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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

-----X

In the Matter of the Application of

DIN # [REDACTED]

NYSID # [REDACTED]

Petitioner,

- against-

ANDREA W. EVANS, as Chairperson
of the State Division of Parole,
the STATE DIVISION OF PAROLE
and the STATE BOARD of PAROLE,

Respondents,

FOR A JUDGMENT PURSUANT
TO CPLR ARTICLE 78

PETITION

Index No.

Oral Argument
Requested

-----X

David Lenefsky, an attorney duly admitted to practice law in the State of New York, herein sets forth the application of the Petitioner, [REDACTED] for a Judgment, pursuant to CPLR Article 78, seeking a reversal of the decision of Respondents, New York State Board of Parole, New York State Division of Parole, by their Chairperson, Andrea W. Evans, to deny the Petitioner's parole release, setting forth in this Verified Petition the legal reasons under law why the detention complained of constitutes an arbitrary abuse of discretion, as a matter of law, thereby rendering said detention of Petitioner by Respondents illegal, requiring release of Petitioner from custody forthwith, or, in the alternative, to order a new parole hearing de novo for Petitioner to be held before a different panel of three commissioners within thirty (30) days.

VENUE

Venue is established in Sullivan County because the decision denying the Petitioner's application for parole emanated from [REDACTED] appearance before the Parole Board on September 7, 2010, at the Woodbourne Correctional Facility located in Sullivan County (see *Matter of Phillips v. Dennison*, 41 AD3d 17, 834 N.Y.S.2d 121, 2007 N.Y. Slip Op. 03085).

PROCEDURAL BACKGROUND

On June 9, 2010, Judge Frank J. LaBuda, Acting Supreme Court Justice, granted Mr.

[REDACTED] Article 78 Petition.¹

On September 7, 2010, Mr. [REDACTED] appeared before the Parole Board at Woodbourne C.F. This was his tenth appearance before the Parole Board. Parole was denied (Parole Board Hearing, Exhibit A).

Notice of Appeal was sent to the Division of Parole by certified mail, return receipt requested, and acknowledged by the Division as received on September 30, 2010 (Exhibit B).

An Administrative Appeal on the grounds that the determination of the Parole Board was arbitrary and capricious or was otherwise unlawful, and that the determination was excessive, was timely perfected by present counsel on October 5, 2010 (Appeal from a Final Determination of the Parole Board, Exhibit C).

A Final Determination of the Administrative Appeal has not been received by counsel by February 5, 2011, the suggested statutory time period [9 NYCRR 8006.4 (c)] for the Board of Parole to make such a determination.

¹ Mr. [REDACTED] appeared before the Parole Board for the eighth time on August 10, 2010, but this hearing was postponed because one of the two Commissioners had sat at his 2009 hearing. At his ninth appearance on August 17, 2010, only two Commissioners were present and consensus was not achieved.

FACTUAL BACKGROUND

On August 8, 1981, Mr. [REDACTED] then 16 years old, strangled his girlfriend, [REDACTED] who was also 16 years old. Mr. [REDACTED] wrapped [REDACTED] bra around her neck. He hid her body under a garage, where it remained for ten days until discovered by the police, without assistance from Mr. [REDACTED]. He tried to commit suicide. He then lied to the police telling them the mark around his neck was a result of an assault committed against him.

Mr. [REDACTED] was arrested and indicted for Murder in the Second Degree.

On March 20, 1982, Mr. [REDACTED] was convicted by a jury of Murder in the Second Degree.

At sentence (Sentencing Minutes, Exhibit D), on April 20, 1982, the Fulton County District Attorney William H. Gritsavage, Esq., said: "It was brutal, cold blooded murder." He recommended the maximum sentence of 25 years to life (page 6 line 23 – page 7 line 10). Defense counsel requested the minimum, 15 years to life (page 4 lines 12-13). The Hon. Mario M. Albanese, Fulton County Court Judge, sentenced Mr. [REDACTED] to 18 years to life (page 17 lines 22-24).

At sentence, the Court acknowledged that: 1) Mr. [REDACTED] had recently been released from a juvenile detention center (page 14 lines 11-14); 2) the victim had "met a very violent, senseless death" (page 14 line 4); 3) Mr. [REDACTED] showed "no compassion . . . for the agony" of the [REDACTED] family not knowing the whereabouts of their daughter for ten days (page 14 line 8); and, 4) that the Court "somewhat [had the] impression that [he was] not remorseful" (page 14 line 17). Nonetheless, the Court, just prior to imposing sentence, said the following:

"Despite all that has happened I don't want to make your life any more difficult than you have made it. No one else in this court room is to blame for the fact that you stand before this court room, [REDACTED] you better understand that. The sooner you do, the sooner

you will grow up and mature. There comes a day in everyone's life when one must shoulder his or her responsibility. Unless I have misjudged you, I think up to now you have not done that and that maybe part of the reason you are here. I am sure it will never happen again. I should say I hope it will never happen again and I don't believe it will ever happen again" (page 17 lines 10-18).

Despite the sentencing Court's leniency shown Mr. [REDACTED] and its rejection of the suggested sentence by the District Attorney, the Petitioner – a model prisoner - has now served 28 years, 10 more than the minimum period of incarceration set by the Court.

The Petitioner, now 46 years of age, is presently incarcerated at Woodbourne Correctional Facility, Sullivan County.

THE STATUTORY COMMAND

Executive Law (Exec. L.) Section 259-c states:

The state board of parole shall:

1. have the power and duty of determining which inmates serving an indeterminate . . . sentence of imprisonment may be released on parole and when and under what conditions;

* * *

4. establish written guidelines for its use in making parole decisions as required by law. . . .

Exec. L. Section 259-i(2) provides:

2. Parole.

- a) . . . at least one month prior to the date on which an inmate may be paroled pursuant to subdivision one of section 70.40 of the penal law, a member or members as determined by the rules of the board shall personally interview such inmate and determine whether he should be paroled in accordance with the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article. 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.

The board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same (emphasis added).

* * *

(c) (A) Discretionary 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. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate; . . . (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased . . . Notwithstanding the provisions of this section, in making the parole release decision for persons whose minimum period of imprisonment was not fixed pursuant to the provisions of subdivision one of this section, in addition to the factors listed in this paragraph the board shall consider the factors listed in paragraph (a) of subdivision one of this section (emphasis added).

Paragraph (a) of subdivision one of Exec. L. Section 259-i reads in part:

Such guidelines shall include (i) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement (emphasis added).

In sum, the statute requires that, in determining whether an inmate shall be paroled, the Board must consider whether there is a reasonable probability that, if the inmate is released, he

will live 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.

Furthermore, the Board's determination must not be the product of speculation or caprice. The Board must consider:

- (a) the inmate's institutional record;
- (b) the inmate's release plans;
- (c) any statement made to the Board by the victim's representative;
- (d) the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and,
- (e) the inmate's prior criminal record.

And, most particularly, the statute provides that, if parole is denied, the Board must give its reasons "in detail and not in conclusory terms."

MR. [REDACTED] INCARCERATION

Mr. [REDACTED] institutional record has been exemplary. His conduct while incarcerated has been the model for what society wants and hopes every inmate will emulate. His acceptance of responsibility has been genuinely complete.

The September 7, 2010 Board was provided by counsel with a letter dated August 2, 2010 which enclosed three sets of materials:

- Materials relevant during the time period from Mr. [REDACTED] parole hearing in July 2007 to the present (March 10, 2009 when materials were provided to the Parole Board) (Exhibit E);
- Materials provided to the Board for the hearing in July 2007 (Exhibit F); and,

- Five new items attached as Exhibits "G", "H", "I", "J" and "K".

The Five New Items Provided the September 7, 2010 Board

A. Inmate Progress Report dated March 13, 2009, in which Mr. [REDACTED] receives "excellent" for each of the eleven tested items. The written comments on the report are worth quoting:

"Explain Inmate's Accomplishments While in Your Program or Work Detail:

Inmate [REDACTED] since receiving his outside pass status has demonstrated both self initiative & determination to ensure that all of his job duties are completed both promptly and orderly. This includes all work on the rear platform area as well as his routine trips into the community for recycling.

General Comments:

While in the Camp Crew program, [REDACTED] has again proven to this officer as he has done for years in the Visiting Room that he maintains a consistently positive attitude not only to his work ethics, but also towards his family."

B. Limited Credit Time Allowance Determination Notice. Limited credit time allowance was issued on the basis of two years of college.

C. A poem written by a Correction Officer at Woodbourne C.F., Christmas 2009, and mailed to Mrs. [REDACTED] That a Correction Officer would write about how an inmate positively affected his life is surely unprecedented.

D. A letter from [REDACTED], Esq., former Fulton County Court Judge who sentenced Mr. [REDACTED]

E. A letter from [REDACTED], Justice of the Supreme Court, Fulton County, former defense counsel for Mr. [REDACTED]

Materials Relevant Between July 2007 and the Present (March 10, 2009)

Outside Pass: After Mr. [REDACTED], was transferred from Eastern Annex to Woodbourne in October 2007, he was approved for an Outside Pass on December 9, 2008. Since then [REDACTED] has worked outside doing sanitation-environmental work (See Tab.1). That [REDACTED] was given an Outside Pass to work in the community where his family resides is highly unusual. The institutional fear is that the inmate will be tempted to escape given the proximity of his family.

Full Time Employment Upon Parole Release: [REDACTED] has both an offer for fulltime employment from [REDACTED], a local construction company in the Town of [REDACTED] (Tab.2 letter, February 20, 2009), and an offer for part time employment from [REDACTED], also located in [REDACTED] (Tab.3 letter, February 19, 2009).

Certificates of Achievement and Appreciation: [REDACTED] received a Certificate of Achievement on July 25, 2007 for being "A Positive Role Model" (Tab.4), and a Certificate of Achievement on August 15, 2007 from the Crossroad Bible Institute (Tab.5). On July 25, 2007, [REDACTED] received a Certificate of Appreciation for "Being an Asset to the Entire School Community" (Tab.6).

Letters of Support: Former Chairman of the N.Y.S. Commission of Correction and a former Superintendent, Mr. Stephen Chinlund, states ". . . I have known thousands of inmates. Many have asked me to write on their behalf. It is years since I wrote my last letter. I have never known one I would more enthusiastically recommend for parole than [REDACTED]" (Tab.7).

[REDACTED] wife: "[REDACTED] is an incredible husband and a wonderful father that every one of us looks up to. He is not the messed up sixteen year old that entered the prison

system. That boy just does not exist. Everyone that knows him, sees this including correctional staff and civilian staff as demonstrated by his outside pass status" (Tab.8).

██████████ 17 year old daughter: ". . . I am writing to you with the same vulnerable sincerity, asking you to please let my father come home. Next year I will be a senior in high school, and I do not want to graduate, and enter into adulthood with the absence of my father in our home" (Tab.9).

██████████ 14 year old son: "In my opinion my dad is the greatest person one could ever meet. He is a wonderful dad, a terrific husband to my mom, and the most loving and patient person I have ever seen" (Tab.10).

██████████ Mother-in-Law: "Over the last 27 years, I have observed the maturing of this individual. He has grown into a very caring person. He is an excellent father and husband in spite of his circumstances. He is always there to love, support and discipline his children" (Tab.11).

██████████ Administrator of the ██████████ Christian Academy: "Although I have never met ██████████ I recognize the influence he has on his family. They speak of him as if he is always present because in their hearts he is" (Tab.12).

██████████ "During his period of incarceration, Mr. ██████████ has both participated in and facilitated inmate self-help groups and was a model prisoner" (Tab.13).

██████████ "I'm impressed by ██████████ commitment to his wife and children while being incarcerated, and his steadfast desire to help them grow" (Tab.14).

██████████ "This letter is not meant to detract from the seriousness of the crime that was committed. ██████████ is a very compassionate person who will live with the guilt of his

actions for the rest of his life. I have two young daughters and if I felt for one second that [REDACTED] was a threat to them or any other member of society, I would not be writing to you today” (Tab.15).

[REDACTED] “. . . I did not know [REDACTED] when the tragic incident occurred resulting in incarceration. I do know [REDACTED] now and feel he is ready to resume his place in society. [REDACTED] has a family, a network of friends and a community waiting to support him during his transition from a prison environment to a life as a husband, father, friend and breadwinner for his family” (Tab.16).

[REDACTED] “I have known [REDACTED] for about 23 years. I first met him during a prison ministry visit stemming from my involvement with Prison Fellowship International and other prison ministries. . . . I would like to stress in this letter that the troubled boy that committed the crime no longer exists. That person has been crushed and put to death. The man that [REDACTED] has become is a man of compassion, integrity, and Christian commitment” (Tab.17).

Materials Provided to the Board for its Hearing in July 2007 which the Board also had at the Hearing in April 2009

The Institutional Record Including Program Accomplishments

[REDACTED] has acquired deep psychological insight into his past behavior as revealed by his written statement provided to the Board (Tab.1).

[REDACTED] many accomplishments while incarcerated are singularly impressive. He is a talented artist, free hand drawing in particular, as well as a gifted musician, as demonstrated by his song writing and guitar playing at graduation ceremonies and at other occasions (Tab. 2). A

CD of [REDACTED] guitar playing and singing is separately enclosed. [REDACTED] artistic talents were also ably demonstrated at Christmas 2006 when he co-wrote and co-directed the Christmas play, an outstanding success as all have attested (Tab. 3).

Academic Achievements

The Junior College of [REDACTED] awarded [REDACTED] an Associate in Arts Degree in May 1987 (Tab. 4), and an Honors Certificate in Fall 1985 (Tab. 5) and Spring 1986 (Tab. 6).

[REDACTED] received two School Activities Awards: School Clerk's Duties, January 11, 2007 (Tab. 7); and, Music, April 12, 2007 (Tab. 8).

Also enclosed are two writing assignments by [REDACTED] while at Eastern Annex which received special attention. The first dated January 2, 2006 received the comment (page 2): "I hope you can teach this to others here. This is very important" (Tab. 9). The second dated February 12, 2006 received the comment: "Good work. Important concepts" (Tab. 10).

Vocational Education

Please note [REDACTED] Employability Profile Report of Vocational Training dated October 1, 2004 (Tab. 11).

[REDACTED] has received the following Certifications (starting with the most recent):

1. Certificate of Completion, Food Service Training, June 16, 2000 (Tab. 12);
 2. Certificate of Instruction, Vocational Radio & TV Repair, June 15, 1989 (Tab. 13);
- and,
3. Occupational Training Certificate, Radio & TV Repair - Electronic Assembler, June 1989 (Tab. 14).

Training Assignments

█ has participated in the following additional educational activities (starting with the most recent):

1. Eastern Annex, Domestic Violence Program, April 2007 (Tab. 15);
2. Basic Parenting Class Certificate, The Osborne Association Family Works, April 22, 2006 (Tab. 16);
3. American Bible Study Certificate for Completion of Study Course - The Gospel According to John, February 15, 2005 (Tab. 17);
4. The Mailbox Bible Club, Courses I, II and III A (no dates) (Tab. 18);
5. Certificate of Accomplishment, Episcopal Social Services Network Program, January 15, 2004 (Tab. 19);
6. New York State Department of Correctional Services, Certificate of Completion of Pre-Release Program, Phase Three Cycle, June 13, 2001 (Tab. 20);
7. Certificate of Successful Completion of Alternative Behavior Course, March 14, 2001 (Tab. 21);
8. Course Completion Certificate, Berean School of the Bible, New Testament Studies, April 17, 1998 (Tab. 22);
9. Course Completion Certificate, Berean School of the Bible, Bible Survey, July 16, 1996 (Tab. 23);
10. P.A.C.E. Certificate, HIV/AIDS & Related Material Education, March 26, 1996 (Tab. 24);
11. Prison Fellowship Certificate of Participation, "What Are You Worth," March 10, 1996 (Tab. 25);

12. Course Completion Certificate, Berean School of the Bible, Old Testament Studies, March 4, 1996 (Tab. 26);
13. Course Completion Certification, Berean School of the Bible, Life of Christ, June 5, 1995 (Tab. 27);
14. Certificate of Completion, Aggression Replacement Training, October 12, 1993 (Tab. 28);
15. Certificate, Alternatives to Violence Project, Inc., Workshops for Training in Non-Violence, January 29, 1993 (Tab. 29);
16. Certificate of Completion, Aggression Replacement Training, November 20, 1992 (Tab. 30);
17. Eastern Correctional Facility Certificate of Participation, Ministerial Services, July 7, 1989 (Tab. 31); and,
18. Letter of Recognition - Ravena Bible Training Center, June 12, 1988 (Tab. 32).

Work Assignments

Prior to his transfer to Woodbourne C.F., [REDACTED] was in Eastern Annex Correctional Facility, where he was given the following work assignments, culminating in becoming Administrator Coordinator in April 2007:

1. Librarian/Clerk (See Tab.7). Responsible for all books, magazines, newspapers, and writing various reports pertaining to them; and, processes all incoming inmates for the chart office and business office;
2. Clinical Coordinator (Tab. 33). Tasks include: 1) checking the schedule for group sessions or activities and ensures they start on time; 2) oversees and meets with Orientators on a daily basis to ensure all new inmates have received and signed for the appropriate materials and

information with respect to facility and community orientation; 3) meets with Senior Group Leader and Group Leader on a daily basis to ensure there is group coverage and that the meeting room is arranged properly and with the appropriate audio-visual equipment; and, 4) resolves all issues with inmates through the use of program tools;

3. Senior Group Leader (Tab. 34). Tasks include: 1) ensuring that all groups are begun on time, and that group leaders have all necessary materials and equipment; 2) meeting daily with all group leaders to discuss issues relating to the group process; 3) meeting daily with the Clinical Coordinator to discuss group concerns and to review any absences; 4) investigating “haircuts” (critical comments by other inmates), and forwarding findings to the House Coordinator for accountability; 5) mediating Quiet Room and Conflict and Resolutions. Logs all sessions in Quiet Room Log Book; 6) Meeting daily with all Coordinators to discuss house or individual inmate issues; 7) attending Hierarchy business meetings with Senior Coordinator and the Hierarchy to discuss community issues and plans of action; 8) Resolving all issues with inmates through the use of program tools; and, 9) actively participating in Hierarchy group therapy;

4. Group Leader (Tab. 35). Oversees groups and house meetings to ensure the appropriate format is followed. Attends business meetings with the Senior Coordinator and the Hierarchy to discuss issues and plans of action;

5. Co-Group Leader (Tab. 36). Assists the group leader in facilitating all groups and house meetings;

6. Sponsorship Clerk (Tab. 37). Responsible for ensuring that all new inmates are assigned a sponsor upon arrival. Maintains a current list of all sponsors and sponsees;

7. Co-Clinical Coordinator, January-March 2007 (Tab. 38); and,

8. Administrator Coordinator, April 2007 (Tab. 39).

Therapy

█████ has participated in numerous therapy related programs, for example, Basic Parenting Class (See Tab. 16). At Eastern Annex, as noted above, █████ successfully completed the Domestic Violence Program (See Tab. 15).

Most significantly, █████ Mental Status Report, Office of Mental Health, for the Division of Parole, April 20, 2005, states:

“As this evaluation indicates, there are no overt signs of mental illness. If he were to be released, there are no precautions from a Mental Health standpoint. He has functioned independently without Mental Health services since 1987” (Tab. 40).

Interpersonal Relationships with Staff and Inmates

█████ outstanding relationships with staff and inmates are dramatically demonstrated by the following documentation:

1. Inmate Progress Reports, and Monthly Evaluations, June 2005-April 2007 (collectively assembled, Tab. 41);
2. Push-Ups from Inmates, September 2006-February 2007 (collectively assembled, Tab. 42);
3. Outside Pass Review, March 15, 2005 (Tab. 43); and,
4. Letter of Appreciation from Executive Team, Mid Orange Correctional Facility, July 6, 2000 (Tab. 44).

Release Plans

Upon release, █████ will live with his wife of twenty one years █████
 █████ age eighteen (presently attending college), and █████
 (Photographs, Tab. 45). █████

3. [REDACTED] "My dad has been in prison all of my life and even before I was born. . . . He is the greatest father a son could ever have and we need him in our home." (Tab. 56);

4. [REDACTED] "Over the years we have come to know [REDACTED] very well and we wouldn't wish our daughter to be with anyone else. He is truly a remarkable person and someone any mother would be proud to call 'son'" (Tab. 57);

5. [REDACTED] Administrator of [REDACTED] Christian Academy ([REDACTED] children attend the Academy): "Although I have never met [REDACTED] his influence on his family is evident. They speak of him as if he is always present because in their hearts he is." (Tab. 58);

6. Pastor [REDACTED] and [REDACTED], Believers' Fellowship Center: "We deeply love and respect him as a changed man of great integrity and character." (Tab. 59);

7. [REDACTED], Pastor, Lighthouse Assembly of God: "I recognize that he is a dedicated Christian and has been rehabilitated." (Tab. 60);

8. [REDACTED] "As an educator, I see the tremendous psychological and educational benefits on the [REDACTED] children from the visits with their father. He is academically oriented and helps them greatly with their assignments for school." (Tab. 61);

9. [REDACTED] "I have been involved with Prison Fellowship International and other prison ministries for about 25 years. . . . Over the past 21 years that I have known Mr. [REDACTED] I have observed a continual pattern of growth in his life. The troubled, young boy that entered prison in 1982 has become a respected Christian man, as well as a responsible husband and father" (Tab. 62);

10. [REDACTED] "I have been involved in the lives of [REDACTED] and his family for more than seventeen years. During this time I have observed him as a devoted husband, loving father and dedicated friend." (Tab. 63);

11. [REDACTED] have become part of my extended family and I will do, with God's help, whatever I am capable of doing to support and guide this family through future years." (Tab. 64); and, finally

12. [REDACTED] (Tab. 65).

THE SEPTEMBER 7, 2010 PAROLE BOARD HEARING

The following is a summary of the Board hearing held by Commissioners Ferguson, Loomis and Thompson on September 7, 2010 at Woodbourne C.F.

Commissioner Ferguson conducted the interview. He acknowledged that the hearing was De Novo. Judge LaBuda, so said Commissioner Ferguson, found the previous board acted arbitrary and capricious "based upon the judge's indication that the board failed to ask you whether or not you had any remorse . . . and the judge concluded . . . you are well trusted by the Department of Corrections based upon your granting of day passes." (page 2 line 24 – page 3 line 7)

Commissioner Ferguson asked Mr. [REDACTED] if he knew "the difference between outside clearance and day passes?" (page 3 line 11) He went on to say: "Because I don't want to you know unnecessarily imply that the judge didn't know but the judge certainly should know. I don't know if your wording on appeal was such that lead the judge to an erroneous conclusion or if the judge is just inexperienced and not aware of the difference between a day pass and an outside pass." (page 3 lines 15-22)

The Commissioner stated: “also as to the board failing to ask about remorse, I’ve been doing this for almost six years, the board doesn’t ask about remorse and we don’t do that intentionally. And the reason is this, only an idiot would assume that an inmate would respond no, I don’t have remorse if the parole board were to ask you if you had remorse.” (page 4 lines 15-22)

The Commissioner further said: “So those are the conclusions that the judge based his ruling for a De Novo upon. Don’t know whether or not, you know, he was fully informed as to the facts that he relied upon nonetheless we cannot ignore a judge ordering of an Article 78 regardless of whether or not the basis for it is erroneous.” (page 5 lines 12-18)

Commissioner Ferguson acknowledged: 1) receiving letters in support of parole including one from Mr. [REDACTED] sentencing judge and from the police chief where he would live, if released; and, 2) Mr. [REDACTED] limited credit time based upon his two years Associate Degree. (page 5 line 21 – page 6 line 10)

A discussion of the crime ensued. (page 7 line 6 – page 14 line 24) During that discussion, Commissioner Ferguson asked: “Well, how do you go from trying to revive her from tying something around her neck would (sic) that probably **finish the job**?” (page 11 lines 3-5) (Emphasis added.) He asked a second time: “So now if you’re still afraid one would think you would just run away, instead you decide **to finish the job** and conceal the body which you know it continues to increase the level of depravity that’s in the crime?” (page 11 line 23 – page 12 line 2) (Emphasis added.) A third comment by the Commissioner: “. . . there’s a huge difference between a 16 year old that strangles someone and then decides **to finish the job** . . .” (page 12 lines 8-10) (Emphasis added.)

The discussion returned to Mr. [REDACTED] "extensive amount of programming" (page 16 line 3) as well as his full time and part time job offers (page 17 line 11). Commissioner Ferguson said the Board had "confidential materials" about Mr. [REDACTED] and commented that he didn't "know if the judge was aware" of these materials and that "there's a fair amount of opposition to your release." (page 18 lines 14-19)

Mr. [REDACTED] expressed deep regret. He commented about his psychological growth and maturity while incarcerated, and the role of his wife and children. (page 20 line 25 – page 23 line 15)

Commissioner Lemons asked about the crime. (Page 23 line 21 – page 25 line 10)

The Decision of the Board denying parole reads as follows:

"Denied 24 months, next appearance April 2011.

After 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 and would so deprecate the serious nature of the crime as to undermine respect for the law. This decision is based on the following factors: your instant offense murder in the second degree in which you choked your 17 (sic) year old female victim into unconsciousness and then tied her bra around her neck 'to finish the job' and disposed of her body under a garage. Your record is limited to one prior juvenile offense. Note is made of your sentencing minutes, parole plan and your submissions, remorse, your programming, clean disciplinary record, De Novo decision, all confidential submissions and all other required factors. While your positive rehabilitative efforts are compelling the board finds more compelling the senseless and violent nature of your offense during the commission of which you considered stopping and getting help but instead decided to 'finish the job'. Parole is denied."

THE ADMINISTRATIVE APPEAL

As of date, the Administrative Appeal filed on October 5, 2010 has not been decided, and is thus beyond the suggested statutory mandate to decide these matters, 9 NYCRR 8006.4(c).

LEGAL PRINCIPALS: THE STATUTE AND CASE LAW

III. LEGAL PRINCIPLES

Analysis begins with the language of Executive Law Section 259-i(2)(c)(A):

“Discretionary 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.”

Guidelines are then listed in that paragraph that the Parole Board must consider, i.e., the petitioner’s institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates, and his release plans.

The cases provide additional guidance when examining the facts of a particular case to the statutory Executive Law command.

A. The Parole Board has broad discretion in deciding what weight should be given to each of the factors listed above. *In re William R. Phillips v. Dennison*, 41 A.D.3d 17, 834 N.Y.S.2d 121, 2007 N.Y. Slip Op. 03085 (1st Dept.2007)

B. The Board is not required to expressly discuss each of the guidelines in its determination. *Matter of Walker v. Travis*, 252 A.D.2d 360, 362, 676 N.Y.S.2d (1998) Nonetheless, the reasons for denying parole must “be given in detail and not in conclusory terms.” Executive Law Section 259-i(2)(a).

C. The petitioner bears the heavy burden of establishing that the determination of parole denial was the result of “irrationality bordering on impropriety.” *Matter of Silmon v. Travis*, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000), *quoting Matter of Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69, 77, 427 N.Y.S.2d 982 (1980)

D. The Board's discretion is not, however, unlimited. There are two things the Board cannot do. First, the Board cannot base its determination solely on the serious nature of the crime. *Guzman v. Dennison*, 32 A.D.3d 798, 821 N.Y.S.2d 208 (1st Dept.2006); *Almonor v. New York State Board of Parole*, Slip Copy, 16 Misc.3d 1126(A), 2007 WL 2379719 (N.Y.Sup.), 2007 N.Y. Slip Op. 51588(U). Second, the Board cannot deny parole merely repeating the statutory criteria; rather, the reasons for denying parole must "be given in detail and not in conclusory terms." *Executive Law Section 259-i(2)(a)*.

DISCUSSION: PETITIONER IS ENTITLED TO PAROLE

Directly on point is *In the Matter of Coaxum v. New York State Board of Parole*, 14 Misc.3d 661, 827 N.Y.S.2d 489, 2006 N.Y. Slip.Op. 26493. In that case, the petitioner had been incarcerated for 21 years for murder in the second degree and robbery in the first degree. Her institutional record was exemplary. So too were her psychological insights of her guilt and shame, as well as her remorse for her criminal actions. The court took note of petitioner's devoted family, her elderly mother, children and grandchildren. Yet, petitioner was denied parole four times since her minimum 15 year sentence elapsed. The Board's decision cited the brutality of the murder - tying the hands and feet of an 80 year old victim, strangling her with a cloth around her neck, and then burglarizing the victim's residence. Petitioner was 28 years old at the time.

The Board concluded:

"You've programmed well, have an excellent disciplinary record and have much community support. However, your criminal act was extremely brutal and this panel feels that even though you've spent significant time in prison and have other significant positive factors mentioned above, we feel that your criminal act

was so heinous that to release you at this time would deprecate the seriousness of it and undermine respect for the law.”

The court granted the petition holding that while parole is not to be granted merely as a reward for positive conduct and rehabilitative achievements, these factors must be considered. The court found that the Board’s decision “accorded *no* weight and *no* emphasis whatsoever to *any* factor apart from the seriousness of petitioner’s offense.” *Id.* at 666 (emphasis in original), citing *Friedgood v. New York State Bd. Of Parole*, 22 A.D.3d at 951, 802 N.Y.S.2d 268. See *Anthony v. New York State Div. of Parole*, 17 A.D.3d 301, 792 N.Y.S.2d 900; *Torres v. New York State Div. of Parole*, 300 A.D.2d 128, 129, 750 N.Y.S.2d 759 (1st Dep’t 2002); *Garcia v. New York State Div. of Parole*, 239 A.D.2d at 239, 657 N.Y.S.2d 415; *Vasquez v. State of N.Y. Exec. Dept., Div. of Parole*, 20 A.D.3d at 669, 797 N.Y.S.2d 655.

In *Rios v. New York State Div. of Parole*, 15 Misc.3d 1107(A), 836 N.Y.S.2d 503, 2007 WL 846561 (N.Y.Sup.), 2007 N.Y. Slip Op. 50529(U), the petitioner, age 19, plead guilty to two counts of murder in the second degree and was sentenced to two terms of 18 years to life, to run concurrently.

After parole was twice denied, the petitioner filed an administrative appeal which affirmed the Board. The petitioner then went to court. The court noted that “almost” all of the statutory factors the Parole Board must consider weigh in petitioner’s favor. Consequently, the court expected a “rational explanation” why parole was denied. “Instead, the Parole Board focused almost exclusively on the serious nature of petitioner’s crime” as its reason to deny parole.

The court cited *Matter of King*, 190 A.D.2d at 431:

“It is unquestionably the duty of the Parole Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it,

and where the record convincingly demonstrates that the Parole Board did in fact fail to consider the proper standards, the courts must intervene.”

In *Almonor v. New York State Bd. Of Parole*, Slip Copy, 16 Misc.3d 1126(A), 2007 WL 2379719 (N.Y.Sup.), 2007 N.Y. Slip Op. 51588(U), the petitioner, age 20, was sentenced to 12 1/2 to 25 years for criminal use of a firearm in the first degree, and to 8 1/3 to 25 years for manslaughter one.

The *Almonor* court acknowledged the broad discretion given the Parole Board and that “absent a convincing demonstration to the contrary, the Board is presumed to have acted properly in accordance with statutory requirements.” Citing *Nankervis v. Dennison*, 30 A.D.3d 521, 522, 817 N.Y.S.2d 123, 124 (2nd Dept.2006).

But the *Almonor* court also noted that the Parole Board’s discretion is not “unfettered. The main limitation is that the Board cannot base its determination solely on the serious nature of the crime.” Citing, *Guzman v. Dennison, supra*.

██████ decision is inconsistent with *Coaxum*, *Rios* and *Almonor*.

The ██████ Board based its decision solely on the horrific nature of the crime. The decision twice cites that Mr. ██████ wanted “to finish the job”. Mr. ██████ however, never said that or anything close to that. The only one who did was Commissioner Ferguson, no less than three times! Mr. ██████ was, in effect, denied parole because of something he did not say!²

The decision is completely conclusory in nature. There is no stated factual basis for why the Board believed there is a reasonable probability that Mr. ██████ would violate the law if released. There is no stated factual basis for why the Board believed his release would be incompatible with the welfare of society. There is no stated factual basis for why the Board

² It is not insignificant that Judge LaBuda found that Mr. ██████ was in part denied parole at his April 17, 2009 hearing on the basis of not answering a question he was not asked.

believed that his release would undermine respect for the law. See, *In the Matter of Frank Marino v. Brion Travis, etc.*, 289 A.D.2d 493, 735 N.Y.S.2d 422 (2nd Dept. 2001), wherein the Court required the Parole Board's conclusion – that if released, the Petitioner would not remain at liberty without violating the law – be supported by the record. As cogently stated: "...the Board is required to do more than merely mouth the statutory criteria, particularly whereas here each factor recited and brought forth in the parole interview, other than the crime itself, militated in favor of release." *In the Matter of Herbert Weinstein, Petitioner v. Robert Dennison, Chairman, New York State Division of Parole, Respondent*, 801 N.Y.S.2d 244, 2005 N.Y. Slip Op. 50518 (2005). See also, *Cappiello v. N.Y.S. Bd. Of Parole*, 6 Misc.3rd 1010A, Sup.Ct., N.Y. Co. (2004), (although parole board is to consider severity of crime, its role is to evaluate inmate's danger to society in light of his comportment during incarceration, not to resentence him); *The People of the State of New York ex rel. Ricardo Bermudez v. Robert H. Kuhlmann, Superintendent of Woodbourne Correctional Facility*, 87 Misc.2d 975, 386 N.Y.S.2d 772, Sup.Ct. Dutchess Co. (1976) "...the manner of implantation of that requirement by the board (to set forth reasons for denial of parole) has diluted the intent of the law."

The fact is the Board made their decision to deny parole before starting the interview. Commissioner Ferguson began the interview with an argumentative and hostile attitude. Beginning on page 2, line 20 through page 5, line 20, Mr. [REDACTED] uttered 15 words. During this time, Commissioner Ferguson rambled on for 71 lines with 586 words fulminating against Judge LaBuda granting Mr. [REDACTED] Article 78 petition and asking Mr. [REDACTED] rhetorical questions.

Commissioner Ferguson, for example, was intent on distinguishing an outside pass from a day pass – as if that is important. (page 3 line 5 – page 4 line 8)³ And his explanation for why inmates are not asked about remorse misses the point entirely, namely, that the 2009 parole denial decision was importantly based on his so-called lack of remorse.

Commissioner Ferguson's comments clearly went outside the relevant guidelines and considered factors outside the scope of the applicable statute. The Court of Appeals held a parole hearing, within which that happens, improper. *In the Matter of Darryl King v. New York State Division of Parole*, 83 N.Y.2d 788, 610 N.Y.S.2d 954 (1994).

On the other hand, [REDACTED] is distinguished from *Phillips v. Dennison*, 41 A.D.3d 17, 834 N.Y.S.2d 121, 2007 N.Y. Slip Op. 03085. In *Phillips*, the First Department, in upholding the Board, was correctly influenced by the petitioner's (a former New York City police officer) "apparent reluctance or inability to plainly admit to the Board, without prompting, the exact nature of his criminal acts." *Id.* at 125.

[REDACTED] has fully acknowledged his crime and expressed deep remorse, shame and guilt.

[REDACTED] has had no disciplinary problem while incarcerated.

[REDACTED] has programmed effectively.

[REDACTED] has a support system on the outside.

[REDACTED] has employment waiting.

If released on parole, [REDACTED] will live with his wife, [REDACTED] and their two children in a newly purchased and renovated home [REDACTED] as demonstrated by his letter of support for [REDACTED] has no such concern about the community's welfare or undermining respect for the law.

³ Commissioner Ferguson was wrong (not that this is important but to respect the historical record), when he stated that sometimes the correctional officers who accompany Mr. [REDACTED] outside are armed. They never are.

Directly on point is *People of the State of New York ex rel. Marvin Howard Schaurer v. Harold J. Smith, Superintendent of Attica Correctional Facility*, 81 Misc.2d 1039, 367 N.Y.S.2d 707, County Ct., Wyoming Co. (1975). The Board's "failure to follow the statutes and their repeated failure to follow constitutional due process makes it absolutely useless to send this inmate back to them for a new hearing. This Board has, in effect, by their actions, waived their right to retain this prisoner in jail." Petitioner was ordered released from custody forthwith and placed on parole.

CONCLUSION

In the classic formulations of Article 78, Section 7803, Respondents have failed to perform the duties as to Petitioner enjoined upon them by law. They have made their determinations in violation of lawful procedure, their determinations have been arbitrary and capricious and they have abused their discretion.

The Petitioner has been deprived of his entitlement under the Constitutions of New York State and the United States to due process of law.

WHEREFORE, Petitioner prays that judgment be entered requiring Respondents to release Petitioner forthwith or, in the alternative, to order a new parole hearing be held before a different panel within thirty days.

Dated: New York, New York
February 8, 2011

Respectfully Submitted,

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