Decision in Art. 78 proceeding - Rafikian, Mohammad (2022-06-16)

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

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In the Matter of the Application of
MOHAMMAD RAFIKIAN,

Petitioner,

-against-

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

Respondents.

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DECISION AND ORDER

Index No.: 2022-50517

ACKER, J.S.C.

The following papers, NYSCEF Doc. #s 1-7 and 9-18, were considered on Mohammad Rafikian's ("Petitioner") application pursuant to CPLR Article 78 challenging Respondent's denial of his release to parole supervision:

Notice of Petition-Verified Petition-Exhibits 1-4 .....NYSCEF Doc. #s 1-7
Answer and Return-Exhibits 1-10[1] .....NYSCEF Doc. #s 9-18

Petitioner commenced the instant proceeding seeking an Order reversing the February 2, 2022 affirmance of the Parole Board's July 27, 2021 decision denying his release and granting Petitioner release to parole supervision, or in the alternative, directing Respondents to hold a *de novo* parole interview according to law and based upon a contemporary record.

Petitioner is currently incarcerated at Otisville Correctional Facility. On or about

[1] The Court also reviewed, *in camera*, the confidential documents submitted by Respondents as Exhibit 2 (entire exhibit) and portions of Exhibit 3.

September 21, 2007, Petitioner was convicted, by jury verdict, of multiple counts of grand larceny in the first degree, grand larceny in the second degree, criminal impersonation in the second degree, scheme to defraud in the first degree and practicing or appearing as an attorney without being admitted and registered. On or about September 26, 2012, the Second Department reversed the judgments[2] and the matter was remitted to Supreme Court, Queens County for a new trial. *People v. Rafikian*, 98 AD3d 1139 [2d Dept. 2012]. The Second Department vacated the convictions and ordered a new trial because it found that Petitioner's waiver of counsel before and during his trial was not knowing and voluntary. After the second trial, at which Petitioner was represented by counsel, he was convicted of grand larceny in the first degree, six counts of grand larceny in the second degree and scheme to defraud in the first degree and was sentenced to an aggregate term of 15-30 years imprisonment.

The instant application was brought as a result of the Parole Board's July 27, 2021 decision denying Petitioner discretionary release and imposing a 24-month hold. Petitioner timely filed an administrative appeal and the Appeals Unit affirmed the Board's Decision on or about February 2, 2022. This was Petitioner's second appearance before the Parole Board after having served more than 17 years in prison.

Petitioner's July 27, 2021 Interview and Decision

The transcript of Petitioner's parole interview is annexed to the Petition as Exhibit 2 and to the Answer and Return as Exhibit 4 (hereinafter referred to as "Interview Transcript"). The Parole Board's Decision denying parole is contained at pages 25-26 of the Interview Transcript

[2] Petitioner appealed the three judgments of the Supreme Court, Queens County, which convicted him of the listed charges, upon a jury verdict and imposed sentence. Therefore, when referring to the vacatur of the judgments hereafter, it is understood that the convictions and resultant sentence were vacated.

(hereinafter referred to as "Decision").[3]

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], *leave to appeal dismissed*, 35 NY3d 963 [2020]. 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.*

Discussion

Petitioner raises a singular issue in seeking to annul the Board's decision – that the Board improperly relied upon the sentencing minutes from Petitioner's first sentencing in 2007, even though the 2007 convictions were later vacated, reversed and remanded for a new trial by the Appellate Division. Although Petitioner was later re-convicted and re-sentenced in 2014, the Board did not consider the sentencing minutes from the 2014 conviction. Petitioner argues that the Board's reliance on a sentencing record that was based upon vacated convictions was unconstitutional, as well as arbitrary and capricious. Respondents maintain that they acted in compliance with the law and that the determination denying discretionary release to parole was neither arbitrary, nor capricious.

The Interview Transcript demonstrates that the Board referred extensively to Petitioner's

[3] 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 August 2, 2021.

2007 sentencing minutes during the July 27, 2021 interview. Indeed, Commissioner Drake stated that s/he found the statements made at the 2007 sentencing to be "compelling." The Board discussed various statements from Petitioner's victims, which had either been read into the sentencing record from letters or were given by those who addressed the court in person. The Board reiterated the victims' explanations as to how their lives had been affected by Petitioner's crimes. Notably, at one point during the Interview, when Petitioner responded strongly to the recitation of the victims' statements, Commissioner Drake stated that s/he was "reading from the official document."

The Board also focused on Petitioner's statements that he made about the victims during the 2007 sentencing, stating that "it does reads like a person who has no remorse" and a "person who would rather blame his victims." The Board further commented that Petitioner referred to one of the victims as a "crack-head" several times and it discussed Petitioner's lack of preparation for the sentencing. Although the Board addressed other matters during the Interview, the discussion of the 2007 sentencing minutes encompasses 7½ pages of the transcript out of a total of 24 pages.

The Board decided to deny parole release to Petitioner and imposed a 24-month hold. The 2007 sentencing minutes are not specifically referenced in the Decision, but it is apparent that the contents of the minutes impacted the Board's impression of Petitioner. For example, in the Decision, the Board questions Petitioner's credibility and notes that Petitioner tried to discredit one victim's character and he displayed minimal remorse for the victims' suffering. The discussion of the victims' statements and Petitioner's response thereto was prompted solely by the Board's review of the 2007 sentencing minutes. The Court concludes that consideration

of these minutes were integral to the Board's denial of parole release.

Respondents argue that the Board was entitled to consider the sentencing minutes because the sentencing court did not order that Petitioner's 2007 court records be expunged. This argument, however, misapprehends the import of the Second Department's reversal of the underlying judgments. Simply put, as the 2007 judgments were vacated, the Board should not have relied on the sentencing minutes in this case. Respondents provide no statutory or case law support that it is proper for a Parole Board to consider the contents of the sentencing minutes from a vacated conviction.[4] Importantly, in ordering a new trial, the Second Department determined Petitioner's 6th Amendment right to counsel was impacted when he did not make a "knowing and voluntary" waiver of counsel. He represented himself at a hearing, the trial and sentencing. It is inappropriate for the Board to rely upon statements made by him and others while he was not adequately represented by counsel.

Clearly, the Board's review of the 2007 sentencing minutes was not "*de minimus* harmless error" as posited by Respondents. It is unlikely that Petitioner would have made any of the statements at the 2007 sentencing had he been represented by counsel. In fact, when Petitioner was represented by counsel in 2014, he did not address the sentencing judge.

Additionally, the Board's consideration of the 2007 minutes was in error for another important reason. During the interview, the Board recounts how one of the victims, Mr. Gottlieb, "discussed" at sentencing how Petitioner had no remorse. The Gottlieb portion of the interview encompasses more than a full page of the Interview Transcript. Significantly, the Board's Decision found that Petitioner "displayed minimal remorse for the victim's suffering."

[4] Although Executive Law §259-i(c)(A)(vii) requires the Board to consider "recommendations of the sentencing court," there is no indication that the Board used the 2007 sentencing minutes for this purpose.

But Mr. Gottlieb died in the interim between the two trials and Petitioner was not re-tried on the charges related to him. Therefore, the Board's consideration of statements made by Mr. Gottlieb during the 2007 sentencing was improper and prejudicial to Petitioner.

Although the extent to which the 2007 sentencing minutes impacted the Board's Decision cannot be known by this Court, the fact remains that the minutes played a prominent role during the Interview and the Board's consideration thereof was in error. Based upon the foregoing, the Court remands this matter for a *de novo* interview before a new Board. *See Brazill v. New York State Bd. of Parole*, 76 AD2d 864 [2d Dept. 1980] ("Because of the likelihood that such error may have affected the board's decision to deny parole, a new hearing is required."); *see also Comfort v. New York State Bd. of Parole*, 101 AD3d 1450, 1451 [3d Dept. 2012] and *Lewis v. Travis*, 9 AD3d 800, 801 [3d Dept. 2004].

In addition, since the July 2021 Interview, the minutes from Petitioner's 2014 sentencing have been located. Thus, a *de novo* interview will provide the opportunity for the new Board to consider the appropriate sentencing minutes for the convictions upon which Petitioner is incarcerated.

Therefore, it is hereby

ORDERED that the Petition is granted to the extent that the July 27, 2021 parole determination is annulled; and it is further

ORDERED that the matter is remitted 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 July 27, 2021 interview; and it is further

ORDERED that said interview is to be conducted within forty-five (45) 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
June 16, 2022

CHRISTI J. ACKER, J.S.C.

To: All Counsel via NYSCEF