Matter of Deperno v New York State Dept. of Corrections & Community Supervision
2015 NY Slip Op 32329(U)
November 30, 2015
Supreme Court, Clinton County
Docket Number: 2014-1603
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF CLINTON**

_____X

In the Matter of the Application of
DANIEL DEPERNO, #10-B-2972,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #09-1-2014-0616.36
INDEX # 2014-1603
ORI #NY009013J

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION and **NYS BOARD OF PAROLE**,
Respondents.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Daniel DePerno, verified on October 21, 2014 and filed in the Clinton County Clerk's office on October 30, 2014. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the January 2014 determination denying him discretionary parole release and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on November 3, 2014. Before addressing the somewhat convoluted procedural path this proceeding has taken since the issuance of that Order to Show Cause, the Court finds it appropriate to first describe petitioner's sentencing history, which is also somewhat convoluted.

On September 30, 2010 petitioner was initially sentenced in Cortland County Court to consecutive determinate terms of 4½ years, 4 years and 1½ years (aggregate 10 years), with 10 years post-release supervision, upon his convictions, following pleas, of the crimes of Criminal Sexual Act 2°, Rape 2° and Rape 3°. Although the underlying 31-count indictment alleged various sexual crimes against the victim over the course of three years,

defendant pled guilty to three crimes that had been committed in 2006. Upon direct appeal the Appellate Division, Third Department, found as follows:

> "Defendant contends, and the People concede, that the sentences imposed were illegal. A defendant must be sentenced according to the law as it existed at the time that he or she committed the offense. In 2007, the Legislature categorized rape in the second degree and criminal sexual act in the second degree as violent felony offenses and enacted the felony sex offender statute. Because defendant committed the crimes at issue here in 2006 - prior to the Legislature's amendments to the relevant statutes - the prison sentences for these crimes had to be indeterminate terms, and postrelease supervision was not authorized. We therefore vacate the illegal sentences that were imposed. As the agreed-upon sentences cannot legally be imposed, we remit to County Court for resentencing in accordance with the relevant statutes, with the opportunity for either party to withdraw from the plea agreement." *People v. DePerno*, 92 AD3d 1089, 1090 (citations omitted).

On April 26, 2012 petitioner was resentenced in Cortland County Court to consecutive indeterminate sentences of 2⅓ to 7 years, 2⅓ to 7 years and 1⅓ to 4 years (aggregate 6 to 18 years) upon his convictions, following pleas, of the same three crimes. On November 21, 2013, however, the Appellate Division, Third Department found on direct appeal that the sentencing court violated double jeopardy principles when it imposed an aggregate indeterminate sentence with a maximum term of more than 10 years. Accordingly, the Appellate Division, Third Department, "[o]rdered that the judgment is modified, on the law, by reducing the sentences imposed . . . to 1 to 3 years, 1⅓ to 4 years and 1 to 3 years [aggregate 3⅓ to 10 years] . . . to be served consecutively, and, as so modified, affirmed." *People v. DePerno*, 111 AD3d 1058, 1059. Also on November 21, 2013 the Cortland County Court issued an amended Sentence & Commitment order incorporating the modifications directed by the Appellate Division, Third Department.

Returning to the procedural path this proceeding has taken, it is noted that a Letter Order was issued on January 2, 2015 (approximately two months after the Order to Show

Cause of November 3, 2014) wherein the time for respondents to submit answering papers was extended pending potential settlement. In a Letter Memorandum dated January 23, 2015 counsel for the respondents conceded " . . . that Petitioner is entitled to a *de novo* appearance before the Parole Board and will hold such 'forthwith' upon the Court's decision on this matter. At petitioner's January 21, 2014 appearance before the [Parole] Board, members of the Board had before them and apparently considered the sentencing minutes from Petitioner's overturned conviction[1]. This was error, which requires reversal of the Board's decision and new appearance." (Footnote omitted). Notwithstanding this concession, counsel took issue with various other requests for relief set forth in the Petition. In his response dated January 28, 2015, filed in the Clinton County Clerk's office on February 4, 2015, petitioner, after first addressing specific arguments advanced by counsel in the Letter Memorandum of January 23, 2015, stated as follows: "I have legitimate concerns regarding the settlement offered by Respondents. Only the illegal consideration of sentencing minutes was cited as a matter to correct at a new hearing. It is upon information belief that, unless ALL of the arguments brought forth in my original petition are either agreed to or ruled upon, I will face a further denial of parole following this proposed new hearing. I therefore ask this Court's further intervention in examining and commenting on the multitude of allegations cited in my original petition." Thereafter, by Letter Order dated February 9, 2015, this Court found it apparent that the parties were unable to reach an agreement allowing for the issuance of an order directing *de novo* discretionary parole release consideration on consent, and,

---

[1] Counsel's reference to "Petitioner's overturned [2010] conviction" is somewhat perplexing. In *People v. DePerno*, 92 AD3d 1089, the Appellate Division, Third Department, merely determined that the sentencing component of the 2010 plea agreement was illegal and, therefore, vacated the illegal sentences and remitted the matter to the Cortland County Court " . . . for resentencing in accordance with the relevant statutes, with the opportunity for either party to withdraw from the plea agreement." *Id* at 1090 (citations omitted). There is nothing in the record to suggest that petitioner subsequently withdrew his guilty pleas.

therefore, directed respondents " . . . to serve and mail supplemental answering papers on the merits, in accordance with the provisions of the Order to Show Cause of November 3, 2014 . . ." The Court has since received and reviewed respondents' Return, including *in camera* materials, dated April 14, 2015, as well as respondents' Answer and Supplemental Return, verified on June 11, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated June 11, 2015. The Court has also received and reviewed petitioner's Letter Memorandum in Reply, dated June 15, 2015 and filed in the Clinton County Clerk's office on June 25, 2015. Additional correspondence from petitioner dated July 11, 2015 and September 5, 2015 has also been received and reviewed.

After petitioner was first re-sentenced on April 26, 2012, but before the November 21, 2013 determination of the Appellate Division, Third Department (*People v. DePerno*, 111 AD3d 1058) wherein the minimum period of petitioner's aggregate multiple sentence was reduced from 6 years to 3⅓ years, DOCCS officials calculated petitioner's initial (regular) parole eligibility date as April 19, 2016. As of his November 21, 2013 re-sentencing, however, petitioner's initial (regular) parole eligibility date was recalculated as falling on August 19, 2013. Thus, upon petitioner's November 21, 2013 re-sentencing, he had already passed the August 19, 2013 recalculated parole eligibility date and, accordingly, was immediately eligible to be considered for discretionary parole release.

Petitioner made his initial appearance before a Parole Board on January 21, 2014. Following that appearance petitioner was denied discretionary parole release and directed to be held for an additional 24 months, with his next Parole Board appearance scheduled for January of 2016. The parole denial determination reads as follows:

> "DESPITE THE EEC [Earned Eligibility Certificate], AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY.
>
> THE BOARD HAS CONSIDERED YOUR INSTITUTIONAL ADJUSTMENT INCLUDING DISCIPLINE AND PROGRAM PARTICIPATION. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO COEITY [presumably, SOCIETY], REHABILITATION EFFORTS AND YOUR NEEDS FOR SUCCESSFUL RE-ENTRY INTO THE COMMUNITY. YOUR RELEASE PLANS HAVE ALSO BEEN CONSIDERED. MORE COMPELLING, HOWEVER, IS THE VULNERABILITY OF THE YOUNG VICTIM WHOM YOU RAPED OVER A PROLONGED PERIOD OF TIME.
>
> WHILE INCARCERATED, YOU HAVE NOT YET COMPLETED A SEX OFFENDER PROGRAM. THE BOARD NOTES YOUR COMPLETION OF ART [Aggression Replacement Training] AND YOUR WORK WITH CHAPLIN SERVICES.
>
> THE BAORD [sic] NOTES YOUR LETTERS OF SUPPORT AND PAROLE PACKET, WHICH CONTAIN YOUR PERSONAL STATEMENTS, LETTER OF EMPLOYMENT, RESIDENCE AND PROGRAM ACCOMPLISHMENTS.
>
> ALL FACTORS CONSIDERED, YOUR RELEASE AT THIS TIME IS NOT APPROPRIATE."

Although the documents perfecting petitioner's administrative appeal from the January 2014 parole denial determination are dated June 8, 2014 and August 13, 2014, respectively, the Court is unable to determine from the record precisely when those documents were received by the DOCCS Board of Parole Appeals Unit. In any event, respondents acknowledge that the Appeals Unit failed to issue its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c). This proceeding ensued.

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-

i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268, *Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Jackson v. Evans,* 118 AD3d 701, *Nankervis v. Dennison,* 30 AD3d 521 and *Zane v. New York State Division of Parole*, 231 AD2d 848.

Petitioner's first cause of action centers upon his assertion that erroneous information was relied upon by the Parole Board in connection with the January 2014 parole denial determination. Where erroneous information serves as a basis for a parole denial determination such determination must be vacated and a new hearing ordered. *See Smith v. New York State Board of Parole*, 34 AD3d 1156, *Hughes v. New York State Division of Parole*, 21 AD3d 1176 and *Lewis v. Travis*, 9 AD3d 800. Notwithstanding the foregoing, the presence of erroneous information in the record before a Parole Board does not serve as the basis for a new hearing where there is nothing in the record to suggest that the erroneous information served as a basis for the parole denial determination. *See Sutherland v. Evans*, 82 AD3d 1428 and *Restivo v. New York State Board of Parole*, 70 AD3d 1096.

Petitioner first asserts that the record before the Parole Board improperly included the sentencing minutes from both the initial September 30, 2010 sentencing as well as the April 26, 2012 resentencing. As far as the 2010 minutes are concerned the Court simply notes that respondents have already conceded that the presence of the 2010 minutes in the file, coupled with the Board's apparent consideration of such minutes, warrant the reversal of the January 2014 parole denial determination and *de novo* parole release consideration. As far as the 2012 minutes are concerned, it is noted that such minutes are

not part of the record herein and the Court is unable to conclude that such minutes served as a basis for the January 2014 parole denial determination. In any event, since the Appellate Division, Third Department, simply reduced the sentences imposed by the Cortland County Court at the April 26, 2012 resentencing (without any apparent challenge to the validity of the underlying convictions), this Court finds that even if the Parole Board had considered such minutes no basis to vacate the January 2014 parole denial determination would exist. Accordingly, the Court rejects petitioner's argument on this point.

The Court next finds that the presence of the September 24, 2010 pre-sentence investigation report (PSI) in the Parole Board record does not constitute a basis to vacate the January 2014 parole denial determination. The PSI was prepared after petitioner initially pled guilty to the Crimes of Criminal Sexual Act 2°, Rape 2° and Rape 3° and there is nothing in the record to suggest that such pleas were ever withdrawn or that the underlying convictions were ever judicially overturned. To the extent petitioner purports to challenge the accuracy of certain information set forth in the PSI itself, this Court, for the reasons set forth below, rejects such challenge.

When an individual is found guilty of a felony the trial court is generally required to order a PSI and its sentence may not be pronounced until the court has received that report. *See* CPL §390.20(1). "The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included." CPL §390.30(1) (emphasis added). Due process

considerations require that the sentencing court must assure itself that the information forming the basis of the sentence imposed is reliable and accurate. *See People v. Outley*, 80 NY2d 702. CPL §390.40(1) specifically authorizes a criminal defendant to file a written memorandum with the court, at any time prior to sentencing, setting forth such information as the defendant deems pertinent to his or her sentencing, including information with respect any of the matters set forth in CPL §390.30. The Criminal Procedure Law also authorizes the court to conduct a pre-sentence conference for the purpose of resolving ". . . discrepancies between the pre-sentence report, or other information that the court has received, and the defendant's . . . pre-sentence memorandum . . ." CPL §400.10(1). Thus, there is established in the Criminal Procedure Law a mechanism by which the petitioner could have challenged the accuracy of any information contained in the pre-sentence report. Petitioner may not, however, challenge the accuracy of the PSI in the context of a CPLR Article 78 proceeding commenced more than four years after the report was issued and he was sentenced. Petitioner's challenge it thus untimely in that it should have been addressed to the sentencing court prior to sentencing. *See Hughes v. New York City Department of Probation*, 281 AD2d 229, *Sciaraffo v. New York City Department of Probation*, 248 AD2d 477 and *Salahuddin v. Mitchell*, 232 AD2d 903.

Petitioner next asserts that the January 2014 Parole Board Release Decision Notice itself erroneously specifies "Jail Time in Days: 0070" and "Prison Time in Months: "035[.]" Notwithstanding the foregoing, the record herein suggests that petitioner was confined in local custody for 162 days (from April 22, 2010 to September 30, 2010) prior to being first received into DOCCS custody on October 1, 2010. In addition to those 162 days of local jail time, petitioner had effectively been incarcerated in state DOCCS custody for more than 39½ months (October 1, 2010 to January 21, 2014) as of his January 21,

2014 parole board appearance. The Court therefore finds that the references in the January 27, 2014 Parole Board Release Decision Notice to 70 days of jail time and 35 months of prison time collectively understate the overall duration of petitioner's incarceration by approximately 7½ months. Although the Board did not specifically purport to rely on this erroneous information in the "Reasons for Denial" portion of the Parole Board Release Decision Notice, under the circumstances of this case - where respondents concede, for other reasons, that *de novo* parole consideration is warranted - the Court finds it appropriate to direct them to correct/update the information with respect to petitioner's jail time and prison time.

Petitioner also argues that respondents failed to accurately determine the date he would have next been eligible for parole release following the January, 2014 parole denial determination. In this regard it is again noted that upon the November 21, 2013 modification of petitioner's 2012 re-sentence by action of the Appellate Division, Third Department (*People v. DePerno*, 111 AD3d 1058) DOCCS officials re-calculated petitioner's initial (regular) parole eligibility date as August 19, 2013. Since that parole eligibility date had already passed, petitioner was immediately considered for discretionary parole release with an appearance before a Parole Board on January 21, 2014. Following that appearance petitioner was denied discretionary parole release and it was directed that he be held for an additional 24 months, with his next Parole Board appearance scheduled for January of 2016. Petitioner argues, in effect, that the 24-month hold should have related back to his re-calculated August 19, 2013 initial parole eligibility date and thus his next appearance before the Board should have been scheduled in the months preceding August 19, 2015. Although the Court agrees with petitioner on this point, it is obvious that August 19, 2015 has come and gone. Accordingly, the Court finds, and hereby directs, that if petitioner is not released from DOCCS custody to parole

supervision following *de novo* consideration in accordance with the provisions of this Decision and Judgment, he must next be re-considered for discretionary parole-release no later than August 19, 2017.

A substantial portion of the petition is focused, in one way or another, on the argument that the January 2014 parole denial determination was based excessively/exclusively on the serious nature of the crimes underlying petitioner's incarceration, without adequate consideration of other statutory/mitigating factors. More specifically, petitioner asserts, in relevant part, as follows:

> "In Petitioner's parole file was clear evidence of his exemplary disciplinary record during his nearly four years in prison, a COMPAS Report . . . that indicated an extremely low possibility of recidivism . . . his successful completion of all offered programs and resulting Earned Eligibility Certificate . . . a substantial support system upon release . . . and a job offer for employment upon release . . . The parole file also shows that Petitioner is a married father of two young sons and a first time offender who was convicted of low-level, non-violent felonies . . . Petitioner was charged with statutory rape and related counts with age being the only element of the crimes. The complainant and the Petitioner knew each other well and no force, coercion, threats or manipulation were charged. Petitioner has not only accepted full responsibility for his behavior, but he has also shown remorse at every stage of the proceedings . . . Petitioner, at the time of the illegal contact with the teenager, had been suffering from untreated depression for years. The depression, which manifested itself in 2004 when the Petitioner's wife miscarried twins, was never used as an excuse for Petitioner's behavior. It does, however, provide a mitigating explanation as to why someone of solid character who lived an ethically and morally sound life for nearly 40 years could make such foolish decisions. Petitioner certainly meant no harm and his behavior was consistent with someone suffering from severe depression . . . Petitioner has a long history of strong contributions to all of the communities he has lived in . . . Despite all of these mitigating factors, the Board concluded in its decision that Petitioner if released would not, 'live and remain at liberty without again violating the law' and that his release 'would be incompatible with the welfare of society.' In its decision and during the interview, Respondent made only passing mention of Petitioner's positive COMPAS Report, EEC, and extensive accomplishments and rehabilitative efforts. It is . . . evidence [evident?] that the Board did not properly consider the factors that Executive Law requires it to. The decision, which used boilerplate rhetoric and predictable

> language from other decisions, violated the law by being arbitrary and capricious. Based on the record, it was also irrational bordering on impropriety. A new hearing is required . . . Despite the fact that Petitioner's case involved low-level, non-violent offenses, the Board still focused solely on the crime in its decision, writing in conclusory terms with no explanation of the denial. This is also irrational bordering on impropriety . . ." (References to exhibits and citations omitted).

Notwithstanding petitioner's assertions, a Parole Board need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans,* 116 AD3d 197*, lv granted* 23 NY3d 903*, app dismissed* 24 NY3d 1052*, Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the Parole Board Report (PIE January 2014) and transcript of petitioner's January 21, 2014 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's lack of a prior criminal record, therapeutic programing record (including some sex offender counseling at the Central New York Psychiatric Center), COMPAS ReEntry Risk Assessment Instrument, clean disciplinary record and release plans/community

support, in addition to information with respect to the circumstances of the crimes underlying his incarceration. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. Also petitioner's six-page written statement to parole authorities, submitted under cover letter dated January 2, 2014, was part of the record before the Parole Board and was referenced by one of the presiding commissioners during petitioner's January 21, 2014 interview. Through that detailed written statement petitioner was able to address the Parole Board members, presenting his positions with respect to a variety of issues he deemed relevant to the discretionary parole release decision then at hand, including his depression, remorse for his criminal actions and record of community service.

In view of the foregoing, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality boarding on impropriety as a result of the emphasis placed by the Board on the serious and disturbing nature of the crimes underlying petitioner's incarceration, including the fact that such crimes were committed against a vulnerable young victim who was raped over a prolonged period of time. *See Karlin v. New York State Division of Parole*, 77 AD3d 1015 and *Wellman v. Dennison*, 23 AD3d 974.

To the extent petitioner purports to rely on *King v. New York State Division of Parole*, 190 AD2d 423, *aff'd* 83 NY2d 788, the Court finds such reliance misplaced. In *King* the Appellate Division, First Department, not only determined that the Parole Board

improperly considered matters not within its purview (penal policy with respect to convicted murders) but also that the Parole Board failed " . . . to consider and fairly weigh all of the information available to them concerning petitioner that was relevant under the statute, which clearly demonstrates his extraordinary rehabilitative achievements and would appear to strongly militate in favor of granting parole." *Id* at 433. Notwithstanding the foregoing, in July of 2014 the appellate-level court in *King* went on to note that the only statutory criterion referenced by the Board in the parole denial determination was the seriousness of the crime underlying Mr. King's incarceration (felony murder of an off-duty police officer during the robbery of a fast food restaurant). According to the Appellate Division, First Department, "[s]ince . . . the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself." *Id* at 433.

In July of 2014, however, the Appellate Division, Third Department - whose precedent is binding on this Court - effectively determined that the above-referenced "aggravating circumstances" requirement enunciated by the First Department in *King* does not represent the state of the law in the Third Department. *See Hamilton v. New York State Division of Parole,* 119 AD3d 1268. In *Hamilton* it was noted that the Third Department " . . . has repeatedly held - both recently and historically - that, so long as the [Parole] Board considers the factors enumerated in the statute [Executive Law §259-i(2)(c)(A)] it is 'entitled . . . to place a greater emphasis on the gravity of [the] crime' (*Matter of Montane v. Evans,* 116 AD3d 197, 203 (2014), *lv granted* 23 NY3d 903 (2014) [internal quotation marks and citations omitted]' . . ." *Id* at 1271 (other citations omitted). After favorably citing nine Third Department cases decided between 1977 and 2014, the *Hamilton* court ended the string of cites as follows: " . . . *but see Matter of King v. New York State Div. of Parole,* 190 AD2d 423, 434 (1993), *aff'd on other grounds* 83 NY2d

788[2] (1994) [a First Department case holding, in conflict with our precedent, that the Board [of Parole] may not deny discretionary release based solely on the nature of the crime when the remaining statutory factors are considered only to be dismissed as not outweighing the seriousness of the crime]." 119 AD3d 1268, 1272. The *Hamilton* court continued as follows:

> "Particularly relevant here, we have held that, even when a petitioner's institutional behavior and accomplishments are 'exemplary,' the Board may place 'particular emphasis' on the violent nature or gravity of the crime in denying parole, as long as the relevant statutory factors are considered (*Matter of Valderrama v. Travis,* 19 AD3d at 905). In so holding we explained that, despite [the *Valderrama*] petitioner's admirable educational and vocational accomplishments and positive prison disciplinary history, '[o]ur settled jurisprudence is that a parole determination made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety' (*id*. [internal quotation marks and citations omitted]). We emphasize that this Court [Appellate Division, Third Department] has repeatedly reached the same result, on the same basis, when reviewing denials of parole to petitioners whom we recognized as having exemplary records and as being compelling candidates for release." 119 AD3d 1268, 1272 (additional citations omitted).

The Court therefore rejects petitioner's argument on this point.

Before moving on the Court finds it appropriate at this juncture to address petitioner's repeated assertion that he was only convicted of low-level, non-violent felonies. It is first observed that there is nothing in the January 2014 parole denial determination, or in the Parole Board record itself, to suggest that the Parole Board was under a different assumption. On the first page of the Parole Board Release Decision Notice petitioner's

---

[2] The Court of Appeals in *King* only referenced the fact that " . . . one of the [Parole] 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. Consideration of such factors is not authorized by Executive Law §259-i." 83 NY2d 788, 791. The Court of Appeals, however, did not address that aspect of the Appellate Division, First Department, decision in *King* holding that a parole denial determination must be based upon a showing of some aggravating circumstances beyond the inherent seriousness of the underlying crime.

crimes of conviction are accurately recorded as Criminal Sexual Act 2° (a Class D felony), Rape 2° (a Class D felony) and Rape 3° (a Class E felony). Nowhere in the parole denial determination or parole record, moreover, are any of petitioner's crimes of conviction described as being classified as violent felony offenses under the provisions of Penal Law §70.02[3]. Notwithstanding the foregoing, the serious nature/gravity of petitioner's offenses - committed against his young step-daughter over an extended period of time - is beyond dispute. Such offenses, committed in this context, carry with them the potential for profound, long-lasting emotional damage to the victim.

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall ". . . establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."[4] To the extent petitioner argues that the Parole Board failed to adopt rules or regulations implementing the above-referenced amendment to Executive Law §259-c(4), the Court finds that the promulgation of a certain October 5, 2011 memorandum from Andrea W. Evans, then Chairwoman, New York State Board of Parole, satisfied the Parole Board's obligations with respect to the 2011

---

[3] For what it is worth, the Court notes that although Criminal Sexual Act 2° and Rape 2° were not classified as violent felony offenses at the time petitioner committed such offenses in 2006, Penal Law §70.02(1)(c) was amended by L 2007, ch 7, §32, to designate Criminal Sexual Act 2° and Rape 2° as class D violent felony offenses. This aspect of the 2007 amendment to Penal Law §70.02(1)(c), however, was applicable only to crimes committed on or after April 13, 2007. *See* L 2007, ch 7, §52(a).

[4] Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall ". . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

amendments to Executive Law §259-c(4). *See Partee v. Evans*, 117 AD3d 1258, *lv denied* 24 NY3d 901, and *Montane v. Evans*, 116 AD3d 197, *lv granted* 23 NY3d 903, app dismissed 24 NY3d 1052.

Petitioner also appears to argue that the Parole Board improperly evaluated his risk assessment in that he was scored as a low risk for committing a new violent felony offense, for rearrest and/or for absconding. This Court notes, however, that although the Appellate Division, Third Department, has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), there is nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors

set forth in Executive Law §259-i(2)(c)(A) including, as here, the serious and disturbing nature of the crimes underlying petitioner's incarceration. *See Rivera v. New York State Division of Parole,* 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 24 NY3d 901.

Although petitioner correctly asserts that a Transitional Accountability Plan (TAP) was not prepared in conjunction with the discretionary parole release consideration process, the Court finds that this does not constitute a basis to overturn the January 2014 parole denial determination. As part of the same legislative enactment wherein Executive Law §§259-c(4) and 259-i(2)(c)(A) were amended (L 2011, ch 62, Part C, subpart A), a new Correction Law §71-a was added, as follows:

> "Upon admission of an inmate committed to the custody of the department [DOCCS] under an indeterminate or determinate sentence if imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision."

While Correction Law §71-a became effective on September 30, 2011, the Court finds nothing in the legislative enactment to suggest that it was intended to mandate the preparation of TAP's with respect to inmates - such as petitioner - already in DOCCS custody prior to the effective date of the statute. *See Tran v. Evans,* 126 AD3d 1196 and *Rivera v. New York State Division of Parole*, 119 AD3d 1107.

To the extent petitioner argues that DOCCS officials failed to place him in required programs in anticipation of discretionary parole release consideration - specifically, the sex offender program at the Clinton Correctional Facility - the Court notes its awareness of DOCCS position that the efficacy of therapeutic programing (such as sex offender

programing) is enhanced when such programing is completed just prior to an inmate's supervised release from DOCCS custody. In the case at bar, however, prior to the November 21, 2013 modification of petitioner's sentence by the Appellate Division, Third Department (*People v. DePerno*, 111 AD3d 1058) DOCCS officials properly calculated petitioner's initial (regular) parole eligibility date as April 19, 2016. Thus, this Court finds it neither surprising nor suspect that petitioner was not enrolled in the DOCCS Sex Offender Program prior to his January 21, 2014 Parole Board appearance. The DOCCS Sex Offender Program is a relatively lengthy program and DOCCS officials should not be faulted for not timing petitioner's enrollment in the program such that he would complete the program in the fall of 2013, more than two years before his then-calculated April 19, 2016 initial (regular) parole eligibility date.

The Court also finds that the January 2014 parole denial determination is sufficiently detailed to inform petitioner of the reasons underlying the denial and to facilitate judicial review thereof. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295 and *Ek v. Travis*, 20 AD3d 667, *lv dis* 5 NY3d 862. To the extent petitioner argues that the parole denial determination was rendered beyond the parole released time frame specified in the regulatory guidelines set forth in 9 NYCRR §8001.3(a)[5], without setting forth detailed reasons for exceeding the guidelines (*see* 9 NYCRR §8001.3(c)), the Court notes that " . . . 9 NYCRR §8001.3(c) does not impose an additional requirement regarding the details to be contained in the Board's decision where, as here, the decision involves the denial of a parole release request and not the imposition of a minimum period of imprisonment. *See Richards v. Travis*, 288 AD2d 604, 605 (citations omitted). *See Davis v. Travis*, 292 AD2d 742, *lv dis* 98 NY2d 669.

[5] For what it is worth, 9 NYCRR §8001.3 - including the regulatory guidelines set forth therein - was repealed effective July 30, 2014.

Finally, after considering all the facts and circumstances of this case, the Court finds no basis to direct that petitioner's *de novo* parole release consideration must be conducted before a different panel of parole commissioners.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the January, 2014 parole denial determination is vacated and the matter remanded for prompt *de novo* parole release consideration not inconsistent with this Decision and Judgment.

Dated: November 30, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice