Art. 78 Response - FUSL000018 (2019-10-15)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

[redacted],

Petitioner,

ANSWER AND RETURN

-against-

Index No. [redacted]
Hon. Christi J. Acker
J.S.C.

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

Respondents,

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

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Respondents, by and through their 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 AN OBJECTION IN POINT OF LAW

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

AS AND FOR A DEFENSE TO THE PETITION

3. Petitioner was convicted of Murder in the Second Degree and Criminal Possession of a Controlled Substance in the Second Degree and was sentenced to 25

years to life on the murder charge, and 6 years to life on the drug charge to run concurrently. The instant offense involved petitioner, while being chased by a police officer, hid in the shadows of a building and when the police officer approached him petitioner fired six shots, killing the police officer. A gun and 199 glassine envelopes of heroin was found in the area were petitioner was located.

4 Petitioner was previously denied discretionary parole release in November 2010, January 2013, January 2015, and January 2017. As for the instant litigation, petitioner had a reappearance Parole Board Release Interview on November 7, 2018, and once again release was denied, and petitioner was ordered held for another 24 months. Petitioner timely perfected his administrative appeal on March 27. The Appeals Unit issues its decision dismissing the appeal on June 28. This article 78 petition followed.

5. The article 78 petition is misleading in several areas. The Pre-Sentence Investigation states that petitioner was hiding in the shadows and then ambushed the police officer, shooting at him six times. Petitioner told the Parole Board a totally different story. This issue of how many shots were fired was raised in a prior court decision in [redacted] v New York State Division of Parole, Index No. [redacted], Hartman, J. (Albany Co., Aug.17, 2016) and was dismissed by the court. There the Court ruled that "[r]egarding the number of shots fired, whether petitioner fired one shot or six appears to be insignificant in light of the admission that he shot and killed the police officer victim." *See,* Exhibit 12. The issue of police-based community opposition was also raised in that case as well and was dismissed by the court.

6. Petitioner raises the same issues both in the article 78 petition and the administrative appeal. The Statement of Appeals Unit Findings (Exhibit 7) adequately addressed those issues on appeal and is incorporated herein fully by reference.

7. Briefly stated, discretionary release to parole is not to 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." Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). While consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016);

Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

8. Although the Board placed emphasis on the crime (murder), the record reflects it also considered other appropriate factors and it was not required to place equal weight on each factor considered. Matter of Peralta v. New York State Bd. of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018); Matter of Arena v. New York State Dep't of Corr. & Cmty. Supervision, 156 A.D.3d 1101, 65 N.Y.S.3d 471 (3d Dept. 2017).

9. As for community opposition, the Board may receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an inmate's release to parole supervision. Matter of Applewhite v. New York State Bd. of Parole, 167 A.D.3d 1380, 91 N.Y.S.3d 308, 311 (3d Dept. 2018) ("Contrary to petitioner's contention, we do not find that [the Board's] consideration of certain unspecified 'consistent community opposition' to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination"), appeal dismissed, 2019 N.Y. LEXIS 622 (Mar. 28, 2019); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 89 N.Y.S.3d 134 (1st Dept. 2018) ("the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community"); Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852–53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004) (recognizing 259-i(2)(c)(A)(v)'s list is not the exclusive information the Board may consider and persons in addition to victims and their families may submit letters), lv. denied, 4 N.Y.3d 704, 792 N.Y.S.2d

1 (2005); see also Matter of Jordan v. Hammock, 86 A.D.2d 725, 447 N.Y.S.2d 44 (3d Dept. 1982) (letters from private citizens are protected and remain confidential).

10. The Board may consider negative aspects of the COMPAS instrument. Matter of Espinal v. New York Bd. of Parole, 2019 NY Slip Op 04080, 2019 N.Y. App. Div. LEXIS 4057 (3d Dept. May 23, 2019) (COMPAS instrument yielded mixed results); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017) (COMPAS instrument with mixed results including substance abuse relevant given use before crime); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017) (low risk felony violence but probable risk for substance abuse alcohol related crimes); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (scores not uniformly low including family support), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017).

11. Petitioner's assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672, 720 N.Y.S.2d 855 (3d Dept. 2001). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007). The

Petitioner has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016).

12. There is no letter from the District Attorney. The Parole Board Report is in error on that. The statement from the Commissioner in the interview transcript does not state there is such a letter, but rather only that if there is a letter it will be reviewed. An Inmate Status Report/Parole Board Report containing misinformation, if not used in the decision, will not lead to a reversal. Grune v Board of Parole, 41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007). An Inmate Status Report/Parole Board Report containing erroneous information, if not used in the decision, will not lead to a reversal of the parole denial. Restivo v New York State Board of Parole, 70 A.D.3d 1096, 895 N.Y.S.2d 555 (3d Dept. 2010).

13. The Pre-Sentence Investigation Report says the petitioner shot the police officer six times. Pursuant to Executive Law sections 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, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 474, 477, 718 N.Y.S.2d 704, 706, 708 (2000) (discussing former status report); Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.) (presentence investigation report), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); see also Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). To the extent Petitioner contends the Board relied on erroneous information in the pre-sentence report, this is not the proper forum to raise the issue. Any challenge to the pre-sentence report must be made to the original sentencing court. Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016); Matter of Wisniewski v. Michalski.,

114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014); Matter of Vigliotti v. State of New York, Executive Div. of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012). The Board is mandated to consider the report and is entitled to rely on the information contained in the report. Executive Law § 259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031, 1031, 916 N.Y.S.2d 291, 293 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011).

14. As for errors in the criminal history, petitioner did have a misdemeanor drug arrest in 1974, so his criminal history did begin in that year. Petitioner does have a felony firearms conviction in 1978. So, although the Board cite to the wrong year by four years, that is a totally harmless error. The small error in the dates of the convictions is a totally harmless error. The misstatement of fact in the Board determination did not rise to a level where it affected the Board's decision, and as such any alleged error would be deemed harmless such that no new proceeding is required. Matter of Rossney v. New York State Division of Parole, 267 A.D.2d 648, 649, 699 N.Y.S.2d 319 (3d Dept 1999); Khatib v New York State Board of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014).

15. 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.

16. Contrary to petitioner's claim, the 2011 amendments and 9 NYCRR §

8002.2(a) as amended do not represent a forward-looking shift requiring the COMPAS to be the fundamental basis for release decisions. This proposition is not supported by the language of the statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process. In 2011, the Executive Law was amended to require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042, 22 N.Y.S.3d 640, 645 (3d Dept. 2016); Matter of LeGeros, 139 A.D.3d 1068, 30 N.Y.S.3d 834; Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014).

17 Also, petitioner insists there are COMPAS errors-in particular his drug score. The Board cited the negative drug score in the decision, so the Board did not depart from the COMPAS. The petitioner admits he needs to go to drug clinics upon his release, and that he had been both a seller and a user before. So, the negative COMPAS drug score does not appear to be in error at all. In any event, petitioner didn't raise alleged COMPAS errors during the interview, thereby waiving them. Matter of Shaffer v. Leonardo, 179 A.D.2d 980, 579 N.Y.S.2d 910 (3d Dept. 1992); Boddie v New York State Division of Parole, 288 F.Supp.2d 431 (S.D.N.Y. 2003). 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.

18. 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); 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).

19. An inmate with numerous achievements within a prison's institutional setting is not automatically entitle 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 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). 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).

20. 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, 25 N.Y.S.3d 698 (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, 32 N.Y.S.3d 370 (3d Dept. 2016); Peralta v New York State Board of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018).

21. 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). 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).

22. As for community opposition, the Executive Law does not purport to define the exclusive universe of all information the Board may consider. Certain unspecified consistent community opposition is allowed to be considered. Community members are free to express their opinion regarding the potential release of inmates on parole, and the Board may keep that individuals name and address confidential. Such limitations are essential to protect the internal process in formulating a parole decision, and to permit private citizens to express freely their opinion either for or against an inmate's release. The Legislature demonstrated a clear intent that said opinions are a factor to be considered by the Board. 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 receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an inmate's release to parole supervision. Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852–53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004) (recognizing 259-i(2)(c)(A)(v)'s list is not the exclusive information the Board may consider and persons in addition to victims and their families may submit letters), lv. denied 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005); see also Matter of Costello v. New York State Bd. of Parole, 101 A.D.3d 1512, 957 N.Y.S.2d 486 (3d Dept. 2012) (indicating Board considered Police Commissioner's letter of opposition in original determination to grant open date), rev'd 23 N.Y.3d 1002, 1004, 994 N.Y.S.2d 39 (2014) (rescission of open date inappropriate under particulars of case); Matter of Jordan v. Hammock, 86 A.D.2d 725, 447 N.Y.S.2d 44 (3d Dept. 1982) (letters from private citizens are protected and remain confidential); Matter of Hamilton v. New York State Bd. of Parole., Index # 3699-2013, *Order and Judgment* dated October 25, 2013 (Devine J.S.C.)(Albany Co. Court)(no showing of prejudice by allegedly false information in PBA online petition where Board acknowledged public opposition during interview), aff'd 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Cf. Krebs v. N.Y. State Div. of Parole, No. 9:08-CV-255NAMDEP, 2009 WL 2567779, at *12 (N.D.N.Y. Aug. 17, 2009) (public and political pressure "are permissible factors which parole officials may properly consider as they relate to 'whether 'release is not incompatible with the welfare of society and will not so deprecate the seriousness of the offense as to undermine respect for the law'"); Seltzer v. Thomas, No. 03 CIV.00931 LTS FM, 2003 WL 21744084, at *4 (S.D.N.Y. July 29,

2003) (same); Morel v. Thomas, No. 02 CV 9622 (HB), 2003 WL 21488017, at *5 (S.D.N.Y. June 26, 2003) (same). Additionally, 9 NYCRR 8000.5(c)(2) refers to the security of letters either in support of or in opposition to the release of an inmate. The Board is clearly allowed to consider this information. Matter of Rivera v. Evans, Index No. 0603-16, *Decision & Order* dated July 5, 2016 (Sup. Ct. Sullivan Co.)(LaBuda A.J.S.C.) (recognizing "[c]onsideration of community or other opposition was proper under the statute" and the Board is required to keep identity of persons opposing release confidential), aff'd sub nom. Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017).

23. The interpretation of the statute being urged by petitioner would violate the First Amendment to the Constitution. It is a binding principle that New York courts must avoid, if possible, interpreting a presumptively valid statute in such a manner that would needlessly render it to be unconstitutional. Alliance of American Insurers v Chu, 77 N.Y.2d 573, 585, 569 N.Y.S.364 (1991); Lavalle v Hayden, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125 (2002). Per the First Amendment, "Congress shall make no law ... prohibiting the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The right of petition found in the First Amendment is one of the freedoms protected by the Bills of Rights, and the courts cannot impute to the Legislature an intent to invade these freedoms. This philosophy governs the approach of groups of citizens to administrative agencies (which are both creatures of the legislature, and arms of the executive). Certainly, the right to petition extends to all departments of the government. California Motor Transport Co. v Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed2d 642

(1972). The courts should refrain from adopting such an unconstitutional interpretation. If the court were to adopt the approach advocated by petitioner, it is basically rendering the First Amendment as being meaningless by ordering the Parole Board not to entertain constitutionally authorized activity.

24. This also raises Separation of Powers issues, as the judiciary constitutionally should not be in the business of telling the government which protected speech they must follow, and which speech they can't follow. A very dangerous slope for the court to walk on. Petitioner would have the court go through all submitted outside correspondence and filter what the Parole Board may review. This would put the court in the position of violating the separation of powers doctrine. A State may not require all of those who wish to disseminate ideas to present them to an authority for their consideration and approval, and with a discretion to say some ideas may be disseminated, while others may not. The lodging of such a broad discretion in a public official allows him to determine which expressions of views will be permitted and which will not. This sanctions a device for the suppression of communication of ideas and permits the official to act as a censor. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not by use of a statute providing a system of broad discretionary licensing power. Cox v Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed2d 471 (1965).

25. Also, although not directly on point, the Second Circuit has not recognized the right of a prisoner to have incorrect information expunged from his prison file. Watts v Pataki, WL 2925725 (N.D.N.Y. 2012). The creation of a false

report in a prisoner's file is not, on its own, a due process violation. See Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir.1997) ("a prison inmate has no general constitutional right to be free from being falsely accused in a misbehavior report"); Hollman v. Bartlett, No. 08-CV-1417, 2011 WL 4382191, at *12 (E.D.N.Y. Aug. 26, 2011) (the placement of a false report in an inmate's file, without more, is not a due process violation). In addition, the Second Circuit has not recognized that prisoners have a constitutional right to have incorrect information expunged from their files. LaBounty v. Coombe, 208 F.3d 203 (2d Cir. 2000) (Summary Order). In LaBounty, the Second Circuit noted that it has not followed Paine v. Baker, 595 F.2d 197 (4th Cir. 1979), in recognizing that a prisoner has a constitutional right to have incorrect information relied upon in a parole hearing expunged from his or her file. In affirming the district court's decision in this case, we do not establish such a right. Even if we were to adopt a limited right to an accurate criminal file, we refuse to extend this right to information that comes from third parties and that has not been demonstrated to be inaccurate, such as the information in this case.

26. 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 callous instant offense, criminal history, mixed COMPAS scores, community opposition, and impact of the crime on the victim's family, 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).

27. 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).

28. An inmate has no constitutional right to the information in his parole file, including the pre-sentence investigation report and the confidential section of the Parole Board report. Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). An inmate does not have automatic access to confidential material. Matter of Perez v New York State Division of Parole, 294 A.D.2d 726, 741 N.Y.S.2d 753 (3d Dept 2002); Macklin v Travis, 274 A.D.2d 821, 711 N.Y.S.2d 915, 916 (3d Dept. 2000). The Board may consider the confidential section to the Inmate Status Report/Parole Board Report is permissible. Molinar v New York State Division of Parole, 119 A.D.3d 1214, 991 N.Y.S.2d 487 (3d Dept. 2014).

29 Any report from another agency (e.g., medical, separate enemies list) per 9 N.Y.C.R.R. 8000.5(c)(2)(i)(b) is not to be released. Per Public Officers Law 87(2)(a) and (f) and Executive Law 259-k(2) and 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a)(3), the Board of Parole is authorized to treat records as confidential if their release could endanger the life or safety of any person. Thus, given the inmate's history of violent crime, Justice v Commissioner of the New York State Department of Corrections and Community Supervision, 130 A.D.3d 1342, 15 N.Y.S.3d 853 (3d Dept. 2015). Per Executive Law 259-i(2)(c)(B), items submitted to the Parole Board are deemed to be confidential. Per Executive Law 259-k(2) and 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a)(b), the Parole Board is entitled to designate certain parole records as confidential. Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017). Pursuant to Executive Law §259-k and 9 N.Y.C.R.R. §8000.5 et. seq., parole records are deemed to be

confidential.

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, then the question

of a remedy would arise. In such a situation, release on parole is not correct. Rather, at most the petitioner would be 45rtygentitled to 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. It should also be pointed out that 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 (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). 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 (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 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, 40 N.Y.S.3d 279 (2nd Dept. 2016).

WHEREFORE, respondents respectfully request that the petition be denied, and the proceedings dismissed.

RECORD BEFORE THE RESPONDENT

EXHIBIT 1 Pre-Sentence Investigation Report. Please note that, pursuant to CPL §390.50, the Pre-Sentence Investigation Report is exempt from disclosure and is submitted for **in camera review only**.

EXHIBIT 2 Sentence and Commitment Order

EXHIBIT 3 Parole Board Report. Please note, only Part I of this document may be disclosed to petitioner. Under New York State Public Officers Law §87(g), Part II is exempt from disclosure as intra-agency materials containing evaluative opinion information. **Part II is confidential and submitted for in camera review only**.

EXHIBIT 4 Parole Board Release Interview Transcript.

EXHIBIT 5 Parole Board Release Decision Notice

EXHIBIT 6 Brief on Administrative Appeal.

EXHIBIT 7 Administrative Appeal Decision Notice

EXHIBIT 8 Statement of Appeals Unit Findings

EXHIBIT 9 Sentencing Minutes

EXHIBIT 10 COMPAS (redacted portion to petitioner)

EXHIBIT 11 TAP/Offender Case Plan

EXHIBIT 12 Prior Court decision, [redacted] v New State Division of Parole, Index No. [redacted] Hartman, J. (Albany Co., Aug. 17, 2016)

Dated: Poughkeepsie, New York
October 15, 2019

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I, **JEANE L. STRICKLAND SMITH** affirm under the penalty of perjury pursuant to Section 2106 of the Civil Practice Law and Rules, that I am an Assistant Attorney General in the office of **LETITIA JAMES**, Attorney General of the State of New York, attorney for the respondent.

Your affiant read the foregoing Answer and Return and know the content thereof; that the matters therein are stated upon information and belief, and I believe them to be true. The grounds for my belief are documents, records, correspondence and other material maintained in the file of this action in your deponent's office acquired from the records of the New York State Department of Corrections and Community Supervision Board of Parole.

Dated: Poughkeepsie, New York
October 15, 2019

JEANE L. STRICKLAND SMITH
Assistant Attorney General