December 2020

Administrative Appeal Decision - Bottom, Anthony (2019-06-25)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Bottom, Anthony **Facility:** Sullivan CF

NYSID: [redacted] **Appeal Control No.:** 12-125-18 B

DIN: 77-A-4283

Appearances: Nora Carroll, Esq.
The Legal Aid Society
111 Livingston Street, 10th Floor
Brooklyn, New York 11201

Decision appealed: December 2018 decision denying discretionary release and imposing a hold of 15 months.

Board Member(s) who participated: **Drake, Berliner, Shapiro**

Papers considered: Appellant's Brief received March 19, 2019

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:

_____ **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** _____
Commissioner

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 6/25/19 GG.

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 was sentenced to 25 years to life upon his conviction of two counts of Murder. In the instant appeal, Appellant challenges the December 2018 determination of the Board denying release and imposing a 15-month hold on the following grounds: (1) the Board's decision is irrational because the Board failed to balance the statutory factors; (2) the Board erroneously and unfairly characterized Appellant's interview responses as having "vacillated" and lacked detail; (3) the Board relied exclusively and unlawfully on the instant offense to the exclusion of the reasoning in prior Board decisions; (4) the Board's reliance on the instant offense is irrational in light of the release of Appellant's co-defendant; (5) the decision is not guided by risk and need principles and fails to provide a legitimate explanation for departing from the COMPAS instrument; (6) the Board failed to take into account Appellant's youth at the time of the instant offense; and (7) Appellant should be released on parole or, alternatively, granted a *de novo* interview. 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 factors that are 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). 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 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).

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: Appellant's background, involvement in the Black Panthers and the Black Liberation Army, and related political views; the instant offense involving the in concert shooting deaths of two police officers; Appellant's criminal history in California; his institutional record including educational accomplishments, program completions, initiatives such as the Men's Council, teaching, and discipline; his expressions of remorse; his physical health; and release plans including residence with two friends or, alternatively, his mother out-of-state. The Board also had before it and considered, among other things, the pre-sentence investigation report, the sentencing minutes, Appellant's case plan, the COMPAS instrument, opposition to release, and Appellant's parole packet and letters of support, including from one victim's son.

After considering all required factors and principles, 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 serious nature of the instant offense, and Appellant's motivation, involving the murder of two law enforcement officers as representatives of the State in a self-proclaimed war, the harm Appellant caused, and that, despite professing responsibility during the interview, Appellant was not forthcoming about and distanced himself from the crime insofar as he was vague about what happened and vacillated between not remembering his actions, remembering one shooting and not the other, denying the second shooting and then not recalling it. 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 Robinson v. New York State Bd. of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Matter of Webb v. Travis, 26 A.D.3d 614, 810 N.Y.S.2d 233 (3d Dept. 2006); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Carrion v. New York State Bd. of Parole, 210 A.D.2d 403, 404, 620 N.Y.S.2d 420, 421 (2d Dept. 1994).

Appellant claims the Board failed to engage in required balancing of the statutory factors or explain it sufficiently in its decision. He argues the dissent, in contrast, properly weighed the factors by using "language of balance" in reference to the offense considered in context. While the majority used this so-called "language of balance" in reference to specific factors, there is no legal requirement that the Board use the word "balance" and Appellant has failed to rebut the presumption that the Board fulfilled its duty. Matter of McKee, 157 A.D.2d at 945, 550 N.Y.S.2d at 205; see also 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 also is not required to articulate the weight accorded to each factor, Matter of Allis v. New York State Div. of Parole, 68 A.D.3d 1309, 1309, 890 N.Y.S.2d 200, 201 (3d Dept. 2009); Matter of Porter v. Alexander, 63 A.D.3d 945, 946, 881 N.Y.S.2d 157, 158 (2d Dept. 2009), or even explicitly mention each factor considered, Matter of Betancourt, 148

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A.D.3d 1497, 49 N.Y.S.3d 315; Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). The Board's written decision is governed by Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(d). The decision satisfies the criteria set forth therein, 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). The Board addressed applicable factors and principles in individualized terms and explained those that ultimately weighed most heavily in its deliberations—including the serious murder offense targeting law enforcement officers as representatives of the State and Appellant's vague and inconsistent interview responses concerning the crime. Courts regularly sustain parole decisions with substantially less particularized explanations than presented here. See, e.g., Matter of Siao-Pao v. Dennison, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008), aff'g 51 A.D.3d 105, 110, 854 N.Y.S.2d 348 (1st Dept.) (citing decision); Matter of Kozlowski, 108 A.D.3d 435, 968 N.Y.S.2d 87, rev'g 2013 N.Y. Slip Op 30265(U), 2013 N.Y. Misc. Lexis 552 (citing decision); see also Matter of Garcia, 239 A.D.2d at 237, 657 N.Y.S.2d at 417.

Appellant argues the Board erroneously and unfairly characterized his interview responses as having "vacillated" and lacked detail. He also contends the decision is vague, confusing, and disconnected from the law. The pre-sentence investigation report, on which the Board is entitled to rely, Matter of Carter v. Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept.), lv. denied, 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011), reflects that Appellant shot both officers. Appellant's written personal statement in his parole packet – which makes brief mention of what occurred during the crime – also acknowledges he shot both officers. [redacted] However, his interview responses about what transpired – which were similarly limited in detail – were internally inconsistent and contradicted by the official record. (Tr. at 37-38, 51-52.) The interview transcript supports the Board's characterization of his responses. While Appellant contends his responses were consistent with an in-concert crime, the inquiry and responses characterized as "vacillat[ing]" clearly concerned Appellant's actions in particular, namely, whether or not he personally fired shots at both officers as indicated in the official record. (Tr. at 51-52.) And while Appellant expressed responsibility for the crime, the Board has the authority to make credibility determinations, Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008), and rationally concluded he was not being forthcoming and was distancing himself from the crime. His inability or unwillingness to fully acknowledge his crime is relevant to both his rehabilitative progress and whether release would deprecate the severity of the offense so as to undermine respect for the law. See Matter of Silmon, 95 N.Y.2d at 478, 718 N.Y.S.2d 704; Matter of Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121, 125 (1st Dept. 2007). The

decision also was sufficiently clear and detailed to inform Appellant of the reasons for the parole denial, as discussed above.

Appellant argues the Board relied exclusively and unlawfully on the instant offense to the exclusion of reasoning given in prior decisions. As the weight to be assigned each statutory factor is within its discretion, the Board may emphasize the severity of the offense over the other factors considered. See, e.g., Matter of Olmosperez v. Evans, 114 A.D.3d 1077, 1078, 980 N.Y.S.2d 845, 846 (3d Dept. 2014), aff'd 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept. 2008), aff'd 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008); Matter of Kirkpatrick, 5 A.D.3d 385, 772 N.Y.S.2d 540; Matter of Carrion, 210 A.D.2d at 404, 620 N.Y.S.2d at 421. The appellant has not in any manner been resentenced. Matter of Mullins, 136 A.D.3d at 1142, 25 N.Y.S.3d 698. That the Board found Appellant's postconviction activities outweighed by the serious nature of his crime, together with its impact and his interview responses, does not constitute convincing evidence that the Board did not consider them, see Matter of McLain, 204 A.D.2d 456, 611 N.Y.S.2d 629, or render the decision irrational, see Matter of Garcia, 239 A.D.2d at 239-40, 657 N.Y.S.2d at 418. The record of past parole denials also does not constitute convincing evidence that the Board did not consider the applicable factors or render the decision irrational as there is no legal requirement that a second Board panel must follow the recommendation of a prior Board panel. See Matter of Flores v New York State Bd. of Parole, 210 A.D.2d 555, 620 N.Y.S.2d 141, 142 (3d Dept. 1994). Variation from earlier decisions "shows only that [the Board] considered the factors anew." Matter of Phillips, 41 A.D.3d at 21, 834 N.Y.S.2d at 124.

The inmate's positive institutional efforts do not automatically entitle him to release, as discretionary release shall not be granted merely as a reward for good conduct or efficient performance of duties while confined. Executive Law § 259-i(2)(c)(A); Matter of Gutkaiss v. New York State Div. of Parole, 50 A.D.3d 1418, 857 N.Y.S.2d 755 (3d Dept. 2008); Matter of Faison v. Travis, 260 A.D.2d 866, 688 N.Y.S.2d 782, 783 (3d Dept.), appeal dismissed 93 N.Y.2d 1013, 697 N.Y.S.2d 567 (1999). The Board did not act in an arbitrary or capricious manner when it denied parole on the ground that the seriousness of the crime, together with the harm caused and Appellant's interview responses, were not outweighed by his accomplishments, release plans and letters of support, including from the son of one victim. Matter of Cardenales v. Dennison, 37 A.D.3d 371, 830 N.Y.S.2d 152 (1st Dept. 2007) (Board did not act arbitrarily in denying parole on the ground that serious crimes were not outweighed by other factors such as an exemplary institutional record and many letters of support including a letter from the victim's mother); see also Matter of Anthony v. New York State Div. of Parole, 17 A.D.3d 301, 301, 792 N.Y.S.2d 900, 900 (1st Dept. 2005) (citation omitted), lv. denied, 5 N.Y.3d 708, 803 N.Y.S.2d 28 (2005); Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 129, 750 N.Y.S.2d 759, 760 (1st Dept.

2002); Matter of Silmon v. Travis, 266 A.D.2d 296, 297, 698 N.Y.S.2d 685, 686 (2d Dept. 1999), aff'd 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000).

Appellant asserts that the Board's reliance on the instant offense is irrational in light of a co-defendant's release. However, the parole status of a co-defendant from the underlying criminal transaction is irrelevant. Each application for parole release is to be considered on its own individual merits. Baker v. McCall, 543 F. Supp. 498, 501 (S.D.N.Y. 1981), aff'd, 697 F.2d 287 (2d Cir. 1982); see also Matter of Phillips, 41 A.D.3d at 22, 834 N.Y.S.2d at 124-25 ("There is no entitlement to parole based upon comparison with the particulars of other applicants. Rather, each case is sui generis, and the Board has full authority in each instance to give the various factors a unique weighted value."). Here, the Board reviewed the record, conducted a thorough interview and deliberated with a majority of the panel ultimately deciding to deny parole release. Its decision was based not only upon the instant offense and the harm caused but also upon Appellant's interview responses. Appellant's suggestion that the Board was swayed by media attention and officials' criticism is purely speculative and unsubstantiated. Matter of MacKenzie v. Evans, 95 A.D.3d 1613, 1614, 945 N.Y.S.2d 471, 472 (3d Dept.), lv. denied, 19 N.Y.3d 815, 955 N.Y.S.2d 553 (2012); Matter of Huber v. Travis, 264 A.D.2d, 695 N.Y.S.2d 622 (3d Dept. 1999). This is insufficient to rebut the presumption of honesty and integrity that attaches to Judges and administrative fact-finders. See People ex rel. Carlo, 294 A.D.2d at 383, 741 N.Y.S.2d 703; People ex. rel. Johnson, 180 A.D.2d at 916, 580 N.Y.S.2d at 959.

Appellant's apparent contention that the Board failed to comply with the 2011 amendments to the Executive Law and the Board's regulations is likewise without merit. The 2011 amendments require procedures incorporating risk and needs principles to "assist" the Board in making parole release decisions. Executive Law § 259–c(4). The Board satisfies this requirement in part by using the COMPAS instrument. Matter of Montane v. Evans, 116 A.D.3d 197, 202, 981 N.Y.S.2d 866, 870 (3d Dept. 2014); see also Matter of Hawthorne v. Stanford, 135 A.D.3d 1036, 1042, 22 N.Y.S.3d 640, 645 (3d Dept. 2016); 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 Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). This is encompassed in the Board's regulations. 9 N.Y.C.R.R. § 8002.2(a). However, the COMPAS is not predictive and was never intended to be the sole indicator of risk and needs as the Board gets risk and needs information from a variety of sources, including the statutory factors and the interview. Notably, the 2011 amendments did not eliminate the requirement that the Board conduct a case-by-case review of each inmate by considering the statutory factors including the instant offense. The amendments also did not change the three substantive standards that the Board is required to apply when deciding whether to grant parole. Executive Law § 259-i(2)(c)(A). Thus, the COMPAS cannot mandate a particular result. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). Rather,

the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the three standards are satisfied. See Matter of Rivera v. N.Y. State Div. of Parole, 119 A.D.3d 1107, 1108, 990 N.Y.S.2d 295 (3d Dept. 2014); accord Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014).

Contrary to Appellant's claim, the regulations do not require the COMPAS be given more weight but rather require the Board to consider risk and needs principles, including the COMPAS scores, and provide an explanation if a denial decision is impacted by a departure from any COMPAS scale. In the matter at hand, the Board considered the COMPAS instrument and explained why, despite low scores, it was nonetheless denying release. In so doing, it was not expressing disagreement with any particular scale and nothing in its written decision contradicted the COMPAS instrument. Rather, the Board concluded that Appellant's COMPAS instrument was outweighed by other considerations indicating that, despite scores that suggested a low risk of recidivism relative to the incarcerated population as a whole, release would be contrary to the welfare of society and would undermine respect for the law. As such, it committed no error by addressing the overall COMPAS.

Moreover, there is no merit to Appellant's contention that the instant offense, or an inmate's present attitude towards it, can never be the basis for a COMPAS departure. Even assuming, arguendo, that this is what occurred, nothing in the relevant statutes and regulations indicates that a failure to appreciate the scope of harm one has caused is irrelevant to the considerations addressed by the COMPAS instrument. Similarly, the suggestion that the Board can never place more weight on the instant offense, including where the Board relies on the second and third statutory standards, is incorrect. See Matter of Montane v. Evans, 116 A.D.3d at 203, 981 N.Y.S.2d at 871; see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Lewis v. Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017).

Insofar as Appellant objects that the Board failed to take into account his youth at the time of the instant offense, the Board was not required to treat his age (19 y.o.) as a mitigating factor. The Board is required to consider an inmate's youth in relation to the commission of an offense for which he is serving a maximum life sentence pursuant to the Third Department's decision in Matter of Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 39, 30 N.Y.S.3d 397, 400 (3d Dept. 2016), and the Board's amended regulations, 9 N.Y.C.R.R. § 8002.2(c). However, this requirement does not apply whereas here the inmate was an adult when he committed the offense. 9 N.Y.C.R.R. § 8002.2(c) (defining "minor offenders" as inmates serving a maximum sentence of life imprisonment for a crime committed prior to the individual attaining the age of 18 years of age); Matter of Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017) (Hawkins inapplicable to offender who was over 18 at time of offense); cf. Miller v. Alabama, 567 U.S. 460,132 S. Ct. 2455 (2012) (holding unconstitutional mandatory life

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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). Nothing in the Executive Law or current case law supports expanding minor offender consideration to adults. It also is far from clear that Appellant's criminal behavior reflects "transient immaturity." Matter of Hawkins, 140 A.D.3d at 36, 30 N.Y.S.3d at 398. We nonetheless note the interview transcript reflects the Board considered Appellant's age, circumstances and subsequent development while incarcerated. The Board also had before it and considered the official statements by Appellant's trial attorneys and other material in his packet that addressed his age and circumstances.

As for Appellant's claim seeking release, we note that the proper remedy for a successful challenge to a parole release decision is a *de novo* interview. Matter of Quartararo v. New York State Div. of Parole, 224 A.D.2d 266, 637 N.Y.S.2d 721 (1st Dept.), lv. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 984 (1996); accord Matter of Ifill v. Evans, 87 A.D.3d 776, 928 N.Y.S.2d 480 (3d Dept. 2011); Matter of Lichtel v. Travis, 287 A.D.2d 837, 731 N.Y.S.2d 533 (3d Dept. 2001).

Recommendation: Affirm.