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### Decision in Art. 78 proceeding - Salim, Rafiq J. (2000-06-19)

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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IN THE MATTER OF THE APPLICATION

**[REDACTED]**  
RAFIQ J. SALIM #76-B-1024  
Petitioner

v.

Index No. 2000/2236

JAMES L. BERBARY, SUPT., COLLINS  
CORRECTIONAL FACILITY, BRION D.  
TRAVIS, CHAIRMAN, NYS DIVISION  
OF PAROLE

Respondents

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RAFIQ J. SALIM  
**[REDACTED]**

*Pro Se*

MICHAEL J. RUSSO, ESQ.  
ELIOT SPITZER, ESQ.  
Attorneys for Respondents

MEMORANDUM DECISION

FAHEY, J.

Petitioner brings special proceeding pursuant to Article 78 of the CPLR challenging the decision of Respondent, New York State Division of Parole to deny him release to parole supervision.

The Petition is granted, the matter is remanded to Respondents, who are directed to provide Petitioner with a *de novo* hearing, before a different panel, which shall consider all of the statutory criteria, and all the available information relevant to whether or not Petitioner shall be granted parole.

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Petitioner was sentenced to a term of twenty years to life on June 18, 1976, as the result of his conviction for murder in the second degree. On May 8, 1975, Petitioner, then nineteen, had broken into a deli in Copiague, New York. Later he had gotten into a struggle with the female store owner, Mrs. Thomson, over her gun. *During the struggle,* Mrs. Thompson was shot and killed.

The Court notes Petitioner's most recent institutional history, which includes graduation from high school, a Bachelors Degree from Syracuse, his work as a Chaplain's Aide, Nurse's Aide, HIV counselor, honor dorm status and freedom from disciplinary action since 1994.

Petitioner first appeared before the Respondent's parole board in March of 1995, and then March of 1997. Parole was denied on each occasion. Petitioner then appeared before the Board on March 3, 1999.

By decision dated March 8, 1999, Respondent's board again determined to deny parole.

"Parole is again denied for the following reasons. The violence displayed during the commission of the instant offense of murder 2<sup>nd</sup> and burglary 2<sup>nd</sup>. You illegally entered a deli, got into a struggle with the female victim and subsequently shot and killed her. This total indifference to human life leads the panel to conclude you are not an acceptable candidate for discretionary release." (See Respondent Answer, Exhibit "C" Parole Board Release Decision Notice, p. 2)

The Court has reviewed the transcript of the March 3, 1999 hearing. The panel initially reviewed Petitioner's two prior appearances before it. It then questioned him about the circumstances of the crime, particularly how the gun came into his hands and the question of intent (pp. 3-9). The panel then asked what Petitioner had done by way of programming the prior two years, that he intended to work in a restaurant as a cook, that he and his wife owned a home in Buffalo (p. 9). Petitioner was then asked if there was anything else to say.

"A. Yes, sir. There is.

Q. All right.

A. There is absolutely nothing that I can ever do to erase what I did 24 years ago.

Q. That's right, a woman is dead.

A. Yes, sir.

Q. It's over for her.

A. Yes, sir. There is absolutely nothing that I can do.

Q. Absolutely.

A. At all.

Q. Yes.

A. And when I came before the Parole Board this is the third time that I've been before the Parole Board and I'm questioned about this and I don't know if there is nothing new that I can say. I'm not really searching for anything new to say because I understand what I did and I take full responsibility for it.

Q. All right.

A. But the only thing that I would like to point out to the Parole Board is today right now in 1999 I am not the same person that I was in 1975 by any stretch of the imagination and to anyone who knows me or works with me that's readily apparent. Unfortunately you can't see into me. I'm not a piece of glass where you can just look inside of me and say I can see this man's motives and this is what he is going to do. You can't do that. So you're in a difficult position and I understand this but it's very frustrating to me to know who I am and what I am about and what my goals are and the kind of man that I am and I mean, I don't know what to do other than time. I don't know what to do other than time and I'm not looking for an easy life. It's kind of too late for that. I destroyed that 24 years ago, the possibility of having an easy life, but if I am going to ever be released and be successful upon release it doesn't get any easier for me to make the transition and to live a productive life outside. It doesn't get any easier, it gets more difficult as time goes by and I get older in terms of finding a place in the work force and

being able to help and assist my wife and my wife can't even work now. She's on disability. So it's just getting more difficult. I'm not looking for sympathy.

COMMISSIONER TAURIELLO: Who is this Brown that you intend to get some work through in Buffalo?

A. Mr. Brown is a head of an agency.

COMMISSIONER TAURIELLO: What kind of agency?

A. Employment agency. They work through - -

COMMISSIONER TAURIELLO: Where is he located?

A. In Buffalo. I'm not a native of Buffalo.

COMMISSIONER TAURIELLO: I'm just curious. He's in the City of Buffalo?

A. Yes, sir.

COMMISSIONER TAURIELLO: He's got a recognized agency of some sort?

A. Yes, sir. There are actually - I think he's with a seed program. The actual program for electrical trades is through the Step Up Program which also functions through the seed - -

COMMISSIONER TAURIELLO: Where is that, Cathy's Corner, is that a restaurant?

A. Yes. It's a deli in Buffalo.

COMMISSIONER TAURIELLO: Where is that located in Buffalo?

A. I don't know the area.

COMMISSIONER TAURIELLO: But it's an established restaurant?

A. Yes.

COMMISSIONER TAURIELLO: All right.

Q. Anything further?

A. I want to go home, I mean as everyone wants to go home and I want to succeed and I want to do what is right and I've been trying to do what is right for as long as I can remember and all I can ask is that you help me because I can't help myself any further.

Q. All right. We'll take everything into consideration that you said and consider the record.

A. All right.

Q. We'll make our determination and we'll notify you in a written decision in a few days.

A. Yes.

Q. One thing you have to remember is the courts gave you a sentence.

A. Yes.

Q. 20 years to life.

A. Yes.

Q. You have served a long time.

A. Yes.

Q. The potential is that you could remain in prison the rest of your life according to this sentence, do you understand that?

A. Yes, I do. Yes, sir.

Q. All right.

A. May I - -

Q. I'm just going to make a comment here, it does appear based upon what you said that you have changed and your direction is different and it probably has been for a long time but no matter how much you changed since that crime was committed the crime has not changed. It's still murder. That person is still dead.

A. Yes, sir.

Q. And that person will always be dead.

A. Yes, sir.

Q. Thank you for coming in. We'll make a determination and we'll notify you in writing in a few days.

A. Thank you."

(Exhibit "B", Transcript, Respondent Answer pp. 9-14)

There is nothing in the record showing the panel's deliberations concerning the denial.

Section 259-I[2] provides that "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 reason shall be given in detail and not in conclusory terms."

It is well settled that a parole board's determinations are discretionary, and if made in accordance with the statutory factors contained in §259-I Executive Law, are not subject to judicial review (*see, Matter of Heitman v. N.Y.S. Bd. of Parole*, 214 A.D.2d 673 [2d Dept. 1995]).

" The Parole Board performs a very significant function in determining the length of time which an inmate will spend in prison and it is entitled to exercise substantial discretion within its sphere (Penal Law §70.40; Executive Law §259-I [5]). However, that discretion must be exercised under the standards laid down in the Executive Law, which provides: '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' (Executive Law §259-I [2] [c]).

The statute specifically delineates the type of information which the Board must take into account in making a decision as to whether these general criteria have been met: '(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; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government \* \* \* and (v) the written statement of the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated.' (Executive Law §259-I [2] [c].)

Additionally, if the court, as here, set the minimum period of imprisonment, the Board must also take into account: '(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' (Executive Law §259-I [1] [a]; [2] [c])." *Matter of King v. N.Y.S. Div. Of Parole*, 190 A.D.2d 423, 431 (1<sup>st</sup> Dept. 1993) *aff'd* 83 N.Y.2d 788.

It is not necessary that the Board's decision specifically refer to each and every one of these factors (*see, Matter of Davis v. N.Y.S. Div. Of Parole*, 114 A.D.2d 413 [2d Dept. 1985]). Nor is the fact that the Board did not discuss each factor with Petitioner convincing evidence that it did not consider them (*see, Mackell v. N.Y.S. Bd. Of Parole* [2d Dept. 1983]). Nor need the Board give each factor equal weight (*see, People ex. rel. Herbert v. N.Y.S. Bd. of Parole*, 98 A.D.2d 128 [3d Dept. 1984]).

This Court is extremely reluctant to second-guess the decision of the Board, and the presumption that it has properly complied with its statutory duty.



Nevertheless, the duty of the Board is to give fair consideration to each of the applicable statutory factors as to each person who comes before it. The Courts must intervene if the record shows a failure to weigh all of the relevant considerations.

What is troubling concerning the Board's stated reasons for denial is that the reasons - "the violence displayed", "the illegal entering", "the struggle, shooting and killing", "the total indifference to life" - amount to one reason, the seriousness of the offense.

The problem offered here, that the State Legislature has determined that a murder conviction *per se* should not preclude parole, means that there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself (*see, Matter of King Supra* at 433 ) if denial is based exclusively on this ground. The Board cannot engage in a circular finding, where the aggravating circumstance is the inherent seriousness of the crime itself.

Yet, based on the record this Court has before it, which provides very little for determining there were aggravating circumstances, that is precisely what the Board has done. The Court does not have access to a transcript of Petitioner's sentencing, except for a small portion contained in less than appropriate form, and submitted by Petitioner. Presumably the sentencing transcript would provide the best basis for determining if there are aggravating circumstances to this crime.

But that portion of the sentencing transcript provided by petitioner, its accuracy not disputed by Respondent, provides more grounds for mitigatory than aggravating circumstances to the offence.

"MR. FLAHERTY: Your Honor, the People do have a recommendation.

With all the information available to me as a result of talking to people in the community where Mrs. Rebecca Thompson lived and police officers who were witnesses at the trial of this matter indicate that Mrs. Thompson was a woman of substance, a woman of credit and a great value to her community. As a result of the actions of this defendant, Mrs. Thompson and the community - Mrs. Thompson is dead, the community is deprived of her contributions to that community. I think society as a result of being deprived of Mrs. Thompson is entitled to ask for a substantial penalty to be imposed on the person responsible for the death of Mrs. Thompson.

However, there are mitigating circumstances. Those mitigating circumstances being the age of the defendant, the mitigating circumstance that it was not the defendant who apparently entered Mrs. Thompson's premises with a weapon at the time of the initial burglary, there was apparently no intent to cause physical harm to Mrs. Thompson. Society has suffered grievously and I think something greater than the minimum permissible sentence should be imposed in light of that. I think the litigating factors are of such a nature that the maximum sentence is not called for either.

On that basis, your Honor, I'd ask the Court to the murder conviction to impose a sentence with a minimum term of 20 years and a maximum term to be the natural life of the accused. I'll make no recommendation with respect to the burglary conviction."

Given the failure of the Board to articulate if any aspect of the other statutory factors played a role in its decision to deny parole, the Court cannot but conclude that the only factor weighed in denial was the seriousness of the crime. <sup>(14)</sup> But one factor cannot be a brick wall up against which all other factors crash - "that no matter how much...(Petitioner had changed)...the crime ha[d] not changed. (Transcript at p. 14)"

The determination is annulled and the matter remanded to Respondents to hold within sixty days a *de novo* hearing before a different panel with a decision to be made within thirty days of the hearing.

Submit Order upon notice to opposing counsel.

GRANTED

JUN 20 2000

by CAROL M. WILLIAMS

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EUGENE M. FAHEY J.S.C.

DATED: June<sup>19</sup>, 2000