STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
RICKY MARTIN, 82-A-4576

Petitioner,

-against-

ANDREA EVANS, CHAIRWOMAN,
BOARD 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-ST3870 Index No. 3793-12

Appearances:

Ricky Martin
Inmate No. 82-A-4576
Self represented Petitioner
Fishkill Correctional Facility
P.O. Box 1245
Beacon, New York 12508

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224-0341
(Gregory J. Rodriguez, Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Fishkill Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a denial of parole. Petitioner argues that the Parole Board

failed to comport with statutory and regulatory mandates governing release in the case of persons re-appearing for release consideration and the Board failed to utilize risk and needs principles required by Executive Law Section 259-c(4). Respondent opposes the petition contending that all laws were properly followed; that the petition fails to state a cause of action.

Petitioner was convicted by verdict of the crimes of Murder 2nd, Criminal Possession of a Weapon and by plea of Attempted Robbery and Attempted Criminal Possession of a Weapon on 9/08/82. Petitioner was sentenced to various indeterminate terms on the charges to be served concurrently. The controlling sentence is on the murder conviction of 25 years to life. The parole denial being challenged arises from petitioner's fifth appearance before the board on December 16, 2011.

In its decision denying Petitioner parole release, the Board stated:

> Denied 12 months; Next appearance 12/2012
>
> Parole release is denied. After a personal interview, record review and deliberation, this panel finds release incompatible with the public safety and welfare of the community, and would so deprecate the seriousness of your crime as to undermine respect for the law. Your criminal record reflects prior unlawful behavior. When you committed this murder second degree offense, you were on probation. This repeated criminal behavior is a concern for this panel. Your criminal conduct was senseless with a total disregard for human life. The panel notes your positive programing, good disciplinary record, release plans, and your educational achievements, and letters of support. However, despite these accomplishments, this panel finds more compelling the seriousness of your murder second degree offense. There is a reasonable probability you would not live a law abiding life. All Commissioners concur.

Petitioner filed an administrative appeal by filing an Appeal on January 30, 2012. The Appeals Unit affirmed the Board's decision, mailing such decision to petitioner on August 6, 2012. This article 78 petition is verified June 27, 2012 and stamped by the office of the Albany

County Combined Courts on July 2, 2012. The Order to Show cause was signed July 23, 2012.

Petitioner asserts that the Parole Board actions were arbitrary, capricious, or irrational, in that (i) it failed to properly apply the law to persons re-appearing (ii) that the decision of the board lacked consideration of the 2011 amendments to Executive Law 259.

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, see Reed v Evans, 94 AD3d 1323 (Third Dept. 2012). The same criteria applies to parole determinations whether it is a first or subsequent appearance. A review of the transcript of the parole interview[1] reveals that petitioner admitted to the shooting of someone to death; attention was paid to such factors as petitioner's completion of vocational programs, his clean disciplinary record and his plans for a job and living arrangements upon release. Petitioner submitted a parole plan to the Board. Petitioner

[1] Transcript of parole interview, Respondent's exhibit E

described his position as an inmate program assistant. Petitioner was afforded ample time in the hearing to make comments supportive of his release. Petitioner expressed his remorse for the victim's family.

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). 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, 95 AD3d 1613 [3d Dept., 2012]; 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).

As relevant here, the 2011 legislation amended Executive Law Section 259-c, as it relates to parole determinations to 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 subsection now recites: "[t]he state board of parole shall [259-c] (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". This amendment was made effective six months after its adoption on March 31, 2011, that is, on October 1, 2011. 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. This amendment was effective immediately upon its adoption on March 31, 2011. Under the former law the factors to be considered were listed in different sections of the Executive Law. The amendment did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision but placed the factors in one section. As a result, the factors for the Board to consider in determining whether Petitioner should be released to parole are the same whether under the former version of Executive Law 259-i or the current one. On October 5, 2011 the Chairperson of the Parole Board

issued a Memo[2] containing the written procedure to be followed by the board in making parole decisions. The memo makes it clear that steps taken by an inmate toward rehabilitation are to be discussed at the interview. The record does establish that the statutory criteria were considered. Petitioner's claim that the respondent failed to consider the 2011 amendments to the Executive Law is without merit.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. 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

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[2] Respondent's Exhibit K

respecting filing, entry and notice of entry.

ENTER

Dated: March 19, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated July 23, 2012
2. Verified Petition dated June 27, 2012 with exhibits
3. Petitioner's memorandum of law
4. Answer Dated November 6, 2012
5. Affirmation of Gregory J. Rodriguez, Esq. dated November 8, 2012 with exhibits.

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Presentence Investigation Reports, and respondent's Exhibit D, Confidential Portion of Inmate Status Reports, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: March 19, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice