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September 2022

### Habeas Petition - FUSL000121 (2021-11-23)

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STATE OF NEW YORK  
COUNTY OF ONEIDA

SUPREME COURT

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

**VERIFIED PETITION  
FOR WRIT OF HABEAS CORPUS**

Petitioner,

– against –

**Index No.**

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

Respondent.

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

1. I have been retained to represent on litigation related to his continued unlawful detention by the New York State Department of Corrections and Community Supervision (DOCCS) after he was granted parole release.

2. I am fully familiar with the facts and circumstances in this case. The facts are within my knowledge or known upon information and belief based on my conversations with Mr. and DOCCS representatives, as well as based on relevant documents.

**PRELIMINARY STATEMENT/ SUMMARY OF THE ARGUMENT**

3. was granted parole release on or about August 31, 2021, and the subsequent written decision said that he would be released *9/28/21 or earlier*. (Parole Board Decision and DOCCS inmate locator, attached as Exhibit “A”)

4. Mr. [REDACTED] would have been released as of September 28, 2021 except that he still needed address approval and needed to complete the SORA leveling process. Upon information and belief, Mr. [REDACTED] proposed address was approved by Parole on or about October 5, 2021, after a parole officer completed a home visit. Then, on November 10, 2021, the SORA level process was completed (with a level three designation.) (Exhibit “B”) At that point *there was nothing left for DOCCS to do but process Mr. [REDACTED] release.*

5. However, Mr. [REDACTED] who is being held at Marcy Correctional Facility (where he successfully completed the sex offender treatment program) was then told by his Counselor, Mr. [REDACTED], that his release would be delayed as he was being considered for civil confinement under Mental Hygiene Law (MHL) Art. 10. A November 3, 2021 Memorandum from DOCCS Associate Commissioner Jason D. Effman stated that the case was referred to an Article 10 Case Review Team. (Exhibit “C”)

6. As discussed below, Respondent has *no authority* to hold [REDACTED] under Article 10 unless a petition is filed in court by the Attorney General. Therefore, given the liberty interest accorded to him by virtue of his grant of parole, Mr. [REDACTED] is seeking a writ of habeas corpus ordering his immediate release.

#### **THE PARTIES**

7. Relator [REDACTED] is a prison inmate who was granted parole release and is now being held (unlawfully) for Article 10 review. Respondent is Anthony Annucci, Acting Commissioner of DOCCS, in whose custody Mr. [REDACTED] is detained.

#### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction pursuant to CPLR 7001. Venue is proper in Oneida County because Mr. [REDACTED] is detained in said county. CPLR 7002

9. A petition for a 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 AD3d 992, 993 (3<sup>rd</sup> Dep't 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 NY3d 187 (2020.)

### STANDING

10. I make this emergency verified petition for a writ of habeas corpus pursuant to CPLR 7002(a) on Mr. \_\_\_\_\_ behalf, because he is detained outside the county where my office is located, further delay will cause him irreparable injury, and the factual allegations are within my personal knowledge or upon information and belief.

### THE FACTS

11. \_\_\_\_\_ (who has consistently asserted his innocence) is serving a sentence of twenty to forty years for Rape in the first degree and related sex offenses. (Exhibit "A" at 1) He was eligible for parole in 2017. (Exhibit "A" at 2)

12. Mr. \_\_\_\_\_ was granted parole release on or about August 31, 2021, and the subsequent written decision said that he would be released 9/28/21 or earlier. (Parole Board Decision and DOCCS inmate locator, attached as Exhibit "A" at 2, 4) The Decision stated:

"This open date following a 24-year incarceration is granted based on the statutory factors, including your programming, good overall disciplinary record, and low COMPAS risk and needs scores. These lead the panel to conclude that you can remain law-abiding in the community. Your well-formed plans and significant family and community support lead the panel to conclude that your release is appropriate at this time." (Exhibit "A" at 4)

13. Mr. \_\_\_\_\_ would have been released as of September 28, 2021, except that he

still needed address approval and the completion of the SORA leveling process. Upon information and belief, Mr. [redacted] proposed address was approved by Parole on or about October 5, 2021, after a parole officer completed a home visit. Then, on November 10, 2021, the SORA level process was completed (with a level three designation.) (Exhibit “B”) At that point *there was nothing left for DOCCS to do but process Mr. [redacted] release.*

14. However, Mr. [redacted] was then told by his Counselor, [redacted] that his release would be delayed as he was being considered for civil confinement under Mental Hygiene Law Art. 10.

15. A November 3, 2021 Memorandum from DOCCS Associate Commissioner Jason D. Effman stated that his case was referred to an Article 10 Case Review Team. (Exhibit “C”)

16. On November 15, 2021, undersigned counsel emailed the Superintendent (Patrick Reardon) and Deputy Superintendent (David Debejian) of Marcy, asking if Mr. [redacted] release could be processed that week, since his address was approved and the level process was complete. (Exhibit “C” at 2) Mr. Debejian wrote back and said “Mr. [redacted] is still involved in the Article 10 process. This process will determine if an incarcerated individual can be released.” (Exhibit “C” at 2)

17. I then wrote back to Mr. Debejian, stating:

“...[I]t is my understanding that when someone is granted release, they can’t be held on Art ’10 unless a Petition is filed. I know of someone who was granted habeas release<sup>1</sup> when he was held for Art. 10 review after he would otherwise have been released on parole.” (Exhibit “C” at 2)

18. Mr. Debejian then responded, still on November 15, stating, “*I’m not disputing*

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<sup>1</sup> This was the case of *People ex rel Martha Rayner, Esq., v Annucci*, Index No. [redacted] (Ulster Co. 2021.) I later learned that in that case, about one week after the petition was filed, Respondent released the inmate in question, although he had been held unlawfully for several months prior to the filing of that petition.

*what you wrote below* but I know the process is under review. Thanks.” (Exhibit “C” at 2, emphasis supplied)

19. The next day, November 16, I emailed Mark Richter, DOCCS Deputy Counsel, stating that I had gotten his name from Martha Rayner (the attorney who had filed the habeas petition referred to in Footnote 1), let him know the situation, and said that I was hoping to resolve this without having to file a habeas petition. (Exhibit “C” at 3)

20. I also called Mr. Richter’s office, and spoke to one of his subordinates, who said he would bring this to Mr. Richter’s attention and get back to me. (Exhibit “C” at 3) When I hadn’t heard back by November 18, I emailed Mr. Richter again and let him know I would be filing a habeas petition if this wasn’t resolved by the beginning of the following week. (Exhibit “C” at 3) Later that day, Mr. Richter responded to me, and stated:

“I am not involved in these matters, but was told that Mr. \_\_\_\_\_ case is moving forward through the process. Unfortunately, I do not have any further information at this time.” (Exhibit “C” at 3)

### **ARGUMENT**

21. DOCCS lacks any authority to detain \_\_\_\_\_ now that he has been granted parole and has done everything required to gain release. There is nothing in Mental Hygiene Law Article 10 which authorizes DOCCS to hold someone who would otherwise have been released, and where no petition has been filed by the Attorney General.

22. Article 10 of the Mental Hygiene Law requires three stages of review before the Attorney General may file a petition seeking a civil management order. MHL 10.05. The first stage is a ‘preliminary review’ to determine whether the person should be referred to a case review team. MHL 10.05(d)

23. The second stage is where Mr. \_\_\_\_\_ is now – a case review team looks at the

documents (and may arrange for a psychiatric exam) and then decides whether they believe civil management is warranted. MHL 10(e), (g).

24. The third stage is review by the Attorney General in order to decide whether to file a civil management petition in court. MHL 10.06(a). If such a petition is filed, it triggers the right to counsel, and, unless the individual has other counsel, the court must appoint counsel, generally from mental hygiene legal services. MHL 10.06(c)

25. Significantly, Article 10 contemplates that some subjects of this review will be at liberty, and thus provides a mechanism for detention of said persons *after* an Art. 10 petition is filed. See, i.e. MHL 10.06(f) and (h.)

26. 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<sup>2</sup>, the Attorney General may file a securing petition in the court where a civil confinement proceeding is contemplated.

27. MHL 106(h) provides that if the individual has been released to parole supervision at the time a petition is filed, the court may order confinement, but there must be a probable cause hearing within seventy-two hours.

28. In *Matter of New York v. Rashid*, 16 NY3d 1 (2010) the Court of Appeals held that in order to pursue civil management, the State must file a petition either while the individual is still confined, or while he or she is under supervision – the Court noted that the petition may be filed after someone is released from custody (but still under supervision), stating:

“According to the State, this provision [MHL 10.06(h)] ‘underscores that the Legislature contemplated an offender’s release prior to the filing of the petition’ ...

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<sup>2</sup> As noted above, the Parole Board evaluated the case thoroughly and determined that Mr. \_\_\_\_\_ was likely to be law-abiding upon release.

...[S]ection 10.06[h] is meant to deal with the circumstances where a petition is filed against someone ‘at liberty’ because not confined, but who is still subject to State supervision...

Section 10.06(f) authorizes the Attorney General to *file a ‘securing petition’* to protect the public safety ... in order to prevent a respondent’s release ‘if it appears that the respondent may be released prior to the time the case review team makes a determination.’ ...

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In sum, we read Article 10 to *require the Attorney General to file a sex offender civil management petition* while a respondent is in State custody or, if the respondent is not confined, still subject to State supervision. ...” *Rashid*, supra, at 12-14, emphasis supplied.

29. Thus, based on the foregoing, the *only* way (relevant to these purposes) someone may be detained under Article 10 is if the Attorney General files a petition under MHL 10.06(a) and a court grants detention; the Attorney General files a securing petition (after the requisite public safety determination) under MHL 10.06(f); or the Attorney General files a petition under MHL 106(h) and the court orders confinement and holds a hearing within seventy-two hours.

30. Aside from those provisions, which all require the Attorney General to file a petition in court, *there is simply no authority for someone to be held under Article 10. As no such petition has been filed herein, Mr. [redacted] detention, which Respondent stated is pursuant to Art 10, is unlawful.*

31. The fact that [redacted] was given an open date for parole release (and has an approved address and a completed SORA proceeding) means that he has a liberty interest entitling him to due process and a legitimate expectation of release. *Victory v. Pataki*, 814 F.3d 47, 60 (2<sup>nd</sup> Cir. 2016); *People ex rel Johnson v. Superintendent, Adirondack Corr. Facility*, 174 AD3d 992, 993 (3<sup>rd</sup> Dep’t 2019.) *Art. 10 review may not stand in the way of that release without the filing of, at the very least, a securing petition by the Attorney General.*

32. Therefore, this Court should find that [redacted] is being unlawfully



detained by Respondent, and order his immediate release to parole supervision.

WHEREFORE, it is requested that the Court:

1. Issue a writ of habeas corpus and order immediate release;
2. Grant any further relief as the Court deems just and proper.

AFFIRMED: November 23, 2021

*Kathy Manley*  
Kathy Manley  
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#### VERIFICATION

Kathy Manley, an attorney admitted to practice law in New York State, hereby affirms under the penalties of perjury that the contents of this petition are true based on my personal knowledge, except for those matters alleged to be based upon information and belief, which I believe to be true.

*Kathy Manley*  
Kathy Manley