

**Matter of Coles v NYS Dept. of Corrections &
Community Supervision**

2014 NY Slip Op 33057(U)

April 22, 2014

Supreme Court, Franklin County

Docket Number: 2013-754

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN
X

In the Matter of the Application of
MARVIN COLES, #07-R-0903,
Petitioner,

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

-against-

**CONSOLIDATED
DECISION AND JUDGMENT
RJI #16-1-2013-0391.98
INDEX # 2013-754
ORI # NY016015J**

**NYS DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,
D. E. LaCLAIR, Superintendent, Franklin
Correctional Facility, and TINA M. STANFORD,
Chairwoman, NYS Board of Parole,**
Respondents.

In the Matter of the Application of
MARVIN COLES, #07-R-0903,
Petitioner,

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

**CONSOLIDATED
DECISION AND JUDGMENT
RJI #16-1-2014-0019.24
INDEX # 2014-32
ORI #NY016015J**

**NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY
SUPERVISION,**

Respondent.

The habeas corpus proceeding under Franklin County Index # 2014-32 was originated in Supreme Court, Westchester County, by the Petition (denominated “Writ of Habeas Courpus [sic]”) of Marvin Coles, sworn to on June 24, 2013. An Amended Petition (denominated “Writ of Habeas Corpus (Amended)”), sworn to on July 29, 2013, was subsequently filed by the petitioner in Westchester County. Supreme Court,

Westchester County, issued an Order to Show Cause on August 15, 2013 and an Amended Order to Show Cause on September 3, 2013. The Supreme Court, Westchester County, received the Answer of the respondent New York State Department of Corrections and Community Supervision, verified on August 26, 2013. By Order dated October 10, 2013 the Supreme Court, Westchester County (Hon. Barbara G. Zambelli) transferred this proceeding to the Hamilton County Court where it was assigned Hamilton County Index # 2013-7054. By Decision and Order dated January 10, 2014 the Hamilton County Court transferred this proceeding to Supreme Court, Franklin County, where it was assigned Index #2014-32.¹

The habeas corpus proceeding under Franklin County Index #2013-754 was originated by the Petition (denominated “Writ of Habeas Corpus (Amended)”), dated July 29, 2013, sworn to on August 15, 2013 and filed in the Franklin County Clerk’s office on August 28, 2013. The Court issued an Order to Show Cause on September 10, 2013. By undated letter, received via fax on October 16, 2013, Assistant Attorney General Rogers advised chambers of the then pendency of the Westchester County proceeding and concluded as follows: “Given the confusion on where the Westchester Petition has been transferred, the fact that the answering papers have already been filed in the Westchester Petition, and that the Franklin Petition is identical to the Westchester Petition, I would respectively request that Respondent’s time to file a response to the Franklin Petition be extended for at least a month so that some clarity can be given to the situation.” Notwithstanding the foregoing, petitioner’s Reply to Answer, verified on October 18, 2013,

¹ The convoluted history whereby this proceeding wended its way from Supreme Court, Westchester County, to Supreme Court, Franklin County, is set forth in the January 10, 2014, Decision and Order of the Hamilton County Court.

was filed in the Franklin County Clerk's office on October 29, 2013 in connection with the habeas corpus proceeding under the Franklin County Index #13-754.

By Letter Order dated January 10, 2014 this Court advised the litigants of the issuance of the Hamilton County Court Decision and Order of January 10, 2014, whereby the habeas corpus proceeding originally brought in Westchester County and subsequently transferred to Hamilton County was, in turn, transferred to Franklin County. The Letter Order of January 10, 2014, went on, in relevant part, as follows:

“ Once the transfer of the Hamilton County proceeding to Franklin County is completed, there will be two identical habeas corpus proceedings pending before me in Franklin County. At that point it would be the Court's intention to proceed as follows: The two Franklin County proceedings would be consolidated with the Answer of the respondent New York State Department of Corrections and Community Supervision, verified on August 26, 2013 and originally filed in Westchester County, deemed to be the return of the respondents in the consolidated Franklin County proceeding. This would leave the matter of petitioner's Reply thereto as the only procedural impediment to the Courts issuance of a final determination in the consolidated proceeding . . . It is noted, however, that petitioner's Reply to Answer, verified on October 18, 2013, was filed in the Franklin County Clerk's office on October 29, 2013 in connection with the Franklin County proceeding under Index #13-754. If petitioner wishes to rest on that Reply the Court can promptly move to final disposition of the consolidated proceeding as soon as the Hamilton County to Franklin County transfer is effected. If petitioner would rather submit a new/additional Reply to the respondents' Answer, the Court would allow him an additional three weeks to do so.

Both litigants are hereby directed to advise chambers, on or before January 24, 2014, whether or not they are in agreement with the procedures outlined in this letter. Petitioner is also directed to advise chambers, on or before January 24, 2014, whether or not he intends to submit a new/additional Reply.”

By Letter dated January 13, 2014 petitioner advised chambers that he was in agreement with the procedures outlined in the Letter Order of January 10, 2014 and wish to rest on the previously submitted Reply. By Letter dated January 21, 2014 Hilary D. Rogers, Esq., Assistant Attorney General, advised chambers that the respondents were in agreement

with the procedures outlined in the Letter Order of January 10, 2014. Accordingly, this Court directs that the proceedings under Franklin County Index Nos. 2013-754 and 2014-32 are hereby consolidated for disposition.

Petitioner, who was an inmate at the Franklin Correctional Facility but has been re-released to parole supervision on January 29, 2014, purports to challenge his continued incarceration in DOCCS custody. Although petitioner's re-release has rendered his claim of entitlement to immediate re-release moot for habeas corpus purposes, the Court finds that the dismissal of this proceeding is not warranted. If petitioner prevails with respect to his challenge to the revocation of his parole following a final hearing concluded on May 15, 2013, the calculation of the maximum expiration date of his underlying sentence would undoubtedly be affected. *See Nieblas v. New York State Board of Parole*, 28 AD3d 1017.

On February 23, 2007 petitioner was sentenced in Supreme Court, Dutchess County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Robbery 3^o. The sentencing court specifically directed that its sentence run "[c]onsecutively to that now serving." Petitioner was released from DOCCS custody to parole supervision on January 5, 2012. On February 24, 2012, however, a parole violation warrant was issued. As of the date of the warrant petitioner's whereabouts were unknown. More than 11 months later, on or about January 29, 2013, petitioner was taken into custody in Plattsburgh, New York.

On January 31, 2013 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 February 22, 2012 petitioner failed to enter and complete the Blaisdale Residential Drug Treatment Program. Parole Violation Charge #2 alleged that on or before February 22, 2012 petitioner changed his

approved residence without notifying parole authorities. Parole Violation Charge #3 alleged that on February 22, 2012 and thereafter petitioner failed to make scheduled office reports as instructed to do so by his supervising parole officer (PO Welch). Parole Violation Charge #4 alleged that on or before February 15, 2012 petitioner admittedly used marijuana without proper medical authorization. Parole Violation Charge #5 alleged that on or before February 15, 2012 petitioner admittedly used “opiates” without proper medical authorization.

On or about March 22, 2013 a Supplementary Parole Violation Report setting forth two additional parole violation charges was issued. Parole Violation Charge #6 alleged that petitioner “. . . violated Rule #8 of his Conditions of Release to Parole Supervision on 01/19/13, when he threatened Alicia Gilliam, who was seven months pregnant, by telling her that if she called the police he would beat her and kill her unborn child. He was subsequently arrested and charged with Menacing 3rd degree.” Parole Violation Charge #7 alleged that petitioner “. . . violated Rule #12, Parole Board Imposed Special Condition, when he resided with a partner, Alicia M. Gilliam, without the prior written permission of his Parole Officer.”

A preliminary parole revocation hearing was conducted on February 13, 2013. At the conclusion of the preliminary hearing a probable cause determination was made with respect to Parole Violation Charge #3 (the only charge presented). A final parole revocation hearing was conducted at the Clinton County Jail in Plattsburgh on March 13, 2013, April 10, 2013, April 24, 2013 and May 15, 2013. At the conclusion of the final hearing Parole Violation Charges #1, #2, #3, #6 and #7 were sustained.² Petitioner’s parole was revoked, with a modified delinquency date of February 22, 2012, and a 12-

² Parole Violation Charges #4 and #5 were withdrawn with prejudice during the course of the final parole revocation hearing session of April 24, 2013.

month delinquent time assessment was imposed upon him as a persistent violator (9 NYCRR §8005.20(c)(5)). This proceeding ensued.

Petitioner advances two arguments in support of his ultimate contention that the underlying parole violation warrant must be vacated and all delinquent time restored. Regarding the February 13, 2013 preliminary hearing, petitioner alleges that the evidence against him with respect to Parole Violation Charge #3 consisted entirely of the hearsay testimony of Supervising Parole Officer Angrisani received, over his objection, in the absence of retired Parole Officer Welch. According to petitioner, Supervising Parole Officer Angrisani “. . . never testified that he observed PO Welch instruct the petitioner to report and never did he mention that he observed or did not observe the petitioner at the parole office on the day of the alleged report date. SPO [Angrisani] testified that the alleged violation occurred on 2/22/2012 in which he clearly has no firsthand or direct knowledge of nor does he present any collaborating [sic] testimony, witnesses, or evidence to support his hearsay testimony from the retired parole office[r] of record [PO Welch] who has questionable creditability [sic] issues.” Citing, *inter alia*, *People ex rel McGee v. Walters*, 62 NY2d 317 and 9 NYCRR §259-i(3)(f)(v), petitioner alleges that the hearing officer’s reliance on the hearsay testimony of SPO Angrisani violated his due process and statutory rights.

Citing, *inter alia*, *People ex rel Ford v. LaPaglia*, 176 Misc 2d 912 and Executive Law §259-i(3)(f)(i), petitioner next argues that his due process and statutory rights were violated because the final parole revocation hearing, which was not completed until May 15, 2013, was not held within 90 days of the February 13, 2013 probable cause determination.

In their First Objection in Point of Law respondents argue that the petition must be dismissed for lack of personal jurisdiction due to petitioner’s alleged failure to properly

effect service of process on the respondent New York State Department of Corrections and Community Supervision. It is noted, however, that this objection is interposed specifically with respect to the Westchester County proceeding which was ultimately transferred to this Court and assigned Franklin County Index #2014-32. No personal jurisdiction objection was interposed in connection with the proceeding commenced in Franklin County under Index #2013-754. In view of the unusual procedural history of this case - specifically the consolidation of the two proceedings - and in view of the fact that respondents have fully addressed the arguments advanced in the Amended Petition on the merits, this Court finds that dismissal on personal jurisdiction grounds is not warranted.

In their Second Objection in Point of Law respondents argue that the petition must be dismissed since petitioner failed to perfect an administrative appeal from the parole revocation determination. A habeas corpus proceeding brought by an adjudicated parole violator to challenge one or more aspects of the underlying parole revocation process is ordinarily subject to dismissal where the violator fails to first exhaust administrative remedies through the administrative appeal process set forth in 9 NYCRR Part 8006. *See People ex rel DeMarta v. Sears*, 31 AD3d 918, *lv den* 7 NY3d 715 and *People ex rel Bariteau v. Donelli*, 24 AD3d 1065. Where, however, the claimed error constitutes a violation of due process and immediate release is the only appropriate remedy for such violation, dismissal is not required. *See People ex rel Sumter v. Connell*, 10 AD3d 823, *People ex rel Brooks v. Russi*, 237 AD2d 394, *lv den* 90 NY2d 801 and *People ex rel Hacker v. New York State Division of Parole*, 228 AD2d 849, *lv den* 88 NY2d 809. In the case at bar the arguments advanced by petitioner - particularly his argument with respect to the timeliness of the final parole revocation hearing (*see People ex rel Levy v. Dalsheim*, 48 NY2d 1019, *aff'g* 66 AD2d 827) - appear to fall within the above-referenced

exception to the habeas corpus exhaustion requirement. Accordingly, the Court will address both of petitioner's arguments on the merits.

With respect to petitioner's first argument, wherein he challenges the hearing officer's alleged total reliance on the hearsay testimony of Senior Parole Officer Angrisani at the preliminary parole revocation hearing of February 13, 2013, the Court finds that such challenge has been rendered moot by the revocation of petitioner's parole following the final parole revocation hearing. *See Nieblas v. New York State Board of Parole*, 28 AD3d 1017, *People ex rel Ciccarelli v. Saxton*, 23 AD3d 1095, *lv denied* 6 NY3d 708, and *People ex rel Bell v. Santor*, 21 AD3d 1192.

The disposition of petitioner's second argument, wherein he challenges the timeliness of the final parole revocation hearing concluded on May 15, 2013, is more problematic. An accused parole violator has a due process right to a final parole revocation hearing within a reasonable time after he or she is taken into custody. *See Morrissey v. Brewer*, 408 US 471 at 488. Under the provisions of Executive Law §259-i(3)(f)(i) final parole "[r]evocation hearings shall be scheduled to be held within ninety days of the probable cause determination." In the absence of a statutory exception, not relevant to this proceeding, a delay in holding a final parole revocation hearing beyond the 90-day statutory time frame is deemed unreasonable *per se*, with vacatur of the underlying parole violation warrant and reinstatement to parole the only appropriate remedy. *See People ex rel Levy v. Dalsheim*, 48 NY2d 1019, *affg* 66 AD2d 827.

The probable cause determination in the case at bar was made on February 13, 2013, following the preliminary parole revocation hearing, and there appears to be no dispute that the outside date for timely conducting petitioner's final parole revocation hearing fell on May 14, 2013. Notwithstanding the foregoing, respondents argue that the 90-day statutory time frame set forth in Executive Law §259-i(3)(f)(i) only mandates that

the final hearing be “scheduled to be held” within such time frame. According to respondents, completion of the final hearing within 90 days is not required and, “[f]urther, 9 N.Y.C.R.R. §§ 8005.17(c)(4) and (c)(5) permit the administrative law judge, in his or her discretion, to grant adjournments of hearings already in progress giving due regard to the interests of all parties.”

There is no appellate-level authority squarely addressing the issue of whether commencement - but not completion - of a final parole revocation hearing within 90 days of the probable cause determination/waiver of preliminary hearing satisfies the statutory mandate and the due process requirement embodied therein. Statutory and regulatory provisions pertaining to the timeliness of preliminary parole revocation hearings, however, are remarkably similar to those associated with the timeliness of final parole revocation hearings, with the exceptions of the length of the permissible time frame and the designation of statutory exceptions. Executive Law §259-i(3)(c)(iv) provides that “[t]he preliminary hearing shall be scheduled to take place no later than fifteen days from the date of execution of the [parole violation] warrant.” 9 NYCRR §8005.6(a), provides that “[t]he preliminary hearing shall be scheduled to take place within 15 days of the date that a warrant for retaking and temporary detention is executed.”

The First and Fourth Departments have both found that if a preliminary parole revocation hearing is timely commenced but thereafter adjourned for legitimate reasons without prejudice to the accused parole violator, there is no violation of the 15-day requirement set forth in Executive Law §259-i(3)(c)(iv). *See People ex rel Chesner v. Warden*, 71 AD3d 499, *lv den* 15 NY3d 703 and *Emmick v. Enders*, 107 AD2d 1066. Unreported cases out of Supreme Court, Bronx County, have cited *Emmick* in holding that Executive Law §259-i(3)(f)(i) only mandates that a final parole revocation hearing be commenced within the 90-day statutory time period but does not impose a time in which

the final hearing must be completed. See *People ex rel Angelakos v. New York State Division of Parole* (Bronx County Index No. 2222/96, August 21, 1996) and *People ex rel Padilla v. New York State Board of Parole* (May 6, 1993).

In *People ex rel Ford v. LaPaglia* 176 Misc 2d 912, decided by the Ulster County Court on April 1, 1998, the 90-day statutory time frame expired on March 4, 1998. Prior to that date, on February 24, 1998, Mr. LaPaglia's final parole revocation hearing was commenced with testimony received from two witnesses called by the Division of Parole. Due to the lateness of the day, cross examination of one of the Division's witnesses could not be conducted on February 24, 1998 and the hearing was adjourned to March 10, 1998. The witness in question, however, was not available on March 10 and after a third witness testified the matter was adjourned until March 17, 1998, at which time cross examination was completed and the Division introduced an unspecified document into evidence. The *LaPaglia* court, noted that the 90-day statutory/regulatory time frame must be "adhered to strictly," granted the petition for writ of habeas corpus without discussing the impact of the commencement, but not conclusion, of the final hearing prior to the expiration of the 90-day time frame. According to the *LaPaglia* court, "... the 90-day time limit must be adhered to strictly, absent any of the statutory exceptions." *Id.* at 914 (citations omitted). The conclusion of the Ulster County Court in *LaPaglia* is arguably inconsistent with the previously-referenced unreported decisions of the Supreme Court, Bronx County.

This issue has more recently been considered by the Supreme Court, St. Lawrence County, in *Washington v. Superintendent* (St. Lawrence County Index No. 130421, August 28, 2009) and *Echevarria v. Superintendent* (St. Lawrence Index No. 139730, February 19, 2013).³ The 90-day statutory time frame in *Washington* was determined to

³ The same jurist presiding in the case at bar, as Acting Supreme Court Judge in Franklin County, presided in *Washington* and *Echevarria*, as Acting Supreme Court Judge in St. Lawrence County.

expire on January 5, 2009. The final parole revocation hearing was originally commenced on December 5, 2008 with ALJ Beltrani presiding. On that date Parole Violation Charge #5 was withdrawn and Mr. Washington plead guilty to Parole Violation Charge #2 but not to the remaining three charges (1,3 and 4). Following the testimony of one parole officer, the hearing was adjourned to December 17, 2008 for an additional witness. On that date ALJ Cox appeared and announced that ALJ Beltrani had taken ill and would otherwise be unavailable until after the 90-day statutory time frame expired. Since the parties were unable to agree to an extension of the 90-day time frame, ALJ Cox re-commenced the final parole revocation hearing *de novo* over Mr. Washington's objection. The parole revocation specialist elected to proceed on all five charges, including the previously withdrawn Parole Violation Charge #5. Mr. Washington plead not guilty to all five charges, including Parole Violation Charge #2 to which he had plead guilty on December 5, 2008. Testimony was taken from a police officer and at the conclusion thereof the parole revocation specialist sought an adjournment to obtain testimony from the parole officer who had previously completed testifying on December 5, 2008 when Parole Violation Charges #2 and #5 were effectively off the table. On January 2, 2009 the parole revocation specialist required an additional adjournment due to the unavailability of the parole officer. An adjournment was granted to February 5, 2009 - the next available date - without the consent of Mr. Washington. The final parole revocation hearing concluded on February 5, 2009. By Decision and Judgment dated August 28, 2009 the Supreme Court, St. Lawrence County, dismissed Mr. Washington's petition for writ of habeas corpus as follows:

“ . . . [G]iven the unusual set of circumstances leading to the adjournment of petitioner's final parole revocation hearing beyond January 5, 2009, this Court finds no violation of the 90-day statutory/regulatory timeliness provisions, set forth

in Executive Law §259-i(3)(f)(i) and 9NYCRR §8005.17(a). The respondents are cautioned, however, that the Court does not lightly find legitimate reasons for the adjournment of an already commenced final parole revocation hearing beyond the 90-day statutory/regulatory framework. In the case at bar, however, testimony with respect to Parole Violation Charge #1 was completed at the *de novo* final parole revocation hearing on December 17, 2008, and the only apparent reason for the adjournment of the *de novo* hearing at that time stemmed from petitioner's entry of a plea of not guilty to Parole Violation Charge #2 when he had already plead guilty to that charge at the original hearing on December 5, 2008. This development necessitated that Parole Officer Titus be re-called to testify at the adjourned *de novo* hearing even though it appeared that she had already completed her testimony at the original hearing on December 5, 2008. Under these circumstances, the Court finds that petitioner was not unduly prejudiced by completion of the DeNovo hearing of February 5, 2009."

In *Echevarria* the 90-day statutory time frame was determined to expire on June 17, 2012. After an appearance and adjournment on April 16, 2012, the testimonial phase of the final parole revocation hearing in *Echevarria* commenced on May 21, 2012. On that date, after testimony was taken from one police officer the parole revocation specialist requested an adjournment to secure the testimony of an additional police officer (Donaldson), whose "regular day off" fell on May 21, 2012. According to the testimony of the specialist, "I contacted his command to try to get him to come to no avail, so the Division will ask for a continuance . . ." At that point the presiding ALJ responded as follows: "You know the outside date is June 17th, and the parties were advised before today that I would be on vacation subsequent to this week, so the next date that would be available to me, and the only date available to me in the week of June 25th would be June 26th . . ." The parole revocation specialist indicated that June 26, 2012 would be "fine" and the ALJ announced the adjournment. After counsel for the petitioner pointed out that the outside date was June 17, 2012, the ALJ responded as follows: "That's correct, but I'm not

going to be able to do it on the 17th. If you want to file a writ making a 90 day argument, you are free to do so. They started their case today. Whether or not writ court would conclude that this was a good faith effort to start with and the time required is an issue for that court. I understand where you are coming from. Your objection is noted.”

The *Echevarria* court ultimately adopted the position taken in *Washington*, finding as follows:

“Absent specific appellate-level authority to the contrary, this Court is not prepared to hold that a final parole revocation hearing - meaningfully commenced within the 90-day time frame set forth in Executive Law §259-i(3)(f)(i) - must, without exception, be concluded within that statutory time frame in order to pass muster. Nevertheless, as noted in *Washington*, this Court will not lightly find legitimate reasons for the adjournment of the final parole revocation hearing beyond the statutory time frame. Where, however, compelling circumstances substantially beyond the control of prosecuting parole authorities support such an adjournment, and the alleged parole violator is not unduly prejudiced, the final hearing may be adjourned and lawfully completed after the expiration of the 90-day time frame.”

After applying the above-reference standards to the facts and circumstances of the case before it, however, the *Echevarria* court was “. . . unable to conclude that compelling circumstances substantially beyond the control of prosecuting parole authorities supported the completion of petitioner’s final parole revocation hearing after the expiration of the 90-day statutory time frame set forth in Executive Law §259-i(3)(f)(i).” The *Echevarria* court noted that although five weeks elapsed between the initial April 16, 2012 session of the final parole revocation hearing (when the May 21, 2012 adjourned date was established) and the commencement of the testimonial phase of the final hearing on May 21, 2012, prosecuting parole authorities did not bring Police Officer Donaldson’s unavailability to appear on May 21, 2012 to the attention of ALJ and/or counsel for the petitioner. In addition, the *Echevarria* court found that the record did not reflect any

“compelling reason” for Police Officer Donaldson’s unavailability on March 21, 2012 since such record merely indicated that it was his “regular day off.” The *Echevarria* court ultimately concluded “. . . that the failure to complete the final parole revocation hearing within the 90-day statutory time frame was not the results of any compelling set of circumstances substantially beyond the control of prosecuting parole authorities but, rather, a matter of routine witness management that simply cannot trump petitioner’s due process right to a final parole revocation hearing within a reasonable time after he was taken into custody, as embodied in the 90-day time frame set forth in Executive Law §259-i(3)(f)(i).”

At the March 13, 2013 session of petitioner’s final hearing the parole revocation specialist was not ready to proceed and the matter was adjourned, at his request, to April 10, 2013. The testimonial phase of the final hearing commenced on April 10, 2013. On that date, after petitioner pled not guilty to all seven parole violation charges, the presiding Administrative Law Judge (ALJ) placed the following on the record: “We talked prior to coming into the room about the fact that the stenographer is not feeling well today and we are not going to finish this hearing today. We are going to take the testimony of the [parole] officer who came to Plattsburgh from the New York City area and then we will ask how she’s [presumably the stenographer] doing and if we are able to go on with any other witnesses, we will. If she is not, we are going to adjourn the case until the 24th [of April].” Senior Parole Officer Angrisani then testified under direct examination by the parole revocation specialist, was cross examined by counsel for the petitioner and testified under redirect examination. Counsel for the petitioner declined to re-cross examine the witness. After SPO Angrisani completed his testimony the ALJ placed the following on the record: “The division [of parole] has another witness present [presumably Alicia Gilliam, who is mentioned in Parole Violation Charges #6 and #7] and

that witness has brought with her an infant that looks to me to be weeks if a month old. Corrections has indicated that the infant will not be allowed in the facility [Clinton County Jail]. She came to the facility unescorted by anyone else so there is no one to leave the infant with and that is another reason that we are going to have to adjourn this case. We are going to adjourn this case to April 24th, 2013 . . .”

At the April 24, 2013 session of petitioner’s final parole revocation hearing two parole officers (PO Burdo and PO Moore) - both apparently operating out of the Plattsburgh Parole Office - were called as witnesses. PO Burdo testified under direct examination by the parole revocation specialist and was cross examined by counsel for the petitioner. PO Moore testified under direct examination by the parole revocation specialist, was cross examined by counsel for the petitioner and testified under redirect examination. Counsel for the petitioner declined to re-cross examine PO Moore.

After PO Moore completed his testimony the parole revocation specialist advised the ALJ that an additional witness was present accompanied by an infant child. The ALJ inquired as to the identity of the additional witness and the following colloquy occurred:

<p>“P.R.S. Snyder [Parole Revocation Specialist]:</p>	<p>Her name is Alicia Gilliam. She’s been subpoenaed on two occasions now to be here. She did show for her first appearance on April 10th where we had her continuance to today.</p>
<p>Administrative Law Judge:</p>	<p>And she’s here again with her child and not able to gain access to the facility?</p>
<p>P.R.S. Snyder:</p>	<p>Correct. I checked with the jail personnel and there is not an alternative location for us to go to.</p>

Administrative Law Judge: Other than that, that's your last witness?

P.R.S. Snyder: Yes, your honor.

Administrative Law Judge: I am not going to create a situation where a single mother with an infant child who is days old if not weeks old is not able to be heard simply because she has a child and is unable to secure child care. It is my further understanding that she has attempted and thought she had child care for today for this proceeding.

P.R.S. Snyder: That is correct. In fact, I was in phone contact with her before 8:00 a.m. this morning again and she was continuing at that point to make calls. She had been told that she had coverage, but that person failed to show.

Administrative Law Judge: I want to hear from this witness. I believe the circumstances dictate that especially with her reappearing at this facility repeatedly with an infant child and I'm talking about a newborn. I'm going to give the Division additional time. I'm going to give their witness additional time. This is what I want to happen: I want the Division to one, see if she's able to obtain child care for the next day that we are to here, because we are going to adjourn this. I want to hear from this witness. She is a single mother. I don't know where she's from whether she's from here or downstate. If she's unable to secure child care, than

[sic] we need to figure out a way for her testimony to be given here. We may need to find another location perhaps in the visitors room where she would be able to have the baby.

P.R.S. Snyder:

Had I known prior to this morning that this would be the situation, I would have tried to make arrangements for someone even from our office here in Plattsburgh to come and sit in the lobby.

Administrative Law Judge:

I don't know what the liability issues are for the Division. I'm not directing the Division to do anything like that. What I'm saying is that I believe that people are allowed to bring their children into the visitation room. Where we conduct this part of the proceeding is not really material. What is important is that all parties are there. I think we can all agree - - I won't ask you to agree, Ms. Fox [counsel for petitioner] - - that she has been here each time that this has been down for a contested hearing. She appears to be an interested witness here and she is the alleged victim of a domestic situation. I am not going to because of the regulations of the correctional department just dismiss this woman's testimony and what she wants to be heard here. I want every effort made to secure that testimony and to give Mr. Coles his right to cross-examine. Like I said, the thing that pops into my head immediately is the visitation

room where I believe they do allow family members. I have personally seen children come and go. We can do that one witness in that room and then come back here. Would they be willing to do it today? I know today is visitation so it may be a strain.

P.R.S. Snyder:

I did ask for today and they can't.

Ms Fox:

I don't mean to cut you off, but they don't have visitation on Monday and Friday and there is a room up front where we have preliminary hearings and I don't know why that room isn't available to us today, because it's right there.

P.R.S. Snyder:

Because it's in a secured area she can't take a child in there.

Administrative Law Judge:

It appears that one area we do know that may be a viable option is the visitation room. I don't know how all of this works. What I do know is that we have an alleged victim who is interested in this case who has appeared on several occasions and every effort should be made to secure her testimony. The fact that a single young mother has no child care should not be the roadblock set up for her to provide testimony regarding a domestic dispute. That's all I have to say on that issue.

P.R.S. Snyder:

Given that, I would respectfully request a two week adjournment to our next hearing date. I don't

know if that's a two week adjournment, but an adjournment to our next hearing date. Which I believe is 5/14.

Ms. Fox:

I know that we start at noon, but they don't have visitation between 11:00 and noon.

Administrative Law Judge:

Or perhaps we could come here before we go to Franklin. That would be a very early start, but I think it's important that we secure the testimony of this witness.

P.R.S. Snyder:

I would have to check with the facility.

Administrative Law Judge:

We are just talking about doing this one witness.

P.R.S. Snyder:

Can we go off the record for a second?

Administrative Law Judge:

Yes.
(Off-the-record discussion)

Administrative Law Judge:

Back on the record. We will be here on May 15th next and I will leave it to you Mr. Snyder and you Ms. Fox to work with the jail and figure this out."

Counsel for the petitioner placed an objection to the adjournment on the record.

At the May 15, 2013 session of petitioner's final parole revocation hearing counsel for the petitioner moved to dismiss the underlying warrant "... for failure to conduct the [final] hearing within the 90-day statutory period..." The ALJ, noting that the hearing commenced within the 90-day time frame on April 10, 2013, denied counsel's motion. Alicia Gilliam then testified under direct examination by the parole revocation specialist,

was cross-examined by counsel for the petitioner and was further questioned by the ALJ. Although the parole revocation specialist declined to conduct a re-direct examination of the witness, counsel for the petitioner was permitted to further question Ms. Gilliam. After Ms. Gilliam completed her testimony the parole revocation specialist rested. Without testifying himself, and without calling any other witnesses, petitioner also rested. Closing arguments were heard and the final parole revocation hearing was closed with the decision reserved.

Absent specific appellate-level authority to the contrary, this Court is not prepared to hold that a final parole revocation hearing - meaningfully commenced within the 90-day time frame set forth in Executive Law §259-i(3)(f)(i) - must, without exception, be concluded within that statutory time frame in order to pass muster. Notwithstanding the foregoing, the Court will not lightly find legitimate reasons for the adjournment of the final parole revocation hearing beyond the statutory time frame. Where, however, compelling circumstances substantially beyond the control of prosecuting parole authorities support such an adjournment, and the alleged parole violator is not unduly prejudiced, the final hearing may be adjourned and lawfully completed after the expiration of the 90-day time frame.

Upon applying the above-referenced standards to the facts and circumstances of the case at bar, the Court first finds that petitioner's final parole revocation hearing was meaningfully commenced within the 90-day time frame set forth in Executive Law §259-i(3)(f)(i). In this regard it is noted that during the course of the April 10, 2013 and April 24, 2013 sessions of the final hearing all of the witnesses sought to be called by the prosecuting parole authorities, with the exception of Alicia Gilliam, completed their testimony. It also bears mentioning that Ms. Gilliam's testimony, which was eventually heard and completed on May 15, 2013, was wholly irrelevant to the disposition of Parole

Violation Charges #1, #2 and #3. It is further noted that SPO Angrisani testified on April 10, 2013 that neither he nor any parole officer that he supervised granted petitioner permission to relocate to Plattsburgh and, in addition, PO Burdo testified on April 24, 2013 with respect to a conversation he had with petitioner soon after petitioner was taken into custody in Plattsburgh on January 29, 2013. According to PO Burdo's testimony, petitioner ". . . stated to me that he had been living at his girlfriend's place on South Catherine Street [in Plattsburgh] for quite awhile [sic] . . . He said that he had left the Poughkeepsie area where he was being supervised." Thus, although Alicia Gilliam's testimony was relevant with respect to Parole Violation Charges #6 and #7, it is arguable that Parole Violation Charge #7 could have been sustained solely on the basis of the testimony of SPO Angrisani and PO Burdo. In view of all of the foregoing, it is clear that petitioner's final parole revocation hearing was meaningfully commenced within the 90-day time frame set forth in Executive Law §259-i(3)(f)(i) on April 10, 2013 and April 24, 2013.

The Court also finds that compelling circumstances substantially beyond the control of prosecuting parole authorities supported the adjournment of the final parole revocation hearing to May 15, 2013. As detailed previously, the adjournment of petitioner's final parole revocation hearing from April 24, 2013 to May 15, 2013 was ordered by the presiding ALJ in order to allow for the receipt testimony from Alicia Gilliam, who was the only eyewitness (other than petitioner himself) with respect to the serious allegations set forth in Parole Violation Charge #6. The record suggests that prosecuting parole authorities took reasonable and appropriate steps to timely secure Ms. Gilliam's testimony at both the April 10, 2013 and April 24, 2013 sessions of the final hearing by issuing a subpoena(s) to compel her attendance on those dates. Whether or not the subpoenaed witness actually desired to testify at the final hearing, she cooperated

with prosecuting parole authorities at least to the extent of going to the Clinton County Jail (where the final hearing was held) on both occasions. The efforts to secure Ms. Gilliam's testimony on April 10, 2013 and/or April 24, 2013, however, were thwarted by her apparent inability to find someone to watch her newborn child⁴ when she was required to enter a secure area of the Clinton County Jail to testify. The rules and regulations of that facility apparently prohibited children from entering such an area. The parole revocation specialist, moreover, stated on the record that he had been in telephone contact with Alicia Gilliam on the morning of April 24, 2013 and was advised that the subpoenaed witness anticipated someone would be available to stay with her child during her testimony. This is not a case where lax witness management on the part of prosecuting parole authorities necessitated the adjournment of an already-commenced final parole revocation hearing beyond the 90-day set forth in Executive Law §259-i(3)(f)(i). Nor is this a case where the reason why a necessary witness was unavailable to testify during the 90-day statutory window was lacking in substance, as was the situation in *Echevarria* where it was reported that the necessary witness - a public servant - was unavailable simply because the final hearing was scheduled on his "regular day off." Rather, in the case at bar, Alicia Gilliam's unavailability to testify on April 10, 2013 and April 24, 2013 stemmed from her inability to find supervision for her newborn child, coupled with facility regulations that prevented her from bringing the child into the hearing room in a secure area of the Clinton County Jail.

Finally, in view of all of the foregoing the Court finds no basis to conclude that petitioner was unduly prejudice by the fact that his final parole revocation hearing

⁴ According to Alicia Gilliam's May 15, 2013 testimony, the child in question was born on March 4, 2013.

ultimately concluded on May 15, 2013, one day after the 90-day time frame set forth in Executive Law §259-i(3)(f)(i) expired.

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: April 22, 2014 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge