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

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In the Matter of the Application of
ZAID ALI,#98-A-4045,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2013-0279.16
INDEX # 141102
ORI # NY044015J

-against-

CALVIN O. RABSATT, Superintendent,
Riverview Correctional Facility,
Respondent.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Zaid Ali, verified on April 15, 2013 and filed in the St. Lawrence County Clerk's Office on April 19, 2013. Petitioner, who is now an inmate at the Gouverneur Correctional Facility, purports to challenge his continued incarceration in the custody of New York State Department of Corrections and Community Supervision. The Court issued an Order to Show Cause on April 23, 2013 and has received and reviewed respondent's Answer/Return, including Confidential Exhibit B, verified on May 31, 2013. The Court has also received and reviewed petitioner's Reply thereto, dated June 13, 2013 and filed in the St. Lawrence County Clerk's office on June 17, 2013.

On May 19, 1998 petitioner (then under the name Lance Lane) was sentenced in Dutchess County Court, as a second felony offender, to an indeterminate sentence of 10 to 20 years upon his conviction of the crime Manslaughter 1°. After having his parole revoked on one prior occasion, petitioner was released from the Willard Drug Treatment Campus to community-based parole supervision on December 28, 2010. Petitioner, however, absconded from supervision and in August of 2012 was declared delinquent as

of July 25, 2012. Although petitioner's whereabouts were unknown at that time, a parole violation warrant was issued on or about August 15, 2012.

On November 14, 2012 petitioner was arrested in connection with new criminal charges in the State of Florida. According to petitioner, the New York parole warrant was lodged against him as a detainer in Florida on November 16, 2012. On November 19, 2012 petitioner waived extradition and on December 21, 2012 the Florida criminal charges were dismissed. On January 3, 2013 parole authorities in New York were notified by Florida authorities, via fax, that petitioner was " . . . done with local charges and is ready for your pick-up."

On January 8, 2013 petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in three separate respects. Parole Violation Charge #1 alleged that petitioner " . . . failed to make his office report on July 25, 2012, and thereafter . . ." Parole Violation Charge #2 alleged " . . . that on or about August 3, 2012, he [petitioner] moved from his approved residence . . . without the knowledge or approval of his Parole Officer." Parole Violation Charge #3 alleged an August 3, 2012 curfew violation.

A preliminary parole revocation hearing was conducted at the Dutchess County Jail on January 15, 2013. At the preliminary hearing Parole Officer Disla stated an intent to proceed with Parole Violation Charge #1. At that point the petitioner interjected as follows: " . . . [T]he purpose of my requesting a Preliminary Hearing was on the grounds of my due process rights and the untimely manner in which I was served. I am not contesting the charge. I am contesting the untimely service." The Hearing Officer presiding at the preliminary hearing advised petitioner to pursue that claim "through a writ" and proceeded with the hearing. After testimony was taken, probable cause was found with respect to Parole Violation Charge #1.

A final parole revocation hearing was conducted at the Dutchess County Jail on January 31, 2013. Petitioner was represented by counsel at the final hearing. His attorney affirmed that there were no "notice issues" and, a bit later, the presiding Administrative Law Judge (ALJ) stated for the record as follows: "We did have a pre-hearing conference with regard to this case. It was agreed in return for a plea of guilty to Charge three, that's a Rule 13, a violation of curfew, Charges one and two would be withdrawn with prejudice. The delinquency date is amended to 8-3-2012. Now, Mr. Ali is on Parole for manslaughter first degree. A category one offense. The minimum time assessment is fifteen months or twelve months with mitigation . . . I did indicate in return for his plea of guilty, I will go along with a joint recommendation of an eighteen month hold. Is that everyone's understanding?" The Parole Revocation Specialist and counsel for the petitioner both answered in the affirmative.

Counsel for the petitioner waived a formal reading of Parole Violation Charge #3 and entered a guilty plea. Petitioner's parole was revoked with a modified delinquency date of August 3, 2012, the remaining parole violation charges were withdrawn and the ALJ then solicited recommendations with respect to the delinquent time assessment. After the Parole Revocation Specialist and counsel for the petitioner spoke, the ALJ asked petitioner if there was anything he would like to state on his own behalf. At that point the following colloquy occurred:

"THE PAROLEE	I just want to say for the record, I wanted the enforcement date for the Warrant, 1-8 [January 8, 2013], I want to contest that. That's definitely wrong. That's the date I was served and that was not the date that the Warrant was enforced.
[ALJ]:	As I told you off the record, this is always a point of contention, it seems, in

> out of state cases. I don't have the authority to say, basically, when it [presumably the running of the delinquent time assessment[1]] starts. We are provided numbers and we go with the numbers we were given. It's not saying they were right, though. Unfortunately for you, this is not the forum, in other words, determine when, where it starts. You are going to have to take that up with the Department of Corrections. You will get all of this reviewed and you will get a time computation and it will tell you everything you are suppose to know. And if you take exception with that, then you have to take it up with the time-keeper of the Department of Corrections and through it and possibly file an Article 78 if you did not agree with them. But I have no authority over that issue. As I said, the Department of Corrections, they are very regimented in these things. Everybody has their responsibilities.
>
> THE PAROLEE: I understand."

An 18-month delinquent time assessment was ultimately imposed.

The only argument advanced by petitioner in this proceeding is " . . . that he was deprived of a preliminary hearing within fifteen days of the execution of [parole] warrant . . . in violation of Executive Law §259-i(3)(c)(i)/(iv) . . ." According to petitioner, the parole violation warrant was executed on December 21, 2012 when the Florida criminal charges were dismissed. For the reason set forth below, however, the Court finds that the guilty plea at the final parole revocation hearing constituted a waiver similar to that of a

[1] 9 NYCRR §8002.6(b)(1) provides, in relevant part, that a delinquent time assessment " . . .will commence running on the date that the parole violation warrant was lodged."

criminal defendant and therefore precludes it from considering any challenge to the timeliness of the preliminary hearing.

The entry of the guilty plea by defendant in a criminal action " . . . generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings." *People v. Fernandez*, 67 NY2d 686, 688 (citation omitted). *See People v. Granger*, 96 AD3d 1669 and *People v. Whitehurst*, 291 AD2d 83, *lv denied* 98 NY2d 642.

At the final parole revocation hearing neither petitioner nor his counsel articulated any challenge to the timeliness of the preliminary hearing and/or otherwise attempted to preserve that issue. Although there apparently was some off-the-record discussion during the course of the final hearing - which is not in and of itself improper - there is nothing in the hearing record to indicate that the alleged untimeliness of the preliminary hearing was the subject of any such discussion. In paragraph five of his Reply petitioner states that "[i]n an effort to preserve on the record his continued intention to challenge the [timeliness] violation, the petitioner objected to parole's attempt to amend the parole warrant's execution date to January 8, 2013." It appears to this Court, however, that the on-the-record discussion referenced by petitioner - as previously quoted in this Decision and Judgment - related to the issue of when the 18-month delinquent time assessment should commence running. Petitioner, having specifically asserted a timeliness challenge during the course of his preliminary hearing, clearly knew how to articulate such a challenge at the final hearing if he desired to do so. Rather, while represented by counsel, a plea bargain agreement was accepted whereby two of three parole violation charges against petitioner were dismissed, his delinquent time assessment was limited to 18 months and his delinquency date was modified from July 25, 2012 to August 3, 2012. The Court finds that the timeliness challenge asserted by petitioner in this proceeding is not

jurisdictional in nature and, therefore, did not survive the guilty plea at the final parole revocation hearing.

Finally, even if petitioner's timeliness challenge was properly before the Court, it would not be persuaded that petitioner would prevail. Executive Law §259-i(3)(a)(iii) provides, in relevant part, that where, as here, " . . . the alleged violator is detained in another state pursuant to such [New York parole] warrant . . . the warrant will not be deemed to be executed until the alleged violator is detained exclusively on the basis of such warrant and the department has received notification that the alleged violator (A) has formally waived extradition to this state or (B) has been ordered extradited to this state pursuant a judicial determination." Notwithstanding the fact that petitioner apparently waived extradition on November 19, 2012 as well as the fact that the Florida criminal charges were dismissed on December 21, 2012, there is nothing in the record to suggest that New York authorities were notified by Florida authorities with respect to the availability of petitioner for pick-up and return to New York until the January 3, 2013 fax was sent/received. Petitioner's bald assertion that New York authorities were notified by telephone prior to January 3, 2013 represents mere speculation. With the parole violation warrant thus statutorily deemed to have been executed on January 3, 2013, the Court would find that the preliminary parole revocation hearing was timely conducted within 15 days of that date (*see* Executive Law §259-i(3)(c)(i)) on January 15, 2013.

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 19, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge