STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JOHN PLATTEN,

Petitioner,

-against-

NYS DIVISION 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 # 01-12-ST3579 Index No. 849-12

Appearances: John Platten
Inmate No. 90-C-0145
Petitioner, Pro Se
Livingston Correctional Facility
P.O. Box 1991
Sonyea, NY 14556

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Livingston Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated July 20, 2011 to

deny petitioner discretionary release on parole.[1] He is serving a term of 20 years to life upon a conviction of the crime of second degree murder. The petitioner indicates that he is 51 years of age and has been incarcerated for almost 23 years. He points out that he has had only one disciplinary infraction during his incarceration; that he had outside clearance without supervision for three years; that he works as a paralegal assistant in the law library. He indicates that he has only prior misdemeanor conviction (for driving while intoxicated), and has appropriate release plans, which include guaranteed job offers. He has completed all programming requirements. He acquired a bachelor's degree in science, and has a paralegal certificate from the University of Buffalo School of Law. In support of his release, he has submitted 70 letters from from correction officers and staff, and a petition with one hundred signatures from family and friends. The petitioner maintains that the Parole Board failed to consider whether there is a reasonable probability that if released, the petitioner will live and remain at liberty without violating the law. In the petitioner's view, the Parole Board failed to consider the relevant factors under Executive Law 259-i, and the parole determination is irrational bordering on impropriety. The petitioner contends that the determination was based solely on the seriousness of the crime for which he is currently incarcerated, without consideration of other factors. He maintains that the Parole Board improperly resentenced him to an additional term of imprisonment, over and above that imposed by the sentencing judge. He asserts that a review of the sentencing minutes makes clear that the sentencing judge intended the petitioner to be released after he served his 20

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[1]The July 20, 2011 appearance before the Parole Board was a court-ordered *de novo* parole interview relating back to a June 2010 Parole determination which was annulled.

year minimum. The petitioner also maintains that the Parole Board failed to comply with the 2011 amendments to Executive Law § 259-i and 259-c (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.) .

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

> "Denied - Hold for 24 months, Next appearance date: 6/2012
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> "After a personal interview, record review and due deliberation, this panel finds your release is incompatible with the public safety and welfare of the community and would so deprecate the serious nature of your crime as to undermine respect for the law. This decision is based on the following factors: You appeared before this panel for the serious I.O. of murder 2nd wherein you shot your child's mother thereby causing her death. This was a senseless and merciless offense with a total disregard for human life. You showed little remorse. Your criminal history reflects no prior felony convictions. However, it does not minimize the serious nature of your instant offense. The panel notes your positive programming, release plans, good disciplinary record and your letters of support and educational achievements, however, despite these accomplishments, when considering all relevant factors, discretionary release is not warranted.

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]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). 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 educational accomplishments, his almost perfect disciplinary record, his current employment in the prison law library as assistant paralegal, his outside clearance, and support from family and friends. He was given ample opportunity to make comments in support of his 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 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 MacKenzie v Evans, supra; 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).

Petitioner's claims that the determination to deny parole is tantamount to a resentencing, 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., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d Dept., 2011]; Matter of Valentino v Evans, 92 AD3d 1054 [3d Dept., 2012]). 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 Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; 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]). The imposition of less than the maximum sentence by the trial judge does not constitute a favorable sentencing recommendation (see Duffy v New York State Division of Parole, 74 AD3d 965 [2d Dept., 2010]).

As relevant here, the 2011 amendments to the Executive Law (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq., supra) made two modifications with respect to how parole determinations are handled. First, Executive Law § 259-c was revised to abolish the old guideline criteria, and establish a review process that would place greater emphasis on assessing the degree to which inmates have been rehabilitated, and the probability that they would be able to remain crime-free if released. Said section now recites: "[t]he state board of parole shall [] (4) establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (L 2011 ch 62, Part C, Subpart A, § 38-b). This amendment was made effective six months after its adoption on March 31, 2011, that is, on October 1, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49-[f]). In the second change, Executive 259-i (2) (c) was amended to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62,

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: September 4, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated February 24, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 27, 2012, Supporting Papers and Exhibits
3. Petitioner's Reply dated May 4, 2012