June 2023

Administrative Appeal Decision - Thompson, Rahmel (2019-09-30)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name:	Rodriguez, Fermin	**Facility:**	Woodbourne CF
NYSID:	[redacted]	**Appeal Control No.:**	04-137-19 B
DIN:	95-A-4957		

Appearances: Fermin Rodriguez 95A4957
Woodbourne Correctional Facility
99 Prison Road
P.O. Box 1000
Woodbourne, New York 12788

Decision appealed: April 2019 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: Alexander, Berliner, Drake

Papers considered: Appellant's Brief received May 31, 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:

_____ ___ **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 Inmate and the Inmate's Counsel, if any, on 9/30/19.

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: Rodriguez, Fermin **DIN:** 95-A-4957

Facility: Woodbourne CF **AC No.:** 04-137-19 B

Findings: (Page 1 of 5)

Appellant challenges the April 2019 determination of the Board, denying release and imposing a 24-month hold. Appellant's crime consisted of him and several co-defendants kidnapping a victim and holding him hostage in an underground pit for several weeks and at the same time demanding ransom money for his safe release. Appellant raises the following issues: 1) the decision is arbitrary and capricious in that the Board failed consider all the factors. 2) the Board ignored his CPDO status. 3) calling the appellant the "mastermind" of the criminal scheme is inserting personal opinion in the matter. 4) the decision is based upon erroneous information as the victim was not "thrown" into the pit. 5) the decision lacks detail. 6) the Board failed to list any facts in support of the statutory standard cited. 7) the decision violates the equal protection clause of the constitution in that the Board let out other inmates with worse crimes and worse records. 8) the Board failed to comply with the 2017 Board regulations in that the reason given for the departure is void.

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).

The Board is permitted to consider, and place greater emphasis on, the brutal nature of the offense. 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), affd 26 N.Y.3d 1014, 21 N.Y.S.3d 686 (2015); Matter of

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Rodriguez, Fermin **DIN:** 95-A-4957

Facility: Woodbourne CF **AC No.:** 04-137-19 B

Findings: (Page 2 of 5)

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); Garofolo v Dennison, 53 A.D.3d 734, 860 N.Y.S.2d 336 (3d Dept. 2008).

The Board may take note that the crime was premeditated. Gaston v Berbary, 16 A.D.3d 1158, 791 N.Y.S.2d 781 (4th Dept. 2005); Matter of Platten v. New York State Bd. of Parole, 153 A.D.3d 1509, 59 N.Y.S.3d 921 (3d Dept. 2017). 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).

The Board may consider a district attorney's recommendation to deny 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 Porter v. Alexander, 63 A.D.3d 945, 881 N.Y.S.2d 157 (2d Dept. 2009); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998); Matter of Walker v. New York State Bd. of Parole, 218 A.D.2d 891, 630 N.Y.S.2d 417 (3d Dept. 1995); Matter of Williams v. New York State Bd. of Parole, 220 A.D.2d 753, 633 N.Y.S.2d 182 (2d Dept. 1995); Matter of Confoy v. New York State Div. of Parole, 173 A.D.2d 1014, 569 N.Y.S.2d 846, 847 (3d Dept. 1991); Matter of Lynch v. New York State Div. of Parole, 82 A.D.2d 1012, 442 N.Y.S.2d 179 (3d Dept. 1981).

Remorse is a permissible factor. 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 Beodeker v. Stanford, 164 A.D.3d 1555, 82 N.Y.S.3d 669 (3d Dept. 2018) (limited expression of remorse).

In the sentencing minutes, the appellant is referred to as the "mastermind" of this crime. And when the Board asked appellant about this, he answered in the affirmative. The Board can give greater weight to statements made in the sentencing minutes. Williams v New York State Division of Parole, 114 A.D.3d 992, 979 N.Y.S.2d 868 (3d Dept. 2014). The Board is entitled to rely on the sentencing minutes. Platten v New York State Board of Parole, 153 A.D.3d 1509, 59 N.Y.S.3d 921 (3d Dept. 2017). As the inmate admitted this, then the Board did not rely on erroneous information. Paniagua v Stanford, 153 A.D.3d 1018, 56 N.Y.S.3d 894 (3d Dept. 2017). If a Board member makes an erroneous statement during the interview, but the inmate doesn't try to correct it during the interview, then the Board decision will not be vacated. Gordon v Stanford, 148 A.D.3d 1502, 50 N.Y.S.3d 627 (3d Dept. 2017).

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).

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." 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) (citation omitted); accord Matter of Reed v. Evans, 94 A.D.3d 1323, 942 N.Y.S.2d 387 (3d Dept. 2012). The language used by the Board was "only semantically different" from the statute. Matter of Miller v. New York State Div. of Parole, 72 A.D.3d 690, 691–92, 897 N.Y.S.2d 726, 727 (2d Dept. 2010); Matter of James v. Chairman of New York State Div. of Parole, 19 A.D.3d 857, 858, 796 N.Y.S.2d 735, 736 (3d Dept. 2005); see also 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) (upholding decision that denied release as "contrary to the best interest of the community"); Matter of Murray v. Evans, 83 A.D.3d 1320, 920 N.Y.S.2d 745 (3d Dept. 2011) (Board provided adequate statutory rationale).

Inasmuch as appellant argues he did not receive the same fair consideration as other similarly situated inmates, the decision has a rational relationship to the objectives of community safety and respect for the law. Matter of Valderrama v. Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005). There is no merit to his equal protection claim. Matter of Williams v. New York State Div. of Parole, 70 A.D.3d 1106, 894 N.Y.S.2d 224 (3d Dept.), lv. denied, 14 N.Y.3d 709, 901 N.Y.S.2d 143 (2010); Matter of Tatta v. Dennison, 26 A.D.3d 663, 809 N.Y.S.2d 296 (3d Dept.), lv. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 750 (2006); Matter of DeFino v. Travis, 18 A.D.3d 1079, 795 N.Y.S.2d 477 (3d Dept. 2005). Furthermore, appellant has not identified a suspect class. 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). The Board's decision would have a rational

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Rodriguez, Fermin **DIN:** 95-A-4957

Facility: Woodbourne CF **AC No.:** 04-137-19 B

Findings: (Page 4 of 5)

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relationship to the objectives of community safety and respect for the law. Matter of Valderrama v. Travis, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758 (3d Dept. 2005); see also Matter of Williams v. New York State Div. of Parole, 70 A.D.3d 1106, 894 N.Y.S.2d 224 (3d Dept.), lv. denied 14 N.Y.3d 709, 901 N.Y.S.2d 143 (2010) (rejecting Equal Protection claim). There is no entitlement to parole based upon comparison with the particulars of other applicants. Rather, each case is sui generis, and the Board may give each case a unique weighted value. Phillips v Dennison, 41 A.D.3d 17, 834 N.Y.S.2d 121 (1st Dept. 2007).

The existence of a final deportation order does not require an inmate's release, but is merely one factor to consider. Matter of Delrosario v. Stanford, 140 A.D.3d 1515, 34 N.Y.S.3d 696 (3d Dept. 2016); Matter of Lackwood v. New York State Div. of Parole, 127 A.D.3d 1495, 8 N.Y.S.3d 461 (3d Dept. 2015); People ex rel. Borrell v. New York State Bd. of Parole, 85 A.D.3d 1515, 925 N.Y.S.2d 922 (3d Dept.), lv. denied, 17 N.Y.3d 718, 936 N.Y.S.2d 75 (2011); Matter of Samuel v. Alexander, 69 A.D.3d 861, 892 N.Y.S.2d 557 (2d Dept. 2010). The Board denied parole, which encompasses CPDO. Executive Law § 259-i. The Board was not required to explicitly discuss CPDO in the decision. Borrell v. Superintendent of Wende Corr. Facility, No. 12-CV-6582 CJS MWP, 2014 WL 297348, at *7 (W.D.N.Y. Jan. 27, 2014), appeal dismissed (Oct. 31, 2014).

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.

The victim was kidnapped and forcibly put into a dark pit at knifepoint. Whether or not he was "thrown" into the pit is a matter of mere semantics and at most would constitute harmless error. Matter of Rossney v. New York State Div. of Parole, 267 A.D.2d 648, 649, 699 N.Y.S.2d 319 (3d Dept. 1999), lv. denied, 94 N.Y.2d 759, 705 N.Y.S.2d 6 (2000).

STATE OF NEW YORK – BOARD OF PAROLE

APPEALS UNIT FINDINGS & RECOMMENDATION

Name: Rodriguez, Fermin **DIN:** 95-A-4957

Facility: Woodbourne CF **AC No.:** 04-137-19 B

Findings: (Page 5 of 5)

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 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); Peckham v. Calogero, 12 N.Y.3d 424, 883 N.Y.S.3d 751 (2009); Henry v. Coughlin, 214 A.D.2d 673, 625 N.Y.S.2d 578 (2d Dept. 1995).

The Board decision did depart from the COMPAS, but in doing so did comply with the regulations. Appellant's answers showed a clear lack of remorse and concern, and displayed an attitude.

Recommendation: Affirm.