Art. 78 Response - FUSL000138 (2022-04-18)

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FUSL000138

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted],

Petitioner,

-against-

Tina M. Stanford, Chair of New York State Parole Board,

Respondent(s).

ANSWER

[redacted]

Respondent, by its attorney, Letitia James, Attorney General of the State of New York, J. Gardner Ryan, of counsel, submits the following as an answer and record:

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 record annexed hereto.

3. The determination and record demonstrate that respondent acted in compliance with the law and that the Board of Parole's challenged determination denying discretionary release to parole was not arbitrary, capricious or made in violation of law.

AS AND FOR A DEFENSE TO THE PETITION

4. Petitioner was convicted of multiple rapes. He was first convicted in 1998 of two counts of Rape 1st degree and sentenced to a term of 8-16 years on each count, concurrent. The Petitioner, in two different incidents, one in December, 1996, another in May, 1997, met women at nightclubs in Manhattan, lured the women into his car with the pretext of driving them home, then drove to isolated locations in Queens where he brutalized, choked and raped them. The petitioner has five misdemeanor convictions starting in 1991 for criminal mischief, disorderly conduct, sexual abuse, larceny and assault for which he was at times incarcerated or on probation. He was on probation at the time of the 1996 rape. His probation was terminated by his re-arrest. He was out on bail for the December, 1996 rape when he raped again in May, 1997.

5. The second conviction arose as a result of a DNA sample obtained after the petitioner was convicted and confined for the rape. Using the DNA sample extracted from him at that time, the police were able to match the petitioner to an earlier unsolved rape. The earlier rape occurred in August, 1994.

6. The modus operandi of the 1994 rape was the same as the others. The petitioner met the woman at a nightclub in Manhattan, cajoled her into his vehicle, took her to a remote location in Queens, beat, choked and raped her. He was convicted after trial for the 1994 rape, assault, sexual abuse and unlawful imprisonment and in July, 2005 received a controlling sentence of 8 1/3 years to 25 years. It was to run consecutively to the 1998 sentence on his conviction on plea to the later rapes. The Petitioner's resulting aggregate sentence is 16 1/3 years and to 40 years. (Exhibit 2, Sentence and Commitment.).

7. The petitioner was 21 years old when his earliest known rape was perpetrated;

25 years old at the time of his last. His youngest victim, the last woman he raped in 1997, was 17 years old.

8. The Petitioner's sentence will expire in 2037, and his conditional release date is in 2024. He is now 50 years of age. He became eligible for discretionary release to parole in March, 2014 and in this proceeding challenges a November 15, 2021 determination of the Board of Parole issued following a reappearance interview on November 2, 2021. The decision rejected his request for a discretionary release to parole supervision in the community. The petitioner asserts that the determination was arbitrary, capricious, and made in violation of the controlling statute and regulations.

9. The Board's determination states:

> *A review of the record and interview lead the panel to conclude 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 with the welfare of society.*
>
> *The panel considered the instant offense of 3 counts of Rape 1st, Assault 2nd, Sexual Abuse 1st, and Unlawful Imprisonment 1st, which consists of three separate incidents. The record reflects on multiple separate occasions, you raped your victims, including one who was just 17 years old, while in a vehicle. Your actions also included punching, slapping and choking your victims. The record further reflects you were on probation at the time you committed some of these offenses. When asked about the instant offense you told us you did not know any of your victims prior to the instant offense. You explained you met them at a nightclub on separate occasions. You also told us at the time you did not value women and thought because of your culture you could do whatever you want. You explained you have come to understand your actions were wrong and expressed your remorse. However, your actions were violent and demonstrated poor judgment. Your current term represents your first NYS term of incarceration. Consideration has been given to your case plan as well as your letter of support from your family and your 2019 parole packet, which you told us still reflects your current plans. Your rehabilitative efforts were also considered and include completion of SOP, ASAT, ART, phases 1 and II, and vocational programming. We also reviewed and considered your disciplinary*

history, which reflects you have been discipline free since 2007; while the panel commends your progress and overall institutional adjustment, discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined.

We weighed and considered your COMPAS risk and needs assessment and the low risk scores indicated therein, with the exception of you being medium for history of violence. Notwithstanding your low scores, the panel departs from your low risk scores for risk of felony violence and arrest for the following reasons. First, the instant offense involves multiple acts of violence and sexually deviant behavior against multiple victims. Second, you committed some of the instant offenses while on community supervision. Additionally, while on bail for one of the sex related offenses, you committed another rape. Given your repeated course of conduct and poor history on community supervision, we have little reason to believe that you will be law abiding in the community and will comply with parole. We also weighed and considered your sentencing minutes and pre-sentence report, which reveal the immense pain and suffering you caused you victims and we remain concerned about the lasting impact of your violent actions. You displayed not only total disregard for the law, but for the life and safety of others. Further, your repeated actions demonstrate your willingness to put your own needs above that of society's. Your release would trivialize the severity of your offense and would so deprecate the seriousness of the crime as to undermine respect for the law. Lastly, we also considered official opposition from the Queens County District Attorney's office. Therefore based on all statutory factors weighed and considered, discretionary release is not appropriate at this time.

s now a man of religious faith. However, in the 1998 PSI, it is stated the Petitioner was in the mosque every Friday. So, his faith was there at the time of the beatings and the rapes. (Exhibit 1, Pre-Sentence Investigation and Exhibit 5, Parole Board Report)

10. Petitioner was ordered held for another 24 months. (Exhibit 4, Parole Interview Transcript and Exhibit 5, Parole Release Decision Notice.) A timely administrative appeal was and the Appeals Unit issued its decision affirming the Board's

action and dismissing the appeal on March 14, 2022. (Exhibit 6, Appellate Brief; Exhibit 8, Administrative Appeal Decision Notice; Exhibit 7, Appeals Unit Findings). This proceeding followed.

11. During the Parole interview, Petitioner did not dispute his guilt or the general description of his acts in his pre-sentence probation reports, but provided no further elaboration. When the Board probed, seeking petitioner's insights into his behavior, he attributed his actions in part to a cultural attitude he observed as a youth where women were not greatly valued and were maltreated – petitioner, his mother, brothers and sisters emigrated from Afghanistan in the 1980s. He was 10 years of age. As to his particular conduct, he attributed his behavior to his "…stupid thinking. I was young and stupid and I thought I could do whatever I wanted at that time, I didn't care about nobody." (Exhibit 4, Parole Interview Transcript, p. 6).

12. Speaking to his time incarcerated, the petitioner stated:

> I worked very hard to better myself all these years. I learned and I grow, I took the classes, I changed my life, I wanted to change, and I am ready and I am safe today. I can assure you of that. I am not that same person I was 24 years ago, I don't feel like that. I walk around with shame and guilt every day for what I did and I am not that person.

13. During his interview, the petitioner illustrated his moral sense and self-consciousness by telling the Board of how, after the 1996 rape, when the police were looking for him, he realized that he needed help, sought the advice of his older brother who had worked with the NYPD in some capacity, and "did the right thing" by turning himself in. He stated:

> I turned myself in. I went to the precinct, I knew I needed help. My brother

used to work for NYPD and I went and spoke to him about what I was doing and the cops came and he told me you have to go do the right thing and I said I need help, so I went with him to the precinct and I turned myself in. (Exhibit 4, Parole Interview Transcript, p. 10)

14. The Board noted that, after turning himself in, the petitioner, within months and while released on bail, committed his third rape, following the same opportunistic pattern, with the same brutality, and of a 17 year old. He was nearly 25 years old.

15. In a searching interview, the Board discussed with Petitioner his offense, his family life, his criminal record, his lengthy institutional record, his release plans, the case plan and the COMPAS instrument. Following the interview, review of his submissions, and consideration of his COMPAS assessment, release plan, programming, and institutional record, discretionary release was denied.

Petitioner's Claims

16. Petitioner maintains that the Board fails to consider and/or properly weigh the required statutory factors, the decision lacks detail, the decision fails to list any facts in support of the statutory standard cited in justification for denying parole, and the decision fails to comply with the 2011 amendments to the Executive Law, and the 2017 regulations, in that the positive portions of the COMPAS were minimized, ignored or departed without valid reason.

17. The petition should be denied, and the proceeding dismissed. The attached record demonstrates that the Board had before it all the available relevant information and gave consideration to all factors bearing on the issue whether Petitioner was a suitable candidate for a discretionary release to parole supervision.

18. The Board's determination was not based on any erroneous information or improper considerations and is supported by the record. It was based on an evaluation of the required factors and the facts bearing on the Petitioner's suitability for release. The Board's written decision denying release to parole adequately states the basis for the decision in terms of the particular facts relating to the Petitioner in the context of its interview.

19. There is no dispute that the petitioner has acclimated to incarceration, availed himself of available educational opportunities, programs, capably performed assignments, and attended the programming available for drug usage, including ART, ASAT, & NA, programs of doubtless relevance given his violence and indulgence when at liberty. Release to parole, however, is not granted as a reward for good conduct or efficient performance of duties while confined. It is a grant made in the Board's discretion in consideration whether there is a reasonable probability that, if released, the inmate will live and remain at liberty without violating the law; and whether release is compatible with the welfare of society or will so deprecate the seriousness of the 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).

20. The Parole Board must consider the relevant factors identified in the statute: viz., the inmate's particular crimes; sentence, institutional record; deportation status; criminal history; education; health; skills; plans; employability; likely drug or alcohol use; financial needs, abilities, available familial and social resources and any statistical assessments of risks and needs, and weigh them in the context of a personal interview in

an attempt to assess a suitability, readiness for release, and the likelihood of a successful reintegration with society. 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).

21. The determination, while dependent on facts, is subjective and discretionary. 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 in this challenge to the Board's adverse determination, Petitioner must show a significant deviation from statutory requirements or that the Board's determination is irrational "bordering on impropriety." *See* Matter of Russo v. New York State Board of Parole, 50 N.Y.2d 69 (1980).

22. Absent a convincing demonstration to the contrary, the Board is presumed to have acted properly 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). *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, *supra*.).

23. The Board's may assign such weight to a factor as it in its sole discretion deems appropriate (Mullins v New York State Board of Parole, 136 A.D.3d 1141 (3d Dept. 2016), and is not required to give equal weight to all requisite factors. 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).

Executive Law 259-i(c)(1) confers exclusive discretion on the parole board to determine whether and when, if ever, parole release is granted. Hodge v Griffin, 2014 WL 2453333 (S.D.N.Y. 2014).

24. An inmate has no right to a release on parole. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (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) and the the statutory scheme governing release gives rise to no legitimate expectancy or presumption of a discretionary release before the sentence is completed. There is no expectation that a parole ever will be granted, merely that the Board will fairly consider as to every eligible inmate whether a parole is appropriate under the law. The Executive Law merely "holds out no more than a possibility of parole", it does not create a liberty interest implicating any constitutionally protected right. 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).

25. The Board may not categorically bar an inmate from release based on the nature of an offense. If the legislature has determined that offenders may be paroled, the Board is bound to fairly consider whether, in each particular instance, a parole should be granted. It is, however, well within the Board's discretion to find that the nature, circumstances, and particulars facts of a candidate's offense are so egregious or concerning as to outweigh other may more positive factors (*see* Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 385 [2d Dept. 2004]; Matter of Wright v. Travis, 284 A.D.2d 544 [2d Dept. 2001]), particularly where it perceives in the candidate a lack of candor, authenticity,

insight or remorse. *See* Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 506 (2d Dept. 2002). Here, the record as a whole shows that the Board considered the appropriate factors and acted within its discretion in determining that petitioner's self-serving protestations of change, reformation and new-found empathy for his victims were not so credible as to outweigh his demonstrated capacity for violence, his persistence in brutalizing and sexually assaulting women, and his inability to conform to minimal standards of acceptable behavior in the community even when he was on probation, under close scrutiny and already facing severe legal penalties for similar behaviesor.

26. Petitioner's claim that Board failed to properly consider the COMPAS instrument is unsound. The 2011 statutory amendments and implementing regulations (9 NYCRR § 8002.2(a)) do not make the COMPAS assessment tool dispositive in the Board's release decisions. The Executive Law was amended to incorporate statistical risk and needs analysis principles, as reflected in the COMPAS and similar instruments, as part of the Board's decisional process. Their inclusion, however, was to "assist" and "guide" the Board in the exercise of its discretion, not to limit that discretion. Executive Law § 259–c(4). The Board here considered the COMPAS instrument in its decision-making, and fulfilled its responsibility under the statute and regulations. 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, 139 A.D.3d 1068; Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559 (4th Dept. 2014).

27. The Board must still consider the reasonable probability whether the inmate, if released, will live and remain at liberty without violating the law; whether the inmate's

release is compatible with the welfare of society, and; whether the inmate's release will so deprecate the seriousness of the 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, *supra*. (3d Dept. 2014). Those are discretionary subjective assessments,

28. Neither COMPAS, nor any analytical instrument, is so reliable or predictive of a prospective parolee's potential for success as to be a suitable substitute for the Board's reasoned judgment as to an inmate's readiness for release based on the facts before it. The Board collects and considers information regarding the statutory factors, including the COMPAS, from all available sources, weighs the factors, and its Commissioners are to apply their own judgment, experience and understanding of community expectations to resolve whether a release of the individual before it is appropriate.

Commented [JGR1]:

29. The Board is free to accept or reject the scored results of the COMPAS instrument and when it chooses to depart from some COMPAS measurement, must merely indicate what scores it is rejecting and articulate its reasons for doing so (9 NYCRR § 8002.2(a)). Those articulable grounds, need not be defended, nor justified since no presumptive reliability and accuracy attaches to them to give them greater weight and utility than the other tools available. Here the Board articulated its reasons why it believed that COMPAS's purely statistical calculations did not adequately reflect the risk of petitioner reoffending when his serial violent rapes were so similar, harmful, expressive of core personal gender/sexual/mysogenic attitudes, occurred over an extended period, with decreasing intervals of time between offenses, and so undeterred by fear of social and legal

consequence.

30. There is no merit to the petitioner's contention that the Board based its decision to deny parole solely on the nature of his offense to the exclusion of other factors. The Petitioner was not categorically excluded from release by his crime and the Board made clear that all relevant factors were being considered to assess Petitioner's current suitability for release. De los Santos v Division of Parole, 96 A.D.3d 1321 (3d Dept. 2012). The Board's decision makes clear that, as it must, it considered the particulars of petitioner's crimes, criminal history and use or abuse of earlier opportunities to show an ameliorative effect of supervision in the community on his behavior and used its interactions with Petitioner to probe for signs of insight, growth and an authentic acceptance of personal responsibility. It looked for signs that petitioner had developed the behavioral controls needed for him to be a law-abiding and contributing member of society, and was unpersuaded that the passage of time, his good behavior, accomplishments while incarcerated, endorsements, COMPAS and protestations of reform were adequate indicia that he no longer posed a significant, risk of opportunistic sexual violence against women.

31. The Board is empowered to deny parole where it concludes release is incompatible with the welfare of society, and there is a strong rehabilitative component in the statute that is given important effect by the Board's considering an inmate's candor, insight, acceptance of personal responsibility, and the authenticity or inauthenticity of any protestations of remorse and empathy for the victims Silmon v Travis, 95 N.Y.2d 470 (2000); Crawford v New York State Board of Parole, 144 A.D.3d 1308 (3d Dept. 2016); Matter of Phillips v. Dennison, 41 A.D.3d 17, 23 (1st Dept. 2007); Matter of Almeyda v. New York

State Div. of Parole, 290 A.D.2d 505 (2d Dept. 2002); Sithat ao-Pao v Dennison, 51 A.D.3d 105 (1st Dept. 2008). Here, the Board concluded that petitioner's avowed acceptance of responsibility, expressions of remorse, empathy and his potential as a contributing member of the community were counterbalanced and outweighed by the absence of any identifiable factors and triggers that repeatedly distorted his cultural mores and personal desires to incidents of devastating sexual violence against women.

32. The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b), It was sufficiently detailed to inform petitioner of the Board's 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).

33. In the event that the Board's challenged determination is not sustained, the only proper remedy is to remand the matter for a *de novo* interview and consideration of Petitioner's suitability for release by a new panel of commissioners 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).

34. If a *de novo* consideration is directed, the Court is asked to 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, and

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
April 18, 2022

Letitia James
Attorney General of the
State of New York
Attorney for Respondent
One Civic Center Plaza, 4th Floor
Poughkeepsie, New York 12601

_____
J. GARDNER RYAN
Assistant Attorney General

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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 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
April 18, 2022

J. Gardner Ryan
Assistant Attorney General