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

PRESENT: EMILY JANE GOODMAN PART 17
Justice

JACK SOUTH a/k/a Derrick Corley

MOTION INDEX NO. 113811/07

MOTION DATE

- v -

MOTION SEQ. NO. 001

The New York State Division of Parole and George B. Alexander, Chairman of the State Board of Parole and CEO of the New York State Division of Parole

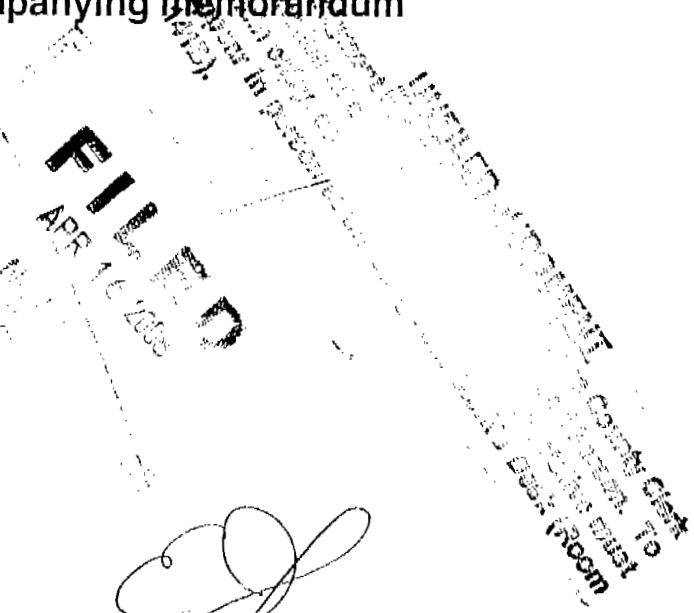
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits: Not accepted as it was not filed.	

Cross-Motion: ☐ Yes ☑ No

Upon for foregoing papers, it is ordered that this Petition is decided in accordance with the accompanying memorandum decision.



Dated: April 8, 2008

J.S.C.
EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

IF NOT, THE MOTION IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 17

----------X

In the Matter of the Application of
JACK SOUTH a/k/a DERRICK CORLEY,

Petitioner, Index No. 113811/07

For Judgment under Article 78
of the Civil Practice Law and Rules,

-against-

THE NEW YORK STATE DIVISION OF PAROLE
and
GEORGE B. ALEXANDER, CHAIRMAN OF
THE STATE BOARD OF PAROLE AND CHIEF
EXECUTIVE OFFICER OF THE NEW YORK
STATE DIVISION OF PAROLE,

Respondents.

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EMILY JANE GOODMAN, J.S.C.:

This Article 78 proceeding is a challenge to Petitioner's sixth parole hearing. In a charming irony, the Attorney General concedes, in effect, that "the constable has blundered," and the hearing was hopelessly flawed. The New York State Division of Parole, in other words, seeks another chance to obey the law. And that is precisely what the Petitioner is doing in asking to be paroled - - another chance to obey the law.

Petitioner, a 58-year old, honorably discharged veteran of the United States military, has been imprisoned for almost 19 years on an 8-to-life sentence following his guilty plea in Brooklyn. During his imprisonment he has been a near "model prisoner,"

and has accomplished the very things a "correctional service" might encourage if the goal was rehabilitation and reform. His impressive educational achievements are an example of his efforts. Moreover, Petitioner, who has a serious illness, has been accepted into a residential program for veterans, a program specializing in counseling and job preparation, to which he would go upon release.

The sixth hearing, the subject of this proceeding, took place in New York County, as designated by the Parole Board, and was summarily conducted by members of the board in person, while the inmate was electronically conferenced into the premises of the New York State Division of Parole on the westside of Manhattan while he was in Elmira at Wende Correctional Facility. Accordingly, the Article 78 venue was properly set in New York County (see Matter of Phillips v Dennison, 41 AD3d 17 [1st Dept 2007]; Matter of Ramirez v Dennison, 39 AD3d 310 [1st Dept 2007]).

Parole was denied for the sixth time with the unexplored conclusion that there was a "reasonable probability that [he] would not live and remain at liberty without again violating the law." The transcript of the abbreviated hearing suggests that the decision was a foregone conclusion before it even took place. In fact, the brief record demonstrates no probing beyond the conclusory statements that this man, whose crimes were unquestionably serious, weapon-based robberies, including one in which an individual sustained an injury, could not be and should not be allowed to live in the community after 19 years of confinement, notwithstanding his certificate of earned

eligibility for parole, which creates a presumption in favor of release, and his good institutional record (see Correction Law, art 24, §805). Furthermore, he unambiguously acknowledged his guilt and expressed remorse.

Petitioner also argues that his underlying history had all been taken into consideration by the highly esteemed Hon. Albert Tomei presiding in Supreme Court, Kings County (Brooklyn), in setting the original indeterminate sentence at a minimum of eight years, though a harsher sentence was available, thus implying that with his thorough knowledge of the case, it was not Justice Tomei's intention or hope or desire that the Parole Board add on indefinitely, with actual lifetime incarceration as their apparent goal, notwithstanding the Court's sentence and notwithstanding the contrary established guidelines for length of incarceration prior to parole (see 9 NYCRR §8001.3). In fact, it is also instructive to note that Justice Tomei elected to run lesser sentences concurrently and not consecutively, indicating that he did not anticipate that this individual would serve more than 2-1/2 times the eight years imposed (with "life" at the back end). But there is no indication in the record or transcript indicating that sentencing minutes or statements (if any) from Justice Tomei were considered, or referencing Petitioner's successful efforts to be rehabilitated and educated.

Furthermore, the Board failed to set forth its reasoning in denying parole which cannot be based on offenses alone (see Wallman v Fravis, 18 AD3d 304, 307-08 [1st Dept 2005]). In other words, the established maximum standards for a parole hearing

were not met (see Executive Law § 259-i [2] (c) [A]). Still, one is left with the impression that the State's position is that because of this man's past crimes, there would, in essence, never be a time that he would be suitable for release, no matter what he has accomplished in 19 years of imprisonment, even though the lengthy confinement and punishment are not in accord with cases of similar seriousness. The Court is mindful that Executive Law § 259-i [2] (c) [A] provides that "[d]iscretionary 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 the law." Moreover, not each element of the Executive Law must be analyzed as pertains to the pending application, nor given equal weight (see Matter of Leopold Siao-Pao v. Dennison, 2008 NY App Div LEXIS 2010 [1st Dept March 11, 2008]).

Based on the acknowledged flaws, the Respondent, State of New York, has essentially "confessed error" and conceded that this hearing was improper and did not meet the requisite standards. Therefore, the Attorney General, as counsel for Respondents, has consented to - - even proposed - - a hearing *de novo*. The State's desire to vacate the hearing, hold a new hearing, correct the Board's errors (and, perhaps reach the same result), would appear to resolve the matter and render it moot and the

matter would proceed to a hearing *de novo,* by court order, on consent (see Matter of McLaurin v. NYS Board of Parole, 27 AD3d 565 [2d Dept 2006]). Yet, Petitioner does not join in seeking that result, and, in fact, opposes it to some extent. First, Petitioner moves for an order that he be paroled, a remedy which this court is powerless to impose. In addition, Petitioner's counsel[1] suggests that Respondents are forum shopping. Venue for this litigation was established in New York County because the parole hearing was conducted in New York County as described above. But when the Petitioner commenced this litigation, he was summarily and unexpectedly transferred to a different prison, for the purpose, he suggests, of setting a new locale for a new hearing and thereby removing jurisdiction and venue from New York County for any future litigation. That is, Petitioner suggests that Respondents have chosen a different institution where the Parole Board would convene and that they plan to hold the hearing there, so that in the event of another denial, Supreme Court jurisdiction would be the Third or Fourth Department (see Judiciary Law §§70 and 140). However, although Petitioner inmate was in an upstate facility when the hearing upon which this Article 78 proceeding is based was held, that hearing was held in New York County, facilitated by modern technology. Therefore, the Court would expect that in good faith, and unless Petitioner's claims of forum shopping are, in fact true, the same procedure would be followed, i.e., having the Parole Board again meet in New York County, conduct a hearing in conformity with the law, and have

[1]The Court commends the law firm of Kaye Scholer, LLP, for its pro bono work on this case.

Petitioner participate electronically, as before. If the prison at which Petitioner is currently lodged lacks such capability, whether or not that is what motivated the relocation, the Court is confident that the Department of Correctional Services or the Division of Parole can make the necessary arrangements for a video hook-up, or removal or return of Petitioner to a facility so equipped, such as the one he just left.

Accordingly, it is

ORDERED and ADJUDGED that the Petition is granted to the extent that a seventh parole hearing take place *de novo,* forthwith and, that said hearing be conducted in the same venue as the prior hearing, it is further

ORDERED that Petitioner may be deemed present by electronic means.

This constitutes the Decision, Order and Judgment of the Court.

Dated: ~~March 31, 2008~~
April 8, 08

ENTER:

J.S.C.

EMILY JANE GOODMAN