STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
NAKIA CHANEY,#08-A-0639,
Petitioner,

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

DECISION, ORDER AND JUDGMENT
RJI #16-1-2012-0445.105
INDEX # 2012-940
ORI # NY016015J

-against-

ANDREA W. EVANS, Chairwoman, NYS Board of Parole, and **BRUCE S. YELICH**, Superintendent, Bare Hill Correctional Facility,
Respondents.

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This proceeding was commenced by the Petition for Writ of Habeas Corpus of Nakia Chaney, sworn to on October 16, 2012 and filed in the Franklin County Clerk's office on October 19, 2012. Petitioner, who was an inmate at the Bare Hill Correctional Facility and the Hudson Correctional Facility, challenged his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision.

An Order to Show Cause was issued on October 26, 2012 and an Amended Order to Show Cause was issued on October 30, 2012. The Court has received and reviewed respondents' Return, dated November 28, 2012, as well as petitioner's Reply thereto, dated December 5, 2012 and filed in the Franklin County Clerk's office on December 6, 2012. By Letter Order dated January 24, 2013 the respondents were directed to supplement their Return. The Court has since received and reviewed the February 11, 2013 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, as well as respondents' Notice of Motion to Change Venue, dated February 11,

2013 and supported by Mr. Michael's Affirmation dated February 11, 2013. The Court has also received and reviewed petitioner's Reply to the respondent's supplemental submission and motion to dismiss, as well as additional correspondence from petitioner dated March 19, 2013.

On January 31, 2008 petitioner was sentenced in Schenectady County Court, as a second felony offender, to a determinate term of 5 years, with 3 years post-release supervision, upon his conviction of the crime of Attempted Criminal Sale of a Controlled Substance 3°. He was received into DOCCS custody on February 5, 2008, ultimately certified as entitled to 342 days of jail time credit. On September 30, 2010 petitioner was resentenced in Schenectady County Court, again as a second felony offender, to an indeterminate term of 4½ years, with 3 years post-release supervision, upon his conviction of the crime of Attempted Criminal Sale of a Controlled Substance 3°. Attempted Criminal Sale of a Controlled Substance 3° is a class C felony offense defined in Article 220 of the Penal Law. *See* Penal Law §§220.39 and 110.05(4). Petitioner was released from DOCCS custody to post-release supervision on January 11, 2011. His post-release supervision, however, was revoked, with a sustained delinquency date of March 19, 2012, following a final parole revocation hearing conducted on April 23, 2012. A 12-month delinquent time assessment was imposed at that time.

In this proceeding petitioner, citing Executive Law §259-j, asserts that parole authorities acted without jurisdiction in determining that he violated the conditions of his post-release parole supervision because the underlying sentence " . . .should have been terminated upon one year unrevoked parole [o]n January 11, 2012 . . ."

Respondents' motion to change venue is premised upon the assertion that on December 24, 2012 petitioner was transferred from the Bare Hill Correctional Facility in Franklin County to the Hudson Correctional Facility in Columbia County. Citing *Greene*

v. Supreme Court, State of New York, Westchester County, 31 AD2d 649, respondents go on to assert that petitioner's transfer from the Bare Hill Correctional Facility to the Hudson Correctional Facility " . . . suspended the jurisdiction of this Court to continue the proceeding."

CPLR §7002(b)(1) provides that a petition for a writ of habeas corpus " . . . shall be made to . . . the supreme court in the judicial district where the person is detained . . ." Inasmuch as the petitioner was detained in DOCCS custody in Franklin County when this proceeding was commenced, the petition was properly "made" to this Court. Since the Court perceived that there were no disputable issues of fact to be resolved, an Order to Show Cause, rather than a Writ of Habeas Corpus, was issued pursuant to CPLR §7003(a). The Order to Show Cause of October 26, 2012/Amended Order to Show Cause of October 30, 2012 was properly made returnable in Franklin County, where the petitioner was then detained. *See* CPLR §7004(c). The Court finds, therefore, that this proceeding was properly commenced and made returnable in Franklin County. For the reasons set forth below, it is further found that petitioner's December 24, 2012 transfer to the Hudson Correctional Facility in Columbia County did not, in and of itself, rob this Court of jurisdiction.

The petitioner in *Greene*, a DOCCS inmate detained in Westchester County, properly commenced a habeas corpus proceeding in that county. Before a hearing was conducted, however, he was transferred to a DOCCS facility in Clinton County. After the records in the habeas corpus proceeding were transferred to the Supreme Court, Clinton County, the petitioner commenced a CPLR Article 78 proceeding seeking an order compelling the restoration of his case to Westchester County. The Appellate Division, Second Department, denied such relief as follows:

> " . . .The removal of petitioner from one State institution to another in the exercise of an appropriate administrative power suspended the jurisdiction of the Supreme Court, Westchester County, to continue the proceeding . . . at least under normal circumstances . . .Since a habeas corpus proceeding requires the production of the petitioner at all hearings, a contrary ruling would impose the burden of transporting prisoners who have instituted such proceedings throughout the State, if a transfer of the prisoner occurred during the pendency of the proceeding. We think that public policy embodied in the statue opposes such a result." 31 AD2d 649 at 649-650 (citation omitted).

In the case at bar, however, there is no need for the production of the petitioner before this Court. All pleadings have been fully submitted and no hearing is to be scheduled. All that remains is for the Court to issue its decision. Under such circumstances the Court finds that form would be elevated over substance, to the detriment of the petitioner, if the Court were to require the transfer of venue to Columbia County at this late juncture[1]. The Court, therefore, will consider the merits of the petition.

Correction Law §205(4)(formerly Executive Law §259-j(3-a)[2]) provides, in relevant part, that DOCCS " . . . must grant termination of sentence after three years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for a class A felony offense defined in article two hundred twenty of the penal law, and must grant termination of sentence after two years of unrevoked presumptive release or

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[1] In petitioner's March 19, 2013 letter to the Court he reported that he was scheduled for re-release from DOCCS custody to post-release supervision on March 21, 2013, apparently upon expiration of the 1-year delinquent time assessment imposed at his final parole revocation hearing. It is the Court's understanding that petitioner has, in fact, been re-released. While this development has clearly rendered petitioner's claim of entitlement to immediate release from DOCCS custody moot, a favorable resolution of the issue he advances in this proceeding would obviously impact on the expiration date of his underlying sentence. The Court therefore finds it appropriate to consider the conversion of this habeas corpus proceeding into a proceeding for judgment pursuant to Article 78 of the CPLR. *See People ex rel Speights v. McKoy*, 88 AD3d 1039 and *People ex rel Howard v. Yelich*, 87 AD3d 772. Since such issue is ultimately not resolved in petitioner's favor, no conversion is warranted.

[2] Executive Law §259-j(3-a) was deleted by L 2011, ch 62, Part C, Subpart A, §38-g, effective March 31, 2011. The substance of the former Executive Law §259-j(3-a) was re-codified into newly-enacted Correction Law §205(4) pursuant to L 2011, ch 62, Part C, Subpart A, §32, also effective March 31, 2011.

parole to a person serving an indeterminate sentence for any other felony offense defined in article two hundred twenty . . . of the penal law." It is clear that petitioner is not entitled to mandatory termination of his sentence under this statutory provision. It is first noted that petitioner was released to post-release supervision from a determinate sentence of imprisonment and Correction Law §205(4) applies only to persons presumptively released or released on parole from an indeterminate sentence of imprisonment. In any event, even if Correction Law §205(4) was applicable, the relevant period of unrevoked release would be two years. Petitioner's period of unrevoked post-release supervision only lasted 1 year, 2 months and 8 days.

Correction Law §205(3)(formerly Executive Law §259-j(3)[3]) provides, in relevant part, that "[a] merit termination of sentence may be granted after two years of . . . release to post-release supervision to a person serving a sentence for a class A felony offense defined in article two hundred twenty of the penal law. A merit termination of sentence may be granted to all other eligible persons after one year of . . . release to post-release supervision." (Emphasis added). While the discretionary merit sentence termination provisions set forth in Correction Law §205(3) are applicable to petitioner's situation, there is simply nothing in the record to suggest that petitioner was ever granted discretionary merit sentence termination. Rather, the record indicate that a decision was made to defer discretionary merit sentence termination consideration for a period of 12 months.

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

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[3] Executive Law §259-j(3) was deleted by L 2011, ch 62, Part C, Subpart A, §38-g, effective March 31, 2011. The substance of the former Executive Law §259-j(3) was re-codified into newly-enacted Correction Law §205(3) pursuant to L 2011, ch 62, Part C, Subpart A, §32, also effective March 31, 2011.

ORDERED, that respondents' motion to change venue is denied; and it is further

ADJUDGED, that the petition is dismissed.

DATED: May 7, 2013 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge