STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
CURTIS GLENN,#09-R-0833,
a/k/a KURTIS GLENN

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2012-0506.21
INDEX # 139429
ORI # NY044015J

-against-

ELIZABETH A. O'MEARA, Superintendent,
Gouverneur Correctional Facility, and
ANDREA EVANS, Chairwoman,
NYS Board of Parole,

Respondents.

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The Court has before it the Amended Petition for a Writ of Habeas Corpus of Simone Petromelis, Esq., the former Attorney for Curtis Glenn, verified on March 27, 2012 and originally filed in Bronx County. Mr. Glenn, who will hereinafter be referred to as the petitioner, is challenging his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. By Order dated May 30, 2012 the Supreme Court, Bronx County (Hon. Edward Davidowitz) relieved Attorney Petromelis of her assignment to represent petitioner and directed that venue be transferred from Bronx County to Ulster County. By Order dated June 27, 2012 the Supreme Court, Ulster County (Hon. Christopher E. Cahill) directed that venue be transferred from Ulster County to St. Lawrence County. The papers originally filed in Bronx County were received in the St. Lawrence County Clerk's office on July 17, 2012.

The Court issued an Order to Show Cause on July 26, 2012 and has received and reviewed respondents' Return, dated September 21, 2012, as well as petitioner's Reply

thereto (denominated Response to Return) sworn to on October 1, 2012 and filed in the St. Lawrence County Clerk's office on October 3, 2012.

On February 26, 2009 petitioner was sentenced in Supreme Court, Suffolk County, to a determinate term of 3 years, with 3 years post-release supervision, upon his conviction of the crime of Attempted Robbery 2°. He was conditionally released from DOCCS custody to post-release supervision on December 31, 2010. On September 28, 2011, however, petitioner was served with a Notice of Violation/Violation of Release Report charging him with violating the conditions of his release in five separate respects. Parole Violation Charge #1 alleged that on September 26, 2011 petitioner knowingly and unlawfully possessed 21 bags of marijuana. Parole Violation Charge #2 alleged that on or before September 26, 2011 petitioner used marijuana without proper medical authorization. Parole Violation Charge #3 alleged that on September 26, 2011 petitioner " . . . violated Rule #8 of the Conditions Governing his Release in that he did resist arrest by flailing his arms, causing injury to PO Dwayne Ancrum's [Ingram's ?] left forearm." Parole Violation Charge #4 alleged that on September 26, 2011 petitioner " . . . violated Rule #8 of the Conditions Governing his Release in that he did resist arrest by flailing his arms, causing PO Marcellus Randolph to sustain an injury to his right shoulder." Parole Violation Charge #5 alleged that on September 26, 2011 petitioner knowingly and unlawfully possessed a pair of brass knuckles.

Probable cause was found with respect to Parole Violation Charge #2 following an October 11, 2011 preliminary hearing. A contested final parole revocation hearing was conducted on January 5, 2012. At the conclusion of the final hearing the presiding Administrative Law Judge (ALJ) sustained Parole Violation Charges #2, #3 and #4 but found that Parole Violation Charges #1 and #5 had not been proven by preponderance of legally sufficient evidence. Petitioner's post-release supervision was revoked and the ALJ

imposed a delinquent time assessment directing that petitioner be held to his maximum expiration date. Although a notice of administrative appeal was filed with the DOCCS Board of Parole Appeals Unit on February 7, 2012, petitioner never perfected an administrative appeal. This proceeding ensued.

The parole violation charges stemmed from a home visit/residence search conducted by multiple parole officers on September 26, 2011. At that time there was an alleged physical altercation between petitioner and several parole officers in the hallway outside petitioner's apartment. The marijuana and brass knuckles were allegedly found when the parole officers subsequently entered petitioner's apartment. At issue in this proceeding are the circumstances under which the home visit/residence search was undertaken.

Parole Officer Sharon Joseph, petitioner's supervising parole officer, testified that on September 26, 2011 she received a phone call from a representative of the New York City Policy Department (NYPD) and was informed that petitioner possibly had a gun and drugs at his residence. According to P.O. Joseph, " . . . what was said was that a friend of his [petitioner's] had been shot and killed and Mr. Glenn was there at the time and they [NYPD] believe he might have taken the weapon that, that his friend had." When questioned as to whether the phone call was the impetus for the September 26, 2011 home visit/residence search, the following colloquy occurred:

> "PAROLE OFFICER SHARON JOSEPH: Well I normally do home visits and at the point that I conference it with my supervisor as well as my area supervisor they felt for my safety because I'm the only one who do the home visits at his house that we should at least check it out.

MR. JEREMY FREDRICKSEN [attorney for petitioner]: You didn't have a home visit scheduled for that day for him though, did you?

PAROLE OFFICER SHARON JOSEPH: Um, no.

MR. JEREMY FREDRICKSEN: Okay, so it was the phone calls from the police that caused you to make that home visit.

PAROLE OFFICER SHARON JOSEPH: Yes."

When petitioner's attorney then asked P.O. Joseph if the NYPD phone call was the subject of a September 26, 2011 chronological entry in her records, he was cut short by the ALJ and, in effect, directed to address what took place during the home visit/residence search rather than the circumstances underlying the decision to conduct the home visit/ residence search.

After P.O. Joseph had completed her testimony, and following a lunch adjournment, petitioner's attorney sought to re-call P.O. Joseph to testify with respect to chronological records that were apparently provided to him (petitioner's attorney) that day. According to petitioner's attorney, " . . . [T]here's a basis for suppression of the search . . ." At that point the following colloquy occurred:

"THE COURT [ALJ]: Yeah but that's not gonna be addressed to me you could file that, if there's a Criminal Case you can file it in Criminal Court or you could have brought a writ perhaps (inaudible) in Supreme Court.

MR. JEREMY FREDRICKSEN: Well I just found about this chrono Your Honor. I wouldn't need to recall the Parole Officer if the Division is willing to concede what that, what that chronological entry would be otherwise the testimony of the Parole Officer [sic].

MS. SHAW
[Parole Revocation Specialist]: I, the Division would not, the Division, it is part of his [presumably, petitioner's] conditions of release that his rule four is that the Division has a right to search and visit his place of residence for any reason at any time. So regardless to what the reason was the Division has within its scope a reason to search an apartment for whatever the reason may be. Whether it be from a phone call or for, for, from anything from just wanting to search. So the relevance for our case this is not important in relevance to the issues with the Parole Officer's or even to me (inaudible) to the charges as he admitted that what was found was his . . .

MR. JEREMY FREDRICKSEN: Your Honor the Division of Parole and Parole Officers are not allowed to act as agents of law enforcement of the police to perform searching that would otherwise be [inadmissable]. As this chronological entry makes clear the police called the Parole Officer and asked if they could go and search the house. The Parole Officer said yes, but not with the police and then the Parole Officer went and conducted the search . . . I'm just asking them [Parole] to concede rather than calling in Parole Officer Joseph I'm asking them to concede that this is her chronological entry."

The ALJ, while continuing to maintain that the suppression issue would have to be addressed in a different forum, went on to state that he would nevertheless have a copy of the chronological record marked for identification purposes as petitioner's Exhibit A and further stated that he would " . . . read it into evidence . . . [i]n the event you

[petitioner's attorney] want to file a proceeding that would be more appropriate . . ." The Court notes that an apparent copy of the chronological entry is annexed to the final hearing record as part of Exhibit F of Respondents' Return.

Citing People v. Candelaria, 63 AD2d 85 and *People ex rel Vasquez v. Warden*, 2010 NY Slip Op 51507(U), it is asserted in the Amended Petition that the September 26, 2011 home visit/residence search violated petitioner's fourth amendment rights because the parole officers conducting such home visit/residence search acted as agents for the NYPD. As set forth in paragraph 15 of the Amended Petition, " . . . the search performed by PO Joseph and her colleagues was illegal in that they acted solely as an agent for the NYPD who sidestepped probable cause requirements in trying to get a proper search warrant. In doing so, marijuana and brass knuckles were allegedly found in relator's apartment which should be excluded due to the illegal search. Also, if not for the illegal search, there would not have been any confrontation between relator and parole officers, which caused the arrest and a parole violation against relator."

Respondents initially asserts that this proceeding should be dismissed based upon petitioner's failure to exhaust administrative remedies through the administrative appeals process set forth in 9 NYCRR Part 8006. For the reasons set forth below, however, this Court is not persuaded that petitioner's failure to exhaust administrative remedies mandates the dismissal of this habeas corpus proceeding.

The exclusionary rule, prohibiting the use of the illegally obtained evidence, applies to all stages of the parole revocation process. *See People ex rel Piccarillo v. New York State Board of Parole*, 48 NY2d 76, *People ex rel Coldwell v. New York State Division of Parole*, 123 AD2d 458, *State v. Harder*, 8 Misc 3d 764 and *People ex rel Taylor v. Warden*, 2011 NY Slip Op 52333(U); *but see People ex rel Gordon v. O'Flynn,* 3 Misc 3d 963. Notwithstanding the foregoing, the ALJ presiding at a parole revocation hearing has

no authority to rule on suppression issues. *People ex rel Johnson v. New York State Division of Parole*, 299 AD2d 832 and *People ex rel Victory v. Travis*, 288 AD2d 932. Where a criminal action is pending with respect to the same conduct underlying the parole revocation proceedings, suppression issues can be addressed in criminal court. Where, as in the case at bar, however, no criminal action pending, an accused parole violator cannot be denied a judicial forum to litigate the suppression issue(s) related to his/her parole revocation proceedings. *People ex rel Johnson v. New York State Division of Parole*, 299 AD2d 832 and *People ex rel Victory v. Travis*, 288 AD2d 932. Thus, in the case at bar, the ALJ correctly ruled that the final parole revocation hearing was not the proper forum for petitioner to pursue the suppression/unlawful search issue and he limited the efforts of petitioner's attorney to develop such issue on the record. Since disposition of the suppression issue was beyond the authority of the presiding ALJ, and therefore not fully developed on the record, this Court perceives no reason why petitioner's failure to pursue disposition of the suppression issue at the appellate level of the administrative board (Board of Parole) precludes judicial disposition. Accordingly, the Court declines to dismiss this proceeding based upon petitioner's failure to exhaust administrative remedies.

Under the relevant provisions of Criminal Procedure Law §710.20 evidence that may be offered against a criminal defendant is subject to judicial suppression where such evidence "1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant; or . . . 4. Was obtained as a result of other evidence obtained in a manner described in [subdivision] one . . ." The Amended Petition only references two categories of tangible property allegedly obtained by means of the allegedly unlawful September 26, 2011 home visit/residence search - the bags of marijuana and the brass knuckles. This

Court notes, however, that both Parole Violation Charge #1 (relating to the 21 bags of marijuana) and Parole Violation Charge #5 (relating to the brass knuckles) were found by the ALJ presiding at petitioner's January 5, 2012 final parole revocation hearing to be " . . . not proven by a preponderance of legally sufficient evidence . . ." To the extent it is asserted in the Amended Petition that the bags of marijuana and brass knuckles, or testimony with respect to same, must be suppressed in the context of petitioner's completed final parole revocation hearing, such assertion is of academic interest only given the fact that Parole Violation Charges #1 and #5 were not sustained.

As alluded to previously, it is not only asserted in the Amended Petition that the bags of marijuana and brass knuckles found at petitioner's apartment should be suppressed, it is also asserted that if the alleged illegal home visit/residence search of September 26, 2011 had not taken place the physical altercation between petitioner and the parole officers in the hallway outside petitioner's apartment would not have occurred. That physical altercation, the Court notes, formed the basis for sustained Parole Violation Charges #3 and #4. Although not clearly expressed, it would best appear that the Amended Petition also seeks suppression of testimony with respect to the September 26, 2011 physical altercation in the context of the January 5, 2012 final parole revocation hearing. For the reasons set forth below, however, the Court finds that even if the September 26, 2011 home visit/residence search was found to constitute an unlawful search and seizure, there would be no basis to suppress testimony with respect to the physical altercation in question.

It is first noted that testimony with respect to the hallway altercation does not fall within any statutory category of suppressible evidence. Such testimony does not consist of tangible property (Criminal Procedure Law §710.20(1)) nor does it represent evidence obtained as a result of other tangible evidence obtained in a manner described in Criminal

Procedure Law §710.20(1). *See* Criminal Procedure Law §710.20(4). This Court is unaware of any authority standing for the proposition that testimony with respect to a defendant's alleged criminal conduct directed against a police officer effecting a search of defendant's residence is subject to suppression if it is subsequently determined that such search was unlawful. While not strictly on point, the Court notes that pursuant to Penal Law §35.27, "[a] person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a police officer or peace officer when it would reasonably appear that the latter is police officer or a peace officer ."

In the case at bar the Court finds that even if the September 26, 2011 home visit/residence search was determined to be unlawful (and the Court cautions the litigants that it has made no such determination), the testimony of the various parole officers regarding the physical altercation that took place in the hallway outside petitioner's apartment is not subject to suppression.

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: December 20, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge