

**Matter of Pena v New York State Bd. of Parole**

2007 NY Slip Op 33018(U)

September 24, 2007

Supreme Court, Albany County

Docket Number: 0409607/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In The Matter of JASON PENA,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-07-ST7744 Index No. 4096-07

Appearances: Jason Pena  
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Petitioner, Pro Se  
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**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently residing at Gouverneur Correctional Facility, has

commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated December 20, 2005 to deny petitioner discretionary release on parole. Petitioner is serving a term of eight and a third to twenty five years on a conviction of first-degree manslaughter, running concurrently with a term of five to fifteen years for a conviction of second-degree criminal possession of a weapon and consecutively with a term of one and a half to three years for attempted first-degree promotion of prison contraband. Among the many arguments raised by petitioner (including those advanced in his administrative appeal) petitioner asserts that the Parole Board failed to consider the statutory factors under Executive Law § 259-i. In his view, the determination was based solely on the seriousness of the crimes for which he was incarcerated. He maintains that the Parole Board failed to consider his accomplishments while incarcerated<sup>1</sup>, or his plans upon being released. He takes the position that the Parole Board improperly re-sentenced him to an additional term of imprisonment. In the petitioner's view, the Parole Board erred in not providing guidance as to how he could qualify for parole in the future. Petitioner also asserts that the Parole Board failed to provide anything other than general reasons for its determination, and that this violated his rights to due process. Finally petitioner asserts that respondent's decision not to parole him violated the Equal Protection Clauses of the Federal and New York Constitutions.

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<sup>1</sup>Petitioner provided a list of his activities while he has been incarcerated which include all of the following: earning a G.E.D., completion of several programs including ASAT, ART , AVP as well as programs on welding and plumbing, completion of DOCS Alcohol and Substance Abuse Training programs, his work as a leader of Narcotics Anonymous and his employment in the prison kitchen and as a housing porter.

Petitioner's assertion that the Parole Board based its determination to deny parole solely upon the serious nature of the crimes for which the petitioner was incarcerated for, while not considering his various accomplishments during that incarceration is belied by the record.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

"The I.O., Manslaughter 1<sup>st</sup>, CPW 2<sup>nd</sup>, Att. Promoting Contraband, involved you shooting ap person in the head and multiple times in his body as he lay on the ground, causing death. The Att. Promotion of Prison Contraband involved you possessing a weapon while in prison. This panel had made note of two Tier II infractions for unhygienic act and fighting since your last board. During your interview, you expressed little remorse for the victim and demonstrated limited insight into why you were so violent as to take a human life. This panel has noted your improved discipline and programmatic performance, however, when we consider all relevant factors, including your age, we believe that you need additional time in a structured setting. Return with a clean disciplinary record and continue to improve yourself."

As stated in Executive Law §259-i (2) (c) (A):

"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 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 guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and

interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law §259-i [2] [c] [A]).

"Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Board of Parole, 189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v. New York State Bd. of Parole, 157 AD2d 944). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review (see Ristau v. Hammock, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, his education, his employment history while incarcerated, his disciplinary record, and his plans upon release. Furthermore, the decision

was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v. New York State Division of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v. New York State Board of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Farid v Travis, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3rd Dept., 2001]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3<sup>rd</sup> Dept., 2006]). In other words, “[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner’s criminal history, together with the other statutory factors, in determining whether the individual ‘will live and remain at liberty without violating the law,’ whether his or her ‘release is not incompatible with the welfare of society,’ and whether release will ‘deprecate

the seriousness of [the] crime as to undermine respect for [the] law” (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

Petitioner’s claims that the determination to deny parole is tantamount to a re-sentencing are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3<sup>rd</sup> Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3<sup>rd</sup> Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., Westchester Co., 2006]). Moreover, it is well settled that the Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3<sup>rd</sup> Dept., 2006] lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3<sup>rd</sup> Dept., 2007]).

The record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3<sup>rd</sup> Dept., 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3<sup>rd</sup> Dept., 2002]; Matter of Jones v Travis, 293 AD2d 800, 801 [3<sup>rd</sup> Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3<sup>rd</sup> Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3<sup>rd</sup> Dept., 2006]).

With regard to petitioner’s arguments concerning an alleged violation of his right to

due process, the Court observes that it has been repeatedly held that a constitutionally protected liberty interest does not arise under Executive Law § 259-i, since it does not create an entitlement to, or legitimate expectation of release (see Barna v Travis, 239 F3d 169 [2<sup>nd</sup> Cir., 2001]; Marvin v Goord, 255 F3d 40 [2<sup>nd</sup> Cir., 2001], at p. 44; Paunetto v Hammock (516 F Supp 1367 [US Dist. Ct., SD NY, 1981]; Washington v White, 805 F Supp 191 [SDNY, 1992]). The Court, accordingly, finds no due process violation.

The Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see, Matter of Tatta v State of New York, Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

Furthermore, petitioner's argument that the Parole Board is required to advise petitioner and/or provide guidance with regard to the programs he should take, or rehabilitative efforts he should engage in to increase his chance for release at a future parole interview has no merit (see Executive Law § 259-i [2] [a]; 9 NYCRR § 8002.3; Boothe v Hammock, 605 F2d 661 [2<sup>nd</sup> Cir, 1979]; Matter of Freeman v New York State Division of Parole, 21 AD3d 1174 [3<sup>rd</sup> Dept., 2005]).

Finally, with respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict

judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (see Giordano v City of New York, 274 F3d 740, 751 [2<sup>nd</sup> Cir., 2001]).

The Court has reviewed petitioner's remaining arguments and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

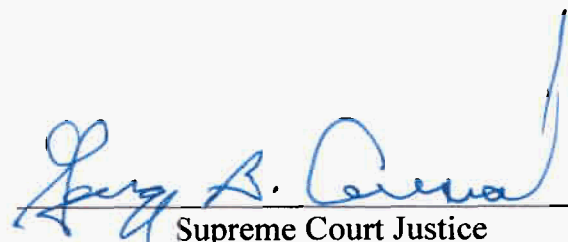
Accordingly, it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

**ENTER**

Dated: September 24, 2007  
Troy, New York

  
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Supreme Court Justice  
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated Verified Petition, Memorandum of Law, Supporting Papers and Exhibits
2. Respondent's Verified Answer dated February 21, 2007, Supporting Papers and Exhibits