MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

December 10, 2012

Mr. Robert M. Graber, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*McCarter, Marcus v. Koch, Robert, Superintendent ECCF - OTSC inmate challenge to his release date*
Document Received:	Order to Show Cause
Name of Claimant:	Marcus McCarter #113528 Erie County Correctional Facility 11581 Walden Avenue Alden, New York 14004
Claimant's attorney:	Claimant is *pro se*.

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle Parker
First Assistant County Attorney

MMP:dld
Enclosure

RECEIVED
DEC 7 - 2012
ERIE COUNTY
DEPARTMENT OF LAW

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

IN THE MATTER OF THE APPLICATION OF
MARCUS MCCARTER, #113528

Petitioner,

-vs-

ROBERT KOCH, SUPERINTENDENT,
ERIE COUNTY CORRECTIONAL FACILITY,

Respondent.

ORI# NY 014015J

ORDER TO
SHOW CAUSE

Index No.
I-2012-3877

SUPREME COURT, ERIE COUNTY

HON. PAULA L. FEROLETO , JUSTICE PRESIDING

APPEARANCES:

Petitioner, Pro Se
MARCUS MCCARTER, #113528

This *ex parte* matter was referred to my attention at a Term of the Supreme Court, Erie County.

Upon the reading of the petition for relief pursuant to Article 78 of the Civil Practice Law and Rules, sworn to on October 12, 2012, with accompanying exhibits, and it appearing that the above referenced petitioner, **MARCUS MCCARTER,** a sentenced inmate, having made application pursuant to section 1101(f) of the CPLR, seeking poor person status and requesting a reduced filing fee,

LET RESPONDENT SHOW CAUSE at a Special Term of the Supreme Court to be held in and for the County of Erie on **JANUARY 14, 2013** before the **HON. M. WILLIAM BOLLER,** Acting Justice of the Supreme Court, in Part 13 at 25 Delaware Avenue, Buffalo, New York, **WHY** the relief requested in the Petition should not be granted.

IT IS ORDERED that Robert Koch, Superintendent of the Erie County Correctional Facility in Alden, New York where petitioner is now confined will produce the body of **MARCUS MCCARTER** only if the court submits a letter to the superintendent ordering the production of the petitioner; and it is further

ORDERED that since the petitioner lacks sufficient means to pay the full filing fee ordinarily required in the prosecution of an action pursuant to Article 78 of the CPLR, the petitioner's application for reduced filing fee is hereby granted; and it is further

ORDERED that the petitioner will be permitted to pay a reduced filing fee of fifteen dollars ($15.00) to proceed with this action. This fee shall be assessed against the petitioner as an outstanding obligation and collected by the facility in which the petitioner is lodged; and it is further

ORDERED that the petitioner is not required to make an initial payment of a portion of the reduced filing fee; and it is further

ORDERED that in the event the petitioner should receive an unfavorable decision, said petitioner is hereby granted poor person relief pursuant to Article 11 of the Civil Practice Law and Rules for the limited purpose of filing a Notice of Appeal in the Erie County Clerk's Office without paying the fee required by CPLR 8022(a); and it is further

ORDERED that a waiver of fees for service by publication, for stenographic transcripts, or for any other cost or fee related to this proceeding in this Court shall only be granted upon a separate application to the Court, on notice to the County Attorney of Erie County, pursuant to CPLR 1101, showing the need therefor; and it is further

ORDERED that service of a signed and executed copy of this Order to Show Cause, the petition and any supporting papers by ordinary First Class mail upon the named respondent, Robert Koch on or before **December 17, 2012** be deemed adequate. In addition, the petitioner, on or before said date, shall similarly serve the Erie County Attorney, 95 Franklin Street, Room 1634, Buffalo, New York 14202 ; and it is further

ORDERED that it shall be the responsibility of the party seeking an extension of time to serve papers or seeking an adjournment of this matter to make such request for an extension of time or an adjournment to Acting Justice Boller, and any party receiving an adjournment shall notify the other party or parties of said adjourned date; and it is further

ORDERED that it is the petitioner's responsibility to:

(a) Serve a signed and executed copy of this Order to Show Cause, the petition and any supporting papers as authorized above or by personal service. The reduction of the filing fee herein does not authorize court personnel to provide photo-reproduction services, nor service of papers on behalf of a *pro se* litigant, as these services are not statutorily authorized under a grant of poor person relief (CPLR 1102).

(b) Submit the original proof of service to the chambers of the **Hon. M. William Boller,** 25 Delaware Avenue-Second Floor, Buffalo, New York 14202 at least eight (8) days prior to the return date; and it is further

ORDERED that a copy of any answer or response shall be served upon the petitioner not less than five (5) days before the return date. The original of any such answer or response is to be delivered to the chambers of Acting Justice Boller not less than three (3) days prior to said return date.

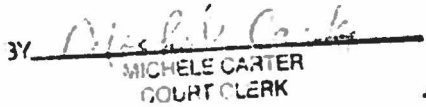
DATED: Buffalo, New York
November 20, 2012

HON. PAULA L. FEROLETO
Justice of the Supreme Court

GRANTED:

GRANTED

NOV 20 2012

BY 
MICHELE CARTER
COURT CLERK

State of New York
County of Erie

In the matter of the application of

Marcus McCarter
Petitioner

-v-

John Doe Commisioner of Corrections. Etal
Respondent

for a judgment pursuant to Article 78 of the NYS Civil Practice Laws and Rules

Affidavit in support of order to show cause

Index # 2012-3877

RECEIVED
DEC 7 - 2012
ERIE COUNTY
DEPARTMENT OF LAW

✓ NMP

State of New York)
County of Erie) **SS:**
)

I, _____, being duly sworn, depose and say that:

I am the Petitioner I the above-entitled proceeding.

I make this affidavit in support of my annexed application for an Order to show cause to prosecute the attached petition pursuant to Article 78 of the New York Civil Practice Laws and Rules which challenges: Release date

The facts surrounding this Petition are as follows: Please see Pages attached

Petitioner seeks to proceed by Order to Show Cause rather that by Notice of Petition because: Please see attached pages and Exhibits.

Petitioner, being incarcerated at the Erie County Correctional Facility, 11581 Walden Avenue, Town of Alden, County of Erie, also cannot effect personal service of the within papers and respectfully requests that timely service by U. S. mail be deemed sufficient.

Petitioner designates Erie County as the place of venue.

No previous application for the relief sought herein has been made.

I have moved by the annexed affidavit for a waiver of filing fees.

WHEREFORE, Petitioner respectfully prays that this Court enter an order directing Respondent to show cause why a judgment should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules, and granting such other relief as this Court may deem just and proper.

Date: 10/19/12

Signature, Petitioner Pro Se
11581 Walden Avenue
Alden, New York 14004

SHEILA M. CURRY
NOTARY PUBLIC, STATE OF NEW YORK
REGISTRATION No. 01CU6250833
QUALIFIED IN ERIE COUNTY
My Commission Expires 10-31-15

Sworn to before me on
this 19 day of
OCTOBER, 2012

Notary Public

STATE OF NEW YORK
County of Erie

Affidavit In support

IN THE MATTER OF: Article 78 order to show cause

Marcus McCarter, Petitioner

-v-

Superintendent John Rodriguez, Respondent
Carol L. Calire, Respondent
John Doe, Commissoner of Corrections, Respondent
Probation Officer Nicole Lupocta, Respondent

Statement of Facts,

1. On or about November 19, 2006 Petitoner McCarter, was arrested please see indictment No. Niagct 2006-575, subsequent, Petitoner pleaded guilty and was given 10 years on Felony Probation.

2. In addition, On or about June 4, 2010 petitoner McCarter while on felony probation was arrested for Driving while Intoxicated please see docket No. 10T 8262. Subsequent, Petitoner was sentenced to 90 days and 3 years city probation.

3. Moreover on indictment Niagct 2006-575 petitoner having been arrested November 19, 2006 remained in custody for 4 days, which is when petitoner posted bail on this matter. Subsequently petitoner remained in custody for 11 days on docket No. 10T 8262, which is when petitoner also posted bail.

4. In lieu, of petitoner on 2 different probation status on or about May 29th, 2012 petitoner was ordered to appear befor Hon. John L. Michalski due to petitoner having allegedly violating the conditions of probation. Please see Exhibit A

5. Despite the fact petitoner having 2 probation convictions 1st one being County (Niagct 2006-575) and the second being City (10T 8262) both of the probation conviction sentences was being supervised by probation officer (Laporta) who was designated to supervise both of petitoner's probation matters.

6. Whereas petitoner assests that a total of 77 day was served on both above cases (violations) up until Petito was sentenced to a county year in the matter of Indictment no NiagCT 2006:575 which such sentence occured on August 13, 2012.

7. To compound matters, Petitoner is aware of the fact that petitoner was re-sentenced in the matter of docket No. 10T 8262 which petitoner was brought before Hon. Betty Calve-Torress on June 7, 2012 on re-sentenced on this matter on September 17, 2012 to 8 months County time. Petitoner does not dispute that both matters where run concesecutive. However Petitoner is challenging the fact that petitoner's time in custody is credited as of May 29, 2012 (NiagCT 2006:575 and as of June 7, 2012 (10T 8262) up until August 13, 2012 which is when petitoner was offically sentenced in the matter of NiagCT 2006:575

Please See Exhibit B

8. Never the less, on or about September 27, 2012 Petitoner spoke with respondent Calice regarding the error made in petitoner's time calculation and release date. The respondent Calice refused to correct such error thus, subjectidy petitoner to remain further in unlawful imprisonment by way of reckless disregard

Please see Exhibit C and D

9. Therefore, Petitoner seeks to invoke the judical power of this court as this court holds jurisdiction of such said matters and without the courts intervention which the court may deem just and proper petitoners issues of merit will remain null and void.

Sworn to before me this 9 day of October, 2012

SHEILA M. CURRY
NOTARY PUBLIC, STATE OF NEW YORK
REGISTRATION No. 01CU6250062
QUALIFIED IN ERIE COUNTY
My Commission Expires 10-31-15

State of New York
County of Erie

In the matter of the application of | **Petition**

Marcus McCarter
Petitioner

Index # 2012-3877

-v-

John Doe Commisoner of Corrections ETAL
Respondent

for a judgment pursuant to Article 78 of the NYS Civil Practice Laws and Rules

---

To: Show Cause in State Supreme Court

This Petition, of order to Show Cause, duly sworn to and complaining of the Respondent, respectfully alleges:

Petitioner is an inmate at the Erie County Correctional Facility, 11581 Walden Avenue, Town of Alden, County of Erie, State of New York 14004.

Respondent is John Doe Commisoner of corrections, Probation Officer Nicole Laporta, Super. John Rodriguez, and Carol L. Calire.

The grounds for this complaint and Petition are: Please See pages 1-4 and Exhibit A1, B1+B2, C1 and D1.

WHEREFORE, Petitioner respectfully prays that a judgment be entered pursuant to Article 78 of the NYS Civil Practice Laws and Rules:

vacating and setting aside Respondent's determination of: Petitioner's sentence and release date.

AND/OR

directing Respondent to: Correct petitioner's sentence / Time of incarceration and release date

and for such other and further relief as this Court may deem just and proper.

Date: 10/19/12

Signature, Petitioner Pro Se
11581 Walden Avenue
Alden, New York 14004

SHEILA M. CURRY
NOTARY PUBLIC, STATE OF NEW YORK
REGISTRATION No. 01CU6250633
QUALIFIED IN ERIE COUNTY
My Commission Expires 10-25-15

Sworn to before me on
this 19 day of
OCTOBER, 2012

Notary Public

VERIFICATION

In the matter of the application of

Marcus McCarter
Petitioner

-v-

John Doe Commissioner of Corrections ETAL
Respondent

for a judgment pursuant to Article 78 of the NYS Civil Practice Laws and Rules

Marcus McCarter, the above named Petitioner, being duly sworn, deposes and says that the contents of the foregoing petition are well known to him/her, and that same is true to his/her own knowledge, except as to matters therein stated on information and belief, and as to those matters (s)he believes it to be true.

Dated: 10/23/12

Signature, Petitioner Pro Se

Print Name of Petitioner

Sworn to before me this 23
day of OCTOBER, 2012

SHEILA M. CURRY
NOTARY PUBLIC, STATE OF NEW YORK
REGISTRATION No. 01CU6250833
QUALIFIED IN ERIE COUNTY
My Commission Expires 10-19-31

Signature, Notary Public

EXHIBIT A

(Exhibit A) 113538 D-107

INDICTMENT NO.(S) NiagCt 2006 575

COMMITMENT OF PRISONER

THE SHERIFF OF ERIE COUNTY, NEW YORK, YOU ARE HEREBY ORDERED TO RECEIVE AND DETAIN:

NAME: Marcus McCarter

CHARGE: PL 130.30

SENTENCE: 1 yr ECCF

VIOLATION OF PROBATION X YOUTHFUL OFFENDER

DATE: 8.13.12 JUDGE/JUSTICE: JOHN L. MICHALSKI

The case started in C Lockport Dist 2000 2431 per office Zengler Niagara Co Jail

~~DOA~~ 11/19/06 - 11/22/06

From an examination of the records, it appears that the above-named defendant has spent 117 in the Erie County Jail since his transfer on the charge named within.

Timothy B. Howard
SHERIFF OF ERIE COUNTY, N.Y.

5/30/08 - 6/2/08 - 4

9/2/08 - 10/6/08 - 35 = PRE TRIAL SUS

5/29/12 - 8/13/12 77

117

2012 AUG 14 AM 7:10 ALTERNATIVE CORRECTIONAL FAC NEW YORK

Certificate of Conviction

Criminal Form - CT-348

Consecutive

CITY COURT--County of Erie, City of Buffalo

THE PEOPLE OF THE STATE OF NEW YORK

against

Marcus McCarter

Date of Arrest: **June 04, 2010**

Docket No.: **10 T 8262**

Part : **3**

Date: **September 17, 2012**

The above named **Marcus McCarter** having been found guilty of the offense of **CPL 410.30 [vtl 1192.3]** before the **Hon. Betty Calvo-Torres** , a Judge of the City Court of Buffalo,

It is adjudged that he/she be remanded into the custody of the Erie County Sheriff, for the term of **8** months and **0** days.

Dated at the City of Buffalo, **September 17, 2012** .

Hon. Betty Calvo-Torres
Judge of the City Court of Buffalo

VOP/VOC'D

EXHIBIT B

EXHIBIT B (2)

rom an examination of the
ecords, it appears that the
has
Erie
transfer
n the charge
within.
Timothy B. Howard
County
Sho
COUNTY, N.Y.

2017 SEP 17 AM 10:

6/1/10 - 6/30/10 11

3/1/11 - 4/19/11 50 = prev serv

5/13/12 - 8/13/12 93

154

n29

EXHIBIT C

Exhibit C

MCCARTER, MARCUS

Entered Jail Time

11/19/2008to 11/22/2008
05/30/2008to 06/02/2008
09/02/2008to 10/06/2008
05/29/2012to 08/13/2012
06/04/2010to 06/14/2010
05/13/2012to 08/13/2012

Calculated Jail Time

✓ 05/30/2008to 06/02/2008= 4
✓ 09/02/2008to 10/06/2008= 35
✓ 11/19/2008to 11/22/2008= 4
06/04/2010to 06/14/2010= 11
05/13/2012to 08/13/2012= 93

Total J.I. = 147

Violation of Probation calc.

Sentence_____: 20 Months = 12 mo + 8 mo Consec

In date_____: 08/13/2012

Jail Time_____: 147

Good Time_____: 203

Prior lost G.T___: 0
Prior days served: 50 = 3/1/11-4/19/11

Minimum out date_: 03/11/2013

Maximum out date_: 09/30/2013

154
117
271

9/18/12
ce

271
147
124

EXHIBIT D

McCarter, Marcus

Entered Jail Time

11/19/2006to 11/22/2006
05/30/2008to 06/02/2008
09/02/2008to 10/06/2008
05/29/2012to 08/13/2012

Calculated Jail Time

11/19/2006to 11/22/2006= 4 - From Niagara county
05/30/2008to 06/02/2008= 4
09/02/2008to 10/06/2008= 35
05/29/2012to 08/13/2012= 77

Total J.T. = 120

Regular sentence calculation

Sentence_____: 12 Months

In date_____: 08/13/2012

Jail Time_____: 120

Good Time_____: 122

Minimum out date_: 12/14/2012

Maximum out date_: 04/15/2013

8/14/12

CE

McCarter Affidavit

State of New York
Erie County
Supreme Court
----------x

Marcus McCarter
Petitioner/Plaintiff

v

Commisioner of Corrections John Doe. ETAL
Respondent/Defendant
----------x

Affidavit in Support of Application Pursuant to CPLR 1101 (f) (Reduces Filing Fee)

Index/File # 2012-3877
DIN # 11-5624
NYSID # 9045897Y

State of New York)
) SS:
County of Erie)

I, Marcus McCarter, being duly sworn, hereby declare as follows:

1) I am the Petitioner/Plaintiff in the above-entitled proceeding, I am a sentenced inmate in a federal, state or local correctional facility (state place of incarceration: Erie County Correctional Facility, and I submit this affidavit in support of my application for a reduction of the filing fee pursuant to CPLR 1101 (f).

2) I currently receive income from the following sources, exclusive of correctional facility wages:
None

3) I own the following valuable property (other than miscellaneous personal property):

☒ NONE
1) List Property: Value

4) I have no savings, property, assets or income other than as set forth herein.

*Will be assigned by the Court/County Clerk

5) I am unable to pay the total fee necessary to prosecute this procedure.
6) No other person who is able to pay the total filing fee has a beneficial interest in the result of this proceeding.
7) The facts of my case are described in my claim and other papers filed in the court.
8) I have made no prior request for this relief in this case.
9) My date of birth is 11/27/82.
10) NYSID # 9045597Y.
11) Aliases None.

(signature)

Sworn to before me this 1st day of Nov, 2012.

Notary Public Carol L. Calvin
Notary Public State Of
Qualified in Erie Cou
My Commiss
3/30/14

AUTHORIZATION

I, Marcus McCarter, inmate number 113523. request and authorize the agency holding me in custody to send to the Clerk of the Court certified copies of the correctional facility trust fund account statement (or the institutional equivalent) for the past six months.

I further request and authorize the agency holding me in custody to calculate the amounts specified by CPLR 1101 (f)(2), to deduct those amounts from my correctional facility trust fund account (or the institutional equivalent) and to disburse those amounts as instructed by the Court.

This authorization is furnished in connection with the above entitled case and shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT THE ENTIRE FILING FEE AS DETERMINED BY THE COURT WILL BE PAID IN INSTALLMENTS BY AUTOMATIC DEDUCTIONS FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

(signature)

Trust Account Statement

TRUST ACCOUNT STATEMENT

DOC: 0000113528 Name: MCCARTER, MARCUS DOB: 11/27/1982
LOCATION: ECCF-MED-1232

ACCOUNT BALANCES Total: 0.25 CURRENT: 0.25 HOLD: 0.00

SUB ACCOUNT	05/29/2012 START BALANCE	11/09/2012 END BALANCE
SPENDABLE BALANCE	0.00	0.25

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF AMT.

TRANSACTION DESCRIPTIONS -- SPENDABLE BALANCE SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
05/30/2012	VSTC	Cash Visit Receipt-ECHC	10.00	10.00
05/31/2012	CRS	CRS SAL ORD #596021CAN1	(10.00)	0.00
06/04/2012	VSTC	Cash Visit Receipt-ECHC	20.00	20.00
06/07/2012	CRS	CRS SAL ORD #596878CAN1	(20.00)	0.00
06/09/2012	AD	Cash on Arrival	0.00	0.00
06/12/2012	CASH	Cash-ECCF ELVIN PARROTT - V	20.00	20.00
06/12/2012	CASH	Cash-ECCF DONNA THRIST - V	25.00	45.00
06/19/2012	CRS	CRS SAL ORD #598492CAN1	(44.85)	0.15
06/25/2012	CASH	Cash-ECCF DONNA THIRST-V	30.00	30.15
06/26/2012	CRS	CRS SAL ORD #599358CAN1	(29.70)	0.45
07/03/2012	CRS	CRS SAL ORD #600391CAN1	(0.45)	0.00
07/10/2012	CASH	Cash-ECCF DONNA THRIST - V	20.00	20.00
07/17/2012	CRS	CRS SAL ORD #602260CAN1	(19.30)	0.70
07/24/2012	CASH	Cash-ECCF DONNA THRIST - V	20.00	20.70
07/31/2012	CRS	CRS SAL ORD #604079CAN1	(20.50)	0.20
07/31/2012	PST	Postage Disbursement-ECCF	(0.20)	0.00
08/08/2012	CASH	Cash-ECCF DELMARIST ANDERSON - V	40.00	40.00
08/14/2012	CRS	CRS SAL ORD #606047CAN1	(40.00)	0.00
08/26/2012	CASH	Cash-ECCF DONNA THIRST-M	25.00	25.00
08/28/2012	CRS	CRS SAL ORD #607955CAN1	(24.85)	0.15
09/07/2012	CASH	Cash-ECCF/M-DONNA THRIST	25.00	25.15
09/11/2012	CRS	CRS SAL ORD #609709CAN1	(25.15)	0.00
09/21/2012	CASH	Cash-ECCF CARRIE REILLY - M	20.00	20.00
09/24/2012	PCSR	PCS Refund	2.72	22.72
09/25/2012	CRS	CRS SAL ORD #611584CAN1	(20.00)	2.72
09/28/2012	CASH	Cash-ECCF/M-DONNA THRIST	25.00	27.72
10/03/2012	CRS	CRS SAL ORD #612650CAN1	(26.20)	1.52
10/10/2012	CRS	CRS SAL ORD #613455CAN1	(1.00)	0.52
10/26/2012	PST	Postage Disbursement-ECCF	(0.52)	0.00
10/30/2012	CASH	Cash-ECCF DONNA THRIST - M	25.00	25.00
10/31/2012	CRS	CRS SAL ORD #616300CAN1	(24.75)	0.25