Art. 78 Petitioner's Reply - FUSL000055 (2021-01-06)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted],

Petitioner,

-against-

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

Respondent(s).

ANSWER AND RETURN
Index No. 2020-54062
Hon. Christi J. Acker
J.S.C.

Respondent, by its attorney, LETITIA JAMES, Attorney General of the State of New York, Heather R. Rubinstein, Assistant Attorney General of counsel, submits the following as an answer and return upon the petition:

1. Denies each and every allegation of the petition except to the extent it is confirmed by the attached record.

OBJECTION IN POINTS OF LAW

2. Respondent's determination was made in accordance with applicable law and was neither arbitrary nor capricious.

AS AND FOR A DEFENSE TO THE PETITION

5. Petitioner was convicted of Attempted Robbery 2nd Degree and was sentenced as a persistent violent felony offender to a term of 12 years to life. The instant offense consisted of the petitioner pointing an imitation pistol at the victim and taking his jewelry and money. Exhibits 1 and 2. The Judgment, Supreme Court, Bronx County, rendered July 1, 2010, as amended July 23, 2010, convicting defendant, upon his plea of guilty, of attempted robbery in

the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, was unanimously affirmed on appeal. People v Byrdsong, 114 A.D.3d 604 (1st Dept. 2014) lv. den. 2014 N.Y. LEXIS 2610.

6. After having served the minimum period of time required under his sentence, the petitioner had his initial Parole Board Release Interview on March 10, 2020. At that time discretionary release was denied, and petitioner was ordered held for another 18 months. Petitioner timely perfected his administrative appeal on July 30, 2020.

7. The Appeals Unit did not respond while they were awaiting sentencing minutes – the lack of which was raised by petitioner. The Board received the minutes on December 9, 2020. Regardless, petitioner is not in any way prejudiced by the failure of the Appeals Unit to issue a Findings Statement within four months. The Appeals Unit failure to act does not make the underlying administrative decision constitutionally defective or invalidate the administrative decision. Rather, pursuant to 9 N.Y.C.R.R. §8006.4(c), the sole consequence is that the petitioner may deem his administrative remedy to be exhausted and may immediately seek judicial review of the underlying determination. Graham v New York State Division of Parole, 269 A.D.2d 628 (3d Dept. 2000), lv. den. 95 N.Y.2d 753 (2000); People ex rel. Tyler v Travis, 269 A.D.2d 636 (3d Dept. 2000); Lord v State of New York Executive Department Board /Division of Parole, 263 A.D.2d 945 (4th Dept. 1999), lv. den. 94 N.Y.2d 753 (1999); reargument denied 95 N.Y.2d 826 (1999); D'Joy v New York State Division of Parole, 127 F.Supp2d 433, 442 (S.D.N.Y. 2001). Failure of the Appeals Unit to act on the administrative appeal in a timely manner does not deprive an inmate of due process. Mentor v New York State Division of Parole, 87 A.D.3d 1245 (3d Dept. 2011) lv.app.den. 18 N.Y.3d 803 (2012).

8. During the March 2020 interview, the Board discussed with petitioner his offense, his history of substance abuse, his institutional record, his release plans, the case plan, sentencing minutes, his medical conditions and the COMPAS instrument. Following the interview, review of his submissions, and consideration of his COMPAS risk assessment, release plans, programming, and institutional record, discretionary release was denied.

ARGUMENT

9. Petitioner maintains, as he did at the administrative level, that: 1) the decision is arbitrary and capricious in that the Board failed to consider and/or properly weigh the required statutory factors; 2) the decision illegally resentenced the petitioner to life without parole. 3) the Board never reviewed the sentencing minutes; 4) the DA letter is old, and because a new administration has been voted into office, the Board is required to seek a new DA letter; 5) the decision is based upon racism; 6) as the petitioner has been a drug addict, better to send him to rehabilitation, and not more prison time; 7) the decision doesn't explain how each factor was considered; 8) the decision was predetermined; 9) the Board intimidated the petitioner by referring back to his statements from prior Board interviews; 10) the Board decision failed to list any factors in support of the statutory standard cited; and 11) the Board failed to comply with the 2011 amendments to the Executive Law, and the 2017 regulations, in that the COMPAS has an error on it, each factor was not explained, the Case Plan was never discussed during the interview, and the COMPAS departure was void as no individual reason for a specific scale was given.

10. Pursuant to Executive Law §259-i(2)(c), the Parole Board must consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record or criminal behavior, giving whatever emphasis they so choose to each factor. In re Garcia v

New York State Division of Parole, 239 A.D.2d 235 (1st Dept. 1997); People ex rel. Herbert v. New York State Board of Parole, 97 A.D.2d 128 (1st Dept. 1983). The Board is not required to give equal weight to each statutory factor. Shark v New York State Division of Parole Chair, 110 A.D.3d 1134 (3d Dept. 2013); Jones v New York State Parole Board, 127 A.D.3d 1327 (3d Dept. 2015); Hill v New York State Board of Parole, 130 A.D.3d 1130 (3d Dept. 2015); Dolan v New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); Fischer v Graziano, 130 A.D.3d 1470 (4th Dept. 2015); De la Cruz v Annucci, 122 A.D.3d 1413 (4th Dept. 2014); Davis v Evans, 105 A.D.3d 1305 (3d Dept. 2013); Thomches v Evans, 108 A.D.3d 724 (3d Dept. 2013); Rodriguez v Evans, 10 A.D.3d 1049 (3d Dept. 2013); Martinez v New York State Board of Parole, 83 A.D.3d 1319 (3d Dept. 2011); Ward v New York State Division of Parole, 26 A.D.3d 712 (3d Dept. 2006) lv. den. 7 N.Y.3d 702; Morel v Travis, 18 A.D.3d 930 (3d Dept. 2005); Matter of Farid v Travis, 239 A.D.2d 629 (3d Dept. 1997); Phillips v Dennison, 41 A.D.3d 17 (1st Dept. 2007); Davis v Lemons, 73 A.D.3d 1354 (3d Dept. 2010); MacKenzie v Evans, 95 A.D.3d 1613 (3d Dept. 2012). That an inmate has numerous achievements within a prison's institutional setting does not automatically entitle him to parole release. Matter of Faison v Travis, 260 A.D.2d 866 (3d Dept. 1999); Pulliam v Dennison, 38 A.D.3d 963 (3d Dept. 2007). Moreover, per Executive Law §259-i(2)(c), an application for parole release shall not be granted merely as a reward for appellant's good conduct or achievements while incarcerated. Larrier v New York State Board of Parole Appeals Unit, 283 A.D.2d 700 (3d Dept. 2001); Vasquez v State of New York Executive Department, Division of Parole, 20 A.D.3d 668 (3d Dept. 2005); Wellman v Dennison, 23 A.D.3d 974 (3d Dept. 2005). A determination that the inmate's achievements are outweighed by the severity of the crimes is within the Board's discretion. Kirkpatrick v Travis, 5 A.D.3d 385 (2d Dept. 2004); Anthony v New York State Division of Parole, 17 A.D.3d 301 (1st Dept. 2005); Cruz v New York State

Division of Parole, 23 A.D.3d 974 (3d Dept. 2007); Santos v Evans, 81 A.D.3d 1059 (3d Dept. 2011). Parole release decisions are discretionary, and will not be disturbed so long as the Board complies with the statutory requirements of the Executive Law. Williams v New York State Division of Parole, 114 A.D.3d 992 (3d Dept. 2014).

11. The Board may place particular emphasis upon the nature of the offense. Mullins v New York State Board of Parole, 136 A.D.3d 1141 (3d Dept. 2016). The Board in its discretion properly placed greater emphasis on the present offenses, as it is not required to give equal weight to all requisite factors. Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289 (3d Dept. 2016); Peralta v New York State Board of Parole, 157 A.D.3d 1151 (3d Dept. 2018).

12. The fact that the petitioner committed the instant offense while on parole supervision is also a basis for denying parole release. Berry v New York State Division of Parole, 50 A.D.3d 1346 (3d Dept. 2008); Davis v New York State Division of Parole, 114 A.D.2d 412 (2d Dept. 1985); Delman v New York State Board of Parole, 93 A.D.2d 888, 889 (2d Dept. 1983); Wilson v Board of Parole, 284 A.D.2d 846 (3d Dept. 2001); Coombs v New York State Division of Parole, 25 A.D.3d 1051 (3d Dept. 2006); Ward v New York State Division of Parole, 144 A.D.3d 1375 (3d Dept. 2016).

13. The Board is obligated to consider the inmate's prior criminal record. Matter of Partee v Evans, 117 A.D.3d 1258 (3d Dept. 2014); Applewhite v New York State Board of Parole, 167 A.D.3d 1380 (3d Dept. 2018). The Board may put more weight on the inmate's criminal history. Bello v Board of Parole, 149 A.D.3d 1458 (3d Dept. 2017); Hall v New York State Division of Parole, 66 A.D.3d 1322 (3d Dept. 2009); Davis v Evans, 105 A.D.3d 1305 (3d Dept. 2013); Jones v New York State Parole Board, 127 A.D.3d 1327 (3d Dept. 2015); Wade v Stanford,

148 A.D.3d 1487 (3d Dept. 2017). The fact that the Board afforded greater weight to the inmate's criminal history, and not to an alleged positive institutional adjustment, does not render the denial of parole for that reason irrational or improper. Matter of Ortiz v Hammock, 96 A.D.2d 735 (4th Dept. 1983); Peo. ex rel. Yates v Walters, 111 A.D.2d 839 (2d Dept. 1985); Matter of Ristau v Hammock, 103 A.D.2d 944 (3d Dept. 1984) lv. to appeal den. 63 N.Y.2d 608 (1984); Torres v New York State Division of Parole, 300 A.D.2d 128 (1st Dept. 2002); Lashway v Evans, 110 A.D.3d 1420 (3d Dept. 2013); Tafari v Cuomo, 170 A.D.3d 1351 (3d Dept. 2019). The denial of parole release based upon nature of conviction and criminal history is appropriate. In the Matter of Hawkins v Travis, 259 A.D.2d 813 (3d Dept. 1999); Farid v Russi, 217 A.D.2d 832 (3d Dept. 1995); Charlemagne v New York State Division of Parole, 281 A.D.2d 669, 670 (3d Dept. 2001); Burress v Evans, 107 A.D.3d 1216 (3d Dept. 2013); Boccadisi v Stanford, 133 A.D.3d 1169 (3d Dept. 2015); Bush v Annucci, 148 A.D.3d 1392 (3d Dept. 2017); Holmes v Annucci, 151 A.D.3d 1954 (4th Dept. 2017); Espinal v New York State Board of Parole, 172 A.D.3d 1816 (3d Dept. 2019).

14. The fact that the petitioner had a prior violation of parole is also a basis for denying parole release in the present. Walker v Russi,176 A.D.2d 1185 (3d Dept. 1991), lv. to appeal dismissed 79 N.Y.2d 897 (1992); Webb v Travis, 26 A.D.3d 614 (2d Dept. 2006); Rodriguez v Evans, 10 A.D.3d 1049 (3d Dept. 2013); Davis v Evans, 105 A.D.3d 1305 (3d Dept. 2013); Lashway v Evans, 110 A.D.3d 1420 (3d Dept. 2013); Holmes v Annucci, 151 A.D.3d 1954 (4th Dept. 2017).

15. The fact that the petitioner had a prior violation of probation is also a basis for denying parole release. Velasquez v Travis, 278 A.D.2d 651 (3d Dept. 2000); Vasquez v New York State Division of Parole, 215 A.D.2d 856 (3d Dept. 1995); People ex rel. Herbert v New York State Board of Parole, 97 A.D.2d 128, 130 (1st Dept. 1983).

16. The consideration by the Board of prison disciplinary violations is also appropriate. People ex rel. Henson v Miller, 244 A.D.2d 729 (3d Dept. 1997), lv. den. 91 N.Y.2d 809 (1998); Warburton v Department of Correctional Services, 254 A.D.2d 659 (3d Dept. 1998), appeal dismissed, leave to appeal denied 92 N.Y.2d 1041 (1999); Matter of Partee v Evans, 117 A.D.3d 1258 (3d Dept. 2014); Rivers v Evans, 119 A.D.3d 1188 (3d Dept. 2014); Boccadisi v Stanford, 133 A.D.3d 1169 (3d Dept. 2015); James v New York State Board of Parole, 136 A.D.3d 1089 (3d Dept. 2016); Almonte v New York State Board of Parole, 145 A.D.3d 1307 (3d Dept. 2016); Crawford v New York State Board of Parole, 144 A.D.3d 1308 (3d Dept. 2016); Betancourt v Stanford, 148 A.D.3d 1497 (3d Dept. 2017); Bush v Annucci, 148 A.D.3d 1392 (3d Dept. 2017); Perea v Stanford, 149 A.D.3d 1392 (3d Dept. 2017); Mays v Stanford, 150 A.D.3d 1521 (3d Dept. 2017); Gonzalvo v Stanford, 153 A.D.3d 1021 (3d Dept. 2017); Paniagua v Stanford, 153 A.D.3d 1018 (3d Dept. 2017); Lewis v Stanford, 153 A.D.3d 1478 (3d Dept. 2017); Cobb v Stanford, 153 A.D.3d 1500 (3d Dept. 2017); Franza v Stanford, 155 A.D.3d 1291 (3d Dept. 2017); Constant v Stanford, 157 A.D.3d 1175 (3d Dept. 2018); Robinson v New York State Board of Parole, 162 A.D.3d 1450 (3d Dept. 2018); Tafari v Cuomo, 170 A.D.3d 1351 (3d Dept. 2019).

17. The COMPAS can contain negative factors that support the Board's conclusion. Wade v Stanford, 148 A.D.3d 1487 (3d Dept. 2017); Espinal v New York State Board of Parole, 172 A.D.3d 1816 (3d Dept. 2019).

18. The Board set forth in adequate detail the reasons for its denial of the inmate's request for release. Burress v Evans, 107 A.D.3d 1216 (3d Dept. 2013). The written Board decision in this case contains sufficient detail. McLain v New York State Division of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); Walker v Russi,176 A.D.2d 1185 (3d Dept. 1991), appeal dismissed 79 N.Y.2d 897 (1992); Thomas v Superintendent of Arthur Kill Correctional

Facility, 124 A.D.2d 848 (2d Dept. 1986), appeal dismissed 69 N.Y.2d 611 (1987); De la Cruz v Annucci, 122 A.D.3d 1413 (4th Dept. 2014); Betancourt v Stanford, 148 A.D.3d 1497 (3d Dept. 2017); Robinson v New York State Board of Parole, 162 A.D.3d 1450 (3d Dept. 2018); Applegate v New York State Board of Parole, 164 A.D.3d 996 (3d Dept. 2018); Schendel v Stanford, 185 A.D.3d 1365 (3d Dept. 2020).

19. The Board Commissioner did not threaten the petitioner with a predetermined life without parole. Rather, he merely stated that the current sentence has the word life attached to it, so there is no guarantee he will ever be released. Nothing in the Board's decision indicates a permanent denial of parole consideration. Hodge v Griffin, 2014 U.S. Dist. LEXIS 75509 (SDNY 2014). The minimum term of imprisonment in a plea agreement is not tantamount to a sentencing recommendation-and a parole denial does not thus constitute a re-sentencing. Gomez v New York State Division of Parole, 87 A.D.3d 1197 (3d Dept. 2011) lv. app. den. 18 N.Y.3d 802 (2011). That the sentencing court did not impose the maximum sentence is not an indication that the sentencing court made a favorable parole recommendation. Duffy v New York State Division of Parole, 74 A.D.3d 965 (2d Dept. 2010). A claim that the denial of parole release amounted to a resentencing is without merit. Kalwasinski v Patterson, 80 A.D.3d 1065 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 710 (2011); Marnell v Dennison, 35 A.D.3d 995 (3d Dept. 2006) lv. den. 8 N.Y.3d 807; Murray v Evans, 83 A.D.3d 1320 (3d Dept. 2011); Gonzalez v Chair, New York State Board of Parole, 72 A.D.3d 1368 (3d Dept. 2010); Borcsok v New York State Division of Parole, 34 A.D.3d 961 (3d Dept. 2006) lv. den. 8 N.Y.3d 803. The Board was vested with discretion to determine whether release was appropriate, notwithstanding what the minimum period of incarceration which was set by the Court. Cody v Dennison, 33 A.D.3d 1141, 1142 (3d Dept. 2006), lv. den. 8 N.Y.3d 2007; Burress v Dennison, 37 A.D.3d 930 (3d Dept. 2007).

20. There is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. People ex.rel. Johnson v New York State Board of Parole, 180 A.D.2d 914, 916 (3d Dept. 1992); Withrow v Larkin, 421 U.S. 35, 47 (1975). And, Courts presume the Parole Board follows its statutory commands and internal policies in fulfilling its obligations. Garner v Jones, 529 U.S. 244 (2000). The decision was not predetermined. Dean v New York State Division of Parole, 21 A.D.3d 1207 (3d Dept. 2005) lv. den. 6 N.Y.3d 705 (2006); Hakim-Zaki v New York State Division of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Tafari v Cuomo, 170 A.D.3d 1351 (3d Dept. 2019); Gonzalvo v Stanford, 153 A.D.3d 1021 (3d Dept. 2017). There is no merit to the inmate's contention that the parole interview was improperly conducted or that he was denied a fair interview. Black v New York State Board of Parole, 54 A.D.3d 1076 (3d Dept. 2008); Rivers v Evans, 119 A.D.3d 1188 (3d Dept. 2014); Mays v Stanford, 150 A.D.3d 1521 (3d Dept. 2017). Simply because the Board felt the severity of the crime was enough to deny parole does not mean the Board was biased. Garcia v New York State Division of Parole, 239 A.D.2d 235 (1st Dept. 1997).

21. By way of analogy, in the parole revocation context, the Board may impose a time assessment instead of providing rehabilitative treatment. Robinson v Travis, 295 A.D.2d 719 (3d Dept. 2002).

22. With regard to petitioner's allegation related to the letter from the prosecuting attorneys office, there is nothing in the Executive Law that requires the Parole Board to request a new letter each time a new District Attorney is elected from the County of conviction or prevents the Board from considering a letter with a more remote date.

23. The Board is allowed to look at the entire record of the petitioner. That includes statements he made to prior Parole Boards during interviews. Credibility of an inmate's

explanation is to be made by the Board. The Board may consider other matters involving the inmate's capacity to tell the truth, and how this impacts on the statutory factors. Siao-Pao v Dennison, 51 A.D.3d 105 (1st Dept. 2008). Pursuant to Executive Law §259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports and may rely on the information contained therein. See Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976); Lee v U.S. Parole Commission, 614 F.Supp. 634, 639 (S.D.N.Y. 1985); Carter v Evans, 81 A.D.3d 1031 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712 (2011); Simmons v Travis, 15 A.D.3d 896 (4th Dept. 2005).

24. As for the required three-part statutory standard, contrary to petitioner's claim, the Board is not required to repeat the language of the statute verbatim. Rather, it needs merely insure that sufficient facts are in the decision which comply with the standard-which it has clearly done in this case. The factors cited, which were petitioner's instant offense, committed while on parole, extensive criminal history, prior parole and probation violations, disciplinary record, and poor COMPAS scores, show the required statutory findings were in fact made in this case. Language used in the decision - which is only semantically different from the statutory language (e.g. continued incarceration serves the community standards) - is permissible. James v Chairman of the New York State Division of Parole, 19 A.D.3d 857 (3d Dept. 2005); Miller v New York State Division of Parole, 72 A.D.3d 690 (2d Dept. 2010). Although the Board's determination could have been stated more artfully, this is insufficient to annul the decision. Ek v Travis, 20 A.D.3d 667 (3d Dept. 2005). The Board's failure to recite the precise statutory language of the first sentence in support of its conclusion to deny parole release does not undermine its determination. Silvero v Dennison, 28 A.D.3d 859 (3d Dept. 2006); Reed v Evans,

94 A.D.3d 1323 (3d Dept. 2012); Mullins v New York State Board of Parole, 136 A.D.3d 1141 (3d Dept. 2016).

25. The inmate may not review the Board's weighing process or assess whether the Board gave proper weight to the relevant factors, since it is not required to state each factor it considers, or weigh each factor equally or grant parole due to exemplary behavior. Comfort v New York State Division of Parole, 68 A.D.3d 1295 (3d Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014). The due process clause is not violated by the Board's balancing of the statutory criteria, and which is not to be second guessed by the courts. Mathie v Dennison, 2007 U.S. Dist. LEXIS 60422 (SDNY 2007); MacKenzie v Cunningham, 2014 U.S. Dist. LEXIS 134969 (SDNY 2014).

26. The Board did not have the sentencing minutes at the time of the interview. Petitioner did not submit the sentencing minutes in support of his own position. Respondent has since obtained the sentencing minutes. Exhibit 7. A review of the sentencing minutes reveals that at no time during the proceeding did the court proffer any recommendation in favor of or in opposition to the petitioner's possible release to parole supervision. That the Parole Board neither had nor considered the sentencing minutes when they fail to contain any recommendation in favor of or in opposition to an inmate's possible release to parole supervision constitutes harmless error and does not provide a basis for setting aside the appealed from decision. Schettino v New York State Division of Parole, 45 A.D.3d 1086 (3d Dept. 2007); Motti v Alexander, 54 A.D.3d 1114 (3d Dept. 2007); Valerio v New York State Division of Parole, 59 A.D.3d 802 (3d Dept. 2009); Abbas v New York State Division of Parole, 61 A.D.3d 1228 (3d Dept. 2009); Cruz v Alexander, 67 A.D.3d 1240 (3d Dept. 2009); Davis v Lemons, 73 A.D.3d 1354 (3d Dept. 2010); Ruiz v New York State Division of Parole, 70 A.D.3d 1162 (3d Dept. 2010).

27. Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 U.S. Dist. LEXIS 75509 (SDNY 2014); Romer v Travis, 2003 U.S. Dist. LEXIS 12917 (SDNY 2003); Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (SDNY 2008); Hanna v New York State Board of Parole, 169 A.D.3d 503 (1st Dept. 2019). An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014); Ward v City of Long Beach, 20 N.Y.3d 1042 (2013).

28. In the absence of a convincing demonstration that the Board did not consider the statutory factors set out under Executive Law §259-i, it must be presumed that the Board fulfilled its duty. Jackson v Evans, 118 A.D.3d 701 (2d Dept. 2014); Tomches v Evans, 108 A.D.3d 724 (3d Dept. 2013); Peo. ex rel. Herbert v New York State Board of Parole, 97 A.D.2d 128, 133 (1st Dept. 1983); People ex.rel. Haderxhanji v New York State Board of Parole, 97 A.D.2d 368 (1st Dept. 1983); Garner v Jones, 529 U.S. 244 (2000); McLean v New York State Division of Parole, 204 A.D.2d 456 (2d Dept. 1994); Zane v Travis, 231 A.D.2d 848 (4th Dept. 1996). Per Executive Law §259-i(5), parole release is a discretionary function of the Board. Anthony v New York State Division of Parole, 252 A.D.2d 704 (3d Dept. 1998), lv. den. 92 N.Y.2d 812 (1998), cert. den. 525 U.S. 1183 (1999); Bottom v New York State Board of Parole, 30 A.D.3d 657 (3d Dept. 2006).

29. Petitioner's claim that the Board failed to comply with the 2011 amendments to the Executive Law is without merit and clearly contradicted by the Return attached hereto. Dolan v New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169 (3d Dept. 2015). Furthermore, the

2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017.

30. As for the alleged COMPAS error, petitioner didn't raise it during the interview, thereby waiving the matter. Matter of Shaffer v Leonardo, 179 A.D.2d 980 (3d Dept. 1992); Boddie v New York State Division of Parole, 288 F.Supp.2d 431 (S.D.N.Y. 2003); Molinar v New York State Division of Parole, 119 A.D.3d 1214 (3d Dept. 2014). If the inmate was given a chance to discuss the matter at the interview and didn't mention it, the issue is without merit. Matter of Mercer v New York State Department of Corrections and Community Supervision, Index # 5872-13, *Decision/Order/Judgment* dated April 7, 2014 (Sup. Ct. Albany Co.)(Ceresia J.S.C.); Matter of Cox v Stanford, Index # 228-14, *Decision and Order* dated June 17, 2014 (Sup. Ct. Albany Co.)(McGrath J.S.C.). If the inmate fails to raise the issue of alleged COMPAS error at the interview, and the matter could have been corrected then, the issue is waived. Matter of Cox v Stanford, Index # 228-14, *Decision and Order* dated April 18, 2014 (Sup. Ct. Albany Co.)(McGrath J.S.C.).

31. The contention that the 2017 regulation requires each factor to be explained is a novel legal theory that, as petitioner concedes, has no support in caselaw. Respondent respectfully submits that this novel argument must be disregarded. Courts must defer to the Parole Board's interpretation of its own regulations so long as it is rational and not arbitrary nor capricious. Brown v Stanford, 163 A.D.3d 1337 (3d Dept. 2018); Lorillard Tobacco v Roth, 99 N.Y.2d 316 (2003). Petitioner's argument is not supported by statute, regulation or caselaw and is contrary to common sense.

32. The Board duly considered the Case Plan. It is specifically mentioned in the final decision as having been considered. Cobb v Stanford, 153 A.D.3d 1500 (3d Dept. 2017).

33. The Board did not depart from the COMPAS. Instead, the decision quite clearly cites several of the poor scale grades in the COMPAS. Thus, there was no departure. The decision is consistent with amended 9 NYCRR § 8002.2(a) as there is no departure to explain. That is, the Board's decision was not impacted by a departure from a scale within the assessment. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. Rather, the Board cited the COMPAS instrument in its denial. The amended regulation was intended to increase transparency in the Board's decision making by providing an explanation if and when the Board departs from scales in denying an inmate release. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. Petitioner's argument that the Board violated its own regulations [*see* 9 NYCRR §8002.2(a)] by failing to provide individualized reasons for its departure from petitioner's COMPAS scores is without merit. A reading of the parole interview transcript and the Board's decision indicates that the decision denying release to parole was not impacted by a departure from a COMPAS scale. The Board did not find a reasonable probability that petitioner would not live and remain at liberty without violating the law. Rather, the Board decided, despite low risk scores, that release would be inappropriate under the other two statutory standards. Executive Law §259-i(2)(c)(A). Scharff v NYSDOCCS et.al., Dutchess Co. Index # 2019-53460 (FORMAN, J., Acting Supreme Court Justice).

34. Pursuant to 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. So long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts. 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 A.D.3d 1268 (3d Dept. 2014).

35. Furthermore, should the Court find in favor of petitioner, despite respondent's arguments and the record before the Court, it is respondent's position that petitioner's only remedy is a de novo interview. In such a situation, release on parole is not correct. Rather, at most the petitioner would be entitled to a de novo interview. Matter of Quartarraro New York State Division of Parole, 224 A.D.2d 944 (1st Dept. 1996), lv. den. 88 N.Y.2d 805 (1996).

36. It is also worth noting that, pursuant to Executive Law §259-i(5), actions undertaken by the Parole Board are deemed to be judicial functions and are not reviewable when made in accordance with law. Cruz v Travis, 273 A.D.2d 648 (3d Dept. 2000). Thus, in order for there to be Judicial intervention, the decision must show irrationality bordering on impropriety in order to be reversed. 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 N.Y.2d 69 (1980); Matter of Despard v Russi, 192 A.D.2d 1076 (4th Dept. 1993). Petitioner has failed to meet this burden. 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 A.D.2d 688 (3d Dept. 1997), lv. den., 90 N.Y.2d 805 (1997); Matter of Davis v New York State Division of Parole, 114 A.D.2d 412 (2d Dept. 1985); Matter of Ristau v Hammock, 103 A.D.2d 944 (3d Dept. 1984), lv. den. 63 N.Y.2d 608 (1984); Matter of Harden v New York State Board of Parole, 103 A.D.2d 777 (2d Dept. 1984); Matter of Ganci v Hammock, 99 A.D.2d 546 (2d Dept. 1984). Parole release is a discretionary function of the Board, and petitioner has not demonstrated that any abuse in this regard by the Board has occurred. Judicial review of the determinations of the New York State Division of Parole is narrowly circumscribed. Esquilin v New York State Board of Parole, 144 A.D.3d 846 (2d Dept. 2016).

RECORD BEFORE RESPONDENT

1. Pre-Sentence Investigation Report ** **for *in camera* review only.**
2. Sentence and Commitment Order
3. Parole Board Report. ****Please note only Part I of this document may be disclosed to petitioner. Pursuant to New York State Public Officers Law §87(g), Part II (marked "confidential" at the top) is exempt from disclosure as intra-agency materials containing evaluative opinion information and is submitted for *in camera* review only. Zhang v. Travis, 100 A.D.3d 829 (3d Dept. 2004).**
4. Parole Board Release Interview Transcript
5. Parole Board Release Decision Notice
6. Brief on Administrative Appeal
7. Sentencing Minutes
8. COMPAS Instrument (redacted and unredacted copies). ****Please note only the redacted version may be disclosed to petitioner.**
9. TAP/Offender Case Plan
10. DA Letter. ***In camera* only. Grigger v New York State Division of Parole, 11 A.D.3d 850 (3d Dept. 2004); Matter of Ramahlo v Bruno, 273 A.D.2d 521 (3d Dept. 2000) lv. den. 95 N.Y.2d 767 (2000); Mingo v New York State Division of Parole, 244 A.D.2d 781 (3d Dept. 1997).**

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

DATED: Poughkeepsie, New York
January 6, 2021

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Respondent

BY: [signature]
Heather R. Rubinstein
Assistant Attorney General
One Civic Center Plaza, 4th Floor
Poughkeepsie, New York 12601

To: Clerk of the Court (via NYSCEF)
Martha Rayner, Esq. (via NYSCEF)

HEATHER R. RUBINSTEIN affirms under the penalty of perjury pursuant to Section 2106 of the Civil Practice Law and Rules, that she is an Assistant Attorney General in the office of Letitia James, Attorney General of the State of New York, the attorney for the respondent.

Your affiant has read the foregoing Answer and Return knows the contents thereof; that the same is true to her own knowledge, except as to matters stated therein to be alleged on information and belief and to the extent that affiant relies upon records of the New York State Department of Corrections and Community Supervision Board of Parole and, as to those matters, she believes them to be true.

DATED: Poughkeepsie, New York
January 6, 2021

HEATHER R. RUBINSTEIN
Assistant Attorney General