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

---X

In the Matter of the Application of
NATHANIEL DENNIS,#06-A-5159,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2010-0489.99
INDEX # 2010-1250
ORI # NY016015J

-against-

DARWIN LaCLAIR, Superintendent, Franklin Correctional Facility, and **ANDREA EVANS**, Chief Executive Officer, NYS Division of Parole and Chairwoman, NYS Board of Parole,
Respondents.

---X

This proceeding was originated by the Petition for a Writ of Habeas Corpus of Nathaniel Dennis, verified on August 13, 2010 and filed in the Franklin County Clerk's office on October 1, 2010. Petitioner, who is an inmate at the Franklin 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 October 12, 2010 and has received and reviewed respondents' Return, dated November 26, 2010 as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on December 7, 2010.

On August 6, 1999 petitioner was sentenced in Supreme Court, Bronx County, as a second violent felony offender, to a determinate term of 6 years, with 5 years post-release supervision, upon his conviction of the crime of Attempted Robbery 2°. On December 1, 2004 he was conditionally released from DOCS custody to post-release parole supervision.

On August 7, 2006 petitioner was sentenced in Supreme Court, Bronx County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction

of the crime of Attempted Assault 2°, committed on April 14, 2006. He was received back into DOCS custody on September 25, 2006, certified as entitled to 150 days of jail time credit.

On December 24, 2008 petitioner was again released from DOCS custody to parole supervision. On June 1, 2009, however, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in five separate respects. Parole Violation Charges #1, 2 and 3 all alleged, in various fashion, that on April 18, 2009 petitioner assaulted his wife, slapping her in the face causing swelling and bruising (Charge #1), choking her around the neck causing her to lose her breath and fear for her life (Charge #2) and grabbing her around the neck causing a bruise (Charge #3). Parole Violation Charge #5 alleged that petitioner " . . . violated Rule #13 of the Rules Governing Parole, in that on 5/23/09 . . . he failed to comply with the oral directive given to him during an office report on 5/20/09 by P.O. Carter not to have any contact with [his wife]." Two additional parole violation charges were subsequently added in a Supplementary Violation of Parole Report dated June 9, 2009.

Petitioner waived preliminary hearing and a final parole revocation hearing was conducted on August 18, 2009 and August 31, 2009. At the conclusion of the contested final hearing Parole Violation Charges #1, 2, 3 and 5 were sustained. The presiding Administrative Law Judge (ALJ) imposed a delinquent time assessment holding petitioner to the maximum expiration of his sentences. On December 1, 2009, however, the delinquent time assessment was amended to 26 months. The results and disposition of the final parole revocation hearing were affirmed on administrative appeal. This proceeding ensued.

To the extent the petition might be construed as including a broad challenge to the sufficiency of the evidence supporting the ALJ's determination to sustain Parole Violation Charges #1, 2 and 3, this Court rejects such challenge. Executive Law §259-i(3)(f)(viii) provides that "[a]t the conclusion of the [final parole revocation] hearing the presiding officer may sustain any or all of the violation charges or may dismiss any or all violation charges. He may sustain the violation charge only if the charge is supported by a preponderance of the evidence adduced." *See* 9 NYCRR §8005.19(e). A court reviewing a determination to revoke parole, in the context of a habeas corpus proceeding, may not make its own determination based upon its own assessment of the credibility of witnesses. Rather, the reviewing court is limited to an examination of the record to determine if required procedural rules were followed and to determine if there is any evidence which, if credited, would support the revocation determination. *See People ex rel Crespo v. Yelich*, 71 AD3d 1214, *People ex rel Gonzalez v. LaClair*, 63 AD3d 1493, *lv den* 13 NY3d 705, and *People ex rel Brazeau v. McLaughlin*, 233 AD2d 724, *lv den* 89 NY2d 810.

In sustaining Parole Violation Charges #1, 2 and 3 the ALJ relied primarily upon the testimony of petitioner's wife with respect to the incident of April 18, 2009. As noted by the ALJ, she " . . . testified that she was choked, slapped in the face on the left check, and thrown onto the couch." The ALJ specifically found such witness' testimony to be credible notwithstanding the impeachment efforts of petitioner's counsel. The ALJ also noted that the photographs received into evidence at the final hearing, identified as depicting the face of petitioner's wife after the April 18, 2009 incident, " . . . all indicate swelling and/or abrasions to the person in the photographs . . ."[1] In view of the foregoing,

[1] The record before the Court did not include copies of the photographs in question.

this Court finds no basis to disturb the determination sustaining Parole Violation Charges #1, 2 and 3.

As far as the determination sustaining Parole Violation Charge #5 is concerned, the Court has serious concerns. As noted previously, Parole Violation Charge #5 alleged that petitioner " . . . violated Rule #13 of the Rules Governing Parole, in that on 5/23/09 . . . he failed to comply with the oral directive given to him during an office report on 5/20/09 by P.O. Carter not to have any contact with [his wife]."[2] Rule #13 of the Rules Governing Parole provided, in relevant part, as follows: "I [petitioner] will fully comply with the instructions of Parole Officer and obey such special additional written conditions as he . . . may impose." *See* 9 NYCRR §8003.2(l). Since the rule in question distinguishes between a releasee's obligation to comply with the "instructions" of his/her parole officer and the parolee's obligation to comply with "special additional written conditions" imposed by his/her parole officer, and since the relevant provisions of 9 NYCRR §8003.3 mandate that a parolee "be provided with a written copy of each special condition imposed" by a parole officer subsequent to his/her release, this Court perceives that there must be some qualitative distinction between a verbal "instruction" given by a parole officer and a "special condition" imposed by a parole officer. In this regard the Court finds that when a parole officer verbally instructs a parolee to perform, or refrain from performing, a particular act, and where the obligation associated with such instruction is limited in scope/duration, a parolee's failure to comply with such verbal instruction may form the basis for parole revocation proceedings as a violation of Rule #13/9 NYCRR §8003.3(l). Where, however, as in the case at bar, a parole officer seeks to impose an

[2] The "contact" underlying Parole Violation Charge #5 consisted of a telephone conversation initiated by petitioner. There is nothing in the record, however, to suggest that he employed any inappropriate language during the course of that conversation.

ongoing restriction on the actions of a parolee, which restriction is unlimited in duration, such restriction must take the form of a written special condition in order to be enforceable through the parole revocation process. Since Parole Officer Carter's verbal "instruction" that petitioner have no contact with his wife, presumably for the duration of the period of parole supervision, was concededly never reduced to a written special condition, the Court finds that the determination sustaining Parole Violation Charge #5 must be vacated.

In paragraph 20 of the petition it is asserted that a review of the August 7, 2006 Bronx County Sentence and Commitment order indicates that an indeterminate sentence of 2 to 4 years was imposed on petitioner. Petitioner goes on to assert in paragraph 20, in somewhat in cryptic fashion, as follows: "Clearly there is no postrelease supervision on commitment, Petitioner can not violate what has not been imposed by a Judge of the New York State Supreme Court, and commitment has expired. Making petitioner's detention unlawful." It is clear, however, that a 5-year period of post-release supervision was judicially pronounced in connection with the 6-year determinate term imposed against petitioner by the Supreme Court, Bronx County, on August 6, 1999. In the absence of any cogent argument that such period of post-release supervision has been completed and/or that petitioner has otherwise reached the maximum expiration date of the multiple sentences (1999 and 2006) imposed against him, the Court is simply not persuaded that petitioner's ongoing detention in DOCS custody is illegal.

Finally, the Court finds that the two (plus)-page typewritten, single-spaced "Analysis" prepared by the ALJ at the conclusion of the final parole revocation hearing, as well as the one and one half- page "Amended Decision" prepared in connection with the reduction in the delinquent time assessment on December 1, 2009, are more than sufficient " . . . to provide a significant decision to permit intelligent challenge by a party

aggrieved and adequate judicial review following the determination . . ." *People ex rel Hacker v. New York State Division of Parole*, 228 AD2d 849, 850, *lv den* 88 NY2d 809 (citation omitted).

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the determination sustaining Parole Violation Charge #5 is vacated and the matter remanded to the respondent Evans for the purpose of reconsidering the 26-month delinquent time assessment as a result thereof.

DATED: March 31, 2011 at
Indian Lake, New York

_____
S. Peter Feldstein
Acting Supreme Court Judge