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July 31, 2019

John P. Asiello
Chief Clerk
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *People ex rel. Johnson v. Superintendent*, No. APL-2019-00147

Dear Mr. Asiello:

I write on behalf of respondents New York State Department of Corrections and Community Supervision (DOCCS) and the Superintendent of the Adirondack Correctional Facility, in response to this Court's jurisdictional inquiry. As explained below, this Court should dismiss this appeal because no substantial constitutional question is directly involved in the decision of the Appellate Division, Third Department. *See* C.P.L.R. 5601(b)(1); *Matter of Kachalsky v. Cacace*, 14 N.Y.3d 743, 743 (2010).

Background

Appellant Fred Johnson is a repeat sex offender whose extensive criminal record consists of at least five felonies and nearly 50 misdemeanors, including 23 convictions for sexual abuse in the third degree. (Record on Appeal (R.) 19-20, 73, 79.) In 2004, Johnson pleaded guilty to persistent sexual abuse in connection with assaulting a woman on the subway. (R. 19.) Johnson was sentenced to an indeterminate term of two to four years' incarceration, and was designated a level-three sexually violent offender under New York's Sex Offender Registration Act (SORA)—the most serious classification under SORA. (R. 19, 100.)

Johnson's sentence subjects him to lifetime parole supervision (R. 19, 100). Because of his status as a level-three sex offender, New York's Sexual Assault Reform

Act (SARA) imposes a mandatory parole condition that prohibits Johnson from residing within 1,000 feet of school grounds. *See* Executive Law § 259-c(14).

Shortly after Johnson's release for the 2004 offense, he sexually assaulted another woman on the subway, pleaded guilty to another persistent sexual abuse charge, and was sentenced in 2009 to an indeterminate term of two years to life. (R. 19, 22-23, 73.) In 2017, the Parole Board granted Johnson an open release date of August 10, 2017, subject to Johnson's compliance with the special conditions of release set by the Board, including SARA's mandatory school-grounds condition. (R. 81-84, 89-96.) Johnson has been unable to secure a SARA-compliant residence and is currently on a waiting list for a bed at a New York City SARA-compliant homeless shelter. (R. 140.) Because Johnson is unable to comply with the conditions of his parole, he remains in DOCCS custody. (R. 171.)

In November 2017, Johnson filed this petition for a writ of habeas corpus. Johnson contended that DOCCS (1) violated his federal and state substantive due process rights by continuing to confine him after having granted him an open parole release date, and (2) did not give him adequate housing assistance. (R. 6, 8-16.) Johnson sought immediate release, or alternatively, an order directing DOCCS to find him SARA-compliant housing within 45 days. (R. 17, 153.) In March 2018, Supreme Court, Essex County (Meyer, J.) rejected the constitutional challenge and dismissed the petition, concluding that Johnson's claims of unlawful detention are not supported by the record. (R. 163-167).

In July 2019, the Appellate Division, Third Department unanimously affirmed. As the court explained, Johnson has no fundamental right to unconditional parole release and therefore no right to be free from special conditions on his residence. (Decision & Order at 2-3.) The court further held that SARA satisfies substantive due process because it is rationally related to a legitimate state interest in protecting children from sexual predators. (*Id.* at 3-4.) Finally, the court concluded that the record demonstrated that DOCCS satisfied its statutory duty to provide housing assistance. (*Id.* at 5.)

Johnson has now filed a direct appeal with this Court to challenge SARA's constitutionality as applied to individuals, like him, who are serving a life sentence, have an open parole release date, and are unable to find SARA-compliant housing. (*See* Rule 500.9(b) Notice to Attorney General; *see also* Preliminary Appeal Statement at 4.)

Discussion

This Court has jurisdiction over appeals taken pursuant to C.P.L.R. 5601(b)(1) where a final order of the Appellate Division "directly involves the construction of the constitution of the state or the United States." C.P.L.R. 5601(b)(1); *see also* N.Y.

Const. art. VI, § 3(b)(1) (same). Any constitutional question raised by such an order must be "substantial" to give this Court jurisdiction. *Kachalsky*, 14 N.Y.3d at 743. This Court should dismiss Johnson's appeal because his substantive due process challenge to SARA is "so clearly not debatable and utterly lacking in merit." Arthur Karger, *Powers of the New York Court of Appeals*, § 7:5, at 226 (3d ed. 2005) (quoting *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245, 258 (1934)).

It is well-established that inmates have no fundamental right to *unconditional* parole release under either the federal or New York State Constitutions. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7-8 (1979); *Matter of Russo v. New York State Board of Parole*, 50 N.Y.2d 69, 74 (1980). Courts have accordingly long held that reasonable restrictions on parolees, including restrictions that might limit where those offenders may live or travel, are lawful. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972); *Matter of Breeden v. Donnelli*, 26 A.D.3d 660 (3d Dep't 2006); *Matter of M.G. v. Travis*, 236 A.D.2d 163, 167 (1st Dep't 1997), *lv. denied* 91 N.Y.2d 814 (1998).

Here, the Third Department correctly found that SARA's mandatory parole condition is rationally related to the legitimate governmental interest in protecting children from sexual predators. Specifically, the court found that it was rational for the Legislature to decide to protect children by preventing certain high-risk sex offenders from living near school grounds while they remain subject to state supervision under the authority of a criminal sentence. (Decision & Order at 4.) The First Department reached the same conclusion in an earlier substantive due process challenge to SARA. *See Matter of Williams v. Department of Corr. & Community Supervision*, 136 A.D.3d 147, 164-165 (1st Dept. 2016), *appeal dismissed*, 29 N.Y.3d 990 (2017).

The Third Department also correctly found that the Legislature reasonably limited SARA's application to those sex offenders who posed the highest recidivism risk—those who had committed sex offenses against children; and those who, like Johnson, received the highest classification of dangerousness from their sentencing courts through the SORA process. (Decision & Order at 4.) In the courts below, Johnson objected that the Legislature's judgment was irrational as applied to sex offenders like himself who had not offended against children. But this Court rejected such an argument in *People v. Knox*, which upheld the Legislature's decision to impose restrictions on certain *non-sex* offenders based on reasonable concerns about the relationship between such offenses and sexual abuse of children. 12 N.Y.3d 60, 67-70 (2009). As the Third Department here explained in applying *Knox*, "the lack of certainty in making such an assessment and the serious nature of sex offenses against children" made the Legislature's application of SARA to all level-three sex offenders reasonable. (*Id.* (citing *Knox*, 12 N.Y.3d at 67).)

Moreover, to the extent that Johnson has legitimate objections about whether he currently remains sufficiently dangerous to warrant the level-three designation,

he may present those arguments in a petition for modification of his SORA level, as the Third Department noted. (Decision & Order at 4 n.1 (citing Correction Law § 168-o(2).) If Johnson is successful in reducing his designation, then he may no longer be subject to SARA's mandatory parole condition. Johnson's constitutional challenge is not the appropriate vehicle to raise concerns about the appropriateness of SARA's application to him when a statutory vehicle to present such concerns remains available.

Because no substantial constitutional question is thus directly involved in this appeal, Johnson has not met the requirements for an appeal as of right under C.P.L.R. 5601(b). This Court should therefore dismiss the appeal.

Respectfully submitted,

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cc: Denise Fabiano, Esq.
Legal Aid Society
199 Water Street
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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK):

Megan Chu, being duly sworn, deposes and says:

(1) I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the Respondents herein.

(2) On July 31, 2019, I served one paper copy of the attached Jurisdiction Letter, by U.S. Postal Service first-class/priority mail upon the following named person(s):

Denise Fabiano, Esq.
Legal Aid Society
199 Water Street
New York, NY 10038

Megan Chu

Sworn to before me on
July 31, 2019

Assistant Solicitor General