October 2019

Art. 78 Response - FUSL000028 (2014-10-16)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of [redacted]	
	VERIFIED ANSWER
Petitioner,	
	Index No. [redacted]
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,	
- against -	
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION; ANTHONY J. ANNUCCI, ACTING COMMISSIONER; and TINA M. STANFORD, CHAIRWOMAN OF THE NEW YORK STATE BOARD OF PAROLE,	
Respondents.	

Respondents, the New York State ("N.Y.S.") Department of Corrections and Community Supervision ("DOCCS"); Anthony J. Annucci, the Acting Commissioner of DOCCS; and Tina M. Stanford, Chairwoman of the N.Y.S. Board of Parole, by their attorney, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, answer the August 13, 2014 Petition as follows:

1. Denies upon information and belief every material allegation contained in the Petition except as admitted herein, and refers the Court to the Affirmation of Terrence X. Tracy, dated August 8, 2014, submitted herewith and in further opposition to the Petition.

2. The NYS Board of Parole is a part of DOCCS.[1] The Parole Board, consisting of up to nineteen (19) members appointed by the Governor and confirmed by the Senate for six-year terms, is tasked primarily with deciding which inmates should be granted discretionary release to the community along with imposing any conditions of release.

[1] DOCCS is a result of the merger of the Department of Correction Services and the Division of Parole in March 31, 2011. The Board of Parole was part of the Division of Parole.

3. Petitioner, [redacted], is in the care and custody of DOCCS and is an inmate at Taconic Correctional Facility.

PETITIONER'S CRIMINALITY

4. In 1995 and 1996, Petitioner engaged in a series of robberies targeting elderly victims and inflicting serious injuries, in the course of which, on April 12, 1996, Petitioner's robbery of 75 year-old [redacted] resulted in the death of the victim. After Ms. [redacted] refused to give Petitioner's accomplice her bank card, Petitioner and her accomplice followed Ms. [redacted] down the street and took her handbag by force, during which Ms. [redacted] was knocked to the ground and suffered fatal injuries including a broken neck. Petitioner committed one known robbery in this style after Ms. [redacted] See Pre-Sentence Report submitted for *in camera* review, attached as Exh. A; see also Pet. pgs. 10.

5. On April 30, 1997, Petitioner was sentenced to eighteen years to life for felony murder, twelve years and six months to twenty-five years for robbery in the first degree, and seven years and six months to fifteen years for robbery in the second degree. See Sentence & Order of Commitment, attached as Exh. B.

PROCEDURAL HISTORY

6. Petitioner had an interview with the NYS Parole Board on December 3, 2013. At the conclusion of her interview, Petitioner was denied release to parole. See Pet. pg. 7.

7. Petitioner submitted an administrative appeal on April 18, 2014. Id. On September 4, 2014, after four months, Petitioner then filed this Article 78 proceeding seeking an order vacating the December 3, 2014 denial of parole and alternatively granting release to parole supervision or a new parole release interview. See Pet.

FIRST OBJECTION IN POINT OF LAW

THE PAROLE BOARD'S DETERMINATION NOT TO RELEASE PETITIONER ON PAROLE WAS MADE IN ACCORDANCE WITH THE LAW, PROPERLY CONSIDERED ALL OF THE STATUTORY FACTORS, AND WAS NOT ARBITRARY, CAPRICOUS, OR IRRATIONAL BORDERING ON IMPROPRIETY

A. The Parole Board Considered All Relevant Statutory Factors and Based Its Decision on Permissible Factors

8. It is well established that the Parole Board's release decisions are discretionary. In New York, it is "the . . . Board [that] holds the power to decide whether to release a sentenced prisoner on parole." Matter of Silmon v Travis, 95 N.Y.2d 470, 476 (2000).

9. So long as the Board's discretion satisfies the statutory requirements, its decisions are not subject to judicial review. See Matter of Saunders v. Travis, 238 A.D.2d 688 (3d Dep't. 1997); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 131 (1st Dep't. 1983).

10. As the Court of Appeals has explained, "[t]o 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." Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 76-77 (1980) (internal quotation marks omitted).

11. A decision by the Board to deny parole release cannot be disturbed in the absence of a convincing demonstration by Petitioner that it was affected by irrationality bordering on impropriety. See Matter of Silmon, 95 N.Y.2d at 476; Matter of Russo, 50 N.Y.2d at 69; Matter of Felder v. Travis, 278 A.D.2d 570 (3d Dep't. 2000).

12. Pursuant to Executive Law § 259-i(2)(c)(A), when determining whether an inmate should be released on parole after the minimum period of imprisonment imposed by the sentencing court, the Board must consider: (1) the inmate's institutional record, "including program goals and accomplishments, academic achievements, vocational education, training or

work assignments, therapy and interactions with staff and inmates;" (2) "performance, if any, as a participant in a temporary release program;" (3) the inmate's release plans, "including community resources, employment, education and training and support services available to the inmate;" (4) any deportation order issued by the federal government against the inmate while in the custody of DOCCS and any recommendations regarding deportation made by the commissioner of DOCCS; (5) any statement made to the Board by the crime victim or the victim's representative "where the crime victim is deceased;" (6) "the length of the determinate sentence" where applicable; (7) "the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement;" and (8) the inmate's "prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." N.Y. Exec. Law § 259-i(2)(c)(A) (McKinney); see also Silmon, 95 N.Y.2d at 476-77.

13. Parole release is a discretionary function of the Board and Petitioner has not met her burden of demonstrating that the Board abused its discretion or that its determination was arbitrary and capricious. Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239 (1st Dep't. 1997) (holding that "the Board of Parole has been vested with an extraordinary degree of responsibility in determining who will go free and who will remain in prison, and a petitioner who seeks to obtain judicial review on the grounds that the Board did not properly consider all of the relevant factors, or that an improper factor was considered, bears a heavy burden.").

14. In the absence of a convincing demonstration that the Board did not consider the statutory factors set forth in Executive Law § 259-i, it must be presumed that the Board fulfilled

its duty. People ex rel. Herbert v. New York State Board of Parole, 97 A.D.2d 133 (4th Dep't. 1994).

15. In support of its decision, the Board cited not only the serious nature of the instant offense, i.e., robbing, injuring, and killing "vulnerable, innocent, elderly victims," but also the aggravating circumstances beyond the inherent seriousness of the instant offense, namely, specifically targeting the most vulnerable members of society and her "callous disregard for the sanctity of human life" in addition to her disciplinary infractions while incarcerated. See Exh. 2 to Pet.; see also Exh A.

16. Furthermore, the Board gave Petitioner an opportunity to explain her rehabilitation, to explain the circumstances surrounding her crime, and allowed her to present a statement. See Exh. 2 to Pet. pgs. 4-7. The Board also went through her COMPAS, her program and vocational participation while at prison, and her plans for release. Id. at pgs. 5-7; Tracy Aff. ¶¶ 8-9.

17. The Board is permitted to consider the brutality and depravity of the offense and the inmate's disregard for the life of another human being. See Dudley v. Travis, 227 A.D.2d 863 (3d Dep't. 1996); Hakim v. Travis, 302 A.D.2d 821 (3d Dep't. 2003); Angel v. Travis, 1 A.D.3d 859 (3d Dep't. 2003). It is within the Board's discretion to conclude that the violent nature of the crime is an overriding consideration warranting the denial of parole release. See Rodeney v. Dennison, 24 A.D.3d 1152 (3d Dep't. 2005). Accordingly, the Board's emphasis on the violent nature of the crime does not establish irrationality bordering on impropriety. See Pulliam v. Dennison, 38 A.D.3d 963 (3d Dep't. 2007); Sterling v. Dennison, 38 A.D.3d 1145 (3d Dep't. 2007) ("The Board was not required to give each factor equal weight and could, as it did, choose to place greater emphasis on the violent nature of petitioner's crimes.").

18. Moreover, the reasons stated by the Parole Board members for denying Petitioner parole are sufficient grounds to support its decision. See Matter of Alvarez v. Schneiderman, 2014 N.Y. Misc. LEXIS 2075 (N.Y. Sup. Ct. May 5, 2014) ("The Courts have routinely held that parole may be denied based upon the seriousness of the crime.") (citing cases); People ex rel. Yates v. Walters, 111 A.D.2d 839 (2d Dep't. 1985); Matter of Ganci v. Hammock, 99 A.D.2d 546, 471 N.Y.S.2d 630 (2d Dep't. 1984); Matter of Vuksanaj v. Hammock, 93 A.D.2d 958 (3d Dep't. 1983).

19. Petitioner argues that the Board did not consider all the relevant factors. Even if Petitioner is correct, which she is not, the case law is clear that the failure to discuss all of the relevant factors at the interview does not provide a basis for upsetting the Board's decision. See Matter of Morales v. Travis, 260 A.D.2d 710 (3d Dep't. 1999); Matter of Waters v. New York State Division of Parole, 252 A.D.2d 759 (3d Dep't. 1998); Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412 (2d Dep't. 1985); Matter of Mackall v. New York State Bd. of Parole, 91 A.D.2d 1023, 1024 (2d Dep't. 1983). Here, the Board told Petitioner that it considered the statutory factors, but determined that if she is released, "there is a reasonable probability that [she] would not live and remain at liberty without violating the law, and [her] release at this time is incompatible with the welfare and safety of the community." Exh. 2 to Pet. pg. 8-9; Tracy Aff. ¶¶ 8-9.

20. Further, Petitioner's contention that the Board erred because it did not explain why the instant offense outweighed all other factors lacks merit. While the Board is statutorily required to consider criteria relevant to the individual inmate, the Court of Appeals has held that the "Board need not expressly discuss each of these guidelines in its determination." Matter of

Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dep't. July 24, 2014) (quoting Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788, 791 (1994)).

21. The Board also does not need to refer to each and every one of the requisite factors in its decision or give them equal weight. See Matter of Siao-Pao v. Dennison, 51 A.D.3d 105 (1st Dep't. 2008); Matter of King v. New York State Div. of Parole, 190 A.D. 2d 423 (1st Dep't. 1993), aff'd, 83 N.Y. 2d 788 (1994); Matter of Blasich v. New York State Bd. of Parole, 48 A.D. 3d 1029 (3d Dep't. 2008); Matter of Thompson v. New York State Div. of Parole, 30 A.D.3d 746 (3d Dep't. 2006); Matter of De Lagarde v. New York State Div. of Parole, 23 A.D.3d 876 (3d Dep't. 2005); Legette v. Travis, 11 A.D.3d 849 (3d Dep't. 2004); Mata v. Travis, 8 A.D.3d 570 (2d Dep't. 2004); Matter of Ek v. New York State Bd. of Parole, 307 A.D.2d 433 (3d Dep't. 2003).

22. There simply is no merit to Petitioner's position that the Board's mere mention of the statutory factors in its decision meant that the Board did not consider the factors. The record reveals that the Board did consider all required factors for discretionary release to parole supervision when it rendered its decision, legitimately placing more weight upon the severity of the instant offense, the robbery, injury, killing of Petitioner's elderly victims, than upon Petitioner's positive adjustment while incarcerated for the instant offense, including maintaining a recently improved disciplinary record, educational advancements, plans for release, rehabilitative efforts, plans for release, community support, the contents of her application for parole release and the COMPAS Re-Entry Risk assessment prepared for the Board's consideration. See Exh. 2 to Pet. pgs. 4-9, 21-22; Tracy Aff. ¶¶ 7-9. While the Board was concerned that Petitioner's "release would so deprecate the severity of the crimes as to undermine respect for the law," of greater concern was their underlying basis for this statement,

as Petitioner "placed [her] own interests above those of society's senior citizens." See Exh. 2 to Pet. pg. 9.

23. Thus, Petitioner's contention that the Board erred because it considered Petitioner's commission of the instant offense to the exclusion of other factors for discretionary release to parole supervision and that the Board failed to acknowledge in its decision Petitioner's accomplishments regarding her institutional record, lacks merit.

24. Moreover, the Board's decision was sufficiently detailed to inform Petitioner of the reasons for the denial of parole. See Exh. 2 to Pet. pgs. 8-9. Accordingly, it satisfied the criteria set forth in Executive Law § 259-i. See Siao-Pao v Dennison, 11 N.Y.3d 777 (2008) (holding that "[t]he Board's written determination, while less than detailed than it might be, is not merely "conclusory" and so does not violate the law); Matter of Whitehead v. Russi, 201 A.D.2d 825 (3d Dep't. 1993).

B. Petitioner's COMPAS Score Is Only One Of Several Factors the Board Must Consider

25. Petitioner claims that pursuant to Executive Law § 259-i(2)(c)(A) the Board is legislatively mandated to base its release decision on Petitioner's rehabilitation and likelihood of success upon release as measured by her COMPAS Re-Entry and Risk Assessment. However, Petitioner's position that the Board did not consider the COMPAS because the Board merely mentioned it in its decision is baseless. See Tracy Aff. ¶¶ 26-31.

26. As a preliminary matter, Petitioner's allegations criticizing the customizability and proprietary nature of the COMPAS are not material to the lawfulness of the Board's decision to deny Petitioner parole. This argument is unavailing as it does not constitute an appealable issue. See 9 N.Y.C.R.R. §8006.3. Furthermore, Petitioner's opposition to the validity of the COMPAS is suspect, as she criticizes its acumen where the factors fall against her, but praises its

support where her COMPAS results are favorable. See Pet. pgs. 19-20, 38. Regardless, the Board's use of the COMPAS in its decision does not abrogate its established authority to exercise its independent judgment in placing the appropriate weight it deems necessary to each of the factors for discretionary release under Executive Law §259-i(2)(c)(A). See Tracy Aff. ¶ 28.

27. At the outset, there is a presumption of honesty and integrity attaching to judges and administrative fact-finders. See People ex rel. v. Johnston v. New York State Bd. of Parole, 180 A.D. 2d. 914 (3d Dep't. 1992). Absent a convincing showing to the contrary, courts presume that the Parole Board follows its statutory commands and internal policies in fulfilling its obligations. See Garner v. Jones, 529 U.S. 244 (2000); accord Matter of Silmon, 95 N.Y.2d at 476. Thus, Petitioner's contention is self-serving and speculative and fails to establish with convincing evidence that the Board did not consider the COMPAS in connection with its determination here.

28. Under Executive Law § 259-i(2)(c)(A), the COMPAS report is only one factor among many the Board considers in exercising its discretion to grant an inmate release. See Matter of Rivera v. New York State Div. of Parole, 119 A.D.3d 1107 (3d Dep't. July 10, 2014); Matter of Alvarez v. Evans, Index # 2804/2013, *Decision and Order* dated July 30, 2013 (Sup. Ct. Dutchess Co.)(Brands, J.S.C.); Matter of Singh v. Evans, Index # 1411-13 *Decision and Order* dated October 11, 2013 (Sup. Ct. Sullivan Co.)(LaBuda J.S.C.) aff'd 987 N.Y.S.2d 271 (3d Dep't. 2014). Copies of unpublished decisions citied have been attached as Exh. C. See also Tracy Aff. ¶ 31.

29. Here, the Board considered Petitioner's COMPAS report and had the benefits of its results, but the COMPAS does not abrogate or diminish the Board's obligation to consider

and weigh all of the statutory factors and render a decision under the governing standard set forth in Executive Law §259-i(2)(c)(A). See Pet. Exh. 2 pgs. 8-9; see also Tracy Aff. ¶¶ 88-10, 26-31. In fact, the Board discussed with Petitioner some of the information derived from the COMPAS and shortly thereafter gave Petitioner the opportunity to speak regarding any material subject. See Exh. 2 to Pet. pg. 6-7; Tracy Aff. ¶¶ 26-27.

30. Petitioner maintains that the Board's decision should be vacated because the low risk scores under the COMPAS contradict the Board's articulation of the statutory rationale in support of its decision. Similar to the other documents and information the Board considers under section 259-i(2)(c)(A) of the Executive Law, the Board may place whatever weight that it deems appropriate to the information derived from a scored COMPAS Re-Entry Risk Assessment when making its release decision. See Matter of Montane v. Evans, 116 A.D.3d 197 (3d Dep't. 2014) (leave to appeal granted 23 N.Y.3d 903 (2014)); Matter of Rivera, 2014 N.Y. App. Div. LEXIS 5140; Matter of Garfield v. Evans, 108 A.D.3d 830 (3d Dep't. 2013); see also Tracy Aff. ¶¶ 10, 28, 32. Accordingly, Petitioner's argument is without merit.

C. Petitioner's View That There Is Erroneous Information Is Immaterial

31. Petitioner's contention that there is erroneous information in the COMPAS is unavailing.

32. First, Petitioner did not object to any allegedly erroneous information contained in the COMPAS. See Exh. 2 to Pet. pgs. 6-7. Petitioner had ample opportunity to address the record before and during the interview and she should not now be allowed to complain that the Board based its decision on an erroneous impression. See Matter of Morrison v. Evans, 81 A.D.3d 1073 (3d Dep't. 2011).

33. Additionally, because Petitioner failed to raise an objection at the parole interview, her claim has not been preserved. See Matter of Vanier v. Travis, 274 A.D.2d 797 (3d Dep't. 2000); Flores v. New York State Bd. of Parole, 210 A.D.2d 555 (3d Dep't. 1994); Matter of Morel v. Travis, 278 A.D.2d 580 (3d Dep't. 2000), lv. denied, 96 N.Y.2d 752 (2001).

34. Moreover, similar to all the other documents and information the Board considers under section 259-i(2)(c)(A) of the Executive Law, the Board may place whatever weight that it deems appropriate to the information derived from a scored COMPAS Re-Entry Risk Assessment when making its release decision. See Matter of Montane, 116 A.D.3d at 197; Matter of Rivera, 2014 N.Y. App. Div. LEXIS 5140. Accordingly, Petitioner's argument is meritless.

D. Petitioner's Counsel's Opinion is Immaterial for Determining Statutory Compliance

35. The opinion and assessment of Petitioner's counsel regarding the weight of the statutory factors and the importance of Petitioner's rehabilitative activities while incarcerated does not override the determination and discretion of the Board. See Pet. pgs. 11-17. Petitioner's counsel may not re-present the Parole Board Interview before this Court in hopes of procuring a more favorable result. The purpose of the instant proceeding "is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the [statute] and rendered a determination that is supported, and not contradicted, by the facts in the record." Matter of Hamilton v. N.Y.S. Div. of Parole, 119 A.D.3d 1268 (3d Dep't 2014); see also Tracy Aff. ¶¶ 13-14.

36. Executive Law § 259-i(2)(c) expressly provides that discretionary release on parole will not be granted merely as a reward for good conduct or efficient performance of duties while confined. Discretionary release to parole is only warranted after considering and weighing

each of the relevant statutory factors by the Board. See Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 900 (3d Dep't. 2000); Larrier v. New York State Bd. of Parole Appeals Unit, 283 A.D.2d 700 (3d Dep't. 2001); Walker v. Travis, 252 A.D.2d 360 (1st Dep't 1998); Vasquez v. State of New York Executive Department, Division of Parole, 20 A.D.3d 668 (3d Dep't. 2005); Wellman v. Dennison, 23 A.D.3d 974 (3d Dep't. 2005).

37. Petitioner's achievements while in prison, regardless of how significant she believes they are, do not automatically entitle her to parole release. See Matter of Faison v. Travis, 260 A.D.2d 866 (3d Dep't 1999); Pulliam v Dennison, 38 A.D.3d 963 (3d Dep't 2007). The Board's determination that the inmate's achievements are outweighed by the severity of the crime is properly within the Board's discretion. See Matter of Phillips v. Dennison, 41 A.D.3d 17 (1st Dep't. 2007); Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dep't. 2004); Anthony v. New York State Division of Parole, 17 A.D.3d 301 (1st Dep't. 2005); Wellman v Dennison, 23 A.D.3d 974 (3d Dep't. 2005); Santos v. Evans, 81 A.D.3d 1059, 916 N.Y.S.2d 325 (3d Dep't. 2011).

38. In a recent case decided by the Third Department on July 24, 2014, the petitioner was a model citizen with exemplary prison record. Matter of Matter of Hamilton v New York State Div. of Parole, 2014 N.Y. App. Div. LEXIS 5417, at *13 (3d Dep't. July 24, 2014). However, because of the violent natures of the petitioner's crime, i.e., murder, the court affirmed the dismissal of the petition, holding that "[o]ur settled jurisprudence is that a parole determination made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety ...We emphasize that this Court has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release." (citing cases)

39. The court further stated "[i]n short, the statutory language of Executive Law § 259-i (5) dictating our limited power of review and the interpretation of that language by the Court of Appeals remain unchanged. Accordingly, inasmuch as the Board has not violated the statutory mandates and its determination does not exhibit irrationality bordering on impropriety under either our precedent or that of the Court of Appeals, its discretion is absolute and beyond review in the courts." (internal quotation marks and citation omitted).

40. Nor is there merit to Petitioner's contention that the Board erred by not focusing upon forward looking matters in her record rather than past or static matters. Amended Executive Law § 259-c(4) in 2011 does not undermine the authority of the Board to exercise its independent judgment in placing whatever weight that it deems appropriate to the factors for discretionary release to parole supervision, pursuant to Executive Law § 259-i (2)(c)(A). See Tracy Aff. ¶¶ 22-25.

41. Further, there is no merit to Petitioner's argument that Amended Executive Law § 259- c (4) in 2011 requires the Board to emphasize forward looking matters such as an inmate's accomplishments and progress concerning her institutional record and her plans for release in determining whether or not to grant an inmate discretionary release to parole supervision. That is, Amended Executive Law § 259- c(4) in 2011 does not prohibit the Board from exercising its independent judgment in placing weight that it deems appropriate to the factors for discretionary release to parole supervision, pursuant to Executive Law § 259-i(2)(c)(A). See Matter of Montane, 116 A.D.3d at 197; Matter of Partee v. Evans, 40 Misc.3d 896 (Sup. Ct. Albany Co. 2013) ("It is clear that the two sections of the Executive Law [§259-i(2)(c) and §259-c(4)] are meant to be read together."), aff'd. 117 A.D.3d 1258 (3d Dep't. 2014). Accordingly, Petitioner's argument is without merit.

E. The Board's Decision Does Not Violate The International Covenant And Of Civil And Political Rights

42. The Petition speaks at length that the Board's decision is conclusory and inhumane under the International Covenant and of Civil and Political Rights. However, for the reasons discussed above, her arguments are unsupported.

43. As the record reveals, the Board considered all the statutory factors under the law, such as her heinous offense, her plans for release, her attempts at rehabilitation, and her prison record. See Exh. 2 to Pet. The Board also allowed Petitioner to make a statement. Thus, the Board's decision did not violate any international treaty, regardless of applicability.

44. Furthermore, as conceded by Petitioner, the cited treaty "provides analogous standards to those of the New York Executive Law on parole." See Pet. pg. 25. Thus, even interpreted in the most favorable light, this point in the Petition is irrelevant and duplicative.

F. The Board Did Consider The Parole Submissions And Its Decision Was Made In Accordance Of The Law

45. There is no merit to Petitioner's argument that the Board failed to consider her extensive parole submissions. As explained above, the Board is presumed to have professionally discharged its responsibilities. See People ex rel. v. Johnston, 180 A.D.2d. at 914; Garner, 529 U.S. at 244. Absent a convincing showing to the contrary, there is a presumption that the Board has acted properly in following the statutory requirements. See Matter of Silmon, 95 N.Y.2d at 476.

46. Further, the Board's decision cited all the factors it considered, such as the nature of the offense, her rehabilitative efforts while incarcerated, disciplinary infractions, her COMPAS, and her plans for release. See Exh. 2 to Pet. pgs. 4-9. To the extent that Petitioner contends reversible impropriety in allegedly failing to consider the letter from [redacted]

that allegation is excessive and untrue. See Pet. pgs. 38-39. While the Board did not have a copy of the letter, they did state that "we'll take [Petitioner's] word for it." See Exh. 2 to Pet. pg. 6. Far from objecting, Petitioner accepted the Board's decision to "take [her] word for it" and thanked them. Id. Thus, any objection to the physical absence of that letter is not preserved for review. Additionally, the contents of that letter are duplicative of other evidence before the Board, conclusorily reiterating only Petitioner's continued rehabilitation, education, acceptance of blame, and providing for her care if she were to be released. See Exh. 11 to Pet.; cf. Exh. 2 to Pet. pgs. 5-7 (education, rehabilitation, care); Exh. 3 to Pet. (rehabilitation); Exh. 4 to Pet. pg. 1 (rehabilitation); Exh. 5 to Pet. pgs. 2-3 (acceptance).

47. Petitioner's allegation that the Board's decision to "take [Petitioner's] word for" the letter is limited to merely its existence is picayune, overly technical, and not supported by the context in which Petitioner described its contents. This position further fails to recognize the Board's authority to weigh each document as it sees fit. See Tracy Aff. ¶¶ 8-11, 25. Therefore, Petitioner's argument is unavailing.

G. Petitioner's Claims Regarding TAP and the Board's Written Procedures Are Meritless

48. There is no merit to Petitioner's contention that the Board erred by failing to utilize a Transitional Accounting Plan ("TAP") in connection with its decision. While Petitioner cites Correction Law §71-a to suggest that a TAP was required for her parole release consideration, this provides no basis for vacating the Board's decision.

49. The Board's written procedures say that the Board must consider a TAP when a TAP has been prepared in lieu of an Inmate Status Report. Nothing within the Executive Law or the Board's written procedures require a TAP to be created for the Board's parole release

decision-making process. See Matter of Montane, 116 A.D.3d at 197; Matter of Rivera, 2014 N.Y. App. Div. LEXIS 5140; see also Tracy Aff. ¶¶ 34-35.

50. Moreover, the legislation that created the TAP, Chapter 62 of the Laws of 2011, Part C, subpart A, §16-a, (i.e., Correction Law §71-a), provides that "upon admission of an inmate committed to the custody of the department…the department shall develop a transition accountability plan." (emphasis added). Nothing within the 2011 legislation indicates that this provision of the Correction Law is applied retroactively. See Tracy Aff. ¶ 35.

51. Petitioner was received into DOCCS's custody in 1997, well before this legislation became effective on October 1, 2011, (see Chapter 62 of the Laws of 2011, Part C, subpart A, §49[h]). Accordingly, her argument fails to provide a basis upon which relief can be granted pursuant to Article 78 of the Civil Practice Laws and Rules. See Matter of Ng v. Chairperson, Index # 2650-13, *Decision and Order* dated February 6, 2014 (Sup. Ct. Sullivan Co)(LaBuda, A.J.S.C.); Matter of Belgrave v. NYS Board of Parole, Index #2013-667, *Decision and Judgment* dated January 28, 2014 (Sup. Ct. Franklin Co.)(Feldstein)(A.J.S.C.).

52. Moreover, there is no merit to Petitioner's contention that the Board failed to establish and implement written procedures to measure her rehabilitation and likelihood to succeed, if released to parole supervision, as required by Executive Law §259-c(4). Amendments to Executive Law § 259-c(4) in 2011 requiring that the Board establish such written procedures became effective on October 1, 2011. See Tracy Aff. ¶ 16.

53. On October 5, 2011, former Chairwoman Andrea W. Evans of the Board of Parole, in a Memorandum, established written procedures for the use of risk and needs assessments to be used by the Board for determinations regarding discretionary release decisions by the Board. The Board utilizes such procedures to gauge the rehabilitation of an inmate being

interviewed by the Board, and to measure the likelihood of an inmate's success upon release to parole supervision. See Tracy Aff. ¶ 16-17. Since Petitioner's Board appearance occurred in December of 2013, such written procedures were in place when she had her subject Board interview. Id.

54. Further, the record reveals that the Board, through its review of Petitioner's inmate status reports, other institutional records, and personal interview, considered the steps that she has taken towards rehabilitating herself, and that the Board evaluated her likelihood for success if released to community on parole supervision. As stated above, the record reveals that the Board considered the COMPAS prepared for the Board's review.

55. Additionally, many courts have acknowledged that former Chairwoman Evans' Memorandum establishes written procedures for risks and needs assessments in accordance with Executive Law §259-c(4). See Matter of Montane, 116 A.D.3d at 197; Matter of Partee v. Evans, 117 A.D.3d 1258 (3d Dep't. 2014), affirming 40 Misc.3d 896 (Sup. Ct. Albany Co. 2013); Matter of Michael v. Evans, Index # 2014-0030 dated July 21, 2014 (Sup. Ct. Cayuga Co.) (Leone, J.S C.).

56. There is no merit to Petitioner's contention that written procedures that the Board has promulgated subsequent to the Board's decision here memorializing former Chairwoman Evans' memorandum are legally infirm in that such procedures require the Board to consider "the most current risk and needs assessment only if they have been prepared" because the new regulations are not mandatory; rather, they are discretionary, and that the same is true with respect to preparing a case plan.

57. Petitioner's argument is also unavailing because it does not constitute an appealable issue. See 9 N.Y.C.R.R. §8006.3. In any event, there is nothing infirm about former

Chairwoman Evans' memorandum considering the legal authority. Additionally, there is nothing within the Executive Law or the Board's written procedures requiring a TAP to be created for the Board's parole release decision-making process. See Matter of Montane, 116 A.D.3d at 197; Matter of Rivera, 2014 N.Y. App. Div. LEXIS 5140.

58. Moreover, there is no merit to Petitioner's contention that the Board failed to follow former Chairwoman Evans' memorandum. The Board, through its review of Petitioner's Inmate Status Report, other institutional records, and personal interview, considered the steps that she has taken towards rehabilitating herself, and that the Board evaluated her likelihood for success if released to community on parole supervision.

59. Finally, Petitioner's argument that the Board's decision should be reversed because the Board's decision is predetermined is without any support and completely speculative. Petitioner argues that the failure of the Board to have a TAP for review indicates that the Board "made a predetermination that it was unnecessary to promote a productive re-entry and reintegration". However, as already cited, the preparation of a TAP for the Board's consideration was not required and Petitioner offers no further support for her speculative opinion. Thus, Petitioner's argument lacks any merit.

H. The Law Prevents Petitioner From Obtaining Confidential Information

60. Petitioner's argument that the Board withheld information from her that prevented her from addressing all information available to the Board lacks merit. Any undisclosed information was based upon legitimate reasons, including but not limited to confidential information based upon evaluative opinions by staff, and information in the presentence investigative report that may not be disclosed without court order.

61. Petitioner's contention that the redacted information from the COMPAS should have been made available to Petitioner is misleading. To the contrary, such information concerns intra-agency materials containing evaluative opinions by staff in connection with the preparation of the COMPAS for the Board's review. Therefore, the information was legitimately withheld from disclosure to Petitioner. See Public Officers Law §87(g)(2).

62. The confidential information expresses the author's opinion regarding the appropriateness of the Petitioner's possible release which are evaluative in nature, regardless of their form or brevity. Such information is exempt from disclosure. See 9 N.Y.C.R.R. §8000.5(c)(2); see also Ramahlo v. Bruno, 273 A.D.2d 521 (3d Dep't. 2000), lv. denied, 95 N.Y.2d 767 (2000); Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850 (3d Dep't. 2004), lv. denied, 4 N.Y.3d 704 (2005); Mingo v. New York State Div. of Parole, 244 A.D.2d 781 (3d Dep't. 1997).

63. Any similar evaluations or assessments developed by parole staff would be exempt from disclosure for the same reason. The fact that the Parole Board would consider such information prior to rendering its decision does not constitute sufficient reason, i.e. good cause, to release them. See 9 N.Y.C.R.R. §8000.5(c)(2)(i).

64. Petitioner's position that information that she was allegedly unlawfully deprived of having access to the complete COMPAS report available for review by the Board is similarly baseless. Documents to the Board of Parole supporting or opposing an inmate's possible release to parole supervision are exempt from public disclosure pursuant to Public Officers Law §§87(2)(a), 87(2)(f), and 87(2)(g).

65. The disclosure of such documents could endanger the authors of such documents. See 9 N.Y.C.R.R. §8000.5(c)(2)(i)(a)(3); see also Executive Law §259-i(2)(c)(B). The

Department does not have to establish that the disclosure of information would actually cause harm or injury; instead, it need only indicate that the possibility of harm or injury to others exists. See Matter of Nalo v. Sullivan, 125 A.D.2d 311, 312 (2d Dep't. 1986) lv. denied, 69 N.Y.2d 612; Stronza v. Hoke, 148 A.D.2d 900, 901 (3d Dep't. 1989); Ruberti, Girvin and Ferlazzo v. N.Y.S. Div. of State Police, 218 A.D.2d 494 (3d Dep't. 1996).

66. Also, the information set forth in such documents expresses the author's opinion regarding the appropriateness of an offender's release and such documents are evaluative in nature rendering such information exempt from disclosure. See 9 N.Y.C.R.R. §8000.5(c)(2); see also Ramahlo, 273 A.D.2d at 521; Matter of Grigger, 11 A.D.3d at 850; Mingo, 244 A.D.2d at 781.

67. The efforts taken by Petitioner to highlight her employment and financial future, as well as minimize her affinity for substance abuse, indicate that redaction was appropriate. Any contrary opinions or conclusions in the COMPAS would undermine Petitioner's entire theory of deserving release. Thus, absent confidentiality, the opining writer would be subjected to inappropriate pressure to agree out of fear of reprisal. Therefore, there is no merit to Petitioner's argument.

68. Notwithstanding the above, the allegedly improper redactions in the COMPAS, namely, the nondisclosure of Petitioner's assessment for future risk of substance abuse, future difficulties with employment, and future financial difficulties are *de minimis* because Petitioner was still scored a low risk for employment and financial concerns, and concerns over substance abuse are predictably obvious given her history of substance abuse increasing the severity of her criminal behavior. See Pet. pgs. 19-20; Exh. 6 to Pet. pg. 1; Exh. 2 to Pet. pgs. 3-4; Exh. 1 to Pet. pgs. 5, 7-9.

I. Petitioner's Argument That By Denying Her Parole Supervision, She Has Been Re-Sentenced And That Parole's Decision Was Pre-Determined, Is Fallacious

69. Petitioner's contention that the Board impermissibly re-sentenced her when it denied her release to parole supervision is unsubstantiated. Petitioner argues that the Board re-sentenced her by denying her release to parole supervision solely upon the basis of the instant offense. Petitioner also argues that, by repeatedly denying her parole, the Board has unlawfully re-sentenced her.

70. A denial of parole based upon the Board's consideration of all required factors after an inmate has served the minimum portion of her indeterminate sentence does not constitute re-sentencing. See Matter of Marsh v. New York State Div. of Parole, 31 A.D.3d 898 (3d Dep't. 2006); Matter of Crews v. New York State Executive Dep't. Bd. of Parole Appeals Unit, 281 A.D. 2d 672 (3d Dep't. 2001).

71. Here, because the record reveals that the Board considered all required factors for discretionary release to parole supervision, the Board's decision should be sustained when subject to judicial review. See Tracy Aff. ¶ 4-11.

J. Petitioner's Remaining Contentions Are Without Merit

72. The record reveals that in denying Petitioner's discretionary release, the Board considered the relevant statutory factors. The record does not support Petitioner's contention that the Board's decision was arbitrary or capricious, or irrational bordering on impropriety. The Board's determination was made in accordance with the law. Accordingly, the Petition should be dismissed.

SECOND OBJECTION IN POINT OF LAW

EVEN IF PETITIONER'S CLAIMS WERE MERITORIOUS, THE ONLY RELIEF AVAILABLE IS A *DE NOVO* HEARING

73. It is well-established law that the only relief available to Petitioner in the instant proceeding is a *de novo* hearing. "[T]he appropriate remedy for a successful challenge to a parole release determination is annulment of that determination and remand for a new parole release hearing." Matter of Ifill v. Evans, 87 A.D.3d 776, 777 (3d Dep't. 2011); Matter of Lichtel v. Travis, 287 A.D.2d 837, 838 (3d Dep't. 2011).

74. Accordingly, should the Court grant this petition, the only authorized relief is a *de novo* hearing.

CONCLUSION

WHEREFORE, Respondents respectfully request that the court grant the following relief:

(a) a judgment confirming Respondents' determination and dismissing the Petition;

(b) and for such other relief as this Court deems just and proper.

Dated: New York, New York
October 16, 2014

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Respondent
By:

David T. Cheng
Volunteer Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-6139

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of [redacted] Petitioner,	**VERIFICATION**
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,	Index No. [redacted]
- against -	
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION; ANTHONY J. ANNUCCI, ACTING COMMISSIONER; and TINA M. STANFORD, CHAIRWOMAN OF THE NEW YORK STATE BOARD OF PAROLE, Respondents.	

DAVID T. CHENG, ESQ., an attorney admitted to practice before the courts of the State of New York, affirms and states as follows:

I am a Volunteer Assistant Attorney General in the Office of ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, attorney for Respondents in the above-captioned proceeding. I have read the annexed answer, know the contents thereof, and state that the same are true to my knowledge, except for those matters alleged to be upon information and belief, and as to those matters I believe them to be true.

Executed October 16, 2014

David T. Cheng

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of [redacted]	**AFFIRMATION OF SERVICE**
Petitioner,	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,	Index No. [redacted]
- against -	
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION; ANTHONY J. ANNUCCI, ACTING COMMISSIONER; and TINA M. STANFORD, CHAIRWOMAN OF THE NEW YORK STATE BOARD OF PAROLE,	
Respondents.	

DAVID T. CHENG, ESQ., an attorney duly admitted to practice law before the courts of the State of New York, declares under penalty of perjury as follows:

On October 16, 2014, I served the annexed Verified Answer and the exhibits attached thereto, as well as the Affirmation of Terrence X. Tracy with exhibits, upon:

Martha Rayner, Esq.
Attorney for Petitioner
Lincoln Square Legal Services, Inc.
150 West 62nd Street, 9th Floor
New York, N.Y. 10023
mrayner@lsls.fordham.edu

Via Email and First-Class Mail

David T. Cheng

Executed on October 16, 2014

STATE OF NEW YORK
SUPREME COURT COUNTY OF NEW YORK

In the Matter of the Application of
[redacted]

AFFIRMATION

Petitioner,

Index No. [redacted]

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER, and TINA M. STANFORD, CHAIRWOMAN OF THE NEW YORK STATE BOARD OF PAROLE,

Respondent.

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

I, [redacted] hereby affirm under the penalty of perjury:

1. I am employed by the New York State Department of Corrections and Community Supervision and serve as Counsel to the New York State Board of Parole ("Board of Parole", "Parole Board" or "Board"). Through the enactment of Chapter 62 of the Laws of 2011, Part C, subpart A, the former New York State Division of Parole ("Division of Parole" or "the Division") and New York State Department of Correctional Services were merged to create a new State agency, the New York State Department of Corrections and Community Supervision ("DOCCS" or "the Department").

2. Prior to the aforementioned merger that became effective on March 31, 2011, I served as Counsel to the Division of Parole from December 1996. Under Article 12-B of the Executive Law as it existed prior to March 31, 2011, the Board of Parole was a part of the Division of Parole; subsequent to the merger, it now functions as a separate unit within DOCCS.

In this proceeding, the petitioner complains of the December 3, 2013 decision of the Parole Board that denied her release to parole supervision and requests relief from the Court. I am familiar with the transactions and occurrences that are the subject of this proceeding and make this affirmation in opposition to the petition.

3. By her petition petitioner contends that the Board's decision was arbitrary and capricious and in violation of law. Petitioner also argues that the Board has not established written procedures in accordance with Executive Law §259-c(4) as amended in 2011.

4. So long as the decision to deny release to parole supervision is made in accordance with the statutory requirements, which respondent maintains occurred in this instance, the Board's decision should be sustained when subject to judicial review. Matter of Briguglio v. New York State Board of Parole, 24 N.Y.2d 21, 29, (1969); Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Williams v. New York State Division of Parole, 114 A.D.3d 992 (3d Dept. 2014); Matter of Martinez v. Evans, 108 A.D.3d 815 (3d Dept. 2013); Matter of Burress v. Evans, 107 A.D.3d 1216 (3d Dept. 2013); Matter of Patterson v. Evans, 106 A.D.3d 1456 (4th Dept.), reargument denied, 107 A.D.3d 1647 (4th Dept), leave to appeal dismissed in part and denied in part, 22 N.Y.3d 912 (2013); Matter of Maricevic v. Evans, 86 A.D.3d 879 (3d Dept. 2011)(the Board's decision is "deemed a judicial function and shall not be reviewable if done in accordance with law"); Matter of De La Cruz v. Travis, 10 A.D.3d 789 (3d Dept. 2004); see Borda v. New York State Division of Parole, 219 A.D.2d 843 (4th Dept. 1995). In the absence of a convincing demonstration to the contrary, it must be presumed that the Board acted in accordance with the statutory requirements. Matter of Hanson v. New York State Board of Parole, 57 A.D.3d 994 (2d Dept. 2008); Matter of Bottom v. New York State Board of Parole, 30 A.D.3d 657, 659 (3d Dept. 2006); Matter of Fuchino v. Herbert,

255 A.D.2d 914 (4th Dept. 1998); Matter of Putland v. Herbert, 231 A.D.2d 893 (4th Dept. 1996); Matter of Zane v. Travis, 231 A.D.2d 848 (4th Dept. 1996). In this regard, where the record demonstrates that the Board's decision making was made in accordance with the governing statutory requirements, a reviewing court should not substitute its judgment for that of the Parole Board. Matter of Farid v. Travis, 17 A.D.3d 754 (3d Dept. 2005); Matter of Garcia v. New York State Division of Parole, 239 A.D.2d 235 (1st Dept. 1997); Matter of Gaithor v. Russi, 186 A.D.2d 1048 (4th Dept. 1992); Matter of Tomarkin v. Bombard, 56 A.D.2d 881 (2d Dept. 1977); Matter of Watkins v. Caldwell, 54 A.D.2d 42 (4th Dept. 1976).

5. Executive Law §259-i(2)(c)(A) provides in part: "[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law."

6. In every parole release determination where the minimum period of imprisonment was established by the sentencing court, the Board is required to consider the seriousness of the offense and the "prior criminal record, including the nature and pattern of offenses, [and] adjustment to any previous probation or parole supervision and institutional confinement." Executive Law §259-i(2)(c)(A). Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000); Matter of Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Geames v. Travis, 284 A.D.2d 843 (3d Dept. 2001); Matter of Herouard v. Travis, 273 A.D.2d 236 (2d Dept. 2000); Matter of Hawkins v. Travis, 259 A.D.2d 813 (3d Dept. 1999); Matter of Farid v. Travis, 239 A.D.2d 629 (3d Dept. 1997). In this regard, the Board may

properly rely upon and base its decision denying release on the nature of the instant offense or the offender's criminal history. Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Howithi v. Travis, 19 A.D.3d 727 (3d Dept. 2005); Matter of Putland v. Herbert, 231 A.D.2d 893 (4th Dept. 1996), lv. denied, 89 N.Y.2d 806 (1997); Matter of Jackson v. New York State Division of Parole, 217 A.D.2d 732 (3d Dept. 1995); see Vigliotti v. State of New York, Executive Division of Parole, 98 A.D.3d 789 (3d Dept. 2012); Matos v. New York State Board of Parole, 87 A.D.3d 1193 (3d Dept. 2011); Dobranski v. Evans, 83 A.D.3d 1355 (3d Dept. 2011); Martinez v. New York State Board of Parole, 83 A.D.3d 1319 (3d Dept. 2011); Gordon v. New York State Board of Parole, 81 A.D.3d 1032 (3d Dept. 2011); Watson v. New York State Board of Parole, 78 A.D.3d 1367 (3d Dept. 2010); Gonzalez v. Chair, New York State Board of Parole, 72 A.D.3d 1368 (3d Dept. 2010); Marcus v. Alexander, 54 A.D.3d 476 (3d Dept. 2008); Alamo v. New York State Division of Parole, 52 A.D.3d 1163 (3d Dept. 2008); Matter of Zhang v. Travis, 10 A.D.3d 828 (3d Dept. 2004).

7. The factors the Board is required to consider in making its determination as to the appropriateness for granting parole are set forth in Executive Law §259-i(2)(c)(A); they include matters such as the circumstances of the inmate's instant offense(s), his or her criminal record, their performance on any prior period of probation or community supervision, institutional behavior and accomplishments and release plans, including community resources.

8. A review of the transcript from petitioner's December 3, 2013 Board interview reveals that the Board discussed her instant offense, criminal history, prison programming, residence, history of drug abuse, sentencing minutes, employment, prison discipline, family support, documents submitted and COMPAS Re-Entry Risk Assessment. Annexed hereto as Exhibit D is a copy of the transcript of that Board interview.

9. In its decision denying petitioner parole, the Board concluded that there is a reasonable probability she would not live and remain at liberty without violating the law, that her release would be incompatible with the public safety and welfare of the community, and it would so deprecate the seriousness of the crime as to show disrespect for the law. In so concluding, the Board specifically cited the serious nature of the instant offenses, several committed against vulnerable victims, her propensity for violence, prison disciplinary record, and callous disregard for human life. See Exhibit D annexed hereto.

10. It is well settled that the weight to be accorded each of the requisite factors is solely within the discretion of the Parole Board. Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Montane v Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903 (2014); Matter of Martinez v. Evans, 108 A.D.3d 815 (3d Dept. 2013); Matter of Burress v. Evans, 107 A.D.3d 1216 (3d Dept. 2013); Matter of Patterson v. Evans, 106 A.D.3d 1456 (4th Dept.), reargument denied, 107 A.D.3d 1647 (4th Dept), leave to appeal dismissed in part and denied in part, 22 N.Y.3d 912 (2013); Matter of Wise v. New York State Division of Parole, 54 A.D.3d 463 (3d Dept. 2008); Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, (1st Dept. 2008); Matter of Valerio v. Dennison, 35 A.D.3d 938 (3d Dept. 2006); Matter of Freeman v. New York State Division of Parole, 21 A.D.3d 1174 (3d Dept. 2005); Mata v. Travis, 8 A.D.3d 570 (3d Dept. 2004); Matter of Ek v. New York State Board of Parole, 307 A.D.2d 433 (3d Dept. 2003); Matter of Walker v. Travis, 252 A.D.2d 360, 362 (1st Dept. 1998). The Board's assessment that one of the factors or set of factors outweigh the others it considered is not subject to judicial review. Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (3d Dept. 2004).

11. It is therefore well settled that the decision of the Board of Parole to deny an offender discretionary release to parole can be largely premised upon his or her current crimes of

conviction, the related circumstances and criminal history. Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980); see Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Montane v Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903 (2014); Matter of Olmosperez v. Evans, 114 A.D.3d 1077 (3d Dept.), leave to appeal granted, ___ A.D.3d ___, 2014 WL 2922276 (2014); Matter of Williams v. New York State Division of Parole, 114 A.D.3d 992 (3d Dept. 2014); Matter of Kozlowski v. New York State Board of Parole, 108 A.D. 3d 435 (1st Dept. 2013); Matter of Patterson v. Evans, 106 A.D.3d 1456 (4th Dept.), reargument denied, 107 A.D.3d 1647 (4th Dept), leave to appeal dismissed in part and denied in part, 22 N.Y.3d 912 (2013); Matter of Martinez v. New York State Board of Parole, 83 A.D.3d 1319 (3d Dept. 2011); Matter of Gordon v. New York State Board of Parole, 81 A.D.3d 1032 (3d Dept. 2011); Matter of Rodriguez v. Alexander, 73 A.D.3d 1354 (3d Dept. 2010); Matter of Hall v. New York State Division of Parole, 66 A.D.3d 1322 (3d Dept. 2009); Matter of Gardiner v. New York State Division of Parole, 48 A.D.2d 871 (3d Dept. 2008); Matter of Reed v. Division of Parole, 41 A.D.3d 1016 (3d Dept. 2007); Matter of Howithi v. Travis, 19 A.D.3d 727 (3d Dept. 2005); Henderson v. New York State Div. of Parole, 295 A.D.2d 678 (3d Dept. 2002); Matter of Larrier v. New York State Board of Parole Appeals Unit, 283 A.D.2d 700 (3d Dept. 2001); see Matter of Putland v. Herbert, 231 A.D.2d 893 (4th Dept. 1996), lv. denied, 89 N.Y.2d 806 (1997).

12. Against this settled case law, it cannot be said that the reasons provided by the Board in its decision denying petitioner release to parole were improper or proscribed under section 259-i(2) of the Executive Law, and as the reasons provided by the Board in its decision were properly detailed, its decision to deny petitioner release to parole should withstand judicial review. Corley v. New York State Division of Parole, 33 A.D.3d 1142 (3d Dept. 2006); Matter

of Dorman v. New York State Board of Parole, 30 A.D.3d 880 (3d Dept. 2006); Matter of Pearl v. New York State Division of Parole, 25 A.D.3d 1058 (3d Dept. 2006); Matter of Cornejo v. New York State Division of Parole, 269 A.D.2d 713 (3d Dept. 2000); Matter of Herouard v. Travis, 250 A.D.2d 911 (3d Dept. 1998); Matter of Confoy v. New York State Division of Parole, 173 A.D.2d 1014 (3d Dept. 1991); see generally Matter of Little v. Travis, 15 A.D.3d 698 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); Matter of Whitehead v. Russi, 201 A.D.2d 825 (3d Dept. 1993); Matter of Green v. New York State Division of Parole, 199 A.D.2d 677 (3d Dept. 1993).

13. When an inmate challenges a decision of the Board that denied him or her parole, in a proceeding such as this, the Court's role "is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the [statute] and rendered a determination that is supported, and not contradicted, by the facts in the record." Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Matter of Comfort v. New York State Division of Parole, 68 A.D.3d 1295 (3d Dept. 2009). Respondent maintains that the record before this Court demonstrates the Board followed the governing statutes and rendered a determination regarding petitioner's parole consideration that is supported by the record.

14. Absent a convincing showing to the contrary, there is a presumption that the Board has acted properly in following the statutory requirements; judicial intervention is warranted only upon a showing of irrationality bordering upon an impropriety. Matter of Silmon v. Travis, 95 N.Y.2d 470, 476 (2000); Matter of Montane v Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903 (2014). There is a presumption of honesty and integrity attaching to Judges and administrative fact-finders. People ex rel. v. Johnston v. New York State

Board of Parole, 180 A.D.2d 914 (3d Dept. 1992). Courts presume that governmental entities like the Parole Board follow their statutory commands and internal policies when carrying out their lawful obligations. Garner v. Jones, 529 U.S. 244 (2000).

15. The petitioner also maintains that the Board of Parole has not complied with Executive Law §259-c(4) in that it has not established the written procedures required thereby; this argument is without merit.

16. As previously noted, the Division of Parole and Department of Correctional Services were merged into one State agency pursuant to Chapter 62 of the Laws of 2011, Part C, subpart A; the merger was effective on March 31, 2011. Contained within that legislation were numerous amendments to both the Executive and Correction Law. Among those amendments was a change to Executive Law §259-c(4), which requires the Board of Parole to "establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release, and assist members of the State Board of Parole in determining which inmates may be released to parole supervision." The amendment to Executive Law §259-c(4) became effective October 1, 2011. See Chapter 62 of the Laws of 2011, Part C, subpart A, §49-f.

17. By memorandum dated October 5, 2011, former Chairwoman Andrea W. Evans outlined the aforementioned change in the Executive Law. In addition, she provided her fellow Board members with instructions as to how they should proceed in light of this legislation when assessing the appropriateness of an offender's possible release to parole supervision. This memorandum of former Chairwoman Evans serves as the written procedures of the Board pursuant to section 259-c(4) of the Executive Law. See Exhibit A annexed hereto. Matter of

Partee v. Evans, 117 A.D.3d 1258 (3d Dept. 2014), aff'g., 40 Misc.3d 896 (Sup. Ct.; Albany Co. 2013); Matter of Montane v Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903 (2014). The Board of Parole has memorialized these written procedures into its regulations through a notice of adoption filed with Department of State on July 14, 2014. See Exhibit F annexed hereto.

18. It is noteworthy that the language of the amendment to section 259-c(4) of the Executive Law did not expressly require the Board of Parole to have before it a risk and needs assessment instrument, i.e., a COMPAS Re-Entry Risk Assessment, when it considers an inmate for possible release to parole supervision. That portion of section 259-c(4) of the Executive Law which previously called for the Board's use of a "risk and needs assessment instrument" was expressly deleted by Chapter 62 of the Laws of 2011, Part C, subpart A, §38-b. See Exhibit B annexed hereto; but see, Matter of Garfield v. Evans, 108 A.D.3d 830 (3d Dept. 2013); see also Matter of Malerba v. Evans, 109 A.D.3d 1067 (3d Dept. 2013); Matter of Thomas v. Evans, 109 A.D.3d 1069 (3d Dept. 2013).

19. Of significance, however, to the written procedures called for under section 259-c(4) of the Executive Law is the mandate within Executive Law §259-i(2)(c)(A) that "[i]n making the parole release decision, the procedures adopted pursuant to subdivision 4 of section [259-c] of this article shall require that the following be considered: ..." What then follows in the statute is a listing of the statutory factors that the Board must consider whenever an inmate is considered for the possible grant of parole. See Executive Law §259-i(2)(c)(A)(i) through (viii); see also Exhibit A; Matter of Partee v. Evans, 40 Misc.3d 896 (Sup. Ct.; Albany Co. 2013) ("It is clear that the two sections of the Executive Law [§259-i(2)(c) and §259-c(4)] are meant to be read together."), aff'd., 117 A.D.3d 1258 (3d Dept. 2014).

20. Consistent with this legislative mandate, included within the written procedures of October 5, 2011 are the precise factors as set forth in Executive Law §§259-i(2)(c)(A)(i) through (viii). See Exhibit A annexed hereto; see also Matter of Torres v. New York State Board of Parole, Index # 466-13, *Decision and Judgment* at 4 dated June 27, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Partee v. Evans, 117 A.D.3d 1258 (3d Dept. 2014), aff'g., 40 Misc.3d 896 (Sup. Ct.; Albany Co. 2013).

21. In addition, the written procedures note that the statutory factors set forth in the current Executive Law §§259-i(2)(c)(A)(i) through (viii), the very same factors that existed within the Executive Law prior to the enactment of Chapter 62 of the Laws of 2011, Part C, subpart A (see Matter of Torres v. New York State Board of Parole, Index # 466-13, *Decision and Judgment* dated June 27, 2013 [Sup. Ct., Albany Co] [copy annexed hereto as Exhibit C]; accord Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014), reflect the strong "rehabilitative component" within section 259-i of the Executive Law, citing Silmon v. Travis, 95 N.Y.2d 470 (2000). See Exhibit A annexed hereto. Finally, the written procedures of October 5, 2011 instruct the Board that "in your consideration of the statutory criteria set forth in Executive Law §259-i(2)(c)(A)(i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole supervision." Id.

22. Although legal commentators have opined that the 2011 amendments to the Executive Law obligate the Board to render a decision under section 259-i(2)(c)(A) upon an assessment that focuses only on matters that may occur in the future, i.e., what risk does the offender present to the community if released, and not on an assessment of static matter that

transpired in the past, e.g., criminal history and crime of conviction, their observation is without the support of those courts that have addressed this issue.

23. While the amendment now requires the Board to consider a new factor, which is forward looking, the Board still must consider the severity of the offense, criminal history, and institutional adjustment. The amendment does not change the well settled law that the Board is not required to discuss every factor considered, and it need not accord every factor equal weight Matter of Partee v. Evans, 40 Misc3d 896, 908 (Sup. Ct. Albany Co. 2013, aff'd, 117 A.D.3d 1258 (3d Dept. 2014), citing, Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788, 791 (1994); Graziano v. Evans, 90 A.D.3d 1367 (3d Dept.2011), leave to appeal denied, 18, N.Y.3d 810, reargument denied, 19 N.Y.3d 938 (2012). In this vein, the 2011 amendments to Article 12-B of the Executive Law did not " 'transform [ ] or otherwise alter [ ] the obligations of ... the Board in articulating its decision'." Matter of Hamilton v. New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714, 720 (3d Dept. 2014), quoting, Matter of Montane v. Evans, 116 A.D3d at 203-04, n.2. Finally, as noted by Acting Justice Feldstein:

> "the 'risk and need principles' that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " ... *assist* members of the state board of parole in determining which inmates may be released to parole supervision ..." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A).

Matter of Belgrave v. N.Y.S. Board of Parole, 2014 WL 574584, Index #2013-667, *Decision and Judgment* dated January 28, 2014 (Sup. Ct. St. Lawrence Co.)(Feldstein, A.J.S.C.).

24. Courts have determined that the parole release consideration afforded to offenders under these written procedures against the statutory backdrop of section 259-i(2)(c)(A) of the Executive Law are consistent with the amendments to section 259-c(4) of the Executive Law. See Matter of Partee v. Evans, 117 A.D.3d 1258 (3d Dept. 2014), aff'g., 40 Misc.3d 896 (Sup. Ct.; Albany Co. 2013); Matter of Montane v Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903 (2014); Matter of Diaz v New York State Board of Parole, 42 Misc3d 523 (Sup. Ct., Cayuga Co. 2013); Matter of Belgrave v. NYS Board of Parole, 2014 WL 574584, Index #2013-667, *Decision and Judgment* dated January 28, 2014 (Sup. Ct., St. Lawrence Co.)(Feldstein, A.J.S.C.); Matter of Liao v. Stanford, Index #141882, *Decision and Judgment* dated December 19, 2013 (Sup. Ct., St. Lawrence Co.)(Feldstein, A.J.S.C.); Matter of Congelosi v. Department of Corrections and Community Supervision, State Board of Parole, Index # 2746-13, *Decision and Order* dated December 13, 2013 (Sup. Ct., Albany Co.)(Connolly, A.J.S.C.), aff'd., 120 A.D.3d 874 (3d Dept. 2014); Matter of Abernathy v. Evans, Index #3487-13, *Decision and Order* dated October 31, 2013 (Sup. Ct., Albany Co.)(Breslin, J.S.C.); Matter of Russell v. Evans, Index # 1757-13, *Decision and Judgment* dated August 13, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Davis v. Evans, Index # 808-13, *Decision and Order* dated August 12, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Torres v. New York State Board of Parole, Index # 466-13, *Decision and Judgment* dated June 27, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Dafnos v. New York State Board of Parole, Index # 452-13, *Decision and Order* dated July 9, 3013 (Sup. Ct., Albany Co.)(McGrath, J.S.C.); Matter of Adorno v. Evans, Index # 4948-12, *Decision/Judgment* dated February 27, 2013 (Sup. Ct.; Albany Co.)(Devine, J.S.C.); Matter of Hall v. New York State Department of Corrections and Community Supervision, Index #2089-13, *Decision and Order* dated November 15, 2013 (Sup.

Ct., Sullivan Co.)(LaBuda, A.J.S.C.); Matter of MacKenzie v. Evans, Index # 2313-13 *Decision and Order* dated November 12, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C.); Matter of Singh v. Evans, Index # 1411-13, *Decision and Order* dated October 11, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C), aff'd, 118 A.D.3d 1209 (3d Dept. 2014); Matter of Medina v. NYS Board of Parole, Index # 1496-13, *Decision and Order* dated October 8, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C); Matter of Rivers v. Evans, et ano., Index # 0837-13, *Decision and Order* dated September 17, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C.), aff'd, 119 A.D.3d 1188 (3d Dept. 2014); Matter of Cruz v. N.Y.S. Board of Parole, Index # 202-13, *Decision and Order* dated April 1, 2013 (Sup. Ct.; Sullivan Co.)(LaBuda, A.J.S.C.). Copies of the afore-cited unreported decisions are annexed hereto as Exhibit C.

25. As previously noted, the Board, as part of its parole release consideration, interviewed the petitioner on December 3, 2013. See Exhibit D annexed hereto. A review of the transcript from the interview reveals that the Board discussed not only the petitioner's instant offenses and criminal history, but also her institutional record and plans if released.

26. The record also establishes that the Board had the benefit of a COMPAS Re-Entry Risk Assessment that had been prepared in connection with petitioner's parole release consideration. See Garfield v. Evans, 108 A.D.3d 830 (3d Dept. 2013); see also Matter of Malerba v. Evans, 109 A.D.3d 1067 (3d Dept. 2013); Matter of Thomas v. Evans, 109 A.D.3d 1069 (3d Dept. 2013). While the COMPAS instrument assists the Board in its assessment of the risks an offender may present to the community if released and what his or her needs may be to address those risks, (i.e., the incorporation of risk and needs principles into the parole release decision-making process), the results of a scored COMPAS Re-Entry Risk Assessment in no way abrogates or diminishes the Board's obligation to consider and weigh all of the statutory factors

and render a decision under the aforementioned governing standard set forth within Executive Law §259-i(2)(c)(A), i.e., "[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." (Emphasis added). Matter of Torres v. New York State Board of Parole, Index # 466-13, *Decision and Judgment* dated June 27, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.).

27. With what was addressed in the course of the petitioner's parole interview coupled with the other information about her that was contained in the documents that were provided to the Board for its consideration, see Respondent's Answer and the exhibits annexed thereto, it cannot be said that the manner by which the Board assessed the appropriateness of petitioner's possible release to parole supervision was at variance with the October 5, 2011 written procedures or the governing provisions of the Executive Law.

28. Executive Law §259-c(4) and the Board's associated use of the COMPAS instrument do not abrogate the authority of the Board of Parole to exercise its independent judgment in placing whatever weight it deems appropriate to each of the factors for discretionary release to parole supervision pursuant to Executive Law §259-i(2)(c)(A). See People v. Lankford, 35 Misc.3d. 418 (Bronx Co.: 2012); Matter of Torres v. New York State Board of Parole, Index # 466-13, *Decision and Judgment* dated June 27, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Hall v. New York State Department of Corrections and Community Supervision, Index #2089-13, *Decision and Order* dated November 15, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C.); Cruz v. N.Y.S. Board of Parole, Index # 202-13, *Decision*

and Order dated April 1, 2013 (Sup. Ct.; Sullivan Co.)(LaBuda, A.J.S.C.). Copies of the above decisions are annexed hereto as Exhibit C.

29. All that is required under Executive Law §259-c(4) is for the Board to have written procedures that incorporate risk and needs principles designed to measure the rehabilitation of parole eligible offenders, their likelihood of success if released and assist in making release decisions. This the Board has done by its October 5, 2011 procedures and use of the COMPAS instrument, for when considering the statutory criteria set forth in Executive Law §§259-i(2)(c)(A)(i) through (viii), it ascertained what steps petitioner took toward her rehabilitation and the likelihood of her success once released to parole supervision. See Exhibits A, D and E annexed hereto; see also Matter of Montane v Evans, 116 A.D.3d 197 (3d Dept.), leave to appeal granted, 23 N.Y.3d 903 (2014).

30. As previously noted, a COMPAS Re-Entry Risk Assessment was prepared for petitioner's parole review and the same was considered by the Board in assessing the appropriateness of granting her parole. (Petitioner is being afforded a redacted version of this document and an unredacted copy is being submitted to the Court for *in camera* review. See Exhibit E).

31. When prepared, the results of a COMPAS Re-Entry Risk Assessment constitute one of the many factors the Board must consider and weigh when making its parole release decision. Matter of Russell v. Evans, Index #1757-13, *Decision and Judgment* dated August 13, 2013 at 6 (Sup. Ct., Alb. Co)(Platkin, A.J.S.C.) (copy annexed hereto as part of Exhibit C). Like all of the other documents and information the Board considers pursuant to section 259-i(2)(c)(A) of the Executive Law, the Board may afford whatever weight that it deems appropriate to the information derived from a scored COMPAS Re-Entry Risk Assessment when making its

release decision. Matter of Rivera v. New York State Division of Parole, 119 A.D.3d 1107 (3d Dept., July 10, 2014); Matter of Davis v. Fischer, Index # 808-13, *Decision and Judgment* dated August 12, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.) (copy annexed hereto as part of Exhibit C). The weight to be accorded each of the requisite factors remains solely a matter of the Parole Board's discretion. See Matter of MacKenzie v. Evans, Index # 2313-13, *Decision and Order* dated November 12, 2013 at 5 (Sup. Ct., Sullivan Co.)(La Buda, A.J.S.C.); Matter of Torres v. New York State Board of Parole, Index # 466-13, *Decision and Judgment* dated June 27, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.) (copies annexed hereto as part of Exhibit C); Matter of Singh v. Evans, Index # 1411-13, *Decision and Order* dated October 11, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C.), aff'd, 118 A.D.3d 1209 (3d Dept. 2014); Matter of Khatib v. New York State Board of Parole, 118 A.D.3d 1207 (3d Dept. 2014); Matter of Montane, 116 A.D.3d at 203; see generally Matter of Valderrama v. Travis, 19 A.D.3d 904 (3d Dept. 2005), Matter of Legette v. Travis, 11 A.D.3d 849 (3d Dept. 2004).

32. Finally, the standard utilized by the Board for assessing the appropriateness of granting the inmate parole continues to be set forth in Executive Law §259-i(2)(c)(A). Without question, this standard necessarily calls upon the Board to assess an inmate's risk of reoffending if released, as well as the risk he or she may present to the welfare of society. As for the Board's assessment of the inmate's efforts toward rehabilitation while incarcerated, such an assessment necessarily occurs through its consideration of the statutory factors set forth in Executive Law 259-i(2)(c)(A)(i) through (viii), factors which the New York Court of Appeals in Silmon v. Travis found reflect the strong rehabilitative component within section 259-i(2) of the Executive Law, with the benefit of a scored COMPAS instrument. In this vein, with the statutory criteria set out in Executive Law §259-i(2)(c)(A) being considered in light of the instructions contained

in the Board's October 5, 2011 written procedures and petitioner's scored COMPAS instrument, the Board assessed the steps taken toward rehabilitation. Consequently, it cannot be disputed that during the course of the petitioner's December 3, 2013 release consideration the Board assessed the steps taken by the petitioner to effect her rehabilitation while incarcerated.

33. Against this backdrop it cannot be said that the Board's decision-making process for the petitioner was in violation of the governing law and that the decision denying her release to parole was arbitrary or capricious.

34. To the extent the petitioner contends that the Board's decision was somehow infirm because a transition accountability plan ("TAP") was not prepared for her release consideration, this too provides no basis for granting relief pursuant to Article 78 of the New York Civil Practice Law and Rules. See Matter of Rivera v. New York State Division of Parole, 119 A.D.3d 1107 (3d Dept., July 10, 2014); Matter of Singh v. Evans, Index # 1411-13, *Decision and Order* dated October 11, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C), aff'd., 118 A.D.3d 1209 (3d Dept. 2014); Matter of Medina v. NYS Board of Parole, Index # 1496-13, *Decision and Order* dated October 8, 2013 (Sup. Ct., Sullivan Co.)(LaBuda, A.J.S.C); Matter of Russell v. Evans, Index # 1757-13, *Decision and Judgment* dated August 13, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Davis v. Evans, Index # 808-13, *Decision and Order* dated August 12, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Torres v. New York State Board of Parole, Index # 466-13, *Decision and Judgment* dated June 27, 2013 (Sup. Ct., Albany Co.)(Platkin, A.J.S.C.); Matter of Partee v. Evans, 117 A.D.3d 1258 (3d Dept. 2014), aff'g., 40 Misc.3d 896 (Sup. Ct.; Albany Co. 2013).

35. Nothing in the Executive Law or the Board's written procedures of October 5, 2011 require the creation of a TAP instrument for a Parole Board appearance. The October 5,

2011 procedures simply instruct that when a TAP has been created in lieu of an Inmate Status Report, that the Board is to consider that document in the course of its decision-making. In this instance, an Inmate Status Report, not a TAP, was prepared for the Board's December 3, 2013 parole release consideration. In addition, section 71-a of the Correction Law, the statute that created the TAP instrument (see Chapter 62 of the Laws of 2011, Part C, subpart A, §16), became effective on October 1, 2011 and incorporates no language that calls for a prospective application of that statute. See Chapter 62 of the Laws of 2011, Part C, subpart A, §49. Petitioner was received into State custody in May 1997, nearly 14 years before section 71-a of the Correction Law took effect.

WHEREFORE, upon the foregoing it is respectfully requested that the relief sought by the petitioner be denied and that the Petition be dismissed in its entirety.

Dated: September 22, 2014
Albany, New York

TERRENCE X. TRACY