February 2022

Art. 78 Response - FUSL000112 (2020-07-08)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

In the Matter of
[redacted]

Petitioner,

-against-

TINA STANFORD, Chair of the,
New York State Board of Parole,

Respondent.

ANSWER AND RETURN
Index No. [redacted]
Hon. Stephan G. Schick

Respondents, by and through their attorney, Letitia James, Attorney General of the State of New York, Elizabeth A. Gavin, 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.

Preliminary Statement

2. Petitioner, an inmate, was convicted of two counts of Murder in 1977 and sentenced to a term of 25 years to life imprisonment. Exhibit 1. The convictions stem from a 1971 incident where the petitioner and a codefendant shot and killed two NYC police officers. Exhibit 2, Page 3. Petitioner committed these crimes as retribution for the killing of a child by NYC police while working as a part of the Black Liberation Army, a militant offshoot of the Black Panther Party. Exhibit 4. After killing the police officers, the petitioner and his codefendant stole their service weapons and fled the scene. Exhibit 2, Page 3. This is petitioner's first and only conviction in New York State. Exhibit 2.

3. Prior to the instant offense, petitioner was previously convicted of Burglary as a juvenile offender in California. Exhibit 2, Page 2. Petitioner was also convicted of Burglary, Conspiracy, and Transfer of Marijuana as an adult in California. Id.

4. Subsequently to the instant offense in New York, petitioner returned to California. Petitioner was convicted of Armed Robbery after robbing a bank in San Francisco in July 1971. Id. Petitioner was also convicted of Assault with a Deadly Weapon Against a Police Officer (2 counts) and Felony Possession of a Gun after attempting to kill three San Francisco police officers in August 1971. Id. Ultimately, petitioner was arrested in the State of California, where he served time for his California convictions, before being returned to the State of New York for trial for the instant offense. Exhibits 2 and 4.

Petitioner's 2019 Parole Release Interview and Decision

5. Petitioner's most recent Parole Board Release Interview took place on October 10, 2019. Exhibit 4. After confirming Petitioner's sentence and conviction, age and time served, the interview began with a discussion of Petitioner's formative years, including home life, positive school activities, and behaviors in the community during a period living on the streets; his involvement with the Black Panther Party and Black Liberation Army; and the social and political context. Id. at 5-39. During the discussion, Petitioner indicated his uncle was murdered by police during an attempted arrest – under circumstances he analogized to Eric Garner's case – and it had a big impact on him as a child. Id. at 11-12. He also described some of his own experiences with racism (Id. at 21-22) and his perception of police at the time as an occupying force (Id. at 35). He explained his involvement with the Black Panther Party and attraction to the more militant Black Liberation Army engaged in a "counter arm struggles" against police Id. at 25-27, 35.

6. The interview then turned to discussion of the instant offense, which involved the in-concert shooting deaths of two uniformed police officers who were approached from behind and shot multiple times after which Petitioner removed one service weapon and fled with it. Exhibit 4 at 39- 71. Petitioner – who long denied involvement only to be vague and evasive after acknowledging, at times unapologetically, a role attributed to war with law enforcement (see, e.g., Exhibit 14 at 5; Exhibit 15 at 3-7) – acknowledged, in detail, "horribly" killing Officers [redacted] and [redacted] in what he characterized as an unplanned, revolutionary act of retaliation for a police killing. Exhibit 4 at 41-42, 44, 47, 70. He expressed frustration with the way some view it, stating: "Part of these claims that I hate is we just killed two cops, you know?" Id. at 69. Petitioner acknowledged committing prior and subsequent crimes in California that included retaliation and shootouts against police, gun trafficking, and bank robbery. Id. at 58, 61-62, 66.

7. After again recognizing the time served, the interview addressed Petitioner's institutional record, health, and release plans in Rochester. Exhibit 4 at 71-83, 90-91. In so doing, the Board inquired about Petitioner's disciplinary record consisting of approximately 10 infractions but recognized he received no new infractions in over two years. Id. at 72-75. The discussion also encompassed Petitioner's positive program participation, recent involvement in therapy, academic achievements with two college degrees and certificates, and teaching. Id. at 76-79, 93-94. In addition, Petitioner's COMPAS instrument and case plan were reviewed, including his future goals upon release. Id. at 79-80, 83. The Board further acknowledged its receipt and consideration of official recommendations, community opposition and support. Id. at 84-89.

8. During the interview, Petitioner noted he is the "last Black Panther Party member" in the State prison system, but purported to now accept he is in prison for his crime, not his political views and stated he has "duly paid" for it. Exhibit 4 at 88, 93. After disavowing violence as a means to address problems, he incredulously went so far as to proclaim he now recognizes police are heroes. Id. at 94-95. Near the end of the interview, in response to questions by a commissioner who is a former pastor, Petitioner expressed interest in teaching young people conflict resolution and playing a role in healing community relations with police; the record indicates he became tearful as he declared a need to redeem himself for the life he took, then, both men. Id. at 96-98. In the very next breaths, he asserted prison does not lend itself to resolving issues of redemption and rehabilitation and questioned whether there was anything remaining for him to address that would lend to a release decision. Id. at 99, 100. The Board allowed for the possibility that some activity addressing community-police relations might as easily take place in prison as in the community and indicated the panel would be deliberating extensively. Id. at 99-101.

9. Based on its review of the record, the interview and deliberation, a majority of the panel ultimately denied discretionary release and Petitioner was ordered held for another 12 months with reappearance set for September 2020. In its October 21, 2019 decision, the Board explained:

> After an overall review of the record, an extensive personal interview, and due deliberation, it is the determination of the panel that your release at this time remains incompatible with the welfare and safety of society and would still so deprecate your offense as to undermine respect for the law.
>
> You stand convicted of two counts of degreeless Murder by way of verdict in New York County. The instant offense involved your actions, in concert with your codefendants, where you approached two (2) New York City Police Officers from behind, without notice, and shot them several times. Each officer sustained a gunshot wounds to the head and throughout their bodies, causing their subsequent

deaths. As the mortally wounded officers laid on the ground, you and your codefendants removed their service weapons from their holsters and fled the scene. According to your statements made during your parole eligibility interview, you fled to a location in the Bronx, New York, where you finalized your escape. The stolen police service weapon belonging to one officer, along with your firearm, was placed in the mail via the United States Postal Service (USPS) and mailed to a location in the State of California. You flew to California and retrieved the weapons. In fact, when you were apprehended by law enforcement officers in California, you had on your possession the stolen service weapon of the murdered NYC Police Officer to which the service weapon belonged.

Your instant offense represents your only term of New York State (NYS) incarceration. Although you maintained your innocence for many years, you now acknowledge your role in the instant offense. However, your criminal engagements in California are extensive and also includes crime against law enforcement. You have demonstrated a continuation of negative behaviors that began during adolescence and escalated quickly thereafter.

The panel has considered your age at the time of the instant offense and the external factors in the community that may have influenced your impulsive reactions. In addition, the panel notes the adverse challenges you endured during your formative years that have created a certain level of vulnerability for you. Nonetheless, in determining your suitability for release to the community, consideration has been given to your COMPAS risk and needs assessment. Your COMPAS indicates low scores for Risk of Felony Violence, Arrest Risk, Abscond Risk, Criminal Involvement, History of Violence, and Prison Misconduct, among other low risk indicators. However, the panel departs from the COMPAS risk and needs assessment because you come across as still believing in the righteousness of your crime and because your remorse lacks the depth that is necessary to give your low risk of reoffending the necessary weight to overcome the remaining standards that this panel finds you still fall short of.

In addition, the panel has considered your appropriate case plan. You highlighted several goals, tasks, and activities to support your level of rehabilitation. These goals are in further support of your engagement in DOCCS recommended programs. Moreover, consideration was given to your sentencing minutes, extensive level of community support and letters of assurance. Your letters of support are from several family members-including your mother. Additional support letters are from individuals in the community, academia, civic organizations, professionals, advocates, and elected officials. The panel acknowledges, however, receipt of as many or more letters in opposition to your release. These letters of opposition are extensive, and they have been submitted from community members, civic organizations, professionals, law enforcement and elected officials, all of which have been considered as well.

> Your course of conduct in targeting law enforcement officers across several jurisdictions concerns this panel. This panel is equally concerned about your other criminal engagements and violent crimes. You appear to have gained insight into the factors that contributed to your feelings, thoughts, and behaviors that fueled your reaction to your environment and subsequent negative behaviors, and the panel applauds you for that growing insight. You have improved your discipline over the years and have demonstrated prosocial behaviors by following the rules of the facility. As such, you have not received additional misbehavior reports since your last board appearance. In addition, the panel acknowledges the advances you have made in acquiring educational achievements as evidenced by two undergraduate college degrees and several certificates of completions from various programs. However, discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. Further, the panel concludes that a release is not appropriate. A release at this time would so deprecate the seriousness of the offense as to undermine respect for the law.

Exhibit 5.

Petitioner's Administrative Appeal

10. Petitioner perfected his administrative appeal on January 10, 2020, and the Appeals Unit issued its decision dismissing the appeal within four months on May 6, 2020. Exhibits 6 – 8.

Petitioner's Claims

11. This Article 78 proceeding followed. In the instant litigation, Petitioner asserts the following claims: (1) the decision is arbitrary and capricious because it is based almost solely on the instant offense; (2) the Board's findings regarding remorse and the statutory rationale for denial were not supported by the record; (3) the Board failed to adequately explain its departure from low COMPAS scores or specify the scales from which it departed; and (4) it was improper for the Board to consider community opposition from people who, upon information and belief, do not know Petitioner and are expressing their personal penal philosophy. Petitioner also now challenges as unsupported interview statements alleged to imply he may not be ready for release and suggests the Board's determination is undermined by his age.

12. While the Notice of Petition seeks an Order granting immediate release or, alternatively, a *de novo* interview before Commissioners who did not participate in the prior interview or administrative appeal, the Petition itself requests a *de novo* interview before commissioners who did not sit on the October 2019 Board. Petition at ¶129.

Standard of Review

13. Pursuant to Executive Law § 259-i(2)(c)(A), 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 whether: (1) there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law; (2) that his release is not incompatible with the welfare of society; and (3) that his release will not so deprecate the seriousness of his crime as to undermine respect for the law. See Matter of Karimzada v. New York State Bd. of Parole, 176 A.D.3d 1555, 1556, 113 N.Y.S.3d 316, 317 (3rd Dept. 2019). A conclusion that an inmate fails to satisfy any one of these three standards is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000); Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 1273-74, 990 N.Y.S.2d 714, 719 (3d Dept. 2014); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

14. In making this determination, Section 259-i requires the Board to consider a variety of factors, including: the inmate's institutional record such as program accomplishments, academic achievements, work assignments and interactions with staff and inmates; release plans; any prior or current victim impact statement; 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 prior criminal record. Executive Law § 259-i(2)(c)(A). In addition, the Board must consider the inmate's most current risk and needs assessment (*i.e.*, COMPAS instrument) and offender case plan. Executive Law § 259–c(4); Correction Law § 71-a.

15. While consideration of the statutory factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon, 95 N.Y.2d at 477, 718 N.Y.S.2d at 708. 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); Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717; Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1015, 105 N.Y.S.3d 461 (2d Dept. 2019); Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017). 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 McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990). There is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992).

16. On review, the Court's "role is not to assess whether the Board gave the proper weight to the relevant factors," Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717 (quotation omitted), or to "substitute its judgment for that of the Board," Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 240, 657 N.Y.S.2d 415, 419 (1st Dept. 1997). Under Executive Law § 259-i(5), actions undertaken by the 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, 942 N.Y.S.2d 290 (3d Dept. 2012); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Cruz v. Travis, 273 A.D.2d 648, 711 N.Y.S.2d 360 (3d Dept. 2000). When construing this language, the Court of Appeals held that "so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts." Matter of Briguglio v. N.Y. State Bd. of Parole, 24 N.Y.2d 21, 29, 298 N.Y.S.2d 704, 710 (1969) (quoting Matter of Hines v. State Bd. of Parole, 293 N.Y. 254, 257 (1944)). Thus, the petitioner has the heavy burden of showing the Board's determination is irrational "bordering on impropriety" before judicial intervention is warranted. Matter of Silmon, 95 N.Y.2d at 476, 718 N.Y.S.2d 704; Matter of Peralta v. New York State Bd. of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018).

The Board properly considered parole

17. Here, the record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors. These factors include Petitioner's formative years, involvement with the Black Panther Party and Black Liberation Army, and the social and political context; the instant offense stemming from the in-concert shooting deaths of two uniformed police officers who were approached from behind and shot multiple times after which Petitioner removed one service weapon and fled with it; the sentence imposed, recommendations

of the sentencing court, the district attorney and defense counsel, and time served; Petitioner's criminal history in California; his institutional record including program completions, educational accomplishments, teaching, therapeutic endeavors, and improved discipline; his expressions of remorse; his age and health; and release plans to reside with friends, pursue a degree in audiovisual engineering and web design, and establish a computer lab. The Board also had before it and considered, among other things, the pre-sentence investigation report, sentencing minutes, the COMPAS instrument, Petitioner's case plan, opposition to release, and Petitioner's parole packet and letters of support from a variety of sources, including the son of one victim.

18. After considering all required factors and principles, the Board acted within its discretion in determining release would not satisfy the standards provided for by Executive Law § 259-i(2)(c)(A). In reaching its conclusion, the Board permissibly relied on the nature of the instant offense, Petitioner's extensive criminal engagements in California that include crime against law enforcement, and that he demonstrated a continuation and escalation of negative behaviors, expressing concern with his course of conduct targeting law enforcement officers across several jurisdictions and other criminal activity. See Matter of Moore v. New York State Bd. of Parole, 137 A.D.3d 1375, 26 N.Y.S.3d 412, 413 (3d Dept. 2016); Matter of Tran v. Evans, 126 A.D.3d 1196, 3 N.Y.S.3d 633 (3d Dept. 2015); Matter of Partee v. Evans, 117 A.D.3d 1258, 1259, 984 N.Y.S.2d 894 (3d Dept.), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014); Matter of Warren v. New York State Div. of Parole, 307 A.D.2d 493, 493, 761 N.Y.S.2d 883 (3d Dept. 2003). The Board considered Petitioner's COMPAS instrument and low risk indicators therein but concluded release would be inappropriate under the second and third statutory standards because Petitioner came across as still believing in the righteousness of his crime and his remorse

lacked depth. See Matter of Silmon, 95 N.Y.2d at 477, 718 N.Y.S.2d at 708; Matter of Phillips, 41 A.D.3d at 23, 834 N.Y.S.2d at 125.

19. That the Board afforded greater weight to Petitioner's criminal record and limited remorse, as opposed to other positive factors, does not render its decision irrational or improper. See, e.g., Matter of Davis v. Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Matter of Cardenales v. Dennison, 37 A.D.3d 371, 830 N.Y.S.2d 152 (1st Dept. 2007); Matter of Garcia, 239 A.D.2d at 239-40, 657 N.Y.S.2d at 418. The Board is not required to give each factor equal weight. See Matter of Marszalek v. Stanford, 152 A.D.3d 773, 59 N.Y.S.3d 432 (2d Dept. 2017); Matter of Symmonds v. Dennison, 21 A.D.3d 1171, 1172, 801 N.Y.S.2d 90, 90 (3d Dept.), lv. denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005).

20. Even assuming the Board relied solely on the instant offense (and it did not), this alone would not render the determination unlawful. It is well established that "so long as the Board considers the factors enumerated in the statute, it is entitled... to place greater emphasis on the gravity of the crime," Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717 (alteration in original) (citation omitted); see Matter of Campbell, 173 A.D.3d 1012, 105 N.Y.S.3d 461; Matter of Olmosperez v. Evans, 114 A.D.3d 1077, 1078, 980 N.Y.S.2d 845, 846 (3d Dept. 2014), aff'd, 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept. 2008), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008), particularly whereas here there are aggravating factors present. Matter of Guzman v. Dennison, 32 A.D.3d 798, 799, 821 N.Y.S.2d 208, 208 (1st Dept. 2006).[1] Notably, Petitioner participated in a targeted assault on two randomly selected, unsuspecting law enforcement officers who were ambushed from behind and repeatedly shot even as one officer pled for his life. After the shooting, Petitioner

1 The Board does not agree aggravating factors are always necessary to support reliance on an inmate's crime. Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714.

removed a service weapon from one victim's holster before eventually fleeing with it to California where he engaged in additional criminal activity. The offense was not an isolated act and was committed as an act of revolution. It represented an assault on the justice system and rule of law. And although Petitioner – after maintaining his innocence for many years – now acknowledges his role, legitimate concerns remain about his attitude towards his crime. These are significant matters supporting the Board's conclusion that release would be incompatible with the welfare of society and undermine respect for the law by deprecating the seriousness of the offense.

21. Petitioner disputes the Board's conclusion that he came across as still believing in the righteousness of his crime and his remorse lacked depth. He also appears to distance himself from prior (and recent) statements to the Board, attributing them to youthful distrust of authority and highlighting his nascent participation in therapy. Although Petitioner repeatedly referred to his crime as "horrible" and "terrible" and even expressed admiration for police, it was within the authority of the Board – which also had the opportunity to observe him – to assess Petitioner's credibility and the Board found him to be disingenuous. Matter of Siao-Pao, 51 A.D.3d at 108, 854 N.Y.S.2d at 351.

The Board committed no error in its consideration of COMPAS

22. Petitioner's claims concerning the COMPAS instrument are without merit. The 2011 amendments to the Executive Law 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 v. New York State Bd. of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834

(2d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). This is encompassed in the Board's regulations. 9 N.Y.C.R.R. § 8002.2(a). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each inmate by considering the statutory factors. Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 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 three standards are satisfied. See Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014); Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014).

23. That is exactly what occurred here. The Board considered Petitioner's COMPAS instrument and issued a decision consistent with amended 9 N.Y.C.R.R. § 8002.2(a). The amended regulation was intended to increase transparency in the Board's decision making by providing an explanation if and when a decision denying release is impacted by a departure from any scale. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. Thus, in denying release, the Board did not *need* to depart from any particular scale. For example, the Board did not find Petitioner likely to reoffend but rather concluded, *despite* low risk scores, release would be inappropriate

under the other two statutory standards. The Board therefore was not strictly required to address scales from which it was departing. The Board nonetheless explained why it was denying release despite low risk scores. In so doing, the Board permissibly concluded that Petitioner's release would not be compatible with the welfare of society and would so deprecate the seriousness of his crime as to undermine respect for the law based on his criminal activity and the fact that he came across as still believing in the righteousness of his crime and his remorse lacked depth. Petitioner's COMPAS did not preclude the Board from reaching this conclusion or render the decision irrational.

The Board's consideration of community opposition was not improper

24. Petitioner's objections to the Board's consideration of community opposition – which include submissions from community members, civic organizations, professionals, law enforcement and elected officials – are likewise without merit.[2] 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. See, e.g., Matter of Jones v. New York State Bd. of Parole, 175 A.D.3d 1652, 1652, 108 N.Y.S.3d 505, 506 (3d Dept. 2019) (recognizing letters in support and in opposition to release as relevant considerations); 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) ("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"); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 531-31, 89 N.Y.S.3d 134, 135 (1st Dept. 2018) ("the Board permissibly considered letters in opposition to the parole

2 If the Court would like to review the confidential file, we will produce copies for *in camera* review only pursuant to court order. See Executive Law §§ 259-i(2)(c)(B), 259-k(2); 9 N.Y.C.R.R. §§ 8002.4(e), 8000.5(c)(2). Due to the volume, we request 30 days to prepare any such submission.

application submitted by public officials and members of the community"); Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017), aff'g 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"). The same has long been recognized as true with respect to letters supporting an inmate's potential parole release. Indeed, the Board considered letters in support of Petitioner's release – which include submissions from individuals in the community, academia, civic organizations, professionals, advocates and elected officials.[3]

25. Petitioner's allegations concerning penal philosophy do not require reversal. Matter of King affirmed the proposition that the Board cannot substitute its personal views on the proper basis for a parole denial for that of the legislature. Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788, 791, 610 N.Y.S.2d 954, 955 (1994), aff'g 190 A.D.2d 423, 432, 598 N.Y.S.2d 245, 251 (1st Dept. 1993). But Matter of King does not require the annulment of a decision simply because material expressing personal penal philosophy was included in submissions which were properly considered. See Matter of Duffy v. New York State Dep't of Corr. & Cmty. Supervision, 132 A.D.3d 1207, 1209, 19 N.Y.S.3d 610 (3d Dept. 2015). Even assuming some opposition to Petitioner's release reflected penal philosophy, the record does not indicate the Board afforded those statements any particular weight or substituted those views for the criteria of Executive Law § 259-i. At most, it reflects consideration of the fact of their opposition, not deference to the beliefs motivating it.

3 While now objecting that opposition comes from individuals who do not know him, Petitioner concedes he has similar support. (Pet. ¶ 33.)

Unpreserved claims must be dismissed

26. Petitioner now asserts several interview statements incorrectly imply he may not be ready for release. This claim is not only unpreserved, see Matter of Gordon v. Stanford, 148 A.D.3d 1502, 50 N.Y.S.3d 627 (3d Dept. 2017); Matter of Tafari v. Evans, 102 A.D.3d 1053, 1054, 958 N.Y.S.2d 802 (3d Dept.), lv. denied, 21 N.Y.3d 852, 965 N.Y.S.2d 790 (2013), but without merit. Read in context, it is clear the Board simply was responding to Petitioner's claim that imprisonment does not allow for rehabilitation and redemption. The Board, after addressing the general claim, allowed for the possibility that some activity addressing community-police relations might as easily take place in prison as in the community. But the Board did not, as he claims, hold him to develop skills needed to help promote dialogue. This is confirmed by the Board's written decision.

27. Petitioner highlights his age in challenging the determination as unsupported. This claim is likewise unpreserved. Even if properly before the Court, the Board considered his age and it did not preclude the Board from finding release would be incompatible with the welfare of society and undermine respect for the law by deprecating the seriousness of the offense. See, e.g., Matter of Phillips, 41 A.D.3d at 22, 834 N.Y.S.2d at 124.

The proper remedy in the event of reversal is a de novo interview

28. Petitioner has failed to demonstrate the Board's decision was not made in accordance with the pertinent requirements or was so irrational as to border on impropriety. Parole release is a discretionary function of the Board, and the petitioner has not demonstrated any abuse by the Board has occurred.

29. In the unlikely event of an unfavorable court ruling on the merits, the proper remedy is to remand the matter for a *de novo* interview. Matter of Quartararo v. New York State Div. of Parole, 224 A.D.2d 266, 637 N.Y.S.2d 721 (1st Dept.), lv. denied 88 N.Y.2d 805, 646 N.Y.S.2d 984 (1996); accord Matter of Kellogg v. New York State Bd. of Parole, 159 A.D.3d 439, 73 N.Y.S.3d 139 (1st Dept. 2018); Matter of Ifill v. Evans, 87 A.D.3d 776, 928 N.Y.S.2d 480 (3d Dept. 2011); Matter of Hartwell v. Div. of Parole, 57 A.D.3d 1139, 868 N.Y.S.2d 828, 829 (3d Dept. 2008); Matter of Siao-Pao v. Travis, 5 A.D.3d 150, 772 N.Y.S.2d 511, 512 (1st Dept. 2004), lv. denied 3 N.Y.3d 603, 782 N.Y.S.2d 697 (2004). As a matter of policy, any *de novo* interview would be conducted by Commissioners who did not participate in the original interview or the administrative appeal affirming it. The respondent respectfully requests at least 60 days for any Court ordered *de novo* to occur. It is very difficult to schedule a *de novo* interview in a shorter time period due to the limited pool of commissioners who can participate, among other things. We can provide an affidavit explaining if necessary.

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

RECORD BEFORE THE RESPONDENT

A copy of the administrative agency's records in this matter is submitted herewith:

1. Sentence and Commitment Order.
2. **Pre-Sentence Investigation Reports. **The Reports are exempt from disclosure pursuant to CPL § 390.50 and submitted for *in camera* review only.** An inmate is not entitled to the pre-sentence investigation report as a part of the Parole Board Release Interview process. Allen v. People, 243 A.D.2d 1039, 663 N.Y.S.2d 455 (3d Dept. 1997). Only the sentencing Court which originally issued and/or adjudicated the report is authorized under CPL § 390.50 to release this highly confidential material. Blanche v. People, 193 A.D.2d 991, 598 N.Y.S.2d 102, 103 (3d Dept. 1993).
3. Parole Board Report. **Only Part I may be disclosed to Petitioner. Pursuant to New York State Public Officers Law § 87(g), Part II (marked "confidential" at the top) is exempt from disclosure as intra-agency materials containing evaluative opinion information and is submitted for *in camera* review only. Zhang v. Travis, 100 A.D.3d 829, 782 N.Y.S.2d 156 (3d Dept. 2004).**
4. 2019 Interview Transcript.
5. Parole Board Release Decision Notice.
6. Brief on Administrative Appeal.
7. Statement of Appeals Unit Findings and Recommendation.
8. Administrative Appeal Decision Notice.
9. Sentencing Minutes.
10. Official Statement by the trial Judge **This statement is submitted for *in camera* review only.
11. Official Statement by the District Attorney. ** This statement is submitted for *in camera* review only.
12. COMPAS Instrument (redacted and unredacted copies). **Only the redacted version may be disclosed to Petitioner.**
13. Case Plan.
14. 2006 Interview Transcript
15. 2016 Interview Transcript

Dated: Poughkeepsie, New York
July 8, 2020

Respectfully Submitted,
Letitia James
Attorney General of the
State of New York
Attorney for Respondent
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BY: _____
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Assistant Attorney General

To: Kathy Manley, Esq.
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Elizabeth A. Gavin, affirms under the penalty of perjury pursuant to Section 2106 of the Civil Practice Law and Rules, that he is an Assistant Attorney General in the office of Letitia James, Attorney General of the State of New York, the attorney for the respondent.

Your affiant has read the foregoing Answer and Return knows the contents thereof; that the same is true to her own knowledge, except as to matters stated therein to be alleged on information and belief and to the extent that affiant relies upon records of the Department of Corrections and Community Supervision and respondent and, as to those matters, he believes them to be true.

DATED: Poughkeepsie, New York
July 8, 2020

Elizabeth A. Gavin
Assistant Attorney General