

<b>Matter of Ifill v NYS Dept. of Corr.</b>
2019 NY Slip Op 31161(U)
April 26, 2019
Supreme Court, Seneca County
Docket Number: 52567
Judge: Daniel J. Doyle
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STATE OF NEW YORK  
SUPREME COURT      SENECA COUNTY

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In the Matter of  
RICHARD SUNDAY IFILL DIN #17A3409

Petitioner,

Decision and Order

vs

Index No. 52567

NYS DEPARTMENT OF CORRECTIONS,  
ACTING COMMISSIONER ANNUCI and the  
SUPERINTENDENT OF FIVE POINTS  
CORRECTIONAL FACILITY

Respondent.

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Petitioner commenced this Article 78 Petition by way of Petition and Order to Show Cause. The Petition sought to challenge the collection of \$100 as a result of two DNA fees imposed for convictions in New York County in 2017 and Bronx County in 2018 arguing that those fees ought not to have been imposed based upon a previous fee for a conviction in 1987 and the collection of DNA as a result of that conviction. The Order to Show Cause directed Petitioner to serve the Respondent no later than February 23, 2019 and provided that service could be effectuated by ordinary mail. Petitioner failed to effectuate service in accordance with the Order to Show Cause. Petitioner filed an Affidavit of Service stating that he mailed the Order to Show Cause on March 1, 2019.

Thereafter, in a Notice of Motion dated March 11, 2019, Respondent

moved to dismiss the Petition on the grounds of lack of personal jurisdiction. Petitioner opposed the motion by the submission of a “Sworn Affirmation Affirmed Under Penalty of Perjury.” This “affirmation” was not notarized and in it, the Petitioner contradicts the Affidavit of Service that he swore to before a notary public in which he stated he served the Order to Show Cause on March 1, 2019.

Failure to comply with service directives set forth in an order to show cause require dismissal of the petition for lack of personal jurisdiction (*Smith v Annucci*, 166 AD3d 1172, 1173 [3d Dept 2018]; *Marino v Annucci*, 146 AD3d 1241, 1241 [3d Dept 2017]). The Petitioner did not serve the Respondent in accordance with the Order to Show Cause and the Petitioner’s “affirmation” which was not notarized cannot contradict what he stated in his Affidavit of Service. Even had the Petitioner obtained jurisdiction over the Respondents, he would not be entitled to relief. The DNA fees arise out of a criminal conviction that could be challenged on a direct appeal from the criminal conviction (see Penal Law § 60.35) and the Petitioner may not maintain an Article 78 action as the Petitioner had an adequate alternative remedy (see *Tyler v Forma*, 231 AD2d 891, 891 [4th Dept 1996]). Moreover, as the Appellate Division, Second Department has held, there nothing in the language of Penal Law § 60.35[1][a][v] “that precludes the imposition of subsequent DNA databank fees upon a defendant who has

previously provided a DNA sample in connection with a felony conviction  
(*People v Cooper*, 88 AD3d 1009, 1010 [2d Dept 2011]).

Based upon the foregoing, the motion to dismiss by the Respondent  
pursuant to a lack of personal jurisdiction (CPLR 3211[a][8]) is granted and the  
Petition is dismissed.

Dated: April 26, 2019

A handwritten signature in black ink, appearing to read 'D. J. Doyle', written over a horizontal line.

The Honorable Daniel J. Doyle  
Supreme Court Justice