May 2021

# Administrative Appeal Decision - Voii, Sergio (2020-01-16)

STATE OF NEW YORK – BOARD OF PAROLE

# *ADMINISTRATIVE APPEAL DECISION NOTICE*

**Name:** Voii, Sergio **Facility:** Fishkill CF

**NYSID:** [redacted] **Appeal Control No.:** 04-023-19 B

**DIN:** 82-A-0661

Appearances: Martha Rayner, Esq.
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New York, New York 10023

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

Board Member(s) who participated: **Berliner, Davis, Shapiro**

Papers considered: Appellant's Brief received July 31, 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 1/16/20 (AH).

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:** Voii, Sergio **DIN:** 82-A-0661

**Facility:** Fishkill CF **AC No.:** 04-023-19 B

**Findings: (**Page 1 of 6)

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Appellant was sentenced to an aggregate term of 32 years to life upon his conviction of Murder in the second degree, Manslaughter in the first degree, CPW in the second degree, and Reckless Endangerment in the first degree. Appellant appeared for a Parole Board Release Interview in March 2019 and ultimately was denied parole with an 18-month hold. In the instant appeal,[1] Appellant challenges the Board's decision on the following grounds: (1) the Board relied on the instant offense without identifying any aggravating factor; (2) the Board ignored mitigating factors and other statutory factors such as Appellant's vocational history, lack of prior criminal history, and release plans; (3) the denial constitutes an unauthorized resentencing for the manslaughter conviction for which Appellant completed his sentence; (4) the Board erroneously relied on community opposition submitted in relation to that manslaughter conviction; (5) the Board's consideration of and reliance on community opposition was unlawful in and of itself and because it only reflected general penal philosophy; (6) the Board's reliance on official opposition was erroneous because it was submitted during an earlier D.A.'s administration and did not reflect indefinite opposition; (7) the Board's failure to solicit a recommendation from the current D.A. was fundamentally unfair; (8) the Board failed to adequately consider the COMPAS instrument and explain its departure from the COMPAS; (9) the Board failed to adequately explain the reason for denial and how it considered the statutory factors; (10) the Board relied on an unproven fact in the D.A. letter to extend Appellant's sentence in violation of his Sixth Amendment right to a trial by jury; and (11) the Board increased Appellant's minimum sentence as an adolescent offender in violation of the Sixth Amendment. 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).

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[1] After filing a Notice of Appeal and prior to perfecting the appeal, Appellant submitted to DOCCS a record request pursuant to 9 N.Y.C.R.R. § 8000.5. In processing the request, some material considered by the Board was not identified for review. The error was discovered during the Appeal Unit's work on Appellant's perfected appeal. As a result, DOCCS initiated another review to determine what might be released consistent with the Executive Law and the Board's regulations. The Appeals Unit notified Appellant's counsel and offered Appellant the opportunity to supplement his appeal. Appellant, through counsel, declined to do so. Accordingly, the Appeals Unit is issuing its findings and recommendations to address the claims asserted in Appellant's original submission.

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 Campbell v. Stanford, 173 A.D.3d 1012, 1015, 105 N.Y.S.3d 461 (2d Dept. 2019); Matter of Betancourt v. Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017). 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).

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offense wherein Appellant, at age 18, shot a man to death with an illegal firearm during an argument on a ball field, fled and fired additional shots while others were in pursuit, and caused the death of an off-duty officer who was shot during a struggle over the gun; his explanation for carrying the firearm and his injuries; that Appellant had no prior criminal history although he incurred a misdemeanor assault conviction while incarcerated in 1989; his institutional record including good discipline since that incident, work as lead clerk at Corcraft, completion of ART and involvement with Puppies Behind Bars; and release plans to transfer to N.C. to be with family and alternate plans. The Board also had before it and considered, among other things, the sentencing minutes, an official D.A. statement, Appellant's case plan, the COMPAS instrument, and letters of support and in opposition.[2]

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 the tragic, reckless nature of the crimes that began with Appellant's fatal decision to carry an illegal firearm and use it during an argument, that two men are dead as a result and, while commending Appellant's seemingly sincere remorse for the victims and their families and the work he has done to understand his actions and their effects, that there is more to do. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d at 478, 718 N.Y.S.2d 704; Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 82 N.Y.S.3d 240 (3d Dept. 2018); Matter of Kirkpatrick v. Travis, 5 A.D.3d 385, 772 N.Y.S.2d 540 (2d Dept. 2004).

[2] Insofar as Appellant states there is no opposition from the victims' families, information concerning victim impact statements is confidential pursuant to 9 N.Y.C.R.R. § 8002.4(e).

The Board also noted the D.A. and community opposition. See Matter of Applegate, 164 A.D.3d at 997, 82 N.Y.S.3d 240; 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 Porter v. Alexander, 63 A.D.3d 945, 881 N.Y.S.2d 157 (2d Dept. 2009).

While the Board does not agree that aggravating factors are always necessary to support reliance on an inmate's crime, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, there was an aggravating factor in that there were two victims. See, e.g., Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011); Matter of Hunter v. New York State Div. of Parole, 21 A.D.3d 1178, 800 N.Y.S.2d 799 (3d Dept. 2005); Matter of Olivera v. Dennison, 22 A.D.3d 949, 802 N.Y.S.2d 270 (3d Dept. 2005). In any event, the Board's denial here was not based solely on the seriousness of the instant offense.

Appellant asserts that the denial constitutes a resentencing for the manslaughter conviction and the Board erroneously relied on community opposition submitted in relation to that conviction. Both claims are predicated on the belief that Appellant completed his sentence for the manslaughter conviction. However, concurrent and consecutive sentences yield single sentences, either by merger when concurrent or by addition when consecutive. Penal Law § 70.30(1); People v. Buss, 11 N.Y.3d 553, 557, 872 N.Y.S.2d 413, 415 (2008). Thus, the inmate is not sequentially completing punishment for each particular conviction. People v. Almestica, 97 A.D.3d 834, 949 N.Y.S.2d 425 (2d Dept. 2012). Rather, the inmate is subject to all the sentences that make up the merged or aggregate sentence he is serving and the Board may consider the facts of those crimes. Matter of Dawes v. Annucci, 122 A.D.3d 1059, 994 N.Y.S.2d 747 (3d Dept. 2014).

Appellant's assertion that the denial of parole release amounted to an improper resentencing also 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. 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).

Appellant's objections to the Board's consideration of community opposition are likewise without merit.[3] The Board may receive and consider written communications from individuals, other

[3] The community opposition includes but is not limited to form letters.

than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an inmate's release to parole supervision. See, e.g., Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d at 997, 82 N.Y.S.3d 240; Matter of Clark v. New York Bd. of Parole, 166 A.D.3d 531, 531-31, 89 N.Y.S.3d 134, 135 (1st Dept. 2018); Matter of Rivera v. Evans, Index No. 0603-16, *Decision & Order* dated July 5, 2016 (Sup. Ct. Sullivan Co.)(LaBuda A.J.S.C.), aff'd sub nom. Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017); see also Matter of Campbell v. Stanford, 173 A.D.3d at 1016, 105 N.Y.S.3d at 465. The same has long been recognized as true with respect to letters supporting an inmate's potential parole release.

Appellant's allegations concerning penal philosophy do not require reversal. Matter of King affirmed the proposition that the Board cannot substitute its personal views on the proper basis for a parole denial for that of the legislature. Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788, 791, 610 N.Y.S.2d 954, 955 (1994), aff'g 190 A.D.2d 423, 432, 598 N.Y.S.2d 245, 251 (1st Dept. 1993). But Matter of King does not require the annulment of a decision simply because material expressing personal penal philosophy was included in submissions which were properly considered. See Mtter of Duffy v. New York State Dep't of Corr. & Cmty. Supervision, 132 A.D.3d 1207, 1209, 19 N.Y.S.3d 610 (3d Dept. 2015). Even assuming some of the opposition to Appellant's release reflected penal philosophy, the record does not indicate that the Board afforded those statements any particular weight or substituted those views for the criteria of Executive Law § 259-i. At most, it reflects consideration of the fact of their opposition, not deference to the beliefs motivating it.[4] Any suggestion that the Board simply denied parole "because he 'killed' a police officer" is unsupported and incorrect.

The Board also committed no error in its consideration of official D.A. opposition. Executive Law § 259-i(2)(c)(A)(vii) requires the Board to consider recommendations of the sentencing court, the inmate's attorney, and the "district attorney." As such, the Board was obligated to consider the official D.A. statement it received. Appellant's suggestion that recommendations expire is baseless. His additional assertion that the Board misconstrued the recommendation is unsupported. Furthermore, the Board was not required to solicit additional recommendations. We note nothing precluded the D.A. from submitting another statement.

Appellant's additional claims concerning the COMPAS instrument do not provide a basis to disturb the Board's decision.[5] The 2011 amendments to the Executive Law require procedures

[4] The interview transcript does not support Appellant's claim that a Commissioner's comments reflect reliance on penal philosophy.

[5] Appellant notes that DOCCS did not update his COMPAS instrument in advance of the 2019 interview. Even if Appellant had preserved this as a claim (which he did not), see Matter of Morrison v. Evans, 81 A.D.3d 1073, 916

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 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.[6] 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. The Board considered Appellant's COMPAS instrument and issued a decision consistent with amended 9 N.Y.C.R.R. § 8002.2(a). That is, the Board did not find Appellant likely to reoffend but rather concluded, *despite* low risk scores, release would be inappropriate under the other two statutory standards. The Board therefore was not strictly required to address scales from which it was departing. The Board nonetheless explained why it was denying release despite low risk scores.

The Board's decision also 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. See Matter of Applegate v. New York State Bd. of Parole, 164 A.D.3d 996, 997, 82 N.Y.S.3d 240; 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). The Board

N.Y.S.2d 655 (3d Dept. 2011); Matter of Vanier v. Travis, 274 A.D.2d 797, 711 N.Y.S.2d 920 (3d Dept. 2000), he alleges no errors in the COMPAS instrument that the Board considered.

[6] The COMPAS scales are based on a comparison to a norm group composed of the offender population as a whole and are not an absolute indication of an inmate's risk.

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

**Name:** Voii, Sergio **DIN:** 82-A-0661

**Facility:** Fishkill CF **AC No.:** 04-023-19 B

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addressed many of the factors and principles considered in individualized terms and explained those that ultimately weighed most heavily in its deliberations: namely, the nature of Appellant's crime, that it resulted in the death of two men, that there is more to do in his work to understand his actions and their effects, and opposition to release.

Finally, Appellant's Sixth Amendment claims have no merit. There is no basis to equate a parole denial – which is within the authorized sentence and may be reconsidered later – with an extension of the sentence. See 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); cf. Flores v. Stanford, 2019 U.S. Dist. LEXIS 160992, at 30-33 (S.D.N.Y. Sep. 20, 2019). We nonetheless note the record is clear that the Board understood Appellant was not convicted of murder in relation to the second victim. We also note Appellant was over 18 at the time of the instant offense. See Matter of Cobb v. Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017).

**Recommendation:** Affirm.