STATE OF NEW YORK
SUPREME COURT **COUNTY OF ESSEX**

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In the Matter of the Application of
JOSE CINTRON, #01-A-3307,
Petitioner,

For a Judgment Pursuant to Article 70
Of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #15-1-2007-0033.02
Index #107-07
ORI#NY015015J

-against-

LEO BISCEGLIA, Superintendent,
Adirondack Correctional Facility**,** and
NYS DIVISION OF PAROLE,
Respondents.

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This is a habeas corpus proceeding that was originated by the petition of Jose Cintron, verified on January 26, 2007, and stamped as filed in the Essex County Clerk's office on February 1, 2007. Petitioner, who is an inmate at the Adirondack Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on February 7, 2007, and has received and reviewed respondents' Return, dated March 9, 2007, as well as petitioner's Reply thereto, filed in the Essex County Clerk's Office on March 23, 2007.

On June 6, 2001, the petitioner was resentenced in Albany County Court, as a probation violator, to an indeterminate sentence of imprisonment of one to three years upon his conviction of the crime of Criminal Possession of a Controlled Substance 5°. On February 14, 2003, the petitioner was sentenced (amended) in Columbia County Court, as a second felony offender, to an indeterminate sentence of imprisonment of two to four years upon his conviction of the crime of Criminal Possession of a Weapon 3° (Penal Law

§265.02(1)) and a concurrent, determinate sentence of imprisonment of four and one-half years upon his conviction of the crime of Criminal Possession of a Weapon 3° (Penal Law §265.02(4)). The Court notes that Criminal Possession of a Weapon 3° under the provisions of Penal Law §265.02(4) is a class D violent felony offense. (Penal Law §70.02(1)(c)). On April 6, 2005, the petitioner was released from DOCS custody on parole (Penal Law §70.40(1)(iii)). The petitioner, however, was the subject of three separate Violation of Release Reports issued on March 21, 2006, June 23, 2006, and July 21, 2006. The first two reports were closed with notations of "[n]o delinquency - no warrant issued," and "[n]o delinquency pending court action," respectively. At the time of the issuance of the third (supplementary) Violation of Release Report a parole violation warrant was issued and executed. On July 21, 2006, the petitioner waived a preliminary parole revocation hearing.

A total of 16 separate parole violation charges were set forth in the three Violation of Release Reports. Parole Violation Charge #2 alleged that the petitioner violated the conditions of his release on February 26, 2006, when he ". . . pushed and grabbed Tamara Wilmer, causing her to fall to the ground." Parole Violation Charge #6 alleged that the petitioner violated the conditions of his release on April 29, 2006, when he ". . . contacted Tamara Wilmer through a friend, which was a direct violation of Special Conditions . . . that the subject could not associate in any way or communicate by any means with Tamara Wilmer . . ." Parole Violation Charged #8 alleged that the petitioner violated the conditions of his release on July 18, 2006, when ". . . he was in the company of one Maurice Smith, a Federal Probationer, who is a person known to him as having a criminal record." Finally, Parole Violation Charge #14 alleged that the petitioner violated the

conditions of his release on July 18, 2006, at approximately 11:56 PM when he ". . . was in violation of his 10:00 PM curfew established by his Parole Officer."

A final parole revocation hearing was commenced at the Columbia County Jail on September 19, 2006. During the course of that hearing a plea agreement was apparently reached as follows:

> "ALJ O'MALLEY: There was an off-the-record negotiation. It's my understanding there was a proposal, rather than proceed with the rest of the hearing, and I believe Ms. Jeffords [the Parole Revocation Specialist] and Mr. Ackerman [counsel for the petitioner] came to an agreement after conferencing with myself, that there would be a plea to Charges 6, 8 and 14 as violations in an important respect. The Division will withdraw the remaining charges, and there will be a recommendation for a 15-month time assessment as Mr. Cintron is a Category I violator.
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> MR. ACKERMAN: You're correct.
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> ALJ O'MALLEY: Is that correct, Mr. Ackerman?
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> MR. ACKERMAN: Yes, ma'am.
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> ALJ O'MALLEY: Is that correct Ms. Jeffords?
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> MS. JEFFORDS: Yes, ma'am.
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> ALJ O'MALLEY: Mr. Cintron, is that how you wish to proceed today?
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> THE PAROLEE: Yes, ma' am . . .
>
> MS. JEFFORDS: Your honor, we will withdraw the remaining charges with the understanding that this is Category I behavior, with a 15-month hold."

At some point after the September 19, 2006, final parole revocation hearing, when the ALJ sat down to draft the concluding paperwork, she apparently came to the

conclusion that the negotiated plea was "inconsistent" with the agreed time assessment.[1] Accordingly, the ALJ apparently communicated by telephone with counsel for the petitioner and followed up that communication with a letter dated October 3, 2006. The letter reads, in relevant part, as follows:

> "After further reviewing the case, I discussed the matter with you and indicated I was willing to accept an alternative plea to charges 2, 8 and 14 rather than the initial charges 6, 8, and 14 . . . with the same 15-month time assessment. If your client is amenable to such disposition then we could proceed in that manner. If he is not so inclined, please advise me as soon as possible so the Division can subpoena its witnesses for the hearing to begin anew.
>
> You specified you were unavailable from approximately 10/2/06 until 10/17/06 but would be able to appear in the afternoon on 10/17/06. At this point I do not have a precise time but it must be coordinated with the Columbia County Jail and is dependant on whether the matter will be contested. Please advise whether the matter should be calendared for a contested hearing . . ."

Apparently there was some miscommunication between the ALJ, parole, and Mr. Ackerman. Mr. Ackerman, who was apparently away on vacation or unrelated business

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[1] Although the ALJ's initial correspondence provided no details with respect to the nature of the inconsistency, that issue was addressed by the ALJ during an October 19, 2006, final parole revocation appearance at the Columbia County Jail. 9 NYCRR §8005.20(c)(1)(i), (v) and (vi) define Category 1 violators in relevant part as follows: "(i) the violator was conditionally released from a sentence imposed on a conviction of a violent felony offense . . . (v) the violator was paroled from a sentence imposed on any violent felony offense involving the use or threatened use of a deadly weapon or dangerous instrument or the infliction of physical injury upon another . . . (vi) the violator's current violative behavior, as established by the sustained violation charge, involves . . . the infliction or attempted infliction of physical injury upon another . . ." Although the petitioner was apparently released from DOCS custody to parole supervision on his conditional release date, the record was clear that the petitioner was paroled (Penal Law §70.40(1)(a)) rather than conditionally released (Penal Law §70.40(1)(b)). Therefore, the fact that petitioner was convicted of a violent felony offense does not support Category 1 status unless the violent felony offense involved the use or threatened use of a deadly weapon or dangerous instrument or the infliction of physical injury upon another. Compare 9 NYCRR §8005.20(c)(1)(i) with 9 NYCRR §8005.20(c)(1)(v). The Court notes, however, that neither the use or threatened use of a deadly weapon or dangerous instrument nor the infliction of physical injury upon another is an element of the crime of Criminal Possession of a Weapon 3° under the provisions of Penal Law §265.02(1) or (4). The ALJ's proposal to substitute a finding of guilt with respect to Parole Violation Charge #2, rather than number 6, was apparently designed to bring petitioner's violative behavior within the ambit of 9 NYCRR §8005.20(c)(1)(vi) and thus support a Category 1 designation.

from October 2, 2006, to October 17, 2006, was apparently not apprised of ALJ O'Malley's October 3, 2006, letter in a timely fashion. Mr. Ackerman appeared at the Columbia County Jail on October 17, 2006, at 3:00 PM, anticipating some sort of continuation of his client's final revocation hearing. When neither an ALJ nor a representative of parole appeared Mr. Ackerman waited until 3:45 PM. Then left the facility and dictated a letter, dated October 17, 2006, to ALJ O'Malley and parole revocation specialist Jeffords. In that letter Mr. Ackerman advised Ms. O'Malley and Ms. Jeffords that it was his understanding that an appearance was, in fact, scheduled for October 17, 2006, at 3:00 PM and he went on to describe the frustrating events of that afternoon. Mr. Ackerman closed his letter with the somewhat cryptic statement that "I deem this entire matter closed."

ALJ O'Malley, who apparently received Mr. Ackerman's October 17, 2006, letter via fax, responded on October 18, 2006. ALJ O'Malley noted that in her original letter of October 3, 2006, she asked that Mr. Ackerman's office contact her to advise whether or not Mr. Cintron's final parole revocation hearing would continue as a contested matter. Her October 18, 2006, letter, continued, in relevant part, as follows:

> "I had the pleasure of speaking with Ms. Herrington of your office the following week [after October 3, 2006] and she reported you wished to discuss the matter with your client. In that you were not to return to your office until late on the 16th I was lead to believe you would not be able to counsel your client prior to the 17th, and therefore could not advise me as to whether the matter would be contested so that the Division could prepare its case; thus, the case was not returned to the calendar. Whatever miscommunication occurred between your office and me is unfortunate . . .
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> That you indicated that you appeared and were ready, willing and able to proceed yesterday, leads me to conclude you discussed the proposed disposition of this matter with Mr. Cintron as outlined in my October 3rd letter to which he was agreeable; and as such considered the matter closed. As a courtesy to you I advise you that I will be at Columbia County Jail tomorrow [October 19, 2006] at 9:30 A.M. to close the matter. I will relate the information to your client that you provided to me in your letter."

The miscommunication comedy continued as it appears Mr. Ackerman did not become aware of ALJ's O'Malley's October 18, 2006, letter/fax until approximately ten o'clock on the morning of October 19, 2006. Thus, Mr. Ackerman did not appear at the Columbia County Jail at 9:30 a.m. on October 19, 2006. At that time the petitioner advised the ALJ that he had not discussed the situation with Mr. Ackerman and he therefore, understandably, declined to proceed in the absence of counsel. The ALJ then adjourned the matter to November 2, 2006, for a contested hearing. The ALJ also stated for the record that since Mr. Ackerman had advised her during their telephone conversation of September 29, 2006, that he would be unavailable from October 2, 2006, through October 17, 2006, that time would be chargeable to the petitioner.

On November 2, 2006, at 9:00 a.m. all relevant parties were in attendance at the Columbia County Jail for the continuation of petitioner's final parole revocation hearing. At the outset of the hearing Mr. Ackerman directed ALJ O'Malley's attention to *People ex rel Brown v. New York State Division of Parole*, 70 NY2d 391, and urged that pursuant to Executive Law §259-i(3)(f)(i) his client was entitled to a final parole revocation hearing within 90 days of the probable cause determination. Mr. Ackerman further noted that as of November 2, 2006, more than 90 days had elapsed. The ALJ acknowledged Mr. Ackerman's objection and proceeded with the hearing. At 9:45 a.m. ALJ O'Malley stated for the record that Ms. Wilmer, the Division's first witness (the Division had apparently staggered its witnesses) had been scheduled to appear at 9:30 a.m. but had not yet arrived. As of 10:15 a.m. no witnesses were present. At that point ALJ O'Malley closed the hearing with the following statement:

> "Mr. Ackerman has to be in Warren County in front of Judge Tarantino at 12:30. My understanding is that there would have to be an adjournment which Mr. Ackerman would not consent to even though he would be unavailable to complete the hearing if we wait for the witnesses.
>
> In any case, after consideration, I believe I am going to close the matter and leave it as it was with whatever objections are on the record.
>
> Mr. Ackerman and his client certainly has whatever legal remedies that there are. I will draft a decision. I will submit it for - - putting it in the computer and, Mr. Cintron and Mr. Ackerman, you will receive a copy of that decision.
>
> That will conclude the matter. Thank you very much."

A Parole Revocation Decision Notice was issued on November 16, 2006. In her decision the ALJ sustained Parole Violation Charges 6, 8 and 14, revoked petitioner's parole with a modified delinquency date of April 29, 2006, and imposed a 15-month delinquent time assessment upon finding petitioner to be a Category I parole violator. The ALJ specifically stated in her decision that the findings of guilt with respect to Parole Violation Charges 6, 8, and 14 were based upon petitioner's September 19, 2006 plea, which had never been withdrawn. As far as the Category I designation and the 15-month delinquent time assessment were concerned, the ALJ stated in her decision as follows:

> "Given the totality of the circumstances, that is, and negotiating the plea, the Division stated, 'Your honor we will withdraw the remaining charges with the understanding that this is Category 1 behavior, with a 15-month hold' . . . counsel [for the petitioner] did not object, and those pleas were never withdrawn. I am inclined to rely on the negotiated pleas with the category '1' designation and the agreed upon 15-month time assessment. Mr. Cintron and counsel assessed the testimony of the two witnesses thus far presented, formulated a strategy, and proposed a negotiated plea rather than proceed with the hearing. Mr. Cintron received a benefit of the bargain with the proposed recommendation and the withdrawal of remaining violation charges in exchange for his guilty pleas. *See, generally,* Robinson v. Bennett, 300 AD2d 715 (3d Dept. 2002). While the category designation with respect to the sustained charges may have been inconsistent, it was not impossible as counsel opined."

The petitioner's notice of administrative appeal was received by the Division of Parole, Appeals Unit on December 11, 2006. By letter dated December 12, 2006, the petitioner was advised that the latest date for him to submit documents perfecting his appeal was April 11, 2007. This proceeding was commenced on February 1, 2007. The petitioner's administrative appeal was never perfected.

The petitioner argues that his constitutional right to a prompt final parole revocation hearing was violated since the hearing was not held within the 90 day time frame set forth in Executive Law §259-i(3)(f)(i), which provides that "[r]evocation hearings shall be scheduled to be held within ninety days of the probable cause determination. However, if an alleged violator requests and receives any postponement of his revocation hearing, or consents to a postponed revocation proceeding initiated by the board, or if an alleged violator, by his actions otherwise precludes the prompt conduct of such proceedings, the time limit may be extended."

The 90-day limitation set forth in Executive Law §259-i(3)(f)(i) commenced running on July 21, 2006, when petitioner waived his right to a preliminary hearing. *See People ex rel Gray v. Campbell*, 241 AD2d 723. Therefore, if there had been no actions or omissions on the part of the petitioner extending the 90-day deadline, the last date for timely conducting the final parole revocation hearing was October 19, 2006.

The Court first observes that petitioner's final parole revocation hearing was held and apparently completed by a plea agreement on September 19, 2006. Pursuant to that agreement the petitioner pled guilty to three specific parole violation charges and the remaining 13 charges were withdrawn with the specific, mutual understanding that petitioner would receive a 15-month delinquent time assessment as a Category 1 parole

violator. To the extent the Category 1 designation, which supported the 15-month delinquent time assessment, was subsequently determined to be inconsistent with petitioner's underlying criminal convictions as well as the nature of the conduct underlying his specific parole violations, the Court finds that the ALJ, the Parole Revocation Specialist and the petitioner, through his counsel, must all share responsibility for their mutual mistake. This Court is unaware of any judicial authority addressing the issue of the impact of a similar mutual mistake on the 90-day time frame set forth in Executive Law §259-i(3)(f)(i). This Court finds, however, that the mutual mistake for which petitioner, through counsel, shared responsibility, constituted a situation or event that allowed for the extension of the 90-day time limit under the provisions of Executive Law §259-i(3)(f)(i). The Court also finds that upon discovery of the mutual mistake, the ALJ acted in an appropriate manner by promptly bringing this matter to the attention of counsel and proposing a reasonable procedure whereby a plea of guilty to Parole Violation Charge #2, rather #6, would be substituted so as to clearly support the Category 1 designation. The prompt consideration and possible implementation of the procedure proposed by the ALJ was hampered by miscommunication with petitioner's counsel which stemmed, to a large degree, from counsel's unavailability from October 2, 2006, through October 16, 2006. Indeed, it is apparent from the record that the circumstances surrounding the mutual mistake of September 19, 2006, as well as the ALJ's proposal to rectify that mistake, were not brought to the attention of the petitioner until October 19, 2006, when he appeared before the ALJ without counsel.

In view of the totality of the above-described circumstances, the Court finds that the re-opened final parole revocation hearing was timely held on November 2, 2006, in

accordance with the extended 90-day time limitation set forth in Executive Law§259-i(3)(f)(i). The Court also finds that even if the 90-day limitation was more strictly applied, the unavailability of petitioner's counsel for 14 days from October 2, 2006, through October 16, 2006, would constitute a delay attributable to the petitioner thus rendering timely re-opened final parole revocation hearing of November 2, 2006.

The petitioner also argues that the hearing officer improperly considered the testimony of Ms. Wilmer, who was never made available for cross-examination, in reaching the determination of guilt with respect to Parole Violation Charges 6, 8 and 14. The Court, however, agrees with the respondents that this issue should not be considered in the context of this habeas corpus proceeding since the petitioner failed to raise it in a perfected administrative appeal. *See People ex rel DeMarta v. Sears*, 31 AD3d 918, *People ex rel Howe v. Travis*, 18 AD3d 1052 and *People ex rel Woods v. McGreevy*, 191 AD2d 938.

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

ADJUDGED, that the petition is dismissed.

Dated: July 2 , 2007 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice