December 2020

# Administrative Appeal Decision - Solomon, Matthew (2019-02-14)

STATE OF NEW YORK – BOARD OF PAROLE

# *ADMINISTRATIVE APPEAL DECISION NOTICE*

**Name:** Solomon, Matthew **Facility:** Otisville CF

**NYSID:** [redacted] **Appeal Control No.:** 07-030-18 SC

**DIN:** 89-A-1381

Appearances: Steven Zeidman, Esq.
CUNY School of Law Main Street Legal Services
2 Court Square West
Long Island City, New York 11101

Decision appealed: June 2018 decision denying discretionary release and imposing a hold of 18-months.

Board Member(s) who participated: **Berliner, Smith, Crangle, Cruse, Alexander, Shapiro**

Papers considered: Appellant's Brief received October 11, 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:

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

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

Tina M. Stanford ✓ **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 2/14/19 kb.

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***

**Name:** Solomon, Matthew **DIN:** 89-A-1381

**Facility:** Otisville CF **AC No.:** 07-030-18 SC

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Appellant was sentenced to 18 years to life upon his conviction of Murder in the Second Degree. In the instant appeal, Appellant, through counsel, challenges the June 2018 determination of the Board denying release and imposing a 18-month hold on the following grounds: (1) the decision was unlawful, arbitrary and capricious because the Board placed impermissible weight on the instant offense without meaningful consideration of other factors such as the sentencing court's recommendation, the sentence imposed and mitigating factors; (2) the Board engaged in an "illegal resentencing" of Appellant; (3) the decision was unlawful, arbitrary and capricious because the Board failed to adequately address during the interview and placed impermissible weight on official opposition by the District Attorney; (4) the decision was unlawful, arbitrary and capricious if the Board considered submissions by members of Parents of Murdered Children and media coverage as official opposition; (5) the decision was unlawful and violated due process because it denied parole in conclusory terms; (6) the Board improperly failed to explain why it deviated from the COMPAS as required by State law and the prior Appeals Unit decision; (7) the Board violated Appellant's due process rights by failing to provide a copy of the official opposition cited in the decision; (8) the Board violated Appellant's due process rights by issuing a predetermined decision; and (9) the appropriate remedy is release or, alternatively, 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 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). A conclusion that an inmate fails to satisfy **any one** of the considerations set forth in Executive Law § 259-i(2)(c)(A) is an independent basis to deny parole. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 477, 718 N.Y.S.2d 704, 708 (2000); Matter of Hamilton, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719; Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007). That an inmate has served the minimum sentence does not alter or restrict application of this framework. See Matter of Hamilton, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719; Matter of Kozlowski v. New York State Bd. of Parole, 108 A.D.3d 435, 436, 968 N.Y.S.2d 87, 88 (1st Dept. 2013); Matter of Phillips, 41 A.D.3d at 21, 834 N.Y.S.2d at 124.

# ***APPEALS UNIT FINDINGS & RECOMMENDATION***

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While consideration of the statutory 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).

Here, the record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein Appellant strangled his wife following a dispute on Christmas, dumped her body in a field and participated in a community search after reporting her missing; that it is his sole conviction of record; his institutional record including completion of [redacted] ART, and AVP, participation in the Network program, and good discipline; his expression of remorse; and release plans to live with his mother, work in home remodeling and continue [redacted] The Board also had before it and considered, among other things, the sentencing minutes, a favorable official statement from the sentencing judge, multiple official statements from the Suffolk County District Attorney's Office and the original prosecutor, Appellant's case plan, the COMPAS instrument, and Appellant's parole packet including letters of support and his letter to the Apology Bank.

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). Specifically, the Board concluded release at this time would not be compatible with the welfare of society and would so deprecate the seriousness of the offense as to undermine respect for the law. In reaching its conclusion, the Board permissibly relied on Appellant's course of conduct – not only murdering his young wife, but also dumping her in a field and then participating in the search for her – and official opposition to release. See Matter of Applegate v. New York State Bd. of Parole, 2164 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), aff'd 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); Matter of Williams v. New York State Bd. of Parole, 220 A.D.2d 753, 633 N.Y.S.2d 182 (2d Dept. 1995); 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). As the weight to be assigned each statutory factor is within the Board's

discretion, it committed no error by emphasizing the severity of the inmate's offense over other factors following its consideration of the full record. See 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 King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998).

Appellant's assertion that the denial of parole release amounted to an improper resentencing is without merit inasmuch as 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). The Board was vested with discretion to determine whether release was appropriate notwithstanding the minimum period of incarceration set by the Court. Matter of Burress v. Dennison, 37 A.D.3d 930, 829 N.Y.S.2d 283 (3d Dept. 2007); Matter of Cody v. Dennison, 33 A.D.3d 1141, 1142, 822 N.Y.S.2d 677 (3d Dept. 2006), lv. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007); Matter of Maida v. Evans, 2009 NY Slip Op 32974(U), 2009 N.Y. Misc. Lexis 4333 (Sup. Ct. Albany Co. Dec. 4, 2009). The appellant has not in any manner been resentenced. Matter of Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 1142, 25 N.Y.S.3d 698 (3d Dept. 2016); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006).

Appellant complains that the Board's reference to "official opposition" is conclusory and left him to guess the source: the district attorney, Parents of Murdered Children, or the media. At the same time, however, Appellant acknowledges the sources of official statements received by the Board pursuant to the Executive Law are the sentencing court, the district attorney and the defense attorney (Executive Law § 259-i(2)(c)(A)(vii)) and that the only opposition from an official party in this case – which party was mentioned during the interview – was DA opposition. There is no merit to his assertion that the term "official opposition" is conclusory. Appellant – who raised no issue during the interview – also now objects that the Board did not discuss the statements in more detail. However, the nature and extent of a parole interview are solely within the discretion of the Board, Matter of Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 28-29, 298 N.Y.S.2d 704, 710 (1969), and the Board is not required to discuss confidential information during the interview, 9 N.Y.C.R.R. § 8002.1(c). The transcript does not support Appellant's contention that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). His contention that the Board could not consider a statement by the original prosecutor who tried the case, from his perspective as the trial prosecutor,

because he is no longer employed by the Suffolk County District Attorney's Office also is incorrect. While the prosecutor may now be a county judge, there was no confusion on the Board's part concerning the capacity in which he wrote the letter. And even if the letter did not fall within the statutory provision for official statements (and it does), it still could be considered consistent with the statute. See Matter of Applewhite v. New York State Bd. of Parole, 2018 NY Slip Op 08989, 2018 N.Y. App. Div. LEXIS 8932 (3d Dept. Dec. 27, 2018); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, --N.Y.S.3d -- (1st Dept. 2018). As to objections concerning the weight given the applicable factors, that is a matter that falls squarely within the Board's discretion. See Matter of Hamilton, 119 A.D.3d at 1271, 990 N.Y.S.2d at 717. The court's recommendation does not abrogate the Board's discretion. See Matter of Maida, 2009 NY Slip Op 32974(U), 2009 N.Y. Misc. Lexis 4333; see generally Matter of Silmon, 95 N.Y.2d at 477, 718 N.Y.S.2d at 708.

As to Appellant's remaining contentions about the official opposition in his case, under no plausible reading could "official opposition" in this context refer to a non-profit organization or the media. The decision did not mention, much less rely on, Parents of Murdered Children submissions in denying release. Appellant's contention that the Board should not even have considered any such submissions from the public is incorrect. See, e.g., Matter of Applewhite v., 2018 NY Slip Op 08989, 2018 N.Y. App. Div. LEXIS 8932; Matter of Clark, 166 A.D.3d 531, --N.Y.S.3d --; Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852–53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004), lv. denied, 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005). Appellant's claim that the Board may have been influenced by concern about media coverage and treated it as "official opposition" is speculative and unsupported. Further, 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).

The Board also considered the sentence imposed in addition to the court's parole recommendation. However, Appellant's claim that the court's decision to impose less than the maximum sentence reflected recognition of mitigating factors that should have been considered is purely speculative and without record support. That Appellant ultimately may have confessed to causing his wife's death – upon arrest *after* attempting to conceal his crime by hiding his wife's body, claiming she disappeared and participating in the search – did not constitute a mitigating factor that the Board was obligated to consider. To the contrary, his behavior gave rise to aggravating factors under the Executive Law. See, e.g., Matter of Applegate, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240; Matter of Hynes v. Stanford, 2017 NY Slip Op 32322(U), 2017 N.Y. Misc. Lexis 4195 (Sup. Ct. Seneca Co. Nov. 3, 2017); Matter of Evans v. Dennison, 13 Misc. 3d 1236(A),

1236A, 831 N.Y.S.2d 353, 353 (Sup. Ct. Westchester Co. 2006). We further note that the pre-sentence investigation report and sentencing minutes reveal Appellant maintained his wife's death was an accident.

Appellant does not seriously dispute that the Board considered the applicable factors. Indeed, he concedes that a significant portion of his interview focused on positive aspects of his file. Rather, he objects that favorable factors did not receive more attention in the decision. His complaint boils down to an objection to the weight given the applicable factors. This includes a complaint that the Board gave improper weight to official D.A. opposition and insufficient weight to the sentencing court's letter. However, the Board need not explicitly refer to each factor in its decision, nor give them equal weight. Matter of Marszalek v. Stanford, 152 A.D.3d 773, 59 N.Y.S.3d 432 (2d Dept. 2017); Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. The inmate's positive institutional record does 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 inmate's positive postconviction activities did not preclude the Board from placing greater emphasis on the serious nature of his criminal behavior and official opposition. See Matter of Hamilton, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719; Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 128-29, 750 N.Y.S.2d 759, 760 (1st Dept. 2002); People ex rel. Thomas v. Superintendent of Arthur Kill Corr. Facility, 124 A.D.2d 848, 508 N.Y.S.2d 564 (2d Dept. 1986), lv. denied, 69 N.Y.2d 611, 517 N.Y.S.2d 1025 (1987). The Board considered the recommendation of the sentencing court, but, as Appellant correctly notes the court acknowledged, the Board also had to weigh other considerations. The recommendation of the sentencing court did not preclude the Board from determining, following its review of all applicable factors, that release would be incompatible with the welfare of society and undermine respect for the law. See Matter of Maida, 2009 NY Slip Op 32974(U), 2009 N.Y. Misc. Lexis 4333; see generally Matter of Hamilton, 119 A.D.3d at 1272, 1273-74, 990 N.Y.S.2d at 718, 719.

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(d), as it was sufficiently detailed to inform the inmate of the reasons for the denial of parole. Matter of Applegate, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240; Matter of Kozlowski, 108 A.D.3d 435, 968 N.Y.S.2d 87; 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). The Board addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations, despite low COMPAS scores: namely, Appellant's course of conduct and official opposition. The Board was not required

to articulate the weight accorded to each factor, 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 in the decision, Matter of Marszalek, 152 A.D.3d 773, 59 N.Y.S.3d 432; Matter of Mullins, 136 A.D.3d 1141, 25 N.Y.S.3d 698. While the Board's amended regulation reinforces that detailed reasons must be given for a denial of release, it did not alter this well-established principle. 9 N.Y.C.R.R. § 8002.3(b). And as discussed above, the reference to "official opposition" was not impermissibly conclusory.

Appellant also complains that the Board failed to properly explain its departure from the COMPAS instrument as required by State law and his prior administrative appeal decision. Contrary to Appellant's claim, the 2011 Amendment and amended 9 NYCRR § 8002.2(a) do not represent a forward-looking shift requiring the COMPAS to be the fundamental basis for release decisions. This proposition is not supported by the language of the statute itself, considering the relatively modest change to Section 259-c(4) and the absence of any substantive change to Section 259-i(2), which governs the discretionary release consideration process. In 2011, the Executive Law was amended to 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, 139 A.D.3d 1068, 30 N.Y.S.3d 834; Matter of Robles v. Fischer, 117 A.D.3d 1558, 1559, 985 N.Y.S.2d 386, 387 (4th Dept. 2014). 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. Executive Law § 259-i(2)(c)(A); Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870. 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 instrument cannot mandate a particular result. Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Rather, the COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether all three statutory 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); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017). Amended 9 NYCRR § 8002.2(a) did not alter this approach. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2 (reaffirming "any [risk and needs] instrument used is not dispositive"). Indeed, the COMPAS does not (and cannot) supersede the Board's authority to determine, based on members' independent judgment and

application of section 259-i(2)(c)(A)'s factors, whether an inmate should be released. See 2011 N.Y. Laws ch. 62, § 1, part C, § 1, subpart A, § 1; Matter of Montane, 116 A.D.3d at 202, 981 N.Y.S.2d at 870.

The new regulation was intended to increase transparency in the Board's decision making by providing an explanation if and when the Board departs from scales in denying an inmate release. Notice of Adoption, NY Reg, Sept. 27, 2017 at 2. Here, the Board considered the COMPAS instrument and fully complied with the statute and amended regulation's requirements. In denying Appellant discretionary release to parole, the Board did not depart from COMPAS scores within the meaning of the regulation, for example, by finding a reasonable probability that Appellant 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. The Board nonetheless provided an individualized reason why it was denying release despite low risk scores and could do so by addressing his low risk scores collectively. The suggestion that Appellant's course of conduct was part of the COMPAS such that it could not be the reason for a COMPAS departure is incorrect, as is the implication that a denial decision could never place emphasis on an offense. See Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of King, 137 A.D.3d 1396, 26 N.Y.S.3d 815. Furthermore, the Board did not ignore the prior administrative appeal decision. The Board more clearly articulated why release was denied as required by 9 N.Y.C.R.R. § 8002.3(d) and the reasons for denial in light of the COMPAS scores. While Appellant is correct that the vacated decision also mentioned the offense and opposition, read as a whole it failed to adequately articulate the basis for the denial. The *de novo* decision remedies that error.

Insofar as Appellant alleges due process violations, an inmate has no Constitutional right to be conditionally released on parole before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 2104 (1979); Matter of Russo v. Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Matter of Vineski v. Travis, 244 A.D.2d 737, 664 N.Y.S.2d 391 (3d Dept. 1997). The New York State parole scheme "holds out no more than a possibility of parole" and thus does not create a protected liberty interest implicating the due process clause. Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; see also Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005).

Thus, there is no merit to Appellant's contention that his constitutional rights were violated when he was denied a copy of the official opposition for the purposes of his appeal. See also Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). The Board may consider confidential information, Matter of Molinar v. New York State Div. of Parole, 119 A.D.3d 1214,

# ***APPEALS UNIT FINDINGS & RECOMMENDATION***

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991 N.Y.S.2d 487 (3d Dept. 2014), and its consideration of the official DA statements was not improper, Matter of Applegate, 2164 A.D.3d 996, 997, 82 N.Y.S.3d 240; Matter of Williams v. New York State Bd. of Parole, 220 A.D.2d 753, 633 N.Y.S.2d 182 (2d Dept. 1995). Appellant is not entitled to official DA statements. See, e.g., Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 783 N.Y.S.2d 689 (3d Dept. 2004); Matter of Ramahlo v Bruno, 273 A.D.2d 521, 708 N.Y.S.2d 206 (3d Dept. 2000), lv. denied 95 N.Y.2d 767 (2000). This includes official DA statements by former prosecutors relating to their work while employed by the office. See generally Matter of Carty v. New York State Division of Parole, 277 A.D.2d 633, 716 N.Y.S.2d 125 (3d Dept. 2000). We understand DOCCS has re-reviewed Appellant's request for records and, after conducting an analysis to determine whether Appellant could be granted access to responsive records, produced other material with any necessary redactions. See, e.g., Executive Law § 259-i(2)(c)(B); 9 N.Y.C.R.R. § 8000.5(c).

Finally, there is no evidence the Board's decision was predetermined. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 695 N.Y.S.2d 622 (3d Dept. 2000). The inmate has failed to demonstrate that the use of a worksheet by the interviewing Board members reflected a predetermined decision to deny him release to parole. Duffy v. Evans, No. 11 CIV. 7605 JMF, 2013 WL 3491119, at *5 (S.D.N.Y. July 12, 2013). As Appellant concedes, the Board uses different forms and the specific reasons for his denial were not pre-typed in the worksheet. That the Board, following a *de novo* interview, ultimately decides to again deny parole release does not mean the decision was predetermined. Similarly, that the Board considered positive factors and found them outweighed by the severity of the crime together with official opposition does not mean the decision was predetermined. Matter of Garcia, 239 A.D.2d 235, 240, 657 N.Y.S.2d 415.

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.