STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of
DERRICK R. OMARO, 92-A-0608,

Petitioner,

-against-

GEORGE B. ALEXANDER, CHAIRMAN,
NYS 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 # 01-09-ST0112 Index No. 936-09

Appearances: Derrick R. Omaro
Inmate No. 92-A-0608
Petitioner, Pro Se
Auburn Correctional Facility
PO Box 618
Auburn, NY 13024

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Brian J. O'Donnell, Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Auburn Correctional Facility, has commenced the instant

CPLR Article 78 proceeding to review a determination of respondent dated September 15, 2008, which denied petitioner discretionary release on parole. The respondent opposes the petition seeking its dismissal.

The petitioner, sentenced as a persistent felony offender, is currently serving a controlling term of 10 years to life for the offenses of Robbery, First Degree; Robbery, Second Degree; and Assault, Second Degree. The circumstances underlying these offenses involved the petitioner grabbing the female victim from behind, forcing her to the ground – injuring her in the process. The petitioner then forced the victim into her vehicle, after which the petitioner proceeded to drive that vehicle around town. The petitioner eventually released the victim from the vehicle after robbing the victim of her jewelry and other items. He then drove off in the vehicle.

On August 12, 2008, the petitioner reappeared before the Parole Board but, after a brief discussion, that interview was postponed for a month to allow a mental health evaluation to be conducted. The record of that appearance reveals that the petitioner had refused to submit for such an evaluation. The petitioner noted to the Board that he did not see any need for the evaluation, claiming that the Parole Board would not give it any weight. A member of the panel denied that claim.

On August 28, 2008, the petitioner again failed to attend a scheduled mental health evaluation. He did, however, on September 9, 2008, appear for the seventh time before the Parole Board for an interview. At that interview, the Parole Board discussed the instant offense. The Parole Board also noted that the petitioner had two Tier II violations. Further,

the Parole Board noted the petitioner's efforts at programing and his post-release plans. The Board also gave the petitioner an opportunity to discuss any matters he wanted to raise with the Parole Board.

Following the interview, the Parole Board released its decision, which provided:

> After a review of the record and interview, parole is again denied. You continue to serve 10 to life for Robbery 1st, Robbery 2nd, and Assault, 2nd. You are also serving 3-6 for Grand Larcey [sic] 4th and 2 to 4 for Unauthorized Use of a Motor Vehicle. Your criminal history is poor, with convictions for Burglary and Rape 1st. The Panel finds that your release at this time is incompatible with the public welfare as it would so deprecate the seriousness of the offense as to undermine respect for the law (Parole Board Release Decision Notice [dated 9-15-08], Answer, Exhibit G).

The petitioner then administratively appealed this determination. After the Appeals Unit did not determine that appeal, the petitioner commenced the instant CPLR article 78 proceeding. Here, the petitioner effectively argues that the Parole Board (1) improperly held a parole hearing even though it had not obtained the mental health report after postponing a prior hearing to obtain such a report; (2) failed to consider all the statutory factors since it did not have the sentencing minutes ; (3) predetermined the matter due to governmental policies; and (4) violated the petitioner's due process and equal protection rights by relying solely on the instant offenses.

First, the Court notes that, the sole consequence to the Appeals Unit failure to timely issue a decision is to permit the petitioner to deem his or her administrative remedy to be exhausted, and enable the petitioner to immediately seek judicial review of the underlying determination (see 9 NYCRR 8006.4 [c]; Graham v New York State Division of Parole, 269

AD2d 628 [3rd Dept, 2000], lv denied 95 NY2d 753; People ex rel. Tyler v Travis, 269 AD2d 636 [3rd Dept 2000]). Otherwise, 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 Board 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 of Division of Parole, 294 AD2d 726 [3rd Dept 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, his disciplinary record, and his plans upon release. In addition, the Parole Board allowed the petitioner an opportunity to discuss any other matter he felt warranted the Parole Boards' attention (see Matter of Serna v New York State Div. of Parole, 279 AD2d 684, 684-685 [3d Dept 2001]). Further, the decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept 1993]).

With regard to the Parole Board's purported failure to consider the sentencing minutes, contrary to the petitioner's contention, the sentencing minutes were before the Parole Board. The Court observes that only the relevant statutory directive requires that the Parole Board consider the *recommendations* of the sentencing court (see Executive Law 259-i [2] [c] [A] [emphasis supplied] last sentence, which makes reference to the provisions of Executive Law § 259-i [1] [a]). Since the sentencing minutes were before the Parole Board,

it complied with its statutory obligation.

Likewise, the Court is not persuaded that the determination should be annulled in this instance since a new mental health evaluation was not before the Parole Board. Here, the petitioner on at least two occasions refused to attend such evaluation. Additionally, the record shows that the Parole Board postponed the petitioner's appearance for a month to essentially allow him to change his mind and attend the evaluation, which the petitioner did not. Further, the record reflects that the Parole Board even discussed with the petitioner the importance of complying with the request for an evaluation.

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, 1367-1368 [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 AD3d 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.

With respect to petitioner's equal protection argument, the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562; Maresca v Cuomo, 64 NY2d 242, 250). In this instance there is simply no evidence of either selective or disparate treatment or that the respondent's determination was motivated by impermissible considerations (see Giordano v City of New York, 274 F3d 740, 751 [2nd Cir. 2001]). In addition, because "New York courts addressing a state equal protection claim will ordinarily afford the same breadth of coverage conferred by federal courts under the US Constitution in the same or similar matters" (Brown v State of New York, 45 AD3d 15, 20-21 [3rd Dept 2007], quoting Brown v State of New York, 9 AD3d 23, 27 [3d Dept 2004]), the Court discerns no violation of NY Const art 1 § 11. The Court finds the argument to have no merit.

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 Division of Parole, 205 AD2d 906, 907 [3rd Dept 1994]; Matter of Sinopoli v. New York State Board

of Parole, 189 AD2d 960, supra; Matter of Dudley v Travis, 227 AD2d 863 [3rd Dept 1996]), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept 1998]). 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 Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept 2008]). 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 Division of Parole, 3 AD3d 816 [3rd Dept 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

Further, the fact that an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept 2008]). 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 petitioner's sentence (see Matter of Silmon v

Travis, 95 NY2d 470, 476 [2000]; 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]). Moreover, the record does not support petitioner's assertion that the decision was predetermined consistent with an alleged executive branch policy mandating denial of parole to all violent felony offenders. The Court, accordingly, finds no merit to the argument (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3rd Dept 2003]; Matter of Perez v State of New York Division of Parole, 294 AD2d 726 [3rd Dept 2002]; 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 Motti v Dennison, 38 AD3d 1030, 1031 [3rd Dept 2007]).

Otherwise, the Court has reviewed petitioner's remaining arguments and finds them to be without merit. Thus, since petitioner has failed to meet his burden of showing the Parole Board's determination exhibited irrationality bordering on impropriety, judicial interference is unwarranted (Matter of Silmon, 95 NY2d at 476; Matter of Farid, 17 AD3d at 754).

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly, it is

ORDERED and ADJUDGED that the petition is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are

being delivered to the County Clerk for filing. The signing of this decision/order/judgment and delivery of the decision/order/judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: July 30, 2009
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 11, 2009, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 14, 2009, Supporting Papers and Exhibits
3. Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General dated March 14, 2009.