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### Art. 78 Response - FUSL000152 (2022-10-26)

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

In the Matter of the Application of

Petitioner,

-against-

TINA M. STANFORD, CHAIR OF THE  
NEW YORK STATE PAROLE BOARD,

Respondent.

**ANSWER AND RETURN**

Hon. Christie D'Alessio, J.S.C.

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.

**AS AND FOR A DEFENSE TO THE PETITION**

4. Petitioner was convicted of two counts of Murder, Rape in the First Degree and Kidnapping in the First Degree and was sentenced, in 1975, to a maximum aggregate indeterminate term of incarceration of 20 years to life. (Exhibit 1, Sentence and Commitment Orders).
5. On August 13, 1971, the petitioner, then twenty-four years old, lured his nine year old female victim to a Bronx park where he brutally attacked, raped and killed her by fracturing her skull.

After the murder, petitioner fled the scene leaving the little girl's naked and bruised body to be discovered in the Bronx River. (Exhibit 2, Pre-Sentence Investigation, *In Camera* Review Only; Exhibit 4, pages 12-16).

6. Petitioner appeared for his most recent Parole Board Release Interview in August 2021. After the interview, the Board denied discretionary release and imposed an 18-month hold on reconsideration. (Exhibit 4, August 2021 Parole Interview Transcript and Exhibit 5, Parole Release Decision Notice). The disposition was affirmed at the conclusion of an administrative appeal. Petitioner administratively appealed and the disposition was affirmed. (Exhibit 6, Administrative Appeal Decision Notice and Exhibit 7, Appeals Unit Findings). This proceeding followed.

7. During the Parole interview, petitioner admitted to luring his minor victim to a park under the guise of buying her candy. (Exhibit 4, p. 14-16). He acknowledged that he was drinking and smoking marijuana prior to the offense and that he knew his victim for approximately two years as someone who lived in the same building as his mother and as someone who often played with his daughter. (*Id.* at 14, 20). Petitioner struggled throughout the interview to explain his behavior that day. (*Id.* at 13, 16, 17, 19, 20).

8. The Board discussed with petitioner his offense, his family life, his criminal record, his institutional record, his release plans, his present health, the case plan, the COMPAS instrument and various letters of support. 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 mixed COMPAS scores but was not convinced his release would be appropriate. The determination states, in part, 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 of murder, kidnapping first, and rape first, where, by your own admission, you lured your nine-year-old female victim to a secluded area in a park near the Bronx Zoo. You led her to believe you were going to buy her candy but, instead, took her approximately 20 minutes away from her home, forcibly removed her clothing, forcibly raped her, and fractured her skull, resulting in her death. Records indicate you left her body in a river where she was found and which you deny. It also indicates she died from a fractured skull which you also minimize.

Your disciplinary record is minimal. You have also participated in programs, and your COMPAS is low with the exception of probable reentry, substance abuse. The panel departs from the low scores on the COMPAS, specifically risk of felony violence, as during the interview and despite approximately 50 years of incarceration, emersion in rehabilitative programs such as ART, ASAT, and SOP, you failed to provide motivation for the brutal rape and disregard of your vulnerable nine-year-old victim whom you knew, who played with your daughter and trusted you. During the interview you often couldn't answer the commissioner's questions critical to your acts, deviant behaviors, distorted thinking, or how you would prevent this behavior in the future.

Another aggravating factor is that you continue to blame alcohol and drugs for the depravity you exhibited, changed your account of the crime and rationale for your crime compared to past interviews, and relayed that you were with your young victim approximately two hours, yet, could not account for what you were doing during that time. As such, the panel finds you unbelievable and without understanding of your behaviors, coping mechanisms, and motivation behind your sex offender and homicidal behavior. The likelihood of you committing a similar act is increased. Therefore, release is not warranted and to do so would deprecate the serious nature of the crime and undermine respect for the law.

(Exhibit 4, pages 47-48).

#### **Petitioner's Claims**

9. Petitioner maintains, as he did at the administrative appeal, that the decision is arbitrary and capricious in that the Board failed to consider and/or properly weigh the required statutory factors and based the determination solely on the instant offense.

10. The petitioner also claims for the first time, in the instant proceeding, that the Board failed to adequately explain its departure from the COMPAS and that one of the main reasons for the decision, petitioner's lack of insight, is not supported by the record. Since these arguments were not raised by the petitioner in his administrative, they should be deemed waived and not be considered for the first time in this

Article 78 proceeding. Cruz v Travis, 273 A.D.2d 648 (3d Dept 2000); Moore v New York State Board of Parole, 233 A.D.2d 653 (3d Dept 1996); Matter of Samuels v Kelly, 143 A.D.2d 506 (4<sup>th</sup> Dept 1989), leave to appeal denied 73 N.Y.2d 707 (1989); Beyah v Leonardo, 182 A.D.2d 868 (3d Dept 1992); Hernandez v Alexander, 64 A.D.3d 819 (3d Dept. 2009); Santos v Evans, 81 A.D.3d 1059 (3d Dept. 2011); Tafari v Evans, 102 A.D.3d 1053 (3d Dept. 2013); Del Rosario v Stanford, 140 A.D.3d 1515 (3d Dept. 2016); Peterson v Stanford, 151 A.D.3d 1960 (4<sup>th</sup> Dept. 2017); Brunson v New York State Department of Corrections and Community Supervision, 153 A.D.3d 1077 (3d Dept. 2017). A defendant raising a different angle of complaint about a parole matter than raised at the lower level is unpreserved for appeal. People v Escalera, 121 A.D.3d 1519 (4<sup>th</sup> Dept. 2014).

### ARGUMENT

11. Even if given consideration, 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.

12. Despite petitioner's argument, 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 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.

13. Petitioner has acclimated to incarceration and availed himself of available programs. A discretionary release to parole, however, 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).

14. 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.*

15. 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). 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 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 apparent lack of insight and present inability to explain his criminal behavior as well as his minimization of his violent behavior, outweighed more positive factors and made discretionary release inappropriate at this time.

16. 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).

17. 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).

18. 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 still 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 so deprecate the seriousness of the crime as to undermine respect for the law. Executive Law § 259-i(2)(c)(A) (emphasis added); *accord* Matter of Hamilton v. New York State Div. of Parole, *supra*. (3d Dept. 2014).

19. 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, and must merely identify any particular scoring with which it disagrees and articulate its reasons (9 NYCRR



§8002.2(a)). Here, the Board noted the high probability of re-entry drug abuse and the otherwise low COMPAS scores, but permissibly departed from it, citing petitioner's present inability to offer any meaningful insight into his criminal behavior despite fifty years of programming during his incarceration.

20. 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 criminal history 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 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.

21. 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, petitioner's present minimalization of the murder, combined with his apparent unwillingness to engage in the type of self-reflection needed for reform, provide ample support for the Board's decision.

22. 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 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742 (3d Dept. 2002); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128 (1st Dept. 1983). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations.

23. 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.

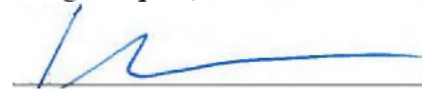
**RECORD BEFORE RESPONDENT**

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 (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. Administrative Appeal Decision Notice
7. Statement of Appeals Unit Findings
8. Brief on Administrative Appeal
9. COMPAS Instrument (\*\*Redacted version to Petitioner)
10. Case Plan

**WHEREFORE**, respondent requests that the petition be denied.

DATED: Poughkeepsie, New York  
October 26, 2022

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



HEATHER R. RUBINSTEIN  
Assistant Attorney General

To: Kathy Manley, Esq. (via NYSCEF)

**Heather R. Rubinstein**, 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, she believes them to be true.

DATED: Poughkeepsie, New York  
October 26, 2022



Heather R. Rubinstein  
Assistant Attorney General