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

PEOPLE OF THE STATE OF NEW YORK ex.
rel. MARTHA RAYNER, ESQ.
on behalf of [REDACTED]

Petitioner,

-against-

ANTHONY ANNUCCI, Acting
Commissioner, New York State Department of
Corrections and Community Supervision,

Respondent.

Index No. _____

VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS

MARTHA RAYNER, an attorney duly admitted to practice law in the State of New York,
hereby affirms the following under penalty of perjury:

1. I am a law professor at Fordham University School of Law and associated with the
law school's clinical law office, Lincoln Square Legal Services, Inc., 150 West 62nd Street, New
York, NY 10023.

2. I represent the petitioner, Mr. [REDACTED] DIN# [REDACTED], in this litigation related
to his continued and unlawful detention by the New York State Department of Corrections and
Community Supervision ("DOCCS"), despite having been granted parole and his fulfillment of all
conditions of release to parole supervision.

3. As the attorney in this case, I am fully familiar with its facts and records. The pertinent
allegations and facts are within my knowledge or known on information and belief based on my

communications with Mr. [REDACTED] his family, DOCCS, and the Attorney General's office, as well as my review of parole and court records and independent investigation.

PRELIMINARY STATEMENT AND SUMMARY OF THE ARGUMENT

4. Mr. [REDACTED] 67 years old, has been incarcerated for nearly 47 years. He is detained at Eastern Correctional Facility in Ulster County, New York, by respondent New York State Department of Corrections and Community Supervision.

5. In a decision dated April 9, 2021, Mr. [REDACTED] was granted parole. An open date "upon receipt of approved field investigation" was set, with earliest release on May 19, 2021. In its decision, the Parole Board stated: "The panel finds you have developed the tools to be law abiding in the community and your release at this time is compatible with the welfare of society." Ex. 1.

6. On information and belief, by May 18, 2021, or earlier, all release conditions were fulfilled, including approval of residency and Mr. [REDACTED] was due to be released on May 19, 2021.

7. Mr. [REDACTED] uncle sent him "parole clothes" to wear upon his release, and DOCCS provided Mr. [REDACTED] with a three-month supply of his medications to take with him upon release.

8. Mr. [REDACTED] brothers flew in from California the night of May 18th and his sisters travelled the same day by car overnight from South Carolina. Mr. [REDACTED] siblings planned to reach the [REDACTED] Correctional Facility the morning of May 19, 2021 to greet Mr. [REDACTED] upon his release.

9. On May 18, 2021, Mr. [REDACTED] was given a hand-written post-it note from his Offender Rehabilitation Counselor that stated: "Hold for SOMTA Article 10 review. No decision as of 5/18/21. Call your family." Ex. 2.

10. Despite being granted parole and meeting all conditions for release, Mr. [REDACTED] was not released to parole supervision on May 19, 2021, and remains indefinitely detained by Respondent.

11. Having been granted parole, Mr. [REDACTED] has a constitutionally cognizable liberty interest, yet has been deprived of release to parole supervision without substantive or procedural due process.

12. Besides the above referenced post-it note, he has received no notice of the legal or factual grounds upon which he is being indefinitely detained.

13. Mr. [REDACTED] grant of parole has been functionally rescinded by Respondent yet he has been afforded no due process.

14. Although it appears Respondent has not released Mr. [REDACTED] because there is an "Article 10 review," Article 10 does not authorize Respondent to detain a subject of an Article 10 review without a court order.

15. Contact with the Attorney General's office and DOCCS counsel's office have established that there is no court order authorizing DOCCS to detain Mr. [REDACTED]

16. Respondent simply has no legal authority to deprive Mr. [REDACTED] of release to parole supervision under these facts.

17. Accordingly, as set forth at greater length below, this verified petition seeks a writ of *habeas corpus* ordering Mr. [REDACTED] immediate release on the grounds that his continued detention violates his state and federal constitutional rights.

THE PARTIES

18. Mr. [REDACTED] is serving a sentence of 15 years to life imposed after a conviction for Murder in the Second Degree. Respondent is Anthony Annucci, Acting Commissioner of DOCCS, in whose custody Mr. [REDACTED] is detained.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction pursuant to C.P.L.R. § 7001. Venue is proper in Ulster County because Mr. [REDACTED] is detained at [REDACTED] Correctional Facility, an Ulster County prison located in this Judicial District. C.P.L.R. § 7002(b)(1).

20. No court or judge of the United States has exclusive jurisdiction over Mr. [REDACTED] and since the challenged detention does not directly arise from a formal order or decree, no appeal has been taken. C.P.L.R. § 7002(c)(3), (5).

21. A petition for writ of *habeas corpus* is the appropriate action because the remedy sought is immediate release from DOCCS custody. *See People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 174 A.D.3d 992, 993 (3d Dept. 2019) (“[P]etitioner has been granted an open parole release date and will be entitled to immediate release if the mandatory condition is found unconstitutional, rendering his claims cognizable in a habeas corpus proceeding.”), *aff’d as modified*, 36 N.Y.3d 187 (2020).

22. No prior application for the relief sought herein has been made.

STANDING

23. I make this emergency verified petition for a writ of *habeas corpus* pursuant to Article 70 of the C.P.L.R. on Mr. [REDACTED] behalf, because he is presently detained outside the county in which my office is located, further delay will cause him material and irreparable injury, and the pertinent factual allegations are within my knowledge or on information and belief.

THE FACTS

24. On April 6, 2021, Mr. [REDACTED] was interviewed by the Parole Board. He was granted parole on April 9, 2021, receiving an “Open Date” of May 19, 2021.

25. An “Open Date” is “the earliest possible release date . . . contingent upon the inmate

receiving an approved residence in accordance with established residency restrictions and local laws.” DOCCS Community Supervision Handbook at 12–13, 15, https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf.

26. Mr. ██████ was convicted of Murder in the Second Degree for conduct that took place in 1974. He is not subject to the Sex Offender Registration Act (“SORA”) or the Sexual Assault Reform Act (“SARA”).

27. On information and belief, Mr. ██████ proposed residency with his aunt and uncle was approved by a parole officer and thus there were no impediments to Mr. ██████ release on May 19, 2021.

28. Instead, the day before Mr. ██████ was scheduled to be released, he was handed a post-it note that read: “Hold for SOMTA Article 10 review. No decision as of 5/18/21. Call your family.” Ex. 2.

29. It has been 70 days since Mr. ██████ should have been released and he has not received any notice of the legal and factual basis for his detention, nor been given an opportunity to be heard before an independent and impartial court.

ARGUMENT

30. DOCCS lacks authority to unilaterally detain Mr. ██████ without due process after he has been granted parole. Handing Mr. ██████ a post-it note does not meet constitutional due process requirements.

31. Mr. ██████ was granted an open parole date in May 2021. All conditions for his release were fulfilled, yet DOCCS did not release Mr. ██████ There is nothing in Article 10 that authorizes DOCCS to unilaterally refuse to release a person who has been granted parole and has an approved residence.

32. Article 10 of the Mental Hygiene Law requires three stages of review before the filing, by the Attorney General, of an Art. 10 petition seeking a civil management order. There are no enforceable limits as to the duration of any one of the three stages. Notably, Article 10 contemplates that some subjects of an Art. 10 review will be at liberty during such review, and thus provides a mechanism to secure such persons *after* the filing of an Art. 10 petition. In addition, Art. 10 contemplates that some individuals may be eligible for release before the review process has been completed and thus provides a mechanism for the attorney general to obtain a securing order from a court *before* the filing of an Art. 10 petition. Art. 10 does not authorize detention during the review process without a court order.

33. Enacted in 2007 as part of the Sex Offender Management and Treatment Act (“SOMTA,” L. 2007, ch. 7), Article 10 of the Mental Hygiene Law, M.H.L. §§ 10.01–17, “sets out procedures for determining whether a ‘detained sex offender’ is a ‘sex offender requiring civil management’”— essentially, requiring commitment “to mental hospitals, rather than [] release[], when their prison terms expire.” *People ex rel. Joseph II. v. Superintendent of Southport Corr. Facility*, 15 N.Y.3d 126, 130, 132 (2010). The centerpiece of Article 10 is a trial at which the State must establish, by clear and convincing evidence, that a detained sex offender “suffers from a mental abnormality as defined in that statute” and should be civilly managed instead of released. *State v. Floyd Y.*, 22 N.Y.3d 95, 99 (2013).

34. A person deemed subject to civil management under SOMTA is, among other defined persons, “A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article.” M.H.L. § 10.03(g)(4).

35. Article 10 establishes a multi-step process for the review and referral of persons who may be subject to SOMTA and are approaching release. The Court of Appeals has referred to it as

“an internal administrative review procedure that may—but usually does not . . . —result in a sex offender civil management petition.” *State v. Rashid*, 16 N.Y.3d 1, 14 (2010); *see also* NYS Office of Mental Health, 2020 Annual Report on the Implementation of SOMTA, https://omh.ny.gov/omhweb/statistics/somta_report_2020.pdf (of 1,645 referrals for Art. 10 review from November, 2019 to October, 2020, 2.5% were recommended for civil management).

36. At the outset, the relevant agency—here, DOCCS—must alert the Attorney General and the New York State Office of Mental Health [OMH] that a person who may be subject to civil maintenance is “nearing an anticipated release from confinement.” M.H.L. § 10.05(b). The agency must aspire to “give such notice at least [120] days prior to the person’s anticipated release,” but its failure to do so has no effect. *Id.* (“...failure to give notice within such time period shall not affect the validity of such notice or any subsequent action, including the filing of a sex offender civil management petition.”).

37. This notice triggers the *first* stage of OMH review. After OMH receives the referral, its staff conducts a “preliminary review” of “relevant medical, clinical, criminal, and institutional records, actuarial risk assessment instruments and other records and reports” to determine “whether the person who is the subject of the notice should be referred to a case review team for evaluation.” M.H.L. § 10.05(d).

38. If OMH determines that further review by the case review team is warranted, the subject receives notice of the referral and the *second stage* of review takes place. M.H.L. § 10.05(e). A “case review team” conducts a review of all relevant records and may “arrange for a psychiatric examination” of the subject. *Id.* The review is supposed to be completed “within [45] days of the commissioner [of mental health] receiving the notice of anticipated release”—but as with the 120 days for initial notification, any failure to do so has no effect. *Id.* § 10.05(g) (“However, failure to do

so within that time period shall not affect the validity of such notice or finding or any subsequent action, including the attorney general's filing of a sex offender civil management petition subsequent to receiving the finding of the case review team.”).

39. If the case review team concludes that civil management is warranted, the team informs the subject and the Attorney General. M.H.L. § 10.05(g). That notice must include a “written report from a psychiatric examiner that includes a finding as to whether the respondent has a mental abnormality,” and where the underlying conviction is a “designated felony, it shall also include the case review team's finding as to whether the act was sexually motivated.” *Id.*

40. The Attorney General then conducts the *third* stage of review to determine whether a civil management petition is appropriate, subject to a 30-day window that again has no practical effect. *Id.* § 10.06(a) (“The attorney general shall seek to file the petition within thirty days after receiving notice of the case review team's finding, but failure to do so within that period shall not affect the validity of the petition.”).

41. The filing of a petition triggers the right to counsel and mandates a probable cause hearing within 30 days. *Id.* § 10.06(c), (g). If probable cause is established, the subject may be confined pending completion of the aforementioned jury trial. *Id.* §§ 10.06(k), 10.07(a); *State v. Rashid*, 16 N.Y.3d 1, 8 (2010).

42. Art. 10 specifically contemplates that some persons subject to an Art. 10 review will be at liberty during the three-stage review process. There is a procedure in place to secure those persons should an Art. 10 petition be filed. If the subject of the OMH investigation was released after DOCCS gave notice to OMH and is therefore at liberty when the petition is filed, the Art. 10 “court shall order the respondent's return to confinement, observation, commitment, recommitment or retention, as applicable, for purposes of the probable cause hearing.” M.H.L. §10.06(h). In such a

case, the probable cause hearing must “commence no later than seventy-two hours from the date of the respondent's return.” And, if, after the filing of petition, but before a probable cause hearing can be held, the Art. 10 respondent should become eligible to be released, “the court shall order the stay of such release pending the probable cause hearing.” *Id.*

43. There is also a process to secure persons who may be released during the review process, but before an Art. 10 petition has been filed. The Attorney General may (but is not required to) seek a “securing petition” through the process laid out in § 10.06(f):

[I]f it appears that the respondent *may be released prior to the time the case review team makes a determination*, and the attorney general determines that the protection of public safety so requires, the attorney general may file a securing petition at any time after receipt of [the initial] written notice pursuant to subdivision (b) of section 10.05 of this article (emphasis added).

Although phrased as a unilateral action, at least two courts have described this as a “securing order” process requiring judicial intervention before detention can be ordered. *See State v. Randy M.*, 57 A.D.3d 1157, 1158 (3d Dept. 2008); *State v. Robinson*, 21 Misc. 3d 1120(A), 2008 N.Y. Slip Op. 52111(U), at *1 (Sup. Ct., Bronx Co. 2008).

44. The “statutory language demonstrat[es] that the Legislature contemplated the release of a detained person prior to a determination by the case review team or the filing of a petition.” *People ex rel. David NN. v. Hogan*, 53 A.D.3d 841, 844 (3d Dept. 2008) (And at f.n. 3 noting that OMH’s detention of petitioner during an Art. 10 review “was with no legal authority.”); *see also Rashid*, 16 N.Y.3d at 15 (reciting the State’s position that “the Legislature contemplated an offender’s release prior to the filing of the petition”). An Article 10 civil management petition can still be validly lodged even if a person is not confined, so long as he or she is “still subject to State supervision.” *Rashid*, 16 N.Y.3d at 17; *see also Abreu v. Stanford*, 153 A.D.3d 1455, 1456 (3d Dept. 2017)

(addressing an Article 10 petition initiated by the Attorney General after “petitioner was released on post-release supervision”).

45. Nothing in this process contemplates or allows the referring agency—here DOCCS—to unilaterally detain a person subject to an Art. 10 review.

46. The power to detain a person subject to an Art. 10 review or a respondent after the filing of a petition by the Attorney General, rests in the courts, not with DOCCS.

47. Here, Mr. [REDACTED] has been detained for over two months without a court order. He has received no information as to whether DOCCS referred his case to OMH, whether OMH has commenced the review process and, if so, at what stage is such review. What may or may not be taking place is wholly opaque to Mr. [REDACTED]

48. Since there are no enforceable limits to the duration of each stage of the review process, Mr. [REDACTED] detention could continue indefinitely.

49. This indefinite detention is proceeding without any notice of the legal or factual basis for the detention and without an opportunity to be heard before an independent court.

50. There is no indication that the attorney general has filed a securing petition or is even inclined to do so—or, for that matter, that a securing petition of indefinite length without review could pass constitutional muster. *See Mental Hygiene Legal Serv. v. Spitzer*, No. 07 CIV. 2935(GEL), 2007 WL 4115936, at *11 (S.D.N.Y. Nov. 16, 2007) (expressing doubt that anything other than “a short period of detention” before a judicial hearing would be a “constitutional application” of M.H.L. § 10.06(f)).

51. That Mr. [REDACTED] received an open parole date does not diminish in any way his entitlement to immediate release. “[A] New York inmate who has been granted an open parole release date,” unlike a “mere applicant for parole,” has “a legitimate expectancy of release that is grounded

in New York's regulatory scheme," and therefore possesses a "protectable liberty interest that entitled him to due process." *Victory v. Pataki*, 814 F.3d 47, 60 (2d Cir. 2016) (internal quotation marks and citation omitted).

52. While the New York Court of Appeals has held that the liberty interest in question is not enough to prevail, on rational basis review, in a substantive due process challenge against legal impediments to release, such as SARA restrictions, see *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 199, 203 (2020), here there is no actual law, regulation, or other condition acting as a counterweight to Mr. [REDACTED] liberty interest in immediate release. Under both procedural and substantive due process, his liberty interest easily prevails over the absence of any legitimate reason for his continued detention.

53. In *Johnson*, the petitioners had been accorded procedural due process as to the SORA and SARA determinations. Having been found to be level III offenders after notice, appointment of counsel, and a hearing, they were subject to detention until SARA compliant housing was obtained despite one petitioner having reached his maximum date, but remained on post release supervision, and the other petitioner having been granted parole. *Id.* at 193-194. Mr. [REDACTED] is not subject to SORA or SARA, and his residency has been approved by DOCCS.

54. That Mr. [REDACTED] is apparently under review by OMH pursuant to Art. 10 does not, alone, authorize detention without a basis in law and appropriate procedural due process. As explained above, the only law which allows for detention before the filing of an Art. 10 petition, is M.H.L. §10.06(f), which if the attorney general choose to utilize would require a level of procedural due process commensurate with the liberty interest at stake.¹ See *Mental Hygiene Legal Serv. v. Spitzer*, 2007 WL

¹ Mr. [REDACTED] does not suggest that a securing petition would be either justified or lawful in his case—merely that it provides the only statutory option for his detention prior to the filing of a civil management petition.

4115936 (S.D.N.Y. 2007), aff'd sub nom. Mental Hygiene Legal Servs. v. Paterson, 2009 WL 579445 (2d Cir. 2009) (discussing “serious” potential procedural due process concerns pending how §10.06(f) is applied, but declining to rule the statute facially unconstitutional).

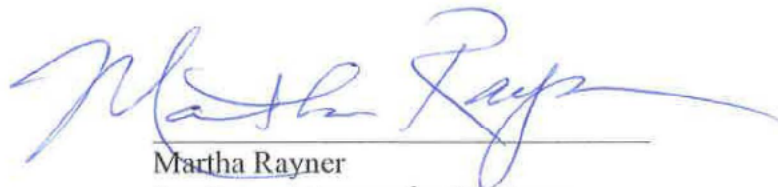
55. For these reasons, DOCCS’s continued detention of Mr. [REDACTED] violates his rights under the Fourteenth Amendment of the U.S. Constitution, as well as Article I, Section 6 of the New York Constitution. Mr. [REDACTED] respectfully requests that the Court grant his petition for a writ of *habeas corpus* and order DOCCS to release him.

PRAYER FOR RELIEF

WHEREFORE, it is respectfully prayed that this Court

1. Issue a writ of *habeas corpus* and order Mr. [REDACTED] immediate release, on the grounds that his continued detention violates his rights under the United States and New York constitutions, and is otherwise unauthorized by law or regulation; and
2. Grant any other relief as the Court deems just and proper.

Dated: July 28, 2021
New York, NY



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VERIFICATION

Martha Rayner, an attorney admitted to practice law in New York State, an attorney admitted to practice in the Courts of this State, hereby affirms under the penalties of perjury that the contents of this petition are true based on my personal knowledge, except for those matters alleged to be based upon information and belief, which I believe to be true. This verification is made by me and not by petitioner because the majority of the relevant facts are known to me exclusively and petitioner resides outside of New York County, where my office is located.


Martha Rayner, Esq.

Dated: July 28, 2021
New York, NY

Sworn before me on July 28, 2021.


NOTARY PUBLIC

Genesis Z. Bartley
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