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

X

In the Matter of the Application of
RAMON SEVILLA, #90-A-9500,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0283.71
INDEX # 2012-587
ORI #NY016015J

-against-

ANDREA EVANS, Chairwoman,
of the New York State 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 Ramon Sevilla, verified on July 3, 2012 and filed in the Franklin County Clerk's office on July 9, 2012. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the June 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 July 13, 2012 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on July 29, 2012, as well as the August 29, 2012 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, submitted on behalf of the respondent. The Court has received no Reply thereto from petitioner.

On July 11, 1990 petitioner was sentenced in Supreme Court, Bronx County, as a persistent violent felony offender, to an indeterminate sentence of 10 years to life upon his conviction of the crime of Attempted Robbery 1°. Petitioner's 1990 conviction/sentencing was affirmed on direct appeal to the Appellate Division, First Department. *People v. Sevilla*, 182 AD2d 454, *lv den* 80 NY2d 837. It is noted that

petitioner was at liberty under parole supervision from a prior (1983) robbery conviction at the time he committed the criminal act underlying his 1990 Bronx County conviction. It is further noted that petitioner was at liberty under parole supervision from a prior (1976) manslaughter conviction at the time he committed the criminal act underlying his 1983 conviction.

After petitioner's 1990 Bronx County conviction/sentencing he was first released from DOCCS custody to parole supervision in June of 2003. Following a sustained parole violation and the imposition of a 12-month delinquent time assessment petitioner was re-released to parole supervision in June of 2006. His parole release, however, was ultimately revoked, with a sustained delinquency date of June 10, 2008, following a final parole revocation hearing conducted on October 9, 2008. Another 12-month delinquent time assessment was imposed and petitioner was returned to DOCCS custody as a parole violator. On July 21, 2009, apparently upon expiration of the 12-month delinquent time assessment, petitioner appeared before a Parole Board for a parole violator reappearance interview. *See* 9 NYCRR §8002.6(d)(2). Following that interview he was denied parole release and directed to be held for an additional 24 months. The 2009 parole denial determination reads, in relevant part, as follows:

> "AFTER A CARFUL REVIEW OF THE RECORD, THIS INTERVIEW AND DUE DELIBERATION, PAROLE IS DENIED FOR THE FOLLOWING REASONS. YOU ARE CURRENTLY SERVING A LIFE SENTENCE UPON YOUR CONVICTION OF ATT. ROBBERY 1ST. YOU WERE RELEASED TO THE COMMUNITY AND HAVE NOW BEEN RETURNED TO THE STATE FACILITY ON YOUR 2ND VIOLATION. DURING YOUR 12 MONTH HOLD YOU HAVE USED DRUGS IN THE FACILITY. CLEARLY YOU ARE ILL PREPARED FOR RELEASE AT THIS TIME. ALL FACTORS CONSIDERED, THE PANEL CONCLUDES THAT IF RELEASED AT THIS TIME THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW. THEREFORE EARLY RELEASE IS DENIED."

Petitioner re-appeared before a Parole Board for discretionary release consideration on June 29, 2011. Following that appearance parole was again denied and petitioner was directed to be held for an additional 24 months. The 2011 parole denial determination, which is the subject of this proceeding, reads as follows:

> "AFTER A CARFUL REVIEW OF YOUR RECORD, PERSONAL INTERVIEW, AND DELIBERATION, PAROLE IS DENIED. THIS PANEL REMAINS CONCERNED ABOUT YOUR LENGTHY CRIMINAL HISTORY DATING BACK TO 1971, INCLUDING PRIOR ROBBERY AND MANSLAUGHTER CRIMES. YOU ARE SERVING 10 YEARS TO LIFE FOR ATT. ROBBERY 1ST. IN 1989 YOU COMMITTED A GUNPOINT ROBBERY. WHEN APPROACHED BY A POLICE OFFICER YOU STRUCK THE OFFICER IN THE FACE WITH YOUR GUN CAUSING A LACERATION. YOU WERE ON PAROLE AT THE TIME OF THE INSTANT OFFENSE. THIS IS YOUR 3RD STATE PRISON TERM. YOUR VIOLENT ACTIONS ARE A CONCERN FOR THIS PANEL. YOUR INSTITUTIONAL ACCOMPLISHMENTS AND RELEASE PLANS ARE NOTED. YOU HAVE MAINTAINED A CLEAN DISCIPLINARY RECORD SINCE 2009. IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW. YOUR RELEASE AT THIS TIME IS INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY."

The document perfecting petitioner's administrative appeal from the 2011 parole denial determination was received by the DOCCS/Board of Parole Appeals Unit on December 2, 2011. The Appeals Unit, however, failed to issue its findings and recommendation within the four month time frame set forth in 9 NYCRR §8006.4(c)[1]. 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 the law. In making the parole release decision, the procedures adopted

[1] A belated decision on administrative appeal was issued after this proceeding had been commenced.

> 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 interactions with staff and inmates . . .(iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

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 argues, in effect, that the June 29, 2011 Parole Board unlawfully considered the nature of the crime underlying his 1990 conviction as well as his prior criminal record. According to petitioner these two factors were taken into consideration when he was first released to parole supervision in 2003 and on both occasions when his parole was revoked and 12-month delinquent time assessments were imposed. Although petitioner concedes that his violation of the standards of inmate behavior while serving the second delinquent time assessment supported the determination requiring his appearance at a parole violator re-appearance interview on July 21, 2009 (*see* 9 NYCRR

§8002.6(d)(2)(iii)(a)), as well as the 24-month hold imposed following such interview, he goes on to assert that during the course of the 24-month hold (leading up to the June 29, 2011 Parole Board appearance) he completed the six-month DOCCS Alcohol and Substance Abuse Treatment (ASAT) program and maintained a clean disciplinary record. According to petitioner the July 21, 2009 parole denial determination, issued following the parole violator reappearance interview, did not focus on the nature of the crime underlying his 1990 conviction or prior criminal record but, rather, upon his violation of his standards of inmate behavior by marijuana use while serving the 12-month delinquent time assessment. Petitioner goes on to argue as follows:

> "Then, once this petitioner kept a clean disciplinary record and completed ASAT, this most recent Board in June 2011 did not have any other reasons except to revert to the previously decided nature of the crime and past criminal history . . . [T]hat is just what this panel [Parole board] did. It turned a 12-month time assessment into a 36-month hold based on this Petitioner's drug infraction . . . Then, once this petitioner addressed that issue the Respondent created a completely different reason in the 2011 Parole Board hearing, ultimately re-sentencing this Petitioner to a total of a 60-month hold."

Petitioner's arguments to the contrary notwithstanding, this Court finds no basis to conclude that a Parole Board considering an inmate for discretionary parole release after such inmate had already been released on parole, returned to custody as a parole violator and held beyond his/her delinquent time assessment following a parole violator reappearance interview, is precluded from considering all of the factors set forth in Executive Law §259-i(2)(c)(A), including the nature/seriousness of the offense underlying the inmate's incarceration as well as his/her prior criminal record/parole violation(s) (Executive Law §259-i(2)(c)(A)(vii) and (viii).

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, reviews of the Inmate Status Report and transcript of the June 29, 2011 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic and vocational programming, clean disciplinary record since 2009 and release plans, in addition to the circumstances of the crime underlying his incarceration and prior criminal record. *See Zhang v. Travis*, 10 AD3d 828. 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 2011 parole denial determination was affected by irrationality bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crime underlying petitioner's incarceration and his prior criminal record/parole violation(s). *See Perez v. Evans,* 76

AD3d 1130, *Hall v. New York State Division of Parole,* 66 AD3d 1322 and *White v. Dennison,* 29 AD3d 1144.

Petitioner's argument to the contrary notwithstanding, the Court also finds that the 2011 parole denial determination was sufficiently detailed to inform petitioner of the reasons underlying the denial and to facilitate judicial review thereof. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295 and *Ek v. Travis*, 20 AD3d 667, *lv dis* 5 NY3d 862; *cf. Vaello v. Parole Board Division of State of New York*, 48 AD3d 1018.

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: December 11, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice