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

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In the Matter of the Application of
WILLIAM GONZALEZ, #91-A-6869,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2012-0401.97
INDEX # 2012-870
ORI #NY016015J

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision, and **ANDREA EVANS,** Chairwoman, NYS Board of Parole,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition (apparently denominated Notice of Petition) of William Gonzalez, verified on August 10, 2012 and filed in the Franklin County Clerk's office on September 25, 2012. Petitioner, who is now an inmate at the Mid-State Correctional Facility, is challenging the March 2012 determination denying him parole and directing that he be held for an additional 24 months. An Order to Show Cause was issued on October 3, 2012 and a Decision and Order/Supplemental Order to Show Cause was issued on January 8, 2013. The Court has since received and reviewed respondents' Answer, including confidential Exhibits B and D, verified on February ___, 2013 and supported by the Affirmation of Gregory J. Rodriguez, Esq., Assistant Attorney General, dated February 21, 2013. Annexed to the respondents' answer (Exhibit K) is the Affirmation of William B. Gannon, Esq., Assistant Counsel to the NYS Board of Parole, dated

February 20, 2013. The Court next received and reviewed petitioner's Reply dated March 7, 2013, his Affidavit sworn to on March 11, 2013 and his undated Memorandum of Law, all filed in the Franklin County Clerk's office on March 12, 2013. The Court has also received and reviewed petitioner's Notice of Motion, dated March 3, 2013, and supporting Affidavit, sworn to on March 11, 2013, both filed in the Franklin County Clerk's office on March 19, 2013.

By Letter Order dated August 2, 2013 the Court directed respondents " . . . to supplement the record in this proceeding . . . by documenting if and when any COMPAS Risk and Needs Assessment instrument was made available to the Parole Board considering petitioner for discretionary release and, if so, by suppling the Court with a complete copy of the instrument." In response thereto the Court has received and reviewed Assistant Attorney General Rodriguez's letter of August 6, 2013, with a confidential exhibit.

On July 12, 1991 petitioner was sentenced in Supreme Court, Kings County, to consecutive indeterminate sentences of 8⅓ to 25 years, 8⅓ to 25 years, 3½ to 7 years and 3 to 9 years upon his convictions, by jury verdict, of the crimes of Rape 1°, Sodomy 1°, Assault 2° and Criminal Possession of a Weapon 2°. At that time petitioner was also sentenced to additional concurrent sentences of 2⅓ to 7 years and 5 to 15 years upon his convictions, also by jury verdict, of the crimes of Sexual Abuse 1° and Robbery 1°.[1] In addition, on July 22, 1991 petitioner was sentenced in the same court, upon a plea, to a

[1] Petitioner's convictions were affirmed on direct appeal to the Appellate Division, Second Department. *People v. Gonzalez*, 209 AD2d 431, *lv den* 85 NY2d 909.

concurrent indeterminate sentence of 2 to 6 years upon his conviction of the crime of Sexual Abuse 1°.

Petitioner made his initial appearance before a Parole Board on March 6, 2012. Following that appearance a decision was issued denying him discretionary release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "PAROLE IS DENIED. AFTER A CAREFUL REVIEW OF YOUR RECORD, A PERSONAL INTERVIEW, AND DUE DELIBERATION, IT IS THE DETERMINATION OF THIS PANEL THAT, IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AT LIBERTY WITHOUT VIOLATING THE LAW, AND YOUR RELEASE AT THIS TIME IS INCOMPATIBLE WITH THE WELFARE AND SAFETY OF THE COMMUNITY AND WOULD SO DEPRECATE THE SERIOUSNESS OF THE CRIME AS TO SHOW DISRESPECT FOR THE LAW.
>
> THIS DECISION IS BASED ON THE FOLLOWING: YOU STAND CONVICTED OF THE SERIOUS OFFENSE OF RAPE 1ST AND OTHER CRIMES FOR WHICH YOU ARE SERVING AN AGGREGATE SENTENCE OF 23 YEARS 2 MONTHS TO 50 YEARS IN WHICH YOU DISPLAYED A GUN AND STOLE THE VICTIM'S WALLET AND THEN RAPED AND SODOMIZED HER. WHEN THE VICTIM'S FATHER TRIED TO STOP THIS CRIME, HE WAS SHOT IN THE GROIN. THE MOTHER OF THE VICTIM ALSO WAS MENACED WHEN SHE APPEARED.
>
> YOUR RECENT GOOD DISCIPLINE IS NOTED. THROUGH 2008 YOU HAD A NUMBER OF TIER 2 AND TIER 3 TICKETS.
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> CONSIDERATION HAS BEEN GIVEN TO ALL REQUIRED STATUTORY FACTORS INCLUDING YOUR EFFORTS OF REHABILITATION, YOUR RISK TO THE COMMUNITY AND YOUR NEEDS FOR SUCCESSFUL REINTEGRATION INTO THE COMMUNITY. HOWEVER, YOUR RELEASE AT THIS TIME IS DENIED."

The document perfecting petitioner administrative appeal from the parole denial determination, dated March 21, 2012, was received by the DOCCS Parole Appeals Unit on March 26, 2012. Although the Appeals Unit apparently failed to issue its findings and

recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was issued on or about September 4, 2012. This proceeding ensued.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, 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 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; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department . . . (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 Parole Board unlawfully focused its attention on the nature of the crimes underlying his ongoing incarceration, without proper application of the "future focused risk assessment analysis" mandated pursuant to Executive Law §259-c(4). Indeed, petitioner takes this argument to the point where he asserts that " . . . that the board of parole cannot use current offense, or past criminal history to arrive at a denial of parole."

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall " . . .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 . . ." (Emphasis added).[2] Since petitioner does not specifically challenge the implementation procedures put into effect by the Board of Parole in response to the amendment to Executive Law §259-c(4), such potential issue will not be addressed in this Decision and Judgment.

The Court first notes that as a part of the same legislative enactment (L 2011, ch 62, part C, subpart A) wherein Executive Law §259-c(4) was amended - albeit with a different effective date - the list of factors that must be considered in connection with discretionary

[2] Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall " . . .establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

parole release decisions was amended/consolidated in Executive Law §259-i(2)(c)(A), as quoted previously in this Decision and Judgment. The seriousness of the offense underlying an inmate's incarceration as well as his/her prior criminal record are included among these statutory factors. *See* Executive Law §259-i(2)(c)(A)(vii) and (viii). Thus, whatever else the import of the amendment to Executive Law 21259-c(4), such amendment does not foreclose the Parole Board from consideration of the seriousness of the crime underlying an inmate's incarceration or his/her past criminal history. Indeed, both of these factors must be considered by the Board in conjunction with the other statutory factors set forth in Executive Law §259-i(2)(c)(A).

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 March 6, 2012 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 records, disciplinary record, release plans, community support and lack of a prior criminal record, in addition to 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 crime underlying petitioner's incarceration in DOCCS custody as well as his prison disciplinary record.[3] *See Rodriguez v. Board of Parole*, 100 AD3d 1179 and *Pitts v. Dennison*, 40 AD3d 1184.

With respect to the COMPAS ReEntry Risk Assessment instrument prepared in conjunction with the consideration of petitioner for discretionary parole release, it is noted that such instruments scores petitioner as a low risk for felony violence or rearrest. Petitioner, while acknowledging that the Parole Board had the COMPAS instrument in

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[3] Although the parole denial determination noted petitioner's "RECENT GOOD DISCIPLINE," it was also noted that "THROUGH 2008 YOU HAD A NUMBER TIER 2 AND TIER 3 TICKETS." On page four of the Inmate Status Report (respondents' Exhibit C), under the heading "DISCIPLINARY," the following is stated: "Seventeen Tier II disciplinary infractions are noted, the most recent of which occurred on August 4, 2008. The subject was cited for a variety of charges, the most significant of which involved fighting with another inmate. In total, these infractions result in a significant amount of various loss of privileges. Five Tier III disciplinary infractions are noted, the most recent of which occurred on August 22, 2006. The subject was cited for a Drug Use (3), Contraband, Smuggling, Sex Offense and Facility Visiting. As a result of these infractions, the subject was assessed 135 days Keeplock, 258 days SHU [Special Housing Unit], 611 various loss of privileges and 20 months recommended loss of Good Time."

their possession, asserts that the Board " . . . failed to use it as a guidance in making the parole determination." Although the Appellate Division, Third Department has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* ___AD3d_____, 2013 NY Slip Op 08189, *Malerba v. Evans,* 109 AD3d 1067 and *Garfield v. Evans*, 108 AD3d 830), this Court finds nothing in such cases, or the amended statute, to suggest that the quantified risk assessment determined through utilization of a risk and needs assessment instrument supercedes the independent discretionary authority of the Board of Parole to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. In this regard it is noted that the "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A). *See Partee v. Evans*, 40 Misc 3d 896. In the case at bar the Parole Board ultimately concluded that a denial of parole was warranted based upon the nature of the crimes underlying petitioner's incarceration as well as his prison disciplinary record.

In his Reply petitioner asserts for the first time that the Parole Board relied upon incorrect information in connection with the parole denial determination. More specifically, citing paragraph 64 of respondents' Answer, petitioner asserts that the Board of Parole incorrectly " . . . claimed he [petitioner] was on parole when he committed the instant offense . . ." While the petitioner's confusion on this point is understandable, the Court finds no merit to this argument. The Court first notes that the recitation of petitioner's prior criminal record, as set forth in the Inmate Status Report, shows nothing other than a February 9, 1987 Disorderly Conduct conviction. In addition, it is noted in the "INSTITUTIONAL ADJUSTMENT" portion of the Inmate Status Report that " . . . the Instant Offense represents his [petitioner's] first term of State incarceration." During the course of petitioner's March 6, 2012 Parole Board appearance, moreover, Commissioner Ross stated " . . . prior to the instant offense it looks like you [petitioner] had a violation of disorderly conduct, that was your only offense?" Petitioner responded in the affirmative. Finally, there is nothing in the parole denial determination itself even remotely suggesting that petitioner was on parole at the time he committed the criminal acts underlying the 1991 convictions.

Notwithstanding the foregoing, the petitioner was obviously confused - as was the Court - by the following language set forth in paragraph 64 of the February 21, 2013 supporting Affirmation of Assistant Attorney General Rodriguez: "Further, the fact that petitioner committed the instant offense while on parole supervision is also a basis for denying parole release." (Citations omitted). Given the fact that there is not one scintilla of evidence in the record that the Parole Board mistakenly believed petitioner was at liberty under parole supervision when he committed the criminal acts underlying his 1991 convictions, this Court must presume that paragraph 64 of the Assistant Attorney General's Affirmation represents a clerical error whereby language applicable with respect

to the Attorney General's representation of the state official in prior litigation (involving a different DOCCS inmate) was inadvertently retained in the Affirmation of Assistant Attorney General Rodriguez in this proceeding.

Finally, for the reasons set forth below, the Court denies petitioner's motion that the respondents be required to produce the teleconference video of the March 6, 2012 Parole Board interview. In his motion papers petitioner alleges that during the course of that interview Commissioner Ferguson " . . . went out side the parole statutes of Executive Law §259-i(2)(c)(A), by providing his own take on the law, and this shows his proclivity for denying parole." (citations omitted). Further, according to petitioner's motion papers, at the parole interview " . . . Commissioner FERGUSON acted like prosecutor and judge and made a big speal [sic] about the **Law** and the **Law** that he was going to employ inregardless [sic] of the fact that it isn't in the preview [sic] of the Board of Parole to punish the petitioner. He [sic] the Commissioner FERGUSON'S decision reflects: (1) that the sentence of 23 to 50 the court imposed to be of no consequence, and (2) he viewed the 23 year sentence to be a life sentence." (Emphasis in original). Petitioner requested that this Court direct the production of the teleconference video because the transcript of the March 6, 2012 Parole Board interview annexed view the respondents' Answer as Exhibit E was allegedly " . . . incomplete, doctored up and does not contain the entire parole hearing . . ."

This Court recognizes that if petitioner did not have access to the transcript of the March 6, 2012 Parole Board interview prior to receiving a copy of the respondents' Return he would have been unable to address any alleged omission in the transcript prior to that time. The Court would nevertheless have expected petitioner to have raised the issue of Parole Commissioner Ferguson's alleged improper statements from the outset. It is noted, however, that no allegations with respect to such statements were asserted in the

petition or on administrative appeal. Particularly in view of this circumstance, the Court finds that the belated assertions of impropriety set forth in petitioner's motion papers do not support the extraordinary remedy of this Court going beyond the certified transcript of the parole interview and directing production/review of the teleconference video.

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 19, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice