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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
PRESENT: HON. LAWRENCE H. ECKER, J.S.C.**

-----X
In the Matter of CALVIN KADET,

Petitioner,

-against-

Index No. 10178/2011

**DECISION, ORDER &
JUDGMENT**

NEW YORK STATE BOARD OF PAROLE,

Respondent.
-----X

The following papers numbered 1 to 20 were read on petitioner's application pursuant to CPLR Article 78 seeking an order annulling and vacating his denial of parole and granting a new parole release hearing:

PAPERS NUMBERED

Order to Show Cause /Petition/ Exhibits 1-6	1-8
Answer and Return/Exhibits 1-11	9-20

Upon the foregoing papers, the decision, order, and judgment of the court is as follows:

Petitioner Calvin Kadet ("Petitioner") seeks an order and judgment pursuant to CPLR Article 78 seeking the following relief: 1) annulling and vacating the December

15, 2010 determination of respondent New York State Board of Parole ("Respondent") denying him parole; and 2) ordering a de novo parole hearing. Respondent opposes the petition and seeks its dismissal.

Facts

On December 15, 1975, petitioner and three others committed an armed robbery of a grocery "numbers" operation store at 29 Tompkins Avenue in Brooklyn, New York. The store owner and four customers were robbed. They demanded that an upstairs safe be opened. Petitioner went upstairs and held a family at gunpoint. One person was struck in the head with a pistol when he could not open the safe. When the safe could not be opened, petitioner exited the store. He was grabbed by an off-duty police officer, searched, and laid on the ground. He was able to flee when the officer took cover as the other robbers exited the store. He then shot and killed a Good Samaritan bystander who was trying to restrain him for the police. The victim was 33 years old and left a wife and two children. Petitioner fled the scene in the getaway driver's vehicle. He was arrested three months later.

On December 15, 1976, petitioner was convicted, following a jury trial, of murder in the second degree [PI 125.25] in Supreme Court, Kings County. He was sentenced to an indeterminate term of 25 years to life imprisonment. The two co-defendant robbers who entered the store also received sentences of 25 years to life imprisonment following trial. The fourth defendant who acted as the getaway driver pleaded guilty to manslaughter in the first degree and was sentenced to 10-20 years imprisonment.

At the time of the robbery-murder, petitioner, 27, had a lengthy criminal history, including two felony convictions. He had recently finished parole for the armed robbery

of a drug store. He had been unemployed for a few months and decided to commit the instant robbery to get some money.

After serving 25 years, petitioner became eligible for parole in March, 2001. He has appeared six times before the Board of Parole in 2001, 2003, 2005, 2007, 2008, and 2010. Now 62 years old, he has served 36 years of his sentence. His two co-defendants who received the identical sentence were released in December, 2006.

At the December, 2010 parole hearing at Otisville Correctional Facility, the interview primarily focused on the crime. Petitioner took responsibility for the crime, expressed remorse, and described his conduct as "despicable." The Board noted his excellent disciplinary record, considerable program achievements, and remarked he had made good use of his time.¹ Respond. Answer and Return, Exhibit 4.

Petitioner was denied parole again and held for 24 months to November, 2012.

The Board's decision stated:

Despite a Certificate of Limited Credit Time Allowance Parole release is denied. After a personal interview, record review, and deliberation, this panel finds your release is incompatible with the public safety and welfare of the community, and would so deprecate the serious nature of your crime as to undermine respect for the law. Your appear before this panel with the serious instant offense of Murder in the 2nd Degree. This was a heinous offense with a total disregard for human life. Your criminal record reflects prior unlawful behavior. This repeated criminal behavior is a concern for this panel. The panel notes your positive programming, good disciplinary record, release plans, your educational achievements, and letters of support;

¹Petitioner's program and institutional achievements include over three dozen certificates of commendation, exemplary work assignment reports, college transcripts and course work achievements, and other statements of recognition. Petition, Exhibit 4.

however, despite these accomplishments, when considering all relevant factors release is not warranted at this time.

Petitioner took an administrative appeal from the Board's decision. On or about July 14, 2011, the Board of Parole affirmed its decision denying parole.

Discussion

It is well settled that parole release is a discretionary function of the Parole Board and its determination should not be disturbed by the court unless it is shown that the Board's decision is irrational "bordering on impropriety" and that the determination was, thus, arbitrary and capricious. *Matter of Salmon v. Travis*, 95 N.Y.2d 470 (2000); *Matter of King v. NYS. Division of Parole*, 190 A.D.2d 423 (1st Dept., 1993), *aff'd* 83 N.Y.2d 788 (1994); *Matter of Duffy v. N.S. Div. Of Parole*, 74 AD3d 965 (2d Dept 2010); *Matter of Rios v. N.S. Division of Parole*, 15 Misc. 3d 1107(A) (Sup. Ct., Kings Co., 2007). In reviewing the Board's decision, the court must also examine whether the Board's discretion was properly exercised in accordance with the parole statute.

Executive Law §259-c[4] was recently amended to require the Board to promulgate new procedures in making parole release decisions. Such new 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." See, Laws of 2011, ch. 62, Part C, Subpart A, §38-b.

The amendments to the parole statutes are remedial in nature and designed to modernize decision-making in the area of parole release. In *Matter of Thwaites v. NYS.*

Bd. Of Parole, ___ Misc3d ___, 934 NYS2d 797, 2011 NY Slip Op. 21453 (2011), this court held the above remedial amendment should apply in a pending proceeding, and petitioner was entitled to a new parole hearing consistent with the new risk assessment procedures.

Here, respondent relied entirely on the seriousness of the crime and criminal history in denying parole. Every other factor discussed at the brief parole hearing was very positive. While his institutional, educational, program accomplishments, and letters of support were noted in its decision, the Board focused on the circumstances of the crime committed thirty-five years ago. The court notes the co-defendants were released years ago. When the Board reasoned that "your release is incompatible with the public safety and welfare of the community and would so deprecate the serious nature of your crime as to undermine respect for the law" and that petitioner's "discretionary release was not warranted at this time", it was employing past-focused rhetoric, not future-focused risk assessment analysis. Such reasons failed to articulate a rational determination on the inquiry at hand: whether 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 deprecate the seriousness of his crime as to undermine respect for the law. Executive Law §259-i[2][c].

In *Matter of King v. NYS. Div. of Parole, supra, 190 AD2d 423 (1st Dept 1993)*, *aff'd 83 NY2d 788 (1994)*, the court, in finding the Parole Board's determination fundamentally flawed, stated, "The role of the Parole Board is not to resentence petitioner, according to the personal opinions of its members as to the appropriate

penalty for murder, but to determine whether, *as of this moment*, given all of the relevant statutory factors, he should be released." *Id.* at 432. (emphasis added)

Similarly, in *Matter of Rios v. NYS. Division of Parole, supra*, 15 Misc3d 1107 (A), 2007 WL 846561 (Sup. Ct., Kings Co., 2007), the court stated:

"[t]his court, of course, does not mean to minimize the seriousness of petitioner's offense, nor the tragedy of the death of petitioner's victim[s], however in affording the possibility of parole to those convicted of murder, the Legislature has made a determination that, despite the seriousness of that crime, rehabilitation is possible and desirable.....certainly every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, 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, *quoting Matter of King, supra* at 433."

The court agrees with the reasoning of *King* and *Rios* and finds the Board's decision denying parole in this case to be arbitrary and capricious, irrational, and improper based upon the Parole Board's failure to articulate any rational, nonconclusory basis, other than its reliance on the seriousness of the crime as to why the Board could not believe "there is a reasonable probability that if petitioner is released, he would 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." Executive Law §259-1(2)(c).

It is further undisputed the Board's decision was not made in accordance with the subsequent 2011 Amendments to the Executive Law which require a new parole hearing utilizing risk assessment principles and procedures. *Matter of Thwaites, supra*.

Accordingly, the court grants the petition, annuls the Board of Parole's determination of December 15, 2010, vacates the denial of parole release to petitioner, and remands to the Board of Parole which, within 30 days of the service of a copy of this order with notice of entry, shall hold a new parole hearing consistent with this decision and the mandates of Executive Law §259-c and §259-l, as amended by Laws of 2011, ch. 62. The new hearing shall be held before a different panel of the Parole Board.

The foregoing constitutes the decision, order, and judgment of the court.

Dated: Goshen, New York
February 27, 2012



HON. LAWRENCE H. ECKER, J.S.C.

cc: Calvin Kadet
77-A-0046
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