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STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Turner, David **Facility:** Gouverneur CF

NYSID: [redacted] **Appeal Control No.:** 01-108-19 B

DIN: 17-A-5220

Appearances: David Turner 17A5220
Gouverneur Correctional Facility
P.O. Box 370
Scotch Settlement Road
Gouverneur, New York 13642

Decision appealed: January 2019 decision, denying discretionary release and imposing a hold of 21 months.

Board Member(s) who participated: Crangle, Davis, Demosthenes

Papers considered: Appellant's Letter-brief received March 6, 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 5/10/19 GG.

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: Turner, David **DIN:** 17-A-5220

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Appellant challenges the January 2019 determination of the Board, denying release and imposing a 21-month hold. Appellant stands convicted of Attempted Strangulation 2nd Degree in which he head butt the female victim in the face, causing a fractured nose and bleeding, and later grabbed her by the throat several times and lifted her off the ground and banged her head against a window, causing injury. Appellant raises the following claims: 1) the decision is arbitrary and capricious in that the Board ignored and departed from the COMPAS. 2) the decision was due to bias on the part of the Board. 3) the Board ignored his EEC. 4) many of the statements concerning the instant offense are not true.

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). Whereas here the inmate has received an EEC, the Board may deny release to parole on a finding that there is a reasonable probability that, if such inmate is released, the inmate will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. Correction Law § 805; Matter of Heitman v. New York State Bd. of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 771, 583 N.Y.S.2d 502, 503 (1st Dept. 1992); Matter of Walker v. Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept. 1991), appeal dismissed, 79 N.Y.2d 89 7, 581 N.Y.S.2d 660 (1992). 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).

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); 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). The Board may place particular emphasis upon the nature of the offense. Mullins v New York State Board of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). The Board in its discretion properly placed greater emphasis on the present offenses, as it is not required to give equal weight to all requisite factors. Wiley v State of New York Department of Corrections and Community Supervision, 139 A.D.3d 1289, 32 N.Y.S.3d 370 (3d Dept. 2016).

APPEALS UNIT FINDINGS & RECOMMENDATION

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The Board may place greater emphasis upon the egregious and protracted nature of the crime. Crawford v New York State Board of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016).

The Board may consider the inmates minimizing of their role in the crime. Serrano v New York State Executive Department-Division of Parole, 261 A.D.2d 163, 689 N.Y.S.2d 504, 505 (1st Dept 1999).

Insight is a permissible factor Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016) (lack of insight and failure to accept responsibility); Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000); 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) (minimization of crimes); Matter of Almeyda v. New York State Div. of Parole, 290 A.D.2d 505, 736 N.Y.S.2d 275 (2d Dept. 2002) (limited insight into why crime committed).

Receipt of an EEC does not preclude denial of parole. Matter of Milling v. Berbary, 31 A.D.3d 1202, 1203, 819 N.Y.S.2d 373, 374 (4th Dept.), lv. denied, 7 N.Y.3d 808, 809, 822 N.Y.S.2d 481 (2006); Matter of Romer v. Dennison, 24 A.D.3d 866, 867, 804 N.Y.S.2d 872, 873 (3d Dept. 2005); Matter of Barad v. New York State Bd. of Parole, 275 A.D.2d 856, 713 N.Y.S.2d 775, 776 (3d Dept. 2000), lv. denied, 96 N.Y.2d 702, 722 N.Y.S.2d 793 (2001). An EEC does not automatically entitle an inmate to discretionary release or eliminate consideration of the statutory factors including the instant offense. Matter of Corley v. New York State Div. of Parole, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818 (3d Dept. 2006); Matter of Pearl v. New York State Div. of Parole, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817 (3d Dept. 2006); Matter of White v. Dennison, 29 A.D.3d 1144, 814 N.Y.S.2d 393 (3d Dept. 2006). Moreover, the Board is not required to give each factor equal weight. Matter of Corley, 33 A.D.3d 1142, 1143, 822 N.Y.S.2d 817, 818; Matter of Pearl, 25 A.D.3d 1058, 808 N.Y.S.2d 816, 817. The Board may deny release to parole on a finding that there is a reasonable probability that, if such inmate is released, the inmate will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. Correction Law § 805; Matter of Heitman v. New York State Bd. of Parole, 214 A.D.2d 673, 625 N.Y.S.2d 264 (2d Dept. 1995); Matter of Salcedo v. Ross, 183 A.D.2d 771, 771, 583 N.Y.S.2d 502, 503 (2d Dept. 1992); Matter of Walker v. Russi, 176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept. 1991), appeal dismissed, 79 N.Y.2d 89 7, 581 N.Y.S.2d 660 (1992).

Denial of parole is neither arbitrary nor capricious when the Parole Board relied on the factors defined by the New York statute. Hodge v Griffin, 2014 WL 2453333(S.D.N.Y. 2014) citing Romer v Travis, 2003 WL 21744079. An arbitrary action is one without sound basis in reason and without regard to the facts. Rationality is what is reviewed under an arbitrary and capricious standard. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d

Dept. 2014). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. Ward v City of Long Beach, 20 N.Y.3d 1042 (2013). Denial is neither arbitrary nor capricious when the Board relies on factors defined by New York statute. Siao-Paul v. Connolly, 564 F. Supp. 2d 232, 242 (S.D.N.Y. 2008); Hanna v New York State Board of Parole, 169 A.D.3d 503, 92 N.Y.S.3d 621 (1st Dept. 2019).

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.

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). Appellant has failed to overcome the presumption that the Board complied with its duty. See Matter of Davis v. New York State Div. of Parole, 114 A.D.2d 412, 494 N.Y.S.2d 136 (2d Dept. 1985). There must be support in the record to prove an alleged bias and proof that the decision flowed from such bias. Matter of Hernandez v. McSherry, 271 A.D.2d 777, 706 N.Y.S.2d 647 (3d Dept. 2000), lv. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000); see also Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017) (rejecting bias claim); Matter of Grune v. Board of Parole,41 A.D.3d 1014, 838 N.Y.S.2d 694 (3d Dept. 2007). No such proof exists in this case.

Because the Board decision cites lack of insight as a factor for the denial, the Board did not depart from the COMPAS. Anyway, the COMPAS cannot mandate a particular result, and declining to afford the COMPAS controlling weight does not violate the 2011 amendments. Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016). The COMPAS is an additional consideration that the Board must weigh along with the statutory factors for the purposes of deciding whether the 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).

As for details of the crime, pursuant to Executive Law §259-i(2)(c)(A) and 259-k(1), the Board is required to obtain official reports and may rely on the information contained therein. See Billiteri v U.S. Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976); Lee v U.S. Parole Commission, 614 F.Supp. 634, 639 (S.D.N.Y. 1985); Carter v Evans, 81 A.D.3d 1031, 916

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N.Y.S.2d 291 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011). To the extent the appellant complains about the information contained within the pre-sentence report, the Board is mandated to consider it, is not empowered to correct information therein, and is entitled to rely on the information contained in the report. See, Executive Law §259-(a)-1; Executive Law §259-(1)(a); (2)(c)(A); May v New York State Division of Parole, 273 A.D.2d 667, 711 N.Y.S.2d 349 (3d Dept. 2000); Richburg v New York State Board of Parole, 284 A.D.2d 685, 726 N.Y.S.2d 299 (3d Dept. 2001); Payton v Thomas, 486 F.Supp. 64, 68 (S.D.N.Y. 1980); Baker v McCall, 543 F.Supp. 498, 501 (S.D.N.Y. 1981), affirmed 697 F.2d 287 (2d Cir. 1982); Williams v Travis, 11 A.D.3d 788, 783 N.Y.S.2d 413 (3d Dept. 2004); Sutherland v Alexander, 64 A.D.3d 1028, 881 N.Y.S.2d 915 (3d Dept. 2009); Wisniewski v Michalski et.al., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014). The inmate is not permitted to collaterally attack the presentence report. Cox v New York State Division of Parole, 11 A.D.3d 766, 768 (3d Dept. 2004); Simmons v Travis, 15 A.D.3d 896, 788 N.Y.S.2d 752 (4th Dept. 2005). The inmate can't challenge the accuracy of information in the Pre-sentence Investigation Report, as that challenge should have been made to the original sentencing court. Manley v New York State Board of Parole, 21 A.D.3d 1209 (3d Dept. 2005) lv. den. 6 N.Y.3d 702 (2005); Champion v Dennison, 40 A.D.3d 1181, 834 N.Y.S.2d 585 (3d Dept. 2007). lv.dism. 9 N.Y.3d 913, 844 N.Y.S.2d 167. Carter v Evans, 81 A.D.3d 1031, 916 N.Y.S.2d 291 (3d Dept. 2011) lv. app. den. 16 N.Y.3d 712, 923 N.Y.S.2d 416 (2011); Vigliotti v State of New York, Executive Division of Parole, 98 A.D.3d 789, 950 N.Y.S.2d 619 (3d Dept. 2012); Wisniewski v Michalski et.al., 114 A.D.3d 1188, 979 N.Y.S.2d 745 (4th Dept. 2014); Del Rosario v Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016).

Recommendation: Affirm.