VERMONT SUPERIOR COURT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 312-6-19 Wncv

Richard Sylvester,
Petitioner

v.

Michael Touchette, Commissioner,
Vermont Department of Corrections,
Defendant

Opinion and Order

Petitioner Richard Sylvester currently is serving a sentence of incarceration following a conviction for lewd and lascivious conduct. Following his conviction, the Vermont Department of Correction's ("DOC's") Sex Offender Review Committee ("Committee") designated Mr. Sylvester a "high risk" sex offender, pursuant to 13 V.S.A. § 5411b. Because Mr. Sylvester had been convicted of a qualifying offense and designated high-risk, the DOC imposed the "70% Rule," pursuant to 28 V.S.A. § 204b (no early release until 70% of maximum sentence served). After exhausting his administrative remedies, Mr. Sylvester sought "appeal de novo" of his high-risk designation in this Court under 13 V.S.A. § 5411b(b).

The parties have filed cross-motions for summary judgment. Mr. Sylvester argues that the 70% Rule increased his minimum sentence in violation of his Sixth Amendment right to trial by jury, made applicable to the states through the

Fourteenth Amendment, under *Alleyne v. United States*, 570 U.S. 99 (2013). He also argues that the Committee's "high risk" finding is not supported by a preponderance of the evidence. The State argues that Mr. Sylvester's *Alleyne* argument is beyond the scope of this appeal, that *Alleyne* does not apply in this case because Mr. Sylvester was sentenced pursuant to a plea agreement, and that the 70% Rule did not alter Mr. Sylvester's minimum sentence for Sixth Amendment purposes. Otherwise, the State argues that Mr. Sylvester was properly found to be a high-risk offender.

The material facts (further described below) are undisputed and consist of the administrative record relevant to Mr. Sylvester's high-risk designation.

I. *Background*

The high-risk designation is part of Vermont's sex offender registry statutes. "The designation . . . is for the purpose of identifying an offender as one who should be subject to increased public access to his or her status as a sex offender and related information, including Internet access." 13 V.S.A. § 5411b(a). "'High risk' means a high degree of dangerousness that a sex offender poses to others. Dangerousness includes the probability of a sexual reoffense." 13 V.S.A. § 5401(16).

The Committee makes its initial determination by a preponderance of the evidence after evaluating available "objective risk assessment instruments, and any other appropriate factors it deems relevant." Vt. Admin. Code 12-8-4:4.4. "'Other appropriate factors' may include, but are not limited to, offender's age, physical conditions (such as sickness, age, etc.), pattern of sexual offending, nature of sex

offense(s), pattern of cooperation while under correctional supervision and recent behavior, recent threats, or expressions of intent to commit additional offenses." Vt. Admin. Code 12-8-4:4.1.2.

Following the initial designation, if requested, the offender is given an opportunity to be heard and to present evidence to the Committee, following which the Committee enters a final administrative determination. Vt. Admin. Code 12-8-4:4.5. Thereafter, the offender may petition the Committee to alter the designation every two years. Vt. Admin. Code 12-8-4:4.6. After exhausting administrative remedies, "a sex offender who is designated as high risk shall have the right to appeal de novo to the Superior Court in accordance with Rule 75 of the Vermont Rules of Civil Procedure." 13 V.S.A. § 5411b(b).

A sex offender who is designated high risk and is convicted of certain offenses "shall not be eligible for parole, furlough, or any other type of early release until the expiration of 70 percent of his or her maximum sentence." 28 V.S.A. § 204b (the 70% Rule). There is no particular procedure that attends imposition of the 70% Rule. It is an automatic consequence of a high-risk designation in the context of predicate offenses.

Upon incarceration, Mr. Sylvester was referred to the Committee for consideration of a high-risk designation due to his "risks scores and sex offending history." The Committee initially determined that he is high risk, describing its essential finding as follows: "This decision was based upon the following fact: your Pattern of Predatory Sexual Offending." Following a hearing at which Mr.

Sylvester, represented by counsel, argued, among other things, that his age suggested that one of his risk scores should be more favorable, the Committee clarified its finding, as follows:

> You were not designated high risk based on the Risk Assessment tools. Although the tools are used as a guide, they are not solely used when designating someone high risk. The committee designated you high risk based on your pattern of predatory sexual offending. "Predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization. "Pattern" means having two or more sexual offense victims and typically, one or more prior sex offense convictions.

With that clarification, the Committee affirmed its designation of Mr. Sylvester as high risk, and Mr. Sylvester sought de novo review here.

II. *Standard of Review*

Pursuant to 13 V.S.A. § 5411b(b), Mr. Sylvester is entitled to "appeal de novo" in this Court of the Committee's high-risk determination. "Appeal de novo," like "review de novo," is a term of art contemplating that "the reviewing court will reappraise the evidence in the record and reach its own independent conclusion on the matter at issue." *State v. Madison*, 163 Vt. 360, 372 (1995). It is unlike a trial or hearing de novo in which the evidence is taken anew, though the record may be augmented for good cause shown. *Id.* Neither party has sought to augment the record in this case.

As a prominent administrative law treatise describes, appeal de novo is non-deferential:

> The court must be convinced that the agency is correct; it must agree with the agency before it can accept the agency's decision. . . . [If] the court agrees with the agency it makes the decision its own. If it

> disagrees with the agency, it must substitute its judgment for that of the agency."

3 Charles H. Koch, Jr. and Richard Murphy, *Admin. L. & Prac.* § 9:21 (3d ed.). Nonetheless: "The challenger, like any other plaintiff, must show by a preponderance in the judicial record that the agency decision is wrong." *Id.* § 9.22.

The State argues for the first time in its Reply that "Plaintiff's appeal is limited to the writs available under Rule 75. Here, where the review is of a quasi-judicial decision, the applicable writ is certiorari."[1] This argument presumably follows from the statutory reference to Rule 75 in 13 V.S.A. § 5411b(b). Ordinarily, Rule 75 procedure applies in the case of governmental action or inaction where there is no statutory right to review but review is "otherwise available by law," which typically refers to the "general law by proceedings in the nature of certiorari, mandamus, or prohibition." Vt. R. Civ. P. 75, Reporter's Notes; State v. Cavett, 2015 VT 91, ¶ 11, 199 Vt. 546, 550 ("The Reporter's Notes explain that Rule 75 'provides a procedure applicable whenever county court review is provided by ... statute ... or is available as a matter of general law by proceedings in the nature of certiorari, mandamus, or prohibition.'"); *see also* Vt. R. Civ. P. 81(b) (abolishing certain extraordinary writs).

[1] Ordinarily, the Court will not address issues first raised in a reply brief because the opposing party was deprived of a fair opportunity to respond. *See Bigelow v. Dep't of Taxes*, 163 Vt. 33, 37–38 (1994). Here, the Court addresses this issue for the sake of clarity and because there is no prejudice to Mr. Sylvester.

In this case, there is no need to go looking for any general law right to review such as certiorari because there is a statutory right to review in § 5411b(b). Otherwise, the civil rules do not alter or affect jurisdiction. Vt. R. Civ. P. 82. Thus, the reference to Rule 75 in 13 V.S.A. § 5411b(b) must be understood to refer exclusively to the *procedures* of Rule 75.[2] It is not a reference to the substantive claims (such as certiorari) that the usual predicate for applying Rule 75 procedure. Moreover, statutory de novo review is probing and wholly incompatible with certiorari review, which is quite limited. The State is simply wrong that Mr. Sylvester's appeal is limited to review in the nature of certiorari.

III. *The 70% Rule and Alleyne v. United States, 570 U.S. 99 (2013)*

Mr. Sylvester argues that the 70% Rule effectively *raises his minimum sentence* to 70% of his maximum sentence based on a finding that he is "high risk." He argues that such a finding is a factual determination that must be found by a jury beyond a reasonable doubt under *Alleyne*. Because it was not, he argues that the attendant increase in his minimum sentence violates his Sixth Amendment right to a jury trial.

[2] The reference to Rule 75 in 13 V.S.A. § 5411b(b) remains enigmatic, however, insofar as "appeal de novo" is a form of record review and the procedures designed to accommodate record review appear in Rule 74, not Rule 75. In this case, Mr. Sylvester filed the administrative record with his summary judgment motion, the State supplemented the record with the transcript of the administrative hearing, and neither party argues that the record is incomplete or otherwise deficient. The Court, therefore, concludes that the record is complete and sufficient for review, pursuant to § 5411b(b).

Preliminarily, the State argues that the *Alleyne* issue is beyond the scope of appeal, and that *Alleyne* per se cannot apply in this case because Mr. Sylvester was convicted by plea rather than a jury. The *Alleyne* issue is not outside the scope of Mr. Sylvester's appeal pursuant 13 V.S.A. § 5411b(b). The principal issue addressed by *Alleyne* is who—the jury or the sentencing judge—constitutionally may make a finding that increases the minimum sentence. At issue in Mr. Sylvester's case is a finding that, according to him, has the same effect. This issue is not outside the scope of this appeal—it is squarely presented by it, at least as formulated by Mr. Sylvester. Moreover, *Alleyne* is not limited to cases with jury verdicts. *Alleyne* is predicated on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the criminal defendant in *Apprendi* was convicted by plea agreement. The mere fact of a plea agreement does not obviate the *Apprendi–Alleyne* line of cases. An admission of the pivotal fact (causing the increased punishment) might do so, but there was no such admission here. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004). Mr. Sylvester has not admitted that he is high risk; he has actively contested that. The Court thus addresses the substance of Mr. Sylvester's constitutional argument.

In *Apprendi*, the United States Supreme Court addressed a sentencing regime in which the sentencing judge was responsible for finding a fact that increased the defendant's maximum potential sentence. After reviewing the authorities, the Court summarized its Sixth Amendment holding as follows:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

> submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [a prior] case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi, 530 U.S. at 490. In so ruling, the *Apprendi* Court made clear that its holding does not limit judges from exercising "discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Id.* at 481.

The Vermont Supreme Court first applied *Apprendi* in *State v. Provost*, 2005 VT 134, 179 Vt. 337. There, it addressed a sentencing regime in which findings by the sentencing judge were used to raise a *minimum* permissible sentence from 35 years to life without parole. The Court concluded that the rationale of *Apprendi* applies in the circumstance of sentence minimums just as it does to sentence maximums, which were addressed in *Apprendi*. *Provost*, 2005 VT 134, ¶ 17, 179 Vt. at 349. Thus, if a finding of fact increases the statutorily permissible minimum sentence, the jury must make it beyond a reasonable doubt.

In *Alleyne v. United States*, 570 U.S. 99 (2013), the United States Supreme Court, as the Vermont Supreme Court did in *Provost*, extended *Apprendi* to sentence minimums. In making that ruling, it affirmed that judges' "broad sentencing discretion" within statutory limits does not violate the Sixth Amendment. *Alleyne*, 570 U.S. at 116. More pointedly, and with pronounced importance to indeterminate sentencing regimes, such as Vermont's, it noted:

"'[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.'" *Id*. at 117 (*quoting Apprendi*, 530 U.S. at 519 (Thomas, J., concurring)).

The Vermont Supreme Court returned to this subject matter in *State v. Goewey*, 2015 VT 142, 201 Vt. 37. Goewey argued, among other things, that a post-sentencing determination by the Committee that he is high risk, triggering the 70% Rule, would violate the Sixth Amendment under *Apprendi* and *Provost* as it would raise his minimum sentence based on a finding not made by the jury. Although *Alleyne* is not cited in *Goewey*, this is the issue addressed in *Alleyne* and raised in this case by Mr. Sylvester.

The *Goewey* Court squarely rejected any claim that the post-sentencing high-risk finding, leading to application of the 70% Rule, is unconstitutional under the *Apprendi/Provost* line of cases. Echoing the United States Supreme Court's distinction in *Alleyne* between the statutorily available sentence and the sentence that actually must be served, the *Goewey* Court explained:

> The problem with defendant's argument is that the 70% rule is not an enhancement of a potential sentence to a different and harsher one, which might trigger the *Provost* concerns. The sentence imposed by the court remains the sentence for which the defendant will be in execution. The imposition of life as the maximum sentence is not a function of § 204b, but of 13 V.S.A. § 3271, which requires a maximum sentence of life for this offense. The amount of time defendant must actually serve is dependent upon many factors. In the appropriate case, the 70% rule would be one of them, triggered by the post-sentencing determination of high risk. *The application of the 70% rule to a particular sentence, however, is not an enhancement of a sentence any more than would be a denial of parole once the minimum sentence had been reached.*

Goewey, 2015 VT 142, ¶ 30, 201 Vt. at 50 (emphasis added). The 70% Rule simply has no impact on the statutorily available sentence minimum or maximum (or the sentence imposed by the sentencing judge) and thus does not trigger Sixth Amendment concerns. It affects only the amount of time that the defendant actually will serve, and it remains subject to change at two-year reviews. *See Apprendi*, 530 U.S. at 481 (not "impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute" (emphasis in original)).

Mr. Sylvester appears to accept that the *Goewey* Court has already ruled on the issue he raises here. He argues, however, that the Vermont Supreme Court quickly contradicted itself shortly after *Goewey* by stating as follows in *Chandler v. Pallito*, 2016 VT 104, ¶ 25 n.17, 203 Vt. 482, 496 n.17 (emphasis added): "[I]f § 204b's seventy-percent rule had been applied to plaintiff, the statute's plain terms *would have retroactively increased the length of plaintiff's minimum sentence.*" Because, under *Alleyne*, any fact that increases the minimum sentence must be found by the jury, and the Supreme Court purportedly has contradicted itself as to whether application of the 70% Rule amounts to a raised minimum, Mr. Sylvester in essence asks the Court to reconsider whether the 70% Rule violates *Alleyne*, though this would appear to have been resolved in *Goewey*. The Court disagrees.

The Court in *Chandler* was addressing the Ex Post Facto Clause, not the Sixth Amendment right to trial by jury. It was only in that context that the Court

said that application of the 70% Rule represented an increased minimum. *Chandler* has nothing to do with the Sixth Amendment issue in *Provost*, *Goewey*, and this case. The disputed statement is *Chandler*, made in a totally different context and does not contradict anything the Court said in *Goewey*. The Chandler Court did not overrule, *sub silencio*, its decision in *Goewey*.

Otherwise, Mr. Sylvester's conflation of the amount of time he may actually serve due to the 70% Rule with the indeterminate sentence range statutorily available due to his conviction reflects a substantial misunderstanding of the *Apprendi* principle. The matter is explained in one article as follows:

> One might argue that in an indeterminate system, the minimum sentence is not the earliest eligibility date that the law allows the judge to set, but instead is whatever term the paroling authority later decides the offender must serve. But this would miss the point of the *Apprendi*/*Alleyne* line of cases. The *Apprendi* rule targets statutes that essentially short-circuit the Bill of Rights requirements of notice and proof beyond a reasonable doubt to a jury by shifting factfinding that determines the sentencing range away from the trial to the sentencing phase. The minimum sentence that matters in *Alleyne* is the floor of the range available to the sentencing judge, the penalty "affixed to the crime," not the sentence that might actually be served by the offender. That a paroling authority may ultimately decide not to release the defendant when he first becomes eligible is irrelevant. What is crucial is that the legislature has narrowed the penalty range available to the trial judge once the specified fact is determined.
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> Similarly, because *Alleyne* is concerned only with factfinding that legislatures have given to judges rather than juries, delays in release eligibility that result from the decisions of corrections officials made after initial sentencing, even when such decisions depend upon findings of fact, are not affected by *Alleyne*. Corrections officials' decisions denying release on parole after eligibility, delaying release eligibility by refusing to grant or revoking good time credit (also called earned or gain time credit), reclassifying the prisoner so that his ability to earn good time credit is reduced, as well as findings by corrections officials regarding satisfaction of statutory criteria for

> release after the date of first eligibility, including medical conditions and overcrowding, all fall outside of the *Apprendi* principle. These decisions may change the actual sentence served, but they do not "increase [] either end of the range" available to the sentencing judge.

Nancy J. King and Brynn E. Applebaum, *Alleyne on the Ground: Factfinding that Limits Eligibility for Probation or Parole Release*, 26 Fed. Sent. R. 287, 289 (2014) (footnotes omitted). Other state authorities agree with that approach. *See Fogleman v. State*, 283 So.3d 685, 690 (Miss. 2019) ("[A]pplying *Alleyne* to any judicial finding that impacts parole eligibility stretches the Supreme Court's decision beyond its actual holding."); *State v. Kiriakakis*, 196 A.3d 563, 578 (N.J. 2018) ("A rational system of justice requires differentiating among offenders—based on their backgrounds and the nature and circumstances of their offenses—within the range authorized by the jury verdict."); *People v. Barnes*, 90 N.E.3d 1117, 1140 (Ill. Ct. App. 2017) ("Although the finding of great bodily harm by the court may change the actual amount of jail time defendant serves, it does not increase defendant's mandatory minimum sentence and thus does not violate Alleyne."). This is wholly consistent with *Goewey*.

In short, the Sixth Amendment issue raised by Mr. Sylvester already has been decided by *Goewey*. *Goewey* is binding on this Court. To the extent Mr. Sylvester asks this Court to reexamine the principles underlying that decision in light of *Chandler*, it has done so. In light of the above analysis, the Court continues to believe *Goewey* was properly decided on this point.

IV. *De novo review of high-risk designation*

Mr. Sylvester next challenges the Committee's high-risk designation. The question is whether, upon the Court taking a fresh look at the record, Mr. Sylvester has shown by a preponderance of the evidence that the Committee's decision is wrong. The Committee found that Mr. Sylvester is "high risk," demonstrated by a "pattern of predatory sexual offending." Mr. Sylvester accepts that while there may be a "pattern," it is not "predatory." Moreover, he argues, the Committee wrongfully disregarded the available actuarial tools (risk tests), simply substituted its own completely subjective views and, in any event, the evidence does not show that he is high risk.

The Court has reviewed the record. It plainly shows that Mr. Sylvester has engaged in a pattern of predatory sexual offenses against four different victims. Along with convictions for a violation of probation and a violation for failing to comply with the sex offender registry, Mr. Sylvester was convicted of prohibited sexual acts in 1994, lewd and lascivious conduct in 1996, and lewd and lascivious conduct again in 1997. He is currently incarcerated on another lewd and lascivious conduct conviction stemming from charges filed in 2016. As his counsel acknowledged at his high-risk hearing, his sexual convictions demonstrate a worrisome pattern. In each case, he surprised his non-consenting victim by spontaneously and forcibly thrusting himself on her sexually. The record reveals that each victim was no more than a recent mere acquaintance with whom Mr. Sylvester had no significant personal relationship, much less any sexual one.

Mr. Sylvester argues that this pattern is not predatory insofar as "predatory," as the Committee used the term, suggests that the victims were strangers or specifically groomed for the sexual offense that occurred. Although the record does not show that Mr. Sylvester "groomed" his victims, it shows clearly that all his victims were strangers, at least in the sense that they were mere acquaintances. In other words, his sexual offenses did not emerge out of substantial personal relationships that could contextualize them (for better or worse). Rather, they essentially were random and opportunistic. To the extent that Mr. Sylvester believes that a "stranger" in this context must be someone with whom he had no acquaintance whatsoever, he offers no rationale for such a stringent definition and why it is necessary to a high-risk determination.

Mr. Sylvester asserted at his hearing, and again here, that one of his risk assessments, the VASOR-2, should have generated a slightly lower risk score due to his age. Mr. Sylvester claims that the DOC should have used his age at the time that he will satisfy 70% of his maximum sentence. Evidence in the record shows that the VASOR-2 uses the age of the offender at the time of "community placement." Dr. Kathleen Kennedy, who conducted Mr. Sylvester's pre-sentence psychosexual evaluation, appears to have used his age at the time of the evaluation, likely because she could not have known when he might be placed in the community. Dr. Kennedy's VASOR-2 score placed Mr. Sylvester in the moderate-high risk category.

Mr. Sylvester does not explain why the VASOR-2 should use his age at the time he serves 70% of his maximum. Indeed, he urges that he is not high risk and should not be required to serve 70% of his maximum. In any event, even if he is correct that an updated VASOR-2 would produce a slightly lower score, and thus a slightly lower risk profile, the Court is not persuaded that this issue has any determinative impact on whether Mr. Sylvester is high risk. As the Committee explained, it uses these risk tools as a guide but makes its decision based on all the circumstances. Here, it relied principally on Mr. Sylvester's persistent pattern of sexual offenses against mere acquaintances rather than strictly on his risk scoring.

Finally, Mr. Sylvester faults the Committee for, in his view, making a purely subjective determination of his high-risk status. No doubt the high-risk designation calls upon the Committee to exercise its discretion based on its expertise and consideration of the facts and factors that it considers relevant. "High risk" is not defined in a manner that permits any purely mechanical calculation. 13 V.S.A. § 5401(16). The determination in this case is based compellingly on Mr. Sylvester's history and circumstances. Mr. Sylvester's risk scores generally reflect a medium risk to reoffend, and Dr. Kennedy noted in his psychosexual evaluation some pro-social responses. The doctor also noted, however: "During his interview for this evaluation, Mr. Sylvester did not take responsibility for his offense behavior and did not discuss the allegations." She further explained, "Mr. Sylvester previously completed sex offender treatment and subsequently reoffended. He is not currently participating in sex offender treatment and his sexual risk management is poor."

Based on its own assessment of the record, and Mr. Sylvester having failed to show by a preponderance of the evidence that the Committee's determination is wrong, the Court concludes that Mr. Sylvester is high risk for purposes of 13 V.S.A. § 5411b.

Order

For the foregoing reasons, Mr. Sylvester's Motion for Summary Judgment is denied, and the State's Motion for Summary Judgment is granted.

Dated this __ day of May 2020 at Montpelier, Vermont.

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Timothy B. Tomasi,
Superior Judge