December 2020

Administrative Appeal Decision - Scott, Todd (2019-06-28)

STATE OF NEW YORK – BOARD OF PAROLE

ADMINISTRATIVE APPEAL DECISION NOTICE

Name: Scott, Todd **Facility:** Elmira CF

NYSID: [redacted] **Appeal Control No.:** 11-116-18 B

DIN: 89-A-8015

Appearances: Cheryl Kates, Esq.
P.O. Box 734
Fairport, New York 14450

Decision appealed: November 2018 decision, denying discretionary release and imposing a hold of 24 months.

Board Member(s) who participated: **Davis, Alexander**

Papers considered: Appellant's Letter-brief received February 28, 2019
Appellant's Supplemental Letter-brief received March 28, 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:

Tina M ✓ **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 6/28/19 66.

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

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Appellant was sentenced to an aggregate term of 25 years to life upon his conviction of two counts of Murder in the second degree, CPW in the second degree, [redacted]. In the instant appeal, Appellant, through counsel, submits a disjointed letter-brief and a supplemental letter to challenge the November 2018 determination of the Board denying release and imposing a 24-month hold. The arguments boil down to the following:

(1) the decision is unlawful, arbitrary and capricious because the Board focused solely on the instant offenses (without specifying any "mitigating factor") and community opposition (based on penal philosophy) without considering that he was not the shooter, other statutory factors, and the COMPAS instrument's low scores;
(2) the Board failed to adequately explain the COMPAS departure by specifying the scale deviated from and providing a reason for departure other than the instant offenses;
(3) the Board failed to discuss all statutory factors on the record and in the denial decision;
(4) the decision is conclusory and fails to adequately explain the parole denial;
(5) the Board failed to make detailed mention in the record as to whether official defense attorney statements were solicited from both cases and, upon information and belief, any requests were sent to the incorrect address;
(6) the Board failed to mention its review of the case plan in the decision;
(7) the Board failed to properly consider Appellant's age at the time of his criminal behavior as a mitigating factor;
(8) the Board improperly considered community opposition;
(9) the Board's reliance on community opposition to deny parole was improper because, upon information and belief, it contains erroneous information and/or penal philosophy;
(10) the Board imposed a higher standard and relied on penal philosophy by following a protocol against releasing inmates convicted of killing police officer and acting on PBA political pressure;
(11) the decision constitutes an unauthorized resentencing to life without parole based solely on the Commissioners' personal views as to the appropriate penalty and/or PBA/community opposition containing, on information and belief, erroneous information/penal philosophy, which is arbitrary and capricious, excessive, and cruel and unusual punishment; and
(12) Appellant was improperly denied access to community opposition, victim impact statements, and requests for defense attorney statements.

These arguments are without merit.

APPEALS UNIT FINDINGS & RECOMMENDATION

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Standard for Discretionary Release on Parole

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 the statutory 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 Mullins v. New York State Bd. of Parole, 136 A.D.3d 1141, 25 N.Y.S.3d 698 (3d Dept. 2016). 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 McKee v. New York State Bd. of Parole, 157 A.D.2d 944, 945, 550 N.Y.S.2d 204, 205 (3d Dept. 1990).

The Board's Consideration of Parole

The record as a whole, including the interview transcript, reflects that the Board considered the appropriate factors, including: the instant offenses wherein Appellant participated in the in-concert shooting death of a police officer sitting in his patrol car providing security to an unrelated witness in a "hit" ordered by incarcerated drug lords, fatally shot a woman who stole drugs and/or money from the drug distribution ring for which Appellant also was employed, and, as a youth, passed cocaine to a car passenger;[1] Appellant's drug dealing history in the community; his

[1] The Board clearly understood Appellant, while having shot the woman, was not the gunman in the police officer's murder. (Tr. at 38, 44.) Appellant's role was to distract the officer while a co-defendant shot him. (Tr. at 34-35.)

perception of how he became involved in crime and expressions of remorse for the instant offenses; his institutional record, including improved discipline, completion of ART and current work assignment in the mess hall with positive reports; and his parole release plan and support system. In addition, the Board had before it and considered, among other things, the sentencing minutes and a negative recommendation therein, an official statement by the DA in opposition to release, Appellant's case plan, the COMPAS instrument, and Appellant's submission, letters of support from the community, staff and others, and letters of assurance. Appellant also was given the opportunity to raise additional matters during the interview.

After considering all required factors and principles, 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 serious nature of Appellant's two murder offenses. See 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 Copeland v. New York State Bd. of Parole, 154 A.D.3d 1157, 63 N.Y.S.3d 548 (3d Dept. 2017); 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). The Board acknowledged low risk indicators in the COMPAS instrument, but explained it was departing from the COMPAS because the serious nature of the offenses demonstrated a continuous, well-thought-out course of conduct that caused a police officer's assassination and a young woman's murder. 9 N.Y.C.R.R. § 8002.2(a). While the decision acknowledged the DA's official opposition, the Board did not mention or rely upon community opposition. The Board encouraged Appellant to maintain positive institutional behavior, build upon healthy family attachment and complete all support services offered to him.

That the Board found the serious nature of his crimes outweighed other factors does not constitute convincing evidence that the Board did not consider them, see Matter of McLain v. New York State Div. of Parole, 204 A.D.2d 456, 611 N.Y.S.2d 629 (2d Dept. 1994), or render the decision irrational, see Matter of Hamilton, 119 A.D.3d at 1273-74, 990 N.Y.S.2d at 719; Matter of Torres v. New York State Div. of Parole, 300 A.D.2d 128, 128-29, 750 N.Y.S.2d 759, 760 (1st Dept. 2002); Matter of Garcia, 239 A.D.2d at 239-40, 657 N.Y.S.2d at 418. As the weight to be assigned each statutory factor is within the Board's discretion, it committed no error by emphasizing the severity of the inmate's offenses over other factors considered.[2] See Matter of Robinson v. New

[2] While the Board does not agree that *aggravating* factors are always necessary to support reliance on an inmate's crime, Matter of Hamilton, 119 A.D.3d 1268, 990 N.Y.S.2d 714, there are aggravating factors present here, namely, the calculated nature of two separate murders that resulted in a woman's death and an officer's assassination for drug lords. The inmate's crimes went "well beyond the 'unjustifiable taking and tragic loss of life'" that describes every murder. Matter of Phillips v. Dennison, 41 A.D.3d 17, 22, 834 N.Y.S.2d 121, 125 (1st Dept. 2007) (citation omitted).

York State Bd. of Parole, 162 A.D.3d 1450, 81 N.Y.S.3d 235 (3d Dept. 2018); Matter of King v. Stanford, 137 A.D.3d 1396, 26 N.Y.S.3d 815 (3d Dept. 2016); Matter of Walker v. Travis, 252 A.D.2d 360, 676 N.Y.S.2d 52 (1st Dept. 1998).

Compliance with the 2011 Amendments to Executive Law

Appellant's contention that the Board improperly ignored his low COMPAS scores is incorrect. 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 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, 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 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).

That is exactly what occurred here. The Board considered the COMPAS instrument and explained in its decision why it was departing from low risk indicators, such as the risk of felony violence, arrest and absconding, in denying release consistent with 9 N.Y.C.R.R. § 8002.2(a). Contrary to Appellant's claim, the Board was entitled to place more emphasis on the two murders. See 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 Montane, 116 A.D.3d at 203, 981 N.Y.S.2d at 871; 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). Any suggestion that the Board should have explained the COMPAS departure during the interview is mistaken. Indeed, the Board had not yet deliberated and made a determination.

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Interview and Written Decision

Appellant argues the Board failed to discuss all statutory factors on the record and in the decision. This includes requests for official defense attorney statements, which are addressed below. He also objects that the Board did not mention its review of the case plan in the decision. In addition, he asserts the written decision was conclusory insofar as the Board failed to cite all factors considered and explain the parole denial other than the instant offense and an allegedly vague reference to community opposition. There is no merit to these claims.

The requirement under 9 N.Y.C.R.R. § 8002.1(c) that the Board must discuss all applicable "factors" during the interview, excluding confidential information, concerns the "factors" listed in 9 N.Y.C.R.R. § 8002.2(d). The record reflects the Board satisfied this requirement, as indicated above. However, the Board is not required to explain the weight accorded to each factor in its decision, Matter of Allis v. New York State Div. of Parole, 68 A.D.3d 1309, 1309, 890 N.Y.S.2d 200, 201 (3d Dept. 2009); Matter of Garofolo v. Dennison, 53 A.D.3d 734, 735, 860 N.Y.S.2d 336, 338 (3d Dept. 2008), or explicitly mention each factor considered, Matter of Betancourt, 148 A.D.3d 1497, 49 N.Y.S.3d 315; Matter of Mullins, 136 A.D.3d 1141, 25 N.Y.S.3d 698. While the Board's amended regulation reinforces that detailed reasons must be given for a denial of release, it did not alter this well-established principle. 9 N.Y.C.R.R. § 8002.3(b).

The Board's decision satisfied the criteria set out in Executive Law § 259-i(2)(a) and 9 N.Y.C.R.R. § 8002.3(d), 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). The Board addressed many factors and principles considered in individualized terms and explained what ultimately weighed most heavily in its deliberations, namely, the continuous, well-thought-out course of conduct resulting in an officer's assassination and a woman's murder. As discussed, the Board is permitted to place greater emphasis on the serious nature of the offenses. While Appellant complains the Board made impermissibly vague reference to community opposition,[3]

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[3] Insofar as Appellant appears to allege a due process violation, an inmate 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), and the New York State parole scheme does not implicate the due process clause, Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001); Matter of Russo, 50 N.Y.2d at 75-76, 427 N.Y.S.2d at 985; Matter of Freeman v. New York State Div. of Parole, 21 A.D.3d 1174, 800 N.Y.S.2d 797 (3d Dept. 2005).

the Board did not cite community opposition.[4] As for the case plan, the record reflects the Board discussed it during the interview. That the Board did not mention it in the written decision does not render the decision invalid. Cf. Matter of Betancourt, 148 A.D.3d 1497, 49 N.Y.S.3d 315.

Official Statements by Defense Attorneys

Appellant objects that the Board did not mention if defense attorneys from both cases were contacted to solicit official statements and speculates that, even if solicited, the requests were sent to the incorrect addresses because the attorneys have moved since sentencing. The Board addressed official statements during the interview, acknowledging the practice of soliciting official statements from the district attorney, defense attorney and the court and that the Board received a response in his case. But nothing in the Executive Law nor the regulations requires the Board to discuss the requests on the record (in detail). Nor did Appellant raise any issue. See Matter of Vanier v. Travis, 274 A.D.2d 797, 711 N.Y.S.2d 920 (3d Dept. 2000). And while DOCCS has been unable to locate copies of the original requests sent to Appellant's defense attorneys, it recently sent new requests to his surviving attorneys, including both attorneys who represented him at sentencing in the instant offenses, at their current addresses and received no responses. Accordingly, there is no basis to set aside the Board's decision. Cf. Matter of Almonte v. New York State Bd. of Parole, 145 A.D.3d 1307, 42 N.Y.S.3d 691 (3d Dept. 2016), lv. denied, 29 N.Y.3d 905 (2017) (failure to consider sentencing minutes that contained no parole recommendation was harmless error); Matter of Davis v. Lemons, 73 A.D.3d 1354, 899 N.Y.S.2d 919 (3d Dept. 2010) (same).

[redacted]

[4] While Appellant's objection concerns community opposition, we note the Board's reference to official opposition was not impermissibly vague. See, e.g., Matter of Branch v. Annuci, 2017 N.Y. Misc. LEXIS 1695, at 5, 7 (Sup. Ct. Seneca Co. May 5, 2017). The sources of official statements received by the Board pursuant to the Executive Law are the sentencing court, the district attorney and the defense attorney (Executive Law § 259-i(2)(c)(A)(vii)) and the only opposition from an official party in this case – as reflected in the Parole Board Report – was the district attorney.

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[redacted]

Community Opposition, Penal Philosophy and Resentencing

Appellant contends the Board's consideration of community opposition was improper because a family member of the victim made a statement, precluding purported representation by the PBA. In Appellant's view, the Board otherwise may not consider community opposition. However, 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 inmate's release to parole supervision. 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) ("Contrary to petitioner's contention, we do not find that [the Board's] consideration of certain unspecified 'consistent community opposition' to his parole release was outside the scope of the relevant statutory factors that may be taken into account in rendering a parole release determination"), 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) ("the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community"); 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) (recognizing 259-i(2)(c)(A)(v)'s list is not the exclusive information the Board may consider and persons in addition to victims and their families may submit letters), lv. denied, 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005).

Appellant also speculates community opposition contained improper material that the Board relied upon, (incorrectly) equating any reliance on such opposition with adoption of the views motivating it. But as discussed, the Board did not rely on community opposition in denying release. And even assuming the Board received material containing improper matters, a decision will not

be reversed simply because material expressing personal penal philosophy or erroneous information was included in submissions which otherwise were properly considered. See Matter of Duffy v. New York State Dep't of Corr. & Cmty. Supervision, 132 A.D.3d 1207, 1209, 19 N.Y.S.3d 610 (3d Dept. 2015) ("The Board's decision will be upheld if there is nothing indicating it was influenced by, placed weight upon, or relied upon any improper matter, in the victim's family statement or otherwise"); Matter of Bailey v. New York State Div. of Parole, Index No. 973-16, *Decision & Judgment* dated Aug. 17, 2016 (Sup. Ct. Albany Co.) (Hartman A.J.S.C.) (even assuming PBA letters contained inaccuracies or were inflammatory, Board would be permitted to consider them for what they were worth and will be presumed not to have relied on inappropriate matters therein unless decision indicates otherwise).

The transcript as a whole does not support Appellant's contention that he was denied a fair interview. Matter of Rivers v. Evans, 119 A.D.3d 1188, 989 N.Y.S.2d 400 (3d Dept. 2014); Matter of Bonilla v. New York State Bd. of Parole, 32 A.D.3d 1070, 1071, 820 N.Y.S.2d 661, 662 (3d Dept. 2006). There is no support for Appellant's claim that the Board imposed a heightened standard and relied on its personal opinion regarding penal philosophy, contra Matter of King v. New York State Div. of Parole, 83 N.Y.2d 788, 610 N.Y.S.2d 954 (1994) (Commissioner considered factors outside the scope of the applicable factors during interview, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place), aff'g 190 A.D.2d 423, 432, 598 N.Y.S.2d 245, 251 (1st Dept. 1993) (quoting Commissioner), much less opinions on penal philosophy held by others including as set forth in the media. Appellant's claim that the decision was determined by PBA political pressure is purely speculative and unsubstantiated. See Matter of MacKenzie v. Evans, 95 A.D.3d 1613, 1614, 945 N.Y.S.2d 471, 472 (3d Dept.), lv. denied, 19 N.Y.3d 815, 955 N.Y.S.2d 553 (2012); Matter of Huber v. Travis, 264 A.D.2d, 695 N.Y.S.2d 622 (3d Dept. 1999). There also is no evidence the Board's decision was predetermined by an alleged protocol against releasing inmates convicted of killing police officers. See Matter of Bottom v. Travis, 5 A.D.3d 1027, 773 N.Y.S.2d 717 (4th Dept.), appeal dismissed 2 N.Y.3d 822, 781 N.Y.S.2d 285 (2004); Matter of Guerin v. New York State Div. of Parole, 276 A.D.2d 899, 900, 714 N.Y.S.2d 770, 771 (3d Dept. 2000). Appellant has failed to rebut the 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).

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 per Executive Law § 259-i(2)(c)(A) and after considering the factors set forth

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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). Appellant's claim equates the Board's denial of parole with the imposition of a life sentence without the possibility of parole. But there is no basis to equate a parole denial, which is within the authorized sentence and may be reconsidered later, with an irrevocable life sentence in prison. As for the Eighth Amendment, the denial of parole under a statute invoking discretion in parole determinations does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Carnes v. Engler, 76 Fed. Appx. 79 (6th Cir. 2003); Lustgarden v. Gunter, 966 F.2d 552, 555 (10th Cir.), cert den. 506 U.S. 1008, 113 S. Ct. 624 (1992), rehearing denied 507 U.S. 955, 113 S. Ct. 1374 (1993); Pacheco v. Pataki, No. 9:07–CV–0850, 2010 WL 3909354, at *3 (N.D.N.Y. Sept. 30, 2010). Appellant's maximum sentence is life imprisonment. The Board acted within its authority and discretion to hold him for another 24 months, after which he will have the opportunity to reappear before the Board. Executive Law § 259-i(2)(a); 9 N.Y.C.R.R. § 8002.3(b); Matter of Tatta v. State of N.Y., Div. of Parole, 290 A.D.2d 907, 737 N.Y.S.2d 163 (3d Dept. 2002), lv. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278 (2002); see also Matter of Campbell v. Evans, 106 A.D.3d 1363, 965 N.Y.S.2d 672 (3d Dept. 2013). Appellant has failed to demonstrate that a hold of 24 months for discretionary release was excessive or improper.

Record Access

Insofar as Appellant complains that DOCCS unlawfully failed to release records thwarting his right to appeal, his complaint is beyond the scope of this appeal. 9 NYCRR § 8006.3; id. §§ 8006 *et seq*. Nonetheless, we note counsel's initial records request did not include a signed authorization from Appellant as required by 9 N.Y.C.R.R. § 8000.5(c)(4). While counsel claims an authorization was submitted, this claim is unsubstantiated. Counsel was informed by DOCCS of the deficiency as early as December 10, 2018 (if not sooner) and inexplicably did not submit a signed authorization to the facility until April 2019 (dated March 26, 2019) to accompany a record request filed in late March. In the meantime, counsel proceeded to perfect this administrative appeal on February 28, 2019, without seeking an extension of time pursuant to 9 N.Y.C.R.R. § 8006.2(a). The record request therefore was not properly submitted prior to the timely perfection of Appellant's administrative appeal. 9 N.Y.C.R.R. § 8000.5(c)(1), (4). We also note Appellant is not entitled to confidential victim impact statements, if any. 9 N.Y.C.R.R. § 8002.4(e). In addition, we understand DOCCS has not released records responsive to other requests because counsel has refused to pay the associated fees.

Recommendation: Affirm.