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

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In the Matter of the Application of
KNUD BUSBY,#10-R-0215,
Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2013-0148.07
INDEX # 140846
ORI # NY044015J

-against-

SUPERINTENDENT, Ogdensburg
Correctional Facility, and **NEW YORK**
STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Elon Harpaz, Esq., The Legal Aid Society, Parole Revocation Defense Unit, 199 Water Street, New York, NY 10038, as attorney for Knud Busby, verified on February 28, 2013 and filed in the St. Lawrence County Clerk's office on March 4, 2013. Mr. Busby, who is an inmate at the Ogdensburg Correctional Facility and 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. The Court issued an Order to Show Cause on March 8, 2013 and has received and reviewed respondents' Answer/Return, verified on April 24, 2013, as well as the May 2, 2013 Reply Affirmation of Kerry Elgarten, Esq., submitted on behalf of the petitioner and filed in the St. Lawrence County Clerk's office on May 6, 2013.

On January 19, 2010 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Burglary 3°. Petitioner was most recently released from DOCCS custody to parole supervision on August 9, 2012. On September 26, 2012, however, he

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 the Conditions governing his Release in that on 09/25/12 . . . [s]ubject threatened the safety and well-being of his Paramour . . . in that he used a closed fist, striking her in her lip." Parole Violation Charge #2 alleged a curfew violation on August 12, 2012. Parole Violation Charge #3 alleged a curfew violation on September 6, 2012. Parole Violation Charge #4 alleged a curfew violation on September 25, 2012.

9 NYCRR §8004.3(b) provides, in relevant part, that "[t]he date of delinquency is the earliest date that a violation of parole is alleged to have occurred." Notwithstanding the earlier dates of the charges set forth in Parole Violation Charge #2 and Parole Violation Charge #3, the Violation of Release Report specified a delinquency date of September 25, 2012 rather than August 12, 2012. At the time he was served with the Notice of Violation/Violation of Release Report petitioner waived preliminary hearing. An Amended Violation of Release Report was subsequently issued on or about November 16, 2012. The only change in the amended report was the substitution of August 12, 2012 for September 25, 2012 as the delinquency date.

A contested final parole revocation hearing was conducted at Rikers Island on December 4, 2012. At the conclusion of the final hearing the presiding Administrative Law Judge (ALJ) sustained Parole Violation Charge #1 and Parole Violation Charge #3 but found that Parole Violation Charges #2 and #4 were not proven by a preponderance of legally sufficient evidence. Petitioner's parole was revoked, with a modified delinquency date of September 25, 2012, and a 12-month delinquent time assessment was imposed. This proceeding ensued.

Petitioner argues that his purported waiver of preliminary hearing was invalid since he did not knowingly, intelligently and voluntarily sign such waiver. In paragraphs 20, 22 and 24 of the petition it is asserted, in relevant part, that " . . . at the time Mr. Busby marked the box on the Notice of Violation Report indicating he did not want a preliminary hearing, he did so based on the representation on the form itself seeking to declare him delinquent as of September 25, not any earlier date . . .[I]n deciding whether or not to waive his preliminary hearing, Mr. Busby justifiably relied on the delinquency date stated in bold at the top of his Violation of Release of Report. There was no delinquency prior to September 25, 2012 charged at **THE TIME MR. BUSBY SIGNED THE FORM**. . . Because Mr. Busby did not make a valid wavier, yet was not given a preliminary hearing within 15 days, Respondent DOCCS violated Mr. [Busby's] due process rights under 9 NYCRR §8005.3(b) and §8005.6, NY Executive Law §259-i(3)(c)(iii), and *Morrissey* [*v. Brewer*], 408 U.S. 471 . . ." (Emphasis in original).

Executive Law §259-i(3)(c)(iii) provides, in relevant part, that "[t]he alleged [parole] violator shall, within three days of the execution of the [parole] warrant, be given written notice of the time, place and purpose of the [preliminary] hearing . . . The notice shall state what conditions of . . . parole . . . are alleged to have been violated, and in what manner . . ." The statute also mandates that the written notice inform the alleged parole violator of certain enumerated rights to which he/she is entitled in connection with the preliminary hearing. See also 9 NYCRR §8005.3(b). This Court notes that nothing in the above-referenced statute/regulation - or in *Morrissey* - requires parole officials to separately advise an alleged parole violator of the potential final delinquency date[1], which

[1] Thus, even if the original Violation of Release Report did not separately specify <u>any</u> potential final delinquency date, this Court would perceive no statutory, regulatory or constitutional infirmity.

is ultimately determined by the Administrative Law Judge (ALJ) presiding at the alleged parole violator's final revocation hearing.

In the case at bar the Court finds nothing in the record to suggest that the notice provided to petitioner in the Notice Violation/original Violation of Release Report did not fully comply with the statutory/regulatory mandates referenced in the preceding paragraph. In this regard it is noted that although the amended Violation of Release Report changed the stated delinquency date from September 25, 2012 to August 12, 2012, not a single word in any of the four parole violation charges was altered. In this regard the Court finds the facts and circumstances of this case to be distinguishable from those in *People ex rel Davis v. Warden*, 2011 NY Slip Op 50911(U) and *People ex rel Plock v. Warden* (Supreme Court, Bronx County, Index No. 75160-07), which were relied upon by petitioner. In both *Davis* and *Plock* parole violation charge(s) were materially altered after waivers of preliminary hearing were executed.[2]

In view of all of the foregoing, the Court finds no basis to conclude that petitioner's September 26, 2012 waiver of preliminary hearing was not voluntarily, knowingly and/or intelligently executed, notwithstanding the fact that such waiver was made at the time petitioner was served with the Notice of Violation/original Violation of Release Report which specified the September 25, 2012 delinquency date. To the extent this Court has any concerns with respect to the subsequent amendment of the stated delinquency date, a proper remedy might be to bar the ALJ from sustaining a final delinquency date earlier than September 25, 2012. However, since the ALJ ultimately modified the final delinquency date to September 25, 2012, this concern need not be addressed.

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[2] In any event, this Judge, sitting in Franklin County, previously expressed his respectful disagreement with the analysis of the *Davis* court. *See Frain v. Yelich*, 2012 NY Slip Op 33051(U).

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: June 27, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge