February 2022

Art. 78 Response - FUSL000095 (2020-06-30)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
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In the Matter of the Application of
[redacted],

ANSWER AND RETURN

Petitioner,

Index No. [redacted]
Hon. Peter M. Forman,
J.S.C.

-against-

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

Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.
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Respondent, by and through its attorney, LETITIA JAMES, Attorney General of the State of New York, Jeane L. Strickland Smith, Assistant Attorney General, of counsel, submits the following answer and return upon the petition:

1. Respondents deny the allegations of the petition except to the extent they are confirmed by the attached records.

AS AND FOR A FIRST OBJECTION IN POINT 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

3. By way of background, the petitioner was convicted of Murder 2nd Degree, Attempted Robbery 1st Degree, and Criminal Possession of a Weapon 2nd Degree. He was sentenced to a term of 25 years to life on the murder charge, and 5-15 years on the latter two

charges, each concurrent with each other. The instant offense consisted of the petitioner attempting to rob a cab driver, and when the driver resisted, the petitioner ran to a location, picked up a gun, and ran back and shot the cab driver to death.

4. Petitioner has previously been denied release in August 2013, August 2015 and August 2017. As for the instant litigation, petitioner had a reappearance Parole Board Release Interview on August 14, 2019. Once again, release was denied, and petitioner was ordered held for another 24 months. Petitioner timely perfected his administrative appeal on November 1. The Appeals Unit, concededly in a tardy manner, issued its decision dismissing the appeal on April 1. This article 78 proceeding followed.

5. It is important to note that petitioner had a parole release **interview** and not a **hearing.** This distinction is essential in the implication of many factors including the right to counsel, hearsay, burden of proof, etc. Any use by the legal community of these two terms interchangeably in the context of parole release matters must be stopped. Banks v Stanford, 159 A.D.3d 134, 71 N.Y.S.3d 515 (2d Dept. 2018).

6. Petitioner is not in any way prejudiced by the failure of the Appeals Unit to issue a Findings Statement within four months. Nor does the failure to act make the underlying administrative decision constitutionally defective nor invalidate the administrative decision. Rather, per 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, 702 N.Y.S.2d 708 (3rd Dept 2000), leave to appeal denied 95 N.Y.2d 753, 711 N.Y.S.2d 155 (2000); People ex rel. Tyler v Travis, 269 A.D.2d 636, 702 N.Y.S.2d 705 (3rd Dept 2000); Lord v State of New York Executive Department Board /Division of Parole, 263 A.D.2d 945, 695 N.Y.S.2d

461 (4th Dept 1999), leave denied 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999); re-argument denied 95 N.Y.2d 826, 712 N.Y.S.2d 450 (1999); D'Joy v New York State Division of Parole, 127 F.Supp2d 433, 442 (S.D.N.Y. 2001).

7. It is important to note some additional facts in this case. During the presentence interview, petitioner shows no remorse and is nonchalant about the entire crime. In the sentencing minutes, it is pointed out the robbery went awry, and petitioner started to leave. He then purposely went to get a gun and came back to finish off the victim. The sentencing minutes also point out the petitioner lied when he said he didn't have a drug problem. The Judge gave him the maximum sentence and stated he wished he could have imposed an even harsher sentence.

8. The administrative appeal raised the following issues: 1) the decision is irrational bordering on impropriety in that the Board failed to consider and/or properly weigh the required statutory factors; 2) the Board ignored the DA letter urging his release; 3) one Commissioner has participated in prior interviews; 4) the Board failed to make any required findings of fact in support of the statutory standards; 5) no aggravating factors exist; 6) prison discipline doesn't give the Board an excuse to resentence him; 7) the Board failed to comply with the 2011 amendments to the Executive Law and the 2017 regulations in that the mostly positive COMPAS was ignored and the departure was void in that no specific scales were cited, and no valid reason for departing exists.

9. The instant petition focusses mainly on just two points - namely, the DA letter and the COMPAS score.

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, 657 N.Y.S.2d 415 (1st Dept. 1997); People ex rel. Herbert v. New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (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, 972 N.Y.S.2d 741 (3d Dept. 2013); Jones v New York State Parole Board, 127 A.D.3d 1327, 6 N.Y.S.3d 774 (3d Dept.2015); Hill v New York State Board of Parole, 130 A.D.3d 1130, 14 N.Y.S.3d 515 (3d Dept. 2015); Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); Fischer v Graziano, 130 A.D.3d 1470, 12 N.Y.S.3d 756 (4th Dept. 2015); De la Cruz v Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Davis v Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Thomches v Evans, 108 A.D.3d 724, 968 N.Y.S.2d 888 (3d Dept. 2013); Rodriguez v Evans, 10 A.D.3d 1049, 958 N.Y.S.2d 529 (3d Dept. 2013); Martinez v New York State Board of Parole, 83 A.D.3d 1319, 920 N.Y.S.2d 742 (3d Dept. 2011); Ward v New York State Division of Parole, 26 A.D.3d 712, 809 N.Y.S.2d 671(3d Dept. 2006) lv. den. 7 N.Y.3d 702, 818 N.Y.S.2d 193; Morel v Travis, 18 A.D.3d 930, 793 N.Y.S.2d 920 (3d Dept. 2005); Matter of Farid v Travis, 239 A.D.2d 629, 657 N.Y.S.2d 221 (3d Dept 1997); Phillips v Dennison, 41 A.D.3d 17, 834 N.Y.S.2d 121 (1st Dept. 2007); Davis v Lemons, 73 A.D.3d 1354, 899 N.Y.S.2d 919 (3d Dept. 2010); MacKenzie v Evans, 95 A.D.3d 1613, 945 N.Y.S.2d 471 (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, 688 N.Y.S.2d 782 (3d Dept.1999); Pulliam v Dennison, 38 A.D.3d 963, 832 N.Y.S.2d 304 (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, 723 N.Y.S.2d 902, 903 (3d Dept 2001); Vasquez v State of New York Executive Department, Division of Parole, 20 A.D.3d 668, 797 N.Y.S.2d 655 (3d Dept. 2005); Wellman v Dennison, 23 A.D.3d 974, 805 N.Y.S.2d 159 (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, 772 N.Y.S.2d 540 (2d Dept. 2004); Anthony v New York State Division of Parole, 17 A.D.3d 301, 792 N.Y.S.2d 900 (1st Dept. 2005); Cruz v New York State Division of Parole, 23 A.D.3d 974, 805 N.Y.S.2d 159 (3d Dept. 2007); Santos v Evans, 81 A.D.3d 1059, 916 N.Y.S.2d 325 (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, 979 N.Y.S.2d 868 (3d Dept. 2014).

11. The seriousness of the offense alone has long been held to constitute a sufficient ground to deny parole release. Matter of Secilmic v Keane, 25 A.D.2d 628, 639 N.Y.S.2d 437 (2d Dept 1996); Howithi v Travis, 19 A.D.3rd 727, 796 N.Y.S.2d 195 (3d Dept. 2005); Matter of Dudley v Brown, 227 A.D.2d 863, 642 N.Y.S.2d 386 (3d Dept 1996), lv to app. den. 88 N.Y.2d 812; People ex rel Thomas v Superintendent Arthurkill Correctional Facility, 124 A.D.2d 848, 508 N.Y.S.2d 564 (2d Dept 1986) app. den. 69 N.Y.2d 611. The Board's emphasis on the serious nature of the crime does not demonstrate a showing of irrationality bordering on impropriety. Philips v Dennison, 41 A.D.3d 17, 834 N.Y.S.2d 121 (1st Dept. 2007); Cardenales v Dennison, 26 A.D.3d 614, 810 N.Y.S.2d 233 (1st Dept. 2007); Berry v New York State Division of Parole, 64 A.D.3d 1030, 882 N.Y.S.2d 759 (3d Dept. 2008); Smith v New York State Division of Parole, 64 A.D.3d 1030, 882 N.Y.S.2d 759 (3d Dept. 2009); Robles v Dennison, 449 F.Appx. 51, 53-54 (2nd Cir. 2011); Hodge v Griffin, 2014 WL 2453333(SDNY 2014); Perea v Stanford, 149 A.D.3d 1392,

53 N.Y.S.3d 231 (3d Dept. 2017); Tafari v Cuomo, 170 A.D.3d 1351, 94 N.Y.S.3d 458 (3d Dept. 2019).

12. The Board properly considered the deliberate nature of the murder. Molinar v New York State Division of Parole, 119 A.D.3d 1214, 991 N.Y.S.2d 487 (3d Dept. 2014).

13. The Board is obligated to consider the inmate's prior criminal record. Matter of Partee v Evans, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014); Applewhite v New York State Board of Parole, 167 A.D.3d 1380, 91 N.Y.S.3d 308 (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, 53 N.Y.S.3d 715 (3d Dept. 2017); Hall v New York State Division of Parole, 66 A.D.3d 1322, 886 N.Y.S.2d 835 (3d Dept. 2009); Davis v Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Jones v New York State Parole Board, 127 A.D.3d 1327, 6 N.Y.S.3d 774 (3d Dept. 2015); Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (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, 465 N.Y.S.2d 341 (4th Dept 1983); Peo. ex rel. Yates v. Walters, 111 A.D.2d 839, 490 N.Y.S.2d 573 (2d Dept. 1985); Matter of Ristau v. Hammock, 103 A.D.2d 944, 479 N.Y.S.2d 760 (3d Dept. 1984) lv. to appeal den. 63 N.Y.2d 608, 483 N.Y.S.2d 1023 (1984); Torres v New York State Division of Parole, 300 A.D.2d 128, 750 N.Y.S.2d 759 (1st Dept 2002); Lashway v Evans, 110 A.D.3d 1420, 973 N.Y.S.2d 496 (3d Dept. 2013); Tafari v Cuomo, 170 A.D.3d 1351, 94 N.Y.S.3d 458 (3d Dept. 2019).

14. 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, 686 N.Y.S.2d 198 (3d Dept. 1999); Farid v. Russi, 217 A.D.2d 832, 629 N.Y.S.2d 821 (3d Dept. 1995); Charlemagne v New

York State Division of Parole, 281 A.D.2d 669, 722 N.Y.S.2d 74, 75 (3d Dept 2001); Burress v Evans, 107 A.D.3d 1216, 967 N.Y.S.2d 486 (3d Dept. 2013); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015); Bush v Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Holmes v Annucci, 151 A.D.3d 1954, 57 N.Y.S.3d 857 (4th Dept. 2017); Espinal v New York State Board of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019). Per Executive Law 259-i(2)(c)(A), the Board is obligated to consider the inmate's prior criminal record and the nature of the instant offenses, and the fact that such consideration resulted in a parole denial does not reflect irrationality bordering on impropriety. Singh v Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept. 2014). The serious nature of the instant offense and past criminal history are sufficient grounds per se to deny parole release. Wiley v Travis, 244 A.D.2d 734, 664 N.Y.S.2d 657 (3d Dept 1997).

15. The Board decision noted petitioner was agitated during the interview. By way of analogy, if the inmate has a poor demeanor of anger and hostility at the interview, reflecting an inability to handle stress that is not compatible with the welfare of society, then denial is not irrational. Thorn v New York State Board of Parole, 156 A.D.3d 980, 66 N.Y.S.3d 712 (3d Dept. 2017). It was well within the Board's authority to make an assessment of Appellant's credibility. Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept.) ("credibility determinations are generally to be made by the Board"), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008).

16. The COMPAS can contain negative factors that support the Board's conclusion. Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017); Espinal v New York State Board of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019).

17. No constitutional or statutory right of petitioner is violated because a Parole

Board member involved in the immediate Board decision took part in a prior Board decision against the inmate. DiChiaro v Hammock, 87 A.D.2d 957, 451 N.Y.S.2d 248 (3d Dept 1982); Payne v Stanford, 173 A.D.3d 1577, 104 N.Y.S.3d 383 (3d Dept. 2019).

18. 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, criminal history, negative score on his COMPAS, and his agitation and demeanor during the interview, 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, 796 N.Y.S.2d 735 (3d Dept. 2005); Miller v New York State Division of Parole, 72 A.D.3d 690, 897 N.Y.S.2d 726 (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, 798 N.Y.S.2d 199 (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, 811 N.Y.S.2d 822 (3d Dept. 2006); Reed v Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012); Mullins v New York State Board of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016).

19. The Board may deny parole release without the existence of any aggravating factors, no matter how exemplary the institutional record is. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 1272, 990 N.Y.S.2d 714 (3d Dept. 2014).

20. The Board stressing the nature of the underlying offense, troubling criminal history and prison disciplinary record, does not constitute irrationality bordering on impropriety. Perez v Evans, 76 A.D.3d 1130, 907 N.Y.S.2d 701 (3d Dept. 2010); Mentor v New York State Division of Parole, 87 A.D.3d 1245, 930 N.Y.S.2d 302 (3d Dept. 2011) lv.app.den. 18 N.Y.3d 803, 938 N.Y.S.2d 860 (2012); Stanley v New York State Division of Parole, 92 A.D.3d 948, 939 N.Y.S.2d 132 (2d Dept. 2012); Moore v New York State Board of Parole, 137 A.D.3d 1375, 26 N.Y.S.3d 412 (3d Dept. 2016).

21. The Board may place greater weight on an inmate's disciplinary record even though infractions were incurred earlier in the inmate's incarceration. Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013).

22. As for the favorable DA letter, several things need to be pointed out to the court. Discretion vested in a governmental authority may not be abrogated by the District Attorney or the Court. A prosecutor's representations may not bind other State agencies. Public policy does not permit excesses by a prosecutor to divest an independent body of its lawful discretion. Chaipis v State Liquor Authority, 44 N.Y.2d 57, 404 N.Y.S.2d 76 (1978). As such, the prosecutor's recommendation is not enforceable. Property Clerk of New York City Police Department v Ferris, 77 N.Y.2d 428, 568 N.Y.S.2d 577, 580 (1991). 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, 979 N.Y.S.2d 868 (3d Dept. 2014); Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016).

23. Also, per the enclosed documents from the website of the Kings County DA, his favorable parole recommendations are a part of his political policy to decrease what he calls mass

incarceration. His parole board recommendations are clearly tainted by political policy. The district attorney's recommendation is but one factor for the Board to consider. Executive Law § 259-i(2)(c)(A)(vii); Matter of Neives v. Stanford, 2015 NY Slip Op 30264(U), 2015 N.Y. Misc. Lexis 558 (Sup. Ct. Franklin Co. Feb. 5, 2015) (Feldstein, A.S.C.J.) (the Board considered the appropriate factors including the D.A.'s positive letter and was not required to give equal weight to each factor considered).

24. The Board can give greater weight to statements made in the sentencing minutes. Williams v New York State Division of Parole, 114 A.D.3d 992, 979 N.Y.S.2d 868 (3d Dept. 2014). The Board is entitled to rely on the sentencing minutes. Platten v New York State Board of Parole, 153 A.D.3d 1509, 59 N.Y.S.3d 921 (3d Dept. 2017). 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, 916 N.Y.S.2d 291 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). To the extent the petitioner complains about the information contained within the pre-sentence report, the Board is mandated to consider it, is not empowered to correct information therein, and is entitled to rely on the information contained in the report. See, Executive Law §259-(a)-1; Executive Law §259-(1)(a); (2)(c)(A); May v New York State Division of Parole, 273 A.D.2d 667, 711 N.Y.S.2d 349 (3d Dept. 2000); Richburg v New York State Board of Parole, 284 A.D.2d 685, 726 N.Y.S.2d 299 (3d Dept. 2001); Payton v Thomas, 486 F.Supp. 64, 68 (S.D.N.Y. 1980); Baker v McCall, 543 F.Supp. 498, 501 (S.D.N.Y. 1981), affirmed 697 F.2d 287 (2d Cir. 1982); Williams v Travis, 11 A.D.3d 788, 783 N.Y.S.2d 413 (3d Dept. 2004); Sutherland v Alexander, 64 A.D.3d 1028, 881 N.Y.S.2d 915 (3d Dept. 2009);

Wisniewski v Michalski et.al., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014). The inmate is not permitted to collaterally attack the presentence report. Cox v New York State Division of Parole, 11 A.D.3d 766, 768 (3d Dept. 2004); Simmons v Travis, 15 A.D.3d 896, 788 N.Y.S.2d 752 (4th Dept. 2005). The inmate can't challenge the accuracy of information in the Pre-sentence Investigation Report, as that challenge should have been made to the original sentencing court. Manley v New York State Board of Parole, 21 A.D.3d 1209 (3d Dept. 2005) lv. den. 6 N.Y.3d 702 (2005); Champion v Dennison, 40 A.D.3d 1181, 834 N.Y.S.2d 585 (3d Dept. 2007). lv.dism. 9 N.Y.3d 913, 844 N.Y.S.2d 167. Carter v Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); Vigliotti v State of New York, Executive Division of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012); Wisniewski v Michalski et.al., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014); Del Rosario v Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016).

25. 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, 987 N.Y.S.2d 422 (2nd Dept. 2014); Tomches v Evans, 108 A.D.3d 724, 968 N.Y.S.2d 888 (3d Dept. 2013); Peo. ex rel. Herbert v. New York State Board of Parole, 97 A.D.2d 128, 133, 468 N.Y.S.2d 881 (1st Dept. 1983); People ex.rel. Haderxhanji v New York State Board of Parole, 97 A.D.2d 368, 467 N.Y.S.2d 38, 382, (1st Dept 1983); Garner v Jones, 529 U.S. 244, 120 S.Ct. 1362, 1371, 146 L.Ed.2d 236 (2000); McLean v New York State Division of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept 1994); Zane v Travis, 231 A.D.2d 848, 647 N.Y.S.2d 886, 887 (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, 679 N.Y.S.2d 158 (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, 815 N.Y.S.2d 789 (3d Dept. 2006).

26. Petitioner's claim that the Board failed to comply with the 2011 amendments to the Executive Law is rejected. Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196, 3 N.Y.S.3d 633 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015). Furthermore, the 2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017. The 2017 amended regulations don't create any substantive right to release, but rather, merely increase transparency in the final decision.

27. Again, one of the COMPAS scales was a medium score, which was cited in the Board decision. Thus, there was no departure. 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, 82 N.Y.S.3d 622 (3d Dept. 2018); Peckham v. Calogero, 12 N.Y.3d 424, 883 N.Y.S.3d 751 (2009); Henry v. Coughlin, 214 A.D.2d 673, 625 N.Y.S.2d 578 (2d Dept. 1995).

28. The 2011 amendments still permit the Board to place greater emphasis on the gravity of the crime. Matter of Montane v Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept.) appeal dismissed 24 N.Y.3d 1052, 999 N.Y.S.2d 360 (2014); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014); Moore v New York State Board of Parole, 137 A.D.3d 1375, 26 N.Y.S.3d 412 (3d Dept. 2016). The Board can still consider the nature of the inmate's crimes, the criminal history, the prison disciplinary record, the program accomplishments and post release plans. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 990 N.Y.S.2d 295 (3d Dept. 2014). The Board is obligated to consider the serious nature of the crime. Khatib v New York State Board of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d

Dept. 2014); Hanna v New York State Board of Parole, 169 A.D.3d 503, 92 N.Y.S.3d 621 (1st Dept. 2019). A positive COMPAS score does not create any guarantee to release, but rather is only one factor considered by the Board in exercising its discretion when making a parole determination. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 990 N.Y.S.2d 295 (3d Dept. 2014); Dawes v Beale, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); Byas v Fischer, 120 A.D.3d 1586, 992 N.Y.S.2d 813 (4th Dept. 2014); Matter of Montane v Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept.) appeal dismissed 24 N.Y.3d 1052, 999 N.Y.S.2d 360 (2014); LeGeros v New York State Board of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016); Rodriguez v New York State Board of Parole, 168 A.D.3d 1342, 92 N.Y.S.3d 482 (3d Dept. 2019).

29. Notably, the 2011 amendments to the Executive Law did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole, namely (1) whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law"; (2) whether release "is not incompatible with the welfare of society"; and (3) whether release "will not so deprecate the seriousness of his crime as to undermine respect for law." *See* Executive Law § 259-i(2)(c)(A). Even uniformly low COMPAS scores and other evidence of rehabilitation would not resolve the broader questions of society's welfare, public perceptions of the seriousness of a crime, or whether release would undermine respect for the law. Thus, the COMPAS cannot mandate a particular result, and declining to afford the COMPAS controlling weight does not violate the 2011 amendments. King v Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept 2016); Furman v Annucci, 138 A.D.3d 1269, 28 N.Y.S.3d 352 (3d Dept. 2016). The COMPAS is an additional

consideration that the Board must weigh along with the statutory factors for purposes of deciding whether the three standards are satisfied. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); Dawes v Annucci, 122 A.D.3d 1059, 1061, 994 N.Y.S.2d 747 (3d Dept. 2014).

30. 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, 890 N.Y.S.2d 700 (3rd Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (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 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014). Nothing in the due process clause requires the Parole Board to specify the particular evidence on which rests the discretionary determination an inmate is not ready for conditional release. Duemmel v Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010). There is no due process requirement that the Parole Board disclose its release criteria. Haymes v Regan, 525 F.2d 540 (2d Cir. 1975).

31. Per Executive Law 259-i(5), any action by the Board is deemed to be a judicial function and is not reviewable if done in accordance with law. 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, 990 N.Y.S.2d 714 (3d Dept. 2014).

32. In the unlikely event of an unfavorable judicial ruling, the appropriate remedy would be a *de novo* interview. Matter of Quartarraro New York State Division of Parole, 224 A.D.2d 944, 637 N.Y.S.2d 721 (1st Dept 1996), lv. denied 88 N.Y.2d 805, 646 N.Y.S.2d 984 (1996).

33. Further, 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, 711 N.Y.S.2d 360 (3rd 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, 427 N.Y.S.2d 982 (1980); Matter of Despard v. Russi, 192 A.D.2d 1076, 598 N.Y.S.2d 753 (4th Dept. 1993). 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, 656 N.Y.S.2d 404 (3rd Dept. 1997), lv denied, 90 N.Y.2d 805, 661 N.Y.S.2d 831 (1997); Matter of Davis v New York State Division of Parole, 114 A.D.2d 412, 494 N.Y.S.2d 136 (2nd Dept. 1985); Matter of Ristau v. Hammock, 103 A.D.2d 944, 479 N.Y.S.2d 760 (3rd Dept. 1984), leave to appeal denied 63 N.Y.2d 608, 483 N.Y.S.2d 1023 (1984); Matter of Harden v. New York State Board of Parole, 103 A.D.2d 777, 477 N.Y.S.2d 413 (2nd Dept. 1984); Matter of Ganci v. Hammock, 99 A.D.2d 546, 471 N.Y.S.2d 630 (2nd Dept. 1984). Parole release is a discretionary function of the Board, and appellant has not demonstrated that any abuse in this regard by the Board has occurred. 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, 40 N.Y.S.3d

279 (2nd Dept. 2016).

34. Finally, a petitioner in an Article 78 proceeding challenging a denial of discretionary release bears a **heavy** burden. Garcia v New York State Division of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415, 418 (1st Dept 1997). For the forgoing reasons, the petition should be dismissed.

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

RECORD BEFORE THE RESPONDENT

A copy of the administrative agency's records in this matter is submitted herewith:

EXHIBIT 1) Pre-Sentence Investigation Report. ** **Please note, this document is exempt from disclosure pursuant to CPL §390.50 and is submitted for in camera review only.** An inmate is not entitled to the pre-sentence investigation report as a part of the Parole Board Release Interview process. Allen v People, 243 A.D.2d 1039 (3rd Dept 1997); Salamone v Monroe County Department of Probation, 136 A.D.2d 967 (4th Dept 1988). Only the sentencing Court which originally issued and/or adjudicated the report is authorized under CPL §390.50 to release this highly confidential material. Holmes v State of New York,140 A.D.2d 854 (3rd Dept. 1988); Blanche v People, 193 A.D.2d 991 (3rd Dept 1993); Thomas v Scully, 131 A.D.2d 488 (2nd Dept. 1987).

EXHIBIT 2) Sentence and Commitment Order

EXHIBIT 3) Parole Board Report ** **Please note, only Part I of this document may be disclosed to Petitioner. Per New York State Public Officers Law §87(g), Part II is exempt from disclosure as intra-agency materials containing evaluative opinion information. Parts II is submitted herewith for in camera review only. Zhang v Travis, 100 A.D.3d 829 (3rd Dept.2004).**

EXHIBIT 4) Parole Board Release Interview Transcript

EXHIBIT 5) Parole Board Release Decision Notice

EXHIBIT 6) Brief on Administrative Appeal

EXHIBIT 7) Statement of Appeals Unit Findings

EXHIBIT 8) Administrative Appeal Decision Notice

EXHIBIT 9) Sentencing Minutes

EXHIBIT 10) COMPAS (**redacted portion to petitioner)**

EXHIBIT 11) TAP/Offender Case Plan

EXHIBIT 12) DA Letter (not confidential)

EXHIBIT 13) Printout from Brooklyn DA website

Dated: Poughkeepsie, New York
June 30, 2020

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Jeane L. Strickland Smith 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 Department of Corrections and Community Supervision and respondent and, as to those matters, he believes them to be true.

DATED: Poughkeepsie, New York
June 30, 2020

Jeane L. Strickland Smith
Jeane L. Strickland Smith
Assistant Attorney General