To be argued by
DENISE FABIANO
(15 minutes)

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRED JOHNSON, DIN # 09A1104, NYSID # 04899722M,

APL-2019-00147

Petitioner-Appellant,

-against -

SUPERINTENDENT, ADIRONDACK CORRECTIONAL FACILITY, AND NEW YORK STATE DEPT. OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

BRIEF FOR PETITIONER-APPELLANT

JANET E. SABEL
Attorney for Defendant-Respondent
THE LEGAL AID SOCIETY
Criminal Appeals Bureau
199 Water Street, 5th Floor.
New York, N.Y. 10038
(212) 577-3917
dfabiano@legal-aid.org

DENISE FABIANO
Of Counsel
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PRELIMINARY STATEMENT

This appeal is taken pursuant to Articles 55-57 of the C.P.L.R. from an order of the Appellate Division, Third Department, entered July 3, 2019, People ex rel. Fred Johnson v. Superintendent, et. al., 174 A.D.3d 992 (3rd Dept. 2019), affirming the decision and judgment of the Supreme Court, Essex County, rendered March 13, 2018, (Meyer, J.), denying the petition for a writ of habeas corpus. On October 16, 2019, this Court terminated its jurisdictional inquiry and permitted the appeal to proceed pursuant to C.P.L.R. Sec. 5601(b)(1). (R.175-78).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain the appeal pursuant to C.P.L.R. §5601(b)(1), because it involves a substantial constitutional question supporting an appeal as of right, the order of the Appellate Division disposed of all the issues, was a final order pursuant to C.P.L.R. §5611, and the action originated in Supreme Court. Appellant, Fred Johnson, claims that his continuing, indefinite imprisonment by respondents following his grant of parole from a sex offense against an adult, pursuant to the school-zone exclusion of Executive Law Sec. 259-c(14), violated his right to substantive due process. The claim presents a question of law for this Court's review because Mr. Johnson litigated this claim both in his petition for a writ of habeas corpus and in his appeal to the Third Department.

QUESTION PRESENTED

> Whether the continuing indefinite imprisonment of petitioner-appellant, a level three sex offender with an adult victim, over two years past his parole release date based on the application of Executive Law §259-c (14)'s residency requirements, violated his federal and state substantive due process rights. U.S. Const., Amend. V, XIV; N.Y. Const., Art. I, §6.

SUMMARY OF ARGUMENT

Petitioner-appellant, Fred Johnson, now 61 years old, began serving a sentence of 2 years to life in prison in 2009, for a persistent sexual abuse conviction, involving an adult "female stranger on a subway train." Following a hearing, the Board of Parole determined that Mr. Johnson had earned his release after serving 8 ½ years of his sentence and granted him parole, effective August 10, 2017. Nevertheless, Mr. Johnson remained in prison for over two additional years for one reason only, the lack of SARA-compliant housing.[1] Respondents maintained below that, absent such housing, they were entitled to keep Mr. Johnson in prison indefinitely, if necessary, for the rest of his life. That conclusion does not comport with the Constitution. With respect to Mr. Johnson, who did not victimize a child and was granted parole based on the Board's determination that he presented the lowest risk of criminal recidivism of any kind, the application of SARA's residency restriction to hold him in prison indefinitely violated his constitutional substantive due process rights and the claimed right to indefinite detention was illegal. This Court should reverse the Appellate Division's decision to the contrary.

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1 The Sexual Assault Reform Act (2000, amended 2005), established Executive Law § 259-c(14), and courts have used "SARA" as a shorthand for the statute. The SARA law is not a residency restriction per se. Even though it has obvious implications for where a person serving community supervision may live, and is often referred to as a residency restriction, on its face it restricts offenders from going within 1,000 feet of a school, whether as a resident, a pedestrian, or an occupant of a vehicle. C.L. §259-c(14); P.L. §220.00(14).

STATEMENT OF FACTS

Procedural Background

On July 13, 2004, petitioner-appellant, Fred Johnson, was convicted upon a plea of guilty of persistent sexual abuse and sentenced to two to four years of incarceration under Ind. No. 5337/03. He was paroled on March 25, 2008. Prior to his release, he was required to register as a level three offender pursuant to Sex Offender Registration Act ("SORA") proceedings (R.19). On January 15, 2009, Mr. Johnson was convicted of persistent sexual abuse and sentenced to a term of two years to life in prison[2] (R.19). In both cases, the victims were adult female strangers on the subway. Id.

The Parole Board granted Mr. Johnson an open release date of August 10, 2017, after he had spent approximately 8 years of his 2 years to life in prison sentence in the custody of New York's Department of Corrections and Community Supervision ("DOCCS") (R.22-23).[3]

In granting Mr. Johnson release, the Parole Board necessarily found that there was a reasonable probability that he would "live and remain at liberty without violating the law" and that his release was "not incompatible with the welfare of society." Exec. Law §259-i (2)(c). In assessing the amount of supervision that Mr.

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2 Mr. Johnson was adjudicated a Level 2 offender for this crime. (R.20).

3 During that time, Mr. Johnson received only two tickets, neither of which involved sexual misconduct. (R.25, DOCCS Inmate Disciplinary History, Oct. 31, 2017).

Johnson would require after his release, DOCCS determined that he was a low risk of re-offense and would need the least amount of supervision (R.27-30, DOCCS Supervision Recommendation and Directive 9000); (R.32, R.75, DOCCS COMPAS Supervision Recommendation, June 22, 2017).

Mr. Johnson was not released pursuant to his parole grant on August 10, 2017, solely because he was unable to obtain housing that satisfied SARA's residency requirements. SARA makes most of New York City off limits to those subject to it and Mr. Johnson, who is indigent, does not have any family or friends in New York City living in SARA-compliant housing with whom he could reside.

Mr. Johnson had requested housing through New York City's Department of Homeless Services ("DHS"). A very limited number of DHS shelters, each making available only a small fraction of their total bed space, are compliant with SARA, and the order in which state inmates will be released to those shelters is controlled by DOCCS. DOCCS had Mr. Johnson "on a list" for a bed in a SARA-compliant shelter in NYC since December 2017 (R.140, R.166).

In November 2017, Mr. Johnson filed a petition for a writ of habeas corpus, requesting that he be released pursuant to his open parole date or, in the alternative, that he be given SARA-compliant housing within 45 days (R.1-17; R.143-53). Specifically, he argued that his indefinite continued detention beyond his open parole date violated his fundamental right to be free from indefinite confinement

and, under the facts of his case, did not serve a compelling state interest. On March 13, 2018, the court denied the petition, finding that it is "the obligation of the petitioner to identify an approvable residence to which he may be released on parole; it is not the function nor duty of DOCCS to seek out and locate any such residence for the petitioner" and further noting that Mr. Johnson "is on a list for SARA-compliant homeless shelter housing" (R.166-67).

The Appellate Division Decision

On July 3, 2019, the Appellate Division, Third Department, affirmed the ruling of the Supreme Court (R.179-87). The Third Department concluded that DOCCS had acted lawfully in indefinitely continuing to confine Mr. Johnson in prison past his open parole date. Id., People ex rel. Fred Johnson v. Superintendent, et. al., 174 A.D.3d 992 (3d Dept. 2019). In reaching that conclusion, the court acknowledged that Mr. Johnson, based on his grant of parole, had a "'legitimate expectation of early release from prison' that cannot be taken away without due process." Id. at 994. The court concluded, however, that the right asserted by Mr. Johnson was not fundamental and that imposition of the mandatory condition under Executive Law Sec. 259-c (14) to hold him in prison satisfied due process because it was rationally related to the "legitimate government interest of protecting 'children from the risk of recidivism by certain convicted sex offenders.'" Id. at 994. Moreover, the Third Department concluded that the legislature acted rationally in

not excluding level three sex offenders with an adult victim from the mandatory requirements of Executive Law Sec. 259-c(14). Id. at 995. Finally, the court found that DOCCS met its obligation under Correction Law Sec. 201(5), providing adequate resources, investigating proposed residences and placing Mr. Johnson on a wait list for "those found appropriate." Id. at 995.

In a concurring opinion, Justice Garry, joined by Justice Clark, noted that most of the city is within the 1,000 foot buffer zone and off limits to sex offenders and, because of Mr. Johnson's limited social and financial resources, a shelter was his only housing option. Id. at 996. Problematically, there are only four homeless shelters that are SARA-compliant. Id. Justice Garry noted that DOCCS maintains a waiting list for these shelter spots and has an agreement with DHS whereby DHS reserves certain shelter beds for those under DOCCS supervision. As revealed at the time of oral argument, 295 prisoners were on the list and the average waiting time for placement was approximately two to three years. Id. Moreover, the concurrence observed that:

> placement decisions cannot depend solely upon which prisoners have been on the waiting list longest; inmates such as those who have been placed in residential treatment facilities must be released first while prisoners like petitioner –with a maximum sentence of life imprisonment—have no such deadline and, thus, may linger on the waiting list while others are necessarily released ahead of them.

Id. at 997. The concurrence lamented that it is this arrangement that gave "rise to the previously mentioned waiting list and to petitioner's current retention in prison almost two years past his August 2017 open release date." Id. at 997.

The concurrence further questioned the effectiveness of the mandatory conditions that prohibit certain sex offenders from residing within 1,000 feet of a school, noting that "multiple courts and scholars have observed that there is little evidence that SARA's residence restrictions serve the laudable purposes for which they were optimistically enacted." Id. at 997. Indeed, at least one court has noted that residency requirements "'have a destabilizing effect on housing for convicted sex offenders, impede treatment, and interfere with law enforcement efforts to supervise sex offenders.'" Id. at 997-98, citing Matter of Williams v. Department of Corr. & Community Supervision, 136 A.D.3d 147, 162-63 (1st Dept. 2016). The concurrence continued, citing research that indicated that residence restrictions for sex offenders "actually increase the risk of recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." Id. at 998 (emphasis in original).

For this reason, the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the State of New York has called upon the legislature to revise the residency requirements because there is:

> 'scant evidence that [such] requirements have any impact on reducing recidivism,' that most child victims of sexual abuse are victimized by persons known to them rather than by strangers, that studies have not shown a relationship between recidivism and residing close to schools, and that moving parolees around in an effort to comply with residency restrictions can make it more difficult for parole officers to supervise them.

Id. at 998. The concurrence concluded, however, that such solutions are better left to the legislature, not the courts.

ARGUMENT

It should be noted at the outset that on November 6, 2019, after serving 27 months in prison past his open parole date, just three weeks after this Court determined he had an appeal as of right to this Court, Mr. Johnson was finally released from prison. This fact does not, however, affect the current appeal, as it qualifies under the exception to the mootness doctrine in that the issue raised is substantial, capable of evading review, and likely to reoccur. Matter of Gonzalez v. Annucci, 32 N.Y.3d 461, 470-71 (2018); People ex rel. DeLia v. Munsey, 26 N.Y.3d 124, 134 and fn.2 (2015) (after considering merits of Article 70 writ challenging illegal detention, despite release of petitioner, Court ordered habeas proceeding be converted to a declaratory judgment action); Mental Hygiene Legal Servs. ex rel. Aliza K. v. Ford, 92 N.Y.2d 500, 505-06 (1998) ("this is the kind of case that falls within the exception in that it is likely to recur, will typically evade

review, and is substantial and novel"). Indeed, as the Third Department correctly recognized in the instant case, petitioner "is by no means alone in this circumstance." 174 A.D.3d at 996. Respondent DOCCS is applying Executive Law § 259-c(14) to individuals in Mr. Johnson's predicament to hold them in correctional facilities indefinitely beyond their open parole dates and, according to respondent below, it can and will continue to do so. Indeed, the issue may arise again with respect to Mr. Johnson himself should he ever be incarcerated in the future for a parole violation.

POINT

THE CONTINUING INDEFINITE IMPRISONMENT OF PETITIONER-APPELLANT, A LEVEL THREE SEX OFFENDER WITH AN ADULT VICTIM, OVER TWO YEARS PAST HIS PAROLE RELEASE DATE BASED ON THE APPLICATION OF EXECUTIVE LAW §259-C (14)'S RESIDENCY REQUIREMENTS, VIOLATED HIS FEDERAL AND STATE SUBSTANTIVE DUE PROCESS RIGHTS. U.S. CONST., AMEND. V, XIV; N.Y. CONST., ART. I, §6.

Fred Johnson was granted parole and, as a result, had a legitimate expectation of release and a fundamental liberty interest in being free from indefinite confinement in prison. Respondents kept him incarcerated, however, citing Executive Law §259-c(14), which prohibits any sex offender whose crime involved

a person under 18, or who is adjudicated a level three risk,[4] from living within 1,000 feet of a school. Yet, as applied to Mr. Johnson, an indigent parolee who was on the waitlist for a SARA-compliant shelter bed, keeping him incarcerated pursuant to this prohibition is not "narrowly tailored," substantially related," or even "rationally related" to the state's interest in protecting children. Not only is there is no evidence that such residency restrictions are effective, but Mr. Johnson's crimes are not sex offenses involving minors. DOCCS claimed right to use Executive Law §259-c (14)'s residency requirements to justify the continued and indefinite incarceration of Mr. Johnson, a parole grantee serving a life sentence with no child victim, violated his substantive due process right to be free from indefinite confinement in prison. Accordingly, this Court should reverse the Third Department's decision to the contrary and so hold. U.S. Const., Amend. XIV; N.Y. Const., Art. I, §6.

a) DOCCS' Continued Indefinite Detention of Petitioner-Appellant Violated Substantive Due Process

Mr. Johnson's indefinite imprisonment over two years past his open parole date solely because he could not locate SARA-compliant housing violated his

4 Executive Law §259-c (14) aims to protect children by keeping designated sex offenders away from school grounds. When first enacted as part of the Sexual Assault Reform Act of 2000, the Executive Law provision ("SARA") only targeted individuals who had actually committed a sex crime against a child. SARA provided that "where a person serving a sentence for an [enumerated] offense . . . and the victim of such offense was under the age of eighteen . . . is released," the Board of Parole must impose as a mandatory condition that the designated offender not knowingly enter upon school grounds. Exec. Law § 259-c(14). In 2005, the legislature amended SARA to include within its scope level three sex offenders, including those who had never victimized a child.

constitutional substantive due process rights. Mr. Johnson's liberty interest in being free from indefinite confinement in prison after being granted parole is two-fold. First, it derives from the Due Process Clause itself. See, e.g., DeShaney v. Winnebago, 489 U.S. 189, 200 (1989)("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause[.]");); Reno v. Flores, 507 U.S. 292, 315-16 (1993)(O'Connor, concurring)(same); Foucha v. Louisiana, 504 U.S. 71, 80 (1992)("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); United States v. Salerno, 481 U.S. 739, 750-51 (1987) (recognizing the "fundamental nature" of the "individual's strong interest in liberty" under the Due Process Clause).

"[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." Zinermon v. Burch, 494 U.S. 113, 125 (1990); accord Salerno, 481 U.S. at 746. It is "clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Foucha v. Louisiana, 504 U.S. at 80; Jones v. United States, 463 U.S. 354, 361 (1983); see also

Salerno, 481 U.S. at 750 (courts must be careful not to "minimize the importance and fundamental nature" of an individual's right to liberty); Morrissey v. Brewer, 408 U.S. 471, 482 (1972)(stating that the liberty of a parolee, in the context of a revocation hearing, "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee . . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment"). Indeed, any "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny." Reno v Flores, 507 U.S. at 316 (emphasis added)(O'Connor, concurring). DOCCS' claim that Mr. Johnson must remain in prison indefinitely, after having been granted parole, solely because he could not find SARA-compliant housing implicates his "strong interest in liberty," Salerno, 481 U.S. at 750-51, and "freedom from bodily restraint," triggering "heightened, due process scrutiny." Reno v. Flores, 507 U.S. at 316 (O'Connor, concurring).

Second, it derives from a state created liberty interest provided to a parolee who has been granted parole in New York State. Victory v. Pataki, 814 F.3d 47, 60 (2d Cir. 2016) (an inmate "who has been granted an open release date has a legitimate expectation of release that is grounded in New York's statutory scheme"); see Sandin v. Conner, 515 U.S. 472, 483-84 (1995), citing Wolff v. McDonnell, 418 U.S. 539 (1974)(noting that a protected liberty interest to be free from restraint

under the Due Process Clause may arise under the Due Process clause itself –often where the restraint exceeds the sentence in an unexpected manner –or may arise under a regulatory scheme created by states that imposes an "atypical and significant hardship on the inmate")(emphasis added);.

As a person who has been granted a parole release date in New York, Mr. Johnson has a legitimate expectancy of release and a protectable liberty interest. Victory v. Pataki, 814 F.3d at 60. This is because "[u]nlike a mere applicant for parole," an individual who has been granted an "open parole release date" in New York has a legitimate expectancy of release grounded in New York's regulatory scheme that creates a protectable liberty interest.[5] Victory v. Pataki, 814 F.3d at 60; Green v. McCall, 822 F.2d 284 (2d Cir. 1987); Rizo v. NYS Board of Parole, 251 A.D.2d 997 (4th Dept. 1998)(noting that petitioner had a liberty interest in parole release after Board granted him conditional parole for deportation only).

The Third Department relied on Matter of Williams v. Department of Corr. & Community Supervision, 136 A.D.3d 147 (1st Dept. 2016) (R.55-59) for the proposition that Mr. Johnson did not have a "'liberty interest [or] fundamental right . . . to be free from special conditions of parole' regarding his residence under either

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5 It should be noted that the Board cannot deny parole because of an inability to find SARA-compliant housing, as it is not one of the factors set forth in Exec. Law 259-i (2)(c)(A). But that is, in effect, what the State is doing by granting petitioner parole in name only and then implementing a restriction in such a way that he may be held in prison for the rest of his life. And, of course, once granted, an open parole date cannot be rescinded unless certain procedures are followed. 9 N.Y.C.R.R. 8002.5.

the Federal or the State Constitution." People ex rel. Johnson v. Superintendent, 174 A.D.3d at 994. But Mr. Johnson did not claim the right to be free from special conditions of parole and that decision is irrelevant to the issue presented here. In Williams, the petitioner, who was serving a 7 to 21 year sentence, had already been released on parole and was residing in the Bellevue men's homeless shelter at the time he challenged the SARA restrictions. 136 A.D.3d at 150. Rather than challenging continued indefinite confinement, petitioner, who remained in the community, raised both an Ex Post Facto argument as well as a "right to intrastate travel" which deprived him "of his liberty, in violation of the Due Process Clause." Id. at 164. In support of these contentions, the Williams petitioner claimed that the SARA restrictions made it "impossible to find housing within the borough of Manhattan and nearly impossible to find housing elsewhere in the city" and that he could not "reasonably travel within Manhattan" and remain in compliance with SARA. Id. The Williams court rejected the Ex Post Facto claim and summarily concluded that SARA did not violate "any fundamental right to intrastate travel," assuming such a right existed. Id. at 157, 164. There is, of course, a vast difference between protesting the ability to travel freely around Manhattan as a released parolee and being held in prison indefinitely after having been granted parole.[6]

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6 Indeed, in analyzing SARA on Ex Post Facto grounds, the Williams court rejected the argument that the lack of an individualized assessment rendered SARA punitive, distinguishing Kansas v. Hendricks, 521 U.S. 346 (1997), a Supreme Court case involving an Ex Post Facto

As explained above, Mr. Johnson, who had been granted parole, had a fundamental liberty interest in being free from indefinite confinement in prison. Nevertheless, respondents relied on Executive Law §259-c (14)'s residency restrictions to keep him confined 27 months past his open parole date, and, according to respondents, could have kept him confined until the end of his life sentence. When fundamental rights and liberty interests are involved, substantive due process affords heightened protection, subject to strict scrutiny, requiring the state to show that the infringement is narrowly tailored to serve a compelling state interest. See Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

In this case, as a result of SARA's broad sweep, Mr. Johnson's confinement was in no way tailored to the state's interest in protecting children. First, and as a general rule, SARA's residency restrictions have not been shown to be effective. SARA's residency restrictions are intended to protect children from sexual abuse. See, e.g., People v. Knox, 12 N.Y.3d 60, 67 (2009). However, to date, there is no evidence that such constraints are successful. See The Pointless Banishment of Sex Offenders, N.Y. Times, September 8, 2015 ("Protecting children from sexual abuse

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challenge to a civil commitment statute, because it was the "magnitude of the restraint, [namely,] involuntary and *potentially indefinite* confinement . . . [that] made individual assessment appropriate" in that case. Williams, 136 A.D.3d at 163-64 (emphasis added). In contrast, the Williams court concluded that "SARA's restraints are not of sufficient magnitude to require individualized assessment [because] . . . it lapses once the period of parole terminates." Id. at 164. Under the Williams court's rationale, in the instant case, where petitioner is serving a sentence of two years to life, the period of parole will never terminate and the magnitude of the restraint—potentially indefinite confinement—would require more.

is, of course, a paramount concern. But there is not a single piece of evidence that [residency restrictions] actually do that"); Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates, N.Y. Times, August 21, 2014. Indeed, courts have recently acknowledged the questionable effectiveness of residency restrictions. In striking down Michigan's SORA's residency restrictions on *ex post facto* grounds, the Sixth Circuit in Does #1-5 noted the absence of any record suggesting "that residential restrictions have any beneficial effect on recidivism rates." Does #1-5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016); accord State of New York v. Floyd Y., 56 Misc.3d 271 (Sup. Ct. N.Y. Co. 2017)("There is no evidence the 1,000 foot rule promotes public safety.").

Furthermore, "[r]esearch consistently shows that residence restrictions do not reduce sexual reoffending or increase community safety." Association for the Treatment of Sexual Abusers, Sexual Offender Residence Restrictions, at 1 (Aug. 2, 2014)(ATSA). A study in Minnesota tracked the recidivism rates for people designated high-risk sex offenders. The researchers found that four percent of them were arrested for a new sex crime and that "[n]one of the new crimes occurred on the grounds of a school or was seemingly related to a sex offender's living within close proximity to a school." Jill S. Levenson & Andrea L. Hern, Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry, 9 Just. Res. & Pol'y 59, 61 (2007). They concluded that "residential proximity to schools

and parks appeared to be unrelated to sex offense recidivism" and "advised that blanket-policies restricting where sex offenders live are unlikely to benefit community safety." Id.

Studies in Colorado and Florida also showed that sex offenders living within 1000 to 2500 feet of a school or daycare did not reoffend more often than those who lived farther away. ATSA at 2; Zandberger, P., Levenson, J.S., and Hart, T. (2010), Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism, Criminal Justice and Behavior, Vol. 37, No. 5, 482-502 (2010)(Florida study); Colorado Sex Offender Management Board, White Paper on the Use of Residence Restrictions as a Sex Offender Management Tool, at 2 (June 2009). The Colorado study concluded that residency restrictions "are unlikely to deter sex offenders from committing new sex crimes" and "should not be considered a viable strategy for protecting communities." Levenson & Hern, at 61.

Second, the SARA residence restrictions make almost all of New York City off-limits to sex offenders. The statute mandates that a person under parole supervision for a designated sex offense cannot enter within 1,000 feet of a school ground if the crime victim was under the age of 18 or if the offender has been adjudicated a level three risk. The provision is so broad as to render most of New York City off-limits to those subject to it. People ex rel. Johnson v. Superintendent, 174 A.D.3d at 996; see also People v. McFarland, 35 Misc.3d 1243(A) *7 (N.Y. Co.

Sup. Ct. 2012), rev'd on other grounds, 120 A.D.3d 1121 (1st Dept. 2014)(chance that sex offender would find apartment in New York City not within 1,000 feet of a school is "probably non-existent").

Third, and most significantly, given the questionable effectiveness of the broad sweep of SARA's restrictions,[7] they should not be used to keep an individual who has been granted parole confined in prison indefinitely unless he presents an acute threat to children. Mr. Johnson decidedly does not. Mr. Johnson's crimes involved adult female strangers on the subway; his behavior presented no risk to children. While incarcerated, Mr. Johnson never received a ticket related to sexual misconduct. He spent over eight years working to rehabilitate himself, and prior to the Parole Board hearing at which he was granted an open parole date, DOCCS assessed his risk of committing any offenses whatsoever as low.

Moreover, Mr. Johnson is 61 years old. Studies have shown that age is a robust predictor of recidivism, with recidivism steadily decreasing with age. See, e.g., Helmus, L., Thorton D., Hanson, R.K., and Babchishin, K.M., (2012), Improving the Predictive Accuracy of Static-99 and Static-2002 With Older Sex Offenders: Revised Age Weights, Sexual Abuse: A Journal of Research and

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7 Also calling into question the effectiveness of SARA is that ninety-three percent of sexual crimes against children are committed by people the children already know. *See* U.S. Department of Justice, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics, at 10 (2000) (34% were committed by family members and 59% by acquaintances).

Treatment, 64. A study of 4724 released sex offenders found that age "had a substantial association with recidivism, with offenders older than age 50 at release reoffending at half the rate of the younger (less than 50) offenders." Harris, A.J.R. & Hanson, R.K. (2004), Sex Offender Recidivism: A Simple Question, Public Safety and Emergency Preparedness Canada, at 7.[8] Another study of 4673 sex offenders found that there were very few recidivists (3.8%) among those sexual offenders released after the age of 60 and that none of the rapists released after the age of 60 had reoffended. Hanson. R.K., Recidivism and Age: Follow-up Data from 4673 Sex Offenders, 17(10) J. Interpersonal Violence 1046-62 (2002).[9]

Given the ineffectiveness of the residency restrictions and the lack of risk Mr. Johnson posed to children, applying SARA's residency restrictions to hold him in prison past his open parole date indefinitely fails to satisfy strict scrutiny and violates substantive due process. This is particularly true where, in addition to robust federal protection, this Court has "repeatedly construed the State Constitution's Due

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8 This study may be found on-line at www.publicsafety.gc.ca under Resources and then Publications (last visited January 7, 2020).

9 A 2003 report undertaken by the Federal Bureau of Justice Statistics confirmed these studies. Tracking for three years 9691 sex offenders released from state prisons in 1994, the report found that the lowest rate of re-arrest for a new sex crime belonged to the oldest offenders. Only 3.3% of sex offenders who were 45 years or older when released were re-arrested for a new sex crime within three years. Lanagan, P.A., Schmitt, E.L., & Durose, M.R. (2003) Recidivism of Sex Offenders Released from Prison in 1994, U.S. Department of Justice, Bureau of Justice Statistics NCJ 198281, at 1, 25. See also Barabaree, R.H., Blanchard, R., & Langton, C.M., The Development of Sexual Aggression Through the Life Span, 989 Annals of the N.Y. Acad. Sci. 59-71 (2003).

Process Clause to provide [even] greater protection than its federal counterpart." People v. LaValle, 3 N.Y.3d 88, 127 (2004); accord Cooper v. Morin, 49 N.Y.2d 69, 79 (1979)(departing from federal standard in the context of the conditions of confinement with pretrial detainees and finding that substantive due requires "a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement"); see also Matter of Lucas v. Scully, 71 N.Y.2d 399, 405-06 (1988)(in the context of prison regulations imposed on the incarcerated, there is "a balancing of the competing interests at stake: the importance of the right asserted and the extent of the infringement are weighted against the institutional needs and objected being promoted" in contrast to the federal standard which requires a regulation be "reasonably related to legitimate penological interests.").

Even if this Court should find that strict scrutiny does not apply, however, the statute as applied to Mr. Johnson, and others in his predicament, does not satisfy intermediate scrutiny. Intermediate scrutiny requires a statute be "substantially related" to the achievement of important government interests. Anonymous v. Rochester, 13 N.Y.3d 35, 48 (2009).

In Anonymous v. Rochester, 13 N.Y.3d 35, 48 (2009), a minor challenged a curfew ordinance on the ground that it interfered with his fundamental right to freedom of movement. Although noting that "freedom of movement is the very

essence of our free society," the Court of Appeals found that, while it may be a fundamental right for adults, "children do not possess the same constitutional rights possessed by their adult counterparts." Anonymous v. Rochester, 13 N.Y.3d at 45-46. Therefore, the Court found that "intermediate scrutiny is better suited to address the complexities of curfew ordinances" as applied to minors because "it is sufficiently skeptical and probing to provide rigorous protection of constitutional rights yet flexible enough to accommodate legislation that is carefully drafted to address the vulnerabilities particular to minors." 13 N.Y.3d at 47. Similarly, here, even though a parole grantee's right to be free from indefinite confinement may not be the same as one who has never been convicted because "they can be subject to greater regulation and control by the state," it is still a right "protected by the Constitution" that may be addressed with intermediate scrutiny. Id. at 46-47. Under intermediate scrutiny, the regulation must be "'substantially related' to the achievement of 'important' government interests." Id. at 48.

For the reasons stated above, the SARA restrictions, as applied to Mr. Johnson, do not survive intermediate scrutiny. See supra pages 17-19. To be clear, it is not the SARA residency restriction itself that Mr. Johnson contests. Rather, it is that DOCCS' application of SARA to justify holding Mr. Johnson--a 60-plus year old parole grantee, with no child victim—in prison indefinitely, is neither narrowly tailored nor substantially or rationally related to the state's interest in protecting

children. As this Court has stated:

> [A]lthough the government need not produce evidence of [a substantial nexus between the burden imposed and the goal] to a scientific certainty, the 'purpose of requiring [proof of] that close relationship is to assure that the validity [of the statute] is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate assumptions.'

Anonymous v. City of Rochester, 13 N.Y.3d at 48 (citation omitted). Here, no nexus, much less a substantial one, has been shown.

Even the contention that there is a rational relationship between SARA and its goal of protecting children is not born out by empirical research. See supra pages 17-20. Significantly, recent studies on the efficacy of residency restrictions led the Sex Offender Management Assessment and Planning Initiative (SOMAPI) of the U.S. Department of Justice's Office of Justice Programs (OJP) to conclude that "there is no empirical support for the effectiveness of residence restrictions. In fact, a number of negative unintended consequences have been empirically identified...that may aggravate rather than mitigate offender risk." Christopher Lobanov-Rostovsky, *Chapter 8: Sex Offender Management Strategies*, in SEX OFFENDER MGM'T. ASSESSMENT & PLANNING INITIATIVE, U.S. Dep't. of Justice, Office of Justice Programs, Office of Sex Offender Sentencing Monitoring, Apprehending, Registering, and Tracking (SMART), NCJ-247059 (October 2014) at 163 *available at*

https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf (last visited January 7, 2020).

But even assuming that some rational relationship exists between residency restrictions in general and the goal of protecting children, there is no evidence at all—and respondents offered none below—to support the efficacy of residency restrictions as they apply to an offender with an adult victim. To be sure, the Division of Parole has discretion to impose special conditions upon parolees and DOCCS can, of course, set conditions on release. See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972). Mr. Johnson here makes no claim that he is free from conditions of parole or SARA and specifically sought in his writ below to be released or, in the alternative, to be granted a spot in a SARA-compliant shelter.[10]

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10 The Third Department noted that there is "no federal or state constitutional right to be released to parole supervision before serving a full sentence" and "reasonable residential restrictions may be imposed as a condition precedent to release." 174 A.D.3d at 993-94. Mr. Johnson does not disagree. The cases cited by the Third Department for those general propositions, however, are inapposite to the issues in this case. Those cases either involve petitioners who were who were up for conditional release; see, e.g., Matter of Bredeen v. Donnelli, 26 A.D.3d 660 (3rd Dept. 2006)(denial of conditional release); Matter of Boss v. New York State Div. of Parole, 89 A.D.3d 1265 (3rd Dept. 2011)(same); Matter of Lynch v. West, 24 A.D.3d 1050 (3d Dept. 2005)(same); see also Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1 (1979)(determining what procedural due process is due in a discretionary parole decision hearing); or petitioners involved in parole revocation hearings; People ex rel. Stevenson v. Warden of Rikers Is., 24 A.D.3d 122 (1st Dept. 2005)(noting that the "special conditions imposed upon petitioner" did not violate "any constitutional or statutory provision" and the revocation was within "the lawful exercise of the Division of Parole's official discretion."); People ex rel. Matthews v. New York State Div. of Parole, 58 N.Y.2d 196 (1983)(denial of petitioner's request to adjourn his final parole revocation hearing until after pending criminal charges were resolved); see also Matter of Russo v. New York State Bd. of Parole, 50 N.Y.2d 69 (1980)(permitting the parole board to establish a minimum sentence that was the same as the maximum sentence under a statutory scheme in effect at the time).

What Mr. Johnson does claim is that DOCCS should not be allowed to hold an indigent parole grantee, with no child victim, in prison indefinitely for lack of a SARA-compliant address.

b) DOCCS, Which Controls the Wait List for a Shelter Bed, is Required to do More Than Hold a Level Three Sex Offender with No Child Victim Who Has Been Granted Parole in Prison Indefinitely

Correction Law Section 201(5) tasks DOCCS with an obligation to "assist inmates eligible for community supervision and inmates who are on community supervision" to secure housing. Of course, as this Court recognized in Matter of Gonzalez v. Annucci, 32 N.Y.3d 461 (2018), DOCCS is only obligated to assist all inmates in a "general manner" and the statute "does not alleviate the ultimate obligation on the inmate to locate housing." 32 N.Y.3d at 473.

The Third Department here concluded that DOCCS had met "its obligation under C.L. §201(5) to provide Mr. Johnson the resources to propose residences and placed him on a wait list for those found appropriate." 174 A.D.3d at 985. To say that DOCCS has assisted Mr. Johnson by placing him on a wait list, when they control the wait list and the order in which people are reached on the wait list, is convenient, but insufficient to satisfy constitutional requirements.

Here, Mr. Johnson had been granted parole, was not subject to a parole revocation hearing, did not ask to be exempt from the SARA conditions, and yet DOCCS claimed the right to incarcerate him indefinitely. Victory v. Pataki, 814 F.3d at 59-60 ("[A] New York inmate who has been granted an open parole release date has a legitimate" and "protectable liberty interest" in release that does not exist for inmates who have not been granted open parole dates).

As the Appellate Division recognized, the well-known problems with locating a residence in NYC that is not within 1000 feet of a school are legion. There are but four shelters that fit this requirement, and DOCCS has an agreement with the New York City Department of Homeless Services that they will set aside a limited number of beds in those shelters for the release of sex offenders who will be subject to SARA. See Matter of Gonzalez v. Annucci, 32 N.Y.3d 461, 469 (2018). "DOCCS maintains a waiting list" of inmates for those shelter beds. People ex rel Johnson v. Superintendent, 174 A.D.3d at 996 (Garry, J., concurring). But DOCCS does not base placement decisions "solely upon which prisoners have been on the waiting list longest; inmates such as those who have been placed in residential treatment facilities" are released first. Id.; Matter of Gonzalez v. Annucci, 32 N.Y. 3d at 469. Petitioner in the instant case is not in a residential treatment facility and, therefore, remained on the waiting list while others were released ahead of him. Johnson, 174 A.D.3d at 997 (Garry, concurring).

According to respondents below, there is no end limit on how long they are entitled to hold a parole grantee serving a life sentence in prison awaiting a SARA-compliant shelter bed because DOCCS is not improperly holding inmates beyond the expiration date of a validly imposed sentence. In short, they claimed they were entitled to hold Mr. Johnson in prison for life. This suffices under neither C.L. § 201(5) nor due process. See, e.g., Foucha v. Louisiana, 504 U.S. 71, 82

(1992)(striking down a law that permitted the indefinite detention of persons acquitted based on insanity grounds unless they proved they were not a danger to others); United States v. Salerno, 481 U.S. at 747 (noting that the duration of the detention upheld under the Bail Reform Act was strictly limited); see also Reno v. Flores, 507 U.S. 292, 314 (1983)(upholding the challenged regulation and noting that it did not permit indefinite detention).

Here, Mr. Johnson, who is indigent, requested release to a New York City shelter. New York City is a "Right to Shelter" city, required to provide shelter that meets the needs of the person applying, and, as such, if petitioner were released, he could present himself at any homeless shelter in New York as a level-three offender subject to SARA restrictions and they would have to give him a bed. Matter of Gonzalez v. Annucci, 32 N.Y. 3d at 489 (Wilson, J. dissenting); https://www1.nyc.gov/site/dhs/shelter/shelter.page (last visited January 7, 2020); Callahan v. Carey, 12 N.Y.3d 496 (2009); Callahan v. Carey, Final Judgment by Consent, Index No. 42582/79 (Sup. Ct., N.Y. Cnty. Aug. 26, 1981); see, e.g., Jenkins v. NYC Dep't of Homeless Servs., 643 F. Supp. 2d 507 (S.D.N.Y. 2009) (individuals with mental health and substance abuse diagnoses); In re Plaza v. New York, 305 A.D.2d 604 (2d Dep't 2003) (individuals in wheelchairs); Lamboy v. Gross, 126 A.D. 2d 265 (1st Dept. 1987) (families with children). Mr. Johnson was denied that same ability by virtue of his continued detention by DOCCS.

It is precisely for this reason that Mr. Johnson filed a petition for a writ of habeas corpus, requesting that he be released pursuant to his open parole date or, in the alternative, that he be given a SARA-compliant bed within 45 days. Certainly, under the above circumstances, DOCCS must do more for an indigent parolee who was held 27 months past his parole release date. While they may not be required to affirmatively "assist," they should not be allowed to thwart his ability to secure a bed outside the prison walls. Simply saying that they are legally entitled to hold Mr. Johnson in prison until he dies is no answer.

Indeed, indefinite confinement is not the only alternative to SARA compliance. Not only could DOCCS release Mr. Johnson so that he could present himself at a SARA-compliant shelter, DOCCS may also release individuals subject to SARA to a shelter even if the shelter is not SARA-compliant. By its plain terms, Executive Law §259-c(14) obligates the board of parole to "require, as a mandatory condition of [ ] release, that [the] sentenced offender shall refrain from knowingly entering into or upon any school grounds." Imposing the condition, though, is not the same as enforcing the condition. As the agency exclusively in charge of supervising everyone on community supervision, the Board of Parole/DOCCS has sole authority to determine when an individual is in violation of the conditions of release and when a warrant for retaking should be issued. See Executive Law §259-i(3)(a)(i). Thus, as long as DOCCS imposes the SARA condition, it has complied

with the statute. If it releases an individual to a non-SARA compliant shelter or other non-compliant residence when no other option is available, the issuance of a warrant is not required. DOCCS has the discretion to determine that that person will not be violated immediately. See Executive Law §259-i(3)(a)(i).

Indeed, DOCCS' employees routinely exercise discretion when it comes to enforcing conditions of release. When individuals on community supervision miss an office report, an arrest does not automatically follow. The same holds true for a curfew violation. And, when they fail a drug test, it is not automatically considered a violation in an important respect. It all depends on the circumstances unique to each individual's supervision, and whether an arrest is considered necessary to secure that person's compliance with the rules.

Discretion is exercised routinely with respect to the SARA condition as well. It is virtually impossible for an individual living in New York City to avoid going within 1,000 feet of a school. Whenever that person goes to the grocery store, to the parole office, to the doctor, to the bank, etc., he or she is likely to run afoul of SARA. See Matter of Williams v. DOCCS, 136 A.D.3d at 150. Yet, even if DOCCS were to learn of the breach, it would not automatically issue an arrest warrant, but instead would explore whether the person had a legitimate explanation for traveling less than a thousand feet from a school.

In fact, DOCCS chooses to selectively observe SARA every time it releases an individual to a SARA-compliant shelter. When a homeless inmate subject to SARA is released from prison to a SARA-compliant shelter, the first stop in the release process is the Bellevue shelter, where intake is done. Only then are they moved to a SARA-compliant shelter. Bellevue is located within 1,000 feet of a school, see, e.g., Matter of Williams v. DOCCS, 136 A.D.3d at 150, which means that DOCCS is sanctioning a violation of the SARA condition every time it releases a prisoner to a SARA-compliant shelter.

In yet another example, when DOCCS finds out that a school has opened within 1,000 feet of where an individual on community supervision subject to SARA has been living, DOCCS does not arrest the individual that day, nor require the person to leave home immediately. Rather, they work with the person to find compliant housing, whether a private residence or a homeless shelter. DOCCS understands that there has to be some flexibility in enforcing the SARA condition, even if its imposition is mandatory. So too, here, with parole grantees entitled to release.

And, unlike DOCCS' practice from 2005-2014, when individuals subject to SARA were permitted to remain in non-compliant shelters indefinitely, any stay in a non-compliant shelter would be temporary, lasting only so long as it takes for the individual to locate a SARA-compliant residence or for DOCCS to secure a bed

space in a SARA-compliant shelter.[11] Yet another solution DOCCS could explore is releasing a parolee subject to electronic home monitoring to provide protections against recidivism. See, e.g., Arroyo v. Annucci, 61 Misc.3d 930, 940 (Sup. Ct. Albany Co. 2018).

What is apparent is that DOCCS up to now has not explored ways to address the SARA crisis because no court decision has placed any limits on its authority.

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[11] Indeed, when SARA was amended in 2005, to expand to a 1,000 foot radius the zone around schools that designated sex offenders were prohibited from entering, DOCCS interpreted the law to exclude homeless shelters. As a result, whenever an individual scheduled to be released from prison and subject to SARA could not locate a compliant residence, DOCCS would release that person to a shelter, regardless of its proximity to a school. See People ex rel. Johnson v. Superintendent, 47 Misc.3d 984, 987 (Sup. Ct. Dutchess Co. 2015), cited in Matter of Williams v. Department of Corr. and Community Supervision, 136 A.D.3d 147, 150 fn.2 (1st Dept. 2016) (though noting that Bellevue Men's Shelter lies within 1,000 feet of a school, and that DOCCS ordered the petitioner to live there upon the maximum expiration of his prison term in August 2013, Supreme Court nonetheless finds that DOCCS' prior non-compliance with SARA based on its erroneous interpretation of the law did not estop the agency from subsequently enforcing the statute correctly).

Thus, from 2005 until 2014, DOCCS did not keep anyone subject to SARA in custody past their release date, whether it was release from a grant of parole, conditional release, release to a term of PRS, or release from a punishment imposed for violating the conditions of release. In early 2014, DOCCS started applying SARA to homeless shelters, precipitating the present crisis that has ensnared Fred Johnson. See, e.g., August 21, 2014 New York Times article titled "Housing Restrictions Keep Sex Offenders in Prison Beyond Release Date," at https://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html.

To counsel's knowledge, during the nine-year period when DOCCS did not enforce the SARA law with respect to homeless shelters, not a single sex offense was reported that involved a child who was on or near school grounds in which the perpetrator was a stranger living in a homeless shelter less than 1,000 feet from that school. This is hardly surprising, given the absence of evidence that geographic proximity of sex offenders to schools is related in any way to the incidence of sex offenses perpetrated against children. See supra pages 17-19; State v. Floyd Y., 56 Misc.3d 271, 275 (Sup. Ct. N.Y. Co. 2017) ("There is no evidence the 1,000 foot rule promotes public safety . . . . [the] notion that the typical sex offender commits crimes against strangers he opportunistically encounters in public places, like children near schools, is a myth. Research from the Department of Justice indicates approximately 93% of all sex crimes are committed by offenders known to the victim prior to the offense").

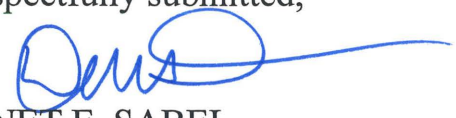
Instead, the manner in which DOCCS is implementing SARA in this case has transformed parole from a grant of conditional liberty, to confinement without end. DOCCS' claimed right that SARA empowers them to solve its problem through indefinite incarceration of parole grantees with no child victim enters that zone of arbitrariness that violates substantive due process.

In sum, DOCCS claims the right to use SARA to keep Mr. Johnson, a paroled sex offender serving a life sentence with an adult victim, and others like him, confined in prison indefinitely in violation of substantive due process. There is no showing that the residency restrictions are related to a reduced risk of recidivism or that Mr. Johnson poses a threat to children. DOCCS, according to its own analysis, granted Fred Johnson parole because it does not consider him a threat. Thus, this Court can and should find that keeping Mr. Johnson incarcerated for more than two years past his open parole date, with the claimed right to hold him indefinitely, pursuant to those restrictions deprived him of due process. U.S. Const. Amend. V, XIV; N.Y. Const., Art. I, Sec. 6.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE DECISION OF THE APPELLATE DIVISION SHOULD BE REVERSED AND THIS COURT SHOULD HOLD THAT AN APPLICATION OF EXECUTIVE LAW §259-C (14)'S RESIDENCY REQUIREMENTS TO MR. JOHNSON, A PAROLE GRANTEE SERVING A LIFE SENTENCE WITH NO CHILD VICTIM, TO PERMIT DOCCS TO DETAIN HIM, AND OTHERS LIKE HIM, IN PRISON INDEFINITELY VIOLATES SUBSTANTIVE DUE PROCESS.

Respectfully submitted,



JANET E. SABEL
Attorney for Petitioner-
Appellant

DENISE FABIANO
Of Counsel
February, 2020

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) Sec. 500.13(c)(1), Denise Fabiano, an attorney in the Office of The Legal Aid Society, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,945 words, which complies with the limitations stated in Sex. 500.13(c)(1). The word processing system used to prepare this brief and to calculate the word count was Microsoft Word 2003. The brief is printed in Times New Roman, a serifed, proportionally space typeface. The type size is 14 points in the text and headings and 12 points in the footnotes. The line spacing is two.

Denise Fabiano, Esq.