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Administrative Appeal Decision - Croskery, Curtis (2021-11-19)

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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Croskery, Curtis

DIN: 93-B-2169

Facility: Franklin CF

AC No.: 03-083-21 B

Findings: (Page 1 of 5)

Appellant challenges the March 2021 determination of the Board, denying release and imposing a 24-month hold. Appellant is incarcerated for four separate crimes. In the first, he broke into a house, cut the female victim with a knife, and engaged in deviate sexual intercourse with her by forcible compulsion. In the second, appellant burglarized a house. In the third, he again forced his way into a house and struck the female victim several times with a blunt instrument and then engaged in deviate sexual intercourse by forcible compulsion. And in the fourth, appellant again forced his way into a house and cut the female victim with a dangerous/sharp instrument and engaged in sexual contact and intercourse through forcible compulsion. Appellant raises the following issues: 1) the decision is arbitrary and capricious, and irrational bordering on impropriety, in that the Board failed to consider and/or properly weigh the required statutory factors. 2) the decision illegally resentenced him. 3) the decision failed to list any facts in support of the statutory standard cited. 4) the decision lacks details. 5) the decision violated the due process clause of the constitution. 6) the Board failed to comply with the 2011 amendments to the Executive Law in that the COMPAS was ignored, and the laws are now rehabilitation/present/future based.

Executive Law § 259-i(2)(c)(A) requires the Board to consider factors relevant to the specific incarcerated individual, including, but not limited to, the individual'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 Schendel v. Stanford, 185 A.D.3d 1365, 1366, 126 N.Y.S.3d 428, 429 (3rd Dept. 2020); Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1015, 105 N.Y.S.3d 461 (2d Dept. 2019); Matter of Phillips v. Dennison, 41 A.D.3d 17, 21, 834 N.Y.S.2d 121, 124 (1st Dept. 2007).

The Board is permitted to consider, and place greater emphasis on, the heinous nature of the offenses. 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), aff'd 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 Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997).

The fact that the incarcerated individual committed the instant offense while on community supervision is a proper basis for denying parole release. See, e.g., Matter of Byas v. Fischer, 120

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Name: Croskery, Curtis

DIN: 93-B-2169

Facility: Franklin CF

AC No.: 03-083-21 B

Findings: (Page 2 of 5)

A.D.3d 1586-87, 1586, 992 N.Y.S.2d 813, 814 (4th Dept. 2014); Matter of Thompson v. New York State Bd. of Parole, 120 A.D.3d 1518, 1518-19, 992 N.Y.S.2d 464, 465 (3d Dept. 2014); Matter of Guzman v. Dennison, 32 A.D.3d 798, 799, 821 N.Y.S.2d 208, 208 (1st Dept. 2006).

The Board may emphasize the nature of the instant offense and that it was an escalation in illegal behavior. See Matter of Stanley v. New York State Div. of Parole, 92 A.D.3d 948, 948-49, 939 N.Y.S.2d 132, 134 (2d Dept.), *lv. denied*, 19 N.Y.3d 806, 949 N.Y.S.2d 343 (2012); Matter of Symmonds v. Dennison, 21 A.D.3d 1171, 1172, 801 N.Y.S.2d 90, 90 (3d Dept.), *lv. denied*, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005); Matter of Warren v. New York State Div. of Parole, 307 A.D.2d 493, 493, 761 N.Y.S.2d 883 (3d Dept. 2003); Matter of Garcia v. New York State Div. of Parole, 239 A.D.2d 235, 239-40, 657 N.Y.S.2d 415, 418 (1st Dept. 1997).

The Board may consider the potential danger an inmate would pose to the community if the inmate were to be released Bridget v Travis, 300 A.D.2d 776, 750 N.Y.S.2d 795 (3d Dept 2002) or that the inmate would place the public at risk. Valerio v Dennison, 35 A.D.3d 938, 825 N.Y.S.2d 574 (3d Dept. 2006); 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); Constant v Stanford, 157 A.D.3d 1175, 67 N.Y.S.3d 508 (3d Dept. 2018).

The Board may place greater weight on an incarcerated individual's disciplinary record even though infractions were incurred earlier in the individual's incarceration. Matter of Karlin v. Cully, 104 A.D.3d 1285, 1286, 960 N.Y.S.2d 827, 828 (4th Dept. 2013) (while improved since last interview, concern with multiple violations accumulated before 2007); Matter of Warmus v. New York State Dep't of Corrs. & Cmty. Supervision, Index No. 7516-17, *Decision, Order & Judgment* dated Sept. 10, 2018 (Sup. Ct. Albany Co.) (O'Connor, A.S.C.J.).

The Board may consider the sentencing court's recommendation to deny parole. Matter of Rodriguez v. New York State Bd. of Parole, 168 A.D.3d 1342, 92 N.Y.S.3d 482 (3d Dept. 2019) (Board properly considered sentencing minutes which included court's recommendation against parole); Matter of Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017) (same); Matter of Porter v. Alexander, 63 A.D.3d 945, 881 N.Y.S.2d 157 (2d Dept. 2009); Matter of Delman v. New York State Bd. of Parole, 93 A.D.2d 888, 461 N.Y.S.2d 406, 407 (2d Dept. 1983).

"[T]here is a strong rehabilitative component in the statute that may be given effect by considering insight." Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000).

The Board may consider an incarcerated individual's history of drug and/or alcohol abuse. Matter of Espinal v. New York Bd. of Parole, 172 A.D.3d 1816, 100 N.Y.S.3d 777 (3d Dept. 2019) (substance abuse history); Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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AC No.: 03-083-21 B

Findings: (Page 3 of 5)

Dept. 2017) (substance abuse history and risk of future drug abuse); Matter of Dean v. New York State Div. of Parole, 21 A.D.3d 1207, 1208, 801 N.Y.S.2d 92, 93 (3d Dept. 2005) (involvement with weapons and drugs), lv. denied, 6 N.Y.3d 705, 812 N.Y.S.2d 34 (2006); Matter of Sanchez v. Dennison, 21 A.D.3d 1249, 801 N.Y.S.2d 423 (3d Dept. 2005) (history of drug abuse); Matter of Llull v. Travis, 287 A.D.2d 845, 846, 731 N.Y.S.2d 405, 406 (3d Dept. 2001) (drug abuse); Matter of Brant v. New York State Bd. of Parole, 236 A.D.2d 760, 761, 654 N.Y.S.2d 207, 208 (3d Dept. 1997) (history of alcohol and drug abuse); Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994) (history of alcohol abuse); People ex rel. Herbert v. New York State Bd. of Parole, 97 A.D.2d 128, 468 N.Y.S.2d 881, 884 (1st Dept. 1983) (drug addiction); Matter of Maciag v. Hammock, 88 A.D.2d 1106, 453 N.Y.S.2d 56 (3d Dept. 1982) (problem of alcohol and drug abuse with the concomitant need for programmed counseling).

The Board may take into account an incarcerated individual's [REDACTED] when denying parole release. See Matter of Dudley v. Travis, 227 A.D.2d 863, 642 N.Y.S.2d 386 (3d Dept.), lv. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379 (1996); Matter of Baker v. Russi, 188 A.D.2d 771, 591 N.Y.S.2d 540 (3d Dept. 1992); see also Pender v. Travis, 243 A.D.2d 889, 662 N.Y.S.2d 642 (3d Dept. 1997), lv. denied, 91 N.Y.2d 810, 670 N.Y.S.2d 404 (1998); People ex rel. Brown v. New York State Dept. of Correctional Services, Parole Bd. Div., 67 A.D.2d 1108, 415 N.Y.S.2d 137 (4th Dept. 1979), appeal denied, 47 N.Y.2d 707, 418 N.Y.S.2d 1025 (1979); Rodriguez v. Henderson, 56 A.D.2d 729, 730, 392 N.Y.S.2d 757, 758 (4th Dept.), lv. denied, 42 N.Y.2d 801, 397 N.Y.S.2d 1025 (1977).

The Board provided its statutory rationale for denying parole. 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 incarcerated individual 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

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

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AC No.: 03-083-21 B

Findings: (Page 4 of 5)

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 incarcerated individual 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 Vinesi 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).

“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts”; or, put differently, ‘[r]ationality is what is reviewed under . . . the arbitrary and capricious standard.’” Hamilton v. New York State Division of Parole, 119 A.D.3d 1268, 1270 n.1, 990 N.Y.S.2d 714, 716 (3d Dept. 2014) (quoting Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974)).

The petitioner has failed to demonstrate the Board’s decision was not made in accordance with the pertinent statutory requirements or was irrational “bordering on impropriety.” Matter of Silmon v. Travis, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000) (quoting Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69, 427 N.Y.S.2d 982 (1980)).

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).

STATE OF NEW YORK – BOARD OF PAROLE

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Findings: (Page 5 of 5)

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).

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

Recommendation: Affirm.

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Croskery, Curtis

Facility: Franklin CF

NYSID: [REDACTED]

**Appeal
Control No.:** 03-083-21 B

DIN: 93-B-2169

Appearances: Thomas Soucia Esq.
Franklin County Public Defender
355 West Main Street
Malone, New York 12953

Decision appealed: March 2021 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s)
who participated: Cruse, Corley

Papers considered: Appellant's Brief received August 30, 2021

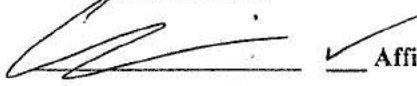
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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 Appellant and the Appellant's Counsel, if any, on

11/19/2021 66