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STATE OF NEW YORK
COUNTY OF DUTCHESS

SUPREME COURT

In the Matter of [REDACTED]
Petitioner.

-against-

PETITION

CPLR ARTICLE 78

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

Index No:

Respondent.

The Petition of [REDACTED] respectfully shows and alleges:

PRELIMINARY STATEMENT

1. [REDACTED] has served 27 years for crimes he has steadfastly denied committing and for which his guilt is very questionable – his case was recently taken up for possible exoneration by the Deskovic Foundation for Justice. He has already been in prison for *three times longer* than nine years that the key protagonists of the crimes served. Guilty of those crimes or not, over a period of almost three decades [REDACTED] has far exceeded the expectations society has of an incarcerated individual. It is clear from the record that his release to parole supervision would indeed be compatible with the welfare of society. The Parole Board’s Decision not only was unlawfully arbitrary and capricious, but it also constituted unjust harm to [REDACTED] and to the rehabilitative purpose of incarceration.

2. The Parole Board committed material errors of fact and law in denying parole to [REDACTED]. The Parole Board based its Decision chiefly and improperly on the circumstances of the alleged offense, which involved rape, sodomy, sexual abuse and assault convictions, in connection with an incident that occurred on March 28, 1991. The incident occurred less than a month following [REDACTED]’s honorable discharge from the Navy after five years of service

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during which he received many commendations for his demeanor, selflessness and dedication.

This likely wrongful conviction was [REDACTED]'s *first and only conviction*.

3. The Board also erred by: 1) not adequately explaining its departure from the uniformly low COMPAS scores; 2) concluding that [REDACTED] “incurred an extensive number of disciplinary infractions in the form of Tier 2 and Tier 3 tickets” while failing to appreciate the substantiated retaliatory nature of the 2017 ticket; 3) concluding that [REDACTED] is a flight risk; 4) ignoring the completely credible reason why [REDACTED], following poor advice from others out of despair, deviated just once—in his 2016 parole hearing—from his decades-long insistence that he is innocent of the crimes for which he was convicted; 5) giving no weight to his sincere and compelling expressions of remorse for failing to protect the victim from the horrible violence inflicted on her; 6) ignoring his excellent record, which includes many achievements and commendations, as well as his fully formed post-release plans; and 7) not providing adequately detailed reasons for denial of release.

4. [REDACTED] has matured into a stable, thoughtful, altruistic human being who has tutored dozens of other incarcerated persons; obtained college degrees; completed all required programs; and earned commendations and praise from prison authorities. It is a testament to his character that he was able to accomplish all of this while firmly insisting that he is innocent of the crimes for which he was convicted.

5. Even without taking into account the compelling evidence that he may be innocent, it can be seen from his institutional record that [REDACTED] is well respected by inmates and staff alike, and has a long history of being a mentor and role model to other inmates, including having founded two rehabilitative programs which have helped many people turn their

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lives around. What more does he have to do to prove his value as a human being deserving of release to parole supervision?

STATEMENT OF FACTS

6. [REDACTED] was convicted upon a jury verdict, of Rape and Sodomy in the first degree, Assault in the second degree and Unlawful Imprisonment. (See Interview Transcript, attached as Exhibit "A" at 2) He was sentenced to 25-50 years, and has served 27 years at this time. (Exhibit "A" at 2, 8)

Petitioner's Claims of Innocence

7. Petitioner faces a "Catch-22" type situation with regard to asserting his innocence. When preparing for his first parole interview in 2016, Petitioner was told by many people that if he continued to claim innocence, he would be denied parole. (See Letter from Deskovic Foundation, attached as Exhibit "B" at 4) For that reason, Petitioner decided to claim that he committed the offense, and did so in the interview, though not providing a lot of detail. Subsequently, however, he decided that he needed to tell the truth, and he looked into getting the conviction vacated. Petitioner's case was taken up by the Deskovic Foundation for Justice, who have started to investigate it. In his letter to the Deskovic Foundation, Petitioner stated:

"...Although I have been told by numerous people that the Parole Board only wants to hear the acceptance of responsibility before granting parole (which is why I had went along with the accusations at my last parole board hearing) but I am moving forward on the truth, and faith. Nothing good can come of something based on a lie. ...I have to believe in a Higher Power and have faith that the truth will set me free." (Exhibit "B" at 4)

8. The letter written by [REDACTED] of the Deskovic Foundation, also stated:

"...[W]e have come across many disturbing occurrences/red flags which leave us with grave concerns regarding [REDACTED]'s guilt.

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There was no physical evidence linking [REDACTED] to the crime. The entire case is the victim's word against [REDACTED]'s.

There was one known DNA test performed on seminal fluid in the victim... and *it excluded* [REDACTED] and his brother... Given the victim's testimony as to the extensive nature of the rape it seems puzzling that there was not more DNA in evidence.

At trial the victim claimed not to have known [REDACTED] and not to have had sexual relations with him before the night of the incident... Yet there were witnesses, who were not called, who would have testified that the victim knew [REDACTED] as early as January of 1990 and witnesses that could have testified that [REDACTED] and [the victim] had consensual sex in Virginia in the fall of 1990. The victim also testified that she did not receive anything for her testimony, yet the prosecutor wrote a letter to her Parole Officer in which he asked that she not be remanded for shoplifting. Had the jury known both of these facts... it might have reached a different verdict." (Exhibit "B" at 2-3, emphasis supplied)

9. While it is true that the Parole Board is not the place to relitigate guilt or innocence, it is noted that, as pointed out in the Deskovic letter, there are compelling reasons to doubt Petitioner's guilt. While Petitioner does not expect the Court to determine or believe that he is innocent, it is also submitted that, given these circumstances, it is unjust to *penalize* Petitioner for asserting his innocence, and use that as a basis for denial of parole, as occurred herein.

Institutional Record

10. [REDACTED] has an excellent institutional record. He had one Tier II adjudication in 2017, but, as discussed below, it is being appealed and appears to have been filed in retaliation for his filing a grievance which has been partially substantiated by DOCCS. Other than that, Petitioner had a Tier II adjudication for failing to follow a direct order in 2016, and no other violations *since 2008*. (Exhibit "C," at 7-9) Beyond that, he has a multitude of positive accomplishments, including two college degrees; a long history of serving as a mentor and teacher to other inmates; and a large number of recommendations from corrections personnel.

2017 Disciplinary Charge

11. Undersigned counsel represents Petitioner on his appeal of his 2017 disciplinary charges, which was transferred to the Second Department in 2018. I wrote a letter about this incident, which was included in Petitioner's Parole Packet. In that letter I stated:

"I strongly believe that the charge was fabricated because it was filed just *after* [REDACTED] filed a grievance due to (repeated) harassment by a particular Correctional Officer. Recently, in July, 2018, [REDACTED] received notification that his grievance was partially substantiated, and that none of the allegations were unfounded. Because of his harassment by this same CO who filed the disciplinary charge, [REDACTED] was also transferred from Otisville to Woodbourne. This ticket should *not* be held against him." (Exhibit "C" at 1)

12. At this point it will take quite a while for the Second Department to render a decision. (The Attorney General's response brief is due on July 29, 2019 and it will be many months after than before there is a decision.) Under the circumstances, especially since the retaliation by the CO who filed the charge was substantiated, the Parole Board should not have used this incident as support for the denial of parole. (See Exhibit "C" at 3-6 for the Notification stating Petitioner's Grievance was partly substantiated and that none of his allegations were unfounded; a copy of the Grievance; and a letter from NYS Assemblyman [REDACTED] [Chair of the Assembly Standing Committee on Correction] expressing concern about the harassment of Petitioner by this CO.)

Letters from Corrections Staff & Commendable Behavior Reports

13. Very significantly, [REDACTED] has received several letters of support and other positive recognition from Corrections staff between 2010 and 2018. He also received two Commendable Behavior Reports for recently saving another inmate's life when he was choking. In February, 2018, Petitioner was given two Commendable Behavior Reports - one from Otisville Superintendent [REDACTED] and three of her staff. (Exhibit "D" at 1) They stated:

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“On February 13, 2018 at approximately 9:10 am, you observed another inmate experiencing difficulty breathing. You recognized that he was choking and immediately utilized the Heimlich Maneuver to clear his airway. ... Thanks to your swift and decisive action, you saved him from a serious life threatening situation. ...” (Exhibit “D” at 1)

14. C.O. [REDACTED] also wrote a Commendable Behavior Report about this incident, stating, “...For his immediate actions, [REDACTED] could have very well saved [REDACTED]’s life, and should be commended for such action....” (Exhibit “D” at 2)

15. In June, 2018, C.O. [REDACTED] wrote a glowing letter in support of Petitioner, who had worked for him as a clerk for over a year. He stated, “...I have noticed [Petitioner] to be a very respectful individual to his peers and to DOCCS staff. Inmate [REDACTED] completes all of his assigned work tasks with little to no supervision and he takes initiative to work on tasks that enhance the housing unit environment.” (Exhibit “D” at 3)

16. That same month, another C.O., [REDACTED], also wrote a letter in support of [REDACTED], noting that he was an asset to everyone, treated her very respectfully, and was a good candidate for parole, stating:

“Inmate [REDACTED] ... has completed all tasks assigned to him. ... Inmate [REDACTED] has been an asset to his housing unit peers and DOCCS staff alike. I am a female correction office and Inmate [REDACTED] has always been respectful and kind in his interactions. From my point of view I see Inmate [REDACTED] as a positive person and a good candidate for parole release consideration.” (Exhibit “D” at 4)

17. [REDACTED] received an outstanding letter in 2016 from long time C.O. [REDACTED] at Fishkill, *who had only written such a letter once before in 24 years*. He said he was putting his reputation on the line to support Petitioner’s release because he was convinced that [REDACTED] would be an asset to society upon release – the letter stated:

“...I have known [REDACTED] for approximately a decade and previously worked with him on a daily basis. His institutional behavior is impeccable. ... I wish that all of my inmates behaved as well as [REDACTED].

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[REDACTED]'s achievements while incarcerated include his establishment of the inmates' Veterans Organization. He also worked very hard and obtained his Bachelor's degree in Art & Science. ... [REDACTED] spent almost every night up in the Chapel and helped the Imam (Chaplain) as a clerk. [REDACTED] was a true role model. He is also an honorably discharged United States Navy veteran.

I'm putting my name and my reputation on the line writing this letter of support for [REDACTED], which I do not take lightly. This is only the second time in my 24+ year correctional career that I have written a letter of support for an inmate. It is my belief that [REDACTED] has paid his debt to society. I also believe with all my heart that [REDACTED] will prove to be a productive citizen in our society should he be given the chance. I ask the Parole board to take this into consideration and to have mercy on this man." (Exhibit "D" at 5, emphasis supplied)

18. Finally, Staff at Sullivan Correctional Facility recognized Petitioner in 2010 and 2011 by giving him awards both years (including a Gold Star Award in 2011) for his "positive and uplifting accomplishments." (Exhibit "D" at 5-6)

Academic Achievements

19. [REDACTED], who had a GED when he entered prison, obtained two college degrees while incarcerated. First, he received an Associates Degree in Humanities in 2014 from Sullivan Community College. (Exhibit "E" at 1) Then, in November 2016, he graduated from Nyack College with a Bachelor's Degree in Organizational Management. (Exhibit "E" at 2-3)

20. One of his professors, [REDACTED], wrote about what an excellent student Petitioner was, and how he was also a leader in the program, stating:

"...I met [REDACTED] [another name by which Petitioner is known] in January of 2014 when I was teaching Environmental Geology to his cohort of students... He obtained an Associate in the Arts degree in ... Humanities. [REDACTED] was the class liaison to the administrator of that educational program, and was the person I would go to if I needed anything in regards to teaching the class. He ... was very helpful to me since it was my first time teaching in the correctional facility. In June 2014, I was able to attend and was one of the recipients of an award at the annual RIESA ceremony, for which [REDACTED] was a founding member and organizer. ... I also attended the graduation ... and it was visible that [REDACTED] left a positive imprint on anyone who had taught him.

[REDACTED] worked very hard in his studies. He did exceptionally well as a student in my class. ... [H]e often distinguished himself ... by going above and beyond what was required... I could expect a newspaper or magazine clipping from him about a 'real-

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life' connection every time I walked in the classroom. He was dedicated to not only succeeding, but also to producing high-quality, meaningful work. *With a GPA of 3.85, he graduated with Honors, but I also know he graduated with knowledge he will someday apply.*

I truly believe that upon release, [REDACTED] will be an asset to society rather than a liability. ..." (Exhibit "E" at 4)

21. [REDACTED], Assistant Professor of Humanities at Sullivan County

Community College, also wrote a letter about what a great student [REDACTED] was, stating:

"I first became acquainted with [REDACTED] during the first semester of 2011, when he was a student in the Speech class I was teaching. [REDACTED] was an excellent student who always prepared, who listened attentively to my suggestions, as well as to those of his fellow classmates, and who contributed intelligently and with good humor to the classroom activities...

[REDACTED] [enrolled] in the Comp I course I taught during the Spring semester of 2012. Once again, my experiences with him were entirely positive. ... [REDACTED] added a great deal to the course, always phrasing his remarks in ways that moved the class forward.

This semester [2012] [REDACTED] has been my student again, this time in an Introduction to Literature class. ... Last evening we discussed the 'Prologue' to Chaucer's 'Pardoner's Tale.' Sure enough, [REDACTED] was at the top of his game, adding considerably to the complicated discussion that followed. Through all this, [REDACTED] has maintained a wonderful sense of humor that does much to create an excellent atmosphere in the class and to promote intelligent discussion. His classmates obviously respect and enjoy him.

In short, my observations of [REDACTED] lead me to believe very strongly that *he is an individual who can be counted on to fulfill his obligations to his classes and to society and to carry them out with grace and good humor. I think, without hesitation, that he will continue to present himself in the positive light he appears to be in now, and that his way of participating in class suggests that he will eventually become an intelligent, productive, reliable, trustworthy member of society.*" (Exhibit "E" at 6-7, emphasis supplied.)

Serving as a Mentor, Teacher and Other Volunteer Work

22. In addition to his academic and program accomplishments, which are many, [REDACTED]

[REDACTED] has become a very well-respected role model for other inmates and has long served as a mentor to teach others the skills he has learned. In fact, he took the initiative to start two different endeavors. In 2016, the Riverside Church Prison Ministry wrote a letter in support of Petitioner and lauded his mentorship, stating:

“We are very impressed by [REDACTED]’s unswerving commitment to transform his thinking and his life over many years of confinement. That commitment has been demonstrated time and again through the range of programs and activities he has created, led, and participated in, from the Recognizing Individual Exceptional Strides Award (RIESA) to mentoring incarcerated peers. In the process, he has helped many others to transform their own lives. He is clearly ready to be a contributing member of society. ...” (Exhibit “F” at 1[a])

23. Also in 2016, [REDACTED] of the Think Outside the Cell Foundation, wrote a glowing letter in support of [REDACTED], discussing his deep commitment to positive transformation for himself and others, stating:

“...Among other accomplishments, [Petitioner] created the Recognizing Individual Exceptional Strides Award (RIESA) which honor [those] who have continually worked to become their best selves... He also created a ‘Smart is the New Tough’ mentoring campaign intended to awaken incarcerated people to the importance of education. ... He plans to continue his campaign when he returns home, targeting at-risk young people.

[REDACTED] has devoted more than 400 hours to voluntarily tutoring math... And for more than 10 years, he led the Veterans Organization at Sullivan... In one poignant case, he was instrumental in ensuring that a veteran named [REDACTED] who died while incarcerated in 2009 was buried in the Veterans National Cemetery on Long Island rather than in ‘Potters Field.’

[REDACTED]’s achievements underscore his deep and abiding commitment to doing the hard work required to grow and flourish as a human being, the hard work required to transform and redeem oneself. It is the kind of work that all of us would be better for undertaking, whether we are behind prison walls or in halls of power...” Exhibit “F” at 8[a]-8[b])

RIESA

24. [REDACTED] initiated the Recognizing Individual Exceptional Strides Award (RIESA) in 2010, and it is now a highly anticipated annual event at both Fishkill and Sullivan. (See Exhibit “F” at 1-5, which includes the Programs for the Fifth Annual RIESA Banquet at Sullivan, and the Second Annual Banquet at Fishkill.) Staff Advisor [REDACTED] wrote this about the RIESA program in 2014:

“In 2010, Inmate [REDACTED] founded the ... Recognizing Individual Exceptional Strides Award (RIESA.) This awards ceremony which formally recognizes the

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exceptional strides and accomplishments of outstanding inmates, has been an annual event held at Sullivan Correctional Facility. The mission statement of RIESA is: ‘To formally recognize the positive academic, behavioral/attitudinal and/or other exceptional accomplishments, including volunteer services of the incarcerated. ...

...The annual RIESA ceremony has been a highly anticipated event at Sullivan Correctional Facility as both inmates and staff have participated and received awards for their exceptional strides.’” (Exhibit “F” at 1)

Smart is the New Tough

25. Petitioner also initiated his own Smart is the New Tough program, which has been incorporated into RIESA at both Sullivan and Fishkill. (Exhibit “F” at 3-8) The program, which includes a whole curriculum of instruction and activities, is designed to people to change their thinking in order to avoid recidivism. (See Exhibit “F” at 9-23 for some sample material.) For example, Petitioner teaches that there are three stages to making a positive transition to a law-abiding life upon release – he states:

“Transition has three states:

The Ending – Letting go of the old ways and the old identity people had. This first phase of transition is an ending, and the time when you need to help people to deal with their losses.

The Neutral Zone – Going through an in-between time when the old is gone but the new isn’t fully operational. We call this time the ‘neutral zone’: it’s when the critical psychological realignments and repatterning take place.

The New Beginning. Coming out of the transition and making a new beginning. This is when people develop the new identity, experience the new energy, and discover the new sense of purpose that makes the change begin to work.” (Exhibit “F” at 10)

Tutoring Math and Life Skills

26. In addition to all this, [REDACTED] has spent a lot of time tutoring math to other inmates, and even created a curriculum called “Algorithm of LIFE” which not only teaches actual math skills, but also uses them to teach other critical life skills. (Exhibit “F” at 27-33)

27. [REDACTED] received two awards for his work tutoring and facilitating math classes. (Exhibit “F” at 24-25) In April 2018, Petitioner received an outstanding Inmate Progress Report

for his work tutoring math. (Exhibit "F" at 26) The Report noted excellent performance in all areas and stated:

"[REDACTED] is a very conscientious worker in the classroom. ... [REDACTED] teaches the advanced math in Algebra to everyone who needs it. He explains to the students on their individual level and breaks down the math according to their learning abilities.

... [REDACTED] is a polite, courteous and well-mannered individual. He is extremely patient with the students and doesn't go on to the next topic until he is sure everyone gets it. *He is a pleasure to work with plus he is a great asset to the students in my class.*" (Exhibit "F" at 26, emphasis supplied)

28. Petitioner also has spent a lot of time in other volunteer work, including hundreds of hours facilitating Alternatives to Violence Programs (AVP), founding and leading Veterans Groups, taking on a leadership role in the Community Minded Organization, and much more. (Exhibit "F" at 34-52)

AVP Facilitator

29. [REDACTED] has long been an AVP Facilitator, and he received several Certificates of Appreciation from AVP for his more than 220 hours of service as a facilitator. (Exhibit "F" at 36-41) Petitioner was one of several inmates featured in an AVP publication in 2013 where the inmates said "What being an AVP facilitator means to me." (Exhibit "F" at 34) Petitioner stated:

"Being an AVP Facilitator is like conducting a train on a journey of enlightenment.... During the journey, all aboard come to realize that life has a lot to offer and there is great opportunity on the horizon. The conductor pulls into station and hands the controls to the passengers. For they now have the experience and tools needed to conduct their own peaceful journey." (Exhibit "F" at 34)

Teaching Road to Redemption Course

30. [REDACTED] also facilitated the Road to Redemption Course for the Community Minded Organization at Fishkill in 2016, and the group's President and Staff Advisor wrote to him about how important his contribution was, stating:

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“I personally would like to thank you for your excellent job of facilitating the **Road to Redemption course** in the R-East Mental Health Unit during the summer 2016 schedule. Your example of giving back serves as an inspiration to your peers. Even with all the bumps on this new road that we have walked through you never gave up on yourself nor your fellow inmates. . .*I do not know what I would have done without your assistance...*” (Exhibit “F” at 42, emphasis supplied)

Veterans’ Groups

31. [REDACTED] has long served in (and helped found) Veterans Groups at several different facilities. He received Certificates of Appreciation for his service as Vice President of the Veterans Group of Fishkill in 2016, and for his dedication to the Veterans’ group at Sullivan in 2014. (Exhibit “F” at 46-47) The 2014 Certificate stated:

“When the call of duty went out, you never sent it to voice mail, you always answered. When the organization needed resuscitation, you blew breath into its lungs. Your hard work, sacrifice, and dedication to the furtherance of the Sullivan Veterans program is unquestioned and unmatched.

The organization is lucky to have been under your stewardship, as you have given us, not only validity amongst the administration, but a leadership role among the facility organizations and peers. You have a heart of gold, yet the heart of a lion, and we want you to know that we recognize and appreciate your leadership.” (Exhibit “F” at 47)

Other Volunteer Work

32. Petitioner also received Certificates of Appreciation for facilitating a 10-week Advanced Creative Writing Workshop, and for facilitating a workshop called Father From Afar. (Exhibit “F” at 44-45) In addition, he received certificates and letters of appreciation for service to the Caribbean African Unity group; the African-American Organization; Prisoners for AIDS Counseling and Education (PACE); Children of Promise; and the Kawaida Shule Organization. (Exhibit “F” at 48-52)

Personal Growth and Programming

33. Of course, [REDACTED] could never have become such a great mentor and role model if he had not already done a lot of work on himself – he has clearly done so, and continues

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to better himself. Petitioner has completed a multitude of therapeutic programs over the years, between 1997 – 2016. (Exhibit “G” at 1-14)

34. Despite his long-standing assertion of innocence, Petitioner was required to complete the Sex Offender Counseling and Treatment Program, and he successfully did so in 2016, receiving excellent ratings in all categories. (Exhibit “G” at 1-3)

35. [REDACTED] completed many AVP classes over the years, including an advanced course in nonviolent conflict resolution; facilitator training classes, and parenting classes in addition to the regular basic and advanced AVP classes. (Exhibit “G” at 5-9) He also completed a domestic violence training in 2013. (Exhibit “G” at 4)

36. Petitioner additionally completed Think Outside the Cell’s Life Enhancing workshop in 2014; a Manhood Responsibilities Course; Inmate Program Assistance (IPA) Training; and Aggression Replacement Training. (Exhibit “G” at 10-14) He received an Award for Outstanding Achievement in the IPA Program. (Exhibit “G” at 12)

COMPAS Risk Assessment Instrument [NEED]

37. 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 “J”) The 2018 RAI Risk Assessment *found low risk in every possible category*. (Exhibit “J” at 1) The RAI went on to document that [REDACTED] has good family support, has a high school diploma (in fact he has two college degrees), and has a firm job offer and the ability to find work in a trade or profession. (Exhibit “J” at 2, 5, 6)

Letters of Support from Family and Others

38. In addition to the letters from staff, discussed above, many other people have written letters in support of [REDACTED]. [REDACTED] and [REDACTED] wrote a recent letter

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about how Petitioner had been a valuable mentor to their son when he was in prison, stating:

“We first met [REDACTED] during the summer of 2014 at a family picnic in the yard of Sullivan Correctional Facility. ...Our son had been telling us about a group of older inmates who took him under their wing, helping him to adjust to prison and offering him guidance about redirecting his life toward mature behavior. [REDACTED] was one of these men.

During the meal, we chatted with [REDACTED] and learned his life story. We were impressed with his introspective reflections about himself and types of leadership styles as well as his commitment to mentoring younger inmates like our son...Over the years we corresponded with [REDACTED] and visited him in prison. Our first impressions of [REDACTED] as a solid, reliable, stable man remain unchanged.

We and our son believe that without [REDACTED]'s assistance our son's first year at Sullivan would have been much more difficult. [REDACTED] *helped our son become a wiser, calmer and more mature person.* He helped lay the groundwork for our son's eventual parole release in 2017 and successful reentry into society. ...” (Exhibit “H” at 1-2, emphasis supplied)

39. Petitioner's sister, [REDACTED], wrote about how much she always looked up to him and the positive role he played in her life, which included taking her in as a young teen when she was starting to get in trouble – the letter stated:

“...When my brother was in the military, I was in junior high school and heading down the wrong path. [REDACTED] stepped in and brought me to Virginia to live with him so I could have a better life. I will never forget that. I looked up to him then and look up to him now.

Our father died when I was 12 years old. Since then my brother, who is nine years my senior, has always been a father figure to me.

Today I have 5 children... All of them look up to my brother as a father figure, as I did/still do. ...I sit here writing this to you in hopes and prayers that you will understand how complete my life as a sister and family would be should you grant my brother parole. ...” (Exhibit “H” at 3)

40. [REDACTED], of the prison reform group Critical Resistance, wrote of the group's very positive experiences with [REDACTED], stating:

“...[REDACTED] is an asset to our organization. Through letters he has sent to Critical Resistance over the years as well as his published writings, we have gotten to know [REDACTED] and his character. We cherish opportunities to talk to [REDACTED] and learn about his life and vision for the world. ... He is a man of utmost character. We are entirely confident that [REDACTED] will continue to maintain a lawful ... life of service to our communities. [REDACTED] has devoted his time to mentoring, educating, inspiring others, encouraging them to educate

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themselves so that they may live successful, recidivist-free lives when they get out..." (Exhibit "H" at 4)

41. [REDACTED]'s aunt, [REDACTED], also wrote in support of him, stating:

"...I am currently employed by the US Postal Service, where I have been employed for over 33 years. ... [REDACTED] has lived with me ... since his pre-teen years. I have observed my nephew excel in school and maintain employment throughout the summer months. [REDACTED] enlisted in the military at the age of 18 and was honorably discharged at the age of 23. Soon thereafter, he was arrested for a crime which I believe he did not commit.

I believe that [REDACTED]'s conviction was a product of a negative situation that he happened to be in the presence of. That does not make [REDACTED] a bad person. ... I can attest to the fact that [REDACTED] has always been a kind, considerate and caring human being. I know that my nephew continues in the process of being vindicated from what he expressed to me was a wrongful conviction. When [REDACTED] is released, *he is welcome to live with me in the residence where he grew up... I will provide my full support in assisting my nephew with his reentry and reintegration into society. ...*" (Exhibit "H" at 5)

42. In addition to the above letter from his aunt, saying he can live with her upon release and that she will assist him with whatever he needs, Petitioner has other letters of assurance from individuals and organizations who see his positive character and abilities. Petitioner's uncle, [REDACTED], wrote that he could also provide a place for him to stay, and employment for him in his home improvement company. (Exhibit "H" at 6) AVP provided [REDACTED] with a letter of reasonable assurance as well, stating that he was eligible for their "Landing Strip" program upon release, which would help provide various transitional resources. (Exhibit "H" at 7) Finally, [REDACTED] received a letter of reasonable assurance from the Osborne Association, which provides employment training and other reentry services. (Exhibit "H" at 8-9)

Military Accomplishments

43. As noted above, [REDACTED] served in the Navy from 1986 to 1991, and received an honorable discharge as well as several commendations and extremely positive

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evaluations. (See Exhibit "I" at 1-7) He received a Commendation in November 1987 for superior performance and assistance. (Exhibit "I" at 2) In July 1988, he was chosen for the Sailor of the Quarter Citation, which stated:

"For outstanding performance... You... were selected over all other eligible personnel... Your professionalism, timely-response and courtesy have been noted... Additionally, you have devoted off-duty hours standing watches so shipmates could attend college classes, participating as a Teacher's Aid/Bus Monitor during Vacation Bible School, and readily volunteering for community projects...." (Exhibit "I" at 3, emphasis supplied.

44. In January 1988 [REDACTED] received an outstanding evaluation in his capacity as a Cryptologic Technician, which stated:

"[REDACTED] is a fine Cryptologic Technician Operator. He is a superb performer and dedicated team player earning the respect of superiors and peers. ...His is an asset to this command and the U.S. Navy and is most strongly recommended for promotion..." (Exhibit "I" at 4, emphasis in original)

45. Later, in July of that same year, Petitioner received another glowing evaluation, which stated:

"[REDACTED]'s superb performance, dedication, and professionalism make him a most valued member of this command with unlimited potential. ...Flawless military appearance and demeanor. Good-humored, well-mannered, promotes a sense of pride and contributes to high morale of command. [REDACTED] is the best junior enlisted CTO in the command and is most strongly recommended for advancement..." (Exhibit "I" at 6)

46. [REDACTED] also received two letters of appreciation for his volunteer work helping needy people in the Philippines, and helping families who lost their homes in a fire. (Exhibit "I" at 5, 7)

2018 and 2016 Decisions

47. Despite the mountains of evidence showing [REDACTED]'s exemplary character and outstanding institutional history, the Parole Board denied release, stating:

“...The instant offense reflects your first New York State incarceration and related conviction. While serving this bid of incarceration you incurred an excessive number of disciplinary infractions in the form of Tier II and Tier III tickets. ... Your COMPAS indicates low risk criminologic needs scale, however the panel will depart from the COMPAS. The panel is not convinced you will lead a law abiding life. The COMPAS indicates low risk to abscond but after committing the instant offense you fled to another state only to be apprehended 12 months later. ...[T]he interview revealed two different stories related to your culpability in the instant offense. Your unwillingness to provide the panel with an accurate outline of the instant offense in the role you played concerns this panel. ... Use the time to examine the role you played ... to gain clarity of how to begin the rehabilitation process...” (Exhibit “A” at 15-16)

48. The claim that there were an “excessive number of disciplinary infractions” is obviously false given that in 2016, the panel said, “Note is made ...of your ... *minimal disciplinary record.*” (Exhibit “A” at 19) It is also significant that, during the 2018 interview, there was *no mention whatsoever* of the disciplinary history. As noted above, there was one Tier II adjudication in 2017, but it was filed in retaliation for Petitioner’s filing a grievance against a Correction Officer for harassment – the grievance has been partially substantiated by DOCCS. Other than that, Petitioner had a Tier II adjudication for failing to follow a direct order in 2016, and no other violations *since 2008*. (Exhibit “C,” at 7-9) There were no Tier III adjudications *since 2000* and [REDACTED] has received only three Tier III’s in total. Why would this history have been termed *minimal* in 2016 and *excessive* in 2018?

49. Similarly spurious is the claim that despite the COMPAS finding of low risk of absconding, the risk is actually high because Petitioner went to Virginia after the instant offense. As noted, Petitioner had ties there, and had *already* planned to move there after a brief stay in New York. (Exhibit “A” at 3, 8) The fact that he went to Virginia months later and married his fiancée as planned in 1991 does not in any way indicate a high risk of absconding in 2019 – the COMPAS was correct.

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50. Finally, it can be seen from the hearing transcript that Petitioner did not tell two different stories during this interview. He simply asserted his innocence, and while the panel did not have to believe him, given all the evidence of his exemplary character, they should not have held this against him in the manner they did.

2018 Hearing

51. Initially, the panel asked [REDACTED] to describe what happened in the instant offense, which involved rape, sodomy, sexual abuse and assault. (Exhibit "A" at 2-3) He said that while he was at the house where the attack took place, he was not involved in it, and was not in the room where it took place. (Exhibit "A" at 3-6) He did express remorse for not having assisted the victim. (Exhibit "A" at 6, 14) When asked about his 2016 interview and statement where he had tried to accept responsibility because he was told he had to do that to get released, [REDACTED] said:

"That personal statement and a lot of what I said at that Parole Board was inaccurate and the reason why, I felt so hopeless, I felt so afraid to tell the accurate story because I didn't, the courts barred me from any more [pro se] motions. I put that into the parole packet and the Jeffrey [Deskovic] Foundation for Justice recently picked up my case and they wrote a letter on my behalf..." (Exhibit "A" at 11)

52. The panel discussed [REDACTED]'s successful completion of the sex offender treatment program, and he discussed his awareness of the trauma suffered by victims, as well as his own experience being the victim of a much more minor incident. He showed great remorse for what had happened to [REDACTED], stating:

"...I was able to hear not only from other individuals that were in the group, but from the social worker about the importance of knowing what a victim goes through, the trauma... not only on them but the far reaching effects on the family, on their relationships. And I know that [REDACTED] was traumatized... And to this day her relationships could be jeopardized through that. I myself in here in prison was verbally and sexually harassed and ... it was substantiated by OSI and although I was removed from the environment and transferred here I didn't realize that the lasting effects stayed

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on my mind. And I have to take antianxiety medication because of that. So I know that was just harassment. I couldn't imagine [REDACTED]'s long lasting effects... I shouldn't have been in that house. I should have helped her... Her mother came to trial. She was crying. I think about that a lot, it affects me." (Exhibit "A" at 8-9)

53. The Board noted that the *COMPAS found low risk in all areas*. (Exhibit "A" at 11) At the end of the interview, when Petitioner was asked if he had anything else to add, he mentioned family support that he has and the positive work he would do upon his release:

"...I've learned to look at the far reaching effect of behaviors and anything that I could do could have an effect on other people... My sister has been coming for 27 years and right now she has a cancer scare, they found some lump in her breast. She has five children. I've been mentoring them and I plan to continue mentoring. I have a Smart is the New Tough mentoring campaign that I started and I want to continue it. And I started the [Recognizing] Individual Exceptional Strides Awards to help other individuals and I really want to help guide youth from being in negative situation like I was in... You can't let someone be attacked and traumatized. ... It could have been my sister... no woman should be going through that." Exhibit "A" at 13-14)

Administrative Appeal

54. On May 10, 2019 the Board's determination was affirmed in the Administrative Appeal Decision Notice. (Exhibit "K") The Appeal Unit stated erroneously, *inter alia*, that the Board was entitled to deny release based on the seriousness of the offense, and that the decision contained sufficiently detailed reasons. (Exhibit "K" at 1-4)

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ARGUMENT**POINT I****THE PAROLE BOARD BASED ITS DECISION ALMOST SOLELY
ON THE CIRCUMSTANCES OF THE OFFENSE - THIS
SHOULD RESULT IN A DE NOVO HEARING**

55. In both *Rivera v. Stanford*¹, 2019 NY App. Div. LEXIS 3595 (2nd Dep't 2019) and *Ferrante v. Stanford*², 2019 NY App. Div. LEXIS 3407 (Second Dep't 2019), the Second Department stated very recently that it is improper to deny release based only on the seriousness of the offense. In *Ferrante*, supra, the Second Department upheld a finding of contempt against the Parole Board for having done just that, stating:

“...The Board is not required to address each [statutory] factor in its decision or to give all factors equal weight. However, *the Board may not deny an inmate parole based solely in the seriousness of the offense.*” *Ferrante*, supra, at 10, emphasis supplied and citations deleted.

56. It appears that the Board did deny release based almost solely on the seriousness of the offense. While mention is made of disciplinary infractions, it is significant that in 2016, the panel said, “Note is made ...of your ... *minimal disciplinary record.*” (Exhibit “A” at 19) It is also significant that, during the 2018 interview, there was *no mention whatsoever* of the disciplinary history.

57. Prior to the recent *Ferrante* decision, in *Ramirez v. Evans*³, 118 AD3d 707 (2nd Dep't 2014), *Perfetto v. Evans*, 112 AD3d 640 (2nd Dep't 2013) and *Matter of Huntley v. Evans*, 77 AD3d 945 (2nd Dep't 2010), the Second Department reversed the denials of new parole

¹ Richard Rivera was granted an open date for parole release in June, 2019.

² Danielle Ferrante is the John MacKenzie's daughter and the representative of his estate – John tragically committed suicide in prison in 2016 after his tenth denial of parole.

³ Santiago Ramirez was, after his latest de novo hearing in March, 2017, granted parole with an open date.

hearings where the parole board improperly based the decisions solely on the seriousness of the offense. As noted in *Ferrante*, supra, the First Department did the same thing in *Matter of Rossakis*⁴ v. *NYS Bd. of Parole*, 146 AD3d 22 (1st Dep't 2016.)

58. There have also been several other court decisions in the past few years granting or upholding new parole hearings for this same reason. *Matter of Kellogg v. NYS Bd. of Parole*⁵, 2018 NY App. Div. LEXIS 1469 (1st Dep't 2018); *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (New York Co. 2019) (new hearing granted where the board relied *almost solely* on the nature of the offense for its denial); *Matter of Almonte v. Stanford*, Index No. 10476/2018 (Orange Co. 2019) (new hearing granted where board focused *almost solely* on nature of offense); *Matter of Ciaprazi v. Evans*, Index No. 0910/2016 (Dutchess Co. 2016); *Matter of Platten v. NYS Bd. Of Parole*, 2015 NY Misc. LEXIS 932 (Sullivan Co. 2015); *Matter of Gonzalez v. NYS Dep't of Corrections & Community Supervision*, 401130/14 (New York Co. 2015); *Matter of Rabenbauer*⁶ v. *NYS DOCCS*, 2014 NY Misc. LEXIS 4824 (Sullivan Co. 2014); *Matter of McBride*⁷ v. *Evans*, 42 Misc.3d 1230(A) (Dutchess Co. 2014); *Matter of West*⁸ v. *NYS Bd. Of Parole*, 41 Misc.3d 1214(A) (Albany Co. 2013).

59. In the instant case, despite the fact that the COMPAS scores were uniformly low, the Board *still* managed to ignore this (as well as all the other positive facts discussed above) and deny parole based only on the circumstances of the offense and the assertion of innocence (as well as a spurious mischaracterization of the disciplinary record.) The decision stated that many factors (almost entirely positive) were considered, but said “*More compelling, however, is that*

⁴ Niki Rossakis was released in March, 2017 and has not been reincarcerated.

⁵ Laurie Kellogg was released in April, 2019 and has not been reincarcerated.

⁶ Philip Rabenbauer was released January 20, 2015 and has not been re-imprisoned.

⁷ Moses McBride was released March 10, 2014 and has not been re-imprisoned.

⁸ Michael G. West was released October 7, 2014 and has not been re-imprisoned.

the instant offense marks your first New York State incarceration resulting in your conviction for rape [etc]...” (Exhibit “A” at 18, emphasis supplied)

60. In both *Kellogg*, supra, and *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (New York Co. 2019) courts recently granted new hearings even where, as in the instant case, the petitioners had not accepted responsibility for the offenses in question. In *Kellogg*, the First Department stated:

“...[P]etitioner participated in numerous programs, including working as a teacher’s aide and helping inmates obtain their GEDs, training service dogs, and serving as a chaplain’s clerk. ...[P]etitioner compiled an extraordinary disciplinary record... ...[P]etitioner’s risk assessment placed her in the lowest category of likelihood of reoffense.

...*The commissioners emphasized that petitioner had failed to accept responsibility for the crimes she had been found guilty of committing...* ...

Supreme Court granted petitioner’s article 78 petition, stating, *inter alia*, that ‘[s]ubjective views of [petitioner’s] alleged lack of remorse... cannot be allowed to override objective evidence of the last 25 years’... *The court reflected, ‘Does saying you are sorry,’ as a means to seek freedom from incarceration, mean that you are less likely to re-offend than if you do not?’* We now modify to remand for a new hearing, rather than outright release, and otherwise affirm....” *Kellogg*, supra, at 2, 4, emphasis supplied.

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

“...Petitioner still *maintained that she did not commit the murder...*

...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. As in *Kellogg* and *Sullivan*, Petitioner has an exemplary institutional record, and his failure to accept responsibility for the offenses due to his assertion of innocence should not prevent his release. It is noted that, as pointed out in the letter from the Deskovic Foundation,

which is investigating his case, there are many signs which cast doubt on the conviction. (See Exhibit “B” at 1-7) If Petitioner is innocent as he claims, then he clearly poses no risk of re-offense, and his long incarceration has been a great injustice. If he is guilty, then he has still served 27 years with an exemplary institutional history and a long history as a mentor, teacher and role model, and he will be subject to strict supervision upon release.

63. In *Almonte*, supra, the court very recently granted a new hearing where, as in the instant case, the Board had relied *almost exclusively* on the seriousness of the offense, stating:

“A parole board’s denial of parole which focused almost exclusively on the inmate’s crime, while failing to take into account and fairly consider any of the other relevant statutory factors which categorically supported [the] inmate’s release, was arbitrary and capricious. ...

In the instant matter, the Court cannot find, as a matter of law, that the Board’s hearing focused exclusively on petitioner’s crime. ... Nor can the Court find that the Board ignored the COMPAS assessment ... noting, as it did, the high probability for substance abuse...

In this matter, the Board’s decision appears to have accorded no weight to any factor apart from the seriousness of petitioner’s offense. ...” *Almonte*, at 6-7, 9.

64. Even prior to the passage of 2011 amendments which attempted to force the Board to use current assessments of risk, and not rely only on the past, 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*⁹, 22 AD3d 950 (3rd Dep’t 2005); *Vaello v. Board of Parole*¹⁰, 48 AD3d 1018 (3rd Dep’t 2008); *Gelsomino v. Board of Parole*¹¹, 82 AD3d 1097 (2nd Dep’t 2011); *Malone v. Evans*¹², 83 AD3d 719 (2nd Dep’t 2011); *Johnson v. Division*

⁹ Charles Friedgood was released in 2007 and has not been re-imprisoned.

¹⁰ Jose Vaello was released in March, 2012 and has not been re-imprisoned.

¹¹ Louis Gelsomino was released in 2011 and has not been re-imprisoned.

¹² Mark Malone was released in 2011 and has not been re-imprisoned.

of Parole¹³, 65 AD3d 838 (4th Dep't 2009); *Prout v. Dennison*¹⁴, 26 AD3d 540 (3rd Dep't 2006); *Mitchell v. Division of Parole*¹⁵, 58 AD3d 742 (2nd Dep't 2009); *Winchell v. Evans*¹⁶, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Wallman v. Travis*¹⁷, 18 AD3d 304 (1st Dep't 2005); *Oberoi v. Dennison*¹⁸, 19 Misc.3d 1106(A) (Franklin Co. 2008); *Rios v. NYS Division of Parole*¹⁹, 15 Misc.3d 1107(A) (Kings Co. 2007); *Weinstein v. Dennison*²⁰, 2005 NY Misc. LEXIS 708 (NY Co. 2005); *Cappiello v. NYS Board of Parole*²¹, 2004 NY Misc. LEXIS 2920 (NY Co. 2004); *Almonor v. Board of Parole*²², 16 Misc.3d 1126(A) (NY Co. 2007); *Coaxum v. Board of Parole*²³, 14 Misc.3d 661 (Bronx Co. 2006); *Schwartz v. Dennison*²⁴, 14 Misc.3d 1220(A) (NY Co. 2006); *King v. New York State Division of Parole*, 190 AD2d 423 (1st Dep't 1993).

65. Therefore, based on *Ferrante*, *Kellogg*, *Sullivan*, *Almonte*, and the other cases cited above, because the Parole Board improperly based its decision almost exclusively on the severity of the offense, this Court should grant a *de novo* hearing before different commissioners.

POINT II

THERE WERE NO DETAILED REASONS GIVEN FOR THE DENIAL

66. It is clear that the reasons given for parole decisions must be detailed, and not simply perfunctory. *Rivera v. Stanford*, supra; *Sullivan v. NYS Bd. of Parole*, supra; *Winchell v.*

¹³ Daniel Johnson was released in 2009 and has not been re-imprisoned.

¹⁴ William Prout was released in 2009 and has not been re-imprisoned.

¹⁵ Roger Mitchell was released in 2009 and has not been re-imprisoned.

¹⁶ Craig Winchell was released in 2011 and has not been re-imprisoned.

¹⁷ Jay Wallman was released in 2005 and has not been re-imprisoned.

¹⁸ Gurpreet Oberoi was released in 2009 and has not been re-imprisoned.

¹⁹ Ivan Rios was released in 2007 and has not been re-imprisoned.

²⁰ Herbert Weinstein was released in 2006 and has not been re-imprisoned.

²¹ John Cappiello was released in 2005 and has not been re-imprisoned.

²² Chester Almonor was released in 2007 and has not been re-imprisoned.

²³ Jean Coaxum was released in 2006 and has not been re-imprisoned.

²⁴ Jerrold Schwartz was released in 2008 and has not been re-imprisoned.

*Evans*²⁵, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Matter of Rossakis*²⁶ 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*²⁷, 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 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 Kozłowski*²⁸ v. *NYS State Bd. Of Parole*, 2013 NY Misc. LEXIS 552 (NY Co. 2013).

67. In the instant case the Decision only perfunctory noted the “low risk criminologic needs scale,” and Petitioner’s “case plan ... institutional behavior and program participation” and then went on to deny release based on what occurred in 1991, as well as Petitioner’s assertion of innocence and an interpretation of his disciplinary record which is not supported by the record.

68. The Board completely ignored all the evidence in Petitioner’s parole packet showing that he had become a well-respected model for other inmates – this included commendable behavior reports and letters from staff, including C.O. [REDACTED] who had only written one previous letter for an inmate in 24 years and who said he was putting his name and reputation on the line by supporting [REDACTED]. (See Exhibit “D” at 5) The Board also ignored [REDACTED]’s two college degrees and the letters by his professors who were sure he would be an asset to society upon release. (Exhibit “E” at 4, 6-7) The Board ignored similar letters from the

²⁵ Craig Winchell was released in 2011 and has not been reincarcerated.

²⁶ Niki Rossakis was released in March, 2017 and has not been reincarcerated.

²⁷ Jack Maddaloni was released on September 10, 2018 and has not been reincarcerated.

²⁸ L. Dennis Kozłowski was released January 17, 2014 and has not been re-imprisoned.

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Riverside Church Ministry and the Think Outside the Cell Foundation, as well as the fact that he had taken the initiative to start the RIESA Award Program (now going strong in two facilities) and the Smart is the New Tough program. They also ignored his history as a math tutor and use of math to teach life skills as well; his long history as an AVP Facilitator; his leadership of Veterans Organizations and much more. In short, the Board ignored everything that [REDACTED] [REDACTED] has become over the last 27 years.

69. In *Matter of Rossakis*, supra, the First Dep't upheld the grant of a new hearing for this reason, 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.

70. As in *Rossakis*, in the instant case the Board likewise noted Petitioner's institutional achievements, his low COMPAS scores, and his case plan, all of which strongly supported release, yet denied parole without sufficient explanation.

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

71. As in *Matter of Coleman v. NYS DOCCS*²⁹, 2018 NY App. Div. LEXIS 136 (2nd Dep't 2018) and *Winchell v. Evans*, 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

²⁹ David Coleman was released in March 2018 and has not been reincarcerated.

no facts showing any likelihood of re-offense. In *Winchell*, supra, the court granted a new hearing, before different board members, 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.

72. As in *Winchell* and *Coleman*, the Board did not produce any evidence that [REDACTED] would not be a law-abiding citizen upon release. It is quite instructive to note that despite the Board having denied release to the 29 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 is not Incompatible With the Welfare of Society

73. The Board also claimed, mouthing the statutory language, that Petitioner’s release was incompatible with the welfare of society. There is no support in the record for this conclusory claim. In *Almonte*, supra, this was one of the reasons for the recent grant of a *de novo* hearing – the court stated:

“...[T]he Board’s failure to explain, other than the facts of the crime, why the inmate’s release was incompatible with the public safety and welfare, could not be supported.

It is particularly ironic that the ‘boilerplate’ language follows a recitation of petitioner’s positive factors, including his lack of other criminal history, his progress and achievements, his clean disciplinary record, etc., and then goes on to conclude that his

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discretionary release is *thus* incompatible with the welfare of society. (Emphasis in original) Little could be more contradictory and less informative.

Reasoning that employs past-centered rhetoric and not future-focused risk assessment analysis is inconsistent with the rational determination of the inquiry at hand, to wit, whether the inmate can live and remain at liberty without violating the law and whether his release was incompatible with the welfare of society and did not deprecate the seriousness of his crime so as to undermine respect for the law. ...” *Almonte*, supra, at 7-8.

74. In *Sullivan*, supra, where, as in the instant case, the petitioner maintained her innocence, the court stated:

“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). ...” *Sullivan*, at 9-10.

75. As in *Sullivan* and *Almonte*, the Board simply recited the statutory language without providing any factual support for its claim that release was incompatible with the welfare of society. As in those cases, a new hearing should be granted herein.

Petitioner’s Age Also Indicates a Low Risk of Recidivism

76. The fact that [REDACTED] is now 51 years old also supports release. 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 50 pose a very 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, let alone over 60, than among younger persons....” *Presley*, at 3.

77. In addition, a 2015 Report from Columbia University’s Center for Justice, “*Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety*,” stated:

“People in prison aged 50 and older are far less likely to return to prison for new crimes than their younger counterparts. For example, only 6.4% of people incarcerated in New York

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State released age 50 and older returned to prison for new convictions; this number was 4% for people released at the age of 65 and older. Nationally, arrest rates are just over 2% for people aged 50+ and are almost 0% for people aged 65+.” Report, Executive Summary - http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf

POINT III

THERE WAS NO JUSTIFICATION FOR DEPARTING FROM THE LOW COMPAS SCORES

78. In this case, the Board departed from the COMPAS Risk and Needs Assessment’s scores, and failed to adequately explain this in the Decision. The Decision said:

“Your COMPAS indicates low risk criminologic needs scale, however the panel will depart from the COMPAS. The panel is not convinced you will lead a law abiding life. The COMPAS indicates low risk to abscond but after committing the instant offense you fled to another state only to be apprehended 12 months later...” (Exhibit “A” at 15)

79. As discussed above, the fact that Petitioner relocated to Virginia months after the 1991 offense, as planned before the offense, in order to marry his fiancée, does not in any way indicate a high risk of absconding in 2019 – the COMPAS was correct.

80. In *Sullivan*, supra; *Robinson v. Stanford*, Index No. 2392/18 (Dutchess Co. 2019); and *Comfort v. NYS Bd. of Parole*, Index No. 1445/2018, the courts granted *de novo* hearings because the Board did not explain its departure from the low COMPAS scores. The Board likewise failed to adequately explain its departure from the low COMPAS scores in the instant case, and a new hearing should be ordered for this reason as well as the other reasons argued herein.

POINT IV

THE BOARD VIOLATED PETITIONER’S RIGHT TO DUE PROCESS

81. 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

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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.

CONCLUSION

82. Based on the foregoing, Petitioner [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 October, 2018 Board, and direct that the Board *not* deny release based solely on the nature of the offense(s).

Dated: July 8, 2019.

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