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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA, Justice S.C. PART 46

Dydra Johns

-v-

OCA

INDEX NO. 400714/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	1
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision and judgment.

FILED
OCT. 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Oct. 8, 2009

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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In the Matter of the Petition of

SYDON JOHNS,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 400714/09

-against-

DECISION AND JUDGMENT

OFFICE OF COURT ADMINISTRATION OF NEW YORK STATE and RECORDS COORDINATOR, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES AT COXSACKIE,

Respondent.

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Nicolas Figueroa, Justice:

The Article 78 petitioner seeks a mandamus against the State's Office of Court Administration (OCA) and the records coordinator of the State's Department of Correctional Services (DOCS) at Coxsackie Correctional Facility, Green County. Petitioner is currently incarcerated at Coxsackie, serving a 15-year determinate term on his guilty plea to first-degree manslaughter. He asks this court to direct respondents to act immediately under a recent amendment to the Correction Law (section 601-d) by reviewing his sentencing and notifying the sentencing court to schedule him for a re-sentencing hearing.

Petitioner's sentence was pronounced on June 7, 2004. Having been convicted of a violent felony, petitioner was subject to a statutorily mandated five-year term of post-release supervision (Penal Law § 70.45). It appears from his commitment order, however, that post-

release supervision may not have been pronounced at the time he was sentenced. Subsequently, a trio of Court of Appeals decisions (*Garner v Dept. of Correctional Services*, 10 NY3d 358, *People v Sparber*, 10 NY3d 457, and *People v Catu*, 4 NY3d 242) made it clear that such an omission would compromise a sentence's validity. *Garner* and *Sparber* established that a sentence for a determinate term of incarceration was defective if the sentencing court did not at the time of pronouncement explicitly state a term of mandatory post-release supervision. *Catu* for its part determined that the plea of a defendant who was not expressly informed as to the duration of post-release supervision could not be voluntary, knowing, and intelligent and thus was fatally flawed. These rulings prompted the legislature to enact Correction Law § 601-d and Penal Law § 70.85,, which in combination were designed to rectify such sentencing infirmities.

In relevant part, section 601-d of the Correction Law section provides that,

> Whenever it shall appear to the satisfaction of the department [of correctional services] that [a determinate sentence was imposed, between 9/1/98 and 6/30/08, upon an inmate in its custody, but the commitment order for such inmate does not indicate imposition of any term of post-release supervision] ..., [the department] shall make notification of that fact to the court that sentenced such person, and to the inmate ....

The same section further directs the sentencing court to establish whether a term of post-release supervision was in fact expressly imposed, notwithstanding the commitment order's silence, and, if it was not, to cure the omission by a re-sentencing. It is noted that the statute imposes certain time constraints on a sentencing court once it has received notice under section 601-d.

By contrast, section 70.85 of the Penal Law provides that, where the duration of mandatory post-release supervision as a component of a determinate sentence was not disclosed when sentence was pronounced, and the sentencing court has been given notice pursuant to

section 601-d,

> the court may, notwithstanding any other provision of law ..., re-impose the originally imposed determinate sentence of imprisonment without any term of post-release supervision, which then shall be deemed a lawful sentence.

The objective of the foregoing provision is to assure the validity of a guilty plea by honoring the terms of the plea agreement as the defendant originally understood them (*People v Boyd*, 12 NY3d 390).

The instant petition, filed in March 2009, was premised on the theory that respondent had flouted the foregoing decisional and statutory law by failing to have notified the sentencing court pursuant to section 601-d(2). Exhibits to the petition show that petitioner had written to respondent records coordinator in August 2008, asking her to notify the sentencing court of his case pursuant to the statute, which had been enacted less than two months earlier. In her response, also dated August 2008, the records coordinator advised that DOCS was coordinating with the Office of Court Administration (OCA) and the various District Attorneys to take appropriate action to identify the in-mates to whom the new law applied and to proceed in an orderly way, given the numerous cases involved. Apparently dissatisfied with such response, petitioner then wrote to respondent OCA, expressing the view that DOCS was "stalling," and reasserting his rights under section 601-d. In relevant part, OCA in turn explained to petitioner the following:

> Due to the significant numbers of inmates who are eligible, ... [§ 601-d] notifications are to be staggered. And because the outcome of a re-sentencing procedure will determine whether a defendant is subject to a period of post-release supervision, the highest priority will go to those inmates who are either eligible for immediate release or who will become eligible in the near future. Once those inmates have

> been resentenced, the backlog of remaining cases will be handled. You are currently serving a fifteen year determinate sentence and are not due for release for several years, so your case will be scheduled as soon as the cases of those inmates who are about to be released have been resolved. This does not mean that your case has been overlooked or that you will not be resentenced.

Petitioner's reaction to the above explanation is reflected in the instant petition, which was filed in March 2009. The theory underlying the pleading is that petitioner's situation under section 601-d presents respondents with an essentially clerical duty that can be undertaken without delay. As respondents note, petitioner's need for expedition in relation to post-release supervision is not clear from the petition itself, in view of the remoteness of petitioner's projected release date.

Petitioner's reply to respondents' opposition papers attempts to add clarity in such respect. That is, according to petitioner, time is of the essence because he plans to move to withdraw his plea, and the proceeding contemplated by section 601-d would assure him assigned legal representation (§ 601-d[4][a]). In other words, petitioner contends that respondents' failure to have given 601-d notice in his case has prevented him from moving forward with the planned motion. However, even assuming arguendo that a section 601-d proceeding would be an appropriate context for a motion to withdraw a plea, petitioner's contention is refuted by the availability of two statutes under the Criminal Procedure Law and the County Law. Thus, section 440.10 of the Criminal Procedure Law provides an independent mechanism for moving to vacate a judgment, and section 722 of the County Law establishes indigent criminal defendants' right to assigned counsel.

There remains for consideration the petition's thesis that respondents have wilfully

ignored the mandate of section 601-d and should therefore be compelled to give petitioner's sentencing court notice of his case without any further delay. As respondent points out, however, the statute does not impose any specific deadline by which respondents must determine the statute's applicability to a particular in-mate and then give notice if required. In other words, the fact that petitioner's case has not yet been the subject of such a notice does not bespeak a breach of duty by respondents requiring Article 78 relief. Moreover, the record reflects nothing less than a responsible effort on respondents' part to carry out the statute's mandate in a way that balances the administrative limits of the court system with in-mates' individual needs for expedition in view of their respective release dates.

For the foregoing reasons, the petition is dismissed.

This constitutes the decision and order of the court.

Dated: October 8, 2009

ENTER:

J.S.C.