STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of FRANCHOT MURPHY, 83-A-3178,
Petitioner,

-against-

STATE OF NEW YORK EXECUTIVE DEPARTMENT DIVISION OF PAROLE APPEALS UNIT,
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-ST1337 Index No. 651-10

Appearances:

Franchot Murphy
Inmate No. 83-A-3178
Petitioner, Pro Se
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Altona, New York 12910-2090

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Attorney For Respondent
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Altona Correctional Facility, commenced the instant

CPLR Article 78 proceeding to review a determination of respondent dated February 11, 2009 to deny petitioner discretionary release on parole. Petitioner is serving a term of twenty five years to life for murder in the second degree, as well as a term of five to fifteen years for attempted robbery in the first degree. Among the many arguments set forth in the petition, petitioner contends that the board failed to apply all of the Executive Law §259-i factors. Petitioner asserts his denial of parole amounts to a re-sentencing. Petitioner contends his twenty four month hold is excessive. Petitioner also argues that the court considered unlawful information such as his juvenile records and records of arrest to determine whether petitioner should be paroled.

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

> "After a careful review of the record, your appearance before the parole board, and deliberation, parole is denied. The instant offense murder 2nd and att. Robbery 1st involved you being found guilty of shooting the manager of a business causing his death during an attempted robbery. This behavior exhibited a depraved indifference to human life. Your criminal history dates back to the 1970's as an adjudicated Y.O. Since your last appearance before the parole board you have incurred two Tier II disciplinary infractions, your most recent a Tier II for property unauthorized and vandal/stealing in December 2008 for which you provided an explanation. During your interview you appeared to have given much thought to your values and discussed how you believe you have gained a value system since the instant offense. However you spoke little about how your actions took the life of another. What we do not see is a legitimate release plan. While there is a letter from one family member there are no letters of reasonable assurance from agencies/organizations willing to assist you, letters from potential employers, or other various letters of support. Consideration has been given to your completion of correction programs and positive demeanor. Continue to focus on positive life goals, refrain from future tickets and develop a release plan.

> This panel finds your release at this time is not in the best interest of society making parole inappropriate for you at this time."

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 Bd. of Educ., 34 NY2d 222 [1974]).

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 release. 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 Young v New York Division of Parole, 74 AD3d 1681 [3rd Dept., 2010]; 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).

Petitioner's claims that the determination to deny parole is tantamount to a re-sentencing, in violation of the Double Jeopardy Clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., Westchester Co., 2006]). 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]).

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

To the extent that the Parole Board considered petitioner's youthful offender record, that would appear to be proper (see Criminal Procedure Law § 720.35 [2])[1]. Even if petitioner's parole records improperly include arrest information with regard to sealed criminal matters, there is no evidence that the Board relied upon this information in making its determination, and any alleged error would appear to be harmless (see Matter of Gardiner v New York State Division of Parole, 48 AD3d 871, 872 [3rd Dept., 2008]).

The Court has reviewed petitioner's remaining arguments and contentions and finds

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[1]Criminal Procedure Law § 720.35[2] recites, in part, as follows:

> "[e]xcept where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers...relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency, other than ...the division of parole and a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law."

them to be without merit[2]. 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 Court concludes that the petition must 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: September 30, 2010
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated March 11, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 13, 2010, Supporting Papers and Exhibits

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[2]The Court has limited its review to those arguments and grounds expressly raised by the petitioner.