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Matter of Schwartz v Dennison
2006 NY Slip Op 52543(U) [14 Misc 3d 1220(A)]
Decided on April 18, 2006
Supreme Court, New York County
Schlesinger, J.
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Decided on April 18, 2006

Supreme Court, New York County

In the Matter of the Application of Jerrold Schwartz, No.02-A-4845, Petitioner, For a Judgment under Article 78 of the Civil Practice Law and Rules,

against

Robert Dennison, Chairman, New York State Board of Parole, Respondent.

115789/05

Alice Schlesinger, J.

Petitioner Jerrold Schwartz (Schwartz) commenced this Article 78 proceeding to annul the September 6, 2005 determination made by respondent the New York State Board of Parole (Parole Board) after a hearing at the Oneida Correctional Facility where Schwartz is imprisoned. In that determination, the Parole Board denied the application by Schwartz for release to parole supervision and ordered him held for an additional twenty-four months before further review by the Board. Schwartz asserts that the Parole Board's determination is arbitrary and capricious in three respects: (1) the Parole Board failed to rebut the presumption in favor of release to which Schwartz was entitled under Correction Law §805; (2) the Board relied on materially false information in reaching its determination; and (3) the Board's denial of parole failed to comport with the regulatory guidelines set forth in 9 NYCRR §8001.2(b) and its decision failed to set forth the reasons for this departure.

The Parole Board has opposed the petition and has cross-moved for a change of venue pursuant to CPLR §§ 506, 510 and 511. The Board asserts that venue should be placed either in Oneida County, where the Board rendered its original determination, or in Albany County, where the Division of Parole denied the administrative appeal and maintains its office. Schwartz has opposed the motion, asserting that venue in New York County is proper based on the "material events" which occurred here.

Background Facts

Petitioner Jerrold Schwartz was incarcerated in August 2002 in the Oneida Correctional Facility pursuant to a judgment of the Supreme Court, New York County (Solomon, J.), which convicted Schwartz pursuant to a guilty plea on two counts of Sodomy in the Third Degree. The [*2]conduct, which had occurred in 1996, consisted of contact between Schwartz's mouth and the penis of the complainant, a member of Schwartz's Boy Scout troop who was fifteen or sixteen years old at the time. Schwartz, a 46 year-old first-time offender with no criminal record, was sentenced to two consecutive sentences of one and one-third to four years, for a total sentence of two and two-thirds to eight years.

Schwartz came before the Parole Board in April 2005, having completed the minimum sentence, and requested a release to parole supervision. His application was supported by countless letters from community members, including parents of other Boy Scouts. In addition, Schwartz demonstrated a true understanding and remorse for his conduct, as well as his successful participation in a program

for sex offenders. He indicated that, if released, he would live with his 76 year-old mother and support her. Schwartz presented the Board with various offers of employment. Last but not least, the Parole

Board had before it Schwartz's Certificate of Earned Eligibility issued by the Department of Corrections to demonstrate its satisfaction with Schwartz's program participation and good behavior while imprisoned.

The Parole Board denied Schwartz's application, with a 24-month hold until the next appearance in February 2007. The Board stated in relevant part as follows:

While the Panel notes your receipt of an Earned Eligibility Certificate and overall positive adjustment as an inmate, both in terms of discipline and willingness to program, your programming progress is not yet commensurate with the harm inflicted and the Panel concludes that if you are released at this time there exists a reasonable probability that you will not live and remain at liberty without further violation of the law. The vulnerable nature of the victim makes your release contrary to the best interest of the community at this time.

Schwartz filed an administrative appeal on his own. There he argued that the Board's determination was erroneous in that it failed to overcome the presumption of release created by the Certificate of Earned Eligibility and relied on incorrect information about Schwartz's conviction. Noting that the Board had considered all relevant factors, the Appeals Unit found that the Board had not abused its discretion or otherwise erred, and it affirmed the decision below. This Article 78 proceeding ensued. The Board filed both a motion to dismiss based on venue and a verified answer based on the merits of the underlying determination.

I. *A Basis Exists for Venue in New York County*

Respondent Parole Board has moved to dismiss this proceeding pursuant to CPLR §510, subd. 1, claiming that New York County is "not a proper county" for venue. According to respondent, venue may properly be placed in only one of two places: either in Oneida County where the parole proceedings were held and the initial determination made, or in Albany County where the Parole Board rendered its final determination and where the Commissioner's principal place of business is located. In opposition to the motion, petitioner Schwartz insists that venue here is proper because "material events otherwise took place" in New York County within the meaning of CPLR §506.

An analysis of the issue necessarily begins with a review of the language in CPLR §506(b) cited by the parties. That section begins with the general rule which states [*3]three alternate bases for venue in a special proceeding to review a determination made by a body or officer:

[1] where the respondent made the determination complained of ... or [2] where the material events otherwise took place, or [3] where the principal office of the respondent is located...[FN1]

CPLR §506(b) then goes on to specify four exceptions to the general rule relating to: (1) proceedings against a judge or justice, (2) proceedings against various specified agencies or commissioners, (3) proceedings against the Commissioner of Education, and (4) proceedings against the New York city tax appeals tribunal. As to those four exceptions, the statute restricts the place of venue to a particular county. Significantly, the Parole Board is not listed in any of the four specified exceptions, signifying that the three more generous alternatives set forth at the beginning of the statute are controlling. McKinney's Statutes §240.

The three general bases in 506(b) are "equally proper alternative bases for venue, with no indication that any alternative is to be favored." Weinstein, Korn, Miller, *New York Civil Practice:CPLR*, Vol.14, §7804.02[2] (2d ed. 2005). Indeed, the Courts have recognized this principle for years. Thus, in *Zorach v. Clauson*, 86 NYS2d 17 (Sup. Ct., Kings Co.), *aff'd* 275 App. Div. 774 (2d Dep't 1949), *aff'd* 300 NY 613, the court denied a motion by the Commissioner of Education to dismiss the proceeding commenced in Kings County based on improper venue, or to transfer it to Albany County based on the Commissioner's principal place of business. In the proceeding, petitioners had attacked certain regulations promulgated by the Commissioner based on their impact on Kings County children. The Court found that venue in Kings County was as proper as venue in Albany based on the occurrence of "material matters"

or events in Kings County; i.e., the release of the children from Kings County public schools for religious education pursuant to the regulations at issue.

Neither party in the instant case seriously disputes that the three alternative bases for venue are equally proper. Rather, the dispute turns on the proper interpretation of the phrase "material events." Petitioner Schwartz contends that his conviction and sentencing in New York County constitute "material events" justifying venue here. Respondent Parole Board, on the other hand, insists that only the parole proceedings and determinations in Oneida and Albany Counties are "material events" within the meaning of the statute.

To limit "material events" to the place of the determination or the Board's office would make the "material events" basis of venue superfluous, since those grounds are separately stated in the statute as alternatives for venue. *See*, Weinstein, Korn, Miller*, supra* . What is more, had the Legislature intended to limit venue in Parole Board proceedings in that manner, it could have easily specified such a limitation as another exception to the general rule. The absence of any such limitation allows the inference that the Legislature intended all three of the general bases for venue to apply equally to Article [*4]78 review of parole determinations. McKinney's Statutes §240; *see also, Knight v. NYS Dept of Environmental Cons.,* 110 Misc 2d 196, 204 (Sup. Ct, Monroe Co. 1981) (since the Legislature did not list DEC among the specific exceptions in CPLR §506(b)(2), DEC is "subject to the more general provisions of CPLR 506(b) which give petitioners a clear choice of alternatives").

Case law provides ample support for the assertion by petitioner Schwartz that his conviction and sentencing in New York County constitute "material events" which form a basis for venue here. Those decisions, in fact, span decades, dating back to *Daley v. The Board of Estimate of The City of New York*, 258 App. Div. 165 (2nd Dep't 1939), which was cited by the Court of Appeals with approval in *Browne v. NYS Board of Parole*, 10 NY2d 116, 122 (1961). Emphasizing that the "material events" alternative "indicates legislative intent that [Article 78] proceedings generally may be brought outside the district in which the questioned official took place," the Appellate Division affirmed the trial court's denial of the Board's motion to dismiss based on venue. Although the decision denying petitioner accidental death benefits had been made in New York County, the court found that venue had properly been placed in Queens County based on material events there, including the accident upon which petitioner's claim was based. *Daley*, 258 App. Div. at 166; see also,

Zorach v. Clauson, 96 NYS2d 17, 20 (Sup. Ct., Kings Co. 1948), *aff'd* 275 App. Div. 774 (2nd Dep't 1949), *aff'd* 300 NY 613 (the "material facts" clause has long been interpreted to afford statutory authority for the commencement of a proceeding in a county wherein the underlying events occurred which gave rise to the official action complained of, even though such county was in a judicial district different from the one in which the actual determination was made). And whereas most courts discuss the "material events" ground as an equally proper alternative to the place of the determination, some courts have indicated that it is the preferable alternative. *See, e.g., Lacqua v. O'Connell*, 280 App. Div. 31, 32 (1st Dep't 1952) (determination made by the New York State Liquor Authority in New York County regarding a premises located in Kings County "can best be heard and determined where the material facts took place, that is in the judicial district embracing the county in which the premises are located")[FN2].

Despite the wide-reaching acceptance of the "material events" alternative, respondent Parole Board insists in the case at bar that, with respect to Parole Board determinations, the location of "material events" necessarily coincides with the location of the parole hearing and the Board's determination. While this Court agrees that those events are material, other material events occurred here in New York County, including the offense, petitioner's conviction, and his sentence. Respondent cannot reasonably argue otherwise. The Parole Board placed great weight in its determination on the nature of the offense in New York County and its impact on the "vulnerable victim." Additionally, a great deal of time was spent discussing whether petitioner had been convicted and [*5]sentenced in New York County on two counts or four.[FN3] In fact, since the Parole Board is required by Executive Law §259-i to consider the "recommendations of the sentencing court," the sentencing proceedings necessarily constitute "material events." *Cf. Edwards v. Travis, as Commissioner of the Div. Of Parole*, 304 AD2d 576 (2nd Dep't 2003) (Parole Board's determination annulled due to failure to consider sentencing minutes); *Key v. NYS Div. of Parole*, 10 Misc 3d 1072 (A) (Sup. Ct., Kings Co. 2006) (denying Board's motion to change venue to county of parole hearings or determination, as Board's reliance on seriousness of the offense in Kings County implied that the offense was a "material event").

Only a limited number of decisions have been rendered in this judicial district involving "material events" as a basis for venue in Article 78 proceedings against the Parole Board, and they are all at the trial level.[FN4] The main case, discussed by both parties in their

briefs here, is *Weinstein v. Dennision*, 7 Misc 3d 1009(A)(Sup. Ct., NY Co. 2005). There, Justice Kornreich denied the motion by the Parole Board to change venue and then proceeded to grant the petition on the merits, annul the Board's determination, and remand for a re-hearing. The court concluded that the Parole Board's reliance on the crime and sentence in New York County confirmed that "material events" had occurred here, forming a basis for venue. Specifically, the court stated (in fn. 2) as follows:

CPLR §506(b) provides that a proceeding may be brought against a State official or body "in any county within the judicial district ... where the material events otherwise took place ..." The sentence underlying the Parole Board determination and the crime itself occurred in New York County and "are so interwoven with [the parole] determination as to constitute material facts' which otherwise took place' within the judicial district in which this proceeding was instituted." *Browne v. N.Y.S. Bd. of Parole*, 10 NY2d 116, 122 (1961). *Accord, Hawkins v. Coughlin*, 132 Misc 2d 45, 47, 503 NYS2d 476 (S. Ct., Queens Co., 1986), *aff'd* 132 AD2d 381, 523 NYS2d 542 (2d Dept. 1987), *aff'd* 72 NY2d 158 521 NYS2d 881, 527 NE2d 759 (1988).

Petitioner Schwartz in the case at bar urges this Court to adopt the *Weinstein* holding as directly on point and correctly decided. [FN5] He notes that here the Parole Board [*6]relied in its determination on the offense, the impact on the victim, the conviction, and the sentence, all of which occurred in New York County, thereby establishing those events as material. Petitioner asserts that the sentencing in this case was particularly material, and it has produced transcripts of those proceedings to prove its point. Specifically, whereas the trial court had, in fact, sentenced petitioner based on his conviction on only two counts, the Parole Board rendered its determination based on the misunderstanding that petitioner had been convicted on four counts. (See Point IIB, below).

Respondent attempts to discredit *Weinstein* in a footnote in its moving papers on the ground that the court improperly extended *Browne* and *Hawkins*, cited above, to parole proceedings. *Browne* involved the issue whether the sentences had been incorrectly calculated as consecutive when they should have been concurrent. Venue based on "material events" was set in Queens County based on the sentencing there. Similarly, in *Hawkins* the issue was whether petitioner had been given proper credit for time served, and the court found that the determination of the sentence in Queens County was a "material event" justifying venue there. Respondent herein argues that Justice Kornreich's analysis in *Weinstein* was "incorrect" because it relied on *Browne* and *Hawkins* where "the central issue was the sentences imposed on the inmates, not the denial of parole, which was at issue in *Weinstein* and herein." At oral argument, respondent presented an unpublished decision which, while not discussing *Weinstein*, distinguished *Browne* and *Hawkins*, as respondent seeks to do here, on the ground that they did not involve parole hearings. *Gelman v. Dennison*, slip. op. January 27, 2006, Index No. 403458/05 (Sup. Ct., NY Co.) (Stone, J.).

This Court agrees with petitioner that *Weinstein* was correctly decided and that no basis exists for distinguishing *Browne* and *Hawkins* on the ground they did not involve parole. None of the other cases cited by respondent makes any such distinction or otherwise precludes the application of the "material events" phrase to parole proceedings. What is more, as discussed above, the "material events" clause has been broadly applied in a wide range of cases to include the situs of the actions underlying the official determination in all contexts. *See* Weinstein, Korn & Miller*, supra* . After the parties submitted their briefs in this case, Justice Paul Feinman, relying on *Weinstein*, denied a Parole Board motion to change venue, finding that the crime and sentencing in New York County constituted "material events" justifying venue here. In his decision, Justice Feinman cited a string of cases for the proposition that the "material events" basis for venue "has been interpreted to mean the locale where the underlying events that gave rise to the official action in dispute." *Crimmins v. Dennison*, NYLJ, April 12, 2006, 18:1 (Sup. Ct., NY Co.).

For these reasons, this Court finds that "material events" occurred in New York County which justify venue here. Respondent's motion to change venue is accordingly denied, and this Court shall proceed to determine petitioner's application on the merits.

II. *The Parole Board Decision Must be Annulled*

A. *The Board Failed to Rebut the Presumption of Release in Correction Law §805*

The decision denying petitioner Schwartz parole must be annulled, as the Parole [*7]Board failed to properly apply the mandates of Correction Law §805. That section provides in relevant part that:[A]n inmate who is serving a sentence with a minimum term of not more than eight years and has been issued a certificate of earned eligibility, *shall* be granted parole release at the expiration of his minimum term ... *unless* the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not

live and remain at liberty without violating the law and that his release is not compatible with the welfare of society.

(Emphasis added). *See also* 9 NYCRR § 8002.1(b).

As recently as 2005 our Appellate Division confirmed that Correction Law §805 "creates a presumption in favor of parole release of any inmate who, like petitioner, has received a Certificate of Earned Eligibility and has completed a minimum term of imprisonment of eight years or less ..." *Wallman v. Travis*, 18 AD3d 304, 307 (1st Dep't 2005) (citation omitted). Although the statute does not preclude the Board from denying parole, nor eliminate the Board's discretion, the presumption it creates in favor of release is a strong one. *Wallman*, 18 AD at 307. If the Board declines parole when presented with a Certificate of Earned Eligibility, it must articulate its rationale for its determination under the statute that a "reasonable probability" exists that the inmate, if released, will not live at liberty without violating the law and that his release is not compatible with the welfare of society. As the *Wallman* court explained, absent a rational basis for the "reasonable probability" determination, the decision must be annulled. *Id.*

In fact, in annulling the Parole Board determination, the Appellate Division in *Wallman* reversed the lower court and made such a finding of irrationality based on the §805 presumption. Petitioner Wallman had been a long-term attorney in his 60's when he pleaded guilty to grand larceny in 2000 for stealing client escrow funds. While in prison, he had a good disciplinary record and was granted an earned eligibility certificate pursuant to Correction Law §805. At his parole hearing, Wallman presented numerous letters in support of his request for release, explained obligations he had assumed to repay the funds, and expressed remorse for his actions. After applying §805, the Parole Board denied Wallman's application for release, specifically finding that a "reasonable probability" existed that Wallman would not remain at liberty without violating the law and that his release was "incompatible with the welfare and safety of the community." The Supreme Court reviewing the determination dismissed Wallman's Article 78 petition, finding that the Parole Board's decision was not irrational in that the Board had considered all appropriate factors.

The Appellate Division reversed, finding that Wallman had succeeded in demonstrating the irrationality of the Board's determination in two respects. First, the Board had relied for its "reasonable probability" determination almost exclusively on the nature and seriousness of the offense. Such reliance, the Court held, contravened the statute and effectively constituted an unauthorized re-sentencing of the defendant. 18 AD3d at 307. Secondly, noting that the inmate's "remorse and insight into his crimes are highly relevant in evaluating an inmate's rehabilitative progress," the Court described the Board's discussion as "perfunctory" and held that the Board had offered "no supportive [*8]facts justifying its finding of lack of insight and remorse." *Id*. at 308.[FN6]

Respondent Parole Board in the case at bar insists that it has rebutted the presumption of release in Correction Law §805. It notes that it reviewed petitioner's entire record and made a specific finding that a "reasonable probability" existed that petitioner would not remain at liberty without violating the law. In addition, it points to the Board's cited "concern about the harmful effects of petitioner's actions upon his vulnerable victim", and its express finding that petitioner's release would be contrary to the best interests of society. (Answer at ¶ 39, 40).

However, this Court agrees with petitioner Schwartz that the Board's discussion of the relevant factors in this case, like that in *Wallman*, was perfunctory and unsupported by the evidence in the record. Schwartz had a spotless disciplinary record in prison and proposed a sound and confirmed release plan which included a place to live and employment. He demonstrated that he had successfully completed the Sex Offender Program in prison, to the point where he had assumed the role of mentor of others. Indeed, his Certificate of Earned Eligibility issued by the Commissioner confirmed this fact. What is more, Schwartz discussed in detail at his parole hearing his understanding and remorse for his conduct, and his release was supported by countless letters from community members, including the parents of other Boy Scouts. In addition, and quite significantly, Schwartz had been at liberty without incident for several years after the conduct underlying the offense ceased in 1997 and his imprisonment in 2002. Thus, nothing in Schwartz's record suggests a "reasonable probability" that he will be a repeat offender or that his release would be contrary to the interests of the community.

An examination of the Parole Board decision reveals that it lacks a rational basis and fails to rebut the presumption of release. The decision is centered on the Parole Board's finding that Schwartz would benefit from the completion of the sex offender program. The finding is unsupported by the record evidence. Although Schwartz technically had a few weeks remaining in the program when he first appeared before the Board, the Commissioner's issuance of the Certificate of Earned Eligibility represented the conclusion that Schwartz had "successfully participated" in the program. What is more, by the time Schwartz had come before the Appeals Board, he

had completed the program in its entirety, yet the Appeals Unit relied on the Board's unsubstantiated and irrational finding that parole should be denied so that Schwartz could complete his program.

The Panel then went on to conclude that Schwartz's "programming progress is not yet commensurate with the harm inflicted" on the victim. This conclusion, as well, lacks a rational basis in the record. While harm to the victim is a consideration at sentencing, it is not one of the stated statutory criteria for a parole determination. Moreover, it is the Certificate of Earned Eligibility issued by the Commissioner, rather than past harm to the victim as perceived by the Parole Board, which is relevant proof of the inmate's programming progress.

As the Parole Board's findings lack a rational basis, they fail to rebut the [*9]presumption of release in Correction Law §805, and the determination denying parole must therefore be denied.

B. *The Board Relied on Erroneous Information*

The Parole Board's determination must also be annulled as arbitrary and capricious because it is based on erroneous information that petitioner Schwartz was convicted and sentenced based on four counts of sodomy, rather than two. The Parole Board and Schwartz had an extensive discussion at the hearing wherein Schwartz explained that he had actually been convicted and sentenced on only two counts. The Parole Board had in its possession the transcript of Schwartz's December 17, 2004 appearance before Justice Solomon wherein it was confirmed that the initial plea to four counts was only to secure Schwartz's return to court, but that, once Schwartz did return, the conviction and sentence were based on two counts only. Nevertheless, the parole proceedings reveal that the Board misunderstood and made its determination based on "four counts altogether" (T 5).

Respondent in its Answer (at ¶43, 44) suggests that the Board was entitled to rely on the various references to four counts contained, for example, in the Pre-Sentence Report, whether or not it was correct. The argument defies logic and is unsupported by a single relevant citation. Quite the contrary, the courts recognize an inmate's right to a record free of false information. *Garrett v. Ransom*, 128 AD2d 210, 212 (3rd Dep't 1987). In addition, the courts have annulled Parole Board decisions based on misinformation. *See, e.g., Lynch v. Hammock*, 81 AD2d 921 (2nd Dep't 1981)(annulled Board determination which relied on incorrectly computed inmate rating); *Brazil v. Board of Parole*, 76 AD2d 864 (2nd Dep't 1980)(granted new parole hearing where Board's determination relied on conviction for first degree rape, rather than attempted rape).

Respondent misses the point with its assertion of the Board's broad discretion to consider relevant factors such as sentencing. That discretion cannot reasonably include a determination which deprives an inmate of possible parole and liberty based on incorrect information. Since the record confirms the Board's misunderstanding of the facts, and since the Board relied on that misinformation at least in part, the decision-making process is fatally flawed and the determination is arbitrary and capricious and must be annulled.

C. *The Board Departed from the Guidelines Without Justification*

The Parole Board is mandated to consider the guidelines codified at 9 NYCRR §8001.2(b) before rending its determination. *Tarter v. State*, 68 NY2d 511 (1986). Those guidelines indicate when a grant of parole is appropriate based on a variety of factors. Section 8002.3(c) provides that:

When the minimum term of imprisonment is in accord with or greater than the time ranges for imprisonment contained within the guidelines adopted pursuant to this Part, parole release *shall* be granted at the expiration of such minimum term of imprisonment, as long as such release is in accordance with the remaining guideline criteria.

Those remaining criteria, as applicable here, include the inmate's institutional record and his release plans. As petitioner Schwartz demonstrated an exemplary institutional record and confirmed release plans, he was entitled to parole under the guidelines. Because the Board failed to explicitly justify its deviation from the guidelines as required by §8002.3(d), its decision must be annulled.

Wholly unpersuasive is respondent's insistence that the Board's decision is entitled [*10]to judicial affirmance because the Board considered all relevant factors. Where, as here, the Board's decision is not grounded on specific findings consistent with the record, the

decision must be annulled. *Wallman v. Travis, supra* .

For all these reasons, the petition is granted, the Board's determination denying petitioner Schwartz parole is annulled, and the matter is remanded for a *de novo* hearing before a new panel. *King v. NYS Division of Parole*, 83 NY2d 788 (1994), *affirming* 190 AD2d 423 (1st Dep't 1993).

This constitutes the decision and judgment of this Court.

Dated: April 18, 2006

_____

J.S.C.

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Footnotes

Footnote 1: The omitted language refers to mandamus or prohibition proceedings, rather than Article 78 certiorari proceedings such as the instant one to review a determination made by a body or officer.

Footnote 2: Although a *sua sponte* transfer like the one in *Lacqua* is no longer an option under CPLR 509 and 510, the stated preference for "material events" venue is still recognized. Weinstein, Korn & Miller, § 7804.02[2], n.16.

Footnote 3: As discussed more fully below, the Parole Board mistakenly understood that four counts were involved.

Footnote 4: Respondent points to *Howard v NYS Board of Parole*, 5 AD3d 271 (1st Dep't 2004), where the Court suggested that a "proper venue" was either Sullivan County or Albany County, where the parole hearings were held or where the Board's principal office is located. Venue was nevertheless kept in New York County because the Board had failed to follow the required procedures to change venue. The reference to New York as "an improper county for venue" was in non-binding *dicta* only. Moreover, the Court never addressed the "material events" alternative for venue. Sadly, Mr. Howard died in prison before his claims could be heard on the merits.

Footnote 5: Interestingly, the Appellate Division cited *Weinstein* with approval in *Wallman v. Travis* 18 AD3d 304, 307 (1st Dep't 2005), although the discussion was addressed to the determination on the merits, rather than the venue decision.

Footnote 6: Wallman was reportedly paroled on July 6, 2005. Caher, John. "Court Decisions Give Parole Board Wide Discretion." NYLJ, 1/31/06, 8:1.

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