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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

Index # [REDACTED]

PEOPLE OF THE STATE OF NEW YORK ex. rel.
ROCHELLE F. SWARTZ, ESQ.
on behalf of [REDACTED]

Petitioner,

-against-

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

Respondent.

VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS

ROCHELLE F. SWARTZ, an attorney duly admitted to practice law in the State of New York,
hereby affirms the following under penalty of perjury:

1. I am associated with Orrick, Herrington and Sutcliffe LLP ("Orrick"), 51 W. 52nd
Street, New York, NY 10019, counsel to Petitioner, Mr. [REDACTED] DIN # [REDACTED].

2. We represent Mr. [REDACTED] related to his continued, unlawful detention by the New York
State Department of Corrections and Community Supervision, despite having been granted parole
and provided adequate release residence alternatives.

3. As one of the attorneys 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] 42 years old, has been incarcerated for nearly 28 years. He is detained at [REDACTED] Correctional Facility in [REDACTED] New York (“[REDACTED]”), by Respondent New York State Department of Corrections and Community Supervision (“DOCCS”).

5. As explained below, Mr. [REDACTED] has now been illegally and unconstitutionally detained for 72 days.

6. Respondent’s actions in continuing Mr. [REDACTED] detention are outrageous and without any substantial justification.

7. Consequently, Mr. [REDACTED] now requests that this Court grant interim relief ordering Respondent to immediately release Mr. [REDACTED] from DOCCS’s custody pursuant to the conditions of release that were approved on or around October 26, 2021 and into the custody of his mother where he has a loving, supportive and positive environment that will allow him to thrive upon his reentry into society.¹

8. As detailed below and in Exhibit A to the Swartz Affirmation, Mr. [REDACTED] was granted parole on October 14, 2021, setting a release date of no later than November 17, 2021.

9. By October 26, 2021, or earlier, all release conditions were fulfilled, including approval of Mr. [REDACTED] residence: his mother’s home in upstate New York.

¹ This Court has authority to grant the requested relief because rescission of the approved housing was plainly arbitrary and capricious. *See, e.g., Telford v. McCartney*, 155 A.D.3d 1052, 1054 (2d Dep’t 2017) (“Under the circumstances of this case, speculation by DOCCS about possible community efforts to exclude the petitioner from otherwise suitable housing and about the petitioner’s potential response to such efforts is not a rational basis for denial of otherwise suitable housing. As the respondents have articulated no other basis for denying approval of the proposed residence, the respondents’ refusal to approve the Telford home as a suitable postrelease residence was arbitrary and capricious, as the determination bears no rational relation to the petitioner’s past conduct or likelihood that he will re-offend.”) (citing *People v. Diack*, 24 N.Y.3d 674, 677 (2015)); *Matter of Brown v. Commissioner of N.Y. State Dept. of Correctional Servs.*, 70 A.D.2d 1039 (4th Dep’t 1979); *People ex rel. Howland v. Henderson*, 54 A.D.2d 614 (4th Dep’t 1976); *Matter of Ebbs v. Regan*, 54 A.D.2d 611 (4th Dep’t, 1976).

10. Despite being granted parole and meeting all conditions for release, Mr. [REDACTED] was not released to parole supervision on November 17, 2021.

11. Instead, on November 16, 2021, Mr. [REDACTED] was verbally informed by corrections officers at [REDACTED] that he would not be leaving the next day and was being held pending a review pursuant to the Sex Offender Management and Treatment Act under Article 10 of the Mental Hygiene Law (“Article 10”).²

12. As detailed below, detention pending an Article 10 review is unlawful without a court order. Contact with the Attorney General’s Office and DOCCS counsel’s office have established that Respondent never obtained any such court order authorizing DOCCS’s continued detainment of Mr. [REDACTED]

13. On January 25, 2022, Mr. [REDACTED] was informed via written memorandum that his Article 10 review was complete and the commission determined that he is not a sex offender requiring civil management.

14. Upon information and belief, on or around January 26, 2022, Mr. [REDACTED] was verbally informed by a corrections officer that he would not be released to his mother’s residence.

15. Having been granted parole, Mr. [REDACTED] has a constitutionally cognizable liberty interest, yet has been deprived of release to parole supervision (to his mother) without due process.

16. Mr. [REDACTED] grant of parole has been rescinded by Respondent, yet he has been afforded no due process. *See* 9 N.Y.C.R.R. § 8002.5 (2002).

17. Mr. [REDACTED] has received no notice of the legal or factual grounds upon which the decision to rescind approval of his mother’s residence was made or why he is still being detained.

² Of note, Mr. [REDACTED] was never convicted of a sex crime and while Mr. [REDACTED] was verbally informed on the Article 10 proceeding in November, he did not receive any written notice of such proceeding until December 2021.

18. Respondent has no legal authority to deprive Mr. [REDACTED] of release to parole to his mother's supervision under these facts.

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

THE PARTIES

20. Mr. [REDACTED] is serving a sentence of nine years to life imposed after a conviction for Murder in the Second Degree as a thirteen-year-old juvenile.

21. Respondent is Anthony Annucci, Acting Commissioner of DOCCS, in whose custody Mr. [REDACTED] is detained.

JURISDICTION AND VENUE

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

23. 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).

24. 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).

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

STANDING

26. 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

27. On October 5, 2021, Mr. [REDACTED] was interviewed by the Parole Board. He was granted parole on October 14, 2021, receiving an “Open Date” of November 17, 2021.

28. 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.

29. Mr. [REDACTED] was convicted of Murder in the Second Degree for conduct that took place in 1993, when he was thirteen years old. He is not subject to the Sex Offender Registration Act or the Sexual Assault Reform Act.

30. Upon information and belief, Mr. [REDACTED] proposed residency with his mother was approved by a parole officer in October 2021 and thus there were no impediments to Mr. [REDACTED] release on November 17, 2021 to his mother. Swartz Affirmation, Ex. A, [REDACTED] Aff. at ¶ 24. The parole officer, after investigating the home, informed Mr. [REDACTED] mother that the residence was approved, and that Mr. [REDACTED] would be released to her. *Id.* at ¶¶ 11-24.

31. After the parole officer’s visit and approval of the proposed residence, however, the parole officer reached out to Mr. [REDACTED] mother again to inform her that her residence was removed as

an approved residence. *Id.* at ¶¶ 26-27. No basis for the decision to rescind approval was provided, but rather, the parole officer informed Mr. ██████ mother that the decision came from someone senior to him and indicated that he had done everything in his power to advocate for Mr. ██████ to live at her home upon release. *Id.* at ¶¶ 27-29.

32. Media reports as to Mr. ██████ impending release emerged after the parole officer approved the residence. The parole officer's eventual rescission of the residence approval came only after these media reports.

33. It has been 72 days since Mr. ██████ should have been released and he has not received any notice of the legal and factual basis for his continued detention, nor been given an opportunity to be heard before an independent and impartial court.

ARGUMENT

34. DOCCS lacks authority to unilaterally detain Mr. ██████ without due process after he has been granted parole.

35. In October 2021, Mr. ██████ was granted parole and given an open parole date for November 17, 2021. All conditions and requests for his release were fulfilled, yet DOCCS did not—and has yet to—release Mr. ██████ There is nothing in Article 10 that authorizes DOCCS to unilaterally refuse to release a person who has been granted parole and who had an approved residence that was improperly rescinded. Accordingly, Mr. ██████ continued detention is unlawful.

36. By revoking Mr. ██████ approved housing and continuing to detain him beyond his open parole date, DOCCS has effectually rescinded Mr. ██████ release without due process in violation of 9 N.Y.C.R.R. § 8002.5.³ *See also Victory v. Pataki*, 814 F.3d 47, 60-63 (2d Cir. 2016) (citing 9

³ 9 N.Y.C.R.R. § 8002.5 (b)(3)-(5) outlines the required procedure if a parolee's release date is rescinded:
(3) Subsequent to the temporary suspension of the inmate's release date, the parole officer shall, as soon as practicable, notify the inmate in writing of the suspension. The parole officer having charge

N.Y.C.R.R. § 8002.5) (“New York regulations provide robust procedural protections [a]fter an inmate has received a parole release date,” which mandate that, before rescinding a prior grant, the Board of Parole must provide the inmate with, inter alia, notice of “the specific allegations which will be considered” as a basis for rescission and a hearing at which the grantee is afforded the right to be represented by counsel, the right to present witnesses and introduce documentary evidence, and, ordinarily, the right to cross-examine adverse witnesses.”).

37. DOCCS’s rescission of Mr. █████ approved residence is nothing more than a mere pretext in response to media attention towards Mr. █████ release. The Article 10 process of the New York Mental Hygiene Law is also an inappropriate basis to detain Mr. █████ and in any event, upon

of the inmate shall thereafter commence an investigation into the circumstances surrounding the basis for the temporary suspension, and shall prepare a rescission report delineating the results of said investigation. Said report shall be submitted to a member of the board as soon as practicable.

(4) Upon review of the rescission report, a member of the board shall order:

- (i) that the inmate be held for a rescission hearing; or
- (ii) that the inmate's release date be reinstated, except that where the board's reinstatement occurs subsequent to the date originally established for release, the board shall order that release occur as soon after reinstatement as practicable; or
- (iii) for any case involving the imposition of an additional indeterminate sentence or a resentence pursuant to clause (2)(ii)(e) of this subdivision, that the release date be rescinded and the inmate scheduled to appear before a panel of the Board of Parole at least one month prior to the expiration of the new or aggregated minimum period of imprisonment as calculated by the inmate records coordinator. Written notice of a rescission decision rendered pursuant to this paragraph shall be sent to the inmate, and shall state the reason for rescission.

(5) When a rescission hearing is ordered by the board, the inmate shall be presented with a copy of the rescission report and a notice of rescission hearing. The notice of rescission hearing shall be presented to the inmate not less than seven days prior to the scheduled date of the rescission hearing and shall inform the inmate of the following:

- (i) the date and place of hearing;
- (ii) the specific allegations which will be considered at the hearing;
- (iii) the inmate's rights at the final hearing, which include:
 - (a) the right to be represented by counsel;
 - (b) the right to appear and speak on his own behalf; to present witnesses and introduce documentary evidence; and
 - (c) the right to confront and cross-examine adverse witnesses, unless he has been convicted of a crime for which an additional sentence has been imposed or unless a majority of the members of the Board of Parole conducting the hearing find good cause in the record for the nonattendance of a witness.

information and belief, it is complete.

38. Mr. [REDACTED] has been detained for over two months without a lawful court order.

39. Mr. [REDACTED] 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.

40. 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*, 814 F.3d at 60 (2d Cir. 2016) (internal quotation marks and citation omitted).

41. 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.

42. 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 to his mother’s residence immediately.

PRAYER FOR RELIEF

WHEREFORE, it is respectfully prayed that this Court

1. Issue a writ of *habeas corpus* and order Mr. [REDACTED] immediate release to his mother's home 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;⁴ and
2. Grant any other relief as the Court deems just and proper.

Dated: January 28, 2022
New York, NY

/s/ Rochelle F. Swartz

Rochelle F. Swartz

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Attorneys for Petitioner

⁴ If Mr. [REDACTED] is released during pendency of this action and the Court deems the request for a writ of *habeas corpus* to no longer be the appropriate procedural vehicle for the full relief being sought, this Court should *not* dismiss the action, and instead should convert the action to an Article 78 special proceeding. *See, e.g., People ex rel. Turner v Sears*, 63 A.D.3d 1404 (3d Dep't 2009) (“[A]s the record reflects that petitioner was released on parole during the pendency of this appeal . . . the matter affects the period of petitioner’s postrelease supervision[.] [Thus,] rather than dismissing the appeal as moot, we convert the . . . proceeding to a CPLR article 78 proceeding”); *see also People ex rel. Brown v. New York State Div. of Parole*, 70 N.Y.2d 391 (1987) (holding that a *habeas corpus* proceeding would be converted by the court into an Article

78 proceeding in order to permit the parolee to raise the issue of whether the division of parole had held a final revocation hearing within the requisite 90-day period); *People ex rel. Cook v. Mantello*, 136 A.D.2d 891 (4th Dep't 1988) (holding that although *habeas corpus* could not be used by a petitioner, his motion papers should have been treated as an Article 78 proceeding to determine whether he was entitled to parole status because of the alleged failure of the Parole Board to carry out the statutorily mandated notice requirements); *People ex rel. Goldberg v. Warden*, 45 A.D.3d 356 (1st Dep't 2007); *People ex rel. Talley v. Executive Dept., New York State Div. of Parole*, 232 A.D.2d 798 (3d Dep't 1996); *People ex rel. Gonzalez v. Smith*, 104 A.D.2d 725 (4th Dep't 1984).

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COUNTY OF SULLIVAN

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ROCHELLE F. SWARTZ, ESQ.
on behalf of [REDACTED]

Index No. _____

Petitioner,

VERIFICATION

-against-

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

Respondent.

ROCHELLE F. SWARTZ, an attorney duly admitted to practice before the courts of this state, does hereby affirm under penalty of perjury that the following statements are true:

1. I am counsel to [REDACTED] petitioner.
2. I have read the foregoing verified petition and know its contents.
3. The contents of the foregoing verified petition are true to the best of my knowledge and based on my communications with petitioner.
4. I make this verification on petitioner's behalf because he is presently incarcerated outside of the county in which my office is located.

Dated: January 28, 2022
New York, New York

/s/ Rochelle F. Swartz
Rochelle F. Swartz