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

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In the Matter of the Application of
AUDEL BELTRAN, #09-A-0514,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0462.89
INDEX # 2011-1062
ORI #NY016015J

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

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The Court has before the Petition for judgment pursuant to Article 78 of the CPLR of Audel Beltran, verified on October 5, 2011 and filed in the Franklin County Clerk's office on October 25, 2011. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the January 2011 determination denying him parole and directing that he be held for an additional 24 months. The Court issued an Order to Show Cause on November 1, 2011 and has received and reviewed respondent's Answer, verified on December 15, 2011 and supported by the Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General, dated December 15, 2011. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on January 10, 2012.

On January 20, 2009 petitioner was sentenced in Supreme Court, New York County, to a controlling determinate term of 8 years, with 5 years post-release supervision, together with a concurrent indeterminate sentence of 1 to 3 years, upon his convictions of the crimes of Criminal Possession of a Controlled Substance 1° and Conspiracy 2°. The maximum expiration, conditional release and parole eligibility dates

of petitioner's merged sentences are calculated by DOCCS officials as June 21, 2015, April 29, 2014 and April 29, 2014, respectively.

Notwithstanding the fact that petitioner would not ordinarily be eligible for discretionary parole release consideration until April 29, 2014 (*see* Penal Law §70.40(1)(a)(iii)), on January 4, 2011 he appeared before a Parole Board for early conditional parole for deportation only (ECPDO) consideration pursuant to Executive Law §259-i(2)(d). Following that appearance a decision was rendered denying petitioner ECPDO and directing that he be held for an additional 24 months. Both presiding parole commissioners concurred in the denial determination which reads as follows:

> "FOLLOWING CAREFUL REVIEW AND DELIBERATION OF YOUR RECORD AND INTERVIEW, THIS PANEL CONCLUDES THAT DISCRETIONARY RELEASE IS NOT PRESENTLY WARRANTED DUE TO CONCERN FOR THE PUBLIC SAFETY AND WELFARE. THE FOLLOWING FACTORS WERE PROPERLY WEIGHED AND CONSIDERED. YOUR INSTANT OFFENSES IN FEBRUARY 2007, INVOLVED YOUR CONSPIRING WITH CO-DEFENDANTS TO POSSESS AND TRANSPORT QUANTITIES OF COCAINE. YOUR CRIMINAL HISTORY INCLUDES ILLEGAL ENTRIES INTO THE UNITED STATES. YOUR INSTITUTIONAL PROGRAMING INDICATES PROGRESS WHICH IS NOTED. YOUR DISCIPLINARY RECORD APPEARS CLEAN AND IS LIKEWISE NOTED. BASED ON ALL REQUIRED FACTORS IN THE FILE CONSIDERED, YOUR DISCRETIONARY RELEASE, AT THIS TIME, WOULD THUS NOT BE COMPATIBLE WITH THE WELFARE OF SOCIETY AT LARGE AND WOULD TEND TO DEPRECATE THE SERIOUSNESS OF THE INSTANT OFFENSE(S) AND UNDERMIN RESPECT FOR THE LAW."

Upon administrative appeal the denial of discretionary ECPDO release, with the imposition of a 24-month hold, was affirmed. 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 . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate; [and] any deportation order issued by the federal government against 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 as well as the inmate’s prior criminal record. *See* Executive Law §259-i(2)(c)(A) and §259-i(1)(a).[1]

Executive Law §259-i(2)(d)(i) provides, in relevant part, that notwithstanding the provisions of Executive Law §259-i(2)(a),(b) and (c), “ . . . at any time after the inmate’s period of imprisonment has commenced for an inmate serving a determinate or indeterminate term of imprisonment, provided that the inmate has a final order of deportation issued against him . . . if the inmate is subject to deportation by the United State Bureau Immigration and Customs Enforcement, in addition to the criteria set forth in paragraph (c) of the subdivision, the board my consider, as a factor warranting earlier release, the fact that such inmate will be deported, and may grant parole from an

[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 January 4, 2011 ECPDO 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. The amendments to Executive Law §259-i(2)(c)(A) include the incorporation of relevant language from repealed Executive Law §259-i(1)(a).

indeterminate sentence or release for deportation from a determinate sentence to such inmate conditioned specifically on his prompt deportation." Thus, notwithstanding the fact that an inmate meets the statutory criteria for ECPDO eligibility, his/her anticipated deportation is but one factor to be considered in the process of determining whether or not to grant ECPDO. Consideration of the usual statutory factors set forth in Executive Law §§259-i(2)(c) and §259-i(1)(a), as specified in the preceding paragraph, is also relevant. *See Ortiz v. New York State Board of Parole*, 239 AD2d 52.

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 alleges that in December of 2010 he received an Earned Eligibility Certificate (EEC) pursuant to Correction Law §805. He goes on to assert that the statute creates a rebutable presumption in favor of parole release when an EEC has been issued. Correction Law §805 provides, in relevant in part, as follows: "Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term or as authorized by subdivision four of section eight hundred sixty-seven of this chapter unless the board of parole determines that there is a reasonable probability that, if such inmate is released,

he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." In similar fashion, 9 NYCRR §8002.3(c) provides, in relevant part, that "[w]hen the minimum term of imprisonment is in accord with or greater than the time ranges for imprisonment contained within the guidelines adopted pursuant to this Part, parole release shall be granted at the expiration of such minimum term of imprisonment as long as such release is in accordance with the remaining guideline criteria."

It is clear that an inmate's receipt of a EEC does not preclude the Parole Board from issuing a determination denying discretionary parole release nor does such receipt preclude the Board from considering the nature of the crime(s) underlying the inmate's incarceration, as well as his/her criminal history. *See Sanchez v. Division of Parole*, 89 AD3d 1305, *Rodriguez v. Evans*, 82 AD3d 1397, *Davis v. Lemons,* 73 AD3d 1354 and *Corley v. New York State Division of Parole*, 33 AD3d 1142.

The Appellate Division, Second Department, has held that Correction Law §805 " . . . creates a presumption in favor of parole release of any inmate who . . . has received a certificate of earned eligibility and has completed a minium term of imprisonment of eight years or less." *Wallman v. Travis*, 18 AD3d 304, 307 (citations omitted). *See Heitman v. New York State Board of Parole*, 214 AD2d 673. The contours of the "presumption," however, have not been clearly fleshed out. Notwithstanding the foregoing, this Court finds no basis for the application of any presumption in favor of parole release where, as here, the petitioner was considered for ECPDO more than three years in advance of his April 19, 2014 parole eligibility date. In this regard it is noted that the "shall be granted parole release" language set forth in Correction Law §805 applies only upon the expiration of the inmate's minimum term or upon the inmate's successful completion of the DOCCS shock incarceration program, which renders him/her

immediately eligible for discretionary parole release. *See* Penal Law §70.40(1)(a)(v). Although the reference to the expiration of an inmate's "minimum term," as set forth in Correction Law §805, is not readily understood in the case of an inmate, like petitioner, serving a controlling determinate sentence with a concurrent indeterminate sentence, this Court finds that the statutory/provision must be read as referencing the date upon which the inmate becomes eligible for discretionary parole release. Since the petitioner in the case at bar does not become so eligible until April 29, 2014, he was entitled to no presumption in favor of ECPDO when he appeared before the Board on January 4, 2011.

Petitioner also contends that " . . . there was no meaningful discussion or consideration by the Board of the option to release [him] for deportation . . ." 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. Dennis on*, 33 AD3d 1147 and *Baez v. Dennis on,* 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).

In the case at bar the mere fact that petitioner was considered for ECPDO demonstrates that the Board was well-aware of the final deportation order. In the absence

of such an order petitioner would not have been eligible for discretionary parole release until April 29, 2014. In any event, the existence of the final order of deportation to Mexico, dated November 17, 2009, was specifically noted during the course of petitioner's January 4, 2011 Board appearance.

The Court's review of the Inmate Status Report prepared in conjunction with petitioner's ECPDO consideration and the transcript of the January 4, 2011 Parole Board interview reveals that in addition to information with respect to the final order of deportation the Board had before it, and considered, other appropriate statutory factors including petitioner's programming, vocational and academic achievements, clean disciplinary record, release plans, as well as the circumstances of the crime underlying his incarceration and prior record. *See Zhang v. Travis*, 10 AD3d 828. With regard to the final two factors referenced in the preceding sentence, the Court notes that during the course of the January 4, 2011 ECPDO interview the petitioner acknowledge that he and his co-defendants " . . . conspired for the shipment of large amounts of cocaine across the Mexican border in California and ultimately to New York State." Petitioner also acknowledged that he had illegally entered the United States on at least three occasions. In addition, during the course of the January 4, 2011 appearance petitioner was specifically afforded an opportunity to bring to the Board's attention any additional maters he deemed significant. 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 ECPDO determination in this case was affected by irrationality bordering on impropriety. *See Sanchez v. Division of Parole,* 89 AD3d 1305 and

Samuel v. Alexander, 69 AD3d 861, *app dis* 14 NY3d 837.

Finally, to the extent petitioner argues that the provisions of 9 NYCRR §8002.3(b) precluded the Parole Board from considering the nature/seriousness of the crime underlying his incarceration, as well as his prior criminal record, this Court rejects such argument. The regulation in questions is not applicable where an inmate's minimum period of imprisonment was established by his/her sentencing court. *See Hall v. New York State Division of Parole*, 66 AD3d 1322, *Guerin v. New York State Division of Parole*, 276 AD2d 899 and *Flecha v. Travis*, 246 AD2d 720. This Court finds no basis to apply the regulatory restriction where, as here, all elements of petitioner's controlling determinate term and concurrent indeterminate sentence were set by the sentencing court.

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: March 13, 2012 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice