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STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: McCarthy, Brian

DIN: 87-D-0088

Facility: Cayuga CF

AC No.: 04-109-21 B

Findings: (Page 1 of 6)

Appellant, through counsel, challenges the April 2021 determination of the Board, denying release and imposing a 24-month hold. The Appellant is serving 23 years to life as a result of his plea to Murder in the Second Degree. The instant offense involved the Appellant attacking a 19-year-old woman on the Clarkson University campus. He raped her, beat her and strangled her during the attack. The victim died approximately 2 days after the attack as a result of the injuries perpetrated by the Appellant.

Appellant raises the following issues: (1) the Board failed to review age as a mitigating factor; (2) the Board failed to review all prior plans and risk assessments submitted on Appellant's behalf; (3) the Board improperly deviated from the COMPAS findings; (4) the Board based their denial on community opposition; (5) the Board failed to consider other factors including the Appellant's institutional record and remorse; (6) the Board denied release based solely on the seriousness of the offense; (7) the decision was conclusory and lacked detail; and (8) the Board improperly resentenced the Appellant. 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).

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). 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,

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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.

After considering all required factors, 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 instant murder offense, which was committed while on supervision and which represented a severe escalation in the Appellant's criminal behavior, as well as the Appellant's lack of remorse for the victim's loss of life. 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); 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); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901 (2017).

Contrary to Appellant's claim, Hawkins – which requires consideration of youth and its attendant characteristics in relationship to the commission of the crime at issue for inmates serving a maximum life sentence for crimes committed as juveniles – does not apply whereas here the inmate was an adult (23 y.o.) when he committed the offense. Matter of Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, 140 A.D.3d 34, 30 N.Y.S.3d 397, 400 (3d Dept. 2016); accord Matter of Cobb v Stanford, 153 A.D.3d 1500, 59 N.Y.S.3d 915 (3d Dept. 2017). See also Miller v. Alabama, 57 U.S. 460, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010). Furthermore, there is no requirement that the Board consider youth at the time of prior crimes as a mitigating factor and the Board must consider an offender's criminal history, which may include crimes committed as a youth. In the Matter of Brian McCarthy, NY Sup. Ct. Index No.: 3664-18 (2018); See e.g. Matter of Amen v. NYS Div. of Parole, 100 A.D.3d 1230 (2012);

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: Appellant's instant offense of Murder in the Second Degree; Appellant's criminal history; Appellant's institutional efforts including disciplinary record, completion of required programming, and work as a painter as well as his cleaning and sanitizing

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duties pursuant to covid-19 protocols; and release plans to live with his fiancée. The Board also had before it and considered, among other things, the case plan, the COMPAS instrument, the sentencing minutes, an official statement from the District Attorney, community opposition and Appellant’s parole packet including letters of support and assurance. The Board also had before it and considered three independent assessments provided by Appellant.

Inasmuch as Appellant contends the Board failed to consider requisite factors, 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’s additional contention that the Board failed to properly assess risk and needs is without merit. The 2011 amendments 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 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. 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 did not deviate from the COMPAS assessment. In fact, they specifically note in their decision that the risk assessment indicates low risk in all categories other than substance abuse

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issues upon reentry. As such, the Board concluded that the Appellant was not a risk for future criminal behavior. Ultimately the Board found that, after weighing all the information provided, the Appellant's release would be incompatible with the welfare of society and would deprecate the seriousness of the crime.

As for community opposition, the Board may receive and consider written communications from individuals, other than those specifically identified in Executive Law § 259-i(2)(c)(A), opposing an incarcerated individual's release to parole supervision. Matter of Jones v. New York State Bd. of Parole, 175 A.D.3d 1652, 1652, 108 N.Y.S.3d 505, 506 (3d Dept. 2019); 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 Clark v. New York Bd. of Parole, 166 A.D.3d 531, 89 N.Y.S.3d 134 (1st Dept. 2018); Matter of Rivera v. Stanford, 53 N.Y.S.3d 404, 149 A.D.3d 1445 (3d Dept. 2017), aff'g Matter of Rivera v. Evans, Index No. 0603-16, *Decision & Order* dated July 5, 2016 (Sup. Ct. Sullivan Co.)(LaBuda A.J.S.C.); Matter of Grigger v. New York State Div. of Parole, 11 A.D.3d 850, 852–53, 783 N.Y.S.2d 689, 691 (3d Dept. 2004), lv. denied, 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005). The same has also long been recognized as true with respect to letters supporting an incarcerated individual's potential parole release. See, e.g., Matter of Hamilton v. New York State Div. of Parole, 119 A.D.3d at 1273, 990 N.Y.S.2d at 719 (3d Dept. 2014); Matter of Gaston v. Berbarly, 16 A.D.3d 1158, 1159, 791 N.Y.S.2d 781, 782 (4th Dept. 2005); Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 129, 750 N.Y.S.2d 759, 760 (1st Dept. 2002); Matter of Walker v. Travis, 252 A.D.2d 360, 362, 676 N.Y.S.2d 52, 54 (1st Dept. 1998); cf. Cardenales v. Dennison, 37 A.D.3d 371, 371, 830 N.Y.S.2d 152, 153 (1st Dept. 2007). Indeed, 9 N.Y.C.R.R. § 8000.5(c)(2) refers to the security of letters either in support of or in opposition to an incarcerated individual's release.

Inasmuch as Appellant disputes the Board's finding with respect to insight, it was well within the Board's authority to make an assessment of Appellant's credibility (Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept.), aff'd, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008)) and there is record support. The interview transcript reflects that the Appellant displayed limited remorse for the life of the victim and continued to focus on consequences he has faced. The Court of Appeals held that the Board rationally denied release to a "model prisoner" based upon the brutality of his crime, his refusal to accept responsibility and lack of insight and remorse. Matter of Silmon v. Travis, 95 N.Y.2d 470, 718 N.Y.S.2d 704 (2000).

The Board is permitted to conclude that the serious nature of the incarcerated individual's offense, as well as limited insight and/or remorse, outweigh other factors. See, e.g., Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000), aff'g 266 A.D.2d 296, 297, 698 N.Y.S.2d 685, 686 (2d Dept. 1999); Matter of Beodeker v. Stanford, 164 A.D.3d 1555, 82

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N.Y.S.3d 669 (3d Dept. 2018); Matter of Crawford v. New York State Bd. of Parole, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3d Dept. 2016), lv. denied, 29 N.Y.3d 901, 57 N.Y.S.3d 704 (2017); 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 Serrano v. N.Y. State Exec. Dep't-Div. of Parole, 261 A.D.2d 163, 164, 689 N.Y.S.2d 504, 505 (1st Dept. 1999).

The record reflects that the Board properly considered the required factors and adequately set forth its reasons for denying parole. The Board is not required to give each factor equal weight and may place greater emphasis on the gravity of the incarcerated individual's offense. Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4th Dept. 2017); Matter of Kenefick v. Sticht, 139 A.D.3d 1380, 31 N.Y.S.3d 367 (4th Dept. 2016); Matter of Fischer v. Graziano, 130 A.D.3d 1470, 12 N.Y.S.3d 756, 756 (4th Dept.), lv. denied, 132 A.D.3d 1331, 17 N.Y.S.3d 344 (2015); Matter of Delacruz v. Annucci, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4th Dept. 2014); Matter of Freeman v. Fischer, 118 A.D.3d 1438, 988 N.Y.S.2d 780 (4th Dept. 2014). “[T]he record establishes, although the Parole Board placed heavy emphasis on the severity of petitioner's offense, it did not solely consider that factor” and “it cannot be said that the Parole Board's determination that petitioner is not yet suitable for release was ‘so irrational under the circumstances as to border on impropriety.’” Matter of Freeman v. Fischer, 118 A.D.3d 1438, 988 N.Y.S.2d 780 (4th Dept. 2014) (citation omitted). “The decision to deny parole may be based upon the seriousness of the crime and its violent nature.” Matter of Putland v. Herbert, 231 A.D.2d 893, 648 N.Y.S.2d 401 (4th 1996), lv. denied, 89 N.Y.2d 806, 654 N.Y.S.2d 716 (1997).

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 also is without merit inasmuch as the Board fulfilled its obligation to determine the propriety of release pursuant to 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

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period of incarceration set by the Court. See 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. See Matter of Mullins, 136 A.D.3d 1141, 25 N.Y.S.3d 698. Appellant's maximum sentence is life. The Board acted within its discretion to hold Appellant for another 24 months, after which he will have the opportunity to reappear before the Board.

In conclusion, Appellant 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, 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)).

Recommendation: Affirm.

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: McCarthy, Brian

Facility: Cayuga CF

NYSID: [REDACTED]

Appeal Control No.: 04-109-21 B

DIN: 87-D-0088

Appearances: Cheryl L. Kates, PC
PO Box 734
Fairport, NY 14450

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

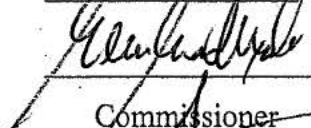
Board Member(s) who participated: Berliner, Coppola

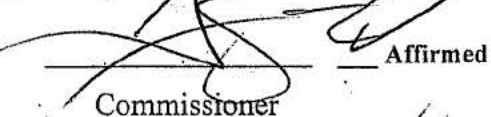
Papers considered: Appellant's Brief received September 8, 2021

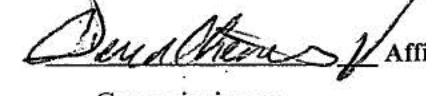
Appeals Unit Review: Statement of the Appeals Unit's Findings and Recommendation

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:

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

11/19/2021 GG.