September 2021

Decision in Art. 78 proceeding - Siao-Pao, Leopold (2006-09-07)

[* 1]

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

PRESENT: **Kornreich, Shirley Werner, J.** PART 54
Justice

LEOPOLD SIAO PAO, 82B1697

- v -

ROBERT DENNISON, Chairman, NYS Division & Board of Parole

INDEX NO. 401345/06

MOTION DATE 6/22/06

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this Article 78 Petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6-7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that the petition is decided in accordance with the accompanying memorandum.

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: September 7, 2006

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Application of

LEOPOLD SIAO-PAO, 82B697,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

-against-

ROBERT DENNISON, Chairman, NYS Division & Board of Parole,

Respondent.

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Index No.: 401345/06

DECISION, ORDER & JUDGMENT

KORNREICH, SHIRLEY WERNER, J.

In this Article 78 proceeding, petitioner challenges a determination of the New York State Board of Parole ("Board"), dated August 16, 2005 (Determination), denying his application for parole for the fourth time.[1] Following a guilty plea, petitioner was convicted on August 29, 1982, of the offenses of second degree murder and first degree robbery. The crimes were committed when petitioner was nineteen years old. Petitioner was sentenced to concurrent terms of incarceration of eighteen years to life for the murder and eight years and three months to twenty-five years for the robbery. At the time of the Determination, petitioner was forty-three years old and had served just under twenty-three years of his sentence.

Petitioner challenges the Determination on the following grounds: it relied upon erroneous factual information; it failed to consider the factors set forth in Executive Law §259-

[1]This court denied respondent's motion to change venue and gave respondent thirty days to answer the petition.

i(2)(c)(A); it was an usurpation of the jurisdiction of the sentencing court because it essentially substituted a new and longer sentence; it imposed an excessive penalty; it was *ex post facto* in that it was based on a new policy of the Board that was not contemplated at the time of petitioner's plea bargain; that procedural changes set forth in 9 N.Y.C.R.R. 8002.2(b) increasing the number of interviewers allowed to question petitioner were adopted without appropriate rule-making procedures; the Commissioner's Worksheet was not properly signed or filled out so as to indicate the factors used to deny petitioner parole or the decisions of all persons taking part in the decision; and members of the parole board whose terms had expired took part in the Determination.

The Determination denied petitioner's application for parole with the following written decision:

> AFTER A REVIEW OF THE RECORD AND THIS INTERVIEW, PAROLE IS DENIED. THE INSTANT OFFENSE, MURDER IN THE SECOND DEGREE AND ROBBERY IN THE FIRST DEGREE, OCCURRED WHEN DURING THE COMMISSION OF A ROBBERY, YOU CAUSED THE DEATH OF A MALE VICTIM BY STABBING HIM WITH A KNIFE. THIS CRIME REPRESENTS AN ESCALATION OF YOUR ANTI-SOCIAL BEHAVIOR. YOUR INSTITUTIONAL ACHIEVEMENTS AND POSITIVE DISCIPLINARY RECORD ARE NOTED AND CONSIDERED. THE BOARD FINDS YOUR PROPENSITY FOR VIOLENCE AND INDIFFERENCE FOR THE LAW AS AN INDICATOR OF YOUR UNSUITABILITY FOR RELEASE AT THIS TIME.

The Determination indicates that the Commissioners unanimously denied petitioner's application.

The Board interviewed petitioner and petitioner's mental health was evaluated by a social worker prior to the issuance of the Determination. The interview revealed that petitioner has no living parents, is estranged from his two siblings, and plans to become a truck driver if he is

paroled, but he had no definite job offer or place to live, although he was planning to apply to a government program for a supervised living situation. Petitioner has not been disciplined for violent offenses while in prison, where he earned a High School Graduate Equivalency Degree, attended an Alternative to Violence Program, and participated in Aggressive Replacement Training, as well as some vocational training. Petitioner has worked as a law librarian for a substantial time while in prison.

The parole interview focused largely on the fact that petitioner stabbed the murder victim. The record demonstrates that the victim was stabbed twice. However, the interview transcript indicates that one member of the Board exaggerated the violence of the crime during the interview. Petitioner maintained that he was holding the knife used in the robbery while he attempted to thwart a fight between his co-defendant and the victim, who was stabbed accidentally. Petitioner admitted that it was reckless to hold the knife in his hand while trying to break up a fight. However, Commissioner Bogey, the main interrogator at the parole interview, apparently was under the impression that the victim was stabbed repeatedly:

> stabbing somebody one time is one thing, but to stab him ***again and again***, that takes effort, it takes force, that's a little more than just stopping a fight.... (emphasis supplied)

See, Transcript Interview, dated August 2005, Respondents' Cross-Motion to Change Venue, Exh. C.

On the other hand, the record also reflects that at the interview, petitioner was less than candid and not sufficiently remorseful or insightful. He denied seeing blood on the knife after the stabbing, in contradiction to his confession and several earlier statements that he noticed the blood just after the stabbing, as he was leaving the scene of the crime. He justified his

involvement in the stabbing by saying that he was unemployed and without family support, circumstances with which he will be faced if released. Petitioner repeatedly described the crime in terms that implied that he feels that he was a victim of an unintended outcome, rather than accepting full responsibility for a stabbing that was a foreseeable consequence of robbing someone at knife-point.

In an Article 78 proceeding, the Supreme court's scope of review is limited to deciding whether there is ***any*** rational basis for the determination of the agency. *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974); *In the Matter of Campo Corp. v. Feinberg*, 279 AD 302; 110 NYS2d 250 (3d Dept. 1952), *affirmed*, 303 N.Y. 995 (1952). If the determination has any rational basis that would appeal to a reasonable mind, and has any support in the record, it cannot be held by the court to be arbitrary and unreasonable. *In the Matter of Campo Corp. v. Feinberg*, *supra*.

In reviewing decisions of the Parole Board, a court should not interfere unless there is a showing of irrationality bordering on impropriety. *Marino v. Travis*, 289 A.D.2d 493 (2d Dept. 2001). The Parole Board must consider the seriousness of the offense, including the recommendations of the court and prosecutor, mitigating and aggravating factors, and the presentence report; any prior criminal record; the adjustment to confinement; whether there is a reasonable probability that if the inmate is released he/she will remain at liberty without violating the law; whether the inmate's release is incompatible with the welfare of society; and whether release will not so deprecate the seriousness of the crime as to undermine respect for the law. Executive Law §259-i(2)(c)(A); 9 N.Y.C.R.R. 8002.1. Other factors relevant to petitioner that respondent was required to consider in making the Determination were petitioner's: 1)

institutional record, including educational achievements, vocational training, therapy, work assignments, and interpersonal relationships with staff and inmates; and 2) release plans.[2] 9 N.Y.C.R.R. 8002.3. The Board is entitled to consider an inmate's lack of insight or minimization of the crime. *Salmon v. Travis*, 95 N.Y.2d 470, 477 (2000). It is not necessary for the Board to mention all of the factors it considered in its decision if the record as a whole demonstrates that the appropriate factors were considered. *Matter of Walkman v. Travis*, 18 A.D.3d 304, 308 (1st Dept. 2005); *Matter of King v. Div. of Parole*, 190 A.D.2d 423, 431 (1st Dept. 1993). The factors need not be given equal weight. *Id.* However, respondents may not rely exclusively on the severity of the crime. *Matter of Walkman v. Travis, supra* at 307.

There is a rational manner in which to interpret the Determination's reference to an "escalation" of anti-social behavior, which is the allegedly erroneous factual information which petitioner cites. Petitioner argues that, as he has not committed any other crimes, and his psychiatric evaluations did not find that he had a propensity for violence, the Determination was irrational. However, the reference to an "escalation" of anti-social behavior is susceptible of interpretation as a reference to prior criminal behavior, a relevant factor, specifically petitioner's trespass and motorcycle equipment violations, that preceded petitioner's murder and robbery convictions. Nor is it true that petitioner's three mental health evaluations specifically stated that he had no propensity for violence. Rather they found that he denied having homicidal thoughts. Commissioner's Bogey's exaggeration that the victim was stabbed "again and again," standing alone is not enough for this court to find that the Determination so irrational that it bordered on

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[2]Other factors contained in 9 NYCRR 8002.3 do not apply, as petitioner did not earn a Certificate of Eligibility and is not eligible for a temporary release program.

impropriety, especially in light of petitioner's attempts to minimize the crime and his sketchy release plans. The Determination explicitly considered petitioner's institutional record and achievements in prison, while the interview probed his release plans and his insight about the brutality of the offense. The record demonstrates that petitioner, who has spent his entire adult life in prison, still lacks honest self-reflection about the crime and did not have secure plans for employment or housing. Based on the entire record, it was not irrational for respondents to conclude that petitioner was unsuitable for release.

Petitioner is mistaken that the Determination extended the sentence imposed by the court in 1982. The sentences imposed had maximums of life imprisonment and twenty-five years. As petitioner had served twenty-three years at the time of the Determination, respondent did not increase petitioner's sentence. There is no state or federal constitutional right to be released from prison before serving one's full sentence. *Matter of Hyman v. State Div. of Parole*, 22 A.D.3d 224 (1st Dept. 2005). Moreover, at his sentencing hearing, the prosecutor stated on the record that "there is no guarantee that he [petitioner] will be paroled at the expiration of the minimum time...." *Petitioner's Reply to Answer*, dated August 8, 2006, Exh. D, p. 3.

It was not a violation of the State Administrative Act for respondent Dennison to write a memorandum in 2004 mandating a panel of three commissioners to review the parole application for all convicted murderers. *See, Petitioner's Memorandum of Law*, dated April 1, 2006, Addendum 13. The relevant rule, which was adopted in 1978, provides that the parole release interview shall be conducted by "a panel of at least two members of the Board of Parole." 9 N.Y.C.R.R. 8002.2(b). Therefore, the memorandum did not enact a new rule.

Finally, it was proper for members of the Parole Board to act after the expiration of their

terms of appointment. Members of the Parole Board are state public officers who may serve until their successors are appointed. The Governor appoints members of the Parole Board. *Executive Law*, §259-(b)(1). A "state officer" includes every officer appointed by an officer for whom all electors of the state are entitled to vote, which includes officers appointed by the Governor. *Public Officers Law*, §2. Officers holding over after the expiration of their appointed terms, with exceptions not relevant here, may continue to discharge their duties until a successor is chosen and qualified. *Public Officers Law*, §5.

Petitioner's remaining contentions have been considered by the court and have been found to be without merit. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the petition is denied with prejudice.

Dated: September 7, 2006

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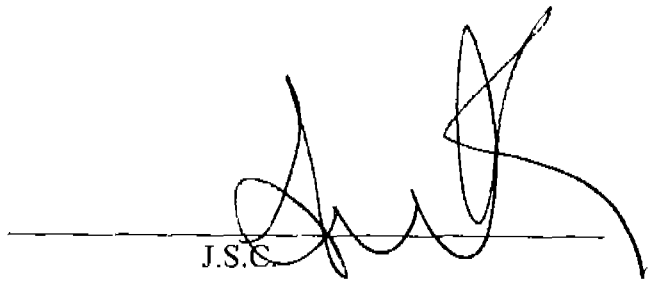

J.S.C.