

Matter of Dennis v Martuscello

2025 NY Slip Op 32472(U)

July 10, 2025

Supreme Court, Kings County

Docket Number: Index No. 504995/2025

Judge: Anne J. Swern

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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 7th day of July 2025

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

In the Matter of the Application of RAYMOND DENNIS
For a Judgement Pursuant to Article 78 of the New York
Civil Practice Law and Rules,

DECISION & ORDER

Index No.: 504995/2025

Calendar No.: 24 & 25

Motion Seq.: 001 & 002

Return Date: 3/27/2025

Submit Date: 4/11/2025

Petitioner,

-against-

DANIEL MARTUSCELLO, Acting Commissioner, New York
State Department of Corrections and Community Supervision;
PATRICIA JANVIER, Administrative Law Judge, New York
State Department of Corrections and Community Supervision,

Respondents.

Recitation of the following papers as required by CPLR 2219(a):

	Papers Numbered
MS 001 Order to Show Cause, Petition, and Exhibits (NYSCEF 1-16)	1, 2
Affirmation and Exhibits in Opposition (NYSCEF 24-33)	3
Reply Affirmation (NYSCEF 34)	4
MS 002 Notice of Motion, Affirmation, and Exhibits (NYSCEF 17-21)	5, 6
Affirmation and Exhibits in Opposition (NYSCEF 24-33)	7
Reply Affirmation (NYSCEF 34)	8
Supplemental Briefings (NYSCEF 35 and 36)	9

*Upon the foregoing papers and after oral argument, the decision and order of the Court
is as follows:*

This special proceeding seeks a Writ of Mandamus under Article 78 of the New York
Civil Practice Law and Rules, to compel the New York State Department of Corrections and

Community Supervision ("DOCCS") to vacate Parole Warrant No. 844262, cancel Petitioner's delinquency, and restore him to supervision.

FACTS

a) The Underlying Incident

Petitioner was conditionally released to community supervision (parole) on 11/30/2023 after serving approximately 13 years in a New York State Correctional Facility (NYSCEF 4, p.8). Petitioner agreed to adhere to certain conditions upon his release and was informed that a failure to abide by them would result in the revocation of his parole. It is alleged that approximately one year later, on 10/15/2024, petitioner attacked his roommate (the complaining witness) in the shelter where both were residing, thereby lacerating his nose and puncturing his back with a metal comb. A police officer responded to the scene, interviewed the complainant, photographed his injuries, and took a report of the incident.

A few days later, on 10/24/2024, Parole Warrant 844262 was issued charging petitioner with a violation of 20 Conditions of Release (*id.*, pp.1-7). Petitioner was charged with a violations of Rule 8 that reads in pertinent part that he shall "not behave in such a manner as to violate the provisions of any law to which [he is] subject which provides for a penalty of imprisonment, nor will [his] behavior threaten the health and safety of [himself] or others" (*id.*, p.9). Petitioner was arrested pursuant to the parole warrant on October 24, 2024. A recognizance hearing was held on 10/25/2024 at which time the Supreme Court determined that petitioner did not present a substantial risk that he would fail to appear at the preliminary or final revocation hearings. He was released on his own recognizance and was referred to an anger management program. (NYSCEF 6).

b) The Preliminary Revocation Hearing

The preliminary parole revocation hearing before an Administrative Law Judge (ALJ) was held on 10/29/2024, within 10 days of the recognizance hearing pursuant to New York Executive Law (NYEL) § 259-i [3] [c] [i] [A] and 9 NYCRR 8000.6 [a] [2] [i].¹ At that time DOCCS commenced to present its case on Charges 1 (punching in the face causing bruising and laceration to the nose) and 19 (threats of physical harm causing fear and alarm). During extensive direct and cross examination, the complainant described an incident that occurred when he sought to address petitioner's smoking in their bathroom whereupon petitioner punched him in the head and slammed him in the back with a metal comb causing him to receive stitches and a tetanus shot. The Administrative Law Judge (ALJ) reserved decision thereupon and ordered a continuance, beyond the outside date, for the respondent to present evidence on additional charges with additional witnesses including the responding police officer. Respondent objected to the continuance as an adjournment beyond the ten-day limit. The ALJ ruled that since the hearing had commenced, the proceeding was being continued, not adjourned.

The ALJ directed that the respondent could proceed on the additional Rule 8, Charge 7 violation (puncturing complainant's back with a metal comb causing laceration and pain) at the "continued" proceeding.

While the parties were discussing next steps, respondent's additional witness [the police officer] eventually appeared. The respondent requested the opportunity to continue the hearing after the lunch break. The ALJ denied this request due to the number of cases remaining on the calendar that day. The parties discussed their availability, that of the ALJ and the police officer

¹ Title 9, Executive Department, Subtitle CC, Division of Parole, Part 8000, *et. seq.* The statutory authority for the Division of Parole is derived from Executive Law §§ 259 [2] and 259-b [11].

and selected 11/13/2024. Petitioner's attorney then objected to that date as it was beyond the statutory 10-day window.

On 11/13/2024, the arresting police officer testified regarding Charge 7 of the parole warrant. The responding police officer testified that he had a conversation with the complainant, observed and photographed his injuries, arrested the petitioner and completed police paperwork. He then visited the complainant in the hospital where he was being treated for his injuries. The officer admitted that he did not witness the assault, because he arrived at the scene after it had occurred.

The ALJ found, by a preponderance of the evidence, that petitioner violated the conditions of his parole and sustained Charge 7. The ALJ scheduled the final hearing for 11/15/2024.

ARGUMENTS OF COUNSEL

a) Petitioner

Petitioner claims that his right to a timely preliminary revocation hearing was violated by improperly adjourning the hearing to 11/13/2024 outside the 10-day period in NYEL § 259-i [3] [i] [A]). He notes that a hearing may only be adjourned for legitimate reasons (*Matter of Emmick v Enders*, 107 AD2d 1066 [4th Dept 1985]). The petitioner contends that the hearing was not adjourned for legitimate reasons, as it was not adjourned due to his own actions or factors outside the respondent's control (*People ex rel. Goldberg v Warden*, 45 AD3d 356 [1st Dept 2007]). The petitioner alleges that the hearing was adjourned because the respondent was not ready to proceed on the additional charges.

Additionally, petitioner claims that on 11/13/2024, he was denied his constitutional right to confront witnesses as the ALJ permitted the arresting officer to testify as to hearsay statements

made by the complaining witness (*Morrissey v Brewer*, 408 US 471 [1972]). Although a parole revocation is an administrative proceeding, and hearsay may be admitted in evidence (*People ex rel. McGee v Walters*, 62 NY2d 317, 319 [1984]), petitioner argues that the respondent did not sustain its burden of proof as Count 7 was based only on respondent's presentation of hearsay statements made by the complaining witness, an out-of-court declarant, at the "continued" hearing (*cf. People ex rel. Rosenfeld v Sposato*, 87 AD3d 665, 667 [2d Dept 2011]).

b) Respondent

Respondent argues that the petitioner received a timely hearing because once a parole revocation hearing is "timely scheduled, or held in whole or in part, and is thereafter adjourned or continued for legitimate reasons without prejudice to petitioner, there is no violation of the [time] limit" (*People ex rel. Morant v Warden*, 35 AD3d 208, 209 [1st Dept 2006]; *Matter of Emmick v Enders*, 107 AD2d 1066 [4th Dept 1985]). An adjournment that complies with the [ALJ's] order continuing the hearing to secure additional evidence and resolve the proceeding on the merits is a legitimate reason (*People ex rel. Leacock v New York State Dept. of Corrections*, 38 Misc. 3d 1215(A) [Sup. Ct., NY Cty. 2013]). An adjournment may also be granted without regard to the earliest possible date (*People ex rel. Goldberg v Warden*, 45 AD3d 356, 356 [1st Dept 2007]).

Respondent also argues that it has established by a preponderance of the evidence that petitioner violated one or more of the conditions of his release within the 10-day period, despite the continuance by the ALJ. Furthermore, petitioner did not establish any specific prejudice, as he was released on his recognizance, which better allowed him to prepare his case for the final determination. Respondent argues that unlike a criminal proceeding, a parole revocation hearing is a summary administrative proceeding, and a parolee is not entitled to a presumption of

innocence (*People ex rel. Ayers v Lombard*, 87 Misc. 2d 355, 357-358 [Monroe Cty. 1976], citing *Gagnon v Scarpelli*, 411 US 778, 786 [1973]) or an absolute right to confront witnesses (*People ex rel. McGee v Walters*, 62 NY2d 317, 319 [1984] [A parolee is entitled to minimum due process rights at the final parole revocation when the parolee's fate hangs in the balance. The rules of evidence in an administrative proceeding are relaxed.]

Finally, respondent asserts that the petition must be dismissed because respondent does not have the right to an administrative appeal of a preliminary parole revocation hearing decision, as he has not exhausted all administrative remedies. Respondent notes that an appeal may only be taken to the Appeals Unit after a final hearing determination (NYEL § 259-i [4-a]). A preliminary revocation hearing decision is an interim determination and, therefore, rendered moot by the final hearing determination (*People ex rel. Ciccarelli v. Saxton*, 23 AD3d 1095, 1096 [4th Dept 2005]).

LAW & ANALYSIS

a) Appeals from a determination by the State Board of Parole

The Legislature authorized the creation and funding of the State Board of Parole (NYEL § 259-a and § 259-b [1]). The State Board of Parole was granted the power to “establish written procedures for its use in making parole decisions as required by law” (NYEL § 259-c [4]), which included procedures for parole revocation hearings (NYEL § 259-i). The Legislature granted parolees released on recognizance the right to an expedited preliminary revocation hearing within ten days of issuance of an order of release (NYEL § 259-c [3] [i] [A]). Importantly, the Legislature further recognized that some parolees may not be released from custody, resulting in a higher level of deprivation of freedom than a released parolee. In that instance, a preliminary revocation hearing is to be held within five days of the issuance of the detention order (NYEL

§ 259-c [3] [i] [B]). To guarantee an expedited preliminary revocation hearing and final determination, the Legislature enacted NYEL § 259-i [4] [a], which reads in pertinent part as follows:

Except for determinations made upon preliminary revocation hearings upon allegations of violation of presumptive release, parole, conditional release or post-release supervision, all determinations made pursuant to this section may be appealed in accordance with rules promulgated by the board. Any board member who participated in the decision from which the appeal is taken may not participate in the resolution of that appeal. The rules of the board may specify a time within which any appeal shall be taken and resolved. [italics added].

The plain language of the statute exempts preliminary revocation hearings from the appeal process because “[A] regulation adopted by an agency, in [the] implementation of the statutory scheme it is empowered to enforce is to be read, if possible, in a manner consistent with, rather than in opposition to, the governing statute” (*Matter of Mayfield v Evans*, 93 AD3d 98, 105-106 [1st Dept 2012], citing *People ex rel. Knowles v Smith*, 54 NY2d 259, 267 [1981]). The New York State Department of State’s Division of Administrative Rules enacted 9 NYCRR § 8006.1 [a] consistent with NYEL § 259, *et seq.* as follows:

An administrative appeal may be taken from a final determination of the Board of Parole regarding a parole release, parole rescission or final revocation proceeding. [emphasis added].

Based on the plain wording of the Executive Law and the NYCRR, the petitioner is not entitled to a review of the preliminary revocation hearing. To implement NYEL § 259-i [3] [i] [A] and ensure a prompt adjudication on the merits, the Department of State, consistent with the Legislature’s intent, did not grant a parolee the right to an interim appeal from the preliminary revocation hearing. While the Legislature promulgated different hearing timelines for incarcerated and non-incarcerated parolees, it chose not to promulgate different appellate rights.

All parolees may only appeal a final determination. To allow interim appeals would frustrate the expedited nature of the proceedings.

The Courts have aligned with the Legislature's decision to expedite preliminary revocation hearings by adhering to lower standards of evidence and permitting continuances and adjournments (*People ex rel. Walker v Warden of Rikers Island Correctional Facility*, 162 AD2d 107 [1st Dept 1990], citing *People ex rel. McKay v Sheriff of County of Rensselaer*, 152 AD2d 786, 787-788 [3rd Dept 1989]).

Since petitioner does not generally have the right of administrative appeal from an interim preliminary revocation hearing decision, any irregularities are rendered moot and subsumed by the final hearing determination (*People ex rel. McCummings v DeAngelo*, 259 AD2d 794, 794-795 [3rd Dept 1999]). The right of review of the propriety of a parole revocation is by way of an appeal from that [final] determination (*id.*). Therefore, the Court lacks jurisdiction to review technical or substantive errors during the preliminary revocation hearing process and decision because a "court cannot contort statutory language and elide legislative intent" (*Matter of Mayfield v Evans*, 93 AD3d 98, 106).

Thus, the remedy for any injustice incurred by petitioner during the preliminary revocation hearing process lies with the Legislature to amend the Executive Law § 259-i [4] [a], and 9 NYCRR § 8006.1 to permit interim appeals or a right of review.

b) Confrontation of Witnesses

Petitioner argues that he was denied his constitutional right to confront witnesses and, therefore, the preliminary revocation hearing decision may in fact be reviewed without exhausting his administrative remedies. He submits that the Police Officer's testimony was

predicated on hearsay evidence and thus his right of confrontation was violated. This Court disagrees.

Generally, the doctrine of “exhaustion of administrative remedies” does not apply where [the agency’s] action is challenged as unconstitutional” (*Dozier v New York City*, 130 AD2d 128, 132-133 [2d Dept 1987]). However, parolees are only entitled to minimum [constitutional] due process rights (*People ex rel. McGee v Walters*, 62 NY2d 319) because unlike criminal prosecutions, violation hearings are summary in nature and evidence presented thereat may include hearsay, although that may not be the sole basis for finding the violation (*People v Beliacqua*, 91 AD3d 1120, 1120 [3rd Dept 2012]; *People v Hancarik*, 202 AD3d 1151, 1153 [3d Dept 2022]; *People v Concepcion*, 41 Misc. 3d 1, 5 [App. Term, 2d Dept 2013], citing *People v Beliacqua*, *supra.*; *People v Filipowicz*, 111 AD3d 1022-1023). Even if an interim review was permitted due to an alleged constitutional infirmity, Charge 7 was sustained by the officer’s hearsay testimony in addition to his observations of the complainant’s injuries at the scene and at the hospital and the complaint’s non-hearsay and detailed testimony from the earlier date. Petitioner had a full and fair opportunity to confront and cross-examine the complaining witness about the entire incident during the 10/29/24 two-hour hearing. Therefore, Petitioner was not deprived of his constitutional right to confront the witnesses, and his constitutional argument is without merit.

Based on the foregoing, the petitioner’s remaining arguments are academic because under the facts of this case, the Court is without jurisdiction to review the substance of the ALJ’s preliminary revocation hearing decision as petitioner does not have an interim right of appeal to the State Board of Parole Appeal Unit or judicial review per CPLR § 7801 [1] (*People ex rel. McCummings v DeAngelo*, 259 AD2d 795; *Zagata v Freshwater Wetlands Appeals Board*, 244

AD2d 343, 344-345 [1997] [The DEC Commissioner's interim decision that a hearing must be conducted is not a final determination that is ripe for review.]

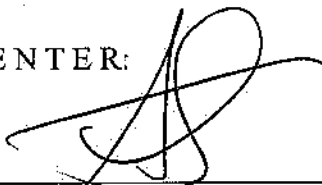
c) Motion to Stay the Final Revocation Hearing

The motion for a stay of the final hearing is denied for the aforesaid reasons.

Accordingly, it is hereby ORDERED that the petition is denied and dismissed (MS 001), and it is further

ORDERED that the motion for a stay of the final hearing is denied (MS 002).

This constitutes the decision and order of the Court.

ENTER: 

Hon. Anne J. Swern, J.S.C.
Dated: 7/10/2025

For Clerks use only: MG _____ MD _____ Motion seq. # _____
