Art. 78 Petition - FUSL000102 (2019-11-12)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

[redacted],

Petitioner,

v.

THE NEW YORK STATE BOARD OF PAROLE,

Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

PETITION

Index No: _____

Preliminary Statement

In denying [redacted]'s parole application, the panel majority placed primary reliance on the observation that his "prison misconduct" score on his Compas assessment report was "High." This was false. The Compas report describes Mr. [redacted]'s score in this category as "Low." This is not a difference of interpretation; it is a flat misstatement of the record. Indeed, the Board erroneously recited that the score was a 10, whereas the report itself shows a score of five—and expressly characterizes that number as "Low."

Mr. [redacted] has consistently and repeatedly taken responsibility for his involvement in a 1981 robbery in which another participant shot and killed an off-

duty police officer. Indeed, in the 38 years he has already spent in prison as a result of that incident, Mr. [redacted] has been both eloquent and adamant in his embrace of responsibility for his crime. He has conveyed his remorse and manifested his rehabilitation in numerous ways. Neither the Compas assessment tool nor any other evidence suggests that Mr. [redacted] poses any risk of violence, flight, or re-arrest if he were to be released.

Almost seven years ago, Mr. [redacted] asked the commissioners conducting his fourth parole interview whether there was any purpose in his continuing to appear before the Board, or whether denial—at that hearing and forever—was a forgone conclusion. He asked that question fully understanding both the gravity of his offense and the sentiment within the Board against release of anyone convicted of crimes involving the death of a police officer. He asked that question knowing that he was really asking another series of questions: Would the Board ever actually consider his remorse? His rehabilitation? His hope for forgiveness? For this Court, that question takes a specific form: has the Board actually complied with its governing statutes and its own regulations, in his case? The record and the law are clear that it has not.

The panel majority's decision-making process here was worse than arbitrary. It was simply and obviously wrong. It reflects an egregious failure to properly use the very "risks and needs" instrument that the Board itself has chosen

to rely on. This stark misrepresentation of the record before it requires reversal of the Board's denial of parole.

Venue

This action is properly commenced in Dutchess County both because it is the county where the petitioner is confined and because it is the county where the Board conducted the parole hearing and made its decision to deny parole. CPLR 506(b); Ex. 1 at 1 (reciting "Location" as "Green Haven Correctional Facility Videoconference to NYS DOCCS 20 Manchester Road, Poughkeepsie, New York.").

Procedural History

This petition challenges petitioner [redacted]'s most recent denial of parole on November 28, 2018, after a hearing conducted via videoconference on the same day. (Ex. 1 at 20-21.) Mr. [redacted] timely filed notice of administrative appeal, which was perfected on April 11, 2019. (Ex. 2.) On July 17, 2019, Mr. [redacted]'s counsel received the Board's Appeals Unit's decision affirming the Board's denial of parole, which was dated July 10, 2019. (*See* Ex. 3.) Mr. [redacted] has exhausted his administrative remedies and this matter is ripe for the present special proceeding.

Factual Background

In 1981, [redacted] joined two acquaintances in robbing a civilian of a briefcase containing cash. During the course of the robbery, the victim's son-in-law emerged from a nearby house and attempted to intervene. One of the other participants shot and killed the son-in-law. The son-in-law turned out to be an off-duty police officer. (Ex. 1, Nov. 28, 2018 Tr. at 11:4-8.)

Mr. [redacted] was convicted of second-degree murder and related charges and sentenced to 25 years to life. He entered prison in 1983. This was his first time in prison. (Ex. 8 at 2.) He was 21 years old. He is now 59. He has been incarcerated almost twice as long as he lived free.

Over the years of his imprisonment, Mr. [redacted] received a number of mostly minor disciplinary infractions. (Ex. 4.) Early on, he was disciplined a number of times for using marijuana. (*Id.*) However, his record has improved markedly over time. (*See generally id.*) He has not received any violence-related disciplinary "tickets"—for even so much as a push or a shove—since 2002. (*Id.*) He has never been disciplined for having or using any kind of weapon in prison. (*Id.*) His most recent infraction (in 2015) reflected only the fact that his electric cooker overheated. (*Id.*) And, Mr. [redacted] received no infractions at all in the two years preceding his most recent denial of parole. (*Id.*)

Mr. [redacted] is now 59 years old. He has spent 38 of those years incarcerated as consequence of his participation in the 1981 robbery. He has been eligible for parole since 2007, but his applications for parole have been denied on every occasion: a total of seven times.

Although limited in his activities due to a serious heart condition and significant learning disabilities, Mr. [redacted] has made active use of the rehabilitation programming available to him. (Ex. 1, Nov. 28, 2018 Tr. at 16:21-17:5 (describing rehabilitative programming); *id.* at 7:12-14 (explaining that "I was in GED, but I have a special ed issue, so I'm working and trying to do the best I can."); *see also* Ex. 6, Feb. 8, 2011 Tr. at 6:20-22 (describing heart attack shortly before parole interview).) He has completed aggression replacement training and substance abuse counseling including AA, among other programs. (Ex. 1, Nov. 28, 2018 Tr. at 16:21-17:21.) Mr. [redacted] has consistently described his ambition to work with young people at risk of irresponsible behavior to avoid the types of bad decisions that he made. (*Id*. at 17:6-14; *see also* Ex. 6, Feb. 8, 2011 Tr. at 9:22-10:5 (same plan expressed at 2011 parole interview).) He is in close contact with his family, and his niece (who, like several other family members, visits him regularly at Green Haven Correctional Facility) has invited him to live with her if he should successfully obtain release to parole supervision. (Ex. 1, Nov. 28, 2018 Tr. at 4:2-17.)

Mr. [redacted] has repeatedly and consistently acknowledged responsibility for his role in the 1981 shooting. His DOCCS-generated "Parole Board Report" for his November 2018 parole interview states that he "continues to admit guilt in the instant offense and takes full ownership for his actions." (Ex. 5.) He both began and ended his November 2018 parole interview by conveying his wish for forgiveness. (Ex. 1, Nov. 28. 2018 Tr. at 3:13-17; *id.* at 18:23-19:4.) This theme appears consistently in his parole interview transcripts across the years. (Ex. 6, Feb. 8, 2011 Tr. 6:12-17 ("I understand my responsibility, and I take full responsibility [for] what happened."); *id.* 6:25-7:6 ("I take responsibility for my actions. There's nothing I can do. I can't bring that back. I made a mistake in my life. I accept that. I accept that wholeheartedly. I realize my mistake. … I made a bad choice in my life, and I'm paying for it."); Ex. 7, Dec. 18, 2012 Tr. at 6:3-17 ("[T]here's no justification behind this. I made a bad choice in life and this is a bad mistake that I made. I am not going to sit here and try to deny it…I messed up…It happened and I am taking full responsibilities of my actions of being there…I made a bad choice of even having a gun…I am taking full responsibility of being there that night.").)

In the course of a December 18, 2012, parole interview, one of the commissioners acknowledged Mr. [redacted]'s effort to take full responsibility for his actions. Commissioner Elovich noted that Mr. [redacted] "wrote a three-page letter to

the Board of Parole, talking about [his] actions and some of [his] insights and expressing remorse for what [he] had done." (*Id.* at 8:1-7 (commenting that Mr. [redacted] "did a nice job" on letter).)

With each denial of parole, it has become more difficult for Mr. [redacted] to believe that his record of remorse and rehabilitation, and the objectively confirmed absence of risk to the wider community are actually being considered by the Board. And his experience prompted him, several years ago (several parole interviews ago) to pose a question that goes to the heart of parole as an institution in New York State. At his December 18, 2012 hearing, Mr. [redacted] asked the Commissioners: "I'm just asking you, this offense is never going to change…and I understand how the public and Commissioners feel and I truly accept that. If there is no need for me to come back before this Board, if you are telling me I am not never going to get released, can that be known to me?" *Id.* at 11:4-9.

Compas Assessment

In advance of his November 2018 parole interview, Mr. [redacted] was assessed on August 27, 2018, using the Compas risk assessment instrument.[1] (Ex.

[1] "Compas" stands for Correctional Offender Management Profiling for Alternative Sanction. It is a protocol adopted by the Board pursuant to the 2011 amendment to Executive Law Section 259-c(4), which required the Board to utilize an objective "risks-and-needs" approach in its decision-making.

8.) His risk was assessed as "low" on all three of the assessment risk scales reflected in the instrument:

ASSESSMENT RISK SCALES	
Risk of Felony Violence :	Low
Arrest Risk :	Low
Abscond Risk :	Low

(Ex. 8 at 2.) This was corroborated by his low corresponding "Criminogenic Need Scales."

Criminogenic Need Scales

New York		
Risk of Felony Violence	2	Low
Arrest Risk	1	Low
Abscond Risk	1	Low

(*Id.* at 1.) Indeed, Mr. [redacted] received the lowest possible risk scores for arrest risk, abscond risk, "criminal involvement," and absence of family support. His scores for "ReEntry Financial" and "ReEntry Employment Expectations" are both rated as "unlikely" to present risk. (*Id.* at 1.) Thus, and unsurprisingly, Mr. [redacted]'s "supervision status level" was determined to be four, which is the lowest level of risk classification under the Compas assessment tool. (*Id.* at 3.)

Mr. [redacted]'s risk score for "Prison Misconduct" was five, which the report describes as "Low." (*Id.* at 1.)

Apart from the — concededly serious — crime for which he is presently incarcerated, Mr. [redacted] has no other adult criminal history and has never before been incarcerated. (*Id.* at 4 (responses to questions two and three).)

November 2018 Parole Denial

Mr. [redacted] appeared for his seventh parole interview on November 28, 2018. In the course of that short interview, conducted by videoconference, the only commissioner to speak substantively or pose any questions to Mr. [redacted] was Commissioner W. William Smith. The colloquy, guided by Commissioner Smith, focused primarily on the facts of the underlying crime, but did acknowledge Mr. [redacted]'s strong family support, positive recommendations from his supervisor, and completion of rehabilitation programming. Apart from the facts of the underlying offense, the only adverse factors alluded to in the interview were Mr. [redacted]'s prison discipline history and his Compas scores.[2]

Commissioner Smith observed an obligatory piety by reciting that "[t]he instant offense is one of many things we look at, as we determine whether now is an appropriate time for you to go into the community," (Ex. 1, Nov. 28, 2018 Tr. at 3:18-20) and that the panel's consideration would be on "certainly not just the instant offense" (*id.* at 17:25-18:2). However, any fair reading of the

[2] Commissioner Smith did allude to letters received from the Queens County district attorney's office, but those letters themselves merely recapitulate the facts of the underlying offense. (*See e.g.* Ex. 9.)

interview transcript—particularly in the context of the disconnect between the result and Mr. [redacted]'s actual Compas report—shows that the actual focus was on the crime alone.

To begin with, fully seven pages of the 19-page interview transcript are devoted to a recapitulation of 1981 robbery and shooting. (*Id.* at 8-14.) Most of the rest of the transcript is devoted either to introductory procedural matters, to misstatements about the Compas report, or to *positive* features of Mr. [redacted]'s application.

For example, Commissioner Smith acknowledged that Mr. [redacted] has a "stable environment" to return to, in the home of his adult niece. (*Id.* at 4:2-5:3.) He also acknowledged multiple "commendable work reports" and "good evaluations" from Mr. [redacted]'s prison job supervisor. (*Id.* at 5:4-14.) He noted a "community petition" in support of release. (*Id.* at 5:15-21.) Commissioner Smith also discussed with Mr. [redacted] his successful completion of rehabilitative programming including Alcoholics Anonymous (*Id.* at 17:15-21), Aggression Replacement Training (known by the acronym "ART") (*id.* at 16:21-24), and residential substance-abuse treatment (referred to as "RSAT"). (*Id.* at 16:24-25). Commissioner Smith also touched upon Mr. [redacted]'s contact with the Osborne Association concerning potential post-release employment (*id.* at 7:15-21) and mentioned Mr. [redacted]'s aspiration, reflected in the Case Plan developed with his

counsel, to work, upon release, with a program known as [redacted], which provides support and accountability to young people with criminal justice involvement. (*Id*. at 17:6-14.)

Albeit acknowledging these positive efforts, Commissioner Smith expressly relied heavily on Mr. [redacted]'s (supposedly) adverse Compas scores. Specifically, Commissioner Smith remarked that "[y]ou have in your COMPAS, probably the highest COMPAS score you have is under prison misconduct, you have a 10." (*Id.* at 8:2-3.) This was false. As noted above, Mr. [redacted]'s score for "prison misconduct" on the Compas report generated in advance of the November 2018 parole interview was a 5. (Ex. 8. at 1)

Commissioner Smith also misstated Mr. [redacted]'s Compas score for risk of felony violence as a 4 and noted that score was "not the lowest." (Ex. 1, Nov. 28, 2018 Tr. at 13:4-8.) Whatever Commissioner Smith might have intended by that observation, it has nothing to do with Mr. [redacted]'s actual score in that category as of the interview date. His actual "risk of felony violence" score was a 2, not a 4. (Exhibit 8 at 1.)

Ultimately, the panel majority (with one commissioner dissenting) denied parole, ostensibly on the basis of Mr. [redacted]'s Compas score reflecting his disciplinary record while incarcerated. Specifically, the panel majority stated that "[w]e have considered your COMPAS risk and needs score," and that "[y]our high

COMPAS prison misconduct score reflects your poor compliance with DOCCS rules." (Ex. 1, Nov. 28. 2018 Tr. at 20:13-21.)

The panel majority seemed to willfully ignore the disconnect between the Compas score it purported to rely upon and the reality of Mr. [redacted]'s disciplinary record. As set forth above, that record shows that Mr. [redacted] had no disciplinary infractions at all in the past 24 months (i.e. since before his last parole interview) and that more than fifteen years had elapsed since he was subject to discipline related to violence of any kind. (*See supra* at 4.) The panel majority did acknowledge Mr. [redacted]'s "limited criminal record" (Ex. 1, Nov. 28, 2012 Tr. at 21:1-2) and other positive aspects of his application, but allowed its incorrect reading of his Compas report to outweigh them.

Argument

The denial of parole at issue in this proceeding should be reversed because the panel majority's misstatement of Mr. [redacted]'s "prison misconduct" risk score is worse than arbitrary or irrational: it is a misstatement of the plain documentary record. To uphold denial of parole on such a self-evidently incorrect basis would erode any notion that the Board must follow its own rules or even read its own reports.

While judicial review of parole board action is generally deferential, denial of parole must be reversed if that denial is "arbitrary and capricious," *Ramos*

v. Heath, 106 A.D.3d 747, 747 (2013), meaning either that the decision partakes of "irrationality bordering on impropriety," *Campbell v. Stanford*, 173 A.D.3d 1012, 1015 (2d Dep't 2019), or that the Board fails to consider the required statutory factors or set forth its reason for denial "in detail and not in conclusory terms." N.Y. Exec. Law § 259-i. In particular, as relevant here, the Board (1) must utilize an objective risk and needs assessment tool, and (2) cannot base its decision solely on the seriousness of the underlying offense. *See Ramirez v. Evans*, 118 A.D.3d 707 (2d Dep't 2014). Reversal is mandatory where the Board misstates the results of the Compas risk and needs assessment instrument.

I. The Panel Majority's Decision Must Be Reversed Because It Misstates Critical Aspects of the Compas Report on which It Purports to Rely

The denial of parole must be reversed because the panel majority proclaimed its reliance on a "High" prison discipline score of "10," whereas Mr. [redacted]'s actual score in that category was "Low," with a numerical score of "5."

Denial of parole is arbitrary where the decision-maker misstates a Compas score that it relies on. For example, the Third Department recently reversed a Supreme Court affirmance of parole denial where the parole board, "erroneously stated, in its statement of its findings and recommendation, that petitioner was assessed 'high' on his COMPAS Risk and Needs Assessment instrument for the risk factors related to a history of violence and risk of absconding, when, in fact, he was assessed 'medium' for both factors." *Karimzada*

v. New York State Bd. of Parole, __ A.D.3d __, No. 528570, 2019 WL 5606623, at *2 (3d Dep't Oct. 31, 2019)[3]; *Torres v. Stanford*, 173 A.D.3d 1537, 1538, 102 N.Y.S.3d 794, 796 (3d Dep't 2019) (reversing denial of parole where panel "inaccurately reported that petitioner murdered six, as opposed to four, people").

Here, the panel majority's determination is manifestly defective. It proclaims reliance on Mr. [redacted]'s Compas scores, with specific reference to his scores for "prison misconduct" and "risk of felony violence." (*See supra* at 11-12.) But, it flatly and repeatedly misstates both of those scores. (*See supra* at 11-12.) To uphold this determination would fly in the face of reason, law, and any concept of basic fairness.

And this is no mere academic or technical defect. The panel majority's misrepresentation of the record before it *matters*, because Mr. [redacted]'s actual prison discipline and risk of violence scores are both "Low," not "High." This difference is even greater than the difference between "High" and "Medium" that the appellate division held to present a "likelihood that such error may have affected the decision to affirm" in *Karimzada*. 2019 WL 5606623, at *2.

And it matters because the record actually before the panel reflects the reality that Mr. [redacted] is not, today, a violent or disruptive person. He has received no disciplinary "tickets" at all since his last parole interview in 2016. His last

[3] For the Court's convenience, this case is included as Exhibit 11.

incident was for a defective cookpot that melted slightly when he inadvertently left it plugged in. Most of his disciplinary infractions were from decades ago.

The Second Department recently reversed a trial court that upheld denial of parole for an applicant on a very similar record to Mr. [redacted]'s. In *Rivera v. Stanford*, 172 A.D.3d 872 (2d Dep't 2019), the Parole Board denied parole in a decision reciting that "[o]f significant concern is [the petitioner's] poor behavior during this term." As the appellate division observed, this was an inadequate basis for denial of parole where, "from the time of the petitioner's 2014 appearance before the Parole Board until the time of his 2016 appearance before the Parole Board, the petitioner had *no* disciplinary infractions." *Id.* at 874. The panel majority's language was remarkably similar in Mr. [redacted]'s case, relying on the Compas score's supposed correspondence with "your poor behavior during this term," notwithstanding the fact that Mr. [redacted]—exactly like the petitioner in *Rivera*—had received no disciplinary infractions at all in the preceding two years.

Thus, the panel majority's reliance on Mr. [redacted]'s disciplinary record is defective *both* because it flatly misstated the corresponding Compas score for "prison discipline" as a 10 when it was actually a 5 *and* because Mr. [redacted]'s disciplinary record, in itself and as described in the panel majority's decision, is no basis to deny parole.

II. The Panel Majority's Determination Should Be Reversed Because It Relies Solely on the Seriousness of the Offense

For the reasons already explained, it is clear that the panel majority did not rely on Mr. [redacted]'s actual Compas scores. Since the only other material adverse feature of Mr. [redacted]'s parole application was the nature of the underlying offense, it follows inexorably that the panel majority relied in fact only on that factor. This is not permitted and is an independent basis for reversal.

While the Board has generally broad discretion in weighing the statutory and regulatory factors governing parole release, the law is absolutely clear that it may not rely solely on the gravity of the underlying offense. *Gelsomino v. N.Y.S. Bd. of Parole*, 82 A.D.3d 1097 (2d Dep't 2011) ("Where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstances, it acts irrationally."); *King v. N.Y.S. Div. of Parole*, 190 A.D.2d 423 (1st Dep't 1993), *aff'd* 83 N.Y.2d 788 (1994). And this makes sense: if it were otherwise, the parole interview process would be potentially meaningless for any applicant convicted of a serious crime. After all, the crime of conviction is the one thing a person cannot do anything to change—no matter how long he spends in prison, no matter how genuinely remorseful, no matter how profoundly rehabilitated. As this court explained early last year, "No particular length of sentence can bring back the victim or ease his family's pain and suffering. The only variable that can change is whether the petitioner has been

rehabilitated and can safely be released to parole supervision." *Diaz v. Sanford*, Index No. 2017/53088 (Sup. Ct. Dutchess Cty. Apr. 4, 2018).[4]

Here, Commissioner Smith paid voluble lip service to the notion that the crime of conviction was only one of many factors the parole majority considered. (E.g. Ex. 1, Nov. 28, 212 Tr. at 3:18-20 ("The instant offense is one of many things we look at, as we determine whether now is an appropriate time for you to go into the community."); *see also supra* at 9.) However, those statements ring profoundly hollow here, where the only other adverse fact discussed in the panel majority's decision was Mr. [redacted]'s prison discipline record as reflected in his supposed Compas scores. (*See supra* at 11-12.) Thus, the inescapable conclusion is that the 1981 robbery and shooting, leading to the death of a police officer, was the one and only reason for denial of parole.

If this Court were to affirm the Board's action on that basis, it would be endorsing a bitter and cynical answer to Mr. [redacted]'s question to his 2012 panel: "If there is no need for me to come back before this Board, if you are telling me I am not never going to get released, can that be known to me?" (Ex. 7, Dec. 18, 2012 Tr. at 11:6-9.) Affirmance here would a declaration, in effect, that there is no substance to the parole interview process, no point in Mr. [redacted]'s continuing to show the Board his acceptance of responsibility, his remorse, his

[4] For the Court's convenience, this case is included as Exhibit 10.

rehabilitation—no point, ultimately, in even participating in the parole interview. Fortunately, the law commands a different answer. Where a panel majority relies solely on the gravity of the offense, Supreme Court must reverse and remand for a new interview. *See Gelsomino*, 82 A.D.3d at 1097.

III. The Court Should Remand for a De Novo Parole Interview Before a New Panel that Excludes the Panel Majority and the Commissioners Who Participated in the Administrative Affirmance

The misstatement of Mr. [redacted]'s Compas scores at issue here bespeaks—at the very best—extreme carelessness in a matter of profoundly serious weight. Under these circumstances, the Court can and should remand with instructions for a new parole interview in no less than 30 days before a panel composed of commissioners who were not part of the panel majority here OR the determination of Mr. [redacted]'s administrative appeal. *See Diaz v. Stanford*, Index No. 2017-53088 at 9 ("The matter is remanded to the Parole Board for a de novo parole release interview and review before a panel of the Board consisting of members who have not been involved in this interview or prior interviews involving petitioner.").

Conclusion

For all of the foregoing reasons, the Board's denial of parole should be reversed and a new parole interview should be ordered held within 30 days, before a panel that excludes the panel majority below and the commissioners who participated in the administrative appeal.

Dated: New York, New York
November 12, 2019

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VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF DUTCHESS)

Isaac B. Zaur, an attorney admitted to practice in the State of New York, affirms pursuant to C.P.L.R. § 2106 under penalty of perjury:

1. I represent [redacted], the Petitioner in the within proceeding. I make this Verification pursuant to C.P.L.R. § 3020(d)(3).
2. I have read the attached Verified Petition and know its contents.
3. The statements in the Verified Petition are true upon information and belief, as set forth in the attached record.

Dated: New York, New York
November 12, 2019

Isaac B. Zaur

Sworn to before me this November 12, 2019

NOTARY PUBLIC, STATE OF NEW YORK

EMILY A WEISSLER
Notary Public - State of New York
NO. 02WE6396047
Qualified in Kings County
My Commission Expires Aug 12, 2023