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October 2019

### Art. 78 Petition - FUSL000041 (2018-06-27)

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X

In the Matter of [REDACTED],  
Petitioner

For a Judgment Pursuant to CPLR Article 78

Notice of Petition

-against-

Index No. \_\_\_\_\_

NEW YORK STATE BOARD OF PAROLE, Tina  
Stanford, Chairwoman

Respondent

-----X

PLEASE TAKE NOTICE, that upon the annexed petition of [REDACTED]  
[REDACTED] verified on June 19, 2018, together with the accompanying  
memorandum of law and administrative record, an application will be made to this  
Court, at the courthouse located at [REDACTED],  
on July 30, 2018 at 9:30 a.m. or as soon thereafter as counsel can be heard, for a  
judgment pursuant to CPLR Article 78: 1.) annulling a determination of the Board of  
Parole dated February 1, 2018, which denied Petitioner parole release; 2.) remitting  
the matter to the Board of Parole for a de novo parole release hearing.

PLEASE TAKE FURTHER NOTICE, that an answer and supporting  
affidavit, if any, shall be served at least five days before the aforesaid date of hearing.

Respectfully,

\_\_\_\_\_  
Alfred O'Connor  
New York State Defenders Assoc.  
194 Washington Ave., Suite 500  
Albany, New York 12210  
(518) 465-3524

Dated: June 27, 2018

[REDACTED]

To: [REDACTED] Board of Parole

Tina Stanford, Chairwoman  
97 Central Avenue  
Albany, New York 12206

Hon. Barbara Underwood  
Attorney General  
Poughkeepsie Regional Office  
One Civic Center Plaza  
Poughkeepsie, New York 12601

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X

In the Matter of [REDACTED],  
Petitioner

For a Judgment Pursuant to CPLR Article 78

Verified Petition

-against-

Index No. \_\_\_\_\_

NEW YORK STATE BOARD OF PAROLE, Tina  
Stanford, Chairwoman

Respondent

-----X

1. This is a petition for a judgment pursuant to CPLR Article 78 seeking to annul a determination of the Board of Parole denying petitioner parole release and to direct the Board to conduct a *de novo* hearing.
2. Petitioner, [REDACTED], is a 70-year old inmate incarcerated at [REDACTED]. He is serving an aggregate sentence of 33 1/3 years to life on controlling convictions of murder in the second degree and attempted murder in the second degree.
3. Respondent is the New York State Board of Parole. Its principal office is located at 97 Central Avenue, Albany, New York. Tina Stanford is the Board's chairwoman.
4. The determination denying parole release was made [REDACTED], which is located in the Ninth Judicial District. Therefore, venue is properly laid in Dutchess County.
5. Procedural History - Petitioner first became eligible for parole release consideration in January 2014. The Board denied his application for release and directed that he be held two years before reconsideration. Petitioner appeared for a second time in January 2016 when parole was once again denied.

Petitioner filed an administrative appeal and a *de novo* hearing was ordered for procedural error. But in October 2016 the Board again denied his application for release. Petitioner next appeared in January 2018 after he had served more than 37 years in prison. But for the fourth time, the Board denied him parole release.

6. This Article 78 proceeding concerns the February 1, 2018 parole release denial. Petitioner filed a timely administrative appeal and the Board affirmed the determination on May 24, 2018.
7. Crime of Conviction - The underlying facts of [REDACTED] convictions are unusual, tragic and largely uncontroverted. The facts recounted here are primarily derived from the summary of the case included in the Appellate Division, Fourth Department's decision on petitioner's direct appeal. [REDACTED] [REDACTED] (A copy of the decision is attached as Exhibit A.) The victims were undercover New York State troopers. [REDACTED] was shot and fatally wounded, and [REDACTED] was shot and seriously injured while working undercover in December 1980. However, as Parole Board acknowledged in its most recent decision, Mr. [REDACTED] did not know he was shooting at undercover police officers. He believed he was shooting at drug dealers who were intent on killing him and his brother.<sup>1</sup>
8. The shootings arose from a series of events involving [REDACTED] younger brother, [REDACTED]. [REDACTED] became involved in a large-scale drug deal with [REDACTED] [REDACTED]. They had fronted [REDACTED] 28 ounces of cocaine to sell in the [REDACTED] in November 1980. When [REDACTED] returned to the [REDACTED], they were arrested and found in possession of a 9mm. pistol. [REDACTED]

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<sup>1</sup> See Transcript of parole release hearing dated Jan. 31, 2018, Exhibit B at 20, and the panel determination denying parole release dated February 1, 2018, Exhibit C

agreed to cooperate with the State Police to arrest the local dealers, [REDACTED]. The State Police released [REDACTED] as part of the cooperation deal. Monitored by the police, they called [REDACTED] and insisted on full payment for the 28 ounces of cocaine.

9. Upon being summoned by [REDACTED], [REDACTED] fell into a panic because he had mismanaged the transaction and had paid only \$10,000 of the \$50,000 he owed them. Worse, he now possessed only 12 of the original 28 ounces of cocaine. Convinced the armed and dangerous [REDACTED] would kill him for double-dealing, [REDACTED] sought help and protection from his older brother [REDACTED], who up to this point had no involvement in his younger brother's drug-dealing. [REDACTED] accompanied [REDACTED] to a parking lot, where they returned the remaining cocaine to [REDACTED]. But to mask the shortage, [REDACTED] had heavily diluted the package with cutting agents. After the exchange, [REDACTED] returned to his ex-wife's house where [REDACTED] later joined him.

10. The tragic events unfolded when [REDACTED] spotted two men sitting in [REDACTED] parked suspiciously in the dark outside his ex-wife's house. Fearing the men were associates of [REDACTED], [REDACTED] walked away from the house only to find the [REDACTED] slowly following him down the road. Panicked, [REDACTED] returned to the house and yelled to his brother, "Grab the gun and come with me . . . [REDACTED] are going to kill me." The [REDACTED] brothers jumped into a red Monte Carlo and drove away. [REDACTED] was behind the wheel and [REDACTED] in the back seat. Although they did not realize it, the men in the [REDACTED] were not associates of [REDACTED]. They were undercover troopers, [REDACTED], wearing civilian clothes, staking out the house as part of the drug investigation.

11. The undercover troopers drove off in pursuit and moments later the Monte Carlo sped up and passed them. [REDACTED] deliberately drove alongside the Plymouth seeking to identify its occupants. The [REDACTED] saw an older man with a beard and long hair [REDACTED] and a younger one wearing a leather jacket [REDACTED]. Then, [REDACTED] pulled into a car wash and came to a complete stop. The Plymouth came straight at them. [REDACTED] yelled, "Hold on. They're going to ram us!" The Plymouth rammed the Monte Carlo in the driver's side door with enough force to buckle a steel guard rail inside the door frame. The Monte Carlo was propelled sideways and 3 ½ feet by the force of the impact. The cars came to rest side by side.

12. The Appellate Division summarized the chaotic and tragic events that followed:

The two vehicles came to rest side by side. [REDACTED] testified that as [REDACTED] yelled "Hold on, they're going to ram us," he placed two deer slugs into the shotgun. After the collision [REDACTED] observed the men in the Plymouth, heard [REDACTED] shout "Run, they're going to kill us," and then fired the shotgun. The bullet pierced the side window of the Plymouth, struck and killed [REDACTED], who was seated in the passenger seat, passed through his body and struck [REDACTED] in the back. Using his vehicle as cover [REDACTED] fired two shots at [REDACTED] and [REDACTED] as they ran; however [REDACTED] reached the corner of the car wash and [REDACTED] vanished into the darkness. Within a minute [REDACTED] shot and grievously wounded [REDACTED].

[REDACTED] [REDACTED] rushed into the bar yelling "Call the cops, call the cops!" The brothers remained at the scene for the police to arrive and were later arrested.

13. The jury rejected the brothers' self-defense claims. [REDACTED] was convicted, *inter alia*., of murder in the second degree and attempted murder in the second degree. Before announcing its verdict, the jury sent a note to the trial judge inquiring whether it could consider or recommend mercy for [REDACTED] [REDACTED]. On appeal, the Appellate Division split 3-2 on whether the trial judge

had properly instructed the jury on [REDACTED] self-defense claims. A dissenting judge described this as a “close case” in which “[t]he testimony adduced at trial raised a substantial issue of self-defense.” [REDACTED]

[REDACTED].<sup>2</sup> As noted, the January 2018 Parole Board panel wrote that [REDACTED] “was not aware that the men [he was] shooting at were officers, but were drug dealers, and assumed [his] life and life of [his] brother was in danger.”<sup>3</sup>

14. Institutional Record - [REDACTED] has a stellar institutional record. In over 37 years of imprisonment, he has received only two disciplinary tickets, the last of which was in 2001 for possession of a single poker chip.<sup>4</sup> The January 2018 panel noted that his disciplinary record was “virtually clean.”<sup>5</sup> Until age and health problems forced him to stop working, Mr. [REDACTED] had been an electrician for [REDACTED], where he was commended for his skilled and conscientious work. He has completed all recommended therapeutic programs, including ASAT and ART. At the January 2018 hearing, Commissioner Drake noted that Mr. [REDACTED] was “program satisfied on all levels.”<sup>6</sup>

15. COMPAS Risk and Needs Assessment Instrument - COMPAS is a risk and needs assessment instrument developed by the Northpointe Institute for Public Management. It is in widespread use in New York’s criminal justice system in different formats keyed to the offender populations under review. COMPAS provides actuarially-based estimates, expressed in decile scores of 1 (lowest) through 10 (highest), of an offender’s 1.) risk of felony violence; 2.) risk of re-

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<sup>2</sup> [REDACTED] was also convicted of murder but the Appellate Division reversed the conviction and dismissed the charge for insufficient evidence. [REDACTED], [REDACTED]

<sup>3</sup> Exhibit B at 20, Exhibit C

<sup>4</sup> DOCCS Inmate Disciplinary History, Exhibit D

<sup>5</sup> Exhibit B at 20

<sup>6</sup> Exhibit B at 13



arrest; and 3.) risk of absconding from supervision. Within an adult offender inmate population, COMPAS also provides a ten-point scale of an inmate's criminal involvement, history of violence and prison misbehavior. COMPAS additionally assesses criminogenic needs, evaluating an inmate's risk of encountering circumstances conducive to criminality, such as substance abuse, unemployment, low family support, or other negative social conditions or attitudes that might interfere with successful re-entry.

16. [REDACTED] COMPAS report ranked him as posing the lowest possible risk of felony violence, arrest and absconding from supervision (1 out of 10). Mr. [REDACTED] also scored in the lowest risk category for substance abuse and negative social attitudes (1 out of 10). [REDACTED] strong family ties placed him in the lowest risk in the family support category (1 out of 10).<sup>7</sup> All of the remaining scores fell within the low category.

At the January 2018 parole release hearing, Commissioner Drake remarked:

Now when I look at your COMPAS scores, all of your COMPAS scores are low, which indicates a lack of risk to the community (emphasis added).<sup>8</sup>

17. Prior Criminal Record - Mr. [REDACTED] is now 70 years-old. Before the instant offense in 1980 his criminal involvement was minimal, consisting of teen-aged misconduct more than fifty years ago. He served a reformatory sentence for stealing a car in 1965. Otherwise, his only other jail sentences were 30 day terms for buying alcohol for a minor and simple assault when [REDACTED] himself was less than 18 years-old. Once he reached adulthood, Mr. [REDACTED] led a law-abiding life with the exception of an occasional traffic ticket.<sup>9</sup>

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<sup>7</sup> COMPAS Risk and Needs report [REDACTED] [REDACTED] Exhibit E at 1

<sup>8</sup> Exhibit B at 13

<sup>9</sup> Pre-Sentence Report, Exhibit F at 4-5

Commenting on Mr. [REDACTED] long-ago criminal record at the hearing, Commissioner Drake stated:

You are absolutely correct, you were very young. Some of this stuff, you got some speeding tickets in 1975 and '80, those are local things. I only point that out because we're just kind of getting an idea of the type of lifestyle, you may have been living, back then. But you are correct, I did read in the Sentencing Minutes, it did state that you were doing fairly well, for a while there, and then you encountered this problem with your brother.<sup>10</sup>

18. REMORSE- [REDACTED] has consistently expressed remorse for the tragic death of Trooper [REDACTED] and the injury to Trooper [REDACTED], stating that "there's not a day that goes by that I don't think about this." He continued, "I would hope that someday the family forgive me for what I did, and I would like to say I'm sorry. There's no words I could use. I still feel terrible. Every day I live with this. Hopefully, some day the family will forgive me. I am very, very sorry for my actions."<sup>11</sup>

19. Declining Health - Mr. [REDACTED] appeared at the parole release hearing in a wheelchair, which he needs to move around the facility.<sup>12</sup> He suffers from breathing difficulties (Chronic Obstructive Pulmonary Disease), diabetes and has a bad knee. He was hospitalized at the [REDACTED] for several months prior to his transfer to [REDACTED] in 2017.

20. REENTRY PLANS - Mr. [REDACTED] has proposed to live with his wife, [REDACTED], in the [REDACTED] area upon his release and to work part-time to the extent his serious medical problems will permit.

21. The Panel's Decision

The panel's decision stated in full:

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<sup>10</sup> Exhibit B at 12

<sup>11</sup> Exhibit B at 16-17

<sup>12</sup> Exhibit B at 14

██████████, parole denied. Hold 12 months. Next appearance, January 2019.

Careful review of the record and interview led the panel to determine that if released at this time there is a reasonable probability that you would not live and remain at liberty without again violating the law, and that release at this time will be incompatible with the welfare of society. Parole is denied.

The decision is based on the following factors: The Instant Offense where you, and your brother, were involved in a shootout with police officers, who were culminating an undercover Cocaine investigation. Following gunfire one officer was killed, and another seriously injured; this is of concern to the Panel.

COMPAS scores rate you low, overall. You are program satisfied and have made great efforts at rehabilitation, to the best of your ability, given your mental health disability and failing health.

Further, and as indicated in the minutes, you were not aware that the men you were shooting at were officers, but were drug dealers, and assumed your life and the life of your brother was in danger.

However, this does not take away the severity of the crime and impact it has had on the victim's family and the community.

You have served over thirty-seven years and continue to have family and community support. The Panel urges you to maintain your virtually clean disciplinary record, and continue to monitor your failing health, and maintain contact with the community that will support successful transition (emphasis added).<sup>13</sup>

22. Effective September 27, 2017, the Board of Parole's regulations require an "individualized" explanation when a panel departs from the COMPAS instrument. The regulation provides that [i]f 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." *See* 9 NYCRR § 8002.2 (Exhibit G)

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<sup>13</sup>Determination denying parole release dated February 1, 2018, Exhibit C

23. Administrative Appeal - Petitioner filed an administrative appeal from the parole denial. He argued the panel failed to comply with the new regulation because it gave no “individualized reason” for its conclusion that petitioner would not live and remain at liberty without violating the law. The COMPAS report assessed [REDACTED], an ailing 70 year-old inmate with a nearly spotless disciplinary record, as posing the lowest possible risk of reoffending. Thus, under the Board’s own regulation, petitioner argued, the panel was required to “specify any scale within the [COMPAS instrument] from which it departed and provide an individualized reason for such departure.”<sup>14</sup>

24. The Board denied the administrative appeal, reasoning that the panel complied with the new regulation by “cit[ing] strong details for the [parole] denial.” The Statement of Appeals Unit Findings, which was adopted by Board stated:

As for the cited regulation which was recently amended, the new regulation does not change substantive law or create any new right to release. Rather, the intent is more transparency in parole release denial decisions, especially in cases where the COMPAS score is very positive. Here in this case the COMPAS score is very positive, and the Board decision acknowledges this positive score. However, in this decision the Board cites strong details for the denial such that to the extent they depart from the COMPAS, the Board does in fact give sufficient supporting factual details. So the decision is in compliance with the amended regulation.<sup>15</sup>

25. For the reasons stated in the accompanying memorandum of law, the determination denying parole release was affected by an error of law and was otherwise arbitrary and capricious. *See* CPLR § 7803 (3). This court should annul the determination and direct the Board of Parole to conduct a *de novo* parole release hearing.

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<sup>14</sup> Administrative Appeal (without exhibits), Exhibit H

<sup>15</sup> Statement of Appeals Unit Findings, Exhibit I at 5

VERIFICATION  
STATE OF NEW YORK

██████████, being duly sworn, deposes and says that he is the Petitioner herein; that he has read the foregoing petition, and that all of the allegations thereof are true to his personal knowledge, except those made upon information and belief, and as to those he believes them to be true.

\_\_\_\_\_  
██████████

Sworn to before me this  
19<sup>th</sup> day of 2018

## SUPREME COURT OF THE STATE OF NEW YORK

[REDACTED]

-----X

In the Matter of [REDACTED],  
 Petitioner

For a Judgment Pursuant to CPLR Article 78

Memorandum of Law

-against-

NEW YORK STATE BOARD OF PAROLE, Tina  
 Stanford, Chairwoman

Respondent

-----X

**ARGUMENT**

The Parole Board panel failed to provide any explanation for departing from the COMPAS risk assessment instrument, which rated the ailing, 70 year-old [REDACTED] [REDACTED] as posing the lowest possible risk of re-offending. But the panel concluded otherwise, declaring that Mr. [REDACTED] would “not live and remain at liberty without violating the law.” Under the Board’s own regulation (9 NYCRR § 8002.2), the panel was required to acknowledge the departure from the COMPAS assessment and give an “individualized” reason” for it. The panel’s failure to do so warrants a de novo hearing because the determination was affected by an error of law – the Board’s failure to follow its own regulation.

The Board of Parole amended its regulations effective September 27, 2017 to provide that in making release decisions the “board shall be guided by risk and needs principles, including the inmate’s . . . scores generated by a periodically-validated risk assessment instrument.” 9 NYCRR § 8002.2. The Board of Parole currently uses the COMPAS risk and needs assessment instrument. The regulation further provides that when a panel denies parole and departs from the COMPAS score on a specific scale, it shall specify the scale and “provide an individualized reason for such departure.” The regulation, which applied at petitioner’s January 2018 parole release hearing, states:

9 NYCRR § 8002.2:

Risk and needs principles: in making a release determination, the board shall be guided by risk and needs principles, including the inmate's risk and needs scores generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision . . . 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 (emphasis added) (Exhibit G).

The mandated “individualized reason” for COMPAS departures is in addition to the statutory and regulatory requirement that the Board provide “reasons for the denial of parole release “in detail” and “in factually individualized and non-conclusory terms.” See 9 NYCRR § 8002.3 (b); *see also* Executive Law § 259-i (2)(a)(i) (“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.”)

The September 2017 regulation was enacted in response to 2011 legislation that instructed the Board to establish “written procedures” for a new evidence-based system for evaluating whether an inmate was suitable for parole release: *i.e.*, whether there was a reasonable probability he or she would “live and remain at liberty without violating the law.” See Executive Law § 259-c (4). The 2017 regulation repealed and replaced an earlier regulation enacted by the Board in 2014. The 2014 regulation did not require any explanation for COMPAS departures, an omission that that was widely criticized as failing to provide for consistent and meaningful use of the risk assessment instrument by the 14-member Parole Board. See *e.g.*, *A Chance to Fix Parole in New York*, New York Times editorial, Sept. 4, 2015

(<https://www.nytimes.com/2015/09/05/opinion/a-chance-to-fix-parole-in-new->

[york.html](#)); Caher, *Parole Board's Plan to Enact Risk Analysis Criticized*, New York Law Journal, Feb. 3, 2014.<sup>16</sup>

In petitioner's case, the January 2018 panel departed from the COMPAS instrument, which assessed the ailing, 70 year-old, wheel chair-bound Mr. [REDACTED] as posing the lowest possible risk of felony violence (1 out of 10), the lowest possible risk of arrest (1 out of 10) and the lowest possible risk of absconding from supervision (1 out of 10).<sup>17</sup> The panel's determination departed from the COMPAS instrument, however, and concluded there was a "reasonable probability" that Mr. [REDACTED] would reoffend:

Careful review of the record and interview led the Panel to determine that if released at this time there is a reasonable probability that you would not live and remain at liberty without again violating the law, and that release at this time will be incompatible with the welfare of society. Parole is denied (emphasis added).<sup>18</sup>

Although the panel was not required to follow the COMPAS instrument, the Board's own regulation required the panel "to specify any scale within the [COMPAS instrument] . . . from which it departed and provide an individualized reason for such departure." The panel failed to do so, as it neglected to specify that it was departing from the COMPAS assessment on the risk of re-offense scale. And it failed to provide any reason for departing from the COMPAS instrument's assessment of petitioner as posing the lowest possible risk of reoffending. Because the Board failed to follow its own regulation governing parole decision-making, a de novo hearing should now be ordered.

Contrary to the conclusion reached by the Board on administrative appeal, the panel did not comply with the new regulation by citing "strong details for the

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<sup>16</sup> Copies of the NY Times editorial and New York Law Journal article are attached as Exhibit J and K, respectively

<sup>17</sup> Exhibit E at 1

<sup>18</sup> Exhibit C



denial.”<sup>19</sup> First, the panel failed to even acknowledge that it was departing from the COMPAS instrument on the risk of re-offense scale, as plainly required by the new regulation. (“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 so it is pure speculation to conclude that the panel actually engaged with petitioner’s favorable COMPAS result on the risk of re-offense scale and endeavored to give any reason for the departure. Second, the sole reason cited for denying [REDACTED] parole release had nothing to do with any perceived risk of his re-offending. The panel simply concluded that all of the factors supporting his parole release were outweighed by the “severity of the crime and impact it on the victim’s family and the community.” Contrary to the Board’s administrative appeal decision, this was not an “individualized reason” for the panel’s departure from the COMPAS result on the risk of re-offense scale.

In all other respects, the panel noted that Mr. [REDACTED] had made “great efforts at rehabilitation,” and had a “virtually clean” disciplinary record, family and community support, and suffered from “failing health.” The panel recognized that:

COMPAS scores rate you low, overall. You are program satisfied and have made great efforts at rehabilitation, to the best of your ability, given your mental health disability and failing health.

Further, as indicated in the minutes, you were not aware that the men you were shooting at were officers, but were drug dealers, and assumed your life and the life of your brother was in danger.<sup>20</sup>

Significantly, the panel did not conclude that Mr. [REDACTED] release would “so deprecate the seriousness of the crime as to undermine respect for law.” *See* Executive Law § 259-i (2)(c)(A). Rather, it relied solely on the conclusion that “if [he were released] at this time there is a reasonable probability that [he] would not live and

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<sup>19</sup> Exhibit H at 5

<sup>20</sup> Exhibit C

remain at liberty without again violating the law, and that release at this time will be incompatible with the welfare of society.” This conclusion is directly at-odds with petitioner’s COMPAS scores on the risk of re-offense scale. It required the panel’s acknowledgment of the departure and articulation of an “individualized reason” for it. Because the panel failed to do either of these things, the hearing was affected by an error of law and a de novo hearing should be ordered.

Respectfully submitted,

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Counsel for Petitioner, [REDACTED]