SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON.** JOAN A. MADDEN **PART** 11
Justice

Derrick Newton

Plaintiffs,

- v -

Robert Dennison, Chairman, NYS Exec Div. of Parole,

Defendants.

INDEX NO.: 403034/06

MOTION DATE:

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this ~~motion~~ petition to/for Article 78 relief

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the annexed memorandum, Decision & Order + Judgment.

UNENTERED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: March 22, 2007

J.S.C.

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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In the Matter of the Application of
DERRICK NEWTON,

Index No.: 403034/06

Petitioner,

- against -

ROBERT DENNISON, Chairman, New York State Division of Parole,

Respondent,

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Derrick Newton ("Newton"), appearing *pro se*, seeks to vacate a decision of the Parole Board ("Board") denying him parole, or to order the Board to conduct a de novo parole hearing. Respondent cross moves to dismiss the petition on the grounds that New York County is an improper venue for this matter, and that the Board's discretionary determination denying petitioner release to parole was in accordance with statutory guidelines. For the reasons below, this court concludes that when, as here, the Board's determination denying parole is based primarily on the seriousness of the crime, venue in the county where the crime occurred is proper, and as the Board failed to consider the relevant statutory guidelines in its determination, the petition is granted to the extent of directing that a de novo hearing be held.

BACKGROUND

Petitioner is incarcerated at Fishkill Correctional facility in Dutchess County, New York pursuant to a 1992 conviction of Murder in the Second Degree after a jury trial in the Supreme Court of New York County. According to the record before this court, the charge of Criminal

Possession of a Weapon in the Second Degree was dismissed.

Petitioner was sentenced to an indeterminate prison term of 15 years to life. The crime occurred on the evening of November 17, 1990, in a park near West 129th Street in Manhattan. Petitioner, who was then thirty-two years-old, had no criminal record, was employed as a plumber, and resided with his wife and three children on West 143rd Street in Manhattan.

According to the probation report, the victim, Kenneth Greenhill ("Greenhill"), was the boyfriend of the Newton's brother's wife. At approximately 6:43 pm, Newton and Greenhill got involved in an argument in front of 225 West 129th Street. Later that evening, Newton and Greenhill, who was accompanied by another man, had a confrontation in a nearby park during which Greenhill punched Newton in the face, causing him to fall to the ground. Newton was carrying a handgun for which he had a target pistol license and while on the ground, he fired at Greenhill, who was hit in the chest and died. Newton left the scene and subsequently turned himself in at the local precinct on November 26, 1990.

At trial, Newton maintained that he shot Greenhill because he believed that Greenhill was going to shoot him. Although the record indicates that Greenhill was unarmed, Newton attributed this belief to certain movements by Greenhill and a 1982 assault in which he was shot twice by a driver whose vehicle hit Newton's parked car. Newton testified that after he asked the driver for his registration and other papers, the driver went to his car to retrieve a gun and shot him twice and, after Newton fell, attempted to shoot him in the chest at point blank range, but the gun misfired.

At the time of sentencing, the Assistant District Attorney asked for the minimum sentence of 15 years to life in view of petitioner's lack of a prior record and the circumstances of the case.

Newton first become eligible for parole in 2005, and made his first appearance before the Board in September, 2005 There is no dispute that Newton has a spotless disciplinary record in prison. Newton has been employed throughout his incarceration, including as a plumber's helper in maintenance, a program aide for the disabled, and an industries worker in metal fabrication. He has taken various educational courses and has obtained a high school equivalency diploma and an associate of religious education degree. He also successfully completed the Violence/Aggressive Behavior Program, Basic Parenting and Hispanic Needs Program Eradicating Violent Behavior.

Numerous letters were written supporting Newton's release, including a letter from Bishop William Brown, of the Salvation and Deliverance Church, who stated that before his imprisonment, Newton worked with the church to "counsel young people against the use of drugs, encouraging them to stay in school and to maintain gainful employment," and that upon his release, the church would provide support to Newton and keep him engaged in the community. Newton also submitted letters from Pastor William James Williams and Minister Paul Ferbe indicating that Newton is a person of great integrity. Various members of Newton's family also wrote supportive letters and his daughter, Latesha Rivers, invited Newton to live with her and her family upon his release.

Following a discretionary release interview in September 2005, the Board denied parole and ordered petitioner held for another 24 months until his next appearance in September 2007. The Board stated that:

> Upon a review of the record, personal interview and due deliberation, it is the determination of the panel that parole is denied. You are presently incarcerated upon your conviction of

> murder in the second degree, by verdict, wherein, during the course of an argument, you shot your male victim, causing his death. The instant offense is your only involvement with the criminal justice system. The panel has considered your institutional programming and clean disciplinary record. Discretionary release is inappropriate at this time. You committed a violent and senseless crime resulting in the tragic loss of life. Your willingness to carry a loaded handgun, notwithstanding your lack of authority to do so, and your willingness to shoot an unarmed man evidences a callous disregard for public safety and leads the panel to conclude that your release at this time is incompatible with the public safety and welfare and release would deprecate the severity of your conduct, undermine respect for the law and tend to trivialize the tragic loss of life which you caused.

Newton's attorney filed an administrative appeal, arguing, inter alia, that in its decision, the Board improperly relied on that nature of the offense as the sole basis for denying release, and disregarded the rehabilitative component of the indeterminate sentencing and parole statutes. The Appeals Unit rejected these and other arguments made on appeal and affirmed the Board's decision.

Newton now brings this Article 78 proceeding challenging the adverse determination denying parole release and requesting that the court vacate the Board's September 2005 decision and direct the respondent to conduct a de novo parole hearing. Respondent cross moves to dismiss arguing that New York county is not the proper venue and files a verified answer opposing the petition on the merits.

Venue

Respondent asserts that the choice of venue in New York County is improper, and that under CPLR 506(b), this proceeding should have been commenced in Dutchess County, where the parole determination was made, or in Albany County, as the principal location of the New York State Board of Parole, Division of Parole. In opposition, Newton argues that New York

County is the proper venue since "material events" occurred here, including the underlying offense, and his sentencing.[1]

CPLR 506(b), provides the following three alternative bases for venue in a special proceeding against a body or officer: "(1) within the judicial district where the respondent made the determination complained of...or (2) where the material events otherwise took place, or (3) where the principal office of the respondent is located." As there is no question that the Board's determination occurred in Dutchess County, and that respondent's principal office is in Albany County, the only issue is whether venue is proper in New York County as the place where "material events otherwise took place," including the commission of the underlying crime and the sentencing of Newton.

Two recent appellate division decisions have been issued regarding the proper venue for Article 78 proceedings challenging parole determinations. In Vigilante v. Dennison, 36 AD3d 620 (2d Dept 2007), which was decided while this proceeding was pending, petitioner brought an Article 78 proceeding in Kings County, where he committed one of the crimes leading to his incarceration, and where he was sentenced for that crime and two unrelated crimes. The Second Department held that venue in Kings County was improper since the underlying material event "was the decision-making process leading to the determination under review." In support of its conclusion, the Second Department cited Howard v. New York State Board of Parole, 5 AD3d 271 (1st Dept 2004), in which the Appellate Division, First Department, while suggesting that the proper venue for an Article 78 proceeding challenging a parole determination was where either the determination took place or the Board was located, held that based respondent's failure to

[1]Respondent erroneously states that Newton was sentenced in Dutchess County, but subsequently corrects this error.

follow proper procedures, the proceeding must continue in New York County even though it is "an improper county" for venue.

Significantly, neither Vigilante nor Howard squarely addressed the issue here, which is whether when the primary challenge to the parole decision is that the Board's determination was based on the seriousness of the underlying crime, the place of the crime constitutes a "material event" for the purposes of venue under CPLR 506(b). In fact, in Vigilante, the court specifically noted that only one of the crimes resulting in petitioner's incarceration occurred in Kings County. Moreover, in Vigilante, the Second Department does not indicate the grounds for petitioner's challenge to respondent's denial of parole, including whether the underlying crime committed in Kings County and petitioner's sentencing there were central to the Board's denial of parole and thus, arguably, were "material events" relating to the parole determination.

Likewise, while dictum in Howard suggests that, in general, the proper venue for proceedings challenging parole determinations is either the place of the determination or respondent's location, the First Department did not address the issue herein which, as stated previously, is whether venue would be proper in the county where the sole crime was committed and the sentencing occurred when the nature of the crime was basis of the Board's determination to deny parole. Accordingly, neither Vigilante nor Howard mandates a determination that venue is improper in this county.

The question thus becomes whether, under the circumstances here, New York County is where "material events otherwise took place," for the purposes of CPLR 506(b). The phrase has been interpreted to mean the place "*wherein occurred the underlying events* which gave rise to the official action complained of." Brothers of Mercy Nursing and Rehabilitation Center v. De Buono, 237 AD2d 907, 908 (4th Dept 1997)(internal quotations and citations omitted); see also,

Alexander, Practice Commentaries, McKinney's Consol. Laws of NY, Book 7B, CPLR 506, at 86.

Brothers of Mercy Nursing and Rehabilitation Center, involved an Article 78 proceeding brought by medical providers challenging respondent's methods of calculating Medicaid reimbursement rates. Although the determination complained of and the relevant records were located in Albany County, the Appellate Division, Fourth Department held that venue was proper in Erie County as the place where the medical providers performed the acts which gave rise to the rate determinations.

In Browne v. New York State Board of Parole, 10 NY2d 116 (1961), the Court of Appeals found that the county where a prison sentence was imposed was a proper venue for an Article 78 proceeding challenging the Parole Board's determination regarding the proper date for the expiration of petitioner's prison sentence since "the two sentences underlying the determination challenged are so closely interwoven with said determination as to constitute 'material facts' which 'otherwise took place' in the place where the proceeding was commenced.

As the phrase "material events which otherwise took place" refers to events that give rise to the challenged determinations or are closely related to such determinations, it necessarily follows that "material events" to parole determinations potentially include those facts underlying petitioner's incarceration such as the crime committed and the sentencing. In this case, the Board based its denial of parole on the nature of the crime and petitioner's possession of a loaded handgun which caused it to conclude that petitioner's release was incompatible with the public safety, and would deprecate the loss of life caused by his conduct.

This court concludes that under these circumstances, as the Board's determination focused and was based on the nature of the crime, the crime itself is a material event. See e.g.

Coaxum v. New York State Board of Parole, 2006 WL 3524328 (Sup Ct Bronx Co. 2006) (holding that material events to parole determination took place in Bronx County, including petitioner's offense, its impact on the victim, petitioner's guilty plea and the court's sentence, particularly as Board's determination relied extensively on the underlying offense and petitioner's life sentence); Schwartz v. Dennison, 14 Misc3d 1220(A), 2006 WL 3932753 (Sup Ct. NY Co.2006)(holding that material events occurred in New York county where Parole Board "placed great weight in its determination on the nature of the offense in New York county and the 'vulnerable victim'"); Crimmins v. Dennison, 12 Misc3d 725 (Sup Ct. NY Co. 2006)(New York county was proper venue for proceeding challenging parole determination as the situs of the petitioner's crime and his sentencing); but see., Villaronga v. New York State Division of Parole, 13 Misc3d 1228(A), 2006 WL 3026318 [Sup Ct]; Wallace v. New York State Board of Parole, 2006 WL 3256509 (Sup Ct NY Co. 2006).

To reach a contrary conclusion and to find, as urged by respondent, that the parole determination complained of provides the only material event that may be serve as a basis for venue under CPLR 506(b), would render the clause "where the material events otherwise took place" meaningless and redundant since the statute also provides that the proceeding can be commenced in the "county where the determination was made." See Coaxum v. New York State Board of Parole, 2006 WL 3524328, *3 [Sup Ct Bronx Co. 2006]; Crimmins v. Dennison, 12 Misc3d at 729-730. Furthermore, nothing in the venue statute suggests that proceedings challenging parole determinations should be treated differently than other proceedings. Coaxum v. New York State Board of Parole, 2006 WL 3524328, *3.

Accordingly, respondent's cross motion to change venue is denied.

Challenge To Parole Determination

Executive Law § 259-i sets forth the procedures governing parole. Section 259-i(2)(c) provides that the Parole Board consider certain guidelines, including the inmate's "institutional record including program goals and accomplishments...vocational education, training or work assignments...release plans including community resources, employment, education and training and support services available to the inmate..." See King v. New York State Division of Parole, 83 NY2d 788, 790 (1984). At the same time, however, discretionary parole release is not to "be granted merely as a reward for good conduct or efficient performance of duties while confined" but only after considering whether "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 as to undermine respect for law." N.Y. Exec. Law § 259-i (2)(c). In addition, when, as here, the court, rather than the Board, has set the minimum sentence, the Board "must also consider the seriousness of the offense and the inmate's prior criminal record." " See King v. New York State Division of Parole, 83 NY2d at 790.

"Parole release determinations are discretionary and will not be disturbed as long as they meet the requirements of the Executive Law." Friedgood v. New York State Board of Parole, 22 AD3d 950 (3d Dept 2005). Thus, "[w]hile all relevant statutory factors must be considered [the Board] is not required to give them equal weight or to articulate each and every factor that was considered in making its decision." Id.; Garcia v. New York State Division of Parole, 239 AD2d 235,, 239 (1st Dept 1997). However, as "there is a strong rehabilitation component in the statutory parole scheme, the Board is mandated to consider an inmate's institutional record, release plans, the sentence imposed, recommendations of the district attorney...." Weinstein v.

Dennison, 7 Misc3d 1009(A)(Sup Ct. NY Co. 2005), citing Silmon v. Travis, 95 NY2d 470, 476 (2000).

Moreover, "[a] Parole Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute but also effectively constitutes an unauthorized resentencing of the defendant." Wallman v. Travis, 18 AD3d 304 , 307 (1st Dept 2005). Thus, it is an abuse of discretion for a Parole Board to conclude that a murder conviction per se precludes parole in the absence of any "aggravating circumstances beyond the inherent seriousness of the crime itself," King v. New York State Division of Parole, 190 AD2d 423, 433 (1st Dept 1983), aff'd, 83 NY2d 788, 790 (1984)

Petitioner has a spotless disciplinary record in prison, is a dependable worker and has participated in many programs and activities while incarcerated, and these are factors to be weighed in connection with the Board's discretionary release determination. (N.Y. Exec. Law § 259-i [2][c] [i]-[iii]). However, the decision of the Board merely states that petitioner's "institutional programming and clean disciplinary record" were considered, before it goes on to discuss the petitioner's "violent and senseless" crime and to find that petitioner's willingness to carry a loaded handgun without authority to do so (even though the charges relating to this aspect of the crime were dismissed), and his shooting of an unarmed man evidences a "callous disregard for public safety," and therefore petitioner's release is "incompatible with the public safety."

At petitioner's interview, the Board focused almost exclusively on the underlying offense and petitioner's decision to carry a loaded handgun Notably, after the Board inquired about petitioner's crime, it rejected any mitigating explanation given by petitioner, including the particular circumstances surrounding the offense and his explanation that he feared for his life

based on the 1982 incident in which he was shot. Petitioner stated that his discussion of the crime was not an attempt to justify his actions, and that he would like an opportunity to show that, if released, he would not have any further problems, and that he planned to continue to help others through his work in the ministry.[2]

After spending almost the entire interview discussing the details of the offense committed by petitioner, the Board acknowledged petitioner's lack of any prior criminal record, his spotless disciplinary record and his accomplishments in prison, and stated that these facts would be considered against the "terrible crime" petitioner committed.

However, while in its decision the Board briefly mentioned petitioner's accomplishments in prison and his lack of a prior criminal record, the record does not reflect that these factors, which would weigh in favor of granting parole, were actually considered in determining whether if petitioner were released he would remain at liberty without violating the law and whether his release was incompatible with the welfare of society. Nor does the record reflect that the Board considered petitioner's insight into the crime, or whether he was rehabilitated based on his achievements in prison. Rather, the record shows that the Board justified its denial of parole by concluding, based on the nature of the crime committed, that petitioner would pose a threat to public safety. See Wallman v. Travis, 18 AD3d at 308 (noting that in assessing whether an inmate's release is incompatible with the welfare society, petitioner's remorse and insight into crime are highly relevant when "inmate has otherwise lived a law abiding life and maintained a good prison record").

Moreover, the record indicates that the Board failed to take into account petitioner's

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[2]As previously indicated, prior to his incarceration, petitioner did work in his community through the ministry, including counseling young people.

character references from ministers and family members. See Wallman v. Travis, 18 AD3d at 308 (noting that in assessing whether an inmate's release is incompatible with the welfare society, petitioner's remorse and insight into crime are highly relevant when "inmate has otherwise lived a law abiding life and maintained a good prison record").

Furthermore, while the Board may consider the seriousness of the crime and the sentence warranted, it must do so in the context of statutory factors. Wallman v. Travis, 18 AD3d at 307; King v. New York State Division of Parole, 190 AD2d at 433 (annulling parole decision when Board did not "consider and fairly weigh all information available to them concerning petitioner that was relevant under the statute" and did not explain why the murder conviction at issue should preclude parole); see also, Friedgood v. New York State Board of Parole, 22 AD3d at 951 (annulling determination of parole board and directing de novo hearing where Parole Board based its decision solely on the seriousness of inmate's crime and did not consider various other factors including petitioner's rehabilitation, remorse, and good disciplinary record). Here, when the Board relied exclusively on the seriousness of the crime, it effectively ignored the 15 years to life sentence imposed by the court as recommended by the District Attorney, and thus undertook an "unauthorized resentencing" of petitioner. Wallman v. Travis, 18 AD3d at 307; see also,Coaxum v. New York State Board of Parole, 2006 WL 3524328, *7.

In addition, there must be "aggravating circumstances" to justify the Board's sole reliance on the seriousness of the underlying crime to deny parole. King v. New York State Division of Parole, 190 AD2d at 433. In the instant case, no such aggravating circumstances exist, but rather the minimum sentence imposed by the court, and recommended by the District Attorney, and the circumstances surrounding the crime suggest that careful consideration should have been given to the relevant statutory guidelines, including, as previously stated, petitioner's

lack of a prior criminal record, his clean disciplinary record, his achievements in prison, his training as a plumber, and his post release plans and support. See N.Y. Exec. Law § 259-i (2)(c)(i)-(iii).

Under these circumstances when, in denying petitioner parole release, the Board failed to consider and weigh all the statutory factors and relied exclusively on the seriousness of petitioner's crime, its determination must be annulled, and the petition granted to the extent of granting petitioner a de novo hearing as directed below.[3]

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that this matter is remanded to respondent, and within thirty days of this decision and order, the Parole Board shall hold a new hearing before a different panel than convened at petitioner's September 2005 hearing with a new decision to be made within thirty days; and is further

ORDERED that the cross-motion to dismiss is denied.

DATED: March 22, 2007

J.S.C.

[1]Petitioner's alternative request seeking parole release is not a proper remedy in this proceeding. See Quartararo v. New York State Division of Parole, 224 AD2d 266 (1st Dept), lv denied,88 NY2d 804 (1996)