Habeas Petitioner's Reply - FUSL000121 (2021-12-20)

STATE OF NEW YORK
COUNTY OF ONEIDA

SUPREME COURT

PEOPLE OF THE STATE OF NEW YORK ex. rel. KATHY MANLEY, Esq., on behalf of

Petitioner,

– against –

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent.

REPLY AFFIRMATION

Index No.

Kathy Manley, duly authorized to practice law in the State of New York, hereby affirms the following under the penalties of perjury:

1. Respondent states, in Paragraph 13 of the Answer, that habeas relief is unavailable because is not entitled to immediate release. To the contrary, it is submitted that Mr. *is* entitled to immediate release, and has been since at least November 10, 2021, when his SORA level proceeding was complete. He was granted an open date for parole release[2], which gave him a legitimate expectation of release and a liberty interest under the Due Process Clause of the Constitution. *People ex rel. Johnson v. Superintendent,*

[1] Mr. has been approved to live with his 81 year old mother, and she is anxiously awaiting his release, not understanding why it has not yet occurred. Moreover, as noted in the Petition, Mr. has long asserted his innocence, and upon information and belief, the Innocence Project is currently reviewing his case (it passed an initial review and the final review should be conducted in January, 2022.)

[2] As noted in *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 193 (FN 1) (2020), an open date (in this case the Decision granting release said 9/28/21 or earlier) is "contingent upon the inmate receiving an approved residence…" Thus, once the address was approved (and the SORA proceeding complete) Mr. had a legitimate expectation of release, and should have been released at that time.

Adirondack Corr. Facility, 36 NY3d 187, 199 (2020); *Russo v. State Bd. of Parole*, 50 NY 2d 69, 73-74 (1980); *Victory v. Pataki*, 814 F.3d 47.

2. *People ex rel. Richardson v. West*, 24 AD3d 996 (3rd Dep't 2005), cited by Respondent, is distinguishable, as the relator in that case had lost good time credit, presumably due to a disciplinary violation, and under state law, DOCCS was thus permitted to change his conditional release date.

3. In *Victory v. Pataki*, supra, the Second Circuit held that someone who is granted an open date for parole release in New York has a protected liberty interest in that release, which may not be abridged without due process. The Court stated:

> "The first issue before us is whether a New York parole grantee, like Victory, has a liberty interest in his open release date of which he may not be deprived without due process. Consistent with this Court's holding in Green v. McCall, 822 F.2d 284 (2d Cir. 1987), we conclude that he does.
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> … [A] protectable liberty interest arises only if he has "a legitimate expectancy of release that is grounded in the state's statutory scheme." Graziano v. Pataki, 689 F.3d 110, 114 (2d Cir. 2012) (quoting Barna v. Travis, 239 F.3d 169,170)…
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> *…Unlike a mere applicant for parole, a New York inmate who has been granted an open parole release date has a legitimate expectancy of release that is grounded in New York's regulatory scheme. We therefore conclude that a New York "parole grantee has a protectable liberty interest that entitles him to due process…*" *Victory*, at 59-60, emphasis supplied.

4. In *People ex rel. Johnson,* supra, cited by Respondent, the Court of Appeals stated:

> "…As this Court has recognized, 'when a State adopts a sentencing scheme which creates a legitimate expectation of early release from prison, then there exists a liberty interest deserving of constitutional protection' (*Russo*, 50 NY2d at 73-74)
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> Rather than a fundamental right, such a liberty interest 'is grounded in New York's regulatory scheme' (*Victory v. Pataki*, 814 F.3d 47, 60 [2d Cir. 2016] and is a restricted form of liberty, not subject to strict scrutiny." *Johnson,* at 199.

5. However, *Johnson* is distinguishable because, in contrast to the instant case, that

relator had *not* obtained an approved address. The Court held that, because being released without an approved address would have resulted in an immediate parole (or supervised release) violation, the state policy of holding people in Residential Treatment Facilities (RTFs) during the supervision period until they have an approved address survived the rational basis test. Significantly, the Court did *not* deal with the issue of procedural due process as it had not been raised in the court below.

6. has a legitimate expectation of release, and a clear right to procedural due process. *DOCCS has failed to provide the requisite due process in this case.* Respondent claims, in Paragraph 10 of the Answer that "Relator has only been temporarily detained *in accordance with Department regulations* for evaluation pursuant to Article 10…" (emphasis supplied)

7. Respondent, however, fails to cite to any Department regulations which allow for detention pursuant to Article 10 *without the filing of a petition in an Article 10 court proceeding*. It is submitted that this is because no such regulations exist.

8. Similarly, in Paragraph 17, Respondent claims that "[o]ffenders subject to Article 10 reviews are not ready for release to the community until this review has been completed." Respondent then cites MHL 10.05(d) and (e), which describe with the first two levels of review under Article 10, the preliminary review and the case review team process. However, as discussed in the Petition herein, nothing in Article 10 provides that those subject to this review process may not be released before or during the review.

8. To the contrary, as noted in the Petition, MHL 10.06(f) provides that where, as is the case herein, it appears that the individual may be released prior to the time the case review

team makes its determination, *if* the Attorney General determines that public safety requires it[3], the Attorney General may file a securing petition in the court where a civil confinement proceeding is contemplated. That did not occur herein.

9. Thus, the relevant statute not only does not support Respondent's claim that Mr. may be detained pursuant to Art 10, but it shows that he *may not be so detained*, unless a securing petition is filed first.

10. Moreover, DOCCS has promulgated a Directive (Directive 8302), attached herein as Exhibit "A," which also shows that what Respondent is doing herein is improper, and apparently not in accordance with DOCCS policy[4]. Directive 8302 involves a Special Condition which may be imposed by the Parole Board in certain Article 10 cases.[5] Significantly, this Directive only applies in cases where the Article 10 Petition has been filed – the Directive states:

> "It is the policy of the Department of Corrections and Community Supervision (DOCCS) to identify and process offenders who are eligible for parole release, conditional release, or release to a period of post-release supervision *who are the subject of a petition filed by the NYS Office of the Attorney General (OAG) under Article 10 of MHL for civil management and an Order to Show Cause has been issued authorizing their temporary retention pending a probable cause hearing*, for consideration of a special condition to be imposed by the Board of Parole that requires their continued incarceration." (Exhibit "A" at 1, emphasis supplied)

11. Thus it is clear that, in accordance with Article 10, Directive 8302 requires the filing of an Article 10 Petition *before* any "temporary retention" due to the civil management process may occur.

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[3] As noted once again, the Parole Board evaluated the case thoroughly and determined that Mr. was likely to be law-abiding upon release.

[4] Even if, *arguendo*, DOCCS did have a policy allowing for detention in these circumstances, such a policy would be unconstitutional unless it provided adequate due process, which has not occurred herein.

[5] The Special Condition states that the person won't be released until their residence "can be evaluated by DOCCS to determine its appropriateness in light of any determination made by a court of competent jurisdiction pursuant to Article 10…" Exhibit "A" at 2. No such Special Condition was imposed herein, nor could it have been, as this Directive only comes into play *after* an Article 10 Petition is filed in court.

12. In sum, continued detention is unlawful in violation of his right to procedural due process, and is not in accordance with the Article 10 statute and DOCCS own Directive.

13. In *Victory*, supra (which involved a man granted parole but not yet released who was then subject to a parole recission proceeding) the Second Circuit discussed what due process is required for a parole grantee, stating:

> "B. Process Due
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> Victory does not contest that, in general, the robust procedures established by the New York regulations are constitutionally adequate to protect the liberty interests of parole grantees. Rather, he asserts that *Defendants deliberately sought to circumvent New York's procedural protections by depriving him of a neutral decisionmaker* at his rescission hearing and entering into an agreement to unlawfully rescind his parole using a fabricated ground for rescission. If proven, *these allegations would suffice to establish a violation of his right not to be deprived of liberty without due process*.
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> 1. Denial of Impartial Decision-Maker
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> "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Holcomb v. Lykens, 337 F.3d 217, 223 (2d Cir. 2003) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)). Even the most minimal guarantees of procedural due process require that the decision be issued by "a neutral and detached hearing body such as a traditional parole board" and supported by at least "some evidence." Friedl v. City of New York, 210 F.3d 79, 85 (2d Cir. 2000) (internal quotation marks omitted). Indeed, "the essence of a fair hearing is an impartial decisionmaker." Surprenant v. Rivas, 424 F.3d 5, 16 (1st Cir. 2005) (citing Wolff v. McDonnell, 418 U.S. 539, 570-71 (1974)). A parole grantee facing rescission is therefore entitled to "a de novo hearing before a neutral and detached hearing body." Green, 822 F.2d at 287." *Victory*, supra, at 62-63, emphasis supplied.

14. As with the regulations at issue in *Victory,* Article 10 provides for due process in that it requires a petition filed in court and a probable cause hearing by a neutral arbiter in order to detain someone. As in *Victory*, DOCCS is circumventing this statute (and its own Directive) by detaining Mr. without the filing of an Article 10 petition.

15. Therefore, this Court should find that is being unlawfully

detained[6] by Respondent, and order his immediate release to parole supervision

AFFIRMED: December 20, 2021

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[6] Respondent also claimed, in Paragraph 18, that the Petition failed to comply with CPLR 7002(c)(1) in that it did not attach a "mandate of his detention." In fact, the Petition did contain exhibits showing that Mr. detention has been based on a 20-40 year sentence for sexual offenses out of Queens County Supreme Court. These include Exhibit "A," the DOCCS inmate information showing Mr. sentence, county of commitment and the open date for parole release, as well as the Decision granting parole release accompanied by the parole conditions; and Exhibit "B," the SORA Order from Queens County Supreme Court, showing that Mr. release date from incarceration was scheduled for September 28, 2021. It is submitted that any one of those documents (and certainly in combination) suffices to constitute the required "mandate." It is clear from the case law surrounding CPLR 7002 that the purpose of this provision is so that the habeas court can be aware of the purported cause of the detention, so as to determine whether said detention is illegal. (See, i.e. *People ex rel Medina v. Senkowski*. 265 AD2d 779 [3rd Dep't 1999]; *People ex rel Combs v. LaValley,* 53 Misc.2d 281, 281 [Cayuga Co 1967] [noting that, contrary to the instant case, no "mandate" documents were attached, but stating the requirement 'will be waived, as the necessary material facts of the underlying conviction can be gleaned from the petition and they have been verified by reference to reported opinions'] – and the appeal in that case which granted the habeas petition where the relator had been denied counsel at a parole violation hearing is codified at 29 AD2d 128 [4th Dep't 1968]). It is exceedingly clear, as shown by the Exhibits, and as understood by Respondent, that Mr. detention has always been based on the Queens County Supreme Court sentence.