People ex rel. Eraso v Annucci
2022 NY Slip Op 33519(U)
August 10, 2022
Supreme Court, Bronx County
Docket Number: Index No. 810791/2022e
Judge: David L. Lewis
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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PEOPLE OF THE STATE OF NEW YORK ex rel.
Laura Eraso Esq. on behalf of Robert Robinson

Index#810791/2022e
B & C 8252200475
NYSID # 0170578K
Warrant # 794694

Petitioner,

-against

DECISION & ORDER

ANTHONY ANNUCCI, Acting Commissioner,
New York State Department of Corrections and
Community Supervision ;LOUIS MOLINA ,
Commissioner New York City Department of
Corrections,

Respondents,
---x

David L. Lewis, ASCJ.

Petitioner has moved for the issuance of a writ of habeas corpus on a number of grounds. The court has already ordered Mr. Robinson to be released predicated upon the court's reading of the clear language of the Less is More amendments to the Executive Law, implementing the Legislature's purpose to advance deincarceral outcomes in parole matters and to provide more due process to the parolee.

Petitioner further alleges that his preliminary hearing was untimely held due to the delay in the holding of his recognizance hearing. He alleges that his recognize hearing was not held within the mandated 24-hours of the execution of the warrant, by his arrest. Parole has a mandatory obligation to have the recognizance hearing occur within the 24 hours. There is no exceptions available to Respondents when the courts of record are open and functioning. Respondents failed to fulfill their statutorily imposed obligation regarding Petitioner. As a consequence of such failure, the preliminary hearing was not held within the statutory mandated five-day period. NY Exec L § 259-i

Here the issue is whether the delay in the recognizance hearing is of no moment even though it delays the preliminary hearing beyond the five days from the execution of the warrant. The statute provides that the preliminary hearing "shall" be held within five days of the execution of the warrant i. e. the arrest of parolee or within five days from the recognizance

hearing. Executive Law 259i (3)(a)(i)(B). The statute favors no period over the other.

Respondents assert that they are not at fault regarding the delay in the recognizance hearing. They lay the blame on the Office of Court Administration.("OCA").

Respondents also assert that the measure of time for the five days is as they select between the two provisions of the statute. DOCCS has elected the longer period and promulgated regulations to that effect. They further argue that the regulation is controlling, even though by its operation it deletes the requirement for a preliminary hearing within five days of the execution of the warrant. Respondents read the statute to afford them the greater period in which to conduct a preliminary hearing, even though the parolee is a detainee entitled to the recognizance hearing within twenty-four hours. In effect the delay in the holding of the recognizance hearing provides extra time for the holding of the preliminary hearing, in derogation of the intent of the Legislature in enacting Less is More..

In support of their position, they point to their own regulation, which eliminates a portion of the statute i.e., the measurement of the five-day period from the execution of the warrant, and renders that language a nullity. Respondents start the preliminary hearing clock by making make their own election between the execution of the warrant and the holding of the recognizance hearing. Thus, Respondents control the start of the preliminary clock by any delay in the recognizance hearing. Further there is no incentive to timely have the recognizance hearing timely held as illustrated by the inexplicable delay in this matter of July 16 and July 17, where no action was done to get the hearing held.

Respondents demand that the court must defer to the expertise of the agency as contained in their regulation which absolves DOCCS of any delay in the recognizance hearing which in turn delays the preliminary hearing. They seek a determination that Respondents may by regulation determine the sole means of measuring when the preliminary hearing clock begins to run and within which it must be held and that the court must defer to their expertise..

Functionally at issue is from when the five-day period shall run. DOCCS claims it is the greater period by their regulation to that effect. Petitioner disagrees.

Respondents assert that Petitioner's claim is without merit T e procedural issue raise by Respondents is frivolous.[1] Respondents assert that the court must defer to the agency's interpretation of the statue when it chooses between statutory alternatives.

FACTS

On September 8, 2020, Petitioner was released to parole supervision and agree to follow the conditions imposed upon him by DOCCS as a condition for his release and to remain at liberty. He was told that the failure to abide by these conditions would result in the revocation of his parole. He was to remain under parole supervision until June 12, 2024.

On April 19,2021 he was declared delinquent by parole . He was also charged with violating thirty-two(32) conditions of his parole, principally absconding A parole warrant #794694 was issued against Petitioner on April 29, 2021. He was arrested on July 15, 2022, and on that day the warrant was lodged. His recognizance hearing should have been held by July 16th. It wasn't. The law provides that a recognizance hearing must be held within 24 hours of the detention of the parolee insofar as the courts are open. Specific provision applies to the courts within the City of New York, which are always open.

Respondents seek to lay the blame for the delay on the Office of Court Administration ("OCA"). They allege the United Court System Electronic Document Delivery System ("EDDS") which randomly assigns matters is at fault. Based upon a sequence of computer entries on CHRONS, submitted as the totality of evidence in support of opposition to the petition all entered on July 19, 2022, making the entries not contemporaneous, state that on the same day,

A parole employee entered on July 19 at 9:30 AM that the officer e mailed Queens Supreme Court and asked for an order to produce Petitioner for a recognizance hearing. The need for the order to produce means that Petitioner was in fact arrested and taken to a corrections facility and not to a courthouse, corroborating Petitioner's claim. Parole in a further entry made on July 19 a minute later, wrote that they sent an e mail to EDDS, on July 15, 2022, requesting that a recognizance hearing be held at Queens Supreme Court Criminal Term. Parole alleges that that there was no answer. No further action was taken until three days later, July 18, indicating in an undated entry, that Parole on that day contacted Queens Supreme Court Part K-17 and

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[1] The statute cited by Respondents relates solely to a "trial " detainee. Such a detainee is challenging matters within and about the trial, and logically should not be able to shop the claim between counties, when on trial is a specific county. Petitioner as in every habeas corpus action brought with regard to parole is not a trial detainee. He has fewer rights than a trial detainee and less due process.

was told that neither the folder, the judge or the clerk was there at 10:14 AM and was told to call back later. There is no explanation as to how and why Parole contacted a specific part. Nor is there any mention of the EDDS system. In a subsequent entry dated July 19, 2022, Parole wrote that it called the Queens Supreme Court at11:40 AM and was told to have the Parole Officer come to the courthouse at 2:30PM. There was no evidence of an order to produce being issued. This is the sum and substance of the evidence.

The recognizance hearing was held that afternoon and completed on July 18, 2022, but days beyond the 24-hour statutory requirement. Petitioner was ordered detained. On July 18, 2022, Petitioner was served with his notice of violation of parole and a copy of the violation of conditions of release report and a preliminary hearing date was set. Petitioner's preliminary hearing was held in Kings County on July 22, 2022, and Petitioner was ordered detained.

Respondents assert that the court is bound by DOCCS' interpretation by regulation and their election of the relevant event that starts the five-day clock. It asserts that the measurement for the holding of the five-day preliminary hearing is five days from July 22, 2022, and was thus timely. Petitioner argues that the time to hold the preliminary hearing expired on July 20, 2022, and thus the preliminary hearing was conducted two days late.

The issue is whether the delay in the recognizance hearing beyond 24 hours has any consequences given the burden on the parolee's liberty interest, codified in Less is More. Respondents claim the delay is of no moment, even though it then delays the preliminary hearing beyond the five days from the execution of the warrant. By the time the recognizance hearing was held on July 18, 2022. Petitioner was held in detention for three days. Petitioner asserts that the preliminary hearing held on July 22, 2022, seven days from Petitioner's arrest on the warrant, and four days from the recognizance hearing.

DISCUSSION

Respondents' again repeat their assertion that these matters must be transferred to in effect their home counties based upon CPLR 7002 (b)(5). It has been and remains a frivolous procedural argument. A careful reading of the cited section of law requires transfer only when Petitioner is a "trial inmate" Petitioner is not being held as a trial inmate, thus CPLR 7002 (b)(5) does not apply to this Petitioner. Respondents are required to make claims consistent with the law. Jurisdiction is predicated upon CPLR 7002(b)(1) and CPLR 704(c). Petitioner is being held in Rikers Island and all Rikers Island claims are administratively referred to the Bronx. Respondents' claim that this

subordinates all the other counties to the Bronx is not only frivolous but fantastical.

Turning to the merits of the application, Respondents' position, in effect, determines by regulation that there is no consequences for the delay of the recognizance hearing beyond the statutory 24-hour period, even though the parolee is in their custody and entitled to the hearing within the 24 hours. The statute requires Respondents to find a court of record open which to bring the parolee for his recognizance hearing. The 24-hour period can only be extended upstate where courts do not function as they do in New York City, seven days a week, 24 hours a day.

However, the 24-hour requirement within which the recognizance hearing must be held is binding on DOCCS.[2] Respondents assert that it is the fault of the Office of Court Administration that the recognizance hearing was not timely held and zeros in on the electronic system OCA maintains for the allocation of cases. They identify the EDDS system which they allege reported that no other courts were available, a computer entry that is, on its face, not true. Respondent claim that they did all they could do to get petitioner a recognizance hearing. Respondents provide no evidence of any response from the EDDS system, no less than the one they claim they received. They provide no evidence at all that the delay was due to OCA or the EDDS system..

The facts do not support the argument. They do provide evidence that no act was taken to obtain a recognizance hearing on July 16 or 17, 2002. They have not even an explanation. Parole is charged with providing a recognizance within 24 hours. Sending an e mail within 34 hours, and waiting two days, they claim is sufficient. They show that Parole e- mailed and then phoned to get a recognizance hearing scheduled. But the follow up phone call was made after the 24-hour period mandated by law expired. Before the followed up their e mail, they waited a day, a full 24 hours to "check" on the status pf the calendaring of the hearing, omitting the fact that they did nothing on July 16th... An entry that the clerk and the judge and the file were not in the courtroom on the morning of the day when the recognizance hearing was held in the afternoon is of no moment because on that day, morning or afternoon, the recognizance hearing was already untimely. DOCCS was notified that the hearing would begin in the afternoon session of the same day.

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[2] The recognizance hearing provision in the Executive Law was enacted as part of Less is More and was designed to end automatic detention fir parolee arrested on alleged parole violations. It was added in order to give the liberty interests of the parolee a means to be heard on the issue of detention by a judge and not decided by their parole officer. Specifically, it was to free more people held interminably waiting for parole determinations. This court found the provision to be retroactive because it was remedial and ameliorative in intent and application. See Elgarten ex rel. Ramirez v Annucci, Index # 803234-2022E (Supreme Court Bronx County April 27, 2022)(Lewis, J.)

The alleged misbegotten entry was generated by DOCCS claims it made the request, followed up a number of days later and they were thus faultless in the matter.

Respondents' papers and exhibits fail to support any allegation as to the EDDS response. They show a request for an order to produce be signed. They also show that there was no recognizance hearing held on either the 16th or the 17th of July, both days on which the courts were open. But DOCCS only followed up on the 18th of July-three days after taking the parolee into custody. Petitioner remained incarcerated until his recognizance hearing was held on the 18th, far in excess of within 24 hours since he was taken into custody. .

Nothing proves in any respect that the failure was caused by the EDDS, rather than DOCCS dilatory action. Just as the Petitioner must provide proof for the facts alleged, so do Respondents.

The 24-hour provision is silent upon the issue of fault, but it is clear, when read together with the entire provision on the procedures of parole revocation, there are consequences , such as enforcement of the statutory time period for holding the preliminary hearing.

Respondents cite the statutory provision in the Executive Law 259-i(3)(a)(iv). They state that the statute specifically excluded any interpretation of the running of the clock in which to hold a preliminary hearing.

DOCCS is relying on their own interpretation embodied in their own regulation. They do not explain how they come to this interpretation that diminishes the rights of the parolee by extending his unadjudicated period of incarceration and thereby obtaining more time within which to prepare and hold the preliminary hearing than the time contemplated by the legislature, which set out to specifically shorten the time for parolees to be held and the period by which DOCCS must provide hearings.

While the language of the statute favors neither option over the other and it lacks language such as "whichever is the greater" or "whichever is the lesser", it is left to the court to interpret the language , in order to determine the validity of the regulation and the proper application of the statute. In interpreting the statute, the court must look to the legislative intent and harmonize the entirety of the enactment to give effect to the intent. NY Statutes sec. 98.(McKinneys) It also must use every part of the statute. It cannot, as Respondents functionally demand, ignore the possibility of measurement of the timeliness of the preliminary hearing based upon the execution of the warrant as the act that starts the five-day clock.

Respondents' interpretation beginning the five-day clock in every case from the determination of the recognizance hearing, it allows for such

hearings to be delayed and thereby delay the preliminary hearing without consequences to DOCCS and with unconstitutional consequences to the parolee of incarceration while DOCCS moves at its own pace as opposed the statutory set pace. It is especially significant because it fails to give life to the limiting of circumstances under which people subject to community supervision could be reincarcerated for violations ..of community supervision. Sponsors Memorandum.

The order to detain a parolee issued by the recognizance court cannot exist unless and until the parolee is brought before the court on a properly executed warrant. By the terms of the statute the recognizance hearing must occur after the execution of the warrant," [U]pon execution of a warrant issued ...for any releasee alleged to have committed a violation of a condition of release in an important respect in the city of New York, the authorized officer shall present the releasee to the criminal court of the city of New York or the supreme court criminal term in the county where the violation is alleged to have been committed for a recognizance hearing within twenty-four hours of the execution of the warrant. " Executive Law, Id. A warrant issued pursuant to this section shall constitute sufficient authority to the superintendent or other person in charge of any jail, penitentiary, lockup or detention pen to whom it is delivered to hold in temporary detention the person named therein pending a recognizance hearing "Executive Law, Id.

Read consistent with the Legislature's purpose enunciated in the Sponsor's Memorandum of Support of S 1144() the portion of the provision providing "the execution of the warrant" as beginning the clock is to prevent exactly what occurred here. Because the execution proceeds the recognizance hearing, DOCCC would be able to e extend the parolee's detention without adjudication indefinitely. The regulation allows such a detention to occur. The execution of the warrant provision applies when DOCCS has not provided a recognizance hearing within the 24-hour period after execution of the warrant. It ensures that if the recognizance hearing is delayed, the execution of the warrant possibility makes sure that the preliminary hearing is held I the five-day period as intended.

Under DOCCS theory as happened to Petitioner, if the recognizance hearing is delay for a number of days when Petitioner is held pending such a hearing,, additional days of delay adds five more days to the period of incarceration i.e., ten days without a preliminary hearing. In some cases, if no violation is found, then the length of unlawful detention is multiplied in derogation of the statute's plain language and intent. He use of the execution of the warrant is a benchmark to reduce the wait for a preliminary hearing. It comports with the legislative intent recited in the Sponsors Memorandum of Support of S 1144A 'reduce the number of persons

held in jail and prison in New York by shortening the timeframe for adjudicatory hearings. " In this manner the interpretation, contrary to the regulation, gives effect and meaning to all the language in the provision and provides a means of ensuring that the recognizance hearing is held within the 24-hour time frame.

Fundamentally, the statute where it sets out two options, DOCCS must be required by the purpose of the law as demonstrated in its legislative history, extensively discussed in People ex rel. Elgarten v Annucci, supra. By delaying the recognizance hearing in good faith or not, DOCCS gets more time than the Legislature intended in its amendments of the Executive Law as to the timing of the preliminary hearing.

The relevant statute provides that the preliminary hearing "shall" be held within five days of the execution of the warrant i. e. the arrest of parolee or within five days from the recognizance hearing. The statute favors no period over the other. Respondents interpret the statute to mean that the five-day period runs from the decision on the recognizance hearing by a court, whenever that occurs. Petitioner argues that the period should run from the execution of the warrant, asserting that their position reflects the Legislature's intent to deincarcerate individuals and to shorten the time for the holding of parole revocation proceedings and the imposition of penalties in order to return parolees to supervision expeditiously. Petitioner asserts that the five-day hearing clock starts from the execution of the parole warrant, when the recognizance hearing is delayed beyond the 24-hour period, and not when the decision is rendered on the recognizance hearing, no matter when it is held. The starting of the five-day clock from the execution of the warrant assures that any delay in the recognizance hearing occasions a consequence.

While there is no remedy for the violation of the 24-hour law,, the statute provides an option of a longer or a shorter period, within which the preliminary hearing may be held. If the recognizance hearing is held promptly as the law requires, Parole and the parolee have five days to prepare for the preliminary hearing. That set schedule by the Legislature is deliberate. The section that Respondents read as a fault-based license for delay is a mythical interpretation. The 24 hours rule is silent as to fault .It is an imperative.

DOCCS in effect argues that they can rely on the response that no court was open, despite that they must know that the entry is false, to excuse any delay in the recognizance hearing, even though common sense requires Parole to know that the courts are open, not closed.. The problem with their interpretation is that there is a difference between no court is available in reality and the EDDS designation. Common sense requires a parole officer to know that the courts are open 24 hours a day, seven days a week in New York

City. The statute only excuses the 24 hours when no court in New York City's criminal court system is open and in session. In that unlikely event, the statute explicitly requires that the recognizance hearing must be held within the following twenty-four hours. That did not occur. Parole did nothing. DOCCS follow up telephone call days after the initial request still does not comply with the letter of the law. It was neither energetic nor scrupulous.[3]The statute reads in pertinent part as follows :

> Notwithstanding the provisions of any other law, upon execution of a warrant issued pursuant to this section for any releasee alleged to have committed a violation of a condition of release in an important respect in the city of New York, the authorized officer shall present the releasee to the criminal court of the city of New York or the supreme court criminal term in the county where the violation is alleged to have been committed for a recognizance hearing within twenty-four hours of the execution of the warrant. If no such court of record is available to conduct any business of any type within twenty-four hours of the execution of the warrant, the recognizance hearing shall commence on the next day such a court in the jurisdiction is available to conduct any business of any type.

The statute provides that the authorized officer shall present the parolee to the criminal court in the City of New York or the Supreme Court , Criminal Term in the county where the violation was allegedly committed. DOCCS argues that despite the fact that a court of record was available to conduct the recognizance hearing in Queens County on July 15, 2022. OCA is not to blame for the days that the recognizance hearing was required to be held either in the first 24 hours period or after the alleged responsive data entry, the next 24-hour period.

Inexplicably, Petitioner was not brought to any of the courts opened for business, either Queens Criminal Courthouses, Supreme or Criminal Court, but instead Parole brought him to a New York City jail facility. Only once he was lodged there, did DOCCS request a hearing as evidenced by their request for an order to produce Petitioner for the recognizance hearing. DOCCS wrote an e mail on July 15, 2022, to the Supreme Court in Queens County requesting a recognizance hearing to be scheduled on July 15, 2022, the same day that the parole warrant was executed. Had the hearing been held when it was requested then the preliminary hearing according to DOCCS had to be held no later than July 20. DOCCS knew that it would seek remand of Petitioner at a recognizance hearing, as they always do. If successful Parole would have to hold the preliminary hearing five days later on July 20.

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[3] Emmick v Enders. 107 AD2d 1066 1066 [4th Dept 1985; People ex rel. Morant v Warden, 35 AD3d 208 (1st Dept (2006)

Eventually the recognizance hearing was held long after the 24-hour requirement. At the recognizance hearing Petitioner called attention to the delay in the holding of the recognizance hearing., DOCCS still did not schedule the hearing on either the remaining lawful available days within the five-day window. DOCCS scheduled it for seven days after the warrant was executed, July 22, 2022.

The delay even as DOCCS seeks to shift blame to OCA is not dispositive. DOCCS omits the fact that it in this case did not attempt to present the case to the Criminal Court when the Supreme Court was "not available" for a recognizance hearing. The statue gives explicit directions. DOCCS did not follow them. Further, DOCCS failed to follow the law when Queens County could not accommodate the matter, Instead of holding the parolee for more than 24 hours without a recognizance hearing, DOCCS should have had the hearing commence on the next day in such a court in the jurisdiction is available to conduct any business of any type, such as the Queens County Criminal Court of the City of New York which operates every weekend as well as during the work week. DOCCS did not do so. They waited.

Respondents claim that the statutory language permits the delay in this matter. They misreads the very words of this statute. There is no ambiguity in the term twenty-four hours.

DOCCS' assertion that they are helpless before the electronic system set up to avoid judge shopping is irrelevant for two reasons: first, they did not act within 24 hours of the rejection to find another court in the City of New York and second, they waited days to make any inquiry about the status of the matter to the court system. They did nothing to engage the court system to attempt to obtain the recognizance hearing within the time set in the statute for either the immediate one or the delayed hearing. DOCCS' efforts were minimal and actually too little too late. Tellingly, Parole did nothing to serve Petitioner with his violation notice and charges until the delayed recognizance hearing.

Petitioner asserts that the time for the holding of the preliminary hearing should be measured from the recognizance hearing date, giving Respondents five days to hold such hearing., i.e., July 20. It makes the hearing held on July 22, 2022, untimely by two days. Respondents urge that the hearing is timely because the five days is measured from the latter of the execution of the warrant or a decision on the recognizance hearing. holding of the recognizance hearing, meaning July 23, and therefore the preliminary hearing was timely. The language of the statute reads:

> For any alleged violation for which a court issued an order detaining a person, within five days of the issuance of such order to detain or

> execution of a warrant for the violation, the department shall afford such person a preliminary hearing before a hearing officer designated by the department.

It provides no guidance for situations, as here, where delay under one measure makes the hearing untimely and the other does not. A detention order from the recognizance hearing and the execution of the warrant often are not the same date and produces an anomalous result.

As Respondents point out the language does not indicate an order of priority or any other words as to which of the two alternatives should apply. DOCCS cited their own regulation 9 NYCRR 8005.6(a)(2)(ii)(b) in support of their position that the preliminary hearing was timely held. In pertinent part it reads as follows:

> The preliminary revocation hearing shall be scheduled to take place according to the rules provided in this section, and other sections of this Part and Part 8004 of this Title as may be relevant to reasonably ensure substantial compliance with the Executive Law. Generally:...If the releasee appears as directed in response to a notice of violation, the preliminary hearing is to be scheduled to occur within 10 days of issuance of the notice. If the releasee does not appear as described in paragraph (2) of subdivision (d) of section 8004.7 of this Title and a parole warrant was issued, then upon completion of a recognizance hearing and an order from the court therefrom, If the releasee was ordered by the court to be detained pending completion of their revocation case, the preliminary hearing is to be scheduled to occur within 5 days of the issuance of such order.

The key phrase for the determination of this matter "reasonable assures compliance with the Executive Law" What reasonably assures compliance with the Executive law is not the selecting of a longer period of time for a preliminary hearing by delay in the time for a recognizance hearing. By not complying with the 24-hour legal requirement which directly addresses what to do to insure that the recognizance hearing is within 24 hours of arrest on the warrant, Parole and DOCCS do not comply with the Executive Law. Thus, Parole has demonstrated non-compliance with the Executive Law.

By regulation DOCCS seeks to erect a "reasonable" standard that is not found in the statute. Functionally the Regulations weaken and undermine the strict schedule enacted by the Legislature. The Regulation states that all preliminary hearings are to be measured from the day of the securing order after the recognizance hearing. Under such a theory however the delay of the recognizance hearing, as in this case, however, long expands

the Parolee is held in jail and extends the time for the preliminary hearing-all to the detriment of parolees and this Petitioner. The regulation provides five days from the determination of the detention order. The Regulations ignore completely the Legislatures determination that the time for hearings should be as short as possible and not a matter of convenience for DOCCS. See Sponsors Memorandum of Support S 1144(a), and Ramirez, supra. This court interprets the language of the statute to be mandatory and binding on DOCCS . To the extent that the DOCCS regulation conflicts with the statute, it cannot be relied upon by a court.

Respondents urge that the DOCCS interpretation being five days from the recognizance hearing, forces the court to ignore the alternative lesser measure as from the execution of the warrant. They rely on a line of cases indicating that the court shall defer to the agency's interpretation because of its expertise, citing in principle part, International Union of Painters & allied Trades v. New York State Dept. of Labor, 32 NY3d 198, 208-209 (2018). Further they assert the Chevron doctrine of federal law applies. Chevron, USA Inc v Nat. Resource Defense Council. 467 US 837, 844 (1984) They argue that it is not the role of court to weigh the desirability of any action or choose among alternatives citing Friends of PS 163 Inc v Jewish Home Life Care 30 NY3d 416, 430 (2017) The courts cannot set forth their own plausible alternative statutory interpretation. Astoria Generating Co v Gen Counsel of NYS Dept of En Con, 299 AD2d 706 (#d Dept 2002). Respondents portray this as a duel of interpretations of the language of the statute.

To the extent that the law requires courts to accord great deference to an agencies' interpretation of the statute as evidenced by the regulations promulgated by the agency, it is not limitless. Interpretations by administrative agencies concerning their own regulations must be accorded great weight, especially when the interpretation involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn from such data Great weight or of that type. Deference is to be given to an administrative agency's interpretation of a statute. See KSLM-Columbus Apartments, Inc. v. New York State Div. of Housing and Community Renewal, 5 N.Y.3d 303 (2005).

In the usual situation, administrative agencies are deemed to have greater expertise in technical matters entrusted to them and their interpretation. For this reason alone, agency applications of their own rules and procedures governing enforcement of the relevant statutes is accorded great weight, or substantial deference. However, the regulations may not exceed the statute so as to undermine its legislative purpose of ensuring prompt hearings on parole revocation, as enunciated by the sponsors memorandums of support. The court in considering the mischief sought to be

corrected by the new legislation should construe the act in question so as to suppress the evil and advance the remedy. NY Statutes sec 95. The Legislature's determination to make the law remedial and ameliorative is undermined by DOCCS regulation's reading of the statute.

Therefore, their interpretation is not entitled to unquestioning judicial deference, since the ultimate responsibility for interpreting the law is with the court. Even an administrator's interpretation of the administrator's own regulation does not bind the court. Courts are not required to embrace an agency's regulatory construction which conflicts with the plain meaning of the promulgated legislative language or the intent of the Legislature.

DOCCS regulations ignore the legislative intent in its enactment, which was to reduce the number of people held in jail in New York by shortening the time frame for adjudicatory hearings and decisions See Sponsors Memorandum of Support S 1144(A). The DOCCS regulation improperly lengthens the time frame for a preliminary hearing under its formulation.

By election between two coordinate time frames, by regulation, DOCSS is mandating a longer time of incarceration before the preliminary hearing can be held and as such it undermines the Legislature ameliorative intent. The interpretation given a regulation by the agency is controlling and must not be disturbed except if there are weighty reasons. The Legislature's purpose was to reduce individual's periods of incarceration. As evidenced by the Sponsor's Memorandum and the extensive analysis in People ex rel. Elgarten v Annucci, Id, the "weighty reason" is the legislature's determination to pursue non encareral methods as a factor in the constitutionally required parole hearing procedural steps.

As to special expertise or knowledge, the issue is the number of days to perform an act by DOCCS, either five or ten, a measurement easily made and applied. This is far, far from an area presenting problems of a highly technical nature, the solutions to which in general have been left by the Legislature to the expertise of the agency. Matter of N.Y. State Council of Retail Merchants, Inc. v. Pub. Serv. Com., 45 N.Y.2d 661, 672(1978). Thus, there is no specialized knowledge or understanding of underlying operational practices or an evaluation of factual data and the inferences to be drawn therefrom that requires deference. Not surprisingly, Respondents did not identify any such specialized knowledge or understanding, because there is none in this matter. Despite the Respondents claim that this measurement of days calls for specialized knowledge and understanding, the determination could not be simpler. Indeed, the calculation is so simple that it can be counted using only one's ten fingers.

The counting is not accomplished by an understanding of "operational practices" or "an evaluation of factual data and inferences to be drawn therefrom" See Painters 32 NY3d at 209. Respondents assert that their interpretation is a "textbook example of where the agency's understanding of underlying operational practices." By doing so they mislead themselves into believing that they have some special expertise in the ability to read statutes that direct their activity. It is a textbook example however of an agency attempting to circumvent the legislature's purpose by filling by choosing the more advantageous option to DOCCS to the detriment of parolees and in derogation of the statute's purpose. It determines that only the greater period of time is to be utilized when the Legislature enacted these provisions to remedy the defects in the prior law. In making such amendments, the Legislature sought to reduce the time within which to hold the revocation hearing, not expand.

DOCCS interpretation is without any expertise other than common arithmetic. DOCCS reads the statute in favor of longer periods of incarceration, detrimental to the liberty interest of parolees instead of lesser periods of incarceration while waiting for an adjudication.

While there is no statutory remedy for the failure to hold a recognizance hearing within the 24-hour period, there is remedy for a delayed preliminary hearing occasioned by the failure to hold the precursor recognizance hearing. It is to dismiss the warrant. It is odd that an agency that so requires its parolees to toe the line, give themselves license by regulation to weaken the purpose of the governing statute.

Finally, Respondents take aim at the court calling adherence to the order signed by the judge who accepted the habeas corpus petition and set a very tight schedule for the return by the Attorney General's Office. The call it an abuse of discretion. The issuing court gave Petitioner until July 27, 2022, to serve the Attorney General with the order and verified petition. Petitioner actually served it a day in advance of the required date. CPLR 7006 requires that the individual or entity served the petition for habeas corpus shall make a return on the petition. CPLR 7008 (a) governs the return. It provides the return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding and filed at the time and place specified in the writ, or, where the writ is returnable forthwith, within twenty-four hours after its service. Respondents insist that the return requires a hearing. It does not.

The issuing justice set the return to be filed by the following day July 28, 2022. Respondents claim that historically they have been permitted to make a return by the next date that the writ court is sitting. The writ court sits

only on Wednesday.[4] Therefore ,the Attorney General does not in their view have to respond within the statutory period. They are wrong. Their plea to historically being allowed to in effect hold Petitioners as long as seven days, in order that they can file a written return that is approved by superiors is not binding on anyone. The custom or courtesy, such as it is or was, only harms detainees.

Because we are guided by statute and not historical practices, and the statute states that when the writ is returnable forthwith, it should be returned within 24 hours of its service. The office of the Attorney General complains that the return time is too great a burden because not enough staff is assigned to the division. It seems to ignore that the writ of habeas corpus is brought to free persons from unlawful incarceration. The office seeks to advance their administrative convenience over the rights of Petitioners possibly illegally detained held to appear before a Justice and plead their case.[5]

Respondents do not explain why they have not sought to meet the requirement to seek an adjournment by proving that there was an extenuating circumstance beyond their control and demonstrate that Petitioner would not be prejudiced by the delay. See People ex rel. Vanderburgh v Coombe 103 AD2d 951 (1984)(Attorney General's office was shuttered) In the instant case holding Petitioner while the Attorney General's Office's response was filed was untenable and prejudicial to Petitioner. The court notes that the 2022-2023 State Budget provides more than adequate funding to the Department of Law. See Senate Bill 8000-E Department of Law allocation and expenditure budget enacted as Chapter 50 of the Laws of the State of New York 2022 enacted as "an act making appropriations for the support of government".

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4 There have been isolated exceptions in emergencies.

5 The court notes that the written returns of the Attorney General's Office appear to be basically cut and paste, i.e., the same arguments almost *in haec verba* from case to case.

The office's staffing issues are in fact not beyond their control.

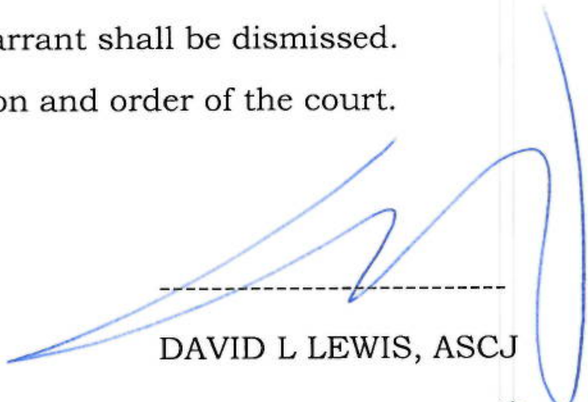
In weighing the issue, the court has considered the liberty interest of the applicant for a writ of habeas corpus against the Office of the Attorney General's allocation of funding to the Department of Law. The liberty interest must prevail.

The writ is granted. The warrant shall be dismissed.

This constitutes the decision and order of the court.

Dated: August 10, 2022

Bronx, New York



DAVID L LEWIS, ASCJ

HON. DAVID L. LEWIS