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

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In the Matter of the Application of
RONALD WATTS, #02-B-0948,
Petitioner,

for Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2010-0334.70
INDEX # 2010-801
ORI # NY016015J

-against-

DAVID ROCK, Superintendent,
Upstate Correctional Facility, and **NYS**
DIVISION OF PAROLE,
Respondents.

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This Habeas Corpus proceeding was originated by the Petition (denominated "Notice of Motion for a Writ of Mandamus, Motion to Compel Writ of Habeas Corpus") of Ronald Watts, verified on June 22, 2010, filed in the Franklin County Clerk's office on June 24, 2010 and received in chambers on July 12, 2010. Petitioner, who is an inmate at the Upstate 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 July 13, 2010 and has received and reviewed respondents' Return, dated August 24, 2010 as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on August 30, 2010.

On April 30, 2002 petitioner was sentenced in Supreme Court, Onondaga County, as a second felony offender, to five concurrent indeterminate sentences of 4½ to 9 years each upon his convictions of the crimes of Criminal Sale of a Controlled Substance 3° (two counts) and Criminal Possession of a Controlled Substance 3° (three counts). He was received into DOCS custody on May 8, 2002, certified as entitled to 399 days of jail time

credit. At that time the maximum expiration date of petitioner's multiple sentences was calculated as April 3, 2010.

Petitioner was first released from DOCS custody to parole supervision on April 3, 2007 but was ultimately declared delinquent as of June 12, 2007 following a final parole revocation hearing conducted on April 10, 2008. As of that delinquency date he still owed 2 years, 9 months and 21 days against the maximum term of his 2002 sentences. On April 16, 2008 petitioner was returned to DOCS custody as a parole violator, certified as entitled to 308 days of parole jail time credit. At that time, the adjusted maximum expiration date of petitioner's 2002 sentences would have been calculated as March 29, 2010.

Petitioner was released from DOCS custody to parole supervision for a second time on September 12, 2008 but was ultimately declared delinquent as of January 8, 2009 following a final parole revocation hearing conducted on July 28, 2009. As of that delinquency date he would have still owed 1 year, 2 months and 21 days against the adjusted maximum expiration date of his 2002 sentences. On August 31, 2009 petitioner was returned to DOCS custody as a parole violator, certified as entitled to 109 days of parole jail time credit. At that time the re-adjusted maximum expiration date of petitioner's 2002 sentences would have been computed as August 3, 2010.

On April 12, 2010, an amended Parole Jail Time Certificate was issued with respect to petitioner's first parole violation, reducing his entitlement to parole jail time credit from 308 to 68 days. Two weeks later, on April 26, 2010, an amended Parole Jail Time Certificate was issued with respect to petitioner's second parole violation, reducing his entitlement to parole jail time credit from 109 to 75 days. The aggregate 274-day

reduction in petitioner's parole jail time credit resulted in the re-calculation of the maximum expiration date of his 2002 sentences from August 3, 2010 to May 7, 2011.

In his first cause of action petitioner challenges the determination revoking his parole following the July 28, 2009 final parole revocation hearing. The relevant parole violation charges related to a series of incidents dating back to December 10, 2008, when petitioner appeared before Hon. Anthony J. Paris in connection with a civil proceeding in Supreme Court, Onondaga County. At that time, after Justice Paris issued a bench decision dismissing the civil action, petitioner allegedly became disruptive and directed disrespectful/threatening language to the bench. Justice Paris found petitioner in contempt (Judiciary Law §750(1)) and committed him to the Onondaga County Correctional Facility for a period of 30 days. By letter to Justice Paris, dated January 6, 2009 and received in chambers on January 8, 2009, petitioner stated that he "meant every word" of what he had said in court on December 10, 2008. Criminal charges were brought based upon the contents of the January 6, 2009 letter and on April 28, 2009 petitioner was sentenced in City Court, City of Syracuse, to a definite term of 8 months upon his conviction of the crime of Aggravated Harassment 2° (Penal Law §240.30(1)), a class A misdemeanor.

On June 17, 2009 the petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his parole release in two separate respects. Parole Violation Charge #1 reads as follows: "WATTS, RONALD violated Rule #8 of the Conditions governing his release[1] in that on 12/10/08 . . . at the

[1] Rule #8 of petitioner's Conditions of Release provides as follows: "I [petitioner] will not behave in such manner as to violate the provisions of any law to which I am subject which provide for a penalty of imprisonment, nor will my behavior threaten the safety or well-being of myself or others."

Syracuse County Court House . . . the Subject, was held in contempt of court by the Honorable Judge A. J. Paris. Subject was sentenced to 8 months incarceration on 4-28-09 for a plea to Aggravated Harassment." Parole Violation Charge #2 reads as follows: "WATTS, RONALD violated rules #8 of the Conditions governing his release in that on 1-8-2009 . . . received, in that Chamber of the Honorable Judge A. J. Paris at the Syracuse County Court House . . . a letter from Subject dated 1-6-09 . . . Among other things, the hand written letter indicated that the Subject meant every word said on 12-10-08 continuing the threat and harassment of the Honorable A. J. Paris originally initiated by the Subject on 12-10-08." Two additional parole violation charges (#3 and #4), set forth in a Supplementary Violation of Release Report, related to petitioner's alleged disruptive/assaultive conduct at the Onondaga County Correctional Facility on February 22, 2009.

On the Division of Parole's direct case at the final parole revocation hearing of July 28, 2009 no witnesses testified with respect to the substance of the four parole violation charges and the only document received into evidence with respect to the substance of the four charges was a certificate of conviction signed by the presiding judge of the Syracuse City Court indicating that petitioner had been convicted of the crime of Aggravated Harassment 2°. When the certificate of conviction was offered into evidence the Parole Revocation Specialist stated that such certificate related to Parole Violation Charge #2. The Parole Revocation Specialist repeated this assertion on at least two subsequent occasions during the course of the hearing and the presiding Administrative Law Judge (ALJ), after admitting the document into evidence, stated that it related to Parole Violation Charge #2. The ALJ then stated that " . . . based upon the certificate of

conviction, I do find that Charge Number 2 has been sustained." The ALJ then asked the Parole Revocation Specialist if Parole Violation Charges #1, #3 and #4 were going to be withdrawn and the specialist responded in the affirmative. On at least two more occasions during the course of the hearing the ALJ stated that Parole Violation Charge #2 had been sustained. The written Parole Revocation Decision Notice likewise indicated that Parole Violation Charge #2 had been sustained and Parole Violation Charges #1, #3 and #4 had been withdrawn. A delinquent time assessment of hold to maximum expiration was imposed. The parole revocation determination was affirmed on administrative appeal and this proceeding ensued.

Petitioner's first cause of action is simple. As argued on administrative appeal petitioner maintains that the certificate of convictions introduced into evidence at the July 28, 2009 final parole revocation hearing did not relate to Parole Violation Charge #2 and therefore could not serve as a basis to sustain Parole Violation Charge #2. In the Findings and Recommendation of the Division of Parole Appeals Unit, issued in connection with petitioner's administrative appeal, it was acknowledged that petitioner " . . . is correct that it [the certificate of conviction] does not relate to charge #2; but rather, was meant to be for charge #1. However, in parole revocation proceedings, clerical errors will not require a reversal. *Kirk v. Hammock*, 119 AD2d 851 . . ." Noting the multiple occasions on which the presiding ALJ stated that Parole Violation Charge #2 was sustained and Parole Violation Charges #1, #3 and #4 were withdrawn, both orally at the hearing and in his written decision, the petitioner takes issue in this proceeding with the Appeals Unit's characterization of the ALJ's error as a "clerical error."

This Court finds that the Syracuse City Court Certificate of Conviction, evidencing petitioner's conviction of the crime of Aggravated Harassment 2°, had no direct bearing in the allegations set forth in Parole Violation Charge #2, or Parole Violation Charges #3 and #4 for that matter. Rather, the certificate of conviction directly related to the allegation set forth in Parole Violation Charge #1 that on April 28, 2009 petitioner was convicted/sentenced in connection with " . . . a plea to Aggravated Harassment." To the extent the Parole Revocation Specialist first stated to the ALJ that the certificate of conviction had been offered (and received) into evidence with respect to Parole Violation Charge #2, instead of Parole Violation Charge #1, he was in error. In addition, to the extent the ALJ repeatedly stated, both orally and in writing, that Parole Violation Charge#2 was sustained and Parole Violation Charge #1 was withdrawn, he was in error.

The Court agrees with petitioner's assertion that the ALJ's oral and written error, as described above, did not constitute in mere "clerical error" in that the ALJ's actual oral and written statements, although erroneous, are accurately set forth in the record of the July 28, 2009 final parole revocation hearing. The Court, however, is not persuaded that the disposition of this case must ultimately turn on the nature of the underlying error. In this regard it is noted that in *Kirk v. Hammock*, 119 AD2d 851, which was cited by both the Division of Parole Appeals Unit in its findings and recommendation as well as by the respondents in this proceeding, the Appellate Division, Third Department never used the term "clerical error" in describing the hearing officer's inadvertent overlooking of a parole violation charge that was clearly established by the admission into evidence of a certificate of conviction. According to the *Kirk* court, this "procedural irregularity" did not require a reversal. *Id* at 853.

In the case at bar there is no doubt that petitioner received adequate notice in Parole Violation Charge #1 that such charge was based upon his Aggravated Harassment conviction. There is likewise no doubt that the certificate of conviction clearly established petitioner's guilt with respect to Parole Violation Charge #1. In the absence of any credible assertion of prejudice to petitioner, the Court finds that the ALJ's erroneous determination sustaining Parole Violation Charge #2, rather than Parole violation Charge #1, constituted a harmless procedural irregularity that does not require reversal of the underlying parole revocation determination. *See People ex rel Ward v. Sullivan*, 137 AD2d 779 and *Kirk v. Hammock*, 119 AD2d 851.

In his second cause of action petitioner challenges the issuance of Amended Parole Jail Time Certificates on April 12, 2010 and April 26, 2010. Although petitioner asserts that these amendments extended his August 3, 2010 maximum expiration date an additional 342 days, the Court observes, as noted previously, that the April 12, 2010 Amended Parole Jail Time Certificate, issued in connection with petitioner's first parole violation, reduced his entitlement to parole jail time credit from 308 to 68 days (240 day reduction) while the April 26, 2010 Amended Parole Jail Time Certificate, issued in connection with petitioner's second parole violation, reduced his entitlement to parole jail time credit from 109 to 75 days (34 day reduction). Thus, the total parole jail time credit reduction associated with the two amended certificates was 274 days, resulting in the re-calculation of petitioner's maximum expiration date from August 3, 2010 to May 7, 2011. Notwithstanding the foregoing, all of petitioner's arguments with respect to the issuance of the amended parole jail time certificates relate to the April 12, 2010 amended

certificate. Before addressing these arguments, however, a more detailed examination of the circumstances surrounding petitioner's first parole violation is warranted.

As noted previously, petitioner was released from DOCS custody to parole supervision on April 3, 2007 but was declared delinquent as of June 12, 2007 following a final parole revocation hearing conducted on April 10, 2008. Petitioner was received back into DOCS custody on April 16, 2008 originally certified as entitled to 308 days of parole jail time credit covering the entire period from the June 12, 2007 delinquency date until his return to DOCS custody on April 16, 2008. On February 22, 2008, however, petitioner was sentenced in Syracuse City Court to a definite term of 1 year upon his conviction of the crime of Aggravated Harassment 2nd[2]. The sentencing court did not specify whether its definite sentence was to run concurrently with or consecutive to the unexpired term of petitioner's 2002 sentences. Also on February 22, 2008 the Onondaga County Sheriff's Office certified that petitioner was entitled to 255 days of jail time credit (Penal Law §70.30(3)) against the 1 year definite term, covering the period from June 12, 2007 through February 21, 2008.

Although the Court is unable to make clear sense out of some of the dates set forth in the sheriff's certificate establishing petitioner's entitlement to 255 days of jail time credit and/or the April 12, 2010 Amended Parole Jail Time Certificate, it does appear clear that the 240-day reduction in parole jail time credit from 308 days to 68 days was intended to excise the relevant portion of petitioner's definite sentence (2/3 of 1 year) from the parole jail time credit calculation. The Court finds, moreover, for the reasons set

[2] This conviction is not the conviction associated with petitioner's letter to Justice Paris.

fourth below, that the petitioner has failed to articulate any basis to disturb the amended calculations of his parole jail time credit.

Citing Criminal Procedure Law §440.40(1), petitioner first asserts that the respondents were statutorily time barred from issuing the Amended Parole Jail Time Certificates in April of 2010. The statute in question provides that "[a]t any time not more than one year after the entry of a judgment [of conviction], the court in which it was entered may, upon motion of the people, set aside the sentence upon the ground that it was invalid as a matter of law." According to the petitioner, the Division of Parole had only one year from February 22, 2008, when city court imposed the 1-year definite sentence, to correct any "errors" that appeared in such sentence. The issuance of the Amended Parole Jail Time Certificate, however, bore no relationship to any motion by the people in the sentencing court (here Syracuse City Court) to set aside the underlying sentence of February 22, 2008. Indeed, there is nothing in the record to suggest that any such motion was made or that the sentence in question was ever set aside. Under the provisions of Executive Law §259-c(12) the State Board of Parole is charged with the function of certifying to DOCS officials the amount of parole jail time credit (Penal Law §70.30(3)(c)) to which an inmate is entitled. Although it is certainly preferable, from any number of standpoints, that an erroneous Certificate of Parole Jail Time Credit be corrected before an extended time has passed, the Court finds no basis, statutory or otherwise, to disturb the April 12, 2010 amendment to the 308-day certificate issued on April 18, 2008 simply by reason of the passage of time.

Finally, petitioner asserts that the issuance of the April 12, 2010 Amended Parole Jail Time Certificate is linked to an erroneous determination that his February 22, 2008

Syracuse City Court 1-year definite sentence must be calculated as running consecutively, rather than concurrently, with respect to the undischarged term of his 2002 sentences. According to petitioner, the city court's " . . . sentencing record was silent as to how this misdemeanor sentence would run. Penal Law 70.25 subdivision one states that in such a case the sentence is deemed to run concurrent with any other sentence." Petitioner, however, has misconstrued the statute which reads, in relevant part, as follows:

> "1 . . . [W]hen a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence . . . imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged term . . . in such manner as the court directs at the time of sentence. If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows:
>
> (a) an indeterminate or determinate sentence shall run concurrently with all other terms; and
>
> (b) a definite sentence [such as the February 22, 2008 Syracuse City Court sentence] shall run concurrently with any sentence imposed at the same time and shall be consecutive to any other term." (Emphasis in original).

Accordingly, there is no error in the determination to calculate petitioner's February 22, 2008 Syracuse City Court definite sentence as running consecutively with respect to the undischarged term of the sentences imposed in 2002.

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: October 12, 2010 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge