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M E M O R A N D U M

**SUPREME COURT - QUEENS COUNTY
I.A.S. PART 5**

In the Matter of the Application
of FRANK MARINO, NYSID
No. 8354336P,

Index No:22169/00

By: **POSNER, J.**

For a Judgment pursuant to
Article 78 of the New York
Civil Practice Laws and Rules,

Date:March 22, 2001

Motion Date:December 19, 2000

Petitioner,
-against-

BRION TRAVIS, Chairman,
NEW YORK STATE DIVISION OF PAROLE,

Respondent.

The petitioner, Frank Marino, is an 82 year old man who
was admitted to practice law in New York State in 1947.

Following his admission to the bar, the petitioner began
practicing law in Lake Ronkonkoma, New York, with his wife,
Shirley Ehman. The petitioner and his wife were arrested after
an investigation revealed that they had defrauded a number of
clients by withdrawing moneys from escrow accounts and using
these monies for their personal use.

After he was indicted, the petitioner pled guilty in
the County Court, Suffolk County to two counts of grand larceny
in the second degree, a class "C" felony. At the recommendation
of the Suffolk County District Attorney, the petitioner was
sentenced on April 1, 1997 to two concurrent indeterminate terms
of imprisonment of three to nine years. The petitioner's wife

received the same sentences in return for her guilty plea. As a result of their convictions, the petitioner and his wife have been disbarred from the practice of law.

During his incarceration, the petitioner has had an exemplary record with no disciplinary action ever having been taken against him. He worked as a literacy volunteer while incarcerated and has been issued a certificate of earned eligibility. On February 26, 1999, the petitioner was transferred to Queensboro Correctional Facility and assigned to the work release program. He is a teacher's assistant at the Friends of Island Academy, a nonprofit institution in Manhattan whose goal it is to help young people who have been released from correctional facilities to obtain their high school equivalency diplomas and secure employment. During this time he has been residing with his daughter at her home in Douglaston, Queens for five days each week, returning to the Queensboro facility the other two days. The petitioner has been commended for his work with the troubled adolescents at the Academy and has never failed to return to the Queensboro facility for the required two day incarceration each week.

On January 6, 2000, the petitioner appeared before the parole board for consideration of his release to parole supervision. At the conclusion of the hearing, the board denied the petitioner's parole release and ordered that he be held for an additional 24 months. In its decision, the board noted that there was a reasonable probability that if released, petitioner "would not live and remain at liberty without violating the law."

This was based upon the nature of petitioner's offense and his lack of appreciation for the severity and affect of his criminal behavior.

Following this decision, the petitioner filed an administrative appeal with the Appeals Unit of the Board of Parole. The parole board decision was affirmed by the Appeals Unit which held that a certificate of earned eligibility did not automatically entitle the petitioner to parole; that the board had applied the appropriate standards in arriving at its decision, and that the board had provided a rational basis for its decision.

The petitioner concedes that generally decisions of the New York State Board of Parole are not judicially reviewable when made in accordance with the law. (See, Correction Law §805; (5); Matter of Hall v New York State Executive Dept., Div. Of Parole, 188 AD2d 791; Matter of Davis v New York State Div. Of Parole, 114 AD2d 412). The petitioner, Frank Marino, however, has been issued a certificate of earned eligibility and Correction Law §805 mandates his parole release "unless the board of parole determines that there is a reasonable probability that he...will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society".

Frank Marino, is an 82 year old disbarred attorney who embezzled escrow funds of his clients. He has no other criminal record and has been a model prisoner, who has made an important contribution teaching former Rikers Island inmates while on work release. In all the cases relied upon by the respondent, the

petitioners had been convicted of violent felony offenses. Thus, in those cases there was a rational basis for the parole board's determination that there was a reasonable probability that these inmates would not live and remain at liberty without violating the law. (See, Silmon v Travis, 95 NY2d 470).

There is no rational basis for concluding that this petitioner will not live and remain at liberty without violating the law. His advanced age coupled with the fact that he can no longer practice law makes it almost a certainty that petitioner, who has no other criminal record, will not violate the law. The parole board's determination to the contrary is not rationally based. It appears rather to be an emotional response attributable in large part to the petitioner's inartful comment (when attempting to explain his crime) that, "I suppose being an attorney and a person who is held in trust it can happen so quickly to an attorney." The interrogating Parole Board Commissioner, who is an attorney, found this statement particularly offensive and was also outraged by the petitioner's crime. The fact is that neither this nor petitioner's absorption with the harm he caused his family, instead of the hardship to his clients who trusted him, provide a rational basis for determining that there is a reasonable probability that, if released, this 82 year old petitioner "would violate the law".

This Court recognizes that Correction Law Section 805 creates only a limited protected liberty interest "which extends as far as an inmate's right to be heard and, if parole is denied, a right to a statement of reasons for denial." (Clarkson v

Coughlin, 898 F. Supp. 1019, 1040). Nevertheless, the New York Court of Appeals has recognized a right of intervention where there is a "showing of irrationality bordering on impropriety." (Russo v NYS Bd. of Parole, 50 NY2d 69, 77). This Court finds that such a showing has been made by the petitioner, Frank Marino. He was convicted of a non-violent felony. He is an elderly disbarred attorney in poor health, who has a certificate of earned eligibility. What possible harm could he be to anyone? It would be a strain in the "quality of mercy" to find that the petitioner "would violate the law", the only reason that the statute specifies for denying parole.

Accordingly, the petition herein is granted and the respondents are directed to release the petitioner to parole supervision under such conditions as are deemed appropriate.

Settle order and judgment.

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J.S.C.