STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of
SHERMAN SYMES,

Petitioner,

-against-

FELIX ROSA, CHAIRMAN NEW
YORK STATE BOARD 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-ST0096 Index No. 2317-09

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Groveland Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated March 25, 2008, which denied petitioner discretionary release on parole. The respondent opposes the petition seeking its dismissal.

The petitioner is currently serving a term of 25-years to life following a guilty verdict on December 18, 1981 on the charge of Murder, Second Degree. The circumstances underlying this conviction involved the petitioner, then 17-years-old, entering a neighbor's house ostensibly to return a misdirected piece of mail. Within a few minutes of being in that house, the petitioner had stabbed the 36-year-old, female victim 21 times.

On March 25, 2008, the petitioner reappeared before the Parole Board for the second time. At that interview, the Parole Board discussed the instant offense with the petitioner, including a discussion with respect to the insights that the petitioner has gained over his 27-years of incarceration regarding what lead him to commit the murder. The Parole Board also took note of the petitioner's disciplinary record and congratulated him on his fine efforts at programming and his educational endeavors. In addition, the Parole Board discussed the petitioner's post-release plans, which include living with his wife of 14-years and attempting to further his education in psychology. 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, the panel has determined that if released at this time, that your release would

> be incompatible with the welfare of society. This decision is based on the following factors: Your instant offense murder 2nd involved you fatally stabbing your victim. This offense represents your only felony conviction. You have maintained a satisfactory disciplinary record since January of 1998. This panel notes your positive programmatic participation, including completion of Phase III, ASAT and ART. You have also continued your productive work as a clerk in the library (Parole Board Release Decision Notice [dated3-31-08], Answer, Exhibit E).

The Parole Board directed that he be held for 24 months.

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. Among the arguments advanced by the petitioner, he maintains that the Parole Board (1) rendered a determination that was irrational bordering on impropriety; (2) failed to consider all the statutory factors, including factors favoring release and improperly relied solely on the instant offense; (3) rendered a predetermined decision; (4) illegally re-sentenced the petitioner; (5) placed on excessive hold on him; and (6) violated the separation of powers doctrine and the petitioner's right to due process.

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. The record before the Court reveals that the Parole Board reviewed the sentencing minutes and the pre-sentence report as well as the Inmate Status Report. 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]). While the petitioner argues that the majority of the time he was before the Parole Board the discussion only concerned the underlying offense, that is a mis-characterization of the interview. As noted, during that interview the Parole Board also discussed with the petitioner any insights he gained while incarcerated that would lead to his ability to live a crime-free, productive life if released. Further, the parole decision (supra) 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]).

The Court rejects petitioner's argument that the Parole Board usurped the sentencing court's authority by holding him for 24 months. "The scheduling of the reconsideration hearing was a matter for the Board to determine in the exercise of its discretion, subject to the statutory 24-month maximum" (Matter of Tatta v State of New York, Div. of Parole, 290 AD2d 907, 908 [3d Dept 2002]). Thus, the Parole Board neither usurped the sentencing court's authority nor violated the separation of powers doctrine (see Matter of Marsh v New York State Div. of Parole, 31 AD3d 898, 898 [3d Dept 2006]; Matter of Abascal v New York State Bd. of Parole, 23 AD3d 740, 741 [3d Dept 2005]; Connelly v New York State Div. of Parole, 286 AD2d 792, 793 [3d Dept 2001], lv dismissed 97 NY2d 677). Likewise, the Court rejects petitioner's argument that the additional hold of 24 months is excessive. Nothing in the record suggests that the Parole Board abused its discretion in holding petitioner for the maximum statutory period (see Matter of Marsh, 31 AD3d at 898; Matter of Abascal, 23 AD3d at 741).

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.

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]). The Court notes that parole is not a reward for good conduct or efficient performance of duties while confined (see Matter of Lue-Shing v Pataki, 301 AD2d 827, 828 [3d Dept 2003], lv denied 99 NY2d 511, quoting Matter of Silmon, 95 NY2d at 476). Here, the record makes clear that the Parole Board was not only aware of the petitioner's institutional and educational achievements but positively commented about them. Further, during the interview, the Parole Board essentially acknowledged that the weighing of factors in this instance was very difficult.

The Court has reviewed petitioner's remaining arguments and finds them to be without merit. Inasmuch as petitioner has failed to satisfy 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 being returned to the attorney for the respondents. All other

papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/ judgment and delivery of this decision/order/judgment does 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: September 2, 2009
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition dated March 13, 2009;
2. Petition verified March 5, 2009, with accompanying Exhibits;
3. Answer verified May 13, 2009, with accompanying Exhibits A-G;
4. Affirmation of Robert M. Blum, Esq., Assistant Attorney General dated May 13, 2009;
5. Reply Affirmation of Bennet Goodman, Esq., dated May 26, 2009.