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

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In the Matter of the Application of
THEODORE CHASE,#05-A-4580,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0078.12
INDEX # 2014-151
ORI # NY016015J

-against-

DARWIN E. LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Theodore Chase, verified on February 25, 2014 and filed in the Franklin County Clerk's office on February 27, 2014. 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 Corrections and Community Supervision. The Court issued an Order to Show Cause on March 6, 2014 and has received and reviewed respondent's Return, dated April 17, 2014, as well as petitioner's Reply thereto, dated April 29, 2014, received directly in chambers on May 5, 2014 and intended to be filed in the Franklin County Clerk's office simultaneously with this Decision and Judgment.

On September 7, 2005 petitioner was sentenced in Rockland County Court, as a second felony offender, to two concurrent determinate terms of 6 years each, with 3 years post-release supervision, upon his convictions of the crimes of Criminal Sale of a Controlled Substance 3° (two counts). He was received into DOCCS custody on September 8, 2005 and at that time the original maximum expiration date of his merged multiple sentences was calculated as May 21, 2011.

On July 9, 2010 petitioner was conditionally released from DOCCS custody to post-release parole supervision. His supervision was subsequently transferred to the State of Texas pursuant to the uniform act for out-of-state parolee supervision. On August 19, 2012 petitioner was arrested in Texas in connection with new criminal charges. He was released on bail on August 28, 2012. A New York parole warrant was apparently lodged against petitioner on September 26, 2012 and on October 31, 2012 petitioner was arrested pursuant to that warrant and taken back into local custody in Texas. Petitioner ultimately pled guilty in connection with the Texas criminal charges and was sentenced in that state to a 2-year term of incarceration. On September 11, 2013 petitioner was released from his Texas incarceration and extradited to New York.

A final parole revocation hearing was held at the Westchester County Jail on October 23, 2013. The Administrative Law Judge (ALJ) presiding at petitioner's final hearing placed the following on the record:

> "We did have a prehearing conference with regard to this case. Where it was agreed that in return for a plea of guilty to Charge Number Three, which is a Rule 11 violation, it's the use of, rather, possession of crack cocaine, the remaining charges would be withdrawn with prejudice. The delinquency date sustained would be August 19, 2012.
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> Mr. Chase is a Category One [parole violator] based on a C.P.W. in the second degree, which is use of a firearm and that's a violent felony offense[1]. The minimum time assessment in Category One is actually 15 months or 12 months with mitigation. Despite the conviction that he was given a sentence in Texas; he already served a significant amount of time for that, and so, under those circumstances, given the fact that the Division's [presumably, New York State Division of Parole] records are indicating that they're running the warrant from September [presumably September 11, 2013 when petitioner was extradited to New York], I am going to go along

[1] Since the 2005 Rockland County Court sentence was imposed upon petitioner, as a second felony offender, upon his convictions of the crime of Criminal Sale of a Controlled Substance 3° (two counts), it is presumed that the reference to a conviction of the crime of Criminal Possession of a Weapon 2° is a reference to a prior conviction.

> with the minimum in the category, which, as I said, is 12 months. Is that everyone's understanding?"

The parole revocation specialist, petitioner's attorney and petitioner himself all responded in the affirmative. Petitioner then entered his plea and the remaining parole violation charges were withdrawn with prejudice.

In discussing the 12-month delinquent time assessment recommended by the Parole Revocation Specialist, petitioner's attorney stated that petitioner " . . . did serve a substantial amount of time in Texas, essentially, for the same charges. This is his first violation. The Parole papers indicate that he was on parole for two years, 1 month and 10 days prior to the violation. He was - - unfortunately, he is not getting any credit for the time that the warrant of [sic] lodged in Texas [September 26, 2012] until he was brought back to New York [September 11, 2013]. For all those reasons I think 12 months is more than enough time for the punishment."

The ALJ verbally imposed a 12-month delinquent time assessment. Although the ALJ's written Parole Revocation Decision Notice also specified a 12-month delinquent time assessment (without a stated estimate of the expiration date of that time assessment), the 12-month delinquent time assessment set forth on the written document was, at some point, crossed out and replaced with a 23-month delinquent time assessment. Petitioner was received back into DOCCS custody on November 12, 2013. The DOCCS Legal Date Computation printout, dated November 22, 2013, specifies a tentative release date (expiration of the delinquent time assessment) of August 26, 2014, which is 23 months after the New York parole warrant was lodged against petitioner in Texas on September 26, 2012.

Petitioner argues, in effect, that the 12-month delinquent time assessment imposed by the presiding ALJ at the October 23, 2013 final parole revocation hearing is the only

lawfully-imposed delinquent time assessment and should have been calculated as running as of September 26, 2012, when the New York parole warrant was lodged against him in Texas. In paragraph 20 of the petition it is alleged that "[p]etitioner should have been released from this Parole violation on September 26, 2013, which completed the 12 month hold imposed that began on September 26, 2012." Thus, according to petitioner, the 12 month delinquent time assessment imposed by the ALJ on October 23, 2013 had already expired even as it was being uttered.

A delinquent time assessment " . . . is a period of time which is fixed as a result of a final parole revocation hearing and which determines a date by which time the parole violator will be eligible for re-release." 9 NYCRR §8002.6(a). A time assessment " . . . will commence running on the date that the parole violation warrant was lodged." 9 NYCRR §8002.6(b)(1). "Time assessments will be calculated in the same way for all parole violators for whom a time assessment has been imposed, irrespective of whether the violator is in a local or State correctional facility, and irrespective of whether there are criminal charges pending against the parole violator." 9 NYCRR §8002.6(b)(2).[2]

The Court has experienced some difficulty in attempting to understand the applicability of the above-quoted regulatory provisions to the facts and circumstances of this case. Although 9 NYCRR §8002.6(b)(1) specifies that a delinquent time assessment will commence running on the date the parole violation warrant was "lodged," the Court

[2] The Court notes that certain provisions of Penal Law §70.45(5)(iv) appear ro be in conflict with these regulatory provisions. "An alleged violation of any condition of post-release supervision shall be initiated, heard and determined in accordance with the provisions of subdivisions three and four of section two hundred fifty-nine-i of the executive law." Penal Law §70.45(4). Penal Law §70.45(5)(d)(iv) provides, in relevant part, that "if the person [found to have violated a condition of post-release supervision at a final parole revocation hearing] os ordered returned to the department of corrections and community supervision, the person shall be required to serve the [delinquent] time assessment before being re-released to post-release supervision . . .The time assessment shall commence upon the issuance of a determination after a final hearing . . ." Notwithstanding the foregoing, counsel for the respondent does not argue that the original 12-month delinquent time assessment in this case should have been calculated as commencing to run as of the conclusion of a final parole revocation hearing on October 23, 2013.

is unaware of any statutory or regulatory definition of that term. Other statutes and regulations refer to a parole violation warrant being "issued" (Executive Law §259-i(3)(a)(i) and 9 NYCRR §8004.2(b)) as well as to a parole violation warrant being "executed" (Executive Law §259-i(3)(a)(ii) and 9 NYCRR §8004.2(e)), there is no corresponding reference to a parole violation warrant being "lodged."

In paragraph seven of respondent's Return it is asserted that "[o]n or about September 26, 2012, the New York State Division of Parole issued warrant #621319 and lodged the same with the Harris County [Texas] Sheriff's Department and the Texas Department of Corrections." (Emphasis added). Petitioner, however, was not in the custody of the Harris County Sheriff or the Texas Department of Corrections on September 26, 2012 since he had been released on bail on August 28, 2012 and apparently reporting to supervising Texas parole authorities after that date. Petitioner was not taken back into Texas custody (pursuant to the New York parole warrant) until October 31, 2012. Thus, to the extent the New York warrant was deemed to be "lodged" on September 26, 2012, strict application of the provisions of 9 NYCRR §8002.6(b) would lead to the result that any subsequently-imposed delinquent time assessment would have commenced running while petitioner was at liberty (on bail) in Texas, subject to parole supervision in that state.

While 9 NYCRR §8002.6(b)(2) states, in relevant part, that time assessments will be calculated the same way for all parole violators " . . . irrespective of whether there are criminal charges pending against the parole violator," the regulation does not specifically address the issue of how a time assessment is to be calculated with respect to a parole violator - like petitioner - whose out-of-state criminal charges were no longer pending after an out-of-state conviction/sentencing. Put another way, should a delinquent time assessment be calculated as continue to run during the period of time the parole violator

was serving a sentence imposed following an out-of-state conviction, prior to his/her return to custody of New York authorities?

Under the specific facts and circumstances of this case the Court finds it unnecessary to attempt to resolve the above-referenced difficulties associated with the application of the provisions of 9 NYCRR §8002.6. It is clear from the transcript of the final parole revocation hearing that the ALJ, attorney for petitioner and the petitioner himself all expected the 12-month delinquent time assessment to be calculated as commencing to run on September 11, 2013, when petitioner was received back in New York State after extradition from Texas. Thus, it is presumed that they all expected such delinquent time assessment to expire on September 11, 2014. Viewed in the light of this expectation, the determination to amend the 12-month delinquent time assessment (commencing to run on September 11, 2013 and expiring on September 11, 2014) to a 23-month delinquent time assessment (commencing to run on September 26, 2012 and expiring on August 26, 2014) can be viewed as ministerial/corrective in nature in that such amendment merely served to implement the expectations of the parties at the final parole revocation hearing.

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 17, 2014 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge