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

- X

In the Matter of the Application of
JACINTO CASANOVA, #03-A-1151,
Petitioner,

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

DECISION AND JUDGEMENT
R.I. #44-1-2007-0549.038
INDEX #125391
ORI # NY044015J

-against-

PETER BEHRLE, Superintendent,
Gouverneur Correctional Facility**,**
BRIAN FISCHER, Commissioner,
NYS Department of Correctional Services,
and **GEORGE ALEXANDER,** Chairman,
New York State Board of Parole,
Respondents.

- X

This is a habeas corpus proceeding that was originated by the petition of Jacinto Casanova, verified on August 6, 2007, and stamped as filed in the St. Lawrence County Clerk's office on August 21, 2007. Petitioner, who is an inmate at the Ogdensburg 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 September 6, 2007, and an Amended Order to Show Cause on October 25, 2007. The Court has since received and reviewed respondents' Return with Affirmative Defense, including *in camera* Exhibits B and C, verified on December 14, 2007. The Court has also received and reviewed petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on January 4, 2008.

On February 20, 2003, the petitioner was sentenced in Supreme Court, Bronx County, as a second felony offender, to an indeterminate sentence of imprisonment of 3-6 years upon his conviction of the crime of Criminal Sale of a Controlled Substance 5°.

The petitioner was released from DOCS custody to parole supervision on July 20, 2005, but was subsequently returned to DOCS custody following a final parole revocation hearing conducted at Rikers Island on August 15, 2006. In a written Parole Revocation Decision Notice bearing that date the presiding Administration Law Judge (ALJ) sustained two parole violation charges, revoked petitioner's parole and imposed a 48-month delinquent time assessment. The petitioner was received back into DOCS custody on January 29, 2007. This proceeding ensued.

In paragraph 21 of his petition the petitioner alleges that he never received a copy of the Parole Revocation Decision Notice, and, therefore, was unable to exhaust administrative remedies through the administrative appeals process. Petitioner further alleges that to spite "numerous attempts" to obtain a copy of the written parole revocation determination parole officials never provided him with that document. In support of these allegations the petitioner attached to his petition copies of letters requesting a copy of the parole denial determination allegedly written to parole officials in the Bronx and Albany on February 21, 2007, and June 20, 2007, respectively. In paragraph five of his Reply the petitioner states that he " . . .had no idea that he had received a four year violation until the exhibits were read for the Attorney Generals Office."

A habeas corpus proceeding initiated by a parole violator to challenge one or more aspects of the underlying revocation process is ordinarily subject to dismissal where the violator fails to first exhaust administrative remedies through the administrative appeals process set forth in 9 NYCRR Part 8006. *See People ex rel DeMarta v. Sears*, 31 AD3d 918, *lv den* 7 NY3d 715, *People ex rel Howe v. Travis,* 18 AD3d 1052 and *People ex rel Webster v. Travis*, 277 AD2d 546. Petitioner's claim that he was never provided with a

copy of the written parole revocation determination, however, is not subject to the exhaustion requirement. *See People ex rel Sumter v. O'Connell*, 10 AD3d 823, where the Appellate Division, Third Department held as follows:

> "Executive Law §259-i(3)(f)(xi) provides that an Administrative Law Judge sustaining charges of parole violation 'must prepare a written statement, to be made available to the alleged violator and his counsel, indicating the evidence relied upon and the reasons for revoking . . . parole. As a matter of fundamental due process, petitioner was entitled to the prompt receipt of that statement so that he might have an informed basis upon which to seek review; neither the failure to pursue an administrative appeal nor the absence of prejudice will foreclose our review of that claim." *Id* at 825 (citations omitted)."

In response to petitioner's allegation that he was never provided with a copy of the parole revocation determination, the respondents annexed to their Return the affidavit of Rekha Shah, an employee of the New York State Division of Parole assigned to the division's New York City Parole Violation Unit, sworn to on November 30, 2007 (the "Shah Affidavit"). Ms. Shah, who has apparently been employed in her present capacity since 1998, states that her duties include mailing parole revocation decision notices to parolees and their attorneys and documenting such mailings through the division's computer system, known as PARMIS. Paragraphs four through eight of the Shah Affidavit read as follows:

> " 4. Decision Notices are sent to parolees by regular mail to their addresses as shown in the Division's records, which is usually a State correctional facility or a local jail. This is done once the Administrative Law Judge (hereinafter "ALJ") writes the determination. My consistent business practice is not to make an entry in the PARMIS system as to their mailing until I send the Decision Notices to the mailroom. That was my business practice in August 2006, when petitioner herein claims that he should have, but did not, receive the Decision Notice concerning the revocation which gave rise to this proceeding.

5. At the request of the Attorney General's Office, I checked the PARMIS System for its record of the mailing of the Decision Notice herein. Attached hereto as Exhibit 'A' is a copy of this record. The PARMIS system indicates that I handled the distribution of the Decision Notices in this matter.

6. The Court will note that beneath the caption 'BOARD ACTION ON FINAL' the entry shows that the Affirmation, which is also known as the Decision Notice, says the following 'Affirmation sent 08-17-06 to RI JUDICIAL CTR.' Underneath that entry, it says 'Misc COPY TO ATTY.'

7. In this particular instance, the parolee was housed at Riker's Island at the MTF barge until January 29, 2007. The MTF barge is under the supervision of the Riker's Island staff. The final revocation hearing also took place at Riker's Island. 'RI JUDICIAL CTR' refers to the Riker's Island Judicial Center. Although the PARMIS entry referenced the Riker's Island Center, Decision Notices are not sent to that precise location. The 'RI JUDICIAL CTR' entry is merely a boilerplate reference used when a Decision Notice is mailed to a Riker's Island inmate. There are no inmates housed at Riker's Island Judicial Center. Instead, inmates are housed in other buildings on and around Riker's Island and the decision is sent directly to where they are housed.

8. When a Decision Notice is sent for mailing to an inmate housed at Riker's Island, it is contained within an envelope that is specifically addressed to the inmate/parolee. The address includes the inmate's name, the 'Book and Case' number utilized by the New York City Department of Corrections for identification of inmates, the inmate's New York State Identification Number (NYSID number), and the specific building at which the inmate is housed on Riker's Island, East Elmhurst, New York, which in this case, was the barge known as MTF. This is the normal business practice of the Division of Parole New York City Parole Violation Unit, and it was my business practice in August 2006."

In *Nassau Insurance Company v. Murray*, 46 NY2d 828, the Court of Appeals stated, in relevant part, as follows:

"Where . . . the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have been duly addressed and mailed, a presumption arises that those notices have been received by the insureds . . . Denial of receipt by the insureds, standing alone, is insufficient to rebut the presumption. In addition to a claim of no receipt, there must be a showing that the routine office practice was not followed or was so careless

> that it would be unreasonable to assume that the notice was mailed . . . We would hasten to add, however, that in order for the presumption to arise, office practice must be geared so as to insure the likelihood that a notice of cancellation is always properly addressed and mailed." *Id* at 829, 830 (citations omitted).

More recently, in *Badio v. Liberty Mutual Fire Insurance Company*, 12 AD3d 229, the Appellate Division, First Department, reaffirmed the principles enunciated by the Court of Appeals in *Murray* and clarified that ". . . proof of regular office practice and procedure obviated the necessity of producing a witness with personal knowledge of the actual mailing . . . *(see Bossuk v. Steinberg*, 58 NY2d 916 [1983] . . .)" *Id* at 230.

In the case at bar the Court is ultimately not persuaded that the allegations set forth in the Shah Affidavit, together with the PARMIS computer printout, are sufficient to give rise to a presumption that the parole revocation decision notice was ever received by the petitioner or his attorney. Despite the fundamental, constitutional nature of petitioner's entitlement to prompt receipt of the Parole Revocation Decision Notice, the Division of Parole continues to attempt to prove such receipt by a presumption arising out of a one-size-fits-all, boilerplate-laden computer printout all but devoid of specific detail with respect to the case under consideration. While the PARMIS computer printout indicates that an "Affirmation" was mailed to the petitioner, the record in the case at bar indicates that the ALJ's determination revoking petitioner's parole and imposing the 48 month delinquent time assessment did not require affirmation by a parole commissioner. The Shah Affidavit merely states that the Affirmation ". . . is also known as the Decision Notice . . ." While the computer printout indicates that the "Affirmation" was sent "TO RI JUDICIAL CTR," it is clear that the petitioner was never housed at the Rikers Island Judicial Center. The Shah Affidavit merely states that the

reference to the Rikers Island Judicial Center is only a ". . . a boilerplate reference used when a Decision Notice is mailed to a Rikers Island inmate," and that the materials in question were really mailed specifically to the petitioner at his actual, although unstated, housing location at Rikers Island. In addition, to the extent the computer printout attempts to document a mailing to the petitioner's attorney of record, such attempt is limited to a generic reference to "ATTY," without any mention of the attorney's name and/or address. In short, with the exception of the references to petitioner's name and the August 17, 2006, date on which the mailings of the Parole Revocation Decision Notice to the petitioner and his attorney were allegedly processed, the computer printout is sufficiently non-specific so at to purport to document any mailing of any document to the petitioner at any address at the Rikers Island facility and to any attorney at any address. This Court finds that petitioner's reliance on such a generic record inspires little confidence that there is a likelihood that a Parole Revocation Decision Notice is always properly addressed and mailed.

Despite respondents' inability to effectively rebut petitioner's assertion that he never received a copy of the written Parole Revocation Decision Notice, the Court, for the reasons set forth below, ultimately finds that petitioner is not entitled to the relief he seeks. In examining the due process ramifications associated with the statutory and regulatory requirements that an alleged parole violator and his attorney must be provided with the written parole revocation determination (*See* Executive Law §259-i (3)(f)(xi) and 9 NYCRR §8005.20(f)), the Court of Appeals made clear " . . .that it is notification, not personal notification, that is a requirement of due process . . . therefore, the general rule is that when a litigant appears by an attorney, notice to the attorney will

serve as notice to the client." *People ex rel Knowles v. Smith* 54 AD2d 259, 266. This Court therefore finds that it was incumbent upon the petitioner to not only demonstrate that he, personally, was not provided with a copy of the Parole Revocation Decision Notice but also that his attorney was not provided with such notice. The petitioner's papers, however, do not address the issue of whether or not his attorney of record received a copy of the Parole Revocation Decision Notice. Accordingly, this Court concludes that petitioner's due process-based lack of notice claim must be dismissed. Having so concluded, the Court finds that judicial review of petitioner's remaining claims, in the context of this habeas corpus proceeding, is precluded by petitioner's failure to take an administrative appeal pursuant to 9 NYCRR Part 8006.

Notwithstanding all of the above, the Court finds it appropriate to note that one of the main arguments advanced by the petitioner in this proceeding is based upon his fundamental misreading of the relevant division of parole regulation. 9 NYCRR §8005.20(c)(1), addressing delinquent time assessments to be imposed on Category 1 parole violators like the petitioner, provides, in relevant part, that " . . .the time assessment . . . shall be a minimum of 15 months, or a hold to maximum expiration of the sentence, whichever is less. . ." Referencing this regulation, the petitioner takes the position that the time assessment imposed following his August 15, 2006, final parole revocation hearing could not lawfully exceed 15 months. The 15 month or hold to maximum, whichever is less, limitation, however, relates only to the "minimum" delinquent time assessment that could lawfully be imposed on a Category 1 parole violator. The regulation, however, places no limit on the maximum delinquent time assessment that may be imposed on a Category 1 parole violator. Thus, although the

delinquent time assessment imposed upon the petitioner ordinarily had to be at least 15 months, he could have been ordered held all the way to the maximum expiration of his sentence. *See Hicks v. New York State Division of Parole*, 255 AD2d 842.

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

ADJUDGED, that the petition is dismissed.

Dated: June 26, 2008, at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court