STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of

RICHARD WINKLER,

Petitioner,

-against-

THE NEW YORK STATE
DIVISION OF PAROLE,

Respondent.

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-06-ST6626 Index No. 1583-06

Appearances:

Melinda S. Molina, Esq.
Yusuf A. Rangwala, Esq.
Attorneys for Petitioner
125 Broad Street, 31st Floor
New York, New York 10004

Eliot Spitzer
Attorney General
State of New York
Attorney For Respondents
The Capitol
Albany, New York 12224
(David L. Cochran,
Assistant Attorney General of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner commenced the instant article 78 proceeding to review a denial of parole release. Petitioner is currently serving a sentence of 25 years to life on a conviction of Murder, second degree. The conviction arises out of the shooting death of petitioner's father. This was petitioner's first parole release appearance. Parole was denied based upon a finding that release would deprecate the seriousness of the crime and undermine respect for the law. Determination of the instant proceeding has been held in abeyance pending determination of a companion proceeding challenging a denial of access to certain parole records.

The petition does not contain any allegations of fact which state a cause of action. Rather, the petition refers to an affidavit from petitioner and his memorandum of law for the factual allegations and legal claims. Petitioner's memorandum of law alleges that there was no evidentiary support for a finding that his instant offense demonstrates a propensity for extreme violence, that he has been improperly punished for going to trial, that the Parole Board disregarded petitioner's institutional record and relied solely upon the severity of his offense, failed to set forth sufficient grounds for denial, failed to provide any guidelines to increase petitioner's likelihood of parole release in the future, and relied upon and considered erroneous information.

The Parole Board decision included a statement that "[t]his offense demonstrates a propensity for extreme violence and a depraved indifference for human life." Petitioner contends that there is no evidence to support a finding that at the current time petitioner has a propensity for violence, citing Matter of Friedgood v New York State Bd. of Parole, (22

AD3d 950 [3d Dept 2005]). However, the Court in Friedgood limited its holding to the specific facts of that case. The petitioner therein was 87 years old, had severe physical limitations and needed continuous medical care. Petitioner herein is in his mid forties and in good health. Moreover, denial of parole in Friedgood appears to have been based upon considerations of the safety of the community, not that release would deprecate the seriousness of the underlying crime. The remaining cases cited by petitioner in support of this claim also involve issues of current safety of the community, rather than the deprecation standard. The facts surrounding petitioner's instant offense provide evidentiary support for the stated determination that at the time of the offense, (the only time relevant to the deprecation standard) petitioner exhibited a propensity for extreme violence. As such, the claim is without merit (see Matter of Wilcher v Dennison, 30 AD3d 958 [3d Dept 2006]).

Petitioner's second claim is that he has been punished for going to trial, an improper consideration with respect to parole release. A review of the transcript of petitioner's parole release hearing indicates that during a discussion related to petitioner's insight into his criminality, he stated that he knew he was 100% responsible for his father's death. A single question was posed in response - "why did you take it to trial?" There is no indication that the query or petitioner's response played any part in the ultimate determination to deny parole (see Matter of Waters v New York State Div. of Parole, 252 AD2d 759, 760 [3d Dept 1998]). Moreover, an inmate's insight into his criminality is a proper consideration for the Parole Board (see e.g. Matter of Silmon v Travis, 95 NY2d 470 [2000]). Whether an inmate has

only recently purported to accept responsibility for a crime in an effort to obtain parole release is certainly a relevant consideration. The question clearly could lead to information with respect to this issue. Therefore, such claim is also without merit.

Petitioner's claim that the Parole Board violated lawful procedures by failing properly to consider his positive institutional record is entirely conclusory. Administrative determinations carry a presumption of regularity (see Altamore v Barrios-Paoli, 90 NY2d 378, 386 [1997]; Nehorayoff v Mills, 282 AD2d 932 [3d Dept 2001]). The petitioner must overcome such presumption by submission of "factual allegations of an evidentiary nature or other competent evidence tending to establish his or her entitlement to the requested relief" (Matter of Rodriguez v Goord, 260 AD2d 736, 736-737 [3d Dept 1999]; see also Matter of Barnes v La Vallee, 39 NY2d 721 [1976]; Matter of Tebout v Goord, 290 AD2d 833 [3d Dept 2002]; Matter of Vandermark-Crayne v New York State Dept. of Civ. Serv., 225 AD2d 979 [3d Dept 1996]; Matter of Reynoso v Le Fevre, 199 AD2d 886 [3d Dept 1993]; Matter of Bogle v Coughlin, 173 AD2d 992 [3d Dept 1991]); Matter of Malik v Berlinland, 158 AD2d 836 [3d Dept 1990]). It is not sufficient to allege that there is no evidence that the Board considered the positive factors. Rather petitioner must submit evidence indicating that they did not consider such factors. Conclusory assertions are insufficient. In the instant proceeding, the Board clearly had all of the information before it and discussed petitioner's work evaluations, programming, disciplinary history and release plans during the parole release hearing. The fact that each of the factors was not enumerated

in the decision is of no moment (see Matter of Prout v Dennison, 26 AD3d 540 [3d Dept 2006]; Matter of Farid v Travis, 239 AD2d 629 [3d Dept 1997]). As such, the claim is without merit.

Furthermore, denial of parole based upon the stated ground of an inmate's criminality has been upheld for decades (Matter of Wood v Dennison, 25 AD3d 1056 [3d Dept 2006]; Matter of Olivera v Dennison, 22 AD3d 949 [3d Dept 2005]; Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept 2004]; Matter of Roman v Cirincione, 290 AD2d 748 [3d Dept 2002]; Matter of Martinez v Travis, 289 AD2d 823 [3d Dept 2001]; Matter of Devore v Travis, 274 AD2d 815 [3d Dept 2000]; Matter of Marcelin v Travis, 262 AD2d 836 [3d Dept 1999]; Matter of Herouard v Travis, 250 AD2d 911 [3d Dept 1998]; Matter of Secilmic v Keane, 225 AD2d 628 [2d Dept 1996]; Matter of Carrion v New York State Bd. of Parole, 210 AD2d 403 [2d Dept 1994]; Matter of Salcedo v Ross, 183 AD2d 771 [2d Dept 1992]; Matter of Walker v Russi, 176 AD2d 1185 [3d Dept 1991]; Matter of Confoy v New York State Div. of Parole, 173 AD2d 1014 [3d Dept 1991]; People ex rel. Thomas v Superintendent, Arthurkill Correctional Facility, 124 AD2d 848 [2d Dept 1986]; Matter of Harris v New York State Bd. of Parole, 114 AD2d 897 [2d Dept 1985]). Parole may be denied based upon the seriousness of the crime even where an inmate has had an exceptional institutional record for almost 30 years (see e.g. Matter of Trobiano v State of New York Div. of Parole, 285 AD2d 812 [3d Dept 2001]). As such, there is no merit to the claims that the Parole Board improperly relied only on petitioner's instant offense or that they failed to

provide sufficient reasons for the decision. Furthermore, "there is no requirement that the Board provide petitioner with guidelines to improve his chance of securing parole at his next parole appearance." (Matter of Freeman v New York State Div. of Parole, 21 AD3d 1174 [3d Dept 2005]).

Finally, petitioner contends that the Parole Board relied upon erroneous information. The claim is based upon the fact that petitioner's institutional records reflect that he was terminated from the Chemical Dependency/Domestic Violence Program. Petitioner's objection appears to be based upon the fact that he had an administrative challenge to his removal pending at the time that his initial parole report was prepared. Petitioner has not offered any evidentiary detail with respect to the nature of any alleged errors, and, as above, has not met his burden of establishing the existence of erroneous information in his files. He has also failed to indicate the outcome of the administrative process challenging his removal nor has he shown that the Board based its decision on the reference to his removal from the program as required in order to be entitled to any relief herein, even if the information was proven to be erroneous (see Matter of Tatta v State of N.Y., Div. of Parole, 290 AD2d 907, 908 [3d Dept 2002]).

Accordingly it is hereby,

ORDERED and ADJUDGED, that the petition is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. All papers together with the original of this Decision/Order/Judgment are returned to the attorney for

respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: April 30, 2007
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Order to Show Cause dated March 20, 2006; Petition verified February 15, 2006, with Exhibits A-I annexed;
Affidavit of Richard Winkler sworn to February 15, 2006;
Memorandum of Law dated February 17, 2006;

Answer verified June 5, 2006, with Exhibits A-I annexed; Affirmation of David L. Cochran, Esq. dated June 5, 2006;

Reply Memorandum of Law dated September 7, 2006.