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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

-----X
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.
-----X

VERIFIED RETURN
Index No.:

Hon. David A. Murad, JSC

Thomas Trace, an attorney admitted to practice law in New York State, affirms the truth of the following under penalty of perjury pursuant to CPLR 2106:

- 1) I am of counsel to Letitia James, Attorney General of the State of New York, attorney for Respondent, Anthony Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision (“DOCCS”).
- 2) I have been assigned to defend this CPLR Article 70 habeas corpus proceeding, I am acquainted with its facts, and have reviewed the records of the above-named Respondent. This Verified Return is true to my knowledge, except to those matters alleged on information and belief, as to those matters, I believe them to be true.
- 3) Upon information and belief, Relator _____ is currently in the custody of DOCCS at Marcy Correctional Facility, located in Marcy, New York. A copy of his Parole Board Release Decision Notice and Decision is attached as Exhibit A.

- 4) In the Petition dated November 23, 2021, Relator challenges his continued detention at Marcy Correctional Facility, further stating that he has asserted his innocence consistently while serving a twenty to forty years sentence for Rape in the First degree charges and related sex offenses under DIN .
- 5) Relator was granted an open parole date on August 31, 2021, with the written decision of the Parole Board stating: “Parole Decision: Earliest Release Date: 9/28/2021 – or earlier.” See, Parole Decision, pg. 1. Relator was designated as a level three sex offender on November 10, 2021. Petition, pg. 4.
- 6) On page one of his Petition, Relator acknowledges receipt of the Parole Decision, and the conditions of his release which are listed in the Parole Decision. These conditions include, but are not limited, to participation in various programs as directed by the Relator’s parole office, such as substances abuse treatment and sex offender counseling/treatment programs. See, Decision, pg. 2.
- 7) Relator contends that his release conditions were fulfilled on or about November 10, 2021, when he was designated a level three sex offender and his proposed address after his release was approved by Parole. See, Petition, pg. 2.
- 8) As stated on pg. 2 of the Petition, Relator was enrolled in the sex offender treatment program at Marcy Correctional Facility at which time a Memorandum was issued by DOCCS Associate Commissioner Jason D. Effman, dated November 3, 2021. This “Notice of Referral to Case Review Team,” referred Relator to a Case Review Team for evaluation pursuant to Article 10 of the Mental Hygiene Law.

- 9) Relator contends that despite being granted an open parole date and allegedly meeting the conditions for release, he was not released to parole supervision on November 10, 2021, and remains detained by Respondent at Marcy Correctional Facility, and as such, a constitutional cognizable liberty interest has been violated.
- 10) I submit this Verified Return in support of Respondent's position that Relator has only been temporarily detained in accordance with Department regulations for evaluation pursuant to Article 10 of the Mental Hygiene Law which, upon information and belief, will be concluded by the first week of January, 2022.
- 11) Relator's instant offense involved a sexual component and, accordingly, is designated a felony as defined in the Sex Offender Management and Treatment Act ("SOMTA"). As set forth in Article 10 of the Mental Hygiene Law, DOCCS staff must refer an offender whose offense is a sexually motivated designated felony to the Office of Mental Health ("OMH") for an Article 10 review. See MHL §§10.03(a), 10.03(g)(4); Matter of State of New York v. Rashid, 16 NY3d 1 (2010).

**HABEAS CORPUS RELIEF IS NOT AVAILABLE BECAUSE
PETITIONER IS NOT ENTITLED TO IMMEDIATE RELEASE**

- 12) As recently stated by the Court of Appeals, an inmate's interest in being released on parole after the setting of an open parole date does not constitute a fundamental liberty interest necessitating release. "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence... [T]he conviction, with all its procedural safeguards, has extinguished that liberty right: given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.... the Supreme Court has held... that

because a person's rightful liberty interest is extinguished upon conviction, there is no inherent constitutional right to parole. See, People ex rel. Johnson v. Superintendent Adirondack Correctional Facility, 36 NY3d 187 (2020).

13) Even if Relator's contentions had merit, habeas corpus relief is also unavailable since Relator would still not be entitled to immediate release from custody/prison. See, People ex rel. Richardson v. West, 24 AD2d 996 (3rd Sept. 2005) [the expiration of a relator's sentence is the point in time at which the right to release would accrue, not the conditional release date]. It is well established that habeas corpus relief is an appropriate remedy only if a relator is entitled to immediate release from custody. See, People ex rel. Kaplan v. Commissioner of Correction of the City of N.Y., 60 NY2d 648 (1983); People ex rel. VanSteenburg v Wasser, 69 AD3d 1135, 1136 (3d Dept 2012), lv denied 14 NY3d 883 (2010).

14) it is respectfully submitted that because Relator is not entitled to immediate release from custody/prison, habeas corpus relief is not available. See, People ex rel. Mack v. Reid, 113 AD2d 962, (2d Dept. 1985); see, People ex rel. Kaplan v. Commissioner of Correction, 60 NY2d 648 (1983); People ex rel. Vansteeenburg v. Wasser, 69 AD3d 1135 (3d Dept 2012); People ex rel. Burr v. Rock, 100 AD3d 1175 (3d Dept 2012) ("petitioner would not be entitled to immediate release even if successful [on his arguments] and, therefore, habeas corpus release is unavailable"), lv denied 20 NY3d 858 (2013); People ex rel. Gloss v. Kickbush, 166 AD3d 1522, (4th Dept. 2018), lv denied 32 NY3d 915 (2019).

**RELATOR'S RELEASE WAS WITHHELD IN ACCORDANCE WITH DEPARTMENT
REGULATIONS AND WITH THE APPLICABLE LAW**

- 15) Relator was sentenced to a term of 20 to 40 years following his convictions for Rape in the First Degree (2 counts), Sodomy First, and Sex Abuse 1st. Following his recent interview with the Parole Board, he was given an open parole date: "Parole Decision: Earliest Release date: 9/28/2021 – or earlier."
- 16) Significantly, DOCCS staff did not refer Relator for an Article 10 review at that time since his release date was not set. He was given an open date, since his release plan had not yet been approved, and because Relator had a conditional release date of April 29, 2024, and a maximum expiration date of August 29, 2037.
- 17) Offenders subject to Article 10 reviews are not ready for release to the community until this review has been completed. Pursuant to Article 10, OMH staff conduct a review of the case to determine whether to pursue referral to a case review team for further evaluation. During this review, OMH staff conduct a preliminary review of the case to determine whether to pursue referral to a case review team for further evaluation. See MHL §10.05(d); Rashid, 16 NY3d at 4. If, following this review, OMH staff decide to refer the matter to a case review team, notice is then given to the offender. See MHL §10.05(e); Rashid, 16 NY3d at 4. In the case at bar, the plan is to conclude this review by the first week of January, 2022.

PETITIONER HAS FAILED TO COMPLY WITH CPLR § 7002 (C)(1)

- 18) CPLR § 7002(c)(1) also requires Relator to attach a copy of the mandate of his detention to his Petition for a writ of habeas corpus, or state why he was unable to. Because this has not been accomplished, dismissal of this Petition is also warranted

for this reason. See, People ex. rel. Chaney v. Dagostino, 173 AD3d 1436, 1437 (3rd Dept. 2016); People ex rel. Medina v. Senkowski, 265 AD2d 779 (3rd Dept. 1999); People ex rel. Upchurch v. Gittleson, 41 AD2d 605 (2d Dept. 1972).

WHEREFORE, Respondent respectfully requests that this Court dismiss the Petition and deny the relief requested and such other relief as the Court deems appropriate.

DATED: December 16, 2021
Utica, New York

Thomas Trace
Associate Attorney

VERIFICATION

Thomas Trace, an attorney duly admitted to practice in the State of New York, affirms under penalty of perjury, the following:

I am an Associate Attorney in the Office of Letitia James, Attorney General of the State of New York and attorney for Respondent.

I have been assigned to defend this case, and I am acquainted with its facts. I have prepared and read the annexed verified return, and know the contents thereof, and the same is true of my knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters, I believe them to be true.

Dated: December 16, 2021
Utica, New York

Thomas Trace
Associate Attorney