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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Johnston, Frank **Facility:** Otisville CF

NYSID: [redacted] **Appeal Control No.:** 10-144-19 B

DIN: 87-A-0977

Appearances: Brett Dignam, Esq.
Morningside Heights Legal Services, Inc.
435 West 116th Street, Room 831
New York, NY 10027

Decision appealed: September 2019 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: **Crangle, Berliner, Davis**

Papers considered: Appellant's Brief received February 19, 2020

Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

Final Determination: The undersigned determine that the decision appealed is hereby:

_____ Commissioner — ✓ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____

_____ Commissioner — ✓ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____

_____ Commissioner — ✓ **Affirmed** ___ **Vacated, remanded for de novo interview** ___ **Modified to** _____

If the Final Determination is at variance with Findings and Recommendation of Appeals Unit, written reasons for the Parole Board's determination must be annexed hereto.

This Final Determination, the related Statement of the Appeals Unit's Findings and the separate findings of the Parole Board, if any, were mailed to the Inmate and the Inmate's Counsel, if any, on 6/1/2020 LB.

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File
P-2002(B) (11/2018)

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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Appellant challenges the September 2019 determination of the Board, denying release and imposing a 24-month hold. Appellant is incarcerated for two separate instant offenses. In one, Appellant drove a stolen vehicle onto a sidewalk, struck his ex-fiancée, and continued to accelerate. Appellant dragged the victim under the vehicle for approximately two blocks before the body dislodged and dropped on the street. Appellant drove away and the victim died from her injuries a short time later. In the second instant offense, two weeks before causing the death of his ex-fiancée, Appellant stole a different vehicle. Appellant raises the following issues: 1) the decision was conclusory and lacked detail; 2) the Board departed from the COMPAS without providing an explanation; 3) the Board relied almost exclusively on the nature of the offense in denying parole; 4) the Board failed to consider the full parole packet provided by Appellant; 5) the Board considered erroneous information contained in opposition letters from the District Attorney; 6) the Board improperly relied on undisclosed community opposition; and 7) the Board failed to consider Appellant's youth at the time of the instant offense. These arguments are without merit.

As an initial matter, discretionary release to parole is not to 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." Executive Law § 259-i(2)(c)(A) (emphasis added); accord Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). Executive Law § 259-i(2)(c)(A) requires the Board to consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record and criminal behavior. People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983).

While consideration of these factors is mandatory, "the ultimate decision to parole a prisoner is discretionary." Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000). Thus, it is well settled that the weight to be accorded the requisite factors is solely within the Board's discretion. See, e.g., Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717; Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239, 657 N.Y.S.2d 415, 418 (1st Dept. 1997). The Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Matter of LeGeros v. New York State Bd. Of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007). In the absence of a convincing demonstration that the Board did not consider the statutory factors, it must be presumed that the Board fulfilled its duty. Matter of Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); Matter of McLain v. New York State Div. of Parole, 204

A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994); Matter of McKee v. New York State Bd. Of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990); People ex rel. Herbert, 97 A.D.2d 128, 468 N.Y.S.2d 881.

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses of two counts of Murder in the second degree, Unauthorized Use of a Motor Vehicle in the first degree, Criminal Possession of Stolen Property in the second degree, Leaving the Scene of an Accident Without Reporting, and Criminal Possession of Stolen Property in the first degree; Appellant's criminal history including prior misdemeanor convictions; Appellant's institutional efforts including completion of required programming, volunteer work, receipt of a high school diploma, positions as a teaching assistant and as a visiting room porter, attendance at AA and NA meetings, and no disciplinary infractions since 2011; and release plans to live with his wife and work as a pipe welder. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, statements from the District Attorney, and Appellant's parole packet featuring letters of support and assurance.

After considering all required factors, the Board acted within its discretion in determining release would not satisfy the standards provided for by Executive Law § 259-i(2)(c)(A). In reaching its conclusion, the Board permissibly relied on the heinous instant offense demonstrating that Appellant held no regard for human life, Appellant's lack of insight into his motivation at the time of the crime, the extreme violent nature of Appellant's conduct during and after the commission of the murder offense, and opposition to Appellant's release. See Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Olmosperez v. Evans, 114 A.D.3d 1077, 1078, 980 N.Y.S.2d 845, 846 (3d Dept. 2014), affd 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997); Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000); Matter of Payne v. Stanford, 173 A.D.3d 1577, 1578, 104 N.Y.S.3d 383, 385 (3rd Dept. 2019); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901 (2017); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002); Matter of Porter v. Alexander, 63 A.D.3d 945, 881 N.Y.S.2d 157 (2d Dept. 2009); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998). The Board also cited the COMPAS instrument's elevated score for reentry substance abuse. See Matter of Espinal v. N.Y. State Bd. Of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019); Matter of Bush v. Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Matter of Wade v. Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017).

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The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 968 N.Y.S.2d 87 (1st Dept. 2013); Matter of Little v. Travis, 15 A.D.3d 698, 788 N.Y.S.2d 628 (3d Dept. 2005); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations.

The Board considered the COMPAS instrument and did not depart from it. That is, the decision was not impacted by a departure from a scale. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. For example, the Board did not find a reasonable probability that Petitioner will not live and remain at liberty without violating the law but rather concluded, *despite* low risk scores, release would be inappropriate under the other two statutory standards. This is entirely consistent with the Board's intention in enacting the amended regulation. The Board also cited the COMPAS instrument in its denial and reasonably indicated concern about the "highly probable" score for reentry substance abuse in view of Appellant's history including before the instant offense.

There is no merit to Appellant's claim that the Board failed to consider the full parole packet that he provided. There is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. See People ex rel. Carlo v. Bednosky, 294 A.D.2d 382, 383, 741 N.Y.S.2d 703 (2d Dept. 2002); People ex. rel. Johnson v. New York State Bd. of Parole, 180 A.D.2d 914, 916, 580 N.Y.S.2d 957, 959 (3d Dept. 1992). The Board is presumed to follow its statutory commands and internal policies in fulfilling its obligations. See Garner v. Jones, 529 U.S. 244, 256, 120 S. Ct. 1362, 1371 (2000).

As for Appellant's contention that the Board considered erroneous information contained in opposition letters from the District Attorney, Appellant informed the Board of the alleged error (as to a shootout with police) during interview and there is no indication in the record to suggest the controverted information served as a basis for the decision. Matter of Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017). Appellant also objects to statements in the opposition letters suggesting that he has changed his account of the instant offense over the years. A review of the interview transcript and the Board's written decision demonstrates that those statements played no role in the Board's determination. Matter of Tatta v. State, 290 A.D.2d 907, 908, 737 N.Y.S.2d 163, 164 (3d Dept.), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Amen v. New York State Div. of Parole, 100 A.D.3d 1230, 1230, 954 N.Y.S.2d 276, 277 (3d Dept. 2012).

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Appellant's assertion that the Board improperly relied on undisclosed opposition to his release is without merit. Executive Law § 259-i(2)(c)(A) and 9 NYCRR § 8002.2 require the Board to consider certain factors including risk and needs principles, the case plan, institutional record, release plans, deportation orders, statements made to the Board by the crime victim, if any, the seriousness of the offense, and prior criminal record. The Board is also permitted to receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an inmate's release to parole supervision. Matter of Applewhite v. New York State Bd. of Parole, 167 A.D.3d 1380, 91 N.Y.S.3d 308, 311 (3d Dept. 2018). The Board may consider confidential information, Matter of Molinar v. New York State Div. of Parole, 119 A.D.3d 1214, 991 N.Y.S.2d 487 (3d Dept. 2014), and is not required to discuss confidential information with the inmate during the interview. 9 N.Y.C.R.R. § 8002.1(c).

Finally, contrary to Appellant's claim, Matter of Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 30 N.Y.S.3d 397, 400 (3d Dept. 2016) – which requires consideration of youth and its attendant characteristics for inmates serving a maximum life sentence for crimes committed as juveniles – does not apply whereas here the inmate was an adult when he committed the instant offense. Matter of Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017). Cf. Miller v. Alabama, 567 U.S. 460,132 S. Ct. 2455 (2012) (holding unconstitutional mandatory life imprisonment without parole for juveniles under the age of 18 at the time of their crimes); Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010) (distinguishing juveniles under 18 from adults).

Recommendation: Affirm.