STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
SHERMAN WALKER,#92-A-7141,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2012-0315.12
INDEX #138638
ORI # NY044015J

-against-

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 Sherman Walker, verified on April 23, 2012 and filed in the St. Lawrence County Clerk's office on April 27, 2012. Petitioner, who is now an inmate at the Orleans Correctional Facility, is challenging the September 2011 determination denying him parole and directing that he be held for an additional 18 months.[1] The Court issued an Order to Show Cause on May 3, 2012 and has received and reviewed respondent's Answer/Return including Confidential Exhibit B, C and D, verified on June 28, 2012, as well as petitioner's Reply thereto, dated July 12, 2012 and filed in the St. Lawrence County Clerk's office on July 16, 2012. In response to the Court's Letter Order of September 17, 2012 the Court has also received and reviewed respondent's Supplemental Exhibits (O, P (confidential) and Q), filed in the St. Lawrence County

[1] The copy of the parole denial decision set forth at the end of the transcript of petitioner's September 12, 2011 Parole Board appearances (Respondent's Exhibit F) begins by stating "Denied, 24 months, to 2/2013. "The copy of the parole denial decision set forth in the Parole Board Release Decision Notice (Respondent's Exhibit G), however, begins by stating "DENIED - HOLD FOR 18 MONTHS, NEXT APPEARANCE DATE: 02/2013". Notwithstanding the conflicting entries (24-month hold versus 18-month hold), respondent acknowledges in its papers that petitioner is subject to an 18-month hold.

Clerk's office on October 9, 2012, as well as petitioner's Supplemental Reply, dated October 31, 2012 and received directly in chambers on November 5, 2012.

On February 13, 1992 petitioner was sentenced in Supreme Court, New York County, as a second violent felony offender, to a controlling indeterminate sentence of 12½ to 25 years upon his convictions of the crimes of Robbery 1° and Robbery 2°. On February 27, 1992 petitioner was sentenced in Supreme Court, Queens County, as a second felony offender, to a consecutive indeterminate sentence of 7 to 14 years upon his conviction of the crime of Robbery 2°. On June 16, 1992 petitioner was sentenced in Supreme Court, Queens County, as a second violent felony offender, to an indeterminate sentence of 7 to 14 years upon his conviction of the crime of Robbery 1°. This sentence was directed to run concurrently with respect to the sentence imposed in Queens County on February 27, 1992. DOCCS officials have determined that the multiple sentences imposed against petitioner produced an aggregate indeterminate sentence of 19½ to 39 years.

Petitioner made his second appearance before a Parole Board on September 12, 2011. Following that appearance a decision was rendered denying petitioner discretionary release and directing that he be held for an additional 18 months. The denial determination reads as follows:

> "PAROLE IS DENIED. AFTER A CAREFUL REVIEW OF YOUR RECORD, YOUR 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 W/O VIOLATING THE LAW, YOUR RELEASE AT THIS TIME IS INCOMPATIBLE W/ THE WELFARE AND SAFETY OF THE COMMUNITY, AND IF SO DEPRECATE THE SERIOUSNESS OF THIS CRIME AS TO UNDERMINE RESPECT FOR THE LAW. THIS DECISION IS BASED UPON THE FOLLOWING FACTORS: YOU

> APPEARE [SIC] BEFORE THIS PANEL WITH THE SERIOUS I.O.'S OF ROBBERY 1ST (2 CTS) AND ROBBERY 2ND (2 CTS) WHEREIN YOU IN-CONCERT COMMITTED THREE SEPARATE ROBBERIES OF JEWELRY. ONE ROBBERY INVOLVED A GUN AND ONE ROBBERY INVOLVED A KNIFE. THESE CRIMES CULMINATE A LONG CRIMINAL HISTORY FILLED W/ ROBBERY, ILLEGAL DRUGS AND GRAND LARCENY. YOU HAVE VIOLATED PAROLE IN THE PAST. YOU HAVE A WELL ESTABLISHED PATTERN OF CRIMINAL BEHAVIOR. IN ADDITION, YOU HAVE A POOR RECORD OF ADJUSTMENT WHILE IN PRISON WHICH INCLUDES MULTIPLE TIER II INFRACTIONS AND TIER III INFRACTION. CONSIDERATION HAS BEEN GIVEN TO ANY PROGRAM COMPLETION, HOWEVER, YOUR RELEASE AT THIS TIME IS DENIED."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on December 12, 2011. Although the Appeals Unit 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 May 31, 2012, after the commencement of this proceeding.

At the time of petitioner's September 12, 2011 Parole Board appearance and the issuance of the parole denial determination 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, provided, 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; (ii) performance, if any, as a

> participant in a temporary release program; (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 . . ."

At the time of petitioner's September 12, 2011 Parole Board appearance and the issuance of the parole denial determination Executive Law §259-c(4) 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), however, was amended by L 2011, ch 62, part C, subpart A, §38-b, effective September 30, 2011[2]. Thus, the amended version of Executive Law §259-c(4) was not yet in effect at the time of petitioner's September 12, 2011 Parole Board appearance and the issuance of the parole denial determination. The amended version of Executive Law §259-c(4) provides 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 maybe released to parole supervision . . ." (Emphasis added).

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[2] L 2011, ch 62, part C, subpart A, section 49(f) provides that ". . . the amendments to subdivision 4 of section 259-c of the executive law made by section thirty-eight-b of this act shall take effect six months after it shall have become a law . . ." Since the underlying legislation was enacted on March 31, 2011, the amendment to Executive Law §259-c(4) became effective as of September 30, 2011 (or October 1, 2011).

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 first contends that the parole denial determination was based upon erroneous information. More specifically, he asserts that he had no robbery conviction(s) prior to his 1992 convictions and that he had no prior parole violation. Petitioner's assertions to the contrary notwithstanding, it is clear to this Court that on October 27, 1986 he was sentenced in Supreme Court, Kings County, to an indeterminate sentence of 2 to 6 years upon his conviction of the crime of Robbery 1°. Although the Kings County Sentence and Commitment Order (respondent's Exhibit O) shows the name of the defendant therein as Sherman McRae, such order identifies the defendant's birthday as January 24, 1967 and his NYSID Number as 5026622Q - the same birth date and NYSID number set forth on Sherman Walker's 1992 New York County Sentence and Commitment Order as well as all of Sherman Walker's 1992 Queens County Sentence and Commitment Orders. Petitioner's use of the name Sherman McRae, moreover, is consistent with information set forth in respondent's Confidential Exhibit P. That exhibit also reflects a prior Youthful Offender (Robbery 1°) adjudication in Kings County.

It is also clear that in November of 1988 petitioner's parole was revoked following a contested parole revocation hearing. Although the Parole Revocation Decision

Notice/Parole Board Decision Notice (respondent's Exhibit M) identified the parole violator as Steven Melvin or Stevin Melvin, such notices identified the parole violator by the same 5026622Q NYSID Number affixed to petitioner's various sentence and commitment orders. Petitioner's use of the name "Steven Melvin" and/or "Steve Melvin," moreover, is consistent with information set forth in respondent's Confidential Exhibit P. In addition, petitioner's use of the alias "Steven Melvin" is conceded by the petitioner. Based upon the foregoing, this Court finds no basis to conclude that the September 2011 parole denial determination was based upon erroneous information.

Petitioner next argues that in rendering its parole denial determination the Parole Board failed to take into consideration all of the requisite statutory factors. In this regard petitioner specifically cites his participation in a DOCCS temporary release program (outside work crew) as well as his parole "plan." 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 September 12, 2011 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors including petitioner's therapeutic/vocational programming, academic record, participation in an outside clearance program[3], family support/release plans , and problematic disciplinary record, in addition to the circumstances of the multiple violent crimes underlying his incarceration, criminal record and prior parole violation. *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, before closing the record of the parole interview a parole commissioner questioned the petitioner as follows: "What else do you think we should know? Did I miss anything or is there anything you would like to point out that we did not go over?" In response to those open-ended invitations petitioner responded "[n]ot right off hand. Not right off hand. Everything is pretty much covered." 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

[3] Petitioner's outside clearance was noted in the Inmate Status Report and during the course of the September 12, 2011 parole interview. When asked by a parole commissioner about his outside clearance activities petitioner responded that he had over 400 hours of outside clearance and then stated as follows: "That was in the last facility I was in. I was working for Woodbury from the outside to Sullivan Correctional Facility, working doing the grass, janitor work, cleaning up things they needed me to do, buffing and stuff in that regard and painting and stuff like that."

bordering on impropriety as a result of the emphasis placed by the Board on the nature of the crimes underlying petitioner's incarceration as well as his prior criminal record and parole violation. *See Veras v. New York State Division of Parole,* 56 AD3d 878, *Serrano v. Dennison*, 46 AD3d 1002, *Schettino v. New York State Division of Parole*, 45 AD3d 1086 and *Farid v. Travis*, 17 AD3d 754, *app dis* 5 NY3d 782.

Citing *Thwaites v. New York State Board of Parole*, 34 Misc 3d 694, petitioner next argues that the Parole Board erred in failing to apply the amended version of Executive Law §259-c(4) when it considered him for discretionary parole release and, ultimately, denied such release. Notwithstanding the fact that the 2011 amendment to Executive Law §259-c(4) was designated by the legislature as taking effect on September 30, 2011, the *Thwaites* court found that the amendment had to be applied retroactively to Mr. Thwaites' March 16, 2010 parole denial determination. This Court, however respectfully disagrees with the conclusion of the *Thwaites* court and, for the reasons set forth in the March 6, 2012 Decision and Judgment of the Supreme Court, Albany County (Hon. Richard M. Platkin) in *Hamilton v. New York State Division of Parole*, 36 Misc 3d 440, finds no basis to apply the amended version of Executive Law §259-c(4) in reviewing a pre-September 30, 2011 parole denial determination. *See Tafari v. Evans*, 36 Misc 3d 1216(A), 2012 N.Y. Slip Op. 51355(U). As stated by the *Hamilton* court, "[i]t is apparent . . . that the State Legislature considered the question of the effectiveness of the 2011 Amendments and determined that the new procedures contemplated by the amendments to Executive Law §259-c(4) should not be given effect with respect to administrative proceedings conducted prior to October 1, 2011." 36 Misc 3d 440 at 443.

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: February 4, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court