Art. 78 Response - FUSL000121 (2019-08-27)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted],

Petitioner,

-against-

TINA STANFORD, CHAIRWOAMN OF THE
NEW YORK STATE BOARD OF PAROLE, ET AL

Respondent.

ANSWER AND RETURN
Index No: [redacted]
Hon. Maria Rosa
J.S.C.

Respondents, by and through their attorney, Letitia James, Attorney General of the State of New York, J. Gardner Ryan, 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.

AS AND FOR A DEFENSE TO THE PETITION

2. The petitioner on January 24, 2000 was sentenced to twelve and a half to 25 years in Queens County on charges of rape 1st Degree (2 counts) and Sodomy (1 count) and to three and a half to 7 years on charges of Sexual Abuse 1st Degree (3 Counts). The serial offenses giving rise to the charges occurred over the period from June 21, 1997 to September 3, 1997. The conviction and sentence followed a trial. The sentence for one Rape count and the Sodomy sentence were to be served consecutively. All other sentences were to be served concurrently. The controlling aggregate term of the sentences was 20 to 40 years incarceration.

3. The petitioner was also convicted and sentenced in Nassau County on April 10, 2000 to other serial and unrelated sex offences occurring in the same time period, between June and September, 1997. He was charged with Rape 1st Degree (2 counts), Sodomy 1st Degree (4 counts), Sexual Abuse 1st Degree (7 counts), Kidnapping 3nd Degree (3 counts), Attempted Sodomy 1st Degree, Attempted Assault 3rd Degree and Criminal Use of a Firearm (2 counts). The convictions and sentences were upon his guilty plea, an Alford plea where petitioner consented to entry of the guilty plea without an allocution or admission to the underlying criminal acts.. He was sentenced to 10-20 years on the top two charges of Rape and Sodomy in the 1st Degree, and seven and a half to 15 years on the other charges. All sentences in Nassau County were concurrent to each other and concurrent with the sentences in Queens.

4. Petitioner, in his 30's, college-educated, married and a commercial relator, cruised for his multiple teenage victims on the streets of Queens and Nassau Counties. And with display of a weapon or the verbal threat of a weapon, took his victims into his vehicle and drove them to more secluded areas where the rapes, sodomy, and sexual abuses occurred. He maintains his innocence of all charges, contending that his convictions were the result of the spite and contrivance of an aggrieved and divorcing spouse, faulty police work and laboratory work in both New York City and Nassau County, a coerced confession, over-aggressive prosecution, and an uncritical judiciary. His on-going effort, to reverse or overturn his convictions after tria, to avoid his guilty pleas and to obtain release have not been successful to date. Petitioner has served 22 years under his sentence. He is today 55 years of age.

5. The petitioner has done well while incarcerated. He has become deeply involved in and supportive of his chosen religious practices, participated in aggression replacement programming, although avoiding programs intended specifically for the rehabilitation of sex

offenders, and has avoided serious disciplinary problems, incurring only minor infractions.

6. His avoidance of sex offender programming is due to his continuing claim of innocence of all the offenses and charges. He asserted at his interview before the Board of Parole that participation and successful completion of the available sex offender rehabilitative programming would require that he admit to the sexual predation, an admission that he refuses. He declines the programming rather than have an administrative record of partial participation and unsuccessful completion of the programming which conceivably may count against him.

7. The petitioner became eligible for discretionary release to parole supervision in the community in August, 2017. This was his second appearance before the Board. He had a reappearance interview on October 9, 2018. Release was again denied and petitioner was ordered held for another 24 months. Petitioner timely perfected his administrative appeal from that decision on January 29, 2019. It was affirmed on March 22, 2019 and this proceeding followed.

8. The Board's decision reads in part:

> After a review of the record, interview and deliberation, the Panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and that your release would be incompatible the welfare and safety of society and would so depreciate the serious nature of the crime as to undermine respect for the law. Parole is denied... Your criminal history report is limited to a Disorderly Conduct in 1981 and a conviction for Public Lewdness in 1996[1], yet the [instant offenses] represent a serious escalation of violent criminal behavior that remains a concern to this Panel.

9. The Panel remarks on petitioner's good institutional adjustment, disciplinary history, letters of support, claims of innocence, statistical risk and needs assessment, his needs for re-entering the community, departs from the risk and needs assessment's evaluation of his

1 The Public Lewdness offense involved the petitioner masturbating in view of a young women and reaching into a car to fondle her breasts in 1994. (Exhibit 9, Sentencing Minutes of April 10, 2000). Petitioner does not claim innocence of that offense.

history of violence given the particular mode of his offenses – abducting multiple young females from the streets and sexually assaulting them with threat of violence and a weapon, and concludes that the positive factors favoring his release are out-weighed by the life-long pain and suffering he visited on his victims, the incomprehensible callousness he demonstrated, and the escalation of his criminal activities.

10. In this proceeding, the petitioner asserts that the October, 2018 denial of parole was illegal, arbitrary and capricious. He argues that the Board relied solely on the seriousness of his offenses in denying parole and failed to adequately explain its reasons for departing from the low COMPAS risk assessment score to conclude to the contrary that he still poses an unacceptable risk to society and offers his belief that his current age purportedly renders a continuation of deviant sexuality unlikely. He also contends that he is being punished for proceeding to a trial because he was offered a purported plea in satisfaction of all the charges that was less that the term he has now served and disputes the conclusion reached by the Board of Parole that his parole would depreciate the serious nature of his offenses

11. The Board of Parole cannot determine or re-determine the petitioner's guilt or innocence on the charges that resulted in his sentence and incarceration. See Matter of Silmon v Travis, 95 N.Y.2d 470 (2000); Copeland v New York State Board of Parole, 154 A.D.3d 1157 (3d Dept. 2017); Grune v Board of Parole, 41 A.D.3d 1014 (3d Dept. 2007). That is the responsibility of the trial and appellate courts. The Board of Parole is bound by petitioner's convictions. It can neither discount, nor look behind his trial conviction and plea of guilt.

12. The Board's exclusive responsibility is to assess petitioner's current suitability for release to parole supervision in the community given those convictions and using all enumerated and relevant factors through the context of a personal interview. Executive Law § 259-i(2)(c)(A),

and; In re Garcia v. New York State Div. of Parole, 239 A.D.2d 235 (1st Dept. 1997); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983). The Board is charged with the responsibility of applying its discretion in assessing what is known of the petitioner to resolve a considered opinion whether the petitioner, if released, is likely to be law-abiding, and whether his release is consistent with the safety and welfare of the community and compatible with the community's need to maintain respect for the law.

11. In making that assessment and conclusion, the particular nature of the crimes that resulted in the petitioner's incarceration, while highly significant, are merely one factor to be used in evaluating and determining the petitioner's suitability for release. The Board must consider the seriousness of the petitioner's offenses of conviction, but cannot make that the sole, exclusive and categorical criteria in its decision making. The petitioner is parole eligible and in resolving the propriety of its grant or withholding of parole, no single factor is dispositive. All relevant factors must be considered and weighed. The Board, in its discretion, however, may ascribe the persuasive relative weight to the facts and circumstances of the petitioner's criminal history, behavior and the harm it has caused. Mullins v New York State Board of Parole, 136 A.D.3d 1141 (3d Dept. 2016); Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289 (3d Dept. 2016); Peralta v New York State Board of Parole, 157 A.D.3d 1151 (3d Dept. 2018).

12. Judicial review of Board determinations is narrowly circumscribed. A decision of the Board is "deemed a judicial function and shall not be reviewable if done in accordance with the law". Executive Law § 259–i(5). In order to prevail petitioner must show either a significant deviation from statutory requirements or that the Board's determination is irrational "bordering on impropriety" before judicial

intervention is warranted. *See* Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980). Absent a convincing demonstration to the contrary, the Board is presumed to have acted properly and in accordance with the statutory requirements. *See* Matter of Jackson v. Evans, 118 A.D.3d 701 (2d Dept. 2014); Matter of Thomches v. Evans, 108 A.D.3d 724, 724 (2d Dept. 2013). Thus, in the absence of convincing a demonstration that the Board did not consider the statutory factors set out under Executive Law §259-i, the court must presume that the Board fulfilled its duty. *See* Matter of Strickland v. New York State Div. of Parole, 275 A.D.2d 830, 831 (3d Dept. 2000), *lv. denied* 95 NY2d 505; People ex rel. Herbert v. New York State Bd. of Parole, 97 AD2d 128, 133 (1st Dept. 1983).

13. The petitioner's showing of illegality or irrationality here is less than persuasive and convincing. It amounts to little more than petitioner's bald assertions that the remarkable escalation and serial nature of his sexual offenses and violence against young women should be effectively counter-balanced by his good behavior while incarcerated, that his persistent profession of innocence and victimization by his former spouse and the criminal justice system should be credited by the Board and that his statistical risk and need assessment scores should outweigh the rationally perceived risk to society of repetition of his determined criminal behavior due to whatever unexplored and untreated source there is of his violent and deviant sexual behavior toward young women.

14. The petitioner's contention that he is being punished for his continued assertion of innocence and election to proceed to trial is unsupported. The Board

notes the petitioner's claim of innocence, but it merely poses an issue of credibility for the Board to resolve in its assessment of his suitability for release.

15. Similarly, the petitioner's observation that he would have received a lesser sentence had he accepted an alleged plea offer in satisfaction of all charges, rather than maintain his innocence and contest his guilt at trial is irrelevant. The petitioner elected to reject any plea offer that was made by the prosecutors and risk his conviction by a jury after a trial. According to the sentencing minutes, the trial lasted approximately 5 weeks and there is no issue that petitioner's sentence was a legal one. Neither the petitioner, nor his victims subjected to the ordeal of reliving the events at trial, saw or can expect a benefit from the rejected offer, if such was made.

16. The Board's decision clearly was not based solely on some categorical view of the nature of the petitioner's convictions. The Board decision expressly states that all factors were considered, and discusses both the Board's disagreement with the history of violence component of the COMPAS statistical risk assessment rating, its concerns that the convictions for serial offenses represented a serious escalation of petitioner's criminal and violent behavior. Contrary to the framing of the issue by petitioner, it is not just the serious nature of the instant offense that factors in the Board's decision, but their relatedness and consideration of the extensive harm done to society and the individual victims by the petitioner's repeat violent sexual offenses that the Board found persuasive.

17. The Board determination sets forth in adequate detail of the reasons for its denial of the inmate's request for release. Burress v Evans, 107 A.D.3d 1216, 967 N.Y.S.2d 486 (3d Dept. 2013). The written Board decision in this case specifically references the concern arising from the escalation of the petitioner's violent criminal behavior, the callousness he showed, and the

enduring harm he caused to his victims and explains the reasons for its conclusion. McLain v New York State Division of Parole, 204 A.D.2d 456 (2d Dept 1994); Walker v Russi,176 A.D.2d 1185 (3d Dept 1991), appeal dismissed 79 N.Y.2d 897 (1992); Thomas v Superintendent of Arthur Kill Correctional Facility, 124 A.D.2d 848 (2d Dept 1986), appeal dismissed 69 N.Y.2d 611, 517 N.Y.S.2d 1025 (1987); De la Cruz v Annucci, 122 A.D.3d 1413 (4th Dept. 2014); Betancourt v Stanford, 148 A.D.3d 1497 (3d Dept. 2017).

18. Petitioner 's claim that the Board was illegal in failing to comply with the 2011 amendments to the Executive Law is not shown. The 2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017 and those regulations The regulations merely require do not create a legitimate expectancy of release that would give rise to a due process interest in parole. Fuller v Evans, 586 Fed.Appx. 825 (2d Cir. 2014) cert.den. 135 S.Ct. 2807, or any substantive right to release, but rather, merely increase transparency in the final decision. Courts must defer to the Parole Board's interpretation of its own regulations so long as it is rational and not arbitrary nor capricious. Brown v Stanford, 163 A.D.3d 1337(3d Dept. 2018); Peckham v. Calogero, 12 N.Y.3d 424 (2009); Henry v. Coughlin, 214 A.D.2d 673 (2d Dept. 1995).

19. Contrary to Petitioner 's claim, the 2011 amendments and 9 NYCRR § 8002.2(a) as amended do not represent an intent to make the COMPAS risk assessment the fundamental basis for release decisions. This proposition is not supported by the language of the statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release0 process. Rather, the 2011 Executive Law amendment and its implementing regulations require the Board to incorporate risk and needs principles to "assist" it 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 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042 (3d Dept. 2016); Matter of LeGeros, 139 A.D.3d 1068; Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559 (4th Dept. 2014). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk, but merely a part of the Board's consideration.

20. The Board departure from the COMPAS in regard to its assessment of petitioner's history of violence was valid, as the petitioner's multiple victims and acts of violence, while serial, were fairly contemporaneous and were not considered "prior offenses" in the assessment.

21. The Board imposition of a 24 month hold, even though the prior Board panel had imposed only an 18 month hold, was within its discretion. See Matter of Padilla v. New York State Bd. of Parole, 284 A.D.2d 685 (3d Dept.) ("We are unpersuaded by petitioner's assertion that respondent's decision to impose a 24-month hold despite having imposed a 12-month hold following his 1998 appearance demonstrates that respondent's determination was affected by a 'showing of irrationality bordering on impropriety'") (citations omitted), appeal dismissed, 97 N.Y.2d 649 (2001). In the absence of impropriety, the reconsideration date set by the Board will not be disturbed. Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 908 (3d Dept. 2002); accord Matter of Evans v. Dennison, 13 Misc. 3d 1236(A) (Sup. Ct. Westchester Co. 2006) (rejecting challenge to 24-month hold).

22. For the reasons stated the petition should be dismissed in its entirety, but in the unlikely event of an unfavorable ruling, the question of a remedy arises. The proper remedy available to a successful petitioner is to remand the matter for a *de novo* interview and consideration of release by the Board, since only the Board is authorized to issue a parole. Matter of Quartararo v. New York State Div. of Parole, 224 A.D.2d 266, lv. denied 88 N.Y.2d 805 (1996); accord Matter of Hartwell v. Div. of Parole, 57 A.D.3d 1139; Matter of Siao-Pao v. Travis, 5 A.D.3d 150, lv. denied 3 N.Y.3d 603. If a remand is made the court should allow for at least 60 days in order to accommodate the needed rescheduling and notification to occur.

RECORD BEFORE THE RESPONDENT

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

1) Pre-Sentence Investigation Report. ** **Please note, this document is exempt from disclosure pursuant to CPL §390.50 and is submitted for in camera review only.** 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 (3rd Dept 1997); Salamone v Monroe County Department of Probation,136 A.D.2d 967, 524 N.Y.S.2d. 943, 944 (4th Dept 1988). Only the sentencing Court which originally issued and/or adjudicated the report is authorized under CPL §390.50 to release this highly confidential material. Holmes v State of New York,140 A.D.2d 854, 528 N.Y.S.2d 686, 687 (3rd Dept. 1988); Blanche v People, 193 A.D.2d 991, 598 N.Y.S.2d 102, 103 (3rd Dept 1993); Thomas v Scully, 131 A.D.2d 488, 515 N.Y.S.2d 885, 886 (2nd Dept. 1987).

2) Sentence and Commitment Orders.

3) Parole Board Report. ** **Please note, only Part I of this document may be disclosed to petitioner. Per New York State Public Officers Law §87(g), part II is exempt from disclosure as intra-agency materials containing evaluative opinion information. Parts II is submitted herewith for in camera review only. Zhang v Travis,100 A.D.3d 829, 782 N.Y.S.2d 156 (3rd Dept.2004).**

4) Parole Board Release Interview Transcript.

5) Parole Board Release Decision Notice.

6) Brief on Administrative Appeal.

7) Statement of Appeals Unit Findings, and

8) Administrative Appeal Decision Notice.

9) Sentencing Minutes.

10) **COMPAS (redacted portion to petitioner).**

11) TAP/Offender Case Plan.

12) DA letters. **In camera only. Gigger v New York State Division of Parole, 11 A.D.3d 850, 783 N.Y.S.2d 689 (3d Dept. 2004); Matter of Ramahlo v Bruno, 273 A.D.2d 521, 708 N.Y.S.2d 206 (3d Dept. 2000) lv. den. 95 N.Y.2d 767 (2000); Mingo v New York State Division of Parole, 244 A.D.2d 781, 666 N.Y.S.2d 245 (3d Dept. 1997).**

13) Memos

Dated: Poughkeepsie, New York
August 27 , 2019.

Respectfully Submitted,
Letitia James
Attorney General of the
State of New York
Attorney for Respondent
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BY:
J. Gardner Ryan
Assistant Attorney General

To: Kathy Manely, Esq.
Kathy Manley <mkathy1296@gmail.com>
And via e-file

J. Gardner Ryan, 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 his 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
August 22, 2019

J. Gardner Ryan
Assistant Attorney General