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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF DUTCHESS

In the Matter of the Application of

KENNETH HAILEY,

Petitioner

- against -

NEW YORK STATE DEPARTMENT OF
 CORRECTIONS AND COMMUNITY SUPERVISION,
 ANTHONY J. ANNUCCI, ACTING COMMISSIONER,
 and TINA STANFORD, CHAIRWOMAN, BOARD OF
 PAROLE,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice
 Law and Rules

FORMAN, J., Acting Supreme Court Justice

The following papers were read and considered in deciding Petitioner's application pursuant to CPLR Article 78 for judicial review of the denial of his release to parole supervision:

NYSCEF Docket Numbers 1 - 34

This Article 78 proceeding challenges a decision of the New York State Board of Parole (the "Board") denying Petitioner's application for release to parole supervision. Specifically, Petitioner seeks a judgment vacating and reversing the Board's determination and remitting the matter to the Board for a *de novo* parole release interview. Petitioner also seeks, by separate letter motion dated July 10, 2020 [*see* NYSCEF Docket No. 30], an order permitting counsel to access and review the presentence investigation report and Part II of the Parole Board Report [NYSCEF Docket Nos. 16 & 18, respectively]. For the reasons stated herein, the Petition is denied.

BACKGROUND

On June 5, 1990, Petitioner was sentenced to concurrent terms of 25 years to life on his conviction for Murder in the Second Degree, and five to fifteen years on his convictions for Attempted Robbery in the First Degree and Criminal Possession of a Weapon in the Second Degree.

Petitioner was convicted, after a jury trial, for the murder of a Mr. Sebastian Legant during the attempted commission of a robbery. When the victim fought back, Petitioner left the scene briefly, returned with a sawed-off shotgun, and shot the victim causing his death. Prior to imposing sentence, the Hon. James Starkey stated that if the law permitted a more severe sentence, he would have imposed it [Sentencing Minutes, NYSCEF Docket No. 24, p 11].

Petitioner's application for release to parole supervision was heard by the Board on August 14, 2019¹. During that interview, the Board engaged in an extended conversation with Petitioner. The Board reviewed the circumstances and severity of Petitioner's crime, his institutional and disciplinary record, his program accomplishments, letters of support, and his release plan. The Board also reviewed and considered the COMPAS risks and needs assessment, noting that he was scored as a low risk and low need in most categories but a medium risk in the criminal involvement scale.

Ultimately, the Board denied Petitioner's application for release to parole supervision. Specifically, the Board acknowledged: Petitioner's rehabilitative efforts, including his completion of numerous required and voluntary programs; letters of support (including from the Kings County District Attorney); good disciplinary record; mostly low COMPAS scores; and good case plan. However, the Board also gave consideration to the violent nature of Petitioner's crime, the sentencing minutes, and Petitioner's medium risk on the criminal involvement COMPAS scale. After weighing all of the relevant statutory factors, the Board denied Petitioner's application for release to parole supervision, stating:

¹ Petitioner had previously been interviewed by the Board and denied release in 2013, 2015, and 2017.

Following a personal interview, record review, and deliberation, this panel finds that your release to supervision is incompatible with the public safety and welfare ... significant weight has been placed on your record of unlawful conduct including your instant offenses where you committed a gunpoint planned robbery and shot and killed a cab driver ... To grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law. Parole is therefore denied.

Petitioner timely perfected his administrative appeal from that denial. On or about April 1, 2020, the Appeals Unit denied Petitioner's appeal. This Article 78 proceeding ensued.

DISCUSSION

The Parole Board's release decisions are discretionary and, if made in accordance with statutory requirements, are not subject to judicial review [*see* Executive Law §259-i[2][c][A]; *see also* *Matter of Banks v. Stanford*, 159 AD3d 134 (2d Dept. 2018)]. Petitioner bears the heavy burden of proving that this Court must intervene [*Matter of Duffy v. New York State Division of Parole*, 74 AD3d 965 (2d Dept. 2010)]. Judicial intervention is only appropriate in rare instances when the Board has acted in a manner that demonstrates a showing of "irrationality bordering on impropriety" [*Silmon v. Travis*, 95 NY2d 470, 476 (2000) (quoting *Matter of Russo v. New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]); *Matter of Goldberg v. New York State Board of Parole*, 103 AD3d 634 (2d Dept. 2013)]. Accordingly, a court may only review a Parole Board's denial of parole when such denial is arbitrary and capricious [*id.*]. "While the Parole Board is required to consider the relevant statutory factors, it is not required to address each factor in its decision or accord all of the factors equal weight" [*Matter of Coleman v. New York State Department of Corrections and Community Supervision*, 157 AD3d 672, 672 (2d Dept. 2018) (citations omitted); *see also* *Matter of Stanley v. New York State Div. of Parole*, 92 AD3d 948 (2d Dept. 2012)]. The Board need not give the COMPAS Risk and Needs Assessment instrument any greater weight or consideration than the other statutory factors [*Lewis v. Stanford*, 153 AD3d 1478 (3d Dept. 2017)].

The Board is also entitled to place greater emphasis on the severity of Petitioner's crimes [see *Matter of Campbell v. Stanford*, 173 AD3d 1012 (2d Dept. 2019); *Matter of Crawford v. New York State Bd. of Parole*, 144 AD3d 1308 (3d Dept. 2016), *lv app denied* 29 NY3d 901 (2017)], including the violent nature of the crimes [*Matter of Applegate v. New York State Board of Parole*, 164 AD3d 996, 997 (3d Dept. 2018) (the Board was "free to place emphasis on the brutal nature of the crime and was not required to give equal weight to each statutory factor"); see also *Jones v. New York State Board of Parole*, 175 AD3d 1652, 1653 (3d Dept. 2019) (the board may place particular emphasis on the inmate's troubling course of conduct both during and after the commission of the instant offenses)]. It is also within the Board's discretion to conclude that the severity of an inmate's offense outweighs an inmate's positive institutional record and his letters of support [*Matter of Cardenales v. Dennison*, 37 AD3d 371, 371 (1st Dept. 2007) (denial of application for release to parole supervision was not arbitrary and capricious, even though the petitioner had an exemplary institutional record and had received many letters of support, including a letter of support from the victim's mother); see also *Matter of Anthony v. New York State Division of Parole*, 17 AD3d 301 (1st Dept. 2005), *lv app denied* 5 NY3d 708 (2005); *Matter of Kirkpatrick v. Travis*, 5 AD3d 385 (2d Dept. 2004)].

Ultimately, "whether the Board considered the proper factors and followed the proper guidelines are questions that should be assessed based upon the 'written determination evaluated in the context of the parole hearing transcript'" [*Matter of Jackson v. Evans*, 118 AD3d 701, 702 (2d Dept. 2014) (quoting *Matter of Siao-Pao v. Dennison*, 11 NY3d 777, 778 [2008]); see also *Matter of Fraser v. Evans*, 109 AD3d 913, 914-915 (2d Dept. 2013)]. In the context of that transcript, it is clear that the Board provided a sufficient explanation of the reasons supporting its determination to deny parole [*Matter of Jackson, supra* at 702; *Matter of Fraser, supra*]. The fact 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" [*Mullins v. New York State Bd. of Parole*, 136

AD3d 1141, 1142 (3d Dept. 2016) (citation omitted); *see also Miller v. New York State Div. of Parole*, 72 AD3d 690, 692 (2d Dept. 2010) (the language board used in its parole denial determination was “only semantically different” from the Executive Law)].

Here, the submission before this Court, including the materials submitted for *in camera* review, reveals that the Board considered the relevant statutory factors in reaching its determination, including the circumstances and severity of Petitioner’s crimes, his institutional record, his program accomplishments, his release plan, and his letters of support. The Board was plainly aware of Petitioner’s positive program participation, primarily low COMPAS scores, and the various letters of support (including from the Kings County District Attorney) but found that these positive factors were outweighed by the serious and brutal nature of the Petitioner’s crimes. It was also proper for the Board to consider the sentencing minutes [*see Matter of Platten v. New York State Board of Parole*, 153 AD3d 1509 (3d Dept. 2017); *Matter of Bush v. Annucci*, 148 AD3d 1392 (3d Dept. 2017)].

Contrary to Petitioner’s assertions, the Board also properly incorporated the COMPAS risk and needs assessment in its determination as required by Executive Law §259-c (4) and §259-i(2)(c)(A) [*see Matter of Wade v. Stanford*, 148 AD3d 1487 (3d Dept. 2017)]. However, Petitioner’s low COMPAS scores are not dispositive [*Matter of Dawes v. Annucci*, 122 AD3d 1059, 1060-61 (3d Dept. 2014) (“Although petitioner’s COMPAS Risk and Needs Assessment Instrument indicated that he was at a low risk for violence, rearrest and absconding, the COMPAS instrument is only one factor that the Board is required to consider”); *Matter of Rivera v. New York State Div. of Parole*, 119 AD3d 1107, 1109 (3d Dept. 2014) (“The COMPAS instrument ... is only one factor that the Board was required to consider ... and, notwithstanding the favorable COMPAS instrument, its decision [to deny release to parole] does not reflect irrationality bordering on impropriety.”)]. Moreover, a reading of

the parole interview transcript and the Board's decision makes clear that the decision to deny parole was not impacted by a departure from a COMPAS scale.

Based upon the foregoing, the Board's denial of Petitioner's application for release from confinement was neither arbitrary nor capricious [*see Matter of Fruser, supra; Matter of Ramos v. Heath*, 106 AD3d 747 (2d Dept. 2013)], nor has Petitioner sustained his burden of demonstrating that the challenged determination of the parole board was irrational to the point of bordering on impropriety [*Matter of Campbell, supra; Matter of Murszalek v. Stanford*, 152 AD3d 773 (2d Dept. 2017); *Esquilin v. New York State Bd. Of Parole*, 144 AD3d 797 (2d Dept. 2016); *Matter of LeGeros v. New York State Board of Parole*, 139 AD3d 1068 (2d Dept. 2016); *Matter of Cruz v. New York State Division of Parole*, 39 AD3d 1060, 1062 (3d Dept. 2007) (stating that while the court found the petitioner's "academic and institutional achievements exemplary," and that the court considered the petitioner to be "a prime candidate for parole release," the Board's decision to deny parole would be upheld because it did not exhibit "irrationality bordering on impropriety")].

Motion for Unsealing

The presentence investigation report was properly submitted by Respondents under seal. A presentence report "is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court" [Criminal Procedure Law §390.50(1)]. While CPL §390.50(2)(a) permits a defendant to obtain a copy of the report "for use before the parole board for release consideration or an appeal of a parole board determination," the defendant must submit a written request to the sentencing court requesting release of the report for that purpose. It is the sentencing court, and not this court, that is authorized to release a copy of the report to the defendant for use before the parole board.

Part II of the Parole Report was also properly submitted under seal. The report is an intra-agency memorandum that is not reflective of the final agency policy or determination, and thus

exempt from disclosure [see Public Officers Law §87(2)(g)(iii); *Grigger v. New York State Div. of Parole*, 11 AD3d 850, 851-852 (3d Dept. 2004)]. In any event, it does not appear that the Board relied upon this document in any way in denying Petitioner release. Accordingly, Petitioner's letter motion permitting counsel to access the presentence investigation report and Part II of the Parole Report is denied.

Because Petitioner's remaining contentions are without merit, it is

ORDERED, ADJUDGED, AND DECREED, that the Petition is denied, and that this Article 78 proceeding is dismissed.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

Dated: December 22, 2020
Poughkeepsie, New York



Hon. Peter M. Forman, AJSC