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### Decision in Art. 78 proceeding - Bailey, Rodney (2020-04-16)

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To commence the 30-day statutory time period 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 DUTCHESS**

-----X

In the Matter of the Application of  
RODNEY BAILEY

Petitioner,

-against-

**DECISION AND ORDER**

Index No.: 53704/2019

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

Respondent.

-----X

**ACKER, J.S.C.**

The following papers, numbered 1 to 41, were considered on Petitioner’s application pursuant to CPLR Article 78 challenging Respondents’ denial of his release to parole supervision:

Notice of Petition-Verified Petition-Exhibits 1-25 .....	1-27
Answer and Return-Exhibits 1-12 <sup>1</sup> .....	28-40
Petitioner’s Reply.....	41

Petitioner commenced the instant proceeding seeking to overturn the determination of the Board of Parole dated November 15, 2018, which denied Petitioner parole release, and to provide Petitioner with a *de novo* parole interview.

Petitioner is currently incarcerated at Eastern Correctional Facility, having been convicted of Murder in the Second Degree and Criminal Possession of a Controlled Substance in

<sup>1</sup> The Court also reviewed, *in camera*, the confidential documents submitted by Respondents as Exhibit 1 (entire exhibit) and portions of Exhibits 3 and 10.

the Second Degree on or about January 30, 1981. As a result, he was sentenced to 25 years to life on the murder charge and six years to life on the drug charge, to run concurrently.

On February 12, 1980, at approximately 1:00 a.m., Petitioner was on the front steps of a building in Manhattan with a number of other men. Petitioner was a drug dealer who was in possession of a loaded gun at the time. Two plain clothes police officers pulled up in a vehicle and the group of men started to leave. When the two officers got out of their car and approached the men, Petitioner ran away from the group and Police Officer Bilodeau pursued Petitioner. Once behind a building, Petitioner shot and killed Officer Bilodeau. Petitioner, who had also been shot by the officer, fled the scene, but was taken into custody soon thereafter.

The instant application was brought as a result of the Parole Board's November 15, 2018 parole release denial. Petitioner timely filed an administrative appeal thereafter, and the denial was affirmed on or about June 28, 2019. This was Petitioner's seventh appearance before the Parole Board, after having served approximately 38 years in prison.

Petitioner raises seven bases upon which he alleges the Board's decision was improper: Respondent Board (1) relied upon community opposition that espoused solely penal philosophy; (2) failed to explain the reason for denial in detail and the record does not support the statutory standards cited by the Board; (3) failed to provide individualized reasons for departing from eleven out of twelve COMPAS scores; (4) based its denial solely on the seriousness of the offense; (5) denied Petitioner access to documents before the parole interview; (6) impermissibly considered "separatee information"; (6) failed to consider Petitioner's defense attorney's statement; and (7) based its denial on inaccurate information contained in Petitioner's parole file. Petitioner argues that each ground warrants a reversal of the Board's decision and when

considered together, the need for a *de novo* interview is “overwhelming.”

It is well settled that judicial review of a determination of the Parole Board is narrowly circumscribed. *Campbell v. Stanford*, 173 AD3d 1012, 1015 [2d Dept. 2019]. A Parole Board determination to deny early release may only be set aside where it evinces “irrationality bordering on impropriety.” *Id.* Although the Parole Board is required to consider the relevant statutory factors as identified in Executive Law §259-i(2)(c)(A), it is not required to address each factor in its decision or accord all the factors equal weight. *Id.* “Whether the Parole Board considered the proper factors and followed the proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript.” *Id.*

New York Executive Law §259-i(2)(c)(A) provides that:

[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but 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 his crime as to undermine respect for law.

Further, pursuant to New York Executive Law §259-i(2)(c)(A)(i)-(viii), as relevant to the Petitioner herein, the Parole Board is required to consider the following in making a parole decision: his institutional record including program goals and accomplishments, academic achievements, release plans including community resources, employment, education and training and support services available to the inmate, 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 inmate, the pre-sentence probation report, and prior criminal record, including the nature and pattern of offenses. “If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance

of the factors and reasons for such denial of parole. Such reasons shall be given in detail and not in conclusory terms.” Executive Law §259-i(2)(a).

**Petitioner’s November 7, 2018 Interview and Respondent’s November 15, 2018 Decision**

The transcript of Petitioner’s parole interview is annexed to the Answer and Return as Exhibit 4 (hereinafter referred to as “Interview Transcript”). Respondent’s Decision denying parole is contained at pages 21-23 of the Interview Transcript (hereinafter referred to as “Decision”).<sup>2</sup>

As indicated above, Petitioner provides numerous reasons as to why he believes the Board’s Decision should be annulled and he be granted a *de novo* interview. However, a review of the Decision and the Interview Transcript demonstrates that, in rendering its Decision, the Parole Board considered all of the required statutory factors, as well as Petitioner’s “professionally prepared” parole packet, his COMPAS assessment, letters of support and community opposition.

Petitioner initially contends that the Board inappropriately considered and relied upon community opposition that espoused solely penal philosophy. In support of this argument, Petitioner relies primarily on the Court of Appeals decision in *King v. New York State Div. of Parole*, 83 NY2d 788 [1994]. The Court of Appeals found that the petitioner in *King* was not afforded a proper interview as “one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place.” *Id.* at 791. Petitioner herein takes this argument

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<sup>2</sup> Respondent also provides a separate “Parole Board Release Decision Notice” as Exhibit 5 that contains virtually the same content as the transcript but is dated November 19, 2018.

a step further and argues that the Board here considered and relied upon “significant community opposition” that conveyed purely penal philosophy, which Petitioner contends is contrary to law.

As acknowledged by Petitioner, consideration of community opposition by the Board is not outside the scope of the relevant statutory factors for rendering a parole release determination. *Applewhite v. New York State Bd. of Parole*, 167 AD3d 1380, 1381 [3d Dept. 2018], *appeal dismissed*, 32 NY3d 1219 [2019]<sup>3</sup>; *see also Campbell, supra* at 1016; *Clark v. New York State Bd. of Parole*, 166 AD3d 531, 531–32 [1<sup>st</sup> Dept. 2018] (“the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community”). Instead, Petitioner argues that the content of the community opposition makes the Board’s reliance thereon inappropriate. However, there is no indication in the record that the Board referenced or considered the specific content of the community opposition in rendering its Decision.

In its Decision, the Board notes that Petitioner’s packet contains numerous letters of support from his siblings, children and grandchildren, as well as other persons from the community that support his release. The Decision then indicates that the “Panel also finds that there is significant community opposition to [Petitioner’s] release.”<sup>4</sup> Interview and Decision transcript, p. 22. No mention is made of the content of the opposition, nor does the Board indicate that it considered the “penal philosophy” that Petitioner alleges is espoused therein. *See, Duffy v. New York State Dep’t of Corr. & Cmty. Supervision*, 132 AD3d 1207, 1209 [3d Dept. 2015] (“there is nothing in the Board’s decision indicating that it was influenced by, placed

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<sup>3</sup> Although Petitioner’s counsel takes issue with the holding in *Applewhite* (FN 2, Petition), the appeal to the Court of Appeals was dismissed.

<sup>4</sup> In the Court’s experience, it is not uncommon in cases where a police officer is killed for there to be community opposition to an inmate’s release on parole.

weight upon, or relied upon any improper matter, whether in the victim's family statements or otherwise.”). As such, contrary to the *King* case, *supra*, Petitioner has failed to demonstrate that the Board considered factors outside the scope of the statute.

Petitioner also argues that the Board improperly based its Decision on the seriousness of the crime, that the Board failed explain the reasons for its denial in detail and that the record does not support the statutory standards cited. As these arguments overlap, they will be addressed together.

Review of the record before this Court reveals that the Board considered the relevant statutory factors, including the serious nature of Petitioner's crimes, his criminal history, his prison disciplinary record, his pre-sentence probation report, his academic achievements, the COMPAS Needs and Risk Assessment instrument and his post release plans. *See LeGeros v. New York State Bd. of Parole*, 139 AD3d 1068, 1069 [2d Dept. 2016]. Although the Board cited the serious nature and the circumstances of the underlying offense as one of the main factors in denying parole release, the Board is entitled to place greater emphasis on the severity of the Petitioner's crime. *Campbell, supra* at 1016. The Board also referenced community opposition as another factor in denying his release, but there is no evidence before this Court that the Board disproportionately relied upon community opposition to Petitioner's release. *Campbell, supra* at 1016. Indeed, “the interview transcript indicates that the Parole Board took into account a number of other factors that reflected well on the petitioner, but determined that these factors did not outweigh the factors that militated against granting parole.” *Id.* In sum, the record does not support Petitioner's argument that the Board relied solely on the seriousness of the underlying offense in denying parole.

Petitioner's contention that the record does not support the statutory standards cited by the Board is similarly flawed. Essentially, Petitioner weighs the evidence in the record and concludes that the Board should have reached a contrary decision. Nevertheless, as discussed above, the Board here considered all the necessary statutory factors and decided against parole release. Despite the lengthy arguments made by Petitioner advocating various reasons the record supports release, he has not demonstrated that the Board's Decision to deny release evinces irrationality bordering on impropriety. *Campbell, supra*.

In its Decision, the Board discusses Petitioner's firearms convictions that occurred before the instant offense, noting that Petitioner was on a "bad path long before" he shot his victim. The Board also notes that he scored a high risk on COMPAS for substance abuse and that there is significant community opposition to his release. Further, the Board cites Petitioner's willingness to kill someone to avoid taking responsibility for his own behavior and serving what would have been a much shorter sentence.<sup>5</sup> Given the magnitude of Petitioner's crime, the majority of the Board believes that his discretionary release remains incompatible with the welfare of the community. The Board concludes that shooting the officer was so unnecessary under the circumstances, that his release would so deprecate the serious nature of Petitioner's crime as to undermine respect for the law. After review of the Board's Decision, the Court finds that the Board's "determination was sufficiently detailed to permit intelligent appellate review." *See Robinson v. New York State Bd. of Parole*, 162 AD3d 1450, 1451 [3<sup>rd</sup> Dept. 2018].

According to the Petitioner, the Board also erred by failing to provide an individualized

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<sup>5</sup> The record demonstrates that Petitioner was attempting to get away from the group of men and the police officers in order to unload gun he was carrying so that, if he was caught, he would only be charged with a misdemeanor for an unloaded weapon, rather than a more serious charge of carrying a loaded weapon.



reason for departing from eleven out of twelve COMPAS scores<sup>6</sup> pursuant to 9 NYCRR §8002.2(a). This regulation requires that

[i]n making a release determination, the Board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument . . . If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure.

It bears noting that although the Board is required to consider the COMPAS Risk and Needs Assessment instrument, it is not required to give COMPAS any greater weight or consideration than the other relevant statutory factors. *Lewis v. Stanford*, 153 AD3d 1478 [3d Dept. 2017].

The Board's Decision indicates that it considered Petitioner's COMPAS assessment. The Decision does not state that the Board departed from a specific COMPAS score or that it disagreed with said scores. Nevertheless, Petitioner argues that by denying parole, the Board *de facto* departed from all the scales in which Petitioner received a low risk score and, therefore, the Board was required to provide an individualized reason for each of these alleged departures. However, nothing in 9 NYCRR §8002.2(a) requires a Board, in denying parole, to explain each COMPAS category where a petitioner receives a low score. Otherwise, every Board that denies parole would have to provide an individualized reason for every low COMPAS score. The plain language of the regulation requires an explanation for a departure from a scale. For example, if the COMPAS instrument has a low score on "abscond risk" and the Board disagrees, then the Board must provide an individualized reason. As there is no such departure here, 9 NYCRR

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<sup>6</sup> The twelve categories are: risk of felony violence, arrest risk, abscond risk, criminal involvement, history of violence, prison misconduct, re-entry substance abuse, negative social cognitions, low self-efficacy/optimism, low family support, re-entry financial and re-entry expectations.

8002.2(2) is not implicated and Petitioner is not entitled to a *de novo* interview on this ground.<sup>7</sup>

Next, Petitioner states that prior to his parole interview, he was denied access to portions of the parole file which were considered by the Parole Board. The records to which he was either denied access, or was only provided with redacted copies, were opposition documents, medical summaries, separatee information<sup>8</sup> and the unredacted COMPAS report. As Respondent allegedly violated its own regulations by denying access to these documents, Petitioner argues that he is entitled to a *de novo* interview. The only case to which Petitioner cites in support is *Clark, supra*. In *Clark*, however, the First Department did not annul the initial denial of parole. Rather, it remanded the case for a new administrative appellate proceeding because petitioner was not provided with access to the opposition letters in connection with the inmate's administrative appeal. *Id.* at 532. *Clark* is not applicable to the facts of this case because Petitioner was provided with redacted opposition documents during his administrative appeal. Petitioner fails to cite any case that holds that the failure to turn over documents, regardless of their relevance or type, prior to the parole interview warrants a *de novo* interview. Based on the foregoing and, as Petitioner has not demonstrated any prejudice in not receiving these documents before his parole interview, the Court does not grant a new interview on this ground.<sup>9</sup>

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<sup>7</sup> Petitioner's citation to *Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 AD3d 672, 673 [2d Dept. 2018] does not change this determination. The Second Department in *Coleman* did not address 9 NYCRR 8002.2(a), but merely found (as one basis for ordering a *de novo* interview) that the petitioner therein was assessed "low" for all risk factors on his COMPAS risk assessment. Unlike the petitioner in *Coleman*, Petitioner here did not score low on all of his COMPAS categories, as he was assessed as "highly probable" for re-entry substance abuse.

<sup>8</sup> Petitioner also argues that Respondent Board considered separatee information without informing him. As there is no indication that the Board considered separatee information, nor that it relied upon it in its Decision, there is no basis to annul the Board's denial on this ground.

<sup>9</sup> The Court also rejects Petitioner's allegation that the Board did not consider his Defense attorney's statement. The letter is part of the record, as it was included in Petitioner's parole packet. Assuming this letter qualifies as a

Petitioner's final argument is that the Board based its denial on inaccurate information contained in his parole file. The alleged inaccurate information is as follows: that Petitioner did not shoot the victim six times, Petitioner's criminal history was wrongly stated to have started in 1974, there was not significant community opposition and there were numerous inaccuracies in Petitioner's COMPAS document.

The first paragraph of the Board's Decision indicates that Petitioner fired six rounds causing the victim's death. The final paragraph concludes that "[s]hooting PO Bilodeau six times causing his most painful death was so unnecessary given the circumstances that your release at this time would so deprecate the serious nature of your offense as to undermine respect for the law." This information is contained in Petitioner's presentence report, which states that the autopsy report indicates that the victim died as the result of six bullet wounds and that Petitioner fired six shots on the night of this incident. Although the record contains information that Petitioner did not shoot his victim six times, the Board "was entitled to rely on the information contained in the presentence investigation report, and petitioner is foreclosed from challenging the accuracy of that report here, inasmuch as he failed to raise such a challenge before the sentencing court." *Carter v. Evans*, 81 AD3d 1031 [3d Dept. 2011], *lv. denied* 16 NY3d 712 [2011].<sup>10</sup> As the Board was entitled to rely on the information in the presentence report, and Petitioner did in fact shoot and kill the victim, the alleged inaccuracy is not a basis to overturn the Board's Decision.

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recommendation of the inmate's attorney pursuant to Executive Law §259-i(c)(A)(vii), there is no requirement that the Board address each statutory factor in its decision. As the letter was part of the record, Petitioner cannot establish that the Board failed to consider it.

<sup>10</sup> Petitioner maintains that his trial counsel challenged the accuracy of the presentence report at sentencing. A review of the sentencing minutes, however, does not indicate that the accuracy of the presentence report was addressed by trial counsel at the sentencing. The portion of the sentencing minutes cited involves counsel's arguments on mitigation.

The Court also does not find persuasive Petitioner's claims regarding his "inaccurate" criminal history. The Board's Decision indicates that Petitioner's criminal history "reflects a prior firearms conviction in 1978" among other drug and gambling convictions commencing in 1974. Although Petitioner did not have a conviction in 1974, his criminal history commenced in 1975 and he did have a firearms conviction in 1978. This discrepancy is relatively minor and there is no indication in the record that a purported 1974 conviction served as a basis for the Board's denial of parole release. *See Restivo v. New York State Bd. of Parole*, 70 AD3d 1096, 1097 [3d Dept. 2010]. Similarly unavailing is Petitioner's statement that the Board should not have relied upon the community opposition because it came from unknown and unverified sources.

Petitioner further fails to provide any case law or statutory support for his argument that the Board's Decision should be overturned because of alleged erroneous and unsubstantiated information in his COMPAS. Petitioner concedes that he has scored consistently high in the "ReEntry drug abuse" category of COMPAS in each of the four COMPAS reports that have issued since 2012. Absent from the record is any indication that Petitioner ever contested that score. Moreover, the interview transcript is devoid of any evidence that Petitioner challenged any of the alleged inconsistencies in the COMPAS document at his parole interview.<sup>11</sup> Without any indication that Petitioner contested the contents of the COMPAS instrument, Petitioner fails to demonstrate any basis upon which the Board should have questioned the findings. In any event, Petitioner has not demonstrated that the Board relied upon any of these

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<sup>11</sup> During the interview, Petitioner was asked specifically about his substance abuse score in COMPAS and he did not raise any issue regarding his score. *See* Interview Transcript, p.10.

alleged inconsistencies in rendering its Decision.<sup>12</sup>

Lastly, it is important to note that although this Court may not have reached the same decision as the Respondent Board did in this case, the standard is not whether this Court agrees with the Board's determination, but whether the Board followed the statutory requirements in rendering its Decision. As the Board did so in this case, the Court finds that Petitioner failed to sustain his burden of demonstrating that the challenged determination was irrational and the Petition is denied and the proceeding is dismissed. *Campbell, supra*.

Accordingly, it is hereby

ORDERED that the Petition is denied and the proceeding is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
April 16, 2020

*Christi J. Acker*  
CHRISTI J. ACKER, J.S.C.

To: All Counsel via ECF

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<sup>12</sup> Indeed, the Board noted Petitioner's "good employment options" during the interview. Interview transcript, p. 10.