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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of

[REDACTED] # [REDACTED],

Petitioner,

ANSWER

vs.

Index No. [REDACTED]

NYS DEPT. OF CORRECTIONS AND
COMMUNITY SUPERVISION, ANTHONY
ANNUCCI, Acting Commissioner,
Department of Corrections and
Community Supervision, and
TINA M. STANFORD, Chairwoman,
NYS Board of Parole,

Respondents.

Respondents, by their attorney, answers the Notice of
Petition as follows:

1. Admit the allegations of paragraphs entitled "VENUE"
and "PROCEDURAL HISTORY".
2. Admit the paragraphs entitled "PRELIMINARY STATEMENT"
insofar as it alleges that the Parole Board concluded that there
was a reasonable probability that if released, petitioner would
not remain at liberty without again violating the law and that
release would be incompatible with the welfare of society and
that release would so deprecate the seriousness of the offense so
as to undermine respect for the law, and deny the remaining
allegations of the paragraphs entitled "PRELIMINARY STATEMENT".

3. Admit the allegations contained in the paragraphs entitled "STATEMENT OF FACTS" insofar as they allege that petitioner was convicted of Murder 2nd degree, and two counts of Robbery 1st degree for which he received concurrent sentences of 25 to Life, that on July 21, 2016, petitioner appeared before the Parole Board, and deny the remaining allegations contained in the paragraphs entitled "STATEMENT OF FACTS".

4. Deny each and every allegation contained in the paragraphs entitled "ARGUMENTS (I) (A) (B), (II) (A) (B), (III) and (IV)" and "CONCLUSION".

5. Denies every allegation not admitted, denied or otherwise responded to above.

RETURN

6. Annexed hereto are true copies of the following documents maintained by the New York State Board of Parole:

- A. Sentence and Commitment Order
- B. Sentencing Minutes
- C. Parole Board Report
- D. Release Interview Minutes
- E. Parole Release Decision Notice
- F. Petitioner's Administrative Appeal
- G. Statement of Appeals Unit Findings
- H. Parole Appeal Decision Notice.
- I. Redacted COMPAS ReEntry Risk Assessment form.

The following documents are being submitted to the Court only for in-camera review:

- J. Confidential portion of the Parole Board Report
- K. Pre-Sentence Investigation Report
- L. Un-redacted COMPAS ReEntry Risk Assessment form.

**AS TO THE PETITION'S
CLAIMS, RESPONDENT ALLEGES:**

7. There is no merit to the petition's claim that the decision of the Parole Board (hereinafter "Board") was arbitrary, capricious, excessive and rendered in violation of applicable law.

8. In response to the petition's claims, the respondent hereby incorporates and relies upon the argument and case law set forth in the appeal unit findings annexed hereto as Exhibit G.

9. Any new issues now raised by the petitioner in this proceeding which were not raised in the brief submitted in support of the administrative appeal, have not been preserved for judicial review. See Hernandez v. Alexander, 64 AD3d 819 (3d Dept 2009); People ex rel. Rodriguez v. Warden, Rikers Island Correctional Facility, 61 AD3d 494 (1st Dept 2009); Matter of Shapard v. Zon, 30 AD3d 1098 (4th Dept 2006); Matter of Williams v. NYS Board of Parole, 277 AD2d 617 (3d Dept 2000).

10. The Court is "limited in a CPLR article 78 proceeding to reviewing 'issues actually raised before the administrative agency making the determination.'" See Matter of Erdheim v.

Travis, 7 AD3d 876, 877 (3d Dept 2004), quoting Matter of Roggemann v. Bane, 223 AD2d 854, 856 (3d Dept 1996).

11. Therefore, any issues raised in the petition herein which were not raised in the brief in support of petitioner's administrative appeal, are not properly before the Court for consideration and should not be allowed to be interposed.

12. Additionally, amendments made to the Executive Law by Chapter 62 of the Laws of 2011 did not change the legal standard governing the decision-making process of the Board when assessing the suitability of an inmate's possible release to parole supervision, namely: (1) whether or not "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law"; (2) whether or not the inmate's release is "incompatible with the welfare of society"; and (3) whether or not the inmate's release will "so deprecate the seriousness of his crime as to undermine respect for law." See Executive Law § 259-i(2)(c)(A).

13. In the instant case, the Board considered each of these three factors and specifically relied upon said standards in making its determination.

14. Specifically, the actions undertaken by the panel were as follows:

- The Board in its decision stated that it reviewed the petitioner's entire parole record, considered what was revealed during the interview, and made its decision

following deliberation of all records and statutory and regulatory factors.

- The Board made a finding that if released at this time there is a reasonable probability that the petitioner would again violate the law.
- The Board made a finding that the inmate's release would be incompatible with the welfare of society.
- The Board made a finding that petitioner's release would so deprecate the serious nature of the crime as to undermine respect for the law.
- The serious nature of the crime committed was but one of the many factors considered by the Board in making its determination.
- The Board also considered petitioner's second period of state incarceration.
- The Board also considered petitioner's poor performance while previously released to parole supervision by possessing a weapon.
- The Board further noted petitioner's senseless disregard for human life, continuation of criminal behavior, and reckless need to steal property belonging to other people.
- The Board made its findings and decision only after the interview was conducted and the following factors (among others) were considered: petitioner's volunteer work; institutional programming; his risk and needs assessment; disciplinary record; release plans; needs for successful re-entry into the community; and all factors the Board is required by law.

15. In making any parole release consideration the Board must consider the institutional record of the inmate. See NYCRR §8002.3(a)(1).

16. One of the institutional records the Board must

consider in making determinations as to the suitability of an inmate's possible release to community supervision is a risk and needs assessment designed to measure the inmate's rehabilitation. See Executive Law §259-c(4).

17. In strict compliance with statutory and regulatory requirements, the Department promulgated Directive 8500 which provides comprehensive operating procedures governing the Correctional Offender Management Profiling for Alternative Sanctions instrument, commonly referred to as the COMPAS instrument, a research based clinical assessment instrument used to assist staff in assessing an inmate's risks and needs by gathering quality and consistent information to support decisions about supervision, treatment and other interventions.

18. "By adopting the COMPAS risk assessment and utilizing it in considering an inmate's release, the Board has effectively complied with the minimal requirements of the amendments to the Executive Law." Matter of Steven Diaz v. New York State Bd. of Parole, 42 Misc. 3d 532 (Sup. Ct.; Cayuga Co. 2013).

19. The information contained in the COMPAS instrument is used to assist the Board of Parole in making its decision, but the quantified results contained in the COMPAS instrument are not alone determinative factors in the decision-making process. See Executive Law §§259-c(4), 259-i(2)(c)(A); Matter of Leung v. Evans, 120 AD3d (3d Dept 2014), lv denied 24 NY3d (2015); Matter

of Rivera v. NY State Div of Parole, 119 AD3d 1107 (3d Dept 2014); accord, Matter of Dawes v. Annucci, 122 AD3d 1059 (3d Dept 2014).

20. Moreover, uniformly low COMPAS scores and other evidence of an inmate's rehabilitation do not undermine the broader questions of public safety, public perceptions of the seriousness of a crime, and whether an inmate's release to parole would undermine respect for the law.

21. Thus, the COMPAS instrument cannot mandate a particular result, and the Board determines the weight to be ascribed to the information contained therein. Matter of King v. Stanford, 137 AD3d 1396 (3d Dept 2016).

22. The COMPAS instrument is used to develop the inmate's Case Plan.

23. An Offender Case Plan (formerly called a Transitional Accountability Plan or TAP), or Case Plan, is created for, and in cooperation with, an inmate by an Offender Rehabilitation Coordinator.

24. The Case Plan serves to prioritize the inmate's needs and establish goals to address the needs, and provides tasks to work towards each goal.

25. Case Plans are reviewed with the inmate quarterly unless the inmate's earliest release date is more than four years in the future.

26. A Case Plan was prepared for petitioner and made available to the Board at the time of the interview.

27. Petitioner raises in his brief submitted in support of this Article 78 petition, which is not properly before the Court for consideration as set forth above, that he is entitled to view certain confidential records submitted by the sentencing court and district attorney, as well as any letter submitted by his defense attorney, which may contain a parole recommendation.

28. The petitioner must avail himself of the process provided pursuant to the Freedom of Information Law (FOIL) if he wishes to request these records from the Department.

29. Finally, per Executive Law §259-i(5), any action by the Board is deemed to be a judicial function and is not reviewable if done in accordance with law.

30. So long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts.

31. To require the Board to act in accordance with judicial expectations would substantially undermine the legislative decision to entrust release determinations to the Board and not the Courts. Hamilton v. New York State Division of Parole, 119 AD3d 1268 (3d Dept 2014).

32. In the unlikely event of an unfavorable Judicial ruling, then the question of a remedy would arise. In such a

situation, release on parole is not correct.

33. Rather, at most the petitioner would be entitled to a de novo interview. Matter of Quartarraro v. New York State Division of Parole, 224 AD2d 944 (1st Dept 1996), lv denied 88 NY2d 805 (1996).

34. Thus, in order for there to be judicial intervention, the decision must show irrationality bordering on impropriety in order to be reversed.

35. The petitioner has the burden of showing that the Parole Board's determination is irrational "bordering on impropriety" before judicial intervention is warranted. Russo v. New York State Board of Parole, 50 NY2d 69 (1980); Matter of Despard v. Russi, 192 AD2d 1076 (4th Dept 1993).

36. Thus, it is well established that the Board's release decisions are discretionary, and if made in accordance with the statutory requirements, determinations are not subject to judicial review. Matter of Saunders v. Travis, 238 AD2d 688 (3rd Dept 1997), lv denied, 90 NY2d 805, 661 NYS2d 831 (1997); Matter of Davis v. New York State Division of Parole, 114 AD2d 412 (2nd Dept 1985); Matter of Ristau v. Hammock, 103 AD2d 944 (3rd Dept 1984), lv denied 63 NY2d 608 (1984); Matter of Harden v. New York State Board of Parole, 103 AD2d 777 (2nd Dept 1984); Matter of Ganci v. Hammock, 99 AD2d 546 (2nd Dept 1984).

37. Parole release is a discretionary function of the

Board, and appellant has not demonstrated that any abuse in this regard by the Board has occurred.

38. A petitioner in an Article 78 proceeding challenging a denial of discretionary release bears a heavy burden. Garcia v New York State Division of Parole, 239 AD2d 235 (1st Dept 1997).

39. Based upon the foregoing, the petition should be denied in its entirety.

WHEREFORE, respondent respectfully requests that the petition be dismissed or denied.

Dated: Buffalo, New York
May 8, 2017

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