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STATE OF NEW YORK
COUNTY OF DUTCHESS

FUSL000152

SUPREME COURT

In the Matter of [REDACTED] Petitioner.

-against-

PETITION

CPLR ARTICLE 78

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

Respondent.

The Petition of [REDACTED] respectfully shows and alleges:

PRELIMINARY STATEMENT

1. [REDACTED] 75, committed the heinous rape and murder of a nine year old girl back in 1971; he was sentenced to 20 years to life, and has now served *50 years, more than double his minimum term, and has been denied parole 19 times*, despite having an incredibly positive institutional record, low COMPAS scores, and very fulsome remorse. The denial was improper because the real reason was the nature of the offense, and the other reasons given (regarding an alleged lack of insight into what led to the offense) were not supported by the record. The departure from the low COMPAS score for felony violence was not adequately explained, as the reason given (the claimed lack of insight) was not supported by the record. The record shows that Mr. [REDACTED] in fact has a great deal of insight and that he has transformed himself into a completely different person over the past half century. It is well past time for his release.

STATEMENT OF FACTS

2. [REDACTED] was convicted in Bronx County in 1975 of Murder, Kidnapping in the first degree and Rape in the first degree, and received an aggregate sentence of 20 years to

life. (Parole Board Report, P. 1, attached as Exhibit "A" at 51) This is his *nineteenth* parole denial. (Exhibit "A" at 4)

3. Mr. [REDACTED] has long accepted responsibility and expressed very strong remorse and shame for the horrendous crime he committed, the rape and murder of a nine-year old girl he knew. After all these years, he is still completely horrified that he could have done such a thing. His voice shakes and he often cries when discussing what he did. (Exhibit "A" at 2) A friend of his found him crying once when he happened to see a news story about a similar crime. (Exhibit "D" at 13) It is clearly still very painful for him to talk about because his remorse is so intense.

Institutional Record

4. [REDACTED] has an exemplary institutional record after having served more than *50 years* in prison. He has an excellent disciplinary history, with absolutely *no Tier IIIs*, and only 4 Tier II tickets *in 50 years*, the most recent occurring in 2015 (a minor ticket for being out of place.) (Exhibit "C" at 46) Mr. [REDACTED] has successfully completed all of his required programs, including the *intensive Sex Offender Treatment Program*, long ago, completed his GED, and has received *many* outstanding Inmate Progress Reports over the years. (Exhibit "A" at 32-33; Exhibit "C" at 12-36, 44-45) He has been *sober for 47 years*, even though it is not difficult to abuse various substances in prison.

Programs Completed

5. [REDACTED] has successfully completed all his required programs, and others on a voluntary basis. These include the intensive 18-month long Sex Offender Treatment Program at Gowanda Correctional Facility; Aggression Replacement Training (ART), the ASAT substance abuse program; Transitional Services Phase I & III, and Alcoholics Anonymous. (Exhibit "A" at 33, 40; Exhibit "C" at 3, 8, 44-49)

6. In addition, he obtained his GED, and completed programs in Drug Counseling, Horticulture, Mathematics for the Building Trades, Carpentry, Computer Assisted Instruction, and a Pre-release Program. (Exhibit "C" at 50-57)

Vocational Success and Positive Inmate Progress Reports

7. ██████████ completed training and then became an Inmate Program Assistant/teaching assistant in two different areas: Carpentry and Horticulture. (Exhibit "A" at 32-33; Exhibit "C" at 51-52, 54) Mr. ██████████ has received an impressive number of excellent Inmate Progress Reports (IPRs) for this work, as well as for work as a porter. (Exhibit "C" at 13-36.)

8. He received IPRs with entirely "Excellent" ratings many times over the years. (Exhibit "C" at 13, 14, 15, 18, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36.) There were many very positive comments on the Reports as well, and this occurred on a consistent basis.

9. In 2021, the comments said ██████████ was "very dependable"; and that he "handles his work assignments with very little supervision." (Exhibit "C" at 13, 15) In 2020 it was said that he does a good job and is dependable. (Exhibit "C" at 21.) In 2019 it was pointed out that he "routinely does his assigned task without reminders." (Exhibit "C" at 27) In 2017 he was said to be a "very good worker." (Exhibit "C" at 29)

10. In 2011, Mr. ██████████ took an assignment as laundry porter, and was said to have "quickly acquired the skills and knowledge necessary" and "always maintains a respectful attitude..." (Exhibit "C" at 19.) In 2010, the comments included "does an excellent job... works with little supervision"; "keeps his area extremely clean... *constantly doing more than assigned without having to be directed.*" (Exhibit "C" at 17-18)

11. In 2007 Mr. [REDACTED] was working as a Teacher's Assistant in Horticulture, and the IPR (some of which is difficult to read) stated, "Excellent Teaching Assistant... *He is the best Greenhouse [unclear] that I ever had.*" (Exhibit "C" at 24)

12. In 2006, when [REDACTED] was working as a porter, the IPA comments said:

"Inmate [REDACTED] goes above and beyond what his job is and is always willing to help wherever needed. ...Has worked most all of the porter jobs and completes them well. Good worker. Always does his job without being reminded as well as anything needed extra – is willing to learn and work." (Exhibit "C" at 22)

13. In 2004 an IPA comment stated that Mr. [REDACTED] was the hardest worker his supervisor had ever seen, and also very respectful to everyone - it stated:

"Inmate [REDACTED] is a hard worker and he completes his job and will assist in helping other inmates complete their job duties. ...He is the hardest worker that has ever worked for me... He is also very respectful to other inmates and to the officers..." (Exhibit "C" at 23)

Parole Preparation Letter

14. Sam Smith and Bailey Riley, volunteers with the Parole Preparation Project, helped [REDACTED] put together his Parole Packet and prepare for his nineteenth interview. They were very impressed with him, and wrote a long, heartfelt letter in support of his release, stating:

"...Each of us has been profoundly moved by our relationship with Mr. [REDACTED] which, against the backdrop of his almost-unthinkable crime, has *affirmed our belief in the human capacity to change through deep reckoning and accountability.* ...Mr. [REDACTED] has shown sincere remorse for the profound and irrevocable harm he caused in 1971... Through long reflection, hard work, and building new, loving relationships, he has learned what kind of person he wants to be, and has put his ideals into practice. ...

...In early adolescence he routinely experienced physical abuse at the hands of his alcoholic stepfather and sexual abuse from his stepbrothers. ...He believes that a primary motive for his mother's emigration to the United States, with him and his sisters in tow, was to escape her abusive husband. Through long reflection, Mr. [REDACTED] has come to understand that this history of trauma, upheaval and dislocation was the source of the pain he sought to dampen through the use of alcohol. ...

Mr. [REDACTED] has been extremely vulnerable with us when discussing the instant offense. When he recounts to us the details of his attack against [REDACTED] [REDACTED] on August 13, 1971, it is *with a trembling voice and often through tears.*

...In the months leading up to the crime, his abuse of alcohol had worsened. When his then-girlfriend told him she would not be returning from Puerto Rico as scheduled, Mr. [REDACTED] reacted with feelings of abandonment, despair and anger. ...Mr. [REDACTED] tells us he failed to recognize the warning signs that his anger and depression were reaching a dangerous tipping point; he also failed either to recognize that he needed help, or to ask for it.

Through decades of intensive group and individual therapy, Mr. [REDACTED] has explored his own agency in the crime... *In particular, Mr. [REDACTED] has often referenced the tremendous growth he experienced working with Dr. Mary Lopez at Gowanda Correctional Facility, whom he credits with pushing him to confront his past head on.* Mr. [REDACTED] talks often about learning to control his anger issues... *He understands now that his anger is rooted in his childhood sexual abuse, and that the work he's put into addressing it has allowed him to live a calmer and less reactive life.*

...[H]e is now 47 years sober – an achievement he is ardent about preserving. Through these courses [the therapeutic programs he completed] he has learned concrete skills to understand, cope with, and recognize the triggers that could cause him to feel anger, and to navigate such moments with care and consideration for others... ...He has also learned to practice mindful acknowledgment of his frustrations, as well as to compassionately reframe a scenario, by placing himself in another person's shoes. During a recent visit that we had... he also explained in detail to us ways that he has learned to value de-escalation, and actively practice it; *he has even helped to foster it among the men in his unit – evidence that he has made strides in the process of healing from his own trauma.*

Mr. [REDACTED] 74 years of age, his chronic hospitalizations... for kidney failure, and a new potential diagnosis of prostate complications place him at high risk of death in prison – dangers that are only heightened by [COVID-19 variants] even among those who are already vaccinated. ...

Upon his release to New York City, Mr. [REDACTED] will stay at a SARA-compliant shelter, so as not put pressure on his aging sisters. ...Mr. [REDACTED] plans to attend a Sex Offender support group through the Center for Appellate Litigation, which hosts multiple such support sessions a month. ...

Mr. [REDACTED] has also reaffirmed his commitment to continuing Alcoholics Anonymous and individual therapy after he is released. ...[H]e has shared with us his hope to serve as a sponsor for AA programming, and as a mentor for younger men in the Puerto Rican community. He is emphatic in his wish ... to continue helping others to avoid making the same ... mistakes that he once did ... he views [this] as an urgent opportunity... to do something meaningful with [his] life. ...[W]e believe he has valuable contributions to make in this regard.

In our meetings and written exchanges, Mr. █████ always put our interests ahead of his own. [He said] ‘I don’t want to see you around here until COVID-19 goes away...’ He has been conscientious of our emotional needs and recognizes how his retelling of his horrific crime may impact others. Mr. █████ story has shown us, in no uncertain terms, that true and lasting change is possible... Both of us would gladly welcome him into our home as guests.” (Exhibit “C” at 1-6)

His Personal Statement

15. █████ wrote to the Parole Board before his 19th appearance – he expressed his extreme remorse and shame at what he did, and discussed the hard work he has done over the years to confront his demons and transform himself into someone he can be proud of. This meant recognizing the long-lasting shame and resentment he had felt due to the abuse he suffered as a child, and how this led to substance abuse and violence. He wrote:

“...I will be reappearing before the Board of Parole for the 19th time for the horrible and senseless crime that I committed...

There will never be enough words to express how truly sorry I am for what I did that night to █████ I am both disgusted and ashamed of who I was and what I did. ...

I think of what [I] did every single day and night and it pains me to know that I caused so much hurt and pain... I did some serious soul searching to identify my shortcomings...

I reopened the wound of my life to see where why and how this horrible crime happened. I finally took a good look at some very deep rooted problems of my youthful past. I rewound my life all the way to age four. I was sexually abused from age four to around age thirteen. In no way do I blame this for my action later in life. It was about the age fourteen or fifteen when I started [to feel] the shame and guilt of my abuse... I felt different and kept secrets to myself. ... This was when I was first introduced to alcohol and drugs. ... My anger, guilt, shame and resentment started to appear. I started to fight my stepbrothers, their friends and others.

...I want to make very clear that I do not blame alcohol and drugs for my crime. ...I chose to use substances and run from my problems instead of seeking help to resolve them. I have not used drugs or alcohol in over 47 years and have no desire to ever use it again. I am 100% sure of that. ...” (Exhibit “C” at 7-8)

Medical Problems

16. █████ suffers from several medical conditions, some of which may be life-threatening. Most serious is his kidney disease, for which he has been hospitalized several times.

(Exhibit “C” at 4) He has progressive kidney failure, and when he went to the Parole Board last year in August, 2021, he had 55% kidney function – it is not clear what that number is now.

(Exhibit “A” at 36) Mr. [REDACTED] also suffers from high blood pressure, and has either diabetes or pre-diabetes, as well as thyroid, prostate and colon issues. (Exhibit “A” at 36; Exhibit “C” at 37-42) He takes several medications each day to attempt to keep these conditions under control – they include Allopurinol for his kidney disease; Metoprolol and Lisinopril for his high blood pressure; Metformin for diabetes/pre-diabetes; and Ergocalciferol for his thyroid condition.

(Exhibit “C” at 37-42)

Letters of Support

17. Several family members and friends wrote letters¹ in support of [REDACTED] expressing that he has changed and is ready for release. He also received letters of reasonable assurance from Exodus, the Osborne Association, and the Fortune Society.

18. [REDACTED] niece [REDACTED], wrote:

“...[M]y thoughts and prayers are with the family of Yvette Aliicea.

...[T]he day came when we finally got in touch with my uncle [REDACTED]. He was the happiest person and so was my mother. The happiest of all was my grandfather... My heart is overjoyed knowing he got to see his son before passing away...

...Now, years later, my uncle [REDACTED] calls and doesn't ask only for me on the phone, but he also asks for my growing family!

...He has been incarcerated long before I was born. ...The man that I know and have been speaking to is kind, humble, hopeful and faithful. He has completed many programs... He is wise and shares the best advice with others. I hope to support him to the best of my ability...” (Exhibit “D” at 1-2)

19. Mr. [REDACTED] sister, [REDACTED] also wrote in support of his release, stating:

“...I would like him to have the opportunity to be free and to return home, now that the sentence he has served has given him sufficient time to learn from his mistakes. Moreover, given his age, and his health conditions, I think that for him, freedom is the

¹ Many of the letters were translated from Spanish – both the Spanish and English copies are attached.

best. He has already served many years.I know he will follow all of the rules indicated under his... release.” (Exhibit “D” at 3-5)

20. Another sister, [REDACTED], likewise wrote in support of her brother, and how glad she was to finally find him 7 years ago, stating:

“...I first met my brother around seven years ago; I had not known if he was alive or dead; I met him through another sister of mine, which gave me a lot of joy. Since then, I and my two sisters... have sent him what he has needed in prison. I have spoken with him about God and his purposes. As a boy, he was abused by his stepfather...I believe he has the right to live as a member of free society... Now, he is a different person; he has a fear of God. When I first met him, he was overjoyed, and he told me that this brought him back to life...

He prays... he has changed completely. ... He, as a person, has learned to uphold some extraordinary values. ... [REDACTED] has endured so much time in prison. ... He did not know he was our brother until I was able to contact him... He couldn't believe it, but God willed it that way... Please... give him the opportunity to leave...” (Exhibit “D” at 6-9)

21. [REDACTED], another one of [REDACTED] sister, also wrote, stating:

“...[H]e has learned to live in peace; he has come to know what life means and how valuable it is. ...I know that he has learned his lesson... He has ailments, and I wish for him to be able to spend the years that remain of his life with his family who love him. He has taken various courses; he has not wasted his time, and he has come to know the love of God... ...I found him after so many years, and I would not want to lose him. I wish for him to get to know his nephews and spend time with them. ...” (Exhibit “A” at 10)

22. [REDACTED], Mr. [REDACTED] oldest sister, also wrote in support of him, stating:

“...I am his eldest sister (90 years of age). I... implore you in the name of God to grant him release... so that he can spend the last days of his life with his family...

Through our correspondence and telephone chats, I have realized that my brother... is not the same person who committed such a terrible crime 5 decades back; *he is today a person full of profound regret and remorse for such a horrendous act against a defenseless child... Our entire family, if he is released, will watch over him.* In prison he has had excellent behavior and has completed all of his mandatory programs, and he has always told me that he intends to remain involved in these programs, if he is released, in order to help others...” (Exhibit “D” at 11-12, emphasis supplied)

23. Finally, [REDACTED], a friend of Mr. [REDACTED] from prison (who was just released in July, 2022), wrote:

“...[I met ██████████ about 4 years ago and [he] soon became a very good friend of mine. ... There are some times I am really stressed out and Mr. ██████████ always lead[s] me in the right direction when the mood and vibe aren’t so good around here. *He’s always ready to help his fellow inmates when someone is in need of anything even if it’s ...emotional support.*

...[I]t became clear to me the huge level of remorse and disgust that Mr. ██████████ feels about the crime he committed. ...

*...[O]ne day... I caught Mr. ██████████ ... crying while watching reports of a case very similar with his on the news... ...[H]e tried to look the other way so I couldn’t see him crying but [it] was already too late... ...*That’s when I realized and almost could feel the pain of his remorse myself. ...**

...Mr. ██████████ ... never argues or fights and is always calm, centered and minding his own business. His... records over these 50 years ... reflects that and I truly believe he’s ready to return to society. ...” (Exhibit “D” at 13)

COMPAS Risk Assessment Instrument

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

25. The RAI found a low risk for risk of felony violence, arrest risk, abscond risk, and every other category except for reentry substance abuse, which is claimed to be probable. (Exhibit “B” at 1) It is submitted that, given his *47 years of sobriety*, the finding as to reentry substance abuse is not supported by the record. The RAI went on to document that Mr. ██████████ has a high school diploma or GED, a skill or trade, family support, and the ability to find a job. (Exhibit “B” at 4, 5)

Interview

26. The interview was conducted with a Spanish interpreter translating the questions posed to ██████████ and his responses as well. Right at the beginning the interpreter had trouble hearing Mr. ██████████ (Exhibit “A” at 2) And there were other times (mainly early on) when it seemed the interpreter was having difficulty hearing or understanding him, or in translating his

responses. (Exhibit “A” at 4 [she translated him as saying ‘this is my second appearance’ when it was actually his 19th as he was well aware]; Exhibit “A” at 5 [she said she couldn’t understand him]; Exhibit “A” at 6 [at the bottom of the page there was a confusing translation with regard to whether Mr. ██████ had pled guilty or gone to trial, which read like broken English]; Exhibit “A” at 10 and 12 [the interpreter translated Mr. ██████ as stating that he was working in a “factory of salads”]; Exhibit “A” at 12 [the interpreter translated Mr. ██████ as saying 1) he lived with his mom during this time period, and 2) that he was *visiting* his mom at the time when he met the victim]; Exhibit “A” at 29-30 [there was confusion about whether it was the victim’s brother or sister who saw Mr. ██████ abduct the victim.]

27. It is not clear exactly what caused the translation difficulties, but it may be that Mr. ██████ was having a lot of emotional trouble talking about the details of the instant offense, and so that made it hard for the interpreter to understand him. There may have been other issues too, but it does seem likely, based on all of those examples, that the interpreter may have gotten some things wrong.

28. In any event, the panel spent 28 of the first 31 pages of the transcript discussing the instant offense, and then later another 4 pages (Pages 41-44) discussing it. Of the 45 pages, only 13 were spent discussing everything that occurred since that day in 1971.

29. While it is true that Mr. ██████ said several times that he could not explain why he did what he did, it appears that this was because he somehow felt that *explaining* it was the same as *excusing* it. He did say that when he took the SOTP program (he successfully completed a lengthy intensive program where all this would have been explored in detail, but those records have apparently not been obtained as of yet and were not part of his parole packet) it came out that the underlying causes of the offense included the prior (lengthy, age 4-13) period of sexual

abuse by the stepbrothers, and that substance abuse was a contributing factor. (Exhibit "A" at 17-18)

30. However, Mr. █████ kept saying he didn't want to use those things as an "excuse" or even a "reason" for committing the crime. (Exhibit "A" at 17-18; Exhibit "C" at 7-8) He said that again later – when asked how he could have done this when he had been sexually abused himself, he said "I can't explain that. ...Because of what happened to me with my brothers, she has no fault for that." (Exhibit "A" at 31) It was as if Mr. █████ somehow thought that if he explained that the prior sex abuse was a contributing factor to his crime, it would be like blaming it on the victim, which isn't the case at all.

31. Near the end of the interview, █████ was asked if his anger about his then-girlfriend not returning from Puerto Rico (and his suspicion that she was cheating on him) could have also been a contributing factor leading to the offense, he said it could have been, but that he wasn't sure. (Exhibit "A" at 41)

32. At the very end of the interview, when asked why he should be released, Mr. █████ said:

"Because I'm a very different person from the one who committed the crime in 1972 [it was 1971, this was likely a translation error.] I'm not that same beast that sexually abused █████ that night. The world has everything to lose if you give me an opportunity, and I don't take that opportunity easily. Not only that, no woman, not anybody deserves what I did. I'm at fault for what I did. I have responsibility. I not only hurt █████ that night, but her whole family, my family, the community, and myself until the last moment of my life." (Exhibit "A" at 45)

Decision

33. The Decision stated:

"...[I]f 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 release at this time would be incompatible with the welfare of society. ...

The Board's decision is based on the following factors: The instant offense of murder, kidnapping first, and rape first, where, by your own admission, you lured your nine-year-old victim to a secluded area in a park... You... forcibly removed her clothing, forcibly raped her, and fractured her skull, resulting in her death. ...

Your disciplinary record is minimal. ...[Y]our COMPAS is low with the exception of probable reentry substance abuse. The panel departs from the low scores on the COMPAS, specifically the risk of felony violence, as during the interview and despite approximately 50 years of incarceration, immersion in rehabilitative programs such as ART, ASAT and SOP, you failed to provide motivation for the brutal rape and disregard of your vulnerable nine-year-old victim whom you knew...

During the interview you often couldn't answer the commissioner's questions critical to your acts, deviant behaviors, distorted thinking, or how you would prevent this behavior in the future.

Another aggravating factor is that you continue to blame alcohol and drugs for the depravity you exhibited, changed your account of the crime and rationale for your crime compared to past interviews... As such, the panel finds you uncredible and without understanding of your behaviors, coping mechanisms, and motivation behind your sex offender and homicidal behavior. The likelihood of your committing a similar act is increased. Therefore, release is not warranted and to do so would deprecate the serious nature of the crime and undermine respect for the law." (Exhibit "A" at 47-49)

Administrative Appeal Decision

34. The Administrative Appeal was denied on July 18, 2022, and is attached as Exhibit "E."

ARGUMENT

POINT I

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

35. It is clear that the reasons given for parole decisions must be detailed, and not simply perfunctory, and *they must be supported by the record*. *Rivera v. Stanford*, 2019 NY App. Div. LEXIS 3595 (2nd Dep't 2019); *Matter of Ramos v. Stanford*, Index No. 2022-50440 (Dutchess Co. 2022); *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (NY Co. 2019); *Matter of Coleman v. DOCCS*, 2018 NY App. Div. LEXIS 136 (2nd Dep't 2018); *Almonte v. Stanford*, Index No. 10476/2018 (Orange Co. 2019); *Winchell v. Evans*, 32 Misc.3d 1217(A)

(Sullivan Co. 2011); *Matter of Rossakis v. NYS Bd. of Parole*, 146 AD3d 22 (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*², Index No. 0623/2018 (Dutchess Co. 2018); *Morales v. NYS Board of Parole*, Index No. 934/2017 (Dutchess Co. 2017.)

36. In the instant case, where Mr. ██████████ 75, was sentenced to *20 years to life* but has been incarcerated for *50 years*, well more than *double* his minimum term, the Decision noted the low COMPAS scores; excellent disciplinary record, the successful completion of all required therapeutic programs completed; and the letters of support, yet denied release based on the nature of the offense, and on claims which were not supported by the record.

The Board's Claims Were Not Supported by the Record, and Nothing in the Record Supports the Claim that Petitioner is Likely to Violate the Law Again if Released

37. The Decision stated:

“...[Y]ou failed to provide motivation for the brutal rape and disregard of your vulnerable nine-year-old victim whom you knew...

During the interview you often couldn't answer the commissioner's questions critical to your acts, deviant behaviors, distorted thinking, or how you would prevent this behavior in the future.

Another aggravating factor is that you continue to blame alcohol and drugs for the depravity you exhibited, changed your account of the crime and rationale for your crime compared to past interviews... As such, the panel finds you unbelievable and without understanding of your behaviors, coping mechanisms, and motivation behind your sex offender and homicidal behavior. The likelihood of your committing a similar act is increased.” (Exhibit “A” at 48-49)

38. It is clear from the interview and the remainder of the record that ██████████ is deeply remorseful and ashamed of his heinous crime, and that it is very difficult for him to talk about, even after the passage of more than half a century. He *does* understand that there are

² Jack Maddaloni was released on September 10, 2018 and has not been reincarcerated.

certain factors that led to the offense, including his years of being sexually abused as a child, his substance abuse, and his anger toward his then-girlfriend, who he felt had betrayed him.

39. Yet Mr. ██████ seemed to believe that acknowledging that these things had contributed to his committing the offense would be making excuses for the crime, and not taking full responsibility. He often said he didn't want to use those things as an "excuse" or even a "reason" for committing the crime. (Exhibit "A" at 17-18; Exhibit "C" at 7-8) During the interview he said:

"...In the time that I was in the [sex offender] program for 18 months, always the psychologist that was in the program, Ms. ██████, *she thinks that my problem was drinking alcohol, but I've always drank a lot of alcohol and smoked marijuana, but never in my life have I committed a crime like that.* ...[B]ut also, during the time that I was growing up, my stepfather... I was many times abused... by him and by my half-brother. I was many times abused by them, but I *also don't want to use that as an excuse* for committing the crime I committed." (Exhibit "A" at 17, emphasis supplied)

40. In his personal statement, ██████ also showed that he *did understand the factors that contributed to his having committed the crime*, but didn't want to "blame" them for the offense, stating:

"I think of what [I] did every single day and night and it pains me to know that I caused so much hurt and pain... I did some serious soul searching to identify my shortcomings...

I reopened the wound of my life to see where why and how this horrible crime happened. I finally took a good look at some very deep rooted problems of my youthful past. I rewound my life all the way to age four. I was sexually abused from age four to around age thirteen. In no way do I blame this for my action later in life. It was about the age fourteen or fifteen when I started [to feel] the shame and guilt of my abuse.... I felt different and kept secrets to myself. ... This was when I was first introduced to alcohol and drugs. ... My anger, guilt, shame and resentment started to appear. I started to fight my stepbrothers, their friends and others.

...I want to make very clear that I do not blame alcohol and drugs for my crime. ...I chose to use substances and run from my problems instead of seeking help to resolve them. I have not used drugs or alcohol in over 47 years and have no desire to ever use it again. I am 100% sure of that. ..." (Exhibit "C" at 7-8)

41. Thus, from his statements during the interview and in his Personal Statement, it can be seen that Mr. ██████ *does* understand the motivating factors for the offense, and has dug deep within himself to face them so nothing like that would ever happen again. It was unjust, after 50 years, for the Panel to take his deep shame and desire to take full responsibility for the offense, and twist those words to try to say he didn't understand what led to the offense and therefore might do it again. Nothing could be further from the truth – it is quite clear he has become a very different person who would never again commit such a crime.

42. The letter from ██████ and ██████, of the Parole Preparation Project, also underscores Mr. ██████ insight, and how much he has changed over the years – the letter stated:

“...Each of us has been profoundly moved by our relationship with Mr. ██████ which, against the backdrop of his almost-unthinkable crime, has *affirmed our belief in the human capacity to change through deep reckoning and accountability.*

...In early adolescence he routinely experienced physical abuse at the hands of his alcoholic stepfather and sexual abuse from his stepbrothers. ... Through long reflection, Mr. ██████ has come to understand that this history of trauma ... was the source of the pain he sought to dampen through the use of alcohol. ...

...In the months leading up to the crime, his abuse of alcohol had worsened. When his then-girlfriend told him she would not be returning from Puerto Rico as scheduled, Mr. ██████ reacted with feelings of abandonment, despair and anger.

Through decades of intensive group and individual therapy, Mr. ██████ has explored his own agency in the crime... *In particular, Mr. ██████ has often referenced the tremendous growth he experienced working with Dr. ██████ at Gowanda Correctional Facility, whom he credits with pushing him to confront his past head on.* Mr. ██████ talks often about learning to control his anger issues... *He understands now that his anger is rooted in his childhood sexual abuse, and that the work he's put into addressing it has allowed him to live a calmer and less reactive life.*

...[H]e is now 47 years sober – an achievement he is ardent about preserving. Through these courses [the therapeutic programs he completed] he has learned concrete skills to understand, cope with, and recognize the triggers that could cause him to feel anger, and to navigate such moments with care and consideration for others... ...He has

also learned to practice mindful acknowledgment of his frustrations, as well as to compassionately reframe a scenario, by placing himself in another person's shoes. During a recent visit that we had... he also explained in detail to us ways that he has learned to value de-escalation, and actively practice it; *he has even helped to foster it among the men in his unit – evidence that he has made strides in the process of healing from his own trauma.*

...Mr. [REDACTED] *story has shown us, in no uncertain terms, that true and lasting change is possible... Both of us would gladly welcome him into our home as guests.*" (Exhibit "C" at 1-3, 6, emphasis supplied)

43. Moreover, Mr. [REDACTED] aforementioned statements, and others, show that the Panel was also clearly wrong in its claim that "you continue to blame alcohol and drugs for the depravity you exhibited." Mr. [REDACTED] *never said anything to that effect.* Near the beginning of the interview, he said, "...I was drunk, but I don't want to use that as an excuse." (Exhibit "A" at 15³) And, as cited above, he later said that his SOTP counselor had said alcohol was a factor, but he never said he blamed the offense on alcohol, noting that he had drunk and smoked many times before without committing such a crime. And in his Personal Statement he said, "I want to make very clear that I do not blame alcohol and drugs for my crime." *Thus the Board's claims in this regard were completely contradicted by the record.*

44. The fact that Mr. [REDACTED] is 75 years old also shows how unlikely it would be for him to commit a new violent offense. In *US v. Presley*, No. 14-2704 (7th Cir. June 11, 2015), Judge Richard Posner emphasized the research showing that people over the age of 50, *let alone* 75, 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

³ It also appears that the claim that Mr. [REDACTED] had "changed his story" related to his saying that in addition to drinking, he had also smoked marijuana that day – the Panel thought he hadn't said that before, but he said he had always said that, including in the Sentencing Minutes, which the Panel did not have. (Exhibit "A" at 15) Commissioner Drake said, "I'll take your word for it." (Exhibit "A" at 15)

common among persons over 40, let alone over 60, than among younger persons....”
Presley, at 3.

45. 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

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

46. The record contained no indication that Petitioner’s release was somehow incompatible with the welfare of society, or would deprecate the seriousness of the offenses, especially after the passage of *50 years with a sentence of 20 years to life*. His institutional record has been excellent, and there are simply no facts to back up these spurious claims. In *Rivera v. Stanford*, supra, the Second Department reversed the denial of a *de novo* hearing in a murder case, stating, at 4, “...The Parole Board’s finding that the petitioner’s release was not compatible with the welfare of society... is without support in the record.”

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

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

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

respect for the law.’”

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

POINT II

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

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

51. There have also been court decisions in numerous other cases over the past few years granting or upholding new parole hearings for this same reason. *Matter of Kellogg v New York State Bd. of Parole*⁶, 2018 N.Y. App. Div. LEXIS 1469 (1st Dep’t 2018); *Esquilin v. NYS Bd. of Parole*⁷, 2018 NY Misc. 483 (Orange Co. 2018); *Matter of Villa v. Stanford*⁸, Index No. 53877/21 (Dutchess Co. 2021); *Matter of O’Connor v. Stanford*⁹, Index No. 54/2021 (Dutchess Co. 2021); *Matter of Jennings v. Stanford*¹⁰, Index No.2020-51294 (Dutchess Co. 2020); *Hill v. NYS Bd of Parole*¹¹, Index No. 100121/2020 (NY County 2020); *Matter of Voii v. Stanford*¹², supra; *Almonte v. Stanford*¹³, Index No. 10476/2018 (Orange Co. 2019);

⁴ Richard Rivera was granted an open date for release in June, 2019.

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

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

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

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

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

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

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

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

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

*Phillips v. Stanford*¹⁴, supra; *Slade v. Stanford*, Index No. 203/19 (Dutchess Co. 2019); *Butler v. NYS Board of Parole*, Index No. 2703/17 (Dutchess Co. 2018); *Morales v. NYS Board of Parole*, Index No. 934/2017 (Dutchess Co. 2017); *Kelly v. NYS Board of Parole*, Index No. 580/2017 (Dutchess Co. 2017); *Darshan v. NYS DOCCS*¹⁵, Index No. 652/2017 (Dutchess Co. 2017); *Matter of Ciaprazi v. Evans*, Index No. 0910/2016 (Dutchess Co. 2016.)

52. In this case, the Decision listed the “instant offense” as the major reason for its denial, later adding the other “reasons” discussed above, which were not supported by the record. (Exhibit “A” at 47)

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

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

...[A]lthough Respondent argues that the Board may consider an inmate’s limited expressions of remorse and a lack of insight, the record here does not support the Board’s finding that Petitioner’s remorse was ‘shallow.’ ...

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

54. As with the claim regarding remorse in *Jennings*, the claims as to lack of insight herein were not supported by the record. [REDACTED] did, as discussed above, show insight into the factors leading to the offense - he just didn’t want to “blame them” for the offense, *failing to*

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

¹⁵ Travis Darshan was released in September, 2017 and has not been reincarcerated.

understand the difference between a reason and an excuse. As in Jennings, the only real reason for the denial was the nature of the offense. Therefore, a de novo hearing must be granted before different commissioners.

POINT III

THERE WAS NO ADEQUATE JUSTIFICATION FOR DEPARTING FROM THE LOW COMPAS SCORES

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

“8002.2

(a) Risk and Needs Principles: In making a release determination, the Board shall be guided by risk and needs principles, including the inmate’s risk and needs scores as generated by a periodically-validated risk assessment instrument, if prepared by the Department of Corrections and Community Supervision... If a Board determination, denying release, departs from the Department Risk and Needs Assessment’s scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. ...”
[9 NYCRR S8002.2(a), emphasis supplied.]

56. New hearings were granted based on improper COMPAS departures in *Phillips v. Stanford*, Index No. 2020-50485 (Dutchess Co. 2020); *Voii v. Stanford*, Index No. 2020-50485 (Dutchess Co. 2020); *Jennings v. Stanford*, Index No.2020-51294 (Dutchess Co. 2020); *Comfort v. NYS Bd. of Parole*, Index No. 1445/2018 (Dutchess Co. 2018); *Sullivan v. NYS Bd. of Parole*¹⁶, Index No. 100865/2018 (NY Co. 2019); *Diaz v. Stanford*, Index No. 2017-53088 (Dutchess Co. 2018); and *Robinson v. Stanford*¹⁷, Index No. 2392/18 (Dutchess Co. 2018).

¹⁶ Veronica Sullivan was released in September, 2019 and has not been re-imprisoned.

¹⁷ Dexter Robinson was released in March, 2021 and has not been re-imprisoned.

57. In this case, the Board said that, despite low COMPAS scores for everything except for reentry substance abuse, Mr. [REDACTED] was likely to commit new offenses upon release, and it departed from the COMPAS scale for felony violence, stating:

...[Y]our COMPAS is low with the exception of probable reentry substance abuse. The panel departs from the low scores on the COMPAS, specifically the risk of felony violence, as during the interview and despite approximately 50 years of incarceration, immersion in rehabilitative programs such as ART, ASAT and SOP, you failed to provide motivation for the brutal rape and disregard of your vulnerable nine-year-old victim whom you knew..." (Exhibit "A" at 48)

58. As discussed above, in Point I, there was simply no support in the record for the claim that Mr. [REDACTED] "failed to provide motivation for the brutal rape". And there is also no reason to use this to claim a heightened risk of felony violence, especially given the passage of 50 years, the fact that he is 75 years old, and the fact that the record shows how much he has changed over the years.

59. Again, while Mr. [REDACTED] filled with shame, may have said he didn't understand how he could have committed such a heinous and inexplicable offense, the record shows, based on statements both during the interview, and in writing, that Mr. [REDACTED] *does in fact understand the motivating factors that led to the offense* (his years of being sexually abused as a child, his substance abuse, and his anger at his then-girlfriend.) However, not appreciating the distinction between an excuse and an explanation, he said he didn't want to blame the offense on those things, feeling that it would somehow mean he wasn't taking full responsibility.

60. As discussed above, given the totality of the record, it was unfair for the Panel to come to the conclusion that he didn't know the "motivation" for the crime, and to then find that this somehow means there is a greater risk of future felony violence than the low risk indicated

by the COMPAS. The record simply doesn't support this claim, and thus the Board failed to adequately justify the COMPAS departure.

CONCLUSION

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

Dated: October 3, 2022.

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