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| <b>People ex rel. Seale v Warden, Otis Bantum<br/>Corr. Ctr.</b>                                                                                                                                                                                                             |
| 2014 NY Slip Op 33496(U)                                                                                                                                                                                                                                                     |
| June 25, 2014                                                                                                                                                                                                                                                                |
| Supreme Court, Bronx County                                                                                                                                                                                                                                                  |
| Docket Number: 250020-14                                                                                                                                                                                                                                                     |
| Judge: Robert A. Sackett                                                                                                                                                                                                                                                     |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX: PART T 23

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THE PEOPLE OF THE STATE OF NEW YORK  
ex. rel. GABRIEL SEALE  
B&C #141-13-11623 NYSID# 00747924-M  
WARRANT# 669407

Petitioner,

-against-

**DECISION AND ORDER**  
Index # 250020-14

WARDEN, Otis Bantum Correctional  
Center; and N.Y.S. DEPARTMENT OF  
CORRECTIONS and COMMUNITY  
SUPERVISION,

Respondents.

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Present: The Honorable Robert A. Sackett

Petitioner (Gabriel Seale), by his attorney, Omar R. Fortune, Esq. (Legal Aid Society), brings the instant writ alleging that the waiver of his preliminary hearing was invalid because it was not voluntary, knowing and intelligent in that the waiver did not encompass the additional six charges (charges 6-11) subsequently served upon the petitioner in the supplemental violation of release report following his initial waiver. Petitioner argues that because he was not afforded proper and accurate notice of the violation charges against him, and because he was not given a preliminary hearing, that he must be released and restored to parole supervision.

Respondents (The Division) by Anna M. Hehenberger, Esq. (Office of the NYS Attorney General), makes a general denial and argues that petitioner's claims are without merit and should be dismissed. The Division argues that petitioner's claim is barred due to his pending criminal matter, that supplemental notice is not required beyond the supplemental violation report and any violation would not be fatal; and, that there is just cause to detain the petitioner until a determination on the merits is made at a final hearing.

Petitioner was incarcerated following a 2011 criminal conviction in New York County Supreme Court for Criminal Possession of a Controlled Substance in the Fifth Degree. On or about September 11, 2012, the petitioner was released to the DEPARTMENT OF CORRECTIONS and COMMUNITY SUPERVISION (DOCCS) for parole supervision and agreed to adhere to certain conditions imposed upon him by DOCCS. Prior to his release, DOCCS informed him, and petitioner acknowledged in writing, that failure to abide by these conditions would result in the revocation of his parole.

On or about September 18, 2013, following his arrest for an alleged robbery, parole violation warrant #669407 was lodged against the petitioner by DOCCS. On or before September 23, 2013, the petitioner was served with the Notice of Violation (NOV) and the Violation of Release Report (VORR). The VORR listed five charges against the petitioner. The charges allege violations of the conditions of parole release under rule #2, rule#4 and rule #13, all of which are technical violations related to approved residence, curfew violations, scheduled office visits and changing approved residence without the consent and/or approval of his parole officer. Following his receipt of these charges the petitioner waived his right to a preliminary hearing. On September 30, 2013, the petitioner was produced at the Rikers Island Judicial Center (RIJC) for his final parole hearing. The matter was adjourned to October 17, 2013. On October 17, 2013, the petitioner was produced and served with a Supplemental Violation of Release Report detailing an additional six charges related to the criminal matter which led to the petitioner's arrest on September 18, 2013. The new and additional charges (#6 through #11) arose out of the following incident: "On 9/18/13 the subject (petitioner) was arrested at 919

Myrtle Avenue, Brooklyn, N.Y. by the 79<sup>th</sup> Pct. Complaint #2013-079-6593 had been filed prior stating on 8/30/13 at approximately 08:50 hrs inside a Deli located at 920 Myrtle Avenue, Brooklyn, N.Y. the subject placed a razor blade around his brother (sic) Nathaniel Seale (sic) throat and removed \$200.00 in U.S. Currency from Nathaniel Seale (sic) pocket.”<sup>1</sup> On the October 17 appearance at the RIJC, petitioner’s counsel objected to the added charges on the basis that his waiver to the initial preliminary hearing cannot include the SVORR containing charges 6 through 11 as he was not apprised of these additional charges until October 17, 2013, nearly one month after he was served with the initial VORR.

Pursuant to Executive Law 259-i(3)(c)(i) “Within fifteen days after the warrant for retaking and temporary detention has been executed, unless the releasee has been convicted of a new crime committed while under *presumptive release*, parole, conditional release or post-release supervision, the board of parole shall afford the alleged *presumptive release*, parole, conditional release or post-release supervision violator a preliminary revocation hearing before a hearing officer designated by the board of parole. Such hearing officer shall not have had any prior supervisory involvement over the alleged violator.” At the preliminary revocation hearing, the Division must establish that there is probable cause to believe that the parolee has violated one or more conditions of his parole in an important respect. More specifically, the relevant portions of Executive Law §259-i(3)(c)(iii-vi) provides that, *inter alia*:

(iii) The alleged violator shall . . . have the right to appear and speak in his or her

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<sup>1</sup>Supplemental Violation of Parole form dated 10/3/13, under the heading titled “FURTHER DEVELOPMENTS/CIRCUMSTANCES. This form was signed at the bottom by A. Gould (parole officer) and L. McCleary (senior parole officer) with a handwritten notation at the bottom “charged to 10/31 to Division”.

own behalf; that he or she shall have the right to introduce letters and documents; that he or she may present witnesses who can give relevant information to the hearing officer; *that he or she has the right to confront the witnesses against him or her. Adverse witnesses may be compelled to attend the preliminary hearing unless the prisoner has been convicted of a new crime while on supervision or unless the hearing officer finds good cause for their non-attendance.* As far as practicable or feasible, any additional documents having been collected or prepared that support the charge shall be delivered to the alleged violator.

(iv) . . . *The standard of proof at the preliminary hearing shall be probable cause to believe that the presumptive releasee, parolee, conditional releasee or person under post-release supervision has violated one or more conditions of his or her presumptive release, parole, conditional release or post-release supervision in an important respect.* Proof of conviction of a crime committed while under supervision shall constitute probable cause for the purposes of this section.

(v) At the preliminary hearing, the hearing officer shall review the violation charges with the alleged violator, direct the presentation of evidence concerning the alleged violation, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross examination of those witnesses in attendance.

(vi) At the conclusion of the preliminary hearing, the hearing officer shall inform the alleged violator of his or her decision as to whether there is probable cause to believe that the presumptive releasee, parolee, conditional releasee or person on

post-release supervision has violated one or more conditions of his or her release in an important respect. *Based solely on the evidence adduced at the hearing*, the hearing officer shall determine whether there is probable cause to believe that such person has violated his or her presumptive release, parole, conditional release or post-release supervision in an important respect. The hearing officer shall in writing state the reasons for his or her determination and the evidence relied on. A copy of the written findings shall be sent to both the alleged violator and his or her counsel.

Courts have held that a parolee is entitled to informative notice that details the charges against him (see, *People ex rel. Levy v Walters*, 87 AD2d 620 [2nd Dept 1982]; *People ex rel. Johnson v New York State Bd. of Parole*, 71 AD2d 595 [1st Dept 1979]; see also *People ex rel. Rivera v New York State Div. of Parole*, 83 AD2d 918 [1st Dept 1981]). Clearly, the purpose of this notice is to inform the alleged parole violator of the basis for the violation, and to enable her/him to adequately prepare for the hearing [see Executive Law §259-i(3)(c)(iii)(vi) and (v); see also, *People ex rel Levy v. Walters* 87 AD2d 620 (1982) “The fact that petitioner had some notice, rather than none at all, in advance of the final revocation hearing is irrelevant: the issue is adequacy of the notice. Even were we to find that non-delivery of the first and non-return of the second of these mailed notices were sufficient to meet the statutory 14-day advance notice requirement, we would reverse because petitioner is entitled to not only *timely* notice, but also *informative* notice, detailing the charges against him”.]

In this case, the petitioner was initially informed solely of the violation charges regarding

the technical violations of his residence, and curfew in the VORR. The charges contained in the SVORR occurred on a different date, are totally unrelated to the initial charges in the VORR, and were materially different (see, *People ex rel Davis v. Warden, Ana M. Kross Center*, 929 NYS2d 201 [2011]). The SVORR filed against the petitioner over one month following his arrest and detention and approximately one month after he waived his right to the preliminary hearing to the technical violations cannot be said to encompass the new and additional charges regarding a robbery charge. This Court would be hard pressed to extend the petitioner's waiver to the initial preliminary hearing on technical violations to the more serious charges in the subsequently noticed SVORR. Consequently, the additional charges contained in the SVORR must be dismissed as there was no issue regarding the initial VORR regarding the technical violations properly served and noticed to the petitioner.

Wherefore, the Writ is sustained only to the extent of dismissing the additional charges (6 though 11) contained in the SVORR, and the petition for the Writ of Habeas Corpus is otherwise denied.

This constitutes the decision and order of the court.

Dated: Bronx, New York  
June 25, 2014

A handwritten signature in black ink, appearing to read 'R. Sackett', written over a horizontal line.

Hon. Robert A. Sackett, J.S.C.

Papers considered: Writ of Habeas Corpus Petition of Gabriel Seale (Legal Aid Society by Omar R. Fortune, Esq. dated January 10, 2014; Writ of Habeas Corpus Decision of Honorable Sharon A.M. Aarons, J.S.C., (January 10, 2014); Affirmation in Opposition to Verified Petition for a Writ of Habeas Corpus by Respondent (Attorney General of State of New York by AAG Anna Hehenberger (February 14, 2014); Affirmation in Reply to Opposition to Writ of Habeas Corpus (October 9, 2013) (Legal Aid Society by Kerry Elgarten, Esq.); and Legal Aid exhibits C & D received by the Court on April 14, 2014).