September 2021

Decision in Art. 78 proceeding - Quartararo, Michael (1994-01-31)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39
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IN THE MATTER OF THE APPLICATION OF
MICHAEL QUARTARARO,

Petitioner, Index No. 45734/92

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

- against -

THE NEW YORK STATE DIVISION OF
PAROLE, RAUL RUSSI, Chairman,

Respondent.

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KRISTIN BOOTH GLEN, J.:

Petitioner Michael Quartararo ("Quartararo") was convicted in 1990 for the murder of John Pius, aged 13. He brings this Article 78 proceeding seeking to reverse the determination of the Parole Board's Appeals Unit which affirmed the Parole Board's denial of his application for parole.

FACTUAL AND PROCEDURAL BACKGROUND

John Pius was killed in 1979 for allegedly witnessing the theft of an all-but-worthless motor bike by Quartararo, then aged 14, his brother Peter, aged 15, and two other teen-aged boys, Robert Brensic and Thomas Ryan. John Pius suffered a severe beating, although his death was actually caused by several small stones which were forced down his throat, resulting in his traumatic asphyxiation, all, allegedly, in an attempt to ensure his

silence. His body was found the day after his death hastily shrouded with logs, leaves and sticks in the yard behind the Dogwood Elementary School in Smithtown, New York.

Quartararo was tried and originally convicted of the second degree murder of John Pius in 1981. He was sentenced as a juvenile offender to an indeterminate sentence of 9 years to life. Peter Quartararo, whose several confessions to the murder had implicated his brother, as well as Ryan and Brensic, was tried jointly with Quartararo, with the same result. Ryan and Brensic were convicted of the murder in separate trials.

Quartararo entered the New York State Division for Youth, at Masten Park Secure Center in Buffalo, in 1981. He remained there until he turned 21, on January 14, 1986, when he was transferred to the Department of Correctional Services ("DOCS").

Petitioner brought a habeas corpus proceeding in federal court and was granted a new trial in 1988, after having served nearly seven years of his term, on the basis of ineffective assistance of counsel. Quartararo v Fogg., 679 F. Supp. 212 (EDNY, 1988) aff'd. 849 F2d 1467 (2nd Cir. 1988). Among the reasons for overturning the conviction on ineffective assistance grounds was petitioner's counsel's failure to object to the District Attorney's summation, in which he used photographs of the victim to improperly incite the jury. Quartararo v Fogg, 679 F. Supp. at 243.

Peter Quartararo's conviction was also overturned, on the grounds that his confession (actually several confessions given in one session) was obtained illegally, and was, therefore, inadmissible. Quartararo v Montello, 715 F. Supp. 449, (EDNY, 1989) aff'd, 888 F2d 126 (2nd Cir. 1989). The District Court took notice of the fact that the Temporary Commission of Investigation of the State of New York, in its investigation of the practices of the Suffolk County District Attorney's Office and Police Department, found that the Suffolk County Police deliberately violated the United States Constitution and New York State laws and that their behavior was "characteristic of conduct long tolerated by responsible officials of the Suffolk County Police Department and the District Attorney's Office." 715 F.Supp. at 466. See also, Report of the Temporary Commission of Investigation of the State of New York dated April 1989 (Appendix B to Petitioner's Memorandum of Law). The convictions of both Ryan and Brensic have also been reversed, as a result of the inadmissibility of Peter Quartararo's confession. People v Brensic, 70 NY2d 9 (1987); People v Ryan, 134 AD2d 300 (2nd Dept. 1987).

In People v Brensic, the Court of Appeals held that Peter Quartararo's confession could not be admitted against Brensic because circumstances indicated it was unreliable as a matter of law. The court, criticizing the interrogation of Peter

Quartararo observed:

> ...[e]vidence before the court not only failed to establish the reliability of Peter's [Brensic's co-defendant, Peter Quartararo] confession, it suggested quite the contrary, that he had a strong motive to fabricate when he confessed to his mother.
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> . . .
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> Given this substantial evidence that the confession was but one of several, each containing material differences, that it was obtained from a juvenile after lengthy custodial questioning and that it was given under circumstances which suggest that it was induced by the hope of leniency, the confession should not have been placed before this jury, as evidence.
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> p 21.

Petitioner was released on bail pending his new trial, which took place in March of 1990. Once more tried as a juvenile offender, Quartararo was again found guilty of the second degree murder of John Pius, despite the absence of the inadmissible confession. He was returned to prison to serve, as before, the maximum available term of 9 years to life. The sentencing judge offered his recommendation that Quartararo not be afforded parole until he had served a minimum of 15 years, inclusive of the time already served. An appeal of the second conviction is pending.

Apparently, prison life offered to Quartararo some measure of direction or meaning which he otherwise lacked, because, upon entering the State Division for Youth, and continuing thereafter,

petitioner has amassed an impressive array of vocations, educational credits and accolades. He has completed his Bachelor of Science degree, magna cum laude, and continues to take courses in a number of fields, including law. He has trained as a printer, managed the Wallkill Correctional Facility law library, and, most recently, participated in DOC's Temporary Release Work Program, wherein he maintained a full time job as a printer, his chosen vocation. During his two years out on bail awaiting his new trial Quartararo was employed, attended college, and met and married his wife, Patricia, the mother of two children. Throughout the years since his indictment, and up until the present time, Quartararo has steadfastly maintained his innocence in the death of John Pius.

Quartararo first became eligible for parole in 1992 following completion of 9 years of incarceration. Parole was denied immediately after a hearing held on February 11, 1992. During the hearing, the Board reviewed with petitioner his sentence and institutional history, his accomplishments and positive adjustment during incarceration, his participation in work release, his habeas corpus petition and second conviction, the circumstances of the murder, the fact that he has a new wife and step-children, the arrangements for living and working if released, and the status of his second conviction on appeal. In addition, the Board members referred to Peter Quartararo's suppressed confession stating "Peter

was discharged because they suppressed the confession from him, but the first time he told stories." [Hearing Transcript ("Tr.") p 12 Exhibit 7 to Petition.] [Tr. p 12]. The Board also acknowledged that it could not fairly consider the stories in the press about him but noted that: there is a "clouding of the issues" in petitioner's case by press articles; "press articles just muddy the waters;" "big crimes make big headlines and make big noise" and by stating:

> Your own attorney, he made statements that he would like to take back probably now, you know about growing up - - that was just throwing gasoline on the fire.
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> [Tr. p 19].

A Board member also speculated, on the record, as to the appropriate punishment for this type of crime.

The Parole Board's determination, placed on the record by Commissioner Burke immediately after petitioner left the hearing room, was denial of parole with reconsideration in twenty-four months. The grounds for the denial include consideration of the brutality of the crime, the seriousness of the offense, recommendation of the sentencing judge, severity of the sentence issued to Quartararo, which was the maximum sentence applicable to him as a juvenile offender, and the fact that he had been convicted by two juries. The Board of Parole noted the petitioner's exemplary prison record, and the many letters of support and

recommendation submitted on his behalf, while also noting the many letters from prosecutors, the judge and the victim's family opposing release. The Board also took note that Quartararo "has consistently denied the offense." The Board determined that, despite Quartararo's institutional performance and performance while out on bail," his release at this time is incompatible with the welfare of society, would deprecate the seriousness of this crime and undermine respect for the law." The decision of the Board was upheld by the New York State Division of Parole Appeals Unit on August 20, 1992. Quartararo may next appear for a hearing on the issue of parole in February 1994.

DISCUSSION

Quartararo maintains that he is a fit candidate for parole, that the denial of parole was a violation of his due process rights, and of applicable statutes, and was arbitrary, capricious, and an abuse of discretion.

Quartararo first complains of his summary suspension from the work release program shortly before his parole hearing, allegedly as a result of an unsubstantiated and uninvestigated charge that petitioner had made a threatening remark to another prisoner concerning John Pius' mother. The remark was allegedly relayed to the Parole Board by the District Attorney, who has been quite vocal in his disapproval of Quartararo's participation in work release.

Quartararo's suspension from work release is, allegedly, also a result of inflammatory reports in the press concerning Quartararo's participation in the program. Petitioner also claims to have been unfairly singled out for surveillance and harassment as a result of the public outcry surrounding his participation in the work release program. All of these factors are alleged to have improperly influenced the Parole Board's decision.

Further, petitioner claims that the Board made use of illegally obtained evidence in reaching its determination, in the form of Peter Quartararo's suppressed confession; made use of materials improperly placed in his parole file;[1] relied improperly on the "vindictive" sentence given to petitioner by the sentencing judge; applied the wrong guidelines to Quartararo's case by failing to apply its own "juvenile offender" guidelines; overlooked the achievements of the petitioner; and gave undue weight to petitioner's continuing refusal to express remorse for his role in the death of John Pius.

Respondents, in defense of the Parole Board's determination,

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[1] Pursuant to CPLR §7804(c) petitioner's counsel requested that the parole file be made available to me for in camera inspection to determine whether it contained any materials which were inappropriately placed before the Parole Board for review. Respondent did not oppose submitting the file for in camera review and assured me that no inappropriate materials were contained in it. The file was reviewed and the results of the review will be addressed infra.

argue that Peter Quartararo's confession and press reports were not relied upon; that the sentencing judges's recommendation is not vindictive and the Parole Board properly considered the recommendation as a factor; that petitioner's court imposed minimum sentence exceeded the juvenile offender parole guidelines rendering them inapplicable, and that generally the determination was made in accordance with statutory guidelines and therefore not subject to review.

REVIEW OF PAROLE BOARD DETERMINATION

Standard - Generally

Before considering the specific bases for challenge to the Parole Board's determination first the standard of review must be considered. Because a person's rightful liberty interest is extinguished upon his or her conviction, there is no inherent constitutional right to parole. Matter of Russo v New York State Board of Parole, 50 NY2d 69, 73 (1980). In this state a convicted person has no guarantee that he or she will be considered for parole at any particular time, id. at 75. "The system is thus discretionary and holds out no more than the possibility of parole," id. So long as the Board exercises its discretion in accordance with the state's statutory guidelines, no violation of due process can be claimed. Id. at 75-76; see also, People ex rel. Herbert v New York State Board of Parole, 97 AD2d 128 (1st Dept.

1983).

Since the decisions of the Board of Parole are discretionary, they are not subject to judicial review if made in accordance with statutory requirements. Executive Law §259-1[5]; Matter of Davis v New York State Division of Parole, 114 AD2d 412 (2nd Dept. 1985); Matter of Ristau v Hammock, 103 AD2d 944 (3rd Dept. 1984), appeal den. 63 NY2d 608 (1984). The presumption is that the Board has properly complied with its statutory duty, Matter of Davis v New York State Division of Parole, supra at p 412. The petitioner can only obtain reversal of the Board's decision by making a "convincing showing" that either the Board did not consider the required factors, or considered erroneous information in reaching its decision, Matter of Abrams v New York State Board of Parole, 88 AD2d 951 (2nd Dept. 1982), see also, Monroe v Thigpen, 932 F.2d 1437 (11th Cir. 1991), and only a showing of "irrationality bordering on impropriety" will serve to warrant judicial intervention in the Board's determinations. Matter of Russo, supra at p 79.

There are some limitations on the nearly unreviewable discretion of the Parole Board. Although, unlike the parole systems in Nebraska, see, Greenholtz v Nebraska Penal Inmates, 442 US1 (1978) and Montana, see, Board of Pardons v Allen, 482 US 369 (1987), New York's parole provisions do not establish a scheme

whereby parole is mandated unless specific conditions require its denial, Boothe v Hammock, 605 F.2d 661 (2nd Cir. 1979),[2] parole boards cannot deny parole for discriminatory reasons, Block v Potter, 631 F.2d 233 (3rd Cir. 1980), Farries v U.S. Board of Parole, 489 F.2d 948 (7th Cir. 1973), nor may it engage in "flagrant or unauthorized actions," Monroe v Thigpen, supra at p 1441. Where a denial of a privilege is contrary to state practice it can constitute a denial of the right to due process. See, Durso v Rowe, 579 F.2d 1365 (7th Cir. 1978) cert. den. 439 US 1121 (1979). Parole decisions, like all other forms of state action, cannot be based on impermissible purposes. Brandon v District of Columbia Board of Parole, 734 F.2d 56 (DC Cir. 1984), cert. den. 469 US 1127 (1985). Thus although there is no constitutional right to parole in New York the Parole Board must make its determinations in accordance with Executive Law §259-i.

Statutory Requirements

Under the statutory requirements the Board is bound to consider several factors, including the inmate's institutional record and record of accomplishments, his or her performance in a temporary release program, and the inmate's plans for release.

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[2] As petitioner's counsel points out, there may be room for reconsideration of Boothe v Hammock, supra, in light of Board of Pardons v Allen. It is not necessary to reach the issue here, however, in order to decide this Article 78 proceeding.

Executive Law §259-i[2][c]; 9 NYCRR 8002.3(a). Where the inmate's minimum period of incarceration has been set by the Court, rather than previously, by the Board, consideration must also be given to such factors as the seriousness of the offense, the type and length of sentence, the recommendations of the sentencing court and prosecuting attorney, as well as those of the inmate's attorney and the pre-sentencing probation report, and the inmate's prior criminal record. Executive Law §259-i[2][c]; §259-i[1][a]. Consideration of statements provided by the closest surviving relative of a deceased victim is also required. Executive Law §259-i[2][c][v]. The statutory scheme does not specify how much weight is to be accorded to any given factor in relation to another. McKee v New York State Board of Parole, 157 AD2d 944, 945 (3rd Dept. 1990).

Role and Duty of Parole Board

The question here is how to evaluate the Parole Board's determination, in light of the broad discretion given to the Board by the legislature, the insulation from judicial review where the determinations are made in accordance with statutory requirements, and taking into account the presumption that the Board has complied with its statutory duty. The Appellate Division, First Department in Matter of King v New York State Division of Parole, 190 AD2d 423 (1st Dept. 1993), leave to appeal granted 82 NY2d 746 (1993) has

recently addressed what constitutes the duty of the Board when making parole decisions pursuant to Executive Law §259-i (sub.2). as:

> ... [i]t is unquestionably the duty of the 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 Board did in fact fail to consider the proper standards the courts must intervene.
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> id. p 431.

The prisoner in King was serving a sentence of twenty years to life for felony murder in connection with the murder of an off-duty police officer . The District Attorney conceded, post-trial, that King had not been the shooter. King also had an exemplary record in prison. At the Parole Board hearing, held before Commissioners Gerald M. Burke, Maria Buchanan and Thomas W. Biddle, Commissioner Burke made extensive comments on the record about what the appropriate penalty is for murder in today's society. In particular, he speculated about whether a life sentence without parole or the death penalty would be a more appropriate punishment.

The Appellate Division held that the Parole Board's denial of King's application was a result of the failure to weigh all of the pertinent considerations. Among its criticisms was the fact that the record implied the Board's decision was a foregone conclusion. The Court noted:

> ... Commissioner Burke's extensive remarks at the hearing demonstrate that the Board was proceeding on the assumption that its primary duty was to determine, in the abstract, the appropriate penalty for murder in today's society. ... It is, in fact, difficult to avoid the inference that Commissioner Burke felt some regret that petitioner had not been executed, thereby eliminating the dilemma caused by his rehabilitation, and that he considered petitioner's rehabilitation to be a dilemma for the very reason that he believed that petitioner should not be eligible for parole. Since neither the death penalty nor the imprisonment without the possibility of parole are part of the law of this state, they should clearly not have entered into the Board's consideration.
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> Id. p 432.

The Parole Board had misconstrued its role, in effect establishing penal policy by resentencing King, rather than determining whether he should be released based on the statutory factors. Id. p 432.

In the parole determination at bar, as in King, there is strikingly similar evidence that the Parole Board misconstrued its role. It is worth noting that petitioner's Parole Board hearing was held three days before King's, and was in front of the same three commissioners. Comments made at the hearing by Commissioner Burke indicate that he similarly misconstrued his role with regard to petitioner's parole application. He stated:

> We don't really have the wisdom to know how much is enough. I do it all the time, by the way, because that is the business I'm in.

> But, it is not written on tablets, for sure, we will talk it over and we will make a decision, and we are going to make it in your case. ...
> How high is up? How much is enough for murder? How much is enough for murder if you are sixteen, how much if you are eighteen, how much if you are fourteen?. ... If, the victim is twelve, eight, nine, thirty, what do you do; is it more?
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> . . .
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> Society doesn't have the answer to the death penalty, non-death penalty. Juvenile offenders who committed the act were held accountable as if they were adults. Society is ever changing its position, it is like a pendulum swinging back and forth. We have much more death penalty now than we had ten years ago. ... So there is no answer to the philosophical question.
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> [Tr. pp 21-22]

Here, as in King, Commissioner Burke was resentencing rather than following the statutory guidelines.

Another similarity to the King hearing was that as soon as petitioner left the room Commissioner Burke immediately announced denial of the parole application, apparently without conferring first with the other two Commissioners, [Tr. p 24], confirming the impression that the determination was a foregone conclusion prior to the hearing. For these reasons, I find that the Board misconstrued its role and prejudged this parole application and therefore its determination to deny parole must be set aside and a de novo hearing held.

Since the Board must hold a hearing de novo, I now consider petitioner's remaining claims to determine if other errors were made, in order to avoid their repetition.

Good Behavior

Petitioner claims that the Parole Board overlooked his achievements in rendering its determination. Apart from my finding that the Board misconstrued its role and, as discussed infra, considered information it should not have, the transcript of the hearing itself establishes that the Board did consider Quartararo's record of achievements. The inmate's commendable behavior carries no greater weight than that of other factors, however, see, People ex rel. Herbert v New York State Board of Parole, supra at 133.

In addition, Executive Law §259-i[2][c] specifies that, "[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined." It requires that the Board consider, "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 so as to undermine respect for the law," id.; 9 NYCRR §8002.1(a). There is no evidence in the hearing record or in the parole file to suggest that petitioner's accomplishments and excellent institutional

record, in particular, were not taken into account. One trusts that at least the same attention will be paid at the de novo hearing.

Failure to Admit Crime

Petitioner contends that the Parole Board's reliance on his silence with regard to his role in the murder is a violation of his rights. I note preliminarily that, contrary to petitioner's assertion, despite the fact that he has elected to appeal his conviction, the conviction stands until and unless it is reversed on appeal.

The record clearly shows the Board's dissatisfaction with Quartararo's unwillingness to express any personal remorse over the death of John Pius, in light of the Board's obviously firm belief in his guilt. There is no impropriety here, as was found in the case of Paz v Warden, Federal Correctional Institution, Englewood Colorado, 787 F.2d 469 (10th Cir. 1986) to which Quartararo refers.

In that case the Commission, assessing an inmate's right to parole, made an actual finding that he had committed a crime for which he had never been charged, much less convicted. The court specifically recognized the Commission's right to consider "an offender's inability to accept responsibility for the wrongfulness of his conduct" in finding that an inmate had not been rehabilitated, but felt the Commission's determination to make the inmate confess to further crimes to be improper. Id. at 473. In

the present matter the Board made no similar, improper finding, and did not err in considering as a mark against him Quartararo's lack of remorse for the serious crime of which he had been convicted.

Sentencing Judge's Recommendation

Petitioner also objects to the Board's consideration of the sentencing judge's recommendation that he serve 15 years on his sentence of nine years to life. A sentencing judges's recommendation is one of the factors to be considered by parole authorities, Executive Law Section 259-i(1)(a); Matter of Jorge v Hammock, 84 AD2d 362 (3rd Dept. 1982). Quartararo argues that the 15 year recommendation is an increase over the first sentencing judge's sentence of nine years to life, the maximum sentence, with no added recommendation about how long he should serve.

Quartararo claims that the judge's recommendation of a 15 year minimum sentence to be served prior to parole, amounts to an "enhanced" sentence as a result of a second trial and conviction, which raises a "presumption of vindictiveness" and unfairness in the court's sentencing. See, North Carolina v Pearce, 395 US 711 (1969); People v Van Pelt, 76 NY2d 156 (1990).

In the present case Quartararo received the identical sentence after both convictions. Whether the Appellate Division will find a "presumption of vindictiveness" in such a case, where the judge's parole recommendation was made simultaneously with the sentencing,

awaits the determination of Quartararo's appeal from the conviction. This is not a matter appropriately raised here, since it amounts to a collateral attack on the judgment of the sentencing court. It is sufficient to note that the Board had a duty to consider the sentencing court's recommendation, giving it whatever weight it felt the recommendation deserved, and that the Board did so.

Juvenile Offender Guidelines

Nor is the Board's alleged failure to refer to its own internal Juvenile Offender Guidelines improper. The Board is not required to set forth reasons for deviating from its guidelines when denying parole. Matter of Abrams v New York State Board of Parole, 88 AD2d 951 (2nd Dept. 1982). In addition, the Board's internal guidelines, while perhaps useful in the case of many juvenile offenders, are not promulgated according to statute. Nor do they appear in the Executive Law or in the regulations contained in 9 NYCRR 8001.1, et seq., so they do not have the force of law. See, People ex rel. MacKelvey v New York State Division of Parole, 138 AD2d 549 appeal den., 72 NY2d 802 (1988). As respondent points out, the minimum sentence imposed by the Judge exceeds the guideline maximums such that requiring the Parole Board to consider the Juvenile Offender Guidelines would be meaningless in this situation.

Peter Quartararo's Suppressed Confession

What is of major concern here is the appearance, from the hearing record, that the Board erroneously relied on petitioner's brother's suppressed confession and petitioner's first conviction in its denial of parole. In particular, reference was made to the confession on page 12 of the hearing transcript: "Peter was discharged because they suppressed the confession from him, but the first time he told stories," the confession that was found by the Court of Appeals to be unreliable and unconstitutionally obtained and suppressed, as noted infra, p 3. The exclusionary rule proscribes the use of illegally seized evidence at a parole hearing, because it is quasi-criminal in nature. Piccarillo v Board of Parole, 48 NY2d 76 (1979). Here it is "illegally seized evidence" which has already been suppressed in a criminal action, which was apparently used in a parole hearing. I note also that there are many sources for the Parole Board to use to find out about the circumstances of the crime and Quartararo's role in it.

Similarly, the Board's several mentions of petitioner's first conviction is inappropriate. On page 26 of the transcript, included in the determination was the following language "... the seriousness of the present offense... have combined with the outcome of two jury trials...".

The mention of Peter Quartararo's confession on the record, which at most had a minor effect on the determination, combined with reference to the first jury verdict is of concern here because it evidences a lack of understanding of what the Board may appropriately consider. The contents of an unreliable confession and the outcome of a trial so defective that the conviction was reversed on ineffective assistance of counsel grounds, have no place in a Parole Board hearing or determination.

Press Reports

There is some evidence here that Parole Board members improperly relied on press accounts in their review of the parole application. Although the Board members recognized that they could not fairly consider the statements in the press about Quartararo (Tr. p 16), one commissioner referred on the record to comments made by one of Quartararo's previous counsel, which upset the victim's family (Tr. p 19), and were widely reported in the press, but were not part of the parole file. Additional comments were made by the Board at the hearing such as "There is clouding of the issues in your case by the press articles..." (Tr. p 16) and "[b]ig crimes make big headlines and make big noise." (Tr. p 18).

It is undeniable that the murder of John Pius was brutal and the feelings in the community are strong. Extensive press coverage of the parole status of those convicted of this crime is to be

expected under these circumstances. Nonetheless, it is inappropriate for the Board to consider public pressure. See, People ex rel. Howland v Henderson, 54 AD2d 614 (4th Dept. 1976), cf., Brennan v Cunningham, 813 F.2d 1 (1st Cir. 1987). The Parole Board shall not weigh or even mention press reports or their contents in the hearing de novo or in any future hearings.

Work Release Revocation

Petitioner states that his participation in work release was revoked, a few days before his parole hearing, after reports appeared in the press that the Suffolk County District Attorney was opposed to Quartararo's involvement in that program. He further alleges that the revocation was improperly considered by the Parole Board. In opposition respondent states:

> [Department of Correctional Services'] DOCS' work release programs are in no way operated or influenced by parole and the Parole Board has no connection or affiliation with the work release. Moreover, Commissioner Burke specifically acknowledged Parole's letter to petitioner that any work release issues are between petitioner and DOCS and not parole.
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> [Exhibit 7 to the petition at pps 7 & 8].

Nonetheless, in camera inspection of the parole file revealed that it contained documents relating to the investigation of the allegations against petitioner which resulted in the work release revocation.

There is no question that performance as a participant in a

temporary release program is a factor to be considered by the Parole Board in its parole release decision, Executive Law §259-i(2)(c)(ii). The issue here is whether the circumstances surrounding the work release revocation can be considered where petitioner has not had the opportunity to be heard.

The Parole Board cannot consider disciplinary violations unless the prisoner was accorded the due process afforded him by statute. Collins v Hammock, 52 NY2d 798 (1980). Nor may a parole officer give information about alleged bad acts to a Parole Board member ex parte. People ex rel. Theil v Dillon, 70 AD2d 778 (4th Dept. 1979). Here, the work release revocation could not be considered by the Parole Board until the revocation, which occurred here apparently on an emergency basis, was approved by the temporary release committee or the superintendent in accordance with NYCRR §1904.2.

Of course, this is not the appropriate proceeding in which to attack the work release revocation itself. If Quartararo is entitled to a hearing on the allegedly unsubstantiated charges which, he claims, cost him his place in the work release program, petitioner must pursue his administrative remedies through DOCS, the agency which maintains the program.

I do, however, order that all documentation concerning the work release revocation investigation be removed from the parole

file, unless in the interim, petitioner has had notice of the basis of the revocation, and the opportunity for a hearing or review of the determination in accordance with Correction Law §150 et seq. and 7 NYCRR §1904.

Photographs

Petitioner also objects to inclusion of the photographs of the victim in his parole file. Presumably, these photographs originated with the Suffolk County District Attorney because they were originally trial exhibits. A federal judge has already commented on their misuse by the Suffolk County District Attorney in the first trial, Quartararo v Fogg, supra, 679 F.Supp at 243, where the pictures were used to inflame the jury during the District Attorney's summation.

While it is true that the pictures are more likely to incite jurors than to affect Parole Board members, who daily review serious crimes of parole applicants, what is of concern here is the role the Suffolk County District Attorney is playing in this parole review. While it is clear that the District Attorney may make recommendations regarding parole and it is appropriate for the Parole Board to consider them, Confoy v New York State Division of Parole, 173 AD2d 1014, 1015 (3rd Dept. 1991), this should not be interpreted to mean that s/he may submit trial exhibits to the Parole Board. Accordingly the photographs should be removed from

the parole file and be returned to the District Attorney if appropriate, or to the Supreme Court, Suffolk County, Criminal Term.

As for petitioner's allegations concerning the alleged circulation of the photographs at the Queensboro Correctional Facility, they are more appropriately brought to the attention of the Department of Correction or to the New York State Commission of Investigation.

The cumulative effect of all of these errors leads to the conclusion that the Parole Board reviewed and considered substantial information not properly before it. In addition to the Board's misconstrual of its role, the cumulative effect of these errors: considering the suppressed confession, the first conviction, press reports, and materials not appropriately in the parole file, form another, independent basis to require reversal and a remand.

CONCLUSION

The petition is granted to the extent of reversing the determination of respondent, which denied probation to petitioner, and remanding this matter to the Parole Board to hold a de novo hearing within 30 days of service of a copy of this decision and judgment on it. The new hearing is to be held in accordance with this decision and judgment. Respondent has 30 days from the date

of the hearing to issue a new determination. If the parties consent they may combine this rehearing with the upcoming parole hearing.

All photographs of the victim and any other trial evidence included in the parole file, if any, are to be removed from the parole file within ten days. All reports, memoranda, etc., regarding the work release revocation are also to be removed from the parole file within ten days. The results of the work release revocation hearing, if held, may be included in the file.

This constitutes the decision and judgment of this court.

DATED: January 31 1994

Kristin Booth Glen
J.S.C.