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May 2021

### Administrative Appeal Decision - McCain, Robert (2020-03-16)

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**ADMINISTRATIVE APPEAL DECISION NOTICE**

Name: McCain, Robert

Facility: Groveland CF

NYSID: [REDACTED]

Appeal Control No.: 07-063-19 B

DIN: 81-B-1327

Appearances: Ann E. Connor, Esq.  
Livingston County Public Defender's Office  
6 Court Street, Room 109  
Geneseo, NY 14454

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

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

Papers considered: Appellant's Brief received November 5, 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 03/16/2020

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

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Appellant challenges the June 2019 determination of the Board, denying release and imposing a 24-month hold. The instant offense involved Appellant and a co-defendant causing the death of the 16-year-old female victim by striking her in the head with a rock-like object, stabbing her with a knife, and beating her about the body. Appellant raises the following issues: 1) the Board focused on the seriousness of the instant offense and failed to give appropriate consideration to the applicable factors including Appellant’s institutional record and release plans; 2) the Board gave no weight to the overall low risk determination of the COMPAS instrument; 3) the Board was improperly influenced by political pressure and false and misleading information reported to the public; and 4) the decision was excessive, arbitrary and capricious, and made in violation of lawful procedure. 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 (4<sup>th</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (4<sup>th</sup> 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

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The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense of Murder in the second degree; Appellant's criminal history including offenses committed in his home state of ██████; Appellant's institutional efforts including good disciplinary record, completion of recommended programming, participation in outside clearance work, vocational training in mechanics, volunteer efforts teaching music theory, poetry, and entrepreneurship, and conducting a PTSD group; and release plans to live with a friend and work as a mechanic. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, an official statement from the District Attorney, and Appellant's parole packet including a personal statement, numerous letters of support, correspondence from the Deskovic Foundation, release plan, program involvement, and photographs.

After considering all required factors, the Board acted within its discretion in determining release at this time would be incompatible with the welfare of society and would so deprecate the seriousness of his crime as to undermine respect for the law. The Board concluded, consistent with the statute, that release would trivialize the tragic loss of a teenager's life and years of harm to the family and community. In reaching its conclusion, the Board permissibly relied on the brutal and heinous nature of the instant offense, the vulnerability of the victim, and strenuous community opposition and official opposition to Appellant's release. See Executive Law § 259-i(2)(c)(a); 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 Yourdon v. New York State Div. of Parole, 32 A.D.3d 1065, 1066, 820 N.Y.S.2d 366, 367 (3d Dept. 2006); 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), appeal dismissed, 32 N.Y.3d 1219 (2019); Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 89 N.Y.S.3d 134 (1st Dept. 2018); 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).

Appellant's contention that the Board gave no weight to the overall low risk determination of the COMPAS instrument is 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

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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); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017). That is exactly what occurred here.

There is no merit to Appellant's claim that the Board was improperly influenced by political pressure and false and misleading information reported to the public. Appellant's claim of political pressure 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). There is also no indication in the record that the Board considered or relied upon false and misleading information that was reported to the public.

Finally, the Board's decision to hold an inmate for the maximum period of 24 months is within the Board's discretion and within its authority pursuant to Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(b). Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Appellant has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper.

**Recommendation:** Affirm.