Art. 78 Response - FUSL000137 (2022-05-18)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter [redacted]

Petitioner,

-against-

New York State Board of Parole,

Respondent.

ANSWER AND RETURN

Index No. [redacted]

Respondent, by its attorney, Letitia James, Attorney General of the State of New York, Heather R. Rubinstein, of counsel, submits the following as an answer and return upon the petition:

1. Denies each and every factual allegation of the petition except to the extent it is confirmed by the attached record and leaves the determination of legal issues and conclusions to the Court.

2. The ground for respondent's action is set forth in the determination being challenged and the Return annexed hereto.

3. The determination and record demonstrate that respondent acted in compliance with the law and that the determination denying discretionary release to parole was neither arbitrary, nor capricious.

PRELIMINARY STATEMENT

4. On or about February 1999, petitioner was sentenced to an aggregate term of 20 years to life upon his conviction for Murder in the second degree. Exhibit 2, Sentence and Commitment Order. [redacted]. Petitioner, along with co-defendants, entered the house of a former employer with the

intention of robbing and killing his wife. Exhibits 1 and 3. During the course of the burglary, a woman and her 17 month old child were killed. Exhibit 9, Sentencing Minutes. Petitioner appeared for a de novo Parole Board Release Interview (not a Hearing) on June 15, 2021. Exhibit 4, Transcript. The Board denied discretionary release and ordered petitioner to be held for 24 months. Exhibit 5, Decision Notice. Petitioner's appeal was received on November 8, 2021. Exhibit 6, Administrative Appeal. The final appeal determination was mailed to petitioner on January 25, 2022. Exhibit 8.

PETITIONER'S ALLEGATIONS

5. In the instant litigation, petitioner reiterates the arguments contained in his administrative appeal. To wit: 1) the Board's decision was conclusory and lacked detail; 2) the Board failed to comply with the 2011 amendments and completely discounted petitioner's low COMPAS scores; 3) the Board relied almost entirely on the instant offense; 4) the letter from the District Attorney was outdated; 5) the Board displayed bias during the interview and relied on erroneous information; 6) the presentence investigation report and letter from the District Attorney contained unproven accusations; and 7) petitioner's due process rights were violated.

6. Petitioner also appears to expand on his argument regarding the COMPAS instrument, with the Article 78 papers going further and contending that the Board failed to explain its departure from the low scores.

AS AND FOR A DEFENSE TO THE PETITION

7. Petitioner's added argument related to the COMPAS instrument was not raised by petitioner in his administrative appeal before the Parole Board. Therefore, it is deemed to be waived and may not be raised for the first time in an Article 78 proceeding. As such, it must be dismissed. Cruz v. Travis, 273 A.D.2d 648 (3d Dept. 2000); Moore v. New York State Board of

Parole, 233 A.D.2d 653 (3d Dept. 1996); Matter of Samuels v. Kelly, 143 A.D.2d 506 (4th Dept. 1989), leave to appeal denied 73 N.Y.2d 707 (1989); Beyah v. Leonardo, 182 A.D.2d 868 (3d Dept. 1992); Hernandez v. Alexander, 64 A.D.3d 819 (3d Dept. 2009); Santos v. Evans, 81 A.D.3d 1059 (3d Dept. 2011); Tafari v. Evans, 102 A.D.3d 1053 (3d Dept. 2013); Del Rosario v. Stanford, 140 A.D.3d 1515 (3d Dept. 2016); Peterson v. Stanford, 151 A.D.3d 1960 (4th Dept. 2017); Brunson v. New York State Department of Corrections and Community Supervision, 153 A.D.3d 1077 (3d Dept. 2017). Failure to raise the issue at the administrative level is not preserved for appellate review, regardless as to whether or not the Appeals Unit timely responded to the appeal. Nicoletta v. New York State Division of Parole, 74 A.D.3d 1609 (3d Dept. 2010), lv.dism. 15 N.Y.3d 867. A defendant raising a different angle of complaint about a parole matter than raised at the lower level is unpreserved for appeal. People v. Escalera, 121 A.D.3d 1519 (4th Dept. 2014).

8. Pursuant to the Executive Law, 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 if there is a reasonable probability that, if such [incarcerated individual] 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 for the law." Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268 (3d Dept. 2014). Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific incarcerated individual, including, but not limited to, the individual's institutional record and criminal behavior.

9. While consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477 (2000). Thus, it is well settled that the weight to be accorded each of the requisite factors is within the Board's discretion.

See, e.g., Matter of King v. Stanford, 137 A.D.3d 1396 (3d Dept. 2016); Matter of Delacruz v. Annucci, 122 A.D.3d 1413 (4th Dept. 2014); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983). The Board need not explicitly refer to each and every factor in its decision. Furthermore, the Board is not required to give each factor equal weight. Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1015 (2d Dept. 2019); Matter of Marszalek v. Stanford, 152 A.D.3d 773 (2d 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 McClain v. New York State Division of Parole, 204 A.D.2d 456 (2d Dept. 1994). Petitioner has clearly failed to meet this burden.

10. On judicial 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(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 (1st Dept. 1997). Pursuant to 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 (3d Dept. 2012); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004); Matter of Cruz v. Travis, 273 A.D.2d 648 (3d Dept. 2000). 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 (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; Matter of Marszalek v. Stanford, 152 A.D.3d 773 (2d Dept. 2017). Petitioner has failed to meet this burden.

11. The Board properly considered parole and did not rely solely on the instant offense. The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors. The Board considered: the instant offense of Murder in the second degree; that petitioner was on probation supervision at the time of the instant offense; petitioner's criminal history including a prior conviction for Attempted Criminal Sale of a Controlled Substance in the third degree; petitioner's institutional efforts including completion of all required programs, two college degrees, position as an IPA for ICP, creation of an anti-bullying program, and multiple misbehavior reports but none since 2011; and release plans to live with his wife. The Board also had before it and considered, *inter alia*, the case plan, the COMPAS instrument, the sentencing minutes, a letter from the District Attorney, and petitioner's parole packet featuring letters of support and assurance.

12. After considering all required factors, 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 instant offense, the fact that the instant offense was committed while on probation supervision for a prior conviction, petitioner's criminal history and petitioner's continued inconsistent account of the instant offense. See Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1016 (2d Dept. 2019); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385 (2d Dept. 2004); Matter of Hunter v. New York State Div. of Parole, 21 A.D.3d 1178 (3d Dept. 2005); Matter of Scott v. Russi, 208 A.D.2d 931 (2d. Dept. 1994); Matter of Silmon v. Travis, 266 A.D.2d 296, 297 (2d Dept. 1999), aff'd 95 N.Y.2d 470, 478 (2000).

13. The Board's decision was sufficiently detailed and satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b), as it was sufficiently detailed to inform the incarcerated individual of the reasons for the denial of parole. Matter of Applegate v. New York

State Bd. of Parole, 164 A.D.3d 996, 997 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations.

14. Petitioner's contention that the Board failed to comply with the 2011 amendments to the Executive Law is likewise without merit. The 2011 amendments 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 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042 (3d Dept. 2016); Matter of LeGeros v. New York State Bd. of Parole, 139 A.D.3d 1068 (2d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559 (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 incarcerated individual by considering the statutory factors including the instant offense. 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 (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 Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021 (3d Dept. 2017).

15. That is exactly what occurred here. The Board considered the COMPAS instrument and did not depart from it. That is, the decision was not impacted by a departure from a scale. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. For example, the Board did not find a reasonable probability that petitioner will not live and remain at liberty without violating the law but rather concluded, *despite* low risk scores, release would be inappropriate under the other two statutory standards. This is entirely consistent with the Board's intention in enacting the amended regulation.

16. The Board committed no error in its consideration of the letter from the District Attorney. Executive Law § 259-i(2)(c)(A)(vii) requires the Board to consider recommendations of the sentencing court, the inmate's attorney, and the "district attorney." As such, the Board was obligated to consider the official statement it received from the District Attorney. Petitioner's suggestion that the recommendation is outdated is baseless. As for fresh outreach, a review of the record reveals facility staff sent another letter to the District Attorney requesting an official statement in 2016 and received no response.

17. Inasmuch as petitioner asserts bias, there must be support in the record to prove an alleged bias and proof that the decision flowed from such bias. Matter of Hernandez v. McSherry, 271 A.D.2d 777 (3d Dept. 2000), lv. denied, 95 N.Y.2d 769 (2000). Here, there is no such proof. There was no impropriety in the Board's inquiry into petitioner's inconsistent account of the instant offense. As the challenged questions "were aimed at [petitioner's] remorse, his acceptance of responsibility and insight into the crimes, they were not improper and did not deprive

[petitioner] of a fair interview." Matter of Payne v. Stanford, 173 A.D.3d 1577, 1578 (3d Dept. 2019) (citations omitted). A review of the June 2021 transcript reveals petitioner failed to openly acknowledge during the interview that his co-defendant planned to kill the victim, something he had previously admitted during his September 2018 interview.[1] Exhibit 4, Transcript from September, p. 6. For example, when asked why his co-defendant had purchased a rug cutter, petitioner's response was limited to "he never told me."

18. The Board's reference to a second co-defendant being convicted in the instant offense despite not being present that day is factually accurate and merely captures the discussion during the interview. Petitioner's suggestion that the language implies that he was being untruthful is speculative and does not provide a basis to disturb the Board's determination.

19. With regard to petitioner's claim that the presentence investigation report and the letter from the District Attorney contain unproven accusations, the Board is required to obtain official reports pursuant to Executive Law sections 259-i(2)(c)(A) and 259-k(1) and may rely on the information contained therein. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 474, 477 (2000); Matter of Carter v. Evans, 81 A.D.3d 1031 (3d Dept.), lv. denied, 16 N.Y.3d 712 (2011); see also Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). To the extent petitioner contends the Board relied on erroneous information in the pre-sentence report, this is not the proper forum to raise the issue. Any challenge to the pre-sentence report must be made to the original sentencing court. Matter of Delrosario v. Stanford, 140 A.D.3d 1515 (3d Dept. 2016); Matter of Wisniewski v. Michalski., 114 A.D.3d 1188 (4th Dept. 2014); Matter of Vigliotti

[1] During his 2018 interview, petitioner stated, "I failed to openly say that I knew that morning, when I got into the [redacted] didn't want to believe it, of course, but the reality is that we didn't have any masks, we were going to the home, she knows [redacted] so, of course, she had to die, like, that was the plan. And at my initial parole board, I failed to be accountable for that. I constantly said, no, I didn't know, I didn't know, I didn't know, but the truth is, I did know, sir." Exhibit 4.

v. State, 98 A.D.3d 789 (3d Dept. 2012). The Board is mandated to consider the report and is entitled to rely on the information contained in the report. Executive Law § 259-i(2)(c)(A); 9 N.Y.C.R.R. § 8002.2(d)(7); Matter of Carter v. Evans, 81 A.D.3d 1031 (3d Dept.), lv. denied, 16 N.Y.3d 712 (2011). As noted above, the Board was also obligated to consider the letter from the District Attorney pursuant to Executive Law § 259-i(2)(c)(A)(vii).

20. Finally, an incarcerated individual has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737 (3d Dept. 1997). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174 (3d Dept. 2005).

CONCLUSION

21. Petitioner has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was irrational "bordering on impropriety." Matter of Silmon, 95 N.Y.2d 470, 476 (2000) [quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69 (1980)]. Parole release is a discretionary function of the Board, and the petitioner has not demonstrated any abuse by the Board has occurred.

22. In the event that the Board's challenged determination is not sustained, the only proper remedy is to remand the matter for its *de novo* interview and consideration of petitioner's suitability for release since the Board alone is authorized to issue a parole. Matter of Quartararo v. New York State Div. of Parole, 224 A.D.2d 266 (1st Dept.), lv. denied 88 N.Y.2d 805 (1996); accord Matter of

Hartwell v. Div. of Parole, 57 A.D.3d 1139 (3d Dept. 2008). Therefore, if the Court should find against respondent, contrary to their arguments contained herein, the only relief available is a *de novo* consideration. If a *de novo* consideration is directed, the respondent would respectfully request that the Court give the Board at least 60 days to allow adequate time to schedule the *de novo* interview and provide written notice of petitioner's reappearance to those interested.

RECORD BEFORE RESPONDENT

1) Pre-Sentence Investigation Report. **

2) Sentence and Commitment Order.

3) Parole Board Report. **

4) Parole Board Release Interview Transcript.

5) Parole Board Release Decision Notice.

6) Brief on Administrative Appeal.

7) Statement of Appeals Unit Findings.

8) Administrative Appeal Decision Notice.

9) Sentencing Minutes.

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

11) TAP/Offender Case Plan.

12) DA letter. ***In camera* only**

WHEREFORE, respondent requests that the petition be denied.

DATED: Poughkeepsie, New York
May 18, 2022

Letitia James
Attorney General of the
State of New York
Attorney for Respondent
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Poughkeepsie, New York 12601

Heather R. Rubinstein
Assistant Attorney General

cc: Eve Rosahn, Esq. (via NYSCEF)

Heather R. Rubinstein 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 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 New York State Department of Corrections and Community Supervision and respondent and, as to those matters, he believes them to be true.

DATED: Poughkeepsie, New York
May 18, 2022

Heather R. Rubinstein
Assistant Attorney General