October 2022

Art. 78 Response - FUSL000139 (2022-01-14)

FUSL000139

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

-against-

TINA M. STANFORD, CHARIWOMAN, NEW YORK STATE BOARD OF PAROLE,

Respondent(s).

ANSWER

Index No. [redacted]

Respondent Tina M. Stanford, by her attorney, Letitia James, Attorney General of the State of New York, Jonathan S. Reiner, of Counsel, answers the Petition as follows:

1. Denies 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. Denies the allegations contained in paragraphs 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 29, 31, 32, 33, 34, 35, 36, and 37 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 case law, statutes, regulations or other authority, and with respect to them, respectfully refers the Court to the complete record annexed hereto and the applicable statutory, regulatory, decisional law, and other authority, for a more complete and accurate statement and as the best evidence of what is contained therein.

3. As to the allegations contained in paragraphs 1 and 12 of the Petition, admits the allegations insofar as they allege that Petitioner is an incarcerated individual presently incarcerated

in the custody of New York State Department of Corrections and Community Supervision (DOCCS).

4. Paragraphs 2 and 89 contain no allegations requiring a response from Respondent.

5. Admits the allegations contained in paragraphs 3, 13, and 14 of the Petition insofar as they allege that Tina Stanford is the named Respondent and refers the Court to the applicable statutory authority for a description of Respondent's duties and responsibilities.

6. Deny the allegations contained in paragraphs 4, 5, 6, 53, 60, 88, 91, 92, 93, 94, and 95 of the Petition insofar as they allege any wrongdoing on the part of Respondent, and as they are incomplete, inaccurate, and/or seek to characterize portions of the record and/or case law, statutes, regulations or other authority, and with respect to them, respectfully refers the Court to the complete record annexed hereto and the applicable statutory, regulatory, decisional law, and other authority, for a more complete and accurate statement and as the best evidence of what is contained therein.

7. Admit the allegations contained in paragraphs 7, 8, 10, and 90 of the Petition.

8. As to the allegations contained in paragraphs 9, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 54, 55, 56 and 96 of the Petition, Respondent respectfully referd the Court to the annexed record as the best evidence and most accurate version of Petitioner's Sentence and Commitment, institutional record, November 10, 2020 appearance before the Board of Parole, the Board's decision, Petitioner's administrative appeal, and Respondent's final determination. Respondent denies the allegations to the extent that they are inconsistent with the annexed record.

9. Paragraph 11 constitues a venue statement and requires no response from Respondent.

10. Respondent denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 48, 49, 50, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87 of the Petition.

11. The paragraphs under the heading "Claim for Relief" constitue a wherefore clause setting forth the relief sought by Petitioner to which no response is required, but to the extent one is required, Respondent denies that Petitioner is entitled to the relief sought.

12. Denies each and every allegation of the Petition not specifically responded to above.

OBJECTIONS IN POINT OF LAW

13. The Petition fails to state a cause of action. See, CPLR §3211(a)(7).

14. Any issues raised in this Petition that were not raised in administrative appeal have not been preserved for review and may not be raised for the first time in this Article 78 proceeding. See, CPLR 3211(a)(2).

AS AND FOR A FIRST DEFENSE

15. Respondents' decision denying Petitioner's release to parole supervision was reached in full compliance with all statutory and regulatory requirements and should be sustained.

AS AND FOR A SECOND DEFENSE

16. The Board gave due consideration to all 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 be properly characterized as arbitrary, capricious, or irrational bordering on impropriety.

RECORD BEFORE THE AGENCY BELOW

17. The following constitutes a portion of the record before the administrative agency and Respondent's exhibits:

A. Sentence & Commitment Orders;

B. Pre-Sentence Investigation Reports (confidential and submitted for *in camera* inspection only);

C. Parole Board Report (non-confidential portion);

D. Parole Board Report (confidential portion - submitted for *in camera* inspection only);

E. Parole Interview Transcript;

F. Letters from District Attorney, Presiding Justice, and Defense Counsel;

G. Parole Board Release Decision Notice;

H. Administrative Appeal;

I. Administrative Appeal Decision Notice;

J. Sentencing Minutes;

K. Case Plan;

L. Redacted COMPAS ReEntry Risk Assessment; and,

M. Unredacted COMPAS ReEntry Risk Assessment (confidential and submitted for *in camera* inspection only)

N. Community Letters (confidential and submitted for *in camera* inspection only; sent directly from Wende Correctional Facility to the Court)

WHEREFORE, Respondent respectfully requests that the relief requested in the Petition be denied, and that the Petition and this proceeding be dismissed. In the event that this Court grants the Petition, Respondents request that this Court remand the matter for a rehearing at which the technical matters complained of by Petitioner may be remedied, together with such other relief as may be just and proper.

FUSL000139

Dated: Albany, New York
January 14, 2022

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

By: */s/ Jonathan S. Reiner*
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TO: Martha Rayner, Esq.
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Lincoln Square Legal Services
Fordamn University School of Law
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New York, New York 10023

FUSL000139

VERIFICATION

Jonathan S. Reiner, an attorney admitted to practice in the State of New York, affirms the following under 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 Respondent. 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 Respondent 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.

I make this Verification pursuant to CPLR 3020(d)(2), because Respondent is an of the the State of New York, and I am acquainted with the facts of this proceeding.

Dated: Albany, New York
January 14, 2022

/s/ Jonathan S. Reiner
Jonathan S. Reiner

FUSL000139

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

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Petitioner,

For a Judgment Pursuant to Article 78
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Index No. [redacted]

-against-

TINA M. STANFORD, CHARIWOMAN, NEW ORK STATE BOARD OF PAROLE,

Respondent(s).

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S ANSWER

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent
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Albany, New York 12224-0341

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Table of Contents

FUSL000139

PRELIMINARY STATEMENT

"In the early morning hours of February 26, 1988, a young, newly appointed [redacted] sitting in his patrol car outside the home of a witness he was assigned to protect, was shot five times in the head from a distance of two feet." [redacted] 258 F. Supp. 2d 105, 113–14 (E.D.N.Y. 2003). "The testimony adduced at [Petitioner's] trial established that [redacted] execution-style murder was planned by petitioner and his co-conspirators" to earn a financial bounty from a drug lord who wanted petitioner to "kill a cop." *Id.* at 114. A jury convicted Petitioner of Murder Second Degree and Criminal Possession of a Weapon Second Degree for this execution. The judge who presided over the trial sentenced Petitioner to an aggregate indeterminate term of imprisonment of 25 years to life. Exhibit A (sentence and commitment), Exhibit B (confidential pre-sentence investigation).[1, 2] A federal judge denied Petitioner's collateral attack on his conviction, citing the "overwhelming proof of petitioner's involvement in [redacted] death." [redacted] 258 F. Supp. 2d at 133.

Petitioner appeared for a reappearance Parole Board release interview on November 10, 2020. Exhibit E (transcript of interview and decision). Discretionary release was denied, and Petitioner was ordered held for another 24 months. Exhibit G (parole release decision notice). Petitioner perfected his *pro se* administrative appeal on March 2, 2021. Exhibit H (administrative appeal). The Appeals Unit issued its decision dismissing the appeal on June 10, 2021. Exhibit I (decision on administrative appeal).

Respondent submits this Memorandum of Law in support of her Answer and in opposition to the Petition. Petitioner is an incarcerated individual in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), and he currently is

[1] "Exhibit" refers to those exhibits attached to Respondent's Answer.
[2] Exhibits labeled "confidential" have been submitted for *in camera* inspection only.

incarcerated at Wende Correctional Facility.

ISSUES PRESENTED

In the instant litigation, Petitioner, by counsel reiterates four of the claims set forth in his administrative appeal: 1) the Board ignored Petitioner's positive COMPAS Re-Entry Risk Assessment score; 2) the Board ignored statutory factors and relied solely on the instant offense; 3) the Board failed to consider positive factors in his record; and 4) the Board's Decision was predetermined. *See generally,* Petition; *see also* Exhibit H (administrative appeal); Exhibit I (decision on administrative appeal).

Petitioner also raises three new issues not presented in his administrative appeal: 1) the Board based their decision upon the penal philosophy of the sentencing judge, District Attorney, and police organizations; 2) Commissioner Smith, now retired, was active with politicians who oppose parole release for individuals convicted of killing police officers; and 3) the entire parole file, including victim impact statements, must be turned over to the court. *See* Petition; Exhibit H; Exhibit I. To the extent Petitioner now raises challenges that were not included in his administrative appeal, such claims are "not preserved" for this Court's review. *See Nicoletta v. New York State Div. of Parole*, 74 A.D.3d 1609, 1610 (3d Dep't 2010) (pro se petitioner was "obligated to raise the issue [in administrative appeal] to preserve it for review"). Where a parole-seeker "asserts that he was denied access to confidential materials considered by the [Parole] Board, he has not preserved this claim for [judicial] review given his failure to raise it in his administrative appeal." *Santos v. Evans*, 81 A.D.3d 1059, 1060 (3d Dep't 2011) (declining to review arguments raised by pro se petitioner where he did not have raise it below).

ARGUMENT

Because the Board considered all of the relevant factors set forth in Executive Law §259-i, judicial intervention is not warranted. "[I]t is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements of Executive Law § 259-i." *Molinar v. New York State Div. of Parole*, 119 A.D.3d 1214 (3d Dep't 2014), (quoting *De Los Santos v Division of Parole*, 96 A.D.3d 1321 [3d Dep't 2012]). Executive Law § 259-i(2)(c)(A)'s statutory factors, which the Board must consider, are:

> (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 . . . ;
>
> (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 [for drug offenses];
>
> (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.

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

Importantly, "[a]bsent 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." *Hamilton v. New York State Div. of Parole*, 119 A.D.3d 1268, 1269 (3d Dep't 2014), (quoting *Silmon v. Travis*, 95 N.Y.2d 470, 476 [2000]) (internal quotation marks omitted). Moreover, "[t]he 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." *Montane v. Evans*, 116 A.D.3d 197, 203 (3d Dep't 2014), (quoting *Serrano v. Alexander*, 70 A.D.3d 1099 [3d Dep't 2010]); *see also Leung v. Evans*, 120 A.D.3d 1478 (3d Dep't 2014).

I. THE BOARD CONSIDERED THE STATUTORY FACTORS

Here, the record demonstrates the Board properly considered all of the required statutory factors. In evaluating Petitioner's record, the Board considered his institutional adjustment. Exhibit C (parole board report); Exhibit D (confidential reappearance report). The Board also considered Petitioner's programming, proposed release plans, and criminal history. Exhibit E; *see also*, Exhibit B (confidential pre-sentence investigation); Exhibit D (confidential). The Board also reviewed Petitioner's COMPAS Re-entry Risk Assessment, Exhibit L and M (confidential); Petitioner's Case Plan, Exhibit K; and the sentencing minutes, Exhibit J.

Moreover, at Petitioner's interview, the Board discussed Petitioner's experience with COVID (Exhibit E, pp. 2-3, 19), the instant offense (*id.*, pp. 4-5, 13-15);[3] the Board's authority (*id.*, pp. 6-7); Petitioner's current status of his case, (*id.*, pp. 7-9, 12); Petitioner's submitted parole

[3] When the Board asked Petitioner if he was convicted of murdering Officer Petitioner responded, "that's one of the theories." Exhibit E at 4. Petitioner repeatedly complained that the District Attorney used "a prostitute" to testify against him. *Id.* at 4–5, 13. In an earlier parole interview, Petitioner also repeatedly blamed "the prostitute" and named her twice for the Board. NYSCEF no. 4 at 5, 8, 10.

packet and letters of support (*id*., pp. 9-10); plans upon release (*id*., p. 11); the sentencing minutes (*id*., p. 12); Petitioner's remorse (*id*., pp. 12, 25-27); Petitioner's disciplinary records (*id*., pp. 15-17);[4] Petitioner's positive programming and work mentoring younger incarcerated individuals (*id*., pp. 17-21); and Petitioner's COMPAS Re-Entry Risk Assessment (*id*., pp. 23-24).

Insofar as Petitioner alleges the Board did not consider positive factors in his record, a review of the transcript reveals that the Board discussed Petitioner's community support and plans upon release (*id*., pp. 9-11); his disciplinary history (*id*., pp. 15-17); and his positive programming and mentoring of younger incarcerated individuals (*id*., pp. 17-21). The transcript plainly indicates the Board considered Petitioner's positive record but did not find it dispositive.

Moreover—although petitioner has successfully completed many institutional programs—it is firmly established that "[d]iscretionary parole release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined." *Gutkaiss v. New York State Div. of Parole*, 50 A.D.3d 1418, 1418 (3d Dep't 2008), (quoting Executive Law § 259-i [2][c][A]); *Comfort v. New York State Div. of Parole*, 68 A.D.3d 1295 (3d Dep't 2009); *Hamilton v. New York State Div. of Parole*, 119 A.D.3d 1268 (3d Dep't 2014).

Due to the fact that the Board considered all of the factors set forth in Executive Law §259-i, either within the record before the Board or at Petitioner's interview, and because the Board's decision need not discuss every factor, Respondent respectfully submits that Petitioner has made no "showing of irrationality bordering on impropriety." *Hamilton, supra*; *Silmon, supra* at 476; and *Russo, supra*. As all statutory factors were considered, the Board's decision cannot be considered an abuse of discretion.

[4] Petitioner indicated that he got a disciplinary ticket "not too long ago" and that he did not get into fights. Exhibit E at 16. However, Petitioner's COMPAS report indicates he had an infraction for fighting within the past 24 months. Exhibit L.

II. THE BOARD PROPERLY CONSIDERED PETITIONER'S INSTANT OFFENSE

Executive Law 259-i(2)(c)(A)(vii) requires the Board to consider "the seriousness of the offense with due consideration to the type of sentence." The Board was fully authorized "to place a greater emphasis on the gravity of [Petitioner's] crime." *Montane*, 116 A.D.3d at 203, (quoting *Serrano v. Alexander*, 70 A.D.3d 1099 [3d Dep't 2010]); *see also Valderrama v. Travis*, 19 A.D.3d 904 (3d Dep't 2005) ("Although particular emphasis was placed upon the violent nature of petitioner's underlying crimes, the Board was not required to weigh each statutory factor equally"). Specifically, Executive Law 259-i(2)(c)(A) (viii) allows for the consideration of Petitioner's "prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." Indeed, the Board is obligated to consider the inmate's prior criminal record. *Partee v. Evans*, 117 A.D.3d 1258 (3d Dep't 2014). The Board may put more weight on the inmate's criminal history. *Bello v. Board of Parole*, 149 A.D.3d 1458 (3d Dep't 2017).

Further, the denial of parole release based upon nature of conviction and criminal history is appropriate. *Bush v. Annucci*, 148 A.D.3d 1392 (3d Dep't 2017); *Holmes v. Annucci*, 151 A.D.3d 1954 (4th Dep't 2017). The Board may take note of the inmate's disregard for the life of another human being. *Hakim v. Travis*, 302 A.D.2d 821 (3d Dep't 2003); *Angel v. Travis*, 1 A.D.3d 589 (3d Dep't 2003). The Board may consider the inmate's blatant disregard for the law and the sanctity of human life. *Campbell v. Stanford*, 173 A.D.3d 1012 (2d Dep't 2019).

Petitioner's instant offense involved the pre-meditated murder of a 22-year-old police officer. Exhibit B (confidential); *see also*, Exhibit C; Exhibit F. The victim was guarding a witness that was being violently harassed by a drug trafficking organization of which Petitioner

was a member. *Id.* It would be inappropriate—and illegal—for the Board to ignore the circumstances of Petitioner's horrific conduct. Exec. L. 529-i(2)(c)(A)(vii).

The Board's emphasis on the serious nature of the crime does not demonstrate a showing of irrationality bordering on impropriety. *Smith v. New York State Div. of Parole*, 64 A.D.3d 1030 (3d Dep't 2009). The Board permissibly placed particular emphasis upon the nature of the offense. *Mullins v. New York State Bd. of Parole*, 136 A.D.3d 1141 (3d Dep't 2016).

III. THE BOARD CONSIDERED THE COMPAS INSTRUMENT AND COMPLIED WITH THE 2011 AMENDMENTS

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. *Montane*, 116 A.D.3d at 202; *see also, Hawthorne v. Stanford*, 135 A.D.3d 1036, 1042 (3d Dep't 2016). 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 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. *King v. Stanford*, 137 A.D.3d 1396 (3d Dep't 2016). The Board need not give the COMPAS greater weight than the other statutory factors. *Gonzalvo v. Stanford*, 153 A.D.3d 1021 (3d Dep't 2017). 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. *Rivera v. N.Y. State Div. of Parole*, 119 A.D.3d 1107, 1108 (3d Dep't 2014); *Dawes v. Annucci*, 122 A.D.3d 1059 (3d Dep't 2014). Contrary to the unpublished cases filed as exhibits by Petitioner, the Third Department expressly held the "Board need not enumerate, give equal weight or explicitly discuss every factor considered." *Montane*, 116 A.D.3d at 203.

Here, Petitioner had a high score of 8 out of 10 in the prison misconduct category of the COMPAS. *See* Exhibit E at 23; Exhibit L; Exhibit M. Although Petitioner claimed he did not fight in prison, Exhibit E at 16, the COMPAS indicates otherwise, Exhibits L and M. The COMPAS indicates that Petitioner—while serving a sentence for having ordered the cold-blooded execution of a law enforcement officer guarding a witness—has a high score for misconduct. Exhibits L, M. The basis for that high score was petitioner's recent violence. *Id*. Petitioner denied that recent violence. Exhibit E at 16. Just like Petitioner denied murdering Officer [redacted] *Id.* at 4–5; *see also* [redacted] 258 F. Supp. 2d at 133 (finding alleged error harmless "in light of the overwhelming proof of petitioner's involvement in Officer [redacted] death"). The prisoner misconduct portion of the COMPAS report suggests that Petitioner remains violent. Coupled with his false denials of violence, it shows that Petitioner continues to have a pattern of denying involvement with and responsibility for his violent conduct.

With respect to the other portions of the COMPAS, the Board expressly "weighed and considered [petitioner's] Risk and Needs Assessment and the low scores indicated therein." Exhibit E at 31; *accord.* Exhibit G at 3. However, the Board found that Petitioner's "murder of Officer Byrne . . . demonstrated a callous disregard for human life and a complete lack of respect for the law." *Id*. The Board need not give dispositive weight to good COMPAS scores. *See Lewis*

v. Stanford, 153 A.D.3d 1478 (3d Dep't 2017).[5] Here, the Board simply found the horrific violence more compelling than the COMPAS.

IV. THE BOARD'S DENIAL WAS NOT PREDETERMINED

Because the Board considered all of the statutory factors—as set forth above—this "record belies petitioner's contention that the Board's determination denying his request for parole release was predetermined." *Hakim-Zaki v New York State Div. of Parole*, 29 A.D.3d 1190, 1190 (3d Dep't 2006); *Black v New York State Bd. of Parole*, 54 A.D.3d 1076 (3d Dep't 2008).

Petitioner's argument to the contrary is simply unpersuasive. Although Petitioner cites to discussion about this being "high profile," "political," and or a "media" case, NYSCEF no. 58 at 11–17, a review of the transcript of the interview reflects that Petitioner—not either of the Parole Commissioners—first raised the high-profile nature of the case. Exhibit E at 7:24–25. Petitioner cannot inject an issue into the interview only to complain that that issue infected his interview.

Petitioner is correct that nothing can change the horrific violence of shooting a police officer in the head five times from a distance of two feet as he guarded a witness against Petitioner's drug trafficking confederates. Nothing can change the inevitable chill Petitioner's crimes cast upon community members' cooperation with law enforcement. But Petitioner did not have to go out of his way to absolve himself of any responsibility for his crimes, Exhibit E at 4, despite what a federal judge termed "overwhelming proof of petitioner's involvement in Officer [redacted] death." [redacted] 258 F. Supp. 2d at 133. Petitioner did not have to go out of his way to label the witnesses against him "prostitutes." Exhibit E at 4–5, 13. And Petitioner did

[5] Petitioner's reliance on a series on cases that are unavailable in any format which he had to append as exhibits—*see* NYSCEF 58 at 3–6—betrays the weakness of his argument. In this time of near-universal publication of court opinions, it is remarkable that Petitioner had to append six decisions which are not available in the official reports, the Reporter of Decisions' slip opinion service, or an electronic reporter.

not have to engage in violent conduct in the prison months before his interview. Simply put, Petitioner's interview demonstrated that he has not put this conduct in the past.

V. PETITIONER'S UNPRESERVED ARGUMENTS WOULD NOT ENTITLE HIM TO RELIEF EVEN IF PRESERVED

a. Nothing in the records suggests the Board based the decision upon anyone's penal philosophy

The record is devoid of anything to suggest the anyone's penal philosophy impacted the Board's decision. Petitioner quotes the Board saying that the Sentencing Justice discussed the death penalty. NYSCEF no. 58 at 9. However, Petitioner omits critical context: in the sentence immediately beforehand, Petitioner and the Board engaged in a conversation where Petitioner explained that he had not been successful in a motion pursuant to Section 440 of the Criminal Procedure Law because it would have to go in front of the Sentencing Justice if he were still around. Exh. E at 11:18–12:12. The Board Member's acknowledgment of the Sentencing Justice's remarks were simply an acknowledgment of the futility that Petitioner professed.

The interview transcript contains no other discussion of anything that could be fairly considered anyone's "penal philosophy" other than this one, isolated remark. There is no further discussion of the judge or the prosecutor. To the extent that Petitioner complains the Board considered the views of the prosecutor and judge, it was legally required to do so. *See* Exec. L. § 259-i(2)(c)(A)(vii). Petitioner pontificates that the Board "is obligated to consider the law as the correct measure of what 'society' by way of the legislature has deemed the appropriate response to those convicted of criminal conduct." NYSCEF no. 58 at 7. The Legislature has spoken clearly: a "defendant *must be sentenced to life imprisonment without parole* upon conviction of the crime of" killing a police officer. P.L. § 70.70(5) (incorporating P.L. § 125.26); *see also* P.L. § 125.26(1)(a) ("the intended victim was a police officer . . . who was at the time of the killing

engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known the victim was a police officer"). By Petitioner's own rationale, to the extent that the Board considered any philosophy that Petitioner should never be released, they were considering the wishes of the society as expressed by the Legislature.

Petitioner misplaces his reliance upon *King v. Dep't of Parole*, 190 A.D.2d 423 (1st Dep't 1993) *aff'd* 83 N.Y.2d 788 (2004). In *King*, one of the Commissioners made "extensive remarks" showing "he Board was proceeding on the assumption that its primary duty was to determine, in the abstract, the appropriate penalty." *Id.* at 432. No such remarks are present in the transcript of Petitioner's interview. Petitioner's attempt to conflate remarks by the judge and the prosecutor with remarks by the Commissioner in *King* fails. The Board's passing comment about the remarks in the context of a 440 Motion hardly constitute the "extensive remarks" made by the *King* Commissioner. Even if Petitioner preserved this argument, the Commissioner's passing remark in this context does not demonstrate a showing of irrationality bordering on impropriety. *Smith*, 64 A.D.3d at 1030.

Petitioner also raised the unpreserved argument that his parole "file is very likely brimming with penal philosophy" because of community input. NYSCEF no. 58 at 11. Assuming for the sake of argument that Petitioner's speculation is correct, community members have a First Amendment right to petition the Parole Board. *California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (right to petition extends to all departments of government). Petitioner's implicit contention that the Board cannot consider any community input unfavorable to him would require the Board to violate the First Amendment by discriminating against viewpoints. *See Cox v. Louisiana*, 379 U.S. 536 (1965). The Board properly accepted the letters from the community, some of which supported Petitioner, and failure to do so would have been unconstitutional. In any

event—to the extent that any of these letters contained penal philosophy—there is nothing to suggest that the Board was impacted by such expressions of penal philosophy. Moreover, the Court should not consider the merits of this argument in the first place because Petitioner failed to preserve it for judicial review.

b. Petitioner's attack on Commissioner Smith rests upon inadmissible hearsay and is irrelevant

"Judicial review of administrative determinations is confined to the facts and record adduced before the agency." *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000) (internal quotation marks omitted). That fundamental precept of Article 78 practice notwithstanding, Petitioner conducted an unseemly investigation into Commissioner Smith's personal life. Petitioner now seeks to inject into the record Commissioner Smith's employment history, comments made by former colleagues, statements purportedly made by a gubernatorial candidate in the mid-1990s, and *even commissioner Smith's campaign donations*. There is no reason to assume that Petitioner has not conducted similar intrusions into the personal and professional life of the Court.

As an initial matter, the alleged statements by then-candidate Pataki—who allegedly made these remarks a quarter century before Petitioner's parole interview and had been out of office for a decade-and-a-half prior to the interview—were about the death penalty; Petitioner was not sentenced to death. Petitioner does not allege Governor Pataki singled out Petitioner specifically or those who murder law enforcement officers generally. By Petitioner's logic, no Acting Justice of this Court initially appointed by Former Governor Pataki to the Court of Claims could preside over this action. Nor could a Justice who served in the Pataki administration prior to election to the bench preside. Governor Pataki's ability to directly influence any Parole Commissioner ended a decade before Petitioner had his first interview. This unpreserved argument has no merit whatsoever.

Further, Petitioner claims a former State Senator served as a Parole Commissioner prior to his election to the State Senate, and Commissioner Smith has donated to the former colleague's campaigns. NYSCEF no. 58 at 18–19. This claim rests upon multiple levels of hearsay. First, Petitioner has pulled campaign donations from a database but has not made any effort to either authenticate it or overcome its patent hearsay nature. *See* CPLR §§ 4520 (hearsay exception of public records); 4540 (authentication of public records). Next, that database must get its contents from another source—which would also be asserting Commissioner Smith donated to Candidate Colleague, and it would make that assertion for the truth of the matter asserted. And in all likelihood, the source on which the database relies is the candidate's disclosure statement, which itself relies upon another utterance—likely a check—which asserts that Commissioner Smith donates a certain amount to Candidate Colleague on a specific date. This allegation relies upon unauthenticated hearsay within hearsay within hearsay. The Court should give it no credence.

Petitioner makes no effort to overcome any of these levels of hearsay—but simply says the Court should not trust a quasi-judicial official. Even if this argument rested upon competent evidence—which it does not—it does not follow that that Commissioner Smith's donations "amplif[y] his opposition to parole for 'cop killers.'" NYSCEF 58 at 18–19. Nothing in the record—which is what the Court must base its decision on, *Yarbough, supra*—indicates that Commissioner Smith has a blanket "opposition to parole for 'cop killers.'" Or that the State Senator's position on parole for "cop killers" is the reason for Commissioner Smith's donations. The record simply reveals that a Board on which Commissioner Smith determined that this Petitioner was unworthy of parole at a particular time. That particular time happened to be (1) shortly after Petitioner got in trouble for violence, (2) when Petitioner went out of his way deny

any responsibility for his violence despite what a federal judge called overwhelming evidence,[6] and (3) castigated witnesses against him as prostitutes.

c. Petitioner has no right of access to the entire parole file

Petitioner's ability to review his parole file is created and governed by 9 N.Y.C.R.R. § 8000.5. Petitioner has not alleged that Respondent denied a proper request to review any specific portion of the parole file. Nor has Petitioner offered no proof to demonstrate he complied with the regulation governing access. For example, a request to access at an appropriate time as per Section 80005(c) (i.e., during the administrative process). Nor does "the record reveal that petitioner made the necessary requests in writing for such records pursuant to 9 N.Y.C.R.R. § 8000.5(c)(3)." *Cruz v Travis,* 273 A.D.2d 648 (3d Dep't 2000) (denying Article 78 against Respondent's predecessor in office). Petitioner's claim that he was improperly denied access to his parole file is unsubstantiated and wholly unavailing. *Cruz v Travis*, 273 A.D.2d 648 (3d Dep't 2000); *Fuentes v New York State Bd. of Parole*, 2012 N.Y. Misc. LEXIS 5108 (Sup. Ct., Albany County 2012). The Third Department expressly held this claim precise sort of claim must be raised in the administrative appellate process in order to be preserved for judicial review. *Santos v. Evans,* 81 A.D.3d at 1060. Petitioner has not preserved this argument, and the Court need to address the merits.

Pursuant to Executive Law §259-k and 9 N.Y.C.R.R. §8000.5 et. seq., parole records are deemed to be confidential. Thus, per Public Officers Law §87(2)(b) they are exempt from disclosure on the grounds on confidentiality, invasion of privacy, and the possibility they could endanger the life and safety of a person-even if redacted. *Zarvela v New York State Div. of Parole,*

[6] Petitioner attempted to re-litigate the jury's verdict before the board in response to a question of whether he was convicted of a certain crime. Petitioner could have simply answered "yes." Yet he felt the need to make sure that the Board knew he felt no degree of responsibility.

252 A.D.2d 714 (3d Dep't 1998); *Collins v New York State Div. of Parole*, 251 A.D.2d 738 (3d Dep't 1998); *Robles v Tracy*, 275 A.D.2d 837 (3d Dep't 2000); *Carty v New York State Div. of Parole*, 277 A.D.2d 633 (3d Dep't 2000). Further, the Board could also deny access based upon a concern that it would lead to harm to any person, 9 N.Y.C.R.R. § 8000.5(c)(2)(i)(a)(3), and Petitioner is serving a sentence for having murdered a police officer assigned to guard a witness against his fellow narcotics traffickers, [redacted] 258 F. Supp. 2d at 114. Petitioner's recent institutional record indicates that he sometimes falls back upon his violent ways. Exhibit E at 16; Exhibit L. It is reasonable to assume that Petitioner may again order violence against those that he perceives as standing in the way of his freedom.

To the extent that Petitioner's counsel requests that the Board, as part of its answer, file and serve all records, documents, and materials provided to the Board for the November 10, 2020 interview (Petition, ¶ 4), per CPLR § 408, leave of the Court is required to conduct disclosure in a special proceeding such as an Article 78.[7] In order to obtain permission from the Court, Petitioner needs to show the items sought are material and necessary, and useful, and would not cause unwarranted or unproductive delay. And, because disclosure tends to prolong a case, which is contrary to the intent of a special proceeding, the Petitioner must show the need for the relief. Such request has repeatedly been denied in Article 78 proceedings. *Town of Pleasant Valley v New York State Bd. of Real Property Services*, 253 A.D.2d 8 (2d Dep't 1999); *Levine v Board of Estimate of the City of N.Y.*, 143 A.D.2d 598 (1st Dep't 1988); *Monroe Livingston Sanitary Landfill Inc. v*

[7] Respondent has filed the community letters for *in camera* inspection given the significant risks to the community members who wrote them and Petitioner's failure to properly request these letters in the first place. The Court has access to the letters and is aware of the volume. Even without COVID-related staffing shortages—which are impacting the Department of Corrections and Community Supervision like every other employer in the world—redacting this volume of letters would take weeks if not months.

Bickford, 107 A.D.2d 1062 (4th Dep't 1985); *Oberoi v. Dennison*, 859 N.Y.S.2d 905 (Sup. Ct. Franklin Co.) *aff'd*, 55 A.D.3d 1033 (3d Dep't 2008).

Respondent vehemently opposes any release of victim impact statements. Such disclosure to an incarcerated individual is prohibited by 9 N.Y.C.R.R. § 8002.4(e) unless disclosure is expressly authorized by the victim or by court order.

CONCLUSION

For the reasons set forth above, the Petition should be denied and this proceeding dismissed in its entirety, together with such other relief that this Court may deem just and proper.

Dated: January 14, 2022
Albany, New York

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STATEMENT PURSUANT TO 22 NYCRR 202.8-b

I, Jonathan S. Reiner, affirm under penalty of perjury pursuant to CPLR 2106, that the total number of words in the foregoing Memorandum of Law, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is 4,878 words. The foregoing Memorandum of Law complies with the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing Memorandum of Law, I relied upon the word count of the word-processing system used to prepare the document.

/s/ Jonathan S. Reiner
JONATHAN S. REINER