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COPY

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
**In the Matter of the Application of
ROBERTO PASCAL,**

Petitioner,

DECISION AND ORDER

INDEX NO.: 2032/2014

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

-----X
SCIORTINO, J.

The following papers numbered 1 to 26 were considered in connection with the application by petitioner for an Order and Judgment pursuant to CPLR Article 78:

PAPERS

NUMBERED

Petition/Exhibits A-M¹
Answer and Return/Exhibits 1-11

1 - 14
15 - 26

Petitioner Roberto Pascal (Petitioner) seeks an Order and Judgment pursuant to CPLR Article 78, for the following relief: (A) release on parole; or, alternatively, (B) a new parole hearing.

Background and Procedural History

Petitioner is serving an indeterminate sentence of 25 years to life, upon his conviction for two murders which took place during grocery store hold-ups in Brooklyn in 1979, when petitioner

¹Note that many of the Exhibits propounded by petitioner have multiple exhibits attached to them.

was 19 years old. In the first incident, which occurred on May 24, 1979, petitioner was convicted by a jury as an accomplice acting in concert with co-defendants. In the second incident, on May 30, 1979, petitioner pled guilty, also as an accomplice acting in concert. Petitioner was also convicted of second-degree attempted murder and first degree robbery and pled guilty to separate charges of first-degree robbery and other charges.

Petitioner is a citizen of Panama and is subject to a Final Order of Deportation (#A35-197-863) issued by the United States on July 20, 1994. He will be returned to Panama upon his release from prison.

He was first eligible for parole in 2004 and has appeared before the Parole Board four times, in 2004, 2006, 2008 and 2010, prior to the appearance which is the subject of this Petition. After each appearance, parole was denied, and petitioner was ordered held for an additional 24 months.

On May 22, 2012, petitioner appeared before the Parole Board for a fifth time. Prior to his hearing, on or about May 11, 2012, petitioner was evaluated by the COMPAS Reentry Assessment system, receiving a Risk Level 4 rating, the lowest risk rating for re-arrest or absconding. (Responding Papers, Exhibit 3)

At his hearing on May 22, 2012, petitioner was questioned extensively about the circumstances of his convictions, including the plea offers made to him and his reasons for having become involved in criminal activity. (Responding Papers, Exhibit 4) He was specifically asked whether he fired shots or shot anyone and denied both. He was also asked about his prior criminal history, including a drug-related misdemeanor and a car theft.

Petitioner listed some of his course work and programs which had been completed, including network and parenting and healthy marriage classes. He acknowledged receiving one Tier II

disciplinary ticket, since his last appearance.

The Board questioned petitioner about the Deportation Order, and he expressed that he wished to return to Panama, where he had a cousin and sister. If he were not deported, he anticipated living with his wife in Brooklyn; if he were deported, he expected that she would come to Panama to be with him. He understood that if he were deported, he could not return to the US, where his daughter lives. (Exhibit 4 at p. 6) If he were released, petitioner planned to work with the Fortune Society, Osbourne Association and Exodus for assistance. (Exhibit 4 at page 7)

Petitioner acknowledged responsibility and expressed remorse for the crimes he committed. (Exhibit 4 at pp. 3, 7)

At the conclusion of the hearing, the Board denied parole, and held petitioner for an additional 24 months, to May 2014.² The Decision stated:

After a careful review of your record, a personal interview, and deliberation, parole is denied. Your institutional accomplishments and release plans are noted. Required statutory factors have been considered, including your risk to the community, rehabilitation efforts and your needs for successful reintegration into the community. This panel remains concerned, however, about the serious and violent nature of the instant offense, which when considered with the required relevant factors, leads to the conclusion that if released at this time, there's a reasonable probability that you would you [sic] not live and remain at liberty without violating the law and your release at this time is incompatible with the welfare and safety of the community.

On May 29, 2012, petitioner filed an administrative notice of appeal and filed his brief, perfecting the appeal on May 29, 2012. (Responding Papers, Exhibit 7) The Brief asserted that the Parole Board relied on erroneous information and that the two-year hold was excessive,

²Whether petitioner has appeared at a subsequent parole hearing, and what disposition such hearing may have had is unknown to this Court.

unnecessary and irrational. The erroneous information including references to the COMPAS Assessment, including findings which deemed him to have “notable disciplinary issues;” that he had a history of drug and alcohol abuse; and that it was “unsure” whether he had friends and family who visited him in prison. (Exhibit 7 at page 4) Petitioner argued that the Board’s decision was based on now-defunct sentencing guidelines, instead of measuring the likelihood of petitioner’s success upon release. He further argued that the Parole Board misapprehended his conviction history and his current sentences and ignored the Final Deportation Order as well as his rehabilitation. (Exhibit 7 at pp. 5-6)

On June 18, 2013, the administrative appeal was denied. (Responding Papers, Exhibit 8) Petitioner initially commenced this proceeding in Kings County in June 2013. After an Order to Show Cause to change venue, filed by respondent, venue was transferred to Orange County, by Order dated February 7, 2014.

Petition and Answer

The Petition alleges that the Parole Board’s May 22, 2012 decision violates express and implied legislative policy. (Petition at ¶38) Specifically, petitioner asserts that the Board failed to comply with the 2011 parole law amendments, requiring the implementation of new written procedures for parole release decisions. He reiterates the argument, made in the administrative appeal, that the denial of parole was based on the now-defunct sentencing guidelines repealed by the 2011 amendments. He further argues, for the first time, that the Board’s consideration of his Youthful Offender adjudications as well as arrests that did not lead to convictions, constituted a violation of State Human Rights Law §296(16) and claimed that these factors also led to negative conclusions in the COMPAS evaluation. He asserts that the Board failed to take the deportation

order into consideration. (Petition at ¶45) and that the denial's failure to contain a detailed and non-conclusory explanation of its determination violates Executive Law §259-i(2)(a)(1). (Petition at ¶46) Finally, he argues that the denial of his parole was "pre-determined" and an arbitrary, capricious and irrational abuse of discretion. (Petition at ¶48)

In its Answer, respondent argues that the Court may not consider issues raised in the Petition which were not part of the administrative appeal, specifically, the failure to consider petitioner's remorse; the failure to place the Board's deliberations on the record; the consideration of Youthful Offender adjudications and arrests not leading to convictions; and the failure to sufficiently consider the COMPAS evaluation. (Answer at ¶2) However, to the extent that they may be considered, respondent asserts that the arguments are without merit. Remorse is not a factor in discretionary parole determinations. Nor is there any requirement that internal deliberations appear on the record. Further, the Board is not only entitled, but mandated, to consider the entirety of an inmate's record, including arrests that did not result in prosecution and youthful offender adjudications. Moreover, the Board is entitled to place whatever weight it deems appropriate on any factor, including the scored COMPAS evaluation.

With respect to the balance of petitioner's arguments, respondent asserts that the Board is entitled to exercise its independent judgment in weighing any statutory factor in making its determination. In so doing, the Board may rely on official documents, including the Pre-Sentence Investigation Report, and the inmate is not entitled to collaterally attack it. Finally, the Board's determination complied with the written procedures requirement of Executive Law §259-c(4).

Discussion

Exhaustion of Administrative Remedies:

The Court is not empowered to consider any issue not raised on the administrative appeal. The doctrine of exhaustion of administrative remedies requires that judicial review be limited to consideration of only those issues actually raised before the administrative agency which made the determination. *Roggemann v. Bane*, 223 AD2d 854 (3rd Dep't 1996)

Respondent correctly observes that petitioner's administrative appeal did not include the issues of his remorse, or his argument that the Board's deliberations were not on the record. Nor did he raise the issues concerning the Board's consideration of his prior, non-prosecuted arrests or his Youthful Offender adjudication. While respondent asserts that petitioner's arguments are without merit regardless of the exhaustion issue, this Court is not required to make such a finding and herein dismisses those portions of the petition as beyond the Court's jurisdiction. *Matter of Moore v. NYS Board of Parole*, 233 AD2d 653 (3rd Dep't 1996)

However, respondent's assertion that petitioner failed to raise COMPAS issue is misplaced. Petitioner's Brief on Administrative Appeal does, in fact, address the COMPAS finding that he was at low risk of re-arrest, a factor he alleges was ignored by the Parole Board. Consequently, this argument may be considered by the Court upon review.

Standards for Review:

It has become fundamental that release on parole is a discretionary function of the Parole Board. Provided that the determination of the Board follows statutory standards for such decisions, it will not be disturbed by a Court, absent a showing that the decision is "irrational bordering on impropriety" and, thus, arbitrary and capricious. *Matter of Silmon v. Travis*, 95 NY 2d 470 (2000);

Matter of King v. NYS Div. of Parole, 190 AD2d 423 (1st Dep't 1993), *aff'd*, 83 NY 2d 788 (1994);
Siao-Pao v. Dennison, 51 AD3d 105 (1st Dep't 2008)

Executive Law §259-i(c)(A) provides that discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined, but rather after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law. *Matter of King, supra*, 190 AD2d at 430

The Parole Board is required to consider a number of factors in determining whether an inmate should be released. Executive Law §259-i requires the court to consider factors including, but not limited to, the institutional record (including program goals and accomplishments, vocational education, academic achievements, etc); release plans, including community resources, employment, education and training and available support services; any deportation order issued; the seriousness of the offense, with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the attorney and the pre-sentence probation report, and the prior criminal record. *Matter of Malone v. Evans*, 83 AD3d 719 (2nd Dep't 2011); *Siao-Pao v. Dennison, supra*, 51 AD2d at 106

The Parole Board's decision need not specifically refer to each and every factor nor must it give each factor equal weight. *Matter of King, supra*, 190 AD2d at 431 The weight to be accorded to each statutory factor lies solely within the discretion of the Board. *Siao-Pao v. Dennison, supra*, 51 AD3d at 108 However, it is incumbent on the Board to actually consider each applicable statutory factor and, "where the record convincingly demonstrates that the board did in fact fail to

consider the proper standards, the courts must intervene.” *Matter of King, supra*, 190 AD2d at 431

Executive Law §259-c[4] requires the Board to incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board and the likelihood of success of such persons upon release. Boards must adopt procedures to assist members in determining which inmates may be released to parole supervision. *Matter of Thwaites v. NYS Board of Parole*, 34 Misc. 3d 694 (2011)

Where the Board’s determination includes consideration of all relevant statutory factors, including the criminal history, the instant offense, the [lack of] disciplinary infractions since the last appearance, program and educational accomplishments and post-release plans, further judicial review is precluded. *Matter of Borcsok v. NYS Division of Parole*, 34 AD3d 961 (3rd Dep’t 2006)

Conversely, however, when the Board denies parole, it is required to inform the inmate in writing of the factors and reasons for the denial, and “[s]uch reasons shall be given in detail and not in conclusory terms”. Executive Law §259-i[2][a]; *Matter of Mitchell v. NYS Division of Parole*, 58 AD3d 742 (2nd Dep’t 2009) A detailed written explanation is necessary to enable intelligent judicial review of the Board’s decision. *Matter of West v. NYS Board of Parole*, 41 Misc. 3d 1214(A) (2013) The absence of such a detailed decision inappropriate forecloses the possibility of intelligent review. *Mayfield v. Evans*, 93 AD3d 98, 100 (1st Dep’t 2010) The decision to deny parole cannot be based solely on the nature of the instant offense. *Winchell v. Evans*, 27 Misc. 3d 1232(A) (2010), citing *Wallman v. Travis*, 18 AD 3d 304, 307-08 (1st Dep’t 2005)

A Parole Board’s denial of parole which focused almost exclusively on the inmate’s crime, while failing to take into account and fairly consider any of the other relevant statutory factors which categorically supported inmate’s release, was arbitrary and capricious. Similarly, the Board’s failure

to explain, other than the facts of the crime, why the inmate's release was incompatible with public safety and welfare, could not be supported. *Matter of Morris v. NYS Dep't of Corrections and Community Supervision*, 40 Misc. 3d 226 (2013)

In the instant matter, the Court finds that the Board's decision focused almost exclusively on petitioner's crime and his poor criminal record. Although the serious nature of the crime remains "acutely relevant" in determining whether petitioner should be released, the Board must still take into account and fairly consider the other relevant statutory factors. *Matter of West, supra*, 41 Misc. 3d at 1214(A) An examination of the transcript reveals that the Board's clear focus was on the subject conviction and his prior criminal record. *Id.*

Such intent is corroborated by the "boilerplate" decision, which contains the statutory language and the "terse, conclusory sentences" that "[y]our institutional accomplishments and release plans are noted. Required statutory factors have been considered". *Id.*

Even more convincingly, in *Matter of Thwaites, supra*, the Board's decision stated:

After a careful review of your record, a personal interview, and deliberation, parole is denied. Your institutional accomplishments and release plans are noted, as is your improved disciplinary record. This panel remains concerned, however, about your history of unlawful conduct, the gravity (sic) of your instant offense and the disregard displayed for the norms of our society, when considered with the required relevant factors leads to the conclusion that your discretionary release is inappropriate at this time and incompatible with the welfare of the community and would so deprecate the seriousness of your crime as to undermine respect for the law. (Emphasis added)

Upon review, the Court found that this language, nearly identical to the finding at bar relied almost exclusively on the nature of petitioner's crime. 34 Misc. 3d at 700 While the petitioner's accomplishments and release plans were noted, the decision focused on the

circumstances of the crime committed more than 25 years earlier. *Id.*

Reasoning that employs past-centered rhetoric and not future-focused risk assessment analysis is inconsistent with the rational determination of the inquiry at hand, to wit: whether the inmate can live and remain at liberty without violating the law and whether his release was incompatible with the welfare of society and did not deprecate the seriousness of his crime so as to undermine respect for the law. *Id.*, citing Executive Law §259-i[2][c]

The Court in *Matter of Thwaites* found the Board's decision to be arbitrary and capricious, irrational and improper based on the Board's failure to articulate any rational, non-conclusory basis, other than its reliance on the seriousness of the crime, why the Board could not believe there was a reasonable probability that the petitioner could live and remain at liberty without violating the law, and that his release was incompatible with the welfare of society and did not deprecate the seriousness of his crime so as to undermine respect for the law. *Id.* at 701

Similarly, in *Matter of Morris, supra*, the Court found that a "passing mention" of petitioner's accomplishments and document submissions, and conclusory statements that statutory factors were considered, were "woefully inadequate" to demonstrate that the Board weighed or fairly considered the required statutory factors. 40 Misc. 3d at 234; *Matter of West, supra*, 1214(A)

In this matter, the Board's decision appears to have accorded no weight and no emphasis whatsoever to any factor apart from the seriousness of petitioner's offense. *See, Winchell v. Evans, supra*, 27 Misc. 3d 1232(A) For respondents to have simply restated the usual and predictable language contained in so many parole release decisions, with no specificity or other explanation to justify parole denial, is unacceptable. *Bruetsch v. NYS Department of*

On the basis of the foregoing, the Court concludes that petitioner has adequately established his contention that the Parole Board's determination was arbitrary and capricious, irrational and improper. Having so determined, the Court need not reach the other arguments asserted by petitioner.

The May 22, 2012 decision of the Board of Parole is hereby vacated, and to the extent not already mooted by any action of a subsequent Board, this matter is remanded to the Board of Parole. Within 30 days of the date of the service of a copy of this Order, with notice of entry, petitioner shall be entitled to a new parole hearing consistent with this decision and the mandates of Executive Law §§259-c and 259-i. The new hearing shall be held before a different panel of the Parole Board.

This decision shall constitute the order of the Court.

Dated: June 4, 2014
Goshen, New York

To: Roberto Pascal, 80-B-1082
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ENTER:

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