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STATE OF NEW YORK
COUNTY OF DUTCHESS

SUPREME COURT

In the Matter of [REDACTED],
Petitioner.

-against-

PETITION

CPLR ARTICLE 78

**Tina M. Stanford, Chair of the
New York State Parole Board,**

**Index No:
RJI No:**

Respondent.

The Petition of [REDACTED] respectfully shows and alleges:

1. Petitioner [REDACTED] is *89 years old* and was improperly denied release.

Even though his severe dementia and extremely grave medical condition (requiring 24 hour nursing care) and his positive institutional record shows *no possible risk of re-offense*, the Parole Board improperly denied release based on the seriousness of the crime and a letter of opposition. Though he has expressed remorse in the past, he clearly has no memory of the offense at this time. (At the interview, [REDACTED] had no understanding of why he was there, and when asked which family member he spoke to the most, this 89 year old man said “just my mother.”) (See Parole Interview, attached as Exhibit “A” at 6)

STATEMENT OF FACTS

2. [REDACTED] pled guilty to Aggravated Vehicular Homicide in 2010, and was sentenced to six to eighteen years in prison. (Exhibit “A” at 3) He has been incarcerated for over nine years, and this was his *sixth* denial of parole (there were two regular denials, and three denials of medical parole). His only criminal history is from *over 50 years* ago, dating back to

the 1950s and 1960s, and his COMPAS risk assessment could not be completed due to his dementia. (Exhibit “D” at 6-9; Exhibit “A” at 6, 12)

3. Very significantly, [REDACTED] is dependent on a wheelchair and a catheter, and suffers from severe dementia and several life-threatening conditions including congestive heart failure, kidney failure; sepsis; COPD; cardiac issues for which he has a pacemaker; and more.

4. Petitioner nearly died in September, 2019. An application for Medical Parole was denied in May, 2019 by the Department of Health Services - undersigned counsel successfully challenged that determination in an Article 78 proceeding which then resulted in Petitioner having a new Medical Parole interview in January, 2019¹. The Parole Board denied release at that time. *According to the DOCCS website, as of June 22, there have been 82 cases of COVID-19 in Fishkill Correctional Facility, and five inmates have died from the disease. While many have recovered, [REDACTED] would almost certainly die from the virus were he to contract it.*

Medical Records – Dementia and Several Life-Threatening Conditions

5. In 2014, and again in 2015 and 2016, Petitioner [REDACTED] (who by 2014 was diagnosed with dementia, congestive heart failure, diabetes, coronary artery disease, emphysema [now called COPD], hypothyroidism, and anemia) was deemed eligible for medical parole, but each time he was denied release by the parole board. His life-threatening medical conditions (some of which are new), dementia, and ability to care for himself have all worsened significantly since that time, and he is now 89 years old.

¹ While Petitioner is challenging the July, 2019 denial, as discussed below, it is submitted that this proceeding is not moot because when the intervening parole hearing is for a different type of parole, a challenge to the prior denial is not moot.

Petitioner Nearly Died in September, 2019

6. [REDACTED] was admitted to Putnam Hospital Center on September 19, 2019, and was diagnosed with suspected pneumonia. (Most Recent Medical Records attached as Exhibit “B,” at 3) Once at the hospital, Mr. LeVea was diagnosed with *sepsis, kidney failure*, cardiac conditions and more – the diagnoses were “*Acute chest pain; Acute pyelonephritis; Acute renal failure; Antocoagulated; Deep vein thrombosis; Demand ischemia; Entrrococcal sepsis; Obstructive uropathy; Paroxymal arterial fibrillation; Right urethral stone; and Sepsis.*” (Exhibit “B” at 3) *It appears that these are all new conditions*, although some are related to ongoing chronic conditions.

7. Petitioner’s Cardiology Report also stated that he was “admitted September 9 for suspected pneumonia found to have sepsis secondary to right hydronephrosis due to obstructing right urethral calculus post cystoscopy with urethral stenting 9/10/19, had chest discomfort 9/11/19 in setting of hypotension and volume overload. ECHO 9/11/19 showing EF 45-50% with wall motion abnormality showing inferior/inferolateral infarct, mild vascular disease. ... This hospitalization he also developed rate controlled arterial fibrillation.” (Exhibit “B” at 3).

8. That Report also shows that the heart conditions were the least of his worries, and that invasive cardiac procedures would likely kill him due to his other conditions. At every stage medical personal *made sure the DNR order was in place*. His Assessment/Plan on September 14, 2019 listed several conditions and noted “*multiple other comorbid conditions.*” (Exhibit “B” at 5)

9. Somewhat miraculously, [REDACTED] survived and his kidney function started to improve. He still has sepsis, and all his other conditions. On September 21, 2019, he was brought to St. Luke’s Hospital after complaining of abdominal pain. He was found to have elevated lipase levels (related to pancreatic issues, another likely new problem.) (Exhibit “B” at 6)

Ongoing (and Worsening) Conditions

10. In 2014, Petitioner's case was approved for medical parole, but the parole board denied release, despite a finding of "*minimal risk to reoffend*." (Exhibit "C" at 1) The medical conditions listed at that time were as follows:

"Primary Medical Condition: Dementia worsening mental status

Additional Medical Conditions: Congestive heart failure, diabetes, coronary artery disease s/p coronary artery bypass x 2, emphysema [now called COPD], implanted pacemaker and defibrillator, hypothyroidism, obesity, anemia.

Physical/Cognitive Incapacity: Disoriented requires direction, unable to ambulate independently uses wheel chair

Change in Condition Since Last Review: Deteriorated mental status and now non-ambulatory, last evaluated 2012

Needs Upon Release: Assisted living nursing home or family support at home

Summary: 83 yo male with dementia and *non-ambulatory*, multiple medical problems limiting functional status. Anticipate continued deterioration, improvement unlikely. *Risk to reoffend minimal*" 3/25/14 Medical Parole Consideration Request from Chief Medical Officer [REDACTED], M.D., attached as Exhibit "C" at 1, emphasis supplied)

11. However, the 2014 Application was denied by the Parole Board, chiefly based on the circumstances of the offense. In 2015 and 2016, Petitioner was likewise approved for medical parole, and the Board again denied release both times. Petitioner was also denied regular parole release in 2015 and 2017.

12. As noted above, in 2014, Petitioner suffered from congestive heart failure; diabetes; coronary artery disease (for which he had 2 bypasses and a pacemaker and defibrillator); emphysema [now called COPD]; and hypothyroidism.

13. By 2015, he had also been diagnosed with Waldenstrom macroglobulinemia [cancer – a form of non-Hodgkins lymphoma – see <https://www.cancer.org/cancer/waldenstrom->

[macroglobulinemia/about/what-is-wm.html.](#)] (Exhibit “C” at 4, 9) In addition, he was also by this time completely dependent on a catheter. (Exhibit “C” at 17, 23)

14. In addition, he is now completely dependent on a wheelchair, and is considered at risk for falls. (Exhibit “C” at 2, 12, 23) Even in 2015 it was deemed that Petitioner would require residential health care placement upon release. (Exhibit “C” at 5)

15. Petitioner now suffers from chronic urinary problems (related to his enlarged prostate) requiring a catheter (and related frequent blood and blood clots in his urine); deep vein thrombosis (a blood clot) in his femoral artery; and increased risk of falls – he fell recently and broke part of his hip. (Exhibit “C” at 7, 9, 11, 13, 16, 18, 19, 29) cite 16, 4, 11a) He is also now at risk for malnutrition. (Exhibit “C” at 15)

16. ██████████ was taken to the ER *six times* between November, 2018 and January, 2019² (and was admitted five of those six times) almost completely as a result of these new conditions. (Exhibit “C” at 6-29) He was also hospitalized in May, 2019 for problems with his catheter. (Exhibit “C” at 29)

17. Then, as discussed above, he nearly died in September, 2019 when he was diagnosed with sepsis, kidney failure, and other new conditions.

Dementia

18. ██████████ has been suffering from dementia for several years now, including in 2014 when he was deemed eligible for medical parole. (Exhibit “C” at 1) In fact, this was said to be his “primary medical condition” at that time. (Exhibit “C” at 1) The dementia has certainly

² As shown at Exhibit “C” from 6-19, these hospital visits were November 9-10, 2018 for a fall; November 21- November 28, 2018 for a hip fracture & blood clot; December 10, 2018 for blood in the urine; December 27, 2018 – January 6, 2019 for scrotal cellulitis etc; January 11, 2019 – January 15, 2019 for hematuria; and January 22, 2019 – January 24, 2018 when he had urinary surgery.

not improved since then, and has gotten even worse. This has been very evident to family members and friends who have seen the decline in memory over the past few years (he recalls less and less, not even remembering certain close family members who lived with him for fifteen years.)

19. For example, January 25, 2019 hospital records indicate that it was impossible to do the normal screening because Petitioner could recall little to nothing of his health-related history – the page is filled with “unknown” as a response to nearly all the screening questions. (Exhibit “C” at 22)

20. It is also clear from the Interview Transcript that Petitioner did not know why he was there, did not know how old he was, and did not know who his family members were. (As mentioned above, even though his daughter speaks with him and visits him frequently, he forgot her, and said his long-deceased mother was the only family member he spoke to.)

21. In conclusion, ██████████’s life-threatening medical conditions and dementia have been worsening over time, and based on his dependence on a wheelchair and need for 24 hour nursing care, there is no chance of him ever again breaking the law. (And he is clearly not inclined to do so anyway; his excellent disciplinary history is a testament to that.)

Institutional Record

22. ██████████ has an excellent institutional record, with no disciplinary violations since 2013 (the 2013 infraction was the only one he ever had.) (Exhibit “D” at 3) After successfully completing Transitional Services Phase I and the ASAT substance abuse program in 2011, and then successfully completing the ART program in 2013, he was subsequently unemployed and under medical care from that time forward. (Inmate Program Assignment

attached as Exhibit “D” at 1-2) Petitioner has been listed as a hospital patient at Fishkill Correctional Facility since June 6, 2016. (Exhibit “D” at 1)

COMPAS

23. As noted in the Interview, a COMPAS Risk Assessment Instrument (RAI) could not be completed due to Petitioner’s dementia. (Exhibit “A” at 5, 12) (There was a 2019 COMPAS but, upon information and belief, it simply copied old information – for that reason it erroneously claimed there had been a Tier III disciplinary violation within 24 months, when it fact that *sole* violation occurred in 2013.)

Letters of Support

24. Eleven people, including undersigned counsel, wrote letters in support of release for ██████████. ██████████, a close family friend, wrote about Petitioner’s accelerating dementia and worsening health overall, stating:

“...I have known ██████████ for over thirty years and have visited him several times over the past decade... ██████████ has expressed to me and to family members sincere remorse for his crime... His overall health condition has continued to decline. In addition to a pace maker being implanted in recent years ... he has been hospitalized six times in the last 6 months for other serious medical concerns. His accelerating dementia continues to impact his every day existence... I have visited him multiple times each year which affords me unique observations as his memory fades away. ... ██████████ can no longer recall all the names of his children nor can he recall the names of all his five siblings...” (Exhibit “E” at 1)

25. ██████████, Petitioner’s daughter, similarly wrote about his decline over the past several years, and her fear that he will die in prison, stating:

“...I visit my Dad on a regular basis and have seen a pronounced decline in his health... Since his incarceration he has had a pace maker put in... has developed type 2 diabetes, has COPD, recently he fell and had to have hip surgery, and had some kind of permanent catheter... He has dementia which has significantly worsened over the last couple of years. He doesn’t remember why he is incarcerated and when we explain to him what happened he has shown great remorse. He is approaching 90... Given his

dementia and age he certainly will never drive again. ... He does not have the cognitive ability to makes decisions on his own. Because of the dementia and his physical health, he cannot be left alone. ... I do not want my father to die in prison.” (Exhibit “E” at 2)

26. Petitioner’s granddaughter, [REDACTED], wrote about the tragic nature of the offense, and Petitioner’s inexcusable conduct, but noted that he now poses no risk – she misses him greatly – she stated:

“...The accident resulted in the loss of lives, both literal and figuratively. The [REDACTED] family was on the literal end of this analogy and for that my heart is heavy and filled with sorrow. While I know what [REDACTED] did was wrong I, like the [REDACTED] family, also lost someone that day. I lost my grandfather... My grandfather is currently [about to be] 89 years old, and ... has missed many milestones in my life, such as: my sweet sixteen.... The day I delivered a speech ... because I was the salutatorian that year, and now he has missed my first year of college... ..If my grandfather were to be released soon, I would be elated. ... I would not have to travel ...eight hours just to hear his voice, because his disease prevents him from remembering how the phone system works. I believe my grandfather is no longer a danger to society.” (Exhibit “E” at 5-6)

27. [REDACTED], Petitioner’s son, wrote about how he felt he understood the loss of the [REDACTED] family, because his brother also lost his life due to the actions of another person – he added that his father’s mind is slipping away, and he poses no danger, stating:

“...I feel horrible for the family of [REDACTED]. The day my father was sentenced, and [REDACTED]’s bother spoke... was very heart wrenching... My brother was also killed at the hands of another, and I knew exactly how he felt (the pain, the emptiness and anger.) I also knew that nothing I did was going to bring my brother back. ... [M]y concerns now must be for my own father... his mind is not his own and he slips back into his childhood. I do not feel that my father is a danger to society... My father has worked hard all his life and has taught his trade to myself and my brothers... ..I just do not know what purpose my father dying in prison will serve...” (Exhibit “E” at 8)

28. Another son, [REDACTED], wrote about how his father was all he had after his mother died when he was very young – he stated:

“...Unfortunately, I do not get to see my dad as much as I would like to with my heavy work schedule and a young family... When I do visit it is an all-day event. ...[N]othing is the same and it never will be. My mother died when I was a young child –

all that I have ever had was my dad and he worked hard to take care of us. ...[H]e is [now] an old man and does not even remember anything I talk to him about. His health was not good when he was arrested, and it has declined terribly over the last few years. ...[H]e will never be able to drive a car ... for the rest of his life. ... [If released he would] never be left unsupervised....” (Exhibit “E” at 10)

29. Petitioner’s daughter-in-law, ██████████, also wrote about the offense and how hard it must be to make this decision, but pointed out that there was no way her father could ever drive again, stating:

“...I am at a loss for words in this letter because I would never want my child to be a victim of a crime... and ... this makes this hard, because I try to put myself in the shoes of the victim’s family. They will never have their son or brother to speak with or hold or see again and for that I am truly sorry... *...I do not know if [████████] even understands anymore ... where he is or why he is there.* ...We feel at this time ... with him being incarcerated that *we* are being punished. My sister-in-law and I do most of the visiting – she is almost 70 ... and the ride is long... ...He will never obtain a driver’s license again and a vehicle would not be accessible to him for the entirety of his life. I do understand that you must make a decision , and *I am sure that none of this is easy for the board either...*” (Exhibit “E” at 11)

30. Finally, Petitioner’s son, ██████████, wrote about how hard his dad worked to support the family, stating:

“ ... Growing up with my father was very important to me since my mother died from a stroke when I was about 12 years old. He had to become everything to me and my brother ██████████ while having a job that took him out of town at times. ... We have had a great relationship and I appreciate his love and support in my life. I have been to visit my father several times in the past few months... He did not recognize my step-sister [his daughter] ██████████ at first and *did not remember my wife ██████████ who he had lived with for about 15 years.* I believe my father to be a caring, loving man... ...[H]e has given his children money and co-signed for loans so they could purchase houses... He did this for me... [when] I could not afford to do this for myself... I know he has done this for most if not all of his kids even while on a fixed income. He also saved me from drowning when I was younger...” (Exhibit “E” at 12)

Parole Interview

31. At the outset, the Commissioners asked Petitioner if he knew why he was there, and he said “not really.” (Exhibit “A” at 2) He knew he was in prison, but did not know why. (Exhibit “A” at 3) He had no memory of the offense, or of any of the programs he had completed in prison. (Exhibit “A” at 3-4) Nor did he recall his criminal history, which was *more than 50 years old*, not 30 as stated in the interview. (Exhibit “A” at 5, Exhibit “D” at 6-9) The Commissioners noted that the COMPAS could not be completed due to Petitioner’s inability to answer the questions. (Exhibit “A” at 5)

32. Significantly, when Petitioner was asked which family member he spoke to the most, he replied, “just my mother” [who was long-deceased.] (Exhibit “A” at 6) *Petitioner said he did not have any children*, and had to be reminded that he has a daughter who writes to him. (Exhibit “A” at 7) When asked where she lived, he said “she lives out where I live.” (Exhibit “A” at 7) (In fact, Petitioner has several children and grandchildren, and his daughter [REDACTED] is the one who has Power-of-Attorney for him, and visits him the most.)

33. In addition, Petitioner did not know his age (89), stating that he was “probably in the 70s.” (Exhibit “A” at 8) He did not know who the President is, the date or the month. (Exhibit “A” at 8) Nor could he remember what work he used to do. (Exhibit “A” at 9) He did not know anything about his medical conditions. (Exhibit “A” at 11) (It is noted that this level of dementia is completely consistent with Petitioner’s medical records.)

Decision

34. Despite the fact that Petitioner clearly poses no risk of future offense, the Parole Board denied release based on the nature of the offense, the 50 year-old criminal history, and official opposition³, stating:

“ ...[I]f 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 would be incompatible with the welfare of society. ...

The decision is based on the following factors: The instant offense of Aggravated Vehicular Homicide...

You have a criminal history...

You were unable to complete the COMPAS risk assessment due to your health and age, which has been considered by this board. The panel has also considered your reentry plan, sentencing minutes and official opposition to your release. Such release at this time is inappropriate and to do so would deprecate the serious nature of the offense as to undermine respect for the law.” (Exhibit “A” at 12-13)

Administrative Appeal

35. An Administrative Appeal was filed in November, 2019, but no response was ever received until June 22, 2020. The Appeals Unit improperly⁴ dismissed the appeal as moot, noting that there had been a new parole interview on January 21, 2020. (See June 15, 2020 letter from Appeals Unit, attached as Exhibit “F”) Petitioner would have filed the instant Article ’78 Petition sooner were the courts not closed due to the pandemic. (Upon information and belief, this Court was not accepting Article ’78 Parole Appeals as emergency proceedings.)

³ Counsel has obtained a copy of the “official opposition,” which consists of a 2014 letter from the District Attorney opposing medical parole. The letter states that the medical condition must not be so bad because Petitioner was not in a Regional Medical Unit. However, he *was* placed in the Fishkill Regional Medical Unit in 2016, and has remained there ever since. The letter described the offense, claimed that Petitioner somehow still posed a risk (at that time he was not yet completely dependent on a wheelchair, catheter, 24 hour nursing care etc) and essentially expressed that he should die in prison.

⁴ As discussed in Point IV below, the mootness doctrine does not apply when the intervening parole interview is for a *different type of parole*.

ARGUMENT

POINT I

THE PAROLE BOARD'S CLAIMS ARE NOT SUPPORTED BY THE RECORD

36. In addition to relying almost entirely on the nature of the instant offense to deny parole, as discussed below, the reasons the Board gave for the denial were not supported by the record. In particular, the Board claimed that there was a “reasonable probability” that Petitioner would commit another offense – this is essentially impossible, given his life-threatening medical condition, complete dependence on a wheelchair, and need for 24 hour nursing care. It is noted that even *back in 2014, DOCCS found that Petitioner posed a “minimal risk to reoffend.”* Exhibit “C” at 1)

37. The Board made the same spurious claim in *Matter of Coleman*, 2018 NY App. Div. LEXIS 136 (2nd Dep’t 2018), where the Second Department granted a new hearing, stating:

“...[P]etitioner was convicted of two counts of murder in the second degree arising from his killing of a 14 year old acquaintance who refused his sexual advances. The then-17-year old petitioner strangled and beat the victim, then attempted to rape her....

...The Board’s findings that there was a reasonable probability that, if released, the petitioner would not remain at liberty without violating the law, and that his release would be incompatible with the welfare of society... *are without support in the record.*

Thus, a review of the record demonstrates that in light of all the factors, not withstanding the seriousness of the offense, the Parole Board’s ‘determination to deny the petitioner release on parole evinced irrationality bordering on impropriety.’ (*Matter of Goldberg v. NYS Bd. of Parole*, 103 AD3d 634...” *Coleman*, supra, at 1-4, emphasis supplied.

38. Similarly, in *Winchell v. Evans*, 32 Misc.3d 1217(A) (Sullivan Co. 2011), the court granted a new hearing, and said ... “[T]he Board did not produce any evidence that the petitioner would not be a law abiding citizen.”

39. As in *Winchell*, the board did not produce any evidence that Petitioner would not be a law-abiding citizen upon release. In fact, the Board could not explain how it could even be *possible* for Petitioner to violate the law in the future. He certainly can’t ever drive again, and there is simply no reason to believe he would be at risk for committing any other type of offense, given his excellent disciplinary history and all his health conditions.

40. For what it’s worth, it is also noted that despite the board having denied release to the 32 *individuals* whose cases are cited in the footnotes herein, and who were subsequently released to parole supervision, *not a single one of them has been re-imprisoned*.

Release Would not Deprecate the Serious Nature of the Offense

41. The Board, quoting the statutory language in a conclusory fashion, claimed that Petitioner’s release would somehow deprecate the serious nature of the offense and undermine respect for the law. There is no absolutely support in the record for this conclusory claim.

42. In *Matter of Sullivan v. NYS Bd of Parole*, Index No 100865/2018 (New York Co. 2019), the court recently granted a *de novo* hearing, stating:

“Respondent’s written conclusions that 1) petitioner’s release was incompatible with the welfare of society and 2) her release would deprecate the seriousness of her offense and undermine respect for the law merely track the statutory language, without explanation or context. Thus, the Court cannot evaluate their rationality (*see Rossakis*, 146 AD3d at 28). *Inmates are released on parole following murder convictions without doing this sort of damage, and respondent provides no information showing why it concludes that such a risk exists here. ...*” *Sullivan*, at 9-10, emphasis supplied.

43. Similarly, in *Matter of Diaz v. Stanford*, Index No. 2017/53088 (Dutchess Co. 2018), the court likewise granted a new hearing, stating, at 8:

“The Board does not explain in its decision how releasing Mr. Diaz after 27 years of incarceration... would ‘so deprecate the serious nature of the crime as to undermine respect for the law.’”

44. As in *Sullivan* and *Diaz*, the Board’s conclusory claims in this regard were meaningless boilerplate with no support in the record.

45. Finally, the reliance on *over 50-year-old* criminal history, and on “official opposition” to justify denial were likewise misplaced. Petitioner had lived a peaceful law-abiding life for *forty years* before the instant offense, so the ancient criminal history provides no support for the denial. *Matter of Diaz v. Stanford*⁵, Index No. 2017/53088 (Dutchess Co. 2018) (much more recent serious criminal history than that in Petitioner’s case did not warrant denial); *Hopps v. NYS Bd. of Parole*, Index No. 2553/18 (Orange Co. 2018) (26-year-old criminal history did not support denial.)

46. As discussed in Footnote 2, the opposition letter in question was five years old, was based on a faulty understanding of Petitioner’s medical condition even at that time, and essentially expressed a wish for Petitioner (who was *not* given a life sentence) to die in prison.

POINT II

THE PAROLE BOARD IMPROPERLY BASED ITS DECISION ALMOST SOLELY ON THE CIRCUMSTANCES OF THE OFFENSE, AND THUS SAID DECISION WAS ARBITRARY AND CAPRICIOUS, AND SO IRRATIONAL AS TO CONSTITUTE AN ABUSE OF DISCRETION

47. In its Decision denying parole in the instant case, the Board improperly relied almost solely on the seriousness of the offense. In *Rivera v. Stanford*, 2019 NY App. Div. LEXIS

⁵ Jose Diaz was released in June, 2018 and has not been reincarcerated.

3595 (2nd Dep't 2019); *Ferrante v. Stanford*⁶, 2019 NY App. Div. LEXIS 3407 (Second Dep't 2019); *Coleman v. NYS DOCCS*⁸, 2018 NY App. Div. LEXIS 136 (2nd Dep't 2018); *Ramirez v. Evans*⁹, 118 AD3d 707 (2nd Dep't 2014), *Perfetto v. Evans*¹⁰, 112 AD3d 640 (2nd Dep't 2013) and *Matter of Huntley v. Evans*, 77 AD3d 945 (2nd Dep't 2010), the Second Department reversed the denials of new parole hearings where the parole board improperly based the decisions solely on the seriousness of the offense.

2011 Amendments

48. Because the Parole Board had been erroneously basing its decision on the seriousness of the offense all too often, in 2011 the Legislature amended Executive Law 259-c(4) in order to force the Board to more accurately assess the risk of future offense by using a *dynamic assessment focused on change over time* rather than simply on the distant past. The current circumstances show that there is *no actual risk of re-offense* because Petitioner is confined to a wheelchair and required 24/7 nursing care. Yet the Board *still* denied parole to William LeVea, based essentially only on the circumstances of the offense.

49. In *Ramirez v. Evans*, supra, the court stated:

“Although the decision of the New York State Board of Parole (hereinafter the Board) mentioned the petitioner’s institutional record, *it is clear that the Board denied release solely on the basis of the seriousness of the offense...* The Board’s explanation for doing so was set forth in conclusory terms, which is contrary to law.” *Ramirez*, supra, at 707, emphasis supplied.

⁶ Danielle Ferrante is John MacKenzie’s daughter and the representative of his estate – John tragically committed suicide in prison in 201 after his tenth denial of parole.

⁷ Richard Rivera was granted an open date for release in June, 2019.

⁸ David Coleman was released in March, 2018 and has not been reincarcerated.

⁹ Santiago Ramirez was released in April, 2017 and has not been reincarcerated.

¹⁰ Gary Perfetto was released in June, 2016 and has not been reincarcerated.

50. There have also been several other recent court decisions granting or upholding new parole hearings for this reason. *Matter of Hawkins v. NYS DOCCS*, 2016 NY App. Div. LEXIS 3147 (3rd Dep't 2016); *Matter of Hawthorne v. Stanford*¹¹, 2016 NY App. Div. LEXIS 75 (3rd Dep't 2016); *Matter of Kellogg v New York State Bd. of Parole*, 2018 N.Y. App. Div. LEXIS 1469 (1st Dep't 2018); *Slade v. Stanford*¹², Index No. 203/19 (Dutchess Co. 2019); *Almonte v. Stanford*, Index No. 10476/2018 (Orange Co. 2019); *Phillips v. Stanford*, supra; *Almonte v. Stanford*, Index No. 10476/2018 (Orange Co. 2019); *Matter of Diaz v. Stanford*¹³, Index No. 2017/53088 (Dutchess Co. 2018); *Lackwood v. NYS Bd. of Parole*¹⁴, Index No. 2464/2017 (Dutchess Co. 2018); *Hopps v. NYS Bd. of Parole*, Index No. 2553/18 (Orange Co. 2018); *Maddaloni v. NYS Bd. of Parole*¹⁵, Index No. 0623/2018 (Dutchess Co. 2018); *Esquilin v. NYS Bd. of Parole*¹⁶, 2018 NY Misc. LEXIS 483 (Orange Co. 2018); *Clark v. NYS Bd of Parole*, Index No. 160965/2017 (New York Co. 2018); *Ruiz v. NYS Division of Parole*¹⁷, Index No. 2310/2017 (Dutchess Co. 2018); *Ruzas v. Stanford*¹⁸, Index No. 1456/2016 (Dutchess Co. 2017); *Butler v. NYS Bd. of Parole*, Index No. 2703/17 (Dutchess Co. 2018); *Rodriguez v. Bd of Parole*¹⁹, 2016 NY Misc. LEXIS 5111 (Orange Co. 2016); *Darshan v. NYS DOCCS*²⁰, Index No.

¹¹ Philip Hawthorne was released in September, 2016 and has not been reincarcerated.

¹² Even more recently, in *Matter of Slade v. Stanford*, Index No. 203/19 (Dutchess Co. December, 2019) the *Slade* court held the Parole Board in contempt when it held *two* de novo hearings, and still failed to articulate any valid reason for denial beyond the instant offense – the Board was fined \$250 per day until it orders Mr. Slade's release or provides a proper hearing.

¹³ Jose Diaz was released in June, 2018 and has not been reincarcerated.

¹⁴ Mark Lackwood was released on September, 2018 and has not been reincarcerated.

¹⁵ Jack Maddaloni was released in September, 2018 and has not been reincarcerated.

¹⁶ Adolfo Esquilin was released in May, 2018 and has not been reincarcerated.

¹⁷ Carlos Ruiz was released in July, 2018 and has not been reincarcerated.

¹⁸ John Ruzas was released in December, 2017, and has not been reincarcerated.

¹⁹ Alejo Rodriguez was released in June, 2017 and has not been reincarcerated.

²⁰ Travis Darshan was released in September, 2017 and has not been reincarcerated.

652/2017 (Dutchess Co. 2017); *Matter of Ciaprazi v. Evans*²¹, Index No. 0910/2016 (Dutchess Co. 2016); *MacKenzie v. Stanford*²², Index No. 2789/15 (Dutchess Co. 2015); *Matter of Platten v. NYS Bd. of Parole*, 2015 NY Misc. LEXIS 932 (Sullivan Co. 2015); *Matter of Cassidy v. NYS Board of Parole*, 2255/2014, NYLJ 1202727961167 at *1 (Orange Co. 2015.)

51. In *Diaz*, supra, the court recently granted a *de novo* interview in the case of a man who, in 1990 at the age of 21, shot at a rival drug dealer and killed a bystander, who was an assistant district attorney. He had a prior assault, and a later prison contraband charge in 1991. However, he had done extremely well for many years yet had been denied parole several times based on the seriousness of the offense. This time, the court held that the board acted improperly, stating:

“...The role of the Board is to determine whether, *at the time of the hearing*, petitioner should be released, based upon consideration of the statutory factors. ...

No particular length of sentence can bring back the victim or ease his family’s pain and suffering. The only variable that can change is whether the petitioner has been rehabilitated and can safely be released to parole supervision. ...

Here, the sentencing judge ... imposed a sentence of 15 years to life. The Board does not explain in its decision how releasing Mr. Diaz after 27 years of incarceration... would ‘so deprecate the serious nature of the crime as to undermine respect for the law.’

The record before the Court raises the inference that the Board’s stated reasons for denying petitioner parole release are merely pretextual and that its decision was predicated solely on the nature of the offense. Based on all the facts and circumstances of this case, notwithstanding the seriousness of the underlying offense, the Board’s decision to deny Mr. Diaz parole is unsupported by the record and is therefore, irrational bordering on improper.” *Diaz*, supra, at 6, 8-9, emphasis in original.

52. As in *Diaz*, the record shows that the decision herein was really predicated on the offense itself, which is not permissible.

²¹ Roberto Ciaprazi was released in July, 2017 and has not been reincarcerated.

²² Tragically, John MacKenzie committed suicide after having been wrongly denied parole ten times.

53. Even *prior* to the recent amendments which attempted to force the Board to use reality-based assessments, there have been several cases where Board Decisions have been overturned because the Board erroneously based denial of parole solely on the severity of the offense, and was therefore arbitrary and capricious and/or completely irrational. *Friedgood v. NYS Board of Parole*²³, 22 AD3d 950 (3rd Dep't 2005); *Vaello v. Board of Parole*²⁴, 48 AD3d 1018 (3rd Dep't 2008); *Gelsomino v. Board of Parole*²⁵, 82 AD3d 1097 (2nd Dep't 2011); *Malone v. Evans*²⁶, 83 AD3d 719 (2nd Dep't 2011); *Johnson v. Division of Parole*²⁷, 65 AD3d 838 (4th Dep't 2009); *Prout v. Dennison*²⁸, 26 AD3d 540 (3rd Dep't 2006); *Mitchell v. Division of Parole*²⁹, 58 AD3d 742 (2nd Dep't 2009); *Winchell v. Evans*, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Wallman v. Travis*³⁰, 18 AD3d 304 (1st Dep't 2005); *Oberoi v. Dennison*³¹, 19 Misc.3d 1106(A) (Franklin Co. 2008); *Rios v. NYS Division of Parole*³², 15 Misc.3d 1107(A) (Kings Co. 2007); *Weinstein v. Dennison*³³, 2005 NY Misc. LEXIS 708 (NY Co. 2005); *Cappiello v. NYS Board of Parole*³⁴, 2004 NY Misc. LEXIS 2920 (NY Co. 2004); *Almonor v. Board of Parole*³⁵, 16 Misc.3d 1126(A) (NY Co. 2007); *Coaxum v. Board of Parole*³⁶, 14 Misc.3d 661 (Bronx Co.

²³ Charles Friedgood was released in 2007 and has not been reincarcerated.

²⁴ Jose Vaello was released in March, 2012 and has not been reincarcerated.

²⁵ Louis Gelsomino was released in 2011 and has not been reincarcerated.

²⁶ Mark Malone was released in 2011 and has not been reincarcerated.

²⁷ Daniel Johnson was released in 2009 and has not been reincarcerated.

²⁸ William Prout was released in 2009 and has not been reincarcerated.

²⁹ Roger Mitchell was released in 2009 and has not been reincarcerated.

³⁰ Jay Wallman was released in 2005 and has not been reincarcerated.

³¹ Gurpreet Oberoi was released in 2009 and has not been reincarcerated.

³² Ivan Rios was released in 2007 and has not been reincarcerated.

³³ Herbert Weinstein was released in 2006 and has not been reincarcerated.

³⁴ John Cappiello was released in 2005 and has not been

³⁵ Chester Almonor was released in 2007 and has not been reincarcerated.

³⁶ Jean Coaxum was released in 2006 and has not been reincarcerated.

2006); *Schwartz v. Dennison*³⁷, 14 Misc.3d 1220(A) (NY Co. 2006); *King v. New York State Division of Parole*, 190 AD2d 423 (1st Dep't 1993).

54. Therefore, based on *Diaz, Ramirez*, and the other cases cited above, because the Parole Board improperly based its decision almost solely on the severity of the offense, the Court should hold that said decision was arbitrary, capricious and irrational and grant a *de novo* hearing before different commissioners.

POINT III

THE REASONS GIVEN FOR THE DENIAL WERE TOO CONCLUSORY

55. It is clear that the reasons given for parole decisions must be detailed, and not simply conclusory or perfunctory. *Winchell v. Evans, supra; Matter of Rossakis*³⁸ *v. NYS Bd. of Parole*, 146 AD3d 22 (1st Dep't 2016); *Ramirez v. Evans*, 118 AD3d 707 (2nd Dep't 2014), *Perfetto v. Evans*, 112 AD3d 640 (2nd Dep't 2013); *Ruiz v. NYS Division of Parole*, Index No. 2310/2017 (Dutchess Co. 2018); *Almonte v. Stanford, supra*.

56. In the instant case the Decision mouthed the statutory language that there is a “reasonable probability that you will not live and remain at liberty without again violating the law”; and that release “would so deprecate your offense as to undermine respect for the law.” (Exhibit “A” at 12-13) There was absolutely no basis for these statements in the record, and no explanation for them in the decision.

57. In *Almonte, supra*, the court granted a new hearing for this reason, stating:

“...[W]hen the Board denies parole, it is required to inform the inmate in writing of the factors and reasons for the denial, and ‘[s]uch reasons shall be given in detail and not in conclusory terms.’ Executive Law 259-i(2)(a)...

³⁷ Jerrold Schwartz was released in 2008 and has not been reincarcerated.

³⁸ Niki Rossakis was released in March, 2017 and has not been reincarcerated.

Petitioner's 2017 parole denial, vacated by the Appeals Unit, and his 2018 denial contain nearly identical justification, i.e., petitioner's release would be incompatible with the welfare of society and would deprecate the seriousness of the instant offenses and undermine respect for the law. Although these is language indicating that the Board considered more factors and commends Petitioner for his achievements in the 2018 determination such language, however, is no more explanatory or detailed than the 'boilerplate' justification echoed in the previous parole denial decision.

It is particularly ironic that the 'boilerplate' language follows a recitation of petitioner's positive factors, including his lack of other criminal history, his progress and achievements, his clean disciplinary record, etc, and then goes on to conclude that his discretionary release is *thus* incompatible with the welfare of society at large.... *Little could be more contradictory and less informative.*

Reasoning that employs past-centered rhetoric and not future-focused risk assessment analysis is inconsistent with the rational determination of the inquiry at hand, to wit, whether the inmate can live and remain at liberty without violating the law and whether his release was incompatible with the welfare of society and did not deprecate the seriousness of the instant offenses and undermine respect for the law." *Almonte*, supra, at 6-8, some emphasis supplied.

In *Ruzas v. Stanford*, Index No. 1456/2016 (Dutchess Co. 2017) the court stated:

"Despite the existence of, inter alia, Petitioner's low risk of recidivism, low risk of violence, low risk of substance abuse, his family support, his remorse, his planned employment upon release, his age and his recent stroke, the Board summarily denied without any explanation other than by reiterating the laundry list of statutory factors. The minimal attention, barely lip service, given to these factors and to the COMPAS assessment cannot be justified given the amount of time already served. The 'Parole Board denied petitioner's request to be released on parole solely on the seriousness of the offense,' and its 'explanation for doing so was set forth in conclusory terms, which is contrary to law.' Matter of Perfetto v. Evans, 112 AD3d 640, 641 (2nd Dep't 2013)..." *Ruzas*, supra, at 4-5, emphasis supplied.

58. As in *Almonte*, *Ruzas*, and the other cases cited above, this Court should order a new hearing because the reasons given for denial were too conclusory.

POINT IV

THIS PROCEEDING IS NOT MOOT

59. The Appeals Unit claimed in a recent letter that this case was moot because [REDACTED] was denied parole again in January, 2020. But the Appeals Unit may not have realized that the January, 2020 interview was for *Medical Parole*. (See the first two pages of that

transcript, at Exhibit “A” at 14-15)

60. The Second Department has held that the mootness doctrine does not apply when the intervening parole hearing is for a different type of parole than the one challenged. *Abrams v. Stanford*, 150 AD3d 846, 847 (2nd Dep’t 2017) (challenge to denial of conditional parole for deportation only not mooted by subsequent denial of regular parole.) Thus this proceeding is not moot.

CONCLUSION

61. Based on the foregoing, Petitioner [REDACTED] respectfully requests that the Court vacate the Decision of the Parole Board and grant an immediate *de novo* hearing before a different Board.

Dated: June 24, 2020

Kathy Manley
Kathy Manley
Attorney for William LeVea
26 Dinmore Road
Selkirk, New York 12158
518-635-4005
Mkathy1296@gmail.com