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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. The Parole Board Decision denying parole to [REDACTED] was illegal because the parole board improperly relied solely on the seriousness of the offense, and failed to provide adequately detailed reasons justifying the denial. In addition, the presumption of release afforded by her Earned Eligibility Certificate was not rebutted. Petitioner, who was remorseful from day one, has absolutely no criminal history, and a completely clean disciplinary record. She has done nothing wrong, and everything right, since the day of the offense, and the record shows she poses absolutely no threat to the community.

STATEMENT OF FACTS

2. [REDACTED] was convicted, via a plea, of Vehicular Manslaughter in the second degree, Manlslaughter in the second degree, and DWI, and she was sentenced to concurrent terms of 2 1/3 to 7 years incarceration. (Parole Board Transcript, attached as Exhibit "A" at 2) Ms. [REDACTED] has absolutely *no criminal history*. (Exhibit "A" at 17)

3. Petitioner was extremely remorseful right from the start, and that has certainly not changed. She has no criminal history whatsoever, and an excellent institutional record, with no disciplinary violations at all. She has completed her required programs, and also earned a college degree while in prison.

Institutional Record

4. Ms. [REDACTED] obtained an Earned Eligibility Certificate. (Decision Notice, attached as Exhibit "A" at 30) She also obtained her Associates Degree in Liberal Arts from Medaille College and is currently working on a Bachelor's Degree in Macroeconomics from Ohio University. (Exhibit "A" at 18; Exhibit "C" at 1; Exhibit "D" at 5)

5. Petitioner has successfully completed a variety of programs which have helped her both in dealing with substance abuse, and with coping mechanisms and life skills in general. These include the DWI Program, which she successfully completed on August 9, 2019; the Aggression Replacement Training (ART), which she completed on 5/6/18, and Alternatives to Violence Project (AVP) programs. (Exhibit "A" at 18; Exhibit "C" at 1-2. *Significantly, she was asked to be a panel leader in the DWI program.* (Exhibit "C" at 1)

6. [REDACTED] wrote a letter to the Parole Board in which she expressed deep remorse, and described how, while she never was much of a drinker, she was so distraught on the day in question that she turned to alcohol, and then made the disastrous decision to drive. Ms. [REDACTED] described how she has worked hard to understand how this could have happened, and has worked on herself diligently to make sure nothing like it ever happens again. She also talked about how she will have plenty of support upon release, including from her father and step mother, who have 60 years of sobriety between them. She stated:

“...My fears led me to a behavior that astonishes me to this day, since it is an atypical behavior for me – I turned to relief drinking. I am utterly disappointed and outraged with myself over my abnormal behavior that has brought overwhelming pain and sorrow to family, friends and an entire community who knew [REDACTED].

... [REDACTED] and her loved ones are the first thing that enters my mind every morning, and my last thought before I sleep. I pray for all affected by my poor decision...

...I understand the full impact of my irresponsible act on my victims and the ripple effect it has caused. To me understanding and acceptance is not satisfactory enough, hence my plan to give back. ...Becoming an active advocate ... by joining impact panels, seeking speaking appearances and using my knowledge and education gained through Albion to inform communities by sharing by real life experience.

The past two years at Albion I have been diligently working on positive internal change. This includes my own thought process, feelings, behaviors, emotional and mental growth and overall self improvement. ...

...I have completed my Associates Degree through Medaille College, and am currently enrolled in Ohio University taking Macroeconomics continuing my Bachelors through correspondence. Completing ART on 5/6/2018 and planned completion of my final mandatory program DWI (*where I have been asked to be a panel leader*) on 8/9/19. I have ...[been] learning various coping skills to keep balance of my life. I have also gained insight participating in AVP I and AVP II, and [am] on the waiting list for AVP III. ...

...I will be returning home to a safe, secure, loving and supportive environment. ...I am excited to finish my Bachelors and continue to help others... Continued treatment with my therapist Donna Schoss will keep me on track to heal and move forward... My father and step-mother (Bob and Laura) have over 60 years sobriety combined, and I plan on relying on them both as a gateway for my success...” (Exhibit “C” at 1-2)

COMPAS Risk Assessment Instrument

7. A COMPAS Risk Assessment Instrument (RAI) was prepared in order to help determine if Ms. [REDACTED] would be able to live in a law-abiding fashion upon his release. (2019 Risk Assessment page attached as Exhibit “B”) The RAI found low risk in every category except re-entry substance abuse. (Exhibit “B” at 1)

8. It is submitted that the finding that reentry substance is “highly probable” was erroneous. In addition, the RAI wrongly stated, at 4, that she had a history of problems with alcohol – there is no support for that in the record. As noted above, Petitioner has *no criminal history whatsoever*, and although she had a prior addiction to opiates, which she overcame (as

she discussed in the interview), she had no prior history of alcoholism. On the day of the offense, she was devastated by the end of her long term relationship, and she made the horrible decision to drink and drive.

9. The RAI also noted that Petitioner has family support, has met her educational needs, and would have no problem finding employment upon release. (Exhibit "B" at 4-5)

Letters of Support

10. At least twenty-eight people wrote letters of support for [REDACTED], all of them extolling her character and strongly supporting release. Counselor [REDACTED], LCSW-R, wrote a letter about her treatment of Petitioner over the five-month period from the time she was released from the hospital after the accident until her incarceration. [REDACTED] stated:

"...I first met with Ms. [REDACTED] on October 28, 2016 after the incident... We met regularly until March 29, 2017... She attended counseling sessions weekly. She always arrived on time and was conscientious about dealing with the issues surrounding the accident...

Ms. [REDACTED] ... appeared sincere in her own horror that she had been involved in such an accident, the details of which she had never been able to fully recall. This may have been due to head trauma that she had suffered at the time. She responded positively to feedback from me and stated that she accepted responsibility for the event." (Exhibit "D" at 1)

11. [REDACTED] step father, [REDACTED], wrote about her caring nature and her commitment to improve herself, and said that the drinking and driving was an isolated incident, completely out of character for her, stating:

"...Throughout my career [as an airline pilot] I have had to make accurate assessments of situations and people to accomplish the task safely and properly. I have known [REDACTED] [REDACTED]'s mother] for 18 years and [REDACTED] for 16 years. ... [S]he showed herself to be a very caring and devoted person. I could always count on her. ...

...I have always found [REDACTED] to be kind and gracious to me as the new person in their lives. ... My assessment of [REDACTED] is one that I look for in my fellow crew members – when things get difficult quality comes to the top. To me [REDACTED]'s character is beyond reproach and I would trust her with my life.

██████████ is not a person who abuses alcohol. ... The day of the accident I immediately saw that something was very, very wrong. She was not herself. I asked ██████████ if she would talk to her and see if she could calm her down. We knew that she was emotional but did not think she was intoxicated because this is not her normal way of dealing with things. The decision that she made that day she now realizes to be very wrong and [she] is very remorseful...

I and my wife have gone out every other week to visit her and have watched her endeavors to take advantage of the opportunities to benefit and improve herself. She tells us that she has learned new ways to ...take her bad qualities and deal with them better...

.....[H]er release will not be a threat to society and she will continue to prove herself to be a productive member of society. She does have a good home to come back to... She is going to continue her education which will help her in her future employment. ..." (Exhibit "D" at 2)

12. ██████████'s mother, ██████████ ██████████, wrote about what her daughter was going through the day of the accident; how deep her remorse is over having taken a life; and her commitment to using her experience to keep others from making the same mistake, stating:

"... ██████████ did drink socially but I know she was aware of what she consumed and, if in question, called me or took a cab home.

██████████ was in an 11 year relationship and this man developed a substance abuse problem. ... He let her down again and again and on the day in question, he let her down one more time and she finally decided it was the end. She came over to my house and was extremely emotional, took a nap, and then decided to leave because her contacts were bothering her. I was with her and did not see her as drunk but as emotional.

██████████ is now a broken woman; not a day goes by that she does not cry and demonstrate a deep sense of remorse over her actions. Her poor judgment led to the death of a young girl. ... Counseling has helped her progress to the point that she wants to do something with the rest of her life to honor ██████████ She has talked of working with probation and see how to go about sharing her experience, not only with AA members and high school students, but women's group; people who may have a few drinks in the course of their event and not realize that this may happen to them. So quickly life can change.

...I was going out with my daughter a few days before the accident and she asked me to wait a second and went and helped an elderly neighbor carry in her groceries. That is the person my daughter, my best friend, is. ..." (Exhibit "D" at 3-4)

13. [REDACTED], a long-time co-worker of Ms. [REDACTED] wrote about what an exceptional, compassionate employee she was, and how remorseful she has been, stating:

“...I have known [REDACTED] for the past 12 years as a co-worker... at [REDACTED]. ...She was an exceptional unit clerk and she was respected by everyone... Just prior to the accident she accepted a position from the [REDACTED] ... as a Patient Care Technician. It takes a special kind of person to do the hands on, hard work caring for sick people. [REDACTED] always showed compassion and is a truly caring person. [REDACTED] has taken responsibility for the tragic loss of life... She acknowledges the tremendous pain and suffering the accident caused...

I have never known [REDACTED] do be a consumer of large amounts of alcohol nor was she a frequent drinker...

While in prison [REDACTED] completed an Aggression Replacement Therapy program. A second program ... is the DWI program [completed in August, 2019.] Also while incarcerated she finished her Associates degree in Liberal Arts. Through a correspondence course from Ohio State University, [REDACTED] is currently enrolled in a Sociology course. Her long term goal is to become a counselor for people who are trying to stop their own drug and alcohol abuse.

...I would not hesitate to give [REDACTED] a letter of recommendation, including a character reference for any employment opportunity, or for any other need. I will continued to support [REDACTED] ... when she is released in whatever way I can.” (Exhibit “D” at 5-6)

14. Another co-worker, [REDACTED], also wrote in support of [REDACTED] stating:

“...I met [REDACTED] at [REDACTED] where we were both employed about 11 years ago. ... [REDACTED] was the first point of contact for families, patients, and hospital staff, she always went out of her way to assist and help others... When I moved into a management position I had the opportunity to hire [REDACTED] to my team and did so without hesitation. ... [REDACTED] became an integral part of our success. ...I witnessed her holding the hand of an elderly patient who was scared, singing to a child to distract them as we set their broken bone and so many other acts of compassion...

It is hard for me to reconcile what [REDACTED] did, but I know that she has accepted her punishment and has used her time in the correctional system to better herself as a person. ... With the help and support of her family she will continue to better herself and make wise and safe decisions. ...” (Exhibit “D” at 7)

15. [REDACTED], who has known [REDACTED] for many years, wrote about his own similar experience and the very difficult questions it raised, and how this crime was an aberration from her usual law-abiding life, stating:

...I have found great success in my profession. I currently hold a Master's Degree in Nursing and I am working on my Doctorate. ...When I was young... I found myself in trouble many times. I even claimed the life of an individual. ... It is something I live with every day.

I clearly remember a movie ... [the main character's] son was killed in a head-on collision. ... [In court the father] was wondering which [defendant] was the individual who claimed his son's life. ... When the judge finally called the individual that claimed his son's life the father could not believe what he was looking at. It was a young man just like his son...

...How many of us have seen situations and have said, that could have easily been me? Next, ask yourself, what if I was the parents of the person who lose their life. ... I know these are tough questions to answer. These are the questions I asked myself and they are questions that helped me heal and get me to where I am today. I share my story with many. It is my way of healing and striving for success and helping others not to make the mistakes I made.

I have known [REDACTED] for a long time. The mistake she made that terrible day probably could easily have been avoided but it's a mistake she must live with every day for the rest of her life. Yes, she did break the law and when the law is broken there must be consequences. ... [REDACTED] is [a] person who has never been in trouble, [who] cared for individuals in a time of need and has comforted individuals in a time of need. ... That's the person I know and many others know. She's not evil, she's not a habitual drinker or a drug abuser... My heart grieves for the family who lost their child and if I were God, I would turn back the hands of time and prevent these things from happening. But we all know that is not possible.

...I truly believe that many will learn from her experience and that [REDACTED] will be able to help others. ..." (Exhibit "D" at 8-9)

16. Petitioner's friend and co-worker, [REDACTED], wrote of her support for her, stating:

"I have known [REDACTED] for over 20 years... She was proficient at her own job while helping both patients and co-workers... Always willing to lend a hand.[S]he'd have a drink or two but [was] never a big drinker... She got addicted to legal drugs when she had a health issue. She went to rehab and beat the problem. ...[S]he made a bad choice and she was in a car accident. This could have happened to most anyone." (Exhibit "D" at 13-14)

17. [REDACTED]'s uncle, [REDACTED] [REDACTED], wrote of how he would be available to support her,

stating:

.. [REDACTED] was my tenant and groundskeeper... for over ten years. During this period rent was paid in full on time and [she] kept the property immaculate while working full time and overtime hours at [REDACTED] [REDACTED]. ... She has worked hard at her studies and to be a model prisoner. If she is granted parole we are here and prepared 100% to meet her needs. Moral support to aid her in a drug and alcohol free life....” (Exhibit “D” at 16)

18. [REDACTED], another friend and co-worker, wrote of how this mistake will haunt

[REDACTED] forever, and that further incarceration is unnecessary, stating:

“...I have known [REDACTED] for over 10 years, both on a professional level as well as a personal level. ...[S]he has always appeared to me as a level headed, soft hearted and compassionate person. ...When a person such as [REDACTED] chooses nursing, they make a commitment to nurture and care for people who are in need. ...

...[W]e don't live in a perfect world with perfect people. Mistakes are made, consequences are paid. ...[N]one of us are perfect and it is only up to God to judge our mistakes in the end.

...I can honestly say that the mistake she made in driving home that night will forever haunt her....

They say time heals all, but for the family who has lost a loved one, the pain will always be there... For the accused, the pain hits and stays with them but in other ways. ...It will take perhaps a lifetime if ever to see her shining light show through again. Justice is something I heavily believe in, I however struggle with how incarcerating someone for extended time solves any problems. This was [REDACTED]'s first offense and I believe ... that her life path will most certainly involve bringing attention to others of the risks you take when you ... drive after you have had alcohol. ... They say the best teachers are the ones who have had first-hand experience. ...” (Exhibit “D” at 18)

19. Finally, [REDACTED], yet another co-worker, writes of Petitioner's great

remorse and of what a helpful, supportive person she is, stating:

“...I met [REDACTED] when we joined the [REDACTED] NY, over 5 years ago. [REDACTED] is ... a compassionate, caring, kind, attentive woman ... especially when caring for the patients. ... [REDACTED] was always willing to help whenever and whenever needed ... but she had a special talent in calming the young children, especially as they were receiving stitches. ...

...I know that every day [REDACTED] feels so much pain and remorse. [REDACTED] would never intentionally harm anyone and the thought that she did has pained her every day since that fatal mistake....” (Exhibit “D” at 21)

Hearing Transcript

20. Despite the evidence presented to them showing that Petitioner does not pose any risk to society; the fact that she obtained an Earned Eligibility Certificate; that she had no criminal history and no disciplinary adjudications, and had successfully completed a variety of programs, the parole board denied release, based solely on the circumstances of the offense.

21. In the beginning of the interview, Petitioner discussed the offense, describing how devastated she was at the end of her 11 year relationship, and by the fact that the man was texting her threatening suicide. (Exhibit "A" at 3-4) She said she irresponsibly dealt with her overwhelming feelings by drinking, which was unusual for her, and then she made it so much worse by getting behind the wheel of her car. (Exhibit "A" at 4)

22. Later on [REDACTED] discussed how she had been addicted to prescription opioid pain medication after three surgeries on her feet. (Exhibit "A" at 13) Once when she ran out of pills, a co-worker gave her some heroin. (Exhibit "A" at 15) Ms. [REDACTED] entered treatment at [REDACTED] [REDACTED] October, 2015, and graduated from the program in June, 2016. (Exhibit "A" at 14) After the offense herein, she was in the hospital and received hydrocodone, but did not have a problem with it, so she knew she had overcome that addiction. (Exhibit "A" at 14)

23. When asked how she felt today, Ms. [REDACTED] e said:

"...I am responsible for the death of an 18 year-old, misery, pain and sorrow of friends, family, an entire community who knew [REDACTED] and I have to live with that every day. It's a struggle." (Exhibit "A" at 16)

24. When asked if she had received counseling, [REDACTED] said she had been in treatment before her incarceration, and then obtained counseling through DOCCS while she was

on medication. (Exhibit "A" at 17) After she discontinued the medication, she still saw someone every month, but she said *the therapist decided to close the case because she was doing so well.*

(Exhibit "A" at 17)

25. The commissioners thanked Petitioner for her letter to them, which they said showed deep remorse. (Exhibit "A" at 19) They also noted that they had received numerous letters of support for her. (Exhibit "A" at 20) Then Commissioner Agostini asked Ms. [REDACTED] about her plans to remain sober upon release, and she stated that she was blessed to have the support of her father and his wife who had over 60 years of sobriety between them. (Exhibit "A" at 21-22) She said they were also putting her in touch with a woman who would show her the ropes of AA and support her. (Exhibit "A" at 22) Ms. [REDACTED] said she would also start seeing her therapist, [REDACTED], again. (Exhibit "A" at 22)

26. Commissioner Agostini then said, "...I am glad to hear both of those responses." (Exhibit "A" at 22)

27. At the end of the interview, Petitioner again discussed how angry she was at herself for what she did. (Exhibit "A" at 23) She went on to say that she had learned a lot about what she did wrong, beginning with reaching for alcohol rather than seeking support when she was overwhelmed by the end of her relationship. She said:

"I should have faced my fears. I shouldn't have run from them and that's what I am learning how to do in here for next time because life is going to be full of traumatic experiences. I am only 44 years old. I am going to have a lot more traumatic events so I am learning triggers and different factors of dealing with these traumatic events instead of turning to alcohol next time, being true to myself, being true to the person that I want to be, that I am proud of." (Exhibit "A" at 24-25)

Decision

28. In its Decision the Commissioners denied release, stating:

“...[T]he panel has determined that if released at this time, your release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law. ...During the interview *you expressed remorse* for your actions. ...

Your criminal record reflects *no prior unlawful conduct*.

...The panel notes your efforts toward *rehabilitation* which includes your participation and completion of most required programs. The panel commends you on your *educational achievements*.

We have reviewed and considered your Case Plan and the results of your Risk and Needs Assessment, and the mixed scores indicated therein with re-entry substance abuse being high and low for all other categories.

Your disciplinary record reflects *positive adjustment* to DOCCS rules and regulations. The panel notes your *personal growth* and efficient performance while incarcerated. *However the instant offense shows a total disregard for human life... Note is made of your numerous letters of support. There is opposition to your release. ...*”

... Exhibit “A” at 30-31, emphasis supplied.

Administrative Appeal

29. On February 10, 2020, the Appeal Unit denied the administrative appeal, stating, without giving any reasons, that the presumption accorded the EEC had been rebutted; that the Board could deny release based on the circumstances of the offense. (Exhibit “E” at 3, 5) There was no mention of Petitioner’s claim that the reasons for denial had been too conclusory. The Decision also stated that Petitioner had “admitted to a history of alcoholism,” and claimed that this somehow rendered the COMPAS finding of “highly probable” re-entry substance abuse correct. (Exhibit “E” at 5.) Petitioner did admit that she had turned to alcohol on the day in question to numb her pain over a break-up, and she realizes how much harm her decision to drive under the influence caused. She said she had learned how to deal with her emotions without turning to alcohol, and that she would attend AA meetings and any recommended treatment upon release. That does not in any way mean that the COMPAS finding of “highly probable” re-entry substance abuse was correct – it was not supported by the record, as argued herein.

ARGUMENT

THE PAROLE BOARD BASED ITS DECISION 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

30. There are many cases where *de novo* hearings have been granted because the parole board improperly based denial solely (or chiefly) on the seriousness of the offense. *Rivera v. Stanford*, 2019 App. Div. LEXIS 3595 (2nd Dep't 2019); *Ferrante v. Stanford*, 2019 App. Div. LEXIS 3407 (2nd Dep't 2019); *Coleman v. NYS DOCCS*¹, 2018 NY App. Div. LEXIS 136 (2nd Dep't 2018); *Ramirez v. Evans*², 118 AD3d 707 (2nd Dep't 2014), *Perfetto v. Evans*³, 112 AD3d 640 (2nd Dep't 2013); *Gelsomino v. NYS Bd. of Parole*, 82 AD3d 1097 (2nd Dep't 2011); and *Matter of Huntley v. Evans*, 77 AD3d 945 (2nd Dep't 2010); *Rossakis v. NYS Bd. of Parole*⁴, 146 AD3d 22, 27 (1st Dep't 2016); *King v. New York State Division of Parole*⁵, 190 AD2d 423 (1st Dep't 1993.)

31. In *Ruiz v. NYS Division of Parole*, *supra*, the Court recently granted a *de novo* hearing because the denial was essentially based on the seriousness of the offense, 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. ...

To the extent that the Board relies on the crimes for which petitioner was convicted as an adult, petitioner has also served more than the aggregate maximum sentences imposed for his convictions. *While the Board recited other factors, it failed to*

¹ David Coleman was released in March, 2018 and has not been re-imprisoned.

² Santiago Ramirez was released in April, 2017 and has not been re-imprisoned.

³ Gary Perfetto was released in June, 2016 and has not been re-imprisoned.

⁴ Niki Rossakis was released in March, 2017 and has not been re-imprisoned.

⁵ Darryl King was released in 1995 and has not been re-imprisoned.

give any real explanation for its decision other than in conclusory terms, in violation of Executive Law 259-i(2)(a)...

...Here, the petitioner is left with no guidance as to what issues he must address between now and his next parole hearing in order to alleviate any concerns by the Board as to his release....” *Ruiz*, supra, at 1, 5-8, 10, some emphasis supplied.

32. Similarly, very recently, in both *Almonte v. Stanford*, Index No. 10476/2018 (Orange Co. 2019), and *Slade v. Stanford*⁶, Index No. 203/19 (Dutchess Co. 2019), the courts granted *de novo* hearings where the denials were almost but not exclusively based on the seriousness of the offense. In *Slade*, the court stated:

“...The Board acknowledged that his COMPAS risk assessment rated him low in everything except substance abuse.

...In support of [its] decision the Board cited a past history of violence towards women, the crime of conviction and that it involved violating an order of protection. ...

...[Petitioner’s] parole packet demonstrates that he had a clean disciplinary record for his entire period of incarceration, [and] successfully completed programs for alcohol and substance abuse treatment... Here the Board failed to articulate facts in support of its ultimate reason for denying parole. There is nothing in the record other than the crime of conviction supporting the conclusion that Petitioner does not understand how his behavior could result in violence towards women...” *Slade*, supra, at 2-4.

33. It can be seen from the Decision herein that denial was based only on the seriousness of the offense – it noted Petitioner’s remorse; the absence of any criminal history; the complete lack of disciplinary violations; the completion of several programs; positive responses to their questions; and numerous letters of support, but then stated, “However, the instant offense shows a total disregard for human life.” (Exhibit “A” at 30-31)

⁶ 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.

34. As in *Slade*, where the COMPAS also found a likelihood of re-entry substance abuse, and *Ruiz*, where there were disciplinary violations, a new hearing should be granted because it is clear that the *only real reason* for denial was the seriousness of the offense, and that is not permissible.

35. There have also been several other court decisions granting or upholding new parole hearings where the denial was based on the circumstances of the offense. *Matter of Hawkins v. NYS DOCCS*⁷, 2016 NY App. Div. LEXIS 3147 (3rd Dep't 2016); *Matter of Hawthorne v. Stanford*, 2016 NY App. Div. LEXIS 75 (3rd Dep't 2016); *Matter of Ciaprazi v. Evans*⁸, 2016 N.Y. Misc. LEXIS 2741; (Dutchess Co. 2016); *Darshan v. NYS DOCCS*⁹, Index No. 652/2017 (Dutchess Co. 2017); *MacKenzie v. Stanford*¹⁰, Index No. 2789/15 (Dutchess Co. 2015); *Matter of Bruetsch v. NYS DOCCS*¹¹, 43 Misc.3d 1223(A) (Sullivan Co. 2014); *Matter of Rabenbauer*¹² v. NYS DOCCS, 2014 NY Misc. LEXIS 4824 (Sullivan Co. 2014); *Matter of Stokes v. Stanford*¹³, 43 Misc.3d 1231(A) (Albany Co. 2014); *Matter of McBride*¹⁴ v. Evans, 42 Misc.3d 1230(A) (Dutchess Co. 2014); *Matter of West*¹⁵ v. NYS Bd. of Parole, 41 Misc.3d 1214(A)(Albany Co. 2013).

36. In the instant case, the Board managed to ignore all of Petitioner's positive accomplishments, and denied parole due to its opinion as to the seriousness of the offense. This is why the State passed amendments in 2011 which were intended to look forward at what was

⁷ Dempsey Hawkins was released in January, 2017 and has not been re-imprisoned.

⁸ Roberto Ciaprazi was released in July, 2017 and has not been re-imprisoned.

⁹ Travis Darshan was released in September, 2017 and has not been reincarcerated.

¹⁰ Tragically, John MacKenzie committed suicide in 2016 after having been wrongly denied parole ten times.

¹¹ John Bruetsch was released in September, 2017 and has not been re-imprisoned.

¹² Philip Rabenbauer was released January 20, 2015 and has not been re-imprisoned.

¹³ Robert Stokes was released in May, 2016 and has not been re-imprisoned.

¹⁴ Moses McBride was released March 10, 2014 and has not been re-imprisoned.

¹⁵ Michael G. West was released October 7, 2014 and has not been re-imprisoned.

accomplished rather than simply backward to the circumstances of the offense.

37. Even *prior* to the 2011 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*¹⁶, 22 AD3d 950 (3rd Dep't 2005); *Vaello v. Board of Parole*¹⁷, 48 AD3d 1018 (3rd Dep't 2008); *Gelsomino v. Board of Parole*¹⁸, 82 AD3d 1097 (2nd Dep't 2011); *Malone v. Evans*¹⁹, 83 AD3d 719 (2nd Dep't 2011); *Johnson v. Division of Parole*²⁰, 65 AD3d 838 (4th Dep't 2009); *Prout v. Dennison*²¹, 26 AD3d 540 (3rd Dep't 2006); *Mitchell v. Division of Parole*²², 58 AD3d 742 (2nd Dep't 2009); *Winchell v. Evans*²³, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Oberoi v. Dennison*²⁴, 19 Misc.3d 1106(A) (Franklin Co. 2008); *Rios v. NYS Division of Parole*²⁵, 15 Misc.3d 1107(A) (Kings Co. 2007); *Weinstein v. Dennison*²⁶, 2005 NY Misc. LEXIS 708 (NY Co. 2005); *Cappiello v. NYS Board of Parole*²⁷, 2004 NY Misc. LEXIS 2920 (NY Co. 2004); *Almonor v. Board of Parole*²⁸, 16 Misc.3d 1126(A) (NY Co. 2007); *Coaxum v.*

¹⁶ Charles Friedgood was released in 2007 and has not been re-imprisoned.

¹⁷ Jose Vaello was released in March, 2012 and has not been re-imprisoned.

¹⁸ Louis Gelsomino was released in 2011 and has not been re-imprisoned.

¹⁹ Mark Malone was released in 2011 and has not been re-imprisoned.

²⁰ Daniel Johnson was released in 2009 and has not been re-imprisoned.

²¹ William Prout was released in 2009 and has not been re-imprisoned.

²² Roger Mitchell was released in 2009 and has not been re-imprisoned.

²³ Craig Winchell was released in 2011 and has not been re-imprisoned.

²⁴ Gurpreet Oberoi was released in 2009 and has not been re-imprisoned.

²⁵ Ivan Rios was released in 2007 and has not been re-imprisoned.

²⁶ Herbert Weinstein was released in 2006 and has not been re-imprisoned.

²⁷ John Cappiello was released in 2005 and has not been re-imprisoned.

²⁸ Chester Almonor was released in 2007 and has not been re-imprisoned.

*Board of Parole*²⁹, 14 Misc.3d 661 (Bronx Co. 2006); *King v. New York State Division of Parole*³⁰, 190 AD2d 423 (1st Dep't 1993).

38. As occurred in all of the above cases, the Board's determination herein was unlawful and a de novo hearing must be ordered.

POINT II

THE PAROLE BOARD FAILED TO EXPLAIN WHY PAROLE WAS DENIED DESPITE THE FACT THAT PETITIONER HAD AN EARNED ELIGIBILITY CERTIFICATE, WHICH CREATES A PRESUMPTION IN FAVOR OF RELEASE

39. Correction Law 805 provides:

“...Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been granted a certificate of earned eligibility, *shall* be granted parole release at the expiration of his minimum term ... unless the parole board determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society. ...”

40. The granting of a certificate of earned eligibility creates a *presumption in favor of release*. *Wallman v. Travis*³¹, 18 AD3d 304 (1st Dep't 2005); *Schwartz v. Dennison*³², 339 Fed. Appx. 28 (2nd Cir. 2009); *Marciano v. Goord*, 2006 NY Misc. LEXIS 2656 (NY Co. 2006); *Matter of Eckardt-Rigberg v. Stanford*³³, Index No. 1638-16 (Sullivan Co. 2016.) That presumption has not been rebutted herein. In *Wallman*, supra, the court stated:

“As the terms of section 805 make plain, the receipt of an earned eligibility certificate does not preclude the Board from denying parole... However ... *the statute creates a presumption in favor of parole release of any inmate who, like petitioner, has received a certificate of earned eligibility and has completed a minimum term of imprisonment of eight years or less....*

²⁹ Jean Coaxum was released in 2006 and has not been re-imprisoned.

³⁰ Darryl King was released in 1995 and has not been re-imprisoned.

³¹ Jay Wallman was released in 2005 and has not been re-imprisoned.

³² Jerrold Schwartz was released in 2008 and has not been re-imprisoned.

³³ Ian Eckardt-Rigberg was released in March, 2017 and has not been reincarcerated.

...[T]he Board's *perfunctory discussion* of petitioner's alleged lack of insight is contrary to the Court of Appeals' decision in *Matter of Silmon v. Travis* (95 NY2d 470) which held that *a petitioner's remorse and insight into his crimes are highly relevant in evaluating an inmate's rehabilitative progress, especially where, as here, the prisoner has otherwise lived a law-abiding life and maintained a good prison record. Despite the critical significance of these factors in evaluating an inmate under the 'reasonable probability' standard, the Board's decision in this case offers no supportive facts justifying its finding of lack of insight and remorse.*" *Wallman v. Travis*, at 307-308, emphasis supplied.

41. In *Eckardt-Rigberg*, *supra*, which is very similar to the instant case, the court also granted a *de novo* hearing where the EEC had created an un rebutted presumption for release, stating:

"Petitioner was convicted, by guilty plea, of Manslaughter in the Second Degree... [and sentenced to] three and a third to 10 years... He struck a pedestrian, killing him, and fled the scene of the accident...

...While in state custody, Petitioner has had no disciplinary infractions, has completed all required programming ... and has an Earned Eligibility Certificate. Petitioner has no criminal history prior to the instant offenses.

Petitioner appeared for his initial parole interview on March 8, 2016... The board denied parole release...

When denying release to an inmate with an EEC, a parole board *must* articulate a rationale to support a decision that if released the inmate would not remain at liberty without violating the law and that release would not be compatible with the welfare of society; *simply regurgitating the language of the statute is not enough to overcome the burden of the presumption* that the inmate should be released...

...[T]his Court has determined that the board...failed to consider the EEC (despite mentioning it in passing), and the decision was in conclusory terms. The Court is unable to determine on what *legitimate grounds* the board denied release. ... Considering all of the other required factors, i.e. the EEC, programming, plans for release, completely clean disciplinary history while incarcerated, family and professional support, and other factors, the denial of parole release was arbitrary and capricious and unsupported by the record. *Petitioner cannot change what happened, or his decision to leave the scene of the accident. What he could do, and what he did do, was maintain a clean disciplinary history while incarcerated, take all programs available to and required of him...show remorse and accept responsibility for his criminal behavior, and do everything required by DOCCS and the statute to rehabilitate himself and ready himself for parole release.*

...The written decision does no more than recite the statutory language...but does little more to explain, in sufficient detail, how the board came to such conclusions, other

than its unfounded conclusion that Petitioner is unfit for release because years ago, when he committed the instant offenses, he did not seek help for the victim. *Petitioner's EEC, which creates a presumption of release, required that the board articulate actual reasons to support its conclusion that Petitioner 'would not live at liberty without again violating the law and furthermore [his] release would be incompatible with the welfare of society.'*

In addition, this court finds that the board could not have seriously considered the factors required under 9 NYCRR 8002.3(c) regarding the EEC. Petitioner has a clear disciplinary history. Petitioner has a family and definite release plans. He has no criminal history. There is nothing in the record, overall or specifically, to indicate Petitioner will not be a law-abiding citizen if released to parole supervision or that his release is incompatible with the welfare of society. ... Therefore, it is this Court's opinion that the parole board's decision is unsupported by the objective record before it. The lack of specificity and reasoning in the parole board's written decision, as well as the record before, *it failed to overcome the presumption of release in this case...*" *Eckardt-Rigberg, supra*, at 1-3, 5, some emphasis supplied.

42. As in *Eckardt-Rigberg, supra*, the parole board failed to overcome the presumption afforded by the EEC herein.

There is Nothing in the Record Indicating a Likelihood of Re-offense, or that Petitioner's Release Would be Incompatible with the Welfare of Society

43. As in *Wallman* and *Eckardt-Rigberg, supra*, the record contained no indication that Petitioner was likely to violate the law if released, or that her release was somehow incompatible with the welfare of society. Her institutional record was exemplary, and there are simply no facts showing any likelihood of re-offense. It is also instructive to note that despite the Board having denied release to the 37 *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.*

44. In *Rivera v. Stanford*³⁴, 2019 NY App. Div. LEXIS 3595 (2nd Dep't 2019), the Second Department very recently reversed the denial of a *de novo* hearing in a murder case, stating, at 4, "...The Parole Board's finding that the petitioner's release was not compatible with

³⁴ Richard Rivera was granted an open date for parole release by December, 2019.

the welfare of society... is without support in the record.”

45. Likewise, in *Almonte*, supra, another murder case, the court recently granted a *de novo* hearing for the same reason, stating, at 7, “...[t]he Board’s failure to explain, other than the facts of the crime, why the inmate’s release was incompatible with the welfare of society, could not be supported.”

46. As in *Rivera* and *Almonte*, there was no support in the record for the board’s claims as to a likelihood of re-offense, and that release was incompatible with the welfare of society. In the instant case, the *only* actual reason given for denial was the seriousness of the offense. Therefore, the presumption of release afforded by the Certificate of Earned Eligibility has not been rebutted.

POINT III

THERE WERE NO DETAILED REASONS GIVEN FOR THE DENIAL AND THE PAROLE BOARD’S FINDINGS WERE NOT SUPPORTED BY THE RECORD

47. Under a 2107 Rule, codified at 9 NYCRR 8002, DOCCS mandated that when parole release is denied, the reasons for the denial must be individualized and non-conclusory – the Rule states:

“8002.3

(b) ...If parole is not granted, the inmate shall be informed in writing ... of the decision ... and the factors and reasons for such denial. *Reasons for the denial ... shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable parole decision-making principles and factors listed in 8002.2 were considered in the individual’s case. ...*”

48. There are many cases where *de novo* hearings have been granted or upheld because the parole board’s reasons for denial were insufficiently detailed.; *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (New York Co. 2019); *Matter of Coleman v. DOCCS*, 2018 NY

App. Div. LEXIS 136 (2nd Dep't 2018); *Almonte v. Stanford*, Index No. 10476/2018 (Orange Co. 2019); *Winchell v. Evans*³⁵, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Matter of Rossakis*³⁶ 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*³⁷, Index No. 0623/2018 (Dutchess Co. 2018); *Eckardt-Rigberg v. Stanford*, Index No. 1638-16 (Sullivan Co. 2017); *Matter of West v. NYS Bd. Of Parole*, 41 Misc.3d 1214(A) (Albany Co. 2013); *Matter of Kozlowski*³⁸ v. *NYS State Bd. Of Parole*, 2013 NY Misc. LEXIS 552 (NY Co. 2013).

49. It is noted that in the instant case, *not only* was the parole board's conclusion as to rehabilitation not supported by the record, the COMPAS erroneously claimed that Appellant had a prior history of problems with alcohol.

50. In *Rivera*, supra, a murder case where, unlike the instant case the petitioner had a history of disciplinary violations, the court stated:

“...[T]he Parole Board's terse and conclusory decision did not explain the reason for the denial in detail as required by the Executive Law...

...[T]he Parole Board [said]... it was 'concerned that [his] poor behavior shows limited maturity and self-control,' referring back to the petitioner's disciplinary history.

...[T]he record demonstrates that the petitioner, in fact, does not lack maturity and self-control...

Thus, the record demonstrates that in light of all the relevant factors, including, but not limited to, the petitioner's understanding of and remorse for his crimes, his significant accomplishments, his leadership, and demonstrated maturity, notwithstanding the seriousness of the underlying offenses, the Parole Board's determination to deny the petitioner release on parole 'evinced irrationality bordering on impropriety' (*Matter of Goldberg v. New York States Bd. of Parole*, 103 AD3d 634, 634...)." *Rivera*, supra, at 4, 8, 10.

³⁵ Craig Winchell was released in 2011 and has not been reincarcerated.

³⁶ Niki Rossakis was released in March, 2017 and has not been reincarcerated.

³⁷ Jack Maddaloni was released on September 10, 2018 and has not been reincarcerated.

³⁸ L. Dennis Kozlowski was released January 17, 2014 and has not been re-imprisoned.

51. In *Coleman*, 2018 NY App. Div. LEXIS 136 (2nd Dep't 2018), the Second

Department recently stated:

“...[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.*

Contrary to the Parole Board's determination that petitioner 'distance[d] himself from the crime, the record demonstrates that petitioner took full responsibility for his actions, stating, 'I don't blame it on the drugs. I blame it on me... The petitioner also acknowledged that ... he was aware of the damage he had done to the victim, her family and his own family...

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.

52. As in *Rivera*, in *Matter of Rossakis*, 146 AD3d 22 (1st Dep't 2016) the First Dep't

upheld the grant of a new hearing for lack of detailed reasons, stating:

“The Board *summarily listed petitioner's institutional achievements, and then denied parole with no further analysis of them, in violation of the Executive Law's requirement that the reasons for denial not be given in "conclusory terms" (Executive Law § 259-i[2][a]).* Moreover, the Board's decision began by stating that petitioner's release "would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." These statements came directly from the language of *Executive Law § 259-i(2)(c)*, further violating the Executive Law's ban on the Board making conclusory assertions (*see Executive Law § 259-i[2][a]*)." *Rossakis*, supra, at 10-11, emphasis supplied.

53. As in the above cases, the board herein did not give an adequate explanation for the denial. Essentially everything in the record supported release, yet the board said that, based on the offense, Petitioner had shown a disregard for human life. That is not an adequate

explanation of the denial. In *Slade v. Stanford*, Index No. 203/19 (Dutchess Co. 2019), the court very recently granted a *de novo* hearing for this reason, stating:

“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 upon the balance of the statutory factors...” *Slade*, at 4.

54. As in *Slade*, it appears that, rather than give a reason for denial based on the actual record before it, the board was simply substituting its opinion as to sentence for that of the court.

The Finding that Reentry Substance Abuse was Likely Lacks Support in the Record

55. In *Matter of Lackwood v. NYS Bd of Parole*, Index No. 2464/2017 (Dutchess Co. 2018), where, as in instant case, the COMPAS found that reentry substance abuse was likely, and the parole board claimed this concern was a reason to 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.”

56. As in *Lackwood*, supra, the Board’s alleged concern about re-entry substance abuse is not supported by the record herein, which shows that the offense was an aberration for Petitioner; that she has engaged in therapy and gained a great deal of insight, and that she has completed the DWI program, and was even asked to be a panel leader for that program. Her Case Plan shows she intends to seek continued support (including AA) upon release.

57. Therefore, because the reasons given for the denial of release were conclusory and lacked detail, and were not supported by the record herein, there must be a *de novo* hearing.

CONCLUSION

Based on the foregoing, Petitioner [REDACTED] respectfully requests that this Court vacate the Decision of the Parole Board and grant an immediate *de novo* hearing before commissioners who did not sit on the May, 2019 Board.

Dated: February 24, 2020.

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