Matter of Kellogg v New York State Bd. of Parole
2017 NY Slip Op 30537(U)
March 20, 2017
Supreme Court, New York County
Docket Number: 160366/2016
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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In the Matter of LAURIE KELLOGG,

Petitioner,

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

- against -

THE NEW YORK STATE BOARD OF PAROLE,

Respondent.

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Index Number: 160366/2016

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used to decide this CPLR Article 78 Proceeding:

	Papers Numbered:
Moving Papers	1
Cross-Moving Papers	2
Reply Papers	3
Letter Sur-Reply (admitted and considered in the Court's discretion)	4

Upon the foregoing papers, the petition is granted, and respondent is hereby ordered to grant petitioner parole, as set forth more fully below.

Prologue

> *Tolling for the searching ones, on their speechless, seeking trail*
> *For the lonesome-hearted lovers with too personal a tale*
> *And for each unharmful, gentle soul misplaced inside a jail*
> *And we gazed upon the chimes of freedom flashing*
>
> * * *
>
> *Tolling for the aching whose wounds cannot be nursed*
> *For the countless confused, accused, misused, strung-out ones and worse*
> *And for every hung-up person in the whole wide universe*
> *And we gazed upon the chimes of freedom flashing*

"Chimes of Freedom" by Bob Dylan (emphasis added).

Crime and Conviction

Laurie Kellogg committed a heinous crime.....25 years ago.

Or maybe she did not.

She met decedent Bruce Kellogg when she was 16 years old and he was 33 years old (more than double), and they married before she had turned 17. She claims that she endured his "physical and sexual violence." Unquestionably, on or about June 9, 1991, a young man named Denver (or "Dennis") McDowell shot Bruce dead; Denver, not petitioner, pulled the trigger (several times). However, on or about that evening, petitioner had driven Denver, herself, and several other people to the cabin in which the decedent was sleeping. She claims she did not expect McDowell to leap out of the vehicle and assassinate Bruce.

The jurors apparently did not buy this story. Thus, on July 2, 1992, they found petitioner guilty of second degree felony murder; first degree manslaughter; first degree burglary; first degree criminal use of a firearm; and second degree criminal possession of a weapon. At the sentencing hearing (Answer Exhibit C) the decedent's brother testified movingly about their background, childhood, and relationship. The judge sentenced petitioner to 25-years-to-life in prison. She has now been incarcerated for 26+ years, currently at the Taconic Correctional Facility in Bedford Hills, NY. She has served all of her sentences except that for second degree murder. Respondent does not seem to dispute that during her incarceration, petitioner has been the proverbial "model inmate."

Parole Interview

On February 2, 2016, respondent interviewed petitioner (Petition and [also] Answer Exhibit A). She testified (at 3-4):

> I wish that I could turn back the hands of time and make different decisions. I can tell you that we ma[k]e choices and decisions we don't realize that are going to lead to a chain of events, the domino effect, if you will, that not only change lives but ruin lives, that take lives. * * * I can tell you that if I can go back and do any of what I know now, I know that I would not have listened to other people. I would not have acted impulsively. I wouldn't have panicked, I would have thought, I would have thought long term. I would have thought about our responsibility, I would have thought about what possible outcomes could have resulted from - - from the decisions I made .... * * * I should have contacted my parents, and said what - - what do I do here? I should have - - there are a lot of things I wish I had done.

She said (at 16) that if released she would "get [herself] into therapy."

In her closing statement to the Parole Board (at 18), Ms. Kellogg said as follows:

> I don't believe that I was a horribly bad person. I believe I was not just young and naive, but that I made some bad choices and, as I look back at 51, as opposed to that young girl at 16, who married a 33-year-old man, I look back now and I see that everything we do, the way we treat one another, the way we see ourselves[,] has an effect in the long run and, though I was never in trouble with the law and I can promise you I will never be in

> trouble with the law again, I regret the fact that - - how do I - - I wish that I had listened to people, like my parents, who are wiser than me. I wished [sic] that I hadn't been impulsive. I understand now that every decision we make, everything we say carries weight, carries responsibility. I've been in 9,007 days thinking about everything that's happened and carrying the weight for the responsibility for everything that happened. I carried my husband with me for 9,007 days and I will for the rest of my life. I can't change what happened, but I can try to be better, and I can share what I learned with others so that they don't make the same mistakes I did, and maybe they won't try to grow up so fast.

The Parole Board acknowledged (at 17) (in somewhat garbled syntax or transcription) that petitioner's "risk assessment suggests that statistically you present as low risk of felony violence, arrest and absconding; unlikely to have any criminogenic needs that would tend to lead one back into criminal behavior and low down the list of criminal involvement."

Nevertheless, the Parole Board concluded that "there is a reasonable probability that [if released she] would not live and remain at liberty without again violating the law, that her release would be incompatible with the welfare of society and that it would so diminish the seriousness of the crimes as to undermine respect for the law." The Parole Board denied her discretionary release and, instead, imposed a "24-month hold" on her.

On appeal, the Parole Board's Final Determination (Petition Exhibit B; Answer Exhibit D), dated August 17, 2016, affirmed that initial ruling. The Appeals Unit stated that petitioner was not being released due to the seriousness of her offense, her "failure to accept responsibility for it, and lack of remorse." Somewhat ironically, the Appeals Unit stated (at 5) that after the 2011 amendments to the statute (infra), "The Board can still consider the nature of the inmate's crimes [here, horrific], his [sic] criminal history [here, none], his prison disciplinary record [here, impeccable], his program accomplishments [here, numerous] and post release plans [here, significant]."

The Petition

In support of her petition, Ms. Kellogg has submitted, inter alia, the following Exhibits (punctuation slightly improved by the Court):

Exhibit C, a copy of the psychological report of Charles Patrick Ewing, following evaluations of petitioner at the time of her trial, detailing his conclusion that petitioner was a battered woman suffering from battered woman syndrome.

Exhibit D, certificates awarded to petitioner for her service as a teacher's aide.

Exhibit E, a Certificate of Occupational Training that petitioner received in Animal Caretaking, following an intensive 18-month course given by Puppies Behind Bars.

Exhibit F, a copy of a Certificate of Completion, reflecting petitioner's completion of a 12-week domestic violence program.

Exhibit G, a copy of an October 24, 2016 letter from Cleveland Thornhill, Protestant Chaplain of Bedford Hills Correctional Facility, stating that he has known petitioner for approximately five years; that she "worked diligently and was highly regarded as the Chaplain's clerk at Bedford Hills Correctional Facility"; that she "served faithfully as a team leader in the Protestant church"; that she is "positive, humble, and a trustworthy individual"; that when facing challenging situations she "makes wise choices to overcome them"; that she "has been an excellent tutor to many of the women at Bedford"; and that he believes that petitioner "is ready for re-integration into larger society; and, if given the opportunity, she will be an outstanding and productive member of both her local church and community."

Exhibit H, a copy of petitioner's "Limited Credit Time Allowance" (entitled "LCTI AUGUST 2015") that, petitioner claims, without dispute, she received for her impeccable record while incarcerated.

Exhibit I, a copy of petitioner's July 2015 "COMPAS Risk Assessment," indicating, petitioner claims, without dispute, that she is at the "lowest risk level" of future trouble with the law.

Exhibit J, a copy of a July 29, 2015 letter from Eva S. DeMers offering housing and other support to petitioner upon her release.

Exhibit K, a copy of an October 4, 2016 letter from Bentley-Hall, Inc., a "marketing and publishing company located in Syracuse, New York," offering a job interview, upon her release, to petitioner, whom the founder says has "show[n] exemplary work ethics over the years."

Exhibit L, a June 14, 2016 letter from Peter Orville, of Orville & McDonald Law, PC, 30 Riverside Drive, Binghamton, NY, 13905, petitioner's criminal trial counsel, stating, in part, as follows:

> It is my very strong opinion that Ms. Kellogg should be released on parole at the earliest possible time. * * * Ms. Kellogg was a battered woman who had been deeply abused, both physically and psychologically by her husband … .
>
> * * * [I have a] strong opinion that [the trial and appellate court] were incorrect in not overturning [petitioner's Burglary and, therefore, Felony Murder] convictions.
>
> In the time I spent with Ms. Kellogg, I got to know her as a sensitive, caring person who cared deeply for the people around her…her children, her parents, her friends and her neighbors. She often cared for them at her own peril. She often suffered at the hands of her husband for helping her friends and neighbors.
>
> Ms. Kellogg is a smart, vibrant woman who, to my knowledge, has made the most of the opportunities presented to her in State Prison, and taken many opportunities to help others. * * * She has … been separated from her children for almost the entirety of their childhood. I know Ms. Kellogg's family is, and has always been, supportive of her, and will giver her the love an support she will need when she is released.

> I urge you to allow Ms. Kellogg to be released. She is in no way a threat to society. In truth, upon her release she will be nothing but a huge resource for all she comes into contact with.

Exhibit M, a copy of an October 31, 2016 letter from Jose L. Centeno, Supervising Offender Rehabilitation Coordinator at Taconic Correctional Facility, to the Parole Board stating, in part, as follows (emphasis added):

> I would like to ask that you grant parole to Ms. Kellogg … . I came to know Ms. Kellogg via an in-prison Christian ministerial program which stressed the importance of repentance as a prelude to a new and productive life. It is that Christian teaching that I believe impacted Ms. Kellogg that has led me to send this letter.
>
> Ms. Kellogg is a good person and very sorry for what she has done. She just wants an opportunity to prove it. * * * I had the privilege of observing her during the educational and religious sessions I held and supervised.
>
> If she is granted parole she will find and have the support she needs to ensure that she does not return to prison or a negative lifestyle again.

Exhibit N, a copy of a January 25, 2016 letter from Hector Stalf, a corrections officer at Taconic Correctional Facility, who states as follows:

> I have known Ms. Kellogg since January 2007, when I started working at Bedford Hills Correctional Facility. * * *
>
> * * * Ms. Kellogg is a kind, compassionate and hard-working individual. She is a very intelligent, spiritual and responsible woman, deserving of the respect and admiration she receives from both staff and her peers. * * * I believe she would truly be an asset to her family, church and community upon her release [from] prison.
>
> Ms. Kellogg is a valuable source of knowledge, skills and willingness to help others at all times. * * * I find it extremely commendable that she has spent almost twenty-five years working diligently and growing into a true pillar of her community.
>
> Please … grant her this second chance to start anew as the mature and responsible woman she is today.

Exhibit O, a copy of a "Letter of Commendation" from the Department of Correction and Community Supervision commending petitioner "for her enthusiasm, dedication and commitment to improving the daily lives of the inmate population and enhancing the working relationship between staff and her peers."

Exhibit P, a copy of a March 15, 2009 "Letter of Recognition" from Bedford Hills Correctional Facility recognizing petitioner for having "worked tirelessly to help promote a sense of community within the

facility" and for being "a valuable role model for others as BHCF's Long Termer's Committee continues to grow."

Exhibit Q, a compilation of letters. Kyle Kellogg, Ms. Kellogg's eldest son, writes as follows:

> I am in a unique position to know her extremely well. Even with the disability of being imprisoned, my mother found a way to be a kind, caring, and, above all else, loving parent. * * *
>
> For my brother and I, she played as much of a role in our lives as anyone else's mother - at least for all the important bits. Without my mother in our lives, I'm not sure my brother and I would both be the people we are today - college-educated, young adults not floundering in an economy and climate that's seeing so many of our peers do just that. * * *

Petitioner's cousin(s) write(s) that "Laurie was married at a very young age and in our opinion [was] a victim of abuse in her marriage, both physically and mentally. It is our hope that you will ... find it in your heart to ... order an earlier release ... so that she may come home to her family.

The Assistant Superintendent of the small school district in Monson, MA, that petitioner attended as a child writes as follows:

> I came in contact on a regular basis with all of the students. Laurie was always a good student, very pleasant, and well behaved.
>
> [My husband and I] are also friends of Laurie's family and have made it a point to keep abreast of Laurie's progress while she was in prison. We are familiar with the circumstances relative to Laurie's conviction. I believe it was immaturity and poor judgment on Laurie's part. Fortunately, Laurie is aware of her need to atone for her actions. Laurie participated in counseling when she was first incarcerated. Now, she is asked to counsel the new inmates ... .
>
> * * * It is obvious that Laurie has grown and matured while in prison.
>
> Laurie is fortunate to have a very supportive family and two fine well-educated, successful, and supportive sons. My husband and I both believe that Laurie will make a positive contribution to society if she is fortunate [enough] to be granted parole ... .

A family friend writes:

> With the counseling she received in prison; as well as, the strong family support she receives; Laurie has matured appreciably over the years. Laurie's growth is very evident when reviewing her involvement and contributions to fellow inmates.
>
> Laurie is not a risk to the community ... .

At her Parole Hearing, one of the commissioners summed up petitioner's submissions in support of parole by saying (at 15), "There are a lot of people who think very highly of you ... ."

The Executive Law

Pursuant to a 2011 amendment to Executive Law § 259-c(4), the Parole Board "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, [and] the likelihood of success of such persons upon release." This amendment is to be read in conjunction with Executive Law § 259-i(2)(c)(A), Matter of Partee v Evans, 40 Misc 3d 896 (Sup Ct, Albany County 2013) (McGrath, J.), affd, 117 AD3d 1258 (3d Dept 2014), which section states as follows:

> 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 [sic] 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. In making the parole release decision ... the following [shall] be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; ...(iii) release plans, including community resources, employment, education and training and support services available to the inmate; ...(v) any current or prior statement made to the board by the crime ... victim's representative, where the crime victim is deceased ... ; * * * (vii) 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 (viii) prior criminal record ... . * * *

Petitioner apparently has no "prior criminal record."

Cases

A petitioner challenging a denial of parole bears the burden of showing that the decision was the result of "irrationality bordering on impropriety" and is thus "arbitrary and capricious." Matter of Silmon v Travis, 95 NY2d 470, 476 (2000); see also, Phillips v Dennison, 41 AD3d 17, 21 (1st Dept 2007).

However, "The language of New York's parole statute is such that it creates a presumption of parole release after certain conditions are met ... ." Clarkson v Coughlin, 898 F Supp 1019, 1040 (SDNY 1995). The 2011 amendment was "intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release." Bruetsch v New York State Dept. of Corr. and Community Supervision, 43 Misc 3d 1223(A) at *2 (Sup Ct, Sullivan County 2014). "It is unquestionably the duty of the Board to give fair consideration to each of the statutory factors as to every person who comes before it." Matter of King v New York State Div. of Parole, 190 AD2d 423, 431 (1st Dept 1993). A "parole denial [that] was not rendered in accordance with the law ... must be overturned." Matter of Morris v New York State Dept. of Corr. & Community Supervision, 40 Misc 3d 226, 235 (Sup Ct, Columbia County 2013) (Richard Mott, J.); accord, Cotto v Evans, 2013 NY Slip Op 30222(U) (Sup Ct, NY County) (Feldstein, J.)

Analysis

Purely as a matter of common sense, Laurie Kellogg should be released immediately. But on what legal ground?

On the ground that what the Parole Board has done here is to re-sentence petitioner, which the law does not authorize it to do. The Parole Board is not all-powerful; nor does not write on a clean slate. It may not act as an appellate court to the sentencing judge. It is not a super-legislature, tasked with sentencing discretion.

In a case somewhat similar to ours, in which the Appellate Division, First Department, essentially affirmed the trial court decision (Alice Schlesinger, J.) overturning the denial of parole to a woman claiming abuse but convicted of killing her husband, the appellate court noted the impropriety of Parole Board resentencing:

> [The Second Department] reduced petitioner's sentence to 15 years to life, holding that the trial court's sentence of 23 years to life was excessive ... . However, as the motion court noted, the Board's repeated denials to petitioner of parole have had the effect of undermining this sentence reduction.

Matter of Rossakis v New York State Bd. of Parole, 146 AD3d 22, 29 (1st Dept 2016) (Gesmer, J). In a similar vein is Matter of King v New York State Div. of Parole, 190 AD2d 423, 433 (1st Dept 1993):

> Certainly every murder conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself.

Here, there are no "aggravating circumstances beyond the inherent seriousness of the crime itself."

The sentencing court imposed a harsh punishment on petitioner: 25-years-to-life, a minimum of a generation. That generation has passed. Petitioner has been a model prisoner. Her disciplinary record is free of blemishes. She has numerous indicia of rehabilitation, and a plethora of testimonials to her good character, including from corrections personnel. She has an offer of housing and a job interview and various skills.

The "25 years" in "25-years-to-life" must mean something. If Laurie Kellog, a prisoner as pristine and perfect as a prisoner can be (with a "compelling life story") is not released now, the 25 years becomes meaningless, and, in effect, is read out of the sentence. The sentence might just as well have been "life-unless-paroled." Subjective views of her alleged lack of remorse (disputed by several of the testimonials) cannot be allowed to override objective evidence of the last 25 years: for all that appears, not a single complaint, much less any infraction; no word of bad behavior; no evidence of fights or bad blood; nothing but 25 years in prison for the acts of a single evening. A court may not substitute its judgment for the judgment of the Parole Board; but the Parole Board may not substitute its judgment for

the judgment of the sentencing judge. That sentence was not overturned or modified in any way, and the Parole Board does not have the prerogative to do it.

Furthermore, this Court fails to see how her release would "so diminish the seriousness of the crimes as to undermine respect for the law." If 25 years in the clink would diminish respect for the law, how long would not? Certain people murder if they think they can get away with it; others murder because they are so enraged that they cannot help themselves. But nobody murders thinking, "I'll serve the 25 years, if that is all it is, but not a day more."

Releasing petitioner on parole would, also, reduce "mass incarceration."

> "Mass incarceration" is a term used by historians and sociologists to describe the substantial increase in the number of incarcerated people in United States' prisons over the past forty years. The US's prison population dwarfs the prison populations of every other developed country in the world, including countries thought to be repressive like China and Russia.
>
> * * *
>
> [M]ass incarceration began in the 1960s and 1970s with a rise in "tough-on-crime" approaches to criminal justice and with deliberate policy choices that impose intentionally punitive sentences. This approach has increased both the numbers of people entering the criminal justice system and how long they remain under correctional control.

Mass Incarceration, Wikipedia, https://en.wikipedia.org/wiki/Mass_incarceration (last edited March 10, 2017) (emphasis added). The Vera Institute of Justice has calculated that as of 2012, New York State was spending more money to confine its prisons inmate than any other state in the nation, a whopping $60,076 per inmate per year. Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* (January 2012), available at http://archive.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf (accessed March 20, 2017). Thus, the Parole Board's 24-month hold would cost New York State taxpayers well in excess of $100,000.

Parole Board decisions walk a fine line. If they just parrot the Executive Law, the prisoner can appeal on the ground that the decision was "conclusory." If they go further afield, the prisoner can appeal on the ground that the Board did not consider and weigh the various factors. Perhaps the time has come for courts to view the situation more holistically and ask the following trial-like question: "Could a reasonable parole board have concluded that this person should continue to be incarcerated?" Not here!

Parole hearings remind this Court of Mental Hygiene Article 9 commitment hearings. The irony there is that subjects that say "I have a mental illness" are more likely to go free; whereas subjects that say "I do not have a mental illness" are more likely to be confined. But what if the subjects are correct? The mentally ill would go free and the mentally healthy would not. In parole hearings, subjects that say, "I did the worst thing in the world, and I am sorry" are more likely to be released; whereas if they say, "What I did was not the worst thing in the world, and I am not sorry" they are more likely to be retained. But what if they are correct? Does saying you are "sorry," as a means to seek freedom from

incarceration, mean that you are less likely to re-offend than if you do not? Has anybody studied this? Has anybody written on it?

> Renee Zellweger: *I bet you wanna know why I shot the bastard.*
> Richard Gere: *Shut up, dummy.*
>
> * * *
>
> Reporter: *Are you sorry.*
> Renee Zellweger: *Are you kidding.*

Joao Paulo, *Chicago - We Both Reached for the Gun*, YouTube (March 20, 2017), https://www.youtube.com/watch?v=C9dFKRZ8EbU.

The word "sorry" should not operate as a "get out of jail free" card. "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day." Wood v Duff-Gordon, 222 NY 88, 91 (1917) (Cardozo, J.).

A "broader view" of petitioner's parole hearing testimony demonstrates a nuanced repentance. At her Parole Hearing petitioner testified (at 3), "I wish I could turn back the hands of time and make different decisions." After all these years, that may be the most remorse she can express. Maybe she is not one to ululate or "beat her breasts." She has "paid her debt to society" and now just wants freedom. After all these years of exemplary conduct, she is entitled to that freedom, as a matter of law and as a matter of decency and humanity.

> Billy Crystal: *You remember when we were kids, and we were playing ball, and we hit the ball over the fence out of bounds, and we yelled, "Do over"? Your life is a do over. You've got a clean slate.*
>
> * * *
>
> Daniel Stern: *You know you were right ... . My life is a "do-over." It's time to get started.*

City Slickers (1991).

Remedy

The remedy that courts seem to decree when overturning Parole Board decisions denying release is to order a new hearing within a limited, specified period of time, sometimes with completely new board members. Often, this remedy is meaningless, or close to it, because with the passage of time, the inmate would have been entitled to a new hearing regardless.

Furthermore, such a remedy seems inappropriate in this particular case. First, petitioner has already spent the time in jail to which the trial judge sentenced her, given the range of the sentence imposed and everything that has, and has not, transpired since then. Any further time would be cruel, if not unusual, punishment. Second, there is absolutely no use or reason for another hearing. As a matter of law,

petitioner has served her sentence and is entitled to be released. The only appropriate remedy is to order the Parole Board to grant petitioner parole.

Conclusion

Thus, the petition is granted, and respondent, The New York State Board of Parole, is hereby ordered to grant parole to petitioner, Laurie Kellogg, within 30 days of today's date (in order for respondent and other institutions to do what they need to do to comply herewith and, if respondent deems itself so advised, to appeal this decision and seek a stay).

Dated: March 20, 2017

Arthur F. Engoron, J.S.C.