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STATE OF NEW YORK
COUNTY OF DUTCHESS SUPREME COURT

In the Matter of [redacted],
Petitioner.

-against-

PETITION

CPLR ARTICLE 78

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

Index No:

Respondent.

The Petition of [redacted] respectfully shows and alleges:

PRELIMINARY STATEMENT

1. The Parole Board Decision denying parole to [redacted] was illegal because *it was based solely on the circumstances of the 1997 offense*. The prosecution offered [redacted] a sentence of 8-13 years were he to admit guilt, yet he has consistently maintained his innocence and has now served 22 years. Petitioner has an excellent institutional record; the successful completion of many programs; and an exemplary work history. Many people have written glowing letters in support of him, strongly recommending him for release.

STATEMENT OF FACTS

2. After a mistrial due to a hung jury in his first trial, [redacted] was convicted[1] in Queens County upon a jury verdict of Rape in the first degree, Sodomy in the first degree, and Sexual Abuse in the first degree, and received an aggregate sentence of 20-40 years. (Parole Hearing Transcript, attached as Exhibit "A," at 2) Around the same time, in a related case (which was, like the Queens case, based on a "tip" from his vindictive ex-wife during bitter

[1] At the second trial, [redacted] was acquitted of 14 counts and the judge dismissed six more due to lack of evidence. (Exhibit "F" at 23)

divorce proceedings) he was convicted in Nassau County[2] – *via an Alford plea where he did not admit guilt* – of Rape in the first degree, Sodomy in the first degree, and Attempted Sodomy in the first degree, and the sentence was to run concurrently with the Queens County sentence. (Exhibit "A" at 3) Prior to the Queens re-trial, *he had been offered a plea bargain of 8-13 years to cover both cases, but rejected this because he has always maintained his innocence.* (Exhibit "F" at 14-15) [redacted]' only criminal history was a misdemeanor public lewdness conviction in 1996. (Exhibit "A" at 13-14)

Consistent and Compelling Claim of Innocence

3. While of course the Parole Board cannot investigate claims of innocence, it is submitted that *neither should they deny release simply because, due to a claim of innocence, the individual has not admitted guilt/shown remorse*. And, without going into a lot of detail, this is *not* a "garden variety" innocence claim belied by the record. In addition to other evidence pointing to innocence, [redacted] *passed a polygraph exam in regard to this case.* (Exhibit "F"at 6-7) Moreover, three of his attorneys (the one who represented him at trial; the one who represented him on appeal and on his CPL 440.10 motion; and the attorney representing him on his current *corim nobis* petition) and one of the jurors from his first trial, wrote letters expressing their strong belief in his innocence. (Exhibit "F" at 8-21)

4. More recently, *another* attorney, former Assistant District Attorney Abe George, wrote that he was re-investigating Petitioner's case. (Exhibit "E" at 5) And the Innocence Project is conducting an expedited review of the case. (Exhibit E at 9-14)

[2] Upon information and belief the Nassau County sentence of 10-20 years expired on 9/2/17

5. Thomas F. Liotti, a very experienced criminal defense attorney who is also a Justice in the Village of Westbury, NY, and who represented [redacted] at trial, wrote a letter stating:

> "…I believe that [redacted] has been wrongfully convicted… [redacted] should be released from custody, *and I will do everything within my legal power to ensure that the proper result occurs*.
>
> ***
>
> …[redacted] was offered a plea bargain with a sentence of [at most] 13 years incarceration for *both* the Queens and Nassau County cases which he refused to accept. His Nassau case sentence is concurrent to the sentence in Queens. He has served almost 20 years in prison to date (since September, 1997), *well over the time he would have served had he pled guilty*.
>
> …I believe the charges against him have been, in large manner, the product of a bitter divorce proceeding …where [his former wife] became vindictive and convinced the authorities that [redacted] was a culprit concerning the instant charges. …I believe that as a result, the jurors found [redacted] not guilty of the majority of the charges… On those counts he was found guilty of, the DNA evidence is in dispute. The conviction was a direct result of, among other things, tainted evidence which was tested by the Nassau County police crime lab[3] and Labcorp, *both of which have now been discredited.* The flawed testing results were contradicted by, among other things, alibi and medical evidence. The newly discovered evidence of the crime lab's problems and Labcorp's history of producing shoddy results, among other things, are the subject of a motion to vacate the judgment currently pending…" (Exhibit "F" at 14-15, some emphasis supplied)

Institutional Record

6. [redacted] has a very limited disciplinary history, and has *never* had a Tier III violation. (Disciplinary History, attached as Exhibit "D," at 2)

Programs Completed

7. [redacted] has successfully completed many programs over the years, including Aggression Replacement Training (ART), the Large Print vocational education program, Transitional Services I and II, legal research, and several religious programs. (Exhibit

[3] The Nassau County crime lab, which tested evidence in both the Nassau and Queens cases, was shut down in 2011, after having been discredited.

"D" at 3-6) He also, with help from another inmate whom he taught English, learned to speak, read and write in Spanish. (Exhibit "F[4]" at 3)

8. He successfully completed the ART Program in December, 2008, while at Eastern Correctional Facility. (Exhibit "D," at 1, 5) Petitioner successfully completed the Transitional Services Phase I program in 2004, and Transitional Services Phase II in February, 2017. (Exhibit "D" at 1, 3, 6)

9. In May, 2006, [redacted] completed the "Free at Last!" program with Prison Fellowship Ministries. (Exhibit "F" at 57) He also completed a seminar in Spiritual Discipline in October, 2008. (Exhibit "F" at 56) Rev. Morris G. Webster, who runs the Spiritual Discipline program, recently wrote a letter in support of [redacted], stating:

> "*Although I have been requested to write many letters of recommendation, I have limited those to a very few*. I first met [redacted] over 10 years ago within the prison system at a regular Sunday service. I continued to see him on a regular basis at many of the facilities where he has been transferred – both at Sunday services, weekly Bible studies and at other Christian events…
>
> …I can report that his attitude has always been positive and his study of the Bible diligent and sincere. …I have observed a consistent, steady and positive growth. I believe he understands that his incarceration has served a much needed purpose in turning his life to Christ and to service of his fellow man. … He has grown from a fledgling of Bible knowledge to an understanding an application of that same Bible. I believe [he] has had a true encounter with God. Furthermore, he has demonstrated … his generosity in sharing what God has given to him with his fellow residents – encouraging their regular attendance in the Church, their participation in Bible studies and assisting them in their walk with God. *I would be surprised if anyone who has witnessed* [redacted]*' transformation would ever consider him a threat to anyone* in the community. *I feel very strongly about the character of this gentlema*n and would be willing to aid and stand by him should he need assistance. …" (Exhibit "F" at 38-39, emphasis supplied)

10. [redacted] successfully completed an Advanced Bible Study program run by Chaplain Rev. Robert R. Williams in May, 2006. (Exhibit "F" at 55) He then went on to *teach*

[4] Pages 51-53 of Exhibit "F" have been omitted as they contained duplicate documents.

that program, and received a Certificate for Excellence in Teaching in May, 2008 from another Chaplain, Dr. Welvin Smith of the Hope Fellowship Christian Church. (Exhibit "F" at 54) He continues to teach bible studies and lead prayer meetings. (Exhibit "C" at 14-15; Exhibit "F" at 26) Dr. Smith wrote a letter in support of [redacted], stating:

> "It gives me great honor to recommend [redacted]… [redacted] served in the Protestant Chapel prior to my employment as well as under my leadership as the new Protestant Chaplain.
>
> He has demonstrated innate leadership ability, academic acumen, and conducts his life with high personal value. He is principled about every task and generally completes it meticulously." (Exhibit "F" at 37)

11. Three Elders in the Soul Release Prison Ministries program also wrote a letter in support of [redacted], stating:

> "…We have known [redacted] for the past few years … as a faithful congregant of the Protestant Fellowship since 2013. He has been a Bible teacher and a prayer group leader at Woodbourne.
>
> Because of [redacted]' humble personality, and the demonstrable evidence of the call of God upon his life, it is our request … that [he] be granted parole. We wish to assure you … that Soul Release Ministries will continue to be a support to him in his efforts to reintegrate into his community. …" (Exhibit "F" at 42)

12. More recently, Pastor Rex Duval, who ministers to both inmates and correctional officers at Woodbourne Correctional Facility, wrote a letter in support of [redacted], and also gave him the "Man of Faith" certificate for successful completion of a Program called "Studied, Strong and Courageous." (Exhibit "E" at 15-17). In addition, Petitioner was awarded a new Certificate of Completion for the Thursday Bible Study Class. (Exhibit "E" at 18)

13. In his 2018 letter, Pastor Duval stated that he had been working with [redacted] for three years, and that he recognized that [redacted] had tremendous potential to contribute positively to society, stating:

"…I have had the privilege of counseling and mentoring [redacted]… for the past three years. …[W]e have established a relationship based on trust and authenticity while meeting several times each month.

***

We recognize [redacted] as having tremendous potential to contribute constructively to society…

***

…[redacted] has chosen not to get bitter as many do… but rather he has chosen to get better. …[H]e has worked diligently over these past 20 years to become a more productive man. …[redacted] has strived to be productive by filling his mind with historical and biblical truths, instead of the easily accessed pornography and violent video games and movies, and in so doing, he reflects tangible signs of having become a productive leader and counselor… This is a fact! …

…[O]ur organization is available to continues as an emotional and spiritual support for [redacted], and we will continue to help assure his triumphant re-entry as we currently are doing for several men who have already been released from prison over a period of many years. …" (Exhibit "E" at 15-16)

Work History

14. [redacted] has an exemplary work history in prison. He worked as a chaplain's clerk for many years, and has recently been working as a group leader in the Shop Hall Squad. (Exhibit "D" at 3-7; Exhibit "E" at 19) Over the years he received many Inmate Progress Reports where he was given "excellent" ratings in every category. (Exhibit "E" at 19 and "F" at 61-72) There were also several very positive comments. For example, the Chaplain at Eastern CF wrote:

"Accomplishment is a given regarding [redacted] work in this Ministry. In our daily schedule [redacted] is conscientious … faithful and dutiful. …[redacted]s is assigned as coordinator for second Sunday services to include getting persons to participate in worship. He also serves as Director of our 'Good Samaritan' ministry…" (Exhibit "F" at 65)

COMPAS Risk Assessment Instrument

15. A COMPAS Risk Assessment Instrument (RAI) was prepared in order to help determine if [redacted] would be able to live in a law-abiding fashion upon his release. (2018 Risk Assessment Instrument attached as Exhibit "C")

16. The 2018 RAI found a low risk *in every single category*. (Exhibit "C" at 1) The RAI went on to document that [redacted] has a high school diploma or GED, a skill or trade, family support, and specific employment plans. (Exhibit "C" at 5-6) (Actually he has a college degree in business and economics and owned a commercial real estate company.) (Exhibit "F" at 1, 15) The RAI also states that he has no history of substance abuse. (Exhibit "C" at 3) The "Supervision Recommendation" is for "Supervision Status 4" which is the lowest risk level. (Exhibit "C" at 2)

Letters of Support

17. In addition to the letters cited above, many other people wrote letters in support of [redacted], including family members, friends, clergy and several attorneys (including undersigned counsel). (Exhibit "E" at 1-5; Exhibit "F" at 9-53)

18. Attorney Donna Aldea, whose firm currently represents Petitioner on a *coram nobis* petition, wrote of her strong support for him, stating:

> "…The crimes for which [redacted] was convicted… are no doubt serious, however, [redacted] has always maintained his innocence…. …[H]e voluntarily submitted to a polygraph examination prior to his conviction, which indicated that his denials of guilt were not borne out of deception…
>
> Prior to trial, the District Attorneys … offered [redacted] …*eight to thirteen years… in exchange for his guilty plea, yet he refused to admit his guilt* in either county… At his first trial in Queens, the jury was unable to reach a unanimous verdict …[and] upon [redacted] retrial, jurors … acquitted [redacted] of fourteen counts… which pertained to .... sexual assaults alleged to have been perpetrated on three additional woman in the summer of 1996.
>
> Prior to his incarceration, [redacted] was a successful businessman, who owned his own commercial real estate company. … …[redacted] is hardworking and tenacious… A model prisoner, [redacted] also continues to enjoy strong relationships with family and friends, whose support will further aid a healthy transition back into society…
>
> [redacted] has served almost eight years more than he would have served had he been willing to admit his guilt, and I respectfully urge the Board not to continue to deny him release on account of his refusal to accept responsibility for the crimes he has consistently denied he committed. …" (Exhibit "E" at 3-4)

19. [redacted] has not been able to see his parents for over two years due to their health conditions. His father [redacted] (who recently had a severe stroke and is now paralyzed) and mother, [redacted], wrote a letter describing his accomplishments in prison, as well as his strong claims of innocence, and how badly they want him home, stating:

> "…These past twenty years have been very hard for all of us, and we are humbly asking you to take into consideration all that [redacted] has done during his incarceration, such as … his exemplary institutional record, his study of the Law and the Bible. … [Y]ou will see that [redacted] has been a model prisoner. …
> …We, along with [redacted] fiancée and extended family, are …able to provide [redacted] with any and all financial assistance he may need… [redacted] has always been very hardworking, resourceful, and financially independent and we are confident that he will not need our assistance for too long. We love him greatly and will do everything in our power to see him successful again…." Exhibit "F" at 24-25)

20. [redacted], [redacted] fiancée, also wrote a letter, stating:

> "…After visiting [redacted] all these years in prison and speaking with him daily on the phone, I feel I am fully qualified to speak about [redacted] and his character… One of the first things that attracted me to [redacted] was the sincere and genuine practice of his Christian faith…
> …[I]n prison [redacted] became a Christian, and has immersed himself in the study of the Bible and the teaching of the Bible to others. [redacted] has also spent these twenty long years working for various chaplains as a clerk, and has held positions of leadership at the various prisons. He was, in the absence of a chaplain, *selected by the prison authorities to be an inmate facilitator for the Protestant Church* at Eastern Correctional Facility… [A]t Woodbourne Correctional Facility, [[redacted]] presently teaches Bible Studies and leads weekly prayer meetings, among other things.
> …I have known [redacted] to be a caring, loving, compassionate, grateful, hardworking, intelligent and optimistic human being. …[redacted] always lets me know how much he loves me, through his words and actions…. He never fails to let me know how much he appreciates all that I do for him….
> ***
> [redacted] is extremely independent, however I am fully able and prepared to give [redacted] all the financial, emotional and moral support he needs. And, if granted parole, and the law permits, [redacted] will reside with me. I am a college graduate with a degree in accounting, and … have been working for commercial real estate developers and financial institutions for the past 35 years. …
> While we recognize the Board's reluctance in releasing [redacted], *in significant part because* [redacted]*'s innocence precludes him from admitting guilt or remorse*, we most respectfully submit that true justice and a full and fair review of the underlying facts of

[redacted]'s case should compel … release … on parole…." Exhibit "F" at 26-27, emphasis supplied.

21. [redacted], [redacted]'s sister, wrote:

"…I am a practicing physician in New York State for the past 19 years. …
My parents are elderly and have been severely depressed since [redacted]'s imprisonment. … It is my parents' greatest desire to see my brother [redacted] as a productive member of society during their lifetime.
During my visits with my brother, I have seen his spiritual transformation. … I believe that once you find God especially during a time of need, then you will never let go of him.
***
I am willing to provide any social and financial support [redacted] needs… While nobody can turn back the clock and reclaim lost years, I know that [redacted] is a bright and kind person, and with family support, he can be a productive member of society for the remainder of his life. …" (Exhibit "F" at 28)

22. [redacted]'s cousin, [redacted], also wrote, stating:

"…I am [redacted]'s cousin and have known [redacted] since childhood. ….
…I have visited him numerous times at Eastern Correction Facility and at Woodbourne… I have always found [redacted] steadfast in his belief that he was wrongfully convicted. …
…I truly believe [redacted] has strong faith in Jesus Christ and plans to live his life as a true Christian. As I understand it, [redacted] is actively living a Christian life in prison by attending church, teaching weekly Bible studies and leading prayer meetings, among other things.
…It is my understanding that [redacted], after his hung jury, was offered a plea bargain with a sentence of 13 years for both Queens and Nassau Counties which he refused to accept. He has spent almost 20 years in prison…" (Exhibit "F" at 29)

23. [redacted] and [redacted], [redacted]'s uncle and aunt, wrote a letter in support of him as well, offering him employment and stating:

"…I own a medical diagnostic business…
My wife and I have known our nephew [redacted] his whole life. We are asking you to release [redacted] back into the community under your exact[ing] guidelines.
…We know he helps many people and most of that work has been through his church… I would like to offer not only emotional support for [redacted] when he is released but also employment.
…He could work with me at my establishment. …
…[redacted] has been doing well and we want to help him continue to do so. …His support with employment is secure. We will also support him with anything else he may need. …" (Exhibit "F" at 31)

24. Another uncle, [redacted], wrote a letter too, stating:

"…[redacted] is a very dear and beloved person to my wife and I. … We have always supported [redacted] and have always remained close to him.

If you grant [redacted] his freedom, I assure you that my wife and I would help him in every aspect of life. …" (Exhibit "F" at 32)

25. [redacted], Esq., Litigation Chair at the prominent Buffalo law firm of [redacted], also wrote a letter in support of Petitioner, expressing confidence in his innocence, and stating:

"…[redacted] has been a successful businessman whom I have known since 1982 when we attended college together…

As the Board is aware, [redacted]' first trial resulted in a hung jury… At the retrial, [redacted] was found not guilty on fourteen counts and six additional counts were dismissed by the Court. [redacted] refused a plea bargain which would have resulted in a thirteen year sentence. He has already served twenty years and continues to maintain his innocence.

In my many years of practice, *I have refrained from sending letters like this one … because of my fear that a parolee will commit a crime once released… I have no such reservation about* [redacted] *and submit this letter willingly and enthusiastically.* I do believe [redacted] is innocent… I was aware of his marital situation and the cleverness of his calculating wife well prior to the arrest and accusations. …I believe the conviction was a result of his wife's efforts, and evidence that was tainted, and *contradicted by medical records and by* [redacted]*' alibi*. …To deny [redacted] parole after serving twenty years would be to continue to waste resources on his incarceration, and to deprive this man of the opportunity to lead a productive life on the outside. …" (Exhibit "F" at 22-23, emphasis supplied)

26. [redacted], [redacted]'s friend, wrote a letter, stating:

"…I was friends with [redacted] for over ten years. … I know him to be of good character and moral fiber. ..I did visit him when he was at Eastern Correctional Facility but his current facility has restricted visitation days… making this difficult.

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…I am sure that the Board is aware that in the course of an acrimonious divorce, [redacted]'s ex-wife implicated him in the crimes charged… [redacted] has never admitted guilt and his first trial in Queens County resulted in a hung jury. …" (Exhibit "F" at 33)

27. Another friend, [redacted], wrote as well, stating:

"…[redacted] has … full support from myself, his friends and his loved ones.

***

I believe that [redacted] has been wrongfully convicted… and I have been praying for him daily. …

In my dealing with [redacted] I have not seen any signs of aggression or violence. [redacted]'s fiancée [redacted] and I know [redacted] to be a calm person. …Even under his present condition, [redacted] has been very productive. …

I believe that, in addition to [redacted]'s innocence, [redacted]'s efforts to help himself as well as his exemplary behavior in prison should be taken into consideration…" (Exhibit "F" at 34)

Employment Letter

28. In addition to the employment offer from [redacted], discussed above, [redacted], the owner of [redacted], wrote a letter with a firm offer of employment for [redacted], stating:

"I am owner of [redacted], an Independent Advisors Representative Agency (IAR). I have known [redacted] for over 30 years…

…When I first visited [redacted] in prison, I was extremely pleased to learn that [redacted] had become a born-again Christian…

…[redacted] and I spent a great deal of time sharing and studying the scriptures during our visits. I was privileged to hear about [redacted]'s spiritual experiences. Throughout his 20 years of incarceration, I have seen [redacted]'s faith and walk as a Christian mature. In prison, God has used [redacted] as a leader in various capacities – Chaplain's clerk, prayer group leader, facilitator and bible study teacher.

…I write to assure you *that I am ready, willing and able to offer* [redacted] *employment with my firm*, initially as an administrative assistance. With his work ethic and business acumen, [redacted] will truly be an asset to my firm. …

I understand the Board cannot consider the legal aspects of [redacted]'s case, however, I implore the Board to consider that [redacted]'s first trial in Queens resulted in a hung jury and the second trial resulted in a partial acquittal. In Nassau County, [redacted] was offered a special plea, where he did not have to admit guilt. Significantly, [redacted] rejected a plea of 8-13 years for both cases. I believe that … [redacted] is innocent of the crimes alleged. …

I do not know if [redacted] *'s legal challenges will bear fruit, but nevertheless, even as an innocent man,* [redacted] *is indeed a changed person due to his faith in Christ*. …I trust and pray that you will give [redacted] the opportunity to utilize his faith and talents on the outside. I look forward to a favorable outcome, and can assure you that I will do everything in my power to be a mentor to [redacted]…" (Exhibit "F" at 35-36)

Hearing Transcript

29. At the hearing (much of which was spent discussing the instant offenses and Petitioner's consistent claims of innocence) Commissioner Coppola noted Petitioner's disciplinary history was "very limited" and said this was a "good sign." (Exhibit "A" at 21-22) The Commissioners also noted that he had completed vocational programs, the ART program, as well as Transitional Services One and Two. (Exhibit "A" at 22)

30. As to the sex offender program, the Commissioners noted that Petitioner had refused it in the past, but was had been on the waiting list for this program since 2013. (Exhibit "A" at 15) Petitioner explained that while he had been on the waiting list for some time, he believes he will actually be rejected upon entry into the program because he continues to maintain his innocence. (Exhibit "A" at 16) Commissioner Coppola said that he thought the program had been modified to allow for participation by those who maintain their innocence. (Exhibit "A" at 16)

31. Commissioner Coppola stated that although Petitioner's COMPAS scores were all low, would disagree with the assessment of low risk for history of violence, but added, "But that's the history of violence, a little bit *different than risk of future violence, right? That's different.*" (Exhibit "A" at 21)

Decision

32. In its Decision the Commissioners denied release[5], stating, in relevant portion:

> "…[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 would be incompatible with the welfare and safety of society and would so deprecate the serious nature of the crime as to undermine respect for the law.

[5] In his first denial, Petitioner was given *18 months* until his next board, but this time, inexplicably, he was instead given 24 months until his third board.

> Required statutory factors have been considered, together with your institutional adjustment including discipline and program participation, your risk and needs assessment, and your needs for successful re-entry into the community. *More compelling, however, are the following: Your serious instant offenses* of rape first two counts, sodomy first, rape first, sexual abuse first three counts, rape first, sodomy first two counts, and attempted sodomy first degrees which involved you sexually assaulting multiple female victims in 1997. Your criminal history is limited to a disorderly conduct in 1981 and public lewdness in 1996… *Your positive programming and limited disciplinary record* to date are both noted. Also noted is your claim of innocence and numerous appeals… The panel has weighed and considered the results of your *risk and needs assessment and the low scores indicated* therein. *Nevertheless, none of which outweighs the gravity of your actions* or the serious and lifelong pain and suffering you caused your many female victims. They were abducted off the street, forced into your vehicle, threatened with a weapon and/or physical harm and then sexually assaulted. In doing so you demonstrated callousness beyond comprehension. Therefore, based on all required factors in the filed considered discretionary release at this time is not appropriate." (Exhibit "A" at 29-30, emphasis supplied)

33. It can be seen that the denial was based solely on the circumstances of the offenses, offenses for which the prosecution saw fit to offer a plea deal with a sentence of 8-13 years. If [redacted] had accepted that offer, *he would have been released nine years ago*. Instead, he has consistently maintained his innocence on all charges (he took an *Alford* plea in one case after being convicted of some of the charges following a re-trial in the other case.)

Administrative Appeal

34. On March 22, 2019 the Board's determination was affirmed in the Administrative Appeal Decision Notice. (Exhibit "B") The Decision stated erroneously, *inter alia,* that the Board was entitled to deny release based on the seriousness of the offense." (Exhibit "F" at 1-2)

ARGUMENT

POINT I

THE PAROLE BOARD BASED ITS DECISION SOLELY ON THE CIRCUMSTANCES OF THE OFFENSE - THAT IS CLEARLY IMPROPER AND MUST RESULT IN A DE NOVO HEARING

35. In both *Rivera v, Stanford*, 2019 NY App. Div. LEXIS 3595 (2nd Dep't 2019) and *Ferrante v. Stanford*[6], 2019 NY App. [7]Div. LEXIS 3407 (Second Dep't 2019), the Second Department stated very recently that it is improper to deny release based only on the seriousness of the offense. In *Ferrante*, supra, the Second Department upheld a finding of contempt against the Parole Board for having done just that, stating:

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

36. It can be seen from the instant decision that the Board did precisely what the Second Department said they may not do – denied released based solely on the seriousness of the offense. After noting Petitioner's institutional record (which was positive), the Decision said, "[*m]ore compelling, however, are the following*: Your serious instant offenses [listing the convictions.]" (Exhibit "A" at 29, emphasis supplied)

37. The Decision went on to state:

> "…Y*our positive programming and limited disciplinary record* to date are both noted. Also noted is your claim of innocence and numerous appeals… The panel has weighed and considered the results of your *risk and needs assessment and the low scores indicated* therein. *Nevertheless, none of which outweighs the gravity of your actions* or the serious and lifelong pain and suffering you caused your many female victims…" (Exhibit "A" at 29-30, emphasis supplied)

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[6] Danielle Ferrante is John MacKenzie's daughter and the representative of his estate – John tragically committed suicide in prison in 201 after his tenth denial of parole.
[7] Richard Rivera was granted an open date for release in June, 2019.

38. Prior to the recent *Ferrante* decision, in *Ramirez v. Evans*[8], 118 AD3d 707 (2nd Dep't 2014), *Perfetto v. Evans*, 112 AD3d 640 (2nd Dep't 2013) and *Matter of Huntley v. Evans*, 77 AD3d 945 (2nd Dep't 2010), the Second Department reversed the denials of new parole hearings where the parole board improperly based the decisions solely on the seriousness of the offense. As noted in *Ferrante*, supra, the First Department did the same thing in *Matter of Rossakis*[9] *v. NYS Bd. of Parole*, 146 AD3d 22 (1st Dep't 2016.)

39. There have also been several other court decisions in the past few years granting or upholding new parole hearings for this same reason. *Matter of Ciaprazi v. Evans*, Index No. 0910/2016 (Dutchess Co. 2016); *Matter of Platten v. NYS Bd. Of Parole*, 2015 NY Misc. LEXIS 932 (Sullivan Co. 2015); *Matter of Gonzalez v. NYS Dep't of Corrections & Community Supervision*, 401130/14 (New York Co. 2015); *Matter of Rabenbauer*[10] *v. NYS DOCCS*, 2014 NY Misc. LEXIS 4824 (Sullivan Co. 2014); *Matter of McBride*[11] *v. Evans*, 42 Misc.3d 1230(A) (Dutchess Co. 2014); *Matter of West*[12] *v. NYS Bd. Of Parole*, 41 Misc.3d 1214(A) (Albany Co. 2013).

40. In the instant case, the Board ignored the COMPAS scores (which were low in all categories) and the very positive institutional record and denied parole based only on the circumstances of the offense. This is even more egregious given that the prosecution had offered a sentence which would have resulted in Petitioner having been released nine years ago, had he not consistently asserted his innocence.

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[8] Santiago Ramirez was, after his latest de novo hearing in March, 2017, granted parole with an open date.
[9] Niki Rossakis was released in March, 2017 and has not been reincarcerated.
[10] Philip Rabenbauer was released January 20, 2015 and has not been re-imprisoned.
[11] Moses McBride was released March 10, 2014 and has not been re-imprisoned.
[12] Michael G. West was released October 7, 2014 and has not been re-imprisoned.

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

> "…[P]etitioner participated in numerous programs, including working as a teacher's aide and helping inmates obtain their GEDs, training service dogs, and serving as a chaplain's clerk. …[P]etitioner compiled an extraordinary disciplinary record… …[P]etitioner's risk assessment placed her in the lowest category of likelihood of reoffense.
>
> ***
>
> *…The commissioners emphasized that petitioner had failed to accept responsibility for the crimes she had been found guilty of committing…*' …
>
> ***
>
> Supreme Court granted petitioner's article 78 petition, stating, *inter alia*, that *'[s]ubjective views of [petitioner's] alleged lack of remorse… cannot be allowed to override objective evidence of the last 25 years'… The court reflected, 'Does saying you are sorry,' as a means to seek freedom from incarceration, mean that you are less likely to re-offend than if you do not*?' We now modify to remand for a new hearing, rather than outright release, and otherwise affirm.…" *Kellogg*, supra, at 2, 4, emphasis supplied.

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

> "…Petitioner still maintained that she did not commit the murder…
>
> ***
>
> …Where the petitioner makes 'a convincing showing' that the board reached its determination 'based *almost* exclusively on the nature and seriousness of the offense,' the decision may be overturned. (*Matter of Wallman v. Travis*, 18 AD3d 304, 307 [1st Dep't 2005] [emphasis supplied.])
>
> …[R]espondent relied almost exclusively on the seriousness of the crime, with a brief mention of the statements Petitioner had made 25 years earlier at her sentencing hearing.…" *Sullivan*, supra, at 5, 8-9, emphasis in original.

43. As in *Kellogg* and *Sullivan*, Petitioner has an exemplary institutional record, and his failure to accept responsibility for the offenses due to his assertion of innocence should not prevent his release. It is also noted that unlike *Sullivan*, where additional reasons were given for the denial, in this case, the *only* reason given for the denial was the seriousness of the offenses.

44. Even prior to the passage of 2011 amendments which attempted to force the Board to use current assessments of risk, and not rely only on the past, there have been several cases where Board Decisions have been overturned because the Board erroneously based denial of parole solely on the severity of the offense, and was therefore arbitrary and capricious and/or completely irrational. *Friedgood v. NYS Board of Parole*[13], 22 AD3d 950 (3rd Dep't 2005); *Vaello v. Board of Parole*[14], 48 AD3d 1018 (3rd Dep't 2008); *Gelsomino v. Board of Parole*[15], 82 AD3d 1097 (2nd Dep't 2011); *Malone v. Evans*[16], 83 AD3d 719 (2nd Dep't 2011); *Johnson v. Division of Parole*[17], 65 AD3d 838 (4th Dep't 2009); *Prout v. Dennison*[18], 26 AD3d 540 (3rd Dep't 2006); *Mitchell v. Division of Parole*[19], 58 AD3d 742 (2nd Dep't 2009); *Winchell v. Evans*[20], 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Wallman v. Travis*[21], 18 AD3d 304 (1st Dep't 2005); *Oberoi v. Dennison*[22], 19 Misc.3d 1106(A) (Franklin Co. 2008); *Rios v. NYS Division of Parole*[23], 15 Misc.3d 1107(A) (Kings Co. 2007); *Weinstein v. Dennison*[24], 2005 NY Misc. LEXIS 708 (NY Co. 2005); *Cappiello v. NYS Board of Parole*[25], 2004 NY Misc. LEXIS 2920 (NY Co. 2004); *Almonor v. Board of Parole*[26], 16 Misc.3d 1126(A) (NY Co. 2007); *Coaxum v. Board of Parole*[27], 14 Misc.3d 661 (Bronx Co. 2006); *Schwartz v. Dennison*[28], 14 Misc.3d

[13] Charles Friedgood was released in 2007 and has not been re-imprisoned.
[14] Jose Vaello was released in March, 2012 and has not been re-imprisoned.
[15] Louis Gelsomino was released in 2011 and has not been re-imprisoned.
[16] Mark Malone was released in 2011 and has not been re-imprisoned.
[17] Daniel Johnson was released in 2009 and has not been re-imprisoned.
[18] William Prout was released in 2009 and has not been re-imprisoned.
[19] Roger Mitchell was released in 2009 and has not been re-imprisoned.
[20] Craig Winchell was released in 2011 and has not been re-imprisoned.
[21] Jay Wallman was released in 2005 and has not been re-imprisoned.
[22] Gurpreet Oberoi was released in 2009 and has not been re-imprisoned.
[23] Ivan Rios was released in 2007 and has not been re-imprisoned.
[24] Herbert Weinstein was released in 2006 and has not been re-imprisoned.
[25] John Cappiello was released in 2005 and has not been re-imprisoned.
[26] Chester Almonor was released in 2007 and has not been re-imprisoned.
[27] Jean Coaxum was released in 2006 and has not been re-imprisoned.
[28] Jerrold Schwartz was released in 2008 and has not been re-imprisoned.

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

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

POINT II

THERE WERE NO DETAILED REASONS GIVEN FOR THE DENIAL

46. It is clear that the reasons given for parole decisions must be detailed, and not simply perfunctory. *Rivera v. Stanford*, supra; *Sullivan v. NYS Bd. of Parole*, supra; *Winchell v. Evans*, 32 Misc.3d 1217(A) (Sullivan Co. 2011); *Matter of Rossakis v. NYS Bd. of Parole*, 146 AD3d 22 (1st Dep't 2016); *Ramirez v. Evans*, 118 AD3d 707 (2nd Dep't 2014), *Perfetto v. Evans*, 112 AD3d 640 (2nd Dep't 2013); *Ruiz v. NYS Division of Parole*, Index No. 2310/2017 (Dutchess Co. 2018); *Maddaloni v. NYS Bd. of Parole*[29], Index No. 0623/2018 (Dutchess Co. 2018); *Morales v. NYS Board of Parole*, Index No. 934/2017 (Dutchess Co. 2017); *Matter of Bruetsch v. NYS DOCCS*, 43 Misc.3d 1223(A) (Sullivan Co. 2014); *Matter of McBride v. Evans*, 42 Misc.3d 1230(A) (Dutchess Co. 2014); *Matter of West v. NYS Bd. Of Parole*, 41 Misc.3d 1214(A) (Albany Co. 2013); *Matter of Kozlowski*[30] *v. NYS State Bd. Of Parole*, 2013 NY Misc. LEXIS 552 (NY Co. 2013).

47. In the instant case the Decision only perfunctorily noted "positive programming and limited disciplinary record" as well as the low COMPAS scores, and then went on to

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

inexplicably deny release based on the seriousness of the offenses. There was no adequate explanation of the denial.

48 In *Matter of Rossakis*, 146 AD3d 22 (1st Dep't 2016) the First Dep't upheld the grant of a new hearing for this reason, stating:

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

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

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

> "In 1988 petitioner was convicted of murder in the second degree…
> Subsequently, petitioner was sentenced in 1991 …for a conviction of assault in the second degree during which petitioner fatally stabbed another inmate… and in 1992 … for a conviction of attempted promotion of prison contraband.. for possessing a four inch shank. …
> ***
> The Board must set forth an explanation for its determination in detail and not just conclusory terms…
> ***
> The 2011 amendments to the Executive Law represent a shift in focus from offense driven to a more forward thinking consideration of whether an inmate has been rehabilitated and is ready for release…
> …[P]etitioner repeatedly accepted responsibility for his actions and demonstrated remorse…
> ***

After a review of the entire record, the Court cannot determine from the cursory nature of the Board's decision how it utilized its risk assessment procedures or applied the statutory factors in concluding that petitioner's release was incompatible with the safety of society **at this time**. …

***

To the extent that the Board relies on the crimes for which petitioner was convicted as an adult, petitioner has also served more than the aggregate maximum sentences imposed for his convictions. *While the Board recited other factors*, *it failed to give any real explanation for its decision other than in conclusory terms,* in violation of Executive Law 259-i(2)(a)…

…Here, the petitioner is left with no guidance as to what issues he must address between now and his next parole hearing in order to alleviate any concerns by the Board as to his release. Rather, *the language in the written determination is perfunctory at best as to the consideration given to the relevant statutory factors by the Parole Board. Therefore, the Court finds that the Parole Board has violated its statutory commitment by failing to provide a detailed decision as to the basis for the denial of parole release…*" *Ruiz*, supra, at 1, 5-8, 10-11, some emphasis supplied.

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

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

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

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

53. Everything stated above by the courts in *Ruiz*, *Ruzas* and *Sullivan* applies equally

in the instant case, and this Court should likewise order a *de novo* hearing due to the lack of detailed reasons for the denial.

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

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

> "...[W]here the Parole Board 'focuses, as here, almost entirely on the nature of the petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion and does not comport with the statutory scheme.' *Stanley v. New York State Bd. of Parole*, 2011 NY Slip Op. 21136 (Sup. Ct., Orange Cty., 2011) ...
> ***
> *... [T]he Board did not produce any evidence that the petitioner would not be a law abiding citizen.*
> ***
> **ORDERED,** that the *de novo* hearing shall consist of Parole Board members who have not previously sat on any prior parole hearing involving the above captioned inmate..." *Winchell v. Evans*, supra, at 5-6, emphasis supplied.

55. As in *Winchell,* the Board did not produce any evidence that [redacted] would not be a law-abiding citizen upon release. It is quite instructive to note that despite the Board having denied release to the *30 individuals* whose cases are cited in the footnotes herein, and who were subsequently released to parole supervision, *not a single one of them has been re-imprisoned.* This is rather incredible, given the recidivism rates generally for people released to parole supervision.

Petitioner's Age Also Indicates a Low Risk of Recidivism

64. The fact that [redacted] is now 55 years old also supports release. In *US v. Presley*, No. 14-2704 (7th Cir. June 11, 2015), Judge Richard Posner emphasized the research showing that people over the age of 50 pose a very low risk of re-offense, stating:

"Violent crime... is generally a young man's game. Elderly people tend to be cautious, often indeed timid, and averse to physical danger. Violent crime is far less common among persons over 40, let alone over 60, than among younger persons...." *Presley*, at 3.

65. In addition, a 2015 Report from Columbia University's Center for Justice, "*Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety,"* stated:

"People in prison aged 50 and older are far less likely to return to prison for new crimes than their younger counterparts. For example, only 6.4% of people incarcerated in New York State released age 50 and older returned to prison for new convictions; this number was 4% for people released at the age of 65 and older. Nationally, arrest rates are just over 2% for people aged 50+ and are almost 0% for people aged 65+." Report, Executive Summary - http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf

Release Would not Deprecate the Serious Nature of the Offense

66. The Board also claimed, mouthing the statutory language, that Petitioner's release would somehow deprecate the serious nature of the offense and undermine respect for the law. There is no support in the record for this conclusory claim.

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

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

68. As in *Sullivan*, the Board simply recited the statutory language without providing any factual support for its claim. Moreover, unlike *Sullivan,* this is not a murder case – it is a case where, despite the serious nature of the crimes, the prosecution had offered an 8-13 year sentence if Petitioner would cease asserting his innocence.

POINT III

THERE WAS NO JUSTIFICATION FOR DEPARTING FROM THE LOW COMPAS SCORES

New Regulations

69. Since September, 2017, there has been a Rule mandating that the Board *must provide individualized reasons for any departure from the COMPAS scores*. The Rule states:

> "8002.2
> ***
> (a) Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs principles, including the 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. …*"

70. In this case, the Board departed from the COMPAS Risk and Needs Assessment's low risk scores, and failed to adequately explain this in the Decision. The Decision said that the panel departed from the COMPAS in the area of *history* of violence, but as Commissioner Coppola pointed out during the interview, "But that's the history of violence, a little bit different than risk of future violence, right? That's different." Thus this is basically just further reliance on the offenses itself to justify denial. It certainly doesn't take into effect [redacted] excellent record during the past 22 years, and the failure to do that is precisely why the Legislature mandated forward looking assessments in 2011, and why the new Rule was established.

71. In *Sullivan*, supra; *Robinson v. Stanford*, Index No. 2392/18 (Dutchess Co. 2019); and *Comfort v. NYS Bd. of Parole*, Index No. 1445/2018, the courts granted *de novo* hearings because the Board did not explain its departure from the low COMPAS scores. The Board likewise failed to adequately explain its departure from the low COMPAS scores in the instant

case, and a new hearing should be ordered for this reason as well as the other reasons argued herein.

POINT IV

THE BOARD VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

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

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

CONCLUSION

73. Based on the foregoing, Petitioner [redacted] respectfully requests that this Court vacate the Decision of the Parole Board, grant an immediate *de novo* hearing before commissioners who did not sit on the October, 2018 Board, and direct that the Board *not* deny release based solely on the nature of the offense(s).

Dated: July 10, 2019.

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