

April 3, 2020

New York State Department of Corrections and Community Supervision
Executive Clemency Bureau
The Harriman State Campus Building 2
120 Washington Avenue
Albany, N.Y. 12226-2050

VIA E-MAIL: [REDACTED]

Re: Executive Clemency Applications

Dear Clemency Review Team:

Attached to this letter are 9 applications seeking executive clemency from Governor Cuomo. In light of the quickly escalating public health crisis that the COVID-19 pandemic has triggered within New York State prisons, we ask for expedited review of these applications, and we ask that the Governor effectuate the immediate release of these clients. As a group, these clients are particularly vulnerable to the devastating effects of COVID-19 or are close to the point at which they would otherwise be entitled to release. Most of these clients have specific housing plans so that their release from prison will drastically diminish the risk that they will be exposed to the coronavirus. Additionally, independent of the current pandemic, these applicants all have strong equities and are deserving of executive clemency.

We are sending expedited clemency applications to your office in groups so that they may be administered more efficiently. Some of these applications were sent individually earlier this week and some are supplemental to applications filed in the past; on the following list of the attached applications, we have indicated when that is the case. This first group of applications are on behalf of the following individuals:

- (1) [REDACTED]
- (2) [REDACTED]
- (3) [REDACTED]
- (4) [REDACTED]
- (5) [REDACTED]n
- (6) [REDACTED]
- (7) [REDACTED]
- (8) [REDACTED]
- (9) [REDACTED]

If you have questions or need further information, please do not hesitate to reach out to myself or the individual attorneys who prepared the clemency applications.

Justice in Every Borough.

Very truly yours,

David Loftis

David Loftis
Attorney-in-Charge
Post-Conviction and Forensic Litigation
646-455-7267

April 2, 2020

DOCCS Executive Clemency Bureau
Harriman State Campus
1220 Washington Avenue
Albany, New York 12226

**RE: [REDACTED]
EMERGENCY CLEMENCY APPLICATION FOR
IMMEDIATE RELEASE RELATING TO
CORONAVIRUS/COVID-19 CRISIS**

Criminal Appeals Bureau
199 Water Street
New York, NY 10038
(212) 577-3564
www.legal-aid.org

Simon Greenberg
Landline (212) 577-3453
Cell (917) 922-7474
Fax (646) 365-5536
SAGreenberg@legal-aid.org

John K. Carroll
President

Janet E. Sabel
Attorney-in-Chief
Chief Executive Officer

Justine M. Luongo
Attorney-in-Charge
Criminal Practice

David Loftis
Attorney-in-Charge
of Post-Conviction and Forensic Litigation

To whom it may concern:

This is an emergency clemency application for the immediate release of Mr. [REDACTED]. Mr. [REDACTED] is an inmate at Sing Sing Correctional Facility with an upcoming conditional release date of April 23, 2020. Upon release, he will begin serving two years of post-release supervision. He plans to live with his mother and father.

Mr. [REDACTED] requests that Governor Cuomo immediately grant clemency by releasing him from prison. Three factors support this immediate relief: Mr. [REDACTED] conditional release date is three weeks away, his present sentence is for a non-violent street-level drug offense, and prison inmates are especially vulnerable to being infected with coronavirus/COVID-19.

Mr. [REDACTED] full name is [REDACTED]. His date of birth is [REDACTED].
[REDACTED] See Inmate Information for [REDACTED] Dated
Apr. 2, 2020 (attached).

Mr. [REDACTED] present prison sentence relates to a judgment of conviction under New York County Indictment Number [REDACTED]. On November 6, 2017, Mr. [REDACTED] pleaded guilty to one count of attempted third-degree criminal sale of a controlled substance (P.L. §§ 110.00/220.39(1)) based on an incident in which he sold

¹ The Legal Aid Society represents Mr. [REDACTED] in the appeal from this judgment of conviction. The appeal is currently pending in the Appellate Division, First Department.

crack to an undercover police officer. The court adjudicated Mr. [REDACTED] a second felony drug offender previously convicted of a predicate violent felony (the predicate was a February 26, 2015, judgment of conviction for second-degree assault and attempted second-degree robbery). On March 27, 2018, the court sentenced Mr. [REDACTED] to a determinate sentence of imprisonment of 3 ½ years and 2 years of PRS.

Pursuant to this sentence, Mr. [REDACTED] is presently incarcerated at Sing Sing Correctional Facility. His conditional release date is April 23, 2020, and his maximum expiration date is November 10, 2020. See Inmate Information, supra. Upon his release, he plans to live with his mother and father at [REDACTED], [REDACTED].

In the context of the coronavirus/COVID-19 emergency, there are compelling reasons for Mr. [REDACTED] clemency application. Mr. [REDACTED] is three weeks away from his April 23, 2020, conditional release date for a sentence relating to a non-violent street-level drug offense. As current and former public officials have recognized, Mr. [REDACTED] interest in his own life and personal safety outweighs society's interest in his serving the last 21 days of a years-long prison sentence. Just a few days ago, the Brooklyn District Attorney's Office and the former New York City Health Commissioner recommended that the Governor grant early parole to people who are within 180 days of completing their sentences. See Mary Bassett,² DA Eric Gonzalez, and Darren Walker, Andrew Cuomo, Stop a Coronavirus Disaster: Release People From Prison, N.Y. Times, Mar. 30, 2020 (attached). Mr. [REDACTED] scheduled release is even more imminent than this 180-day benchmark.

Mr. [REDACTED] faces grave danger while incarcerated. Coronavirus/COVID-19 is a contagious and deadly illness that, at the time of this clemency application, has resulted in the deaths of over 1,900 New Yorkers. See Live Updates, N.Y. Times, Apr. 1, 2020 (attached). The living conditions in the prisons—limited access to soap and water, and shared bathrooms, mess halls, and living quarters—create a heightened risk of being infected. See Bassett, DA Gonzalez, and Walker, supra. Moreover, releasing Mr. [REDACTED] and others similarly situated at this juncture does not merely protect those being released. Reducing the prison population would also facilitate social distancing in the prisons and thereby protect both the people remaining incarcerated and DOCCS staff.

² Mary Bassett was the New York City Health Commissioner between 2014 and 2018.

To be clear, Mr. [REDACTED] does not request a complete termination of his sentence. Rather, he requests that the Governor use the clemency power to release him from prison now so that his period of PRS will commence immediately. Mr. [REDACTED] will still be required to serve two years of PRS, and he will not receive credit for any of the time remaining in his prison sentence until after he completes PRS.

In sum, the coronavirus/COVID-19 crisis and Mr. [REDACTED] imminent conditional release date support clemency. Under these extraordinary circumstances, Mr. [REDACTED] requests that the Governor act swiftly to prevent tragedy and injustice.

Very truly yours,

Simon Greenberg
Staff Attorney

Encl.

CLEARY GOTTlieb STEEN & HAMILTON LLP

WASHINGTON, D.C.
PARIS
BRUSSELS
LONDON
FRANKFURT
COLOGNE
MOSCOW

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999
clearygottlieb.com

ROME
MILAN
HONG KONG
BEIJING
BUENOS AIRES
SÃO PAULO
ABU DHABI
SEOUL

April 2, 2020

VIA EMAIL

New York State Department of Corrections and Community Supervision
Executive Clemency Bureau
The Harriman State Campus – Building 2
1220 Washington Ave.
Albany, NY 12226-2050

Re: Executive Clemency Application for [REDACTED]
[REDACTED]

Dear Executive Clemency Bureau:

In 2018, Mr. [REDACTED] submitted a full application for clemency, which is pending. He is currently approved for conditional release on April 13, 2020. He has an approved residence in [REDACTED] with family members. Mr. [REDACTED] is currently at Wallkill Correctional Facility, where there have been press reports of COVID-19 in at least one of the officers. Given the unprecedented health risk that COVID-19 represents, we respectfully request that the Governor direct that Mr. [REDACTED] be released immediately to his approved place of residence, rather than simply wait until his scheduled date of release eleven days from now. In this time of crisis, every day counts.

Below please find the details pertinent to our current emergency request. For more information, we respectfully refer you to Mr. [REDACTED] application for executive clemency, submitted March 20, 2018.

Applicant:

- Name: [REDACTED]
- DIN: [REDACTED]
- Date of birth: [REDACTED]
- County of conviction: Kings
- Indictment number: [REDACTED]

Crime of conviction: Mr. [REDACTED] pleaded guilty to Attempted Murder in the Second Degree on January 13, 2009. The conviction stemmed from a December 8, 2007 altercation in which Mr. [REDACTED] fired shots at Mr. [REDACTED] [REDACTED] after a misunderstanding escalated into a heated disagreement. Mr. [REDACTED] has taken full responsibility for his actions and has expressed sincere remorse for the harm he caused Mr. [REDACTED] and his family.

Sentence and scheduled release date: Mr. [REDACTED] was sentenced to a determinate term of fifteen years in prison followed by five years of post-release supervision. His conditional release date is October 13, 2020. He earned the six-month Limited Credit Time Allowance due to his behavior during his incarceration, however, and his release date is now set for April 13, 2020, eleven days from now.

Behavior during incarceration: Mr. [REDACTED] disciplinary and programmatic record over the course of his confinement demonstrate that he poses no threat to society. He has incurred only limited disciplinary infractions while in prison. He has been regularly employed throughout his incarceration, has earned a GED certificate, and has continued his education through a correspondence course. He has been an avid participant in the Puppies Behind Bars program, which admits only a small number of carefully screened and highly motivated male prisoners to train therapy dogs for use by disabled veterans. And he has become more emotionally mature, in part thanks to successful completion of Aggression Replacement Training.

Post-release housing plans: Mr. [REDACTED] is ready and eager to become a contributing member of society. Following release, Mr. [REDACTED] plans to reside in [REDACTED] with his aunt, [REDACTED] [REDACTED] and his grandmother, [REDACTED] [REDACTED]. We understand that DOCCS has completed a home visit at Mr. [REDACTED] planned post-release residence, and we have not been notified that any issues were found.

* * *

Based on press reports, we understand that corrections officers at Wallkill Correctional Facility, where Mr. [REDACTED] is currently housed, have tested positive for COVID-19. Given the danger of transmission in confined spaces, Mr. [REDACTED] continued detention for the remaining eleven days of his sentence presents an undue health risk. While we appreciate that the Governor likely faces difficult decisions as he considers requests for clemency under these circumstances, Mr. [REDACTED] situation is more straightforward given the limited time remaining on his sentence.

We respectfully request that Mr. [REDACTED] be immediately released. Thank you for your attention to this matter. Please do not hesitate to contact us with any questions.

Sincerely,

/s/ Emily Scherker

/s/ Patrick Swiber

Emily Scherker

Patrick Swiber

Attorneys for [REDACTED] [REDACTED]

Executive Clemency Bureau, p. 3
April 2, 2020

cc: David Crow (via email)
The Legal Aid Society
Criminal Appeals Bureau
199 Water Street
New York, NY 10038



Criminal Appeals Bureau
199 Water Street
New York, NY 10038

Tel: 212-577-3688
www.legal-aid.org

John K. Carroll
President

Janet E. Sabel
Attorney-in-Chief

Justine M. Luongo
Attorney-in-Charge
Criminal Practice

David E. Loftis
Attorney-in-Charge
Post Conviction and
Forensic Litigation

April 3, 2020

DOCCS Executive Clemency Bureau
Harriman State Campus
1220 Washington Avenue
Albany NY 12226

Via email:

Re: Executive Clemency Application,

New York Indictment #

Dear Executive Clemency Bureau:

I submit this clemency application on behalf of [REDACTED] who was approved for release, following his initial appearance before the Parole Board last month. He is currently scheduled to return to the community on July 17, 2020. In light of the COVID-19 pandemic we are seeking expedited review of this application and Mr. [REDACTED] immediate release because he suffers from sarcoidosis, a rare and incurable disease that causes inflammation of the lungs and lymph nodes. See <https://www.mayoclinic.org/diseases-conditions/sarcoidosis/symptoms-causes/syc-20350358>. Those individuals with underlying respiratory conditions, like Mr. [REDACTED] are particularly vulnerable and for them, contracting the virus is a life-threatening, if not life-ending, event.

Mr. [REDACTED] incarceration results from a 1999 conviction for second-degree murder, following which he was sentenced to 22 years to life. In 1999, shortly after entering prison, Mr. [REDACTED] earned his GED. During the years that followed, he became a role model to his peers, completing, among other

programs, the Poisoners for AIDS Counseling and Education (PACE) training for peer educators. [REDACTED], and [REDACTED] noting Mr. [REDACTED] success in the program, stated that he was “[a] positive example of what Peer Educators at this correctional facility can accomplish.” He also received two commendable behavior reports, the first in March 2019 and the second in April 2019.

Mr. [REDACTED] also continues to enjoy the support of his family, four of whom - - his parents, his sister and his nephew - - wrote to the Parole Board on his behalf, offering housing and employment, as well as financial and emotional support. In addition to the letters of reasonable assurance Mr. [REDACTED] has received from ex-offender programs, he will also have assistance of this office’s social work staff. Finally, [REDACTED] [REDACTED] Association, has assured that her organization will provide case management oversight to aid Mr. [REDACTED] with his re-entry to the community.

Given the foregoing, it is not surprising that Mr. [REDACTED] was granted parole.

Now that COVID-19 has entered the prison system, continuing to be detained in such close quarters poses a grave danger to Mr. [REDACTED] who suffers from an underlying respiratory condition. Since the Parole Board has already found him worthy of release and has granted parole, there is no compelling reason to hold Mr. [REDACTED] at great risk to his health, until July, rather than releasing him at the earliest possible date. Wherefore, we respectfully request that this body grant his application for clemency.

Respectfully submitted,

Adrienne M. Gantt
Supervising Attorney

REQUEST FOR COMMUTATION ON BEHALF OF [REDACTED] [REDACTED]

I. Executive Summary

[REDACTED] [REDACTED] a 61-year old man in poor health, has been imprisoned in New York State maximum security facilities since the early 1990s. Following an incredibly difficult childhood and adolescence as an orphan in the wake of the Cuban Revolution, Mr. [REDACTED] made an unfortunate choice to associate with a group of people involved in criminal activities, a choice he deeply regrets. As a result of his poor decisions, Mr. [REDACTED] is serving (1) 20 years-to-life for murder in the second degree and (2) 15 years-to-life for attempted murder, reckless endangerment, and weapon possession, for an aggregate of 35 years-to-life.¹ To date, Mr. [REDACTED] has served over 25 years of this lengthy sentence.

Over the past year, we have been in regular contact with Mr. [REDACTED]. Through this process, Mr. [REDACTED] has recounted his story to us, and has spoken often of the personal growth he has made during his prison sentence, as well as his hope to be reunited with his daughter should he be granted clemency. We have also spoken with individuals who have supervised Mr. [REDACTED] work at Auburn Correctional Facilities, who spoke highly of his work ethic and character, as well as his daughter, a young woman who has expressed her hopes to have an opportunity to get to know her father. It is abundantly clear that Mr. [REDACTED] has spent a great deal of time reflecting on the decisions he made as a younger man, and through these efforts, has grown into the more thoughtful and measured person he is today.

Importantly, Mr. [REDACTED] acknowledges that, for a brief period when he was younger, he made decisions he now deeply regrets, including becoming associated with a group of people involved in criminal activities. However, he has consistently maintained his innocence with respect to the crime for which he is currently imprisoned. This commitment to the truth, knowing that it may affect his chances for clemency, is a testament to Mr. [REDACTED] character. His steadfast commitment to his innocence aside, Mr. [REDACTED] is an excellent candidate for executive clemency. Accordingly, we urge you to accept this petition.

An inmate is an appropriate candidate for executive clemency if: (a) he has made “exceptional strides in self-development and improvement”; (b) he has “made responsible use of available rehabilitative programs and has addressed identified treatment needs”; and (c) commutation is “in the interest of justice, consistent with public safety and the rehabilitation of the applicant.”² Mr. [REDACTED] conduct and circumstances meet each prong of this description. Throughout our interactions, Mr. [REDACTED] impressive self-awareness and maturity have stood out, as has his dedication to learning from and never repeating the mistakes of his youth.

Mr. [REDACTED] has seized upon the opportunity for self-development and improvement while incarcerated. In particular, over the past thirteen years at Auburn Correctional Facility, Mr. [REDACTED] has achieved fluency in the English language, including working as a clerk performing English-Spanish translations and excelling in typing. Additionally, Mr. [REDACTED] previously

¹ Appellate Br. at 3, *People v. [REDACTED]* Ind. No. [REDACTED] (N.Y. Sup. Ct. May 1994).

² State of New York Executive Chamber, *Guidelines for Review of Executive Clemency Applications*, <http://www.doccs.ny.gov/directives/GRECA.pdf>.

worked in the upholstery shop and was recognized as an “excellent sewer” by his supervisor, ██████████. While maintaining these work positions, Mr. ██████████ has written two complete volumes of brain-teaser puzzles and accompanying art that he now seeks to publish.⁴ Mr. ██████████ has also worked to overcome his former struggles with drug addiction, and has not had a single drug infraction since 1995. Mr. ██████████ is currently on the waiting list to participate in the Alcohol and Substance Abuse Treatment Program (ASAT) and the Aggression Replacement Training Program (ART) as part of his case plan goals, which he will be eligible to participate in within two years of his parole board hearing. His vocational skills, work ethic, and desire to be reconnected with his family are reflective of the man that Mr. ██████████ has become.

Furthermore, Mr. ██████████ disciplinary record, especially over the course of the last thirteen years of his incarceration, demonstrates that he poses no threat to society. In that time, Mr. ██████████ has received only three disciplinary infractions, which have all been non-violent and minor in nature. His few more serious infractions occurred long ago, during the early period of his incarceration, while he was still adjusting to the enormous challenges of life in prison, where he did not speak the language, and did not have any support from the outside. Aside from these three minor infractions, Mr. ██████████ disciplinary record has been otherwise spotless for over thirteen years, and he has not had a single cited infraction for more than four years. Today, Mr. ██████████ has only one goal in his life: to reconnect with his daughter, for whom he cares deeply. Mr. ██████████ longs for the opportunity to be physically present in his daughter’s life so she can get to know her father as a man who, despite his troubled past, worked his hardest to learn from his past mistakes and change for the better. Accordingly, his record supports a finding that he poses no risk to public safety, and merits a grant of clemency.

Lastly, we urge you to accept this petition based on the threat the novel coronavirus COVID-19 poses to Mr. ██████████ who due to his age and medical condition is particularly vulnerable and at a higher risk of becoming gravely ill from this virus. COVID-19 is a coronavirus that has reached pandemic status.⁵ On March 7, 2020, Governor Andrew Cuomo issued Executive Order Number 202, declaring a disaster emergency for the state of New York.⁶ According to the Center for Disease Control (“CDC”), those at higher risk of becoming severely sick from COVID-19 include: (1) adults over the age of 60 and (2) people who have serious chronic medical conditions like heart disease, diabetes and lung disease.⁷ Mr. ██████████ falls within this high-risk category since he is 61 years old and suffers from diabetes. Further, due to conditions in his facility, it is impossible for him to take precautions against infection, as made evident by the extensive reports of coronavirus in New York’s prison systems.⁸ As such, correctional public health experts have urged the release from prison of those more vulnerable to

³ Letter from ██████████ Regarding Work Performance, dated Aug. 12, 2008.

⁴ For a sampling of the puzzles, *see* Letter from ██████████ dated Feb. 5, 2018; Letter from ██████████ dated Apr. 5, 2018; Letter from ██████████ dated May 1, 2018.

⁵ Betsy McKay, Jennifer Talfas, Talal Ansari, *Coronavirus Declared Pandemic by World Health Organization*, Wall Street Journal (Mar. 11, 2020) <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>.

⁶ Jesse McKinley and Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency*, NY Times (Mar. 7, 2020).

⁷ Centers for Disease Control and Prevention, *If You Are At Higher Risk*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

⁸ Daniel A. Gross, *It Spreads Like Wildfire: Coronavirus Comes to New York Prisons*, The New Yorker (Mar. 24, 2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

COVID-19, such as Mr. [REDACTED]. For example, the New York City Board of Correction, the independent oversight Board for the city's jail system, has called on New York City to: (1) immediately remove from jail all people at higher risk from COVID-19 infection; and (2) rapidly decrease the jail population.⁹ Also, courts and public officials in other jurisdictions in California, Ohio and Texas, have already responded by taking the measures to release elderly and ill prisoners.¹⁰ This risk mitigation strategy is essential to protecting vulnerable groups from COVID-19. Accordingly, we urge you to accept Mr. [REDACTED] request for commutation.

II. Early Life and Family Background

Mr. [REDACTED] was born on [REDACTED] in the midst of the Cuban Revolution, to parents who chronically abused cocaine.¹¹ His father was killed by Fidel Castro's forces while Mr. [REDACTED] was still in his mother's womb.¹² To add further tragedy to his young life, Mr. [REDACTED] mother died when he was only six years old, leaving him an orphan and ward of the state.¹³ A neighbor took him in briefly, but when he turned ten, the state placed him in military school, where he was subjected to violence and abuse.¹⁴

In addition to the instability that characterized his formative years, Mr. [REDACTED] suffered from mental health issues, which he did not have the resources to fully understand or address as an adolescent. At the age of sixteen, while held involuntarily at military school, he attempted to flee Cuba and start a new life in the United States. However, his attempt to escape Communist Cuba to live the American dream was thwarted when he was caught by Cuban authorities several miles off the coast of Cuba while headed for Florida.¹⁵ He was immediately returned to Cuba and sentenced to prison time. This harsh sentence, imposed on him as a minor for the political crime of seeking to flee a regime that had detained him, also marked the end of Mr. [REDACTED] education.¹⁶ Mr. [REDACTED] recounted to us the hardships of the Cuban prison system, including his confinement in an adult maximum security prison despite being a young teenager.¹⁷ At one point during his incarceration in Cuba, Mr. [REDACTED] attempted suicide.¹⁸

⁹ Press Release, N.Y.C. Bd. of Corr., *New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19* (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf>.

¹⁰ See, e.g., Alene Tchekmedyian et al, *L.A. County releasing some inmates from jail to combat coronavirus*, L.A. Times (Mar. 16, 2020), <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>; Cory Shaffer, *Cuyahoga County official will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, CLEVELAND.COM (Mar. 12, 2020), <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>; WKBN Staff, *Local county jails making changes due to coronavirus outbreak*, WKBN (Mar. 12, 2020).

¹¹ Crime and Sentence Information, dated Aug. 2, 2017.

¹² Letter from [REDACTED] [REDACTED] dated Aug. 7, 2018.

¹³ Appellate Br. at 16, *People v. [REDACTED]* Ind. No. [REDACTED] (N.Y. Sup. Ct. May 1994).

¹⁴ Letter from [REDACTED] [REDACTED] dated Aug. 7, 2018.

¹⁵ Letter from [REDACTED] [REDACTED] dated Aug. 7, 2018.

¹⁶ Appellate Br. at 34-35, *People v. [REDACTED]* Ind. No. [REDACTED] (N.Y. Sup. Ct. May 1994).

¹⁷ Letter from [REDACTED] [REDACTED] dated Aug. 7, 2018.

¹⁸ Pre-Sentence Investigation Report at 9, dated Sept. 19, 1985.

In 1980, when his sentence was nearly complete, he was sent by the Cuban regime to the United States as part of the Mariel Boatlift, instead of being released.¹⁹ The Mariel Boatlift occurred during a housing and job shortage crisis in Cuba, which devastated the economy.²⁰ In response to this crisis, Fidel Castro announced that all Cubans wishing to leave Cuba could board boats at the port of Mariel for the United States.²¹ During this period, over 125,000 Cubans fled for the shores of the U.S., where public outrage erupted once it was discovered that some of the exiles were sent from mental health facilities and prisons.²²

Out of the 125,000 refugees that reached U.S. shores, some were forced into refugee camps, and numerous others were held in federal prisons while they awaited deportation hearings.²³ “In all, more than 1,700 exiles were jailed, and another 587 were detained until they could find sponsors.”²⁴ This group of refugees was immediately stigmatized—a New York Times headline cast them as “retarded people and criminals.”²⁵ Those who managed to remain free in the U.S., like Mr. ██████ lived in perpetual fear of starvation, violence, or deportation back to a hostile nation. Without the support of any family or friends, access to adequate mental or other health treatment, or a formal education, Mr. ██████ faced with few options, was ultimately caught up in the criminal justice system. *See infra* Section III.

Compounding the impact of his isolated and harsh childhood, Mr. ██████ has almost no living relatives. His sister, who lived in Italy and with whom he corresponded regularly, has since passed away. His brother remained in Cuba, becoming, in Mr. ██████ words, a “hardcore communist” who, after Mr. ██████ attempted escape, never spoke with Mr. ██████ again.

III. Prior Criminal History and Mitigation

After fleeing from a dictatorship in which he was a political prisoner, Mr. ██████ was abruptly thrust into the United States without either the support system or the requisite language skills to navigate life in the United States; it may be unsurprising that Mr. ██████ like thousands of the other “Marielitos,” has a criminal history. In an attempt to find his way in a new country and presented with few options for employment, Mr. ██████ in need of steady income, became intertwined with a group of people involved in criminal activities. As a result of these

¹⁹ The Mariel Boatlift occurred during a crisis of housing and job shortages in Cuba, which devastated the economy. *See April 20, 1980: Castro announces Mariel Boatlift*, History (2009), <https://www.history.com/this-day-in-history/castro-announces-mariel-boatlift>.

²⁰ *April 20, 1980: Castro announces Mariel Boatlift*, History (2009), <https://www.history.com/this-day-in-history/castro-announces-mariel-boatlift>.

²¹ *Id.*

²² *Id.*

²³ Andrew Glass, *Castro launches Mariel boatlift, April 20, 1980*, Politico (Apr. 20, 2018), <https://www.politico.com/story/2018/04/20/castro-launches-mariel-boatlift-april-20-1980-528819>.

²⁴ *Id.*

²⁵ Mirta Ojito, *The Long Voyage From Mariel Ends*, N.Y. Times (Jan. 16, 2005), <https://www.nytimes.com/2005/01/16/weekinreview/the-long-voyage-from-mariel-ends.html>; Edward Schumacher, *Retarded People and Criminals Are Included in Cuban Exodus*, N.Y. Times (May 11, 1980), <https://www.nytimes.com/1980/05/11/archives/retarded-people-and-criminals-are-included-in-cuban-exodus-200.html>.

connections, he was convicted of robbery in ██████ in 1981, and grand theft in the second degree in ██████ in 1983.²⁶ During his incarceration in ██████ he worked to improve his circumstances and earned a GED.²⁷

Following his release, in the mid-eighties Mr. ██████ was living in ██████ with a woman named ██████ ██████²⁸ During that time, he developed an addiction to cocaine, just as his parents had, which greatly impacted his conduct and interactions with others. Ms. ██████ recognized the change in behavior caused by his drug use, stating, “his entire personality changed . . . [h]e became very nervous and began yelling at everyone about everything.”²⁹ However, she emphasized that Mr. ██████ was always kind to her children, regularly talking to and playing with them.³⁰ Unfortunately, his addiction led him to commit further crimes between late 1984 and mid-1985, which he truly regrets.

Fully admitting to his guilt for all three crimes, on October 3, 1985, Mr. ██████ pled guilty to criminal possession of a weapon in the third degree, first-degree assault, and attempted arson in the second degree, for which he was sentenced to a total of 4-8 years in prison.³¹ He once again tried to take full advantage of opportunities afforded to him while incarcerated and completed 60 credits at Ulster Community College from 1987 to 1988.³² However, without any meaningful employment prospects or support system, the only option Mr. ██████ felt he had upon his release was to return to work for the same group of people who had led him to his prior convictions.

Current Conviction and Mitigating Circumstances

On October 22, 1992, Mr. ██████ was convicted of murder in the second degree, attempted murder, reckless endangerment, and possession of a weapon. He was convicted in connection with the shooting of ██████ ██████ and ██████ ██████ which resulted in the death of Mr. ██████ and injury to Mr. ██████ leg. Mr. ██████ was arrested the day after the shooting, when the police saw Mr. ██████ enter a car and the police recovered a gun used to commit the shooting from the car. Two of Mr. ██████ brothers identified him as the shooter; a third brother identified him as the driver, but did not identify him as the shooter. No one else was arrested in connection with the case. ██████ sentenced Mr. ██████ to consecutive sentences totaling 35 years-to-life.

Mr. ██████ admits he drove the car used to commit the shooting, but has consistently maintained that he did not shoot the victims. He understands that this may affect his petition, but is unable to accept guilt for something he knows he did not do. In fact, he has maintained his innocence for nearly thirty years, without even the slightest incentive for doing so. He insisted

²⁶ Appellate Br. at 5, *People v. ██████* Ind. No. ██████ (N.Y. Sup. Ct. May 1994).

²⁷ Pre-Sentence Investigation Report at 8, dated Sept. 19, 1985; Appellate Br. at 16, *People v. ██████* Ind. No. ██████ (N.Y. Sup. Ct. May 1994).

²⁸ Appellate Br. at 17, *People v. ██████* Ind. No. ██████ (N.Y. Sup. Ct. May 1994).

²⁹ Pre-Sentence Investigation Report at 8, dated Sept. 19, 1985; Appellate Br. at 17, *People v. ██████* Ind. No. ██████ (N.Y. Sup. Ct. May 1994).

³⁰ Pre-Sentence Investigation Report at 8, dated Sept. 19, 1985.

³¹ Appellate Br. at 5, *People v. ██████* Ind. No. ██████ (N.Y. Sup. Ct. May 1994); Respondent Br. at 3, *People v. ██████* Ind. No. ██████ (N.Y. Sup. Ct. Jan. 5, 1995).

³² Appellate Br. at 16, *People v. ██████* Ind. No. ██████ (N.Y. Sup. Ct. May 1994).

throughout his trial that he was innocent, and fought using every avenue available to him to appeal his conviction. Even now, while Mr. ██████ accepts responsibility and has expressed sincere remorse for his role in the loss of life, it has been important to his sense of dignity and self-worth to maintain his innocence while incarcerated.

Mr. ██████ has taken full responsibility for putting himself in this bad situation, surrounded by terrible influences, and for his admitted participation in driving the car used to commit the shooting. Even though three other passengers were in the car, Mr. ██████ was the only person convicted for this incident and he regrets his lack of judgment and blames only himself for not acting with the integrity of which he knows he was capable. He admits and believes that he deserved jail time for his past actions, and despite maintaining his innocence with respect to his current conviction, bears no ill-will regarding his conviction and current incarceration. Instead, he has used his time while incarcerated over the past 25-plus years to improve and grow into a more virtuous individual. He now believes that only he is capable of changing himself for the better, which he has worked years to do, with the goal of one day reconnecting with his daughter and living out his remaining years in a quiet and productive manner.

IV. Current Incarceration

While Mr. ██████ took some time to adjust to life in a maximum security prison, he has made tremendous strides and used the experience to rehabilitate himself. His new focus on introspection, honesty, and self-awareness is demonstrated by the progress he has made, particularly in the last thirteen years.

A. Early Period of Incarceration

Adjusting to life in prison proved difficult for Mr. ██████ especially in the first facilities in which he was placed. From 1993 to 2007, Mr. ██████ was moved between FAC Elmira, FAC Great Meadow, FAC Clinton, and FAC Upstate, which only complicated his ability to acclimate.

During this period Mr. ██████ received disciplinary sanctions for various incidents such as drug infractions, the possession of contraband, as well as a few violent outbursts including a fight with another inmate. Even so, it was clear from the outset that Mr. ██████ wanted to improve himself. During intake, Mr. ██████ expressed an interest in receiving academic training and work assignments.³³ His records indicate that he has participated actively in work assignments as well as ESL classes.³⁴ Mr. ██████ enrolled in a general business vocational course and eventually became the Program Aide of that class at Elmira Correctional Facility.³⁵ Mr. ██████ was also the Program Aide for the State Shop course at the Elmira Correctional Facility.³⁶ Also, Mr. ██████ served as the Program Aide in his time working in the library at the Clinton Correctional Facility.³⁷ Further, Mr. ██████ actively participated in the Inmate Program

³³ Crime and Sentence Information, Inmate Security Classification - Intake Interview at 6, dated Aug. 2, 2017.

³⁴ Inmate Progress Report, dated Jan. 16, 2015; Inmate Progress Report, dated Dec. 29, 2015. As mentioned above, Mr. ██████ believed he was not eligible to take further college courses because he was not a citizen.

³⁵ Inmate Program Assignment at 8, dated Aug. 2, 2017.

³⁶ *Id.* at 6.

³⁷ *Id.* at 5.

Assignment training (IPA) and has acted as a counselor to other inmates in orientation programs.³⁸ Based on our interactions with Mr. [REDACTED] it is evident that he is now virtually fluent in written and spoken English, despite entering prison without any significant grasp of the English language. Mr. [REDACTED] has used this knowledge to work as a teacher's aide, helping other inmates learn English.

B. Evidence of Behavioral Growth and Rehabilitation

When Mr. [REDACTED] was transferred to the Auburn facility in 2007, he finally found himself in a situation where he could stay out of trouble and realize his potential. He developed the self-awareness to recognize this, and has accordingly used every opportunity to request that he remain at Auburn.³⁹ His behavior during this period reflects both his self-awareness and rehabilitation. Since arriving at Auburn, and overall since 2006, Mr. [REDACTED] has not been involved in a single violent incident.⁴⁰ His inmate reviews make particular note of his "good attitude," "cooperative nature," and "continuing improved behavior."⁴¹

While at Auburn, Mr. [REDACTED] has only been involved in three very minor incidents.⁴² Each were related to possession of contraband, property in unauthorized areas, and/or altered items. Two of the three incidents in part had to do with altering his clothing because the clothing provided by the prison was too big for him (he is only 5'5"), or not warm enough.⁴³ In one instance, he used Velcro that he found in the recycle bins to create a belt, and in the other he tried to sew extra lining into his coat because it was not warm enough.⁴⁴ Finally, the most recent such infraction, on June 24, 2015, related to Mr. [REDACTED] unauthorized possession of a piece of paper depicting a ruler and the daily job description for the upholstery shop at which he was employed.⁴⁵ These minor incidents should not reflect on his overall fitness to re-enter society.

Save for these three minor infractions, Mr. [REDACTED] disciplinary record has been spotless for over thirteen years, and he has not had a single cited infraction for more than four years. This demonstrates that he has become a peaceful person, who has addressed his personal issues head on, and who now wants nothing more than to live out his senior years as a hard-working individual with a place in his daughter's life. As discussed in more detail below, his work ethic during this period and his overall attitude has been exemplary and further evidence his growth and rehabilitation.

³⁸ *Id.*

³⁹ See Inmate Review Packet, dated Aug. 7, 2009; Inmate Review Packet, dated Feb. 3, 2012; Inmate Review Packet, dated Aug. 7, 2013 (actively expressing an interest in staying at the Auburn facility in all reports on record since 2009).

⁴⁰ See Inmate Disciplinary History, dated Aug. 2, 2017. In addition, as noted above, he has not been involved in a drug incident since 1995. *Id.* at 14.

⁴¹ Inmate Review Worksheet, dated Aug. 1, 2012; Inmate Review Packet dated Aug. 8, 2012; Inmate Review Packet, dated Feb. 4, 2013.

⁴² See Inmate Disciplinary History, dated Aug. 2, 2017.

⁴³ Letter from [REDACTED] dated Mar. 1, 2018.

⁴⁴ *Id.* With respect to the incident on June 28, 2010, over eight years ago, there were various other items that the C.O. found in his cell. However, this is the last time he was found with any items in his cell which he was not entitled to hold there, demonstrating that he learned from the incident.

⁴⁵ *Id.*

C. Work Programs

Mr. ██████ records from Auburn demonstrate that he has a strong work ethic and the ability to quickly accumulate skills in unfamiliar work environments. All of his progress reports on file (which begin in 2007) show that Mr. ██████ performance is almost always classified as “excellent” in every category that he is evaluated.⁴⁶ In fact, on nearly ten unique occasions he has been evaluated as excellent in all categories.⁴⁷ The progress reports demonstrate that he has never received a score of “average,” “below average,” or “poor” in any category.⁴⁸ In other words, his work ethic has always been well above average, and as time has progressed, Mr. ██████ has made clear to various supervisors that his capabilities truly are excellent.⁴⁹

In what appears to be his most recent progress report from the library, dated December 29, 2015, his supervisor, ██████ wrote that he “will give any task a try” and that his supervisors “appreciate his honesty.”⁵⁰ We spoke to ██████ who confirmed that she thinks highly of Mr. ██████ character and work ethic.

Prior to his work placement at the library, Mr. ██████ worked in the upholstery shop for approximately seven years, where he was recognized as “an outstanding sewer,” “a master panel upholsterer,” “safety conscious,” “very respectful,” and “a real asset to the shop.”⁵¹ During this time, he worked on many special projects, and his evaluations evidence that he was able to quickly comprehend the task at hand and then execute it with ease.⁵² We had the opportunity to speak to his supervisor at the upholstery shop, ██████ and she informed us that the only reason Mr. ██████ left the upholstery shop was because of a new rule that prohibited inmates from working more than three years in any one work assignment. This had the unexpected collateral effect of depriving Mr. ██████ the continuing benefits of his learned mastery and status within the upholstery shop, but he retains an interest in seeking related work if released. Ms. ██████ also noted that it was unfortunate that he could no longer work at the upholstery shop because he was such a “good worker.”

⁴⁶ Inmate Progress Report, dated Sept. 25, 2007; Inmate Progress Report, dated Nov. 13, 2007; Inmate Progress Report, dated Jan. 8, 2008; Inmate Progress Report, dated May 2, 2008; Inmate Progress Report, dated May 27, 2008; Inmate Progress Report, dated Apr. 9, 2009; Inmate Progress Report, dated July 20, 2009; Inmate Progress Report, dated Sept. 11, 2009; Inmate Progress Report, dated Jan. 14, 2010; Inmate Progress Report, dated Sept. 20, 2010; Inmate Progress Report, dated May 6, 2011; Inmate Progress Report, dated Feb. 27, 2012; Inmate Progress Report, dated July 20, 2012; Inmate Progress Report, dated Mar. 7, 2013; Inmate Progress Report, dated Apr. 26, 2013; Inmate Progress Report, dated June 24, 2013; Inmate Progress Report, dated Aug. 12, 2013; Inmate Progress Report, dated Apr. 3, 2014; Inmate Progress Report, dated May 29, 2014; Inmate Progress Report, dated Jan. 16, 2015; Inmate Progress Report, dated Dec. 29, 2015.

⁴⁷ See *supra* note 38.

⁴⁸ See *supra* note 38.

⁴⁹ The photocopies of the records that we received were often greyed-out. Accordingly, these quotes are based on our best ability to interpret the copies of these records.

⁵⁰ Inmate Progress Report, dated Dec. 29, 2015. This is the most recent report in the documentation received from Auburn Correctional Facility in September 2017.

⁵¹ See Inmate Progress Report, dated Jan. 8, 2008; Inmate Progress Report, dated May 2, 2008; Inmate Progress Report, dated May 27, 2008; Inmate Progress Report, dated Apr. 9, 2009; Inmate Progress Report, dated July 20, 2009; Inmate Progress Report, dated Sept. 11, 2009.

⁵² See *supra* note 43.

In her written evaluations, Ms. ██████ reported that Mr. ██████ “takes great pride in his work”,⁵³ that he “works from the time he enters the shop until it is time to leave,” and that he does so with a positive attitude.⁵⁴ In 2008, Ms. ██████ wrote a letter about Mr. ██████ superior performance and attitude, classifying him as a “very dependable worker” and requesting “[i]f at all possible we would like him to remain here working in the shop.”⁵⁵ Ms. ██████ has since retired from the Department of Corrections (“DOC”) and during our phone conversations indicated she fully supports Mr. ██████ petition for clemency and included a letter in support of his petition.

Since Mr. ██████ has now been incarcerated for more than twenty-five years, he has no family (other than his daughter) and long ago severed contact with the individuals with whom he associated before his conviction. Accordingly, his work assignment supervisors are among the few people who truly know him and both of the individuals we spoke to believe that he is deserving of clemency. In particular, Ms. ██████ worked with him closely for approximately seven years, and we hope that you will take her opinion into account as you consider his request for commutation.

D. Deteriorating Health and COVID-19

Mr. ██████ has served over 25 years of his sentence and, as he is now 61 years old, has developed some illnesses. Mr. ██████ has been diagnosed with medical conditions such as diabetes,⁵⁶ chronic back pain with radiating symptoms,⁵⁷ high cholesterol,⁵⁸ and prostate gland enlargement.⁵⁹ While Mr. ██████ is not requesting clemency specifically as a result of these conditions, we believe the Board should take his deteriorating health into account in evaluating not only the lack of any further threat he poses to society, but the significant costs that his treatment poses to New York State. We also believe the Board should take Mr. ██████ health into consideration in light of the recent developments surrounding COVID-19, since Mr. ██████ is considered high risk of becoming severely ill from this virus due to his age and medical condition.

According to the CDC, those most vulnerable to becoming severely sick from this virus include: (1) adults over the age of 60 and (2) people who have serious chronic medical conditions like heart disease, diabetes and lung disease.⁶⁰ As Mr. ██████ is over the age of 60 and suffers from diabetes, he falls in both of those categories, and he is among those most vulnerable to COVID-19. Further, due to conditions in the facility where he is housed, it is impossible for him to take precautions such as social distancing. COVID-19 is spreading throughout New York’s prison system and the state’s Department of Corrections and Community Supervision (“DOCCS”) has confirmed that two prisoners at Wende Correctional Facility have

⁵³ Inmate Progress Report, dated Apr. 9, 2009.

⁵⁴ Inmate Progress Report, dated May 2, 2008.

⁵⁵ Letter from Ms. ██████ Regarding Work Performance, dated Aug. 12, 2008.

⁵⁶ Upstate University Hospital-Medical Records at 127, dated July 14, 2014.

⁵⁷ *Id.* at 267.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Centers for Disease Control and Prevention, If You Are At Higher Risk, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

tested positive for COVID-19.⁶¹ There have also been reports that coronavirus had infected an individual incarcerated at Mr. ██████ facility, Auburn Correctional Facility.⁶² To combat the spread of COVID-19 and protect vulnerable groups, correctional public health experts have recommended risk mitigation measures, including the release from prison of people who are at high risk. For example, the New York City Board of Correction, the independent oversight Board for the city's jail system, has called upon New York City to work with all its criminal justice partners to: (1) immediately remove from jail all people at higher risk from COVID-19 infection; and (2) rapidly decrease the jail population."⁶³ The New York City Board of Correction further urged the city to follow the leads of Los Angeles County and Cuyahoga County in Ohio, which have already started the process of releasing people to minimize a potential outbreak.⁶⁴

The New York City Board of Corrections also specified which inmates should be prioritized to be released, and Mr. ██████ meets those criteria. These include people who are over 50 and people who have underlying health conditions, including lung disease, heart disease, diabetes, cancer, or a weakened immune system.⁶⁵ They urged the Department of Corrections and Correctional Health Services ("CHS") to work with city partners, to begin identifying and releasing those prioritized inmates.⁶⁶

Mr. ██████ takes the prospect of living out his senior years as a free man seriously, and stated in a letter "[t]his has nothing to do with me requesting clemency, but I also want the Board to understand that I don't want to waste the few years I could have if I take care of myself, doing the same things I did in the past."⁶⁷ We urge you to accept this petition not only because of Mr. ██████ health issues, or his vulnerability to COVID-19, but also because of his personal growth, accomplishments and his desire to spend his remaining years with his family.

V. Re-entry Plans

A. Reconnecting With Family

Mr. ██████ now has a daughter, ██████ who was born after he was arrested. ██████ and her own daughter live in New York City, and ██████ and Mr. ██████ have written letters to each other throughout ██████ life. ██████ and her daughter are Mr. ██████ only remaining family. Mr. ██████ and ██████ both hope that they will be afforded an opportunity to reconnect in person. Mr. ██████ in particular, wants nothing more than to be able to be a part of his daughter's life.

⁶¹ Daniel A. Gross, *It Spreads Like Wildfire: Coronavirus Comes to New York Prisons*, The New Yorker (Mar. 24, 2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

⁶² *Id.*

⁶³ Press Release, N.Y.C. Bd. of Corr., *New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19* (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Letter from ██████ ██████ dated Oct. 22, 2018.

For the more than 25 years that he has been incarcerated, Mr. [REDACTED] has not been able to watch his daughter, [REDACTED] grow up. In his own words, “I have changed because I don’t even know a daughter who I love with all my heart, and I have changed because I want my granddaughter to see me as a good man, not an ex-convict.”⁶⁸ He deeply regrets not having been a present father figure, as he has been incarcerated for her entire life, and his driving motivation now is to make up for lost time. [REDACTED] who is now 28, shares this sentiment and wants the opportunity to get to know her father, and for her daughter to know her grandfather.

As he does not want his daughter to see him as a criminal, Mr. [REDACTED] asked her not to visit him, and thus the two have not seen each other since she was eight years old. He does not want the stress of visiting a prison to weigh on her or to do anything to make her life any more difficult by asking her to visit him. Instead, they correspond by letters, in which [REDACTED] updates him on her life and that of her daughter, his granddaughter. Mr. [REDACTED] longs for the day that he can be physically present in [REDACTED] life and serve as the positive influence to her and his new granddaughter.

[REDACTED] made clear that she would love the opportunity to get to know her father, and included a letter in support of his petition. [REDACTED] also mentioned how much she loves her father and that she can tell he has changed a lot over the course of their correspondence.⁶⁹ [REDACTED] also stated that she hopes her father gets a second chance to be in society, so that they can have a happy life together, and an opportunity to rebuild their bond and to have a father-daughter relationship.⁷⁰ Further, [REDACTED] is currently employed and is willing to assist her father in any way possible.

Mr. [REDACTED] has told us that even if this request is not decided in his favor, the process has significantly improved his life because it has helped bridge the gap between him and his family, to know that [REDACTED] is willing to help him apply for clemency. If given the opportunity, Mr. [REDACTED] plans on quietly living what is left of his elderly years while getting to know his daughter in person and assisting what little family he has left however possible.

B. Work and Housing

Mr. [REDACTED] is committed to living the rest of his life “with a fresh perspective.”⁷¹ He has learned the real things that make his life worth living are “love . . . compassion . . . [and] creativity.”⁷² Accordingly, he has also learned to keep his mind occupied in peaceful and artistic ways. He currently devotes his free time to developing brain-teaser puzzles with accompanying art. To date, he has created two full books of such puzzles comprising over 200 pages.⁷³ These volumes have been created entirely through the use of a pencil and ruler. With access to even slightly more advanced equipment, Mr. [REDACTED] believes he can turn his passion project into a

⁶⁸ Letter from [REDACTED] [REDACTED] dated Apr. 19, 2018.

⁶⁹ Letter from [REDACTED] [REDACTED] dated Nov. 7, 2018.

⁷⁰ *Id.*

⁷¹ Letter from [REDACTED] [REDACTED] dated Mar. 13, 2018.

⁷² Letter from [REDACTED] [REDACTED] dated Apr. 19, 2018.

⁷³ For a sampling of the puzzles, *see* Letter from [REDACTED] [REDACTED] dated Feb. 5, 2018; Letter from [REDACTED] [REDACTED] dated Apr. 5, 2018; Letter from [REDACTED] [REDACTED] dated May 1, 2018.

work of publishable quality. In addition to finding a steady job to serve as a consistent source of income, Mr. [REDACTED] plans to spend his free time refining and hopefully publishing his works.

Beyond the dream of publishing his puzzles, Mr. [REDACTED] has accumulated numerous practical skills that he can utilize in finding employment. He is an experienced tailor and upholsterer who works incredibly well with his hands, as his progress reports make clear. He can also translate between English and Spanish, and can work as a clerk typing in both English and Spanish. He prides himself on the ability to serve as a clerk or work in any administrative capacity, as he has recently proven that he can thrive in such a setting, working with Ms. [REDACTED] at the library. His time working in the library has helped him develop strong organizational and communication skills.

Mr. [REDACTED] recently reached out to the [REDACTED] to inquire about opportunities should he be released. The [REDACTED] provided him with a letter of reasonable assurance, noting that they have an Employment Services Unit that can assist him in his job search upon release.⁷⁴ In addition to the employment services offered, the [REDACTED] offers an array of other programs including a 59-bed transitional housing program that provides emergency housing to individuals that are deemed eligible upon their release from prison. Further, Mr. [REDACTED] would be able to live with his daughter, [REDACTED] were he to be released from prison. If it proves necessary, Mr. [REDACTED] has expressed the willingness to do everything required in order to utilize these programs until he is self-sufficient.

VI. Scientific and Social Context

Mr. [REDACTED] now a 61 year-old man, has already served over 25 years of his sentence and is no longer a danger to society. In addition to his personal development described above, numerous research studies have demonstrated that the vast majority of individuals simply “age out” of criminal behavior.⁷⁵ While those aged 50-64 represent 19% of the population, they represent only 8.3% of all arrests.⁷⁶ Indeed, “individuals over the age of 55 are among the least likely to commit crime. Paying large sums of money and dedicating criminal justice resources to this age group is unlikely to have a large impact on crime and violence.”⁷⁷ This same trend has been documented specifically within New York State: “[older inmates] engage in fewer incidents of misconduct while incarcerated and have a lower rate of re-arrest once released than those who are younger.”⁷⁸

Likewise, the burden on the state posed by the continued incarceration of well-behaved older inmates far exceeds any value derived from compelling such individuals to complete extended sentences. The significant growth in the geriatric prison population from 2007 to 2016

⁷⁴ See Letter from [REDACTED] dated Apr. 26, 2018.

⁷⁵ See, e.g., Caitlin Cornelius et al., *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling* at 1, http://scs.org/wp-content/uploads/2017/06/6_Final_Manuscript.pdf (“The relationship between age and crime is one of the most solid within the field of criminology.”); David Farrington, *Age and Crime*, 7 *Crime and Justice* 189, 235 (1986) (“The perceived costs of crime increased greatly as [inmates] got older, not only in terms of the increased likelihood of lengthy prison sentences, but also in terms of the consequent risk of losing their families.”).

⁷⁶ Michael Rocque et al., *Age and Crime* at 1, *Encyclopedia of Crime and Punishment* (Dec. 2015).

⁷⁷ *Id.* at 6.

⁷⁸ *New York State’s Aging Prison Population* at 10, Office of the New York State Comptroller (Apr. 2017).

is a trend that is not unique to New York State, but “it poses issues that [New York State] must address, including the cost of incarcerating a growing number of older individuals.”⁷⁹ Nationally, the number of prisoners aged 55 or older grew 280% between 1999 and 2016.⁸⁰ During this same time period, the proportion of older inmates grew from 3% of the total prison population to 11%.⁸¹ “[O]lder prisoners cost approximately three times as much as younger prisoners to incarcerate, largely due to healthcare costs[, yet] older former prisoners present the least risk of recidivism[.]”⁸² Certain experts have suggested that recidivism rates are generally lower for older individuals than their younger counterparts and as such, early release for older individuals may be an appropriate strategy.⁸³ “Research has shown that rates of recidivism decrease significantly with age, with the elderly incarcerated presenting the lowest risk of offending after release from prison.”⁸⁴ Likewise, older inmates absorb significantly increased administrative and housing costs, as they experience a higher rate of medical conditions requiring treatment and are placed in specialized segregated housing units at higher rates.⁸⁵

For New York State in particular, the same holds true: it costs New York State an estimated \$100,000 annually to house an older inmate, yet while the overall prison population has shrunk by 17% over the past decade, the percentage of older inmates has grown by 46%.⁸⁶ In recognition of these challenges, Governor Andrew Cuomo has announced “comprehensive reforms to streamline the process for incarcerated individuals to return to the community” through such initiatives as “geriatric parole” for inmates over the age of 55 who have served at least half of their sentences and impose heightened medical costs on New York.⁸⁷

Further, multiple individuals with comparable or even more serious criminal records than Mr. [REDACTED] have recently received sentence commutations in New York State. For instance, Alphonse Riley-James received a commutation on December 31, 2018, despite convictions for

⁷⁹ *New York State’s Aging Prison Population—Message from the Comptroller*, Office of the New York State Comptroller (Apr. 2017).

⁸⁰ Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew Charitable Trusts (Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

⁸¹ *Id.*

⁸² Brie Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, J. of the American Geriatrics Society 1 (May 29, 2012); see also R.V. Rikard & Monica Williams, *Aging Inmates*, Encyclopedia of Corrections 2 (Aug. 2017) (“[t]here is a significant economic cost to providing health care for the increasing number of aging inmates.”)

⁸³ *New York State’s Aging Prison Population* at 10, Office of the New York State Comptroller (Apr. 2017).

⁸⁴ *Id.*

⁸⁵ R.V. Thivierge-Rikard & Maxine Thompson, *The Association Between Aging Inmate Housing Management Models and Non-Geriatric Health Services in State Correctional Institutions*, 19 J. of Aging & Social Policy 39 (Oct. 2008); Laura M. Maruschak, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Dep’t of Justice, Office of Justice Programs (Feb. 2015).

⁸⁶ *New York State’s Aging Prison Population* at 5, Office of the New York State Comptroller (Apr. 2017); Carl Campanile, *Cuomo looks to free old, sick inmates in bid to save money*, N.Y. Post (Jan. 17, 2018), <https://nypost.com/2018/01/17/cuomo-looks-to-free-old-sick-inmates-in-bid-to-save-money/>

⁸⁷ *Governor Cuomo Announces Comprehensive Reforms to Improve the Re-Entry Process for Formerly Incarcerated Individuals*, New York State Governor Andrew M. Cuomo Press Room (Mar. 5, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-comprehensive-reforms-improve-re-entry-process-formerly-incarcerated>.

nearly the exact same crimes as Mr. ██████⁸⁸ The same is true for recent commutes Roy Bolus, Michael Crawford, and Dennis Woodbine.⁸⁹ As New York Secretary of State Rossana Rosado noted in response to these grants, “[t]he goal of the criminal justice system is to repair wrongs, not to inflict life-long punishment.”⁹⁰ This sentiment was echoed by Anthony Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision, who noted that “[f]or a society to be just, then justice must be tempered with mercy.”⁹¹

Also, given the extraordinary circumstances presented by the COVID-19 pandemic, the health and well-being of prisoners who are at high risk, such as Mr. ██████ calls for their release from prison. As the Board of Correction has reported, New York’s prisons face challenges combating disease transmission “on a normal day” and “even more so during a public health crisis.”⁹² They have accordingly recommended the release of those particularly vulnerable to COVID-19, for a number of reasons, including limiting the spread of COVID-19 among both those in custody and those who work in prison facilities, and minimizing the number of individuals who will require medical care.⁹³ Additionally, those in higher-risk categories, such as Mr. ██████ should they contract COVID-19, will need advanced supportive care requiring highly specialized equipment that is already limited in supply.⁹⁴

The purposes of justice have already been served by Mr. ██████ current term of incarceration and he is also at high risk for becoming severely ill from COVID-19. Most older prisoners want to spend their remaining time with their families, as they are coming to terms with mortality, regret their past actions and hope to make amends.⁹⁵ Mr. ██████ is no different. His almost spotless record for over 13 years and his desire to continue to become a better person, among other things, indicate that he is remorseful and if given the chance, would become a contributing member of society.

VII. Conclusion

Mr. ██████ now in his sixties, has lived a difficult life, one characterized by hunger, loss, homelessness and deprivation. While he was largely unable to control the circumstances that brought him to the United States as a Cuban refugee in the first place, he finally has a chance to start fresh and reconnect with his daughter, the emotional pillar he has lived his entire life

⁸⁸ *Governor Cuomo Grants Clemency to 29 Individuals*, New York State Governor Andrew M. Cuomo Press Room (Dec. 31, 2018), <https://www.governor.ny.gov/news/governor-cuomo-grants-clemency-29-individuals>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Press Release, N.Y.C. Bd. of Corr., New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19* (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf>.

⁹³ *Id.*

⁹⁴ *See, e.g., Jan Ransom and Alan Feuer, ‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, NY Times (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html> (noting that Rikers Island is not equipped with any ventilators).

⁹⁵ Jamie Fellner, *Graying Prisoners*, N.Y. Times (Aug. 18, 2013), https://www.nytimes.com/2013/08/19/opinion/graying-prisoners.html?_r=1&.

without. He has taken responsibility for and hopelessly regrets making the unfortunate decisions that led to his incarceration. He wishes that he could go back and do things the right way. But most importantly, Mr. [REDACTED] finally has something to live for—a relationship with his daughter [REDACTED]. He would not do anything to place that relationship in jeopardy. He wants her only to know her father as a principled man who lives life the right way, and he finally has an opportunity to do just that.

Mr. [REDACTED] is aware of the ways in which maintaining his innocence complicates his clemency petition. However, the position Mr. [REDACTED] has maintained regarding his innocence should not detract from his application but rather should underscore the appropriateness of clemency where Mr. [REDACTED] has also demonstrated himself a prime candidate for release, and where he accepts responsibility for his participation in the underlying sequence of events that led to his conviction.

Mr. [REDACTED] recognizes that he is not without significant blame, and that he made mistakes as a young man leading to his previous, less serious convictions, and for all these mistakes, he is remorseful. He also accepts that his prior lifestyle and poor decisions contributed to his conviction. Nevertheless, Mr. [REDACTED] has not let his conviction fill him with spite and resentment. Rather, he has seen it as an opportunity to better himself, as this petition demonstrates, to turn his life around, and to prove to others that he is not the person they thought he was.

Mr. [REDACTED] has shown consistent growth throughout his incarceration and has truly been rehabilitated. His first years in prison, like his impoverished childhood as an orphan in Cuba or his unplanned and unsupported arrival in the United States, were marked by a difficulty in adjusting to his changed circumstances and by feelings that he was an outsider. During the course of his incarceration, when he was finally free of negative influences in his life, Mr. [REDACTED] grew into the person that he was always capable of becoming. He has taken coursework, become fluent in English, developed useful and marketable skills, learned to work with others and to mentor them, created more than one full book with accompanying artwork, and made plans to finally start a life with his daughter. He is not a danger to society, and wants nothing more than to be given the chance at freedom that, as a mature and thoughtful adult, he never had before. Accordingly, we urge you to accept Mr. [REDACTED] request for commutation and provide him with the opportunity to start fresh.

SHEARMAN & STERLING LLP

599 LEXINGTON AVENUE
NEW YORK, NY 10022-6069
+1.212.848.4000

bpolovoy@shearman.com
212-848-4703

March 30, 2020

VIA EMAIL
[REDACTED]

New York State Department of Corrections
and Community Supervision
Executive Clemency Bureau
The Harriman State Campus – Building 2
1220 Washington Avenue
Albany, NY 12226-2050

Request for Urgent Action on Pending Executive Clemency Application of
[REDACTED]

Dear Executive Clemency Bureau:

In light of the extraordinary threat posed by COVID-19 to older adults with serious medical conditions (including, most critically, lung disease), we write to urge the immediate approval of [REDACTED] Executive Clemency Application (which was submitted on February 23, 2018 and supplemented on November 13, 2018 and December 20, 2019).

Mr. [REDACTED] is 59 years old and suffers from Chronic Obstructive Pulmonary Disease (“COPD”), advanced Type-2 diabetes, and high blood pressure, among other conditions. DOCCS has designated him as “Medical Level #1” – the most serious classification. He is incarcerated at Sing Sing, and he takes 11 medications daily pursuant to the instructions of the treating physicians there. He has served 14 years of a 17½ years-to-life sentence for burglary in the second degree and criminal possession of stolen property in the fourth degree. He would be eligible for parole in 3½ years.¹

¹ Pursuant to the directions of the treating physicians at Sing Sing, Mr. [REDACTED] takes the following medicines: (1) sitagliptin 100 mg; (2) gemfibrozil 600 mg; (3) hydrochlorothiazide 50 mg; (4) aspirin 81mg; (5) metformin 1000 mg; (6) potassium chloride 8 mEq; (7) glipizide XL 5 mg; (8) Invokana (canagliflozin) 300 mg; (9) omega-3-acid ethyl esters 1 gram; (10) metoprolol 25 mg; and (11) pioglitazone 30 mg. Mr. [REDACTED] has been requesting medical records and attempted to see his physician today
SHEARMAN.COM

March 30, 2020

As set forth in his Executive Clemency Application (which accompanies this email), Mr. [REDACTED] has no history of violence, and his record in prison demonstrates that he poses no threat to public safety. He has been a model inmate: his programmatic records show that he has made the most of his time in prison by seeking work and educational opportunities, and he has used his impressive cooking skills to benefit the community.

Mr. [REDACTED] exemplary behavior and close ties with his family qualified him to participate in the Family Reunion Program with his son and his granddaughters. Mr. [REDACTED] son, [REDACTED] confirmed to us on the telephone today that he is of course willing and able to have his father live with him and his family immediately upon his father's release.

As a 59-year-old man with lung disease and other serious medical conditions, Mr. [REDACTED] – at “medical level #1” – is at extreme risk if he is exposed to COVID-19. At Sing Sing, that is a question of *when*, not *if*.

I believe that his Executive Clemency Application presents a compelling case on the merits alone; in light of the risks posed by COVID-19 and the fact that Mr. [REDACTED] release would not pose any threat to the community, I think it is an exceptionally compelling case. We urge the Executive Clemency Bureau to approve Mr. [REDACTED] application and order his immediate release from prison.

We thank the Executive Clemency Bureau for its urgent consideration of Mr. [REDACTED] application. I am available at (917) 992-7986 (cell) to answer any questions.

Very truly yours,

/s/ Brian H. Polovoy
Brian H. Polovoy

Attachments

cc: Jeremy Shockett, Esq. (jeremy.shockett@exec.ny.gov)

David Crow, Esq. (DCrow@legal-aid.org)
The Legal Aid Society

but was unable to because of conditions at Sing Sing. He hopes to be able to see his physician on March 31, who would be able to provide additional information on his diseases. Given the urgency of the situation and the difficulty in our obtaining these medical records in a timely fashion (even assuming Sing Sing will email them to us or allow Mr. [REDACTED] to do so), we are submitting this request now instead of waiting. Mr. [REDACTED] has previously approved the release of his medical records in connection with his Executive Clemency Application, and the Bureau is therefore able to obtain confirmation and all records from his treating physicians.

April 2, 2020

Blaine (Fin) V. Fogg
President

New York State Department of Corrections and Community
Supervision
Executive Clemency Bureau
Harriman State Campus
1220 Washington Avenue
Albany, New York. 12226

Janet E. Sabel
Attorney-in-Chief
Chief Executive Officer

Justine M. Luongo
Attorney-in-Charge
Criminal Practice

VIA E-MAIL: [REDACTED]

Re: Executive Clemency Application:
[REDACTED]

Indictment Number [REDACTED]

To the Executive Clemency Bureau:

I am writing this emergency clemency application on behalf of [REDACTED] [REDACTED] who is currently incarcerated at Sullivan Correctional Facility. This application is predicated on the fact that Mr. [REDACTED] extremely poor medical health puts him at serious risk of death if he contracts COVID-19. Mr. [REDACTED] was convicted in Queens County in 2013 of murder for a crime that occurred in 1980 when he was seventeen years old. Mr. [REDACTED] is currently in the eleventh year of a 25 to life sentence. His earliest release date is 1/6/34. His case is currently before the Queens District Attorney's Conviction Integrity Unit, which has agreed to conduct DNA testing on items that were never tested. I have sent a copy of this application to the Conviction Integrity Unit and it is currently being evaluated by their office's screening process.

[REDACTED] [REDACTED] MEDICAL CONDITION

Mr. [REDACTED] currently suffers from Chronic Obstructive Pulmonary Disease, Congestive Heart Failure, Hypertension, Diabetes, Seizures and Peripheral Neuropathy. While incarcerated, he has suffered a heart attack and has contracted pneumonia several times. He just returned from Albany Medical Center where he was

hospitalized for 4 days after having difficulty breathing. He was told that he had water in his lungs.¹ He was tested for COVID-19 but tested negative. In the past two months, I spoke to Mr. [REDACTED] on the phone twice. Each time he did not feel well and had been to the medical clinic that day. This past Monday, March 30th, he was hooked up to the nebulizer and he told me that his heart rate was 187/90. I visited him in prison last July and he walked slowly and with a cane.

Although he has signed a HIPAA release, to date I have been unable to obtain his medical records. Mr. [REDACTED] has a complete set of his medical records that are available for review. I am currently attempting to secure those as well.

In the interim, I have attached a letter from Dr. [REDACTED], an [REDACTED] who has been ranked one of the 100 best doctors in New York City by New York Magazine (see attached letter).² Although Dr. [REDACTED] has not treated Mr. [REDACTED] he did confirm that someone with [REDACTED] multiple medical conditions, combined with his age, put him at extreme risk, should he contract COVID-19.

Discharge Plans

I have spoken with [REDACTED] [REDACTED] [REDACTED] mother. She said that her son can live with her if he is released. She lives at [REDACTED] [REDACTED]

With respect to obtaining the necessary benefits and being able to report remotely to parole, [REDACTED] the president of the [REDACTED], has given assurances that the [REDACTED] will provide remote case management for Mr. [REDACTED]. Specifically, [REDACTED] will provide him with a cell phone so that he can report remotely to parole. It will also set him up with his necessary benefits, such as SSI and Medicaid, and any special conditions if imposed upon him.

¹ I further confirmed that he suffers from all of the above conditions – with the exception of seizures – with his mother, [REDACTED] [REDACTED] with whom he would live if discharged. Ms. [REDACTED] informed me that she also suffers from COPD, congestive heart failure, hypertension and diabetes

² <https://nymag.com/health/bestdoctors/2010/66480/>

Crime, Prosecution and Postconviction Investigation

On September 10, 1980, [REDACTED] was murdered in his home during what appeared to be a break in burglary. Mr. [REDACTED] was found dead in a living room chair, with bloody cuts on the side of his forehead and the bridge of his nose. There was a bloody pillow found on the floor near the front door, as well as a bloody spur that was determined to be part of a gun.

Crime scene detectives obtained 28 fingerprint samples and vouchered the bloody pillow, along with the spur and bloody floor mats. Manual fingerprint comparisons of the fingerprints were compared to 53 suspects with histories of break in burglaries. No manual matches were made. After one suspect was arrested and then released, no one was arrested for this crime and the case was closed in the spring of 1982.

The computerized fingerprint system SAFIS (State Automated Fingerprint Identification System) was created in 1990. By 1991, [REDACTED] fingerprints were in the system. In 1992, the fingerprints from this case were entered into SAFIS, but no matches were found. In 2008, a cold case detective ran the fingerprints into the system again and 8 possible candidates were listed. [REDACTED] was the first name listed. His fingerprints were identified on three jewelry boxes. No other comparisons were made, despite the fact that there was a note stating that there were **“other unidentified fingerprints of value remaining in the case.”** Once [REDACTED] was arrested, the police obtained a sample of his DNA, which was compared to some of the fingerprints. He was excluded from some of those prints, which were found on jewelry boxes. There was at least one test that listed an unknown male, and excluded both Mr. [REDACTED] and the deceased. Other prints did not provide sufficient DNA for testing.

Medical Examiner [REDACTED] testified that the cause of death was asphyxiation by strangulation. Dr. [REDACTED] testified at trial that the bloody found on that discarded pillow was either the result of the deceased having laid faced down on the pillow, or someone putting the pillow over Mr. [REDACTED] bloody face. A next door neighbor told

the police – detailed in a police report -- that she heard moaning sounds and then something that sounded as if someone was being gagged.

██████████ was fifty years old when he was indicted in 2012. Because of the thirty-two years that had passed, he was unable to provide defense witnesses at trial. He has maintained his innocence from the beginning of this case and continues to seek exoneration.

In December, 2019, Mr. ██████████ filed a motion with the Queens District Attorney's Office, asking that the office test the blood pillowcase and spur for possible DNA; and if there is a positive identification, to run that against the remaining fingerprints in this case. ██████████, a fingerprint expert who has worked with the Innocence Project on successful exonerations, attested that the automated fingerprint system has been significantly improved in its accuracy, and that the remaining fingerprints should be tested for both the exclusion of Mr. ██████████ and to see if they yield any other identified persons. Should the pillow yield DNA, those fingerprints can be checked to see if they match the person whose DNA is found on the pillow.³

The Queens County Conviction Review Unit has agreed to test the pillow and possibly the fingerprints, once the evidence is located. However, locating evidence from an old case can be time consuming, and to date, this evidence has not yet been found. Now with most offices being closed, the search will be delayed even longer.

About ██████████ Himself

Because of his medical conditions, Mr. ██████████ has been classified as “medically unassigned,” meaning that it was considered too medically risky to permit him to participate in programs. He spends his days in the law library working on his case, and reading and listening to the news in his cell. He told me that he likes to stay informed and is a fan of WNYC – especially “On the Media.” Although he has a criminal record – he will be the first to tell you that he has not led a perfect life - he worked throughout his life. Because of his multiple impairments, he will not be a safety risk to the community.

³ This motion and its exhibits can be sent to the Executive Clemency Board, should it wish to view it.

In sum, [REDACTED] [REDACTED] is an extremely sick 58 year old man whose continued incarceration during this pandemic puts him at risk of death. He is very close with his mother and he will be able to live with her if released. Whatever restrictions or case management is required, the [REDACTED] [REDACTED] is willing to set that up for him. While the crime for which he was convicted is a serious one, there were always problems with the evidence and the Conviction Review Unit in Queens has agreed to DNA testing once that evidence is located. For all of these reasons, I respectfully urge this Board to recommend clemency for [REDACTED] [REDACTED]

Respectfully submitted,

Elizabeth S. Felber

Elizabeth S. Felber
Supervising Attorney
Wrongful Conviction Unit
The Legal Aid Society
199 Water Street
New York, New York. 10038
efelber@legal-aid.org
(917) 363-3660

April 3, 2020

VIA EMAIL

PardonsAndCommutations@doccs.ny.gov

New York State Department of Corrections
and Community Supervision
Executive Clemency Bureau
The Harriman State Campus – Building 2
1220 Washington Avenue
Albany, NY 12226-2050

Lauren E. Jones
Staff Attorney
T (212) 577-7955
F (646) 514-1463
ljones@legal-aid.org

Janet E. Sabel
Attorney-in-Chief
Chief Executive Officer

Justine M. Luongo
Attorney-in-Charge
Criminal Practice

David Loftis
Attorney-in-Charge
of Post-Conviction and Forensic Litigation

Executive Clemency Application:

Dear Executive Clemency Bureau:

Mr. [REDACTED] is 61 years old and has COPD, asthma, angina, and GERD. His age and lung and heart disease put him at high risk for having serious complications should he contract COVID-19. He co-owns a home with his siblings that he can return to upon his release. His 7 year, minimum sentence for second-degree burglary was never intended to be a death sentence, and thus we plead for the governor to release him immediately. Under these circumstances, any further incarceration is unduly harsh and punitive.

Mr. [REDACTED] Medical Conditions

Mr. [REDACTED] is 61 years old and currently incarcerated at Five Points Correctional Facility. He has Chronic Obstructive Pulmonary Disease (“COPD,” a chronic inflammatory lung disease), asthma, angina, peripheral neuropathy, and Gastroesophageal Reflux Disease (“GERD”). His asthma and COPD cause shortness of breath that Mr. [REDACTED] describes being very scary. He requires daily use of two separate prescription inhalers, Symbicort and Advair.

Mr. [REDACTED] has had multiple heart conditions in the last two decades. In approximately 2008, Mr. [REDACTED] was diagnosed with angina, a type of coronary artery disease, and he also regularly has low blood pressure, which doctors believe is related to tachycardia. Currently, he experiences severe chest pain on a regular basis. Both of Mr. [REDACTED] parents suffered from heart disease; his father died of a heart attack and his mother passed away from complications of diabetes and congestive

heart failure. In addition to his lung and heart diseases, Mr. [REDACTED] has a severe case of GERD, for which he takes medication that lessens but does not eliminate the pain, and also has peripheral neuropathy in his arm.

Since he has been incarcerated, Mr. [REDACTED] has been to the hospital multiple times, but, in general, he has found accessing health care at DOCCS to be a struggle. When he was in the community, he had a team of cardiologists and was almost given a pacemaker, but he does not see a cardiologist at all in state custody. He also used to be prescribed nitroglycerin, a medication that treats angina, but DOCCS took him off of that prescription. His requests for sick calls have not always been acknowledged.

Mr. [REDACTED] age, lung disease, and heart disease mean that he has a high risk of experiencing serious complications, including death, as a result of COVID-19.

The Conditions in Five Points Correctional Facility

In Five Points Correctional Facility, there is no hand sanitizer, and no more soap than usual. Even then, the soap is bar soap, not the liquid soap recommended by the CDC.¹ He is unable to clean his cell every day because cleaning supplies are not provided. No one wears masks.

Mr. [REDACTED] is still required to eat meals in the chow hall with just under 50 people gathered together. While the facility experimented with serving meals to people in their cells, rather than requiring these large gatherings, Mr. [REDACTED] tells me that they are now returning to the chow hall. Even with the social distancing measures Mr. [REDACTED] told me that DOCCS put into place, like requiring an empty seat between people, these large groups gathered together present a serious health risk. Additionally, the people who prepare and serve food do not wear masks.

These conditions mean that Mr. [REDACTED] cannot maintain the minimum recommended cleanliness or hygiene, nor can he practice social distancing to keep himself safe. In these conditions, his continued custody presents a great risk that Mr. [REDACTED] will contract COVID-19 and experience serious complications.

¹ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last updated March 23, 2020).

Mr. [REDACTED] Incarceration, Achievements, and Plans for Release

Mr. [REDACTED] has served more than half of a 7 year sentence for second-degree burglary. Mr. [REDACTED] who has struggled with substance abuse, stole a laptop and an iPad from an apartment in Manhattan. His Conditional Release Date is in April 2022, but he is on track to receive a Limited Credit Time Allowance (LCTA), which would move up his release date to October 2021. During his incarceration, Mr. [REDACTED] has been a model inmate. He has a spotless disciplinary history. He has not received one ticket. In state custody, where many minor mistakes are subject to discipline, this is quite an accomplishment.

Mr. [REDACTED] has also completed all required programming. For the first time, he was able to attend intensive substance abuse treatment, and he successfully completed Alcohol and Substance Abuse Treatment (“ASAT”) in spring 2019. Mr. [REDACTED] has been sober for years now and plans to remain so for the rest of his life. He has also completed vocational training and Aggression Replacement Treatment (“ART”).

In addition to programming, Mr. [REDACTED] has learned a new trade, receiving two titles in residential electric work. He was then selected to be an Inmate Program Associate (“IPA”) for the electrical trade, which is a paid assignment where “carefully screened and trained inmates assist Transitional Services, Education, and Vocational Staff.” (Department of Corrections and Community Supervision, Transitional Services Program, available at <https://doccs.ny.gov/inmate-program-associate> (last visited April 2, 2020)). This vocational training, along with an associate’s degree from Lee College that Mr. [REDACTED] received in the early 1990s, put Mr. [REDACTED] in a good position to find gainful employment upon his release. In his spare time, Mr. [REDACTED] loves to read, and he has a particular affinity for nonfiction. He works as an administrative clerk in the general library.

When he is released, Mr. [REDACTED] plans to return to the home that he co-owns with his siblings. His sister [REDACTED] who currently lives there, is a minister. I have been in touch with his siblings, who have confirmed that he co-owns the home and is welcome to live there. His older brother, [REDACTED] and his sister [REDACTED] told me that they will do whatever they can to help Mr. [REDACTED] get back on his feet after he is released.

* * *

In light of the risks posed by COVID-19 and Mr. [REDACTED] age and serious health conditions, we urge the Executive Clemency Bureau to approve Mr. [REDACTED] application and order his immediate release from prison.

We thank the Executive Clemency Bureau for its urgent consideration of Mr. [REDACTED] application. I am available at (917) 922-7829 (cell) to answer any questions.

Sincerely,

Lauren E. Jones
Staff Attorney

April 3, 2020

VIA EMAIL

New York State Department of Corrections
and Community Supervision
Executive Clemency Bureau
The Harriman State Campus – Building 2
1220 Washington Avenue
Albany, NY 12226-2050
[REDACTED]

Lauren E. Jones
Staff Attorney
T (212) 577-7955
F (646) 514-1463
ljones@legal-aid.org

Janet E. Sabel
Attorney-in-Chief
Chief Executive Officer

Justine M. Luongo
Attorney-in-Charge
Criminal Practice

David Loftis
Attorney-in-Charge
of Post-Conviction and Forensic Litigation

Re: Emergency Clemency Application for Immediate Release
[REDACTED]

Dear Executive Clemency Bureau:

This is an emergency clemency application for the immediate release of Mr. [REDACTED] [REDACTED] who is currently incarcerated at Fishkill Correctional Facility. Mr. [REDACTED] is 55 years-old, receives treatment for his serious mental health needs, and has had an open parole date since November 4, 2019. The Parole Board already decided that he was eligible for, and indeed had earned, parole after more than 21 years in prison. He only has not been released due to his inability to find housing compliant with the Sexual Assault Reform Act (“SARA”), Exec. L. § 259-c(14). Given current prison conditions under the threat of widespread coronavirus contagion, Mr. [REDACTED] should be released immediately.

Mr. [REDACTED]

[REDACTED] [REDACTED] was born on May 21, 1964. In 1998, at the age of 34, a jury convicted him of attempted first-degree criminal sexual act, P.L. §§ 110.00, 130.50, and attempted first-degree sexual abuse, P.L. §§ 110.00, 130.65, and the court sentenced him to 20 years to life in prison. He has now done over 21 years in prison.

Mr. [REDACTED] is a vulnerable individual. He is 55 years-old. Throughout his 21 years in prison, he also has received mental health treatment from the Office of Mental Health.

During his period of incarceration, he received only *one* Tier III ticket. As extraordinary, all of his tickets—including only nine Tier II tickets, all of which were non-violent and non-sexual—are from more than *10 years* ago. Not only does Mr. [REDACTED] not pose a threat in prison; he is ready to be a law-abiding citizen outside of prison, as well.

With all the evidence it had before it, and following an interview with Mr. [REDACTED] the Parole Board determined that he had earned his right to be paroled into the community. As of November 4, 2019—five months ago—he has had an open release date.

On January 24, 2020, he was adjudicated a Level 2 sex offender to whom the Sexual Assault Reform Act applies. Exec. L. § 259-c(14). Mr. [REDACTED] is currently incarcerated at Fishkill Correctional Facility. The Office of Mental Health is involved in his discharge planning, and once released, he will be subject to supervision for the rest of his life.

Coronavirus/COVID-19

The coronavirus and rapid spread of COVID-19 have created an emergency throughout the State of New York—but especially in New York’s prisons. On Monday, March 30, the first incarcerated person in New York, Juan Mosquero, died at Sing Sing Correctional Facility—only 32 miles from where Mr. [REDACTED] is incarcerated. Mr. Mosquero was 58 years-old, only three years older than Mr. [REDACTED]. See Andrew Denney, *First New York Prisoner With Coronavirus Dies at Sing Sing*, N.Y. Post (April 2, 2020).

This week, the Brooklyn District Attorney’s Office and the former New York City Health Commissioner warned that “this is a public health crisis that threatens to become a humanitarian disaster” and recommended that the Governor grant *early* parole to people who are within 180 days of completing their sentences. See Mary Bassett, DA Eric Gonzalez, and Daren Walker, *Andrew Cuomo, Stop a Coronavirus Disaster: Release People From Prison*, N.Y. Times (March 30, 2020). Mr. [REDACTED] does not need early parole; he already was granted parole. He only needs to be released.

Similarly, the Board of Corrections in New York City has called for the immediate release of those most at-risk by COVID-19 infection: people who are over 50 and those with pre-existing medical conditions. *NYC Officials Call for Release of ‘Most at Risk’ on Rikers Island as More Test Positive for Virus*, NBC N.Y. (March 18, 2020). Mr. [REDACTED] meets both of those criteria.

The recommendations to release as many prisoners as possible was made due to the wildly contagious and deadly nature in which coronavirus/COVID-19 is proliferating in New York State—but also because of the fundamental nature of prison: prisons simply cannot adequately socially distance dozens and hundreds of inmates, including the vulnerable inmates. The living conditions in prison—limited access to soap and water, and shared bathrooms, mess halls, and living quarters—create a heightened risk of being infected. See, e.g., Providers of Alice Hyde Medical Center, *Spread of COVID-19 Into Prisons a Concern*, My Malone Telegram (March 31, 2020).

Overall, at the time of this clemency application, there have been 102,863 confirmed cases and 2,935 deaths in New York. In Dutchess County, where Mr. [REDACTED] and Fishkill Correctional Facility are located, there are 809 confirmed cases and 9 deaths. See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times (Updated April 3, 2020, 1:42 p.m. ET). Inside prisons, as of March 31, at least 105 employees and 14 inmates had tested positive for COVID-19 within our prisons—a low estimate due to the severe lack of testing—and individuals at Fishkill Correctional

Facility were under quarantine. See Emily Russell, *NYS Prisons: 105 Employees and 14 Inmates Test Positive for COVID-19*, NPR Buffalo (March 31, 2020); Daniel A. Gross, “*It Spreads Like Wildfire*”: *The Coronavirus Comes to new York’s Prisons*, The New Yorker (March 24, 2020). We have heard from our clients that Fishkill Correctional Facility, where Mr. [REDACTED] is incarcerated, already has confirmed cases of COVID-19 in both its staff and inmates.

The only reason Mr. [REDACTED] has not been released is that the prison has not found him SARA-compliant housing. Exec. L. § 259-c(14). However, because children and adults are on lockdown throughout the state, and all schools are closed, the reasons for prohibiting his release do not apply currently. They also pale in comparison to the great risk he faces from COVID-19 if he remains incarcerated.

In light of the risks posed by COVID-19 and Mr. [REDACTED] age and serious health conditions, we urge the Executive Clemency Bureau to approve his application and order his immediate release from prison. Mr. [REDACTED] will be on parole for the rest of his life. He has served over 21 years in prison *and has an open parole date*. He is 55 years-old and ill. He should not have to die in prison. Releasing him and others similarly situation does not merely protect those being released. It reduces the prison population, thereby facilitating social distancing and enabling the current staff and remaining inmates to stay as safe as possible.

Thank you for your timely consideration of Mr. [REDACTED] application. I am available at your convenience to answer any questions.

Sincerely,

Rachel L. Pecker
Associate Appellate Attorney
rpecker@legal-aid.org / (646) 499-1666

CLEARY GOTTlieb STEEN & HAMILTON LLP

WASHINGTON, D.C.
PARIS
BRUSSELS
LONDON
FRANKFURT
COLOGNE
MOSCOW

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999
clearygottlieb.com

D: +1 212 225 2128
ebarry@cgsh.com

ROME
MILAN
HONG KONG
BEIJING
BUENOS AIRES
SÃO PAULO
ABU DHABI
SEOUL

April 3, 2020

VIA FEDEX AND EMAIL

New York State Department of Corrections and Community Supervision
Executive Clemency Bureau
The Harriman State Campus – Building 2
1220 Washington Avenue
Albany, NY 12226-2050

Re: Executive Clemency Application for [REDACTED]
[REDACTED]

Dear Executive Clemency Bureau:

I am writing on behalf of [REDACTED] [REDACTED] an inmate at Eastern Correctional Facility in Napanoch, New York, to request emergency clemency in light of the current COVID-19 crisis. This letter also supplements Mr. [REDACTED] pending application for executive clemency, which was submitted on November 2, 2018 and previously supplemented on December 2, 2019. As discussed in Mr. [REDACTED] prior application, his exemplary growth during his incarceration makes him a prime candidate for clemency. However, in light of the current COVID-19 crisis, the need to grant Mr. [REDACTED] clemency petition has become more urgent. As the Governor is aware, institutional settings, including state prisons, are especially susceptible to the rapid spread of contagions such as COVID-19. Based on Mr. [REDACTED] low risk of recidivism, exemplary behavior over the past ten years and plans to reside with his mother upon his release, he is a prime candidate for clemency at this time. Granting Mr. [REDACTED] clemency would not only reduce the inmate population at Eastern Correctional Facility but would also decrease his risk of contracting this deadly virus. As the Governor considers using his executive clemency power to reduce the population of incarcerated individuals in New York State, I strongly advocate for Mr. [REDACTED] to be among those who are granted clemency.

- Applicant Name: [REDACTED] [REDACTED]
- DIN: [REDACTED]
- Date of Birth: [REDACTED]
- County of Conviction: Kings
- Indictment Number: [REDACTED]

Medical Condition: Mr. [REDACTED] is very concerned about the possibility of contracting COVID-19, especially in light of health problems he has experienced. Mr. [REDACTED] has struggled with chest pains, difficulty breathing and stomach pains in the past, which have, on multiple occasions, resulted in him being removed from the prison facility to go to an outside hospital for treatment. Mr. [REDACTED] has also used an inhaler in the past and currently suffers from anemia. While Mr. [REDACTED] is taking measures to protect himself, such as limiting the people he has contact with and trying to leave his cell as infrequently as possible, the best protection from this deadly virus would be permitting him to return home to his family.

Post-Release Housing Plans: Mr. [REDACTED] plans to live with his mother, [REDACTED] and his [REDACTED] in [REDACTED] upon his release. Additionally, many members of Mr. [REDACTED] family, fortunately, remain employed during the current COVID-19 crisis and some even own their own businesses, offering Mr. [REDACTED] multiple opportunities for employment. When released, Mr. [REDACTED] plans to work for his father's custodial maintenance company. As is demonstrated by the numerous letters of support submitted in his initial clemency application, Mr. [REDACTED] has a large familial and community support system that remains ready to welcome him home and ensure that his post-incarceration transition goes smoothly.

Crime of Conviction & Sentence: Mr. [REDACTED] has served more than fourteen years of an indeterminate sentence of twenty-two years to life for murder in the second degree, robbery in the first degree, and attempted robbery in the second degree and is eligible for parole on June 30, 2027. On July 2, 2005, shortly after turning sixteen years old, an unarmed Mr. [REDACTED] was involved in a fight during which either Mr. [REDACTED] cousin or one of his cousin's friends pulled out a knife and stabbed another individual to death. None of the other, older individuals involved in this tragic incident served more than three and a half years for their role in the offense. Mr. [REDACTED] despite his relative youth, lack of any prior contact with the law and less central role in the offense, was charged with more serious crimes and received a significantly longer sentence. Nonetheless, Mr. [REDACTED] has expressed deep remorse for his actions and in light of the portion of his sentence that he has already served, I strongly urge the Governor to commute his sentence.

Behavior During Incarceration: Mr. [REDACTED] has experienced incredible personal and intellectual growth during the time that he has been incarcerated and both his programming and disciplinary records demonstrate that he poses no threat to society upon his release. During his incarceration, he has remained committed to his faith; has earned his high school equivalency diploma, and with the support of his mother, is also now exploring opportunities for higher education. Mr. [REDACTED] has also successfully completed a number of programs, including Building Maintenance Training, Public Speaking, Domestic Violence, the Osborne Association's Parenting Program and Strengthening Relationships Program, Aggression Replacement Training, Basic Courses in the Alternatives to Violence Program, and Advanced Courses in Nonviolent Conflict Resolution. Mr. [REDACTED] has also shown remarkable progress during his time in prison, and has not received any violent tickets in nearly ten years.

Most recently, Mr. [REDACTED] participated in the "[REDACTED]" pilot program run by the [REDACTED], which was discussed in the supplement to his pending clemency application. Included in this supplement is a statement Mr. [REDACTED] wrote describing the impact the program had on him. Once released, Mr. [REDACTED]

plans to contact the [REDACTED] to help them in their mission to improve the lives of those in prison. Mr. [REDACTED] has a “strong passion to help other teenagers” as he was a teenager when incarcerated and wants to “deter them from following down the same path” that he did. Personal Statement at 2. The program “inspired [him] to not only want to come back to society a better person and citizen” but also gave him “the tools needed to help successfully guide [him] (and others) down the right path.” Personal Statement at 1.

Also enclosed in this supplement is documentation of Mr. [REDACTED] participation in a 45-hour training program to become an Inmate Program Associate (an “IPA”) and continued work as an IPA. IPAs are “carefully screened and trained inmates [who] assist Transitional Services, Education, and Vocational staff in providing approved programs under staff supervision.”¹ Mr. [REDACTED] completion of the IPA training demonstrates his position as a model inmate, offering evidence of his rehabilitation and support for his very low risk of recidivism upon his release. After finishing the IPA training on December 15, 2019, Mr. [REDACTED] was briefly assigned to instruct a class comprised of individuals with disabilities and is currently teaching a pre-GED class. He feels a sense of satisfaction upon seeing others go through the same process he did in order to obtain his GED and shared with me that he finds it incredibly rewarding to help people “accomplish something that will be important to them forever.” His work as an IPA demonstrates his continued desire to give back to others and use his abilities to lift up those around him.

Mr. [REDACTED] has also been speaking to other inmates at Eastern Correctional Facility about the possibility of making masks and gloves to send to hospitals and other facilities that are in dire need of these items during the COVID-19 crisis. The initiative that Mr. [REDACTED] is taking in the face of this crisis is indicative of his character and the kind of person he is, one who thinks of others before himself and does all he can to try to find positivity in the face of darkness. He is an exemplary person and is well deserving of executive clemency, especially in light of the dangers that his continued incarceration poses for his health and well-being.

* * *

On Mr. [REDACTED] behalf, I respectfully request that this letter and the enclosed materials be included in the record supporting his pending clemency application. Based on this additional information and the health risks Mr. [REDACTED] faces if he was to remain detained, I strongly urge the Governor to commute Mr. [REDACTED] sentence. Thank you for your attention to this matter and please do not hesitate to contact me at (212) 225-2128 or ebarry@cgsh.com with any questions regarding this application.

Sincerely,



Emily C. Barry
Attorney for [REDACTED] [REDACTED]

¹ Dep’t of Corrections and Community Supervision, *Transitional Services Program*, <http://www.doccs.ny.gov/ProgramServices/transitional.html#ipa>.

Executive Clemency Bureau, p. 4

Attachment

cc: David Crow (via email)
The Legal Aid Society
Criminal Appeals Bureau
199 Water Street, 5th Floor
New York, NY 10038