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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

[REDACTED]

*Petitioner,*For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules**ANSWER**

Index No. [REDACTED]

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

Respondents New York State Department of Corrections and Community Supervision, Anthony J. Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision, and Tina M. Stanford, Chairwoman, New York State Department of Corrections and Community Supervision, Board of Parole by their attorney, Letitia James, Attorney General of the State of New York, Chris Liberati-Conant, of counsel, answers the verified petition as follows:

1. Deny each and every allegation contained in the petition that alleges or tends to allege that the challenged action was in any way contrary to constitutional, statutory, regulatory or case law.
2. Deny the allegations contained in all paragraphs of the petition insofar as they allege any wrongdoing on the part of respondents, and as they are incomplete, inaccurate, and/or seek to characterize portions of the record and/or statutes, regulations or other authority, and with

respect to them, respectfully refer the Court to the complete record annexed hereto and the applicable statutory, regulatory and other authority, for a more complete and accurate statement and as the best evidence of what is contained therein.

3. The "WHEREFORE" paragraph of the petition sets forth the relief sought by petitioner; as such, no response is required. To the extent a response is required, respondents deny that petitioner is entitled to the relief sought therein.

4. Deny each and every allegation of the petition not specifically responded to above.

OBJECTIONS IN POINT OF LAW

5. The petition fails to state a viable cause of action for which relief may be granted.

6. Petitioner's failure to set forth his factual claims in single-allegation, consecutively numbers paragraphs is improper per se. CPLR 3014.

FIRST DEFENSE

7. The Parole Board's decision denying petitioner's release to parole supervision was reached in full compliance with all statutory and regulatory requirements and should be sustained by the Court.

SECOND DEFENSE

8. The Parole Board gave due consideration to all of the factors required by statute, including the instant offense and the information contained in petitioner's criminal and institutional records. Based upon these factors, the reasons stated by the Board were sufficient to support the determination. The Board's decision cannot properly be characterized as arbitrary, capricious, or irrational bordering on impropriety.

RECORD BEFORE THE AGENCY BELOW

9. The following documents constitute the record before the administrative agency in this matter and respondents' exhibits:

- A. January 6, 1984 Sentence and Commitment, Erie County, County Court, Indictment #: [REDACTED];
- B. Erie County Probation Department Pre-Sentence Report (confidential and submitted for in camera inspection only);
- C. January 6, 1984 Sentencing Minutes;
- D. November 13, 2018 Parole Board Interview Transcript;
- E. Parole Board Decision Notice;
- F. Administrative Appeal, Received by the Board of Parole's Appeals Unit on May 2, 2019;
- G. Administrative Appeal Decision Notice;
- H. Parole Board Report (non-confidential portion);
- I. Parole Board Report (confidential portions – submitted for in camera inspection only);
- J. COMPAS Re-entry Risk Assessment (redacted);
- K. Unredacted COMPAS Re-entry Risk Assessment (submitted for in camera inspection only); and
- L. Case Plan.

WHEREFORE, respondents New York State Department of Corrections and Community Supervision, Anthony J. Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision, and Tina M. Stanford, Chairwoman, New York State Department of Corrections and Community Supervision, Board of Parole respectfully request that the petition be denied, this proceeding be dismissed, and respondents be awarded costs and disbursements or, in the event the Court grants the petition, that the Court remand the matter for a rehearing, together with such other relief as may be just and proper.

Dated: Albany, New York

January 14, 2020

LETITIA JAMES

Attorney for Respondents

The Capitol

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By: 

Chris Liberati-Conant

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Verification

Chris Liberati-Conant, an attorney admitted to practice in the State of New York, affirms under the following penalty of perjury pursuant to CPLR § 2106:

I am an Assistant Attorney General of counsel in this matter to Letitia James, Attorney General of the State of New York, attorney for respondents New York State Department of Corrections and Community Supervision, Anthony J. Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision, and Tina M. Stanford, Chairwoman, New York State Department of Corrections and Community Supervision, Board of Parole. I have been assigned to defend this proceeding and I am acquainted with the pleadings, papers, and proceedings to date. I have personally examined the exhibits annexed to the foregoing answer and the records of respondents referred to in the answer.

I have read the foregoing answer. The same is true to my knowledge, except as to those matters alleged upon information and belief, and as to those matters, I believe them to be true. The source of my information and basis for my belief is information and documents furnished to me by the Board of Parole, a Division of the New York State Department of Corrections and Community Supervision.

I make this verification pursuant to CPLR § 3020 (d) (2), because respondents is a Division and Officers of the State of New York, and I am acquainted with the facts of this proceeding.

Dated: Albany, New York

January 10, 2020


Chris Liberati-Conant

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

[REDACTED]

Petitioner,

Index No. 907626-19

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

~~-against-~~

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

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S ANSWER

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PRELIMINARY STATEMENT

Petitioner, an inmate in the custody of the New York State Department of Corrections and Community Supervision (DOCCS), challenges a determination by the New York State Board of Parole, a Division of DOCCS (Board), denying him discretionary parole release. Because petitioner has not demonstrated that the Board's determination was marred by irrationality bordering on impropriety and the Board considered the required statutory factors, the petition should be denied.

BACKGROUND

Petitioner was sentenced to an aggregate indeterminate term of 25 years to Life following convictions of Murder 2nd Degree and Assault 2nd Degree. See Exhibit A, Sentence and Commitment; Exhibit B, Pre-Sentence Investigation Report (for in camera review); Exhibit C, Sentencing Minutes.¹

On November 13, 2018, the Board interviewed petitioner for parole release. See Exhibit D, Parole Board Interview Transcript. The Board denied petitioner release to parole supervision.

"Parole is denied 18 months. Next appearance will be 5/20. Based on your interview and record, after weighing the statutory and regulatory factors, your release is denied.

Your instant offense involved the brutal murder and assault of your victim who you claimed you were scared of and was a criminal in the neighborhood. You stated you take responsibility for his death although you disagree with the medical evidence.

The record reflects the victim was beaten and slashed and then marched to a location and dumped in a manhole. You have completed all recommended programs and you are currently a porter. Your improved disciplinary record is noted.

Also considered were letters of assurance for housing, your young age when you committed this crime and your sentencing minutes. We have reviewed your

¹ References to Exhibits are to the exhibits appended to the Board's answer unless otherwise noted.

case plan, your release plans, official letters in support and opposition and your risk and needs assessment which indicates your lower risk and needs.

After your interview, the panel remains concerned about your statements concerning law enforcement and continual mistrust of authority.

Despite your low risk scores and improved discipline, the panel is concerned that, based on your presentation, you have not developed the tools to live a law abiding life. As such this panel is not convinced that you would live and remain at liberty without violating the law. Your release remains incompatible with the welfare of society and would deprecate the heinous nature of these crimes as to undermine respect for the law.

(Commissioner Berliner concurs)"

Exhibit D, pp. 35 and 36; Exhibit E.

On or about May 2, 2019, the Parole Board Appeals Unit received petitioner's administrative appeal. See Exhibit F, Administrative Appeal. The Administrative Appeal Decision Notice was mailed to petitioner, and petitioner's counsel, on July 25, 2019. See Exhibit G.

ARGUMENT

Petitioner Has Not Demonstrated That the Board's Determination Was Affected by Irrationality Bordering on Impropriety

Petitioner argues that the Board's determination should be vacated based on allegations that the Board failed to consider the requisite factors, improperly considered information outside its purview, denied petitioner access to information to which he was entitled, and failed to provide a sufficient explanation for its denial. Because the Board conducted a thorough interview and properly considered all statutorily required factors in rendering its determination, the petition should be denied.

"[P]arole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements set forth in Executive Law §259-i." Matter of Molinar v. New York State Div. of Parole, 119 A.D.3d 1214, 1215 (3d Dept. 2014) (internal quotation marks omitted). "Absent 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 (3d Dept. 2014), quoting Silmon v. Travis, 95 N.Y.2d 470, 476 (2000).

When making a discretionary parole determination, the Board must consider the following factors:

- “(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;
- (iii) release plans including community resources, employment, education and training and support services available to the inmate;
- (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;
- (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.”

Executive Law § 259-I (2) (c) (A) (i-viii).

“Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect of the law.”

Executive Law § 259-I (2) (c) (A).

“The 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 (3d Dept. 2014); See Matter of Robinson v. N.Y. State Bd. of Parole, 162 A.D.3d 1450, 1451 (3d Dept. 2018); Matter of Bello v. Board of Parole, 149 A.D.3d 1458 (3d Dept. 2017); Matter of Arena v. N.Y. State Dept. of Corr. & Community Supervision, 156 AD3d 1101, 1102 (3d Dept. 2017); Matter of Wiley v. State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 1289-90 (3d Dept. 2016). Indeed, the Board is entitled to deny parole release absent any negative considerations beyond the nature of the underlying crime, no matter how exemplary the inmate’s efforts at rehabilitation. See Matter of Hamilton, 119 A.D.3d at 1272.

The record establishes that the Board properly considered all required statutory factors under Executive Law § 259-i when it denied petitioner parole release. In evaluating the appropriateness of parole for petitioner, the Board considered petitioner’s risk to society, institutional adjustment, programming, disciplinary record, rehabilitative efforts, proposed release plans, institutional confinement, sentencing minutes, criminal history, and facts of the underlying offense. See Answer Exhibits H, I.

Petitioner’s contention that the Board placed undue weight on the nature of his crime is meritless. See Matter of Applegate v. N.Y. State Bd. of Parole, 164 AD3d 996, 997 (3d Dept.

2018); Matter of Hamilton, 119 A.D.3d at 1272. Petitioner is serving an aggregate indeterminate sentence of 25 years to life for a heinous and violent murder and was appearing before the Board for the tenth time. See Exhibit A. The Board was entitled to give great weight to the extreme and heinous nature of petitioner's crimes, as well as his refusal to take responsibility for those crimes and mistrust of authority. See, Exhibits B, C, H and I. Accordingly, the Board's determination that petitioner's release would "deprecate the seriousness nature of the crime as to undermine respect for the law" does not exhibit irrationality bordering on impropriety and should not be disturbed. See Matter of Partee v. Evans, 117 A.D.3d 1258, 1259 (3d Dept. 2014), lv. denied 24 NY3d 901 (2014).

In addition, the Board found that the petitioner would not live and remain at liberty without violating the law. Petitioner neglects to mention in his petition or memorandum of law that during the interview he claimed he was innocent of most prison disciplinary charges, and is innocent of the murder. See, Exhibit D. He also accused an Offender Rehabilitation Coordinator of sabotaging his COMPAS. Id. at 25. An inmate who claims prison disciplinary violations were invented by corrections officers and otherwise seeks to deflect responsibility for his own actions has provided evidence of his continuing failure to acknowledge responsibility, raising plausible concerns about his rehabilitation. See Molinar v New York State Division of Parole, 119 A.D.3d 1214, (3d Dept. 2014).

Petitioner's allegation that the Board failed to properly utilize the COMPAS is contradicted by the record and controlling law. Matter of Williams v. New York State Division of Parole, 114 A.D.3d 992, 993 (3d Dept. 2014); Matter of Partee v. Evans, 117 A.D.3d 1258, 1259 (3d Dept. 2014), lv. denied 24 NY3d 901 (2014). The record demonstrates that the COMPAS instrument was prepared prior to petitioner's interview and that the Board considered it. See Exhibits J, K, L.

A low COMPAS score does not create an entitlement to release. The COMPAS is but one factor for the Board to consider, and the Board is not required to give the COMPAS greater weight than other factors. See Gonzalvo v. Stanford, 153 A.D.3d 1021 (3d Dept. 2017); Lewis v. Stanford, 153 A.D. 3d 1478 (3d Dept. 2017); Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1109 (3d Dept. 2014); Dolan v. New York State Board of Parole, 122 A.D. 3d 1058 (3d Dept. 2014).

Petitioner's argument that the Board arrogated the power of the sentencing court by denying discretionary release to parole supervision and imposing a 18-month hold is meritless. See Matter of Mullins v. N.Y. State Bd. of Parole, 136 A.D.3d 1141, 1142 (3d Dept. 2016); Matter of Kalwasinski v. Paterson, 80 A.D.3d 1065 (3d Dept. 2011), lv. denied 16 N.Y.3d 710 (2011). Completion of the minimum incarcerative portion of an indeterminate sentence does not create a presumption of release to parole supervision. See Executive Law § 259-i (2) (c) (A); Silmon v. Travis, 95 N.Y.2d 470, 476 (2000); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 1175 (3d Dept. 2005).

Petitioner's contention that the Board failed to consider petitioner's minor status lacks support. The Board must consider an inmate's youth and subsequent growth and maturity in addition to other relevant factors and principles, such as disciplinary records and programming, the risks and needs assessment, recommendations from relevant parties, as well as the underlying offense. See, e.g., Matter of Allen v. Stanford, 161 A.D.3d 1503, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018). A review of the interview transcript reveals that petitioner's youth and its attendant circumstances and his transient immaturity were discussed, as well as any growth and development over the years. (See e.g., id., at p. 7, 16, 21-22, 30-34). In fact, the Board explained why petitioner's age when he committed the crime did not compel it to grant release to parole: "the

panel is concerned that, based on your presentation, you have not developed the tools to live a law abiding life.” (*Id.* at 36).

Petitioner also argues that the COMPAS was improperly redacted. Per Executive Law 259-i(2)(c)(B), items submitted to the Parole Board are deemed to be confidential. Per Executive Law 259-k(2) and 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a)(b), the Parole Board is entitled to designate certain parole records as confidential. See Wade v Stanford, 148 A.D.3d 1487 (3d Dept. 2017). Per Public Officers Law 87(2)(a) and (f) and Executive Law 259-k(2) and 9 N.Y.C.R.R. 8000.5(c)(2)(i)(a)(3), the Board of Parole is authorized to treat records as confidential if their release could endanger the life or safety of any person. Thus, given the inmate’s history of violent crime, ongoing mental health issues and threats to staff, access to confidential documents may be denied. Justice v Commissioner of the New York State Department of Corrections and Community Supervision, 130 A.D.3d 1342 (3d Dept. 2015).

The statute requires the Parole Board to write to the Office of the District Attorney and the Board may consider a district attorney’s recommendation to deny parole. An inmate has no right to said letter. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997 (3d Dept. 2018); Grigger v New York State Division of Parole, 11 A.D.3d 850 (3d Dept. 2004), lv. denied 4 N.Y.3d 704 (2005); see also Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). That the letter is written by someone not personally involved in the case is irrelevant, as the office still exists and is authorized to speak for the People of the State of New York, regardless as to who is occupying the position at the present time

Finally, to the extent petitioner seeks an order directing his release to parole supervision, such remedy is inappropriate. “[T]he appropriate remedy when a prisoner

successfully challenges the denial of an application for parole is remittal for a new hearing.”

Lichtel v. Travis, 287 A.D.2d 837, 838 (3d Dept. 2001).

CONCLUSION

Petitioner failed to demonstrate that the Board’s decision was affected by irrationality bordering on impropriety or unlawful. Respondent therefore respectfully requests that the Court deny the petition and dismiss this proceeding in its entirety.

Dated: Albany, New York

January 10, 2020

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