STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
JAY YOUNG, #03-A-3746,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2009-0036.03
INDEX #129646
ORI # NY044015J

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jay Young, verified on January 3, 2009, and filed in the St. Lawrence County Clerk's office on January 16, 2009. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the revocation of his parole, his designation as a Category 1 parole violator and the imposition of a 48- month delinquent time assessment. The Court issued an Order to Show Cause on January 21, 2009, and has received and reviewed respondent's Answer, verified on March 12, 2009, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on March 31, 2009. By Letter Order dated May 21, 2009, the Court directed counsel for the respondent to supplement the Answer in three separate respects. In response thereto, respondent filed Exhibit 1, Exhibit 2 and Confidential Exhibit 3 in the St. Lawrence County Clerk's office on June 1, 2009. Additional undated correspondence from the petitioner was filed in the St. Lawrence County Clerk's office on June 3, 2009.

On July 2, 2003, petitioner was sentenced in Westchester County Court, as a second felony offender, to an indeterminate sentence of 6 to 12 years upon his conviction of the crime of Criminal Possession of Controlled Substance 3°, apparently committed

while under parole supervision from a previously imposed indeterminate sentence. On May 4, 2006, petitioner was released from DOCS custody to parole supervision in North Carolina. He was subsequently charge, however, with violating the conditions of his release in six separate respects. Parole Violation Charge #1 alleged that the petitioner " . . . left the State of North Carolina on or about 2/16/2007 without permission of his North Carolina Parole Officer." Parole Violation Charges #2, #3 and #6 alleged that on or about February 16, 2007, petitioner behaved in such a manner as to violate provisions of law which provide for a penalty of imprisonment in that he committed the acts of criminal conspiracy, armed robbery and the purchase of marijuana, respectively. Parole Violation Charge #4 alleged that petitioner possessed a rifle on or about February 16, 2007, and parole Violation Charge #5 alleged that on or about that date petitioner behaved in such a manor as to threaten the safety and well being of himself or others in that he attempted to elude police.

Following waiver of a preliminary hearing, a final revocation hearing was conducted at Rikers Island on April 3, 2008. At the final hearing petitioner, who was represented by counsel, plead guilty to Parole Violation Charge #1 and the remaining charges were withdrawn with prejudice.[1] Petitioner's parole was revoked with a sustained delinquency date of February 16, 2007, he was determined to be a Category 1 parole violator and a 48-month delinquent time assessment was imposed. Petitioner's administrative appeal was received by the Division of Parole Appeals Unit on May 21, 2008. It does not appear from the record that the Appeals Unit issued its findings and recommendation within the four-month time frame specified in 9 NYCRR §8006.4(c). This proceeding ensued.

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[1] The record indicates that on January 11, 2008, following a jury trial, petitioner was acquitted of the robbery charge and the conspiracy charge was dismissed. At that time there were no further criminal charges pending against petitioner.

In paragraph three of the petition it is alleged as follows:

> "The administrative law judge who presided over the parole hearing of the petitioner did not take into consideration the letter from the petitioner's Parole officer assigned to oversee the supervision of the petitioner in North Carolina, a letter which exhonorated [sic] him from any wrong doing in the crossing of state lines when he had obtained permission to do so. The petitioner having this information present at the time of the hearing was ample evidence that there had been no violation of the conditions of the petitioner's conditions of parole."

The letter in question, dated January 28, 2008, merely indicated that the petitioner, who was living within five miles of the state line, had permission to enter South Carolina to go to work and to attend church. Notwithstanding the foregoing, however, petitioner's plea of guilty to violating Parole Violation Charge #1 foreclosed any judicial inquiry into the sufficiency of the evidence underlying such charge since no hearing, at which evidence was taken, was held with respect thereto.

The determination to classify petitioner as a Category 1 parole violator was based on the provisions of 9 NYCRR §8005.20(c)(1)(vii) which provides, in relevant part, for a Category 1 designation where " . . . the violator's criminal record includes . . . youthful offender adjudications, involving the use or threatened use of a deadly weapon or dangerous instrument . . ." Although neither the transcript of the final parole revocation hearing nor the Administrative Law Judge's written Parole Revocation Decision Notice set forth the factual underpinning for the Category 1 designation, it was asserted in paragraph 15 of respondent's answer that "[i]n this matter, petitioner had a youthful offender adjudication for weapons possession."

To the extent petitioner asserts that the presiding Administrative Law Judge improperly considered sealed youthful offender records, the Court finds such assertion to be without merit. The relevant provisions of Criminal Procedure Law §720.35(2) specifically provide for the release of youthful offender adjudication records to the

division of parole for the purpose of carrying out its authorized duties. *See Martin v. New York State Division of Parole*, 47 AD3d 1152. Nevertheless, given the apparent discrepancy between the regulatory language and the description of petitioner's youthful offender adjudication, as set forth in the answer, the Court, as part of its Letter Order of May 21, 2009, directed respondent to " . . . file additional exhibits and/or affidavits demonstrating whether petitioner's 1993 YO adjudication for 'weapons possession' involved ' . . . the use or threatened use of a deadly weapon or a dangerous instrument' as set forth in 9 NYCRR §8005.20(c)(1)(vii)." In response thereto the Court has merely been provided with documentation that the YO adjudication in question replaced a conviction of the crime of Criminal Possession of a Weapon 2° (Penal Law §265.03). At the time of petitioner's YO adjudication Penal Law §265.03 was not broken down into any subdivisions and simply provided that "[a] person is guilty of criminal possession of a weapon in the second degree when he possesses a machine-gun or loaded firearm with intent to use same unlawfully against another." Although a loaded firearm might qualify as a "deadly weapon"under the provisions of Penal Law §10.00(12) (but an unloaded machine-gun would not), in order to serve as predicate for a Category 1 parole violator designation under the relevant provisions of 9 NYCRR §8005.20(c)(1)(vii), the YO adjudication must involve " . . . the use or threatened use of a deadly weapon . . ." Mere possession, regardless of intent, is not sufficient.

In the absence of any evidence in the record that petitioner's 1993 YO adjudication involved the "use or threatened use of a deadly weapon or dangerous instrument," the Court finds that the determination classifying him as a Category 1 parole violator must be vacated. In view of this finding, the Court declines to reach petitioner's remaining contention that the 48-month delinquent time assessment was otherwise excessive.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the determination classifying petitioner as a Category 1 parole violator is vacated and this matter is remanded to the respondent for further proceedings not inconsistent with this Decision and Judgment.

Dated: August 19, 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice