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At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on September 23, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF DUTCHESS

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In the Matter of the Application of
 VERNON SMITH

Petitioner

Index No.:2020-51338

-against-

DECISION AND ORDER
 (Motion Sequence 1)

NEW YORK STATE DEPARTMENT OF
 CORRECTIONS AND COMMUNITY SUPERVISION
 ANTHONY J. ANNUCCI, Acting Commissioner and
 TINA STANFORD, Chairwoman New York State
 Parole Board

Respondents

-----x

Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding Petitioner’s Article 78 petition:

<u>Papers</u>	<u>Numbered</u>
Petitioner’s Verified Petition/ Affirmation of Anthony Lombardo, Esq. /Exhibits 1-9	1
Respondents’ Answer by Elizabeth Garvin, Esq. New York State Office of the Attorney General / Exhibits 1-11	2
Petitioners’ Reply Memorandum of Law/ Affirmation of Anthony Lombardo, Esq./Exhibits 1-5	3

RELEVANT BACKGROUND

On February 20, 1996 Petitioner was sentenced to a term of twenty-five (25) years to life upon his conviction of Murder in the Second Degree, Robbery in the First Degree, and Criminal

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Possession of a Weapon in the Second and Fourth Degree. Petitioner was 17 years old at the time of the incident and is now 43 years old. Petitioner files this Article 78 petition to have this Court annul the decision of the Parole Board dated August 14, 2019, which denied Petitioner's parole release and to afford Petitioner a new hearing, alleging that the Parole Board did not consider all the statutory factors in making its determination, and that the at least one of the records relied on by the Parole Board was relative to Petitioner's brother and not Petitioner. *See*, Petitioner's Petition at pages 1-2; *see also*, Sentence and Commitment Order as Respondent's Exhibit 2.

Petitioner declares that the incident began with a misguided plan by his uncle, to replace Petitioner's brother Lavonne's stolen bicycle, by stealing a bicycle from a bicycle shop. Petitioner states he was unaware that his uncle was carrying a real gun at the time of the incident or intended to do more than steal a bicycle. Amid the incident, the police were called and entered the bicycle shop, whereby Petitioner's uncle shot and killed one of the responding officers. Another officer returned fire and killed Petitioner's uncle. The three boys, Petitioner being the oldest, ran to the basement of the store where they were apprehended. At the time of Petitioner's parole interview, Petitioner stated he had accepted the responsibility for the role he played in the incident and the tragic impact it had on the families involved. *See*, Transcript of Petitioner's Initial Parole Interview dated August 14, 2019 as Petitioner's Exhibit 1.

Petitioner alleges that the Parole Board made several errors which warrant a de novo interview, specifically that the Parole Board relied upon erroneous information in Petitioner's parole file; failed to give meaningful consideration to Vernon's adolescence at the time of the crimes and failed to explain its departure from the COMPAS assessment. Petitioner also argues that the Parole Board relied on community opposition that did not reflect on the circumstances of the crime but a general penal philosophy and failed to explain in detail the reason for denying Petitioner's parole, as there was no explanation of how it considered the factors in making its decision. *See*, Petitioner's Petition.

Respondents argue that it considered and explained the statutory factors in its determination denying Petitioner's parole. Respondents also argue the decision to release someone is within the discretion of the Parole Board and as such, the decision should not be annulled. Respondents contend that because Petitioner did not raise the issue that the Parole Board relied on erroneous information in administrative appeal, Petitioner cannot raise it now in this petition. Respondents state that while it considered all the statutory factors, it permissibly relied on the

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seriousness of the offense and explained in detail the reason for the denial of Petitioner's release. *See, Respondents' Answer.*

In reply, Petitioner argues that it could not previously raise the argument about the erroneous information relied on by the Parole Board, that being a victim impact statement from the decedent officer's widow, as the Petitioner's parole file was improperly withheld and not provided to Petitioner's counsel timely, more than a month after the deadline to preserve this argument, and almost four months after the request for said records, and is ultimately the basis for the argument raised in the administrative appeal objecting to not having said records. Petitioner also argues that Respondents' Answer is conclusory, unsupported arguments that do not address the issues relevant to the Petitioner, specifically the unbalanced weight given to an erroneous victim statement and not proper consideration to Petitioner's age at the time of the incident, which is the basis for a new interview and hearing. *See, Petitioner's Reply.*

DISCUSSION

Judicial review of a determination of the Parole Board is narrowly circumscribed. A Parole Board determination to deny early release may be set aside only where it evinces irrationality bordering on impropriety. The Parole Board is required to consider the relevant statutory factors (*see* Executive Law § 259-i[2][c][A]), although it is not required to address each factor in its decision or accord all the factors equal weight. Whether the Parole Board considered the proper factors and followed the proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript. *See, Campbell v Stanford, 173 A.D.3d 1012, 1015 (2nd Dept. 2019), leave to appeal dismissed, 35 N.Y.3d 963 (2020) citations omitted.*

When making the determination, the role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for the crime charged, but to determine whether, as of this moment, given all the relevant statutory factors, the person seeking parole, who sits before them, should be released. The statute expressly mandates that the prisoner's educational and other achievements affirmatively be taken into consideration in determining whether he meets the general criteria relevant to parole release under § 259-i[2](c). *See, Matter of King v New York State Div. of Parole, 190 A.D.2d 423, 432 (1st Dept 1993), aff'd, Matter of, 83 N.Y.2d 788 (1994).*

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It is well settled, that when the record establishes that the Board acknowledged petitioner's extensive rehabilitative success along with the additional statutory factors, but placed greater emphasis on the seriousness of petitioner's crime in its determination that release would be incompatible with the welfare of society and so deprecate the seriousness of the crime as to undermine respect for the law, as it is entitled to do, we are thus constrained to affirm—to do otherwise is to implicitly overrule the decades of our well-settled jurisprudence set forth above. Matter of Hamilton v New York State Div. of Parole, 119 A.D.3d 1268, 1273-74 (3rd Dept. 2014).

Petitioner's initial parole interview, approximately eighteen (18) of the twenty-four (24) pages of transcript, reviews the one and only offense for which the Petitioner is incarcerated. Maybe the interviewer wanted to get an idea of the mentality of the boy now turned man at the time of the incident. However, the review shed light on the cultural biases present when making these assessments even if unintentional. It is indeed revealed that some may believe that a juvenile's socioeconomic background may make them vulnerable to the possible ills of this world on one hand, but counter that the same background somehow toughens up that juvenile and produces a certain maturity level, negating their naivety. It may be disingenuous to state that such is given consideration if the overall psychological deficits and effects on the adolescent will be discounted in its review of the statutory factors.

Albeit the Parole Board's decision is not irrational or improper. The decision although brief, goes through the factors that were considered and gives a basis for its decision. The Parole Board does not give elaborate details about the factors nor does it give specified details to the weight of each factor. This information would be helpful to those seeking parole, as identifying goals to move towards, but it is not required of the Parole Board.

It was erroneous that the victim impact statement related to Lavonne Smith's parole hearing was included in Petitioner's parole file, but nothing indicates that such had any significant bearing on the determination. Although the interview shows an awkward glance at Petitioner's adolescence at the time of the incident, it was considered, along with the COMPAS assessment and other achievements of the Petitioner. In review of the factors, Petitioner has been successful in his programs – there had been issues with Petitioner's discipline. Petitioner's discipline record improved and remained consistent since December 23, 2015. The Parole Board acknowledged that Petitioner did have ebbs and flows of periods without issue. However, Petitioner has been incarcerated for approximately twenty-five years, and the shift in his behavior only became

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consistent within the last four years. When coupled with the seriousness of the crime, specifically the role which Petitioner played, the Parole Board determined that Petitioner release would be incompatible with the welfare of society at this time. This is not an abuse of discretion nor is it irrational.

It is hoped, for an individual convicted as a juvenile, a constitutional sentence guarantees, at some point a meaningful opportunity to obtain release. *See, Campbell v Stanford*, 173 A.D.3d 1012, 1015 (2nd Dept. 2019), lv to appeal dismissed, 35 N.Y.3d 963 (2020). This Court is constrained to affirm the determination of the Parole Board, as the reasoning for its decision is stated, based on the statutory factors and within its discretion. To that extent, Petitioner's Article 78 petition, to find that that the Parole Board's decision to deny Petitioner parole was irrational and an abuse of discretion is **denied**.

Accordingly, it is hereby,

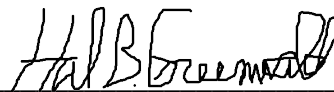
ORDERED, that Petitioner's Article 78 petition is denied, as the determination was not arbitrary and capricious and there is a rational basis for the determination.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: September 23, 2020
Poughkeepsie, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.

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