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### Art. 78 Motion to Change Venue/Opposition - FUSL000148 (2022-05-02)

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS**

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In the Matter of the Application of

[REDACTED],

Petitioner,

[REDACTED]

Hon. Maria G. Rosa

- v. -

Motion Sequence No. 002

TINA M. STANFORD, CHAIRWOMAN, NEW  
YORK STATE BOARD OF PAROLE,

Respondent.

For Judgment Pursuant to Article 78  
Of the Civil Practice Law and Rules

----- X

**PETITIONER’S MEMORANDUM OF LAW IN OPPOSITION TO  
MOTION TO CHANGE VENUE**

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May 2, 2022

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Petitioner<sup>1</sup> [REDACTED] respectfully submits this Memorandum of Law in Opposition to the Parole Board's Motion to Change Venue. *See* NYSCEF Dkt. No. 19.

## I. PRELIMINARY STATEMENT

Rather than respond to the merits of Mr. [REDACTED]'s Article 78 Petition, the Parole Board seeks to delay this time-sensitive matter by moving to change venue. The Parole Board's apparent failure to substantively and timely oppose the Petition strongly suggests that there are no meritorious arguments in opposition. In these circumstances, we ask the Court to deny the request to change venue and reset the schedule for the Parole Board's opposition papers on the Petition and a return date. Separately, we have submitted a letter request and proposed Order to allow Mr. [REDACTED] to attend any hearing on his Petition.

## II. ARGUMENT

### A. **Because the Board Failed to Satisfy the Statutory Requirements, a Venue Determination is Discretionary**

As an initial matter, the Parole Board brought its motion without first making the statutorily required demand upon Petitioner to change venue. *See* N.Y. C.P.L.R. § 511(b) ("The defendant shall serve a written demand that the action be tried in a county he[*she*] specifies as proper. Thereafter, the defendant may move to change the place of trial.") (emphasis added).

Because the Parole Board has not satisfied the requirements of New York CPLR § 511, its request is now entirely within the Court's discretion. *See, e.g., see Howard v. New York State Bd. of Parole*, 5 A.D.3d 271 (1st Dept. 2004) ("since respondent failed to follow the procedure set forth in CPLR 511(a) and (b), it is not entitled to a change of venue as of right."); *Banks v. New York State and Local Employees' Retirement System*, 271 A.D.2d 252 (1st Dept. 2000) (reversing

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<sup>1</sup> Capitalized terms not defined herein are as defined in the Verified Petition, NYSCEF Dkt. No. 1 ("Petition") and opening Memorandum of Law, NYSCEF Dkt. No. 15 ("Opening Brief").

lower court's granting of motion to change venue based on CPLR 506(b) in special proceeding because defendant had failed to follow the demand and motion procedure required by New York CPLR § 511).

**B. Venue is Proper in Dutchess County**

As set forth in the Petition, venue is proper in Dutchess County. Mr. ██████ is housed at Fishkill Correctional Facility in Dutchess County and has been since February 2021. Petition ¶ 2 & Ex. 3, p. 4. Mr. ██████ perfected his administrative appeal while incarcerated at Fishkill. *Id.* ¶ 10 & Ex. 2. He exhausted his administrative remedies there (*id.* ¶ 11) and an Article 78 petition is proper in the county where a petitioner exhausts his or her administrative remedies. *See Hawkins v. New York State Dept. of Corr. & Community Supervision*, 2015 N.Y. Slip Op. 51995(U) (granting de novo interview to petitioner denied parole in Saratoga County before being transferred to Sullivan County, where he eventually filed his Article 78 petition) *aff'd on other grounds, Hawkins v. New York State Dept. of Corrections and Community Supervision*, 140 A.D.3d 34, n. 1 (3d Dept. 2016). Mr. ██████ also received the Parole Board's final determination denying a *de novo* interview in Dutchess County. Petition ¶ 11; *see also* N.Y. C.P.L.R. § 506(b) (“[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent [i] made the determination complained of or [ii] refused to perform the duty specifically enjoined upon him by law, or [iii] where the proceedings were brought or taken in the course of which the matter sought to be restrained originated.”).

Further, Mr. ██████'s parole file(s) are stored at Fishkill. Petition ¶ 74. The Parole Board withheld from Mr. ██████ materials from his parole file(s) prior to his interview and during the pendency of his appeal of the Parole Board's decision, and still has not provided such materials to date (including a complete and unredacted COMPAS assessment). *Id.* ¶¶ 62 & 64; *see Hill v. New York State Bd. of Parole*, Index No. 100121/2020, at \*11 (Sup. Ct. N.Y. Cty. Oct.

23, 2020) (granting a *de novo* interview, in part because “it is a procedural error for the Parole Board to refuse to provide a parole applicant with access to documents considered by the Board.”); *see also* N.Y. C.P.L.R. § 506(b) (“[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent . . . refused to perform the duty specifically enjoined upon him by law . . . or where the material events otherwise took place.”).

Finally, because he is incarcerated at Fishkill, Mr. ██████ would need to be produced from Dutchess County for argument relating to his Petition. And should his Petition be granted—by a Supreme Court Justice sitting in any of the state’s sixty-two counties—Mr. ██████ could only receive a *de novo* interview within Dutchess County. While venue may be proper in numerous locations, the locus of this matter is clearly Dutchess County.

**C. The Authority Upon Which the Board Relies Does Not Establish that Venue is Improper in Dutchess County**

The authority cited by the Parole Board is inapplicable.<sup>2</sup> Most of the cases appear to address an entirely different issue: whether venue is proper in the county of conviction. *See, e.g., Vigilante v. Dennison*, 36 A.D.3d 620, (2d Dept. 2007) (finding that offense and sentence in Kings County were not “material events” for venue pursuant to CPLR § 506(b)); *Phillips v. Dennison*, 41 A.D.3d 17 (1st Dept. 2007) (finding that offense and sentence were not “material events” for purposes of venue); *Ramirez v. Dennison*, 39 A.D.3d 310 (1st Dept. 2007) (finding venue was not proper in Bronx County); *Schwartz v. Dennison*, 40 A.D.3d 218 (1st Dept. 2007) (citing *Ramirez*). Venue here is based on numerous grounds, none of which involve the county of offense, conviction, or sentence to which the Parole Board’s cited authority relates.

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<sup>2</sup> While the relief the Petition seeks speaks for itself, the Parole Board asserts that it “is a petition for a writ of habeas corpus” and requests relief pursuant to New York CPLR Article 70. NYSCEF Dkt. No. 19, ¶¶ 2, 3. If the Parole Board’s characterization of this proceeding is accepted, its reliance upon New York CPLR 7004(c) establishes that venue is proper before “a justice of the supreme court . . . being or residing within the county in which the person is detained” and would further support venue in Dutchess County.

The Parole Board's reliance upon *Howard* also actually undermines its request to change venue. *Howard* stands for the proposition that when—as here—the Parole Board fails to follow the requirements of New York CPLR § 511, venue is permissible even in an “improper” county. *See Howard*, 5 A.D.3d at 272 (vacating Supreme Court's change of venue because respondent “failed to follow the required procedures set forth in CPLR 511(a) and (b) for a change of venue, including a written demand therefor. . . it is not entitled to a change of venue as of right . . . Nor, in any event, is respondent entitled to a discretionary change of venue. . . . Finally, we note that although New York County is an improper county for venue, the proceeding may go forward there.”) (emphasis added). Even if venue were not already proper in Dutchess County—and it is—this matter could still proceed in Dutchess County because the Parole Board has failed to follow the requirements of New York CPLR § 511. *See supra*, Section II(A).

Beyond the facts here and the applicable law, the Parole Board argues that venue is proper in Orleans County because Mr. [REDACTED] was located there when the Board, located remotely in another county (Erie) rendered its decision. NYSCEF Dkt. No. 19, ¶¶ 3–4. By the same logic, venue is proper in Dutchess County, because that is where Mr. [REDACTED] was located when the Board rendered its administrative decision in another county.<sup>3</sup> And Mr. [REDACTED] seeks to vacate both the Board's November 2020 and November 2021 decisions. *See* Petition ¶¶ 1 & 11; Opening Brief pp. 5 & 25.

#### **D. The Requested Stay is Unwarranted**

If the Court does not summarily deny the Parole Board's motion, Mr. [REDACTED]'s original

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<sup>3</sup> The Parole Board has failed to establish that Albany County is the county in which administrative decision was made. While the Parole Board's Appeals Unit is located in Albany County, it merely issues “Findings & Recommendation.” The Parole Board's “Final Determination” can only be made by the Parole Board members who sign the “Decision Notice.” *Compare* Petition Ex. 2, p. 3, with p. 2. There is no indication from the three inscrutable signatures who the Parole Board members were who made the decision, nor whether they were actually in Albany County at the time of that determination.



Article 78 Petition should not be stayed in the interim for multiple reasons. *See* NYSCEF Dkt. No. 19, ¶ 6.

*First*, Mr. [REDACTED] has already provided the Parole Board more than the statutory time to answer the Petition. Even though the Parole Board and Attorney General were both personally served in mid-March, the Parole Board's response to the Petition was not due until mid-April.

*Second*, the Parole Board has failed to seek its motion to change venue with the "due diligence" required by New York CPLR § 511(c). The Parole Board waited nearly three weeks before submitting a two-page request on a narrow technical issue. The Parole Board was also not diligent because it neglected to comply with the requirements of New York CPLR § 511. *See supra*, Section II(A).

*Third*, the allegations set forth in the Petition need to be admitted or denied, regardless of the venue in which they are asserted. The Parole Board's answer to the Petition should not change based on the county in which it is filed. Thus, there is no reason to delay the Board's answer.

*Fourth*, the Parole Board has already sought—and effectively received—an excessive adjournment, extending its time to answer from April 11, 2022 to at least thirty days beyond May 4, 2022. Any further extension is unreasonable in this expedited special proceeding.

### III. CONCLUSION

Mr. [REDACTED] respectfully requests that the Court deny the Parole Board's request to change venue.

Mr. [REDACTED] further requests that the Court reinstitute a schedule for the filing of remaining briefing on his Petition. Contingent upon the demands of the Court's docket, Mr. [REDACTED] would suggest that the Parole Board's answer be due no later than May 27, 2022; Mr. [REDACTED]'s reply be due no later than June 3, 2022; and that his petition be returnable on June 6, 2022. As set forth in our separate proposed order, Mr. [REDACTED] respectfully requests that he be

allowed to attend any hearing granted by the Court on his Petition.

Dated: May 2, 2022  
New York, New York

Respectfully submitted,

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**WORD COUNT CERTIFICATION**

Pursuant to 202.8-b of the Uniform Rules for the Supreme Court and County Courts, I, Chris Fennell, certify that this Memorandum complies with the word count limit, as it contains 1,796 words based on the word-processing system used to prepare this document.

Dated: May 2, 2022  
New York, New York

*/s/ Chris Fennell*

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