STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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In The Matter of JAMES WASHINGTON,

Petitioner,

-against-

ANDREA D. EVANS, Commissioner,
New York State Division of Parole,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

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Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2940 Index No. 5012-11

Appearances: James Washington
Inmate No. 95-A-7306
Petitioner, Pro Se
Livingston Correctional Facility
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**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Livingston Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated January

25, 2011 to deny petitioner discretionary release on parole. Petitioner is currently serving concurrent terms of imprisonment consisting of an indeterminate sentence of twenty years to life for murder in the second degree, and an indeterminate sentence of five to fifteen years for criminal possession of a weapon second degree.

Among the arguments set forth in the petition, petitioner contends that during his incarceration he has completed all programs mandated by the Department of Corrections and Community Services ("DOCCS"). He indicates that he has a supportive family, and has letters requesting that he be released. He maintains that the Parole Board erred in considering a youthful offender adjudication, and that this violated his constitutional and statutory right to procedural due process.

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

> "Denied 24 [months] to 11/2012. Parole is denied.
>
> "After a careful review of your record, your 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 wold not live at liberty without violating the law. Your release at this time is incompatible with the welfare and safety of the community, and will so deprecate the seriousness of the crime as to undermine respect for the law.
>
> "This decision is based upon the following factors: You appear before this Panel with the serious instant offenses of murder second and criminal possession of a weapon second; wherein you shot the victim multiple times causing his death. Your record includes a YO adjudication for robbery second. In addition, you have a poor record while in prison, which include multiple Tier II infractions and a Tier III infraction.
>
> "Consideration has been given to any program completion; however, your release at this time 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 procedures 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 interactions 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 while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." (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]). 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 improved disciplinary record, and his plans upon release. He was given ample opportunity to speak on his behalf. 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 Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; 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 Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [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).

"[C]ontrary to petitioner's assertion, the Board was entitled to consider the otherwise confidential information regarding petitioner's prior youthful offender adjudications in arriving at its parole determination (see CPL 720.35 [2])" (Matter of Martin v New York State Division of Parole, 47 AD3d 1152, [3rd Dept., 2008]). While the petitioner indicates that the Parole Board referred to the youthful offender adjudication as a conviction, that is not what the Parol Board stated. The youthful offender adjudication was properly considered. Thus, there was no statutory or constitutional due process violation. The case of Hughes v NYS Division of Parole (21 AD3d 1176 [3d Dept., 2005]), cited by the petitioner, is not applicable because

in that case, the Parole Board there incorrectly referred to a youthful offender adjudication as a felony conviction. For that reason, the matter was remanded to the Parole Board for a new parole interview. That is not the situation here.

Lastly, 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).

The Court has reviewed 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: November 16, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated August 11, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated October 13, 2011, Supporting Papers and Exhibits
3. Petitioner's Reply dated October 19, 2011