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

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In the Matter of the Application of
DAMON SPRINGER, #95-A-7666,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0004.03
INDEX # 2012-11
ORI #NY016015J

-against-

ANDREA W. EVANS, Chairwoman,
NYS Board of Parole,

Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Damon Springer, verified on December 13, 2011 and filed in the Franklin County Clerk's office on January 4, 2012. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the January, 2011 determination denying him parole and directing he be held for an additional 24 months. An Order to Show Cause was issued on January 11, 2012 and a Supplemental Order to Show Cause was issued on April 20, 2012. The Court has received and reviewed respondent's Answer, including Confidential Exhibits B, E, G and I, verified on June 1, 2012, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on June 22, 2012.

On October 31, 1995 petitioner was sentenced in Supreme Court, New York County, to consecutive, indeterminate sentences of 8⅓ to 25 years and 6⅔ to 20 years upon his convictions of the crimes of Manslaughter 1° and Conspiracy 2°. After having been denied

discretionary parole release on two previous occasions[1], petitioner made an additional appearance before a Parole Board, by teleconference, on January 5, 2011. Following that appearance a decision was rendered denying petitioner parole and directing that he be held for an additional 24 months. Both parole commissioners concurred in the denial determination which reads as follows:

> "THIS PANEL HAS CONCLUDED THAT YOUR RELEASE TO SUPERVISION IS NOT COMPATIBLE WITH THE WELFARE OF SOCIETY AND THEREFORE PAROLE IS DENIED. THIS FINDING IS MADE FOLLOWING A PERSONAL INTERVIEW, RECORD REVIEW AND DELIBERATION. OF SIGNIFICANT CONCERN IS THE CLEAR INTENT TO PRESENT A DANGER TO THE COMMUNITY BY YOUR ACTIONS IN OBTAINING, CARRYING AND OPENLY USING A HANDGUN.
>
> POSITIVE FACTORS CONSIDERED INCLUDE YOUR GOOD BEHAVIOR DURING THE PAST FIVE YEARS. YOUR RECEIPT OF MULTIPLE DISCIPLINARY VIOLATIONS PRIOR TO THAT TIME IS OF CONCERN.
>
> IN ADDITION, YOUR INSTANT OFFENSES OF MANSLAUGHTER 1ST AND CONSPIRACY 2ND INCLUDE CONDUCT OVER A PERIOD OF SEVERAL MONTHS.
>
> TO GRANT YOUR RELEASE AT THIS TIME WOULD SO DEPRECATE THE SERIOUSNESS OF YOUR OFFENSE AS TO UNDERMINE RESPECT FOR THE LAW. WHILE YOUR POSITIVE PROGRAMS AND COMMUNITY SUPPORT ARE NOTED, THE PROBABILITY YOU WILL LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW IS NOT FOUND TO BE REASONABLE GIVEN THE FACTORS NOTED ABOVE."

The parole denial determination was affirmed on administrative appeal. This proceeding ensued.

At the time of petitioner's January 5, 2011 parole interview Executive Law §259-i(2)(c)(A) provided, in relevant part, as follows: "Discretionary release on parole shall

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[1] Petitioner was denied discretionary parole release and directed to be held for an additional 24 months following an initial Parole Board appearance on January 7, 2009. That parole denial determination was apparently reversed in some fashion and petitioner reappeared before a Parole Board on January 5, 2010 but was again denied release.

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).

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 initially argues that the Parole Board failed to take into consideration many of the statutory factors enumerated in Executive Law §259-i(2)(c)(A) but instead relied exclusively on the nature of the crime underlying his incarceration as well as a portion of his disciplinary record dating back more than five years. According to petitioner the Board was presented with evidence of his " . . . good disciplinary record, his exceptionally academic[,] vocational and therapeutic achievements and contributions in prison programs, and letters of reasonable assurance. Yet the Board did not base its decision on a single one of these factors, other than a [disciplinary] violation **FIVE YEARS PRIOR TO HIS BOARD APPEARANCE** for taking an extra milk from the mess hall, in which petitioner received 20 days keep lock." (Emphasis in original).

A parole board 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).

In the case at bar, a review of the Inmate Status Report and transcript of the parole interview reveals that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic and vocational programming,

academic achievements, disciplinary record, release plans, community support, as well as the circumstances of the crimes underlying his incarceration. *See Zhang v. Travis*, 10 AD3d 828. The Court, moreover, finds nothing in the hearing transcript to suggest that the Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries. In view of the above, the Court finds no basis to conclude that the parole board failed to consider the relevant statutory factors. *See McAllister v. New York State Division of Parole* 78 AD3d 1413, *lv den* 16 NY3d 707, and *Davis v. Lemons,* 73 AD3d 1354. 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 his current incarceration and the earlier portion of his prison disciplinary record. *See De Los Santos v. Division of Parole,*____ AD3d____, 2012 N.Y. Slip Op. 05225, and *Cruz v. New York State Division of Parole,* 39 AD3d 1060.

Petitioner next argues that the Parole Board did not review the 1995 sentencing minutes and thus failed to consider the parole recommendations of the sentencing court as required by Executive Law §259-i(2)(c)(A) and §259-i(1)(a). In this regard the petitioner asserts that " . . . prior to sentencing, petitioner's Attorney informed him after consultation with the Court and District Attorney, that if petitioner accepted the negotiated plea 'the court did not see any reason why petitioner should not be released after serving his minimum, providing petitioner manned up and took responsibility for his crime and worked towards rehabilitating himself while incarcerated.[']"

It is not disputed that the Parole Board considering petitioner for discretionary release did not have before it a copy of the 1995 sentencing minutes. The respondent

asserts, however, that an unsuccessful effort was 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 C a copy of the affidavit of Rachel Simone, Senior Court Reporter, Supreme Court, New York County (the"Simone Affidavit"). According to Ms. Simone she was assigned to the relevant part of the Supreme Court, New York County, at the time of petitioner's sentencing. In the Simone Affidavit the following is alleged: "I have thoroughly reviewed my stenographic notes for the requested date(s) [10-31-95] and can find no such record. As a result of the foregoing, I am unable to provide a transcript."

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 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 Smith v. New York State Division of Parole,* 81 AD3d 1026, *Geraci* v. *Evans*, 76 AD3d 1161, *Blasich v. New York State Board of Parole*, 68 AD3d 1339 and *Freeman v. Alexander*, 65 AD3d 1429. In any event, there is nothing before this Court to suggest that the sentencing court expressed any specific parole recommendation on the record during sentencing proceedings. As noted previously, the petitioner merely alleged that his attorney informed him that the sentencing court " . . . did not see any reason why petitioner should not be released after serving his minimum . . ." *See Blasich in New York State Board of Parole,* 68 AD3d 1339.

Finally, petitioner asserts that the Parole Board erroneously considered him for discretionary parole release under the provisions of 9 NYCRR §8002.3(b) instead of §8002.3(a). Petitioner, however, failed to exhaust administrative remedies with respect to this argument since it was not advanced on administrative appeal. Judicial review in this proceeding is, therefore, precluded. *See Rossario v. Fischer*, 95 AD3d 1528 *and Santos v. Evans*, 81 AD3d 1059.

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: July 27, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice