Art. 78 Response - FUSL000144 (2022-03-07)

[redacted]

FUSL000144

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted],

Petitioner,

-against-

Tina M. Stanford, Chairwoman of the New York State Board of Parole,

Respondent.

ANSWER AND RETURN

[redacted]
Hon. Maria G. Rosa
J.S.C.

Respondents, by and through their attorney, Letitia James, Attorney General of the State of New York, Elizabeth A. Gavin, of counsel, submits the following answer and return upon the petition:

1. Respondents deny the allegations of the petition except to the extent they are confirmed by the attached records.

AS AND FOR A DEFENSE TO THE PETITION

2. Petitioner was convicted of Attempted Murder 1st Degree (two counts), Criminal Possession of a Weapon 2nd Degree and Criminal Possession of a Weapon 3rd Degree. Exhibit 2. He was sentenced to a term of thirty years to life imprisonment. Id. The instant offense consisted of the petitioner shooting a gun at a rival drug gang group of people on the street, and when the police arrived, he fired three shots at the police. Exhibit 1.

3. After having served the minimum period required under his sentence, the petitioner had his initial Parole Board Release Interview on February 9, 2021. Exhibit 4. At that time discretionary release was denied, and petitioner was ordered held for another 24 months.

Exhibit 5. Petitioner timely perfected his administrative appeal, with counsel, on August 17, 2021. Exhibit 6. The Appeals Unit issued its decision dismissing the appeal on October 15, 2021. Exhibit 8.

4. Petitioner challenges the February 2021 determination of the Board, denying release and imposing a 24-month hold. Petitioner raises the following issues: 1) the decision is arbitrary and capricious, and irrational bordering on impropriety, in that the Board failed to consider and/or properly weigh the required statutory factors; 2) the decision lacks detail; 3) the Board failed to review his sentencing minutes; 4) Petitioner's refusal to accept a plea bargain is not a statutory factor; 5) due to his advanced age, statistically Petitioner is unlikely to reoffend; 6) no aggravating factors exist; 7) the decision was predetermined; 8) the decision failed to list any facts in support of the statutory standard cited; 9) the Board never explained how they weighed the factors; 10) the decision failed to offer any future guidance; 11) the Board ignored illegally resentenced him; 12) the Board never sought the opinion of the Judge, DA or defense lawyer; 13) the Board's decision was based upon erroneously; 14) the decision violated his due process constitutional liberty interest in a legitimate expectation of early release; 15) the Board failed to comply with the 2011 amendments to the Executive Law in that the laws are now present/forward based.

5. Executive Law § 259-i(2)(c)(A) requires the Board to consider factors relevant to the specific incarcerated individual, including, but not limited to, the individual's institutional record and criminal behavior. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983). While consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely

within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413 (4th Dept. 2014); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Schendel v. Stanford, 185 A.D.3d 1365, 1366 (3rd Dept. 2020); Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1015 (2d Dept. 2019); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21 (1st Dept. 2007).

6. The Board may emphasize the nature of the instant offense. Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49 (2d Dept.), lv. denied, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012); Matter of Symmonds v. Dennison, 21 A.D.3d 1171, 1172 (3d Dept.), lv. denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005); Matter of Warren v. New York State Div. of Parole, 307 A.D.2d 493, 493 (3d Dept. 2003); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40 (1st Dept. 1997).

7. It was well within the Board's authority to make an assessment of Petitioner's credibility. Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108 (1st Dept.) ("credibility determinations are generally to be made by the Board"), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008).

8. The Board may consider an incarcerated individual's failure to comply with DOCCS rules in denying parole. See 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 Karlin v. Cully, 104 A.D.3d 1285, 1286 (4th Dept. 2013); Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49 (2d Dept.), lv. denied, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012).

9. The Board may consider negative aspects of the COMPAS instrument. Matter of Espinal v. New York Bd. of Parole, 172 A.D.3d 1816 (3d Dept. 2019) (COMPAS instrument

yielded mixed results); Matter of Bush v. Annucci, 148 A.D.3d 1392 (3d Dept. 2017) (COMPAS instrument with mixed results including substance abuse relevant given use before crime); Matter of Wade v. Stanford, 148 A.D.3d 1487 (3d Dept. 2017) (low risk felony violence but probable risk for substance abuse alcohol related crimes); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308 (3d Dept. 2016) (scores not uniformly low including family support), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017).

10. Concerning release plans, the Board decision was not based upon erroneous information, as the Board did not deny release due to this. According to Petitioner, an error was made by facility staff on this, and the Board did note that for the record. Erroneous information, if not used in the decision as a basis for parole denial, will not lead to a reversal. Matter of Khatib v. New York State Bd. of Parole, 118 A.D.3d 1207 (3d Dept. 2014); Matter of Restivo v. New York State Bd. of Parole, 70 A.D.3d 1096 (3d Dept. 2010) [status report]; Matter of Grune v. Bd. of Parole, 41 A.D.3d 1014 (3d Dept. 2007)[status report]; see also Matter of Gordon v. Stanford, 148 A.D.3d 1502 (3d Dept. 2017) [misstatement by commissioner in interview that incarcerated individual did not correct]; Matter of Perea v. Stanford, 149 A.D.3d 1392 (3d Dept. 2017) [erroneous information in PBR which incarcerated individual corrected during interview].

11. The Board provided its statutory rationale for denying parole. Matter of Murray v. Evans, 83 A.D.3d 1320 (3d Dept. 2011) (Board provided adequate statutory rationale).

12. The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a), as it was sufficiently detailed to inform the incarcerated individual of the reasons for the denial of parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698 (3d Dept. 2005).

13. As for Petitioner's complaint about lack of future guidance, the Board is not required to state what an incarcerated individual should do to improve his chances for parole in the future. Matter of Francis v. New York State Div. of Parole, 89 A.D.3d 1312 (3d Dept. 2011); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174 (3d Dept. 2005); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany Co. 2013), aff'd, 117 A.D.3d 1258 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

14. While the Board does not agree that aggravating factors are always necessary to support reliance on an incarcerated individual's crime, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, there are multiple aggravating factors present here.

15. There is no evidence the Board's decision was predetermined based upon the instant offense. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021 (3d Dept. 2017); Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899 (3d Dept. 2000).

16. Petitioner's assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672 (3d Dept. 2001). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007). The Petitioner has not in any manner been resentenced. Matter of Mullins

v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142 (3d Dept. 2016).

17. The inmate may not review the Board's weighing process or assess whether the Board gave proper weight to the relevant factors, since it is not required to state each factor it considers, or weigh each factor equally or grant parole due to exemplary behavior. Comfort v New York State Division of Parole, 68 A.D.3d 1295 (3rd Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268 (3d Dept. 2014). The due process clause is not violated by the Board's balancing of the statutory criteria, and which is not to be second guessed by the courts. Mathie v Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014).

18. Contrary to Petitioner's claim, statistics do not require a different outcome. Petitioner attempts to reduce parole release decisions to a mathematical equation and elevate statistics to a statutory factor that the Board must consider and address in denial decisions. However, that is not the law and the cited statistics do not translate into a calculation of Petitioner's re-offense risk. Statistical probabilities alone do not generate constitutional protections. Connecticut Board of Pardons v Dumschat, 452 U.S. 458, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981). Neither the mere possibility of release, nor a statistical probability of release, gives rise to a legitimate expectancy of release on parole. Graziano v Pataki, 689 F.3d 110 (2nd Cir. 2012).

19. The Board did send letters to the sentencing Judge, DA and criminal defense lawyer. No response was received from any of them.

20. If the Board makes a diligent effort to obtain sentencing minutes and/or the sentencing minutes are unavailable whereas here, there is an affidavit from the court reporter indicating the minutes cannot be located a new interview is not required. Exhibit 9. See Matter of Andreo v. Alexander, 72 A.D.3d 1178 (3d Dept. 2010) (court reporter affidavit); Matter of

LaSalle v. New York State Div. of Parole, 69 A.D.3d 1252 (3d Dept.), lv. denied, 14 N.Y.2d 709 (2010) (court letter); Matter of Santiago v. New York State Div. of Parole, 78 A.D.3d 953, (2d Dept. 2010) (sufficient evidence of diligent effort); Matter of Partee v. Evans, 40 Misc.3d 896, 969 N.Y.S.2d 733 (Sup. Ct. Albany Co. 2013), aff'd, 117 A.D.3d 1258 (3d Dept. 2014), lv. denied, 24 N.Y.3d 901, 995 N.Y.S.2d 710 (2014).

21. An incarcerated individual has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; 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).

22. As for refusing to accept a plea bargain offer, the Board may emphasize the inmate's failure to take responsibility for the criminal offense. Cruz v Alexander, 67 A.D.3d 1240, (3d Dept. 2009); Abdur-Raheem v New York State Board of Parole, 78 A.D.3d 1412 (3d Dept. 2010); Khatib v New York State Board of Parole, 118 A.D.3d 1207 (3d Dept. 2014); Crawford v New York State Board of Parole, 144 A.D.3d 1308 (3d Dept. 2016). The Board may inquire into the circumstances surrounding charges and the underlying incidents that were ultimately dismissed. Lynch v New York State Division of Parole, 82 A.D.2d 1012 (3d Dept 1981); People ex rel. Herbert v New York State Board of Parole, 97 A.D.2d 128 (1st Dept 1983). The Board may consider all of the circumstances surrounding the conviction, including conduct for which the

inmate was not convicted, as long as evidence of said conduct is in the record, and it is not the sole basis for the Board's decision. Williams v Travis, 11 A.D.3d 788 (3d Dept. 2004); Nunez v Dennison, 51 A.D.3d 1240 (3d Dept. 2008); Fransua v Alexander, 52 A.D.3d 1140 (3d Dept. 2008); Brower v Alexander, 57 A.D.3d 1060 (3d Dept. 2008) lv. den. 12 N.Y.3d 707, 879 N.Y.S.2d 53. "'Arbitrary action is without sound basis in reason and is generally taken without regard to the facts'; or, put differently, '*[r]ationality is what is reviewed under . . . the arbitrary and capricious standard.*'" Hamilton v. New York State Division of Parole, 119 A.D.3d 1268, 1270 n.1, 990 N.Y.S.2d 714, 716 (3d Dept. 2014) (quoting Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974)).

23. The petitioner has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was irrational "bordering on impropriety." Matter of Silmon v. Travis, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000) (quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980)).

24. In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of Fuchino v. Herbert, 255 A.D.2d 914, 914 (4th Dept. 1998); Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456 (2d Dept. 1994); Matter of McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945(3d Dept. 1990); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

25. Petitioner's claim that the Board failed to comply with the 2011 amendments to the Executive Law is rejected. Dolan v New York State Board of Parole, 122 A.D.3d 1058 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169(3d Dept. 2015).

26. The 2011 amendments to the Executive Law, as well as the state regulations

governing parole, do not create a legitimate expectancy of release that would give rise to a due process interest in parole. Fuller v Evans, 586 Fed. Appx. 825 (2d Cir. 2014) cert.den. 135 S.Ct. 2807, 192 L.Ed2d 851.

27. The issue of the 2011 amendments being present/forward based. The Appellate Division is a single Statewide court divided into departments for administrative convenience. The doctrine of stare decisis requires trial courts statewide to follow precedents set by the Appellate Division of another Department until the Court of Appeals or the Appellate Division in their Department pronounces a contrary rule. This is necessary to maintain uniformity and consistency. Mountain View Coach Lines Inc. v Storms, 102 A.D.2d 663 (2nd Dept. 1984); People v Turner, 5 N.Y.3d 476, 806 N.Y.S.2d 154 (2005). Lower court Judges must apply existing precedent unless it is expressly overruled. Agostini v Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed2 391 (1997).

28. Petitioner didn't raise any issue of alleged COMPAS errors during the interview, thereby waiving the issue. Matter of Morrison v. Evans, 81 A.D.3d 1073 (3d Dept. 2011); Matter of Vanier v. Travis, 274 A.D.2d 797(3d Dept. 2000). Petitioner claims his COMPAS was corrected after the interview. Appellate review is limited to the record made at nisi prius, meaning new facts may not be injected into the record, absent matters which may be judicially noticed. Muntaqim v Keyser, 184 A.D.3d 189 (3d Dept. 2020); Broida v Bancroft, 103 A.D.2d 88, 93 (1984); Paoletti v Karian, 266 A.D.2d 691 (1999); Jackson v Dow Chemical Co., 295 A.D.2d 855, 857 (2002).

29. Contrary to Petitioner's claim, the 2011 amendments and 9 NYCRR § 8002.2(a) as amended do not represent a present/forward-looking shift requiring the COMPAS to be the fundamental basis for release decisions. This proposition is not supported by the language of the

statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process. In 2011, the Executive Law was amended to require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259 c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042 (3d Dept. 2016); Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559(4th Dept. 2014). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each incarcerated individual by considering the statutory factors, including the instant offense. Executive Law § 259-i(2)(c)(A); Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. 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 instrument cannot mandate a particular result. Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether all three statutory standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059 (3d Dept. 2014); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021 (3d Dept. 2017).

30. For the foregoing reasons, the petition should be dismissed.

RECORD BEFORE THE RESPONDENT

A copy of the administrative agency's records in this matter is submitted herewith:

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 affidavit

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

11) TAP/Offender Case Plan.

12) Letters

13) Deportation Order

Dated: Poughkeepsie, New York
March 7, 2022

Respectfully Submitted,

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

Elizabeth A. Gavin
Assistant Attorney General

Cc: Rhick Bose, Esq.
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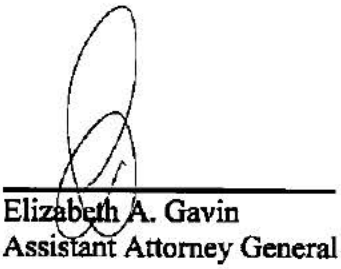
(via NYSCEF)

Elizabeth A. Gavin, 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 Answer and 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 Department of Corrections and Community Supervision and respondent and, as to those matters, he believes them to be true.

DATED: Poughkeepsie, New York
March 7, 2022



Elizabeth A. Gavin
Assistant Attorney General