STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

ANTHONY BOTTOM,

Petitioner,

Index # 902448-17

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

-against-

DEPARTMENT OF CORRECTIONAL SERVICES AND COMMUNITY SUPERVISION, BOARD OF PAROLE,

Respondent.

RESPONDENT'S MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of the Respondent's answer and in opposition to the petition of Anthony Bottom. Petitioner is an inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), currently incarcerated at Shawangunk Correctional Facility.

Petitioner is serving an aggregate indeterminate term of imprisonment of 25 years to life after being convicted of two counts of Murder. (Exhibit A; Exhibit B, confidential and submitted for *in camera* inspection). The instant offense consisted of petitioner, acting in concert with another individual, shooting and killing two police officers that had responded to a call for assistance. Bottom and the other individual then took the officers' guns and fled the scene. Bottom was later apprehended on an unrelated charge in San Francisco. Descriptions of the events surrounding Petitioner's instant offense, as well as an analysis of his criminal history, are set forth in his Pre-Sentence Investigation Report ("PSI"). (Exhibit B).

A Parole Board Report was prepared in June 2016 for Petitioner's reappearance interview with the Board. (Exhibits C and D, submitted for *in camera* inspection). Petitioner's Sentencing minutes, COMPAS Re-Entry Risk Assessment ("COMPAS") and Case Plan were also available for the Board's review. (Exhibit E; Exhibit F, (confidential and submitted for *in camera* inspection only); Exhibit G).

On June 21, 2016, Petitioner appeared in front of the Board for a Reappearance interview. (Exhibit H, pp. 1-23). Following the interview, Petitioner was denied discretionary release to parole supervision. (Exhibit I, pp. 2, 3).

On or about November 7, 2016, the Appeals unit received his administrative appeal. (Exhibit J). The Appeals Unit issued a decision affirming the Board's decision denying

Petitioner's release to community supervision on December 12, 2016. (Exhibit K). Petitioner's administrative remedies are deemed exhausted.

ISSUES PRESENTED

Petitioner brings the instant Article 78 proceeding claiming that the Board's decision was arbitrary and capricious on the following grounds: (i) the Board based its release denial almost exclusively on the seriousness of the offense (Petition, ¶¶ 12, 45, 53, MOL); (ii) the Board did not adhere to the statutory factors, focusing on and considering non-statutory factors (Petition, "Argument"; MOL); (iii) the Board failed to properly consider and apply the COMPAS Risk and Needs Assessment Tool (Petition, "Claims"; MOL); (iv) the Board failed to comply with the 2011 amendments to the Executive Law in that the statutes are now present and rehabilitation based (MOL, p. 1); (v) the Board's decision fails to provide adequate detail and was a foregone conclusion (MOL, pp. 2, 5, 12); (vi) the Board's decision constitutes an unauthorized resentencing (MOL, p. 3); (vii) the Board was biased and badgered him during the interview (MOL, pp. 3, 12)**;** and (viii) the Board denied him the opportunity to review the PBA "lobbying" for accuracy before it was considered by the Board (MOL, pp. 10, 11). As evidenced in detail below, Petitioner's claims have no merit.

A review of Petitioner's administrative appeal (Exhibit J) reveals that he has presented issues in his petition that were not raised in his administrative appeal. Specifically, (i) the Board's decision constitutes an unauthorized resentencing; (ii) the Board was biased and badgered him during the interview; and (iii) the Board denied him the opportunity to review the PBA "lobbying" for accuracy before it was considered by the Board. Accordingly, these claims will not be discussed in this memorandum of law.

Petitioner must have raised the issues in the administrative appeal in order to preserve it

for an Article 78 proceeding. Since these issues have not been raised in his administrative appeal, before the board, they have not been preserved. Matter of Gordon v. Stanford, 2017 N.Y. Slip Op. 02494, 2017 WL 1167591 (3rd Dept. Mar. 30, 2017); Matter of Tafari v. Evans, 102 A.D.3d 1053, 1054 (3rd Dept.), lv. denied 21 N.Y.3d 852 (2013); Matter of Santos v. Evans, 81 A.D.3d 1059 (3rd Dept. 2011). Even if properly before the Court, they too are without merit and should be dismissed.

Accompanying this Memorandum of Law is Respondent's Answer, including a portion of the Record of the Proceedings before the Board of Parole.

LEGAL ARGUMENT

The Board considered all of the relevant Executive Law § 259-i factors, and thus, judicial intervention is not warranted. "[I]t is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements of Executive Law § 259-i." Matter of Molinar v. New York State Div. of Parole, 119 A.D.3d 1214, 1215 (3rd Dept. 2014), *quoting* Matter of De Los Santos v. Division of Parole, 96 A.D.3d 1321, 1322 (3rd Dept. 2012). Executive Law §259-i's statutory factors, which the Board must consider, are:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
>
> (ii) performance, if any, as a participant in a temporary release program;
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> (iii) release plans including community resources, employment, education and training and support services available to the inmate;
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> (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;
>
> (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically

> incapacitated;
>
> (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;
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> (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and
>
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.
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> Executive Law § 259-i(2)(c)(A) (i-viii).

Importantly, "[a]bsent failure by the Board to comply with the mandates of Executive Law Article 12-B, [j]udicial intervention is warranted only when there is a showing of irrationality bordering on impropriety." Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 1269 (3rd Dept. 2014), *quoting* Matter of Silmon v Travis, 95 N.Y.2d 470, 476 (2000), *quoting* Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980) (internal quotation marks omitted). Moreover, "[t]he Board need not enumerate, give equal weight or explicitly discuss every factor considered and [is] entitled … to place a greater emphasis on the gravity of [petitioner's] crime." Matter of Montane v. Evans, 116 A.D.3d 197, 203 (3rd Dept. 2014), *quoting* Matter of Serrano v. Alexander, 70 A.D.3d 1099 (3rd Dept. 2010); Matter of Leung v. Evans, 120 A.D.3d 1478, 1479 (3rd Dept. 2014).

THE EMPHASIS ON PETITIONER'S INSTANT OFFENSE WAS NOT IMPROPER.

Contrary to Petitioner's contention, the Board did not deny Petitioner release to parole supervision exclusively upon the nature of the instant offense. The instant offense, as well as Petitioner's prior criminal record, is discussed in the decision. However, the decision also

acknowledged Petitioner's risk to society, rehabilitation efforts, release plans, Case Plan, Sentencing Minutes, COMPAS and all other required statutory factors. The reasons stated by the Board members for holding Petitioner are clearly sufficient grounds to support their decision. (See Exhibit H; Exhibit I).

In addition to other factors considered, the Board cited the Petitioner's history of unlawful and violent conduct and a negative aspect of the COMPAS instrument. Executive Law § 259-i(2)(c)(A); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308 (3rd Dept. 2016); Matter of Kenefick v. Sticht, 139 A.D.3d 1380 (4th Dept. 2016); Matter of Moore v. New York State Bd. of Parole, 137 A.D.3d 1375 (3rd Dept. 2016).

"The Board is obligated to consider petitioner's prior criminal record and the brutal nature of the offense for which he is presently incarcerated (see Executive Law § 259-i [2] [c] [A])." Matter of Partee v. Evans, 117 A.D.3d 1258, 1259 (3rd Dept. 2014). It was also obligated to consider both "petitioner's lack of remorse and [his] failure to accept responsibility" for his instant offense. Matter of Khatib v. New York State Bd. of Parole, 118 A.D.3d 1207, 1208 (3rd Dept. 2014), as discussed in its decision.

The Board relied on the fact that Petitioner expressed limited remorse for the death of his two victims. Matter of Silmon v. Travis, 95 N.Y.2d 470, 478 (2000); Matter of Dudley v. Travis, 227 A.D.2d 863 (3rd Dept. 1996), lv. denied 88 N.Y.2d 812 (1996).

Insofar as Petitioner may dispute the Board's finding as to remorse, it was within the Board's authority to make an assessment and there is ample support in the interview transcript. Petitioner appears to have presented as combative and with an attitude of entitlement. (Exhibit H, pp. 11-13 and 16-20.) Petitioner explained his participation in the shootings of two unsuspecting officers as an act of war and seemed to suggest he is the last "political prisoner" of the era. (Id.,

pp. 6-7, 9, 10).

While Petitioner's written statement made passing reference to remorse (Petition, Exhibit. 3), at no point during the interview did the petitioner express or demonstrate any remorse for his victims despite numerous opportunities and implicit invitations. Given the connection between an inmate's rehabilitation and remorse for the crime identified by the Court of Appeals in Matter of Silmon v. Travis, Petitioner's inability to demonstrate any recognition that his murder of two police officers was, in fact, not justified by his political convictions provides ample reason to conclude that his rehabilitation is not yet complete.

The Board acted within its discretion in determining these considerations outweighed other positive factors and rendered discretionary release inappropriate at this time. *See generally* People ex rel. Herbert, 97 A.D.2d 128 (1st Dept. 1983). Further, the Board was fully authorized "to place a greater emphasis on the gravity of [Petitioner's] crime." Matter of Montane v. Evans, 116 A.D.3d 197, 203 (3rd Dept. 2014), *quoting* Matter of Serrano v. Alexander, 70 A.D.3d 1099 (3rd Dept. 2010); Matter of Hamilton v. New York State Div. of Parole, 943 N.Y.S.2d 731, 2012 WL 1400923 (Sup. Ct. Albany Co., March 6, 2012); Matter of Valderrama v. Travis, 19 A.D.3d 904 (3rd Dept. 2005).

THE BOARD CONSIDERED THE REQUIRED STATUTORY FACTORS.

Petitioner's claim that the Board did not properly considered all of the required statutory factors, and improperly considered non-statutory factors, is without merit. In evaluating Petitioner's record, the Board had for its review and consideration the following: his Sentence and Commitment and PSI, (Exhibit A; Exhibit B); the Parole Board Report, which contains his institutional programming, release plans and disciplinary record, (Exhibit C; Exhibit D, confidential and submitted for *in camera* inspection), his COMPAS Reentry Risk Assessment,

(Exhibit F, confidential and submitted for *in camera* inspection) and Case Plan (Exhibit G).

During the interview, the Board discussed with the Petitioner the events and circumstances surrounding his instant offense, the Pre-Sentencing Report, and Petitioner's COMPAS Risk assessment scoring. Also discussed was Petitioner's disciplinary history, plans upon release, and his positive programming. (see generally, Exhibit H).

It is well established that the weight to be accorded each of the requisite factors is within the discretion of the Parole Board. See, e.g., Matter of King v. Stanford, 137 A.D.3d 1396 (3rd Dept. 2016); Matter of Delacruz v. Annucci, 122 A.D.3d 1413 (4th Dept. 2014); People ex rel. Herbert, 97 A.D.2d 128 (1st Dept. 1983). The Board need not explicitly refer to each and every one of them in its decision, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497 (3rd Dept. 2017); Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141 (3rd Dept. 2016).

Further, in the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945(3rd Dept. 1990); People ex rel. Herbert, 97 A.D.2d 128 (1st Dept. 1983).

Here, insofar as Petitioner suggests the Board failed to fairly consider the requisite factors, there is a presumption of honesty and integrity that attaches to judges and administrative fact-finders. People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916 (3rd Dept. 1992). Courts presume the Parole Board follows its statutory commands and internal policies in fulfilling its obligations. Garner v. Jones, 529 U.S. 244, 256 (2000). The record as a whole further reflects the Board considered the appropriate factors including the instant offenses involving the shooting deaths of two police officers, Petitioner's criminal history in California, institutional programming and accomplishments, disciplinary record, release plan, case plan, and the COMPAS instrument

as well as the sentencing minutes. Petitioner's document submissions, a packet by the National Lawyers Guild, letters of support including from elected officials and the son of one victim, and petitions for release were also considered by the Board.

Petitioner also was given the opportunity to raise additional matters during the interview when asked by Commissioner Sharkey, "Sir, is there anything that you and I have not talked about that you think we ought to know?" Petitioner's response was "Commissioner Sharkey, in three consecutive parole hearings which we were engaged in, I think we have covered everything from A to Z." (Exhibit H, p. 16.)

Contrary to Petitioner's claim that the board considered non-statutory factors, the Board permissibly considered community opposition to release. While the Board may not consider non-statutory matters like penal philosophy, Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788 (1994), the courts have recognized there are additional factors that are relevant to the Board's task. Thus, for example, an inmate's insight and remorse may be considered. Matter of Silmon, 95 N.Y.2d 470 (2000); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308 (3rd Dept. 2016), lv. denied 29 N.Y.3d 901 (2017); Matter of Dobranski v. Evans, 83 A.D.3d 1355 (3rd Dept. 2011), lv. denied 17 N.Y.3d 709 (2011). A history of alcohol or drug abuse also is a permissible factor. See, e.g., Matter of Sanchez v. Dennison, 21 A.D.3d 1249 (3rd Dept. 2005); Matter of Brant v. New York State Bd. of Parole, 236 A.D.2d 760, 761, (3rd Dept. 1997).

The Executive Law explicitly recognizes numerous individuals other than those specifically identified in Executive Law § 259-i(2)(c)(A) may appropriately have an opinion to offer on the subject of an inmate's possible release back to the community: "Where a crime victim or victim's representative as defined in subparagraph (A) of this paragraph, *or other person* submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that

individual's name and address confidential." Executive Law § 259-i(2)(c)(B) (emphasis added). (Exhibit M, confidential and submitted for *in camera* inspection).

Regulation further makes clear that any private citizen has a right to submit correspondence to the Board supporting or opposing an inmate's parole release. 9 N.Y.C.R.R. § 8000.5(c)(2) ("it is essential… to permit private citizens to express freely their opinions for or against an individual's parole"). In fact, in considering whether to release an inmate to the community, the Board must assess whether "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 law." Executive Law § 259-i(2)(c)(A).

The Board is presumed to understand its obligations and not substitute another's opinion for its own required assessment of whether the inmate's release is appropriate. However, courts have reasoned that this assessment may be rationally aided by private citizens expressing their opinion on the matter. Matter of 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); Seltzer v. Thomas, No. 03 CIV.00931 LTS FM, 2003 WL 21744084, at *4 (S.D.N.Y. July 29, 2003).

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, 11 A.D.3d 850, 852-853 (3rd 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 (2005); *see also* Matter of Rivera v. Evans, Index No. 0603-16, *Decision & Order* dated July 5, 2016 (Sup. Ct. Sullivan Co.) (LaBuda A.J.S.C.) ("[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).

The same has also long been recognized as true with respect to letters supporting an

inmate's potential parole release. Matter of Hamilton, 119 A.D.3d 1268, 1273, (3rd Dept. 2014); Matter of Morrison, 81 A.D.3d 1073 (3rd Dept. 2011); Matter of Cartagena v. Alexander, 64 A.D.3d 841 (3rd Dept. 2009). Indeed, letters (and petitions) favoring an inmate's release but which would not constitute, or provide qualified or first-hand accounting of, the specific factors listed in Executive Law § 259-i(2)(c)(A)(i) through (viii), are not uncommon and, in fact, were considered here. (Petition. Exhibit 4). As expressed by Petitioner during his interview, all private citizens are entitled to express their opinions. (Exhibit H, pp. 17, 20.)

After considering all required and permissible matters here, the Board issued a decision that was sufficiently detailed to inform the inmate of the reasons for the denial of parole. The decision therefore satisfied the criteria set out in section 259-i of the Executive Law. Executive Law § 259-i(2)(a); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435 (1st Dept. 2013); Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983).

As for any similarity to prior decisions, because the Board is required to consider the same statutory factors each time an inmate appears, it follows that the Board may deny release on the same grounds as relied upon in previous determinations. Matter of Hakim v. Travis, 302 A.D.2d 821 (3rd Dept. 2003); see also Matter of Siao-Pao v. Dennison, 51 A.D.3d 105 (1st Dept. 2008) aff'd, 11 N.Y.3d 777 (2008). However, there is no requirement that a second Board panel must follow the recommendation of a prior Board panel. Matter of Flores v. New York State Bd. of Parole, 210 A.D.2d 555 (3rd Dept. 1994). Each interview is a new assessment.

Because all of the Executive Law § 259-i factors were addressed within either the record before the Board or at Petitioner's interview, and the Board's decision need not discuss every factor (Matter of Montane v. Evans, 116 A.D.3d 197, 203 (3rd Dept. 2014), Petitioner makes no "showing of irrationality bordering on impropriety" *quoting* Matter of Silmon v Travis, 95 N.Y.2d

470, 476 (2000) *quoting* Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980) (internal quotation marks omitted). Accordingly, as set forth above, the Board considered all of the statutory factors.

THE BOARD INCORPORATED RISK AND NEEDS PRINCIPLES WHEN IT IMPLEMENTED NEW WRITTEN PROCEDURES PURSUANT TO THE AMENDED EXECUTIVE LAW.

Petitioner incorrectly suggests that the Board failed to comply with the amendments to the Executive Law. Petitioner's interview with the Board of Parole took place on June 21, 2016. For Board interviews that occurred prior to July 30, 2014, the 2011 Amendment to Executive Law § 259-c (4) had been implemented according to former Chairwoman Andrea Evans' October 5, 2011 Memorandum to the Board of Parole (hereinafter "October 2011 memorandum"). (Exhibit L).

Pursuant to the October 2011 memorandum, the Board must, in pertinent part, perform a "COMPAS" risk and needs assessment. In rejecting a challenge to the efficacy of the 2011 memorandum and COMPAS instrument, the Third Department explicitly held that "the October 2011 memorandum sufficiently establishes the requisite procedures for 'incorporat[ing] risk and needs principles' into the process of making parole release decisions." Matter of Montane v. Evans, 116 A.D.3d 197, 202 (3rd Dept. 2014). "[T]he Board satisfied its obligations under the 2011 amendments to Executive Law § 259-c (4)." (Id)

The Board then, on July 30, 2014, incorporated the October 2011 memorandum into its regulations. "[T]he Board has [now] promulgated regulations for parole release decision-making procedures, which became effective July 30, 2014, that are consistent with the procedures set forth in the [October] 2011 memorandum (see 9 N.Y.C.R.R. 8002.3)." Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 1414 (4th Dept. 2014) (internal quotation marks omitted).

Because the October 2011 memorandum properly implemented Executive Law §259-c

(4)'s 2011 amendment and the Board's new regulation (9 N.Y.C.R.R. 8002.3) is consistent with such memorandum, the new regulation itself has appropriately instituted a risk and needs assessment in accord with the 2011 Executive Law § 259-c (4) amendment.

By considering the COMPAS instrument, the Board adequately incorporated the risk and needs assessment into determining whether Petitioner should be released. Matter of Montane v. Evans, 116 A.D.3d 197, 202 (3rd Dept. 2014); accord Matter of Hawthorne v. Stanford, 135 A.D.3d 1036 (3rd Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558 (4th Dept. 2014). (Exhibit F, confidential and submitted for *in camera* inspection).

Notably, the COMPAS instrument cannot mandate a particular result. Matter of King, 137 A.D.3d 1396 (2016). Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the statute's standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108 (3rd Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3rd Dept. 2014); Matter of Jones v. NYS Bd. of Parole, 2015 N.Y. Slip Op. 31816, 2015 WL 5840088 (Sup. Ct. Albany Co. Sept. 11, 2015) (Feldstein A.J.S.C.) (risk assessment serves to "assist" Board and does not supersede independent authority of the Board to determine, based on its consideration of the § 259-i(2)(c)(A) factors, whether an inmate should be released).

Indeed, the Legislature stressed that the 2011 amendments were not intended to interfere with the Board's fundamental . . . authority to make release decisions based on the [B]oard members' independent judgment and application of statutory criteria (L 2011, ch 62, § 1, part C, § 1, subpart A, § 1)." Matter of Montane v. Evans, 116 A.D.3d at 202 (internal quotation marks omitted).

As the record demonstrates that the Department prepared a COMPAS risk assessment for

Petitioner, and the Board considered that COMPAS prior to it issuing its decision, the Board fully complied with the written procedures. (Exhibit F, confidential and submitted for *in camera* inspection; Exhibit H).

THE BOARD'S DECISION WAS PROPERLY DETAILED.

Petitioner's argument that the Board did not provide detailed reasons for its denial of his parole is entirely without merit. Because the decision was sufficiently detailed to "permit intelligent judicial review of the grounds for the Board's denial of parole release," this portion of the Petition must be denied. Matter of Zhang v. Travis, 10 A.D.3d 828, 829 (3rd Dept. 2004); Matter of Siao-Pao v. Dennison, 11 N.Y.3d 777 (2008); Matter of Burress v Evans, 107 A.D.3d 1216 (3rd Dept. 2013).

Moreover, Petitioner offered no factual proof to substantiate his claim that the Board's denial was predetermined. Due to this lack of proof and because "the Board is presumed to have acted properly in accordance with statutory requirements", Petitioner failed to demonstrate that the Board's denial of his release is irrational bordering on impropriety. Matter of Nankervis v. Dennison, 30 A.D.3d 521, 522 (2nd Dept. 2006); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944 (3rd Dept. 1990); Matter of Bottom v. New York State Bd. Of Parole, 30 A.D.3d 657, fn. (3rd Dept. 2006).

Because, as set forth herein, the Board considered all of the statutory factors, the record belies petitioner's contention that the Board's determination denying his request for parole release was predetermined. Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 1190 (3rd Dept. 2006); Matter of Black v. New York State Bd. of Parole, 54 A.D.3d 1076 (3rd Dept. 2008).

CONSTITUTIONAL AND DUE PROCESS RIGHTS

Petitioner's due process rights and constitutional rights have not been violated. Given that "the Board properly took into account the factors set forth in Executive Law § 259-i", Petitioner was afforded all of the process he was due. Matter of Borcsok v. New York State Div. of Parole, 34 A.D.3d 961 (3rd Dept. 2006).

Moreover, "Executive Law § 259-i does not create an entitlement to release on parole and therefore does not create interests entitled to due process protection." Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 1175 (3rd Dept. 2005), *quoting* Matter of Paunetto v. Hammock, 516 F. Supp. 1367 (1981); Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980).

At the federal level, there is no constitutional liberty interest in a legitimate expectation of early release and no inherent constitutional right to parole, Matter of Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 10 (1979), or to be released before the expiration of a valid sentence. Matter of Swarthout v. Cooke, 562 U.S. 216 (2011). Also, under the New York State constitution, there is no due process right to parole. Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980); Matter of Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979). As such, Petitioner's claim should be dismissed.

CONCLUSION

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. Matter of Kelly v. Hagler, 94 A.D.3d 1301 (3rd Dept. 2012); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2nd Dept. 2004); Matter of Cruz v. Travis, 273 A.D.2d 648 (3rd Dept. 2000).

The petitioner has the heavy burden of showing that the Board's determination is irrational

"bordering on impropriety" before judicial intervention is warranted. Matter of Silmon v. Travis, 95 N.Y.2d 470, 476, (2000); Matter of Russo, 50 N.Y.2d 69 (1980); Matter of Mullins, 136 A.D.3d 1141(3rd Dept. 2016); People ex rel. Herbert, 97 A.D.2d 128 (1st Dept. 1983).

The Board's decision cannot be called an abuse of discretion or arbitrary and capricious. Accordingly, the Petition should be denied and this proceeding dismissed in its entirety.

Dated: June 9, 2017
Albany, New York

Lynn Knapp Blake
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