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

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In the Matter of the Application of
KEITH E. ERNEST, #04-B-0982,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

DECISION AND JUDGMENT
RJI #16-1-2008-0283.070
INDEX # 2008-0973
ORI #NY016015J

-against-

NEW YORK STATE DIVISION 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 Keith E. Ernest, verified on June 20, 2008, and stamped as filed in the Franklin County Clerk's office on June 25, 2008. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the August, 2007, decision denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on July 8, 2008, and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on August 26, 2008, as well as respondent's Letter Memorandum of that date. The Court has also received and reviewed petitioner's Reply thereto filed in the Franklin County Clerk's office on September 23, 2008.

On April 2, 2004, petitioner was sentenced in County Court, Onondaga County, as a second felony offender, to two indeterminate terms of 2 to 4 years each upon his conviction of Criminal Possession of a Weapon 3° and Attempted Robbery 3°, the sentences to run consecutively.

Petitioner appeared before his initial Parole Board on August 8, 2007, the Board denied petitioner release and directed that he be held for an additional 24 months. The parole denial determination read as follows:

> "NOTWITHSTANDING THE EARNED ELIGIBILITY CERTIFICATE, AFTER A REVIEW OF THE RECORD AND INTERVIEW, THE PANEL HAS DETERMINED THAT IF RELEASED AT THIS TIME, THERE IS A REASONABLE PROBABILITY THAT YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT AGAIN VIOLATING THE LAW AND YOUR RELEASE WOULD BE INCOMPATIBLE WITH THE WELFARE OF SOCIETY. THIS DECISION IS BASED ON THE FOLLOWING FACTORS: YOUR INSTANT OFFENSE IS CPW 3RD AND ATT ROBBERY 3RD IN WHICH YOU TRIED TO ROB YOUR VICTIM AT KNIFEPOINT AND HE WAS ABLE TO FIGHT YOU OFF AND YOU DID SO WHILE ON PAROLE. YOUR CRIMINAL HISTORY DATES BACK TO 1985 INCLUDES BURGLARY, ROBBERY, ASSAULT, AND WEAPONS POSSESSION, PRIOR PRISON TERMS AND FAILURES AT COMMUNITY SUPERVISION. NOTE IS MADE OF YOUR PROGRAM AND DISCIPLINARY RECORD WHICH INCLUDES VIOLENCE. YOUR 23 YEAR HISTORY OF VIOLENCE AND CRIME CONTINUES EVEN WHILE IN PRISON. YOU HAVE CLEARLY NOT BENEFITTED FROM REPEATED EFFORTS AT REHABILITATION. YOU ARE A DANGER TO SOCIETY. PAROLE IS DENIED."

Petitioner filed an administrative appeal, but the Appeals Unit failed to issue its findings and recommendations within the time prescribed in 9 NYCRR 8006.4(c). 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 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 the minimum period of imprisonment was established by the sentencing court, the Board must also consider the seriousness of the underlying offense and 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 review able 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 contends that he "was not granted a presumption of release consideration after receiving an Earned Eligibility Certificate (EEC)" (paragraph 16); that the Board focused on his instant offense, criminal history, and institutional history to the exclusion of factors more favorable to him, including comments - although no specific parole recommendations - of the sentencing judge; that the Board "relied upon inaccurate information" (paragraph 20); that the Board effectively resentenced him; and that the cumulative effect of these errors necessitates a grant of relief herein.

Although the statutory and regulatory language related to earned eligibility certificates is confusing, at a minimum, it is clear that the Appellate Division, Third Department, has repeatedly upheld parole denial determinations with respect to inmates holding EEC's while citing the nature of such inmates' crimes and/or their criminal records as appropriate factors to be considered. *See e.g. Hopkins v. New York State Board of Parole*, ___ AD3d ___ (2008 WL 2130170), *Berry v. State Division of Parole*, 50 AD3d 1346, *Corley v. New York State Division of Parole*, 33 AD3d 1142, *Pearl v. New York State Division of Parole*, 25 AD3d 1058 and *Velasquez v. Travis*, 278 AD2d 651, *lv den* 96 NY2d 708. Therefore, notwithstanding petitioner's receipt of an EEC, the Court finds that the parole board was not precluded from considering the nature of the crime underlying petitioner's incarceration as well as his criminal history and institutional record. It is clear from the record that the requisite statutory factors were considered. Given the narrow scope of judicial review of discretionary parole denial determinations, this Court is unable to conclude that the emphasis placed by the Board on petitioner's extensive criminal history and violent record both in and out of prison reflects irrationality boarding on impropriety, notwithstanding the existence of those positive factors to which the petitioner makes reference. Nor can this Court say that the Board inaccurately represented the petitioner's history within its remarks or its decision.

To the extent that petitioner failed to raise his re-sentencing argument upon administrative appeal, he has failed to preserve it for review here. Even were the argument preserved it would be unavailing. *See Bonilla v. Board of Parole*, 32 AD3d 1070.

For all of the reasons cited above, petitioner's invocation of a "doctrine of cumulative effect of error" is misplaced and unavailing.

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 15 , 2008, at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice