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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

[REDACTED]

Petitioner,

-against-

ANSWER AND RETURN

Index No. 50517-2022
Hon. Christi J. Acker, J.S.C.

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

Respondents.

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. Petitioner was originally convicted after trial in 2007 of numerous charges that involved scamming over three million dollars from eight different victims through various frauds and financial schemes. However, in 2012 the Appellate Division vacated the decision, and

remanded for a new trial. [REDACTED] After retrial, Petitioner was convicted in 2014 of Grand Larceny 1st Degree, six counts of Grand Larceny 2nd Degree, and Scheme to Defraud 1st Degree and was sentenced to an aggregate term of 15-30 years imprisonment. (Exhibit 1, Sentence and Commitment Orders).

5. Between 2000 and 2004, Petitioner impersonated a lawyer and participated in a scheme to defraud several people of their money by promising to invest or purchase real estate and other property with the funds. [Exhibit 2, Pre-Sentence Investigation (*in camera* submission) and Exhibit 3, Parole Board Report].

6. Petitioner appeared for his second Parole Board Release Interview on July 27, 2021. The Board denied discretionary release and imposed a 24-month hold. (Exhibit 4, July 2021 Parole Interview Transcript and Exhibit 5, Parole Release Decision Notice). Petitioner administratively appealed and the disposition was affirmed. This special proceeding followed. (Exhibit 6, Appellate Brief; Exhibit 7, Administrative Appeal Decision Notice; Exhibit 8, Appeals Unit Findings).

7. During the Parole interview, Petitioner claimed he was innocent of the crimes for which he was convicted and that, on the advice of counsel, he would not be discussing details of the crime in light of the pending appeal. The Board discussed his offense, his 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 plans, programming, and institutional record, discretionary release was denied. The Board noted his COMPAS scores and was not convinced he would lead a law-abiding life. The determination challenged, in part, states that:

Careful review of the record and interview lead the panel to determine 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 release at this time would be incompatible with the welfare of society. Parole is denied.

The Board's decision is based on the following factors: The instant Offense, where on multiple occasions you defrauded approximately eight victims, by fraudulently entering into business ventures. You took their money promising services as an attorney, that you were not legally allowed to do. Further, other victims were defrauded of money and property.

Records indicate you stole approximately five point five million dollars, causing great financial and psychological harm. You have no other crimes in your past.

Your disciplinary record is minimal, although you acquired tickets since your last Parole Board interview. And the COMPAS Risk Assessment indicates low and unlikely scores across the Board. The Panel departs from the COMPAS, most specifically arrest and criminal involvement, as during the interview you denied total involvement in this very detailed case. You extensively tried to discredit one of your victim's character and displayed minimal remorse for the victim's suffering.

Most compelling you defied the trust of your victims and the community at large and since you minimized your culpability in such an intense and detailed case, the Panel questions your credibility and as such puts you at risk for committing similar crimes in the future. Release at this time is not appropriate.

(Exhibits 4-5).

PETITIONER'S CLAIMS

8. Petitioner maintains, as he did at the administrative level, that: the decision is unconstitutional, arbitrary and capricious in that the Board relied the sentencing minutes from Petitioner's 2007 conviction, which was subsequently vacated on appeal, instead of the minutes from his 2014 sentencing after Petitioner was re-tried and re-convicted.

ARGUMENT

9. Despite Petitioner's assertions to the contrary, the Board's determination was not based on any erroneous information or improper considerations but is supported by the record and was based on an evaluation of the appropriate factors and the facts bearing on the Petitioner's suitability for release. Its 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 of the Petitioner.

10. A discretionary release to parole is not granted as a reward for good conduct or efficient performance of duties while confined, but is a grant made 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). Executive Law § 259-i(2)(c) requires the Parole Board to consider those issues in a context specific to the inmate, including the inmate's particular crime, sentence, appearance and demeanor during an interview, institutional record, deportation status, past criminal behavior, education, health, skills, future plans, promises of employment, and any statistical assessments of risks and needs for successful integration back into the community. 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).

11. 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 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, it must be presumed 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, *supra.*)

12. In making its determination, the Board is neither required to explicitly discuss each factor considered nor to weigh each factory equally. *See* Matter of Huntley v. Stanford, 134 A.D.3d 937 (2d. Dept. 2015); Matter of Martinez v. Evans, 108 A.D.3d 815, 816 (2d Dept. 2013). Consequently, the Board is entitled to find that the severity of the offense outweighs 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 petitioner a lack of insight and 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 reflects that the Board considered the appropriate factors and acted well within its discretion in determining that some negative factors, including petitioner's present inability to accept responsibility for his actions, outweighed more positive factors and made discretionary release inappropriate at this time.

13. The Board may place particular emphasis upon the nature of the offense and is not required to give equal weight to all requisite factors. 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).

14. The Board can give greater weight to statements made in the sentencing minutes. Williams v New York State Division of Parole, 114 A.D.3d 992, 979 N.Y.S.2d 868 (3d Dept.

2014). The Board is entitled to rely on the sentencing minutes. Platten v New York State Board of Parole, 153 A.D.3d 1509 (3d Dept. 2017). Executive Law 259-i(c)(1) clearly confers exclusive discretion upon the parole board whether and, if release is granted, and when to release an inmate. Hodge v Griffin, 2014 WL 2453333 (S.D.N.Y. 2014).

15. 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 victim. 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); Siao-Pao v Dennison, 51 A.D.3d 105 (1st Dept. 2008). Those subjective assessments are vested exclusively in the Board's discretion and should not be disturbed so long as they have any rational support in the record. Here, the Petitioner's inability to meaningfully accept any responsibility, combined with his apparent unwillingness to engage in the type of self-reflection needed for reform, provide ample support for the Board's decision.

16. Petitioner argues that his 2007 sentencing minutes were improperly relied on by the Board as the "Second Department reversed *the record* of [REDACTED] first conviction because it found that [REDACTED] waiver of the right to counsel and decision to proceed pro se was not knowing, voluntary and intelligent." *Emphasis added*. (Petition at p. 6). However, it was petitioner's convictions that were reversed and not the records associated with those convictions.

17. Any challenge to purge or revoke the 2007 records from Petitioner's criminal record must be made to the sentencing court. An incarcerated individual cannot challenge the accuracy of

information in the Pre-sentence Investigation Report, as that challenge should have been made to the original sentencing court. Manley v New York State Board of Parole, 21 A.D.3d 1209 (3d Dept. 2005) lv. den. 6 N.Y.3d 702 (2005); Champion v Dennison, 40 A.D.3d 1181 (3d Dept. 2007). lv.dism. 9 N.Y.3d 913. Carter v Evans, 81 A.D.3d 1031 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712 (2011); Vigliotti v State of New York, Executive Division of Parole, 98 A.D.3d 789 (3d Dept. 2012); Wisniewski v Michalski et.al., 114 A.D.3d 1188 (4th Dept. 2014); Del Rosario v Stanford, 140 A.D.3d 1515 (3d Dept. 2016). To date, the sentencing court has made no such order expunging the 2007 records from Petitioner's criminal record.

18. Pursuant to Executive Law 259-c(3), the Parole Board must investigate the "complete criminal court record" of the incarcerated individual. Here, Petitioner's complete criminal record includes the 2007 proceeding. Further, the sentencing minutes from the second trial make explicit reference to the proceedings in the first trial. Thus, the 2007 matter is incorporated by direct reference into the 2014 matter.

19. If the original criminal sentence has been vacated, but the appellant is later convicted again and resentenced, this has no effect on the Board's authority to deny parole and hold him for another 24 months. Desulma v Dennison, 22 A.D.3d 997, 802 N.Y.S.2d 795 (3d Dept. 2005). At most, use of the records from the first trial are a *de minimus* harmless error. Matter of Tatta v. State, 290 A.D.2d 907, 908 (3d Dept.), lv. denied, 98 N.Y.2d 604 (2002); see also Matter of Amen v. New York State Div. of Parole, 100 A.D.3d 1230, 1230 (3d Dept. 2012); Matter of Rossney v. New York State Div. of Parole, 267 A.D.2d 648, 649 (3d Dept. 1999), lv. denied, 94 N.Y.2d 759 (2000).

20. While the Board did not possess the 2014 sentencing minutes despite a diligent effort to obtain them, the Appeals Unit was able to obtain them since Petitioner's appearance before

the Board. A review of those minutes reveals the court made no recommendation with respect to parole. Accordingly, any error in failing to consider them is harmless and does not provide a basis for setting aside the appealed from decision. Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307 (3d Dept. 2016), *lv. denied*, 29 N.Y.3d 905 (2017); Matter of Davis v. Lemons, 73 A.D.3d 1354 (3d Dept. 2010); Matter of Valerio v. New York State Div. of Parole, 59 A.D.3d 802 (3d Dept. 2009).

APPROPRIATE REMEDY

21. In the unlikely event of an unfavorable court ruling on the merits, the question of a remedy arises. In the event that the Board's challenged determination is not sustained, despite Respondent's aforementioned objections/arguments, 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); Matter of Siao-Pao v. Travis, 5 A.D.3d 150 (1st Dept. 2004), *lv. denied* 3 N.Y.3d 603 (2004). If a *de novo* consideration is directed, Respondent respectfully requests that the Board be given 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. Sentence and Commitment Order.
2. **Pre-Sentence Investigation Reports. **The Reports are exempt from disclosure pursuant to CPL § 390.50 and 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 (3d Dept. 1997). Only the sentencing Court which originally issued and/or adjudicated the report is authorized under CPL § 390.50 to release this highly confidential material. Blanche v. People, 193 A.D.2d 991, 598 N.Y.S.2d 102, 103 (3d Dept. 1993).
3. Parole Board Report. ****Only Part I may be disclosed to Petitioner. Pursuant to New York State Public Officers Law § 87(g), Part II (marked “confidential” at the top) is exempt from disclosure as intra-agency materials containing evaluative opinion information and is submitted for *in camera* review only.** Zhang v. Travis, 100 A.D.3d 829, 782 N.Y.S.2d 156 (3d Dept. 2004).
4. 2021 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. 2007 Sentencing Minutes.
10. 2014 Sentencing Minutes.

WHEREFORE, Respondent requests that the petition be denied.

DATED: Poughkeepsie, New York
March 22, 2022

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


HEATHER R. RUBINSTEIN
Assistant Attorney General

[REDACTED]

Heather R. Rubinstein, affirms under the penalty of perjury pursuant to Section 2106 of the Civil Practice Law and Rules, that she 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 her 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, she believes them to be true.

DATED: Poughkeepsie, New York
March 22, 2022



Heather R. Rubinstein
Assistant Attorney General