Art. 78 Petitioner's Reply - FUSL000112 (2020-07-15)

STATE OF NEW YORK
COUNTY OF SULLIVAN SUPREME COURT

In the Matter of
[redacted]

Petitioner.

-against-

REPLY AFFIRMATION

CPLR ARTICLE 78

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

Index No: [redacted]

Respondent.

Kathy Manley, duly authorized to practice law in the State of New York, hereby affirms the following under the penalties of perjury:

STATEMENT OF FACTS

1. In Paragraph 6 of the Answer, Respondent states that during the interview, Petitioner "expressed frustration with the way some view it, stating: '[on Page 69], "[p]art of these claims that I hate is we just killed two cops, you know?" Whatever Petitioner meant by that, the context is clear that he did *not* use the word "just" to mean "only."

2. The context is that Commissioner Corley had just asked Petitioner "once you got into the apartment, I'm wondering if you had anything to say or what your personal feelings was at that time?" (Exhibit "A" at 69) The word "just" in his response clearly refers to the fact that the murders had *just occurred,* i.e. right before he got to the apartment. Petitioner went on to answer the question very honestly, saying, "In our *misguided thinking*, I imagined that we was hoping the community would recognize that there are some people out there that was retaliating against our community being brutalized…" (Exhibit "A" at 69, emphasis supplied)

3. In Paragraph 8, Respondent used the word "incredulously" with regard to Petitioner stating that he now recognizes police can be heroic because, like firefighters, they run into rather than away from, danger. Again, the context is clear that Petitioner wasn't saying that all police always behave as heroes – he clearly is aware of the problems with policing in this country. However, it doesn't seem at all "incredulous" that he would say that police can be seen as heroes, in the same way firefighters are – he said he had a good friend who was a firefighter and that he saw them as heroes. (Exhibit "A" at 94) Petitioner went on to say that the same can be said about police, and he described a recent incident in Texas where he believed the police had behaved heroically to save lives. (Exhibit "A" at 94

4. Later on in Paragraph 8, Respondent notes that Petitioner became tearful when he said he needed to redeem himself for having taken two lives, but then said that prison doesn't really lend itself to that. It is well known that prison is a difficult place for people to open up and express their deepest feelings. It is an environment where one has to maintain an unemotional exterior for survival. While there are, fortunately, some programs which do help people to get in touch with their feelings, Petitioner has taken all those programs years ago, and has in fact been teaching these skills to others in prison.

5. As noted in the Petition, [redacted] started the first men's group in any US prison for this very purpose – to help other men express their feelings and work out conflicts nonviolently. After having spent nearly half a century behind bars, it is time for Petitioner to be able to do this important work on the outside.

ARGUMENT

COMPAS Scores and the Board's Stated Reasons for Denial

6. In Paragraph 18, Respondent stated (emphasis supplied):

> "The Board considered Petitioner's COMPAS instrument and low risk indicators therein but concluded release would be inappropriate under the second and third statutory standards [that release would be incompatible with the welfare of society and would deprecate the seriousness of the offense] *because Petitioner came across as still believing in the righteousness of his crime and his remorse lacked depth*."

7. As discussed at length in the Petition, those particular findings were very much contrary to everything in the record before the Commissioners. And it is noted that even Commissioner Davis seemed to have recognized Petitioner's sincerity, openness and honesty when he stated, "We appreciate your openness, we appreciate your willingness to thoroughly and completely answer our questions, and we value truth telling here on this panel. So thank you, sir." (Exhibit "A" at 70)

8. Significantly, there was little or nothing Respondent could point to in this record to support the Board's conclusions. So, in Paragraph 21, Respondent instead went beyond this interview [and the one in September, 2019] and pointed to statements in interviews from years ago, one in 2006 and one in 2016. Those interviews obviously say nothing about Petitioner's expressions of remorse *this time*, but they do show his trajectory of first taking responsibility for the offense (which he didn't do in 2006, but did in 2016 and, upon information and belief, prior to that) and then later learning, through spiritual work and then counseling, how to honestly discuss his heartfelt remorse with the Commissioners.

9. Also significantly, in Paragraph 23 Respondent erroneously claimed that because the Board had found that Petitioner was *not likely to re-offend*, there was no need to depart from

the COMPAS risk scores, or specify the scales departed from. In other words, the Board agreed with the COMPAS that Petitioner was completely low risk, but still denied release based on boilerplate statutory standards and by misrepresenting the record, as discussed above.

10. While there is limited case law on applying the 2017 Regulations regarding departures from the COMPAS scores, there are two recent decisions which make it clear that when there are completely low COMPAS scores and the Board claims, as it did herein, that "release would not be compatible with the welfare of society," that *is* a departure from the COMPAS. *Robinson v. Stanford*, NYS Misc. LEXIS 6110 (Dutchess Co. 2019); *Phillips v. Stanford*, 52579/19 (Dutchess Co. 2019.) (See also *Sullivan v. NYS Bd. of Parole*, 100865/2018 [NY Co. 2019] which held, even *before* the new regulations went into effect, that failure to consider the COMPAS in these circumstances merits a *de novo* hearing.) Therefore, as stated in those cases, the Board *was* required to specify the COMPAS scale(s) departed from, and to provide an individualized reason for said departure. In *Robinson*, supra, the court stated:

> "Th[at] [COMPAS] assessment gave the petitioner the lowest possible rating in categories for risk of felony violence, re-arrest, absconding and for criminal involvement and found he was unlikely to have issues with family support or significant financial problems upon release. *Petitioner correctly asserts that the Parole Board's finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores in his COMPAS instrument.* As the Board's determination denying release departed from these risk and needs assessment scores, pursuant to 9 NYCRR 8002.2 *it was required to articulate with specificity the particular scale …from which it was departing and provide an individualized reason for such departure. …*" *Robinson*, supra, at 3, emphasis supplied.

11. Interestingly, in *Sullivan v. NYS Bd. of Parole*, supra, the court granted a *de novo* hearing and stated:

> "…Respondent found that, although there was *not a probability that petitioner would violate the law if released,* the board rationally concluded that her release was

incompatible with the welfare of society and would deprecate the seriousness of her crime. Further, respondent stated…[t]he law requiring… explanation [of the COMPAS departure] was not in effect until the month after the parole hearing…

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…[B]oard decisions which merely include a list of an inmate's achievements and progress and track the language of the Executive Law regarding the harmful impact of release on society and the deprecation of the serious nature of the offense which would result from the inmate's release can suggest that the Board's decision violated the statutory mandates… Indeed, although the COMPAS score is not binding on the parole board… it is an important factor which the parole board must duly consider… Indeed, *the COMPAS score is so critical that the failure to consider it adequately mandates a remand. (see Symes [v. New York State Board of Parole]*, 117 AD3d 959 [2nd Dep't 2014]; *Malerba v. Evans*, 109 AD3d 1067 [3rd Dep't 2013]…)

There is another significant limitation on the discretion of the parole board. Where the petitioner makes a 'convincing showing' that the board reached its determination 'based *almost* exclusively on the nature and seriousness of the offense,' the decision may be overturned…

In the proceeding at hand, the Court concludes that respondent did not engage in the type of review that the statute and regulations require. Instead, respondent relied almost exclusively on the seriousness of the crime…

Respondent's written conclusions that 1) petitioner's release was incompatible with the welfare of society and 2) her release would deprecate the seriousness of her offense and therefore undermine respect for the law merely track the statutory language, without explanation or context…." *Sullivan,* at 6-9, some emphasis supplied.

12. In *Sullivan*, the Parole Board (represented by the Attorney General's Office as in the instant case) did *not* claim that there was no need to justify a COMPAS departure under the new regulations, but only said that the regulations weren't yet in effect. In any event, the court held that, even before those regulations went into effect, the failure to adequately deal with the low COMPAS scores mandated a new hearing.

13. And the *Sullivan* court made it clear that just mouthing the language of the statute did not suffice to justify denial. Here, the Board gave an explanation but, as discussed herein and at length in the Petition, that explanation was completely rebutted by the record.

Community Opposition

14. In Footnote 3, relating to Paragraph 24, Respondent states, "while now objecting that opposition comes from individuals who do not know him, Petitioner concedes he has similar support." It is true that in addition to the letters of support from 97 people who do know him, Petitioner does have letters from people who may not know him personally. But those letters do talk about his particular attributes; they don't rely on penal philosophy which runs counter to the way the law works. Upon information and belief, the community opposition herein does just that – stating that no one who has killed a police officer should ever be released from prison.

15. Respondent then states, in Paragraph 25, "[e]ven assuming some opposition to Petitioner's release reflected penal philosophy, the record does not indicate the Board afforded those statements any particular weight…" The record also doesn't show that the Board *didn't* give a great deal of weight to said statements. It is submitted that when a decision mentions community opposition in denying release, that is improper unless it is made clear that the Board wasn't considering improper statements of penal philosophy.

CONCLUSION

16. Based on the foregoing, the Court should grant a *de novo* hearing, and make it clear that: 1) where the COMPAS scores are all low yet the Board denies release, it must provide an individualized explanation for said departure, and must specify the scale(s) from which the Board departed; 2) the Board may not base denial on findings which are clearly not supported by the record (the Board must state, at least briefly, how the record supports its findings); 3) the Board may not deny release simply by repeating the words of the statute without explanation; and 4) the Board may not deny release based only on the seriousness of the offense.

17. Finally, Petitioner respectfully requests that if the Court grants a *de novo* hearing, that the interview occur within 30 days of the decision.

AFFIRMED: July 15, 2020.

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