Art. 78 Petitioner's Reply - FUSL000144 (2022-03-10)

[redacted]

[redacted]

FUSL000144

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of [redacted] Petitioner, For a judgment pursuant to Article 78 of the Civil Practice Law and Rules, -against- TINA M. STANFORD, Chairwoman of the New York State Board of Parole Respondent.	[redacted] Judge: Maria G. Rosa ORAL ARGUMENT REQUESTED

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION FOR RELIEF PURSUANT TO ARTICLE 78 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES AND IN OPPOSITION TO RESPONDENT'S ANSWER

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PRELIMINARY STATEMENT

After serving 30 years in prison for crimes that were committed when he was 23 years old, Petitioner [redacted] brings this action pursuant to Article 78 of the New York Civil Practice Law and Rules to vacate the February 2021 decision of the New York State Board of Parole (the "Board") denying him release on parole. Given Mr. [redacted] age, personal growth, and ties to the community, he is no longer a threat to commit any violent or nonviolent crime. Mr. [redacted] has paid his debt to society. Petitioner timely filed his Article 78 Petition on February 11, 2022. Respondent filed an Answer and Record for Review on March 7, 2022. None of Respondent's objections are persuasive.

The Board's decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." N.Y. CPLR § 7803(3). Respondent's Answer is in sum and substance a re-filing of the Board's Administrative Appeals decision. Dkt. No. 28. As a result, it fails to persuasively address three critical ways in which the Board's decision violated § 7803(3).

First, the Board erred when it issued its decision in reliance upon an inaccurate COMPAS assessment. Contrary to what Respondent suggests, this issue was properly preserved in Mr. [redacted] administrative appeal. Courts have discretionary power to reach issues properly raised on administrative appeal. *See Matter of Rodriguez v. Coughlin*, 219 A.D.2d 876 (4th Dep't 1995); *Mixon v. Wickett,* 196 A.D.3d 1094, 1096, 147 N.Y.S.3d 907, 908 (2021); *Nelson v. Coughlin,* 188 A.D.2d 1071, 591 N.Y.S.2d 670, 671 (1992). In addition, the two cases Respondent cites do not stand for the proposition that issues not raised in a parole hearing are waived.

Second, the Board erred when it issued its decision on the basis of a record that was incomplete and, beyond just the COMPAS assessment, otherwise erroneous. The record demonstrates that the Board did not review letters from the police, district attorney, and sentencing court. Respondent argues that these letters were requested, but conveniently ignores that the last request was in 1994 – *28 years ago*. Dkt. No. 33. There is nothing in the record to indicate that the Board attempted to solicit this crucial information at any point in the intervening decades, over which time the policy of the Manhattan District Attorney has changed to both (1) presumptively favor release of parolees and (2) to cease charging individuals under 25 in adult criminal court in recognition of new research on brain development and to prevent recidivism.

Third, to the extent that the Board considered Mr. [redacted] re-entry plan, it failed to meaningfully do so, as it relied on a plan provided by the state that contained an incorrect release address—an error that the Board impermissibly weighed against Mr. [redacted] Dkt. No. 6 at 15. Mr. [redacted] testified that his counselor "[noted his release address] wrong…the other [address] isn't put there," and that his "counselor said to fix it…when I arrived [at the hearing]." *Id.* at 7-8. By the time DOCCS acknowledged and corrected the error, the record was closed. Dkt. No. 10 at 4 ("Per our conversation the address noted on your Parole Board Report can be updated if you are granted a De Novo appearance.")

For these reasons, the Court should annul Respondent's parole denial and direct Respondent to immediately afford Petitioner a new, *de novo* parole release hearing.

ARGUMENT

None of Respondent's objections are persuasive, and all are insufficient to defeat Petitioner's Article 78 Petition.

I. THE BOARD'S DECISION WAS ARBITRARY AND CAPRICIOUS

Respondent contends that the Board's decision was not arbitrary or capricious or an abuse of discretion. In this objection, Respondent attempts to rebut each of the arguments made in Mr. [redacted] Petition, but none of these attempts is convincing. Most importantly, the record demonstrates that the Board erred by relying on an incorrect COMPAS assessment, failed to effectively solicit recommendations from Petitioner's trial counsel or the current district attorney, and relied on incorrect reentry plans.

A. The Board Improperly Relied on an Inaccurate COMPAS Assessment to Justify its Denial Decision

Respondent's argument that Petitioner waived this Court's consideration of the issue of his inaccurate COMPAS report by failing to raise the issue at his parole hearing is legally and factually wrong.

First, the caselaw establishes that this Court may reach issues that were raised and addressed on administrative appeal. *Matter of Rodriguez v. Coughlin*, 219 A.D.2d 876 (4th Dep't 1995) (Court may reach issues exhausted on administrative appeal); *see Mixon v. Wickett,* 196 A.D.3d 1094, 1096, 147 N.Y.S.3d 907, 908 (2021) (same); *Nelson v. Coughlin,* 188 A.D.2d 1071, 591 N.Y.S.2d 670, 671 (1992) (same). Here, the incorrect COMPAS issue was raised, and administrative remedies were properly exhausted, in Mr. [redacted] administrative appeal. *See* Dkt. No. 27 at 18-21 (exhausting administrative remedies by raising incorrect COMPAS issue at administrative appeal). Respondent's argument that Petitioner waived review of an incorrect COMPAS issue improperly relies on two inapposite cases: *Morrison v. Evans* and *Vanier v. Travis*.

In *Morrison v. Evans*, the petitioner argued that the Board's decision was based on an improper understanding that he was convicted of forgery in the first, and not second, degree. 81

A.D.3d 1073, 1073–74 (2011). Petitioner erroneously confirmed that he had been convicted of forgery in the first degree at his hearing. *Id.* Nonetheless, the court's decision did not find waiver. *Id.* It simply noted that petitioner "made no effort to correct [the] misunderstanding" at his hearing. *Id.*

In *Vanier v. Travis*, the court found that petitioner "failed to demonstrate that he was prejudiced" when he raised an objection, after his parole hearing, to the use of a two-way television to conduct his hearing. 274 A.D.2d 797, 797–98, 711 N.Y.S.2d 920 (2000). Petitioner argued that by using the camera, the Board violated the statutory requirement to be "personally interviewed." *Id.* In describing the circumstances of the hearing, the court noted that "no objection was expressed at the parole hearing." *Id.* In a separate sentence, the court noted that petitioner had not "properly preserved the issue of teleconferencing for our review." *Id.* Petitioner in *Vanier* did not object to the procedure used to conduct his hearing while it was occurring, when he clearly had the opportunity to raise it.

Here, however, Mr. [redacted] faces a completely different scenario. Unlike petitioner in *Vanier,* Mr. [redacted] claim is not a procedural issue later shoehorned into a substantive claim to secure an appeal. Instead, the Board was statutorily required to consider Mr. [redacted] COMPAS report. Mr. [redacted] had no way to know that the Board had an incorrect report at his hearing. The COMPAS report it relied on and "weigh[ed] heavily" was, however, incorrect. Dkt. No. 6 at 15. DOCCS recognized and corrected the erroneous report on March 9, 2021, one month *after* Mr. [redacted] parole board hearing. Dkt. No. 10, Corrected COMPAS at 4. Mr. [redacted] was not in a position to object during his parole hearing, and certainly not in a position to knowingly and voluntarily waive the issue. *See, e.g., United States v. Stevens,* 66 F.3d 431, 436 (2d Cir. 1995).

The COMPAS report before the Board erroneously showed Petitioner's Prison Misconduct score to be "High – 8." Dkt. No. 9, Erroneous COMPAS. This was a factual error committed by the DOCCS upon which the Board relied. In its decision the Board expressed particular concern that Mr. [redacted] institutional accomplishments were outweighed by the erroneous "high risk score for prison misconduct." *Id.* However, the *corrected* COMPAS score shows Mr. [redacted] Prison Misconduct score is actually a "Low – 1." Dkt. No. 10, Corrected COMPAS. This is a material change that a new panel deserves to hear *de novo* and evaluate immediately, not in 24 months.

Even if the Court were to consider Respondent's unsupported waiver argument, which it should not, Article 78's exhaustion and finality requirements exist to preclude the relitigation in state court of claims that have already been decided at the administrative level to preserve judicial resources and discourage gamesmanship. *See, e.g., Watergate II Apartments v. Buffalo Sewer Auth.,* 46 N.Y.2d 52, 57, 385 N.E.2d 560, 563 (1978); *see also United States v. Stevens,* 66 F.3d 431, 436 (2d Cir. 1995) (for the proposition that waiver must be knowing and voluntary). Here, however, Petitioner, proceeding in his parole hearing without counsel, could not have challenged the COMPAS report provided by the state because he stated on the record that he was not even familiar with the COMPAS report. Even if the preservation standard required him to raise the issue at his parole hearing, which it does not, *see, e.g.,* 219 A.D.2d at 876, when asked by Commissioner Cruse whether he was "familiar with the COMPAS," Mr. [redacted] responded, "I'm not really familiar with that." Dkt. No. 25 at 10. Thus, unlike in *Morrison*, where the petitioner presumably should have known and been familiar with his underlying conviction, Mr. [redacted] never confirmed the erroneous facts of his COMPAS report at his hearing. Furthermore, Petitioner should not be faulted for relying on the state to produce an accurate prison record.

The Board acted arbitrarily and capriciously by heavily relying on the state's production of an erroneous COMPAS report for their determination. The Board's decision should be vacated and remanded for a *de novo* review with the corrected COMPAS report.

B. Respondent Has Not Shown that it Properly Solicited Recommendations from the Sentencing Judge, Defense Counsel and the District Attorney

Respondent states that "[t]he Board did send letters to the sentencing Judge, DA and criminal defense lawyer. No response was received from any of them." Answer ¶ 19. Respondent fails to note that these letters were sent in 1994, *28 years before Mr.* [redacted] *was eligible for parole*. At the time of conviction Mr. [redacted] was 23 years old. In the intervening decades, the Manhattan, Brooklyn, and Queens District Attorney's Offices have all established "Post-Conviction Justice Units" that include parole and reentry assistance. The Manhattan DA's Office that prosecuted Mr. [redacted] currently has a policy in place to "participate substantively in the parole process with a presumption in favor of release" and to cease prosecutions of youth under 25 in the adult criminal court system because "[r]esearch shows that brain development continues until up to age 25, youth are physiologically subject to more impulsive behavior, and are still capable of growth and maturation." *See* Exhibit 1, Manhattan District Attorney, Day One Letter at 2-3, *available at* https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf. Also instructive is the model used by the Brooklyn DA, whose policy states:

> For cases in which juveniles (defined as age 23 or younger at the time of the offense) were sentenced to an indeterminate life sentence, special considerations must go into their parole determinations so that there can be a meaningful inquiry into whether they have matured into appropriate candidates for release.

See Exhibit 2, The Brooklyn District Attorney's Office Post Conviction Justice Bureau, *available at* http://www.brooklynda.org/post-conviction-justice-bureau/.

By failing to request the recommendations of the judge, DA and defense attorney for almost three decades, over which time policies and attitudes towards juvenile offenders who committed crimes at age 25 and under have markedly changed. Respondent has failed to show that the Board gave "due consideration to . . . recommendations of . . . the district attorney [and] the attorney for the inmate," as it must do, N.Y. Exec. Law § 259-i(2)(c)(A)(viii).

C. The Record Shows That the Board Did Not Meaningfully Consider Petitioner's Reentry Plans

The Board is not absolved of its duty to explain how it analyzed the relevant factors in a written decision "in detail and not in conclusory terms." N.Y. Exec. Law § 259-i(2)(a)(i); *see Mitchell v. New York State Div. of Parole*, 58 A.D.3d 742, 743 (2d Dep't 2009). Among those factors is "release plans including community resources, employment, education and training and support services available to the inmate." N.Y. Exec. Law § 259-i(2)(c)(A)(iii). As explained in Petitioner's initial brief, the record shows that the Board failed to meaningfully consider Petitioner's release plans, due in part to the fact that it reviewed an erroneous plan. (*See* MOL at 6-7.) Despite acknowledging the erroneous release plan, Respondent's only response is that "the Board did not deny release due to this." Answer ¶ 10. However, the record demonstrates that the Board did improperly consider and weighed this error against Mr. [redacted] The Board noted that Mr. [redacted] "provided a proposed residence other than that noted in the record." Dkt. No. 6 at 15.

The Board's conclusory analysis falls short of the Board's duty to meaningfully consider Petitioner's release plans, particularly where, as here, the Board failed to consider Mr. [redacted] testimony that his counselor "did this wrong…the other [address] isn't put there," and that his "counselor said to fix it…when I arrived [at the hearing]." *Id.* at 7-8. Petitioner must be given a *de novo* hearing so that the Board can properly consider his release plans.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court enter an order:

Petitioner respectfully requests that the Court enter an order:

1. Annulling the decision of Respondent, dated February 9, 2021, denying Petitioner [redacted] parole release; and
2. Directing Respondent to immediately afford Petitioner a new, *de novo* parole release hearing before a new panel that does not include any commissioner who has previously denied Mr. [redacted] release, at which Respondent shall consider all appropriate statutory factors governing parole release determinations; and
3. Granting such additional relief as the Court deems just and proper.

Dated: March 10, 2022
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 202.8-b

1. This brief complies with the type-volume limitation of Uniform Civil Rule 202.8- b because it contains 2,251 words, calculated by the word processing system used in its preparation, and excluding the parts of the brief exempted by Uniform Civil Rule 202.8-b.

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New York, New York

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