Art. 78 Petition - FUSL000123 (2019-02-26)

STATE OF NEW YORK
COUNTY OF DUTCHESS SUPREME COURT

In the Matter of [redacted],
Petitioner.
-against-

PETITION

CPLR ARTICLE 78

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

Index No:
RJI No:

Respondent.

PRELIMINARY STATEMENT

1. The Parole Board based its Decision denying parole to [redacted] improperly based chiefly on the circumstances of the 1982 offense, and without detailed reasons, or a proper explanation as to why there was a departure from the low COMPAS risk scores. The Board also failed to obtain [redacted]'s sentencing minutes and did not show any diligent efforts to do so.

2. [redacted] is 65 years old, suffers from several serious medical problems, and is a completely different person than he was at the time of the murder in 1982. Both his written statement and letter to the Board, and his statement at the parole interview, showed great remorse for killing his wife. There is absolutely no basis for the Board's statement that his strong, consistent remorse was somehow "shallow."

3. The record shows that [redacted] has engaged in a great deal of self-reflection (aided by his aunt, and the therapeutic programs he completed, such as ASAT and ART) over the many years of his incarceration, and has transformed himself from a suspicious, vengeful and bitter person into one who has empathy for others, and would never commit another senseless act of violence.

4. [redacted] has had only a single, minor disciplinary violation in the last seven years (for refusing to go to an outside medical appointment he was not aware had been scheduled) and has successfully completed a plethora of therapeutic programs, as well as educational achievements, and a great deal of volunteer work.

5. [redacted] never knew his father, and was raised by his grandmother and abusive grandfather because his mother could not care for him. When his grandmother became ill, he was sent to his mother in New York at the age of 14. Tragically, both his grandmother and then his mother then soon died within one month of each other, resulting in his being sent, at the age of 15, to relatives in Chicago who did not want him. At that point, he understandably became very bitter and unhappy.

6. [redacted] eventually returned to New York and married [redacted], who had been his girlfriend years earlier. The relationship did not work out, however, and after she left him, he showed up at her office building where, enraged, he ended up stabbing her to death. [redacted] now understands how warped his character was at that time, and he has worked very hard these past 36 years to understand and make the changes necessary to prevent any future violence. He is clearly ready to be released and the Board failed to recognize that – the denial has no support in the record, and is contrary to law.

STATEMENT OF FACTS

7. [redacted] was convicted, upon a jury verdict, of Murder in the second degree and Assault in the first degree based on a 1982 crime where he fatally stabbed his estranged wife and stabbed a bystander in the hand when he attempted to intervene. (See Hearing Transcript, attached as Exhibit "A" at 5) He was sentenced to 32 1/2 years to life. (Exhibit "A" at 3) This is

his fourth time going to the Parole Board and he has served 36 years. (See Parole Board Report, attached as Exhibit "B" at 1)

Institutional Record

8. [redacted] has an excellent institutional record, with a single Tier II disciplinary violation since 2011 (this was for refusing an outside medical appointment because he was not aware of it and was suddenly awakened and expected to go without any advance notice). (Exhibit "A," at 15-16; Hearing Disposition, attached as Exhibit "B" at 4)

9. Beyond that, he many positive accomplishments, including educational achievements, the successful completion of a great deal of positive programming, and quite a bit of volunteer work.

Education

10. After obtaining his GED [redacted] took advantage of the college program in prison while it existed, studying through the Clinton Community College Extension Center from Fall 1994- Spring 1995. (See college transcript, attached as Exhibit "C" at 1) He obtained 24 college credits at that time, in History, Communication, English, Cultural Geography and Earth Science, as well as a couple of remedial math classes, and he had a B+ average. (Exhibit "C" at 1)

11. Unfortunately, in the summer of 1995, there was no more tuition assistance available, and [redacted] could not afford the $252 per course cost of continuing the college program. (See letter from Clinton Community College, attached as Exhibit "C" at 2)

12. [redacted] was able to engage in a recent Cell Study program for Music Theory, and he received an Evaluation in December, 2017, which noted his performance was "excellent" in all areas. (Exhibit "C" at 3) He has also been enrolled in the PACE education program. (Exhibit "D"

at 16) Finally, [redacted] has been taking an Entrepreneur Real-estate Investment Course (ERIC) (Exhibit "D" at 16)

Programs Completed

13. Despite not being able to continue his college education, [redacted] took advantage of a multitude of programs available to him in prison, and successfully completed more than twenty-five programs over the years. (See list of programs at Exhibit "C" at 4) The programs included substance abuse treatment (ASAT and AA); Aggression Replacement Training (ART); many vocational programs; HIV/AIDS counselor training; suicide prevention and First Aid training; and many more. (Exhibit "C" at 4) He is currently taking a theatre workshop on writing and acting. (Exhibit "D" at 16)

14. [redacted] successfully completed ASAT in 2014 while at Livingston Correctional Facility. (Exhibit "C" at 5-6) He also successfully completed the ART program in 2014. (Exhibit "C" at 8) Previously, [redacted] had received a Certificate for having attended 20 AA meetings in 1992, while in Green Haven Correctional Facility. (Exhibit "C" at 7)

15. In December, 2014, [redacted] successfully completed IPA training, and received an excellent evaluation – the comments stated, "Great presentation. Will be a great TA or IPP in Group." (Exhibit "C" at 9) [redacted] also received many excellent Inmate Progress Reports, particularly for his work as a Porter in 2012-2013. (Exhibit "C" at 11-16)

Volunteer Work

16. [redacted] has also done a great deal of volunteer work over the years. This has included being the coordinator for the Veterans' Fundraiser; being a visiting room and facility photographer; being the Music Equipment Technician for Special Events; being a Special Events

Ad-hoc Committee member; and being an Inmate Assistance Music and Choir Director. (Exhibit "C" at 4)

COMPAS Risk Assessment Instrument

17. A COMPAS Risk Assessment Instrument (RAI) was prepared in order to help determine if [redacted] would be able to live in a law-abiding manner upon his release. (Risk Assessment Instrument attached as Exhibit "D")

18. The 2018 RAI Risk Assessment found the lowest risk in every possible category which isn't based on the circumstances of the offense or other long-ago events. (Exhibit "D" at 1) The RAI went on to document that [redacted] has good family support, has a GED and has the ability to find work in a trade or profession. (Exhibit "D" at 1, 5, 6, 10) The RAI indicates that the re-entry substance abuse is "probable" but that does not take into account [redacted]'s involvement in AA and his successful completion of ASAT.

Medical Problems

19. [redacted] is 65 years old and suffers from several serious medical conditions, including Hepatitis C, Diabetes, Hypertension, Hypothyroidism, and HIV – he tries to keep these under control with medication, but they are all very serious and potentially fatal. (See 2018 Medical Problems List, attached as Exhibit "B" at 8, 9) He takes twelve different medications to manage those diseases. In addition, [redacted] is blind in the left eye, and was recently diagnosed with a cataract in his right eye. (Exhibit "B" at 8; Exhibit "E" at 6)

20. [redacted] also underwent surgery for prostate cancer in 2014, and suffered complications from that surgery. (Exhibit "B" at 8; Exhibit "E" at 6) Recently, he has suffered from a herniated disc which causes severe back pain and leg weakness. (Exhibit "E" at 6) After

inexplicably breaking two bones in his left foot while simply walking, he is being evaluated for Osteoporosis. (Exhibit "E" at 6)

Personal Letter and Statement

21. In November, 2017 [redacted] wrote a letter to the Parole Board expressing the great remorse he has long felt for killing his wife – he stated:

> "…There are no words in the human language to adequately describe the regret I feel for causing so much pain to so many good people. … My regret began the nanosecond after I committed this horrendous crime and it has been my companion ever since.
>
> …I failed to take [the plea offer] because of self loathing and a guilt stricken mind. …I had no illusion about my guilt or the trial's outcome because the evidence was overwhelming. I felt so ashamed and guilt-ridden until I would have accepted the death penalty rather than stand up in front of my wife's family and mine and admit that I had committed such a horrible and senseless crime…." (Exhibit "E" at 1)

22. [redacted] then described how he and his wife, [redacted], had fallen in love as teenagers but were forced to separate when he had to leave New York due to the death of his mother (she died right after he learned [redacted] was pregnant.) (Exhibit "E" at 2) They reconciled years later, and [redacted] described what led to his murdering her, stating:

> "…During the intervening years while we were apart, [redacted] grew into a beautiful, intelligent and educated woman capable of making her own decisions. … While I transformed into a distrustful, suspicious, vengeful and controlling person.
>
> ***
>
> Unfortunately my jealous, suspicious and controlling behavior eventually began to ruin our relationship. I saw her need for independence as a sign of rebellion. That is when the arguing and physical abuse began. My treasured appearance of a happy family began collapsing and I didn't know how to handle it. But in the end it was my refusal to let go that ultimately resulted in this senseless tragedy.
>
> Through years of reflection, self-examination, maturity and counseling from my aunt, [redacted], who has been with me evert day of these 35 years, I realize that love does not begin and end with one's ability to pay bills. Love is not obstructive or restrictive. Love can not be forced or controlled. And most importantly, love sometimes means letting go.
>
> … Not only did I deprive her family of a caring daughter, sister and aunt, I deprived my son and daughter of a loving mother. Because of my stupidity and

egotistical behavior, I plunged my children into the same hellish condition I grew up in and that has compounded my grief. …" (Exhibit "E" at 3-4)

23. In the letter [redacted] also described his childhood, where his father was out of the picture and he lived with his grandparents because his mother could not care for him. He lost an eye at the age of 5 when he got in the middle of a fight between his grandparents. When he was 14, his grandmother was diagnosed with terminal cancer, and [redacted] was sent from Arkansas to New York to live with his dysfunctional mother. His grandmother soon died, and only one month later, so did his mother. He was then sent to Chicago to live with relatives who did not want him, and understandably became bitter and distrustful. (See Exhibit "E" at 1-2)

24. [redacted] describes this *not to in any way excuse his crime, but as part of his necessary need to understand who he was, how he could have done this, and how to make sure nothing like that will ever happen again*. He stated:

> "…I lived with my grandparents because my mother was unable to take care of me. My father was never a part of my life. …One morning when I was 5 years old, I was awakened by loud arguing between my grandparents. Being a curious child, I got out of bed and walked … directly in the path of a stick of wood thrown by my grandmother and my grandfather. I was hit in the left side of my face, *knocking my eye out*….
>
> As a child growing up I quickly learned how cruel children can be. I was taunted and called ever vile one-eyed name you can think of. *I also learned that violence would stop the hurtful taunts … and it became my way of dealing with adversity*…
>
> My grandmother was the stabilizing force in my life but at 14, I was uprooted and sent to live with my mother in New York because, unknown to me, my grandmother had terminal cancer. I was 15 when she died. Exactly one month later, my mother died of heart problems and I became totally rudderless. I was sent to Chicago to live with relatives who never made my feel welcome of loved. I became bitter, resentful and distrustful. …" (Exhibit "E" at 1-2, emphasis supplied)

25. As [redacted] stated in his letter, it was only through years of reflection, aided by his aunt, [redacted]e, and the many therapeutic programs he completed in prison, that he came to understand how he became who he was, and how he learned to transform himself into a very different person.

26. [redacted] also wrote a Personal Statement which described in greater detail his transformation, as well as his hope for the future. He stated:

> "…When I entered the department of corrections facing 33 ½ years to life, I never imagined that I would live long enough to appear before a parole board, especially because thoughts of suicide were never far from my mind. For years I avoided any reference to or in-depth conversation about my crime because of the panic and anxiety that gripped me….
>
> Thankfully my aunt, [redacted], has been there for me. She has been my staunchest supporter and at times, my harshest critic. She has cried with me, prayed with me and talked me through bouts of depression and despondency. … She always made me face the fact that I caused my pain and the pain of many others. From her I learned the true meaning of empathy.
>
> ***
>
> My evolution was a long and slow process. But my aunt told me something that put everything in perspective. She said, 'If you take care of today, tomorrow will take care of itself.' Those words caused me to take stock of myself and put a concentrated effort into completing all my programs, maintaining a good disciplinary record, enrolling in college and participating in any curriculum that would further my rehabilitation.
>
> Even though I still experience periods of anxiety, I am able to discuss my crime without the crippling effects of heart palpitations… …. I [now] understand what precipitated my unconscionable acts and I know nothing like that will ever happen again.
>
> ***
>
> If released my first priority is to maintain health and sobriety… I intend to re-enter the wholesale and retail garment industry where I have ten years experience. …
>
> ***
>
> At this juncture in my life I have spent more time behind bars than I have lived out in the real world. Because of this length of time, it would be unrealistic to exit this system without some psychological assistance with re-adjusting in society. This is why I'm seeking to be released to a transitional housing setting… … I have sought and received a Letter of Reasonable Assurance from the Salvation Army…
>
> ***
>
> …Although I will admit to a certain amount of anxiety when contemplating being released into essentially a whole new world … I am nonetheless looking forward to the opportunity and challenge. Even at this late stage in my life I still have goals I want to accomplish. …" (Exhibit "E" at 5-8)

Letters of Support

27. Several people wrote letters in support of [redacted]. His aunt, [redacted], wrote about [redacted] and his journey of transformation, stating:

> "…[redacted] made a horrible mistake that caused much grief to many people that

loved him and that he loved as well. He has been in prison since he was 27 years old and he will be 65 in April [2018.] I realize the tragedy of what [redacted] has done and I am positive he does too.

…I know if given a chance, he will do everything in his power to make amends for the pain that he caused… He has earned the respect of many of the officials in the numerous prisons he has served time in, [redacted] has been appointed to many different committees, he has participated in every self-help program that was offered, educational and work. … He earned his High School Diploma, certificate in computer repair and other college courses. Also, he served as a photographer in the prison visitor area.

He helped organize a gospel choir… I have followed him and counseled him, prayed and encouraged him because I know that my nephew is a wonderful decent person who made a terrible mistake… He has a dream of going into the clothing business and we as a family are committed to help him in any way…." (Exhibit "E" at 11)

28. [redacted], a long-time friend of [redacted], also wrote a letter in support of him, expressing a desire to help him when he is released, and stating:

…[redacted] and I have known each other for a lifetime and …remain friends. …I would appreciate being a part of his transition… …[H]e is welcome to get released to my home.

I have resources that will aid him … [and] help him get around to his parole reports, Dr. appointments, group meetings, find a church to attend and/or his own apartment.

I have my own catering business, I work for Walmart part time, about to release a book onto the market. I have attended Progressive Church for over 30 years and have been in my home since 1988. …

I lead a stress free life. I have never been in any trouble and have a good rapport with community leaders, [the] Mayor …pastors and teachers. …" (Exhibit "E" at 9)

29. [redacted]'s uncle, [redacted], also said he could help him, and wrote:

…[redacted] has family that loves and will support him in rebuilding his life. He has paid with most of his life for this terrible crime that he committed. …He has expressed so much remorse for what he did and for the people he hurt.

I wholeheartedly believe that if you were to give [redacted] another opportunity, he will take full advantage of the second chance… … I know he will make us all proud. …[redacted] will always have a job with my company and will have a home. I need his experience and expertise in the ladies apparel business I own.

…He was 27 years old when he made that awful mistake, he will be sixty-five years old in April. As his family, we will support him in every way to help him build a positive life…" (Exhibit "E" at 10)

30. [redacted]'s cousin, [redacted], wrote about how, as a school principal, she has seen

people make horrible decisions, but go on to lead productive lives – likewise, she feels that her cousin has shown his readiness for release, stating

> "…I am a retired principal of Shelby County Schools [in TN] after working in that capacity for 24 years.
>
> I learned about my cousin's crime when I was a senior in high school. … For about a year, I cut off communication with him. However, he is family and I was concerned about my cousin so I wrote to him and talked to him weekly. Gradually, I saw a man that was remorseful for what he had done, and was determined to take the necessary steps to rectify his life. …
>
> I am writing this letter in the hopes that it will help you to see what kind of person [redacted] has become… … He always encouraged me to finish school, [and] make decisions based on what is right…
>
> I can tell you without a doubt that [redacted] is extremely remorseful… He has expressed this many times, and I believe it has been expressed in his efforts to make amends to the victims… I am a former principal … and I have seen people make really bad decisions that negatively impacted their lives. However, given an opportunity, a chance to redeem themselves, they turned out to be productive citizens that contribute to their community… He has family that has supported him … and will continue to support him if released…" (Exhibit "E" at 12)

31. Finally, [redacted]'s aunt, [redacted], also wrote a letter in support of her nephew, stating:

> "…[redacted] came to my home after that very tragic incident and he was totally devastated, having taken the life of his wife, the mother of his children. …[H]e gave himself up, because he could not deal with what he had done. … I pray that when my nephew comes before your honorable board again that you will … have mercy on him. He has the full support of his family…" (Exhibit "E" at 13)

2018 Decision and Minutes

32. Despite the strong evidence showing that [redacted] is a very different person than he was when he committed the murder in 1982, the Parole Board denied release, stating:

> "Your Instant Offense involved your actions stabbing your estranged wife to death at her place of employment, and then you stabbed another individual in the hand, who had tried to come to her aid.
>
> This is an escalation of your criminal history and record on Community Supervision, which includes offenses in both New York and Illinois.

> The Panel notes your rehabilitation efforts; including your completion of ASAT, as well as you disciplinary record, which includes a Tier II infraction since your last interview.
>
> Also considered were letters of support and assurance and other material located in your well prepared parole packet.
>
> We have reviewed your Case Plan, your release plans, and your risk and needs assessment, which indicates your lower risk scores, but high history of violence.
>
> The Panel was struck with your perfunctory recitation of the facts surrounding your wife's death. It was only in your closing statement that you expressed any statement of remorse, leading the Panel to conclude that your expression was shallow.
>
> Use your time to continue to take programs to develop empathy and work on a more realistic release plan.
>
> …[T]his Panel is not convinced that you would live and remain at liberty without violating the law. Furthermore, your release is not compatible with the welfare of society, and would so deprecate the serious nature of your crime as to undermine respect for the law." (Exhibit "A" at 15-16)

33. At the hearing a Commissioner said that they had requested [redacted]'s Sentencing Minutes, but had not obtained them. (Exhibit "A" at 3) They then discussed the murder, and how he had used flowers as a ruse to get his wife to come to the lobby of her office building. (3-4) [redacted] said there was a yelling match and he then lost control and stabbed her right there in the lobby. (Exhibit "A" at 4-5) He said when a man there tried to intervene, he stabbed him in the hand. (Exhibit "A" at 5)

34. Subsequently, there was a discussion of [redacted]'s prior criminal history. He had never been in prison before, but had previously been convicted of assault and obstruction of governmental administration. (Exhibit "A" at 6-7) He had also served some time in jail in Illinois[1], saying that he had been joyriding in a stolen car at the age of 17. (Exhibit "A" at 8)

35. Petitioner then discussed how his grandmother, suffering from terminal cancer, had sent him to New York to live with his mother at the age of fourteen, and that was how he met his

[1] When [redacted] requested his records from Cook County Circuit Court (which handles misdemeanors and preliminary felony cases in the jurisdiction where he resided) there were no records of him – most likely, he was accorded youthful offender status.

eventual wife, [redacted], who became pregnant with his child. (Exhibit "A" at 9) However, his mother soon died and he was sent to Chicago, but told [redacted] he would come back and help her raise their son. (Exhibit "A" at 9) [redacted] did return to New York and he and [redacted] married, but the relationship didn't work out. (Exhibit "A" at 9)

36. Commissioner Alexander then asked [redacted] about his recent Tier II violation for disobeying a direct order – he explained that it was for refusing to go on an outside medical appointment because he did not realize it had been scheduled. (Exhibit "A" at 9-10)

37. There followed a discussion of Petitioner's career plans – the Commissioner saw that he had a certificate in microcomputer repair, and noted that this was a useful skill. (Exhibit "A" at 10) [redacted] said that he had experience in the garment business and would prefer to get back into that, especially since his family already had a clothing store. (Exhibit "A" at 10)

38. Commissioner Alexander then noted that [redacted]'s COMPAS scores were low, stating, "[Y]our risk scores are low, so that's positive. It does talk to your history of violence, but it doesn't show any real needs; maybe substance abuse. Have you done ASAT?" (Exhibit "A" at 12) Petitioner responded that yes, he had completed the ASAT program. (Exhibit "A" at 12)

39. Commissioner Alexander said that she understood [redacted] had been a peer facilitator, adding, "It looks like you've done a lot." (Exhibit "A" at 12-13) She also noted that he had been doing volunteer work with veterans. (Exhibit "A" at 13)

40. At the end of the interview, when Petitioner was asked if he had anything to add, he stated:

> "Just this: I deeply regret what I've done. I know I can't change anything, but if I could I would.
>
> I've taken my wife from my kids, and from her family. I've caused them do much pain, and I am truly sorry, I am." (Exhibit "A" at 14)

Commissioner Alexander responded, "*I think that's well said, sir*." (Exhibit "A" at 14)

The Missing Sentencing Minutes

41. As mentioned above, the Commissioners said that they had requested a copy of Petitioner's sentencing minutes, but had not received them. This had happened in 2015 as well, and for that reason Petitioner was given a *de novo* hearing in 2016[2]. (See Albany County Judgement, attached as Exhibit "F") That Albany County Decision stated that the Attorney General had conceded that a *de novo* hearing must be ordered because the sentencing minutes had not been considered. (Exhibit "F" at 2) While one of the hearing Commissioners had claimed that a diligent effort was made to obtain them, there appeared to be no basis for that claim, and the respondent did not make that argument, agreeing that a new hearing must be held. (Exhibit "F" at 2)

Administrative Appeal

42. In September, 2018 Petitioner submitted an Administrative Appeal arguing that there must be a *de novo* hearing because: 1) the Board failed to obtained the sentencing minutes and failed to show diligent efforts to do so; 2) the Board improperly based its decision chiefly on the circumstances of the offense; 3) there were no detailed reasons given for the denial; and 4) the Board violated Petitioner's right to due process.

43. On November 28, 2018 the Appeal Unit upheld the Board's determination. (Administrative Appeal Decision attached as Exhibit "G." The Appeal Unit stated: 1) the Parole Board is entitled to deny parole primarily because of the gravity of the crime; 2) the reasons given for denial were adequately detailed (including stated that the deviation from the COMPAS

[2] It is not clear whether the sentencing minutes were considered at the 2016 *de novo* hearing, where release was also denied.

scores was justified); that the Board's failure to obtain the sentencing minutes was a harmless error; and that there is no right to due process in a parole proceeding. (Exhibit "G" – Findings and Recommendation, at Pages 2, 3, 5, 6)

Conclusion

44. Refusing to give any real weight to his accomplishments and clear transformation, the Parole Board denied [redacted] parole for the fourth time, based almost entirely on the circumstances of his offense

ARGUMENT

POINT I

THERE WERE NO DETAILED REASONS GIVEN FOR THE DENIAL AND THE PAROLE BOARD'S CLAIMS ARE NOT SUPPORTED BY THE RECORD

45. The Decision herein failed to provide the requisite detailed reasons for the denial of release. Moreover, the reasons the Board did provide for the denial were not supported by the record.

A. No Detailed Reasons Were Given

46. It is clear that the reasons given for parole decisions must be detailed, and not simply perfunctory. *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (New York Co. 2019); *Winchell v. Evans*[3], 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Matter of Rossakis*[4] *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.

[3] Craig Winchell was released in 2011 and has not been reincarcerated.
[4] Niki Rossakis was released in March, 2017 and has not been reincarcerated.

2310/2017 (Dutchess Co. 2018); *Maddaloni v. NYS Bd. of Parole*[5], 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 Kozlowski*[6] *v. NYS State Bd. Of Parole*, 2013 NY Misc. LEXIS 552 (NY Co. 2013).

47. In the instant case the Decision only perfunctory noted "lower risk scores," "rehabilitation efforts," and "letters of support and assurance and other material located in your well prepared parole packet" and then went on to inexplicably deny release based on what occurred in 1982, ignoring everything which took place since that time. No real explanation was given. (The claims which were made are without support in the record, as discussed below.)

48 The Board herein ignored Petitioner's exemplary institutional record. In *Matter of Rossakis*, 146 AD3d 22 (1st Dep't 2016) 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.

49. As in *Rossakis*, in the instant case the Board likewise noted Petitioner's educational achievements, his essentially clean disciplinary record, his low COMPAS scores, his

[5] Jack Maddaloni was released on September 10, 2018 and has not been reincarcerated.
[6] L. Dennis Kozlowski was released January 17, 2014 and has not been re-imprisoned.

programming, and his case plan, all of which strongly supported release, yet denied parole without sufficient explanation.

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

> "In 1988 petitioner was convicted of murder in the second degree…
> Subsequently, petitioner was sentenced in 1991 …for a conviction of assault in the second degree during which petitioner fatally stabbed another inmate… and in 1992 … for a conviction of attempted promotion of prison contraband.. for possessing a four inch shank. …
> ***
> The Board must set forth an explanation for its determination in detail and not just conclusory terms…
> ***
> The 2011 amendments to the Executive Law represent a shift in focus from offense driven to a more forward thinking consideration of whether an inmate has been rehabilitated and is ready for release…
> …[P]etitioner repeatedly accepted responsibility for his actions and demonstrated remorse…
> *******
> After a review of the entire record, the Court cannot determine from the cursory nature of the Board's decision how it utilized its risk assessment procedures or applied the statutory factors in concluding that petitioner's release was incompatible with the safety of society **at this time**. …
> ***
> 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 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. Rather, *the language in the written determination is perfunctory at best as to the consideration given to the relevant statutory factors by the Parole Board. Therefore, the Court finds that the Parole Board has violated its statutory commitment by failing to provide a detailed decision as to the basis for the denial of parole release…*" *Ruiz,* supra, at 1, 5-8, 10-11, some emphasis supplied.

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

> "Despite the existence of, inter alia, Petitioner's low risk of recidivism, low risk of violence, low risk of substance abuse, his family support, his remorse, his planned

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

52. Very recently, in *Sullivan*, supra, the court also granted a *de novo* hearing where the reasons were insufficiently detailed, stating:

> "…[C]ourts do not rubber stamp a parole denial. … …[W]henever the board denies a parole application, it must provide the inmate a writing which includes *detailed reasons* for the decision '*in factually individualized and non-conclusory terms.' …* …[B]oard decisions which merely include a list of an inmate's achievements and progress and track the statutory language … can suggest that the Board's decision violated the statutory mandates…" (*Sullivan*, at 8)

53. Everything stated above by the courts in *Ruiz*, *Ruzas* and *Sullivan* applies equally in the instant case, and this Court should likewise order a *de novo* hearing due to the lack of detailed reasons for the denial.

B. The Board's Purported Reasons for Denial are Not Supported by the Record

54. In the Decision, the Board focused a great deal on the instant offense, as discussed below. In the last three paragraphs, the Board said Petitioner's remorse was somehow shallow; that they did not believe he would refrain from violating the law if released; and that his release would unduly deprecate the serious nature of the crime. None of those reasons are supported by the record.

Petitioner's Expression of Remorse was Strong and Heartfelt

55. The Board stated, "The Panel was struck by your perfunctory recitation of the facts surrounding your wife's death. It was only in the closing statement that you expressed any statement of remorse, leading the Panel to conclude that your expression was shallow." (Exhibit

"A" at 16)

56. In fact, the interview, not to mention the letter and personal statement he submitted to the Board, actually reveals that [redacted] spent a lot of time talking about the crime, for which he clearly took full responsibility. And the fact that he most strongly expressed his remorse at the end of the interview does not in any way mean it was "shallow." (*The Commissioners did not prompt him to discuss remorse; he was simply asked if he had anything to add*.)

57. As noted above, [redacted] wrote a letter to the Parole Board expressing the great remorse he has long felt for killing his wife – he stated:

> "…There are no words in the human language to adequately describe the regret I feel for causing so much pain to so many good people. … My regret began the nanosecond after I committed this horrendous crime and it has been my companion ever since.
>
> …I failed to take [the plea offer] because of self loathing and a guilt stricken mind. …I had no illusion about my guilt or the trial's outcome because the evidence was overwhelming. I felt so ashamed and guilt-ridden until I would have accepted the death penalty rather than stand up in front of my wife's family and mine and admit that I had committed such a horrible and senseless crime….
>
> ***
>
> … Not only did I deprive her family of a caring daughter, sister and aunt, I deprived my son and daughter of a loving mother. Because of my stupidity and egotistical behavior, I plunged my children into the same hellish condition I grew up in and that has compounded my grief. …" (Exhibit "E" at 1, 4)

58. Then at the end of the interview, when Petitioner was asked if he had anything to add, he stated:

> "Just this: I deeply regret what I've done. I know I can't change anything, but if I could I would.
>
> I've taken my wife from my kids, and from her family. I've caused them do much pain, and I am truly sorry, I am." (Exhibit "A" at 14)

59. Commissioner Alexander responded, "*I think that's well said, sir*." (Exhibit "A" at 14, emphasis supplied)

60. 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.

61. As in *Coleman,* the record herein shows that Petitioner clearly took full responsibility for the offense, and also strongly expressed his great remorse, both in the letter to the Board and in the hearing itself. This was even recognized by Commissioner Alexander, who stated that the expression of remorse was "well said." How then can the Board later claim that the remorse was perfunctory or shallow?

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

62. As in *Coleman,* supra, the record contained no indication that Petitioner was likely to violate the law if released. His institutional record was exemplary, and there are simply no facts showing any likelihood of re-offense. In *Winchell v. Evans,* supra, the court granted a new hearing, before different board members, for the same reason in a very similar case, 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.

63. As in *Winchell*, 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 *35 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.

Petitioner's Advanced Age Also Indicates a Low Risk of Recidivism

64. The fact that [redacted] has now attained the age of sixty-five is also significant and 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 (and with further declines over 60 and beyond) 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.

65. 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 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

66. Because all the evidence in the record signals a very low risk of recidivism, the Board's contrary findings are not supported by the record and cannot be given any weight.

Release Would not Deprecate the Serious Nature of the Offense

67. The Board also claimed, mouthing the statutory language, that Petitioner's release would somehow deprecate the serious nature of the offense and undermine respect for the law. Again, given Petitioner's clear acceptance of responsibility and expressions of remorse, coupled with his excellent institutional record, there is no support in the record for this conclusory claim.

68. In Sullivan, supra, where, unlike the instant case, the petitioner maintained her innocence with regard to the murder, the court very recently granted a *de novo* hearing, stating:

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

69. As in *Sullivan*, the Board simply recited the statutory language without providing any factual support for its claim.

POINT II

THERE WAS NO JUSTIFICATION FOR DEPARTING FROM THE LOW COMPAS SCORES

New Regulations

70. In September, 2017, the Parole Board's new Rule, adopted at its April, 2017 meeting, went into effect, and thus was in effect at the time Petitioner went to the Board in May, 2018. The Rule mandates that the Board *must provide individualized reasons for any departure from*

the COMPAS scores.

71. The Rule states:

> "8002.2
> ***
> (a) Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs principles, including the inmates risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision… *If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure.* …"

72. In this case, the Board departed from the COMPAS Risk and Needs Assessment's low risk scores, and failed to adequately explain this in the Decision. All the Decision said was "We have reviewed your Case Plan, your release plans, and your *risk and needs assessment, which indicates your lower risk scores*, but high history of violence." It would seem that anyone convicted of murder would have a "high history of violence" so this is basically just further reliance on the offense itself to justify denial. And it certainly doesn't take into effect the positive change over the past 36 years – the failure to do that is precisely why the Legislature mandated forward looking assessments in 2011, and why the COMPAS is now being used.

73. Very recently, in *Comfort v. NYS Bd. of Parole*, Index No. 1445/2018, this Court granted a *de novo* hearing solely because the Board did not adequately explain its departure from the low COMPAS scores, stating:

> "…[T]he parole board decision …specifically states that Petitioner's COMPAS scores were low overall.
> …[T]he discrete issue before this court is whether the parole board departed from the COMPAS risk assessment … and thereafter failed to identify and *justify said departure.*
> ***
> …[The] parole board determination clearly stated that parole release was being denied because there was a reasonable probability that Petitioner would not live and remain at liberty without violating the law. In other words, the parole board apparently

believed that it was likely that Petitioner would break the law if released.

Yet, Petitioner's COMPAS instrument clearly identifies Petitioner as the lowest possible risk (1) in the following three categories – *risk of felony violence, arrest risk and abscond risk. … Accordingly, the parole board's finding that it was likely that Petitioner would reoffend is a departure from the COMPAS* instrument. With such a departure, NYCRR 8002.2(a) *requires Respondent to specify the scale from which it departed and provide an individualized reason for such departure. A review of the … decision demonstrates that the parole board did not do so.*

***

The Court acknowledges, and does not minimize, that this case involves the death of a New York State police officer, as well as very significant injuries to another officer. *A murder conviction is surely among the most serious of crimes. Nevertheless, this Court's responsibility is to ensure that Petitioner's application for parole release be appropriately evaluated according to all applicable laws and regulations….*" *Comfort*, supra, at 4-6, emphasis supplied.

74. As in *Comfort*, supra, the COMPAS risk scores - for risk of felony violence, arrest risk and abscond risk - were all low in the instant case, which indicates a low risk of re-offense according to the COMPAS. As in *Comfort*, the Decision herein *failed to specify the scale from which it departed from the COMPAS* f*indings of low risk*. Nor did the Decision explain why it was departing from the COMPAS low risk scores in finding a likelihood of re-offense. Moreover, as discussed above, the reasons for denial which were given in the Decision (though not characterized as explanations for departing from the COMPAS scores) were not supported by the record.

75. In *Sullivan*, supra, even though the new regulations regarding COMPAS departures had not yet gone into effect, the court *still* found that the failure to adequately consider the COMPAS scores required a *de novo* hearing, stating:

"…Respondent stated that petitioner's COMPAS scores were excellent, as she scored a low risk for prison misconduct, propensity for future violence, and subsequent criminal problems. Respondent noted that her history of violence score was in the medium range because of the severity of her crime. Petitioner still maintained that she did not commit the murder, but she acknowledged that she was the catalyst for the crime… Petitioner again expressed her apology for the family's loss…

***

> …[A]lthough the COMPAS score is not binding on the parole board… it is an important factor which the parole board much duly consider… *Indeed, the COMPAS score is so critical that the failure to consider it adequately mandates a remand*…." *Sullivan*, supra, at 5, 8, emphasis supplied.

76. In *Sullivan*, unlike the instant case, the petitioner asserted her innocence as to the instant offense, and neither had low COMPAS findings for history of violence, but both had *low risk scores.* In *Sullivan*, the failure to adequately consider the COMPAS required a new hearing even before the new regulations went into effect. In this case, where the regulations were clearly in effect at the time of the hearing, this Court should grant a *de novo* hearing because the board failed to specify what COMPAS scale it departed from, and failed to provide individualized reasons for said departure.

POINT III

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

77. In its Decision denying parole in the instant case, it is submitted that the only real factor relied upon to deny parole was the circumstances of the offense. While other purported reasons were mentioned (chiefly the claim that the remorse was somehow "shallow") they were not supported by the record, as discussed above.

78. In *Coleman v. NYS DOCCS*[7], supra; *Ramirez v. Evans*[8], 118 AD3d 707 (2nd Dep't 2014), *Perfetto v. Evans*[9], 112 AD3d 640 (2nd Dep't 2013) and *Matter of Huntley v. Evans*, 77 AD3d

[7] David Coleman was released in March, 2018 and has not been reincarcerated.
[8] Santiago Ramirez was released in April, 2017 and has not been reincarcerated.
[9] Gary Perfetto was released in June, 2016 and has not been reincarcerated.

945 (2nd Dep't 2010), the appellate courts reversed the denials of new parole hearings where the parole board improperly based the decisions solely on the seriousness of the offense.

2011 Amendments

79. Because the Parole Board had been erroneously basing its decision on the seriousness of the offense all too often, in 2011 the Legislature amended Executive Law 259-c(4) in order to force the Board to more accurately assess the risk of future offense by using a *dynamic* assessment *focused on change over time* rather than simply on the distant past.

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

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

81. There have also been several other recent court decisions granting or upholding new parole hearings for this reason. *Matter of Hawkins v. NYS DOCCS*, 2016 NY App. Div LEXIS 3147 (3rd Dep't 2016); *Matter of Hawthorne v. Stanford*[10], 2016 NY App. Div. LEXIS 75 (3rd Dep't 2016); *Matter of Kellogg v New York State Bd. of Parole*, 2018 N.Y. App. Div. LEXIS 1469 (1st Dep't 2018); *Sullivan v. NYS Bd of Parole*, supra; *Lackwood v. NYS Board of Parole*[11], Index No. 2464/2017 (Dutchess Co. 2018); *Hopps v. NYS Bd. of Parole*, Index No. 2553/18 (Orange Co. 2018); *Maddaloni v. NYS Bd. of Parole*, supra; *Esquilin v. NYS Bd. of Parole*[12], 2018 NY Misc. LEXIS 483 (Orange Co. 2018); *Clark v. NYS Bd of Parole*, Index No.

[10] Philip Hawthorne was released in September, 2016 and has not been reincarcerated.
[11] Mark Lackwood was granted an open date release in August, 2018, and will likely be released on September 18, 2018.
[12] Adolfo Esquilin was released in May, 2018 and has not been reincarcerated.

160965/2017 (New York Co. 2018); *Ruiz v. NYS Division of Parole*, supra; *Ruzas v. Stanford*[13], supra; *Butler v. NYS Bd. of Parole*, Index No. 2703/17 (Dutchess Co. 2018); *Darshan v. NYS DOCCS*[14], Index No. 652/2017 (Dutchess Co. 2017); *Matter of Ciaprazi v. Evans*[15], Index No. 0910/2016 (Dutchess Co. 2016); *MacKenzie v. Stanford*[16], Index No. 2789/15 (Dutchess Co. 2015); *Matter of Platten v. NYS Bd. of Parole*, 2015 NY Misc. LEXIS 932 (Sullivan Co. 2015); *Matter of Cassidy v. NYS Board of Parole*, 2255/2014, NYLJ 1202727961167 at *1 (Orange Co. 2015); *Matter of Gonzalez v. NYS Dep't of Corrections & Community Supervision*, 401130/14 (April 20) (New York Co. 2015); *Matter of Bruetsch v. NYS DOCCS*, 43 Misc.3d 1223(A) (Sullivan Co. 2014); *Matter of Rabenbauer*[17] *v. NYS DOCCS*, 2014 NY Misc. LEXIS 4824 (Sullivan Co. 2014); *Matter of Stokes v. Stanford*, 43 Misc.3d 1231(A) (Albany Co. 2014); *Matter of McBride*[18] *v. Evans*, 42 Misc.3d 1230(A) (Dutchess Co. 2014); *Matter of West*[19] *v. NYS Bd. Of Parole*, 41 Misc.3d 1214(A) (Albany Co. 2013).

82. In *MacKenzie v. Stanford*, supra, the court (which subsequently held the Parole Board in contempt when Mr. MacKenzie was denied again after the *de novo* hearing) stated:

> "Executive Law 259(c) was amended in 2011 to require the board to establish new procedures to use in making parole determinations. The statutory amendment was *intended to have parole boards focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and the inmate's pre-incarceration behavior….*
>
> ...[T]he final determination to deny parole release and its conclusory statement that petitioner's release would not be compatible with the welfare of society and would deprecate the seriousness of his crimes or conviction *is not supported by an application of the factual record to the statutory factors. Petitioner …unquestionably exhibited acceptance of responsibility and remorse for his actions, had an exemplary record of*

[13] John Ruzas was released in December, 2017, and has not been reincarcerated.
[14] Travis Darshan was released in September, 2017 and has not been reincarcerated.
[15] Roberto Ciaprazi was released in July, 2017 and has not been reincarcerated.
[16] Tragically, John MacKenzie committed suicide after having been wrongly denied parole ten times.
[17] Philip Rabenbauer was released January 20, 2015 and has not been re-imprisoned.
[18] Moses McBride was released March 10, 2014 and has not been re-imprisoned.
[19] Michael G. West was released October 7, 2014 and has not been re-imprisoned.

institutional achievements … and his COMPAS assessment indicated he was a low risk for re-arrest or criminal involvement upon release. ...

... *A parole board is not entitled to exclusively rely on the severity of the offense* to deny parole… *Finding no rational support in the record before this court for respondent's determination, it is hereby*

ORDERED that the board's determination dated December 15, 2014 denying petitioner parole release is vacated and the matter is remanded to the parole board to make a *de novo* determination on petitioner's request for parole release. It is further

ORDERED that none of the individual members on the parole board that rendered that challenged determination shall participate in the parole hearing to be held upon remand." (*MacKenzie*, at 2-4, emphasis supplied)

83. Very recently, in *Sullivan*, supra, where, as in the instant case, the denial was chiefly but not solely based on the seriousness of the offense, the court granted a new hearing, stating:

"…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]… As the First Department [and Second Department] [have] stated, '[a] Parole Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized resentencing of the defendant.' (*Wallman*, 18 AD3d at 307-08.)

…The decision refers only fleetingly to petitioner's overwhelmingly positive submissions, her plans upon release, and her COMPAS score, the latter of which predicted a low probability of recidivism; and, it does not explain how these factors weighed in the parole denial decision. …

…[T]here is no 'explanation why the [25] year old crime outweighed the voluminous evidence that indicates [petitioner] would presently be able to live a quiet and crim-free life in society' *(Pulinaro v. NYS DOCCS*, 42 Misc.3d 1232(A) *4 [Sup. Ct. NY Co. 2014])…." *Sullivan*, supra, at 8-10, emphasis in original.

84. In the instant case, the offense occurred 37 years ago, 12 years longer than that in *Sullivan.* And as in *Sullivan*, the board did not explain why this offense, albeit very serious, outweighed [redacted]'s overwhelmingly positive institutional record.

85. Moreover, in *Hopps* (where the petitioner strangled his girlfriend to death and had two prior felony convictions), *Maddaloni,* and *Lackwood,* supra, the courts likewise recently granted *de novo* determinations where the board had improperly relied on the seriousness of the offense.

86. In *Lackwood* (where the petitioner killed a 14 year old boy while fleeing the scene of a robbery and had been incarcerated for 23 years) the court recently stated:

> "…Respondent Board focused primarily on the seriousness of the instant offense and Petitioner's prior criminal history in rendering its decision.
> ***
> … Respondent Board's *'concern' about re-entry substance abuse is not supported by the unredacted records* available to the Commissioners. Finally, the record reflects that Respondent Board *did not receive opposition from the District Attorney's* Office for Petitioner's 2017 appearances and there is *no evidence of opposition from the victim's family*.
> …The Board does not give any explanation of how it balanced the seriousness of Petitioner's crimes and criminal history against the other statutory factors that weigh in Petitioner's favor. …
> …A murder conviction is surely among the most serious of crimes. *However, if a Parole Board denies release to parole solely on the basis of the seriousness of the offense, New York courts will deem its decision to be irrational in the absence of any aggravating circumstances.* On the record before it, the Court finds that Respondent's determination that there is a reasonable probability that Petitioner would not live and remain at liberty without again violating the law and that his 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, *are without support in the record…..*" *Lackwood*, supra, at 5, 7-8, emphasis supplied.

87. As in *Lackwood,* the concern about re-entry substance abuse is likewise not supported by the record herein, which shows 36 years of sobriety and the completion of ASAT. Also, like *Lackwood*, there is no indication that there was any official opposition to [redacted]'s release, nor was there any indication of any opposition submitted by the victim's family. And the exact same boiler plate language (regarding the probability of living a law-abiding life and the release being somehow incompatible with the welfare of society) which was criticized in *Lackwood* was also cited in this case, and was also without any support in the record.

88. Even *prior* to the recent amendments which attempted to force the Board to use reality-based assessments, there have been several cases where Board Decisions have been overturned because the Board erroneously based denial of parole solely on the severity of the offense, and was therefore arbitrary and capricious and/or completely irrational. *Friedgood v. NYS Board of Parole*[20], 22 AD3d 950 (3rd Dep't 2005); *Vaello v. Board of Parole*[21], 48 AD3d 1018 (3rd Dep't 2008); *Gelsomino v. Board of Parole*[22], 82 AD3d 1097 (2nd Dep't 2011); *Malone v. Evans*[23], 83 AD3d 719 (2nd Dep't 2011); *Johnson v. Division of Parole*[24], 65 AD3d 838 (4th Dep't 2009); *Prout v. Dennison*[25], 26 AD3d 540 (3rd Dep't 2006); *Mitchell v. Division of Parole*[26], 58 AD3d 742 (2nd Dep't 2009); *Winchell v. Evans*, supra; *Wallman v. Travis*[27], 18 AD3d 304 (1st Dep't 2005); *Oberoi v. Dennison*[28], 19 Misc.3d 1106(A) (Franklin Co. 2008); *Rios v. NYS Division of Parole*[29], 15 Misc.3d 1107(A) (Kings Co. 2007); *Weinstein v. Dennison*[30], 2005 NY Misc. LEXIS 708 (NY Co. 2005); *Cappiello v. NYS Board of Parole*[31], 2004 NY Misc. LEXIS 2920 (NY Co. 2004); *Almonor v. Board of Parole*[32], 16 Misc.3d 1126(A) (NY Co. 2007); *Coaxum v. Board of Parole*[33], 14 Misc.3d 661 (Bronx Co. 2006); *Schwartz v. Dennison*[34], 14 Misc.3d

[20] Charles Friedgood was released in 2007 and has not been reincarcerated.
[21] Jose Vaello was released in March, 2012 and has not been reincarcerated.
[22] Louis Gelsomino was released in 2011 and has not been reincarcerated.
[23] Mark Malone was released in 2011 and has not been reincarcerated.
[24] Daniel Johnson was released in 2009 and has not been reincarcerated.
[25] William Prout was released in 2009 and has not been reincarcerated.
[26] Roger Mitchell was released in 2009 and has not been reincarcerated.
[27] Jay Wallman was released in 2005 and has not been reincarcerated.
[28] Gurpreet Oberoi was released in 2009 and has not been reincarcerated.
[29] Ivan Rios was released in 2007 and has not been reincarcerated.
[30] Herbert Weinstein was released in 2006 and has not been reincarcerated.
[31] John Cappiello was released in 2005 and has not been
[32] Chester Almonor was released in 2007 and has not been reincarcerated.
[33] Jean Coaxum was released in 2006 and has not been reincarcerated.
[34] Jerrold Schwartz was released in 2008 and has not been reincarcerated.

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

89. Therefore, based on *Coleman, MacKenzie, Sullivan, Lackwood*, and the other cases cited above, because the Parole Board improperly based its decision solely on the severity of the offense, this Court should hold that said decision was arbitrary, capricious and irrational and grant a *de novo* hearing before different commissioners.

POINT III

THERE MUST BE A DE NOVO HEARING BECAUSE THE BOARD DID NOT OBTAIN THE SENTENCING MINUTES AND MADE NO SHOWING OF DILIGENT ATTEMPTS TO DO SO

90. Under Executive Law 259-i(2)(c)(A)(vii), the Parole Board *must* consider the sentencing minutes for the offense in question. *Matter of Standley v. NYS Div. of Parole*, 34 AD3d 1169, 1170 (3rd Dep't 2006.) If the sentencing minutes are not considered, the Board must show that it made diligent efforts to try to obtain them. *Matter of Midgette v. NYS Div. of Parole*, 70 AD3d 1039 (2nd Dep't 2010); *McLauren v. NYS Bd. of Parole*, 27 AD3d 565 (2nd Dep't 2006); *Matter of Smith v. NYS Div. of Parole*, 64 AD3d 1030, 1031-1032 (3rd Dep't 2009).

91. In this case, while a Commissioner said at the hearing that they had tried to obtain the sentencing minutes, there was nothing said about when, how or to whom any request for the minutes was made; nor was there any indication that they were unavailable. As shown by the above case law, if the minutes are not provided, there must be evidence showing that they are unavailable, and *nothing of that nature has been shown in this case*.

92. As occurred in 2016, when Albany County Supreme Court directed a *de novo* hearing in this case for this very reason, this Court should also direct that there be a *de novo* hearing where

either the sentencing minutes are considered, or evidence is provided regarding their unavailability, such as a letter from the relevant court saying they cannot be found.

POINT IV

THE BOARD VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

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

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

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

CONCLUSION

95. 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 a different Board.

Dated: February 26, 2019

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