

**Matter of Johnson v New York City Dept. of
Probation**

2012 NY Slip Op 32108(U)

August 6, 2012

Sup Ct, NY County

Docket Number: 400561/12

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCHLESINGER ALICE SCHLESINGER
Justice

PART IA PART 16

JOHNSON, ALPHONSO

INDEX NO.

400561/12

MOTION DATE

- v -
NYC. DEPT. PROBATION

MOTION SEQ. NO.

01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

FILED

AUG 09 2012

NEW YORK COUNTY CLERK'S OFFICE

AUG 06 2012

Dated: August 6, 2012

Alice Schlesinger
ALICE SCHLESINGER c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
In the Matter of the Application of

ALPHONSO JOHNSON #95-A-1827

Petitioner,

-against -

Index No. 400561/12
Motion Seq. No. 001

NEW YORK CITY DEPARTMENT OF PROBATION,

Respondent.
-----X

FILED

AUG 09 2012

SCHLESINGER, J:

On September 4, 1980, petitioner Alphonso Johnson was sentenced in New York County Supreme Court to 15 years to Life imprisonment. He had gone to trial and was convicted of murdering Donna Perry. Mr. Johnson was also charged at the time with the Attempted Murder of Jesse Reed. However, he was acquitted of that crime.

NEW YORK
COUNTY CLERK'S OFFICE

Mr. Johnson, having served his minimum time, has come before the Parole Board several times. However, he has been denied release and continues to be incarcerated at the Otisville Correctional Facility.

In this Article 78 proceeding he is asking the Court to direct the New York City Department of Probation to amend his Pre-Sentence Report that was submitted to the Supreme Court before his sentencing. The reason Mr. Johnson gives for this requested relief is his belief that the Board of Parole continues to use incorrect information that he also shot a male victim (Mr. Reed) at the time that he shot Ms. Perry. As exhibits to his petition, he includes the Status Reports from appearances before the Boards in August 2008 (Exh B) and August 2010 (Exh C) where he was denied release. Both Reports contain the following statement under the heading "Present Offense":

[* 3]

On April 19, 1978, in Manhattan, the inmate shot his girlfriend in the head. She died 10 days later. He also shot a male victim causing serious injuries.

Mr. Johnson says that the Board of Parole has continuously used the second shooting to deny him parole. This information should be excised from the Pre-Sentence Report because, he states, he was found not guilty of shooting a second victim.¹

In the "decision" part of the minutes, Commissioner Thompson states the following as the first factor in finding "a reasonable probability that you [Mr. Johnson] would not live and remain at liberty without violating the law..." (line 11, page 8):

Due to the serious nature of the instant offense, Murder, 2nd, involved you shooting the victim in the head, ultimately causing her death. You also shot a second victim causing serious physical injury.

Mr. Johnson did bring this to the attention of the Parole Appeals Unit, where he sought a reversal of the Board's decision not to release him. As his second claim to that body, he asserted that the decision was based upon erroneous information, "specifically he was found not guilty to shooting a second victim" (Exhibit F). The Board then replies that this information came from the Pre-Sentence Investigation Report, which the Board "may rely on the information contained therein." The Board adds that the time to challenge the accuracy of the information was before the sentencing court.

¹Despite the acquittal, both the Board and petitioner, at the latter's 2010 appearance, refer to the Reed shooting in the following way on page 3, line 3, of the minutes of the hearing held on September 15, 2010 (Exh E to petition): Mr. Johnson is asked, "You also shot a second male victim, causing serious injuries. How many times would you say you shot him?" His answer is "once". He was then asked, "Why" and he attempted an explanation.

That is why Mr. Johnson has brought this proceeding, to have Probation "correct" the Report. Several things should be noted in this regard. First, in other places of the Report, specifically on page 9 of the Report under the heading "Defendant's statement," the Report says, "The defendant was acquitted of the other charges". Also, on page 15 the Report states, "He now stands convicted of the murder of the mother of his child." No mention is made of the shooting of another person. Second, the petitioner certainly does not help himself or his argument when he answered, when asked, that he had shot Mr. Reed "once".

In the opposition submitted by the Department of Probation (Department), its counsel points out that the Parole Board relied on multiple factors in denying Mr. Johnson release and that the Pre-Sentence Report was submitted to defendant's counsel as well as the presiding judge before his sentencing. That was the time to make any objections.

The Department also asserts that this petition is untimely in that it is "premature"! (Note that Mr. Johnson was sentenced in 1980). This argument is premised on, what I believe, was erroneous advice given to Mr. Johnson. He was told that he had an available legal remedy, which was to file a "Motion to Amend the Pre-Sentence Report" in the Criminal Court.

I do not believe that such a motion is legally sound. Nor do I think that in Criminal Court such a motion would be heard on the merits. Unfortunately, no legal or statutory reference for such a motion was provided either to Mr Johnson or the Court. This information appeared in counsel's January 9, 2012 letter to petitioner responding to his "recent correspondence regarding errors in your pre-sentence report" (Exh A to Petition).

[*5]

Further, the Department urges that the petition is procedurally barred by §7801(2) of the CPLR, which precludes a challenge to a determination "made in a civil action or criminal matter." I agree with that assertion because allowing such a procedure would bypass the rules involving appeals.

Mr. Johnson filed a Reply wherein he sought to refute some of the arguments presented in the opposition. He also cited to what he believed was relevant case law to persuade this Court. But frankly, those cases he does cite and their holdings do not in fact support his position. For example, he points to a Sixth Circuit decision, 556 F2d 391, for the proposition that the information complained of in the report must in fact be false, and another case for the proposition that the information must be not only false but to a constitutionally significant degree.

That is the problem with the relief being sought. The probation report is not, in fact, false. The complained of statement is on page 6 of the Report under the heading "Abstract of Indictment". The Department took from the indictment the two allegations of criminal behavior for which the Grand Jury voted an indictment. The statement, therefore, was true. That is what the Grand Jury charged.

The fact that Mr. Johnson was acquitted of the Attempted Murder of Mr. Reed, while relevant to the complete story and in fact noted on page 9, does not make the reference to the original charges false or even meaningless. The Parole Board does have a right to consider alleged bad acts of the petitioner, as well as the crime he was convicted of.

Mr. Johnson certainly has a right to try and explain the circumstances of his encounter with Mr. Reed to perhaps give an insight into why the shooting occurred and why he believes he was acquitted of that charge. However, he does not have a right to strike

[* 6]
the phrase from the Report because it is an accurate statement of what the original indictment charged. Therefore, for this and other reasons involving timeliness (i.e., this proceeding was commenced too late) and statutory rules, the relief is denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements. The Clerk is directed to enter judgment in favor of the respondent.

Dated: August 6, 2012

AUG 06 2012

Alice Schlesinger
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AUG 09 2012
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