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This writing sample is excerpted from an opinion rejecting a state prisoner's petition to vacate an adverse administrative ruling by the state parole board that I drafted during my judicial internship during early summer of 2014.

Petitioner Larry Johnson ("Petitioner") commenced this proceeding by Order to Show Cause for relief pursuant to Article 78 of the New York State Civil Practice Law and Rules, seeking vacatur of the January 19, 2013 determination of the New York State Board and Division of Parole ("Parole Board" or "Board") to deny him discretionary release on parole. Petitioner requests that the court grant him the relief sought on the grounds that: […] 2) the determination to deny petitioner discretionary parole was unlawful because the Board relied entirely on the seriousness of petitioner's crime of conviction to support its decision; […] 4) the Board relied on factually inaccurate information in denying petitioner's application.

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In 1983, petitioner was convicted by a Queens County jury of Murder in the second degree, three counts of Robbery in the first degree, Attempted Murder in the second degree, and Criminal Possession of a Weapon in the second degree (Verified Answer, Ex. 2, Sentencing and Commitment Orders). He was sentenced to serve 25 years to life in prison for the Murder, 8 1/3 to 25 years in prison for each count of Robbery, 8 1/3 to 25 years in prison for the Attempted Murder and 5 to 15 years in prison for the Criminal Possession of a Weapon (Id.).

Prior to his 1983 conviction, petitioner had been arrested six times in six years and convicted of a felony (Verified Statement, Ex. 1, Presentence Investigation Report). The incident that resulted in Petitioner's 1983 conviction occurred on December 16, 1981 (Id.). Petitioner was part of a group of armed men who accosted Joseph Mehran, Sr. on Mehran's driveway as he drove home. The men hit Mehran in the back of the head and told him that they intended to rob him. Mehran began to scream. (Id.).

At this point, Anthony Abruzzo, Mehran's son-in-law who was an off-duty NYPD officer, came out of the house. Observing the situation, Abruzzo identified himself as a police officer and

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told the group of men not to move (Id.). Shots were fired at Abruzzo by Petitioner and his accomplices. A bullet struck Abruzzo in the chest, killing him (Id.).

After shooting Abruzzo, Petitioner and his accomplices fired gunshots at other members of Mehran's family, including Abruzzo's wife Barbara, who had emerged from the house (Id.). The four men then fled the scene with cash from the robbery in a car belonging to Mehran (Id.). Petitioner was later charged for his role in this offense while in jail on a separate charge (Verified Answer, Ex. 8, Inmate Status Report 3).

The sentencing court made the following statement during petitioner's sentencing hearing:

> "[T]here are no mitigating facts or circumstances surrounding this case. This defendant and his other two friends, two killer friends, showed no remorse at any time for their acts for which they stand convicted before this Court.
>
> Why? I have been told that even during the course of the trial, during the course of the court taking the verdict from the jury, these defendants were smirking, had wise guy attitudes, looking around at the family of the deceased officer, and making all kinds of signs and gestures which the Court recalls to be a fact. No remorse.
>
> Again, this defendant, if the Court had the power certainly would order the ultimate sentence, death by execution." (Verified Answer, Ex. 3, Sentencing Hr'g Mins. at 4).

In 2004, while incarcerated at Shawangunk Correctional Facility in Ulster County, petitioner was convicted of another felony (Verified Answer, Ex. 4, Presentence Investigation Report). This conviction arose from an incident that occurred during a 2003 visit to the facility by petitioner's wife. Corrections officers became suspicious of furtive movements by the couple during the visit. A search conducted by officers shortly thereafter revealed two balloons containing marijuana on petitioner's wife's person and Oxycodone in her vehicle (Id.). Subsequently, another balloon containing marijuana was found in Petitioner's stool. (Id.) Petitioner was charged with Attempted Promotion of Prison Contraband. He pled guilty to the charge and was sentenced to 1 ½ to 3 years in prison, to run consecutively to his original sentence (Inmate Status Report 1).

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Petitioner was denied release on parole in 2008 and 2010. In January 2013, Petitioner made a third appearance before the Parole Board (Verified Petition, Ex. 10, Parole Hr'g Tr. 1).

During his hearing, the panel first described what they understood to be the facts of petitioner's crime of conviction (Parole Hr'g Tr. at 2-3). Petitioner contended that some details of the panel's description of the facts of the crime were inaccurate. Specifically, he disputed the panel's assertions 1) that he had been involved in another robbery around the time of the offense (Parole Hr'g Tr. 4); 2) that he fired the shot that killed Abruzzo, insisting that he had been unarmed and in Mehran's vehicle at the moment of the shooting (Parole Hr'g Tr. 4-5); 3) that he had heard Abruzzo identify himself as a police officer (Parole Hr'g Tr. 5-6); 4) that he had three accomplices, saying that he had two (Parole Hr'g Tr. 5-6) and 5) that he had shown a witness "a handful of hundred dollar bills" shortly after the crime took place (Parole Hr'g Tr. 6-7). […]

Petitioner repeatedly stated that his drug abuse had led to his past involvement in criminal activities. He also contended that he had changed significantly since his 2004 felony conviction, stating "That's the old Larry Johnson. He no longer exists. I realized that I made some bad choices in my life, and I no longer make bad choices." (Parole Hr'g Tr. 9). The discussion below followed:

Q: That [crime] was [committed] in 2003?

A: Yes.

Q: So that was after you had been in for, what, 22 years?

A: Yes.

Q: So you're in 22 years, you got your first parole board coming up in three years and –

A: I did the dumb thing. Actually, I caught myself helping somebody else. That's how it all happened. I caught myself helping a friend bring in drugs, and I got the worst of it.

Q: Well, one would expect after 22 years in prison your thinking should have been altered, correct?

A: Yes. (Id.) […]

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The panel denied petitioner's application and placed a 24-month hold on his parole (Verified Statement, Ex. 12, Denial of Parole).

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It is well established that "because a person's rightful liberty interest is extinguished upon conviction, there is no inherent constitutional right to parole." Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 73 (Ct. App. 1980) (citing Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979). Inmates confined to state correctional facilities are entitled to parole only if they "have a legitimate expectation of release that is grounded in the state's statutory scheme". Graziano v. Pataki, 689 F.3d 110, 114 (2d Cir. 2012) (quoting Barna v. Travis, 239 F.3d 169, 170 (2d Cir. 2001); see also Washington v. White, 805 F. Supp. 191, 193 (S.D.N.Y. 1992) ("Any liberty interest warranting due process protection must…necessarily have its origin in a state statutory scheme which creates an entitlement to parole."). Because New York law creates no right to parole protected by due process, Russo, 50 N.Y. 2d at 75; see also Barna, 239 F.3d at 171 ("The New York Parole scheme is not one that creates in any prisoner a legitimate expectation of release."), inmates incarcerated in New York State correctional facilities are entitled only to "the possibility of parole". Russo, 50 N.Y. 2d at 75.

New York State Executive Law § 259-i, the primary statute that governs actions taken by the Parole Board, does make it mandatory for the Parole Board to conform to certain guidelines in determining whether to grant parole. Matter of Silmon v. Travis, 95 N.Y.2d 470, 477 (Ct. App. 2000) (citing Executive Law § 259-i(2)(c)(A)); Matter of King v. New York State Div. Of Parole, 83 N.Y.2d 788, 790 (Ct. App. 1994). […]

But the New York laws governing parole do not create a legitimate expectation of parole because they do "not establish a scheme whereby parole *shall* be ordered unless specified conditions

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are found to exist." Boothe v. Hammock, 605 F.2d 661, 664 (2d Cir. 1979) (emphasis added). This is because, ultimately, the Parole Board is authorized to determine on a case-to-case basis whether there is a "reasonable probability that…[an inmate] 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 to the law." Executive Law § 259-i(2)(c)(A)(i).; See Silmon, 95 N.Y.2d at 477. "While guidelines are used to structure the exercise of discretion, no entitlement to release is created." Boothe, 605 F.2d at 664; see also Russo, 50 N.Y.2d at 75.

The discretion afforded to the Parole Board by statute is also reflected in the limits on the permissible scope of judicial review of the Board's decisions. See Matter of Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 28 (Ct. App. 1969). Executive Law § 259-i provides that "[a]ny action by the Parole Board shall be deemed a judicial function and shall not be reviewable if done in accordance with the law". Executive Law § 259-i(5). A court reviewing a determination of the Parole Board may intervene "only when there is a showing of 'irrationality bordering on impropriety'. Silmon, 95 N.Y.2d at 476 (citing Russo, 50 N.Y. 2d at 75); accord Matter of Thomches v. Evans, 108 A.D.3d 724 (2d Dep't. 2013); Matter of Hanson v. New York State Bd. of Parole, 57 A.D.3d 994 (2d Dep't. 2008); Matter of Hardwick v. Dennison, 43 A.D.3d 406 (2d Dep't. 2007).

Consequently, judicial intervention is permitted only if the reviewing court finds an action of the Parole Board to have no rational basis or to be arbitrary and capricious. King, 83 N.Y.2d at 789; Silmon, 95 N.Y.2d at 476; see also Matter of Pell v. Board of Ed. of Union Free Sch. Dist. No. 1, 34 N.Y.2d 222, 231 (Ct. App. 1974). Where there is no abuse of discretion, a reviewing court may not disturb a determination of the Parole Board if it was reached in compliance with the statutory requirements of Executive Law § 259-i. See Briguglio, 24 N.Y.2d 21 at 28; Matter of Martinez v. Evans, 108 A.D.3d 815 (3d Dep't. 2013); Matter of Patterson v. Evans, 106 A.D.3d 1456 (4th Dep't. 2013); Matter of Maricevic v. Evans, 86 A.D.3d 879 (3d Dep't. 2011).

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The crux of petitioner's argument is that the Parole Board's determination to deny him parole was an abuse of the discretion afforded to the Board. In examining this argument, the court must presume that the Parole Board acted in accordance with the law, unless the petitioner convincingly demonstrates that the Board's determination to deny him release on parole did not satisfy the requirements of the statute, Matter of Midgette v. New York State Div. of Parole, 70 A.D.3d 1039, 1040 (2d Dep't. 2010); Matter of Galbreith v. New York State Bd. of Parole, 58 A.D.3d 731 (2d Dep't. 2009), or was otherwise "arbitrary or capricious". Silmon, 95 N.Y.2d at 476.

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[T]he record reflects that that the panel's determination to deny petitioner parole was ultimately informed by "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 presentence probation report as well as consideration of any mitigating or aggravating factors, and activities following arrest prior to confinement." Executive Law § 259-i(2)(c)(A)(vii). It was also informed by the petitioner's "prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." Executive Law § 259-i(2)(c)(A)(viii). […]

Petitioner also contends that the panel abused its discretion by basing its determination solely upon the seriousness of his crime of conviction. He argues that this case is indistinguishable from Matter of Huntley v. Evans, 77 A.D.3d 945 (2d Dep't. 2010), where a parole applicant was granted a new parole hearing on the basis that "the Parole Board cited *only* the seriousness of petitioner's crime, and failed to mention in its determination any of the other statutory factors". 77 A.D. 3d at 947 (emphasis added). Huntley and some other recent cases hold that "where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance," it abuses its discretion. Id.; Matter of Ramirez v. Evans, ___ A.D. 3d ___, 2014 N.Y. Slip Op. 04014 (2d Dep't. 2014) (slip op. at 1); Matter of Perfetto v. Evans, 112 A.D.

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3d 640 (2d Dep't. 2013); Matter of Gelsomino v. New York State Bd. of Parole, 82 A.D.3d 1097, 1098 (2d Dep't. 2011); Matter of Malone v. Evans, 83 A.D.3d 719 (2d Dep't. 2011); Matter of Mitchell v. New York State Div. of Parole, 58 A.D.3d 742, 743 (2d Dep't. 2009). But this principle does not extend to requiring the Parole Board to give equal weight to each statutory factor in deciding whether to grant parole. See Huntley, 77 A.D. 3d at 947; Matter of Miller v. New York State Div. of Parole, 72 A.D. 3d 690, 691 (2d Dep't. 2010); Hanson, 57 A.D.3d at 994-95; Matter of Wan Zhang v. Travis, 10 A.D.3d 828, 829 (3d Dep't. 2004). Therefore, the Parole Board is "entitled…to place a greater emphasis" on the seriousness of a parole applicant's underlying crime if its determination is not solely based on this factor. Montane, 116 A.D. 3d 197 (quoting Matter of Serrano v. Alexander, 70 A.D.3d 1099, 1100 (3d Dep't. 2010)); see also Vigliotti, 98 A.D. 3d at 790. It follows that determinations of the Parole Board to deny parole such as the instant one - which focuses on the seriousness of the inmate's offense in the context of additional aggravating circumstances - do not show "irrationality bordering on impropriety". Matter of Ramos v. Heath, 106 A.D.3d 747 (2d Dep't. 2013); Matter of McCaskell v. Evans, 108 A.D. 3d 926, (3d Dep't. 2013) Matter of Vigliotti v. State Exec. Div. of Parole, 98 A.D. 3d 789, 790 (3d Dep't. 2012); Stanley, 92 A.D.3d at 948-49; Miller, 72 A.D. 3d at 691.

The panel's determination to deny petitioner parole is therefore easily distinguishable from the determination at issue in Huntley. In that case, the panel's written decision stated "you appear before this panel with the serious instant offense of murder 2 wherein you shot a male victim twice in the chest with a hunting rifle causing his death. The panel is disturbed by the extreme violence associated with this terrible crime." 77 A.D. 3d at 947. The written decision in Huntley was deemed an abuse of the Parole Board's discretion because it made reference to no factor other than the violent and serious nature of Huntley's crime. Id.

In contrast, the Parole Board did not deny petitioner's parole application solely on the basis of the seriousness of his original offense. Petitioner's adverse determination was based upon

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aggravating circumstances apart from the seriousness of his offense. It rested upon the panel's finding that, in light of petitioner's significant criminal history, his 2004 felony conviction for Attempted Promotion of Prison Contraband demonstrated he had not been successfully rehabilitated during his years of confinement.

The facts that motivated the determination at issue here more closely resemble those in Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 938 (2d Dep't. 2012), where the Parole Board denied an inmate release on parole based on

> "the seriousness of the offense, his multiple disciplinary violations while incarcerated, and the petitioner's criminal history, with particular attention to the fact that he committed the underlying crime shortly after a period in which he was on probation and that he had displayed an escalation of unlawful activities." 92 A.D.3d at 949.

The denial of discretionary parole on this basis was affirmed by the Appellate Division, Second Department. Id; see also Matter of Davidson v. Evans, 104 A.D.3d 1046 (3d Dep't. 2013).

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Finally, petitioner vehemently and repeatedly argues that the Parole Board abused its discretion by basing its determination upon what he alleges is erroneous information. This contention is based on statements made by the panel during petitioner's parole hearing and expressed in its written decision. Specifically, he argues that the panel's decision to deny him discretionary parole was based on facts that misrepresented his role in the 1981 incident for which he was convicted as well as his involvement in other criminal acts around the time of the incident.

"In article 78 proceedings, the doctrine is well settled that…the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence." Pell, 34 N.Y.2d 222 at 230. Furthermore, courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." Matter of Peconic Bay Broad. Corp. v Bd. of App., 99 A.D.2d 773, 774 (2d Dep't. 1984).

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The record indicates that the Presentence Investigation Report largely informed what petitioner alleges was the panel's inaccurate and prejudicial view of the facts regarding petitioner's crime of conviction. It must be noted that since the original purpose of this report is to give the court all relevant information prior to sentencing,

> "[a] presentence report thus normally contains information from a variety of sources, the inclusion of hearsay is virtually inevitable, and the requirement of accurate reporting may result in the inclusion in the report of statements that are themselves inaccurate. Though verification of the information collected is desirable, verification simply is not always possible." Hili v. Sciarrotta, 140 F.3d 210, 216 (2d Cir. 1998) (internal citation marks omitted).

Even so, "the Parole Board, which is concerned with all facets of a person's character, make-up and behavior, is, a fortiori, certainly entitled to be fully advised of the contents of the presentence report and to use it for giving an offense severity rating and for such other purposes that it finds necessary and proper." Billiteri v. U.S. Bd. of Parole, 541 F.2d 938, 944 (2d Cir. 1976). And, even if some of the facts in the Presentencing Investigation Report relied upon here were inaccurate, petitioner is not permitted to collaterally attack the contents of the report. Matter of Cox v. New York State Div. of Parole, 11 A.D.3d 766, 768 (3d Dep't. 2004); Matter of Salerno v. Murphy, 292 A.D.2d 837 (4th Dep't. 2002); Matter of Antonucci v. Nelson, 298 A.D.2d 388, 389 (2d Dep't. 2002); Matter of Sciaraffo v. New York City Dep't. of Prob, 248 A.D.2d 477 (2d Dep't. 1998). Petitioner "may not now challenge the accuracy of the information in the presentence report, as that issue should have been raised before sentencing". Matter of Williams v. Travis, 11 A.D. 788, 789-90 (3d Dep't. 2004) (internal citation marks omitted). The minutes of petitioner's sentencing hearing – particularly the statement of the sentencing court - show that petitioner clearly did not prove the details of the presentence report that he objects to here to be inaccurate at that juncture (Sentencing H'rg Mins. 4).

Nevertheless, during his parole hearing, petitioner did have the opportunity to challenge alleged factual misstatements in the presentence report, such as that he had fired gunshots during the

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incident that led to his 1983 conviction, including the shot that killed Officer Abruzzo. This opportunity to contest allegedly inaccurate information satisfied the requirements of due process. See People v. Dimmick, 53 A.D.3d 1113 (4th Dep't. 2008); People v. Vaughan, 20 A.D.3d 940, 941 (4th Dep't. 2005); People v. Anderson, 184 A.D.2d 922, 923 (3d Dep't. 1992); People v. Bonadie, 151 A.D.2d 686 (2d Dep't. 1989). Furthermore, the panel was entirely within its discretion not to believe petitioner's self-serving version of events. Berenhaus v. Ward, 70 N.Y.2d 436, 444 (Ct. App. 1987); People ex. rel. Portee v. New York State Div. of Parole, 199 A.D.2d 561 (2d Dep't. 1993). "It is axiomatic that credibility determinations are best made by the person who actually sees and hears the witness." Matter of Crimmins v. Dennison, 12 Misc. 3d 725, 731 (Sup. Ct. New York Cnty. 2006); see also Berenhaus, 70 N.Y.2d at 443 ("It is basic that the decision by the Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by courts, who are disadvantaged in such matters because their review is confined to a lifeless record.")

Moreover, nothing in the record indicates that there is "substantial evidence" to suggest that any material part of the panel's description of the facts surrounding petitioner's crime of conviction was inaccurate. See People v. Rudduck, 85 A.D.3d 1557, 1558 (4th Dep't. 2011); People v. Paragallo, 82 A.D.3d 1508, 1510 (3d Dep't. 2011); People v. LaFrance, 171 A.D.2d 904 (3d Dep't. 1991). Nor does petitioner demonstrate that "false information in his file…had been relied on in a constitutionally significant way." Lowrance v. Coughlin, 862 F. Supp 1090, 1120 (S.D.N.Y. 1994); see also Matter of Smith v. New York State Bd. of Parole, 34 A.D. 1156, 1157 (3d Dep't. 2006). Petitioner has made unsubstantiated allegations, and has not actually offered any convincing reason to justify his contention that the factual inaccuracies he alleges *were* actually inaccurate, or that the Parole Board's reliance upon them was "irrationality bordering on impropriety", arbitrary, or capricious.