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

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In the Matter of the Application of
ISAAC ELMORE,#05-B-1296,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #44-1-2012-0819.32
INDEX # 140135
ORI # NY044015J

ELIZABETH A. O'MEARA, Superintendent, Gouverneur Correctional Facility, **BRIAN FISCHER,** Commissioner, NYS Department of Corrections and Community Supervision, and **ANDREA EVANS,** Chairwoman, NYS Board of Parole,
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Isaac Elmore, verified on November 14, 2012 and filed in the St. Lawrence County Clerk's office on November 16, 2012. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging his continued incarceration in the custody of the New York State Corrections and Community Supervision. An Order to Show Cause was issued on November 26, 2012. The Court has received and reviewed respondents' Return, dated January 4, 2013, as well as petitioner's Affirmation in Reply thereto, verified on January 18, 2013 and filed in the St. Lawrence County Clerk's office on January 23, 2013.

On April 27, 2005 petitioner was sentenced in Onondaga County Court, as a second felony offender, to a controlling determinate term of 6 years, with 5 years post-release supervision, upon his convictions of the crimes of Robbery 2° and Attempted Burglary 1°. Petitioner was released from DOCCS custody to post-release supervision on July 21, 2010.

On September 20, 2010 petitioner was served with a Notice of Violation/Violation Release Report charging him with violating the conditions of his release in four separate

respects. Parole Violation Charge #1 alleged that petitioner " . . . violated Rule #13 of the rules governing his release, in that on 9/15/2010, at approximately 3:45 a.m. he was not in his approved residence in violation of a Special Condition imposed on him on 7/21/2010." Parole Violation Charge #2 alleged that petitioner " . . . violated Rule #7 of the rules governing his release, in that on 9/15/2010, he was in the company [of] Stephanie Perry, someone he knew to have a criminal record, without the permission of his parole officer." Parole Violation Charge #3 alleged that petitioner " . . . violated Rule #8 of the rules governing his release, in that on 9/15/2010, he falsely identified himself to officers of the SPD [Syracuse Police Department] by stating he was Darrell T. Lanier and showed a [sic] Onondaga County Sheriffs I.D. of the same name." Parole Violation Charge #4 alleged that petitioner " . . . violated Rule #8 of the rules governing his release in that, on 9/16/2010, he threatened the safety of Parole Officer Eisenhauer by kicking her in the shin."

Probable Cause with respect to Parole Violation Charge #4 was found following a preliminary hearing conducted on September 29, 2010. After several adjournments, a contested final parole revocation hearing was commenced on November 30, 2010. At the conclusion of the hearing, on December 23, 2010, the presiding Administrative Law Judge (ALJ) sustained all four parole violation charges, with a delinquency date of September 15, 2010, revoked petitioner's release and imposed a 36-month delinquent time assessment. The results and disposition of petitioner's final parole revocation hearing were affirmed on administrative appeal with the final determination apparently mailed to petitioner and counsel on November 2, 2011. This proceeding was commenced more than one year later, on November 16, 2012, when the Petition for Writ of Habeas Corpus was filed in the St. Lawrence County Clerk's office.

As discussed below, the Court finds that the various arguments advanced by petitioner in this proceeding are either meritless or, even if sustained, would not support habeas corpus relief.

Petitioner first asserts that he was not timely served with the Notice of Violation/Violation of Release Report in accordance with the provisions of Executive Law §259-i(3)(c)(iii). The statue provides, in relevant part, that "[t]he alleged [parole] violator shall, within three days of the execution of the warrant, be given written notice of the time, place and purpose of the [preliminary] hearing . . ." In the case at bar the parole violation warrant was executed on November 16, 2010 but petitioner was not served with the Notice of Violation/Violation of Release Report until four days later, on November 20, 2010.[1] The Court notes, however, that November 16, 2010 fell on a Thursday and that the third day after the execution of the warrant was Sunday November 19, 2010. General Construction Law §25-a provides, in relevant part, that "[w]hen any period of time, computed from a certain day, within which or after which . . . an act is . . . required to be done, ends on a . . . Sunday . . . such act may be done on the next succeeding business day . . ." Accordingly, the Court finds that petitioner was timely served with the Notice of Violation/Violation of Release Report on Monday, November 20, 2010. *See People ex rel Atkinson v. Warden of Rikers Island Correctional Facility*, 201 AD2d 271 and *People ex rel Frost v. Meloni*, 124 AD2d 1032, *lv denied* 69 NY2d 606. In any event, even if petitioner was correct in his assertion that he was not timely served in accordance with the three-day notice requirement set forth in Executive Law §259-i(3)(c)(iii), failure to comply with such requirement " . . . does not directly affect the right to be restored to parole, especially in the absence of a showing of prejudice." *People ex rel Washington v.*

[1] In computing the three-day period the day the parole violation warrant was executed is not counted. *See* General Construction Law §20.

New York State Division of Parole, 279 AD2d 379, 380, citing *People ex rel Williams v. Walsh*, 241 AD2d 979, *lv denied* 90 NY2d 809. *See People ex rel Matos v. Warden, Rikers Island Correctional Facility,* 58 AD3d 523, *lv den* 12 NY3d 712 and *People ex rel Thompson v. Warden of Rikers Island Correctional Facility*, 41 AD3d 292. This Court, moreover, finds nothing in the record to suggest that petitioner would have been prejudiced by a one-day delay in his receipt of the Notice of Violation/Violation of Release Report.

The Court next finds no basis to conclude that petitioner's due process rights were violated by reason of the fact that the event(s) underlying Parole Violation Charge #4 occurred after petitioner had been taken into custody in connection with the previously-issued parole violation warrant. In any event, even if the ALJ's determination sustaining Parole Violation Charge #4 was to be overturned, the determinations sustaining Parole Violation Charges #1, #2 and #3 would not be affected. Accordingly, habeas corpus relief would be unavailable.

To the extent petitioner asserts that the evidence adduced at the preliminary parole revocation hearing was insufficient to support the probable cause determination, this Court finds that such issue had been subsumed and rendered moot by the revocation of petitioner's parole following the final parole revocation hearing. *See Nieblas v. New York State Board of Parole,* 28 AD3d 1017*, Westcott v. New York State Board of Parole*, 256 AD2d 1179 and *People ex rel Wilt v. Meloni*, 166 AD2d 927.

The petitioner also argues that his due process rights were violated at the final parole revocation hearing when the ALJ denied his request for an adjournment to secure testimony from an alleged witness to the incident underlying Parole Violation Charge #4 and further denied petitioner's request that parole authorities turnover a report apparently prepared by Parole Officer Eisenhauer with respect to the incident underlying

Parole Violation Charge #4. Even if petitioner was to prevail on one of these points, and the ALJ's determination sustaining Parole Violation Charge #4 was therefore overturned, the determinations sustaining Parole Violation Charges #1, #2 and #3 would not be affected. Accordingly, habeas corpus would be unavailable.

Finally, citing *Jacoby v. Evans*, 84 AD3d 1731, petitioner asserts that he was improperly designated a Category 1 parole violator (9 NYCRR §8005.20(c)(1)). According to the *Jacoby* court, " . . . 9 NYCRR 8005.20 applies to individuals on parole and conditional release, not those serving a period of PRS [post-release supervision] . . . Violators of PRS are subject to Penal Law §70.45(1), pursuant to which 'a violation of any condition of supervision occurring at any time during such period of [PRS] shall subject the defendant to a further period of imprisonment up to the balance of the remaining period of [PRS], not to exceed five years' (*see* Executive Law §259-i(3)(f)(x)(D))." *Id* at 1732 (other citation omitted). The 18-month delinquent time assessment in *Jacoby* was nevertheless upheld since Mr. Jacoby's remaining period of post-release supervision exceeded 18 months. In the case at bar, even if it was determined that petitioner was improperly designated a Category 1 parole violator, such determination would not result in his immediate release from DOCCS custody. In this regard it is noted that the 36-month delinquent time assessment represents a shorter period of time than the 4 years, 10 months and 5 days owed by petitioner against his 5-year period of post-release supervision as of the September 15, 2010 delinquency date. Thus, the time assessment was within the limits set forth in Penal Law §70.45(1) and Executive Law §259-i(3)(f)(x)(D). *See Jacoby v. Evans*, 84 AD3d 1731.

Based upon all of the above, the Court finds that petitioner has not established his entitlement to immediate release from DOCCS custody and, therefore, that habeas corpus relief is unavailable. Although petitioner's challenges to the determination sustaining

Parole Violation Charge #4 might be considered in the context of a proceeding for judgment pursuant to Article 78 of the CPLR, the Court declines to convert this habeas corpus proceeding into a CPLR Article 78 proceeding since the petition was filed well after the expiration of the 4-month statute of limitations set forth in CPLR §217(1). *See People ex rel Price v. West,* 30 AD3d 852 and *Rossano v. Schiriver*, 268 AD2d 912, *lv den* 94 NY2d 765.

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: March 26, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge