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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

In the Matter of the Application of

██████████

Petitioner,

Petition

-against-

TINA M. STANFORD,
CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE,

Index No. _____

Oral Argument Requested

Respondent.

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

The Petition of ██████████ ██████████ respectfully alleges that:

1. Petitioner, incarcerated at Eastern Correctional Facility, brings this petition for a judgment pursuant to CPLR Article 78 seeking annulment of Respondent's ██████████ 2021 denial of parole and directing the Parole Board to conduct a *de novo* parole review.
2. Respondent, New York State Parole Board ["Board"], has not provided petitioner with the full parole file of the proceedings below, specifically the "official opposition," cited in the transcript and decision, the existence, dates and number of victim statements, and documentation regarding Mr. ██████████ mental health level, which was referenced in the parole interview. Therefore, the facts alleged herein are based upon limited portions of the parole file the Board provided to Mr. ██████████
3. Petitioner requests that the Board, as part of its answer to this petition, file with this Court and serve on Petitioner documentation regarding mental health level, "official

opposition,” and the contents (including dates) of victim statements provided to the Board for the [REDACTED] parole review.

4. The Parole Board’s denial of parole was improper for eight reasons:
 - a. The Board departed from Mr. [REDACTED] low COMPAS risk scores without providing individualized reasons for doing so;
 - b. The Board’s denial of parole based on the claim that Mr. [REDACTED] lacked insight was not supported by the record;
 - c. The Board failed to explain how it considered victim statements, that upon information and belief, were in the parole file;
 - d. The Commissioners’ denial of parole was based on their personal sense of justice that Mr. [REDACTED] should not be released until the [REDACTED] community, where the crime took place, found solace and were no longer impacted or aware of the crime;
 - e. The Board denied parole based on petitions and letters that contained speculation and inaccuracies;
 - f. The Board’s decision to deny parole was pre-determined;
 - g. The Board failed to provide Respondent with critical portions of the parole file; and
 - h. The Board failed to issue its decision in the statutorily required time period.
5. Based on the facts and law, the denial of parole was arbitrary, capricious and irrational constituting an abuse of discretion. This Court should vacate the Board’s denial of parole and grant a *de novo* parole review. See Memorandum of Law in Support of Petition.

JURISDICTION

6. Article 78 confers jurisdiction over this matter upon this Court. CPLR §§ 306-b, 307 (2), and 7804(c).
7. Petitioner has exhausted all administrative remedies.
8. This Court has jurisdiction because the Board's denial of Mr. [REDACTED] administrative appeal cannot be further "reviewed by appeal to a court or to some other body or officer." CPLR § 7801(1).

VENUE

9. This action is properly commenced in Ulster County because it is the county in which Petitioner is incarcerated and was located at the time of the parole interview, and it is in the judicial district in which the Board was located when it conducted the interview and made the denial decision. CPLR § 506(b).

PARTIES

10. Petitioner, Thomas [REDACTED] seventy-one years old, has been incarcerated for thirty-four years. He was denied parole on [REDACTED] 2021.
11. Respondent, Tina M. Stanford is the Chairwoman of the New York State Board of Parole.
12. The Board of Parole is the sole entity that considers and determines parole eligibility, sets conditions of release, and revokes parole when the conditions are violated.

PROCEDURAL HISTORY

13. Parole Commissioners Segarra, Cruse, and Agostini denied parole to Petitioner Thomas [REDACTED] right after a [REDACTED] interview conducted via videoconference between Eastern Correctional Facility and the Board's Albany office. Ex. 1.

14. Mr. [REDACTED] filed a timely notice of administrative appeal. He timely perfected the appeal and Respondent received it January 14, 2022. Ex. 23 at 1, 8-21. Respondent denied the administrative appeal in a decision dated March 30, 2022. Ex. 23 at 1-7.
15. Mr. [REDACTED] has exhausted his administrative remedies and this matter is ripe for the instant Article 78 proceeding. 9 NYCRR §8006.4(c); Ex. 23.

STATEMENT OF FACTS

16. Mr. [REDACTED] was convicted of Murder in the 2d degree, Burglary in the 1st degree and Criminal Possession of a Weapon in the 3rd degree for killing his ex-wife, [REDACTED] [REDACTED] on [REDACTED] 1988. He was sentenced to a custodial term of twenty-five years to life. Mr. [REDACTED] first became eligible for parole in January 2013.
17. Mr. [REDACTED] has been denied parole nine times.
18. Respondent's risk and needs assessment tool, COMPAS, scored Mr. [REDACTED] low in ten of twelve categories and all future risk scores were low. Ex. 2 at 1.
19. The only high score (7 out of 10), indicated low family support. The only medium score was for history of violence (6 out of 10), which is static. *Id.*
20. Mr. [REDACTED] earned an Associate Degree from Sullivan Community College in Alcohol and Drug Abuse Counseling, Ex. 24, and has worked towards his bachelor's degree at both Mercy College and Marist College. Ex. 8. He was on the Dean's List at Mercy and Marist Colleges. *Id.*
21. Mr. [REDACTED] focused on psychology. He hopes to work as a counselor for individuals struggling with opioid addiction. *See* Ex. 1 at 29-30.

22. Mr. [REDACTED] joined the Quakers in 1992, which gives him opportunities to reflect on his crime and gain insight into his past actions. *See* Ex. 11 ([REDACTED] letter); Ex. 1 at 18.
23. Mr. [REDACTED] demonstrated his skills as a facilitator in Quaker meetings, where he was “often the voice which helped the group come to unity.” Ex. 11. Mr. [REDACTED] has endeavored to “[support] other members of the group when they have been in difficulty, reminding them of positive directions.” *Id.*
24. [REDACTED] of the Interfaith Worship Group described Mr. [REDACTED] as demonstrating “strength of character often found lacking even outside prison walls” through “calm temperament,” “quiet, yet strong support,” “steady attendance,” and “willingness to contribute and thoughtful reflections.” *Id.*
25. Members of the Quaker worship group are impressed by Mr. [REDACTED] “steadfast attendance and commitment to the group and find him to be one of the more thoughtful and engaged participants.” *Id.* ([REDACTED] letter).
26. During Quaker worship meetings, Mr. [REDACTED] “often expressed regrets for what brought him to prison,” has “show[n] empathy and a willingness to be of assistance to others,” and “he is one of the first to try to find a middle ground that defuses disharmony in the group.” *Id.*
27. Quaker members described Mr. [REDACTED] as equipped to make the transition into society and “clearly committed to turning his life around, mirrored not only in his word but in his actions.” *Id.* ([REDACTED]). Mr. [REDACTED] is “emotionally steady and has the practical and interpersonal skills to be a productive member of the society.” *Id.* ([REDACTED] [REDACTED]).

28. Mr. █████ spent years working with people with intellectual disabilities and recording audio books for blind children, allowing them access to information beyond the students' reading capabilities. Ex. 9. He received a certificate of recognition from Tri-Valley Central School and the Sullivan County BOCES thanking him for his work. *Id.*
29. The senior librarian at Sullivan Correctional Facility worked with Mr. █████ for nine years and praised his work ethic and stated that Mr. █████ "always received good evaluations from me and I would recommend him for any position to which he applies." Ex. 7.
30. Mr. █████ was a leader and facilitator with the Alternatives to Violence Program, earning multiple certificates of appreciation and recognition honoring his hours of service, dedication, and commitment over multiple years. Ex. 10.
31. Mr. █████ has numerous medical issues. In 2019, a tumor in his left eye was found to be cancerous and determined to be melanoma. Mr. █████ had operations on his colon, but still has a partial colon obstruction. He had spinal surgery that entailed a difficult recovery, and he has a heart disease which must be monitored regularly. Ex. 1 at 35-36.
32. Mr. █████ provided a re-entry plan to the Board with letters of assurance from two housing agencies in Buffalo, Erie County, NY. Ex. 4. He plans to earn a living using the skills he acquired through training programs while incarcerated and seeks to get "back on the ground, get an ID, job" and to live a quiet life. *See* Ex. 1 at 26.

INTERVIEW AND DECISION

33. Board commissioners Segarra, Cruse, and Agostini conducted the interview and denied parole on █████ 2021. The transcript of the interview is attached as Ex. 1.
34. Commissioner Cruse was the lead interviewer. *Id.*

35. Commissioner Cruse started the September 2021 interview by explaining to Mr. [REDACTED] that he “may recall, that [he] sat before me ... and Commissioner Segarra as well.” Commissioner Cruse stated that “this [is] a new appearance. ... it’s a new appearance, new opportunity, so let’s deal with it freshly, **if we can.**” Ex. 1 at 3 (emphasis added).

36. The Board’s decision reads as follows:

“After review of the record, interview, and deliberation the panel is led to conclude that your release would be incompatible with welfare of society and would so deprecate the serious nature of your crime as to undermine respect for the law.

The panel has considered the required statutory in your overall institutional adjustment; your program completions, case plan, your rehabilitative accomplishments, and your multiple parole packets. Noted is your academic achievements, your low risk COMPAS scores, your satisfactory discipline record, sentencing minutes, PSI, your OMH mental health status report, and your letters of personal statement and apology. The panel further notes your release plan, your criminal history, and letter in support, assurance, and in opposition of your release, all of which have been considered.

The instant offense marks your first New York state incarceration resulting in your conviction for Murder Second, Burglary first, and Criminal Possession of a Weapon where you caused the death of your ex-wife by stabbing her multiple times about the head, neck, and back. The record reveals your hiding your motorcycle in the woods to be available in your attempt to flee the scene. You denied this point of the description of the instant offense, however, you did not dispute being picked up by law enforcement as you were hitchhiking and later being arrested. The record further reveals you were on probation traveling, given a pass to New York.

The panel weighed and considered the results of your COMPAS risk assessment and the low risk scores indicated therein. The panel does not depart from your favorable low scores, however, said scores fail to outweigh the gravity of the instant offense or mitigate the atrocious type of death nor loath lessons of horrific long-term impact upon the small [REDACTED] community. Parole is denied.

Despite your demonstration of personal growth and productive use of time while confined, the panel concurs that your discretionary release should not be granted merely as a reward for good conduct or official use of duties during incarceration. Though your incarceration has provided you an opportunity for maturity and introspection, the panel remains significantly concerned that despite your lengthy confinement you present limited insight by failing to consider the death and extent of the pain you caused. The panel is concerned that the ██████ community remains aware of your crime given sustained opposition to your release throughout multiple appearances.

Moreover, the panel is persuaded against your release given the strong language noted in official opposition and in the sentencing minutes. The surviving traces of your violence makes it difficult for the victims to find solace. The panel suggests you spend time identifying all your victims in recognition of the weight to be born (sic) in merely stating the words remorse and apologize. Parole is denied.”

Ex. 1 at 47-49.

The Board Failed to Adequately Explain Its Departure From Low COMPAS Scores

37. The Board’s risk and needs assessment tool, COMPAS, determined that Mr. ██████ was low in ten out of twelve COMPAS categories. Ex. 2 at 1.
38. As to risk for “felony violence” and “arrest risk,” Mr. ██████ had the lowest possible score of “1” on a scale of one to ten. His risk for “abscond risk” was also low with a score of “2.” Ex. 2 at 1.
39. As to “family support,” the only high score, this was inevitable since Mr. ██████ is alienated from most of his family due to the nature of his crime. *Id.*
40. The only medium score, “history of violence,” is static in nature and the Board acknowledged this score was based on “the instant offense, that’s [his] only New York State incarceration.” *Id.*; Ex. 1 at 34.
41. Mr. ██████’s needs scores indicated that upon release he was unlikely to have a substance abuse problem, negative social cognition, low self-efficacy in his ability to deal

with various challenges of reentering the community, or any significant financial or employability problems. Ex. 2 at 1.

42. In the denial decision, the Board acknowledged Mr. ██████'s low scores and claimed it was not departing from such scores:

“The panel weighed and considered the results of your COMPAS risk assessment and the low risk scores indicated therein. The panel does not depart from your favorable low scores, however said scores fail to outweigh the gravity of the instant offense or mitigate the atrocious type of death nor loath (sic) lessons of horrific long-term impact upon the small ██████ community. Parole is denied.”

Ex. 1 at 48.

43. Yet, the Board's finding that “release would be incompatible with welfare of society and would so deprecate the serious nature of your crime as to undermine respect for the law,” was inconsistent with the low COMPAS risk and needs scores. *Id.* at 48; Ex. 2 at 1. *See* Arg. I, Memorandum of Law.

44. At a parole review one year before, in September 2020, Commissioner Cruse was also the lead interviewer.

45. At the 2020 parole review, Mr. ██████ had the same favorable low scores as he had for the September, 2021 interview. Ex. 6.

46. In 2020, the Board also denied parole despite low scores. Ex. 12 at 32-34.

47. In 2020, however, the Board admitted departure from the low scores:

“Based on all required factors in the file considered; institutional adjustment, Sentencing Minutes, letters of assurance, discipline, and your low-risk COMPAS, the Panel concurs to depart from the low-risk COMPAS, because your self-described course of action throughout the [Instant Offense], was absent moral judgment, radiated your obvious disrespect for human life and lacked the insight necessary to make the appropriate decisions given other law-abiding options available to you.”

Id. at 33.

48. The 2020 denial decision was administratively reversed because the Board failed to explain its reasons for departure:

“Appellant is correct that the Board decision departed from the COMPAS without any specific individualized scale, which is required by the regulations.”

Ex. 13 at 2.

49. The only reason given for the Board’s *unacknowledged* departure from Mr. ██████’s low COMPAS scores in September, 2021 was the crime which was the same reason given for the *acknowledged* departure in the September, 2020 denial. Ex.1 at 49; Ex. 12 at 2.

50. The Board’s claim in the instant 2021 decision that it was not departing from low COMPAS scores should not excuse the Board from its obligation to “specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure” pursuant to 9 NYCRR §8002.2(a). This obligation should not depend on the Board’s admission of “departure,” or use of the word “depart” in the decision; it should be sufficient that the denial contradicts or is inconsistent with low COMPAS scores. *See* Arg. I, Memorandum of Law in Support.

51. The Board departed from low COMPAS scores in 2021 just as it did in 2020, and just as it did in 2020, failed to specify the scales from which it was departing or provide individualized reasons from such departures, both of which the law requires. *See* Argument I, Memorandum in Support of Petition.

The Board’s Denial of Parole Based on Claim that Mr. ██████ Lacked Insight is Not Supported by the Record

52. The Board denied parole based on a claim that Mr. ██████ “presents limited insight by failing to consider the death (sic) and extent of the pain you caused.” Ex. 1 at 49.

53. This is irrational because it is contrary to the record. *See* Arg. II, Memorandum of Law in Support.

54. Mr. ██████ expressed insight and remorse in his personal statement, in his apology letters to his two children, as well as numerous times during the parole interview.

55. In his personal statement, Mr. ██████ showed remorse and insight for his actions:

“Every day when I awake, I instantly feel horrible pain of what I did twenty-nine years ago. The consequences of my actions on my family and others will last forever.”

“I take full responsibility for the appalling act of killing my ex-wife ██████ Anne ██████

“... nothing could excuse my crime of killing ██████

Ex. 5 at 1.

56. Mr. ██████ sent apology letters to his children acknowledging his crime and the pain he caused them by killing their mother. *Id.* at 4-7.

57. In his letter to his daughter, Mr. ██████ wrote:

“██████ I want to apologize to you for the horrible pain I put you through by killing your mother”

“Nothing I can do now or say to you can erase what I did.”

“I realize now that I didn’t even know what love really was. I thought I did but my actions proved otherwise.”

“I failed you and ██████

Id. at 4.

58. In his letter to his son, Mr. ██████ wrote:

“██████ I apologize form (sic) my heart for killing your mother and causing you so much pain and grief.”

“I will never be able to escape that pain I live with every day.”

“I ask nothing of you.”

“I failed the family that I loved and wanted to protect. I failed you as a father, as a man.”

Id. at 6-7.

59. The interview transcript contains numerous statements by Mr. [REDACTED] demonstrating his understanding of the harm he caused and his remorse.

60. Near the beginning of the interview, Mr. [REDACTED] expressed insight and fully acknowledged his guilt:

MR. [REDACTED] “... And I take full responsibility for what I did. I did a horrible, horrible thing.”

Ex. 1 at 6.

MR. [REDACTED] “... I think back to all the things that I did wrong.”

Id. at 7.

61. In response to Commissioner Cruse’s questions regarding how he felt about killing his ex-wife and taking away the mother of his two children, Mr. [REDACTED] accepted responsibility for the offense and expressed clear remorse and a dedication to gain insight into his crime:

MR. [REDACTED] “I feel horrible. I feel horrible. ... I wish there was something I could do. ... So what I’ve done, I can’t do that. So what I’ve done is I’ve taken my life and tried to change the future and become a better person. And so what I’ve done is I’ve committed myself to finding out why I did that.”

Id. at 11.

MR. [REDACTED] “Yes, I killed the mother of my children.”

COMMISSIONER CRUSE: “Did you consider that at the time; you didn’t consider that at the time, apparently, have you considered that since then?”

MR. [REDACTED] “Yes, Commissioner, I have every day. Every day I hold the pain that I caused them.”

MR. [REDACTED] “Her mother, her father, her brothers, my mother, my father, my sister, all -- both families destroyed.”

Id. at 14.

COMMISSIONER CRUSE: “Anyone else you seem to have hurt based on this behavior?”

MR. [REDACTED] “I destroyed both families doing this. My sister, especially, my children, I wanted to protect them and all I did was cause them more pain.”

Id. at 15.

62. Mr. [REDACTED] also turned to religion and education to reflect upon his criminal behavior:

MR. [REDACTED] “All these years, and what I’ve done is I’ve worked very hard for myself to rehabilitate myself. And the first thing I did was I went back to my religion, I discovered the Quakers, and the Quakers are very good people.”

COMMISSIONER CRUSE: “And that gave you a greater insight to your behavior?”

MR. [REDACTED] “Insight. A great deal of insight.”

COMMISSIONER CRUSE: “Okay.”

MR. [REDACTED] “Because I wanted to increase my academic studies so I went to college and studied psychology, and it’s --”

Id. at 18.

63. He also reflected on his past actions and expressed his efforts to change the person he was at the time by seeking higher education and serving as a mentor to others:

MR. [REDACTED] “I’ve worked very hard to rehabilitate myself, and I’m not – the person that I was then is totally gone. I’m not that person now, as you can see from my disciplinary and from all the work I’ve done. What I’ve done is to try and change myself and the future. I can’t change the past. ... I study religion and Quakers and the other religions as well looking for truth for who I was, why did this happen, and who am I now,

what do I want to be now, what kind of person am I now. ... I think I've proven myself being capable of doing that, the remorse that I feel, the pain that I feel, all these 34 years. ... I am a different person. I'm a changed person, and the person that I am today in no way reflects the person I used to be."

Id. at 44-46.

64. Members of Mr. ██████ Quaker worship group observed that Mr. ██████ reflected on his crime and the death and pain he has caused to his family and others:

"I have heard [Mr. ██████] say on more than one occasion that he considers the Quaker beliefs in non-violence and personal transformation to have been helpful to him in reflecting on his crime. ... As the group worked to make decisions, [Mr. ██████] was often the voice which helped the group come to unity, drawing on his skills as a facilitator for the Alternatives to Violence Program. He has been supportive of other members of the group when they have been in difficulty, reminding them of positive directions. ... Thomas ██████ has used his time in prison to grow and increase his skills."

Ex. 11 (Pamela Wood 9.02.2019 letter).

"[Mr. ██████] has often expressed regrets for what brought him to prison. He shows empathy and compassion to others and encourages his peers to show the same."

Id. (Eugene Lebwohl 7.02.2016 letter).

"Mr. ██████ has expressed a sincere interest in having his life be more than his past. He is clearly committed to turning his life around, mirrored not only in his words but in his actions. ... He has worked hard to turn his life around ...".

Id. (Ruth Matthews 7.01.2016 letter).

65. Where the record establishes that Mr. ██████ had insight into the harm he caused and his past crimes and actions, it is irrational for the Board to claim a lack of insight and deny parole. *See* Argument II, Memorandum in Support of Petition.

The Board Failed to Disclose How Victim Statements Were Considered

66. On information and belief, one or more victim statements were in the parole file made available to the Board.
67. The denial decision did not indicate whether victim statements were considered. Ex. 1 at 47-49.
68. The denial decision did not explain how victim statements were considered. *Id.*
69. On information and belief, it is the Board’s practice not to disclose the existence of victim statements to parole applicants during the parole review process. Ex. 21, *Flores v. Stanford*, 18-civ-02468 (U.S. District Court, SDNY) at 3, 7-8, 9.
70. In *Flores*, United States Magistrate Judge Judith McCarthy found that:
- [D]ue to the confidential nature of victim impact statements, the BOP’s “practice” is to “require[]” commissioners “to not even divulge the existence of victim opposition in the[ir] decision[s],” even when such opposition is “more significant” than any other reason for denial of parole...” *Id.* at 3.
71. The Board is required to consider victim statements and to explain how it considered such statements but did not do so here. See Argument III, Memorandum in Support of Petition.

The Commissioners Considered Their Own Sense of Justice—Penal Philosophy—Which is Not Permitted

72. The Board’s denial decision repeatedly invoked the ██████ community as a basis for denial.
73. First, the Board found that Mr. ██████ low risk COMPAS scores were outweighed by the impact on the ██████ community:

“The Panel weighed and considered the results of your COMPAS risks assessment and the low risk scores indicated therein. The panel does not

depart from your favorable low scores, however, said scores fail to outweigh the gravity of the instant offense or mitigate the atrocious type of death nor lessen the horrific long-term impact upon the small [REDACTED] community.”

Ex. 1 at 48.

74. Second, the Board invoked the [REDACTED] community to claim that Mr. [REDACTED] lacked insight because he did not consider the extent of the pain he caused:

“[T]he panel remains significantly concerned that despite your lengthy confinement you present limited insight by failing to consider the death (sic) and extent of the pain you caused. The panel is concerned that the [REDACTED] community remains aware of your crime given sustained opposition to your release throughout multiple appearances.”

Id. at 49.

75. Third, the Board’s denial was based on the Commissioner’s concern that the victims had not found solace:

“The surviving traces of your violence makes it difficult for the victims to find solace. The panel suggests you spend time identifying all your victims in recognition of the weight to be born (sic) in merely stating the words remorse and apologize.”

Id. at 49.

76. The Commissioners' denial of parole based on their claim that the [REDACTED] community was still aware of the crime, was impacted long-term and had yet to find solace was an expression of their own penal philosophy. The law does not permit Commissioners to impose their personal sense of justice that parole should be denied until the [REDACTED] community is no longer impacted and has found solace. *See* Argument IV, Memorandum in Support of Petition.

The Board Relied on Opposition Material that Contained Numerous Inaccuracies

77. The parole file contained 211 pages of petitions and letters expressing opposition to Mr. ██████'s release. On information and belief, all petitions and letters, or the vast majority, were from current or former residents of ██████ or ██████ County, where the crime took place.

78. The opposition material was a focus of the Board's denial decision and the Board heavily relied and placed weight upon it, despite it being riddled with inaccuracies. Ex. 1 at 49.

79. Each petition and letter included the inaccurate assumption that if released, Mr. ██████ would return to ██████ County, where most of the victim's family presently resides:

“If released, he will be residing in ██████ County, where most of the victim's family resides.”

Ex. 16 at 1 and 6.

“His release would be to ██████ County where many of his victim's family still lives.”

Id. at 2 and 5.

“I live in ██████ County and do not want him released to our area.”

Id. at 3.

80. Mr. ██████ conveyed to the Board that he planned to reside in Buffalo, New York, in Erie County, and provided letters of assurance from two housing agencies in Buffalo. Ex. 1 at 26-29; Ex. 4 (2021 letters from Back to Basics and Peaceprints).

81. Any proposed housing would need to be approved by parole before Mr. ██████ release.

82. Each of the community petitions and opposition letters inaccurately claimed that, if released, Mr. ██████ will pose a danger to the victim's family and community:

“I have a deep concern and interest in helping to keep our streets completely safe not only for my children, but for the surrounding areas of my community and for the safety of the murder victims family.”

Ex. 16 at 7.

“He is not only a danger to his family but the community they live in. ... It is hoped you will think about this murderer’s many victims, continued threat to other’s safety and freedom, ... As a mother of two children I fear someone like this monster being out on the streets. ... Because they are aging, does not mean that these monsters have lost the evil mentality that caused them to commit these horrific crimes. Their victims and their families should not have to fear for their own lives.”

Id. at 8-9.

“██████████ Ann had two children, who are now adults: ... who could be in great danger if he was released. ... I also fear for the community at large that someone with violent tendencies would be released back into the area where such heinous crimes were committed.”

Id. at 10.

“[His daughter] is a personal friend of mine, ... He has made many threats to her already. As a concerned citizen and mother, I fear for my friend’s innocent family and the innocent families across our community.”

Id. at 11.

“He has made threats against his daughter who resides in ██████████ county with her family where he would be released. ... He is not only a danger to his family but to the community they live in.”

Id. at 12.

83. Other than the claims in the opposition material, there is nothing in the record supporting these alleged threats to the victim’s family or community.

84. The claims of dangerousness contradicted Mr. ██████████’s low risk COMPAS scores. Ex. 2 at 1; Ex. 6.

85. The petitions and opposition materials mischaracterized the crime by repeatedly claiming Mr. ██████████ stalked his ex-wife:

“Thomas ██████ stalked and murdered his ex-wife on ██████ 1988.”

Ex. 16 at 13.

“After their divorce he continued to stalk and abuse her.”

Id. at 14.

“Thomas ██████ stalked and brutally attacked his ex-wife on ██████ 1988.”

Id. At 15.

86. Mr. ██████ was not convicted of the crime of stalking, nor was he ever charged with such an offense.

87. The Board itself relied on this inaccuracy in the interview and in its decision.

88. Commissioner Cruse repeatedly implied during the interview that Mr. ██████ “stalked” the victim. Ex. 1 at 16, 25.

89. The Board’s denial decision relied on the inaccurate claim of stalking and danger to the community because it claimed that Mr. ██████ scores “fail to ... mitigate the loath (sic) lessons of horrific long-term impact upon the small ██████ community,” and that the “panel is concerned that the ██████ community remains aware of your crime given sustained opposition throughout multiple appearances,” “the surviving traces of your violence makes it difficult for the victims to find solace,” and that Mr. ██████ should “spend time identifying all [his] victims in recognition of the weight to be born in merely stating the words remorse and apologize.” *Id.* at 49.

90. The Board also accused Mr. ██████ of being “abusive” prior to the crime, which is not supported by the record.

COMMISSIONER CRUSE: “... You also was (sic) very abusive back in the day prior to the instant offense, correct?”

MR. ██████ “No.”

COMMISSIONER CRUSE: “Okay.”

MR. [REDACTED] “My wife and I, we argued, but I never hit her or anything.”

COMMISSIONER CRUSE: “You don’t have to strike someone to be abusive, you know that.”

MR. [REDACTED] “You’re right. I was a controlling person.”

COMMISSIONER CRUSE: “Well, that’s a sense of abuse.”

Id. at 15-16.

91. Numerous petitions and letters make additional unsubstantiated allegations, such as the victim was being asleep at the time of the murder:

“She was asleep in her bed where he viciously attacked her with a heavy bladed knife, stabbing her first in the throat so she could not yell for help.”

Ex. 16 at 16.

“Thomas L. [REDACTED] is in prison for stabbing his ex-wife 21 times while she slept.”

Id. at 17.

92. Numerous petitions and letters allege that Mr. [REDACTED] stalked and threatened his children in the past:

“After stalking his children and ex-wife for a month...”

Id. at 18 and 19.

93. The Board relied on and gave weight to the opposition material riddled with unsupported speculations and inaccuracies. *See* Argument V, Memorandum in Support of Petition.

The Board's Decision to Deny Parole was Pre-Determined

94. The Board's pre-determination was demonstrated in three ways: Commissioner Cruse's hostile conduct toward Mr. [REDACTED] exclusive focus on the nature of the crime, and failure to genuinely consider Mr. [REDACTED] institutional record.
95. Commissioner Cruse's hostility towards Mr. [REDACTED] was evidenced through his interruptions and confrontational comments; his badgering of Mr. [REDACTED] about drug use, despite no evidence of drug use having been part of the crime or current substance abuse issues; his irrational criticism of Mr. [REDACTED] re-entry housing plans; and his allegations against Mr. [REDACTED] that were unsubstantiated in the record. *See* Argument VI-A, Memorandum of Law in Support
96. During Mr. [REDACTED] September 23, 2021 interview, the Board focused almost exclusively on the crime. *See* Argument VI-B, Memorandum of Law in Support.
97. The Board failed to genuinely consider Mr. [REDACTED]'s institutional record. *See* Arg. VI-C, Memorandum of Law. Taken together, the decision was predetermined.

Board Failed to Provide the Complete Parole File

98. On November 12, 2021, undersigned counsel for Mr. [REDACTED] requested, pursuant to 9 NYCRR 8000.5 (a), the parole file considered for the September 2021 parole review. Ex. 14.
99. The Board provided some responsive documents but failed to disclose the District Attorney recommendation. Ex. 15.
100. There was a DA recommendation in the parole file. Ex. 26 at 1, September 2020 Parole Board Report (checking "yes" for "DA" statement in parole file).

101. The Board referenced the DA recommendation as an “official letters” in the interview.

“In review of your file I just wanted to let you know that we often have judges, DAs, and defense attorneys whether or not they have any interest in giving their opinion regarding the possibility to your release, we do have official letters that we are taking into consideration, and we will look at those as we develop our decision.”

Ex. 1 at 44.

102. The Board relied on “official opposition” in denying parole:

“Moreover, the panel is persuaded against your release given the strong language noted in the official opposition ...”

Id. at 49.

103. “Official opposition” refers to a District Attorney and/or sentencing judge recommendation.

104. The Board failed to disclose, without citing a basis, documentation concerning Mr. [REDACTED] mental health level. Ex. 15 at 2.

105. The documentation was in the parole file because the Board referenced a mental health level in the interview. Ex. 1 at 33.

106. The Board failed to disclose whether victim statements were in the parole file and if so, the number of such statements and dates of each. Ex. 15.

107. On information and belief, there were victim statements in the parole file. Ex. 1 at 49 (“(t)he surviving traces of your violence makes it difficult for the victims to find solace.”).

108. The Board’s refusal to disclose these portions of the parole file should require a de novo parole review. Although the request for the parole file was raised in the context

of the administrative appeal, remand for a *de novo* administrative appeal would be futile.

See Argument VII, Memorandum in Support of Petition.

The Board Failed to Issue its Decision in the Statutorily Required Period

109. Mr. [REDACTED] appeared before the Parole Board on [REDACTED] 2021. Ex. 1 at 1.

110. Although the denial decision was made the same day of the interview, Mr. [REDACTED] did not receive notice of the denial and the decision until 16 days after the parole interview on September 23, 2021, after he filed a grievance. Ex. 22.

111. By law, Mr. [REDACTED] should have been notified of the Board's decision by September 21, 2021. *See* Argument VIII, Memorandum in Support of Petition.

CAUSES OF ACTION:

ARTICLE 78 REVIEW OF IMPROPER DENIAL OF PAROLE

(For Judgment Pursuant to CPLR §§ 7801-7806 and Executive Law §259-i(c)(a)(2))

1. Petitioner repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.
2. Article 78 is the appropriate method of review of final agency determinations concerning parole reviews.
3. The Board's [REDACTED] 2021 denial decision violated its statutory and regulatory duties in six ways.
4. *First*, the Board functionally departed from Mr. [REDACTED] low COMPAS scores by denying him parole. This departure required the Board to provide an individualized reason for each such departure. The Board's citation to the nature of the crime does not meet the requirement.

5. *Second*, the Board's denial of parole based on the claim that Mr. [REDACTED] lacked insight is not supported by the record.
6. *Third*, the Board failed to explain how it considered victim statements.
7. *Fourth*, the Board's denial of parole based on the [REDACTED] community's lack of solace, awareness and long-term impact was an expression of the Board's own penal philosophy;
8. *Fifth*, the Board denied parole based on opposition material that contained numerous inaccuracies.
9. *Sixth*, the Board's decision to deny parole was impermissibly pre-determined.
10. *Seventh*, contrary to law, the Board failed to provide portions of the Parole File.
11. *Eighth*, the Board failed to issue its decision in the statutorily required period.

CLAIM FOR RELIEF

In light of the above errors, Petitioner respectfully requests that this Court enter judgment, pursuant to CPLR 7806, and:

1. vacate the Board's [REDACTED] 2021 denial of parole;
2. grant a *de novo* parole review before a different Board panel than that which presided at the [REDACTED] 2021 interview and at the March 30, 2022 administrative appeal denial, and that such take place within 30 days of this order;
3. order Respondent to serve on Petitioner the full parole file at least 14 days before the *de novo* review, and should Respondent withhold any portion of the file, a detailed inventory of such, including source and date of each document, must be served as well.

4. Grant Petitioner such other and further relief as this Court deems necessary and equitable.

Dated: New York, New York
May 24, 2022



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On the Petition:
Susu Zhao
Han Jang
Patricia Reichmuth
Legal Interns

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
THOMAS [REDACTED]
Petitioner,

-against-

ATTORNEY VERIFICATION

TINA M. STANFORD,
CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE,
Respondent

Index No.

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Martha Rayner, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

I am Of Counsel to Lincoln Square Legal Services, Fordham University School of Law's clinical law office, and counsel for Petitioner.

I have read the foregoing Petition and know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters, I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon facts, records, and other pertinent information contained in my files.

I make the foregoing affirmation pursuant to CPLR 3020(d)(3) because Petitioner is not in the County where I have my office.

Dated: May 24, 2022



Martha Rayner, Esq.

STATEMENT PURSUANT TO 22 NYCRR 202.8-B

I, Martha Rayner, affirm under penalty of perjury pursuant to CPLR 2106, that the total number of words in the foregoing Petition, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is under 7,000 words. The foregoing Petition complies with the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

/s/ Martha Rayner _____
MARTHA RAYNER
Lincoln Square Legal Services, Inc.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

In the Matter of the Application of
THOMAS [REDACTED]

Petitioner,

-against-

Memorandum of Law
In Support of Petition

TINA M. STANFORD,

Index No. _____

CHAIRWOMAN, NEW YORK STATE
BOARD OF PAROLE,

Respondent.

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

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ARGUMENT

I. **The Board Failed to Explain Its Departure from Low COMPAS Scores in Violation of 9 NYCRR 8002.2(a)**

When the Board’s denial decision “departs” from low COMPAS scores, the Board is required to “specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure.” 9 NYCRR §8002.2(a).1 Although the Board claimed it did not “depart” from Mr. █████ low COMPAS scores, the Board’s denial decision finding that release “would be incompatible with welfare of society and would so deprecate the serious nature of [his] crime as to undermine respect for the law” was inconsistent with such scores and thus amounted to a departure. Ex. 1 at 47.

The obligation under §8002.2(a) is not dependent on the Board’s admission of “departure,” or use of the word “depart”; it is sufficient that the denial contradicts or is inconsistent with low COMPAS scores. Ex. 19 at 4 (*Phillips v. Stanford* (Sup. Ct. Dutchess Cnty. 2019)) (finding low COMPAS risk and needs scores “directly contradicted” the Board’s finding that discretionary release would not be incompatible with the welfare of society, and thus the Board was “required to articulate with specificity the particular scores in petitioner’s COMPAS assessment from which it was departing and provide an individualized reason for such departures”); Ex. 18 at 2, *Robinson v. Stanford*, Index No. 2392/18 (Sup. Ct. Dutchess Cnty. 2018). (“...[The COMPAS] assessment gave the petitioner the lowest possible rating in categories for risk of felony violence, re-arrest, absconding and for criminal involvement... Petitioner correctly asserts that the Parole Board’s

¹ “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... If a Board determination...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...”

finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores in his COMPAS assessment. As the Board's determination denying release departed from these risk and needs assessment scores ... it was required to articulate with specificity the particular scale in any needs and [risk] assessment from which it was departing and provide an individualized reason for such departure. The Board's conclusory statement ... fails to meet this standard...").²

Mr. [REDACTED] had low COMPAS scores in ten out of twelve categories. Ex. 2 at 1. As to risk for "felony violence" and "arrest risk," Mr. [REDACTED] had the lowest possible score of "1" on a scale of one to ten. The only high score, "family support," was inevitable since Mr. [REDACTED] is alienated from most of his family due to the nature of his crime. The only medium score, "history of violence," is static in nature and the Board acknowledged this score was based on "the instant offense, that's [his] only New York State incarceration." *Id.*; Ex. 1 at 34. Mr. [REDACTED]'s COMPAS scores further show that upon release he is unlikely to have a substance abuse problem, negative social cognition, low self-efficacy in his ability to deal with various challenges of reentering the community, or significant financial or employability problems. Ex. 2 at 1.

Still, the Board denied parole and ducked its regulatory obligation to explain by claiming in its denial decision that it did not depart:

"The panel weighed and considered the results of your COMPAS risk assessment and the low risk scores indicated therein. The panel does not depart from your favorable low scores, however said scores fail to outweigh the gravity of the instant offense or mitigate the atrocious type of death nor loath (sic) lessons of horrific long-term impact upon the small [REDACTED] community."

Id. at 48.

² Unpublished County Supreme Court decisions are provided as exhibits as indicated.

The Board's recent history of parole denials shows that the Board's disavowal of departure was designed to avoid its obligation to explain. The parole denial decision one year before, in September of 2020, explicitly acknowledged departure from the low COMPAS scores. Ex 12 at 33. The 2020 denial was administratively reversed by other commissioners based on the Board's failure to explain such departure. Ex. 13 at 2 (holding that "Appellant is correct that the Board decision departed from the COMPAS without mentioning any specific individualized scale, which was required by the regulations.").

To avoid another reversal, the Board claimed in the September 2021 denial at issue here, that it was not departing from Mr. [REDACTED] low COMPAS scores.³ Whether the Board admits or denies departure or uses the word "depart" in its decision, the Board's claim that release would be "incompatible with the welfare of society and would so deprecate the serious nature of [his] crime as to undermine respect for the law" is inconsistent low risk of "felony violence," "arrest," and "absconding." It also is inconsistent with COMPAS scores indicating the unlikelihood of issues with negative social cognitions, low self-efficacy, or financial and employability problems upon release. Ex. 1 at 47; Ex. 2 at 1; Ex. 19 at 4 (*Phillips*). Therefore, the Board's decision departed from low COMPAS scores. Ex. 20 at 5-6 (*Voii v. Stanford* (Sup. Ct. Dutchess Cnty. 2020)) (rejecting as "flawed" the Board's argument that it need not explain its departure because it did not conclude that petitioner was likely to reoffend, only that petitioner's release was incompatible with the welfare of society and would deprecate the seriousness of the offense, and reiterating that the law "clearly indicates that a departure requires the Board to identify any scale from which it departs and provide an individualized reason" for the departure) (emphasis in original); Ex. 18 at

³ At the intervening March, 2021 *de novo* review – held as a result of the administrative reversal – the Board also claimed no departure. Ex. 25 at 35 ("This panel does not depart from the low COMPAS risk scores").

1 (*Robinson v. Stanford* (Sup. Ct. Dutchess Cnty. 2019)) (finding the Board’s denial citing to incompatibility with the welfare of society, “directly contradicts these scores in [petitioner’s] COMPAS assessment,” which were “the lowest possible rating in categories for risk of felony violence, re-arrest, absconding and for criminal involvement”); Ex. 17 at 3, 6, 11 (*Hill v. Board*, (Sup. Ct. NY Cnty, 2020)) (finding that the Board had an obligation to explain departure from low COMPAS score when denial was based on the conclusion that petitioner would not live and remain at liberty without again violating the law, and release would be incompatible with the welfare of society and so deprecate the serious nature of the crime as to undermine respect for the law.)

The Board’s statement that “said scores fail to outweigh the gravity of the instant offense or mitigate the atrocious type of death nor loath (sic) lessons of horrific long-tern impact upon the small ██████ community” is inadequate and irrational. Ex. 1 at 48. *Id.*

First, the Board provided the same reason for departure—the “instant offense”—in its September, 2020 denial decision, which was found inadequate by the Board on administrative appeal. The September, 2020 denial reads:

“... the Panel concurs to depart from low-risk COMPAS, because your self-described course of action throughout the *Instant Offense*, with absent moral judgment, radiated your obvious disregard for human life and lacked the insight necessary to make the appropriate decisions, given other law-abiding options available to you.”

Ex. 12 at 33 (emphasis added).

Although the September, 2021 denial decision at issue here characterizes its departure from low scores as, “said scores fail to outweigh the gravity of the instant offense,” the reason for rejecting the low scores was, like the 2020 departure, based on *the offense*. Ex. 1 at 48. The administrative appeal decision found the September, 2020 denial decision inadequate. Ex. 23 at 2 (“Appellant is correct that the Board decision departed from the COMPAS without any specific

individualized scale, which is required by the regulations.”). The same should be found here—the Board failed to meet the requirements of 9 N.Y.C.R.R. §8002.2(a).

Second, the nature or severity of the crime and its impact on a community is not a rational explanation for departing from low COMPAS scores. Ex. 20 at 5-6 (*Voii*). In *Voii*, petitioner, convicted of killing a police officer and civilian, had low COMPAS scores, yet the Board denied parole finding that release would be incompatible with the welfare of society and would deprecate the seriousness of the crime so as to undermine respect for the law. *Id.* at 4–5. The *Voii* court held that the Board’s reason for departure, which was the nature of the crimes, was “unrelated to any score contained in the COMPAS assessment,” and that “judicial intervention is warranted because this departure from the regulations evinces irrationality bordering on impropriety.” *Id.* at 6-7.

The same should apply here. By addressing the low scores in this manner, the Board determined that no matter the COMPAS scores, the crime “outweighed” them. Whether the Board admits departure or couches its divergence from low scores as “outweighing,” the purpose of COMPAS is not to “excuse” a person’s crime—it is to determine whether a person who committed a crime decades ago still presents the same risks to society today. By relating the COMPAS scores to the seriousness of the crime and impact on the [REDACTED] community, the Board does not provide an individualized reason for departure and makes release dependent on factors that Mr. [REDACTED] simply cannot change and over which he has no control. As in *Voii*, the Board’s citation here to the nature of the crime and its impact on the [REDACTED] community does not explain the denial’s inconsistency with low COMPAS scores because “... the departure is unrelated to any scale contained in the COMPAS Assessment.” Ex. 20 at 6–7 (*Voii*).

The Board’s failure to adhere to its own regulation is sufficient to grant a *de novo* review. Ex. 20 at 2 (*Voii*); Ex. 18 at 2 (*Robinson*).

II. Denial of Parole Based on the Claim that Mr. [REDACTED] Lacked Insight Was Not Supported by the Record.

The Board denied parole claiming Mr. [REDACTED] “presents limited insight by failing to consider the death (sic) and extent of the pain you caused.” Ex. 1 at 49. This is irrational because the reason for the denial must be supported by the record. *Rivera v. Stanford*, 2019 WL 2030503, at *2 (2d Dep’t 2019) (the Board’s finding that release was not compatible with the welfare of society based upon prison disciplinary record was without support in the record); *Winchell v. Evans*, 27 Misc.3d 1232(A) (Sup. Ct. Sullivan Cty, 2010) (the Board’s denial, based on the petitioner’s failure to show remorse for the victim or her family and not appearing to understand the seriousness of his crime, was contradicted by the record); *Wallman v. Travis*, 18 A.D.3d 304, 308 and 310 (1st Dep’t 2005) (“Despite the critical significance of these factors [remorse and insight] in evaluating an inmate ... the Board’s decision in this case offers no supportive facts justifying its finding of lack of insight and remorse ... [Thus] the court’s conclusions regarding lack of insight and remorse were based on an inaccurate reading of the record.”).

Here, as in *Wallman*, there were *no* facts in the denial decision supporting the conclusion that Mr. [REDACTED] lacked insight and remorse, but there were facts in the record demonstrating remorse and insight. 18 A.D.3d 304, 308-9; Ex. 1 at 48-49, Ex. 5.

In his personal statement, Mr. [REDACTED] wrote:

“Every day when I awake, I instantly feel horrible pain of what I did twenty-nine years ago. The consequences of my actions on my family and others will last forever.”

“I take full responsibility for the appalling act of killing my ex-wife [REDACTED] Anne [REDACTED]

“... nothing could excuse my crime of killing [REDACTED]

Ex. 5 at 1.

In letters to his children, Mr. [REDACTED] expressed insight and acknowledged the impacts of his action. *Id.* at 4-7. To his daughter, Mr. [REDACTED] wrote:

“[REDACTED] I want to apologize to you for the horrible pain I put you through by killing your mother”

“Nothing I can do now or say to you can erase what I did.”

“I realize now that I didn’t even know what love really was. I thought I did but my actions proved otherwise.”

“I failed you and [REDACTED]

Id. at 4.

To his son, Mr. [REDACTED] wrote:

“[REDACTED] I apologize form (sic) my heart for killing your mother and causing you so much pain and grief.”

“I will never be able to escape that pain I live with every day.”

“I failed the family that I loved and wanted to protect. I failed you as a father, as a man.”

Id. at 6-7.

The interview transcript contains numerous statements by Mr. [REDACTED] demonstrating his remorse and understanding of the harm caused. From the start, Mr. [REDACTED] stated:

MR. [REDACTED] “... And I take full responsibility for what I did. I did a horrible, horrible thing.”

Ex. 1 at 6.

MR. [REDACTED] “... I think back to all the things that I did wrong.”

Id. at 7.

MR. [REDACTED] “I feel horrible. I feel horrible. ... I wish there was something I could do. ... So what I’ve done, I can’t do that. So what I’ve done is I’ve taken my life and tried to change the future and become a better person. And so what I’ve done is I’ve committed myself to finding out why I did that.”

Id. at 11.

MR. ██████ “Yes, I killed the mother of my children.”

MR. ██████ “Yes, Commissioner, I have every day. Every day I hold the pain that I caused them.”

MR. ██████ “Her mother, her father, her brothers, my mother, my father, my sister, all -- both families destroyed.”

Id. at 14.

MR. ██████ “I destroyed both families doing this. My sister, especially, my children, I wanted to protect them and all I did was cause them more pain.”

Id. at 15.

Mr. ██████ turned to religion and education to reflect upon his criminal behavior:

MR. ██████ “All these years, and what I’ve done is I’ve worked very hard for myself to rehabilitate myself. And the first thing I did was I went back to my religion, I discovered the Quakers, and the Quakers are very good people.”

COMMISSIONER CRUSE: “And that gave you a greater insight to your behavior?”

MR. ██████ “Insight. A great deal of insight.”

COMMISSIONER CRUSE: “Okay.”

MR. ██████ “Because I wanted to increase my academic studies so I went to college and studied psychology, and it’s --”

Id. at 18.

Members of Mr. ██████ Quaker worship group observed that Mr. ██████ reflected on his crime and the pain he caused:

“I have heard [Mr. ██████] say on more than one occasion that he considers the Quaker beliefs in non-violence and personal transformation to have been helpful to him in reflecting on his crime. ... As the group worked to make decisions, [Mr. ██████] was often the voice which helped the group come to unity, drawing on his skills as a facilitator for the Alternatives to Violence Program. He has been supportive of other

members of the group when they have been in difficulty, reminding them of positive directions.”

Ex. 11 (Pamela Wood letter).

“[Mr. ██████] has often expressed regrets for what brought him to prison. He shows empathy and compassion to others and encourages his peers to show the same.”

Id. (Eugene Lebwahl letter).

“Mr. ██████ has expressed a sincere interest in having his life be more than his past. He is clearly committed to turning his life around, mirrored not only in his words but in his actions.”

Id. (Ruth Matthews letter).

It is irrational for the Board to claim Mr. ██████ had “limited insight” because it is not supported by the record. *Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 A.D.3d 672, 673 (2d Dep't 2018) (“Contrary to the Parole Board's determination that the petitioner ‘distance[d]’ himself from the crime, the record demonstrates that the petitioner took full responsibility for his actions...”).

III. The Board Failed to Explain How it Considered Victim Statements

In determining parole, the Board must consider eight statutory factors, N.Y. Exec. Law § 259-i(2)(c)(A), and pursuant to the 2017 revision of §8002.3 of 9 NYCRR, if parole is denied, the Board must explain how it considered the applicable statutory factors in factually individualized and non-conclusory terms. If present in the parole file, the Board is required to consider victim statements, yet here the Board did not even indicate whether such statements were in the parole file. N.Y. Exec. Law § 259-i(2)(c)(A)(v).

The Board’s silence as to victim statements is not indicative of whether such statements were in the parole file since it is the Board’s practice to “withhold commissioners’ reliance on

these materials from written parole decisions.” Ex. 13, *Flores v. Stanford*, 18-civ-02468 (U.S. District Court, SDNY) at 3, 7-8, 9. In *Flores*, the Magistrate Judge found that:

[D]ue to the confidential nature of victim impact statements, the BOP’s “practice” is to “require[]” commissioners “to not even divulge the existence of victim opposition in the[ir] decision[s],” even when such opposition is “more significant” than any other reason for denial of parole...”

Id. at 3.

On information and belief, victim statements were in Mr. [REDACTED] parole file and thus were considered by the Board. If so, this would be a breach of 9 N.Y.C.R.R. §8002.3, which requires that a denial decision explain how victim statements were considered.

IV. The Commissioners Considered and Placed Weight upon Their Own Sense of Justice—Penal Philosophy—Which is Not Permitted

The Board must not consider their own political or personal beliefs as to the appropriate punishment in considering whether a person should be paroled under the standards and factors defined by the law. *In re King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994) (holding that “penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place” may not be considered because each factor is outside the scope of Executive Law § 259-i). Here, the Commissioners' denial of parole based on their claim that the [REDACTED] community was still aware of the crime, was impacted long-term and had yet to find solace was an expression of their own penal philosophy. Ex. 1 at 48-49. The Commissioners determined that in their opinion Mr. [REDACTED] should not be considered for release until the [REDACTED] community is no longer aware or impacted by the crime and has found comfort, or some abatement of grief. These factors fall outside the law and thus are pure expressions of the Board's own view of justice.

Penal philosophy is one's individual belief as to the appropriate moral, philosophical or criminological response to certain crimes—essentially one's personal sense of what is a just response to those who engage in criminal conduct. Commissioners are obligated to consider the law as the correct measure of what “society” by way of the legislature has deemed the appropriate response to those convicted of criminal conduct. Here, the Commissioners' denial repeatedly invoked the ██████ community as a basis for denial.

First, the denial decision found that Mr. ██████ low risk COMPAS scores were “outweigh[ed]” by the “long-term impact” on the ██████ community. Ex. 1 at 48. Second, the decision expressed “concern” that the ██████ community remained “aware” of the crime and had “sustained opposition” to release. *Id.* at 4. Third, the Board ended its decision by invoking the community once again: “The surviving traces of your violence, makes it difficult for the victims to find solace.” *Id.*

The Commissioners' repeated invocation of the ██████ community –especially their concern that the community had not found solace—evinces a deep and personal concern for the ██████ community. Just as in *King*, the Board “made quite clear” that their “...own personal attitudes toward the propriety of punishing murder with the death penalty or with life imprisonment without the possibility of parole had some relevance to the question of how long petitioner should spend in prison.” *King v. New York State Div of Parole*, 190 A.D.2d 423, 432 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994). Here, the Commissioners did not express personal attitudes regarding the death penalty or life without parole, but they expressed their belief that until the community no longer suffers from the crime, Mr. ██████ should be denied parole.

The issue here is not that the Board considered statements from the ██████ community, it is that the Commissioners concluded that in their view until the community no longer suffers,

release should be denied. Like the commissioner in *King*, the Commissioners here expressed their own personal penal philosophy: to deny parole until the ██████ community no longer suffers from or remembers the crime. The Board is not authorized to consider such factors. *Id.*

V. The Board Denied Parole Based on Opposition Material that Contained Numerous Inaccuracies

As argued above, the opposition material, 211 pages of petitions and letters, was a focus of the Board’s denial decision and the Board heavily relied and placed weight upon it, despite it being riddled with inaccuracies and speculation unsupported by the record. Ex. 1 at 49 (citing “sustained opposition,” “long-term impact,” and difficulty finding “solace.”). The Board may not rely on inaccurate information. *Lewis v. Travis*, 9 A.D.3d 800 (3d Dep’t 2004). (“In as much as the Board relied on incorrect information [murder in the first degree rather than in the second degree] in denying petitioner’s request for parole release, the judgment must be reversed and a new hearing granted.”); *Hawthorne v. Stanford*, 135 A.D.3d. 1036 (3d Dep’t 2016) (granting a de novo interview based on the Board’s “characterization of the petitioner’s disciplinary history as showing ‘marginal compliance with DOCCS rules,’ which it strongly relied upon in denying parole, lacked support in the record.” The inaccurate information need not be the pivotal basis for the Board’s denial. Ex. 27 (*Rodriguez v. Stanford* at 5 (Sup. Ct. Franklin Cnty. 2021) (“This Court will not speculate whether the misstated facts were the proverbial ‘straw that broke the camel’s back’ that led the Board to decide as it did, and we need not so find. It is enough that the erroneous facts were stated in the Board’s reasoning and were likely to have influenced the outcome.”).

Numerous petitions and letters inaccurately claimed Mr. ██████ would have returned to ██████ County if he were released.

“If released, he will be residing in ██████ County, where most of the victim’s family resides”

Ex. 16 at 1 and 6.

“His release would be to ██████ County where many of his victim’s family still lives.”

Id. at 2 and 5.

“I live in ██████ County and do not want him released to our area.”

Id. 3.

These claims were not supported by the record. Mr. ██████ told the Board he planned to reside in Buffalo, NY in Erie County, and provided letters of assurance from housing agencies in Buffalo. Ex. 1 at 26-29; Ex. 4 (2021 letters from Back to Basics and Peaceprints). In addition, any proposed housing would need to be approved by parole before Mr. ██████ release.

The second inaccuracy is that the opposition material claimed that, if released, Mr. ██████ will pose a danger to the victim’s family and community.

“I have a deep concern and interest in helping to keep our streets completely safe not only for my children, but for the surrounding areas of my community and for the safety of the murder victim’s family.”

Ex. 16 at 7.

“He is not only a danger to his family but the community they live in. ... continued threat to other’s safety and freedom, ... As a mother of two children I fear someone like this monster being out on the streets. ... Their victims and their families should not have to fear for their own lives.”

Id. at 8-9.

“██████ Ann had two children, who are now adults: ... who could be in great danger if he was released. ... I also fear for the community at large that someone with violent tendencies would be release back into the area where such heinous crimes were committed.”

Id. at 10.

“[His daughter] is a personal friend of mine, ... He has made many threats to her already. ...I fear for my friend’s innocent family and the innocent families across our community.”

Id. at 11.

“He has made threats against his daughter who resides in [REDACTED] county with her family where he would be released. ... He is not only a danger to his family but to the community they live in.”

Id. at 12.

These claims have no support in the record, and they are contradicted by Mr. [REDACTED]’s low risk COMPAS scores. Ex. 2 at 1, and Ex. 6.

Third, the petitions and letters inaccurately claimed that Mr. [REDACTED] stalked the victim.

“Thomas [REDACTED] stalked and murdered his ex-wife on [REDACTED] 1988.”

Ex. 16 at 13.

“After their divorce he continued to stalk and abuse her.”

Id. at 14.

“Thomas [REDACTED] stalked and brutally attacked his ex-wife on [REDACTED] 1988.”

Id. at 15.

Mr. [REDACTED] was not convicted of the crime of stalking, nor was he ever charged with such an offense. Yet, Commissioner Cruse confronted Mr. [REDACTED] with these inaccurate claims:

COMMISSIONER CRUSE: “Did you ever have (sic) stalk her?”

MR. [REDACTED] “No.”

COMMISSIONER CRUSE: “Never did that. How did you know where she lived ...?”

MR. [REDACTED] “My sister told me.”

COMMISSIONER CRUSE: “Your sister told you. So they’re friends?”

MR. [REDACTED] “Yes.”

COMMISSIONER CRUSE: “Okay.”

MR. [REDACTED] “Both families you know.”

COMMISSIONER CRUSE: “Okay. I thought that the mother might have told you since she told you --”

MR. [REDACTED] “She told me that they were living in [REDACTED] that’s all she told me.”

Ex. 1 at 16; see also 24-25.

Numerous petitions and letters claim, without support in the record, that the victim was asleep at the time of the incident.

“She was asleep in her bed where he viciously attacked her with a heavy bladed knife, stabbing her first in the throat so she could not yell for help.”

Ex. 16 at 16.

“Thomas L. [REDACTED] is in prison for stabbing his ex-wife 21 times while she slept.”

Id. at 17.

There was also a claim, unsupported by the record, that Mr. [REDACTED] has never showed remorse for his actions towards his two children:

“This man has had many years to plot his revenge on her and has never shown an ounce of remorse for his actions.”

Id. at 5.

Mr. [REDACTED] had sent apology letters to his children and expressed remorse numerous times during the interview. *See* II above; Ex. 5 (apology letters to [REDACTED] and [REDACTED] 6.3.2016).

In denying parole, the Board heavily relied on this inaccurate and speculative opposition material. *Id.* at 48-49 (e.g. “the panel is concerned that the [REDACTED] community remains aware of your crime given sustained opposition throughout multiple appearances.”).

VI. The Board’s Decision to Deny Parole was Pre-Determined.

Where there is evidence that the Board’s decision was a foregone conclusion, an individual is entitled to a *de novo* review. *Johnson v. N.Y. Bd. of Parole*, 65 A.D.3d 838 (4th Dep’t 2009). Here, the Board’s pre-determination was demonstrated in three ways: Commissioner Cruse’s

hostile conduct toward Mr. [REDACTED] near exclusive focus on the crime, and failure to genuinely consider Mr. [REDACTED] institutional record.

A. Commissioner Cruse was Hostile Toward Mr. [REDACTED]

Commissioner Cruse displayed hostility in multiple interruptions and confrontational comments, badgering Mr. [REDACTED] about drug use, despite no evidence of it having been part of the crime or a current issue; irrationally criticizing Mr. [REDACTED] re-entry housing plans; and making allegations unsubstantiated in the record. *See Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 46 Misc. 3d 603 (Sup. Ct. Sullivan Cnty. 2014) (“at least one Commissioner was argumentative and appeared to have made the decision prior to the parole interview.”).

Commissioner Cruse repeatedly interrupted Mr. [REDACTED] and made confrontational comments.

COMMISSIONER CRUSE: “Did you ever ask your daughter whether she though (sic) you was (sic) abusive?”

MR. [REDACTED] “No, I never did.”

COMMISSIONER CRUSE: “Did you ever ask her did she think you were control (sic)?”

MR. [REDACTED] “No, I was –”

COMMISSIONER CRUSE: “Yes or no, did you ever ask her?”

Ex. 1 at 20.

MR. [REDACTED] “She was just a little child, you know, six years old, and I didn’t ask her any in depth all solvable questions.”

COMMISSIONER CRUSE: “I’m sorry to be so direct with it, but she wasn’t always six.”

MR. [REDACTED] “Well, the last –”

COMMISSIONER CRUSE: “She wasn’t always six.”

Id. at 21.

Although there was no indication that drug use by Mr. [REDACTED] played a role in the crime, or that Mr. [REDACTED] had any current risk of drug abuse, Commissioner Cruse raised the issue repeatedly. The 2021 COMPAS stated Mr. [REDACTED] was not high or drunk at the time of the offense and scored Mr. [REDACTED] at low risk of substance abuse. Ex. 2 at 1, 4. The Presentence Investigation Report noted no substance use at the time of arrest. Ex. 3.

Despite this, Commissioner Cruse badgered Mr. [REDACTED] about drug abuse during the interview. Ex. 1 at 30-31.

Commissioner Cruse spent a half page of the transcript criticizing Mr. [REDACTED] for being confused:

COMMISSIONER CRUSE: “I made an error in your last ticket. Your last ticket was 5/20/21, it wasn’t 2019. It was a Tier II for altered item. When I asked you that you agreed with me so I thought I was accurate, you didn’t correct me?”

MR. [REDACTED] “I’m sorry, I didn’t understand the question.”

COMMISSIONER CRUSE: “The question was your last – it wasn’t a question – yeah, it was a question, your last ticket was in, I said then, 2019, and you said yes. Now, I look again and it was 2021. So I thought you would correct me, but that it may we now have the right information.”

MR. [REDACTED] “I’m sorry. I’m a little confused.”

COMMISSIONER CRUSE: “Okay. I’m doing your COMPAS. Don’t be confused about that.”

Id. at 33-34.

Commissioner Cruse irrationally disparaged Mr. [REDACTED] re-entry housing plans. Mr. [REDACTED] informed the Board that, if granted parole, he would reside in Buffalo, NY and provided letters of assurance from two housing agencies. Ex. 1 at 26-29; Ex. 4. Yet, Commissioner Cruse

criticized Mr. [REDACTED] for not having a residence “nailed down.” Ex. 1 at 28-29. This was irrational since both letters explained that housing was contingent on a grant of parole and “a referral from the New York State Department of Community Corrections and Supervision, Erie County Parole Division Office.” Ex. 4.

After nearly half a life in prison and having limited family support, Mr. [REDACTED]’s options were limited, but he secured letters confirming housing pending a grant of parole and a referral from DOCCS. Ex. 2 at 1 and 10 (“MR. [REDACTED]’s scale score suggests that he may have limited support from his family.”); Ex. 4.

Commissioner Cruse made unfounded allegations against Mr. [REDACTED] which the Board may not do. *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 51 Misc. 3d 1218(A) (N.Y. Sup. Ct. 2015), aff'd as modified, 140 A.D.3d 34 (2016) (“This Court has been unable to find any statutory or case law that authorizes parole board commissioners to infuse their own personal opinions or speculations into the parole interview or process.”). He repeatedly accused Mr. [REDACTED] of being abusive prior to the crime and “stalking” his ex-wife, despite Mr. [REDACTED] living in another state from his wife at the time of the crime. Ex. 1 at 15-17. Mr. [REDACTED] was never convicted of the crime of stalking, nor was he ever charged with such an offense. There was no claim of stalking in the record other than the unfounded allegations in the opposition materials from the [REDACTED] community. *See* Ex. 16c.

Commissioner Cruse’s hostile interruptions, comments, speculations, and criticism demonstrated the Commissioner’s personal bias against Mr. [REDACTED] and the inevitability of a denial decision.

B. The Board Focused almost Exclusively on the Crime

The Board's focus on the crime in the interview and in the denial decision demonstrated pre-determination. Although the Board is permitted to place emphasis on the seriousness of the underlying crime (*Matter of Schendel v. Stanford*, 185 A.D.3d 1365, 1366 (3d Dep't 2020)), the Board may not deny parole based solely on the seriousness of the crime. *Matter of Ferrante v. Stanford*, 172 A.D.3d 31, 37 (2d Dep't 2019)); *see also Matter of Rossakis v. New York State Bd. of Parole*, supra, at 27 (holding that the Board "acted with an irrationality bordering on impropriety in denying petitioner parole" where it "focused exclusively on the seriousness of petitioner's conviction and the decedent's family's victim impact statements . . . without giving genuine consideration to petitioner's remorse, institutional achievements, release plan"). Instead of providing due consideration to each statutory factor, the Board focused on the nature of the crime, Mr. [REDACTED] state of mind, and Mr. [REDACTED] speculations about his wife's state of mind.

COMMISSIONER CRUSE: "I really want to get to, if we can, what were some of the issues that you were feeling during that time that led you to kill your wife – ex-wife; you know, what were some of the underpinning stuff that prompted your behavior?"

Ex. 1 at 5.

COMMISSIONER CRUSE: "Let's back up a bit. I just want to be clear in what you're sharing with me – with us. You wanted to talk with her – I'm the one who said that, you didn't you said you wanted see her – I think that's what you said, either way your purpose was to share with her or understand from her something or another in regard to your daughter being molested by her boyfriend. Do you think that you could have done that on the phone; yes or no, sir, yes or no?"

Id. at 6-7.

COMMISSIONER CRUSE: "You shouldn't have went there, that's what you shouldn't have done, but that's well behind us this point, right? So let me continue asking you, sir --"

Id. at 9.

COMMISSIONER CRUSE: "And that's what I asked you at the top of the interview, you know, what's some of the underpinnings and I still haven't heard that from you."

Id. at 11-12.

COMMISSIONER CRUSE: “Also I’m just trying to follow what you said, it sounds as though you’re eluding (sic) to your action in some regard as being self-defensive in that you’re saying that she attempted to stab you first?”

Id. at 7.

COMMISSIONER CRUSE: “You knocked by surprise, and she just welcoming gave you, you know, the red carpet and said have a seat; how did that go?”

Id. at 8.

COMMISSIONER CRUSE: “Well, she wasn’t violate (sic) towards you for over three years because you hadn’t had any contact with her. It’s just – it’s difficult to sort of follow?”

MR. [REDACTED] “It’s just conjecture on my part.”

COMMISSIONER CRUSE: “Okay. So let’s stop guessing and go back to some facts.”

Id. at 10-11.

The Board redirected Mr. [REDACTED] from speaking about his accomplishments to return yet again to the nature of the crime.

MR. [REDACTED] “Because I wanted to increase my academic studies so I went to college and studied psychology, and it’s –”

COMMISSIONER CRUSE: “Well (sic), get to your accomplishments. We’ll get to your accomplishment. All right. We’ll get to your accomplishments ...that’s well after this. ...so we got in terms of things that led you to do this is your resentment, you said, and your controlling nature. Was your father abusive also?”

Id. at 19.

The Board did not return to the topic of Mr. [REDACTED] accomplishments.

C. The Board Failed to Genuinely Consider Mr. [REDACTED] Institutional Record

The Board is required to fairly consider the institutional record in making a parole determination, but failed to do so, indicating denial was pre-determined. *In re Winchell*, 32 Misc. 3d 1217(A), 934 N.Y.S.2d 37 (Sup. Ct. 2011) (“The mere mention that petitioner did participate in rehabilitative progress, is itself insufficient to satisfy the strict requirements of Executive Law

§ 259-i. Our courts have so held that “[t]he passing mention in the Parole Board's decision of petitioner's rehabilitative achievements cannot serve to demonstrate that the Parole Board weighed or fairly considered the statutory factors where, as here, it appears that such achievements were mentioned only to dismiss them in light of the seriousness of petitioner's crime.”); *see also Banks v. Stanford*, 159 A.D.3d 134, 144 (2d Dep’t 2018) (“a parole ‘interview’ cannot be understood as merely consisting of a mere face-to-face appearance by the inmate before the parole board ... it speaks to a process that statutorily requires consideration of a panoply of materials including the inmate's institutional record of goals, accomplishments, academic achievements, vocational education, training, or work assignments; performance evaluations from any temporary release program; available post-release community resources, employment, education, training, and support services; crime victim statements; the considerations relevant at the time of sentencing; and the inmate's criminal history.”).

The Board claimed in its denial decision that it considered Mr. ██████ institutional achievements, but the Board did not ask Mr. ██████ any questions about his institutional record. The Board only asked questions about the crime and negative topics, including Mr. ██████ state of mind and motivations (*Id.* at 5, 6-7, 9, 11-12); Mr. ██████ ex-wife's state of mind (*Id.* at 7, 8, 10-11); whether Mr. ██████ was abusive to his wife (*Id.* at 15-16); whether Mr. ██████ stalked his ex-wife, despite living in a different state prior to the crime (*Id.* at 16); Mr. ██████ relationship with his now-adult daughter (*Id.* at 21-22); and Mr. ██████ past drug use, despite his COMPAS assessment scoring him “unlikely” in re-entry substance abuse (*Id.* at 30-31; Ex. 2 at 1, 8).

The only mention of accomplishments during the interview was a list that the Board read into the record, without making any further inquiry of Mr. ██████ Ex. 1 at 34-35

VII. The Board Failed to Provide Petitioner with Portions of Parole File Considered by the Board

In response to Petitioner's November 12, 2021 request for the parole file, pursuant to 9 NYCRR 8000.5(a) and in connection with the administrative appeal, the Board provided some documents, but refused to disclose the District Attorney recommendation, Office of Mental Health Level documents, and the number and dates of victim statements, all of which were in the parole file. Ex. 14 and 15. Failure to disclose portions of the parole file is improper. *Matter of Clark v. New York State Bd. of Parole*, 166 A.D.3d 531, 531–32 (1st Dept, 2018) (holding that the Board's failure to disclose letters in opposition during the administrative appeal process was improper).

First, there was a DA recommendation in the parole file. Ex. 26 at 1, 2020 Parole Board Report (checking "yes" for "DA" statement in parole file). Contrary to law and the Board's own internal directive, the Board refused to provide it. Ex. 15 at 1-2; DOCCS Directive #2014, III-D-7 (submissions from the District Attorney should be released "unless explicitly stated within the letter or noted on the record that the writer requested confidentiality."); *Clark*, 166 A.D.3d 531, 531–32. In denying parole, the Board relied on "strong language" in the "official opposition," which is how the Board refers to DA statements. Ex. 1 at 49 (Moreover, the panel is persuaded against your release given the strong language noted in the official opposition ...).

Second, despite a request, the Board refused to disclose documentation in the parole file regarding the OMH Level 4 designation. Ex. 1 at 33 ("[Y]our mental health is 4."); Ex. 14; Ex. 15 at 2.

Third, the Board failed to provide petitioner's counsel with victim impact statements in violation of Executive Law 259-i(2)(c)(B). Ex. 15. The governing statute permits access to victim statements; the statute limits non-disclosure to name and address. Executive Law 259-i(2)(c)(B) ("Where a crime victim or victim's representative as defined in subparagraph (A) of this paragraph,

or other person submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that individual's name and address confidential.”). Based on the denial decision’s claim that the victims have not found solace, it appears victim impact statements were in the parole file. Ex. 1 at 49. The existence, dates and number of victim impact statements were not provided to petitioner’s counsel. Ex. 15. This does not conform with the law.

If this Court agrees that portions of the parole file were improperly withheld, a *de novo* parole review should be ordered because the Board violated positive law. Although the violation took place in connection with the administrative appeal, remand for a *de novo* administrative appeal would be futile since it could not be decided before Mr. ██████ September, 2022 reappearance and the Board would then dismiss the appeal as moot.

VIII. The Board Failed to Issue its Decision in the Statutorily Required Period

Mr. ██████ appeared before the Board on ██████ 2021. Ex. 1 at 1. He did not receive the denial decision until September 23, 2021, after he filed a grievance and 16 days after the parole interview. Ex. 22. This violates the Board’s statutory obligation to provide a decision within two weeks of the parole interview. E.L. §259-i(2)(a), “[i]f parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole.”

CONCLUSION

For these reasons, Mr. [REDACTED] respectfully requests that this Court grant the petition and order the relief requested.

Dated: New York, New York
May 24, 2022



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STATEMENT PURSUANT TO 22 NYCRR 202.8-B

I, Martha Rayner, affirm under penalty of perjury pursuant to CPLR 2106, that the total number of words in the foregoing Memorandum of Law, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is under 7,000 words. The foregoing Memorandum of Law complies with the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

/s/ Martha Rayner
MARTHA RAYNER
Lincoln Square Legal Services, Inc.