SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of	
[redacted]	**DEMAND FOR CHANGE OF VENUE**
Petitioner,	Index No. [redacted]
- against -	Hon. Debra A. James
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, Acting Commissioner, and TINA M. STANFORD, Chairwoman, New York State Board of Parole	
Respondent.	
For an Order Pursuant to Article 78 of the Civil Practice Law and Rules	

PLEASE TAKE NOTICE THAT Respondents New York State Department of Corrections and Community Supervision, Anthony J. Annucci, and Tina M. Stanford hereby demand, pursuant to CPLR § 511(a) and (b), that the place of trial in the above-entitled action be changed from New York County in which it has been improperly placed, to Westchester County, or in the alternative Albany County, where venue would be proper as provided in CPLR § 506(b), and where the convenience of witnesses and the interests of justice would be promoted pursuant to CPLR § 510.

Dated: New York, New York
May 13, 2020

LETITIA JAMES
Attorney General for the State of New York
Attorney for Respondents
By:

/s/ David T. Cheng
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Attorney for Petitioner

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of [redacted] Petitioner, - against - NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, Acting Commissioner, and TINA M. STANFORD, Chairwoman, New York State Board of Parole Respondent. For an Order Pursuant to Article 78 of the Civil Practice Law and Rules	**NOTICE OF VERIFIED CROSS-MOTION TO CHANGE VENUE PURSUANT TO CPLR §§ 510 AND 511, DISMISS PURSUANT TO CPLR § 3211(a)(2)** Index No. [redacted] Hon. Debra A. James

PLEASE TAKE NOTICE that upon the annexed Verified Affirmation, Respondent NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION ("DOCCS"); ANTHONY J. ANNUCCI, Acting Commissioner of DOCCS, and TINA M. STANFORD, Chair, New York State Board of Parole, by their attorney, LETITIA JAMES, Attorney General of the State of New York, shall move in New York County Supreme Court, Civil Term, Part 59, Room 331, Supreme Court, New York County, 60 Centre Street, New York, New York 10007 before the Honorable Debra A. James, J.S.C., on **May 15, 2020**, at 11:30 A.M., or as soon thereafter as can be heard, for an Order pursuant to CPLR §§ 510 and 511 to change venue on the grounds that venue in Bronx County is improper, and pursuant to CPLR § 3211 to dismiss the Petition on the grounds that it is moot. Any responsive papers are to be served by **May 20, 2020**, and Respondent's Reply is to be served by **May 21, 2020**. See CPLR § 2214(b).

Dated: New York, New York

May 13, 2020

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondents
By:

/s/ David T. Cheng
David T. Cheng
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By E-Filing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of [redacted] Petitioner, - against - NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANTHONY J. ANNUCCI, Acting Commissioner, and TINA M. STANFORD, Chairwoman, New York State Board of Parole Respondent. For an Order Pursuant to Article 78 of the Civil Practice Law and Rules	**AFFIRMATION IN SUPPORT OF VERIFIED CROSS-MOTION TO CHANGE VENUE PURSUANT TO CPLR §§ 510 AND 511 AND DISMISS PURSUANT TO CPLR § 3211(a)(2)** Index No. [redacted] Hon. Debra A. James

DAVID T. CHENG, an attorney at law duly admitted to practice in the courts of the State of New York, hereby affirms under penalty of perjury that the following is true and correct:

1. I am an Assistant Attorney General in the Office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondents New York State ("NYS") Department of Corrections and Community Supervision ("DOCCS"), Anthony J. Annucci, and Tina M. Stanford ("Respondents").

2. I am familiar with the facts of this matter and make this affirmation based on my review of the filings and documents in this action, the public records underpinning the original Article 78 Petition ("Petition"), or on information and belief.

3. [redacted] ("Petitioner") brings this Petition ("Pet.") alleging that she was arbitrarily and capriciously denied a Limited Time Credit Allowance ("LCTA"), because the decision did not comport with the standards of Correction Law § 803-b. See Pet. at 2, 6-7.

4. Respondents submit this affirmation in support of Respondents' cross-motion to dismiss the Petition as moot. Additionally, for the reasons set forth below, Respondents also move to change venue in this Article 78 proceeding and transfer this petition to Westchester County, pursuant to CPLR §§ 510 and 511, on the ground that New York County is not the proper venue for this proceeding as provided in CPLR § 506(b), and the convenience of witnesses and interests of justice will be promoted by the change pursuant to CPLR § 510. In the alternative, as discussed below, venue also lies in Albany County which is the County in which the final determination being challenged was made and the principal office of the Board of Parole is located. You can say it in your own words.

FACTUAL AND PROCEDURAL BACKGROUND

5. The following facts are based on the allegations of the Petition or otherwise subject to judicial notice. See Ptasznik v. Schultz, 247 A.D.2d 197, 198 (2d Dep't 1998).

6. Petitioner was convicted of Murder in the Second Degree for an incident on July 16, 1995. See [redacted]

> At approximately 6:00 P.M. on July 16, 1995, defendant and her father entered the Albany Police Station claiming that they could not locate defendant's three-year-old son. Defendant's father expressed concern that some harm may have come to the child. Sergeant [redacted] asked defendant whether the child was with his father or if she knew of the child's whereabouts. When defendant failed to respond, [redacted] then inquired whether defendant was aware of any harm to the child, to which she first stated that the child "was in the water" and then said "I threw him in" in a low voice. [redacted] testified that he was not sure if there was a problem at that point but that he and defendant's father agreed they should search for the child near the Hudson River. Defendant and her father traveled in her father's car to the river, with Officer [redacted] following them. At the riverbank, [redacted] asked defendant to show him the child's location. Defendant pointed to a site and, thereafter, [redacted] retrieved the child's body and attempted

> resuscitation. After other officers arrived at the scene, defendant approached and asked if the child was "all right".
> Subsequently, defendant agreed to accompany the officers to the police station and no conversation occurred in transit. Defendant was taken to an interview room and, after being provided her *Miranda* warnings by Detective [redacted] she indicated that she understood her rights and agreed to speak with the officers. She offered initial biographical information and then stated that she could not remember how she or the child got to the river. Although she denied having previously stated to the police that she had thrown her child into the river, she claimed that she and her son were "in the water". When accused of killing her child, defendant stood up and started screaming and acting peculiarly. Her father assisted in quieting her and the questioning ceased.
>
> Later that evening, when Detective [redacted] was walking down the hallway at the police station, he heard a commotion in one of the nearby rooms. Entering the room, he found defendant yelling as another officer was trying to calm her. No questions were asked of defendant but [redacted] heard her say "I left him in the water. I didn't even get him. Why didn't I get him? What is wrong with me?" Additionally, after being escorted to the women's bathroom by another officer, defendant gazed in the mirror and spontaneously yelled, "Oh, my God. Oh, my God. What have I done to my baby?" Defendant was thereafter transported to the Albany County Jail.

Id. at 827–28.

7. At trial, Petitioner:

> based her case on the affirmative defense of not responsible by reason of mental disease or defect. Claiming that defendant suffered from mental illness since adolescence, the opening offered by defendant's counsel characterized her as an individual who had "lost touch with the difference between right and wrong, lost touch with the consequences of her actions". The People, therefore, sought to introduce evidence of defendant's prior acknowledgment of misconduct toward her other children to show that her claims of unawareness were false and self-serving, thereby contradicting defendant's affirmative defense. The People further offered the testimony to establish that defendant's conduct was not an aberration in her life, but, rather, that defendant previously neglected her children and was aware of the consequences, had recognized her fault and the ramifications of her actions, and had been admonished in court for such neglect. Finally, it was submitted that the proof of neglect also demonstrated that a plan was developed to assist

> defendant in caring for her children, which was probative to rebut defendant's claim that she never received proper care or treatment for her problems.

Id. at 830.

8. Petitioner was thus "found guilty of murder in the second degree and sentenced to a term of imprisonment of 25 years to life." Id. at 827.

9. On September 3, 2019, Petitioner was afforded a LCTA early parole interview ("LCTI") by the Board of Parole ("Board"). See Pet. Ex. H, 1.[1] LCTA credit was ultimately denied on the basis that that it was "not compatible with the welfare of society and would so deprecate the serious nature of your crime as to undermine respect for the law." Id., 13. DOCCS took care to note that it had "considered [her] rehabilitation efforts" and that her overall disciplinary record showed multiple disciplinary infractions, as well as her "history for violence[.]" Id. Specifically, DOCCS was "concerned that [] LCTI release would trivialize the tragic loss of life you caused your three year old." Id. Petitioner filed an administrative appeal of this determination on several grounds on December 20, 2019, including the one raised here, that a clerical error regarding her COMPAS disciplinary score invalidated the determination as being on erroneous information. See Pet. Ex. I, 1, 3-4.

10. Petitioner had her regularly scheduled parole release interview with the Board on March 3, 2020. See Parole Interview Transcript, dated March 3, 2020, annexed hereto as **Exhibit A**; see Pet. at 4 ("the March 2020 initial parole hearing"). Petitioner's administrative appeal of the LCTA determination (Ex. H, 13) was thereafter denied on April 10, 2020, on the grounds that she had "reappeared for further release consideration on March 3, 2020." Pet. Ex. J.

[1] "The term 'interview' expressly applies to parole release procedures, while the term 'hearing' applies to parole revocation procedures." Banks v. Stanford, 159 A.D.3d 134, 145-46 (2d Dep't 2018). A parole interview is not intended to afford a "full adversary-type hearing." Id. at 144, quoting Briguglio v. N.Y.S. Bd. of Parole, 24 N.Y.2d 21 (1969).

11. A month later, Petitioner initiated this matter by filing an Order to Show Cause ("OTSC") on May 6, 2020. See OTSC. This matter was scheduled for Respondents to electronically file a response by May 13, 2020, and for any reply by Petitioner to be filed by the appearance on May 15, 2020. Id.

12. Respondents file their demand to change venue alongside this motion. As the prerequisites set forth in CPLR § 511 for a motion to change venue have been satisfied, Respondents now move to change the place of trial of this action, pursuant to CPLR § 510 and 511, to Westchester County on the ground that the county designated by Petitioner is not a proper county, as provided in the CPLR § 506(b), and because the convenience of witnesses and the interests of justice will be promoted by venue in Westchester County as provided in CPLR § 510.

ARGUMENT

POINT I: THE PETITION IS MOOT *AB INITIO*

A. PAROLE INTERVIEW MOOTNESS STANDARD OF REVIEW

13. "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that…the court has not [sic] jurisdiction of the subject matter of the cause of action." CPLR § 3211(a)(2). Subject matter jurisdiction cannot be conferred by the agreement of the parties, by equity, or by waiver. See Morrison v. Budget Rent A Car Sys., Inc., 230 A.D.2d 253, 260 (2d Dep't 1997).

14. "[M]ootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court[.]" Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of the United Bhd. of Carpenters & Joiners of Am., AFL-CIO, 72 N.Y.2d 307, 311 (1988). "Where parties cannot be affected by a court's determination, the action should be dismissed as moot" under CPLR § 3211(a)(2) because it is no longer justiciable. Mastrangelo v. Nassau Cty., 102

A.D.2d 814, 814 (2d Dep't 1984) (citing Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 (1980)); see Callwood v. Cabrera, 49 A.D.3d 394, 394 (1st Dep't 2008) (dismissal for mootness under CPLR § 3211(a)(2)); Yates v. NYC Health & Hosps. Corp., 37 Misc. 3d 809, 950 N.Y.S.2d 841, 845 (Civ. Ct. Kings Cty. 2012).

15. A matter is moot unless "judicial determination carries immediate, practical consequences for the parties[.]" Saratoga Cty. Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 812 (2003). Such immediate and practical effect is lost to mootness when a matter "no longer involve[s] a genuine controversy [but rather] present[s] an abstract, hypothetical issue[.]" Fragoso v. Romano, 268 A.D.2d 457, 457 (2d Dep't 2000); see, e.g., Baines v. Berlin, 125 A.D.3d 439, 440 (1st Dep't 2015) (challenge to discontinuance of emergency temporary housing assistance moot after move into permanent housing).

16. A subsequent parole release interview renders claims against a prior interview moot. See Schwartz v. Dennison, 40 A.D.3d 218, 218 (1st Dep't 2007) ("appeal is moot and must be dismissed, since petitioner has reappeared before the Board of Parole and his request for release on parole has again been denied"); Siao-Pao v. Travis, 5 A.D.3d 150, 150 (1st Dep't 2004) (same); Patterson v. N.Y.S. Div. of Parole, 298 A.D.2d 254, 254 (1st Dep't 2002) (same); see also Colon v. Annucci, 177 A.D.3d 1393, 1394 (4th Dep't 2019); Postall v. Alexander, 74 A.D.3d 1078, 1078 (2d Dep't 2010) (same); Pratt v. Van Zandt, 236 A.D.2d 763, 763 (3d Dep't 1997) (same).

B. LCTA PROCEDURES FOR INMATES WITH LIFE AND NON-LIFE SENTENCES

17. If an offender serving an indeterminate sentence *with a maximum of life imprisonment* receives a LCTA, he or she "shall be eligible for release six months before the completion of the controlling minimum period of imprisonment as defined by subdivision one of section 70.40 of the penal law[.]" Correction Law § 803-b(1)(b)(i). In contrast, an offender who

is *not serving a sentence with a maximum term of life* receives the LCTA "shall be eligible for conditional release six months earlier than as provided by paragraph (b) of subdivision one of section 70.40 of the penal law[.]" Correction Law § 803-b(1)(b)(ii)(A). This makes the effect of LCTA release eligibility dependent on the difference between "conditional release" (for non-life maximum sentences) and "completion of the controlling minimum period of imprisonment" (for life maximum sentences). See Correction Law § 803-b(1)(b)(i), (ii)(A).

18. Although it is discretionary whether to grant it, once granted "[c]onditional release from prison is, with few exceptions, statutorily mandated 'when the total good behavior time allowed to him or her, pursuant to the provisions of the correction law, is equal to the unserved portion of his or her term, maximum term or aggregate maximum term.' " Bethune v. State, 2015 WL 9999014, *5, 50 Misc. 3d 1216(A), 36 N.Y.S.3d 46 (Ct. Cl. 2015); see Penal Law § 70.40(1)(b); Correction Law § 803. Thus, automatic early release is generally statutorily mandated for inmates *with non-life sentences* who earn LCTA certificates. Id. In contrast, release after the expiration of the minimum indeterminate term is the definition of parole release. See, e.g., People ex rel. Schaap v. Martin, 6 N.Y.2d 371, 374 (1959). Thus, inmates *with life sentences* who earn LCTA credits are afforded only an earlier *opportunity* to obtain parole release through a LCTA early parole interview. See Correction Law § 70.40(1)(b)(i).

19. Accordingly, LCTA credit *for inmates serving life sentences* only have their *eligibility* for parole release advanced – it does not create a mandatory entitlement to earlier parole release. See Mentor v. N.Y.S. Div. of Parole, 87 A.D.3d 1245, 1246 (3d Dep't 2011) ("it is clear from the record, including the Board's decision, that the Board also considered petitioner's receipt of a certificate of limited credit time allowance [LCTA]. His receipt of this certificate, however, does not entitle him to release, as parole is not to be granted as a reward for good conduct").

20. In effect, the LCTA early parole interview for qualifying inmates with life sentences is a "bonus" parole interview given earlier than ordinarily possible, but it is not an entitlement to early release or credit against the minimum term of the sentence. Id.; see 7 NYCRR § 290.3 ("Effect of LCTA on the sentence[:] In the case of an eligible A-I inmate or persistent offender serving an indeterminate sentence with a maximum life term, such inmate *may be eligible* for release on parole six months before his or her parole eligibility date") (emphasis added).

21. Here, Petitioner is serving an indeterminate sentence with a maximum term of life. See Pet. at 2. Accordingly, Petitioner's circumstances are governed by Correction Law § 70.40(1)(b)(i) and 7 NYCRR § 290.3 for LCTA qualifying inmates with life sentences. Therefore, Petitioner's LCTA certificate qualified her only for early parole *consideration* via the "bonus" LCTA early parole interview.

C. PETITIONER HAS A LIFE SENTENCE, THUS HER LCTA QUALIFICATION ONLY AFFORDED HER A "BONUS" EARLY PAROLE INTERVIEW WHICH WAS RENDERED MOOT BY HER SUBSEQUENT PAROLE INTERVIEW

22. Here, Petitioner seeks a *de novo* LCTA early parole interview on the grounds that parole was erroneously denied, and thus acknowledges that this matter concerns successive parole interviews. See Pet. at 6-7. Petitioner acknowledges that she had a parole interview on March 3, 2020, which resulted in a grant of release to parole supervision as of July 10, 2020. Id. at 4; see Ex. A, 26-27. However, Petitioner claims that "this action is not moot because she was unlawfully denied early parole and remains incarcerated due to this error." Pet. at 2. Oddly, despite the fact that Petitioner is seeking a *de novo* LCTA early parole interview, she places this critical legal position in her "Statement of Facts" and does not address mootness at all in her legal arguments. Id.; see id. at 6-8. Similarly, the fact of her subsequent parole interview on March 3, 2020 granting release is barely mentioned. Id. at 4.

23. Petitioner cites no legal support for her position that her claim is not moot because she remains incarcerated and would have been released earlier had she been granted parole at her LCTA early parole interview. See Pet. at 2. In fact, there is no legal support for such a position. See Schwartz, 40 A.D.3d at 218; Siao-Pao, 5 A.D.3d at 150; Patterson, 298 A.D.2d at 254. The settled appellate law all dismisses challenges to parole interviews as moot after a subsequent parole interview, and does so without any exception for any merit to the original challenge. Id.

24. Petitioner is in a position no worse than the Schwartz, Siao-Pao, or Patterson petitioners – regardless of whether their challenges to the earlier parole interview had merit, the subsequent interview rendered those challenges moot. Id. In fact, Petitioner has even less of an injury than they – and thus even less of a live issue – since they were all denied parole again, but Petitioner was granted parole release at her subsequent interview. See Ex. A, 26-27. Therefore, Petitioner's claim is moot and should be dismissed.

POINT II: VENUE SHOULD BE CHANGED TO WESTCHESTER COUNTY

A. VENUE IS IMPROPER IN NEW YORK COUNTY

25. Under CPLR § 506(b), proper venue lies in Westchester County. CPLR § 506(b) provides that an Article 78 proceeding shall be commenced:

> in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located….

CPLR § 506(b).

26. An Article 78 petition can only be used to challenge a *final* determination. See Grassel v. Dep't of Educ. of City of N.Y., 144 A.D.3d 609, 609 (1st Dep't 2016). "An agency determination is final—triggering the statute of limitations—when the petitioner is aggrieved by

the determination. A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted." Carter v. State, Exec. Dep't, Div. of Parole, 95 N.Y.2d 267, 270-71 (2000) (internal citations omitted).

27. Only a final administrative decision is subject to Article 78 challenge. See Carter, 95 N.Y.2d at 270-71; Grassel, 144 A.D.3d at 609; see, e.g., Alvarez v. Vance, 139 A.D.3d 459, 460 (1st Dep't 2016) (district attorney's de novo review rendered moot the petitioner's challenge to the administrative appeal denying his FOIL request). The Assistant Commissioner made the decision to deny a Certificate at "The Harriman State Campus, 1220 Washington Avenue, Albany, NY 12226-2050" and Petitioner's notification came from the same address. Ex. D; Pet. Ex. A. this is consistent with the fact that the principal office of DOCCS is in Albany County. See Corr. Law § 5(3) ("[t]he principal office of the department of corrections and community supervision shall be in the county of Albany"). Thus, the decision at issue was rendered in Albany County.

28. Likewise, "the relevant material event was the decision-making process leading to the determination under review." Vigilante v. Dennison, 36 A.D.3d 620, 622 (2d Dep't 2007). Adopting this reasoning, the First Department also holds that "[u]nder CPLR § 506 (b), the 'material events' leading to the subject parole determination were not" a peripheral prior court "decision, but 'the decision-making process leading to the determination under review.' " Phillips v. Dennison, 41 A.D.3d 17, 23 (1st Dep't 2007), quoting Vigilante, 36 A.D.3d at 622. As "the relevant material event was the decision-making process leading to the determination under review[,]" material events venue lies in Albany County, where review of the totality of Petitioner's rehabilitation took place, rather than New York County. Vigilante, 36 A.D.3d at 622.

29. "The premise that some fact or circumstance was a material factor informing an official's action or determination does not necessarily make that factor a material event within the meaning of CPLR 506(b)." Riverkeeper, Inc. v. N.Y.S. Dep't of Envtl. Conservation, 39 Misc. 3d 1231(A), *4, 2013 WL 2257843, 972 N.Y.S.2d 146 (Sup. Ct. Westchester Cty. 2013). Thus, an Article 78 challenge can only be brought against a final decision brought about by the conclusion of the administrative appeal. See Carter, 95 N.Y.2d at 270-71; Grassel, 144 A.D.3d at 609.

30. Venue is improper where an underlying and preliminary determination still subject to further review took place. See Alston v. DOC, Index No. 100456-19, 1 (Sup. Ct. N.Y. Cty. July 25, 2019) (Edmead, J.) ("proper venue for an Article 78 challenge to a DOC[CS] determination of visitation is Albany when the final determination is made there"); Aragon v. Stanford, Index No. 251470-16, 2-3 (Sup. Ct. Bronx Cty. July 5, 2018) (Taylor, J.) (petitioner failed to rebut showing that parole revocation administrative appeal decision placed venue in Albany County); Almahdi v. Dep't of Corr. And Cmty. Sup., Index No. 100157-17, 1 (Sup. Ct. N.Y. Cty. Aug. 28, 2017) (Jaffe, J.) ("[a]s the material event in issue here is respondent's denial of petitioner's appeal, which 'took place' in Albany County, and as respondent denied the appeal in Albany County and its principal office is also in Albany County, venue properly lies there"); see, e.g., Alvarez v. Vance, 139 A.D.3d 459, 460 (1st Dep't 2016) (district attorney's de novo review rendered moot the petitioner's challenge to the administrative appeal denying his FOIL request).[2]

31. Here, pursuant to CPLR § 506(b), proper venue in this case does not lie in New York County as no decision or material event took place there. Petitioner relies on the allegation that New York County is proper because DOCCS telecommuted from there for the underlying LCTA interview. See Pet. at 5. However, that interview is subject to several layers of further

[2] Unpublished decisions are annexed hereto as **Exhibit B**.

administrative review, and is thus non-final and cannot be challenged via Article 78. See 7 NYCRR § 290.4; Carter, 95 N.Y.2d at 270-71; Grassel, 144 A.D.3d at 609. In fact, Petitioner did bring an administrative appeal in Albany County and a decision on it was issued in Albany County. See Pet. Ex. I; Pet. Ex. J. Accordingly, venue is improper in New York County.

32. In contrast, under the unusual circumstances facing Petitioner and others at the moment, the COVID-19 pandemic gives proper venue in Westchester County. The Petition refers to Westchester County and the COVID-19 pandemic as heightening Petitioner's interest in release from Bedford Hills Correctional Facility ("Bedford Hills"), in Westchester County. See Pet. at 4. The affirmation of Petitioner's counsel seeking Administrative Order 78/20 emergency status to initiate this case is exclusively reliant on the COVID-19 pandemic. See Rayner Aff. ¶¶ 4-31. Thus, the COVID-19 pandemic is at the heart of Petitioner's interest and the ability to initiate this lawsuit at this point in time.

33. Petitioner bases these interests on her alleged medical conditions and conclusory statements about county-wide risks. See Pet. at 4; Rayner Aff. ¶¶ 4-31. This focus on county-wide risks is telling. Just as New York County courts have the greatest interest in assessing the COVID-19 safety of New York County residents, Westchester County has the greatest interest in assessing the safety of its own residents. Likewise, Westchester County has material interest in assessing its own risk to Westchester County inmates and the availability of county-wide resources to support medical care. Westchester County thus has specific interest in the issues and emergency authority to bring this matter, but New York County has only the generic interest in the COVID-19 pandemic overall.

34. Furthermore, there is no error in filing the demand alongside this motion. Waiting the permitted five days after making a demand is not required prior to filing the venue motion. See

Aaron v. Steele, 166 A.D.3d 1141, 1143 (3d Dep't 2018) ("[t]his argument is based on an interpretation that the language 'unless within five days' places a hold on the defendant's obligation to make a motion, during which time the defendant must simply wait for the plaintiff to respond to the demand (CPLR 511 [b]). We disagree with that interpretation of the statute….Any motion filed within the five-day window essentially causes no harm, no foul. Moreover, if the plaintiff does not file a written consent within the required time frame, it is irrelevant when within the 15-day limit the defendant filed a motion").

35. "By commencing this action in an improper venue in the first instance, the plaintiff forfeited the right to designate venue." Mei Ying Wu v. Waldbaum, Inc., 284 A.D.2d 434, 435 (2d Dep't 2001) (granting motion to change venue for improper designation); see Goercke v. Kim Yong Kyun, 273 A.D.2d 110, 110 (1st Dep't 2000) ("[w]hen plaintiff chose an improper venue, she forfeited her right to select venue initially.") Because Petitioner has forfeited the right to select venue by choosing one that is improper, Respondent has the right to select a proper venue upon timely motion. See Fitzpatrick v. Sullivan, Magee & Sullivan, Inc., 49 A.D.2d 902, 902 (2d Dep't 1975) (untimely motions are discretionary rather than "based on right").

36. Therefore, Respondent's motion to change venue to Westchester County should be granted. See CPLR § 506(b). Alternatively, if the Court disagrees that Westchester County is proper, venue should be changed to Albany County where Petitioner's administrative appeal took place and where DOCCS is headquartered. See Alston, Index No. 100456-19 at 1; Aragon, Index No. 251470-16 at 2-3; Almahdi, Index No. 100157-17 at 1.

B. THE CONVENIENCE OF WITNESSES AND INTERESTS OF JUSTICE ALSO FAVOR CHANGE OF VENUE TO WESTCHESTER COUNTY

37. Additionally, "[t]he court, upon motion, may change the place of trial of an action where… the convenience of material witnesses and the ends of justice will be promoted by the

change." CPLR § 510. As set forth in Point I.A *supra*, Petitioner asserts an interest in the LCTA credit based on COVID-19 and her basis for seeking emergency status to have this matter adjudicated now is entirely based on COVID-19. See Pet. at 4; Rayner Aff. ¶¶ 4-31. As noted in that section above, Westchester County is best suited and has the greatest interest in assessing its own COVID-19 status and the availability of medical care in Westchester County. Accordingly, both the emergency interest in adjudication and the substantive interest in a credit to obtain earlier release are both intertwined with Westchester County's COVID-19 status and readiness.

38. In order for Petitioner to establish any kind of COVID-19 vulnerability unique to her, the excerpted medical records she provided must be placed in their greater context and explained. Therefore, in addition to Westchester County being a proper venue as discussed in Point I.A *supra*, it is also the venue in which the interests of justice in assessing COVID-19 risks and preparedness best lies.[3]

39. By filing this affirmation, respondent does not waive any defenses, including personal jurisdiction.

40. No prior application for this relief has been made to this Court or to any other court.

WHEREFORE, it is respectfully requested that the Court grant the following relief:

(a) an order pursuant to CPLR § 3211(a)(2) dismissing this matter as moot;

(b) an order changing venue and transferring the petition to Westchester County, or in the alternative Albany County upon the ground of improper venue, the convenience of witnesses, and the interests of justice, pursuant to CPLR §§ 506(b), 510 and 511;

[3] As Petitioner asserted COVID-19 medical concerns only in her application for emergency status, and not in the Petition, they are not live issues for adjudication at this point. To the extent that Petitioner is seeking immediate release due to COVID-19 medical concerns, the proper procedure is to file a *habeas corpus* petition returnable in Westchester County. See CPLR § 7004(c).

(c) if the motion to dismissal is denied and the motion to change venue is granted, an order extending Respondents' time to serve an answer or motion in response to the Petition until at least 30 days after the Office of the Attorney General receives written notice from Petitioner of the return date in the transferee court, and that a more definite statement is provided in that period;

(d) if the motion to dismissal is denied, and the motion to change venue is denied, an order extending Respondents' time to serve an answer or motion to 30 days after service of the notice of entry of an order denying the motions; and

(e) for such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 13, 2020

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By:

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