

**STATE OF NEW YORK
COUNTY COURT**

COUNTY OF MONROE

IN THE MATTER OF

Releasee/Petitioner,

-vs-

Index No.: SMZ-70754-22/001

**ANTHONY ANNUCCI, Acting Commissioner
New York State Department of Corrections and
Community Supervision, and TODD BAXTER,
Monroe County Sheriff**

Respondents.

**APPEARANCES: LAWRENCE L. KASPEREK, ESQ.
Attorney for Releasee/Petitioner**

**KIM A. HINKLEY, ESQ.
Attorney for Respondent Todd Baxter**

**TED O'BRIEN, ESQ.
Attorney for Respondent Anthony Annucci**

DECISION AND ORDER

DOUGLAS A. RANDALL, J.

The petitioner has filed an Order to Show Cause and Petition seeking relief pursuant to Article 78 of the CPLR requesting that this court grant a Recognizance Hearing or grant the release of the petitioner from his current detention and restore the petitioner to parole supervision pending a final hearing on the Notice of Violation, due to the government's failure to comply with the mandate to conduct a Recognizance Hearing. This court issued an Order to Show Cause on April 18, 2022 granting oral argument to take place on April 25, 2022 to determine whether the petitioner was entitled to a Recognizance Hearing or his release. The court conducted oral argument on April 25, 2022.

The following are the relevant facts in this case:

The petitioner pled guilty to Criminal Possession of a Weapon in the Second Degree on January 13, 2016. The petitioner was sentenced to serve a determinate term of 3 ½ years in the New York State Department of Corrections plus 3 ½ years of post release supervision. The petitioner was released to parole supervision on December 24, 2018. On October 2, 2020 the petitioner was arrested on allegations of newly committed crimes. A Notice of Violation alleging twelve charges of violating individual enumerated Conditions of Release was filed against the petitioner, and a warrant issued by the Department of Corrections and Community Supervision on or about October 5, 2020. The petitioner did waive his right to a preliminary hearing on October 5, 2020. The petitioner's final parole revocation hearing was scheduled for October 21, 2020. On October 9, 2020 the petitioner requested an adjournment of his final revocation hearing. The parole revocation hearing was placed on the "K" calendar at the petitioner's request and with the consent of the state. Placement on the "K" calendar adjourns the parole proceeding while the petitioner's new criminal proceeding is pending.

The new criminal allegations were charged in Monroe County Indictment 2021-0453B filed with this court. On April 13, 2022 this court dismissed the indictment filed against the petitioner pursuant to CPL 30.30. The dismissal resulted in the petitioner's release on the criminal charges by operation of law. On April 13, 2022 counsel for the defendant sent a letter to the N.Y.S. Division of Parole requesting a Recognizance Hearing for the petitioner. The N.Y.S. Division of Parole has not granted the petitioner his request for a Recognizance Hearing. The petitioner has also requested that the parole

matter be removed from the "K" calendar. The N.Y.S. Division of Parole has granted this request and a final revocation hearing is now scheduled for May 4, 2022.

The petitioner now asks this court to grant a Recognizance Hearing or grant the release of the petitioner from his current detention and restore the petitioner to parole supervision pending a final hearing on the Notice of Violation. Respondent Annucci opposes the release of the petitioner and argues that the petitioner is not entitled to a Recognizance Hearing. Respondent Baxter takes no position with respect to the petitioner's release, however, Respondent Baxter does state that the petitioner is being held legally pursuant to a parole warrant dated October 2, 2020.

Effective March 1, 2022 Executive Law § 259 was amended to include the new "Less is More" legislation. The provisions of the "Less is More" legislation displays a clear legislative intent to protect against unwarranted and unnecessary detention of people while the conclusion of their revocation proceedings are pending. The factual circumstances of the case before this court require the application of the newly amended parole statute. The relevant section of the statute applying to the defendant's situation states:

If the violation charge involves conduct that would constitute a new felony or misdemeanor offense, such recognizance hearing may be held at the same time as a proceeding pursuant to article five hundred thirty of the criminal procedure law for any warrants issued by the department prior to such proceeding. If at the proceeding pursuant to article five hundred thirty of the criminal procedure law the court imposes bail on the new alleged criminal offense or commits the releasee to the custody of the sheriff pursuant to article five hundred thirty of the criminal procedure law and the releasee secures release by paying bail or under non-monetary conditions or by operation of law, then the releasee shall not be detained further based solely on the warrant issued by the department. If the department issues a warrant for a non-technical violation for alleged criminal conduct that has already been the subject of a court's order pursuant to article five hundred thirty of the criminal procedure law, then within twenty-four hours of

execution of the warrant the releasee shall be provided a recognizance hearing pursuant to this subparagraph, provided, however, that if no court as defined in subparagraph (iv) of this paragraph is available to conduct any business of any type within twenty-four hours of the execution of the warrant, then the recognizance hearing shall commence on the next day such court is available to conduct any business of any type (Executive Law § 259-1 [3] [viii]).

Much of the argument before the court concerns the issue of whether or not the statute is retroactive and whether the petitioner is entitled to a Recognizance Hearing.

Respondent Annucci has argued that the statute is not retroactive, and the petitioner is not entitled to the protections and benefits of the new statute because the parole warrant was executed prior to the effective date of the amendment to the Executive Law. This court disagrees that retroactivity is an issue in this case because the petitioner secured his release by operation of law on April 13, 2022, a date after the effective date of the statute. The petitioner secured his release by operation of law when this court dismissed the new criminal charges against the petitioner. The “triggering event” of the petitioner’s release after dismissal of the criminal charges allows this court to apply the new statutory language to this situation. In Mr [redacted]’s case, the “triggering event” occurred after the effective date of March 1, 2022 (*see Smith v Russo*, Supreme Court, County of Rensselaer, March 8, 2022; *see also Perricone v Russo*, Supreme Court, County of Rensselaer, March 7, 2022). The language in the statute is clear:

If at the proceeding pursuant to article five hundred thirty of the criminal procedure law the court imposes bail on the new alleged criminal offense or commits the releasee to the custody of the sheriff pursuant to article five hundred thirty of the criminal procedure law and the releasee secures release by paying bail or under non-monetary conditions or by operation of law, then the releasee shall not be detained further based solely on the warrant issued by the department (Executive Law § 259-1 [3] [viii]).

This language in the statute applies directly to the petitioner's situation. This court arraigned the petitioner on new criminal charges on August 9, 2021. The petitioner was held on no bail, no release while the criminal matter was pending. The petitioner was released from the court's securing order by operation of law when all the new criminal charges were dismissed by the court on April 13, 2022. As a result of the dismissal, the only hold on the petitioner was the parole warrant issued by the Department of Corrections and Community Supervision. According to the statute, when a person has secured their release after being held on new criminal charges, and the sole remaining hold is pursuant to a warrant issued by the Department of Corrections and Community Supervision, then that person must no longer be detained (*see* Executive Law § 259-1 [3] [viii]).

This court determines that this statutory language stands alone and apart from the statutory language addressing the requirement of a Recognizance Hearing and the statutory protections and benefits of a Recognizance Hearing. A person's statutory benefit of release, if only being held by a warrant issued by the Department of Corrections and Community Supervision, after securing his or her release by operation of law is not dependent on holding a recognizance hearing.

Therefore, after reading and interpreting the new statute and applying the statute to the facts and circumstances of this case, it is

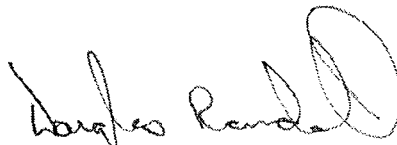
ORDERED, ADJUDGED AND DECREED, that the relief requested by the petitioner seeking his release is granted, and it is further

ORDERED, ADJUDGED AND DECREED, that the Monroe County Sheriff may no longer detain the petitioner based solely upon the parole warrant from the Department of Corrections and Community Supervision, and it is further,

ORDERED, ADJUDGED AND DECREED, that the petitioner shall remain released until the determination of his final parole revocation hearing, unless he is detained by order of a court of competent jurisdiction..

This constitutes the Decision and Order of the court.

Dated: April 28, 2022
Rochester, New York

A handwritten signature in black ink, appearing to read "Douglas Randall", written over a horizontal line.

HON. DOUGLAS A. RANDALL
Acting Supreme Court Justice