STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
DWIGHT JAMES,#84-A-7255,

Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #44-1-2011-0409.21
INDEX #136245
ORI # NY044015J

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 Dwight James, verified on May 23, 2011 and filed in the St. Lawrence County Clerk's office on May 31, 2011. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the September 2010 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on June 3, 2011 and has received and reviewed respondent's Answer/Return, including confidential Exhibits D and C, verified on July 14, 2011. The Court has also received and reviewed petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on July 21, 2011.

On November 14, 1984 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Robbery 3°. The criminal offense underlying petitioner's 1984 conviction was committed on October 11, 1983. On November 6, 1985, petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to a controlling indeterminate sentence of 25 years to life upon his convictions of the crimes of Murder 2°, Robbery 1° and Robbery 2°. The criminal offenses underlying petitioner's

1985 convictions were committed on January 23, 1984, apparently while petitioner was out on bail from the charges associated with his 1984 conviction.

After having been denied discretionary parole release on one previous occasion, petitioner made his second appearance before a Parole Board, by teleconference, on September 14, 2010. Following that appearance a decision was rendered again denying petitioner parole release and directing that he be held for an additional 24 months. Both parole commissioners concurred in the denial determination which reads as follows:

> "After review of the record and interview the Panel has determined if released at this time your release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law. This decision is based on the following factors:
>
> Your instant offenses are murder second degree, robbery first degree, robbery second degree and robbery third degree, your crimes involve you shooting and killing a victim in a supermarket during the course of a robbery. You were also involved in a prior robbery. These crimes are a severe escalation and continuation of a criminal history that includes theft related convictions and you were undeterred by prior court intervention and leniencies. The Board notes your improved discipline and well prepared personal parole summary, which outlines your numerous accomplishments and letters of support. All factors considered, however, your release at this time is not appropriate. More compelling is the senseless loss of life of an innocent victim and the extreme violence exhibited in the instant offenses."

The document perfecting petitioner's administrative appeal was received by the Division of Parole Appeals Unit on December 1, 2010. 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, as here, the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense (with “due consideration” to, among other things, the “recommendations of the sentencing court . . .”) as well as the inmate’s prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a).[1]

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.

Petitioner first asserts that the Inmate Status Report (ISR)prepared in anticipation of his September 14, 2010 Parole Board appearance repeats erroneous information

[1] The quoted excerpts, from Executive Law §§259-i(2)(c)(A) and 259-i(1)(a) are taken from those statutes as they existed at the time of the September 2010 parole denial determination. Executive Law §259-i(1) was repealed and Executive Law §259-i(2)(c)(A) was amended by L 2011, ch 62, part C, subpart A,§§38-f and 38-f-1, effective March 31, 2011. The amendments to Executive Law §259-i(2)(c)(A) include the incorporation of relevant language from repealed Executive Law §259-i(1)(a).

originally set forth in the pre-sentence investigation report. In describing the events leading up to the criminal acts underlying petitioner's 1985 convictions, it is stated on page two of the ISR (under the heading "PRESENT OFFENSE: INDICT #3071-84") that "[o]n 1-23-84 [co-defendant] Sergio Parrilla met [petitioner] Dwight James on the street, who was talking with [co-defendants] Steven Rogers and James Reed, also know as 'his group.' Parrilla noticed that James, Rogers and Reed had guns. James asked Parrilla and the other two men if they wanted to partake in a robbery of a delicatessen." Citing the trial testimony of his various co-defendants, however, petitioner asserts that the ISR erroneously ascribes a leadership role in the criminal undertaking to him, rather than co-defendant James Reed.

When an individual is convicted of a felony the trial court is generally required to order a pre-sentence investigation of the defendant and sentence may not be pronounced until the court has received a written report of the investigation. *See* CPL §390.20(1). "The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included." CPL §390.30(1) (emphasis added). Due process considerations require that the sentencing court must assure itself that the information forming the basis of the sentence imposed is reliable and accurate. *See People v. Outley*, 80 NY2d 702. CPL §390.40(1) specifically authorizes a criminal defendant to file a written memorandum with the court, at any time prior to sentencing, setting forth such information as the defendant deems pertinent to his or her sentencing, including information with respect any of the matters set forth in CPL §390.30. The Criminal Procedure Law also authorizes the court to conduct a pre-sentence conference for the purpose of resolving "... discrepancies between

the pre-sentence report, or other information that the court has received, and the defendant's . . . pre-sentence memorandum . . ." CPL §400.10(1). Thus, there is established in the Criminal Procedure Law a mechanism by which the petitioner could have challenged the accuracy of any information contained in the pre-sentence report. There is no allegation that petitioner availed himself of that opportunity. Instead, he seeks, in effect, to collaterally challenge the accuracy of the pre-sentence investigation, more than a quarter of a century after the fact, in this proceeding. The Court, however, finds petitioner's challenge untimely in that it should have been addressed to the sentencing court prior to sentencing. *See Hughes v. New York City Department of Probation*, 281 AD2d 229, *Sciaraffo v. New York City Department of Probation*, 248 AD2d 477 and *Salahuddin v. Mitchell*, 232 AD2d 903.

To the extent petitioner asserts that the allegedly erroneous information set forth in the ISR was simply copied from the pre-sentence investigation, the Court notes that on the lower portion of page two of the ISR (under the heading "INMATE'S STATEMENT") petitioner is reported to have said " . . .that James Reed was the main person in the robbery, and that he had the guns. The subject [petitioner] also added that the phrase, 'his group,' in the write-up of the present offense refers to James Reed and not the subject." In any event, the Court finds nothing in the record to indicate that the alleged erroneous information regarding petitioner's leadership role in the criminal acts underlying his 1985 convictions served as a basis for the parole denial determination. *See Restivo v. New York State Board of Parole*, 70 AD3d 1096.

Citing Executive Law §259-i(1)(a) petitioner next asserts that the parole denial determination was fatally flawed by reason of the Board's failure to obtain a copy of the 1985 sentencing minutes and the resulting failure of the Board to consider the recommendations of the sentencing court. According to petitioner, he "vividly" recalled that the 1985 sentencing court " . . .made statements relevant to the crime, the sentence

and parole concerns during sentencing, which could impact the Board of Parole's considerations and final determination."

It is not disputed that the Parole Board considering petitioner for discretionary release did not have before it a copy of the relevant sentencing minutes. The respondent asserts, however, that unsuccessful efforts were made to secure a copy of such minutes from the sentencing court. In support of this assertion the respondent annexed to its answer as Exhibit G copies of multiple requests to the sentencing court for the production of the sentencing minutes, dated May 27, 2008, February 2, 2010 and May 19, 2010, together with correspondence from a representative of the sentencing court, dated June 23, 2011 and June 24, 2011, stating that "[a] diligent effort was made to locate the stenographic notes. Unfortunately we have been unsuccessful in finding these notes, and we are unable to provide the requested minutes."

A Parole Board considering a DOCCS inmate for discretionary release is clearly required to take into account any parole recommendation of the sentencing judge and is therefore ordinarily required to have before it a copy of the relevant sentencing minutes. *See Standley v. New York State Division of Parole*, 34 AD3d 1169 and *McLaurin v. New York State Board of Parole*, 27 AD3d 565. Notwithstanding the foregoing, however, where, as here, the failure of a Parole Board to consider the relevant sentencing minutes is the result of a documented inability on the part of the sentencing court to provide a copy of the minutes, such failure does not render a parole denial determination irrational to the point of impropriety. *See Geraci* v. *Evans*, 76 AD3d 1161, *Blasich v. New York State Board of Parole*, 68 AD3d 1339 and *Freeman v. Alexander*, 65 AD3d 1429.

The remainder of the petition is focused, in one way or another, upon the assertion that the Parole Board failed to give adequate consideration to statutory factors other than the nature/circumstances of the crimes underlying petitioner's current incarceration and his criminal history. 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 ISR and the transcript of the parole hearing reveals that the Board had before it, and considered, the appropriate statutory factors including petitioner's programming, vocational and academic achievements, "improved" disciplinary record, release plans, family support, as well as the circumstances of the crime underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. During the course of the September 14, 2010 Board appearance, moreover, petitioner was specifically afforded an opportunity to discuss " . . .anything in particular in your parole packet that you want to point out that you are particularly proud of or want to highlight for our attention." 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 and his prior criminal history. *See*

Veras v. New York State Division of Parole, 56 AD3d 878, *Serrano v. Dennison,* 46 AD3d 1002, *Schettino v. New York State Division of Parole,* 45 AD3d 1086 and *Farid v. Travis,* 17 AD3d 754, *app dis* 5 NY3d 782. The Court notes, moreover, that the Parole Board's reference to petitioner's "improved discipline" can be viewed as constituting double-edged praise. The Board indeed found it noteworthy that petitioner had committed no disciplinary infractions in the 28 months leading up to his September 14, 2010 appearance. Petitioner, citing *Silmon v. Travis*, 95 NY2d 470 at 477, in paragraph 28 of his petition, characterized this development as ". . . exemplifying the 'strong rehabilitative component' underlying the statutory scheme inherent in an indeterminate sentencing structure." A review of the Inmate Disciplinary History printout, annexed to respondent's Answer/Return as part of Exhibit A, however, reveals 10 Tier III infractions and 29 II infractions between August 30, 1989 and May 9, 2008. When petitioner was denied discretionary parole release following his first Parole Board appearance in September of 2008 the Board found that petitioner had " . . .demonstrated a propensity for neglect and out-of-control behavior leading to ongoing sanctions. You [petitioner] have not demonstrated an ability to abide by the rules, therefore, positive-re-entry is unlikely at this time." Although petitioner's clean disciplinary record in the 28 months leading up to his September 14, 2010 Board re-appearance is obviously significant, it is certainly not illogical to view that factor as somewhat less compelling than if such record spanned a substantially broader portion of petitioner's overall period of incarceration.

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: September 15, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court