STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of HERBERT DURANT EDNEY,

Petitioner,

-against-

CHAIRPERSON OF THE 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 # 01-10-ST1136 Index No. 59-10

Appearances: Herbert Durant Edney
Inmate No. 74-A-1456
Petitioner, Pro Se
Fishkill Correctional Facility
P.O. Box 307
Beacon, NY 12508

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Justin C. Levin,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Fishkill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated March 24, 2009 to deny petitioner discretionary release on parole. This was his tenth appearance before the

Parole Board.

In 1974 the petitioner was convicted (after trial) of the following crimes: manslaughter first degree, kidnaping second degree, and kidnaping first degree. On May 3, 1975 the petitioner was sentenced to the following concurrent terms of imprisonment: manslaughter first degree, 0 to 25 years; kidnaping second degree, 0 to 25 years; kidnaping first degree, 25 years to life. Among the many arguments set forth in the petition, petitioner points out that he is now eighty years of age, and has been incarcerated since he was age thirty-nine. He indicates that during his incarceration he has been employed in various jobs, and has been granted a number of certificates and diplomas for successful programing. According to the petitioner, his health has deteriorated during his imprisonment. He has been diagnosed with prostate cancer, a leaking heart valve, poor kidney function and pre-cancerous lesions of the esophagus. The petitioner argues that the determination to deny release is irrational by reason that the Parole Board improperly mentioned the manslaughter conviction in its decision, which he contends was inappropriate by reason that his sentence on that charge has been fully served.[1] He maintains that the Parole Board failed to consider the proper statutory factors under Executive Law § 259-i, including his good disciplinary record, academic and therapeutic accomplishments, programing, family support and an offer of employment. In his view, the Parole Board improperly relied solely upon the seriousness of the crimes for which he was convicted. The petitioner argues that the Parole Board, by repeatedly denying parole release has, in effect, altered his sentence. He also maintains that his constitutional right to equal protection of the law has been violated, citing examples of fellow inmates who were convicted of multiple homicides, but have since been released to parole. The petitioner objects to certain special

---

[1]The petitioner also advances an argument that because the concurrent sentences merged under the provisions of Penal Law § 70.30, the manslaughter sentence "was never being served".

conditions which have been recommended by the facility parole officer which he claims relate to sex offenders. Lastly, the petitioner maintains that the Parole Board relied upon erroneous factual information concerning his criminal record. Specifically, he asserts that the inmate status report contains a reference to his arrest in 1968 on the kidnaping and homicide charges. He indicates that the inmate status report incorrectly states that the kidnaping involved a demand for ransom.

Turning first to a threshold issue, the petitioner maintains that respondent's answer, served on March 12, 2010, was untimely. The Court observes that under CPLR 7804 (c) answering papers must be served at least five days before the return date. In this instance, the return date was Friday, March 19, 2010. Inasmuch as respondent's papers were served seven days prior to the return date, the Court finds that respondent's answer and supporting papers were timely and may be considered..

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

> " Parole is denied. After careful review of your record, personal interview and due deliberation, it is the determination of this Panel that if released at this time there is a reasonable probability that you would not live at liberty without violating the law. Release at this time is incompatible with the welfare and safety of the community and would so deprecate the seriousness of this crime as to undermine respect for the law. This decision is based upon the following factors: the serious nature of the instant offense of kidnaping 1st, kidnaping 2d and manslaughter 1st, wherein you took an eight-year-old girl's life away by brutally and viciously stabbing her to death. You continue to lack remorse and minimize these offenses. This was a heinous crime, with a total disregard for the life of this defenseless human being. Your criminal history reflects a prior felony conviction, wherein you violated parole. It is noted that you have maintained a fair disciplinary record and have programmed well while serving the State sentence. Your letters of support have been considered. However considering all relevant factors, parole release is denied."

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 De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). If the Parole Board's decision is made in accordance with the statutory requirements, the Board's determination is not subject to judicial review (Matter of De La Cruz v Travis, supra). 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 being released, which include relocating to Virginia to be with his sister. The petitioner was afforded ample opportunity during the parole interview to explain why he should be released. 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 Dept., 1994]; Matter of Green v. New York State Division 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 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). Simply stated, the Parole Board properly considered the fact that the petitioner caused the death of his eight year old victim during the kidnaping for which he stands convicted and is still serving time.

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]).

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 and 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 [2007 [3rd Dept., 2007], quoting Brown v State of New York, 9 AD3d 23, 27 [2004]), the Court discerns no violation of NY Const art 1 § 11. The Court finds the argument to have no merit.

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 Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

With respect to the alleged factual error concerning the statement in the inmate status report that the kidnaping was for ransom, the petitioner was given ample opportunity to correct the error during the parole interview, which he in fact did. Nor is there any indication in the record that the determination was affected by an error of fact (see Matter of Restivo v New York State Board of Parole, 70 AD3d 1096 [3rd Dept., 2010]; Matter of Morel v Travis, 278 AD2d 580 [3d Dept., 2000], appeal dismissed 96 NY2d 752 [2001]; Matter of Abascal v New York State Board of Parole, 23 AD3d 740, 741 [3rd Dept., 2005]; Matter of Ponder v Alexander, 56 AD3d 848, 849 [3rd Dept., 2008]).

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

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

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.

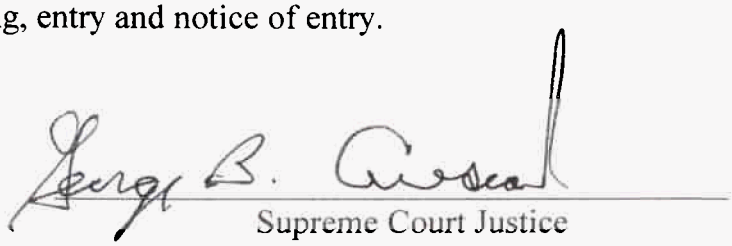
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is 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 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: April 21, 2010
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated January 19, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 11, 2010, Supporting Papers and Exhibits
3. Petitioner's Letter dated March 22, 2010
4. Letter of Justin C. Levin, Assistant Attorney General dated March 29, 2010