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Administrative Appeal Decision - Diaz, Pedro (2020-02-24)

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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Diaz, Pedro

Facility: Marcy CF

NYSID: [REDACTED]

Appeal Control No.: 08-039-19 B

DIN: 89-A-2329

Appearances: Pedro Diaz, 89-A-2329
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

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

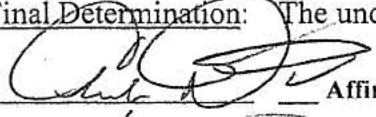
Board Member(s) who participated: **Cruse, Alexander**

Papers considered: Appellant’s Brief received October 10, 2019

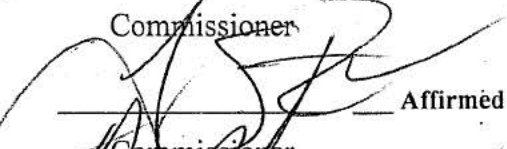
Appeals Unit Review: Statement of the Appeals Unit’s Findings and Recommendation

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

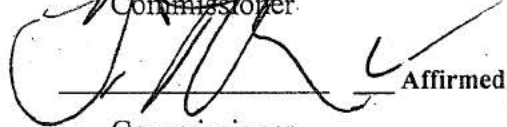
Final Determination: The undersigned determine that the decision appealed is hereby:



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 2/24/2020 (PH).

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Diaz, Pedro

DIN: 89-A-2329

Facility: Marcy CF

AC No.: 08-039-19 B

Findings: (Page 1 of 2)

Appellant challenges the July 2019 determination of the Board, denying release and imposing a 24-month hold. The instant offense involved Appellant pushing the female victim and her two young children into their apartment, threatening them with a knife, taking gold chains and rings from the victim, raping and sodomizing the victim in the presence of her daughter, dragging the victim into the living room, cutting her across the neck from ear to ear three times, suffocating her with his hands, and holding the children at knifepoint before he was forced to flee. Appellant argues that the Board did not have the jurisdiction to conduct a standard reappearance interview because the Board failed to hold a rescission hearing after previously setting conditions for his conditional 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 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.

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Diaz, Pedro

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Findings: (Page 2 of 2)

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense of Attempted Murder in the second degree, Rape in the first degree, Unlawful Imprisonment in the first degree, Sodomy in the first degree, Robbery in the first degree, and Assault in the first degree; Appellant's criminal history including a prior state term of incarceration; Appellant's institutional efforts including one Tier II infraction since his last appearance and enrollment in sex offender programming for the highest risk offenders; and release plans to live at a shelter and work in construction. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, and 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 vicious instant offense, Appellant's need to complete required programming, and Appellant's failure to articulate insight into the crime and the harm he caused. 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 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 Barrett v. New York State Div. of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997); 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 Phillips v. Dennison, 41 A.D.3d 17, 23, 834 N.Y.S.2d 121 (1st Dept. 2007); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002). The Board also encouraged Appellant to spend time solidifying his release plans. See, e.g., Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016).

Appellant's contention that the Board does not have the jurisdiction to conduct a standard reappearance interview is without merit. The Board is required to interview inmates for reconsideration every 24 months pursuant to Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b). The Board's determination with respect to discretionary release is a distinct basis for release that has no impact on conditional release. A review of the record reveals that conditions for Appellant's conditional release were set in 2017 but he subsequently lost his good time. Appellant's impression that a rescission hearing is required is misplaced inasmuch as he was never given an open date.

Recommendation: Affirm.