May 2022

Administrative Appeal Decision - Rivera, Raul (2019-01-31)

STATE OF NEW YORK– BOARD OF PAROLE

Administrative Appeal Decision Notice

Inmate Name: Rivera, Raul **Facility:** Green Haven Correctional Facility

NYSID No.: [redacted] **Appeal Control #:** 06-020-18-B

Dept. DIN#: 98A5820

Appearances:
For the Board, the Appeals Unit
For Appellant: Andre Sedlak Esq.
11 Market Street
Suite 205
Poughkeepsie, New York 12601

Board Member(s) who participated in appealed from decision: **Alexander, Drake**

Decision appealed from: 5/2018-Denial of discretionary release, with imposition of 12 month hold.

Pleadings considered: Brief on behalf of the appellant received on November 2, 2018.
Statement of the Appeals Unit's Findings and Recommendation

Documents relied upon: Presentence Investigation Report, Parole Board Report, Interview Transcript, Parole Board Release Decision (Form 9026), COMPAS, TAP/Case Plan.

Final Determination: The undersigned have determined that the decision from which this appeal was taken be and the same is hereby

_____ ___ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Reversed for De Novo Interview** ___ **Modified to** _____
Commissioner

_____ ✓ **Affirmed** ___ **Reversed 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 1/31/19 GG.

Distribution: Appeals Unit – Inmate - Inmate's Counsel - Inst. Parole File - Central File
P-2002(B) (5/2011)

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

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Findings:

Counsel for the appellant has submitted a brief to serve as the perfected appeal. The brief raises the following issues: 1) the decision is arbitrary and capricious in that the Board failed to consider and/or properly weigh the required statutory factors. Appellant contends he has an excellent institutional record and release plan, and that no aggravating factors exist. 2) the Board failed to make required findings of fact or to offer future guidance or provide detail. 3) the interpreter wasn't court certified, and didn't take an oath, in violation of the due process and equal protection clauses of the constitution. 4) as for records, the Parole Board Report is deficient when compared to the prior Inmate Status Report, and, many records were not turned over to counsel on appeal, in violation of the confrontation clause of the 6th amendment, and the right to effective assistance of counsel. 5) the interview was not properly undertaken, based upon comments by former Commissioner Manley. 6) during the interview, erroneous information about narcotics was used by a Commissioner. 7) the Board failed to comply with the 2011 amendments to the Executive Law in that no written procedures exist, the 2014 regulation is illegal, no TAP was done, and the statutes are now present/future based. Letters from Assemblymen, and statistics, prove this. 8) the 12 month hold is excessive. 9) there should be three Commissioners conducting the interview such that the decision was predetermined and due to bias.

In response, pursuant to Executive Law §259-i(2)(c), the Parole Board must consider criteria which is relevant to the specific inmate, including, but not limited to, the inmate's institutional record or criminal behavior, giving whatever emphasis they so choose to each factor. In re Garcia v. New York State Division of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997); People ex rel. Herbert v. New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881 (1st Dept. 1983). The Board is not required to give equal weight to each statutory factor. Arena v New York State Department of Corrections and Community Supervision, 156 A.D.3d 1101, 65 N.Y.S.3d 471 (3d Dept. 2017); Mays v Stanford, 150 A.D.3d 1521, 55 N.Y.S.3d 502 (3d Dept. 2017); Marszalek v Stanford, 152 A.D.3d 773, 59 N.Y.S.3d 432 (2d Dept. 2017); Paniagua v Stanford, 153 A.D.3d 1018, 56 N.Y.S.3d 894 (3d Dept. 2017); Esquilin v New York State Board of Parole, 144 A.D.3d 846, 40 N.Y.S.3d 279 (2nd Dept. 2016); Kenefick v Sticht, 139 A.D.3d 1380, 31 N.Y.S.3d 367 (4th Dept. 2016); LeGeros v New York State Board of Parole, 139 A.D.3d 1068, 30 N.Y.S.3d 834 (2d Dept. 2016); De la Cruz v Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Phillips v Dennison, 41 A.D.3d 17, 834 N.Y.S.2d 121 (1st Dept. 2007). That an inmate has numerous achievements within a prison's institutional setting does not automatically entitle him to parole release. Matter of Faison v. Travis, 260 A.D.2d 866, 688 N.Y.S.2d 782 (3d Dept. 1999); Pulliam v Dennison, 38 A.D.3d 963, 832 N.Y.S.2d 304 (3d Dept. 2007).

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Moreover, per Executive Law §259-i(2)(c), an application for parole release shall not be granted merely as a reward for appellant's good conduct or achievements while incarcerated. Larrier v New York State Board of Parole Appeals Unit, 283 A.D.2d 700, 723 N.Y.S.2d 902, 903 (3d Dept 2001); Vasquez v State of New York Executive Department, Division of Parole, 20 A.D.3d 668, 797 N.Y.S.2d 655 (3d Dept. 2005); Wellman v Dennison, 23 A.D.3d 974, 805 N.Y.S.2d 159 (3d Dept. 2005).

The Board is obligated to consider the inmate's prior criminal record. Matter of Partee v Evans, 117 A.D.3d 1258, 984 N.Y.S.2d 894 (3d Dept. 2014). The Board may put more weight on the inmate's criminal history. Bello v Board of Parole, 149 A.D.3d 1458, 53 N.Y.S.3d 715 (3d Dept. 2017); Hall v New York State Division of Parole, 66 A.D.3d 1322, 886 N.Y.S.2d 835 (3d Dept. 2009); Davis v Evans, 105 A.D.3d 1305, 963 N.Y.S.2d 485 (3d Dept. 2013); Jones v New York State Parole Board, 127 A.D.3d 1327, 6 N.Y.S.3d 774 (3d Dept. 2015); Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017). The fact that the Board afforded greater weight to the inmate's criminal history, and not to an alleged positive institutional adjustment, does not render the denial of parole for that reason irrational or improper. Matter of Ortiz v. Hammock, 96 A.D.2d 735, 465 N.Y.S.2d 341 (4th Dept 1983); Peo. ex rel. Yates v. Walters, 111 A.D.2d 839, 490 N.Y.S.2d 573 (2d Dept. 1985); Matter of Ristau v. Hammock, 103 A.D.2d 944, 479 N.Y.S.2d 760 (3d Dept. 1984) lv. to appeal den. 63 N.Y.2d 608, 483 N.Y.S.2d 1023 (1984); Torres v New York State Division of Parole, 300 A.D.2d 128, 750 N.Y.S.2d 759 (1st Dept 2002); Lashway v Evans, 110 A.D.3d 1420, 973 N.Y.S.2d 496 (3d Dept. 2013).

The denial of parole release based upon nature of conviction and criminal history is appropriate. In the Matter of Hawkins v. Travis, 259 A.D.2d 813, 686 N.Y.S.2d 198 (3d Dept. 1999); Farid v. Russi, 217 A.D.2d 832, 629 N.Y.S.2d 821 (3d Dept. 1995); Charlemagne v New York State Division of Parole, 281 A.D.2d 669, 722 N.Y.S.2d 74, 75 (3d Dept 2001); Burress v Evans, 107 A.D.3d 1216, 967 N.Y.S.2d 486 (3d Dept. 2013); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015); Bush v Annucci, 148 A.D.3d 1392, 50 N.Y.S.3d 180 (3d Dept. 2017); Holmes v Annucci, 151 A.D.3d 1954, 57 N.Y.S.3d 857 (4th Dept. 2017).

Per Executive Law 259-i(2)(c)(A), the Board is obligated to consider the inmate's prior criminal record and the nature of the instant offenses, and the fact that such consideration resulted in a parole denial does not reflect irrationality bordering on impropriety. Singh v Evans, 118 A.D.3d 1209, 987 N.Y.S.2d 271 (3d Dept. 2014).

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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); Peralta v New York State Board of Parole, 157 A.D.3d 1151, 69 N.Y.S.3d 885 (3d Dept. 2018).

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 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).

The Board may consider the inmate's past history of violent behavior. People ex rel. Herbert v New York State Board of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881, 884 (1st Dept 1983); People ex rel. Henson v Miller, 244 A.D.2d 729, 664 N.Y.S.2d 655 (3d Dept 1997), leave to appeal denied 91 N.Y.2d 809, 670 N.Y.S.2d 403 (1998); Vasquez v New York State Division of Parole, 215 A.D.2d 856, 626 N.Y.S.2d 332 (3d Dept 1995); Ward v New York State Division of Parole, 144 A.D.3d 1375, 40 N.Y.S.3d 803 (3d Dept. 2016); Mays v Stanford, 150 A.D.3d 1521, 55 N.Y.S.3d 502 (3d Dept. 2017); Allen v Stanford, 161 A.D.3d 1503, 78 N.Y.S.3d 445 (3d Dept. 2018).

Appellant had four COMPAS scores in the high/highly probable range. The COMPAS can contain negative factors that support the Board's conclusion. Wade v Stanford, 148 A.D.3d 1487, 52 N.Y.S.3d 508 (3d Dept. 2017).

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).

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As for the required three part statutory standard, contrary to appellant's claim, the Board is not required to repeat the language of the statute verbatim. Rather, it need merely insure that sufficient facts are in the decision which comply with the standard-which it has clearly done in this case. The factors cited, which were appellant's violent instant offense, violent criminal history, and poor COMPAS scores, show the required statutory findings were in fact made in this case. Language used in the decision which is only semantically different from the statutory language (e.g. continued incarceration serves the community standards) is permissible. James v Chairman of the New York State Division of Parole, 19 A.D.3d 857, 796 N.Y.S.2d 735 (3d Dept. 2005); Miller v New York State Division of Parole, 72 A.D.3d 690, 897 N.Y.S.2d 726 (2d Dept. 2010). Although the Board's determination could have been stated more artfully, this is insufficient to annul the decision. Ek v Travis, 20 A.D.3d 667, 798 N.Y.S.2d 199 (3d Dept 2005). The Board's failure to recite the precise statutory language of the first sentence in support of its conclusion to deny parole release does not undermine it's determination. Silvero v Dennison, 28 A.D.3d 859, 811 N.Y.S.2d 822 (3d Dept. 2006); Reed v Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012); Mullins v New York State Board of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016).

The Board set forth in adequate detail the reasons for its denial of the inmate's request for release. Burress v Evans, 107 A.D.3d 1216, 967 N.Y.S.2d 486 (3d Dept. 2013). The written Board decision in this case contains sufficient detail. McLain v New York State Division of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept 1994); Walker v Russi,176 A.D.2d 1185, 576 N.Y.S.2d 51 (3d Dept 1991), appeal dismissed 79 N.Y.2d 897, 581 N.Y.S.2d 660 (1992); Thomas v Superintendent of Arthur Kill Correctional Facility, 124 A.D.2d 848, 508 N.Y.S.2d 564 (2d Dept 1986), appeal dismissed 69 N.Y.2d 611, 517 N.Y.S.2d 1025 (1987); De la Cruz v Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Betancourt v Stanford, 148 A.D.3d 1497, 49 N.Y.S.3d 315 (3d Dept. 2017); Robinson v New York State Board of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Applegate v New York State Board of Parole, 164 A.D.3d 996, 82 N.Y.S.3d 240 (3d Dept. 2018).

The Board may deny parole release without the existence of any aggravating factors, no matter how exemplary the institutional record is. Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 1272, 990 N.Y.S.2d 714 (3d Dept. 2014).

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As for a lack of future guidance, there is no due process right to an inmate obtaining a statement as to what he should do to improve his chances for parole in the future. Boothe v Hammock, 605 F.2d 661 (2d Cir. 1979); Watkins v Caldwell, 54 A.D.2d 42, 387 N.Y.S.2d 177 (4th Dept 1976); Freeman v New York State Division of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept 2005); Francis v New York State Division of Parole, 89 A.D.3d 1312, 934 N.Y.S.2d 514 (3d Dept. 2011). There is no legal requirement that a second Parole Board panel must follow the recommendation of a prior Parole Board panel, nor that the same members should constitute both panels. Flores v New York State Board of Parole, 210 A.D.2d 555, 620 N.Y.S.2d 141, 142 (3d Dept 1994).

Since the Board's decision was sufficiently detailed to inform the inmate of the reasons for the denial of parole, it satisfied the criteria set out in section 259-i of the Executive Law. Siao-Pao v Dennison, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (Ct. App. 2008); Matter of Whitehead v. Russi, 201 A.D.2d 825, 607 N.Y.S.2d 751 (3d Dept. 1993); Matter of Green v. New York State Division of Parole, 199 A.D.2d 677, 605 N.Y.S.2d 148 (3d Dept. 1993). Moreover, the reasons stated by the Parole Board members for holding appellant are sufficient grounds to support their decision. People ex rel. Yates v. Walters, 111 A.D.2d 839, 490 N.Y.S.2d 573 (2d Dept. 1985); Matter of Ganci v Hammock, 99 A.D.2d 546, 471 N.Y.S.2d 630 (2d Dept. 1984); Matter of Vuksanaj v. Hammock, 93 A.D.2d 958, 463 N.Y.S.2d 61 (3d Dept. 1983); Matter of Pina v. Hammock, 89 A.D.2d 799, 453 N.Y.S.2d 479 (4th Dept. 1982). Since the Board's challenged decision was made in accordance with the pertinent statutory requirements, it exercised proper discretion in denying appellant early release on parole. In the Matter of Hawkins v. Travis, 259 A.D.2d 813, 686 N.Y.S.2d 198 (3d Dept. 1999), app. dism. 93 N.Y.2d 1033, 697 N.Y.S.2d 556 (1999); Matter of Barrett v. New York State Division of Parole, 242 A.D.2d 763, 661 N.Y.S.2d 857 (3d Dept. 1997).

Per 9 N.Y.C.R.R. 8002.1(b), only two Commissioners are required to conduct an interview. There is a presumption of honesty and integrity that attaches to Judges and administrative fact-finders. People ex.rel. Johnson v New York State Board of Parole, 180 A.D.2d 914, 580 N.Y.S.2d 957, 959 (3d Dept 1992); Withrow v Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed2d 712 (1975). And, Courts presume the Parole Board follows its statutory commands and internal policies in fulfilling its obligations. Garner v Jones, 529 U.S. 244, 120 S.Ct. 1362, 1371, 146 L.Ed2d 236 (2000). The decision was not predetermined. Dean v New York State Division of Parole, 21 A.D.3d 1207, 801 N.Y.S.2d 92 (3d Dept. 2005) lv. den. 6 N.Y.3d 705 (2006); Hakim-Zaki v New York State Division of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006).

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There is no merit to the inmate's contention that the parole interview was improperly conducted or that he was denied a fair interview. Black v New York State Board of Parole, 54 A.D.3d 1076, 863 N.Y.S.2d 521 (3d Dept. 2008); Rivers v Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); Mays v Stanford, 150 A.D.3d 1521, 55 N.Y.S.3d 502 (3d Dept. 2017).

Simply because the Board felt the severity of the crime was enough to deny parole does not mean the Board was biased. Garcia v New York State Division of Parole, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1st Dept. 1997). There must be support in the record to prove the alleged bias, and proof that the outcome of the Board's Release Decision flowed from the bias. Hughes v Suffolk County Department of Civil Service, 74 N.Y.2d 833, 546 N.Y.S.2d 335, motion to amend remittur granted 74 N.Y.2d 833, 550 N.Y.S.2d 274 (1989); Matter of Silmon v Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2001); Russo v New York State Board of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980); Hernandez v McSherry, 271 A.D.2d 777, 706 N.Y.S.2d 647 (3d Dept 2000), lv. app. den. 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000); Mays v Stanford, 150 A.D.3d 1521, 55 N.Y.S.3d 502 (3d Dept. 2017). No legitimate offer of proof exists in this case.

The alleged erroneous information does not appear anywhere in the Board decision. The Parole Board's reference during a parole release interview to erroneous information that does not ultimately serve as a basis for denying parole, will not result in the Board's decision being disturbed or reversed, nor will it lead to a judicial finding of irrationality bordering on impropriety. Santos v New York State Division of Parole, 267 A.D.2d 533, 698 N.Y.S.2d 563 (3d Dept 1999); Howard v New York State Board of Parole, 272 A.D.2d 731, 707 N.Y.S.2d 719, 720 (3d Dept. 2000); Abascal v New York State Board of Parole, 23 A.D.3d 740, 802 N.Y.S.2d 803 (3d Dept. 2005). There is no support in the record that the Board relied upon incorrect or erroneous information. Shark v New York State Division of Parole Chair, 110 A.D.3d 1134, 972 N.Y.S.2d 741 (3d Dept. 2013); Khatib v New York State Board of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014); Boccadisi v Stanford, 133 A.D.3d 1169, 20 N.Y.S.3d 477 (3d Dept. 2015); Peterson v Stanford, 151 A.D.3d 1960, 59 N.Y.S.3d 219 (4th Dept. 2017).

The statute concerning the use of interpreters was fully complied with. Nor did the appellant object to the interpreter. Failure to object to an interpreter is deemed waived. People v Gordillo, 191 A.D.2d 455, 594 N.Y.S.2d 60, 61 (2d Dept 1993), app. den. 81 N.Y.2d 1014, 600 N.Y.S.2d 202 (1993); People ex. rel. Haderxhanji v New York State Board of Parole, 97 A.D.2d 368, 467 N.Y.S.2d 381, 382 (1st Dept 1983).

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As for due process/constitutional liberty interest in a legitimate expectation of early release, at the Federal level, there is no inherent constitutional right to parole. Greenholtz v Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 2104, 60 L.Ed2d 668 (1979) or to be released before the expiration of a valid sentence. Swarthout v Cooke,562 U.S. 216, 131 S.Ct. 859, 178 L.Ed2d 732 (2011). Nor, under the New York State Constitution, is there a due process right to parole. Russo v New York State Board of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982, 984 (1980); Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979). The New York State parole scheme is not one that creates in any prisoner a legitimate expectancy of release. No entitlement to release is created by the parole provisions. Accordingly, appellant has no liberty interest in parole. Duemmel v Fischer, 368 Fed.Appx. 180, 182 (2d Cir. 2010); Davis v Dennison, 219 Fed Appx 68 (2d Cir. 2007), cert. den. 552 U.S. 863, 128 S.Ct. 151, 169 Led2d 103 (2007); Rodriguez v Alexander, 71 A.D.3d 1354, 896 N.Y.S.2d 693 (3d Dept. 2010), lv. den. 15 N.Y.3d 703, 906 N.Y.S.2d 817. Thus, the protections of the due process clause are inapplicable. Barna v Travis, 239 F.3d 169, 171 (2d Cir. 2001); Freeman v New York State Division of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept 2005); Watson v New York State Board of Parole, 78 A.D.3d 1367, 910 N.Y.S.2d 311 (3d Dept. 2010).

Completion of the minimum term of the sentence still does not create any protected liberty interest. Motti v Alexander, 54 A.D.3d 1114, 1115 (3d Dept. 2008).

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. Duemmel 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 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).

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Findings: (continued from page 7)

As for equal protection, the inmate does not specify exactly what group or classification he has been placed into, or that any law is discriminatory on its face. He has not alleged any facts that can give rise to an equal protection claim (e.g. showing he has been treated differently than others). As such, the petition fails to state a cause of action. Anderson v Coughlin, 700 F.2d 37, 44 (2d Cir. 1982). Even if this is deemed to be a classification, plaintiff has certainly not alleged anything to suggest he is in a suspect class or has been treated invidiously. Nicholas v Tucker, 114 F.3d 17, 20-21 (2d Cir. 1997); Allen v Cuomo, 100 F.3d 253, 260 (2d Cir. 1996); Carbonell v Acrish, 154 F.Supp.2d 552, 561 (S.D.N.Y. 2001), as prisoners either in the aggregate, or by type of offense, are not a suspect class. As long as there is a rational basis for the distinction, it will be upheld. Graziano v Pataki, 689 F.3d 110 (2nd Cir. 2012). Determining the optimal time for parole release eligibility elicits multiple legislative classifications and groupings that are not subject to heightened judicial scrutiny, but rather only to a rational basis to further a legitimate State purpose. McGinnis v Royster, 410 U.S. 263, 93 S.Ct. 1055, 1059, 35 L.Ed2d 282 (1973). Additionally, the equal protection clause will not speculate as to what the primary government purpose might or might not be. One purpose alone is sufficient. (McGinnis, supra, p. 1063). The equal protection clause of the New York State Constitution is no more broad than that found in the U.S. Constitution. It covers the same things, and has co-ordinate commands. Dorsey v Stuyvesant Town Corp., 299 N.Y. 512, 530-532 (1949) cert. denied 339 U.S. 981, 70 S.Ct. 1019 (1950). An equal protection claim is without merit, as the decision has a rational relationship to the objectives of community safety and respect for the law. Valderrama v Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005); Tatta v Dennison, 26 A.D.3d 663, 809 N.Y.S.2d 296 (3d Dept. 2006) denied 6 N.Y.3d 714, 816 N.Y.S.2d 750 (2006); DeFino v Travis, 18 A.D.3d 1079, 795 N.Y.S.2d 477 (3rd Dept. 2005); Williams v New York State Division of Parole, 70 A.D.3d 1106, 894 N.Y.S.2d 224 (3d Dept. 2010) lv.den. 14 N.Y.3d 709, 901 N.Y.S.2d 143; Santiago v Alexander, 80 A.D.3d 1105, 916 N.Y.S.2d 529 (3d Dept. 2011).

In order for an equal protection claim brought by a "class of one" to succeed, there must be proof of intentionally treating the inmate differently from others similarly situated and that there is no rational basis for the difference in treatment. Village of Willowbrook v Olech, 528 U.S. 562, 120 S.Ct. 1073, 1074, 145 L.Ed2d 1060 (2000); Giordano v City of New York, 274 F.3d 740, 751 (2d Cir. 2001); Webb v Travis, 26 A.D.3d 614, 810 N.Y.S.2d 233, lv.den. 7 N.Y.3d 709, 822 N.Y.S.2d 483 (3d Dept. 2006). No such proof exists in this case.

STATE OF NEW YORK - BOARD OF PAROLE

STATEMENT OF APPEALS UNIT FINDINGS & RECOMMENDATION

Inmate Name: Rivera, Raul **Facility:** Green Haven Correctional Facility

Dept. DIN#: 98A5820 **Appeal Control #:** 06-020-18-B

Findings: (continued from page 8)

Claims revolving around a speech by former Commissioner Manley are without merit as his comments were not made under oath, and create no substantive rights. Matter of Alvarez v Evans, Index # 2804/2013, *Decision and Order* dated July 30, 2013 (Sup. Ct. Dutchess Co.)(Brands, J.S.C.).

The Parole Board Report is in compliance with the enabling statute. The 6th amendment has no application to this proceeding because a parole release interview is not a full advesarial type proceeding. The nature and extent of the interview and attendant release considerations is solely within the discretion of the Parole Board. Matter of Briguglio v New York State Board of Parole, 24 N.Y.2d 21, 298 N.Y.S.2d 704, 710 (1969). The Parole Board is not the appellant's advesary. It has an identity of interest with him to encourage rehabilitation and readjustment to society. It is not an advesarial proceeding, and there are no charges or disputed issues of fact. Menechino v Oswald, 430 F.2d 403, 407 (2d Cir. 1970); cert. den. 400 U.S. 1023, 91 S.Ct. 588, 27 L.Ed2d 635 (1971).

Per 9 N.Y.C.R.R. 8006.3, the Appeals Unit lacks subject matter jurisdiction to rule on issues of disclosure of documents on appeal.

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.

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. 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). The 2017 amended regulations don't create any substantive right to release, but rather, merely increase transparency in the final decision. Courts must defer to the Parole Board's interpretation of its own regulations so long as it is rational and not arbitrary nor capricious. Brown v Stanford, 163 A.D.3d 1337, 82 N.Y.S.3d 622 (3d Dept. 2018).

STATE OF NEW YORK - BOARD OF PAROLE

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The 2014 regulations cited by appellant were repealed in 2017. The current regulations do constitute the require written procedures. A TAP was done and considered.

The 2011 amendments still permit the Board to place greater emphasis on the gravity of the crime. Matter of Montane v Evans, 116 A.D.3d 197, 981 N.Y.S.2d 866 (3d Dept.) appeal dismissed 24 N.Y.3d 1052, 999 N.Y.S.2d 360 (2014); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014); Moore v New York State Board of Parole, 137 A.D.3d 1375, 26 N.Y.S.3d 412 (3d Dept. 2016). The Board can still consider the nature of the inmate's crimes, the criminal history, the prison disciplinary record, the program accomplishments and post release plans. Rivera v New York State Division of Parole, 119 A.D.3d 1107, 990 N.Y.S.2d 295 (3d Dept. 2014). The Board is obligated to consider the serious nature of the crime. Khatib v New York State Board of Parole, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3d Dept. 2014).

Statistical probabilities alone do not generate constitutional protections. Connecticut Board of Pardons v Dumschat, 452 U.S. 458, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981). Neither the mere possibility of release, nor a statistical probability of release, gives rise to a legitimate expectancy of release on parole. Graziano v Pataki, 689 F.3d 110 (2nd Cir. 2012).

Letters from several leading Assemblymen, to the extent they depart from rulings of the Appellate Division, are not entitled to any weight by the courts. Matter of Tarbell v Stanford, Index # 1052-14, *Judgment* dated June 27, 2014 (Sup. Ct. Albany Co.)(Weinstein J.S.C.).

Appellant failed to demonstrate that the hold of 12 months was excessive. Hill v New York State Board of Parole, 130 A.D.3d 1130, 14 N.Y.S.3d 515 (3d Dept. 2015); Kalwasinski v Patterson, 80 A.D.3d 1065, 915 N.Y.S.2d 715 (3d Dept. 2011) lv.app.den. 16 N.Y.3d 710, 922 N.Y.S.2d 273 (2011); Matter of Madlock v. Russi, 195 A.D.2d 646, 600 N.Y.S.2d 283 (3d Dept. 1993); Confoy v New York State Division of Parole, 173 A.D.2d 1014, 569 N.Y.S.2d 846,848 (3d Dept 1991); Smith v New York State Division of Parole, 64 A.D.3d 1030, 882 N.Y.S.2d 759 (3d Dept. 2009); Smith v New York State Division of Parole, 81 A.D.3d 1026, 916 N.Y.S.2d 285 (3d Dept. 2011); Shark v New York State Division of Parole Chair, 110 A.D.3d 1134, 972 N.Y.S.2d 741 (3d Dept. 2013).

Recommendation:

Accordingly, it is recommended the decision of the Board be affirmed.