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

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In the Matter of the Application of
GERALD JOHNSON, #80-B-0324,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2013-0006.03
INDEX # 2013-20
ORI #NY016015J

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

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Gerald Johnson, verified on December 31, 2012 and filed in the Franklin County Clerk's office on January 7, 2013. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the October 2011 determination denying him parole and directing he be held for an additional 24 months. An Order to Show Cause was issued on January 15, 2013. The Court has since received and reviewed respondent's Answer and Return, including *in camera* materials, verified on March 19, 2013 and supported by the March 19, 2013 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge. The Court has also received and reviewed petitioner's Reply thereto, dated April 4, 2011 and filed in the Franklin County Clerk's office on April 9, 2013.

On February 11, 2008 petitioner was sentenced in Supreme Court, Erie County, to concurrent indeterminate sentences of 25 years to life upon his convictions of two counts of the crime of Murder 2°. Petitioner's convictions/sentencings were affirmed on direct

appeal to the Appellate Division, Fourth Department. *See People v. Johnson*, 89 AD2d 814.

Having been denied discretionary parole release on four previous occasions, petitioner made his fifth appearance before a Parole Board on October 26, 2011. Following that appearance a decision was rendered again denying petitioner parole and directing that he be held for an additional 24 months. The parole denial determination read as follows:

> "AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY AND WOULD SO DEPRECATE THE SERIOUS NATURE OF THE CRIME AS TO UNDERMINE RESPECT FOR TEH [sic] LAW. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSE INVOLVED YOU AND YOUR CODEFENDANT SHOOTING A 61 YEAR OLD FEMALE VICTIM IN THE HEAD DURING THE COURSE OF A ROBBERY.
>
> THIS BRUTAL CRIME IS THE SEVERE ESCALATION OF YOUR PRIOR THEFT RELATED OFFENSES. YOU HAVE DONE POORLY IN THE PASSED UNDER COMMUNITY SUPERVISION. THE BOARD NOTES YOUR PROGRAM, VOCATIONAL AND WORK ACCOMPLISHMENTS. THE BOARD ALSO NOTES YOUR LETTER OF REASONABLE ASSURANCE FROM CEPHAS HOUSE.
>
> MORE COMPELLING, HOWEVER, IS THE EXTREME VIOLENCE EXHIBITED IN THE I/O [Instant Offense], THE VULNERABILITY OF THE VICTIM, AND YOUR CALLOUS DISREGARD FOR HER LIFE."

The document perfecting petitioner's administrative appeal from the October 2011 parole denial determination was received by the DOCCS Parole Appeals Unit on April 16, 2012. Although the Appeals Unit apparently failed to issue its findings and recommendation within the 4-month time frame set forth in 9 NYCRR §8006.4(c), a belated decision on administrative appeal was, in fact, issued on or about November 13, 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 . . . (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.

A significant portion of the petition is focused, in one way or another, on the assertion that the parole denial determination was improperly based solely on the nature

of the crime underlying petitioner's incarceration, without adequate consideration of other relevant statutory factors such as his vocational programing record, academic achievements, clean disciplinary record since 2005 and release plans. 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. 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 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, clean disciplinary record since 2005, release plans and family support in addition to the circumstances of the crimes underlying his incarceration and prior criminal record. *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. Indeed, just before the conclusion of his October 26,

2011 Parole Board appearance petitioner was asked by a parole commissioner "[a]nything else before we close, that I haven't mentioned, that you'd like use to know?" At that point the following colloquy occurred:

"A [Petitioner's Answer]:	Well, I'd like - - you speak of this crime that you mention that was heinous, as you put it, and I understand that, and I agree with you 100 percent but, as I have stated before, I had no participation in that whatsoever. I mean I ended up with some property that belonged to the victim, and that's what started this whole turn of events, as far as I'm concerned, and - -
Q [Parole Commissioner's Question]:	So you admit that you did have her property, but your position is that you weren't involved in the robbery and burglary, correct?
A:	Absolutely not.
Q:	Okay. All right. Your position is noted. You do understand that as a Board, we can't re-try the case. We have to assume that the jury's decision is correct, unless a court overturns or we hear otherwise, but your position is noted and you have been consistent with that position from the beginning, so we understand that, sir.
A:	Okay. Thank you."

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. In addition, 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 disturbing nature of the crime underlying petitioner's incarceration as well as his prior criminal record. *See Gordon v. New York State Board of Parole*, 81 AD3d 1032, *Gonzalez v. Chair, New York State Board of Parole*, 72 AD3d 1368 and *Marziale v. Alexander*, 62 AD3d 1227.

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 . . ." [1] Although petitioner asserts that the amended version of Executive Law §259-c(4) " . . . directs the Board to focus primarily on who the person appearing [before it] is today rather than who the person was when the offense occurred," he does not specifically challenge the implementation procedures put into effect by the Board of Parole in response to the amendment to

[1] 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 . . ."

Executive Law §259-c(4). Such issue, therefore, will not be addressed in this Decision and Judgment.[2]

Finally, under the facts and circumstances of this case the Court finds no basis to conclude that the parole denial determination usurped the authority of the judiciary by effectively resentencing petitioner for his crimes. *See Comfort v. New York State Division of Parole*, 68 AD3d 1295, *Smith v. New York State Division of Parole*, 64 AD3d 1030 and *Marsh v. New York State Division of Parole*, 31 AD3d 898.

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: August 2, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice

[2] It appears that petitioner is rescheduled to reappear before the Parole Board for discretionary release consideration in November of 2013. While additional appellate-level clarification may come down prior to petitioner's reappearance, it should be noted that the Appellate Division, Third Department has recently indicated that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post- September 30, 2011 discretionary parole release determinations (*see Garfield v. Evans*, __ AD3d __, 2013 NY Slip Op 05029, July 3, 2013)