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ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Patterson, Andre

Facility: Otisville CF

NYSID: [REDACTED]

Appeal Control No.: 09-046-19 SC

DIN: 95-A-5506

Appearances: Andre Patterson 95A5506
Otisville Correctional Facility
P.O. Box 8
Otisville, New York 10963

Decision appealed: August 2019 decision, denying discretionary release and imposing a hold of 18 months.

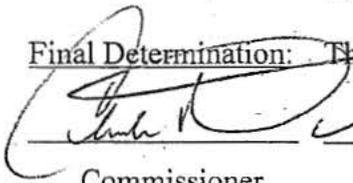
Board Member(s) who participated: Agostini, Smith, Corley

Papers considered: Appellant's Letter-brief received October 16, 2019

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

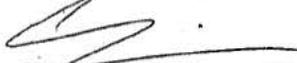
Records relied upon: Pre-Sentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision Notice (Form 9026), COMPAS instrument, Offender Case Plan.

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



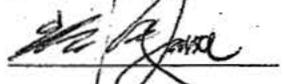
Affirmed Vacated, remanded for de novo interview Modified to _____

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 3/10/2020 66.

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Appellant challenges the August 2019 determination of the Board, denying release and imposing an 18-month hold. Appellant's instant offenses involved three armed robberies of stores within two days, and in two of the robberies shooting the victims for no reason. One of the victims died from his wounds. Appellant raises the following issues: 1) the Board failed to consider and/or properly weigh the required statutory factors. 2) no aggravating factors exist. 3) the decision lacks substantial evidence. 4) the Board failed to list any factors in support of the statutory standard cited. 5) the Board decision illegally resentenced him. 6) the decision lacks detail. 7) the decision violated his due process liberty interest. 8) the decision violated his 8th amendment liberty interest in that he was a juvenile when he committed these crimes. 9) the Board failed to comply with the 2011 amendments to the Executive Law in that the COMPAS was ignored, the attempted departure was done illegally, the statutes are rehabilitation focused, and the regulation creates a constitutional liberty interest (which include a right to confront the evidence against him, a right to counsel).

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).

The Board's emphasis on the violent nature of the crime does not establish irrationality bordering on impropriety. Pulliam v. Dennison, 38 A.D.3d 963, 832 N.Y.S.2d 304 (3d Dept. 2007); Sterling v. Dennison, 38 A.D.3d 1145, 833 N.Y.S.2d 684 (3d Dept. 2007); Marziale v. Alexander, 62 A.D.3d 1227, 879 N.Y.S.2d 636 (3d Dept. 2009). The Board may conclude that the violent nature of the crime

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is an overriding consideration warranting the denial of parole release. Rodney v Dennison, 24 A.D.3d 1152, 805 N.Y.S.2d 743 (3d Dept. 2005). The Board may emphasize the violent nature of the instant offense. Marnell v Dennison, 35 A.D.3d 995, 824 N.Y.S.2d 812 (3d Dept. 2006), lv.den. 8 N.Y.3d 807, 833 N.Y.S.2d 426 (2007).

Although the Board placed emphasis on the crime, the record reflects it also considered other appropriate factors and it was not required to place equal weight on each factor considered. Matter of Peralta v. New York State Bd. of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018). Although the Board placed emphasis on the crime, it was free to do so given all factors need not be given equal weight. Matter of Arena v. New York State Dep't of Corr. & Cmty. Supervision, 156 A.D.3d 1101, 65 N.Y.S.3d 471 (3d Dept. 2017); Matter of Gordon v. Stanford, 148 A.D.3d 1502, 50 N.Y.S.3d 627 (3d Dept. 2017); 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 can give greater weight to statements made in the sentencing minutes. Williams v New York State Division of Parole, 114 A.D.3d 992, 979 N.Y.S.2d 868 (3d Dept. 2014). The Board is entitled to rely on the sentencing minutes. Platten v New York State Board of Parole, 153 A.D.3d 1509, 59 N.Y.S.3d 921 (3d Dept. 2017).

The Board may consider a district attorney's recommendation to deny 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 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); Matter of Walker v. New York State Bd. of Parole, 218 A.D.2d 891, 630 N.Y.S.2d 417 (3d Dept. 1995); 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 Confoy v. New York State Div. of Parole, 173 A.D.2d 1014, 569 N.Y.S.2d 846, 847 (3d Dept. 1991); Matter of Lynch v. New York State Div. of Parole, 82 A.D.2d 1012, 442 N.Y.S.2d 179 (3d Dept. 1981).

The Board may place greater weight on the nature of the crime without the existence of any aggravating factors. Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014).

That the Board "did not recite the precise statutory language of Executive Law § 259-i (2)(c)(A) in support of its conclusion to deny parole does not undermine its conclusion." 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) (citation omitted); accord Matter of Reed v. Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012). The language used by the Board was "only semantically different" from the statute. Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691–92, 897 N.Y.S.2d 726, 727 (2d Dept. 2010); Matter of James v. Chairman of New York State Div. of Parole, 19 A.D.3d 857, 858, 796 N.Y.S.2d 735, 736 (3d Dept. 2005); see also People ex rel. Herbert v. New York State Bd. of

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Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983) (upholding decision that denied release as “contrary to the best interest of the community”); Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011) (Board provided adequate statutory rationale).

The Board’s decision satisfied the criteria set out in Executive Law § 259-i(2)(a), 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); Matter of Davis v. Travis, 292 A.D.2d 742, 739 N.Y.S.2d 300 (3d Dept. 2002); 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).

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). 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).

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).

Nothing in the due process clause requires the Parole Board to specify the particular evidence on which rests the discretionary determination an inmate is not ready for conditional release. Duempel v Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010). There is no due process requirement that the Parole Board disclose its release criteria. Haymes v Regan, 525 F.2d 540 (2d Cir. 1975). The due process clause is not violated by the Board’s balancing of the statutory criteria, and which

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is not to be second guessed by the courts. Mathie v Dennison, 2007 WL 2351072 (S.D.N.Y. 2007); MacKenzie v Cunningham, 2014 WL 5089395 (S.D.N.Y. 2014).

Parole is not constitutionally based, but is a creature of statute which may be imposed subject to conditions imposed by the state legislature. Banks v Stanford, 159 A.D.3d 134, 71 N.Y.S.3d 515 (2d Dept. 2018). Parole release is a statutory grant of a restricted form of liberty prior to the expiration of a sentence. Johnson v Superintendent Adirondack Correctional Facility, 174 A.D.3d 992, 106 N.Y.S.3d 408 (3d Dept. 2019).

There are no substantial evidence issues in Parole Board Release Interviews. Matter of Tatta v. Dennison, 26 A.D.3d 663, 809 N.Y.S.2d 296 (3d Dept.), lv. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 750 (2006); Matter of Valderrama v. Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005); cf. Matter of Horace v. Annucci, 133 A.D.3d 1263, 20 N.Y.S.3d 492 (4th Dept. 2015).

The Board is required to consider Petitioner's youth (under 18) in relation to the commission of the instant 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 regulation, 9 N.Y.C.R.R. § 8002.2(c). The case precedent did not abrogate the requirements of Executive Law § 259-i. Thus, the Board must consider an inmate's youth and subsequent growth and maturity in addition to other relevant factors and principles, such as disciplinary records and programming, the risks and needs assessment, recommendations from relevant parties, as well as the underlying offense. See, e.g., Matter of Allen v. Stanford, 161 A.D.3d 1503, 78 N.Y.S.3d 445 (3d Dept.), lv. denied, 32 N.Y.3d 903 (2018). Here, the transcript reveals that there was extensive discussion with the appellant about his circumstances in his youth, his living arrangements, and contacts that led him to a life of crime. The Board also noted in the interview, and in the decision, the changes in his life since his youth. Thus, the Board covered all required areas.

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.

Appellant's claim that the Board failed to comply with the 2011 amendments to the Executive Law is rejected. Dolan v New York State Board of Parole, 122 A.D.3d 1058, 995 N.Y.S.2d 850 (3d Dept. 2014); Tran v Evans, 126 A.D.3d 1196, 3 N.Y.S.3d 633 (3d Dept. 2015); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015). Furthermore, the 2011 Executive Law amendments have been incorporated into the regulations adopted by the Board in 2017.

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The 2011 amendments to the Executive Law, as well as the state regulations governing parole, do not create a legitimate expectancy of release that would give rise to a due process interest in parole. Fuller v Evans, 586 Fed.Appx. 825 (2d Cir. 2014) cert.den. 135 S.Ct. 2807, 192 L.Ed2d 851. And thus by definition, the 2017 regulations don't create a constitutional liberty interest either. Administrative agencies are but creatures of the Legislature and are possessed only of those powers expressly or impliedly delegated by that body (*Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480; *Matter of City of Utica v Water Pollution Control Bd.*, 5 NY2d 164, 168-169). The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" (*Matter of Nicholas v Kahn*, 47 N.Y.2d 24, 31, 389 N.E.2d 1086, 416 N.Y.S.2d 565 [1979]). In so doing, an agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes (*Goodwin v Perales*, 88 N.Y.2d 383, 395, 669 N.E.2d 234, 646 N.Y.S.2d 300 [1996]). Under the separation of powers doctrine, the legislature cannot delegate its lawmaking power to an administrative agency. However, the legislature may endow administrative agencies with the power to fill in the gaps in the legislative product by prescribing rules and regulations consistent with the enabling legislation. Nicholas v Kahn, 47 NY22 24 (1979). Since the enabling legislation doesn't create any constitutional liberty interest, then the regulations may not either.

Contrary to Appellant's claim, the 2011 amendments and 9 NYCRR § 8002.2(a) as amended do not represent a rehabilitation/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

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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). The Board is not required to give the COMPAS and case plan greater weight than the other statutory factors. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); accord Matter of Lewis v. Stanford, 153 A.D.3d 1478, 59 N.Y.S.3d 726 (3d Dept. 2017). The Board still is entitled to place greater emphasis on the instant offense. See Matter of Montane v. Evans, 116 A.D.3d 197, 203, 981 N.Y.S.2d 866, 871 (3d Dept. 2014); 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).

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 amended 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.

The departure in the Board decision was in compliance with the regulation, as the Board stated they were not confident appellant could live and remain at liberty without violating the law in the community. And, the Board decision cited the disciplinary score on the COMPAS and his violent instant offenses. So, reasons for the departure were given.

Recommendation: Affirm.