

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Decisions in Art. 78 Proceedings

Article 78 Litigation Documents

---

January 2020

### Decision in Art. 78 proceeding - Thomas, Kim (2000-05-31)

Follow this and additional works at: <https://ir.lawnet.fordham.edu/pdd>

---

#### Recommended Citation

"Decision in Art. 78 proceeding - Thomas, Kim (2000-05-31)" (2020). Parole Information Project  
<https://ir.lawnet.fordham.edu/pdd/129>

This Parole Document is brought to you for free and open access by the Article 78 Litigation Documents at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Decisions in Art. 78 Proceedings by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

FCF#3

FILED  
AND  
ENTERED  
ON 5-31-2000  
WESTCHESTER  
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
In the Matter of the Application of

KIM THOMAS,

Petitioner,

DECISION & ORDER

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

Index #99-17982

-against-

NEW YORK STATE DIVISION OF PAROLE,  
and THE SUPERINTENDENT OF THE  
TACONIC CORRECTIONAL FACILITY,

Respondents.

-----X  
LANGE, J.

This is a petition brought pursuant to Article 78 of the Civil Practice Law and Rules, seeking a review of a determination of the respondent New York State Board of Parole which denied release of the petitioner following a hearing conducted on February 16, 1999. The petitioner brought an administrative appeal of the hearing's adverse decision. The decision was affirmed on November 26, 1999.

The petitioner is an inmate at the Taconic Correctional Facility, who is serving an indeterminate term of imprisonment of five years to life upon her conviction by her plea of guilty as a juvenile offender to the crime of murder in the second degree.

FCF#3

FCF#3 /

On February 20, 1980, when the petitioner was 15 years old, she and another juvenile participated in a burglary in the apartment of a 71-year old woman in Queens, New York. According to the petitioner, during the course of the burglary, her codefendant struck the 71-year old woman in the head with her shoe. The petitioner states that she fled from the woman's apartment at that point, and was unaware that her codefendant had caused the woman's death. The petitioner contends, and it is uncontradicted, that she did not directly cause the death of the victim, but she incurred the liability for felony murder by virtue of the fact that she was an accomplice on the burglary. This is corroborated by the fact that the petitioner received the minimum term of incarceration permitted by law for her plea of guilty while her codefendant received the maximum term permitted by law.

The crime occurred on February 20, 1980 at which time the petitioner was 15 years old. The petitioner was not apprehended until some 12-1/2 years later on August 5, 1992. The petitioner had had no involvement with the law prior to February 20, 1980 nor subsequent to the date of the crime until August 5, 1992 when she was arrested for that crime. Since the time of her arrest, she has incurred no disciplinary infractions. She has received a certificate of earned eligibility pursuant to Section 805 of the Correction Law. That section provides in part:

If the commissioner determines that the inmate has successfully participated in the

FCF#3

[assigned work and treatment] program he may issue the inmate a certificate of earned eligibility. Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than six years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term or as authorized by subdivision four of section eight hundred sixty-seven unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. ... [Emphasis added.]

The petitioner first appeared before the Board of Parole on December 16, 1997. During the course of that hearing, the Parole Commissioners discussed the circumstances surrounding the underlying crime which led to the petitioner's conviction and incarceration. The petitioner did state that it was her codefendant who struck the victim in the head. The petitioner stated that she got scared and ran out of the apartment and the victim was still alive at the time she ran out of the apartment. The petitioner did state, "I felt a sense of responsibility because I was present."

The Parole Board denied the petitioner's parole release stating that there was a reasonable probability that she would not live and remain at liberty without violating the law, and that her release at this time is incompatible with the welfare and safety of the community. The petitioner brought an administrative appeal of that determination. The determination was affirmed on appeal on July 13, 1998. The petitioner then

FCF#3

brought a proceeding pursuant to Article 78 challenging that determination.

By a decision and order of this Court dated January 26, 1999, this Court found, "to state that there is a reasonable probability, that is, that it is more likely than not that the petitioner will not live and remain at liberty without violating the law, is irrational bordering on impropriety." The Court granted the petition "to the extent that the Parole Board's decision is vacated and the Parole Board is directed to immediately schedule and hold a de novo hearing and provide a decision in accordance with this decision and order." The ordered parole hearing was conducted on February 16, 1999. The facts elicited at this hearing were substantially the same as had been solicited at the original hearing. It was uncontradicted that during the course of the crime the petitioner and her codefendant talked to the 71-year old victim who invited two girls to her apartment. When they entered the apartment, the petitioner spoke to the victim while the codefendant went into a room in the back and stole an envelope belonging to the victim. The victim discovered the codefendant's actions, said that she was going to call the police, and the codefendant struck the 71-year old woman in the head with a shoe. At that point, the petitioner ran out of the apartment.

At the conclusion of the hearing, the Parole Board issued a decision denying parole release, making a determination

FCF#3 /

that if released at this time, there is a reasonable probability that [the petitioner] would not live and remain at liberty without violating the law, and [her] release at this time is incompatible with the welfare and safety of the community. The decision was based on the severity of the offense and responses made by the petitioner at the Parole Board interview which the Parole Board stated demonstrated limited insight into her criminality.

On December 9, 1999, the petitioner appeared before the Parole Board for the third time. The third time the petitioner relayed her account of what happened on February 20, 1980. She admitted that she and her codefendant spoke to a lady in a laundromat and, after talking to the lady in the laundromat, they went to her apartment. While in the apartment, the petitioner spoke to the lady while her codefendant went into the back and went through the lady's "stuff." The petitioner admitted that she entered the lady's apartment. The plan was that the petitioner was to distract the lady while her codefendant was going to steal the woman's property. When the woman discovered what the codefendant was doing, she screamed that she was going to call the police, the codefendant struck the victim with a shoe, and the petitioner ran out of the apartment. At the conclusion of the hearing, the Parole Board again denied parole release, stating that:

[T]here is a reasonable probability that [the petitioner] would not live and remain at liberty without violating the law, and [the petitioner's] release at this time is

FCF#3 /

FCF#3 2

incompatible with the welfare and safety of the community. This decision is based on the following factors: [Petitioner's] crime of adjudication involves an incident during the course of which a 71-year-old victim's residence was entered and burglarized. During the course of this incident, the victim was killed. Such an action shows extreme disregard for human life as well as the laws of society. You have minimized your involvement in this incident.

The Board of Parole has consistently maintained that the petitioner lacks insight into the seriousness of her offense because of the fact that she has not accepted direct responsibility for causing the victim's death. The Court does not find anything in the record before it to indicate that the petitioner lacks insight into the seriousness of her crime. The petitioner has consistently acknowledged the seriousness of the offense and accepted responsibility for the offense even though she, in fact, did not directly cause the victim's death. The fact that the petitioner received the minimum term permitted by law for her plea of guilty while her codefendant received the maximum term of imprisonment permitted by law indicates to this Court that the trial court considered the petitioner to be the less culpable of the two participants in this felony murder. In fact, the Parole Commissioners appeared to display a lack of understanding of the concept of accomplice liability and felony murder when the petitioner was asked why she plead guilty and did not take the case to trial. In response, the petitioner fully accepted responsibility and stated that she knew she was wrong for going into the apartment.

FCF #3

The respondents have repeatedly advanced the well-accepted principle that a lack of insight into the crime and lack of remorse constitute a legally sufficient basis for denying parole. However, in reviewing the petitioner's statements at three separate parole hearings, the Court does not find anything to support a finding that the petitioner lacks insight into her crime or lacks remorse or appreciation of the seriousness of the crime. The petitioner's failure to conform her account of the incident to what the Parole Commissioners apparently wish to hear does not constitute a lack of insight or failure to accept responsibility.

As previously noted, Correction Law §805 is clear that the petitioner must be granted parole release unless there is a reasonable probability that if such inmate is released he or she will not live and remain at liberty without violating the law, that is to say, that it is more likely than not that the petitioner will violate the law once again. As noted in the Court's earlier decision, when all the factors are considered, the fact that the petitioner was an accomplice in a burglary and not the individual who directly caused the victim's death, that the petitioner had no involvement with the law prior to that offense, and despite not being apprehended had no subsequent involvement with the law for 12-1/2 years, that the petitioner has served in excess of six years in the State prison system without incurring even one disciplinary report, that the petitioner has earned a certificate of earned eligibility, and

FCF #3



FCF #3

that at the time of the offense the petitioner was a 15-year old girl and now is nearly a 36-year old woman, the Court finds to state that there is a reasonable probability that the petitioner will not live and remain at liberty without violating the law is irrational bordering on impropriety. See, Matter of Russo v. New York State Board of Parole, 50 NY2d 69, 77.

The respondents advance the argument that the subsequent appearance before the Parole Board moots any claim with respect to a prior appearance, citing Guzman v. Division of Parole, \_\_AD2d\_\_, 687 NYS 2d 807 (3d Dept, 1999); Herrera v. Board of Parole, 246 AD2d 703 (3d Dept, 1998); and Keating v. Division of Parole, 252 AD2d 635 (3d Dept, 1998). However, courts have recognized an exception to the doctrine of mootness where there exists a likelihood of repetition either between the parties or among members of the public. See, Matter of Hearst Corporation v. Clyne, 50 NY2d 707, at 714, 715.

The Court finds a pattern of impropriety which goes beyond the mere likelihood of repetition, but has actually been repeated by the respondents. The Court further finds that the respondents have not complied with the prior decision of this Court to conduct a de novo hearing and provide a decision in accordance with the decision and order of this Court. The subsequent parole denial decisions do not cite any new factors to justify denial of parole release but simply and blatantly restated the factors which were rejected by the Court in its earlier decision. This hearing and decision was not consistent

FCF #3

or in accordance with the earlier decision of this Court.


FCF#3

The Court will now grant the petition to the extent that the Parole Board's decision is vacated, and the Parole Board is directed to immediately schedule and hold a de novo hearing and provide a decision in accordance with this decision. Specifically, the Parole Board is directed to either establish a rational basis to a finding that there is a reasonable probability that the petitioner will not live and remain at liberty without violating the law or grant the petitioner parole release.

The foregoing constitutes the decision and order of this Court.

The Court considered the following papers in connection with this application: (1) order to show cause dated November 30, 1999, together with petition verified November 19, 1999, and attached exhibits; (2) respondents' answer verified February 10, 2000, together with attached exhibits; (3) petitioner's supplemental affirmation in support of order to show cause dated December 2, 1999, together with attached exhibits; (4) letter from petitioner's attorney dated May 13, 2000, together with attached exhibit; (5) prior decision and order of this Court dated January 26, 1999.

Dated: White Plains, New York  
May 31, 2000

  
KENNETH H. LANGE  
Acting J.S.C.