

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Art. 78 Responses

Article 78 Litigation Documents

Art. 78 Response - FUSL000147 (2022-01-03)

Follow this and additional works at: https://ir.lawnet.fordham.edu/art78_response

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 the New
York State Parole Board,

Respondent.

ANSWER AND RETURN

[REDACTED]
Hon. Hal B. Greenwald, J.S.C.

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 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.
4. Petitioner, a former New York Police Department officer, was convicted by verdict of one count of Murder in the Second Degree and was sentenced in 1994, to an

indeterminate term of incarceration of 25 years to life. (Exhibit 1, Sentence and Commitment Order).

5. On August 22, 1993, petitioner, 27 years old, after a night out with friends, decided not to join the others in extending the evening at an after-hours club, and went to his nearby Brooklyn apartment with the 28 year old, [REDACTED] a mother of two young children, for a nightcap. The petitioner's description during his interview of what then occurred was vague, largely uninformative or unintelligible, but at some point during that early morning at his apartment, he reports he saw [REDACTED] standing in his bedroom looking into an open box on top of his dresser containing his valuable personal items – shield, badge, wallet, service weapon, overreacted, began yelling, thinking she was stealing from him, and shot her six times with his service revolver, striking her once in her face, once in the hand and four times in her back. Ms. [REDACTED] died from her wounds. (Exhibit 2, Pre-Sentence Investigation and Exhibit 3, Parole Board Report).

6. Petitioner had a reappearance for his second Parole Board Release Interview in April, 2021. Discretionary release was denied after his initial appearance before the Board of Parole in 2019. After the April, 2021 interview, discretionary release again was denied and a 24-month hold on reconsideration was imposed. (Exhibit 4, April 2021 Parole Interview Transcript and Exhibit 5, Parole Release Decision Notice). Petitioner administratively appealed, and the disposition was affirmed. (Exhibit 6, Appellate Brief; Exhibit 7, Administrative Appeal Decision Notice; Exhibit 8, Appeals Unit Findings). This proceeding followed.

7. During the Parole interview, petitioner admitted shooting and killing [REDACTED]

[REDACTED] and acknowledged that he consumed alcohol and cocaine before committing the crime. Although his account was unclear, and at times inconsistent, petitioner indicated that he became enraged when he saw [REDACTED] looking into his box containing his personal belongings, including his service weapon, grabbed the gun and fired at her repeatedly. Petitioner stated that he began drinking alcohol and using drugs at age nineteen and became dependent on them by his early twenties. He admitted drinking while on duty as well as being on duty under the influence of drugs. He acknowledged his behavior was deceptive, manipulative and self-destructive, but was unable to explain any reason for his murderous rage or to offer any meaningful connection between those tendencies and the murder of Ms. [REDACTED]. Petitioner asserted his sense of responsibility to the community as a Police Officer, but was unable to explain the contradiction between that responsibility and his criminal behavior that morning. (Exhibit 4, Parole Interview Transcript).

8. During the interview, the Board discussed with petitioner his offense, the effect of his crime on his victim's family, his own family life, his lack of any prior criminal record, his inconsistent, but improving institutional disciplinary record, his program participation, release plans, 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. The Board noted his low COMPAS scores for future arrest or criminal conduct, his likely need for drug and alcohol treatment, and indicated that it was not convinced his release would be appropriate. The determination states, in part, that:

After a review of the record, interview and weighing the statutory factors, this Panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and that your release would be incompatible with the welfare of society. The Board of Parole deliberated, and your discretionary release is denied.

You continue to serve a period of incarceration because you were convicted of Murder 2nd in which you, then an off duty NYPD Police Officer caused the death of your victim by shooting her 6 times with your .38 caliber service revolver. Records note that you shot your victim once in her face, once in her hand, and four times in her back. Also found at the scene was a tin foil packet and straw both containing cocaine. Your victim was an adult female acquaintance and you killed her in the home of your parents.

During the interview with this panel you stated that you were a Police Officer for over 2 years and were not working your current assignment because you were awaiting medical clearance from your employer to return to work. You acknowledged that you were not supposed to be out of your home and in a bar but went out and met with friends and consumed alcohol. You reported that you consumed alcohol regularly and were dependent on cocaine as a Police Officer. You mentioned that you lived with your parents at the time of the crime and that your relationship with your girlfriend had recently ended. You said that you had known your victim for some time and denied that she was at your residence for sexual interest. When asked by this panel if you brutally murdering your victim was misguided anger, you answered with uncertainty. You stated that you have gained insight into your criminal behaviors and explained that your deceptive and manipulative ways were developed from an early age. You minimally discussed how drugs or alcohol or if anger could have impacted you in killing your friend.

The instant offense represents your first contact with the criminal justice system and 1st period of NYS incarceration.

In considering your release we also reviewed the COMPAS risk and needs assessment which presents you as a low risk to offend. Of concern to this panel is your continued criminal thinking which is reflected by the misbehavior tickets you have received. During this period of incarceration, you have received numerous misbehavior reports including for weapon, contraband, fighting and gambling.

During the interview, you related that you possessed excess tobacco as a means of maintaining power. Your disregard for the rules and disregard for the safety of others while incarcerated is of concern to this panel. It is because of this behavior that this panel agrees to depart from the COMPAS risk and needs assessment presenting you as a low risk of arrest and find that your risk of arrest should be scored as high due to your unwillingness to be law abiding. COMPAS also

indicates that your need for re-entry substance abuse treatment upon release is highly probable.

During the interview you discussed that during your period of Incarceration you exchanged your addiction for alcohol for your addiction to gambling. To your credit, you have not received a misbehavior report since 2011 noted that you have been active in participating in AA.

You have participated in all mandated programs and prepared a Parole Packet that included letters of support and assurance from re-entry programs that offer you assistance with you re-integration into society when released. This panel suggests that you start to develop a relapse prevention plan that will include documented support from individual in the community that could guild you with your addictions and addictive tendencies. Services for treatment for gambling addiction in the community should also be sought.

This panel noted that during the interview you minimized your reckless behavior and expressed limited remorse for your victim. This panel found that your insight is still limited and that your rehabilitation is not complete.

We have considered the gravity of your vicious actions and the serious and senseless loss of life that you caused. Your actions demonstrated a cold and callous disregard for human life. To grant you release would so deprecate the serious nature of your crime as to undermine respect for the law.

(Exhibits 4-5).

Petitioner's Claims

9. Petitioner maintains, as he did at the administrative appeal, that: 1) the determination was based solely on the instant offense; 2) the determination was not sufficiently detailed; 3) the determination improperly departed from the COMPAS; and 4) the determination is not supported by the record.

10. 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 a fair consideration to all factors bearing on the issue whether petitioner was a suitable candidate for a discretionary release to parole supervision.

11. The Board's determination was not based on any erroneous information or improper considerations, is supported by the record and was based on an evaluation of the 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.

12. Petitioner has acclimated to incarceration and availed himself of available programs, but a discretionary release to parole is not granted as a reward for good conduct or efficient performance of duties while confined. It 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. [REDACTED]
[REDACTED]; People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983).

13. 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 any convincing 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.*)

14. In making its determination, the Board is neither required to explicitly discuss each factor considered nor to weigh each factor 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). The Board appropriately may find that the severity of an 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 reflects that the Board considered the appropriate factors and acted well within its discretion in determining that negative factors, including petitioner's apparent lack of

insight into his own conduct, empathy, and seeming inability to identify, resolve or avoid the cause for his criminal behavior outweigh more positive steps he has made to prepare himself for release and that discretionary release is inappropriate at this time.

15. The Board may place particular emphasis upon the nature of the offense. 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) 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).

16. An inmate 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, 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). Thus, an individual will have only the liberty interest created by a state statutory scheme governing release which grants a legitimate expectancy of release. As the New York State parole scheme “holds out no more than a possibility of parole”, it 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).

17. Petitioner’s claim that Board failed to properly consider the COMPAS

instrument is unsound. The 2011 amendments and implementing regulations (9 NYCRR § 8002.2(a) as amended) do not require using the COMPAS as a dispositive tool in release decisions. The Executive Law was amended to incorporate statistical risk and needs analysis principles, as reflected in the COMPAS and similar instruments, but their inclusion was merely to “assist” and “guide” the Board in making its decisions. Executive Law § 259–c(4). The Board satisfied the intent of the amendment by considering the COMPAS instrument in its decision-making. 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). It, however, must consider the reasonable probability whether the inmate, if released, will live and remain at liberty without violating the law; and whether the inmate’s release is compatible with the welfare of society, or; whether the inmate’s release will deprecate the seriousness of the crime and 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).

18. Neither COMPAS, nor any statistical analysis instrument is so reliable, predictive or prophetic of a prospective parolee’s potential for success as to be determinative in the Board’s assessment of a particular inmate’s readiness for release. The Board collects and analyses information regarding the statutory factors, including the COMPAS, from all available sources, weighs the factors, and applies its own judgment and experience in resolving whether release of the individual before it is appropriate. Where the Board chooses to depart from any particular COMPAS measurement, it may. In doing

so it must merely identify any particular scoring with which it disagrees and articulate its reasons (9 NYCRR §8002.2(a)). Here, the Board noted the mixed COMPAS scores and indicated it was departing from the assessment instrument's low scores for a risk of future felony violence, arrest and absconding. The Board explained that it did so in light of petitioner's lack of insight into his criminal behavior and his continued criminal thinking as shown by his disciplinary history of persistent gambling and contraband possession charges showing a continuing disregard of rules and a substitution of new manipulative and addictive behaviors, once the opportunity for drug and alcohol use were institutionally denied him.

19. There is no merit to the contentions that the Board based its decision solely upon the instant offense and other criminal history. The petitioner was not categorically excluded from release by his crime and all factors were considered. De los Santos v Division of Parole, 96 A.D.3d 1321 (3d Dept. 2012). The Board's decision makes clear that it is assessing petitioner's current suitability for release in light of the serious crime he committed, gleaning the known and documented history and its own interactions with petitioner for signs of insight, personal growth and acceptance of responsibility as indicators of his likely future behavior in a fair attempt to measure his readiness for release through an assessment of his capacity and willingness to be a law-abiding and contributing member of society.

20. 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). The Board may consider the inmate's limited expression of remorse, which can be shown by failing to acknowledge his drug-impaired state was a contributing factor. Beodeker v Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Pulliam v Board of Parole, 197 A.D.3d 1495, 153 N.Y.S.3d 704 (3d Dept. 2021). 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, petitioner's present inability to explain his criminal behavior and his apparent unwillingness to engage in the type of self-reflection needed for reform, provide ample support for the Board's decision.

21. 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), 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, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (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.

22. 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, 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, 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

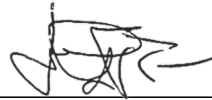
1. Sentence and Commitment Order
2. Pre-Sentence Investigation Report. (**Please note the Reports are exempt from disclosure pursuant to CPL §390.50 and is submitted for *in camera* review only. An inmate is not entitled to the pre-sentence investigation report as a part of the Parole Board Release Interview process. Allen v. People, 243 A.D.2d 1039, 663 N.Y.S.2d 455 (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. (**Please note only Part I of this document 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. Parole Interview Transcript
5. Parole Board Release Decision Notice
6. Appellate Brief
7. Administrative Appeal Decision Notice

8. Statement of Appeals Unit Findings
9. COMPAS Instrument (**Redacted version to Petitioner)
10. Case Plan

WHEREFORE, respondent requests that the petition be denied.

DATED: Poughkeepsie, New York
January 3, 2022

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



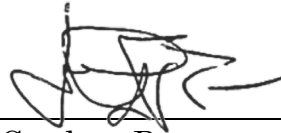
J. GARDNER RYAN
Assistant Attorney General

To: Kathy Manly, Esq. (via NYSCEF)

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
January 3, 2022



J. Gardner Ryan
Assistant Attorney General