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February 2022

### Art. 78 Response - FUSL000100 (2016-05-17)

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ANSWER, BY RESPONDENT, DATED MAY 17, 2016 [178-190]

FUSL000100

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF

In the Matter of the Application of

[REDACTED]

Petitioner,

ANSWER

vs.

Index No. [REDACTED]

TINA STANFORD, in her official capacity  
As Chairperson of the Board of Parole,

Respondent.

Respondent, by her attorney, answers the petition as follows:

1. Admits the allegations of paragraphs 1, 2, 3, 4, 5, 8, and 9.
2. Denies the allegations of paragraphs 7 and 10.
3. With respect to paragraph 6, the respondent denies the petitioner's characterization of the allegations therein and respectfully refers the Court to the parole release decision notice annexed hereto as Exhibit C for a complete and accurate characterization thereof.
4. Denies every allegation not admitted, denied or otherwise responded to above.

RETURN

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

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- A. Parole Board Report
- B. Parole Interview Minutes
- C. Parole Release Decision Notice
- D. Statement of Appeals Unit Findings
- E. Parole Appeal Decision Notice

6. The following documents are being submitted to the Court Only for in-camera review:

- F. Confidential portion of the Parole Board Report
- G. Pre-Sentence Investigation Report
- H. Un-redacted COMPAS ReEntry Risk Assessment form.

AS TO THE PETITION'S  
CLAIMS, RESPONDENTS ALLEGE:

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

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

9. 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 (1<sup>st</sup> Dept. 1997); People

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ex rel. Herbert v. New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1<sup>st</sup> Dept. 1983).

10. 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 (4<sup>th</sup> Dept. 2015); De la Cruz v Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4<sup>th</sup> 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 (1<sup>st</sup> 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).

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11. 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).

12. Moreover, per Executive Law §259-i(2)(c), an application for parole release shall not be granted merely as a reward for petitioner'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).

13. 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 (1<sup>st</sup> 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).

14. 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

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Division of Parole, 114 A.D.3d 992, 979 N.Y.S.2d 868 (3d Dept. 2014).

15. 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).

16. The Board can still consider the nature of the inmate's crimes, his criminal history, his prison disciplinary record, his 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).

17. 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).

18. 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

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deprecate the seriousness of his crime as to undermine respect for law." See Executive Law § 259-i(2)(c)(A).

19. 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.

20. Thus the COMPAS cannot mandate a particular result, and declining to afford the COMPAS controlling weight does not violate the 2011 amendments. *Matter of King v Stanford*, No. 521324, 2016 N.Y. App. Div. LEXIS 1732 (3d Dep't Mar. 10, 2016).

21. 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. See *Matter of Rivera v. N.Y. State Div. of Parole*, 119 A.D.3d 1107, 1108 (3d Dep't 2014); accord *Matter of Dawes v. Annucci*, 122 A.D.3d 1059, 1061 (3d Dep't 2014).

22. 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 (2<sup>nd</sup> 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 (1<sup>st</sup> Dept. 1983); *People ex.rel. Haderxhanji v New York State Board of Parole*, 97

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A.D.2d 368, 467 N.Y.S.2d 38, 382, (1<sup>st</sup> 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 (4<sup>th</sup> Dept 1996).

23. 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).

24. 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 (3<sup>rd</sup> Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014).

25. 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).



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26. 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. Duempel 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).

27. 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.

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

29. 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).

30. Under 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 (3<sup>rd</sup> Dept 2000).

31. Thus, in order for there to be Judicial intervention, the decision must show irrationality bordering on impropriety in

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order to be reversed.

32. 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 (4<sup>th</sup> Dept. 1993).

33. 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, 656 N.Y.S.2d 404 (3<sup>rd</sup> 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 (2<sup>nd</sup> Dept. 1985); Matter of Ristau v. Hammock, 103 A.D.2d 944, 479 N.Y.S.2d 760 (3<sup>rd</sup> 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 (2<sup>nd</sup> Dept. 1984); Matter of Ganci v. Hammock, 99 A.D.2d 546, 471 N.Y.S.2d 630 (2<sup>nd</sup> Dept. 1984).

34. 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.

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

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

Dated: Buffalo, New York  
May 17, 2016

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of New York  
Attorney for Respondent  
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF

In the Matter of the Application of

[REDACTED]

Petitioner,

vs.

TINA STANFORD, in her official capacity  
As Chairperson of the Board of Parole,

Respondent.

ANSWER

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## A F F I R M A T I O N

DAVID J. SLEIGHT, an attorney admitted to practice before this Court and the Courts of the State of New York, affirms under the penalties of perjury:

That he is an Officer of the State of New York, to wit, an Assistant Attorney General; that he is representing the respondent herein as attorney; that he has read the foregoing Answer and/or Return and knows the contents thereof, and that the same is true of his own knowledge, except to the matters herein stated to be alleged upon information and belief, and that as to those matters, he believes them to be true.

Deponent further says that the grounds of his belief as to all matters therein not stated upon his knowledge are based upon documents received by the deponent from the respondent and which are not in his possession.

  
\_\_\_\_\_  
DAVID J. SLEIGHT

Dated: May 17, 2016

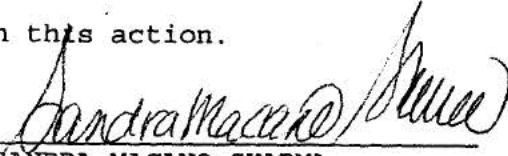
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STATE OF NEW YORK )  
COUNTY OF ERIE ) ss.:  
CITY OF BUFFALO )

SANDRA MACANO SHARMA, being duly sworn, says I am a Legal Assistant II in the office of the Attorney General of the State of New York, the attorney for the respondent(s). On the 20th day of May, 2016, I served the following named persons:

Joshua Dubs, Esq.  
37 Franklin Street, Suite 1110  
Buffalo, NY 14202

attorney in the within entitled action, with a copy of the answer by depositing same, properly enclosed in a post-paid wrapper in the United States Postal Service letter box in the City of Buffalo, New York, the post station of the Attorney General of the State of New York, directed to said petitioner, at the address within the State designated by him for that purpose upon the preceding papers in this action.

  
SANDRA MACANO SHARMA

Sworn to before me this  
20th day of May, 2016.



Assistant Attorney General  
of the State of New York,  
with the general powers of  
a Notary Public, pursuant to  
Section 73 of the Executive  
Law of the State of New York.