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

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In the Matter of the Application of
WILLIAM V. VANDUSEN,#10-B-1215,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0423.81
INDEX # 2011-1001
ORI # NY016015J

-against-

JOHN DEMARS, Superintendent, Chateaugay Correctional Facility, and **ANDREA EVANS**, Chairwoman, NYS Board of Parole,
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of William V. Vandusen, verified on September 23, 2011 and filed in the Franklin County Clerk's office on October 4, 2011. Petitioner, who is an inmate at the Chateaugay Correctional Facility, 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 October 7, 2011. By Decision and Order dated November 29, 2011 respondents' motion to dismiss for failure to exhaust administrative remedies was denied and they were directed to serve answering papers. The Court has since received and reviewed respondents' Return, dated December 23, 2011, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on January 5, 2012.

On April 5, 2010 petitioner was sentenced in Wayne County Court to an indeterminate sentence of 2 to 4 years, to be executed as a sentence of parole supervision pursuant to Criminal Procedure Law §410.91, upon his conviction of the crime of Criminal Mischief 3°. Was received into DOCCS custody on April 22, 2010 with a maximum expiration date of March 3, 2014. On May 13, 2010 he was released from DOCCS custody

to parole supervision initially at the Willard Drug Treatment Campus and later, after successful completion of the Willard program, in the community. On December 10, 2010, however, petitioner was issued a Notice of Violation/Violation Release Report charging him with violating the conditions of his release. He waived a preliminary hearing on December 10, 2010. Following several adjournments, a final parole revocation hearing was ultimately conducted on May 17, 2011. One parole violation charge was sustained, based upon petitioner's plea, and the remaining charges were withdrawn. Petitioner's parole was revoked with a sustained delinquency date of December 6, 2010 and a 18-month delinquent time assessment was imposed.

In paragraph five of the petition it is alleged that the imprisonment and restraint of petitioner is illegal in that he " . . . was not afforded a final parole revocation hearing within 90 days of arrest on the Parole warrant and waiver of the Preliminary hearing, both of which occurred on December 10, 2010." An accused parole violator has a fundamental due process right to a final parole revocation hearing within a reasonable time after being taken into custody. *See Morrissey v. Brewer*, 408 U.S. 471 at 488. In New York the right to a timely final parole revocation hearing is codified in Executive Law §259-i(3)(f)(i), which provides that final "[r]evocation hearings shall be scheduled to be held within ninety days of the probable cause determination.[1] However, if an alleged violator requests and receives any postponement of his revocation hearing, or consents to a postponed revocation proceeding initiated by the board, or if an alleged violator, by his actions otherwise precludes the prompt conduct of such proceedings, the time limit maybe extended." In the absence of one of the statutory exceptions, any delay beyond 90 days

[1] An accused parole violator's waiver of his/her right to a preliminary hearing is the equivalent of a probable cause determination rendered at the conclusion of such a hearing. *See People ex rel Gray v. Campbell*, 241 AD2d 723.

after the probable cause determination is unreasonable per se and necessitates the vacatur of the parole violation warrant and reinstatement of parole as the only appropriate remedy. *See People ex rel Levy v. Dalsheim*, 66 AD2d 827, *aff'd* 48 NY2d 1019.

The May 17, 2010 final parole revocation hearing was obviously conducted more than 90 days after December 10, 2010, when petitioner waived his right to a preliminary hearing. The only issue to be resolved in this proceeding is whether the adjournment of the final parole revocation hearing from March 8, 2011 to May 3, 2011 was properly chargeable against the petitioner and therefore excluded from the 90-day calculation.[2] On March 8, 2011 petitioner and his attorney (Mr. Kernan), along with Parole Revocation Specialist Rutan, appeared before Administrative Law Judge (ALJ) Crowe for a final parole revocation hearing session. At that time the following conversation took place:

> "MR. CROWE: . . .Based on discussions had off the record it's my understanding that there is now a felony charge pending against Mr. Vandusen and you're requesting, Mr. Kernan, that this matter be placed on the Parole 'K' calendar; is that correct?
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> MR. KERNAN: That's correct.
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> MR. CROWE: Mr. Vandusen, I did explain to you what the nature of the 'K' calendar is. And based on my explanation and your attorney's request this matter will now be placed on the Parole 'K' calendar. When you and your attorney are ready to reactivate this matter your attorney can notify Parole and it will be placed on the active calendar."

By letter dated March 10, 2011 from Parole Revocation Specialist Rutan to petitioner's attorney, with a carbon copy to petitioner, counsel was advised that the

[2] Several shorter adjournments of the final parole revocation hearing were determined by parole to be chargeable against petitioner. Those determinations are not at issue in this proceeding.

adjournment of the final hearing " . . . is chargeable to your client and time parameters are suspended until the day of resumption of the hearing. Please advise this office when you are ready to proceed." By letter dated March 18, 2011 from Parole Revocation Specialist Rutan to petitioner's attorney, with a carbon copy to petitioner, counsel was advised that "[t]he Final Parole Hearing is currently in adjourned status. Please notify our office when you are ready to proceed."

Less than two months later counsel for the petitioner did, in fact, request that this matter be re-calendared for, according to the ALJ, " . . . discussions about the status of this case with an eye toward a possible resolution." On May 3, 2011 petitioner and his attorney, along with Parole Revocation Specialist Rutan, appeared before the ALJ. At that time Mr. Kernan made the following statement:

> "Judge, this case was previously placed on the K-Calender. That was in part because of a pending criminal matter which has been resolved. Therefore, we're back before you to resolve this matter. As I told you and Mr. Rutan off the record, I will be eventually raising an issue of the timeliness of the Final Hearing. So, to that and, I was suggesting that I give you the transcripts, which I've obtained from Albany, of the prior hearings along with some decisional law so you can be prepared of when we come back to rule on that issue when I raise it at the Final Hearing. And I would suggest that we go ahead and adjourn this for the Final Hearing to take place at the next available opportunity."

The matter was then adjourned to May 17, 2011, chargeable to the petitioner. On May 17, 2011 counsel for the petitioner argued that the parole violation warrant should be vacated and his client restored to parole supervision since he had already been denied a timely final parole revocation hearing within the 90-day time frame specified in Executive Law §259-i(3)(f)(i). Upon the denial of that application by the ALJ, petitioner entered his plea of guilty to one parole violation charge, as discussed previously in this Decision and Judgment.

The K Calender " . . . is an administrative device that 'serves to not prejudice parolees who have pending criminal matters by indefinitely adjourning their parole revocation hearings' pending resolution of the underlying criminal matter . . . To have a final parole hearing, a parolee must request that his matter be taken off the . . . [K] Calender." *People ex rel Banks v. Warden*, 16 Misc 3d 1111(A), 207 NY Slip Op 51380(U). (Citations to internal exhibits omitted). There is no doubt that the 90-day final parole revocation hearing time frame set forth in Executive Law §259-i(3)(f)(i) is suspended when an accused parole violator, or counsel, requests and receives an indefinite adjournment of a final parole revocation hearing for K Calender purposes and when the accused violator/counsel is notified that the running of the 90-day period will be suspended during the period of the adjournment. *See People ex rel Lewis v. Meloni*, 233 AD2d 947, *lv den* 89 NY2d 807, *People ex rel Dennard v. Meloni*, 151 AD2d 963, *People ex rel Smith v. Meloni*, 142 AD2d 959 and *People ex rel Banks v. Warden*, 16 Misc 3d 1111(A), 207 NY Slip Op 51380(U). The issue to be resolved in this proceeding is whether or not the period of the requested K Calender adjournment (March 8, 2010 to May 3, 2010) was properly chargeable to petitioner where the transcript of the March 8, 2010 parole revocation proceedings - although referencing an off the record explanation as to the nature of the K Calender - does not include any admonition that the 90-day final parole revocation hearing time frame set forth in Executive Law §259-i(3)(f)(i) would be suspended during the period of the K Calender adjournment.

Petitioner argues that since the presiding ALJ " . . . did not explain, on the record what the K calender is, how it works, and the fact that being placed on it put the 90 day time limit into abeyance, then the time continues to count against the division of parole." In support of his position petitioner cites a trio of Supreme Court level cases out of Bronx County: *People ex rel Banks v. Warden*, 16 Misc 3d 1111(A), 2007 NY Slip Op 51380(U),

People ex rel Murphy v. Warden, 4 Misc 3d 1024(A), 2004 NY Slip Op 51016(U) and *People ex rel Campbell v. Warden*, 186 Misc 2d 41.

This Court first observes that the *Campbell* court was addressing Mr. Campbell's claim that he did not understand the indefinite nature of the K Calender adjournment . When offered the opportunity to adjourn his final parole revocation hearing "to December 25, on the K calender," Mr. Campbell agreed to do so but later testified that he understood such adjournment ". . .to mean that he would be returned to [administrative] court on December 25, 1999 for his final hearing."[3] According to Mr. Campbell, " . . . he was not advised by the Administrative Law Judge or his attorney that either he or his attorney could contact either the Parole Revocation Specialist or the Parole Violation Unit to request that the parole matter be restored to the regular calender." 186 Misc 2d 41, 43. Thus, at issue in *Campbell* was the duration of the K Calender adjournment, rather than the suspension of the 90-day final parole revocation hearing time frame during the course of such adjournment. This Court finds the restoration aspect of the K calender adjournment procedure to be far more susceptible to misunderstanding, by either the accused parole violator or his/her attorney, since it is a creature of internal administrative creation. The suspension of the 90-day final parole revocation hearing time frame upon an adjournment requested by of the accused parole violator, on the other hand, has its basis in statute (Executive Law §259-i(3)(f)(i)).

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[3] Although December 25 apparently serves as a control date for final parole revocation hearings that have been adjourned to the K Calendar, no actual appearances take place on that date. According to the *Campbell* respondents, upon a K Calender adjournment " . . .a parolee's . . . pending . . . [final parole revocation] hearing is adjourned to this [K] calender and remains there to December 25 of any given year until one of three conditions occur: the parolee requests that the parole matter be recalendered; the new charge is disposed of with less than a felony conviction; or the parolee is convicted of a new felony charge and is returned State prison. In the absence of any of these conditions occurring, the matter remains on the K calender indefinitely with the parole matter automatically adjourned to December 25 of the following year." 186 Misc 2d 41, 42.

Unlike the *Campbell* court, the *Murphy* court was called upon to consider and accused parole violator's contention " . . . that he was never informed of the significance of being placed on the 'K-calender', *i.e.*, he [Mr. Murphy] alleges that he was not aware that by consenting to this [the K Calender adjournment] he was waiving the 90-day time strictures of the Executive Law." There is no indication that Mr. Murphy was represented by counsel at the time his final parole revocation hearing was adjourned to the K Calender, nor is there any indication that he affirmatively sought such adjournment.

The *Banks* court found that the petitioner therein "voluntarily and unequivocally waived his right to have a final parole hearing to determine the merits of his case within 90 days" inasmuch as he and his attorney were "explicitly warned" on the record that his final parole revocation hearing would remain on the K Calender until he or his attorney notified the Division of Parole that it should be restored to the active calender and that the 90-day time frame set forth in Executive Law §259-i(3)(f)(i) would be "indefinitely tolled" during the period of the K Calender adjournment.

In the case at bar the petitioner was represented by counsel on March 8, 2011 and counsel affirmatively requested that petitioner's case be indefinitely be adjourned to the K Calender. The ALJ, moreover, clearly advised petitioner and his attorney that when they " . . . are ready to reactivate this matter your attorney can notify Parole and it will be placed on the active calender." Less than two months later, counsel did, in fact, request that petitioner's parole violation case be removed from the K Calender and restored to active status. In the meantime, by letter dated March 10, 2011 (two days after the K Calender adjournment) counsel for the petitioner and the petitioner were advised by Parole Revocation Specialist Rutan that the K Calender adjournment was chargeable to petitioner. The Court also finds it significant that notwithstanding the failure of the ALJ to advise petitioner and/or his counsel on the record that the March 8, 2011 K Calender

adjournment would suspend the 90-day final parole revocation hearing time frame set forth in Executive Law §259-i(3)(f)(i), there is nothing in petitioner's papers alleging that he and/or his attorney, was unaware of that statutory consequence of the adjournment.

Although this Court does not understand the apparent ongoing failure of parole authorities to spell out, on the record, all of the pertinent ramifications of a requested K Calender adjournment, so as to avoid litigation of this nature, it finds no basis for habeas corpus relief under the specific facts and circumstances of this case.

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: February 15, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge