
Court of Appeals State of New York

IN THE MATTER OF THE APPLICATION
OF JOHN MOISSETT,

Petitioner-Appellant

-against-

BRION D. TRAVIS, as Chairman of the New York State
Division of Parole, and New York State Board of Parole

Respondent

Brief of the New York State Defenders Association

Amicus Curiae

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	i-ii
INTEREST OF AMICUS.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	5
 <p>AS PETITIONER REMAINS INCARCERATED AND HIS LEGAL CLAIMS REMAIN UNRESOLVED, HIS APPEAL FROM THE DISMISSAL OF AN ARTICLE 78 CHALLENGE TO A FEBRUARY 1997 BOARD OF PAROLE DETERMINATION DENYING HIM RELEASE WAS NOT RENDERED MOOT WHEN THE BOARD AGAIN DENIED HIS APPLICATION FOR RELEASE DURING THE PENDENCY OF THE LITIGATION. PETITIONER’S APPEAL IS NOT MOOT BECAUSE HE REMAINS LEGALLY AGGRIEVED BY BOARD’S 1997 DETERMINATION AND FURTHER JUDICIAL REVIEW CAN AND WILL AFFECT THE CONTINUING RIGHTS OF THE PARTIES.</p>	
CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<u>Matter of Atkins v. NYS Bd. of Parole</u> , 273 A.D.2d 656 (3d Dept. 2000).....	6
<u>Matter of (Berkun-Schimmel) Validation Review Assocs.</u> , 91 N.Y.2d 840 (1997)...	11
<u>Matter of Bruner v. Speckard</u> , 214 A.D.2d 1040 (4 th Dept. 1995).....	6, 9
<u>Matter of D'Angelo v. Hammock</u> , 92 A.D.2d 703 (3d Dept. 1983).....	5
<u>Matter of Davila v. Travis</u> , 272 A.D.2d 699 (3d Dept. 2000).....	6
<u>Matter of Diaz v. Travis</u> , 273 A.D.2d 568 (3d Dept. 2000).....	6
<u>Matter of Doe v. Coughlin</u> , 71 N.Y.2d 48 (1987).....	8
<u>Matter of Douglas v. NYS Div. of Parole</u> , 269 A.D.2d 637 (3d Dept. 2000).....	6-7
<u>Matter of Edge v. Hammock</u> , 80 A.D.2d 953 (3d Dept. 1981).....	13
<u>Matter of Estabrook v. Travis</u> , 273 A.D.2d 694 (3d Dept. 2000).....	6
<u>Matter of Feneque v. NYS Div. of Parole</u> , 252 A.D.2d 469 (1 st Dept. 1998).....	6, 14
<u>Matter of Grand Jury Subpoenas</u> , 72 N.Y.2d 307 (1988).....	6, 11
<u>Matter of Hamm v. Regan</u> , 34 N.Y.2d 992 (1974).....	5
<u>Matter of Hearst Corp. v. Clyne</u> , 50 N.Y.2d 707.....	6, 7
<u>Matter of Hinkhaus v. Travis</u> , 272 A.D.2d 698 (3d Dept. 2000).....	6
<u>Matter of Hough v. NYS Bd. of Parole</u> , 235 A.D.2d 862 (3d Dept. 1997).....	13
<u>Matter of Johnson v. Pataki</u> , 91 N.Y.2d 214, 222 (1997).....	9
<u>Matter of King v. New York State Div of Parole</u> , 190 A.D.2d 423 (1 st Dept.1993) aff'd 83N.Y.2d 788 (1994).....	7, 8, 13
<u>Matter of Lee v. Russi</u> , 211 A.D.2d 720 (2d Dept. 1995).....	6
<u>Matter of Mendez v. Travis</u> , 272 A.D.2d 660 (3d Dept. 2000).....	6
<u>Matter of Pike v. NYS Div. of Parole</u> , 81 N.Y.2d 913 (1993).....	5
<u>Matter of Rentz v. Herbert and Russi</u> , 206 A.D.2d 944 (4 th Dept. 1994).....	8
<u>Matter of Roucchio v. NYS Division of Parole</u> , 83 N.Y.2d 888 (1994).....	5
<u>Matter of Samuels v. NYS Bd. of Parole</u> , 165 A.D.2d 935 (3d Dept. 1990).....	5
<u>Matter of Silmon v. Travis</u> , 95 N.Y.2d 470 (2000).....	10-12
<u>Matter of Smith v. Newberry and NYS Bd. of Parole</u> , 154 A.D.2d 941 (4 th Dept. 1989).....	5

	Page
<u>Matter of Solimine v. NYS Bd. of Parole</u> , 268 A.D.2d 638 (3d Dept. 2000).....	7
<u>Matter of Strafford v. NYS Bd. of Parole</u> , 130 A.D.2d 753 (2d Dept. 1987).....	5
<u>Matter of Weir v. NYS Div. of Parole</u> , 205 A.D.2d 906 (3d Dept. 1994).....	9
<u>Matter of White v. NYS Bd. of Parole</u> , 271 A.D.2d 777 (3d Dept. 2000).....	6
<u>Rochester Tel. Corp. v. PSC</u> , 87 N.Y.2d 17, 27-28 (1995).....	9

Statutes and Regulations

Executive Law § 259-i (2)(a).....	7
CPLR § 5519 (a)(1).....	10
9 NYCRR Part 8001.....	13

INTEREST OF AMICUS

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1300 public defenders, legal aid attorneys, 18-b counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems. The New York State Defenders Association is contractually obligated "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." NYSDA has been granted *amicus* status by this Court in numerous cases dealing with the rights of criminal defendants, including, among others: People v. Young, 94 N.Y.2d 171 (1999); People v. Garcia, 92 N.Y.2d 726 (1999); People v. Romero, 91 N.Y.2d 750 (1998); People v. Grant, 91 N.Y.2d 989 (1998); People v. Burdo, 91 N.Y.2d 146 (1997); People v. Knowles, 88 N.Y.2d 763 (1996); People v. Ford, 86 N.Y.2d 397 (1995); People v. McKiernan, 84 N.Y.2d 397 (1994); and Matter of King v. N.Y.S. Div. of Parole, 83 N.Y.2d 788 (1994).

The instant case raises an important issue about the continued justiciability of Article 78 challenges to determinations of the Board of Parole denying an inmate's application for release when the Board again denies an inmate-petitioner's application for release during the pendency of the litigation. Here, appellant's appeal from the dismissal of his Article 78 challenge to a February 1997 parole denial was dismissed as moot by the Appellate Division, Third Department on the ground that the Board again denied his application for parole release during the pendency of the

appeal. The Appellate Division's ruling in this case is consistent with a line of authority dating from 1990, which this Court has not previously reviewed, and which holds that subsequent unfavorable action by the Board of Parole invariably renders moot an inmate's Article 78 challenge to an earlier Board determination.

The Appellate Division's mootness rule has resulted in the dismissal of scores of appeals by aggrieved inmates seeking judicial review of Board determinations denying them release on parole. The practical effect of this rule has been to grant the Board license to defeat any legal challenge to its determinations with nothing more than a showing that an inmate-litigant has, once again, been legally aggrieved by one its decisions. The rule also offers no assurance that an aggrieved inmate's legal claims will ever be heard on appeal. The New York State Defenders Association has long been committed to protecting the legal rights of inmates who appear before the Board of Parole at release and revocation hearings. For over fifteen years, NYSDA has published a comprehensive manual for lawyers who represent clients in matters before the Board of Parole (Brazil, Rosenbaum, Zuckerman and Werber, Parole Representation in New York). This Court also granted NYSDA's motion for *amicus curiae* status in Matter of King v. NYS Div. of Parole, 83 N.Y.2d 788 (1994), one of the Court's leading cases addressing the parole release decision-making process. Therefore NYSDA has an important interest in the instant appeal.

STATEMENT OF FACTS

Petitioner, John Moissett, was sentenced in 1987 to an indeterminate term of 8 1/3 to 25 years upon his conviction of manslaughter in the first degree in the Sullivan County Court. After serving the minimum term, Moissett became eligible for parole release consideration in 1995. When Moissett appeared before a panel of Board members in February of 1995, the panel

refused to release him and directed that he again appear for parole release consideration in two years.

Approximately two years later, on February 24, 1997, Moissett appeared before another panel of the Board of Parole and was, once again, denied release. The panel cited the “serious nature” of the crime of conviction, which involved the shaking death of a 15-month old child, as its rationale for denying Moissett’s application for release. The panel directed that Moissett next appear for parole release consideration in two years, i.e., February of 1999 (R.105). Moissett filed a timely administrative appeal from the panel’s decision. Approximately eleven months later, on January 23, 1998, a panel of the Board affirmed the February 24, 1997 determination denying Moissett’s application for parole release (R.138).

Having exhausted his administrative remedies, Moissett next filed a timely Article 78 challenge to the agency’s decision. Moissett alleged, inter alia, that the February 24, 1997 determination was affected by an error of law because the panel had failed to consider the mandatory criteria governing parole release decision-making set forth in Executive Law § 259-i, and instead had apparently relied on an unwritten and illegal policy to categorically deny release to inmates convicted of violent felonies, especially homicide offenses (R.24-40). The Supreme Court, Albany County dismissed the petition in a judgment dated December 28, 1998 (R.180-183). Thereafter, Moissett filed a timely notice of appeal from the judgment dismissing his Article 78 petition (R.179).

In the meantime, another two years having elapsed, Moissett appeared in February 1999 for a regularly scheduled appearance before a panel of the Board of Parole. For a third time, his application for parole release was denied based on the “serious nature of the instant offense.”

The panel directed that Moissett next appear before the Board for parole release consideration in February 2001 (R.135).

Thereafter, Moissett pursued his appeal as-of-right from the dismissal of his Article 78 petition concerning the 1997 denial of parole release. His appeal was perfected for the February 2000 Term of the Appellate Division, Third Department (R.21). However, by motion returnable January 10, 2000, the Board of Parole moved to dismiss the appeal, asserting that its February 1999 denial of Moissett's application for parole release rendered his appeal from the 1997 determination moot (R.3). Opposing the motion to dismiss, Moissett denied that his appeal was moot (R.22-23).

The Appellate Division took more than one year to decide the Board's motion to dismiss. By decision and order dated February 8, 2001, the court, applying a rule it has consistently adhered to since 1990, held that the Board's subsequent denial of parole release in 1999 rendered Moissett's Article 78 challenge to the earlier denial moot, and so dismissed the appeal (R.2). Thereafter, by order dated May 10, 2001, this Court granted leave to appeal from the Appellate Division's order.

ARGUMENT

AS PETITIONER REMAINS INCARCERATED AND HIS LEGAL CLAIMS REMAIN UNRESOLVED, HIS APPEAL FROM THE DISMISSAL OF AN ARTICLE 78 CHALLENGE TO A FEBRUARY 1997 BOARD OF PAROLE DETERMINATION DENYING HIM RELEASE WAS NOT RENDERED MOOT WHEN THE BOARD AGAIN DENIED HIS APPLICATION FOR RELEASE DURING THE PENDENCY OF THE LITIGATION. PETITIONER'S APPEAL IS NOT MOOT BECAUSE HE REMAINS LEGALLY AGGRIEVED BY BOARD'S 1997 DETERMINATION AND FURTHER JUDICIAL REVIEW CAN AND WILL AFFECT THE CONTINUING RIGHTS OF THE PARTIES.

It has long been recognized that an inmate's Article 78 challenge to the denial of parole release is rendered moot by subsequent *favorable* action by the Board of Parole during the pendency of the litigation that results in the inmate's actual release from prison. *See e.g., Matter of Hamm v. Regan*, 34 N.Y.2d 992 (1974); *Matter of D'Angelo v. Hammock*, 92 A.D.2d 703 (3d Dept. 1983); *Matter of Strafford v. NYS Bd. of Parole*, 130 A.D.2d 753 (2d Dept. 1987); *Matter of Smith v. Newberry and NYS Bd. of Parole*, 154 A.D.2d 941 (4th Dept. 1989). However, in 1990, the Appellate Division, Third Department held for the first time that subsequent *unfavorable* action by the Board during the course of such litigation likewise renders an inmate's Article 78 challenge to an earlier denial of parole release moot. *Matter of Samuels v. NYS Bd. of Parole*, 165 A.D.2d 935 (3d Dept. 1990).¹ Although the rationale for this holding has never

¹ Respondent asserts that this Court "has regularly found that when an inmate reappears before the Parole Board, any challenges to earlier appearances become moot." *See* Memorandum in Opposition to Motion for Leave to Appeal at 3. However, the cases respondent cites in support of this claim all apparently involved situations where the Board subsequently voted to grant the inmate-petitioner's application for parole release, or where the inmate was conditionally discharged from prison. *See e.g. Matter of Roucchio v. NYS Division of Parole*, 83 N.Y.2d 888 (Petitioner released to parole supervision on April 15, 1994 – Leave to appeal to Court of Appeals later dismissed as moot on May 5, 1994); *Matter of Pike v. NYS Div. of Parole*, 81 N.Y.2d 913 (Petitioner released to parole supervision on January 14, 1993 – Leave to appeal to Court of Appeals later dismissed as moot on April 1, 1993).

been fully explained, the rule is now routinely applied and regularly results in the dismissal of appeals by inmates seeking judicial review of unfavorable decisions by the Board of Parole.² Although it is most often invoked by the Third Department, the rule has been cited by all departments of the Appellate Division. See Matter of Lee v. Russi, 211 A.D.2d 720 (2d Dept. 1995); Matter of Bruner v. Speckard, 214 A.D.2d 1040 (4th Dept. 1995); Matter of Feneque v. NYS Div. of Parole, 252 A.D.2d 469 (1st Dept. 1998).

Despite its widespread acceptance in the Appellate Division, this mootness rule is logically unsupportable and is completely at-odds with the recent decision in Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000), where this Court decided an appeal from a denial of parole release on the merits after the Board had again denied the petitioner's application for parole release during the pendency of the appeal.

A lawsuit becomes moot when events that have occurred after an initial filing render a legal controversy no longer amenable to judicial resolution, and when the court's determination will otherwise have no effect on the continuing rights of the parties. Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707 (1980); Matter of Grand Jury Subpoenas, 72 N.Y.2d 307 (1988). Thus, an Article 78 challenge to the denial of parole release becomes moot when the petitioner is later released on parole because, under these circumstances, events have outrun the pace of the litigation and the petitioner has, in fact, obtained the ultimate goal of his lawsuit – i.e. release from prison. When the petitioner is released, the legal controversy has become academic and, absent a perceived need for judicial resolution of one or more issues as an exception to the

²For example, in the year 2000, the Appellate Division, Third Department invoked the rule nine times to dismiss Article 78 appeals by aggrieved inmates seeking review of unfavorable parole release determinations. See Matter of Atkins v. NYS Bd. of Parole, 273 A.D.2d 656 (3d Dept. 2000); Matter of Estabrook v. Travis, 273 A.D.2d 694 (3d Dept. 2000); Matter of Diaz v. Travis, 273 A.D.2d 568 (3d Dept. 2000); Matter of Hinkhaus v. Travis, 272 A.D.2d 698 (3d Dept. 2000); Matter of Davila v. Travis, 272 A.D.2d 699 (3d Dept. 2000); Matter of Mendez v. Travis, 272 A.D.2d 660 (3d Dept. 2000); Matter of White v. NYS Bd. of Parole, 271 A.D.2d 777 (3d Dept. 2000); Matter of

mootness doctrine [*see* Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707], the former inmate's lawsuit should be dismissed as moot.

The same does not hold true, however, when, during the pendency of an Article 78 proceeding, the Board of Parole again denies release to an inmate at a statutorily mandated two-year reappearance review.³ When the Board of Parole subsequently *denies* an inmate-petitioner's application for release, the petitioner remains incarcerated and the legal issues in the case remain unresolved. Under these circumstances, the inmate's lawsuit is clearly not moot because the court's decision can and will affect the continuing rights of the parties. If the court sustains the inmate's position with respect to one or more legal issues, it can direct the Board to conduct a new hearing in accordance with law. At that new hearing, the inmate-petitioner will have a renewed opportunity to gain release on parole. Therefore, the rule applied by the Appellate Division below - that subsequent unfavorable action by the Board of Parole invariably renders a pending Article 78 challenge to an earlier parole denial moot - is plainly wrong.

The logical flaw in the Appellate Division's misapplication of the mootness doctrine may stem from confusion about the limited relief available to inmates in Article 78 proceedings concerning the denial of parole release. Because the only *affirmative* relief available to aggrieved inmates in such proceedings is a remittal to the Board for a de novo hearing before a different panel of Board members [*see* Matter of King v. NYS Div. of Parole, 190 A.D.2d 423 (1st Dept. 1993), *aff'd* 83 N.Y.2d 788 (1994)], the courts appear to wrongly assume that an inmate, who has reappeared before the Board while the litigation is pending and again been denied parole release, has obtained all of the relief he would otherwise have been entitled to and,

Douglas v. NYS Div. of Parole, 269 A.D.2d 637 (3d Dept. 2000); Matter of Solimine v. NYS Bd. of Parole, 268 A.D.2d 638 (3d Dept. 2000).

³ When the Board denies an inmate's application for release, it must fix a date within two years when the inmate will again be eligible for release consideration. Executive Law § 259-i (2)(a).

consequently, stands to gain nothing from judicial resolution of his legal claims. *See, e.g., Matter of Rentz v. Herbert and Russi*, 206 A.D.2d 944 (4th Dept. 1994).⁴ The logical flaw here is that an inmate who asserts a legal challenge to the Board's denial of release is not merely seeking to obtain a new parole release hearing before he would otherwise be entitled to one under the Executive Law. He is additionally and more importantly seeking a *judicial declaration of his rights at such a hearing*. The inmate has asserted that the Board's unfavorable determination was affected by an error of law, and has asked the court to order a new hearing *at which the legal error identified and recognized by the court will be cured*. *See e.g. Matter of King v. NYS Div. of Parole*, 190 A.D.2d at 435 (ordering Board to forthwith provide petitioner with new hearing and to apply the correct statutory criteria to release determination).

In other words, the inmate-petitioner seeks something that can be obtained only from a court of law: a judicially enforceable declaration of his legal rights in further administrative proceedings concerning his possible release or continued imprisonment. The mere fact that the Board has again denied the inmate's application for parole release during the pendency of the litigation – standing alone - is logically irrelevant to the continued justiciability of the petitioner's legal claims. *See e.g. Matter of Doe v. Coughlin*, 71 N.Y.2d 48 (1987) (Petition challenging denial of conjugal visits to inmate suffering from AIDS not rendered moot when

⁴ In *Rentz*, the court made clear that this was its precise rationale for dismissing the inmate's appeal as moot. The court wrote, "This appeal from an April 1992 decision of the Board of Parole (Board) is moot. Assuming, arguendo, that petitioner were correct in his contention that the Board failed to consider adequately or properly the statutory factors governing release on parole, the appropriate remedy would be a remittal to the Board for a de novo hearing before a different panel (see *Matter of King v. New York State Div of Parole*, 190 A.D.2d 423, 434-435, aff'd 83 N.Y.2d 788). On April 13, 1994, a different panel of the Board denied a subsequent application by petitioner for release on parole. The appeal should be from that more recent determination."

inmate-petitioner was transferred to prison that does not offer such a visiting program - petitioner remained incarcerated and had a “continuing interest in the litigation because [he] may be transferred in the future to a facility which has established a Family Reunion Program”); Matter of Johnson v. Pataki, 91 N.Y.2d 214, 222 (1997) (Validity of executive order superceding local district attorney in potential capital prosecution not rendered moot by death of one defendant and dismissal of indictment against others because the rights of the parties remained to be determined with respect to, inter alia, financial responsibility for costs of the prosecution). *See also* Rochester Tel. Corp. v. PSC, 87 N.Y.2d 17, 27-28 (1995).

The Appellate Division’s erroneous application of the mootness principle in this context also appears to be influenced by the misguided view that an inmate who has reappeared before the Board and again been denied release can no longer be legally aggrieved by the earlier determination (which is sometimes described as having “expired”) because he is presently “being held in custody” pursuant to the later determination. *See* Matter of Weir v. NYS Div. of Parole, 205 A.D.2d 906 (3d Dept. 1994) (Petitioner “is now being held in custody pursuant to the determination made by the Board after said reappearance.”); Matter of Brunner v. Speckard, 214 A.D.2d 1040 (4th Dept. 1995) (Earlier determination “expired during the pendency” of the appeal). However, inmates are not formally “held in custody” by determinations of the Board of Parole; they are imprisoned pursuant to the legal requirements of indeterminate sentences imposed by criminal courts. And, while the Board is statutorily required to review eligible inmates for parole release consideration at least once every two years, it does not follow that the Board’s determinations “expire” every two years. If the Board grants an inmate’s application for parole release, the determination remains in effect until the former inmate reaches the maximum expiration date of his penal sentence, or is retaken into custody on a parole violation. Thus,

while an inmate may *again* be aggrieved by a subsequent determination by the Board to deny release, the later determination does not, by itself, nullify any prejudice caused by legal errors committed at an earlier hearing.

This Court's recent decision in Matter of Silmon v. Travis, 95 N.Y.2d 470 (2000), provides a straightforward illustration of how and why a legal issue raised in an Article 78 challenge to the denial of parole release remains viable even after the Board of Parole has again denied the inmate's application for release during the pendency of the litigation. In Silmon, the issue was whether the Board could properly base its denial of parole release on the inmate's perceived lack of remorse for the bludgeoning death of his wife when the petitioner had steadfastly denied having committed the crime and, more importantly, when the district attorney and sentencing court had accepted his Alford plea to manslaughter in the first degree without an admission of guilt. At Silmon's first parole release hearing in June 1997, the Board denied release based, in part, on his lack of remorse and insight into the crime. Following an unsuccessful administrative appeal, Silmon brought an Article 78 proceeding to challenge the Board's action. In November 1998, the Supreme Court, Westchester County granted Silmon's petition, holding that it was arbitrary and capricious for the Board to rely on Silmon's lack of remorse when the state had allowed him to enter an Alford plea to the criminal charge without an admission of guilt. The court annulled the June 1997 determination and ordered the Board to conduct a new hearing in accordance with law. The Board of Parole appealed, triggering a statutory stay of the judgment pending appeal [CPLR § 5519 (a)(1)].

The state's appeal was argued in the Appellate Division, Second Department on April 26, 1999. While the appeal was *sub judice*, Silmon appeared in June 1999 for regularly scheduled parole release hearing, after which the Board again denied his application for release and

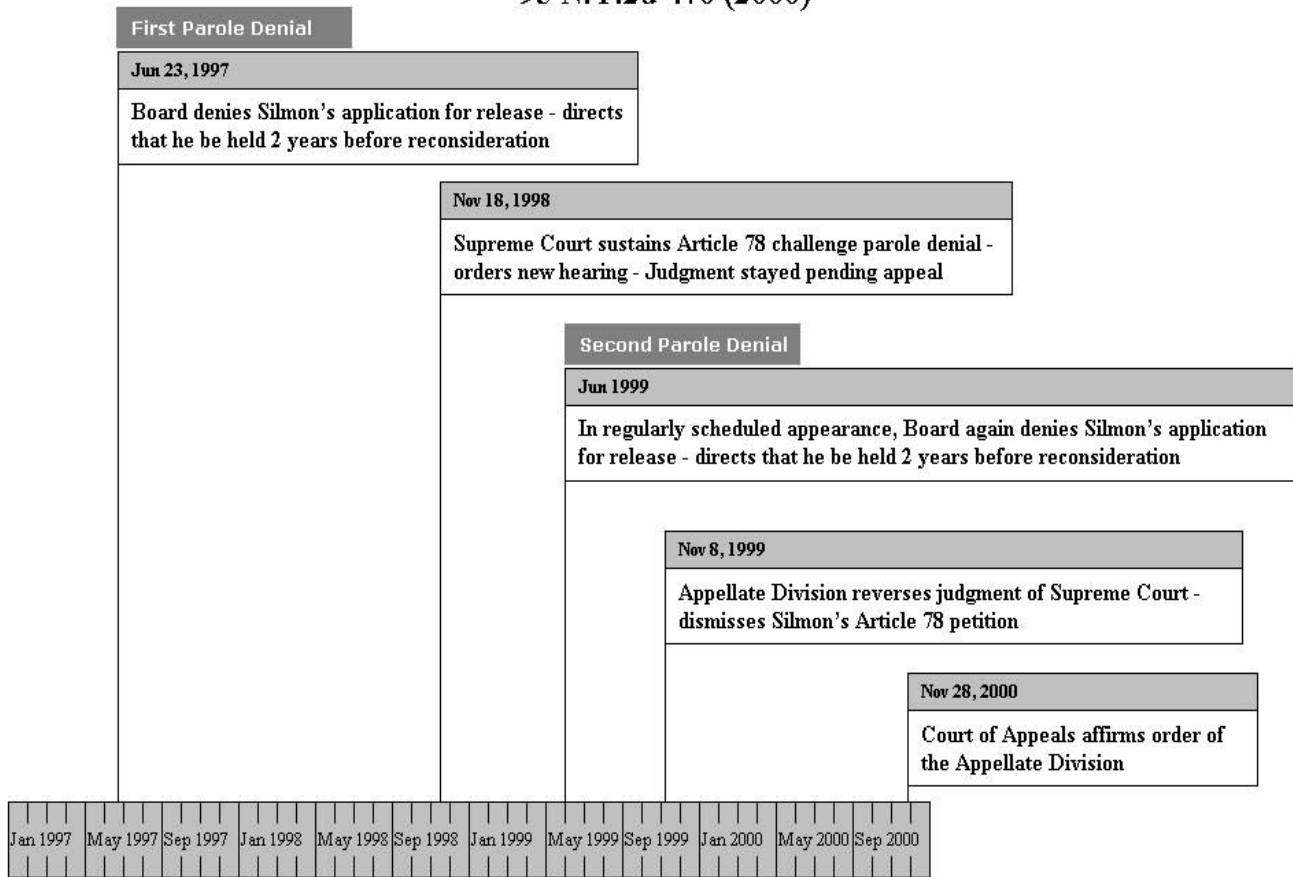
directed that he be held two years before reconsideration. Thereafter, on November 8, 1999, the Appellate Division reversed the judgment of the Supreme Court (one Justice dissenting) and dismissed Silmon's petition. This Court granted leave to appeal and on November 28, 2000, *more than three years after Silmon had initially been denied parole release*, unanimously affirmed the order of the Appellate Division.

For obvious reasons, Silmon's appeal to this Court continued to present a live controversy notwithstanding the fact that the Board again denied his application for release while the case was pending on appeal. Silmon remained imprisoned at all times during the pendency of the litigation and the Board's subsequent determination obviously did nothing to resolve the legal dispute, or to cure the error Silmon claimed had occurred at his 1997 parole hearing. Silmon's appeal to this Court was not moot because, had he prevailed, he would have been entitled to a new hearing *at which the Board would have been precluded by court order from considering his lack of remorse as a basis for denying parole release*.

Under the Appellate Division's mootness rule, however, Silmon's petition should have been dismissed in June 1999 before the Appellate Division ever issued its ruling. *See e.g. Matter of (Berkun-Schimel) Validation Review Assocs.*, 91 N.Y.2d 840 (1997). It would follow under this view that this Court wrongly decided the merits of Silmon's appeal because, by November, 2000, the legal issue raised in his petition would have long since been rendered moot by the Board's subsequent decision to deny release. Although the Board apparently never argued that Silmon's appeal to this Court should be dismissed, "mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court sua sponte." *Matter of Grand Jury Subpoenas*, 72 N.Y.2d 307, 311 (1988). Therefore, this Court's decision in *Silmon v. Travis*

implicitly rejected the Appellate Division’s rationale for its February 8, 2001 order dismissing Moissett’s appeal as moot. *See* Timeline – Silmon v. Travis (Figure 1 below).

Timeline - Silmon v. Travis, 95 N.Y.2d 470 (2000)



The same reasoning that supports appellate review in Silmon v. Travis logically applies to any other alleged legal error at a parole release hearing that adversely affects an inmate-petitioner’s rights and may have resulted in a wrongful denial of parole release. For example,

alleged errors concerning an inmate's guidelines application score (*see* 9 NYCRR Part 8001⁵), disputes about the actual facts of an inmate's criminal offense [*see e.g.* Matter of Edge v. Hammock, 80 A.D.2d 953 (3d Dept. 1981)], or (as alleged in the petition below) claims that the Board failed to properly consider the criteria mandated by Executive Law § 259-i (*see* Matter of King v. NYS Div. of Parole, 83 N.Y.2d 788) should all be reviewable despite negative action by the Board during the pendency of the litigation. The only exception to this general rule would apply in situations where the Board has administratively conceded error, has itself ordered a new hearing to address the error, but has nevertheless denied release on re-review. Under these circumstances, the error has been cured without need for judicial intervention, and any legal issues addressed to the earlier parole release hearing should properly be dismissed as moot. *See e.g.* Matter of Hough v. NYS Bd. of Parole, 235 A.D.2d 862 (3d Dept 1997).

The practical effect of the Appellate Division's mootness rule has been to grant the Board of Parole license to defeat any legal challenge to its determinations with nothing more than a showing that a litigant has, once again, been legally aggrieved by one of its decisions. When the mootness doctrine is misapplied in this manner, the courts offer no assurance that an aggrieved inmate's legal claims will ever be heard on appeal. Under this misguided view, an inmate's right of access to appellate review will always be contingent on such arbitrary factors such as the pace of the litigation on the administrative level, in the Supreme Court and on appeal. In sum, the Appellate Division's mootness rule results in a biennial race against the clock, where aggrieved inmates can only hope that their legal claims will be resolved before another unfavorable

⁵ The Board's release decisions are structured around a non-binding "guidelines time range," which is determined by a grid with a horizontal and vertical axis that establishes average periods of imprisonment that inmates should typically serve in view of the seriousness of their crimes and prior criminal history.

decision comes along and forces them back to square one to begin the process all over again.

At least one appellate court has recognized the inherent unfairness of such a rule. In Matter of Feneque v. NYS Div. of Parole, 252 A.D.2d 469 (1st Dept. 1998), the court, upon dismissing an obviously meritorious appeal under perceived constraint of this flawed rule, felt compelled to note its dissatisfaction with the outcome:

In many ways, this procedural impasse leads to a frustrating outcome for an appellate tribunal and, of course, far more so for petitioner himself. We would simply express our view that petitioner's spotless disciplinary record, as well as his extraordinary academic achievements and rehabilitative efforts, would seem to merit another expedited hearing where the mitigating circumstances of defendant's crime might receive a more focused evaluation.

This Court can now cut a clear path through this "procedural impasse" and restore order, rationality and fairness to Article 78 review of determinations by the Board of Parole. The order of the Appellate Division, Third Department should be reversed and petitioner's appeal should be remitted to that court for review on the merits.

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND THE REASONS SET FORTH IN APPELLANT’S BRIEF, THE ORDER OF THE APPELLATE DIVISION SHOULD BE REVERSED AND THE APPEAL REMITTED TO THAT COURT FOR REVIEW ON THE MERITS.

Respectfully submitted,

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STATE OF NEW YORK
COURT OF APPEALS

-----X
In the Matter of the Application of JOHN MOISSETTE,

Petitioner-Appellant,

-against-

AFFIDAVIT
OF SERVICE

BRION D. TRAVIS, as Chairman of the New York
State Division of Parole, and New York State Board
of Parole,

Respondent.

-----X
STATE OF NEW YORK)

) ss.:

COUNTY OF ALBANY)

ALFRED O'CONNOR, being sworn says: I am not a party to the action, am over 18 years of age and reside at Route 144, New Baltimore, NY, 12124. On the 24th day of August, 2001, I served three true copies of the annexed Notice of Motion for Leave to Submit a Brief *Amicus Curiae* and proposed brief, in the following manner; by delivering true copies thereof personally to the person named below at the address indicated below:

Hon Eliot Spitzer
Attorney General
State of New York
The Capitol
Albany, New York 12224-0341

and, in the following manner: by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

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ALFRED O'CONNOR

Sworn to before me this
24th day of August, 2001
