Art. 78 Response - FUSL000134 (2022-06-16)

[redacted]

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FUSL000134

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of
[redacted],

ANSWER AND RETURN

Petitioner,

[redacted]

-against-

Tina M. Stanford, Chair of New York State Parole Board,

Respondent(s).

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.

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AS AND FOR A DEFENSE TO THE PETITION

4. This 76 year old petitioner was convicted after trial of two counts of Attempted Murder 2nd Degree, 13 counts of Assault 1st Degree, two counts of Criminal Possession of a Weapon 3rd Degree, and one count of Assault 2nd Degree. He was sentenced on May 12, 1996 to a term of eight and a third to 25 years on the attempted murder charges, 5-15 years on all assault first degree charges, and two and a third to seven years on all remaining charges. (Exhibit 2, Sentence and Commitment).

5. His convictions arose from separate, but essentially similar acts, each with multiple actual and potential victims. As a result while some sentences were concurrent, others were consecutive to one another and he did not complete his aggregate minimum sentence of incarceration, and became eligible for discretionary parole release, until 2020. He had his second appearance before the Board of Parole on October 5, 2021. Parole release was denied, and petitioner was ordered held for another 18 months.

6. Petitioner timely perfected his administrative appeal on February 28, 2022. The Appeals Unit dismissed the appeal on May 2, 2022. This timely article 78 petition followed (Exhibit 6, Appellate Brief; Exhibit 8, Administrative Appeal Decision Notice; Exhibit 7, Appeals Unit Findings).

7. The [redacted] educated petitioner, at the age of 49, attempted mass murder on two occasions. On December 15, 1994 and again a week later on December 21, 1994.

8. On December 15, 1994, he drove from his home in suburban New Jersey to Brooklyn and brought with him a home-made incendiary device, concealed in a paper bag.

He went to the Atlantic Avenue subway station and planted the device on a Number 3 IRT train bound for Manhattan. His motivation – as described during the October 5, 2021 Parole Board interview was "to create hysteric, and a noise, attract attention." (Exhibit 4, p. 10, l. 6-8) because he was "angry at nothing" (Exhibit 4, p. 15, l. 12).

9. The incendiary device petitioner planted on December 15, 1994 exploded. It was found and picked up by a teenage student, [redacted], who placed it in his bookbag. The device exploded at 3:15 p.m. in the West 145th Street IRT station, when, according to petitioner's report, [redacted] tried to show his find to a friend. As it happened, only the two youths were injured.

10. The incident did not garner the notoriety that petitioner anticipated. He saw and heard no coverage about an explosion in the subway in the press, radio or television he monitored. His deed did not make a satisfactory loud "noise." So, he tried again.

11. The petitioner returned to Brooklyn on the afternoon of December 21, 1994 with another, more powerful, home-made incendiary device. It was constructed similarly of a glass jar of gasoline with a trigger. The trigger was a battery-operated kitchen timer with a match-head primer. This time the petitioner went to the Atlantic Avenue subway station and boarded a Manhattan bound 4 train on the IRT line. He took it to the Fulton Street station where, reaching into his paper bag, he accidentally detonated the device, causing it to explode and a blast of flames to engulf the interior of the packed, standing room only, subway car. The desired "hysteric" followed with a number of riders receiving serious burn and stampede injuries.

12. The petitioner, although one of those seriously burned, first caught a train back

to Brooklyn in an effort to elude capture, but the severity of his injuries soon caused him to seek assistance. Petitioner tried to pose as a victim of the catastrophe, instead of its source, but the oddity of his fleeing the incident site, alone, without help, when so badly injured, and the descriptions provided by eye-witnesses, brought questions, a warrant and arrest. Similarity linked the December 15, 1994 and December 21, 1994 bombings. Evidence referring to a "Mad Bomber" and a plan to detonate an incendiary device on a subway car while it was passing through the tunnel beneath the East River, remote and relatively unreachable by any emergency response, were found in petitioner's home in New Jersey.

13. The trial jury rejected his defense that his deeds were precipitated by the malfeasance of a psychiatrist treating him for a mild depression. It is petitioner's only arrest and his only conviction. He has acclimated to incarceration, avoiding disciplinary infractions, availing himself of the limited higher educational opportunities available and those programs of interest to him.

14. In a searching interview, the Board discussed with petitioner his offense, his family life, his lack of any criminal record or involvement, his lengthy institutional record, his release plans, the case plan, the COMPAS instrument and sought to elicit information on which it could assess Petitioner's personal motives, attitudes and insights. The petitioner continues to maintain that he had no malice, ill will or harmful intent when planning and executing his bombing of the New York City subway during periods of high-use. He asserts that he was "angry at nothing" and his destructive acts were "crazy" and brought about by the prescriptions given to him to treat his depression.

15. Following the interview, review of his submissions, and consideration of all

statutory factors, discretionary release was denied. The Board noted that his COMPAS scores showed a low probability of future arrest or violent conduct, but was not convinced that its statistical analysis fully captured the individual nuances that made petitioner his release so inappropriate. The determination states that:

> **After a careful review of the record and your interview this panel has determine that if released at this time there is 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 is denying your discretionary release.**
>
> **In the instant offense you detonated incendiary devices on new york city subway trains causing injury to over 50 people. results from these explosions included victims being engulfed in flames where some underwent surgery and long-term hospitalization. during the interview you admitted that you committed the instant offense but minimized your responsibility for the harm and terror you instilled to members of the new york city area.**
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> **The instant offense represents your first contact with the criminal justice system and 1st period of nys incarceration. during this period of incarceration, you have not received any disciplinary infractions, earned college degrees, and worked as a teacher's aide this panel acknowledges your attempt at rehabilitation by also completing recommended programs however discetionary release should not be granted merely as a reward for good conduct or efficient performance of duties while confined.**
>
> **The panel also reviewed and considered your case plan goals and your parole packet which included letters of support from family and friends, re-entry programs and certificates.**
>
> **During the interview and in your parole packet you declared that you committed the instant offense while confused and drugged by prescribed psychiatric medication. you repeatedly discredit the psychiatrist who previously treated you for depression and stated you do not intend to seek mental health services upon release. during the interview you stated that you committed the instant offense because you were in a toxic psychosis and was crazy and minimized the amount of harm you caused your victims by your criminal actions. your inability to acknowledge the level of harm that you cause your victims and limited insight into what motivated you to commit this crime, leaves society vulnerable to potential harm by you.**
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> **In considering your release we also reviewed the risk and needs assessment which indicates that your risk to reoffend is low, this panel.departs from your low-rick score of felony violence due to the instant offense in which through your criminal behavior you showed great disregard for human life. you were aware·of the potential harm the incendiary device you created could cause and**

claimed during the interview that you wanted the devices to create big noise and attract attention. you engaged in criminal conduct which impacted an entire community.

(Exhibits 4 Transcript & 5 Parole Board Decision).

Petitioner's Claims

16. Petitioner maintains, as he did at the administrative appeal, that: 1) the decision is arbitrary and capricious, and irrational, bordering on the improper. He contends that the Board failed to consider and/or properly weigh the required statutory factors. 2) the decision lacks detail. 3) the decision is based upon erroneous information as to how many victims were injured. 4) petitioner professes remorse and has insight. 5) he can engage in mental health services on an outpatient basis. 6) statistics show he is a good candidate for release. 7) the Board failed to comply with the 2011 amendments to the Executive Law, and the 2017 regulations, in that the COMPAS was ignored, and the departure from the COMPAS was improperly done as it was based solely on the instant offense.

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

18. The Board's determination was not based on any erroneous information or improper considerations and is supported by the record. It was based on an evaluation of the required factors and the facts bearing on the petitioner's suitability for release. The written decision denying release adequately states the basis for the decision in terms of the particular facts relevant to the petitioner in the context of its interview. Petitioner's attempt to constrain discretionary parole release decisions to a mandate to implement a

statistical analytic tool is as clear a distortion of the parole process, as clear a distortion on this record as the petitioner's claims of rehabilitation, acceptance of responsibility, remorse, empathy for his victims and acquired insight into his own motivations and actions.

19. 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 the Board's discretion in consideration whether there is a reasonable probability that, if released, petitioner 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).

20. 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, past criminal behavior, education, health, skills, future plans, promises of employment, and any statistical assessments of risks and needs deemed germane to a 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).

21. Judicial review 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 in this challenge, petitioner must show either

a significant deviation from statutory requirements or that the Board's determination is irrational "bordering on impropriety" before 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 and 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); *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*.).

22. In its determination, the Board need not explicitly discuss each factor considered *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), and the weight it attaches to any single factor is a matter entirely within its discretion. The Board appropriately may find that the nature, circumstances, and particulars of an offense are so egregious as to outweigh 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 authentic insight and remorse. *See* Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 506 (2d Dept. 2002).

23. Here, the record shows that the Board considered the appropriate factors and acted well within its discretion. It concluded that petitioner's demonstrated distain for well-being of the community, his negation of the value of the lives and comfort of others, and his capacity to cause harm, grievous loss and immeasurable pain to the individuals

comprising the community – characterized by the sentencing judge as "evil,"[1], outweigh any more positive factors, evinced through petitioner's institutional good behavior and achievements, and made his discretionary release inappropriate.

24. The Board may place particular emphasis upon the nature and circumstances of the inmate's offense and past behavior (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 to determine whether and, if parole release is granted, and when it may be appropriate. Hodge v Griffin, 2014 WL 2453333 (S.D.N.Y. 2014).

25. 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 incorporates statistical risk and needs analysis principles, as reflected in the COMPAS and similar instruments, to "assist" and "guide," but not to dictate to the Board whether and when release is appropriate. 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);

[1] "And so we are left with the only remaining explanation, one for which we hardly have a vocabulary in this rationalist, humanist, age. And that explanation, as far as I am concerned, is evil. Evil exists in this world. No reason for it. It is just there. And you are looking at it."
Exhibit 9, Sentencing minutes, p.39.

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).

26. The Board was not required to accept the statistical assessment and predictions of the COMPAS instrument, however, and since it was bound to consider the reasonable probability whether, if released, the petitioner will live and remain at liberty without violating the law; whether the petitioner'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).

27. There is no merit to the contentions that the Board based its decision solely upon the instant offense to the exclusion of other factors. 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 was assessing petitioner's current suitability for release in light of the particular crime committed and trying to sift from the known and documented history and its own interactions with petitioner any signs or indicia of rehabilitation, insight, personal growth and acceptance of responsibility that could inform its consideration of his likely future behavior in a fair attempt to assess his readiness for release, his capacity and willingness to be a contributing member of society exercising the degree of behavioral self-control demanded by the community.

28. There is a strong rehabilitative component in the law that is given important effect by the Board's discretionary consideration of an inmate's candor, insight, bona fide

acceptance of personal responsibility, authenticity or inauthenticity of protestations of remorse and empathy for the victims, and assessment of the reliability of promises of future adherence to the laws protecting the community..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). Whether petitioner now possesses the degree of empathy, self-reflection and self-control needed to avoid further harm to the community is a question the Board must answer to its own satisfaction based on the information before it. Those subjective assessments should not be disturbed so long as they are rational and based on any reasonable view of the information available to it.

29. As the Board found, the record here shows that petitioner has little, if any, current or articulable understanding of or insight into why he acted as he did. A reading of the interview transcript shows that he continues to attribute his actions to the fault of others and minimize the harm he wrought both to the numerous individuals injured most grievously and to the entire community. Whether the font of petitioner's wanting to make a loud noise is viewed as evil, or, in more humanistic terms, classic *kleos* – the need for and attainment of lasting renown through conduct, virtuous or destructive, the Board rationally considered the information before it in concluding that petitioner's release at this time is not compatible with the welfare of society. Given the scope of the harm, planning, premeditation and disregard for the lives of other shown by petitioner's subway bombings, the uncertainties arising from petitioner's posed inability to articulate any reason, motive or circumstance leading to his acts, the Board of Parole was justified in concluding that petitioner still poses an unacceptable risk

to the community.

30. 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). 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) 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.
10) COMPAS (**redacted portion to Petitioner).**
11) TAP/Offender Case Plan.

12) Judge letter. **In camera only**

WHEREFORE, respondent requests that the petition be denied.

DATED: Poughkeepsie, New York
June 16, 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

Efile

[redacted]

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
June 16, 2022

_____
J. Gardner Ryan
Assistant Attorney General