STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
FREDERICK FRANKLIN, #85-A-1567,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2010-0216.39
INDEX # 2010-533
ORI #NY016015J

-against-

NEW YORK STATE BOARD
OF PAROLE,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Frederick Franklin, verified on April 6, 2010 and filed in the Franklin County Clerk's office on April 21, 2010. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the April, 2009 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on April 27, 2010 and has received and reviewed respondent's Answer, including Confidential Exhibits B and D, verified on June 21, 2010, supported by the Affirmation of C. Harris Dague, Esq., Assistant Attorney General, dated June 21, 2010. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on July 19, 2010.

On February 13, 1985 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2½ to 5 years upon his conviction of the crime of Attempted Burglary 2°. On March 13, 1986 petitioner was sentenced in the same court, as a second felony offender (predicate felony offender), to

concurrent indeterminate sentences of 25 years to life, 12½ to 25 years and 7½ to 15 years upon his convictions of the crimes of Murder 2°, Attempted Murder 2° and Assault 1°. Petitioner made his initial appearance before a Parole Board on April 28, 2009. Following that appearance a decision was rendered denying him discretionary parole release and directing that he be held for an additional 24 months. All three parole commissioners concurred in the denial determination which reads as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSE ATT. BURGLARY 2ND, MURDER 2ND, ATT. MURDER 2ND, ASSAULT 1ST, REPRESENTS A CONTINUATION OF A CRIMINAL HISTORY THAT INCLUDES PRIOR CONVICTIONS FOR CPW 3RD AND ASSAULT 3RD. THIS PANEL NOTES YOU CONTINUED WORK AS A PORTER AND YOUR COMPLETION OF PHASE I AND ART."

Documents perfecting petitioner's administrative appeal from the parole denial determination were received by the Division of Parole Appeals Unit on October 1, 2009 and October 2, 2009. The Appeals Unit, however, failed to issue its findings and recommendation within the four-month time frame specified in 9 NYCRR §8006.4(c). This proceeding ensued.

Executive Law §259-i(2)(c)(A) provides, in relevant part, as follows: "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 . . .[and] (iii) release plans including community resources, employment, education and training and support services available to the inmate . . .” In addition to the above, where the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and the inmate’s prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a).

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5)) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Vasquez v. Dennis*on, 28 AD3d 908, *Webb v. Travis*, 26 AD3d 614 and *Coombs v. New York State Division of Parole*, 25 AD3d 1051. Unless the petitioner makes a “convincing demonstration to the contrary” the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

A significant portion of the petition is focused, in one way or another, on the assertion that the parole denial determination was improperly based solely on the nature and severity of the crimes underlying petitioner’s incarceration, without consideration of other statutory factors. A parole board, however, need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole

determination, nor is it required to expressly discuss each of those factors in its written decision. *See Martin v. New York State Division of Parole*, 47 AD3d 1152, *Porter v. Dennison*, 33 AD3d 1147 and *Baez v. Dennison,* 25 AD3d 1052, *lv den* 6 NY3d 713. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination "... is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior. *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

A review of the Inmate Status Report and the transcript of the parole hearing reveals that the Board had before it, and considered, the appropriate statutory factors including petitioner's programming and vocational achievements, disciplinary record and release plans, as well as the circumstances of the crimes underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. During the course of the April 28, 2009 parole interview the commissioners posed no questions with respect to the specific circumstances of the crimes underlying petitioner's incarceration. Rather, petitioner was broadly asked if there was anything he would like to say about his convictions and was thus provided an opportunity to express remorse and a desire to change his previous lifestyle. Much of the parole interview involved a discussion with regard to petitioner's release plans, including potential post-release programing and living arraignments. The petitioner was also afforded an open-ended opportunity at the

conclusion of the parole hearing to make his own statement to the presiding commissioners. In view of the foregoing, the Court finds no basis to conclude that the Parole Board failed to consider the relevant statutory factors. *See Pearl v. New York State Division of Parole,* 25 AD3d 1058 and *Zhang v. Travis*, 10 AD3d 828.

Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration. *See Cody v. Dennison*, 33 AD3d 1141, *lv den* 8 NY3d 802, *Bonilla v. New York State Board of Parole*, 32 AD3d 1070 and *Vasquez v. Dennison*, 28 AD3d 908.

Petitioner next asserts that the Parole Board's failure to consider the relevant sentencing minutes requires the reversal of the parole denial determination. According to petitioner, "[i]n this matter, as the [1986] sentencing Judge ran his sentences concurrently, rather than consecutively, there is an underlying intent that the Judge did not intend for petitioner to serve more than the minimum of his indeterminate sentence." Citing the unreported decision of the Supreme Court, Kings County, in *Duffy v. New York State Division of Parole*, 23 Misc 3d 1130A, petitioner goes on to assert that "[i]f the sentencing minutes are unavailable, the Board is required to afford the inmate a favorable inference as to sentencing recommendations from the trial Judge." This Court notes, however, that on June 8, 2010 the Supreme Court-level decision in *Duffy* was reversed on direct appeal to the Appellate Division, Second Department. *Duffy v. New York State Division of Parole*, 74 AD3d 965.

In the case at bar it is not disputed that petitioner's Parole Board did not have a copy of any sentencing minutes before it. At the outset of the April 28, 2009 parole interview the petitioner was advised by a parole commissioner that the Board " . . . postponed your interview in February because we didn't have sentencing minutes and we wanted to request them. We did request them again and we still have not received the sentencing minutes. They're unavailable." In this regard the Court notes that Exhibit J, annexed to the respondent's answer, includes a copy of a letter dated February 5, 2009 from a parole officer at the Franklin Correctional Facility to the Chief Clerk of the Criminal Term of the Supreme Court, New York County requesting copies of the 1985 and 1986 sentencing minutes.[1] Although respondent's Exhibit J also includes a December 2, 2009 statement from a Principal Court Reporter in New York County with respect to the unavailability of petitioner's sentencing minutes, the Court notes that the statement only purports to be applicable to the 1985 sentencing minutes. In any event, at the re-scheduled April 28, 2009 parole interview petitioner was asked if he could recall any thing from his sentencing that the Parole Board should know about. He responded, "[t]o be honest with you, it's nothing good." A parole commissioner then commented "[s]o it's probably just as well we don't have them then at this juncture." The petitioner responded "[y]es."

In the absence of any indication that the 1985/1986 sentencing minutes contained any recommendation as to parole, the failure of the Board to obtain and consider such minutes did not prejudice the petitioner. *See Porter v. Alexander*, 63 AD3d 945.

[1] Although the heading of the letter correctly refers to the petitioner by name and by DIN number, and also correctly references petitioner's 1985 and 1986 sentencings by dates and indictment numbers, it is noted that the body of the letter contains a seemingly incorrect reference to Indictment No. 1763-98.

Notwithstanding the erroneous indictment number reference in the body of the February 5, 2009 request letter (see note #1), this Court is satisfied that parole officials duly requested that the sentencing court provide them with copies of petitioner's 1985 and 1986 sentencing minutes but such minutes were not so provided. While the subsequent correspondence from the Principal Court Reporter in New York County only specifically referenced the unavailability petitioner's 1985 sentencing minutes, there is simply nothing in the record to suggest that the 1986 minutes were available. Where, as here, the Parole Board is unable, rather than simply fails, to consider the relevant sentencing minutes, no favorable presumption of a parole recommendation at sentencing arises. *See Lebron v. Alexander*, 68 AD3d 1476. In any event, petitioner's previously-quoted statements at the April 28, 2009 parole interview clearly suggest that the 1986 sentencing judge made no favorable parole recommendations. The mere fact that petitioner's 1986 sentencing court directed its sentences to run concurrently with each other, moreover, cannot be construed as a favorable parole recommendation. *See Duffy v. New York State Division of Parole*, 74 AD3d 965.

The Court next finds that the parole denial determination, predicated upon the statutory basis that petitioner's release would be incompatible with the welfare of society (Executive Law §259-i(2)(c)(A)) and based upon the nature of the crimes underlying petitioner's most recent convictions as well as his prior criminal history, is in compliance with statutory and judicial standards. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295. *Cf. Vaello v. Parole Board Division of State of New York*, 48 AD3d 1018.

Finally, the Court finds petitioner's equal protection argument, based upon allegations that his co-defendant and similarly situated parole applicants with violent and

serious offenses and past violent criminal histories have been granted parole, to be without merit. In this regard the Court finds that equal protection analysis is particularly unsuitable when examining a Parole Board performing its highly discretionary "judicial function" (Executive Law §259-i(5)) of determining which inmates are suitable for parole release. In performing this function the Parole Board must consider the unique personalities, experiences and criminal histories of each inmate appearing before it and this Court rejects the proposition that the Board's disposition of any given case can be meaningfully compared to another for equal protection purposes.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: August 31, 2010 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice