STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
CHESTER DEBIASO,#10-B-3173,
Petitioner,

for Judgment Pursuant to Article 70
of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #44-1-2012-0458.17
INDEX # 139339
ORI # NY044015J

ELIZABETH A. O'MEARA, Superintendent,
Gouverneur Correctional Facility,
Respondent.

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The Court has before it the Petition for Writ of Habeas Corpus of Chester DeBiaso, verified on June 23, 2012 and filed in the St. Lawrence County Clerk's Office on June 29, 2012. Petitioner, who is an inmate at the Gouverneur Correctional Facility, purports to challenges his continue incarceration in the New York State Department of Corrections and Community Supervision (DOCCS). The papers before the Court will be considered as an *ex parte* request for the issuance for the writ of habeas corpus or order to show cause in a habeas corpus proceeding. For the reason set forth below, however, the Court declines to issue such a writ or order.

In September of 2008 petitioner was released from DOCCS custody upon the maximum expiration date of a sentence imposed in connection with an unspecified sex offense. On July 24, 2009 he was sentenced in Niagara County Court to a 10-year period of probation (purportedly pursuant to Penal Law §65.00(3)(a)(iii)) upon his conviction of the crime of Failure to Register as a Sex Offender pursuant to Correction Law §168-f. *See* Correction Law §168-t. Petitioner alleges that soon thereafter he was advised that the sentence was illegal in that the proper period of probation should have been 5, rather than 10, years. *See* Penal Law §65.00(3)(a)(i). He further alleges that the illegality of the 2009

sentence was brought to the attention of his probation officer. Notwithstanding the foregoing, in June of 2010 petitioner was charged with violating the conditions of probation but the petition stated that he had been sentenced on July 24, 2009 to a 5-year period of probation. On September 29, 2010 the underlying sentence of probation was revoked, upon the finding of a violation, and petitioner was sentenced in Niagara County Court, pursuant to Criminal Procedure Law §410.70, to an indeterminate sentence of 1⅓ to 4 years. He was thereafter committed to DOCCS custody. Petitioner's September 29, 2010 sentencing was affirmed by the Appellate Division, Fourth Department, without opinion, in January of 2012. *People v. DeBiaso*, 91 AD3d 1303.

On September 9, 2011 petitioner submitted a motion pursuant to Criminal Procedure Law §440.20 to the Niagara County Court seeking an order setting aside the original July 29, 2009 sentence and re-sentencing him to an authorized term of probation. The Niagara County District Attorney acknowledged that the original sentence of 10 years probation was not authorized for the crime of Failing to Register as a Sex Offender and that the maximum period of probation allowed by statute was 5 years. The People took the position, however, " . . . that the fact that the defendant may be eligible to have the original sentence modified to reduce the period of probation from [10 to 5] years does not affect the subsequent Violation of Probation. The violation occurred within the 'legal' 5 year period of probation. Therefore, the modification of the term of probation should not change the Court's sentence on the subsequent violation of probation." According to the petitioner he submitted a written response with respect to the People's position vis a vis the legality of the September 29, 2010 sentencing.

Petitioner goes on to allege that on October 17, 2011 he was produced before the Niagara County Court in connection with his CPL §440.20 motion " . . . but was not permitted to make any statement . . . and the probation violations being sustained, was

remanded to the custody of the New York State Department of Corrections and Community [Supervision] . . . Relator signed in open court documents indicating his desire to appeal, but a proper Notice of Appeal was not timely filed by his assigned counsel . . . Finally, after notification to the Niagara County Public Defender . . . of his duties to relator pursuant to 22 NYCRR §671.3 he [petitioner] was appointed a conflict defender by the Fourth Department Appellate Division to handle the appeal." Petitioner, however, makes no allegations with respect to the disposition of such appeal, which is presumably pending.

Petitioner's claim of entitlement to immediate release from DOCCS custody, as set forth in the petition, has three central components. He first argues that the original July 24, 2009 sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law" by reason of the 10-year term of probation. He next argues that the September 29, 2010 sentencing, imposed after the determination that he had violated one or more conditions of probation, was rendered without jurisdiction since the underlying July 29, 2009 sentence (10-year probation term) was itself illegal. Petitioner also argues that the disposition of the September 20, 2011 CPL 440.20 motion filed with the Niagara County Court was flawed, not only for procedural reasons, but also because that court simply reduced the probation term of its original July 24, 2009 sentence from 10 years to 5 years but effectively sustained the September 29, 2010 sentencing by remanding him back to DOCCS custody.

Habeas corpus relief is ordinarily unavailable where the issues sought to be raised in the habeas corpus proceeding have been, or could have been, raised on direct appeal or in the context of a CPL Article 440 motion. *See People ex rel Cicio v. Rock,* 85 AD3d 1468*, People ex rel Dixon v. Rock*, 79 AD3d 1518, *lv den* 16 NY3d 709, *People ex rel Joseph v. Napoli*, 75 AD3d 669, *lv den* 15 NY3d 711 and *People ex rel Berry v. LaClair,*

65 AD3d 1428, *lv den* 18 NY3d 992. Although it is not clear that the issues sought to be raised by petitioner in this proceeding were, in fact, raised on direct appeal from the September 29, 2010 revocation of probation and sentencing, the Court perceives no reason why such issues could not have been so raised. The issues sought to be raised in this proceeding, however, were clearly raised in the context of petitioner's September 20, 2011 CPL §440.20 motion. To the extent that he is dissatisfied with the disposition of that motion his remedy lies in direct appeal rather than a habeas corpus proceeding in this coordinate level court. Although the petitioner asserts, in conclusory terms, that his rights or opportunities to appeal the denial of his CPL §440.20 motion were foreclosed by the actions of the presiding Niagara County Court Judge, he also asserts that "...he was appointed a conflict defender by the Fourth Department Appellate Division to handle the appeal." This Court, moreover, finds nothing in the petition supporting a departure from traditional orderly procedure such as direct appeal or CPL Article 440 motion. *See Keitt v. McMann*, 18 NY2d 257, *People ex rel Hall v. Bradt*, 85 AD3d 1422 and *People ex rel Chapman v. LaClair*, 64 AD3d 1026, *lv den* 13 NY3d 712.

Finally, petitioner's argument to the contrary notwithstanding, this Court finds no basis to conclude that habeas corpus relief is available as a means of redress for stressful prison living conditions and/or dangerous prison working conditions. "Entitlement to immediate release from prison, which does not occur until the expiration of an inmate's sentence, is a prerequisite for habeas corpus relief." *People ex rel v. D'Adamo v. Artus*, 61 AD3d 1263, citing *People ex rel Porter v. Napoli*, 56 AD3d 830. *See People ex rel Barnes v. Allard*, 25 AD3d 893, *lv den* 6 NY3d 714.

Accordingly, the Court finds that the petition must be dismissed *sue sponte*. *See People ex rel Forsythe v. Poole*, 56 AD3d 1239, *lv den* 12 NY3d 701 and *People ex rel Smith v. Burge*, 11 AD3d

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that petitioner's request for the issuance of a Writ of Habeas Corpus or Order to Show Cause in a habeas corpus proceeding is denied; and it is further

ADJUDGED, that the petition is dismissed.

DATED: July 16, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge