October 2022

Art. 78 Petition - FUSL000145 (2022-02-21)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

[redacted]

Petitioner

-against-

ARTICLE 78 PETITION

Index No.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, ACTING COMMISSIONER and NEW YORK STATE BOARD OF PAROLE TINA M. STANFORD, CHAIRWOMAN.

Respondents

For Judgement Pursuant to Article 78 of The Civil Practice Law and Rules

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PRELIMINARY STATEMENT

Mr. [redacted] is currently serving a sentence of 15 to 30 years imprisonment for multiple counts of Grand Larceny and Fraud. He has appeared before the Board of Parole on one prior occasion. He has been behind bars for more than 17 years.

The Board's most recent decision should thus be reversed, and a *de novo* hearing conducted, because the Board improperly relied upon Sentencing Minutes from [redacted] **first** sentencing in 2007, later vacated, reversed, and remanded for a new trial by the Appellate Division. He was later re-convicted and re-sentenced, in 2014. Instead of considering the record of [redacted] **second** sentencing (the sentencing the Board is required to consider), however, the Board relied singularly upon statements made at [redacted] first sentencing, where he was impermissibly permitted to proceed *pro se.* [redacted] must be granted a *de novo*; the Board's reliance upon a sentencing record later vacated was not only unconstitutional, but arbitrary and capricious.

VENUE

Under C.P.L.R § 506(b), venue is proper where Respondent was located during the parole interview and original decision, to wit, 20 Manchester Road in Poughkeepsie, New York, located in Dutchess County.

FACTUAL AND PROCEDURAL HISTORY

A. July 27, 2021 Interview

On July 27, 2021, [redacted] appeared before Commissioners Drake, Demosthenes, and Segarra for his second appearance before the Parole Board. Commissioner Drake was the lead commissioner and described the instant offense as a scheme to defraud seven individual victims by way of impersonation of a lawyer. Hearing Transcript ("HT") at 3-5. [redacted] disclosed that

because his conviction was not final at the time, he would not be discussing the specifics of his case. HT at 5.

Commissioner Drake then agreed to "respect that", and moved on to [redacted] lack of criminal history and his disciplinary record (she described him as not having "much" of one). HT at 5. She stated that he "ha[d] programmed…didn't have an academic need.… completed a vocational trade." HT at 6. Commissioner Drake went on to note [redacted] completion of ASAT, lack of need for ART, completion of Transitional Services 2, and possession of a work assignment. HT at 6.

After a brief discussion of [redacted] extensive health issues, Commissioner Drake reiterated that he had "been programming" and that his COMPAS Risk Assessment scores were "low and unlikely across the board." HT at 6. She noted his "fairly detailed Case Plan", and his having written two books. HT at 7.

Turning to [redacted] sentencing minutes, Commissioner Drake inquired as to whether he "recall[ed] anything from sentencing", that he thought would be "significant for [the Commissioners] to know?" HT at 7. Commissioner Drake then read excerpts of victim impact statements made at Mr. Rafikian's sentencing. HT at 8. [redacted] noted that one of the victims had been convicted of Medicare fraud himself and was no longer a doctor, and that another one was a lifetime criminal. HT at 8-9.[1] Commissioner Drake noted that [redacted] had referred to one of his victims as a "crack head" at his sentencing. HT at 11.[2]

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[1] The claim was not without basis, [redacted] was in fact convicted of multiple violations of the federal criminal code and sentenced to 30 months imprisonment. *See United States v. Mittal*, 36 F. App'x 20 (2d Cir. 2002).

[2] Without a doubt, the Commissioners were reading from [redacted] first sentencing minutes, at a hearing held on September 21, 2007. Exhibit 3. At this hearing, statements from victims were read into the record and provided in person, in addition to Mr. [redacted] statements on his own behalf. *Id.* [redacted] second sentencing was held on November 3, 2014, Exhibit 4, after his first conviction was vacated, reversed, and remanded for a new trial by the Appellate Division, Second Department, [redacted] At this hearing, no victim impact statements were referenced and [redacted] did not speak on his own behalf; statements were simply made by attorneys for both sides. *Id.*

[redacted] explained that his outbursts at sentencing were the result of his emotional disbelief and his inability to internalize his wrongful conviction and the havoc it has wreaked on his family. HT at 11. He was clear that had he had greater processing capacity, he would not have said the things he said. HT at 11. A discussion then ensued about [redacted] lack of preparation for sentencing — he tried to explain that at sentencing he was represented by an 18B attorney who had been appointed singularly for that stage of the proceedings. HT at 13.[3] [redacted] then confirmed for Commissioner Drake that he maintains his total factual innocence for the instant offense. HT at 14.

Commissioner Drake acknowledged the letter received from the District Attorney, and also acknowledged the letter from [redacted] appellate attorney. HT at 14. When asked what the most transformative programming experience was while incarcerated, [redacted] described the humbling process of incarceration in general. HT at 14-15. He described shedding the habit of judging other people, particularly those who had been convicted of crimes. HT at 15. The conversation pivoted to [redacted] upbringing in an upper-class family in Iran prior to the revolution; [redacted] described fleeing to the United States alone, at sixteen, to pursue a degree at the New York Institute of Technology. HT at 18.

Commissioner Drake then acknowledged the various bases of [redacted] appeal (insufficiency of the evidence, constitutional violations, etc.), and medical issues. HT at 19. [redacted] confirmed that he had had seven heart attacks since 2017, had four stents placed in his arteries, and takes seventeen medications a day for his heart. HT at 20. Commissioner Drake then acknowledged [redacted] extensive family and community support, HT at 20-21. Commissioners Segarra and Demosthenes declined to ask any questions. HT at 21.

[3] Indeed, because [redacted] was permitted to represent himself at trial (the impropriety of which provided the basis for the Appellate Division, Second Department's 2012 reversal of his conviction, [redacted] it fits that he was represented by an attorney at Sentencing who had no idea what he was doing.

When asked if he deserves parole, [redacted] directed the Commissioners to his claim of actual, factual innocence, and as proof of that, his rejection of multiple offers of time served from the District Attorney's office. HT at 22-23. He made clear that he cares about victims of fraud and deception generally, but that he could not claim to be a perpetrator in this case. HT at 23.

B. Denial of Release to Parole

The Board issued their decision the same day, denying release and imposing a 24 month hold on [redacted]. They wrote that there was a "reasonable probability that [redacted] would not live and remain at liberty without again violating the law" and that [redacted] release to supervision was "incompatible with the welfare of society." HT at 25.

The Board stated that their decision was based in "the following factors", and then proceeded to list only one: the instant offense (recited in a way that presumed [redacted] guilt, rejected his innocence claim, and failed to recognize that his conviction was not yet final). HT at 25. The Board noted his "minimal" disciplinary record, and his low and unlikely COMPAS scores. HT at 26.

They then stated that they were departing from COMPAS (most specifically "arrest and criminal involvement") because of [redacted] innocence claim, specifically his discreditation of one of the victims. HT at 26.

"Most compelling", wrote the Board, [redacted] "defied the trust of [his] victims and the community at large and…minimized [his] culpability in such an intense and detailed case", such that the Board "question[ed] [his] credibility" in a way that "put [him] at risk for committing similar crimes in the future." HT at 26.

***C.* Administrative Appeal**

On November 29, 2021 [redacted] filed an administrative appeal challenging the Board's denial. On February 2, 2022, the Appeals Unit issued their decision. Exhibit 1. [redacted] comes now, having exhausted his administrative remedies.

STANDARD OF REVIEW

Parole release decisions are discretionary and will not be disturbed as long as the Board of Parole complied with statutory requirements. N.Y. Executive Law § 259-i. Discretionary release to parole supervision is not to be granted as a reward for good behavior while in prison; rather, the Board of Parole must consider whether there is a reasonable probability that, if such inmate is released, he or she will live and remain at liberty without violating the law, and that his or her release is not incompatible with the welfare of society and will not so deprecate the seriousness of his or her crime as to undermine respect for law. N.Y. Executive Law § 259-i(2)(c)(A). The Court of Appeals has long interpreted the language—in both current and prior statutes—to mean that "so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts". *Matter of Hines v. State Bd. of Parole,* 293 N.Y. 254, 257 (1944).

In a proceeding pursuant to Article 78 challenging a determination by the state Board of Parole, the Supreme Court, Appellate Division, is limited to considering whether the Board's determination to revoke parole is supported by substantial evidence. McKinney's CPLR 7801 et seq. In *all* CPLR Article 78 proceedings to review determinations that are not made after a quasi-judicial hearing mandated by law, including this one, "the proper standard for judicial review ... is whether the Board's determination was arbitrary and capricious or an abuse of discretion." *Matter of Beck–Nichols v. Bianco,* 20 N.Y.3d 540, 559 (2013).

Whether the Parole Board considered the proper factors and followed the proper guidelines are questions that should be assessed based on the "written determination ... evaluated *in the context of the parole hearing transcript.*" *Fraser v. Evans*, 109 A.D.3d 913, 914–15, 971 N.Y.S.2d 332, 333 (2013) (*emphasis in original*) (internal citations omitted).

ARGUMENT

I. The Board acted unconstitutionally, arbitrarily and capriciously when it relied solely upon the record from [redacted] first trial – a record set aside by the Appellate Division and superseded by the record produced during [redacted] second trial – to deny release to parole supervision.

Unambiguously, the Board relief upon [redacted] statements at his *first* sentencing hearing in order to deny release to parole supervision. Indeed, the entire discussion of [redacted] sentencing transcript was limited to victim impact statements and statements made by [redacted] – statements that could only be sourced from [redacted] 2007 sentencing hearing. *See supra* at fn. 1 (describing that at [redacted] second 2014 sentencing, only attorneys spoke, and no victim impact statements were referenced); *see also,* Exhibits 3, 4 (Sentencing Hearing Transcripts).

Not a single reference was made during [redacted] parole hearing or decision to his second sentencing – the sentencing unambiguously being reviewed here. For multiple reasons, this was error, warranting reversal of the Board's decision and the granting of a *de novo*.

a. The record of [redacted] first trial was vacated, reversed, and remanded on the sole basis of a Sixth Amendment violation that affected not only trial but sentencing; the Board was not permitted to rely on the record of [redacted] first trial given its treatment by the Second Department.

In 2012, the Appellate Division, Second Department reversed the record of [redacted] first conviction because it found that [redacted] waiver of the right to counsel and decision to proceed *pro se* was not knowing, voluntary and intelligent. 98 A.D.3d 1139. [redacted] waiver extended to sentencing – indeed, at sentencing in 2007, [redacted] represented himself, and spoke on his own behalf. Ex. 3 at 14.

The Board improperly held [redacted] *pro se* statements, made at that sentencing hearing now vacated and reversed by the Appellate Division, against him. The Commissioners not only read from victim impact statements made only at [redacted] first sentencing hearing, but asked about and commented on specific statements made by [redacted] HT at 11 ("it reads like a person who

would rather blame his victim"). The Board repeatedly referred to the first Sentencing Minutes as "*the* Sentencing Minutes" (emphasis added); as "the official document." HT at 9. At no point did they mention the second sentencing transcript, from 2014. Ex. 4.

The Sixth Amendment error identified by the Appellate Division tainted [redacted] sentencing; had the trial court rejected [redacted] attempted waiver of the right to counsel, he would not have stood on his own behalf at sentencing. Moreover, the attorney standing by to advise [redacted] at sentencing, was different than the lawyers who advised him at trial (suggesting an even more egregious Sixth Amendment error, as they were probably unfamiliar with all of the facts and circumstances of this complex case). HT at 13. The Board's reliance upon [redacted] first sentencing hearing was thus unconstitutional and must be reversed.

b. The Executive Law does not authorize the Board to consider prior sentences, later vacated.

N.Y. Exec. Law § 259-i reads, in relevant part, that the Board must consider,

> (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the incarcerated individual, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

The Board is thus authorized to consider the sentence that the parole applicant is then serving, at the time of their appearance, as well as *prior criminal record*. The Executive Law simply does not authorized consideration of a prior sentence imposed, later vacated.

[redacted] case is illustrative as to why. [redacted] was convicted of 19 counts after his second trial, compared to 28 counts after his first. He was represented by counsel at the second, who spoke on his behalf at sentencing and in lieu of [redacted] speaking for himself. Ex. 3. He was, the second time around, sentenced on a fundamentally different record; the Board was not

authorized to consider the former, nor should it be – a prior sentencing that has been disturbed on appeal bears no relevance to the Board's inquiry.

Criminal Procedure Law § 390.20 provides further guidance. In *People v. Saez*, 121 A.D.2d 947 (1st Dep't 1986) the First Department held that "CPL 390.20(1) mandates, and the public policy of our State requires, a current presentence report before sentence is imposed…" In *People v. Smith*, 150 A.D.2d 313 (1st Dep't 1989), the court went as far as to reverse a sentence imposed three years after a prior resentencing because an updated PSR was not before the Court. *Id.*

Here, seven years passed between [redacted] first and second sentencing. Just as the Court was required to consider an updated PSR, so too is the Board required to consider only that which was relevant at the second sentencing when determining [redacted] eligibility for release to parole supervision. Instead of considering updated information however – the second PSR and sentencing hearing – the Board singularly relied upon a prior record that had been vacated.

The Board's singular reliance upon [redacted] first sentencing, and utter failure to consider his second sentencing, must be reversed.

Respectfully submitted,

/s [redacted]

EXHIBIT LIST

Exhibit 1	February 2, 2022 Decision of the Parole Board Appeals Unit Affirming the Board's Denial
Exhibit 2	Transcript of July 27, 2021 Parole Hearing and Decision
Exhibit 3	September 21, 2007 Sentencing
Exhibit 4	October 16, 2014 Sentencing