on presumptive release, or parole or conditional release, as the case may be; or

(D) in the case of persons released to a

> period of post-release supervision, direct the violator's reincarceration up to the balance of the remaining period of post-release supervision, not to exceed five years; provided however, that a defendant serving a term of post-release supervision, for a conviction of a felony sex offense defined in section 70.80 of the penal law may be subject to a further period of imprisonment up to the balance of the remaining period of post-release supervision.
>
> Where a date has been fixed for the violator's re-release on presumptive release, parole, or conditional release, as the case may be, the board or board member may waive the personal interview between a member or members of the board and the violator to determine the suitability for re-release; provided however, that the board shall retain the authority to suspend the date fixed for re-release and to require a personal interview based on the violator's institutional record or on such other basis as is authorized by the rules and regulations of the board. If an interview is required, the board shall notify the violator of the time of such interview in accordance with the rules and regulations of the board.
>
> If the violator is placed in a parole transition facility or restored to supervision, the presiding officer may impose such other conditions of presumptive release, parole, conditional release, or post-release supervision as he or she may deem appropriate, as authorized by rules of the board.

NY CLS Exec § 259-i (2011) (emphasis added).

Proper statutory construction of the powers of the parole board and its officers requires a comprehensive understanding of

the statutory scheme set forth in § 259-i (3)(f). Subsections 259-i(3)(f)(ii)-(vi) establish the procedural requirements for conducting a revocation hearirg consistent with due process, including the right of the parolee and his attorney to be notified of the hearing date and location, to be heard in person at the hearing and to cross examine witnesses. These sections make clear that the presiding officer conducts the hearings. Subsection 259-i(3)(f)(vii) establishes the standard of proof for finding a violation.

Subsection 259-i(3)(f)(viii) establishes the presiding officer's power to restore the releasee to supervision if the officer is not satisfied by a preponderance of evidence that a violation occurred. Subsection 259-i(3)(f)(x) enumerates the possible dispositions that a presiding officer can impose if she is satisfied that a violation has been established by a preponderance of the evidence.

Each of the subheadings - (A), (B), (C), and (D) of §259-i (3)(f)(x) - identifies the dispositions that the presiding officer may take for specific classes of releasees. Subheading (A) permits the presiding officer to restore a violator to supervision despite having found a violation; subheading (B) authorizes the presiding officer to place a violator in a parole

transition facility as an alternative to incarceration. Dispositions provided for in (A) and (B) are authorized for all classes of releasees.

Subheading (C) authorizes the presiding officer to fix a date for consideration by the board for the re-release of presumptive releasees, parolees, and conditional releases. Subheading (D) authorizes the presiding officer to hold a releasee, released to post-release supervision, up to the balance of the post-release supervision period.

The remainder of § 259-i(3)(f)(x) establishes the board's power to consider suspension of the re-release date fixed by the presiding officer. The board may only do so after affording the parole violator a personal interview based on the violator's institutional conduct or other additional factors promulgated by the board. 9 NYCRR § 8002.6.

Section 259-i(3)(f)(x)(C) is explicit: it vests the presiding officer with exclusive authority to fix a parolee's date for consideration by the board for re-release. There is no Executive Law provision granting such authority to any other person or body.[6]

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6 If the board wanted one of its members to preside at the hearing, nothing prevented it. Executive Law § 259-i (3)(f)(ii) expressly authorizes a board member to preside at the revocation hearing: "the revocation hearing shall be

The regulation, 9 NYCRR § 8005.20 (c)(6), expressly violates Executive Law § 259-i (3)(f). 9 NYCRR § 8005.20 (c)(6) creates an exception that is not permitted by the Executive Law. The regulation singles out parolees convicted of offenses involving homicide, sex, or kidnapping, and for this class of alleged violators it seizes the presiding officer's authority to fix a date for consideration of re-release and assigns that authority to a single board member who does not preside at the hearing. Thus, it violates the Executive Law mandate that the presiding officer make the decision fixing a date for consideration of re-release by the board, and denies those parolees an opportunity to be heard by the board member vested with final authority to exercise discretion. Because the summary procedure created by the regulation cannot be reconciled with the Executive Law, the Executive Law must prevail. Weiss, 95 N.Y.2d at 5.

B. The Legislative History of Executive Law § 259-i(3)(f)(x) Clearly Establishes Legislative Intent to Vest Final Authority To Impose Time Assessments In The Presiding Officer

The legislative history of Executive Law § 259-i(3)(f)(x)

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conducted by a presiding officer who may be a board member or a hearing officer designated by the board in accordance with rules of the board." Thus, the board possesses the authority to appoint any of its members to preside at revocation proceedings, hear from the parolee, and fix a date for consideration for re-release.

renders the legislative intent of the current statute unambiguous: the legislature has vested authority to exercise discretion in response to a parole violation exclusively in the presiding officer. While earlier versions of the Executive Law made a presiding officer's authority advisory if she was a hearing officer, and not a board member, the Legislature amended the Executive Law in 1991 and vested final authority in the presiding officer regardless of her title.

In 1989, Executive Law § 259-i(3)(f)(x) read in relevant part:

> If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he shall so find. **When the presiding officer is a board member, he may (A) direct the violator's reincarceration and fix a date for consideration by the board for re-release on parole or conditional release, as the case may be;** (B) as an alternative to reincarceration, direct the violator's placement in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision; or (C) direct that the parolee or conditional releasee be restored to supervision. Where a date has been fixed for the violator's re-release on parole or conditional release, as the case may be, the board or board member may waive the personal interview between a member or members of the board and the violator to determine suitability for re-release; provided, however, that the board shall retain the authority to suspend the date fixed for re-release and to require a personal interview based on the violator's institutional record or on such other basis as is authorized by the rules and regulations of

> the board. If an interview is required, the board shall notify the violator of the time of such interview in accordance with the rules and regulations of the board. If the violator is placed in a parole transition facility or restored to supervision, the board member may impose such other conditions of parole or conditional release as he may deem appropriate. **When the presiding officer is a hearing officer, he may recommend to the board the dispositions in clauses (A), (B) and (C) of this subparagraph.**
>
> Executive Law § 259-i(3)(f)(x) (1989), (current version at NY CLS Exec § 259-i (2011)) (emphasis added).

In 1991, the legislature amended the Executive Law, eliminating the recommendation provision:[7]

> If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he shall so find. **The presiding officer may (A) direct the violator's reincarceration and fix a date for consideration by the board for re-release on parole or conditional release, as the case may be;** (B) as an alternative to reincarceration, direct the violator's placement in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision; or (C) direct that the parolee or conditional releasee be restored to supervision. Where a date has been fixed for the violator's re-release on parole or conditional release, as the case may be, the board or board member may waive the personal interview between a member or members of the board and the violator to determine suitability for re-release; provided, however, that the board shall retain the authority to suspend the date fixed for re-release and to require a personal interview based on the violator's institutional record

[7] The 1991 version was again amended in 1998 to account for the creation of post-release supervision.

> or on such other basis as is authorized by the rules and regulations of the board. If an interview is required, the board shall notify the violator of the time of such interview in accordance with the rules and regulations of the board. If the violator is placed in a parole transition facility or restored to supervision, the presiding officer may impose such other conditions of parole or conditional release as he may deem appropriate, as authorized by rules of the board.
>
> Executive Law § 259-i(3)(f)(x) (1991), (current version at NY CLS Exec § 259-i (2011)) (emphasis added).

The 1991 amendment eliminated the non-board member presiding officer's advisory role and vested final authority in the presiding officer, regardless of title. The amendment brought finality to parole revocation proceedings and gave all parolees a meaningful opportunity to be heard by the individual vested with final authority to exercise discretion.

9 NYCRR § 8005.20 (c)(6) disregards the 1991 amendment and ignores that "[T]he Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law." N.Y. STAT. § 193; see also, People ex rel. Sheldon v. Board of Appeals of the City of NY, 234 N.Y. 484, 495 (1926) ("We must assume that the lawmaking body intended to effect a material change in the existing law; otherwise the legislation would be nugatory."); Matter of Stein,

131 A.D.2d 68, 72 (2nd Dept. 1987). The regulation operates as if the pre-1991 Executive Law, which allowed the board to render non-board member hearing officer decisions advisory, still governed. The regulation carves out a class of releasees and dictates that where the presiding officer is a non-board member, all her dispositions shall be advisory.

While 9 NYCRR § 8005.20 (c)(6) would have complied with the pre-1991 Executive Law, the 1991 amendment sets the regulation in express conflict. Under the current version of the statute all dispositions made by the presiding officer are final.

In the lower court, respondent cited a series of cases that rely on the Executive Law as it read pre-1991, not as it reads today. In a 1980 case, Coleman v. Smith, the 4th Department upheld a unilateral modification of a time assessment, citing to the Executive Law as it stood in 1980. 75 A.D.2d 706 (4th Dept. 1980). The 3rd Department has subsequently relied on Coleman, rejecting pro se challenges to board modifications in terse decisions. In so doing, it failed to analyze the plain language of the Executive Law or account for its 1991 amendment. See Matter of Augle v. New York State Board of Parole, 192 A.D.2d 1031 (3rd Dept. 1993); Otero v. New York State Board of Parole, 266 A.D.2d. 771 (3d. Dept. 1999); Folks v. Alexander, 58 A.D.3d

1038 (3d Dept. 2009). Indeed, no appellate division has been presented with the statutory or constitutional claims that appellant asserts herein.

C. The Lower Court Misapprehended The Executive Law

After withdrawing its initial statutory analysis, the lower court again misapprehended the Executive Law. The court held: "the violator's re-release date has been and remains merely a date for the board to consider." (R.173). The court reasoned that the persistence of the clause "fix a date for consideration by the board for re-release," in the post-1991 Executive Law authorized the board to promulgate a regulation that renders the presiding officer's disposition advisory. The court's conclusion failed to account for the placement of the language, "fixed a date for consideration by the board for re-release," in subheading (C) of § 259-i (3)(f)(x); it confused the meaning of that language; and its analysis of the statute contravened the Legislature's intent.

The lower court erroneously held that "there is no language in that regulation that is out of harmony with the governing statute." (R.172). Executive Law § 259-i (3)(f)(x) vests the

presiding officer with final authority to (A) restore a violator to supervision; (B) place a violator in a parole transition facility, (C) fix a date for consideration by the board for re-release, or (D) hold a person released to post-release supervision up to the remainder of his supervision period. By contrast, for a class of releasees, 9 NYCRR § 8005.20 (c) (6) renders a presiding officer's authority advisory with respect to each of the Executive Law dispositions: restoration to parole, placement in a parole transition facility, or imposition of a time assessment.[8]

The lower court cited the language "fix a date for consideration by the board for re-release" in an effort to reconcile this express conflict. However, that language is exclusively found in, and only applies to, subheading (C) of Executive Law § 259-i(3)(f)(x), the subheading governing imposition of time assessments for presumptive releasees,

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8 (i): a single member of the board shall make the decision that imposes a time assessment.

(ii): a decision to restore a violator to supervision serving a sentence for a felony offense under articles 125, 130, 135, or 263 of the Penal Law or section 255.25 thereof to supervision under paragraph (4) of this subdivision or to the Willard drug treatment campus program under paragraph (1) of this subdivision shall not become final and binding until and unless two members of the board concur with the presiding officer's recommendation to restore the violator to supervision. A single member of the board may review a recommendation to restore such a violator to supervision and may modify the recommendation and impose a time assessment that is within the board member's discretion.

parolees, and conditional releasees. The language does not exist in the subheadings pertaining to (A) restoration to supervision, (B) placement in a parole transition facility, or (D) holding a person released to post release supervision up to the remainder of the supervision period. The lower court's decision turns on a misapprehension of the law and a grammatical impossibility: that the language found in subheading (C) of Executive Law § 259-i (3)(f)(x) applies to subheadings where it is nowhere to be found.

The court did not limit the application of the language "fix a date for consideration by the board for re-release," to subheading (C). Even if the court had limited the language in this manner, the court's interpretation would remain untenable. It would read the Executive Law to authorize the board to make a presiding officer's decision advisory *only with respect to* certain classes of releasees ("in the case of presumptive releasees, parolees or conditional releasees," but not a releasee serving a period of post release supervision) and only with respect to certain dispositions (where the hearing officer has imposed a time assessment but *not* where she has restored the releaseee to supervision or sent him to parole transition facility). This reading implies an arbitrary scope of the board's powers, is inconsistent with how the board has

implemented the regulation, and flatly contradicts the sweeping scope of 9 NYCRR § 8005.20 (c)(6).[9]

The lower court's reasoning with respect to the phrase "consideration by the board for re-release," confuses two powers assigned by the Executive Law: (1) the power of a presiding officer to fix a date for consideration for re-release, also known as a time assessment, and (2) the power of the board to consider suspending the date fixed for re-release. The powers are exercised on different bases, at different times, and require different procedures.

When a presiding officer fixes a date for consideration by the board for re-release, she does so on the basis of a parolee's felony conviction and violative behavior while under supervision in the community. Exec. Law. § 259-i (3)(f)(x). The officer presides at the revocation hearing where she is addressed by the parolee. Exec. Law. § 259-i (3)(f)(ii),(vi). At the conclusion of the hearing, she can find a violation, direct reincarceration, and then fix a date for consideration by the board for re-release. Exec. Law. § 259-i (3)(f)(x). Her fixing of a date is

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9 For example, Commissioner Ferguson previously modified a presiding officer's recommendation of a 12-month time assessment with the alternate 90 day Department of Correctional Services Drug Treatment Program (DOCS), to a hold to the maximum expiration of the releasee's sentence, a hold effectively in excess of 6 years. See Parole Violation Warrant 575561 (Parolee: Charles Murchison, DIN: 89A0168).

also referred to as a time assessment. 9 NYCRR § 8002.6 (a).

The board, in fact, re-releases most parole violators at the date fixed by the presiding officer. However, when the date fixed by the presiding officer arrives, the Executive Law authorizes the board to consider suspending it. Executive Law § 259-i (3)(f)(x) specifies the procedure that governs consideration of re-release:

> Where a date has been fixed for the violator's re-release on presumptive release, parole or conditional release, as the case may be, the board or board member may waive the personal interview between a member or members of the board and the violator to determine the suitability for re-release; provided however, that the board shall retain the authority to suspend the date fixed for re-release and to require a personal interview based on the violator's institutional record or on such other basis as is authorized by the rules and regulations of the board.

If the board considers suspending the date fixed for re-release by the presiding officer, § 259-i(3)(f)(x) expressly requires the board to provide the adjudicated violator with a personal interview and instructs the board to specify the bases that may be taken into account in suspending re-release.

The board may consider suspending the date fixed by the presiding officer on the basis of matters occurring, or learned of, subsequent to imposition of the time assessment, and

primarily based on institutional conduct during service of the time assessment. The grounds for considering suspension of re-release are specifically enumerated in 9 NYCRR § 8002.6 as required by the Executive Law, preventing board members from making arbitrary administrative decisions. 9 NYCRR § 8002.6 (d)(2)(iii)(a-e). The board is assigned the authority to consider suspending a parole violator's re-release at the end of the time assessment imposed by the presiding officer, not ex ante. 9 NYCRR § 8002.6 (d)(2)(i). Where the board elects to hold a parole violator beyond the date fixed by the presiding officer, it does so because it has received some new information generated during the parole violator's re-incarceration, not on the basis of the parolee's violative behavior in the community that resulted in revocation of parole. 9 NYCRR § 8002.6 (d)(2)(ii)(b), (iii)(a-e).

Respondent did not act pursuant to its power to consider and suspend the date fixed for re-release. The board member modified the time assessment at its beginning, not its completion. Moreover, it did not provide appellant with a personal interview or limit its consideration to those grounds identified by the Executive Law and 9 NYCRR § 8002.6.

The lower court's reading of the language "fix a date for

consideration by the board for re-release" contravenes the Legislature's intent in the 1991 amendment. Prior to 1991 the Executive Law read: "When the presiding officer is a hearing officer, he may **recommend** to the board the dispositions in clauses (A), (B) and (C) of this subparagraph," where clause (A) read, "direct the violator's reincarceration and fix a date for consideration by the board for re-release on parole or conditional release as the case may be." Exec. Law § 259-i(3)(f)(x) (1989), (current version at NY CLS Exec § 259-i (2011))(emphasis added). The pre-1991 statute also provided that, "When the presiding officer is a board member, he may (A) direct the violator's reincarceration and fix a date for consideration by the board for re-release on parole or conditional release as the case may be." Where the Legislature intended to allow the presiding officer's time assessment to be advisory to the board, subject to its re-release power, it clearly used the terms "recommend to the board the disposition" of fixing "a date for consideration by the board for re-release."

The lower court's reasoning to the contrary defies the principle that: "statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction." N.Y. STAT. §

94. Thus, in the context of Executive Law § 259-i (3)(f)(x)(C), the phrase "fix a date for consideration by the board for re-release on presumptive release, or parole or conditional release," does not, as the lower court misinterpreted, mean *recommend* a date for re-release that a board member can upend at will. The phrase means that the hearing officer will fix a date which, as it approaches, the board will then consider the re-release of the parolee *subject to rules and procedure*.

Although the Executive Law assigns the power to fix a date for consideration for re-release to the presiding officer, ALJ Porter's decision was clearly understood by all parties as a *recommendation* that could be upended at will by a single board member. (ALJ Porter: "what goes on here today is going to be a recommendation by the Division and then a recommendation by me." R.53.). It was the board member, and not ALJ Porter, who actually fixed the date for consideration by the board for re-release.

The Legislature meant what it said: the presiding officer has final authority to impose a disposition in response to a parole violation. The administratively created regulation ignores the intent and plain language of the Legislature in its 1991 amendment, and for a class of releasees, reduces the

presiding officer's disposition to a mere recommendation. 9 NYCRR § 8005.20 (c)(6) clearly contravenes the Executive Law, and must accordingly be annulled.

POINT III

THE SINGLE BOARD MEMBER ACTED ARBITRARILY WHEN HE UNILATERALLY REJECTED THE CAREFULLY NEGOTIATED AND JOINTLY AGREED UPON RECOMMENDATION THAT APPELLANT STAND ELIGIBLE FOR RE-RELEASE BY THE BOARD AFTER 18 MONTHS, AND INSTEAD IMPOSED A TIME ASSESSMENT OF 36 MONTHS.

The single board member's doubling of appellant's time assessment was arbitrary and capricious. The severity of the time assessment bore no relationship to appellant's technical, fraternizing violation. The board member focused almost exclusively on the nature of appellant's felony conviction. See King v. New York State Division of Parole, 190 A.D.2d 423, 433 ("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."). The decision was grossly disproportionate, unjustified, and uninformed.

CONCLUSION AND RELIEF REQUESTED

THE COURT SHOULD REVERSE THE COURT BELOW, ANNUL 9 NYCRR § 8005.20 (C)(6) AND/OR DIRECT RESPONDENT TO REDUCE THE TIME ASSESSMENT TO 18 MONTHS.

Dated: July 6, 2011

Respectfully submitted,