Art. 78 Petition - FUSL000120 (2019-08-15)

STATE OF NEW YORK
COUNTY OF ALBANY 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:

Respondent.

The Petition of [redacted] respectfully shows and alleges:

PRELIMINARY STATEMENT

1. Petitioner [redacted] has no history of violence, but when he was an 18 year old high school student back in 1994, his second cousin talked him into participating in a burglary. Tragically, the residents of the house were home at the time, to Petitioner's great surprise, and the cousin proceeded to stab them to death. [redacted], shocked and horrified by what happened, cooperated with police within days of the crime, and was convicted of felony murder and sentenced to twenty-five years to life in prison. This was his first parole appearance.

2. Unable to confront the reality of his situation, and paralyzed by guilt and shame over having failed to prevent the murders, Petitioner used drugs in prison to blunt the pain. This went on for years until 2011, when he entered a highly regarded treatment program and started on the path to recovery. Since then he successfully completed many other programs as well, obtained vocational training in several areas, and became a certified victim's advocate.

3. The parole board erred in several ways, as detailed below. Most significantly, the board's findings were not supported by the record. In particular, the parole board erred because its conclusion that Petitioner was still likely to engage in reentry substance abuse was not

supported by the record (and was contrary to the COMPAS assessment.) In addition, the board erred by basing the denial chiefly on the instant offense, especially given that Petitioner did not himself commit any violent acts. The record shows that [redacted] is ready for release.

STATEMENT OF FACTS

4. [redacted] was convicted upon a jury verdict, of felony murder (his co-defendant killed three people during a burglary in 1994.) (See Sentencing Minutes, attached as Exhibit "A" at 5, 10) He went to trial only because there was no plea offer in the case. (Parole Interview and Decision, attached as Exhibit "B" at 21.) He was sentenced to 25 years to life. (Exhibit "A" at 10-11) [redacted] was only 18 years old at the time of the crime, and is now 43. (Exhibit "B" at 22)

Sentencing Minutes

5. At [redacted] sentencing, the *prosecutor* requested that he be given "some meaningful reduction" from the maximum sentence, because of his lesser involvement in the crimes, and his cooperation with police and the prosecution. The prosecutor stated:

> "…I truly believe that this defendant is deserving of some meaningful reduction in the sentence from the maximum.
>
> It should be noted that the defendant from the outset has indicated both to the police and to our office through his attorney… that he wished to cooperate with law enforcement, and it appears from the physical evidence… that *this defendant is not the stabber and is less culpable* in terms of his behavior and conduct at the crime scene." (Exhibit "A" at 2-3, emphasis supplied)

6. [redacted]'s attorney pointed out that he had no intent to kill or even assault anyone, nor did he do so. (Exhibit "A" at 5) His intent was only to participate in the burglary. (Exhibit "A" at 6) He also pointed out that [redacted] cooperated with police right from the start, before any attorney was involved, stating:

"The Court knows that if he would have had an attorney and the attorney would have gone to the District Attorney and made arrangements, he probably never would have been convicted of felony murder, but probably would have received a lesser plea and received a much lesser sentence… but the parents… believing in police and believing in being truthful, advised their son to go ahead and tell the police what occurred. He went downtown with them and told them his story. He wasn't aware… of the felony murder statute, that even though he didn't commit the crimes, he would be responsible for them…

…He has never whined or cried about what is occurring to him. He [has] stood up and taken it… He has a very limited record, just that one youthful offender matter… He's a talented young man who can be returned to society, and I ask the Court to consider a minimum sentence of 15 to life concurrent…" (Exhibit "A" at 6-8)

7. [redacted] then apologized to the families of the victims, stating:

"…I would like to apologize to the families, and if I knew it was going to happen, I would have stopped. I didn't know it was going to happen. It happened before I could stop it." Exhibit "A" at 8-9)

8. The judge said that it was a difficult decision for him, as he recognized how horrible the crimes were, but also recognized that [redacted] was only culpable due to the felony murder rule, and had not actually stabbed anyone. (Exhibit "A" at 9-10) He decided on a sentence of 25 years to life. (Exhibit "A" at 10-11)

Institutional Record

9. [redacted] has an excellent institutional record, having successfully completed all required programs as well as many other programs which helped in his personal growth and vocational training. While he had several tickets for drug use over the years, he started the recovery process when he entered the Merle Cooper program eight years ago, in 2011. This was a turning point for him and while, as discussed below, after that program was shut down in the fall of 2014, he did have one brief relapse (using Suboxone in January, 2015), he has really transformed himself into someone who is insightful and committed to sobriety. He and

understands what he needs to do to stay sober, has been working on his recovery every day, and will continue to do so, in or out of prison.

Substance Abuse Programs

10. For many years, Petitioner has given particular focus to dealing with his substance abuse history, and has successfully completed many programs which went into a great deal of depth, and gave him the tools he needs for a sober life upon release. Probably the most intense and extensive program was the Merle Cooer Program at Clinton Correctional Facility. Mr. [redacted] participated in that program from April, 2011 until the latter part of 2014, when the program was unfortunately shut down. (Exhibit "B" at 9; program history attached as Exhibit "E" at 17)

11. [redacted] did very well in the Merle Cooper program, and was promoted from Phase I to Phase II in July, 2011; from Phase II to Phase III in September, 2011; and from Phase III to Phase IV in December, 2011. (Exhibit "E" at 17) He also became a peer counselor in the program. (Exhibit "B" at 9; Exhibit "E" at 8)

12. At the interview, Commissioner Agostini discussed the Merle Cooper Program with Petitioner as follows:

> "Q. …I also saw you were in the Merle Cooper Program, which no longer exists. You might have been in one of the last classes of that program. *It was an excellent program.*
> A. Yes, excellent.
> Q. *It's a shame it's been closed.* I'm glad that you were in it. How long were you in Merle Cooper?
> A. From April 21, 2011 until the closing October 2014.
> ***
> A. …I became a peer counselor… It was an excellent program.
> Q. *It certainly has a good reputation.* So, I guess, you were in the last class to the end. I'm glad that you took that program. *It was a very intensive one that had a number of psychologists and was well regarded.* I'm glad that you were a part of that." (Exhibit "B" at 9)

13. [redacted] had been sober for the three years he was in the Merle Cooper Program, but after it was closed, he unfortunately relapsed briefly and had a dirty urine (testing positive for Suboxone[1]) in January, 2015. (Exhibit "B" at 18) He has been sober since that time, four years before the parole interview. Although this brief relapse was pointed to by the parole board as one of the reasons for denial of release, it is submitted that *a single relapse- for Suboxone - in the middle of a seven-year period of sobriety* should not be given so much emphasis. It is noted that the COMPAS risk assessment instrument stated that *reentry substance abuse was unlikely*, and that conclusion has much more support in the record than any contrary finding. (See Exhibit "C" at 1; Exhibit "D") This is especially true considering that, unlike most cases, the substance abuse happened *mainly in prison*, not on the outside. And Petitioner has now shown a sustained ability to stay sober.

14. In addition to spending three years working on substance abuse issues in the highly regarded Merle Cooper Program, [redacted] also completed the six month ASAT drug program in 2018, and completed the 8 week Drug Alert Program in 2017, both while at Groveland Correctional Facility. (Exhibit "D" at 1, 3-5; Exhibit "E" at 15) Significantly, he even facilitated the Drug Alert class after completing it himself. (Exhibit "D" at 7)

---

[1] It is noted that Suboxone is a form of buprenorphine which has been approved by the FDA for Medication-Assisted Treatment (MAT) of opioid dependence. https://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm600092.htm While Petitioner's use of it in January, 2015 wasn't medically approved and was a disciplinary violation, it is still significant that six DOCCS facilities currently use buprenorphine as part of MAT programs. https://www.timesunion.com/news/article/As-deaths-rise-NY-lawmakers-push-for-addiction-13392779.php. See also https://www.nychealthandhospitals.org/pressrelease/correctional-health-services-enhances-care-for-patients-with-opioid-use-disorder/ and https://gothamist.com/2019/07/15/rikers_medication_ny_state_corrections.php

15. Petitioner additionally completed the PASS (Prisoner Assistance Scholastic Service) program on addiction in April, 2013, and attended countless Narcotics Anonymous (NA) meetings, even becoming an NA service board member. (Exhibit "D" at 2-7) He also attends AA meetings and reads the AA literature every day. (Exhibit "B" at 16)

16. Finally, [redacted] put together an extensive Relapse Prevention Plan, detailing a multitude of steps he will take upon release to prevent relapse. (Exhibit "D" at 9-10) In his personal statement to the board, [redacted] stated:

> "During my time in prison my drug use escalated. Using drugs was my way of coping with the shame, embarrassment and guilt of what I participated in and the everlasting pain and suffering I caused to the victims of this crime, their families and people in the community. By using drugs, I took the cowardly way out. The addictive cycle I was caught in continued on for many years (1995-2011) until I chose to participate in the Merle Cooper Program at [redacted].. While participating in this program, I came to the realization that I was not a good person: I had a lot of negative characteristics. The program also helped me realize that I had no coping mechanisms; I was a drug addict and I needed help. Today, I am clean and sober. I continue to apply Narcotics Anonymous principles to my life.
>
> The skills classes in the Merle Cooper program really helped me work on myself. Some of the skill classes I participated in were: Life Skills, Assertiveness Training, Addiction Class, 12 Step Class, STAC (Stop the abuse cycle), and Change group. I participated in Narcotics Anonymous and was a service board member. After some program participation, I was chosen as a peer counselor by the head of the program… Ms. [redacted] I valued that role very seriously and I liked giving back to other people who needed support. …" (Exhibit "D" at 7-8)

Other Programs

17. In addition to the programs which helped him tackle substance abuse, Petitioner also completed many other programs and classes related to personal growth. In 2015 he obtained college credit from Adams State University in Colorado for successfully completing a 3 credit course in Victim Advocacy. (Exhibit "E" at 1-2) Petitioner earned an A in the course. (Exhibit "E" at 2)

18. [redacted] successfully completed ten different PASS classes and was awarded a PASS diploma in Personal Psychological Development in May, 2014 for having done so. (Exhibit "E" at 3-4) The classes were Addiction; Nonviolent Communication; Living With Purpose; Conflict Resolution; Re-Entry Into Society; Parenting; Victim Awareness; Gang Diversion; Domestic Violence; and Anger Management. (Exhibit "D" at 2; Exhibit "E" at 4-13) He also successfully completed the ART (Aggression Replacement Training) program in December, 2013. (Exhibit "E" at 17)

19. The director of the PASS program, [redacted], wrote a letter in support of Petitioner, stating:

> "…I write to acknowledge the academic accomplishments of inmate [redacted] in completing and *exceeding all expectations* in his degree in Personal Psychological Development from the PASS program. … Notably, [redacted] participation was *entirely self-motivated and evidence of his desire to gain introspection and to advance his rehabilitation* [redacted] achieved exceptional marks in his participation in PASS and we were proud to have him as a student as he undoubtedly benefitted from the program." (Exhibit "E" at 3, emphasis supplied)

COMPAS Risk Assessment Instrument

20. A COMPAS Risk Assessment Instrument (RAI) was prepared in order to help determine if [redacted] would be able to live in a law-abiding fashion upon his release. (Risk Assessment Instrument attached as Exhibit "C") The 2018 RAI Risk Assessment *found low risk in every possible category*. (Exhibit "C" at 1) The RAI went on to document that [redacted] has good family support, has a high school diploma, and has the ability to find work in a trade or profession. (Exhibit "C" at 4, 5)

Letters of Support from Family

21. [redacted] wife, [redacted] wrote a letter describing her husband's great remorse and his transformation over the years, stating:

"..[redacted] and I have discussed the night of the crime at length during several of our visits and he has expressed and appeared to be very remorseful for his role that night. [redacted] has participated in many programs in prison to help him learn different life skills and I believe he is not the person he once was 25 years ago.

I... plan to support him during his transition from prison into society. [redacted] has taken the initiative to locate community resources he can utilize to help himself once released. [redacted] is a very motivated individual who genuinely wants to be a productive member of society, he would not return to any sort of criminal activity in the future." (Exhibit "F" at 1)

22. Petitioner's parents, [redacted] and [redacted], also wrote a letter about how [redacted] had matured and rehabilitated himself during his years in prison, stating:

"...Having your son arrested for such a heinous crime is every parents' worst nightmare. ...

During our son's time in prison, he has participated in numerous rehabilitation programs to help better himself... [redacted] progressed to being a Peer Counselor during his time at the Merle Cooper Program... from 2011-2014 and enjoyed his role in the program as he was afforded an opportunity to ... help influence other inmates to make good choices...

...[A]s the years have progressed he has matured as a person, and has realized the magnitude of his actions and has found as many avenues as possible, given his present circumstances, to seek redemption for his wrong doings..." (Exhibit "F" at 2)

23. Finally, [redacted] sister, [redacted] and her husband [redacted], wrote a letter describing Petitioner's transformation, as well as the support network that will be there for him upon release, stating:

"... [redacted] expresses deep remorse, shame and guilt for what happened to the three older gentlemen in April, 1994. He knows... many lives were changed and ruined forever. [redacted] takes full responsibility for his actions. Since he can't turn back time he has no choice but to make the best of the situation that he created. He definitely has grown up throughout the years and became a better person. [redacted] received his GED and was part of the Merle Cooper Program... where he counseled other inmates. He taught classes and tried his best to get other prisoners on the right track as well as keeping his issues in the forefront and continuing to work on himself. He then proceeded to take college courses and received straight A's. He is a certified Victim's Advocate and always demonstrates a desire to improve himself. ...

[redacted] got married last year and has 2 stepchildren. His wife works as a social worker and always checks with him to make sure he's on the right path. [redacted] actively participates in the 12 step NA addiction recovery program. [redacted] has been clean for many years and realizes he is an addict. He ... will utilize all the tools he has acquired through

the programs… Besides his wife, [redacted] has an amazing support system. [redacted] and I will do everything we can to make sure that he always makes the right decisions. My parents will be there to coach him and help him get accustomed to life outside of prison as well. … He has grown so much… throughout the years and I just want him to have a 2nd chance at life. He is not and will not be a danger to society….

…We believe [redacted] is well prepared to make positive re-entry and will contribute to society as a responsible law abiding citizen…" (Exhibit F" at 3-4)

Decision

24. Despite M[redacted] excellent record and low COMPAS scores, the Parole Board denied release, stating:

"Your instant offense involved the brutal stabbing of three elderly men, one of whom was a member of your family[2]. You went with your cousin allegedly to burglarize the home, and purportedly your cousin killed them… You were eighteen years old at the time and on probation. …*You expressed significant remorse* for your crime during the interview.

Under custody *you have excelled in programs,* completing required programs and multiple voluntary programs, including the intensive PASS program, victim advocacy, Merle Cooper program and *recovery programs* among others. Your disciplinary record has been less than satisfactory with numerous drug use tickets over the years with your last being in 2015. Your COMPAS Risk Assessment scores you as a low risk in all categories, including substance abuse which this Panel departs from given your repeated use in prison. …

…In spite of your low risk scores it is the opinion of this panel that your release at this time would so deprecate your offense as to undermine respect for the law. …" (Exhibit "B" at 22, emphasis supplied)

Parole Interview

25. Commissioner Agostini spent the first seven pages of the interview transcript discussing the offense with Petitioner, who was an 18 year-old high school student at the time of the crime. (Exhibit "B" at 2-7) [redacted] described entering the residence intending to help his older second cousin [redacted], who he looked up to, commit a burglary after having been asked

[2] It is noted that, for what it's worth, the board was wrong about one of the victims being a member of Petitioner's family. As [redacted] explained, the victim was his second cousin's great uncle, and was not related to him. (Exhibit "B" at 3)

to do so. (Exhibit "B" at 3) Petitioner had been told that the victims were away, and he wanted to run when one of them came to the door, but stayed wher[redacted] told him to. (Exhibit "B" at 4) [redacted] went in the house and Petitioner was shocked when he heard noises showing that [redacted] was struggling with the victims. (Exhibit "B" at 4-5)

26. Petitioner then entered the house when he heard[redacted] calling his name, and he saw one victim ([redacted]s great-uncle,[redacted]) lying on the floor in a pool of blood. (Exhibit "B" at 3, 5) He ran upstairs and asked [redacted] what he was doing, saying 'let's get out of here.' (Exhibit "B" at 6. When [redacted] tried to give him a knife and asked him to stab another of the victims, Petitioner ran out of the house to the car they had arrived in, and waited for [redacted] to return. (Exhibit "B" at 6)

27. As acknowledged in the Decision,[redacted] expressed great remorse for his role in the crimes, stating, "I went there to do the burglary. I did nothing to stop it. I've been living with that since the night it happened and I let three innocent men die. … A very heinous death." (Exhibit "B" at 6) Later he said:

> "…I can never make amends for what happened. The only thing I can do is better myself as a person.
>
> The ripple effects were horrible, ma'am. I mean, I destroyed three lives, the community as a whole knowing what happened in the neighborhood, the residents that lived there, their kids, their families. Three men were brutally murdered. I did nothing to stop it. Their families are forever in pain. I mean, I can never apologize for that. Their families are probably always going to deal with that, always. I did nothing to stop it, ma'am, and I should have. I didn't know that was going to happen, ma'am." (Exhibit "B" at 7)

28. Commissioner Agostini then went on to discuss the academic, vocational and rehabilitative programs Petitioner had completed, which included getting his GED; completing the ART and ASAT programs, getting his barber certificate, as well as other programs. (Exhibit "B" at 8) She then discussed his history of addiction, noting several tickets for drug use in

prison, including one in 2015. (Exhibit "B" at 8) As cited above, Petitioner explained his understanding of his addiction, and then they discussed the Merle Cooper Program and how much it had helped him. (Exhibit "B" at 8-9.) Commissioner Agostini also said she was disappointed that the drug use had lasted as long as it had, and that she disagreed with the COMPAS assessment that reentry substance abuse was unlikely. (Exhibit "B" at 9-10)

29. When Commissioner Agostini asked [redacted] what he had learned from all his programs, he stated:

> "I've learned from these programs that I had a lot of negative characteristics and I've rectified a lot of them. Obviously, addiction is very huge and has to be number one. My sobriety has to be the number one thing in my life. It's a day to day process. I'm an addict, ma'am. The only time I'll be recovered is when I pass away. I have to stay disciplined. I can't get complacent with that… I used for a lot of years. A lot of years I had the shame and the guilt, what I did. … I'd like to continue treatment. I've done everything I can in here with the treatment that's available and I continue to work on it." (Exhibit "B" at 10)

30. Later, responding to questions from Commissioner Coppola, Petitioner stated:

> "Being an addict, Mr. Coppola, it's not easy…*I attend AA meetings. I read my literature every day.* …Like you said, I did try to escape reality, the guilt and shame of being in prison… I made a lot of really bad decisions that night, really bad decisions. Because of that three innocent men were brutally murdered. I can never make amends for that… All I can do is continue to work on myself and using drugs was a big thing for me…" (Exhibit "B" at 16, emphasis supplied.)

31. Still later, responding to Commissioner Drake, [redacted] stated:

> "I still have negative characteristics. …I work on it a lot and I still have a lot to work on. … I turned off my emotions for many years. … I didn't want to face everything that I did until I became sober and I had no choice but to face it. The Merle Cooper program really – for many years I didn't think I was an addict until I started doing twelve step classes. I realized they were talking about me… I had the stereotype of what an addict was. I never looked at myself as an addict. I looked at myself as a person who uses drugs but I am an addict. … I have to stay busy with my sobriety and recovery." (Exhibit "B" at 18-19)

32. Commissioner Agostini said that Petitioner's case plan was "really nice," noting a lot of positive goals, some of which were already completed. (Exhibit "B" at 10-11) [redacted] said that upon release he would attend NA meetings, find a job, probably in construction or in barbering, a skill he had learned in prison – he also said he was a certified victim's advocate so he could do some volunteer work in that capacity. (Exhibit "B" at 12)

33. At the end of the interview Petitioner reiterated how committed he was to his recovery, and how remorseful he was about his role in the offense. (Exhibit "B" at 20-21)

Administrative Appeal

34. On July 10, 2019 the Board's determination was affirmed in the Administrative Appeal Decision Notice. (Exhibit "G") The Decision stated erroneously, *inter alia,* that the Board was entitled to deny release based on the seriousness of the offense; that the Decision was sufficiently detailed; and that the departure from the COMPAS finding regarding substance abuse was warranted." (Exhibit "G" at 2, 4, 5)

ARGUMENT

POINT I

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

35. In addition to relying chiefly on the nature of the instant offense to deny parole, as discussed below, the other reasons the Board gave for the denial were not supported by the record, and some of them were entirely conclusory.

Re-Entry Substance Abuse is not Likely

36. As discussed at length above, [redacted] (whose offense was not shown to be connected to substance abuse anyway) used drugs for several years in prison as a way to escape

from his situation and to avoid feeling so much guilt and shame about his role in the offense. However, with the exception of a brief relapse 4 years ago when he used Suboxone (which is increasingly used by DOCCS and other facilities in Medication Assisted Treatment, although that was not the case herein) [redacted] has been sober since 2011, when he entered the highly regarded Merle Cooper program at [redacted].

37. The record of his treatment success in this and other programs, the fact that he was chosen to help teach drug treatment programs, and all the statements he made during his interview, show that Petitioner is very insightful and has the tools to maintain his sobriety. One single relapse with Suboxone, which occurred four years ago soon after the Merle Cooper program was abruptly terminated by DOCCS, does not mean he is likely to use illegal drugs upon release. The COMPAS instrument found that re-entry substance abuse was *not likely*, and the record shows this finding to be correct.

38. There are several cases where courts have granted new hearings because the board's findings were not supported in the record. *Matter of Coleman v. DOCCS*, 2018 NY App. Div. LEXIS 136 (2nd Dep't 2018); *Winchell v. Evans*[3], 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Matter of Eckardt-Rigberg v. Stanford*, Index No. 1638-16 (Sullivan Co. 2017); *Matter of Sullivan v. NYS Bd of Parole*, Index No. 100865/2018 (New York Co. 2019); *Slade v. Stanford*, Index No. 203/19 (Dutchess Co. 2019); *Matter of Lackwood v. NYS Bd of Parole*, Index No. 2464/2017 (Dutchess Co. 2018).

39. In *Lackwood*, supra, where, unlike the instant case, the COMPAS found that reentry substance abuse was *likely,* and the parole board claimed this concern was a reason to

[redacted] was released in 2011 and has not been reincarcerated.

justify denial, the court granted a new hearing because this was not supported by the record, stating, at 7, "…Respondent Board's 'concern' about re-entry substance abuse is not supported by the unredacted records available to the Commissioners."

40. As in *Lackwood*, the Board's alleged concern about re-entry substance abuse is not supported by the record, and is not even supported by the COMPAS finding herein. It is also worth considering that, unlike the majority of cases, Petitioner's substance abuse occurred *mainly in prison* (and wasn't related to his offense anyway.) He has now maintained four complete years of sobriety, after a brief Suboxone relapse following another 3-4 years of sobriety, and he shows a clear understanding of his addiction and what he needs to do to remain in recovery.

There is Nothing in the Record Indicating a Likelihood of Re-offense

41. As in *Coleman* and *Winchell*, supra, the record contained no indication that Petitioner was likely to violate the law if released. His institutional record was excellent, and there are simply no facts showing any likelihood of re-offense. Interestingly, unlike the majority of decisions, *the decision herein did not even claim that Petitioner would be likely to violate the law upon release*. This is the key factor in the statute and if the board does not believe there is a likelihood of recidivism, they should have granted release.

42. It is also quite instructive to note that despite the board having denied release to the *41 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.* This is rather incredible, given the recidivism rates generally for people released to parole supervision.

Release Would not Deprecate the Serious Nature of the Offense

43. The Board did claim, mouthing the statutory language, that Petitioner's release

would somehow deprecate the serious nature of the offense and undermine respect for the law. Again, given Petitioner's clear acceptance of responsibility and expressions of remorse for his role in the offense (where, again, he was not personally involved in the murders), coupled with his excellent institutional record, there is no absolutely support in the record for this conclusory claim.

44. In *Matter of Sullivan v. NYS Bd of Parole*, supra, the court very 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.

45. 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.'"

46. As in *Sullivan* and *Diaz*, the Board's conslusory claims in this regard were meaningless boilerplate with no support in the record.

The Departure from the COMPAS Score was Not Supported by the Record

47. In September, 2017, the Parole Board's new Rule, adopted at its April, 2017 meeting, went into effect, and thus was in effect at the time Petitioner went to the Board in May, 2018. The Rule mandates that the Board must provide individualized reasons for any departure from the COMPAS scores. In this case, the Board departed from the COMPAS Risk and Needs Assessment's finding that re-entry substance abuse was unlikely.

48. Recently, in *Comfort v. NYS Bd. of Parole*, Index No. 1445/2018; *Robinson v. Stanford*, Index No. 2392/18 (Dutchess Co. 2019); and *Sullivan*, supra, the courts granted *de novo* hearings because the Board did not adequately explain its departure from the low COMPAS scores. As discussed above, a new hearing should be granted because the board's claims regarding substance abuse – and its concomitant departure from the well-supported COMPAS finding - were not supported by the record.

Age is a Factor Supporting Release Herein

49. In addition to the arguments presented above, it is noted that [redacted]'s age is an important factor to be considered, both his young age (18) at the time of the offense, and the fact that he is now 43 years old, an age when there is a low risk of re-offense.

50. [redacted] was only 18, immature, and in high school at the time of the offense herein. Although not technically a juvenile offender, the same considerations with regard to the hallmarks of youth discussed in *Graham v. Florida*, 560 US 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Matter of Ruiz*, Index No. 2310/2017 (Dutchess Co. 2018); *Matter of Putland v. NYS DOCCS*, 158 AD3d 633 (2nd Dep't 2018); and *Matter of Hawkins v. NYS DOCCS*[4], 2016 NY App. Div LEXIS 3147 (3rd Dep't 2016), still should apply.

51. In *Ruiz*, where the petitioner had been convicted of murder in 1988, and then in 1991 and 1992 was convicted of a fatal prison assault as well as a separate conviction for weapons possession, the court granted a *de novo* hearing, and stated:

> "Petitioner committed the underlying offense… when he was just 17 years of age. … …[P]etitioner indicated that he was 'young and stupid,' susceptible to peer pressure

[4] Dempsey Hawkins was released in January, 2017 and has not been reincarcerated.

> and was 'not thinking at the time.' … He indicated that he felt he had a debt that he could never repay but wanted to demonstrate that he had changed.
>
> ***
>
> …[W]hile petitioner's accomplishments and adolescent age at the time of the initial crime were mentioned, it appears that they were dismissed solely based upon petitioner's crimes.
>
> ***
>
> …Other than a mere reference to the fact that petitioner was an adolescent at the time the record is devoid of any evidence that the Board considered this fact and its attendant characteristics in relationship to the commission of the crime…" *Ruiz*, supra, at 6-10.

52. [redacted] was about the same age as Mr. Ruiz was at the time of the crime and, as discussed above, also was an immature adolescent very susceptible to peer pressure, particularly from his older cousin/ co-defendant. While petitioner, who was 18 at the time of the offense, may not have the same absolute Eighth Amendment and due process rights as Mr. Ruiz, who was just a year younger at the relevant time, it is submitted that the same factual considerations apply. The board should have taken this into consideration, but appears not to have even been aware that the hallmarks of adolescence were relevant here at all.

53. In addition, Petitioner is now 43, an age when there is a low risk of re-offense. In *US v. Presley*, No. 14-2704 (7th Cir. June 11, 2015), Judge Richard Posner emphasized the research showing that people over the age of 40 pose a low risk of re-offense, stating:

> "Violent crime... is generally a young man's game. Elderly people tend to be cautious, often indeed timid, and averse to physical danger. Violent crime is far less common among persons over 40…than among younger persons...." *Presley*, at 3.

54. Therefore, the board should have taken into consideration both [redacted] adolescence at the time of the crime, which is a mitigating factor; and his age now, which signals a low risk of recidivism.

POINT II

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

55. In *Silmon v. Travis*[5], 95 NY2d 470, the Court of Appeals discussed the standard the Parole Board must utilize in determining whether to release someone, stating:

> "The Board follows the legislative mandate of ensuring that the prospective parolee 'will live and remain at liberty without violating the law, and that his [or her] release is not incompatible with the welfare of society and will not so deprecate the seriousness of [the] crime as to undermine respect for the law.' (Executive Law 259-i[2][c][A]). ..." *Silmon v. Travis*, at 476

56. In its Decision denying parole in the instant case, the Board *did not even claim* that [redacted] would be likely to violate the law again. Aside from its unsupported concern as to re-entry substance abuse, the main factor relied upon to deny parole was the circumstances of the offense, where Petitioner's role was one of a burglar whose co-defendant killed three people. Petitioner feels incredibly remorseful for his participation in this offense, and for not having prevented the murders, but *he was not the killer*, and it is completely improper for the board to deny release due to the seriousness of the offense alone.

57. In *Rivera v, Stanford*, 2019 NY App. Div. LEXIS 3595 (2nd Dep't 2019); *Ferrante v. Stanford*[6], 2019 NY App. [7]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

---

[5] [redacted]s released in 2002 and has not been reincarcerated.

[6] [redacted] is [redacted]s daughter and the representative of his estate – [redacted] tragically committed suicide in prison in 201 after his tenth denial of parole.

[7] [redacted]ra was released in June, 2019 and has not been reincarcerated.

[redacted]as released in March, 2018 and has not been reincarcerated.

[9] [redacted]as released in April, 2017 and has not been reincarcerated.

(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 appellate courts stated that it was improper to based denial of release solely on the seriousness of the offense.

2011 Amendments

58. 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 Board began this process by creating a Risk Assessment Instrument which was utilized in the instant case and, as discussed above, which *showed low risk of re-offense in every single category*. Yet the Board *still* denied parole to [redacted] based largely on the circumstances of the offense.

59. 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.

60. 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); *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (New York Co. 2019);

---

[10] [redacted] to was released in June, 2016 and has not been reincarcerated.

[11] [redacted] as released in September, 2016 and has not been reincarcerated.

Almonte v. Stanford, Index No. 10476/2018 (Orange Co. 2019); *Matter of Diaz v. Stanford*[12], Index No. 2017/53088 (Dutchess Co. 2018); *Lackwood v. NYS Bd. of Parole*[13], Index No. 2464/2017 (Dutchess Co. 2018); *Maddaloni v. NYS Bd. of Parole*[14], Index No. 0623/2018 (Dutchess Co. 2018); *Esquilin v. NYS Bd. of Parole*[15], 2018 NY Misc. LEXIS 483 (Orange Co. 2018); *Ruiz v. NYS Division of Parole*[16], Index No. 2310/2017 (Dutchess Co. 2018); *Ruzas v. Stanford*[17], Index No. 1456/2016 (Dutchess Co. 2017); *Rodriguez v. Bd of Parole*[18], 2016 NY Misc. LEXIS 5111 (Orange Co. 2016); *Darshan v. NYS DOCCS*[19], Index No. 652/2017 (Dutchess Co. 2017); *Matter of Ciaprazi v. Evans*[20], Index No. 0910/2016 (Dutchess Co. 2016); *Matter of Bruetsch v. NYS DOCCS*[21], 43 Misc.3d 1223(A) (Sullivan Co. 2014); *Matter of Rabenbauer*[22] *v. NYS DOCCS*, 2014 NY Misc. LEXIS 4824 (Sullivan Co. 2014); *Matter of Stokes v. Stanford*[23], 43 Misc.3d 1231(A) (Albany Co. 2014); *Matter of McBride*[24] *v. Evans*, 42 Misc.3d 1230(A) (Dutchess Co. 2014); *Matter of West*[25] *v. NYS Bd. Of Parole*, 41 Misc.3d 1214(A) (Albany Co. 2013).

61. In *Sullivan*, supra, the court recently granted a *de novo* hearing, stating:

> "…Petitioner still maintained that she did not commit the murder…
> ***

---

[12] Jose Diaz was released in June, 2018 and has not been reincarcerated.
[13] Mark Lackwood was released on September, 2018 and has not been reincarcerated.
[14] Jack Maddaloni was released in September, 2018 and has not been reincarcerated.
[15] Adolfo Esquilin was released in May, 2018 and has not been reincarcerated.
[16] Carlos Ruiz was released in July, 2018 and has not been reincarcerated.
[17] John Ruzas was released in December, 2017, and has not been reincarcerated.
[18] Alejo Rodriguez was released in June, 2017 and has not been reincarcerated.
[19] Travis Darshan was released in September, 2017 and has not been reincarcerated.
[20] Roberto Ciaprazi was released in July, 2017 and has not been reincarcerated.
[21] John Bruetsch was released in September, 2017 and has not been reincarcerated.
[22] Philip Rabenbauer was released January 20, 2015 and has not been re-imprisoned.
[23] Robert Stokes was released in May, 2016 and has not been reincarcerated.
[24] Moses McBride was released March 10, 2014 and has not been re-imprisoned.
[25] Michael G. West was released October 7, 2014 and has not been re-imprisoned.

> …Where the petitioner makes 'a convincing showing' that the board reached its determination 'based *almost* exclusively on the nature and seriousness of the offense,' the decision may be overturned. (*Matter of Wallman v. Travis*, 18 AD3d 304, 307 [1st Dep't 2005] [emphasis supplied.])
>
> …[R]espondent relied almost exclusively on the seriousness of the crime, with a brief mention of the statements Petitioner had made 25 years earlier at her sentencing hearing…." *Sullivan*, supra, at 5, 8-9, emphasis in original.

62. In contrast to the petitioner in *Sullivan*, [redacted] has always accepted responsibility for his role in the offense; he was not the killer nor was he directly involved in the stabbings committed by his co-defendant. Yet *the parole board relied chiefly on the brutal nature of the* ***co-defendant's actions*** *to justify denial*, stating:

> "Your instant offense involved the brutal stabbing of three elderly men… You went with your cousin allegedly to burglarize the home… and purportedly your cousin killed them with repeated stabbings. … The pain, fear and sadness in which each of these men died is unfathomable. You expressed significant remorse…
> ***
> …*In spite of your low risk scores*, it is the opinion of this Panel that your release at this time would so deprecate your offense as to undermine respect for the law…" (Exhibit "B" at 22)

63. 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, some emphasis supplied.

64. Likewise, in *Slade* supra, where the defendant had killed a three month old baby to exact revenge on his estranged wife, the court granted a *de novo* hearing where the board had based its decision almost solely on the seriousness of the offense and had engaged in an improper resentencing, stating:

> "…Here, the facts set forth in the Board's written decision… are a recitation of [the petitioner's] crime of conviction, a statement about his 'past history of violence towards women' and a statement that 'you haven't integrated how your behavior towards women manifested itself in violence.'
>
> …Here, the record before the Parole Board shows no factual support for its ultimate basis for denying parole; a finding that Petitioner either will commit or does not understand his violent behavior toward women. …While the Parole Board is clearly permitted to place a greater emphasis on the gravity of the offense committed (and this offense was clearly of the gravest type)… it may not rely solely upon that offense as a basis to deny parole…
>
> *It appears to this court that the Board's determination is based on its independent opinion as to the length of time Petitioner should remain incarcerated…* instead of evaluating whether Petitioner's release is warranted based on the balance of the statutory factors…While the severity of the crime lends understanding to the Board's determination, neither the Board nor this court may usurp the authority of the sentencing court which imposed 15 years (to life)…" *Slade*, supra, at 3-4, emphasis supplied

65. As in *Slade* and *Diaz*, the record herein shows that the board's stated reason for denial beyond the offense itself (their unsupported concern as to substance abuse) was pretextual. As discussed above, even the prosecutor herein recognized that Petitioner should be shown some leniency, and the judge struggled with what sentence to impose, choosing 25 years to life. Given

his excellent record, the Board's denial of release after the 25 year minimum term has been served, due to the nature of the offense, constitutes an improper resentencing.

66. 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*[26], 22 AD3d 950 (3rd Dep't 2005); *Vaello v. Board of Parole*[27], 48 AD3d 1018 (3rd Dep't 2008); *Gelsomino v. Board of Parole*[28], 82 AD3d 1097 (2nd Dep't 2011); *Malone v. Evans*[29], 83 AD3d 719 (2nd Dep't 2011); *Johnson v. Division of Parole*[30], 65 AD3d 838 (4th Dep't 2009); *Prout v. Dennison*[31], 26 AD3d 540 (3rd Dep't 2006); *Mitchell v. Division of Parole*[32], 58 AD3d 742 (2nd Dep't 2009); *Winchell v. Evans*, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Wallman v. Travis*[33], 18 AD3d 304 (1st Dep't 2005); *Oberoi v. Dennison*[34], 19 Misc.3d 1106(A) (Franklin Co. 2008); *Rios v. NYS Division of Parole*[35], 15 Misc.3d 1107(A) (Kings Co. 2007); *Weinstein v. Dennison*[36], 2005 NY Misc. LEXIS 708 (NY Co. 2005); *Cappiello v. NYS Board of Parole*[37], 2004 NY Misc. LEXIS 2920 (NY Co. 2004); *Almonor v. Board of Parole*[38],

---

[26] Charles Friedgood was released in 2007 and has not been reincarcerated.
[27] Jose Vaello was released in March, 2012 and has not been reincarcerated.
[28] Louis Gelsomino was released in 2011 and has not been reincarcerated.
[29] Mark Malone was released in 2011 and has not been reincarcerated.
[30] Daniel Johnson was released in 2009 and has not been reincarcerated.
[31] William Prout was released in 2009 and has not been reincarcerated.
[32] Roger Mitchell was released in 2009 and has not been reincarcerated.
[33] Jay Wallman was released in 2005 and has not been reincarcerated.
[34] Gurpreet Oberoi was released in 2009 and has not been reincarcerated.
[35] Ivan Rios was released in 2007 and has not been reincarcerated.
[36] Herbert Weinstein was released in 2006 and has not been reincarcerated.
[37] John Cappiello was released in 2005 and has not been
[38] Chester Almonor was released in 2007 and has not been reincarcerated.

16 Misc.3d 1126(A) (NY Co. 2007); *Coaxum v. Board of Parole*[39], 14 Misc.3d 661 (Bronx Co. 2006); *Schwartz v. Dennison*[40], 14 Misc.3d 1220(A) (NY Co. 2006); *King v. New York State Division of Parole,* 190 AD2d 423 (1st Dep't 1993).

67. Therefore, based on *Diaz, Ramirez, Sullivan, Slade*, and the other cases cited above, because the Parole Board improperly based its decision chiefly on the severity of the offense, this 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

68. 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*[41] *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); *Maddaloni v. NYS Bd. of Parole*, Index No. 0623/2018 (Dutchess Co. 2018); *Morales v. NYS Board of Parole*, Index No. 934/2017 (Dutchess Co. 2017); *Matter of Bruetsch v. NYS DOCCS*, 43 Misc.3d 1223(A) (Sullivan Co. 2014); *Matter of McBride v. Evans*[42], 42 Misc.3d 1230(A) (Dutchess Co. 2014); *Matter of West v. NYS Bd. Of Parole*, 41 Misc.3d 1214(A) (Albany Co. 2013); *Matter of Kozlowski*[43] *v. NYS State Bd. Of Parole*, 2013 NY Misc. LEXIS 552 (NY Co. 2013).

---

[39] Jean Coaxum was released in 2006 and has not been reincarcerated.
[40] Jerrold Schwartz was released in 2008 and has not been reincarcerated.
[41] Niki Rossakis was released in March, 2017 and has not been reincarcerated.
[42] Moses McBride was released in March, 2014 and has not been reincarcerated.
[43] L. Dennis Kozlowski was released January 17, 2014 and has not been re-imprisoned.

69. In the instant case the Decision only perfunctory noted Petitioner's excellence in programming and low COMPAS scores across the board, and then went on to deny release based on what occurred in 1994, and on an alleged concern about substance abuse which is not supported by the record. The board also mouthed the statutory language that release "would so deprecate your offense as to undermine respect for the law." (Exhibit "B" at 22) There was absolutely no basis for this statement in the record, and *no explanation* for it in the decision.

70. In *Winchell v. Evans*, supra, the court granted a new hearing, before different board members, for the same reason, stating:

> "...[W]here the Parole Board 'focuses, as here, *almost entirely on the nature of the petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion* and does not comport with the statutory scheme.' *Stanley v. New York State Bd. of Parole*, 2011 NY Slip Op. 21136 (Sup. Ct., Orange Cty., 2011) ...
> ***
> *... [T]he Board did not produce any evidence that the petitioner would not be a law abiding citizen.*
> ***
> **ORDERED,** that the *de novo* hearing shall consist of Parole Board members who have not previously sat on any prior parole hearing involving the above captioned inmate..." *Winchell v. Evans*, supra, at 5-6, emphasis supplied.

71. As in *Winchell,* the board did not produce any evidence that [redacted] would not be a law-abiding citizen upon release, and did not even claim that he would not be law-abiding upon release.

72. In *Ruiz* v. *NYS Division of Parole*, supra, the court recently granted a *de novo* hearing because the reasons given for denial were too conclusory, stating:

> "In 1988 petitioner was convicted of murder in the second degree…
> Subsequently, petitioner was sentenced in 1991 …for a conviction of assault in the second degree during which petitioner fatally stabbed another inmate… and in 1992 … for a conviction of attempted promotion of prison contraband.. for possessing a four inch shank. …
> ***

> The Board must set forth an explanation for its determination in detail and not just conclusory terms…
>
> ***
>
> The 2011 amendments to the Executive Law represent a shift in focus from offense driven to a more forward thinking consideration of whether an inmate has been rehabilitated and is ready for release…
>
> ***
>
> After a review of the entire record, the Court cannot determine from the cursory nature of the Board's decision how it utilized its risk assessment procedures or applied the statutory factors in concluding that petitioner's release was incompatible with the safety of society **at this time**. …
>
> ***
>
> …*While the Board recited other factors, it failed to give any real explanation for its decision other than in conclusory terms,* in violation of Executive Law 259-i(2)(a)…
>
> … the language in the written determination is perfunctory at best as to the consideration given to the relevant statutory factors by the Parole Board. Therefore, the Court finds that the Parole Board has violated its statutory commitment by failing to provide a detailed decision as to the basis for the denial of parole release..." *Ruiz*, supra, at 1, 5-8, 10-11, some emphasis supplied.

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

74. As in *Winchell, Ruiz, Ruzas,* and the other cases cited above, the appeals unit should order a new hearing because the reasons given for denial were too conclusory.

POINT IV

THE BOARD VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

75. Because the board's decision herein was arbitrary and capricious and an abuse of discretion, it also violated Petitioner's right to due process under the Constitutions of this State and the United States. *Winchell v. Evans*, supra, which found a due process violation under the same circumstances, stating:

> "...[R]espondents have again failed to perform the duties required of them by law as to Petitioner Craig Winchell. They have made their determinations in violation of lawful procedures, and their determination has been arbitrary and capricious. This Board has abused their discretion. Consequently, the Petitioner *has been deprived of his entitlement, under the Constitutions of this State, and the United States, to due process of law in the instant parole hearing*." *Winchell*, at 5, emphasis supplied.

76. More recently, the Second Circuit Court of Appeals remanded a case for consideration of whether the aforementioned 2011 Amendments created a due process interest. *Linares v. Annucci*, 2017 U.S. App. LEXIS 19964 (2nd Cir. 2017.)

CONCLUSION

77. Based on the foregoing, Petitione[redacted] respectfully requests that this Court vacate the Decision of the Parole Board, grant an immediate *de novo* hearing before commissioners who did not sit on the January, 2019 Board, and direct that the Board *not* deny release based solely on the nature of the offense(s).

Dated: August 15, 2019.

Kathy Manley
Kathy Manley
Attorney for [redacted]

28