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### Administrative Appeal Brief - FUSL000134 (2022-02-23)

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STATE OF NEW YORK  
DEPARTMENT OF CORRECTIONS  
AND COMMUNITY SUPERVISION

BOARD OF PAROLE

In the Matter of [REDACTED]

PETITIONER,

-against-

APPEAL OF  
PAROLE BOARD  
DETERMINATION

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

RESPONDENT.

DOCCS  
RECEIVED

FEB 28 2022

PRELIMINARY STATEMENT

APPEALS UNIT  
Board of Parole

The October, 2021 Parole Board Decision denying parole to [REDACTED] was illegal because it improperly departed from the completely low COMPAS scores based solely on the nature of the offense; because the denial was essentially based solely on the circumstances of the offense; and because it provided no adequate or detailed justification for denial. Mr. [REDACTED] who is nearly 77 and has absolutely no criminal history, has had an excellent record with not a single disciplinary violation in his 27 years of incarceration, and should have been granted release.

STATEMENT OF FACTS

[REDACTED] was convicted via jury verdict in New York County in 1996 of two counts of Attempted Murder in the second degree, 12 counts of Assault in the first degree, one count of Assault in the second degree, and two counts of Criminal Possession of a Weapon in the third degree, and received an aggregate sentence of 25-50 years. (Parole Board Report, P. 1, attached as Exhibit "A" at 33) This is his second parole denial.

In December, 1994, Mr. [REDACTED] suffered a psychotic break, which he said was caused by a problematic combination of psychiatric drugs prescribed for depression by a psychiatrist who he

later learned was not actually board-certified, and had been fired from three residency programs. (Exhibit "A" at 6, 9) Tragically, Mr. [REDACTED], under the influence of this prescribed medication, became extremely delusional and agitated, and for some reason ended up preparing two rudimentary incendiary devices (using kerosene in a mayonnaise jar) and bringing them onto the NYC subway on December 15 and 21<sup>st</sup> of 1994. (Exhibit "A" at 8-9) He said that given his very warped thinking at the time, he just wanted to make "a big noise" to attract attention, but he soon realized how irrational and reckless it was to use such lethal devices to do so. (Exhibit "A" at 9-10)

On December 15, he left the device on a train or between two trains, and left. He was unaware until after the 21<sup>st</sup> that the device had ended up being inadvertently detonated by a high school student, who was horribly burned. (Exhibit "A" at 12-13) One other person was injured on that occasion. (Exhibit "A" at 12)

On December 21, Mr. [REDACTED] brought the second device onto a Brooklyn train, and said he hadn't wanted it to go off because the train was so crowded, and had his hand in the bag containing it, trying to prevent it from exploding, when it actually detonated, causing many injuries. (Exhibit "A" at 17-19) It was very fortunate that no one lost their life in either explosion, but the sentencing court noted that there were 14 victims<sup>1</sup>, several of whom were quite seriously burned.

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<sup>1</sup> The Parole Board Report stated that "approximately 48 people were injured (including the subject), 16 of them severely." (Exhibit "A" at 33) However, as noted above, the sentencing court said that there were 14 victims. 15 people (including Mr. [REDACTED]) had gone to the hospital and had what were legally cognizable as physical injuries. It is noted that Mr. [REDACTED] was acquitted of 11 counts of assault, and an additional 7 assault counts had been dismissed by the court. It appears that several people were checked out by EMTs on the scene but didn't require treatment and didn't have any physical injury. However, they were likely traumatized by the incident.

Mr. [REDACTED] has long accepted responsibility for the horrendous explosions he caused, and this was clearly an extreme aberration from his otherwise completely law-abiding life, triggered by the affect the combination of prescription drugs had on him.

Significantly, *every one of his COMPAS scores are low*. He has an excellent institutional record, with *no disciplinary violations* at all; he obtained two college degrees while in prison; completed many therapeutic programs, has a history of volunteering to teach others in prison, and a positive release plan.

### **Institutional Record**

Mr. [REDACTED] *never had any disciplinary violations* during the whole roughly 27 year period he has been incarcerated. (Exhibit "A" at 19). He has also completed all his mandatory programs, as well as many others, obtained two college degrees, and has a long history of helping teach other inmates.

### **College Degrees**

[REDACTED], who had previously nearly completed a degree from [REDACTED] when he was drafted in the 1960's, obtained an Associate's Degree in Liberal Studies (Magna Cum Laude) from [REDACTED] in 2009, and a Bachelor's Degree in Behavioral Science (Magna Cum Laude) from [REDACTED] in 2010. (Exhibit "C" at 14-16)

Mr. [REDACTED]'s transcripts (which included a lot of transfer credits from [REDACTED]) show that he had an overall GPA of 3.684 from the [REDACTED] classes, with 8 A's, 4 A-'s, and 7 B+'s. (Exhibit "C" at 17-19)

### **Programs Completed**

[REDACTED] has successfully completed all his required programs, and others on a voluntary basis. These include Aggression Replacement Training (ART), Transitional Services

Phase I & II, the Alternatives to Violence (AVP) Program, and many more. (Exhibit "A" at 19-20; Exhibit "C" at 21, 25-29, 32-33) He completed the Phase I program in 2006, and Phase II in 2011. (Exhibit "C" at 32-33) Mr. [REDACTED] successfully completed the ART program in 2017. (Exhibit "C" at 32) He completed both the basic and advanced AVP courses in 2016. (Exhibit "C" at 21, 32.)

In addition, Mr. [REDACTED] completed Inmate Program Assistant (IPA) training in 1996, and completed a program on "Facilitating IPA Programs" in 1998 – he also did more IPA training subsequently in different prisons. (Exhibit "C" at 24-25, 32) Finally, he completed a Peer Education Program in HIV/AIDS education in 1998, and received a Certificate of Merit for legal research in 1997. (Exhibit "C" at 27-28)

#### **Teaching other Inmates and Volunteer Work**

[REDACTED] has been teaching other inmates for many years now, ever since 1996 when he first completed IPA training and became a teacher's aide. He worked as a teacher's aide at Auburn Correctional Facility from 1996-1999, teaching a variety of programs, including ART and the ASAT substance abuse program. (Exhibit "A" at 20; Exhibit "C" at 34-35.) In 1997, he received a Certificate of Merit for having completed more than 500 hours of program facilitation. (Exhibit "C" at 26)

Mr. [REDACTED] also worked as an IPA helping teach the GED program at Sing Sing from 2012-2018, and doing the same at Eastern in 2019. (Exhibit "C" at 31-32, 34-35.) In 2018 the GED teacher, [REDACTED] wrote a letter in support of him, stating:

"As the teacher for the High School Equivalency class at Sing Sing Correctional Facility, I have known inmate [REDACTED] as the Teacher's aide in my classroom for approximately six years....

Mr. [REDACTED] has *always shown integrity and respect* in all his dealings with all staff and prisoners. He has been very helpful in teaching, especially science and mathematics.

I wish Mr. [REDACTED] the best in his future. *He has much to contribute.*" (Exhibit "C" at 20, emphasis supplied)

In addition to this formal work as a teacher's aide, since arriving at Woodbourne, Mr. [REDACTED] has been teaching other inmates more informally, on a volunteer basis. (Exhibit "A" at 20) He has also done volunteer work with veterans' organizations, including Vietnam Veterans of America, in 1999 while at Auburn, and with the Veterans Organization in Sing Sing in 2012, when he served as Secretary of the organization. (Exhibit "C" at 22-23, 30)

### **His Statements and Apology Letter(s)**

When he completed his parole packet, [REDACTED] included a 2 page summary of his release plan (which, in short, is to live with his wife of 41 years and work, at least initially, in a funeral home); three more pages on his post-release plans; a resume; a description of the details of his offense; a statement called "What Will Prevent Recurrence;" and a sample of the many apology letters he submitted to the apology letter bank. (Exhibit "C" at 1-13)

In his "What Will Prevent Recurrence" Statement, Mr. [REDACTED] said:

"There is absolutely no excuse for my crimes. ...I was acting in confusion and delusion, under the influence of a dangerous ... combination of prescription psychiatric drugs... I should have known better than to take such a drug combination...

In prison I've been diagnosed with celiac disease... A common problem caused by this disease is a depression which does not respond to medications...

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...My depression is a thing of the past. I know to very carefully seek medical care: my Veterans Administration health care should simplify that. ...

I've learned a lot in the last twenty-seven years... I feel extremely confident that I can enjoy a positive life and make excellent contributions to my family and community." (Exhibit "C" at 9-10)

Significantly, [REDACTED] wrote many letters of apology to his victims (through the apology bank.) He included one in his parole packet – it was written in 2015, years before he was eligible for parole, and it was very heartfelt, stating:

"Dear Ms. [REDACTED]:

I am writing you this letter because I affected you awfully with the fire I caused on the subway in December 1994. I know that any apology will not be enough to make this better, but I want you to understand how very sorry I am that I hurt you. ... I apologize sincerely to your family also.

I have admitted my guilt for my awful actions. I know they must have had a profound effect on your life. I've spent a long time in prison for my crime, but that sentence cannot begin to undo your pain. ... I want you to fully understand that I know what I did was very, very wrong. ... I have no greater regrets than for the hurt I caused you and your family..." (Exhibit "C" at 13)

### Letters of Support and Offer of Employment

Mr. [REDACTED] received several letters of support from family members and others, who expressed their beliefs that he is well prepared to lead a law-abiding and productive life upon release, and described the ways in which they plan to support him. Reverend [REDACTED]

stated:

"...[I]t would be a great joy to welcome [REDACTED] to our church... ...  
[REDACTED] ... wife, [REDACTED], known to us as [REDACTED] has been a member of [REDACTED]  
[REDACTED] since her baptism at age 3.

I have been made aware of the great progress [REDACTED] has made during his incarceration, helping fellow inmates to obtain their GED, serving in the library, working as secretary for the veterans in the prison, receiving both an Associate's and Bachelor's degree... all of which demonstrate [REDACTED] *s care for the well-being of others and willingness to use his gifts and skills to serve.*

I am aware of [REDACTED] and [REDACTED]s plan for his reintegration... [REDACTED] will stand behind and fully support both [REDACTED] and [REDACTED] during this process. ..."  
(Exhibit "D" at 2, emphasis supplied)

[REDACTED] former pastoral assistant at the [REDACTED] wrote about his experience visiting Mr. [REDACTED] in prison, and his belief that Mr. [REDACTED] will continue to serve others upon release, as he has been doing in prison for many years. The letter stated:

"...I am the former pastoral assistant of [REDACTED]  
[REDACTED]... ...[I]n that time of pastoral care and ministry I began to serve Ms. [REDACTED]  
[REDACTED]. As I began to learn about her life... I decided to make a visit to meet her husband, [REDACTED] and [REDACTED]y.

...These visits, to the best of my memory, were in 2020 and 2021. ...He has, by God's grace, been able to broaden his mind and heart... and just really impressed me by bringing some illuminating ideas and conversations forward. Moreover, *his service to others was very telling.* Whether serving in the library, serving as the secretary to

veterans... or tutoring and trying to encourage others – these all speak of an outward focus and giving of self for the good of another.

...I do believe, with proper parole guidelines, support from [REDACTED] and structure and counseling from [REDACTED] can be that bright and encouraging story of someone maturing, reintegrating and thriving. ... *I know he has energy and zeal to continue to think of others and will benefit and grow his community.* ...” (Exhibit “D” at 3, emphasis supplied)

[REDACTED]’s son, [REDACTED], a disabled veteran, wrote about how his dad has been a model inmate, and has paid the price for his crime, stating:

“... You may look at my dad and see a criminal, someone who hurt other people. That’s true, but that isn’t all he is... I look at my dad and see someone who encouraged me to learn and excel. ... I look at him and see an honorably discharged Army veteran that helped inspire me to enlist and serve my country as well. I look at him and see a man that got himself into a bad situation, and then amid a complete mental collapse committed a terrible crime... ...He has been a model inmate and stayed out of trouble year in and year out... *My dad deserved to pay that debt for the things that he did, and he has done that. He does not, however, deserve to be defined by nothing but his punishment until he dies.* He deserves a chance to be more than that again... and to be helped to return to being some of the other, good things he was before that awful day....” (Exhibit “D” at 5, emphasis supplied)

Mr. [REDACTED]’s ex-wife, [REDACTED] wrote in support of him, stating:

“This letter is to advocate for the release of [REDACTED] my ex-husband. As your records surely show, he has been a model prisoner. ... In addition to the offer of a good job, he has several family members ready to provide a supportive home. If he should need an alternative, he is welcome to live with me.

It is true that [REDACTED] was convicted of a very serious crime, but he has since made his life positive and productive. He has a great deal to offer the community and should be given the chance to do so.” (Exhibit “D” at 4)

[REDACTED] Mr. [REDACTED]’s current wife (of 41 years) wrote about his remorse, self-improvement, and release plans, stating:

“...I have visited [REDACTED] very frequently and we have stayed in mutual support with very frequent letters and phone calls to maintain our relationship and support our family in every way possible. We have been married since 1981, with one son and four grandchildren. Both my husband and my son are honorably discharged US Army veterans. Our son receives 100% disability compensation following well decorated service in Afghanistan. ...

I have known [REDACTED] for forty-eight years as a kind, gentle, and supportive family man. ... *I know he is tremendously remorseful about the awful things he did in*



*that dreadful week of December 1994. I know his feelings go out tremendously to all the people he hurt...*

... [REDACTED] has pursued his education and self-improvement by obtaining a bachelor's degree, magna cum laude, in Behavioral Science from [REDACTED] ...

I also know he has furthered his expertise and tried to stay up-to-date in the computer field by reading literally hundreds of books over the years. ...[H]e has always worked in prison to support the education of others by working as a teacher's aide and tutor in and outside the classrooms. ...[H]is current incarceration is his only contact with the law in seventy-four years.

I will certainly welcome [REDACTED] home with my fullest emotional, practical and financial support. ...I am sure we will be very able to help [REDACTED] fully integrate into this community...." (Exhibit "D" at 10-11, emphasis supplied)

[REDACTED] also wrote in support of Mr. [REDACTED], stating:

"... With [REDACTED]'s computer and tech skills, he would be an asset to our community. He intends to keep on helping others through volunteer work, and plans to also continue learning, taking classes at [REDACTED].

[REDACTED]'s wife [REDACTED] is my very special friend. She has just retired as a Nurse Practitioner. She owns her own home and is active in the church. [REDACTED] has a place to live and also a faith community that will welcome him.

Through the last several years spent volunteering with the [REDACTED], I have seen the importance of family and community support. [REDACTED] has these waiting for him." (Exhibit "D" at 12)

[REDACTED] likewise wrote in support of him, stating:

"...I am a very close friend of [REDACTED]'s wife, [REDACTED]. [REDACTED] is very active in our medical, and religious community. [REDACTED] would have support of friends and church community. ...I know that [REDACTED] has taken advantage of furthering his education while incarcerated and would be able to continue his pursuit of his education. ..." (Exhibit "D" at 13)

Finally, [REDACTED], Director of [REDACTED] wrote that she has offered [REDACTED] a full-time or part-time job as a funeral assistant. (Exhibit "D" at 1)

#### **COMPAS Risk Assessment Instrument**

A COMPAS Risk Assessment Instrument (RAI) was prepared in order to help determine if Mr. [REDACTED] would be able to live in a law-abiding fashion upon his release. (2021 Risk Assessment Instrument attached as Exhibit "B").

The RAI found a low risk in every single category. (Exhibit "B" at 1) The RAI went on to document that Mr. [REDACTED] has a high school diploma or GED, a skill or trade, family support, and the ability to find a job. (Exhibit "B" at 4, 5)

### Interview

The interview started with the commissioners noting [REDACTED] obtained a college degree while incarcerated. (Exhibit "A" at 3) (In fact, as discussed above, he obtained two degrees while incarcerated – an Associate's Degree, and a Bachelor's Degree, both Magna Cum Laude.)

Then, after a brief discussion of Mr. [REDACTED]'s future plans and prior employment, the discussion turned to the instant offenses. Mr. [REDACTED] said that the offenses were "stupid" and "horrible" and that he, suffering from depression, had ended up on a combination of four different prescription drugs which triggered an acute psychosis and led to his actions on December 15<sup>th</sup> and 21<sup>st</sup>, 1994. (Exhibit "A" at 6, 9)

When asked why he had taken two homemade incendiary devices onto the NYC subway on the dates in question, Mr. [REDACTED] said he was crazy, knew the devices could be deadly, and had no rational intent. (Exhibit "A" at 9-10) He added that his *irrational* intent at the time was to create a big noise. (Exhibit "A" at 10)

He noted that the high school student who found and accidentally detonated the first device was injured very badly, and that one other person was also injured at that time. (Exhibit "A" at 12) As to the second device, he noted (truthfully, as discussed above in Footnote 1) that there were not really 48 people who were injured as claimed in the Parole Board Report, and read aloud by Commissioner Segara, but in fact 12 people who were injured that day. (Exhibit "A" at 14-15) He did say that some of them were very terribly hurt. (Exhibit "A" at 15)

Later, the commissioners noted that Mr. [REDACTED] had no criminal history and no disciplinary history, that his COMPAS scores were all low, and that he had completed and even taught the ART and AVP programs. (Exhibit "A" at 19-20) They also noted that he had a job waiting for him upon release. (Exhibit "A" at 20)

Mr. [REDACTED] said that since he had been diagnosed with celiac disease, he thought that was what had originally caused his depression, and didn't believe that would be an issue in the future. (Exhibit "A" at 25) He said he would not be seeing a "bogus" psychiatrist again. (Exhibit "A" at 25) When the commissioner said maybe seeing a non-bogus psychiatrist could be helpful, Mr. [REDACTED] did *not* deny this, and did *not* say he would not do that, but simply noted that he would have great health coverage from the VA upon release. (Exhibit "A" at 25-26)

At the end of the interview, after another discussion, initiated by Commissioner Segara, about the number of victims, [REDACTED] said:

"...[T]hese were very good people who didn't deserve anything like this...it was just a terrible thing to do to anyone... It was a horrible, horrible thing I did to them."  
(Exhibit "A" at 27-28)

### **Decision**

The Decision stated:

"...[T]he panel has determined that if released at this time there is a reasonable probability that you would not live and remain at liberty without again violating the law and that your release is incompatible with the welfare of society. ...

In the instant offense you detonated incendiary devices on New York City subway trains causing injury to over 50 people. ...During the interview you admitted that you committed the instant offense but minimized your responsibility for the harm and terror you instilled to members of the New York City area.

The instant offense represents your first contact with the criminal justice system... ...[Y]ou have not received any disciplinary infractions, earned college degrees and worked as a teacher's aide. The panel acknowledges your attempt at rehabilitation by also completing required programs...

...During the interview, and in your parole packet, you declared that you committed the instant offense while confused and drugged by prescribed psychiatric medication. You repeatedly discredit the psychiatrist who previously treated you for

depression and stated that you do not intend to seek mental health services upon release.

... Your inability to acknowledge the level of harm that you caused your victims and limited insight into what motivated you to commit this crime leaves society vulnerable to potential harm by you.

...[W]e also reviewed the risk and needs assessment which indicates that your risk to re-offend is low. This panel departs from your low risk score of felony violence due to the instant offense, in which though your criminal behavior you showed great disregard for human life. ... You engaged in criminal conduct which impacted an entire community.

...[Y]our release at this time would so deprecate the serious nature of the crime as to undermine respect for the law.” (Exhibit “C” at 29-31)

## **ARGUMENT**

### **POINT I**

#### **THERE WAS NO JUSTIFICATION FOR DEPARTING FROM THE LOW COMPAS SCORES**

Section 8002.2(a) of the New York Codes, Rules and Regulations mandates Parole Boards to be guided by COMPAS scores. If a board chooses to depart from the COMPAS scores, it must specify which scale of the assessment it is departing from and provide individualized reasons for such departure. The Rule states:

“8002.2

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(a) Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs principles, including the inmate’s 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. ...”  
[9 NYCRR S8002.2(a), emphasis supplied.]

New hearings were granted based on improper COMPAS departures in *Phillips v.*

*Stanford*, Index No. 2020-50485 (Dutchess Co. 2020); *Voi v. Stanford*, Index No. 2020-50485

(Dutchess Co. 2020); *Jennings v. Stanford*, Index No.2020-51294 (Dutchess Co. 2020); *Comfort*

v. *NYS Bd. of Parole*, Index No. 1445/2018 (Dutchess Co. 2018); *Sullivan v. NYS Bd. of Parole*<sup>2</sup>, Index No. 100865/2018 (NY Co. 2019); *Diaz v. Stanford*, Index No. 2017-53088 (Dutchess Co. 2018); and *Robinson v. Stanford*<sup>3</sup>, Index No. 2392/18 (Dutchess Co. 2018).

In this case, the Board said that, despite completely low COMPAS scores, Mr. [REDACTED] was likely to commit new offenses upon release, and it departed from the COMPAS scale for felony violence based *only* on the circumstances of the offenses of conviction, stating:

This panel departs from your low risk score of felony violence due to the instant offense, in which though your criminal behavior you showed great disregard for human life. ... You engaged in criminal conduct which impacted an entire community....” (Exhibit “A” at 30-31)

In addition to the cases cited above, it is noted that the Appeal Unit has reversed release denials for what appears to be this very reason. See, i.e., the 11/19/21 Administrative Appeal Decision for Clifford Lipscomb 87-A-7174 (who was granted release after a *de novo* interview) which stated:

“A review by the Appeals Unit reveals that the Board’s decision – which concluded there is a reasonable probability Appellant would not live and remain at liberty without violating the law – was impacted by a departure from low risk scores in the COMPAS and the Board did not provide an adequate explanation.”

Moreover, in *Voii*, supra, the court noted that reliance on the circumstances of the offense to explain a COMPAS departure does *not* suffice, stating:

“...Respondent Board expressly stated that it was departing from Petitioner’s COMPAS assessment. Accordingly, 9 NYCRR 8002.2(a) requires that it specify the scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. Respondent Board failed to do so.

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...The Board asserts that it is departing from COMPAS because of the ‘tragic reckless nature of the crimes themselves.’ However, the *COMPAS Risk Assessment* contains twelve categories, none of which involve the nature of the underlying crimes. Thus the alleged ‘individualized’ reason provided by the Board for the departure is unrelated to any scale contained in the COMPAS Assessment.” *Voii*, supra, at 5, 7,

<sup>2</sup> Veronica Sullivan was released in September, 2019 and has not been re-imprisoned.

<sup>3</sup> Dexter Robinson was released in March, 2021 and has not been re-imprisoned.

emphasis supplied.

As in *Voi*, the ‘individualized reason’ provided for the departure related only to the circumstances of the offense, which is improper. And the board’s boilerplate claims that there was a reasonable probability of re-offense, and that release was not compatible with the welfare of society were contradicted by the low COMPAS scores. For these reasons, there must be a *de novo* interview.

## POINT II

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

A parole board may not deny release solely on the basis of the seriousness of a defendant’s offense. *Rivera v. Stanford*<sup>4</sup>, 2019 NY App. Div. LEXIS 3595 (2<sup>nd</sup> Dep’t 2019); *Ferrante v. Stanford*<sup>5</sup>, 2019 NY App. Div. LEXIS 3407 (2<sup>nd</sup> Dep’t 2019).

There have also been court decisions in numerous other cases over the past few years granting or upholding new parole hearings for this same reason. *Matter of Kellogg v New York State Bd. of Parole*<sup>6</sup>, 2018 N.Y. App. Div. LEXIS 1469 (1<sup>st</sup> Dep’t 2018); *Esquilin v. NYS Bd. of Parole*<sup>7</sup>, 2018 NY Misc. 483 (Orange Co. 2018); *Matter of Villa v. Stanford*<sup>8</sup>, Index No. 53877/21 (Dutchess Co. 2021); *Matter of O’Connor v. Stanford*<sup>9</sup>, Index No. 54/2021 (Dutchess Co. 2021); *Matter of Jennings v. Stanford*<sup>10</sup>, Index No.2020-51294 (Dutchess Co. 2020); *Hill v.*

<sup>4</sup> Richard Rivera was granted an open date for release in June, 2019.

<sup>5</sup> Danielle Ferrante is John MacKenzie’s daughter and the representative of his estate – John tragically committed suicide in prison in 2016 after his tenth denial of parole.

<sup>6</sup> Laurie Kellogg was released in April, 2019 and has not been re-imprisoned.

<sup>7</sup> Adolfo Esquilin was released in May, 2018 and has not be re-imprisoned.

<sup>8</sup> Ricardo Villa was granted parole release, and is expected to be released by March 7, 2022.

<sup>9</sup> Raymond O’Connor was granted release in December, 2021 and has not been re-imprisoned.

<sup>10</sup> William Jennings was released in February, 2021 and has not been re-imprisoned.

*NYS Bd of Parole*<sup>11</sup>, Index No. 100121/2020 (NY County 2020); *Matter of Voii v. Stanford*<sup>12</sup>, supra; *Almonte v. Stanford*<sup>13</sup>, Index No. 10476/2018 (Orange Co. 2019); *Phillips v. Stanford*<sup>14</sup>, supra; *Slade v. Stanford*, Index No. 203/19 (Dutchess Co. 2019); *Butler v. NYS Board of Parole*, Index No. 2703/17 (Dutchess Co. 2018); *Morales v. NYS Board of Parole*, Index No. 934/2017 (Dutchess Co. 2017); *Kelly v. NYS Board of Parole*, Index No. 580/2017 (Dutchess Co. 2017); *Darshan v. NYS DOCCS*<sup>15</sup>, Index No. 652/2017 (Dutchess Co. 2017); *Matter of Ciaprazi v. Evans*, Index No. 0910/2016 (Dutchess Co. 2016.)

In this case, it appears all of the reasons given for denial were really based on the instant offenses, and the attempt to say otherwise is not supported by the record, as further discussed below. *Diaz v. Stanford*<sup>16</sup>, supra; *Slade v. Stanford*, Index No. 203/19 (Dutchess Co. 2019.) In addition to relying on all three boilerplate statutory standards, the Decision stated that Mr. [REDACTED] “minimized [his] responsibility for the harm and terror [he] instilled”, and then stated:

“Your inability to acknowledge the level of harm that you caused your victims and limited insight into what motivated you to commit this crime leaves society vulnerable to potential harm by you.” (Exhibit “A” at 30)

First, it is submitted that Mr. [REDACTED] did understand, as well as he could, what led to the offense. He explained that he was in the grip of an acute psychosis triggered by a very problematic combination of four prescription psychotropic drugs. If there was any reason to believe he had these tendencies before or after the week in question, more digging at the underlying cause might be in order. However, given that this was clearly an aberration from an

<sup>11</sup> George Hill was released in January, 2021 and has not been re-imprisoned.

<sup>12</sup> Sergei Voii was released in August, 2020 and has not been re-imprisoned.

<sup>13</sup> Juan Almonte was released in June, 2020 and has not been re-imprisoned.

<sup>14</sup> George Phillips was released in December, 2021 and has not been re-imprisoned.

<sup>15</sup> Travis Darshan was released in September, 2017 and has not been reincarcerated.

<sup>16</sup> Jose Diaz was released in June, 2018 and has not been re-imprisoned.

otherwise completely law-abiding and productive life, his insight into what led to the offense was completely sufficient, and it is hard to know what more he could have said in that regard.

Secondly, while he understandably took issue with the unsupported claims regarding the number of people injured (again, there were 14, according to the sentencing court, 2 from the first offense and 12 from the second) he did acknowledge the harm he caused<sup>17</sup>, stating several times that many people were horribly injured, did not deserve this, and that it was a horrible thing he did to them. He also wrote letters of apology – the one included herein states:

“I affected you awfully with the fire I caused on the subway in December 1994. I know that any apology will not be enough to make this better, but I want you to understand how very sorry I am that I hurt you.

...I know [my actions] must have had a profound effect on your life. [My] sentence cannot begin to undo your pain. ... I have no greater regrets than for the hurt I caused you and your family...” (Exhibit “C” at 13)

Thus, the Board’s claims that Mr. [REDACTED] is likely to re-offend ring hollow, especially given his complete lack of any criminal history, absolutely no disciplinary violations in 27 years, completely low COMPAS scores, stated remorse, completion of therapeutic programs, volunteer work in prison, and all the other facts and circumstances discussed above.

In *Jennings*, supra, the court granted a *de novo* interview where the denial was based on the seriousness of the offense, as well as the panel’s concerns regarding the depth of the petitioner’s remorse. The *Jennings* court stated:

“...[T]he Court finds said Decision should also be vacated because the Board focused exclusively on the serious nature of Petitioner’s crime and its perception that his remorse was ‘shallow.’ ... The Board’s Decision details the manner in which Petitioner stabbed his girlfriend and his alleged prior aggressions against her and concludes that this ‘course of conduct leads the panel to concur that the instant offense is an absolute display of [his] criminal, assaultive and murderous behavior.’

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<sup>17</sup> While he could perhaps have spoken more in the interview about the psychological and emotional trauma he caused, in addition to the physical injuries, the fact that he did not do so in no way indicates a risk of re-offense.



...[A]lthough Respondent argues that the Board may consider an inmate's limited expressions of remorse and a lack of insight, the record here does not support the Board's finding that Petitioner's remorse was 'shallow.' The Court notes that in his final statement to the Board... Petitioner states:

I would like to say, as I've said in the past, that I'm sorry for what happened and I had no right to take anyone's life and it was wrong for me to do something like that. I want to apologize to the family as well... I not only hurt their family but I hurt mine as well so I want to say I'm sorry to everyone, and if I'm released, something like that will never happen again...

Moreover, Petitioner's personal statement letter is contained in the record... The letter goes into detail regarding the remorse that he feels..." *Jennings*, supra, at 5-7.

As in *Jennings*, [REDACTED] expressed remorse and acknowledged the harm he caused several times during the interview and in his apology letter, and, again, the only reason given for the denial was the nature of the offense. Therefore, a *de novo* hearing must be granted before different commissioners.

### POINT III

#### THE REASONS GIVEN FOR THE DENIAL WERE NOT SUPPORTED BY THE RECORD AND WERE NOT SUFFICIENTLY DETAILED

It is clear that the reasons given for parole decisions must be detailed, and not simply perfunctory, and they must be supported by the record. *Rivera v. Stanford*, 2019 NY App. Div. LEXIS 3595 (2<sup>nd</sup> Dep't 2019); *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (NY Co. 2019); *Matter of Coleman v. DOCCS*, 2018 NY App. Div. LEXIS 136 (2<sup>nd</sup> Dep't 2018); *Almonte v. Stanford*, Index No. 10476/2018 (Orange Co. 2019); *Winchell v. Evans*, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Matter of Rossakis v. NYS Bd. of Parole*, 146 AD3d 22 (1<sup>st</sup> Dep't 2016); *Ramirez v. Evans*, 118 AD3d 707 (2<sup>nd</sup> Dep't 2014); *Perfetto v. Evans*, 112 AD3d 640 (2<sup>nd</sup> Dep't 2013); *Ruiz v. NYS Division of Parole*, Index No. 2310/2017 (Dutchess Co. 2018); *Maddaloni v. NYS Bd. of Parole*<sup>18</sup>, Index No. 0623/2018 (Dutchess Co. 2018); *Morales v. NYS Board of Parole*, Index No. 934/2017 (Dutchess Co. 2017.)

<sup>18</sup> Jack Maddaloni was released on September 10, 2018 and has not been reincarcerated.

In the instant case the Decision noted the complete lack of criminal history; the entirely low COMPAS scores; the completely clean disciplinary history; the many therapeutic programs completed; and the release plan and letters of support, yet inexplicably denied release based on the nature of the offense, and on related concerns which were in no way supported by the record. *It is also noted that the Decision's claim that over 50 people were injured in the offenses was false, as discussed in Footnote 1 above.*

**There is Nothing in the Record Indicating that Petitioner's Release Would be Incompatible with the Welfare of Society or Would Deprecate the Seriousness of the Offenses**

The record contained no indication that Petitioner's release was somehow incompatible with the welfare of society, or would deprecate the seriousness of the offenses. His institutional record has been excellent, and there are simply no facts to back up these spurious claims. In *Rivera v. Stanford*, supra, the Second Department reversed the denial of a *de novo* hearing in a murder case, stating, at 4, "...The Parole Board's finding that the petitioner's release was not compatible with the welfare of society... is without support in the record."

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

Similarly, in *Matter of Diaz v. Stanford*, supra, the court likewise granted a new hearing, stating, at 8:

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

As in the above cases, the Board's conclusory claims in this regard were meaningless boilerplate with no support in the record, and cannot be relied upon to justify denial.

**Nothing in the Record Supports the Claim that Petitioner is Likely to Violate the Law Again if Released**

The conclusory claim that there is a reasonable probability that Petitioner is likely to violate the law again was based on spurious claims that he had limited insight and failed to acknowledge the harm he caused. As discussed above, Mr. [REDACTED] did acknowledge the harm he caused many times in the interview and in his apology letters, and he did have insight into how the offense was triggered by an acute psychosis caused by a combination of prescription drugs, which will not re-occur.

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

**Contrary to the Claim in the Decision, Mr. [REDACTED] Did Not Say He Did Not Intend to Seek Mental Health Services Upon Release**

The Decision stated, "...[You] stated that you do not intend to seek mental health services upon release." (Exhibit "A" at 30)

As noted above, what Mr. [REDACTED] said was that he would not be seeing a "bogus" psychiatrist again. (Exhibit "A" at 25) When the commissioner said maybe seeing a non-bogus psychiatrist could be helpful, Mr. [REDACTED] did *not* deny this, and did *not* say he would not do that, but simply noted that he would have great health coverage from the VA upon release. (Exhibit "A" at 25-26) Thus the claim in the Decision that he said he would not seek mental health services upon release was not based on the record.

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

The fact that Mr. [REDACTED] is nearly 77 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, let alone close to 80, 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.

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](http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf)

**CONCLUSION**

Based on the foregoing, Petitioner [REDACTED] respectfully requests that the Appeal Unit vacate the Decision of the Parole Board, grant an immediate *de novo* hearing before commissioners who did not sit on the October, 2021 Board.

Dated: February 23, 2022.

  
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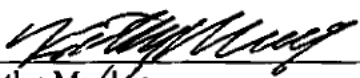
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**CERTIFICATE OF SERVICE**

Kathy Manley hereby certifies that on February 23, 2022 she served the above Appeal of Parole Board Determination to each of the above named individuals, via First Class Mail.

  
Kathy Manley