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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
In the Matter of the Application of
HUMBERTO FERNANDEZ, 96-A-4554,

Petitioner,

AMENDED
DECISION/ORDER

-against-

Index No. 6221-12
R.J.I. No. 01-12-ST4193
Richard Mott, J.S.C.

NEW YORK STATE DIVISION OF PAROLE,

Respondent.

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

-----X
Motion Return Date: Albany County Special Term, February 8, 2013

APPEARANCES:

Petitioner:

✓ Humberto Fernandez
Self Represented Petitioner
Otisville Correctional Facility
Box 8
57 Sanitorium Rd
Otisville, NY 10963

Respondent:

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
The Capitol
Albany, NY 12224-0341
Laura A. Sprague, Esq., Assistant Attorney General,
of Counsel

Mott, J.

Petitioner filed this Article 78 proceeding to challenge Respondent's November 8,
2011 Decision denying him release on parole.

Petitioner was convicted by verdict of Murder in the Second Degree and sentenced to 15 years' to life imprisonment. The sentencing judge explained that the crime was Petitioner's first and that he had no prior arrests. Petitioner initially appeared before the Parole Board in 2009, was denied parole¹, and was held for 24 months.

In its Decision a second time denying Petitioner parole, the panel wrote:

Denied, hold 24. Next appearance November, 2013.

After review of the record and interview, the panel has determined that if released at this time your release will be incompatible with the welfare of society and would so deprecate the nature of the crime as to undermine respect for the law.

This decision is based on the following factors: Your instant offense is Murder 2nd Degree, for which you were serving fifteen to life. Your crime involved you causing the death of a 16-year old victim, after you shot a gun in his direction striking him in the neck.

The Board notes your letters of support, program completions and employment opportunities. More compelling, however, is the extreme violence exhibited in the instant offense against a young victim and your callous disregard for human life. As such your release at this time was not appropriate.

The Parole Board is required to consider a number of statutory factors in determining whether an inmate should be released on parole. Executive Law 259-i, *Matter of Malone v. Evans*, 83 A.D.3d 719 (2d Dept. 2011) citing *Matter of Huntley v. Evans*, 77

¹The Board's November 10, 2009 Decision denying parole like the present Decision was based virtually exclusively on the seriousness of Petitioner's crime. As to the other factors that were to be considered, that Decision merely stated in passing the following terse remark, "Note is made of your positive programming and disciplinary record." Because the circumstances of Petitioner's crime can never be changed, there must be a showing of some aggravating circumstances for the crime continually to justify denial of release. See, e.g., *Matter of Rios v. New York State Division of Parole*, 836 N.Y.S.2d 503, 2007 WL 846561 (Kings County, 2007). No aggravating factors whatsoever are present here.

A.D.3d 945, 947 (2d Dept. 2010) and *Matter of Miller v. New York State Division Of Parole*, 72 A.D.3d 690, 691 (2d Dept. 2010). While the Board need not expressly discuss each of these factors in its determination (see, *Matter of King v. New York State Division of Parole*, 83 N.Y.2d 788, 790 (1994) or afford those factors equal weight (see, *Matter of Wan Zhang v. Travis*, 10 A.D.3d 828 (3d Dept. 2004)), it is the obligation of the Parole Board to give fair consideration to each of the statutory factors, and where, as here, the record convincingly demonstrates that the Board in fact failed to consider the proper standards, the Courts must intervene. *Matter of King v. New York Division of Parole*, 190 A.D.2d 423, 431 (2d Dept. 1993).

Moreover, the Board is required to inform the inmate in writing of the factors and reasons for the denial of parole, and “[s]uch reasons shall be given in detail and not in conclusory terms.” Executive Law 259-i(2)(a). See, *Matter of Malone*, supra, *Matter of Mitchell v. New York State Division of Parole*, 58 A.D.3d 742 (2d Dept. 2009). As the Court wrote in *Cappiello v. New York State Board of Parole*, 6 Misc.3d1010(a), 2004 WL 3112629 (N.Y. County, 2004), the purpose of requiring a detailed written explanation is to enable intelligent review, and serves as a helpful guide to an inmate’s conduct while in prison and in his endeavor to return to society as a useful citizen.

Here, the Court finds that the Board’s decision focused almost exclusively on Petitioner’s crime. While the seriousness of the crime remains acutely relevant in determining whether Petitioner should be released, the record in this case demonstrates that the Board failed to take other relevant statutory factors into account. See, e.g., *Matter of Silmon v. Travis*, 95 N.Y.2d 470, 476-7 (2000). In fact, where the Parole Board focuses, as

here, almost entirely on the nature of Petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion that does not comport with statutory requirements. *Matter of Winchell v. Evans*, 32 Misc.3d 1217(A), 2011 WL 2811465 (Sullivan County, 2011) citing *Stanley v. New York State Board of Parole*, 2011 N.Y. Slip Op 21136 (Orange County, 2011). Indeed, the Board's passing mention of Petitioner's "letters of support, program completions and employment opportunities" was inadequate to show that the Board weighed or fairly considered the required statutory factors. See, *Matter of Rios v. New York State Division of Parole*, 836 N.Y.S.2d 503, 2007 WL 846561 (Kings County, 2007) citing *Matter of King v. New York Division of Parole*, 190 A.D.2d at 434.

Furthermore, the Board's decision, aside from reference to the subject crime, utterly failed to explain its reasoning for denying Petitioner parole. As noted in *Matter of Flynn v. Travis*, Index No. 19168/98 (Westchester County, 1999)(West, J.), the Board "should be well able to articulate the reasoning" for its decision, "if it were come to reasonably, in a non-arbitrary, un-capricious manner." Without such an exposition in this case, "the Court's authority to review in the proper circumstances is thwarted entirely."

Specifically, the Board inexplicably failed first to consider and then weigh factors strongly supporting Petitioner's being released on parole. These include, but are not limited to, the fact that the instant crime was Petitioner's first and only contact with the law. Moreover, atypically, neither drugs nor alcohol were not involved in it. And significantly, after his arrest for murder, Petitioner was released on his own recognizance and remained at large in his community and gainfully employed without being arrested or committing a single crime for two years and nine months, until he was remanded after the

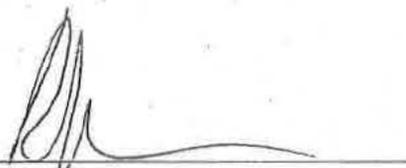
verdict at his trial. During his seventeen years of imprisonment, Inmate Status Reports from 2009 and 2011 confirm that Petitioner has had no recent, major disciplinary penalty. Further, these reports made it clear that Petitioner has a deportation order and warrant that the statute required to be taken into account (Executive Law 259-ii(2)(c)(A)(iv)).

Accordingly, the Board of Parole's determination of November 8, 2011 is vacated and the matter is remanded to the Board of Parole which, within 30 days of the receipt of a copy of this Decision/Order, shall conduct a new parole hearing before a different panel of the Parole Board and issue a Decision in accordance with this Decision/Order within 10 days of the hearing, a copy of which shall be provided to this Court.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to the Respondent, who is required to comply with the provisions of CPLR 2220 with regard to the filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. **All original motion papers are being delivered by the Court either to the Supreme Court Clerk for transmission to the County Clerk, or directly to the County Clerk.**

Dated: Claverack, New York
February 26, 2013

ENTER


RICHARD MOTT, J.S.C.

Papers Considered:

1. Affidavit in Support of Order to Show Cause dated, October 26, 2012;
2. Order to Show Cause dated, November 26, 2012;

3. Petition dated, October 26, 2012 with Exhibits A through D;
4. Answer dated, January 28, 2013, and Affirmation of Laura A. Sprague dated; January 28, 2013 with Exhibits A through M;
5. Reply to Respondent's Affirmation dated, February 6, 2013 with Exhibit.