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

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In the Matter of the Application of
WILLIAM MORALES,#08-A-0474,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0508.125
INDEX # 2012-1043
ORI # NY016015J

-against-

NYS 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 William Morales, verified on November 16, 2012 and filed in the Franklin County Clerk's office on November 30, 2012. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the February 2012 determination denying him parole and directing he be held for an additional 24 months. The Court issued an Order to Show Cause on December 11, 2012 and an Amended Order to Show Cause on January 24, 2013. The Court has received and reviewed respondent's Answer, including Confidential Exhibits B and D, verified on February 5, 2013 and supported by the February 5, 2013 Affirmation Brian J. O'Donnell, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, sworn to on March 22, 2013 and filed in the Franklin County Clerk's office on March 28, 2013.

On December 10, 2007 petitioner was sentenced in Supreme Court, New York County, following a plea, to an indeterminate sentence of 5 to 15 years upon his conviction of the crime of Manslaughter 1°. Petitioner made his initial appearance before a Parole Board on February 8, 2012. Following that appearance a decision was rendered denying

him discretionary release and directing he be held for an additional 24 months. The parole denial determination reads as follows:

> "PAROLE DENIED. AFTER A PERSONAL INTERVIEW, RECORD REVIEW AND DELIBERATION, THIS PANEL FINDS YOUR RELEASE IS INCOMPATIBLE WITH THE PUBLIC SAFETY AND WELFARE. THE REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION EFFORTS, AND YOUR NEED FOR SUCCESSFUL COMMUNITY REINTEGRATION. YOUR INSTANT OFFENSE OF MANSLAUGHTER 1ST INVOLVED YOU SHOOTING A KNOWN MALE MULTIPLE TIMES CAUSING HIS DEATH. DURING THE INTERVIEW YOU MINIMIZE YOUR ACTIONS AND PLACED BLAME WITH THE VICTIM. YOUR FLEEING THE SCENE AND THEN THE COUNTRY IS OF CONCERN[1].
>
> CONSIDERATION HAS BEEN GIVEN TO YOUR RECEIPT OF AN EARNED ELIGIBILITY CERTIFICATE, GOOD BEHAVIOR, LETTERS OF SUPPORT, AND PROGRAMING. DUE TO YOUR VIOLENT INSTANT OFFENSE, AND MINIMIZATION OF YOUR ACTIONS, YOUR RELEASE AT THIS TIME IS DENIED. THERE IS A REASONABLE PROBABILITY YOU WOULD NOT LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW."

The document perfecting petitioner's administrative appeal from the parole denial determination was received by the DOCCS Parole Appeals Unit on June 21, 2012. 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 January 14, 2013, after this proceeding had been commenced.

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:

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[1] The criminal act underlying petitioner's incarceration was committed on July 22, 1992. Petitioner, however, was not arrested until 15 years later in 2007. During the course of the February 8, 2012 parole interview petitioner stated that he fled to the state of Florida after the July 22, 1992 incident and, at some point later, returned to the Dominican Republic.

> "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.

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 therapeutic and vocational programing record, clean disciplinary record and outstanding order of deportation to the Dominican Republic. 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, risk and needs assessment instrument, receipt of an Earned Eligibility Certificate (EEC), clean disciplinary record, release plans, community support, deportation order 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. Indeed, just before the conclusion of petitioner's February 8, 2012 Parole Board appearance he was asked by a parole commissioner "[i]s there anything else that we have not discussed?" Petitioner responded as follows: "I hope to go back to my family, go back to my job. Even if you don't believe it in my case, I am the one that suffered, suffered all these years." 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. *See Martinez v. Evans,* ___ AD3d ___, 2013 NY Slip Op 05022*, Sanchez v. Division of Parole,* 89 AD3d 1305*, Thompson v. New York State Division of Parole,* 30 AD3d 746*, lv denied* 7 NY3d 716 *and Scott v. New York State Division of Parole,* 23 AD3d 950.

With regard to petitioner's receipt of an EEC, it is noted that Correction Law §805 provides, in relevant in part, as follows: "Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term . . . unless the board of parole determines that there

is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." In similar fashion, 9 NYCRR §8002.3(c) provides, in relevant part, that "[w]hen the minimum term of imprisonment is in accord with or greater than the time ranges for imprisonment contained within the guidelines adopted pursuant to this Part, parole release shall be granted at the expiration of such minimum term of imprisonment as long as such release is in accordance with the remaining guideline criteria." It is clear, however, that an inmate's receipt of a EEC does not preclude the Parole Board from issuing a determination denying discretionary parole release nor does such receipt preclude the Board from considering the nature of the crime(s) underlying the inmate's incarceration. *See Sanchez v. Division of Parole*, 89 AD3d 1305, *Rodriguez v. Evans*, 82 AD3d 1397, *Davis v. Lemons,* 73 AD3d 1354 and *Corley v. New York State Division of Parole*, 33 AD3d 1142. To the extent petitioner asserts that he is "over the [9 NYCRR §8001.3] guidelines" for 9 NYCRR §8002.3(c) purposes, the Court simply notes that the Inmate Status Report prepared in anticipation of the February 2012 initial Parole Board appearance (Exhibit C annexed to respondent's Answer) indicates that the guideline range for petitioner is "[u]nspecified." Petitioner, therefore, can not be over the guidelines.

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]

Petitioner's argues 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." In this regard, petitioner asserts as follows:

> "Here, in the instant case, the Board of Parole states in the decision for denial of petitioner's parole release, that all the required statutory factors have been considered, including his [risk] to the community . . . Where if the Board would have considered the [risk] which this petitioner does pose to the community, they would have made an assessment based on the information contained within the Board of Parole's (**COMPAS Re ENTRY Risk Assessment Form**), dated; 1/25/2012, in which the petitioner's 'Risk Assessment' is either (**Low** or **Unlikely**) as an Overall [Risk] Potential. Therefore contrary to the Board's own statement on the parole release decision, the petitioner risk assessment makes him a favorable candidate for parole release as per this board's risk assessment form of the petitioner." (Emphasis in original).

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 issue will not be addressed in this Decision and Judgment. Although 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), this Court finds nothing in *Garfield*

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[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 . . ."

or the amended statute to suggest that the quantified risk assessment determined through utilization of the needs and risk assessment instrument supercedes the independent discretionary authority of the Board of Parole to determine whether or not there is a reasonable probability that a prospective parolee would, if released, live and remain at liberty without violating the law. 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, are only intended 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*, ____ Misc 3d ____, 2013 NY Slip Op 23216 (Sup Ct, Albany Co., June 28, 2013). A review of the transcript of petitioner's February 8, 2012 Parole Board appearance indicates that the Board " . . . had a chance to review your [petitioner's] needs and risk assessment . . ." The Board ultimately concluded, however, that a denial of parole was warranted based upon the nature of the crime underlying petitioner's incarceration, the fact that petitioner, although claiming self defense, fled the state and later the country, as well as the Board's perception

that petitioner minimized his own actions and placed blame with the victim during the course of the parole interview.

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: July 30, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge