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December 2020

### Administrative Appeal Decision - Vargas, Johnny (2019-01-31)

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STATE OF NEW YORK – BOARD OF PAROLE

**ADMINISTRATIVE APPEAL DECISION NOTICE**

**Name:** Vargas, Johnny

**Facility:** Wende CF

**NYSID:** [REDACTED]

**Appeal  
Control No.:** 06-136-18 B

**DIN:** 92-A-4219

Appearances: Mackenzie Stutzman, *Esq.*  
P.O. Box 111  
Bath, New York 14810

Decision appealed: June 2018 decision denying discretionary release and imposing a hold of 24-months.

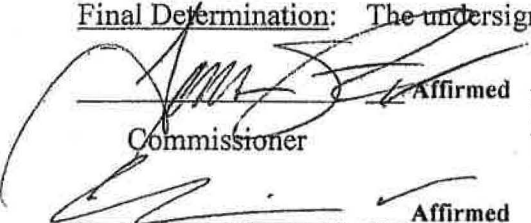
Board Member(s)  
who participated: **Drake, Cruse**

Papers considered: Appellant's Brief received October 30, 2018

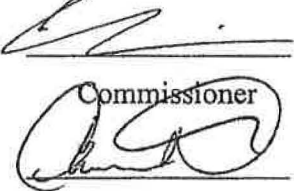
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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 11/31/19 GG.

**APPEALS UNIT FINDINGS & RECOMMENDATION**

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**Findings:** (Page 1 of 2)

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Appellant was sentenced to 20 years to life upon his conviction of Murder in the second degree (6 counts), Unlawfully Wearing a Body Vest, and CPW in the third degree. Appellant, though counsel, challenges the June 2018 determination of the Board to deny discretionary release with a 24-month hold as unlawful, arbitrary and capricious. Specifically, he contends the Board gave inappropriate attention to the instant offenses and failed to consider, or improperly weighed, other statutory factors such as his family support upon release and his institutional record including programming, improved discipline, and efforts to address substance abuse. He contends the statutory factors support his release. This argument is 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 King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d 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 Fuchino v. Herbert, 255 A.D.2d 914, 914, 680 N.Y.S.2d 389, 390 (4th Dept. 1998); 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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses wherein Appellant, who was involved in gang activity/war, committed five calculated murders; his attempts at remorse and insight into his actions; a prior misdemeanor drug conviction; his history of substance abuse in the community

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and while incarcerated; his institutional record including drug/alcohol tickets and program completions with a need [REDACTED] and release plans to live with his son or, if allowed to transfer, his wife in GA. In addition, the Board considered Appellant's age and circumstances at the time of the offenses. The Board also had before it and considered, among other things, official statements by the District Attorney and Sentencing Court, Appellant's case plan, the COMPAS instrument, and letters of support.

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 Appellant's commission of several murders in cold blood and with callousness while involved with gang activity, that, while young and impulsive, his behavior indicated he was aware of the consequences of his actions, that his course of conduct aided terrorizing a community, caused several deaths and resulted in a wake of pain, Appellant's continued substance abuse and negative behaviors after all these years, and related elevated COMPAS scores for prison misconduct and reentry substance abuse. See Matter of Allen v. Stanford, 161 A.D.3d 1503, 1506, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (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 Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017); Matter of Byas v. Fischer, 120 A.D.3d 1586, 1586-87, 992 N.Y.S.2d 813, 814 (4th Dept. 2014). The Board encouraged him to [REDACTED]

Contrary to Appellant's claim, the Board committed no error in its consideration of the instant offenses. Rather, the Board fulfilled its obligation to determine the propriety of release per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth therein. Executive Law § 259 et seq.; Penal Law § 70.40; Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Crews v. New York State Exec. Dept. Bd. of Parole Appeals Unit, 281 A.D.2d 672, 720 N.Y.S.2d 855 (3d Dept. 2001).

In conclusion, Appellant has failed to demonstrate the Board's decision was not made in accordance with the pertinent statutory requirements or was so irrational as to border on impropriety.

**Recommendation:** Affirm.