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October 3, 2020

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

RE: People ex rel. Roland Green v. LaClair
APL-2020-00124

Dear Mr. Asiello:

Greetings. Pursuant to Rule 500.11of the Court's Rules of Practice, respondent-appellee Roland Green ("respondent") hereby submits this letter as and for his Letter Brief in this case, urging affirmance of the decision below of the Appellate Division, Third Department.

INTRODUCTION

As appellants noted in their September 21, 2020, Letter Brief submission, the legal issue presented in this case is identical to the issue and question presented in the case People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility, APL 2019-00091, a Third Department case which is also on appeal to this Court. The parties have fully briefed Negron and it is set for argument on October 13, 2020. The issue here, as in Negron, is whether respondent is lawfully subject to the New York Sexual Assault Reform Act ("SARA"), as set forth in Executive Law §259-c(14), and therefore must have a SARA-compliant address to which he can be released from custody, even though he is not currently serving a sentence for any sex offense.

On April 23, 2020, in accord and affirmance with its decision in Negron, 170

AD3d 12 (2019), the Third Department agreed with respondent that SARA does not apply to him. The court held that merely because respondent was designated a level three sex offender registrant under the Sex Offender Registration Act (SORA), but where he is not also currently serving a sentence for a sex offense, SARA does not apply. Accordingly, respondent urges this Court to affirm the Third Department's decision in this case, as well as in Negron.

STATEMENT OF FACTS

On June 7, 1989, respondent was delivered into DOCCS custody upon conviction in New York County of rape in the first degree and robbery in the first degree, and following and in accordance with imposition of an indeterminate sentence of five (5) to fifteen (15) years. Third Department Record on Appeal ("R.") 19-20; 35. The victim of respondent's sex offense was a minor child relative. R. 99; 110. Respondent was released from DOCCS custody on that sentence on June 9, 2003, upon completion of the term by reaching the maximum expiration of that sentence upon that date. R. 20; 35. Based on this conviction, respondent was adjudicated a level three sex offender pursuant to the SORA, thereby mandating lifetime registration. R. 20.

Subsequently, on May 25, 2007, respondent was convicted in New York County of robbery in the second degree and burglary in the third degree. Respondent was sentenced to a determinate term of thirteen (13) years with five (5) years post release supervision on the robbery conviction and an indeterminate term of three and one-half (3½) to seven (7) years on the burglary conviction. The court ordered both sentences to run concurrently with one another. The date of these offenses was on August 27, 2006, over 3 years after respondent completed serving and fully discharging and satisfying his 1988 sex offense conviction in 2003. R. 20; 38.

On June 13, 2007, respondent was delivered into DOCCS' custody on his present non-sex offense sentence. R. 20; 40. In July 2017, respondent rappeared before the DOCCS Time Allowance Committee ("TAC") at Franklin Correctional Facility, and on August 2, 2017, TAC granted respondent all available good time allowances, which determination was affirmed by both the facility superintendent and the DOCCS Commissioner's designee. R.20; 42. As a result, respondent was afforded an open date of November 16, 2017, for

conditional release to parole supervision. R.20; 40.

On November 9, 2017, Parole issued a Parole Board Release Decision Notice imposing conditions of release upon respondent. These conditions included the assertion that he was subject to SARA and therefore must have a SARA-compliant address to which he can be released. Specifically, the Parole Board asserted that pursuant to Executive Law§ 259-c(14) the mandatory residency special conditions apply to respondent. R. 21; 44.

Respondent was homeless prior to his present incarceration and anticipatorily will remain homeless upon release. Accordingly, he seeks to return to the New York City shelter system where he resided prior to his current incarceration, which is the residence he proposed to DOCCS and Parole officials. Notably, he seeks return to the very same shelter where he previously was permitted to reside, even with his level three SORA designation. R. 21.

DOCCS and Parole rejected and disapproved respondent's proposed residency return to New York City as a homeless person and to once again reside in the City's shelter system. Specifically, respondent was informed that "Because you are a Level 3 Registered Sex Offender, Special Condition 28 and FC01 have been imposed. Special Condition 28 indicate[s] [sic] that you will abide by the mandatory condition imposed by the Sexual Assault Reform Act. Special Condition FC01 is the sex offender housing condition. You will not be released until a residence is approved and compliant with the Sexual Assault Reform Act." Respondent was further informed that "shelters cannot be submitted as proposed addresses." See November 8, 2017, Memorandum to relator from C. Leonard, SORC [Senior Offender Rehabilitation Coordinator] at Franklin Correctional Facility. R. 47.

Despite his grant of all available good time allowances and approval for conditional release to parole supervision, respondent has continued to remain confined in prison, now long-past his approved and open date for release. He has remained imprisoned solely because he is indigent and a homeless individual who seeks to return and reside in the New York City shelter system, but where he cannot locate or provide any non-shelter address that is more than 1000 feet from a school, and because it would appear that DOCCS/Parole cannot locate such an address either.

In short, despite otherwise complete approval by both DOCCS and Parole for long ago immediate release, respondent remains in prison far beyond his open release date of November 16, 2017, strictly and solely because DOCCS/Parole is applying SARA to him. Indeed, during the pendency of this litigation, respondent reached the maximum expiration date of his current robbery and burglary sentence last year, on September 27, 2019. At that time he nonetheless was still retained in DOCCS' custody, and transferred to Fishkill Correctional Facility and placed in Residential Treatment Facility (RTF) status to begin serving his 5-year PRS in confinement, which carries a current expiration date of September 27, 2024.

Respondent contends, and the Third Department agreed, that he is not lawfully subject to the SARA residence restrictions because the statute expressly and unequivocally requires that a subject-individual must be *currently* serving a sentence for a designated sex offense conviction. Respondent is not currently serving a sentence for a sex offense, having fully served, satisfied, and discharged the 1989 sentence for a sex offense in 2003, some 17 years ago. Because he therefore is not subject to SARA, DOCCS and Parole are obligated to release him from custody immediately.

ARGUMENT

THE SARA RESIDENCY RESTRICTIONS DO NOT APPLY TO RESPONDENT BECAUSE HE IS NOT CURRENTLY SERVING A SEX OFFENSE.

1. The Plain Language of the Statute Is Not Ambiguous and Makes Clear SARA Does Not Apply to Respondent.

The statutory text is "the best evidence of legislative intent. As a general rule, a statute's plain language is dispositive." Polan v. State of New York Insurance Dept., 3 N.Y.3d 54, 58 (2004). Further, any special competence or expertise an administrative agency may have "does not come into play where . . . [the court is] called upon to decide a question of 'pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent.'" Id. (citation omitted); see also DeVera v. Elia, 152 A.D.3d 13 (3d Dep't 2017).

Throughout this case, appellants have attempted to inject ambiguity into the SARA statute where there simply is none. They have sought do so by repeatedly and in varying ways essentially "re-writing" both the language and phrasing of the statute in an effort to argue how the language could be read differently than it plainly reads. This has largely entailed, as it did once again in their September 21 letter brief, a sort of deconstructing/re-writing of the statute's plain text and phrasing in order to emphasize a different conjunctive reading of the several relevant clauses.

Indeed, the very first sentence of appellants' argument on page 4 of their letter brief is the epitome of such grammatical contortions they must undertake to inject the necessary ambiguity they seek. It is the poster child, in fact, for how they endeavor to veritably re-write and paraphrase the statute's language in order to wrestle and subdue out of it their reading and interpretation.

Appellants' efforts are entirely improper and unnecessary, and are readily seen to violate not only the core principles of statutory construction but also basic English language grammar and usage. Instead of entertaining appellants' word games, emphases on conjunctions, and what the text might mean, all one needs to do here to readily comprehend what the statute means is look at the plain words of the statute themselves. Specifically and foremost, the words "a person" and "such person."

It is undisputed that SARA (Executive Law §259-c(14)) clearly aims to protect children by keeping certain sex offenders away from school grounds or other places where children may frequent. When first enacted as part of the Sexual Assault Reform Act of 2000, the Executive Law provision (hereinafter referred to as "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.

In 2005, the legislature amended SARA to include within its scope level three sex offenders, including those who had never victimized a child. The amendment was accomplished by inserting the words "or such person is a level three sex offender" immediately after the language referring to the age of the victim.

Use of the term "such person" can only be reasonably understood to be a grammatical shorthand referring back to the only previous reference in the statute to "a person," which is the "person serving a sentence for an [enumerated] offense." Thus the SARA statute, as amended, makes it as plain as the English language allows that a level three sex offender, just like a sex offender whose victim is a child, is subject to the school prohibition only if currently serving a sentence for an enumerated sex offense.

There is no other way to interpret the text of Executive Law Section 259-c(14). Use of the term "such person" is conclusive, irrefutable proof that the legislature intended level three sex offenders to be subject to SARA only when currently serving a sentence for an offense enumerated in the statute.

As if it were even necessary, there is yet more in the text that makes clear SARA only applies to individuals serving a sentence for an enumerated offense. After describing the individuals included within its scope, the statute then states, "the board shall require . . . that *such sentenced offender* shall refrain from knowingly entering into or upon any school grounds." (emphasis added). Who is "such sentenced offender?" In the first instance, it has to be the person serving a sentence for an [enumerated] offense" because that is the only previous reference in §259-c(14) to an offender with a sentence. Again, on that basis alone as well, SARA can only apply to individuals serving a sentence for an enumerated offense.

And, of course, "such sentenced offender" does not refer to every person serving a sentence for an enumerated offense. Rather, the term is a shorthand for the qualifiers that preceded it. Thus "such sentenced offender" applies to a person to be released to community supervision from a sentence for an enumerated offense whose victim was under 18 or who is a level three sex offender. Linguistically and grammatically, there is no other way to understand the text.

Indeed, it seems virtually impossible for the legislature to have drafted language that would have made it any clearer that level three sex offenders are subject to SARA only when they are current serving a sentence for an enumerated sex offense. Perhaps, instead of employing the term "such person," the legislature could have written for a second time a "person serving a sentence for an offense defined in . . . ." But that would have sounded jarringly repetitive and begged the question as to whether the legislature's command of written English was so poor as to not understand it could use the shorthand "such person" to refer to service of a

sentence for those enumerated offenses.

On the flip side, had the legislature amended SARA with the genuine intent of untethering level three sex offenders from the requirement of current service of a sentence for an enumerated sex offense, as appellants would have it, lawmakers surely would have inserted the language about level three offenders prior to the text about current service of a sentence. Thus, they simply would have written that "where a person designated a level three sex offender . . . or where a person serving a sentence for an [enumerated] offense . . . and the victim of such offense was under the age of eighteen . . ., is released on parole or conditionally released . . . the board shall require . . . that such persons shall refrain from knowingly entering into or upon any school grounds." Placing the level three designation before reference to service of the sentence and using the conjunction "or" to link them would have clearly expressed the intent appellants proclaim; namely, to subject level three offenders to SARA whenever they are to be placed on community supervision for any crime, not just for current service of a sentence for a designated offense.

Thus it is apparent that appellants invite the Court to read §259-c(14) as if the legislature had amended the text in the above fashion when it did no such thing. Stated differently, appellants ask this Court to find that the amendment was drafted in such a terribly obtuse and flawed manner that the text is open to appellants' interpretation. They argue lawmakers reasonably may have meant that SARA applies to all level three sex offenders, even those not currently serving a sentence for an enumerated offense, when the legislature clearly could have meant no such thing where it had such a simple textual way it could have clearly expressed such intent.

Appellants' position would require a degree of legislative incompetence breathtaking in scope and would have the judicial branch rewrite the statute. If the legislature's handiwork made no sense and, despite the clear language, produced an irrational result, arguably that could provide a basis for the courts to step in and fix an obviously flawed statute. But here, precisely the opposite is true. The text of §259-c(14) reflects the commonsensical and obvious legislative intent to subject level three sex offenders to the identical prohibition to which only sex offenders who had victimized a child had previously been subjected and would continue to be subjected.

Respondent thus does not fall within the statute's criteria. Although he has

been designated a level three sex offender under the SORA registration law, such designation was in connection with a crime and conviction whose sentence expired more than 16 years ago. Because he is not currently serving a sex offense at all, enumerated or otherwise, appellants' application of the SARA restrictions to him is unlawful.

The issue in this case genuinely is precisely that simple. And yet, due to appellants' strained and flawed reading of the statute, together with respondent's unfortunate poverty, homelessness, and inability to reside outside of a shelter, appellants have already made respondent serve over three additional years of unnecessary and gratuitous imprisonment.

2. **The Legislative Intent Behind the Inclusion of Reference to Level Three Sex Offenders in the SARA Law Amendment is Just As Apparent As the Statutory Text.**

Appellants argue that unlike the alleged ambiguity of the statutory text, the legislative intent they champion is clear by looking to legislative history and engaging in reasoning about the 2005 amendment adding the language about level three sex offenders. They claim doing so leads to deriving an intent more faithfully in keeping with DOCCS' and Parole's interpretation. Nothing could be more incorrect.

While respondent agrees legislative intent is clear, the evidence of that intent is first and foremost based upon and apparent from the text itself, which, as noted, is always "the best evidence of legislative intent." Polan, 3 N.Y.3d at 58. "As a general rule, a statute's plain language is dispositive." Id. Here, for all the above reasons about the clarity of the plain text, there is no reason even to resort to parsing legislative history, yet this is precisely what appellants deign to do and invite the Court to join them in doing.

This is precisely the mistake that the Fourth Department engaged in in People ex rel. Garcia v. Annucci, 167 A.D.3d 199 (4th Dep't 2018). Garcia endorsed DOCCS' application of SARA to an individual in the same circumstances as respondent; namely, a level three sex offender who had long ago completed service of a sentence for a sex offense and who was current serving a new non-sex offense sentence. The Garcia Court first failed to recognize the conclusive nature of the plain

text of the statute, and instead unnecessarily and prematurely looked to legislative history of the 2005 amendment to derive lawmakers' intent. Not only was resort to legislative history entirely unwarranted and inappropriate given the clear meaning in the plain language of the statute, the Garcia Court also relied upon material in the legislative record that affords no reasonable or rational indication of the actual law makers' intentions.

The Garcia Court's flawed approach proceeded thusly. The court first wrongly concluded there were alternative possible constructions to the statutory language, none of which in fact were rational and which required eviscerating and effectively rewording the actual text to support DOCCS' interpretation and professed textual ambiguity. These alternate constructions included one that required reading the word "such" right out of the statute entirely. Another embraced appellants' grammatical contortions that the phrase "such person" might refer to "a person serving a sentence for an enumerated offense against a minor," all in a manner that artificially divorces the reference to level three sex offenders from the rest of the statutory text. Id. at 203. While none of these alternatives makes any sense at all, the Fourth Department used them to conclude the text was ambiguous and to justify turning to the legislative history, history which it then held "strongly supports respondents' [DOCCS] interpretation of the statute." Id.

On the contrary, Garcia cited no legislative history that supports appellants' view in the slightest, let alone strongly. Indeed, the court cited and relied upon material which it refers to as "the legislative record" that neither can be accurately described as legislative history nor which affords any reasonable or rational indication of the actual lawmakers' intentions in the wording of the amendment. Specifically, the Fourth Department panel in Garcia cited and principally relied upon letters not from any legislators, but from individuals and organizations lobbying to support or oppose enactment of the 2005 amendment legislation. These individuals' or organizations' views on, understandings of, or concerns about the proposed legislation have absolutely no bearing on actual legislative intent.

For instance, and quite shockingly, the Garcia Court placed great and particular emphasis upon a letter from the New York Civil Liberties Union (NYCLU) expressing opposition to the 2005 bill, again as if this could have any

modicum of probative value as to legislative intent.[1] While these lobbying materials, including this NYCLU letter, are not part of the present record in this proceeding, and while the undersigned has not seen these letters and materials directly, based on Garcia's discussion of them, it seems clear and can be strongly urged and with confidence that such materials are patently irrelevant to any notions of legislative intent. They can only reflect the views, however warranted or not, of the authors of such letters, not the intent of legislators. Moreover, even on the face of the selected quotes and language of the NYCLU letter, for instance, there is nothing to suggest either what the language of the statute and amendment might actually mean or to whom it may actually apply. In short, this Court should summarily reject the enormously flawed and deeply unsound Garcia decision, from its finding that the text was ambiguous to its excursion into and reliance upon legislative record material.

More recently, after the Negron appeal was briefed in this Court and the present case was briefed below, the Second Department has also accepted DOCCS' view of the SARA statute. People ex rel. Rosario v. Superintendent, Fishkill Corr. Facility, 180 A.D.3d 920 (2d Dept. 2020). However, despite appellants' attempt to portray this second Appellate Division's decision as bolstering their position, and in particular to mean that the correctness of the Third Department's decisions in Negron and in this case are subject to reasonable debate, Rosario supports no such view.

On the contrary, the Rosario Court's decision is both extremely cursory and even more deeply flawed than the Fourth Department's Garcia decision. The Second Department failed to even genuinely and critically consider and assess the issue presented, let alone examine the competing rationales between the Third Department in Negron and the Fourth Department in Garcia. Instead, the Second Department essentially punted, superficially holding merely that because two other

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1 Indeed, the quoted language of the NYCLU letter does not carefully or even accurately reflect the original statutory language of the 2000 SARA, let alone lend meaning to the language of the 2005 amendment. Yet, Garcia emphasized and quoted the letter at length. Specifically, the court noted the NYCLU author wrote, "Current law prohibits from school grounds certain past offenders whose victims were under the age of eighteen. The proposed law would apply this restriction to *all persons* designated 'Level Three' sex offenders." Id. at 204 (emphasis in original). In effect, this letter and the others the court considered and cited are fairly read only as reactions to the statute as the Board of Parole and DOCCS were interpreting and enforcing it, rather than as legal interpretations of the statute's meaning, let alone as evidence of legislative intent of the proposed amending legislation.

Appellate Divisions had decided the issue in different ways the statute must be ambiguous like Garcia had held. Id. at 922. Rosario so held without assessing the relative merits and thoroughness of those decisions. Thus the Rosario Court essentially uncritically accepted DOCCS', Parole's, and the Garcia Court's insupportable interpretations of the statute, its claimed ambiguity, and assessments of legislative intent.

Accordingly, not only is both the evidence and legislative history appellants seek to muster in support of their claimed legislative intent, their reasoning for what legislators intended can be shown to be deeply flawed. Indeed, their arguments as to what lawmakers must have meant when they amended SARA in 2005 strain all reasonable bounds of basic common sense and human reason.

As noted, when initially enacted in 2000, SARA only applied to sex offenders currently serving such a sentence who had victimized a person under the age of eighteen. Not surprisingly, the legislature believed at the time that sex offenders who had actually victimized a child were the individuals from whom children needed protection (i.e. the residence restrictions while on supervised community supervision). In 2005, the legislature decided that level three sex offenders, even those who had not victimized a child, posed a significant enough risk to justify their inclusion in SARA as well. As a result, the legislature amended the SARA law by inserting the wording about level three sex offenders, the provision directly at issue here.

Respondent submits that the intent, which should be obvious to all, was to place level three sex offenders on the same footing as sex offenders who had victimized a child by requiring them to stay away from school grounds. The intent surely was not to place greater restrictions upon such individuals (level three registrants) who had never victimized a child. Yet this is precisely and squarely where appellants' reasoning leads.

Appellants position requires drawing the conclusion that the legislature, after initially determining that children required no special protection from all level three sex offenders, decided to subject individuals who had never victimized a child to greater restrictions than those placed on pedophiles, child pornographers, and others sex offenders who had actually victimized children. That such conclusion must be drawn is because including all level three offenders, irrespective of the age of the victim, and most importantly, regardless of whether they are currently serving a sex

offense, would do precisely that.

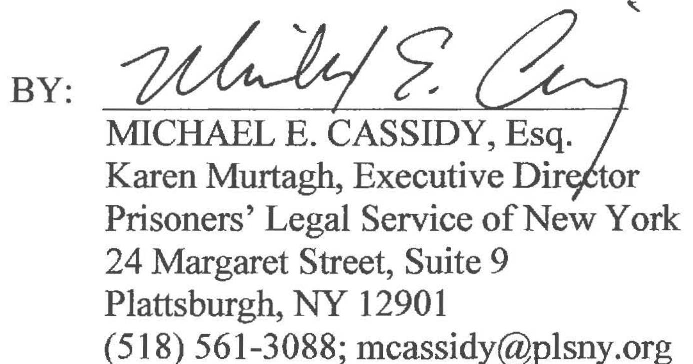
Under DOCCS' view, and thus under the courts' equally illogical holdings in Garcia and Rosario, consider that a person who had been convicted of sexually victimizing a child, who had fully served and satisfied that sentence, been designated level one or two, and then been returned to prison on a non-sex offense, would not be subject to the SARA. Conversely, a sex offender who had never victimized a child, satisfied that sex offense sentence, been designated level three, and then returned to prison on a non-sex offense, would be subject to the SARA. And there you have it. Surely this does not and cannot possibly make any reasonable or rational sense. It would be both an absurd and frankly offensive result, particularly where the entire and undisputed purpose of SARA is to help safeguard children from possible sexual offenses. This Court should not countenance such a nonsensical and repulsive reading of the statute, which is where all of appellants' arguments and reasoning inevitably lead.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that this Court affirm the Memorandum and Order of the Third Department.

Respectfully submitted,

BY:



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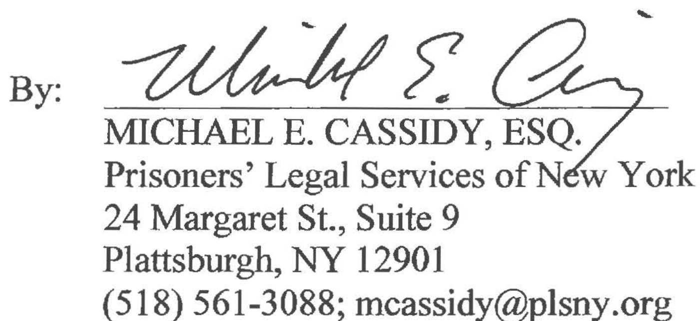
CERTIFICATE OF COMPLIANCE

Michael E. Cassidy, Esq., hereby certifies that this Rule 500.11 letter brief was prepared using a word-processing program and, in reliance upon the word-processing program's word count function, it contains 4,266 words, and thus complies with the word limitation in Rule 500.11(m).

DATED: October 3, 2020

By: 

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STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. ROLAND GREEN, DIN # 07-A-3298,

Respondent,

APL-2020-00124

-against-

Affirmation of Service
By Mail

DARWIN LACLAIR, Superintendent, Franklin Correctional Facility, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, and NEW YORK STATE DIVISION OF PAROLE,

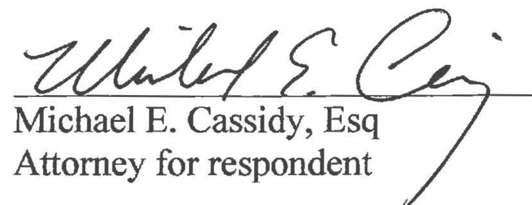
Appellants.

Michael E. Cassidy, Esq., an attorney duly admitted to the practice of law in the State of New York, hereby affirms under penalties of perjury:

1. I am not a party to this action, I am over 18 years of age, and I am employed at Prisoners' Legal Services of New York, 24 Margaret Street, Suite 9, Plattsburgh, New York 12901.

2. On the 3rd day of October, 2020, deponent served a copy of the annexed **Respondent's Letter Brief** in the above-captioned matter, upon appellants' counsel, Brian D. Ginsberg, Assistant Solicitor General, Office of the Attorney General, State of New York, The Capitol, Albany, New York, 12224, the address designated by said individual for that purpose, by depositing a true copy of same in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: October 3, 2020



Michael E. Cassidy, Esq
Attorney for respondent