

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D31039
W/kmb

_____AD3d_____

Submitted - March 31, 2011

PETER B. SKELOS, J.P.
ARIEL E. BELEN
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2009-10024

DECISION & ORDER

In the Matter of Marcus Ortiz, appellant,
v George B. Alexander, etc., respondent.

(Index No. 7162/08)

Marcus Ortiz, Beacon, N.Y., appellant pro se.

Eric T. Schneiderman, Attorney General, New York, N.Y. (Michael S. Belohlavek
and Patrick J. Walsh of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of George B. Alexander, as Chairman of the New York State Division and Board of Parole, dated September 24, 2007, which, after a hearing, denied the petitioner's application to be released to parole, the appeal is from a judgment of the Supreme Court, Dutchess County (Sproat, J.), dated September 10, 2009, which denied the petition and dismissed the proceeding.

ORDERED that the appeal is dismissed as academic, without costs or disbursements.

Where, pending a determination of a proceeding pursuant to CPLR article 78 to review a denial of release to parole, a petitioner receives a subsequent, de novo parole hearing, after which the New York State Board of Parole (hereinafter the Board of Parole) denies release, an appeal with respect to the prior denial is rendered academic, since the petitioner is "being held pursuant to the subsequent determination" (*Matter of Flanders v New York State Div. of Parole*, 14 AD3d 703, 703). This appeal has been rendered academic by the petitioner's subsequent appearance before the Board of Parole for a de novo hearing, following which he was again denied release (*see Matter of Postall v Alexander*, 74 AD3d 1078; *Matter of Lewis v Rosa*, 69 AD3d 943; *Matter of Flanders v*

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New York State Div. of Parole, 14 AD3d 703; *Matter of LaSalle v New York State Div. of Parole*, 5 AD3d 598, 599; *Matter of Lloyd v New York State Div. of Parole*, 217 AD2d 548; *Matter of Bates v Rossi*, 212 AD2d 602; *cf. Matter of McAllister v New York State Div. of Parole*, 78 AD3d 1413, 1414, *lv denied* 16 NY3d 707). Contrary to the petitioner's contention, the issues he raises do not compel consideration of the appeal on the merits under the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 715; *cf. Matter of Lovell v New York State Div. of Parole*, 40 AD3d 1166; *Matter of Marino v Travis*, 13 AD3d 453, 454-455).

SKELOS, J.P., BELEN, LOTT and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court