STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of MICHAEL BURRESS,

Petitioner,

-against-

GEORGE B. ALEXANDER, Chairman of
NEW YORK STATE DIVISION OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST8699 Index No. 1627-08

Appearances: Michael Burress
Inmate No. 79-C-0436
Petitioner, Pro Se
Attica Correctional Facility
P.O. Box 149
Attica, New York 14011-0149

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Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Adrienne Kerwin,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Attica Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent made on August 14, 2007 to deny petitioner discretionary release on parole. The petitioner is serving an indeterminate sentence of twenty years to life in prison upon his most serious conviction of murder in the second degree (see Penal Law § 125.25) in connection with his participation in an armed robbery.

Among the many arguments set forth in the petition, petitioner's primary contentions are that the parole determination was arbitrary and capricious and constituted a denial of his right to due process because: 1) there was no evidence in the record of a reasonable probability that the petitioner would recidivate upon his release; 2) that the Parole Board improperly focused on petitioner's underlying crime and failed to consider positive statutory factors, thereby substituting its judgment for that of the sentencing judge who fixed the minium period of imprisonment; and 3) that the Parole Board improperly acted in furtherance of an executive branch policy designed to deny parole to violent felony offenders. In support of the petition, petitioner has submitted documents indicating that he has obtained an Associates Degree. The petitioner has submitted certificates of merit he has earned as a legal assistant/paralegal, as a counseling aide, in general business, and in a variety of therapeutic programs. The petitioner has also submitted numerous positive evaluations by his supervisors at the correctional facility and letters of community and family support. In

addition, the petitioner has submitted copies of newspaper articles, panel discussions and hearings, and transcripts of other inmates' Parole Board interviews as evidence of the alleged improper executive branch policy.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Denied - Hold for 24 months, next appearance date: 08/2009.
> Conditions of Release/Staff Instructions/Reasons for Denial:
> This panel has concluded that your release to supervision is not compatible with the welfare of society and therefore parole is denied. This finding is made following a personal interview, record review and deliberation, Of significant concern is the escalation of unlawful actions the instant offenses represent where you and a co-defendant planned to rob a hotel. Police responded to the scene and your co-defendant shot at the officers killing one of them.
> Positive factors considered include your community support, program accomplishments and submissions.
> In addition, past sanctions as a juvenile and youthful offender including probation, local jail time, and a state sentence as adult failed to deter you from committing the instant offenses.
> To grant your release at this time would so deprecate the seriousness of your instant offense as to undermine respect for the law. Your statement of why you didn't cooperate with the police shows clear intent to hide your participation. The probability you will live and remain at liberty without violating the law is not found to be reasonable given the factors noted above."

As stated in Executive Law § 259-i (2) (c) (A):

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release

> is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate []; (v) any statement made to the board by the crime victim or the victim's representative []" (Executive Law § 259-i [2] [c] [A]).

"Parole release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable" (Matter of Sinopoli v New York State Bd. of Parole, 189 AD2d 960, 960 [3rd Dept., 1993], citing Matter of McKee v New York State Bd. of Parole, 157 AD2d 944). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review (see Ristau v Hammock, 103 AD2d 944 [3rd Dept., 1984]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v New York State Div. of Parole, 294 AD2d 726 [3rd Dept., 2002]). The Court notes that because there was no formal hearing in this instance,

the standard of review is not whether the determination is supported by substantial evidence, but rather whether the determination is in violation of lawful procedure, affected by an error of law, arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Pell v Board of Educ., 34 NY2d 222 [1974]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and that its determination was supported by the record. A review of the transcript of the parole interview reveals that in addition to the instant offense and petitioner's criminal history, attention was paid to such factors as petitioner's prison disciplinary record, program accomplishments and post-release plans. The petitioner was afforded ample opportunity during the parole interview to explain why he believes that he is entitled to release. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and satisfy the requirements of Executive Law § 259-i (see Matter of Whitehead v Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v New York State Div. of Parole, 199 AD2d 677 [3rd Dept., 1993]).

It is proper, and in fact required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Weir v New York State Div. of Parole, 205 AD2d 906, 907 [3rd Dept., 1994]; Matter of Sinopoli v New York State Bd. of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863 [3rd Dept., 1996]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see

Matter of Farid v Travis, 239 AD2d 629, supra; Matter of Moore v New York State Bd. of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Collado v New York State Div. of Parole, 287 AD2d 921 [3rd Dept., 2001]). Nor must the Parole Board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Div. of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law § 259-i [2] [c] [A], other citations omitted).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing are conclusory and without merit (see Matter of Bockeno v New York State Parole Bd., 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Exec. Dept. Bd. of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A [Sup. Ct., Westchester County, 2006]). Moreover, it is well settled that the Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of the petitioner's

sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476, supra; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006], lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

The record does not support petitioner's assertion that the Parole Board's decision was predetermined consistent with an alleged executive branch policy mandating the systematic denial of parole to all violent felony offenders. Petitioner has submitted numerous documents purportedly in support of this claim; however, the Third Department has squarely rejected all similar contentions (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept., 2003]; Matter of Perez v State of New York, Div. of Parole, 294 AD2d 726, supra; Matter of Jones v Travis, 293 AD2d 800, 801 [3rd Dept., 2002]; Matter of Little v Travis, 15 AD3d 698 [3rd Dept., 2005], Matter of Wood v Dennison, 25 AD3d 1056 [3rd Dept., 2006]; Matter of Ward v New York State Div. of Parole, 26 AD3d 712, 713 [3rd Dept., 2006]; Matter of Hakim-Zaki v New York State Div. of Parole, 29 AD3d 1190 [3rd Dept., 2006]). Thus, the Court finds no merit to this argument.

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate

expectation of, release. Therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD2d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court, accordingly, finds no due process violation.

In addition, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Executive Law § 259-i [2] [a]; Matter of Tatta v State of New York, Div. of Parole, 290 AD2d 907, supra).

The Court has reviewed petitioner's remaining arguments and finds them to be without merit.

The Court finds that the determination of the Parole Board was not in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The Court concludes that the petition must be dismissed.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this

Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: July 30, 2008
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 17, 2008, Petition, Supporting Papers and Exhibits
2. Petitioner's Notice to Admit Truth of Facts dated February 15, 2008
3. Respondent's Response to Notice to Admit Truth of Facts dated May 22, 2008
4. Respondent's Answer dated May 22, 2008, Supporting Papers and Exhibits
5. Affirmation of Assistant Attorney General of Counsel Adrienne Kerwin dated May 22, 2008
6. Petitioner's Reply To Answer filed June 12, 2008

Not Considered:

1. Petitioner's Letter Received July 18, 2008[1]

[1]The letter was submitted *ex parte*, long after final submission of all papers.