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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[REDACTED]

Petitioner,

-against-

TINA M. STANFORD, CHAIR OF THE NEW YORK
STATE PAROLE BOARD,

Respondent.

ANSWER AND RETURN

Index No. [REDACTED]
Hon. Joan S. Posner

Respondent, by and through his attorney, Barbara D. Underwood, Attorney General of the State of New York, Elizabeth Gavin, 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 they are confirmed by the attached records and leaves the determination of legal issues and conclusions contained therein to the Court.

2. The grounds for respondent's actions are fully set forth in the determinations being challenged and the Return annexed hereto.

3. The determinations and record demonstrate that respondent acted in compliance with the law and that the determination was neither arbitrary, nor capricious.

PRELIMINARY STATEMENT

4. Petitioner, an inmate, seeks review of a decision of the Board of Parole (hereinafter “the Board”) denying him discretionary release to parole. Petitioner is serving an indeterminate sentence of fifteen (15) years to life imprisonment for Murder in the second degree. Exhibit 1. Petitioner, at age thirty-three (3), stabbed his girlfriend in the chest seventeen (17) times causing her death. Exhibit 2, Pages 1-2. The incident occurred while standing on [REDACTED], Bronx, NY in broad daylight, “in the middle of traffic [with] cars passing around us.” Exhibit 4, pages 9-10. At the time of the murder, petitioner was currently serving probation for a federal crime, possession of a firearm by a felon. Exhibit 2, Page 2; Exhibit 3, Page 3.

5. Prior to the instant offense, petitioner had a lengthy criminal history in multiple states. Id. When asked about his history of violence against women during his Parole Board Interview, the petitioner is unable to keep all of his charges of assault on women straight. Exhibit 4, Pages 21-24. Petitioner’s criminal history begins in 1981 with two misdemeanor arrests for Breaking and Entering and Larceny. Exhibit 3, Page 3. In 1981, petitioner was also arrested for Attempted Forcible Rape, and eventually convicted of Assault on a Female. Id. In 1985, petitioner was arrested for Rape 1st Degree, Assault with a Deadly Weapon, Breaking and Entering, Larceny, and Possession with Intent to Sell Marijuana. Id. Ultimately, for those arrests petitioner was convicted of Obtaining Property by False Pretense, Receiving Stolen Goods, Possession with Intent to Sell or Deliver Marijuana, Breaking and Entering, and Larceny. Id. In 1987, petitioner was arrested for Possession of a Firearm by a Felon, and he was convicted of that crime in 1988. Id. In 1988, petitioner was arrested for Trafficking in Cocaine, Possession of Stolen Goods, Simple Possession of Cocaine, Possession with intent to manufacture, sell & deliver cocaine, Possession of drug paraphernalia, Resisting a Public Officer, Assault on Law Enforcement Officer, Marinating

a vehicle for cocaine trafficking, and two counts of Possession of a firearm by a convicted Felon. Id. For those crimes, petitioner was convicted of Resisting Arrest, Trafficking Cocaine, and two counts of Possession of a firearm by a Felon. Id.

6. On July 26, 2017, Petitioner had his third Parole Board Interview. Exhibit 4. At the conclusion of that interview, the Board decided not to grant petitioner discretionary release. Exhibit 5. Petitioner appealed that decision on December 13, 2017. Exhibit 6. On January 25, 2018, the Parole Appeals Unit affirmed the Board's decision. Exhibit 8. This Petition followed.

AS AND FOR A DEFENSE TO THE PETITION

7. The Petition raises the following issues: 1) the Board's decision is not sufficiently detailed; 2) the Board's decision was based solely on the seriousness of the instant offense and fails to take into account the required statutory factors; and 3) the Board's decision violates petitioner's due process rights.

8. 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 (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). The Board's decision emphasized factors that influenced their decision to deny petitioner parole. Exhibit 5. Specifically, the Board noted that the instant offense was "a continuation of your multistate and federal criminal history and record on community supervision which includes drugs, weapons, theft and assault related offenses", a "need for reentry substance abuse services and treatment", and that "the panel remains concerned

about your minimization and limited insight about your actions”. Id. This represents a series of specific and detailed concerns about the petitioner’s ability to succeed on parole release.

9. In the Petition, it is alleged that there is no support in the record for petitioner’s high risk of substance abuse on release, as well as no support for the Board’s determination that petitioner lacks insight into his actions. Regarding petitioner’s risk of substance abuse, the interview reveals a record replete with references to petitioner’s past drug use. Petitioner stated, “So when I started selling marijuana at a very young age, I would get invited to parties, I was on the football team, I was on the basketball team. I was very popular, and that led to me getting into selling cocaine and at that point I became addicted to cocaine and I continued to sell it.” Exhibit 4, Pages 4-5. Petitioner also told the Board that he was distressed with his girlfriend’s use of drugs because she knew about his “past with drugs”. Exhibit 4, Page 7. Petitioner admitted that, at the time he committed the murder, he was high on cocaine. Exhibit 4, Pages 7-8, 13. Petitioner even bragged that, “At the time I was a serious drug dealer. I wasn’t just using, at one point I was trafficking drugs and I had a lot of power.” Exhibit 4, Page 21, Lines 18-21. Petitioner even stated that, “my biggest problem was the substance abuse”. Exhibit 4, Page 25.

10. Despite petitioner’s allegations, during the course of the interview, the petitioner’s statements to the board showed that he lacked insight into his actions, as he minimized his culpability by blaming drugs, his lack of confidence, and drug culture for his repeated arrests and acts of violence against women. The full quote is actually, “That’s my biggest problem was the substance abuse. And, as Ms. Smith spoke about the female, I respect females. I always respected females, but being a drug dealer, I was just following what other people was doing and I was disgusting.” Petitioner also stated that, “Once you consume drugs, you give up your decision making, you give up your volition, and I think that’s one of the things that got me into the violent streak”. Exhibit 4, Page 5, Lines 15-17.

Petitioner went on to say that the murder was caused by his drug use in that “I could have avoided all of this by not ingesting the drugs because once you take a hit of drugs, you’ve made the wrong decision already.” Exhibit 4, Page 11, Lines 20-23. *See also*, Exhibit 4, Page 12, Lines 8-22. These statements demonstrate that petitioner minimized his culpability in his crimes, as he gave up his decision making to drugs.

11. Further, when pressed by the Board to explain what he would do to avoid relapsing into drugs, petitioner deflected these questions and explained what he would do to help others, seemingly oblivious to the fact that he would need supports and treatment when re-entering regular society where drugs are readily available. Exhibit 4, Pages 20-21. The Board can consider the credibility of statements made by the inmate in regard to whether full responsibility was taken for the criminal behavior. Matter of Siao-Pao v. Dennison, 51 A.D.3d 105 (1st Dept. 2008), *aff’d*, 11 N.Y.3d 777 (2008). It is well within the discretion of the Board to make determinations as to the credibility of the petitioner.

12. Appellant’s claim that the decision is arbitrary and capricious, and irrational bordering on impropriety, in that the Board failed to consider and/or properly weigh the required statutory factors. Appellant contends he has an excellent institutional record and release plan, but all the Board did was to look only at the instant offense/criminal history and violated the new regulations governing the conduct of the Board which was not in effect at the time of the petitioner’s interview.

13. While not all of the factors to be considered by the Board were actually discussed with the appellant at the interview, it is well settled that the failure to do so does not provide a basis for upsetting the Board’s decision. Morel v Travis, 18 A.D.3d 930 (3d Dept. 2005); Matter of Waters v. New York State Division of Parole, 252 A.D.2d 759, 760-61 (3d Dept 1998), *lv. denied*, 92 N.Y.2d 812 (1998); Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412 (2d Dept. 1985);

Matter of Mackall v. New York State Board of Parole, 91 A.D.2d 1023 (2d Dept. 1983) Mullins v New York State Board of Parole, 136 A.D.3d 1141 (3d Dept. 2016). That the Board did not discuss each factor with the inmate at the interview does not constitute convincing evidence that the Board did not consider the factors. In the Matter of Hawkins v. Travis, 259 A.D.2d 813 (3d Dept. 1999), app. dism. 93 N.Y.2d 1033 (1999); Dolan v New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); In re Garcia v. New York State Division of Parole, 239 A.D.2d 235 (1st Dept. 1997); Matter of Mackall v. NYS Board of Parole, 91 A.D.2d 1023, 1024 (2d Dept 1983); Charlemagne v New York State Division of Parole, 281 A.D.2d 669 (3d Dept 2001). Nor is the Board required to expressly discuss or articulate every factor in its determination. Marszalek v Stanford, 152 A.D.3d 773 (2d Dept. 2017); Fraser v Evans, 109 A.D.3d 913 (3d Dept. 2013); Faison v Travis, 260 A.D.2d 866 (3d Dept 1999) lv. dismissed 93 N.Y.2d 1013 (1999); LeGeros v New York State Board of Parole, 139 A.D.3d 1068 (2d Dept. 2016); Esquilin v New York State Board of Parole, 144 A.D.3d 846 (2nd Dept. 2016); Robles v Dennison, 449 F.Appx. 51, 53-54 (2nd Cir. 2011); Lewis v Stanford, 153 A.D.3d 1478 (3d Dept. 2017).

14. 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). 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).

15. The Board may consider the brutality of the offense. Dudley v Travis, 227 A.D.2d 863 (3d Dept 1996), leave to appeal denied 88 N.Y.2d 812; Borcsok v New York State Division of Parole, 34 A.D.3d 961 lv. den. 8 N.Y.3d 803 (3d Dept. 2006); Matter of Partee v Evans, 117 A.D.3d 1258 (3d Dept. 2014); Bush v Annucci, 148 A.D.3d 1392 (3d Dept. 2017). Per Executive Law 259-i(2)(c)(A), the Board may place greater weight on the violence and level of brutality of the crime, as opposed to an excellent institutional record and achievement. Garofolo v Dennison, 53 A.D.3d 734 (3d Dept. 2008).

16. The Board may consider the inmates minimizing of their role in the crime. Serrano v New York State Executive Department-Division of Parole, 261 A.D.2d 163 (1st Dept 1999).

17. The Board is empowered to deny parole where it concludes release is incompatible with the welfare of society. Thus, there is a strong rehabilitative component in the statute that may be given effect by considering lack of insight. Silmon v Travis, 95 N.Y.2d 470 (2000). Appellant was clearly lacking in this area.

18. The Board did consider the COMPAS, which was mixed, in that he was a risk on re-entry substance abuse, which is relevant to his risk of re-offense. Bush v Annucci, 148 A.D.3d 1392 (3d Dept. 2017). The COMPAS can contain negative factors that support the Board's conclusion. Wade v Stanford, 148 A.D.3d 1487 (3d Dept. 2017). The Board may refer to a history of drug abuse by the inmate in its decision. People ex rel. Herbert v New York State Board of Parole, 97 A.D.2d 128 (1st Dept 1983); Concepcion v New York State Board of Parole, 71 A.D.2d 819 (4th Dept 1979); Nunez v Dennison, 51 A.D.3d 1240 (3d Dept. 2008); Cruz v Alexander, 67 A.D.3d 1240 (3d Dept. 2009); Gonzalvo v Stanford, 153 A.D.3d 1021 (3d Dept. 2017).

19. The fact that the appellant committed the instant offense while under probation supervision is also a basis for denying parole release. Geames v Travis, 284 A.D.2d 843 (3d Dept 2001); Herouard v Travis, 250 A.D.2d 911 (3d Dept 1998); De La Cruz v Travis, 10 A.D.3d 789 (3d Dept. 2004); Hunter v New York State Division of Parole, 21 A.D.3d 1178 (3d Dept 2005); Bush v Annucci, 148 A.D.3d 1392 (3d Dept. 2017); Wade v Stanford, 148 A.D.3d 1487 (3d Dept. 2017); Cobb v Stanford, 153 A.D.3d 1500 (3d Dept. 2017).

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 (3d Dept 1992). 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). 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).

21. As for due process/constitutional liberty interest in a legitimate expectation of early release, at the Federal level, there is no inherent constitutional right to parole. Greenholtz v Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) or to be released before the expiration of a valid sentence. Swarthout v Cooke, 562 U.S. 216 (2011). Nor, under the New York State Constitution, is there a due process right to parole. Russo v New York State Board of Parole, 50 N.Y.2d 69 (1980); Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979). The New York State parole scheme is not one that creates in any prisoner a legitimate expectancy of release. No

entitlement to release is created by the parole provisions. Accordingly, appellant has no liberty interest in parole. Duettel v Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010); Davis v Dennison, 219 Fed Appx 68 (2d Cir. 2007), cert. den. 552 U.S. 863 (2007); Rodriguez v Alexander, 71 A.D.3d 1354 (3d Dept. 2010), lv. den. 15 N.Y.3d 703. Thus, the protections of the due process clause are inapplicable. Barna v Travis, 239 F.3d 169, 171 (2d Cir. 2001); Freeman v New York State Division of Parole, 21 A.D.3d 1174 (3d Dept 2005); Watson v New York State Board of Parole, 78 A.D.3d 1367 (3d Dept. 2010).

22. Completion of the minimum term of the sentence still does not create any protected liberty interest. Motti v Alexander, 54 A.D.3d 1114, 1115 (3d Dept. 2008).

23. 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. Duettel 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).

24. 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).

25. The proposed new regulations were not in effect at the time of the interview and as such are irrelevant to this proceeding.

26. 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 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. 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). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013).

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 (2nd 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, 120 S.Ct. 1362, 1371 (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).

28. 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 (3d Dept. 2014).

29. In the 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 entitled to a de novo interview. Matter of Quartarraro New York State Division of Parole, 224 A.D.2d

944 (1st Dept 1996), lv. denied 88 N.Y.2d 805 (1996).

30. Additionally, if a *de novo* consideration is directed, the Court is asked give the Board at least 60 days to schedule and provide the *de novo* interview.

31. For the foregoing reasons, the petition should be dismissed.

RECORD BEFORE RESPONDENT

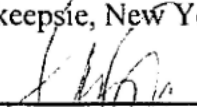
- 1) Sentence and Commitment Order
- 2) Pre-Sentence Investigation Report. **** Please note, this document is exempt from disclosure pursuant to CPL §390.50 and is submitted for in camera review only.**
- 3) Parole Board Report. **** Please note the page marked "confidential" at the top is confidential and is exempt from disclosure as intra-agency materials containing evaluative opinion information and is submitted herewith for in camera review only.**
- 4) Transcript of Board Interview.
- 5) Parole Board Release Decision Notice.
- 6) Brief on Administrative Appeal.
- 7) Statement of Appeals Unit Findings
- 8) Administrative Appeal Decision Notice
- 9) Sentencing Minutes
- 10) COMPAS instrument- redacted and versions to petitioner.
- 11) TAP/Offender Case Plan

WHEREFORE, respondent requests that the petition be denied.

DATED: Poughkeepsie, New York
June 8, 2018

Yours, etc.,

Barbara D. Underwood
Attorney General of the
State of New York
Attorney for Respondent
One Civic Center Plaza, Suite 401
Poughkeepsie, New York 12601

BY: 
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TO: Kathy Manley, Esq.
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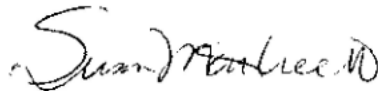
STATE OF NEW YORK :
COUNTY OF DUTCHESS : SS.:
CITY OF POUGHKEEPSIE :

Susan Martinelli, being duly sworn, says:

I am over eighteen years of age and a Legal Assistant in the office of the Attorney General of the State of New York, attorney for State of New York.

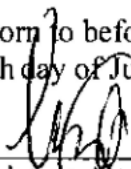
On the 11th of June 2018, I served the annexed Answer and Return on the individual named below at the address indicated by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box at Main and Market Streets, City of Poughkeepsie, New York, a depository under the exclusive care and custody of the United States Post Office Department directed to the said individual at the address within the State respectively theretofore designated by him for that purpose as follows:

Kathy Manley, Esq.
26 Dinmore Road
Selkirk, NY 12158



Susan Martinelli

Sworn to before me this
11th day of June 2018


Assistant Attorney General