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Decided on December 16, 2010

Supreme Court, Sullivan County

In the Matter of of Tuvia Stern, Petitioner,

against

**Brian Fischer, Commissioner, NYSDOCS, Kenneth S.
Perlman, Deputy Commissioner, Program Services,
NYSDOCS, Respondents.**

2328-2010

Tuvia Stern, 09-A-2030

Woodbourne Correctional Facility

P. O. Box 1000

Woodbourne, NY 12788

Petitioner-Pro Se

Attorney General for the State of New York

235 Main St.

Poughkeepsie, NY 12601

By Barry Kaufman, AAG, of counsel

Attorney for Respondents

Frank J. LaBuda, J.

Petitioner seeks Article 78 review regarding (1) denial of merit time and (2) Board of

Parole decision denying early release.

Respondent submits verified answer.

The standard of review in regard to parole release is whether the decision was so irrational as to border on impropriety. *Epps v Travis*, 241 AD2d 738 (3rd Dept., 1997.) [*2]

The weight accorded any particular factor used by the Respondent is solely within its discretion. *Confoy v Board of Parole*, 173 Ad2d 1014 (3rd Dept., 1991.)

Petitioner was sentenced on March 27, 2009 to a term of imprisonment of two and one-half to seven and one-half years for grand larceny in the first degree and a concurrent one year term for bail jumping in the first degree. Amended commitments were issued on April 1, 2009 to reflect mandatory surcharge and crime victims fee effective at the times of the commission of the said crimes in 1989 and 1990 respectively.

Petitioner stole more than one million dollars from a corporation and jumped bail by fleeing to Brazil for eighteen years.

Petitioner's arguments regarding failure to credit him with merit time are moot.

Petitioner's minimum sentence was set at two and one-half years. He was received by DOCS on April 17, 2009. He was given jail credit of 423 days. His parole eligibility date was August 18, 2010. He had a parole hearing on April 12, 2010, about four months prior to his minimum eligibility date of August 18, 2010.

Merit time allowance may be credited to an inmate in the amount of one-sixth of a minimum term of imprisonment if he completes certain programs. Thus, credit for merit time accelerates an inmate's parole eligibility date. However, the calculation of merit time is moot if the inmate has already appeared before the parole board. *Matter of McKeown*, 284 AD2d 622 (3rd Dept., 2001).

Since petitioner appeared at his first parole hearing on April 12, 2010 his argument for merit time credit is moot and denied.

Petitioner's denial of parole release is another matter.

Respondent's argue, through the affidavit of Richard de Simone, Associate Counsel, Office of Sentencing Review, Department of Correctional Services, that, [It is the Department's position that granting the petitioner's presumptive release upon serving his minimum period of imprisonment would not be "consistent with the safety of the community or the welfare of the inmate."]. See, **page 2, affidavit of Richard de Simone, dated September 9, 2010, marked as Exhibit 1.**

The parole board's denial of parole is based upon, "HOWEVER, ALL FACTORS CONSIDERED, DISCRETIONARY RELEASE IS INAPPROPRIATE AT THIS TIME AS [*3]YOU PLACED YOUR OWN INTEREST ABOVE THOSE OF SOCIETY." See, **Parole Board Release Decision Notice, page 2, dated April 12, 2010.**

There are two errors with the respondent's denial of parole.

First, the stated denial in the parole board's decision is inconsistent with their denial in the affidavit of Richard de Simone.

Second, the stated denial in the parole board's decision of "...you placed your own interest above those of society" is a reflection of the inmate's state of mind at the time of the commission of the crime in 1989 it is not a reflection of his state of mind now.

If the parole board bases its denial of parole on the inmate's *mens rea* at the time of the crime this inmate, and all others who are incarcerated, will never be granted parole.

Based upon the above, it is

ORDERED, that the portion of the petition requesting merit time credit is denied as moot, and it is further

ORDERED, that the portion of the petition regarding parole denial is granted to the extent that the board of Parole shall schedule a *de novo* parole hearing forthwith.

This shall constitute the Decision and Order of this Court.

DATED: December 16, 2010

Monticello, NY 12701

Hon. Frank J. LaBuda

Acting Supreme Court Justice