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### Decision in Art. 78 proceeding - Rodriguez, Kenny 2006-11-13

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Rodriguez v New York State Bd. of Parole, 13 Misc.3d 1234(A) (2006)

831 N.Y.S.2d 356, 2006 N.Y. Slip Op. 52124(U)



Unreported Disposition

13 Misc.3d 1234(A), 831 N.Y.S.2d 356 (Table), 2006  
WL 3258645 (N.Y.Sup.), 2006 N.Y. Slip Op. 52124(U)

**This opinion is uncorrected and will not be  
published in the printed Official Reports.**

\*1 Kenny Rodriguez, Petitioner,  
v.

New York State Board of Parole, Respondent.

19073/05

Supreme Court, Kings County  
Decided on November 13, 2006

CITE TITLE AS: Rodriguez v  
New York State Bd. of Parole

**ABSTRACT**

[Trial](#)

[Place of Trial](#)

Proceeding to Review Parole Determination

*Rodriguez v New York State Bd. of Parole*, 2006 NY Slip Op 52124(U). Trial—Place of Trial—Proceeding to Review Parole Determination. [Civil Practice Law and Rules—§ 506](#) (b) (Venue; proceeding against body or officer). (Sup Ct, Kings County, Nov. 13, 2006, Knipel, J.)

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**OPINION OF THE COURT**

Lawrence Knipel, J.

This is a proceeding pursuant to CPLR article 78 to review a determination of the New York State Board of Parole denying petitioner's application for parole. Respondent cross-moves to change the venue from Kings County to either Albany County or Wayne County.

On August 18, 1994, petitioner pleaded guilty to robbery in the first degree and was sentenced (Supreme Court, Kings County [Feldman, J.]) to a term of 7 to 21 years imprisonment. Petitioner applied for parole on one or more occasions and the applications were denied. While incarcerated in the Butler Correctional Facility, petitioner reapplied for parole and was interviewed on September 22, 2004. In a decision dated on or about September 26, 2004, the Parole Board denied the request, stating that discretionary release was inappropriate. On or about May 4, 2005, the Board of Parole Appeals Unit affirmed the Parole Board and denied petitioner's administrative appeal. \*2

Petitioner commenced this proceeding in Kings County. Respondent asserts that venue in Kings County is improper, since the determination to deny parole was made at the Butler Correctional Facility which is in Wayne County, and the administrative appeal was denied in the main offices is Albany County.

[CPLR 506\(b\)](#) provides that a proceeding pursuant to article 78 may be commenced in any county within the judicial district where the respondent made the determination complained of, where the principal office of respondent is located, or "where the material events otherwise took place." Plainly, the county where the determination complained of took place is either Wayne or Albany. The county where the principal office of respondent is located in Albany. Petitioner contends that Kings County is a proper venue for his proceeding since it is where the underlying crime was committed, where the plea was made, and where he was sentenced, and these are "material events." Respondent disagrees, arguing that none of the material events took place in Kings County.

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The courts are split on this issue (*see* “Decisions Split on Right Venue for Parole Cases,” NYLJ May 15, 2006, p.1); compare *Matter of Crimmins v Dennison*, 12 Misc 3d 725 [Sup Court, NY County [Paul G. Feinman, J.]]venue was proper in New York County since that was the situs of petitioner's crime and his sentencing] and *Matter of Key v New York State Division of Parole*, 10 Misc 3d 1072(A), 2006 WL 121938 [Sup Court Kings County, Sylvia Hinds-Radix, J.]] since the board referred to the violence and serious demeanor demonstrated in the commission of the crimes, a “material event” occurred in Kings County] with *Matter of Howard v New York State Board of Parole*, 5 AD3d 271 [1st Dept. 2004][denying respondents' motion to change venue because no demand to change venue was made, but stating that venue was proper where the denial took place, Sullivan County, or in Albany County] and *Matter of Wallace v New York State Board of Parole*, 5/17/2006 NYLJ p. 22, col. 1[Sup. Court, NY County [Bransten, J.]]crimes, convictions and sentences, often secured years before a prisoner is eligible for parole, are, as a general rule, not so closely interwoven with parole determinations to warrant parole challenges in the counties where they were obtained or imposed; although the nature of the crime is material to the parole determination, the location of the crimes has little connection to the determination whether parole is appropriate)).

“In New York, the Parole Board holds the power to decide whether to release a sentenced prisoner on parole” (*Matter of Silmon v Travis*, 95 NY2d 470, 476). The Board must consider, among other things, the inmate's prior record, the seriousness of the offence, mitigating and aggravating factors, and the inmate's institutional record (*Executive Law § 259-i*; *Matter of Silmon v Travis*, *supra*). The Board must provide an inmate with a proper hearing in which only the relevant guidelines are considered, but the ultimate decision to parole a prisoner is discretionary (*Matter of Silmon v Travis*, *supra*; *Matter of King v New York State Division of Parole*, 83 NY2d 788, 791). *Matter of Tarter v State of New York*, 68 NY2d 511).

In the case at bar, the determination challenged by petitioner is the denial of his reapplication for parole. There is no allegation that the plea or the sentence imposed was illegal, improper or unfair, or that it was improperly calculated or implemented (*cf.* *Matter of Browne v New York State Board of Parole*, 10 NY2d 116 [1961][article 78 proceeding to direct respondents to amend records to indicate that two sentences were to be served concurrently and not consecutively was properly instituted in Queens County since material facts - the two sentences imposed - occurred there]; \*3 *Matter of Hawkins v Coughlin*, 132 Misc 2d 45, *affd* 132 AD2d 381 [2d Dept 1987][article 78 proceeding challenging respondents' determination denying petitioner's application for sentence credit pursuant to *Penal Law § 70.30(3)*] brought in Queens County)). To be sure one factor that must be considered by the parole board, together with the inmate's prior criminal record and his institutional record, is the seriousness of the crime committed. However, the place where the crime was committed and where the inmate was sentenced has little or no connection to the determination that is at issue in this proceeding, namely, whether or not the parole board properly exercised its discretion in denying petitioner's application for parole. For these reasons, this court concludes that the underlying crime and the inmate's trial or plea and sentence thereon are not “material events” within the meaning of *CPLR 506(b)* so that the place where they occurred supports venue for a challenge to the determination of the parole board.

Accordingly, the cross motion to change venue is granted, and this proceeding is transferred to Albany County.

This foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

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