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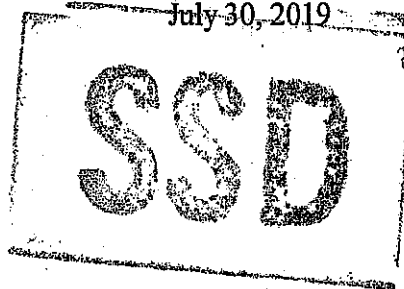
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N.Y.S. COURT OF APPEALS

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Re: People ex rel. Johnson v.  
Superintendent, et al (C.P.L.R. 5601(b)(1))

Dear Mr. Asiello:

As requested, I am submitting this letter to address the Court's subject matter jurisdiction over the above-referenced appeal and to provide copies of the papers filed in the Appellate Division, Third Department, by the parties below.

C.P.L.R. § 5601(b)(1) authorizes "as of right" direct appeals from an order of the appellate division concerning the "construction of the constitution of the state or of the United States." Given that this action was predicated on a claim that Mr. Johnson's ongoing and indefinite detention by respondents violates substantive due process, it directly involves a substantial constitutional question. The sole question on appeal to this Court is whether the school-zone exclusion of Executive Law § 259-c(14), invoked by respondent to justify the continuing, indefinite imprisonment of Mr. Johnson following his grant of parole from a sex offense against an adult, violates his right to substantive due process. This case quintessentially raises a substantial constitutional question. *See, e.g., People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124 (2015).

As a result of a 2004 conviction for persistent sexual abuse petitioner, Fred Johnson, 60 years old, was adjudicated a risk level three sex offender pursuant to the Sex Offender Registration Act. In 2009, he was again convicted of persistent sexual abuse and sentenced to 2 years to life in prison. Both cases involve conduct against adult female strangers on public transportation. Following a hearing, the Board of Parole determined that Mr. Johnson had earned his release after serving 8 ½ years of his 2 to life sentence, and granted him parole, effective August 10, 2017. Two years later, Mr. Johnson remains in prison for one reason only, the lack of SARA-compliant housing. Respondents maintained below that, absent such housing, they can keep Mr. Johnson in prison indefinitely. The Third Department affirmed the lower court's dismissal of Mr. Johnson's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70.

Petitioner argued below that, as applied 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, his continued detention pursuant to SARA's residency restriction violates his state and federal constitutional substantive due process rights. Petitioner contended that, even though a parole grantee's right to be free from indefinite confinement is not the same as one who has never been convicted, it is nonetheless a right that is protected by the state and federal constitution. Petitioner further argued that the application of the residency restriction to Mr. Johnson could not survive strict, intermediate, or even rational relation scrutiny. Specifically, the SARA restrictions make almost all of New York City off-limits to sex offenders, and these restrictions are not sufficiently related to the goal of protecting children with respect to petitioner, a 60-year old man, with no child victim, who has been granted parole.

In response, respondent maintained that SARA, as applied to petitioner here can satisfy any test under the constitution because "SARA's burdens are limited" continuing "only during the term of [parole] supervision" when balanced against the State's "compelling interest in safeguarding its children." (Resp. Br. at 37). Although there are SARA-compliant shelter beds available to incarcerated individuals such as petitioner, as the Third Department noted in its decision, the list of prisoners being placed in those beds is controlled by DOCCS.<sup>1</sup> Nevertheless, respondents maintained that they are entitled to hold Mr. Johnson in prison indefinitely for the duration of his sentence, the maximum term of which is life, meaning until he is dead.

The Third Department affirmed the dismissal of Mr. Johnson's writ of habeas corpus after determining that the ongoing and indefinite detention of Mr. Johnson because he had no SARA-compliant housing, and where DOCCS had not yet afforded him a shelter bed that complied with Executive Law Sec. 25-c(14), was not unconstitutional. In so doing, it found that the right asserted by Mr. Johnson was neither fundamental nor entitled to any heightened scrutiny. In affirming, the Third Department found that a rational basis existed to support the mandatory housing requirement, as applied to Mr. Johnson, set forth in Executive Law Sec. 259-c(14). The constitutionality of Executive Law Sec. 259-c(14), as applied to Mr. Johnson, is thus squarely before the Court.

Were respondents to release Mr. Johnson on parole, appellant would ask that the Court proceed with this appeal, recognizing that this matter should qualify under the exception to the mootness doctrine in that it is capable of evading review and likely to reoccur. *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 134 (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, petitioner "is by no means alone in this circumstance." Respondent is applying Executive

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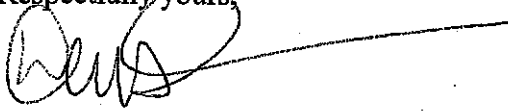
<sup>1</sup> The Court noted that, at the time of oral argument in April 2019, "259 prisoners were then on the list, and that the average waiting time for placement in a SARA-compliant shelter was approximately two to three years." Moreover, the list does not move based on longevity on the list because 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."

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Law § 259-c(14) to individuals in Mr. Johnson's predicament to hold them in correctional facilities beyond their open parole dates, and, according to respondent, it will continue to do so.

Should the Court require any additional materials, please let me know.

Respectfully yours,



Denise Fabiano  
Staff Attorney  
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Encls.

VIA USPS

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