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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
LARRY WILLIAMS, 99-A-2285,

Petitioner,

DECISION AND ORDER

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

-against-

Index No. 1448-03
RJI # 01-03-ST3505

BRION D. TRAVIS, CHAIRMAN, NEW YORK
STATE DIVISION OF PAROLE,

Respondent.

(Supreme Court, Albany County, Special Term)

APPEARANCES:

LARRY WILLIAMS
Inmate No. 99-A-2285
Petitioner, *Pro Se*
Bare Hill Correctional Facility
Caller Box 20
Cady Road
Malone, New York 12953

Albany County Clerk
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Attorney General of the State of New York
(Kate H. Nepveu, Esq.,
Assistant Attorney General, of Counsel)
Attorneys for Respondent
The Capitol
Albany, New York 12224

Leslie E. Stein, J.:

Petitioner, an inmate at Bare Hill Correctional Facility, commenced the instant CPLR Article 78 proceeding to review his first denial of parole release. Petitioner is currently serving a sentence of four years to life on a conviction of Attempted Criminal Possession of a Weapon, Third Degree. Denial of parole was based primarily upon the severity of the crime.

The petition raises a number of grounds for relief. The Court finds that the only ground which has any merit is petitioner's contention that denial of parole was based upon erroneous information and was arbitrary and capricious. Specifically, it appears that respondent relied heavily upon the inmate status report for parole board appearance and on the pre-sentence report, which stated that the inmate had fired a handgun at a police officer during the course of the present offense. The factual basis for such claim is not found anywhere in the record before the parole board or this Court. Moreover, petitioner pleaded guilty to attempted criminal possession of a weapon. Although he was originally charged with Attempted Murder, First Degree and Aggravated Assault upon a Police Officer, as well as Criminal Possession of a Weapon, Second and Third Degrees, he has never been convicted of any crime which involved firing a weapon at a police officer.

The Division of Parole is required to consider the pre-sentence report in making parole release decisions (see Matter of Silmon v Travis, 95 NY2d 470, 476; Matter of Watkins v Annucci, 305 AD2d 889, 891). However, the Division of Parole may not consider alleged crimes for which an inmate has not been convicted and which he denies committing (see Matter of Edge v Hammock, 80 AD2d 953).

In the instant matter, petitioner has consistently denied shooting at the officer. Respondent has failed to submit a plea allocution or any other evidence that petitioner has admitted shooting at the officer (cf. Matter of Maciag v Hammock, 88 AD2d 1106), nor has petitioner plead guilty to any crime which included such an act (cf. Matter of Silmon v Travis, supra). Since the denial of parole was based upon the stated fact that petitioner shot at a pursuing

police officer, the determination is arbitrary and capricious and based upon an error of fact (see Matter of Edge v Hammock, supra; cf. Matter of Richburg v New York State Board of Parole, 284 AD2d 685).

Accordingly, it is

ORDERED and **ADJUDGED**, that the petition be and hereby is granted, with filing fee and disbursements to petitioner. Respondent's determination is hereby vacated and annulled and respondent is directed to provide a new parole release hearing to petitioner within 45 days of the date hereof.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for respondent, who are directed to enter this Decision and Order without notice and to serve petitioner with a copy of this Decision and Order with notice of entry.

SO ORDERED!

ENTER.

Dated: September 19, 2003
Albany, New York



Leslie E. Stein, J.S.C.

Papers Considered:

1. Order to Show Cause dated March 17, 2003;
2. Petition dated February 13, 2003;
3. Answer dated May 13, 2003; Affirmation of Kate H. Nepveu, Esq. dated May 13, 2003, with Exhibits A-I annexed;
4. Petitioner's Reply dated May 20, 2003.