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

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In the Matter of the Application of
ANDRE BEALE,#09-B-0047,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2013-0139.40
INDEX # 2013-293
ORI # NY016015J

-against-

D. E. LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This proceeding was originated by the Petition for a Writ of Habeas Corpus of Andre Beale, sworn to on March 26, 2013 and filed the Franklin County Clerk's office on March 29, 2013. Petitioner, who is an inmate at the Franklin Correctional Facility, purports to challenge his continued incarceration in the custody of the New York State Department of Corrections. The Court issued an Order to Show Cause on April 3, 2013 and has received and reviewed respondent's Return, dated May 24, 2013, as well as petitioner's Reply thereto, sworn to on June 4, 2013 and filed in the Franklin County Clerk's office on June 6, 2013.

On December 23, 2008 petitioner was sentenced in Broome County Court, as a second felony offender, to a determinate term of 5 years, with 3 years post-release supervision, upon his conviction of the crime of Attempted Criminal Sale of a Controlled Substance 3°. He was received into DOCCS custody on January 6, 2009 certified as entitled to 333 days of jail time credit. At that time DOCCS officials calculated the original maximum expiration date of petitioner's 5-year determinate term as February 2, 2013.

On February 11, 2010 petitioner was released from DOCCS custody to post-release supervision after completing the DOCCS Shock Incarceration Program. Upon such

release the running of petitioner's 5-year determinate term was interrupted, with 2 years, 11 months and 21 days still owing to the original maximum expiration date thereof "held in abeyance" pursuant to Penal Law §70.45(5)(a). Also as of petitioner's February 11, 2010 release, the running of his 3-year period of post-release supervision commenced (*see* Penal Law §70.45(5)(a)) with the maximum expiration date of that period initially calculated as February 11, 2013. Petitioner's post-release supervision, however, was revoked with a delinquency date of May 21, 2010. This delinquency interrupted the running of petitioner's period of post-release supervision (*see* Penal Law §70.45(5)(d)(i)) with 2 years, 8 months and 20 days still owed to the originally-calculated February 11, 2013 maximum expiration date of such period.

As of July 26, 2010 petitioner was restored to post-release supervision at the Willard Drug Treatment program, certified as entitled to 63 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the interrupted 2008 determinate term (*see* Penal Law §70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 2 years, 11 months and 21 days to 2 years, 9 months and 18 days.

As of petitioner's July 26, 2010 restoration to post-release supervision at Willard, the running of the time still remaining against his period of post-release supervision (2 years, 8 months and 20 days) re-commenced, with the adjusted maximum expiration date of the period of post-release supervision calculated as April 16, 2013. Petitioner's post-release supervision, however, was again revoked, with a delinquency date April 21, 2011. This second delinquency again interrupted the running of petitioner's period of post-release supervision, with 1 year, 11 months and 25 days still owed to the April 16, 2013 adjusted maximum expiration date of such period.

As of June 14, 2011 petitioner was again restored to post-release supervision at the Willard Drug Treatment program, certified as entitled to 34 days of parole jail time credit (Penal Law §70.40(3)(c)). The parole jail time credit was applied against the interrupted 2008 determinate term (*see* Penal Law §70.45(5)(d)(iv)), reducing the time previously held in abeyance against such term from 2 years, 9 months and 18 days to 2 years, 8 months and 14 days.

As of petitioner's June 14, 2010 restoration to post-release supervision at Willard, the running of the time still remaining against his period of post-release supervision (1 year, 11 months and 25 days) re-commenced, with the re-adjusted maximum expiration date of the period of post-release supervision calculated as June 9, 2013. Petitioner's post-release supervision, however, was again revoked, with a delinquency date of December 1, 2011, following a final parole revocation hearing conducted on December 21, 2011. The Administrative Law Judge presiding at the final hearing determined petitioner to be a persistent parole violator within the meaning of 9 NYCRR §8005.20(c)(5) and imposed a delinquent time assessment directing that petitioner be held to his maximum expiration date. The third delinquency again interrupted the running of petitioner's period of post-release supervision, with 1 year, 6 months and 8 days still owed to the June 9, 2013 re-adjusted maximum expiration date of such period.

Petitioner was returned to DOCCS custody as a post-release supervision violator on December 30, 2011, certified as entitled to 29 days of parole jail time credit. The parole jail time credit was applied against the interrupted 2008 determinate term, reducing the time previously held in abeyance against such term from 2 years, 8 months and 14 days to 2 years, 7 months and 15 days. The 2 years, 7 months and 15 days still held in abeyance against petitioner's 2008 determinate term recommenced running upon his December 30, 2011 return to DOCCS custody (*see* Penal Law §70.45(a)), with the maximum expiration

date of such term to be reached on August 15, 2014. On that date the 1 year, 6 months and 8 days still owing against petitioner's 5-year period of post-release supervision would re-commence running (*see* Penal Law §70.45(5)(d)(iv)) with the maximum expiration date thereof to be reached on February 23, 2016. The petitioner would remain in DOCCS custody throughout the time still owed against the 2008 determinate term, as well as the time still owed against the 3-year period of post-release supervision, pursuant to the delinquent time assessment imposed following the final parole revocation hearing of December 21, 2011.

Petitioner's first argues that his due process rights were violated during the course of the first two parole revocation proceedings since "revoke and restore to Willard" dispositions were imposed notwithstanding the fact that an unspecified criminal charge was pending against him at the time of the underlying hearings. According to petitioner, on January 6, 2012 he was acquitted, after trial, of the unspecified criminal charge. In this regard the Court notes that 9 NYCRR §8005.20(c)(2)(ii), which addresses mandatory "revoke and restore to Willard" dispositions for Category 2 parole violators, provides, in relevant part, that " . . . no violator shall be deemed a Category 2 violator . . . if there are felony[1] criminal charges pending against the violator on the date that the final hearing is completed." (Emphasis added). The Court notes, however, that although petitioner does not specify the nature of the criminal charge pending against him, the December 5, 2011 parole Case Summary, which is annexed to respondent's Return as Exhibit B, indicates

[1] In the petition it is stated that 9 NYCRR §8005.20(c)(2)(ii) bars Willard dispositions "if there are criminal charges pending against the violator on the date that the final revocation hearing [is] completed." It appears that petitioner has taken this language from the 1999 decision of the Supreme Court, Bronx County, in *People ex rel Morejon v. New York State Board of Parole*, 183 Misc 2d 435 at 437. It is this Court's understanding, however, that the regulation in question was amended in 2004 to specify that the proscription against Category 2 mandatory "revoke and restore to Willard" dispositions is applicable only where felony criminal charges are pending.

that the pending charge was Aggravated Harassment 2° (Penal Law §240.30), a class A misdemeanor. The pendency of a misdemeanor charge at the time of petitioner's first two parole revocation hearings would not bar a mandatory "revoke and restore to Willard" disposition under the provisions of 9 NYCRR §8005.20(c)(2)(ii). In any event, even if the Court found that petitioner had been improperly designated a Category 2 parole violator subject to a mandatory "revoke and restore to Willard" disposition, such a finding would not relieve him of the sentence calculation consequences associated with any of the three delinquencies.

Petitioner next argues that he was improperly determined to be a persistent parole violator (9 NYCRR §8005.20(c)(5)) following the final parole revocation hearing of December 21, 2011. The regulation in question extends the duration of authorized delinquent time assessments for certain parole violators " . . . who have incurred two prior sustained violations of their release upon the controlling conviction. . ." Petitioner's argument to the contrary notwithstanding, this Court finds no basis for the exclusion of Petitioner's first two sustained parole violations simply because such violations resulted in "revoke and restore to Willard" dispositions. Such dispositions do not alter the fact that there were sustained parole violations underlying each disposition.

Petitioner also argues that he is entitled to unspecified "time back" in connection with his first parole violation since such violation was based upon "a false arrest and imprisonment . . ." In this regard petitioner alleges that the criminal charge "resulted in his [first] violation" but that "[o]n January 6, 2012 . . . the charge the petitioner was violated for was dropped, do [sic] to an acquital [sic] at trial . . ." This Court finds, however, that even if the sustained parole violation charge(s) associated with petitioner's first revocation proceeding was based solely upon the conduct underlying the criminal charge, the subsequent acquittal does not undermine the revocation of parole based upon

the same conduct. *See McCowan v. Evans*, 81 AD3d 1028. *See also People ex rel Matthews v. New York State Division of Parole*, 58 NY2d 196.

Petitioner's argument to the contrary notwithstanding, the Court next finds that the provisions of 9 NYCRR §8004.3 provide no basis for the cancellation of either of petitioner's first two delinquencies. The provisions of 9 NYCRR §8004.3(e)(2) clearly limit the cancellation of an alleged parole violator's delinquency to situations where the alleged violator completes a treatment program prior to the commencement of a final parole revocation hearing. Where, as here, "revoke and restore to Willard" dispositions were imposed upon sustained violations at final hearings, the subsequent successful completions of the Willard program do not result in the cancellation of the delinquencies.

Finally, the Court finds no error in DOCCS's calculations of petitioner's relevant sentencing dates. Pursuant to the statutory scheme set forth in Penal Law §70.45, as described in this Decision and Judgment, the 5-term of petitioner's 2008 determinate sentence and his 3-year period of post-release supervision never ran at the same time. Had petitioner completed the period of post-release supervision with time still remaining held in abeyance against his determinate term, he would have been entitled to have such remaining time " . . . credited with and diminished by such period of post-release supervision." Penal Law §70.45(5)(d). It is therefore ultimately within the control of the post-release supervision releasee to determine, through his/her behavior while subject to post-release supervision, whether or not the time held in abeyance on an underlying determinate sentence will effectively run concurrently with, or consecutively to, the period of post-release supervision. As far as the petitioner in this proceeding is concerned, the fact that he will effectively end up serving the entire term of his 2008 determinate sentence consecutively with respect to the period of post-release supervision is the result

of his multiple post-release supervision violations rather than any illegal sentence calculation on the part of DOCCS officials.

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: July 10, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge