

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 22, 2011

512166

In the Matter of JOSE DIAZ,
Petitioner,

v

MEMORANDUM AND JUDGMENT

ANDREA W. EVANS, as Chair
of the Division of
Parole,
Respondent.

Calendar Date: November 18, 2011

Before: Mercure, Acting P.J., Spain, Lahtinen, Malone Jr. and
Kavanagh, JJ.

Jose Diaz, Beacon, petitioner pro se.

Eric T. Schneiderman, Attorney General, Albany (Frank Brady
of counsel), for respondent.

Lahtinen, J.

Proceeding pursuant to CPLR article 78 (transferred to this
Court by order of the Supreme Court, entered in Albany County) to
review a determination of the Board of Parole which rescinded
petitioner's open parole release date and imposed a hold period
of 24 months.

In 1991, in the course of trying to gun down a rival drug
dealer, petitioner fired a hail of bullets into a convenience
store, killing an assistant district attorney for the Bronx
District Attorney's office. As a result, petitioner was
convicted of, among other things, murder in the second degree and
sentenced to an aggregate prison term of 15 years to life. In

April 2009, after his third appearance before the Board of Parole, the Board granted parole with an open parole release date of August 25, 2009. However, after they were notified of petitioner's impending release, several members of the victim's family and the Bronx District Attorney's office submitted letters in opposition and petitioner's release was temporarily suspended. The Board concluded that the information was new and accordingly scheduled a rescission hearing. Following the hearing, the Board determined that there was substantial evidence warranting rescission of petitioner's parole release and imposed a 24-month hold. Following an unsuccessful administrative appeal, petitioner commenced this CPLR article 78 proceeding and Supreme Court ultimately transferred the proceeding to this Court.

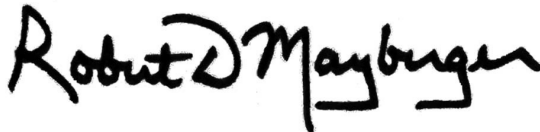
We confirm. The Board's broad discretion to rescind parole is limited only by the requirement that there be substantial evidence of significant information not previously known by the Board (see 9 NYCRR 8002.5 [b] [2] [i]; Matter of Pugh v New York State Bd. of Parole, 19 AD3d 991, 992 [2005], lv denied 5 NY3d 713 [2005]; Matter of Ortiz v New York State Bd. of Parole, 239 AD2d 52, 55 [1998], lv denied 92 NY2d 811 [1998]). Here, the victim impact statements taken following the original parole release decision and letters from the victim's family members contain detailed descriptions of the ongoing devastating impacts of petitioner's crime, far beyond any information contained in petitioner's sentencing minutes or the presentence investigation report. These statements and letters thus constituted significant information not previously known by the Board and provide substantial evidence to support rescission (see Matter of Raheem v New York State Bd. of Parole, 66 AD3d 1270, 1272 [2009], lv denied 14 NY3d 702 [2010]; Matter of Pugh v New York State Bd. of Parole, 19 AD3d at 993). To the extent that petitioner contends that he was deprived of due process, our review of the record demonstrates that he was adequately represented by counsel and the proceedings employed in rescinding his parole were constitutionally sufficient (see Matter of Rizo v New York State Bd. of Parole, 251 AD2d 997, 998 [1998], lv denied 92 NY2d 811 [1998]; Matter of Ortiz v New York State Bd. of Parole, 239 AD2d at 57).

Petitioner's remaining contentions have been considered and found to be either unpreserved or without merit.

Mercure, Acting P.J., Spain, Malone Jr. and Kavanagh, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court