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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
SERGIO VOII

Petitioner,

DECISION AND ORDER

-against-

Index No.: 2020-50485

TINA M. STANFORD, CHAIRWOMAN,
BOARD OF PAROLE,

Respondent.

-----X

ACKER, J.S.C.

The following papers, numbered 1 to 40, were considered on Petitioner’s application pursuant to CPLR Article 78 challenging Respondent’s denial of his release to parole supervision:

Notice of Petition-Verified Petition-Exhibits 1-21	1-23
Answer and Return-Exhibits 1-15 ¹	24-39
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Petitioner commenced the instant proceeding seeking to have this Court order him released to parole supervision, or, in the alternative, to annul the March 2019 parole denial and order a properly conducted *de novo* parole interview before a new panel that does not include Commissioners Berliner and Davis, nor any other commissioner that has previously denied parole.

Petitioner is currently incarcerated at Fishkill Correctional Facility, having been convicted of Murder in the Second Degree, Manslaughter in the First Degree, Criminal

¹ The Court also reviewed, *in camera*, the confidential documents submitted by Respondent as Exhibit 1 (entire exhibit) and portions of Exhibits 4, 5 and 7.

Possession of a Weapon in the Second Degree and Reckless Endangerment in the First Degree.²

Petitioner was sentenced to two to six years for each of the weapons and endangerment convictions to run concurrently. Petitioner's sentences on the murder and manslaughter convictions merged into a combined sentence of 32 years to life, to run concurrently with the two to six year sentences.

On August 2, 1979, Petitioner, who was then 18 years old, was walking home from the subway in Brooklyn. He was returning from Manhattan after taking a civil service exam and was carrying a loaded gun. He and two other pedestrians took a shortcut through a neighborhood field where a softball game was taking place. Petitioner and the other pedestrians started to walk across the field, having been waved on by the umpire (a local priest). An altercation ensued between the pedestrians and the players, during which Petitioner shot and killed one of the players, Edward Brugman. Petitioner fled the scene and was chased by a group of players, including off duty Police Officer Michael Russell. Petitioner fired his weapon a number of times during this approximate four block chase. Officer Russell eventually tackled Petitioner and while they were struggling on the ground, Petitioner shot Russell, who also died from his wounds.

The instant application was brought as a result of the Parole Board's March 2019 decision denying discretionary release and imposing an 18-month hold. Petitioner timely filed an administrative appeal thereafter, and the denial was affirmed on or about January 16, 2020.

This was Petitioner's fifth appearance before the Parole Board, after having served

² Petitioner's first trial ended in a mistrial when the trial judge became ill. Petitioner's second trial resulted in his conviction on the charges of criminal possession and reckless endangerment, with the jury deadlocking on the two murder charges. Petitioner was convicted on the murder and manslaughter charges after a third trial.

approximately 41 years in prison.

Petitioner provides eight reasons why he alleges the Board's decision was improper, to wit: that Respondent Board (1) did not explain its departure from all twelve COMPAS categories, nor did it provide individualized reasons for its departures from each of those scales; (2) did not address how it considered the parole factors set forth in the Executive Law and ignored Petitioner's decades of varied and successful rehabilitative efforts; (3) did not explain its reason for denial in detail; (4) relied on "community opposition" that conveyed penal philosophy based upon erroneous information and contained offensive and inflammatory rhetoric; (5) relied upon erroneous information; (6) failed to request a recommendation from the current Brooklyn District Attorney and relied upon a "stale" letter from former DA Hynes' administration; (7) failed to identify an aggravating factor that justified denying Petitioner parole for the fifth time; (8) violated Petitioner's Sixth Amendment right to a trial by jury by relying upon an unproven assertion that Petitioner intentionally killed Officer Russell to evade arrest.

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.

“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)(i).

Petitioner’s March 20, 2019 Interview and Respondent’s March 25, 2019 Decision

The transcript of Petitioner’s parole interview is annexed to the Answer and Return as Exhibit 9 (hereinafter referred to as “Interview Transcript”). Respondent’s Decision denying parole, which includes a written dissent from one of the Commissioners, is contained at pages 38-41 of the Interview Transcript (hereinafter referred to as “Decision”).³

In reviewing the Respondent’s March 2019 decision in the context of the parole interview transcript, the Court finds that Petitioner has demonstrated that the Board’s determination to deny him release evinces irrationality bordering on impropriety. This is most clearly evidenced by the Board’s admitted departure from Petitioner’s COMPAS. The record establishes that Petitioner had only six disciplinary tickets during his 41-year incarceration, with the last one occurring in 2009. Petitioner had no criminal record prior to the crimes for which he was convicted, although he was convicted of misdemeanor assault against another prisoner in 1989.⁴

³ Respondent also provides a separate “Parole Board Release Decision Notice” as Exhibit 11 that contains virtually the same content as the transcript, but is dated March 25, 2019.

⁴ According to the transcript, Petitioner punched an inmate who “made a romantic advance towards [him], and [he] handled it with a complete lack of diplomacy.” Transcript, p. 19.

In its Decision, the Board commended Petitioner's personal growth, programmatic achievements, productive use of time, his remorse over the crimes and notes that Petitioner's COMPAS risk assessment indicates a low risk in every category.⁵ However, Respondent Board then stated that the majority of the panel

departs from COMPAS due to the tragic reckless nature of the crimes themselves in which you shot a man to death over an argument on a field, led a chase across a busy street in Brooklyn during which you fired additional shots from your gun, and ultimately killed another person during a struggle over your gun when he attempted to apprehend you. These tragic events began with your fatal decision to carry and illegal firearm and to use it during the argument. And the result is that two men are dead.

Petitioner argues that Respondent Board violated its regulatory and statutory requirements by failing to explain this departure from COMPAS.

9 N.Y.C.R.R. §8002.2(a) provides 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 prepared by the Department of Corrections and Community Supervision (collectively, "Department Risk and Needs Assessment"). 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. [Emphasis supplied].

The transcript is clear that Respondent Board expressly stated that it was departing from Petitioner's COMPAS assessment. Accordingly, 9 N.Y.C.R.R. §8002.2(a) requires that it specify the scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. Respondent Board failed to do so.

⁵ A review of the COMPAS Risk Assessment annexed to the Petition as Exhibit 15 confirms that Petitioner scored a "1" in all categories, the lowest possible score. Nothing in the unredacted Risk Assessment submitted as Exhibit 5 of the Answer and Return changes this conclusion.

In its Answer and Return, Respondent Board maintains that it considered Petitioner's COMPAS instrument and issued a decision "consistent" with the amended 9 N.Y.C.R.R. §8002.2(a). It further argues that Respondent Board "did not find Petitioner likely to reoffend, but rather concluded, *despite* low risk scores, release would be inappropriate under the other two statutory standards [emphasis in original]." As a result, the Board "was not strictly required by the regulation to address scales from which it was departing." See Answer and Return, ¶32.

Respondent Board's interpretation of the regulation is flawed. Respondent Board appears to argue that this regulation only requires it to address the scales from which it departs when there is a finding that a petitioner is likely to reoffend – the first criteria listed under Executive Law §259-i(2)(c)(A). However, the regulation does not tie the requirement to explain departures to any particular category in Executive Law §259-i(2)(c)(A). Rather, it clearly indicates that a departure requires the Board to identify any scale from which it departs and provide an individualized reason [Emphasis added]. The fact that Respondent Board here relied upon the other two standards in denying release does not excuse the Board's from complying with 9 N.Y.C.R.R. §8002.2(a).

Moreover, even assuming the Board's generic statement identified the scale from which it departed, the explanation given for the departure is not "individualized." The Board asserts that it is departing from COMPAS because of the "tragic reckless nature of the crimes themselves." However, the COMPAS Risk Assessment contains twelve categories,⁶ none of which involve the nature of the underlying crimes. Thus, the alleged "individualized" reason

⁶ 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. Petitioner scored "1" (the lowest score) in all categories.

provided by the Board for the departure is unrelated to any scale contained in the COMPAS Assessment.

Established case law makes clear that absent a convincing demonstration to the contrary, the Parole Board is presumed to have acted properly in accordance with statutory requirements. *Jackson v. Evans*, 118 AD3d 701, 702 [2d Dept. 2014]. As the evidence before this Court demonstrates that the Parole Board herein did not comply with the statutory requirements of 9 N.Y.C.R.R. §8002.2(a), judicial intervention is warranted because this departure from the regulations evinces irrationality bordering on impropriety. *See Coleman v. New York State Dep't of Corr. & Cmty. Supervision*, 157 AD3d 672, 673 [2d Dept. 2018].

Although the Board's failure to comply with COMPAS provides a sufficient basis to grant a *de novo* interview, Petitioner raises some other grounds for annulment that warrant discussion.⁷ Petitioner maintains that the Board's decision impermissibly relied upon the seriousness of Petitioner's offenses and the Court agrees. As discussed above, the only reason given by the Board in departing from COMPAS is the "tragic reckless nature" of Petitioner's offenses. Indeed, aside from noting official and community opposition, "the Parole Board focused only on the petitioner's conduct during the commission of the subject crimes." *Matter of Rivera v. Stanford*, 172 AD3d 872, 874 [2d Dept. 2019], *citing Matter of Ramirez v Evans*, 118 AD3d 707 [2d Dept. 2014]. The Board does not give any explanation of how it balanced the seriousness of Petitioner's crimes against the other statutory factors, the majority of which weigh in Petitioner's favor. As the Board's determination to deny parole release to the Petitioner appears to have been based solely on the seriousness of the crimes he committed,

⁷ As noted above, Petitioner raised eight arguments in his Petition. As the Court is ordering a *de novo* interview, the Court declines to reach the arguments not addressed herein.

“such analysis, or lack thereof, [is] incompatible with the Parole Board’s duty.” *Matter of Rivera, supra*.

Petitioner further asserts that the Board violated the Executive Law by failing to explain the reasons for its denial in detail. Executive Law §259-i(2)(a)(i) requires that when a parole board denies release, it shall advise the inmate of the factors and reasons for such denial in writing and these “reasons shall be given in detail and not in conclusory terms.” Aside from the above quoted language about the “tragic reckless nature” of Petitioner’s crimes and noting that there is opposition to his release, the Board cryptically advises Petitioner that “there is more to do” and he is encouraged to continue on his rehabilitation. This conclusory language does not explain the reason for denial in the detail required by the Executive Law, which provides additional grounds for a *de novo* interview.

Thus, the record demonstrates that in light of all of the relevant factors, including, but not limited to, the Petitioner’s understanding of and remorse for his crimes, his significant accomplishments and his leadership, notwithstanding the seriousness of the underlying offenses, the Parole Board’s determination to deny the petitioner release on parole “evinced irrationality bordering on impropriety.” *Matter of Rivera, supra* at 876.

This decision, as it must, focuses on ensuring that Petitioner’s application for parole release be appropriately evaluated pursuant to all applicable laws and regulations. However, the Court acknowledges, and does not minimize, that this case involved the senseless death of two men, who were merely enjoying a softball game before the incidents at issue. Nevertheless, the record before this Court entitles Petitioner to a *de novo* interview as discussed herein.

The timing of the *de novo* interview being ordered must also be addressed, given the

current situation involving COVID-19 and Petitioner's age (59). Respondent Board requested that it be given sixty (60) days to hold such an interview, however, given the current pandemic, this request is denied. As Petitioner is currently scheduled for a return to the Parole Board in September 2020, it is reasonable for Respondent to schedule and hold said interview within 30 days of the issuance of this Decision and Order. Should the pandemic affect this scheduling, Respondent shall advise the Court via email to sbrady@nycourts.gov on or before May 27, 2020. Any request made thereafter will not be entertained.

Accordingly, it is hereby

ORDERED that the Petition is granted to the extent that the March 2019 parole determination is annulled; and it is further

ORDERED that the matter is remitted to Respondent for a *de novo* parole release interview and review which complies with all applicable statutes and regulations and is held before a different panel than conducted the March 2019 interview; and it is further

ORDERED that said interview is to be conducted within thirty (30) days of the date of this Court's Decision and Order, and a decision is to be issued within fifteen (15) days of the date of such hearing.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
May 13, 2020

CHRISTI J. ACKER, J.S.C.

To: All Counsel via ECF