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

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In the Matter of the Application of
JEFFREY ORTIZ, #11-A-0877,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2015-0546.78
INDEX # 2015-917
ORI # NY016015J

-against-

DONALD G. UHLER, Superintendent, Upstate Correctional Facility, and **TINA M. STANFORD,** Chairwoman, NYS Board of Parole,
Respondents.

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This proceeding was originated by the Petition (denominated "Writ of Habeas Corpus to Inquire for Writ of Habeas Corpus into the Cause of Detention") of Jeffrey Ortiz, verified on November 25, 2015 and filed in the Franklin County Clerk's office on December 18, 2015. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. An Order to Show Cause was issued on December 23, 2015. Respondents moved to dismiss but by Decision and Order dated March 15, 2016 the motion was denied and they were directed to submit a Return. The Court has since received and reviewed respondents' Answer and Return, verified on April 8, 2016 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated April 8, 2016. No Reply thereto has been received from petitioner.

Petitioner is serving a controlling indeterminate sentence of 2 to 6 years imposed in Ulster County upon his convictions of the crimes of Burglary 2° and Burglary 3°. He

was released from DOCCS custody to Parole Supervision on November 19, 2012. On February 20, 2014, however, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in four separate respects. Parole Violation Charge #1 alleged that petitioner " . . . violated Rule #8 of his conditions of release in that on 9-9-13, at approximately 7:00 p.m., outside of the Ollie's Bargain Store, Dunning Plaza, Middletown, NY, he punched the victim . . . in the face." Parole Violation Charge #2 alleged that at the same time in the same location petitioner forcibly took personal items from the same victim. Following a preliminary parole revocation hearing conducted on March 4, 2014 a probable cause determination was made with respect to a different parole violation charge (#4).

Following a final parole revocation hearing, held at the Ulster County Jail and concluded on May 19, 2015, Parole Violation Charges #1 and #2 were sustained and the remaining two charges were withdrawn. Petitioner's parole was revoked with a sustained delinquency date of September 9, 2013 and a delinquent time assessment was imposed directing that petitioner be held to his maximum expiration date. The document perfecting petitioner's administrative appeal from the parole revocation determination was received by the DOCCS Board of Parole Appeals Unit on August 25, 2014. Although it does not appear that the Appeals Unit issued its findings and recommendation within the four-month time frame set forth in 9 NYCRR §8006.4(c), a decision on administrative appeal was, in fact, issued on or about April 29, 2015. This proceeding ensued.

Petitioner first appears to challenge, on evidentiary grounds, the determinations sustaining Parole Violation Charges #1 and #2. In this regard petitioner asserts that he "denied" ever having contact with the victim identified in the written charges. According

to petitioner, he " . . . never punched or took property from complainant. Petitioner was never outside Ollie's Bargain Store at the date alleged."

A court reviewing a determination to revoke parole may not make its own determination based upon its own assessment of the credibility of witnesses. Rather, the reviewing court is limited to an examination of the record to determine if the required procedural rules were followed and to determine if there is any evidence which, if credited, would support the revocation determination. *People ex rel Brazeau v. McLaughlin*, 233 AD2d 724, *lv denied* 89 NY2d 810. *See People ex rel Crespo v. Yelich*, 71 AD3d 1214 and *People ex rel Gonzalez v. LaClair*, 63 AD3d 1493, *lv denied* 13 NY3d 705.

At the April 28, 2014 session of petitioner's contested final parole revocation hearing the victim testified that on September 9, 2013, at approximately 7:00 PM, he was confronted by two men in the parking lot outside Ollie's Bargain Store. In his testimony the victim identified petitioner as one of the two men in question and specifically stated that it was petitioner who punched him in the face and forcibly removed a watch from his wrist. Petitioner, for his part, did not testify at the final hearing. The only witness called by petitioner was his mother, who testified that she observed her son "hanging out with some friends" in the Village of Ellenville on September 9, 2013 at the approximate time of the incident underlying Parole Violation Charges #1 and #2.

In the written decision following the final hearing the presiding Administrative Law Judge (ALJ) found the testimony of the victim to be "credible" but did not credit the alibi testimony of petitioner's mother, specifically finding her to be "biased" in favor of her

son. Under the previously-referenced limited standard of review, the Court finds no basis to disturb the ALJ's determination sustaining Parole Violation Charges #1 and #2.

The only other argument articulated by petitioner is that his ongoing incarceration in DOCCS custody is illegal " . . . due to criminal charges being dismissed." In this regard it is noted that a copy of a Certificate of Disposition issued by the Wallkill Town Court indicates that three charges against petitioner (Assault 3°, Petit Larceny and Harassment 2°) were dismissed pursuant to Criminal Procedure Law §170.55 (adjournment in contemplation of dismissal) on July 6, 2015. Although it is not apparent from the four corners of the Certificate of Disposition, this Court presumes that the charges referenced in the certificate arose out of the September 9, 2013 incident outside Ollie's Bargain Store. For the reason set forth below, however, this Court finds that the post-final hearing dismissal of criminal charges associated with the September 9, 2013 incident does not warrant the issuance of a judgment vacating the results of petitioner's final parole revocation hearing.

Even where an accused parole violator is acquitted of the criminal charges underlying his/her parole violation charges prior to a final hearing, such acquittal does not constitute a bar to the revocation of parole in the absence of an indication that the acquittal was based upon the defendant/accused parole violator prevailing on an affirmative defense to the criminal charges. *See People ex rel Matthews v. New York State Division of Parole*, 58 NY2d 196 and *People ex rel Kinzer v. Williams*, 256 AD2d 1240. In the case at bar there is simply no suggestion that petitioner was acquitted of the criminal charges arising out of the September 9, 2013 incident as a result of his prevailing on an affirmative defense to the criminal charges.

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: May 19, 2016 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice