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May 2022

### Administrative Appeal Decision - Javier, Jose (2021-11-19)

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STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

**Name:** Javier, Jose

**DIN:** 92-T-0022

**Facility:** Fishkill CF

**AC No.:** 05-057-21 SC

**Findings:** (Page 1 of 3)

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Appellant challenges the May 2021 determination of the Board, denying release and imposing a 24-month hold. Appellant's instant offenses are for breaking into at least four residences at gunpoint, beating and raping women in the residence, and stealing money and jewelry. Appellant 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. 2) the decision lacks detail. 3) no aggravating factors exist. 4) the decision failed to list any facts in support of the statutory standard cited. 5) the decision was predetermined. 6) the Board never explained how they weighed the factors. 7) the decision is also based on "consistent opposition" but community opposition is not a statutory factor.

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 brutal 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).

Contrary to Appellant's contentions, the Board's decision was not rendered irrational by its characterization of his conduct as representing extreme violence." Matter of Gutkaiss v. New York State Div. of Parole, 50 A.D.3d 1418, 857 N.Y.S.2d 755 (3d Dept. 2008); see also Matter of Siao-Pao v. Dennison, 51 A.D.3d 105, 108, 854 N.Y.S.2d 348, 351 (1st Dept. 2008) (Board decision language), aff'd 11 N.Y.3d 777 (2008).

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“The Parole Board’s determination denying petitioner parole was rationally based on the seriousness of petitioner’s crimes.” People ex rel. Watson v. Hollins, 302 A.D.2d 279, 280, 753 N.Y.S.2d 841 (1st Dept. 2003).

“[T]here is a strong rehabilitative component in the statute that may be given effect by considering remorse and insight.” Matter of Silmon v. Travis, 95 N.Y.2d 470, 478, 718 N.Y.S.2d 704 (2000). And that his remorse was shallow. Campbell v Stanford, 173 A.D.3d 1012, 105 N.Y.S.3d 461 (2<sup>nd</sup> Dept. 2019).

Based upon legally confidential material, there has been consistent opposition to the appellant’s release.

While the Board does not agree that aggravating factors are always necessary to support reliance on an incarcerated individual’s crime, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, there are multiple aggravating factors present here.

There is no evidence the Board’s decision was predetermined based upon the instant offense. Matter of Gonzalvo v. Stanford, 153 A.D.3d 1021, 56 N.Y.S.3d 896 (3d Dept. 2017); Matter of Hakim-Zaki v. New York State Div. of Parole, 29 A.D.3d 1190, 814 N.Y.S.2d 414 (3d Dept. 2006); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 695 N.Y.S.2d 622 (3d Dept. 2000).

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). Matter of Siao-Pao v. Dennison, 11 N.Y.3d 777, 866 N.Y.S.2d 602 (2008) (decision, while less detailed than it might be, was not conclusory and did not violate Executive Law), aff’g 51 A.D.3d 105, 110, 854 N.Y.S.2d 348 (1st Dept.) (upholding decision that found incarcerated individual to be unsuitable for release); Matter of Silvero v. Dennison, 28 A.D.3d 859, 860, 811 N.Y.S.2d 822, 823 (3d Dept. 2006) (that the Board “did not recite the precise statutory language of Executive Law § 259-i (2)(c)(A) in support of its conclusion to deny parole does not undermine its conclusion”; upholding denial based on determination incarcerated individual was “not a credible candidate for release” at the time).

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).

STATE OF NEW YORK – BOARD OF PAROLE

**APPEALS UNIT FINDINGS & RECOMMENDATION**

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**Findings:** (Page 3 of 3)

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The appellant may not review the Board’s weighing process or assess whether the Board gave proper weight to the relevant factors, since it is not required to state each factor it considers, or weigh each factor equally or grant parole due to exemplary behavior. Comfort v New York State Division of Parole, 68 A.D.3d 1295, 890 N.Y.S.2d 700 (3<sup>rd</sup> Dept. 2009); Hamilton v New York State Division of Parole, 119 A.D.3d 1268, 990 N.Y.S.2d 714 (3d Dept. 2014). 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).

“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)).

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.

**Recommendation:** Affirm.

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Javier, Jose

Facility: Fishkill CF

NYSID: [REDACTED]

Appeal Control No.: 05-057-21 SC

DIN: 92-T-0022

Appearances: Jose Javier 92T0022  
Fishkill Correctional Facility  
18 Strack Drive  
Beacon, New York 12508

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

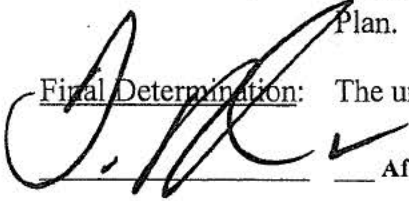
Board Member(s) who participated: Crangle, Lee

Papers considered: Appellant's Brief received September 9, 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.

Distribution: Appeals Unit – Appellant - Appellant's Counsel - Inst. Parole File - Central File P-2002(B) (11/2018)