

**Matter of Jones v O'Meara**

2014 NY Slip Op 30350(U)

February 6, 2014

Sup Ct, St. Lawrence County

Docket Number: 141377

Judge: S. Peter Feldstein

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ST. LAWRENCE  
X**

In the Matter of the Application of  
**RANDY JONES, #08-A-2034,**  
Petitioner,

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

**DECISION AND JUDGMENT  
RJI #44-1-2013-0379.20  
INDEX # 141377  
ORI # NY044015J**

-against-

**ELIZABETH A. O'MEARA**, Superintendent,  
Gouverneur Correctional Facility, and **ANDREA  
W. EVANS**, Chairwoman, NYS Board of Parole,  
Respondents.

**X**

This proceeding was originated by the Petition for Writ of Habeas Corpus of Randy Jones, verified on May 24, 2013 and filed in the St. Lawrence County Clerk's Office on June 6, 2013. Petitioner, who is now an inmate at the Collins Correctional Facility, is challenging 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 June 10, 2013 and has received and reviewed respondents' Answer/Return, including Confidential Exhibit B, verified on July 26, 2013. The Court has also received and reviewed petitioner's Reply thereto (denominated, "TRAVERSE") sworn to on August 22, 2013 and filed in the Franklin County Clerk's office on August 26, 2013. By Letter Order dated November 1, 2013 the respondents were directed to supplement their Answer/Return ". . . by submitting copies/printouts of the computerized chronological entries associated with the processing of the written Parole Revocation Decision Notice and the alleged mailing of that document to the petitioner and his attorney." In response thereto the Court has received and reviewed respondents' Supplemental Answer/Return, with exhibit, dated November 14, 2013.

On April 3, 2008 petitioner was sentenced in Rensselaer County Court to a determinate term of 5 years, with 5 years post-release supervision, upon his conviction of the crime of Robbery 2<sup>o</sup>. He was conditionally released from DOCCS custody to post-release parole supervision on May 31, 2012. Petitioner, however, was subsequently declared delinquent and a parole violation warrant was apparently executed on September 19, 2012. On September 21, 2012 petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in six respects. The specific details of the parole violation charges are not germane to the resolution of this proceeding.

A preliminary hearing was waived and the final parole revocation hearing was conducted at the Albany County Correctional Facility. The testimonial phase of the final hearing was completed on November 13, 2012. By written Parole Revocation Decision Notice dated December 18, 2012 all six parole violation charges were sustained. Petitioner's parole was revoked with a sustained delinquency date of September 10, 2012 and a 36-month delinquent time assessment was imposed.<sup>1</sup> Petitioner was received back into DOCCS custody at the Downstate Correctional Facility on December 27, 2012. Although he was transferred from Downstate to the Willard Drug Treatment Program campus on January 8, 2013, less than one month later, on February 6, 2013, petitioner was transferred out of Willard to the Gouverneur Correctional Facility.

In this proceeding petitioner asserts that he was never provided with a copy of the written Parole Revocation Decision Notice of December 18, 2012. In addition, petitioner

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<sup>1</sup> Although the presiding Administrative Law Judge concluded the "ANALYSIS" portion of the written Parole Revocation Decision Notice by recommending that petitioner "... engage in any program while in state custody to divert this [his?] energy into something constructive so as not to become another statistic in the criminal justice system," there is nothing in the record to suggest that the 36-month delinquent time assessment was subject to being purged by petitioner's participation in an alternative to reincarceration program, such as Willard.

asserts that he was never provided with an explanation for his removal from the Willard program.

The Court first notes that the written Parole Revocation Decision Notice of December 18, 2012 specifies a 36-month delinquent time assessment without any reference to the Willard program or any other alternative to reincarceration. The respondents maintain that petitioner's brief placement at Willard was simply an error. According to respondents, "[t]hat he was inadvertently placed in Willard grants Petitioner no new or additional right to continue with the program. The fact remains that Petitioner will be credited with the time served at Willard, but he must serve the remainder of his 36-month hold in prison." The Court agrees.

Turning to the thornier issue of whether or not petitioner - or his attorney - was provided with a copy of the written Parole Revocation Decision Notice of December 18, 2012, the Court initially notes that Executive Law §259-i(3)(f)(xi) provides, in relevant part, that if the presiding officer at a final parole revocation hearing sustains any violations he or she ". . . 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 . . . and for the disposition made." See also 9 NYCRR §8005.20(f) which provides that "[a]s soon as practicable after a violation hearing, the alleged violator and his attorney shall be advised in writing of the violation hearing decision, or decision and recommendation, including the reason for the determination and the evidence relied upon." An adjudicated parole violator's prompt receipt of the written statement/decision, moreover, is a matter of fundamental due process. See *Morrissey v. Brewer*, 408 US 471, 489 and *Sumter v. O'Connell*, 10 AD3d 823.

In response to petitioner's allegation that he was never provided with a copy of the written Parole Revocation Decision Notice, the respondents annexed to their

Answer/Return the Affidavit of Cynthia Lambert, a Division of Parole/Department of Corrections and Community Supervision employee since 2008, sworn to on July 25, 2013 (the "Lambert Affidavit"). As of the date of her affidavit, Ms. Lambert was employed as an Agency Program Aide for the Albany County Parole Violations Unit (PVU). Paragraphs three through nine of the Lambert Affidavit state as follows:

- “3. In my capacity as an Agency Program Aide for the PVU, I am responsible for the entry and distribution of decisions rendered by judges in Final Revocation Hearings concerning inmates held at jails in our PVU’s region. The procedure of managing this task is undertaken in the same manner each time, as outlined below.
4. After issuing a decision for a Final Parole Revocation Hearing, the judge sends the decision to this Office. The decision is entered within 24 to 48 hours. As part of this procedure, a computerized chronological entry is made for that inmate.
5. Following entry, the decision is placed in the case file, and copies are mailed to the attorney of record (if applicable) and the inmate with a Notice of Appeal Form. These copies are personally put in envelopes, addressed, and stamped by me, and then picked up by the United States Postal Service from the building’s mail room. If the inmate were no longer being housed in the facility where the decision was sent, it would be returned to the PVU and resent to the inmate’s new location.
6. The decisions are not sent via certified mail, and no additional records are kept. However, this is a uniform procedure carried out in the ordinary course of business.
7. The Final Parole Revocation Hearing for Randy Jones, #08-A-2034, on warrant 0653330 for violations occurring on 09/10/12 was completed on 11/13/12.
8. The Honorable Patricia E. O’Malley’s Parole Revocation Decision Notice was received and entered by the PVU on 12/19/12. Upon information and belief due to my regular practices in entering and distributing such decisions, this decision was sent for mailing to both the inmate and his attorney of record, Public Defender James Milstein, on the same day.

9. At the time the decision was mailed, the inmate was housed at the Albany County Jail ('ACJ'), where he remained until 12/27/12. The inmate was thereafter transferred and received at Downstate Correctional Facility ('DCF') on 12/28/12."

The "computerized Chronological Entry" printout, provided to the Court in response to its Letter Order of November 1, 2013, provides little, if any, additional evidence of proper mailing beyond that set forth in the Lambert Affidavit.

In considering the viability of establishing a presumption of receipt of a document through evidence of office mailing practices, the New York State Court of Appeals in *Nassau Insurance Company v. Murray*, 46 NY2d 828, albeit in a different context, 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).

In *Badio v. Liberty Mutual Fire Insurance Company*, 12 AD3d 229, moreover, 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 persuaded that the allegations set forth in the Lambert Affidavit are sufficient to give rise to a presumption that a copy of the

parole revocation decision notice was received by the petitioner at the Albany County Jail. *See People ex rel Demarta v. Sears*, 31 AD3d 918, *lv den* 7 NY3d 715.

Notwithstanding the foregoing, the Court would be remiss if it failed to state its ongoing concern with attempts to prove the mailing of Parole Revocation Decision Notices to adjudicated parole violators and their attorneys by relying on a presumption arising from evidence of office mailing practices rather than direct, contemporaneous evidence of mailing and/or receipt. Much is at stake in proceedings of this nature and it is disturbing to the Court that it is repeatedly placed in the position of resolving disputes with respect to the mailing of written Parole Revocation Decision Notices in the absence of direct evidence of such mailings. If there was no readily-apparent solution to this problem then there would be no reason for judicial concern. Given the fundamental, constitutional nature of an adjudicated parole violator's (and/or counsel's) entitlement to prompt receipt of the written Parole Revocation Decision Notice, however, it simply boggles the mind that the DOCCS employee who actually places a copy of the written decision in a stamped, addressed envelopes does not simply execute a contemporaneous affidavit of service. As an alternative, an adjudicated parole violator who is returned to DOCCS custody could be provided with, and required to sign for, an additional copy of the written Parole Revocation Decision Notice upon his/her arrival at a DOCCS facility. Since the failure to provide an adjudicated parole violator, and/or counsel, with a copy of the written Parole Revocation Decision Notice could result in the vacatur of the parole warrant and return of the violator to community-based parole supervision, it is difficult for the Court to comprehend why one of the above courses of action, or some other solution devised by DOCCS officials, is not employed in order to avoid the uncertainties of litigation such as this.

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:** February 6, 2014 at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Supreme Court Judge