

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

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**In the Matter of
MICHAEL H. CASSIDY,**

Petitioner,

DECISION AND ORDER

For a Judgment Pursuant to CPLR Article 78

INDEX NO.: 2255/2014

Returnable: 5/22/15

-against-

Motion Seq. No. 2

NEW YORK STATE BOARD OF PAROLE,

Respondent.

-----X
SCIORTINO, J.

The following papers numbered 1 to 17 were considered in connection with the application by petitioner for an order adjudging the New York State Board of Parole to be in contempt of Court; and for other related relief:

PAPERS

NUMBERED

Order to Show Cause/Supporting Affirmation (Lewis)/ Exhibits A-F	1 - 8
Petitioner's Memorandum of Law	9
Affirmation in Opposition (Strickland Smith)/Exhibits 1-7	10 - 17

By Order to Show Cause filed May 12, 2015 and returnable May 22, 2015, petitioner Michael H. Cassidy (Petitioner) seeks an Order adjudging the New York State Board of Parole (Parole Board) to be in contempt of Court for its failure to have complied with this Court's Decision and Order of July 18, 2014. In connection with that application, Petitioner asks the Court to order a *de novo* parole hearing in full compliance with the said Decision and Order; a daily fine to be assessed

against the Parole Board and paid to Petitioner; and the payment of legal fees in connection with the within application.

Petitioner seeks a hearing prior to his next scheduled hearing in June 2015, asserting that the Parole Board takes the position that a subsequent denial moots any pending challenges to earlier denials.

Background and Procedural History

Petitioner is serving an indeterminate sentence of 25 years to life, after pleading guilty to the second degree murder of a former girlfriend in 1984, when petitioner was 24 years old. He had no prior violent criminal history and has been in prison for approximately thirty years.

On June 25, 2013, Petitioner appeared before the Parole Board. Prior to his hearing, petitioner was evaluated by the COMPAS Reentry Assessment System, receiving favorable ratings, showing low risk for violence, re-arrest, absconding, or criminal involvement. There was no "potential faking concern" or "inconsistent response concern" During the hearing, petitioner was questioned extensively about the circumstances of his 1984 offense, including allegations of deception about his financial circumstances, alcohol and drug abuse, and anger issues. Petitioner was specifically asked whether there had been prior violence between him and his victim (his former girlfriend), and whether she had been afraid of him. He acknowledged that there had been verbal violence, and that for the first 15 years of his sentence, he continued those behaviors, as well as substance abuse. He had stopped such behavior, however, since 1997.

During the hearing, the Parole Board noted petitioner's efforts at rehabilitation, including substance abuse courses, aggression replacement training (ART), Veterans' programs, physical education and legal research. Petitioner listed some of his course work and programs which had

been completed, including network and parenting and healthy marriage classes. He acknowledged receiving one Tier II disciplinary ticket in 2008, but no other infractions since 1999.

Petitioner advised that if he were released, he planned to reside with his father, and had secured employment at a paper manufacturing company. Petitioner acknowledged responsibility and expressed remorse for the crimes he committed.

The Parole Board advised Petitioner that, although his COMPAS results were low across the board, particularly with those issues with which they were most concerned (future violence, risk of arrest and risk of absconding), they had community opposition to his release and had to consider it.

At the conclusion of the hearing, the Parole Board denied parole, and held petitioner for an additional 24 months, to June 2015. The Decision, a written copy of which was dated June 26, 2013, stated:

After a review of the record and interview, the panel has determined that if released at this time, there's a reasonable probability that you would you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law.

This decision is based on the following factors: I.O.'s are is/are Murder in the 2nd Degree, in which you beat, choked, stabbed and nearly eviscerated Ms. Biasi after she ended your relationship.

Note is made of your sentencing minutes, COMPAS risk assessment, rehabilitative efforts, risks, needs, parole plan, community opposition to your release, clean disciplinary record, remorse, insight, positive presentation and all other required factors.

Your brutal and merciless offense occurred after your deceit, temper and drinking resulted in the termination of your relationship. The extreme level of violence you exhibited is of grave concern. Parole is denied. (Exhibit C at pp. 12-13)

Petition for Article 78 Relief

Petitioner filed an administrative notice of appeal and perfected the appeal on October 25, 2013. No decision was rendered within the four-month window provided by statute. 9 NYCRR §8006.4 (a)(2) Thus, by operation of law, petitioner was entitled to deem his administrative remedy exhausted and seek judicial review of the Parole Board's July 26, 2013 determination. 9 NYCRR

§8006.(c)

He filed a Notice of Petition and Petition on or about March 26, 2014. In his application, he argued that the Parole Board's determination was arbitrary and capricious, and failed to genuinely consider the factors required by Executive Law §259-i(2)(c)(A); instead focusing solely on the seriousness of petitioner's crime. The Parole Board thereafter filed its Answer and Opposition.

On or about July 18, 2014, this Court issued a Decision and Order vacating the decision of the Parole Board. In so doing, the Court noted that contrary to the arguments of the Parole Board, the 2011 amendments to the Executive Law did not maintain the status quo with respect to parole determinations; but rather, replaced past-focused "guidelines" with dynamic present and future-focused risk assessment procedures. The Board was required to determine the likelihood of an inmate's success upon release, and adopt those procedures in its rule-making. Noting that the Parole Board retains substantial discretion, and need not enunciate every factor considered, a denial that focused almost exclusively on the inmate's crime while failing to take into account other relevant statutory factors, or merely giving them a "passing mention" are inadequate, arbitrary and capricious. The Court directed that Petitioner receive a new parole hearing, before a different panel, consistent with the requirements of the Court's Decision and Order and Executive Law §§ 259-c and 259-i.

Subsequent Action

On September 22, 2014, the Parole Board filed a Notice of Appeal, taking the position that such filing stayed this Court's Order. It declined to conduct a new hearing while the appeal was pending. In response to Petitioner's motion to dismiss, the Parole Board voluntarily withdrew the appeal by Stipulation dated January 9, 2015. It was agreed that Petitioner would receive his *de novo* hearing in March, 2015, but the Parole Board was unable to convene a panel of members who had

not been on the June 2013 panel. Accordingly, the hearing was adjourned to April 21, 2015.

Petitioner appeared at that hearing, the minutes of which were appended to the opposing papers as Exhibit 3. Petitioner again submitted a Parole Release Plan, consisting of letters and other materials in connection with the hearing, specifically including for the benefit of the panelists a copy of the July 18, 2014 Decision and Order.

At the conclusion of the hearing on April 21, 2015, and by written decision dated April 27, 2015, the Parole Board once again denied parole. The Decision stated:

After a review of the record, interview and deliberation, the panel has determined that your release would be incompatible with the welfare and safety of society and would so deprecate the serious nature of the crime as to undermine respect for the law. Parole is denied.

Required statutory factors have been considered, together with your institutional adjustment including discipline and program participation, your risk and needs assessment and your needs for successful re-entry into the community. Your release plans, letters of reasonable assurance, as well as opposition to your release, are also noted. More compelling, however, are the following:

Your serious and violent instant offense of murder 2nd degree which involved you causing the death of victim; who at the time was your ex-girlfriend. Records reflect and you verified during the interview you had physically assaulted her, went into the kitchen to obtain a knife, then used that knife, during a struggle with her, to stab her multiple times, thus causing her death.

Your positive programming, improved disciplinary record, and packet submitted to the panel are all noted, however, none of which diminish the serious and senseless loss of life caused by your actions. There is nothing in the description of this offense nor in any record that reflects that the victim posed any physical danger to you, so it appears that your actions were motivated by anger and frustration over your deteriorated relationship with her and the violence you displayed in this offense remains a concern to this panel. Therefore, based on all required factors in the file considered, discretionary release, at this time, is not appropriate.

Application for Contempt

In his Order to Show Cause and supporting papers, Petitioner argues that the Parole Board's decision was in direct violation of this Court's July 18, 2014 Order, as it "did nothing more than mouth the other statutory criteria...while denying parole based solely on the seriousness of the offense. The decision fails to offer any explanation of its denial, or how and why the Board reached its conclusion. Petitioner submits that once again, the denial was based solely on the nature of the offense, and does not provide the detailed, rational and non-conclusory explanation required by the law. To the contrary, the decision pays "lip service" to positive factors, and describes as "more compelling" the underlying facts of Petitioner's crime. The only clear focus was on the subject conviction, indicating that the decision was pre-determined. Nor is there any explanation for why the Parole Board believed that based only on Petitioner's crime, his release after thirty years would endanger the public welfare or undermine respect for the law.

The Parole Board had in its possession a lawful order of the court, expressing an unequivocal mandate. The conduct of the hearing evidences that the Parole Board knew of such order. In repeating the same errors for which the prior decision was vacated, the Parole Board disobeyed it, to the detriment of Petitioner. Petitioner asserts that the Parole Board has thus acted with contempt of Court.

In opposition, the Parole Board denies that its April 21, 2015 panel decision failed to take into account the requisite factors. The Parole Board notes that portion of the July 18, 2014 Decision and Order in which this Court stated that the serious nature of the crime remains "acutely relevant" in determining whether Petitioner should be released. The April 2015 decision elaborated upon the matters in support of the Board's denial much more fully than it did in June 2013, including the

Board's statement that it "remained concerned about petitioner's anger and frustration over his deteriorating relationship with the victim and the violence that he displayed in committing the offense," especially in light of anything to suggest that the victim posed any danger to Petitioner when he committed the crime.

Nor did the Parole Board ignore the statutory factors; in fact, the decision articulated that the Board considered some information, including his institutional adjustment, programs, letters of support, plans for release and Risk and Needs Assessment, as well as his improved disciplinary record. However, it also considered community opposition to Petitioner's release.

While acknowledging (in paragraph 9 of its Opposing Affirmation) that release was denied solely on the basis of the seriousness of the offense, the Board took all factors into consideration, and legitimately placed more weight upon the nature of the offense than any other factor. Petitioner has thus failed to make a clear and convincing showing that the Parole Board was in contempt of the July 18, 2014 Decision and Order.

The Parole Board further argued that Petitioner is not entitled to seek to vacate the Board's decision, as he has not yet exhausted his administrative remedies, in that an appeal has been filed, and not yet perfected.

Finally, the Board argued that Petitioner has failed to demonstrate that he is entitled to sanctions, as there has been no showing that the action of the Board was frivolous or completely without merit in law or fact.

On May 22, 2015, the parties appeared for oral argument, and supplemented their written submissions. The Court has fully considered the written submissions, as well as the oral argument of the parties.

Discussion

Standards for Review:

If Petitioner were before this Court simply seeking to set aside the denial of the Parole Board, based on arbitrariness or caprice, or even failure to consider the statutory requirements, the Board's argument that such action is premature would be correct. Petitioner is required to exhaust his administrative appeals before Article 78 relief may be sought in the Supreme Court; and his appeal remains unperfected to date.

However, the application before this Court is not for vacatur on those grounds; the application is for contempt of Court. To sustain civil contempt, a court must find an alleged contemnor violated a lawful order, which clearly expressed an unequivocal mandate; and that as a result of such violation, a right or remedy of a petition was prejudiced. *Jud. Law §753; McCain v. Dinkins*, 84 NY 2d 216 (1994). The moving party must establish the violation by clear and convincing evidence. *Matter of Kraemer v. Strand-O'Shea*, 66 AD 3d 901 (2nd Dep't 2010) The distinction between a civil contempt and a criminal one is the level of willfulness with which the conduct is carried out. *McCormick v. Axelrod*, 59 NY 2d 574 (1983)

In the matter at bar, this Court issued a clear and unequivocal Order on July 18, 2014. The Parole Board does not dispute that it had notice of the Decision and Order; in fact, the transcript of the hearing references that it is a *de novo* interview, set up by the Court. (Exhibit 3 to Opposing Affirmation at page 3) The Decision and Order found that conclusory statements that statutory factors were considered were "woefully inadequate" and that the Board's June 2013 decision accorded no weight to any factor apart from the seriousness of the crime. (Decision and Order at page 12) The Court clearly required the Parole Board to issue a decision that did more than "merely

mouth the criteria [or]...simply restate the usual and predictable language contained in so many parole release decisions with no specificity or other explanation to justify parole denial.” (Decision and Order at page 12) In accordance with the intent of the Legislature in amending the provisions of the Executive Law in 2011, the Board was further mandated to adopt and use procedures that implement risk and needs principles and determine the likelihood of an inmate’s success upon release.” (Decision and Order at page 13)

The April 21, 2015 decision utterly fails to comport with the standards required by the Court in its July 2014 Decision and Order. The Court emphasizes here, as it did on oral argument, that it is in no way suggesting that the Court can or should usurp the discretion of the Parole Board in making parole determinations. That is not the function of the Court. If the Board’s decision follows statutory standards, it will not be disturbed by the Court, absent a showing that the decision is “irrational bordering on impropriety” *Matter of King v. NYS Div. Of Parole*, 190 AD2d 423 (1st Dep’t 1993), *aff’d*, 83 NY 2d 788 (1994) The Court recognizes that parole is not granted merely as a reward for good conduct, and the Board need not enumerate every factor considered, or give equal weight to each one. *Id.*

The July 18, 2015 Decision and Order specifically mandated that the Parole Board meet the requisite standards: “Executive Law §259-i(c)(A) provides that discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined, but rather 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 the crime as to undermine respect for the law. *Matter of King, supra*, 190 AD2d at 430.....[I]t is incumbent on the Board to actually

consider each applicable statutory factor..." (See Decision and Order, pp. 8-9)

However, an examination of the April decision evidences that, not only did the new panel fail to correct the errors which led to the vacatur of the last decision, it compounded them, by going into excruciating detail and focusing solely on the underlying crime, and failing to proffer any explanation for its conclusion that Petitioner's release would place the public in jeopardy, or would undermine respect for the law. The April 21, 2015 decision is not only a repetition of the earlier one, it is, in the sense of comport with the law of the case, even more egregious.

Most importantly, the April 21, 2015 decision fails to create a nexus between the facts of the underlying offense and the risk to the welfare of society or the risk of deprecation of the seriousness of the crime, so as to undermine respect for the law. *Matter of King, supra* The Board is entitled to draw that conclusion, but the conclusion may not be the entire basis for the denial. There must be a reasoned explanation for the Board's determination, and that explanation is absent from the April 21st decision.

It is equally clear that petitioner has been prejudiced by the Board's decision, not by the fact that he remains imprisoned, but by the improper exercise of the Board's authority, denying him an opportunity to understand and better prepare himself, if possible, for a subsequent hearing.

On the basis of the foregoing, the application to find the Board of Parole in contempt of Court is granted. The aim of a civil contempt is vindication of a private party to litigation, and any sanction imposed upon the contemnor is designed to compensate the injured party for loss of or interference with the benefits of the mandate. *McCain v. Dinkins, supra*, 84 NY 2d at 226

Judiciary Law §753 provides the Court with authority to punish, by fine, imprisonment or either, a neglect or violation of duty, by which a right or remedy of a party to a civil action may be

defeated, impeded or prejudiced. However, civil fines are remedial in nature, and the award must be fashioned solely to compensate the private complainant. *State v. Unique Ideas, Inc.*, 44 NY 2d 345 (1978)

In this matter, the Court finds it appropriate to levy the following sanctions:

1. Petitioner shall be entitled to a *de novo* hearing within sixty days of the date hereof, unless parole is granted to Petitioner during his June 2015 regularly-scheduled hearing. No denial by the Parole Board in June 2015 shall moot or otherwise obviate the obligation to hold such *de novo* hearing. The conduct of the *de novo* hearing shall be consistent with this decision, the decision of July 18, 2014, incorporated by reference herein and the mandates of Executive Law §§259-c and 259-i. Such hearing shall be held before a different panel of the Board of Parole.
2. The Board of Parole shall pay to counsel for Petitioner legal fees in the sum of \$3,000 for the costs and fees incurred in connection with this application.
3. Nothing in this Decision and Order shall interfere with Petitioner's entitlement to his next regularly-scheduled Parole Board appearance or any subsequently-scheduled parole hearing.

This decision shall constitute the order of the Court.

Dated: May 27, 2015
Goshen, New York

ENTER:

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