Habeas Petitioner's Reply - FUSL000141 (2021-08-04)

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

Respondent.

Index No. [redacted]

REPLY AFFIRMATION

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 Mr. [redacted] I submit this affirmation in reply to Respondent's August 3, 2021 Return.

RESPONDENT DOES NOT DENY ANY FACTS ASSERTED IN THE PETITION

3. Respondent does not deny the facts asserted in the Habeas Petition, including that Mr. [redacted] had been granted parole with an open date of May 19th and by May 18th, or earlier, all release conditions had been met.

4. Respondent does not deny that there is no court order authorizing this detention. Nor does Respondent deny that Mr. [redacted] was not afforded any due process before withholding release on May 19, 2021.

5. Respondent concedes that the only reason Mr[redacted] was not released on his open date of May 19, 2021 was because he was under an Art. 10 review that was not completed. *See* Return ¶18.

RESPONDENT DOES NOT CONTEST THAT MR. [redacted] HAS A LIBERTY INTEREST IN RELEASE THAT CANNOT BE DENIED WITHOUT DUE PROCESS

6. Respondent does not contest that Mr. [redacted] has a liberty interest in being released to parole supervision upon a grant of parole with an open date.

7. Nor has Respondent contested that Mr. [redacted] must be accorded due process before being deprived of that liberty interest.

8. Instead, Respondent claims that Mr. [redacted] was "withheld from parole release in accordance with Department regulations," but does not cite any such regulations. *See* Return at ¶12.

9. In addition, Respondent states, referring to Art. 10 reviews, that it is its "position that offenders subject to such reviews are not deemed ready for release to the community until such review has been completed." *Id.* ¶18. Respondent does not cite any statute or regulation in support. Respondent's reliance on *Roache v. AG Office*, 9:12-CV-1034 (LEK/DEP), 2013 U.S. Dist. LEXIS 143493 (N.D.N.Y. Aug. 9, 2013) is misplaced and misleading.

10. In *Roache*, the court dismissed plaintiff's 42 U.S.C. §1983 case, which among other causes of action, claimed he had been involuntarily committed beyond his maximum release date without due process. In *Roache*, however, the Attorney General filed an Art. 10 proceeding before the expiration of plaintiff's maximum release date, and plaintiff was held pursuant to a court order.

See Roache v. AG Office, Civil Action No. 9:12-CV-1034 (LEK/DEP), 2013 U.S. Dist. LEXIS 143493, at 19 (N.D.N.Y. Aug. 9, 2013) ("Accordingly, because his custody was pursuant to court order, plaintiff's allegations that his due process rights were violated as a result of his detention absent a court order are unfounded.")

11. Here, the uncontested facts are quite different: the Attorney General has not filed an Art. 10 petition, and there is no court order authorizing Mr. [redacted]'s detention beyond his open release date.

THIS MATTER MEETS THE EXCEPTION TO MOOTNESS AND SHOULD BE CONVERTED TO A DECLARATORY JUDGMENT ACTION

12. I have been informed by Mr. [redacted] that he was released by Respondent this morning at approximately 11:15 a.m.

13. Despite Mr. [redacted]'s release, the claim of an unconstitutional deprivation of a liberty interest meets the exception to the mootness doctrine, which permits judicial review, "where the issues are substantial or novel, likely to recur and capable of evading review." *See People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 195–96 (2020), reargument dismissed sub nom. *People ex rel. Ortiz v. Breslin*, 36 N.Y.3d 1087 (2021)

14. In *Johnson*, the Court of Appeals denied DOCCS' motion to dismiss a habeas petition on mootness grounds even though the petitioner was released while the litigation was pending. Johnson challenged, on substantive due process grounds, the constitutionality of a provision of the Sexual Assault Reform Act ("SARA"), which authorizes temporary confinement of level three sex offenders who would otherwise be released to parole or post release supervision until they secure SARA compliant housing. Finding the issue significant, likely to be repeated and one that will typically evade review, the Court converted the habeas proceeding to a declaratory

judgment action. *Id.* ("Because Johnson no longer seeks release from Adirondack Correctional Facility, habeas does not lie, and we convert Johnson's habeas corpus proceeding to a declaratory judgment action.")

15. This issue is novel and significant. When SOMTA was passed in 2007, Mental Hygiene Legal Services brought a case challenging the constitutionality of various provisions and has continued to litigate numerous issues of constitutionality and statutory interpretation. *See e.g. Mental Hygiene Legal Serv. v. Spitzer,* No. 07 CIV. 2935(GEL), 2007 WL 4115936 (S.D.N.Y. Nov. 16, 2007), *aff'd sub nom. Mental Hygiene Legal Servs. v. Paterson,* No. 07-5548-CV, 2009 WL 579445 (2d Cir. Mar. 4, 2009) (finding sections 10.06(k) and 10.07(d) of SOMTA facially unconstitutional); *State v. Keith F.,* 149 A.D.3d 671, 672 (1st Dept, 2017) ("Respondent's due process rights were not violated by the 15–month delay between his declaration of readiness for trial, after the probable cause determination, made upon his waiver of a probable cause hearing, and the start of the trial.")

16. But, except for Mental Hygiene Legal Services' facial challenge to the constitutionality of 10.06(f), which is a pre-filing provision, litigation has been exclusively confined to issues arising after the filing of an Art. 10 proceeding.

17. There is no case authority directly addressing the legality of pre-filing detention without a court order. Yet, despite case law strongly suggesting that a person may not be detained for an Art. 10 review without a court order, Respondent ignores such law and continues a practice it claims is based on a regulation and law that it does not specify. *See People ex rel. David NN. v. Hogan*, 53 A.D.3d 841(3d Dept, 2008) (noting in the procedural history that Supreme Court, St. Lawrence County had granted a petition and ordered the release of petitioner who was being detained beyond his release date due to an Art. 10 review but without court order); *State v.*

Robinson, 21 Misc. 3d 1120(A) (Sup. Ct. Bronx Cty. 2008) (noting in procedural history that the Attorney General moved for a securing order to conduct an Art. 10 review after a finding that the underlying basis for incarceration, a parole violation, was unlawful); *Mental Hygiene Legal Serv. v. Spitzer, supra* at 12 (acknowledging that even the use of a securing order pursuant to M.H.L. §10.06(f) to detain a person subject to Art. 10 review, before a petition is filed, may not provide sufficient due process pending how the statute is applied).

18. This issue is capable of repetition because it is likely numerous persons are subjected to Respondent's practice of detaining those subject to Art. 10 review beyond their open dates without court order. From November 1, 2019 to October 31, 2020, the NYS Office of Mental Health received 1,619 referrals for possible civil management. *See* NYS Office of Mental Health, 2020 Annual Report on the Implementation of SOMTA, https://omh.ny.gov/omhweb/statistics/somta_report_2020.pdf. Although not all subjects of such reviews were referred by DOCCS and in DOCCS custody, a significant portion likely were.[1] Therefore, a substantial number of individuals are at risk of being detained by DOCCS for Art. 10 review without due process. And, a very large percentage of such persons will ultimately not be subject to an Art. 10 filing (of the 1,619 referrals, only 151 (9.3%) progressed to OMH's second stage of review, and only 40 (2.5%) were recommended for civil management). *Id.*

19. This issue will typically evade review. First, there is no right to counsel to challenge a detention purportedly based on an Art. 10 review. The right to counsel does not attach unless and until the Attorney General files an Art. 10 petition seeking civil maintenance. In addition, as

[1] *Id.* ("Persons referred for assessment for civil management include (1) sex offenders with qualifying offenses in the custody of DOCCS (Corrections) who are approaching release, (2) persons under supervision of DOCCS (Community Supervision) who are approaching the end of their terms of supervision, (3) persons found not responsible for criminal conduct due to mental disease or defect and who are due to be released, (4) persons found incompetent to stand trial and who are due to be released, and (5) persons convicted of sexual offenses who are in a hospital operated by OMH and were admitted per an Executive Directive.")

happened here, DOCCS can unilaterally moot the litigation by releasing the individual and thus shield its unconstitutional use of power from judicial review.

20. It is unknown how long Mr. [redacted] would have languished in detention had he not filed this petition. OMH's sudden notice to DOCCS is undoubtedly a result of this litigation and evinces the lack of transparency and unilateral use of detention power that is not grounded in law. *See* Return ¶22.

21. For these reasons, this proceeding meets the exception to mootness and the action should be converted to a declaratory judgment action that seeks a declaration that Respondent's detention of Mr. [redacted] after his open date of May19, 2021 based solely upon Respondent's referral of Mr. [redacted] for an Art. 10 review violates his rights under the Fourteenth Amendment of the U.S. Constitution, as well as Article I, Section 6 of the New York Constitution.

Dated: August 4, 2021
New York, NY

Martha Rayner
Pro Bono Attorney for Petitioner
Lincoln Square Legal Services, Inc.
Fordham Law School
150 West 62nd Street
New York, NY 10023
(212) 636-6941
mrayner@lsls.fordham.edu