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Supreme Court of the State of New York
Appellate Division – Third Department

The People of the State of New York ex rel. ROLAND GREEN,

Petitioner-Appellant,

v.

Case No. 528484

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

Respondents-Respondents.

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PRELIMINARY STATEMENT

Petitioner Roland Green, an inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), appeals a decision and judgment of Supreme Court, Franklin County (Feldstein, A.J.), holding that because he has been designated a level-3 sex offender, Executive Law § 259-c(14) of the Sexual Assault Reform Act ("SARA") requires that any release to community supervision be subject to the condition that he not knowingly enter within 1,000 feet of school property. Petitioner's appeal challenges that reading of the statute and thus raises the same SARA question decided by this Court in *People ex rel. Negron v. Superintendent of Woodbourne Correctional Facility*, 170 A.D.3d 12 (3d Dept. 2019), and *Matter of Cajigas v. Stanford*, 169 A.D.3d 1168 (3d Dept. 2019), both of which are now before the Court of Appeals following this Court's orders granting leave to appeal. For the reasons explained below, this Court should hold the present appeal in abeyance pending the rulings of the Court of Appeals in those cases, and then resolve it accordingly. We note that because the lower court converted this matter to a C.P.L.R. article 78 proceeding, the appeal is unlikely to become moot by the time of those rulings.

QUESTION PRESENTED

Does Executive Law § 259-c(14) require that *all* inmates who are level-3 sex offenders being released to community supervision—regardless of the crimes for which they are currently incarcerated—be prescribed the condition of release that they not knowingly enter within 1,000 feet of school property?

Supreme Court answered "Yes."

STATEMENT OF THE CASE

In 1989, petitioner was convicted in Supreme Court, New York County, of rape in the first degree and robbery in the first degree. (Record ["R."] 107.) For those offenses, he was sentenced to an aggregate indeterminate term of 5 to 15 years' imprisonment. (R. 107.) Petitioner finished serving that sentence in 2003. (R. 35.)

On the basis of the rape conviction, after notice and a hearing, petitioner was designated a level-3 sex offender under the Sex Offender Registration Act ("SORA"). (R. 99-100.) A level-3 risk designation indicates that "the risk of repeat offense is high and there exists a threat to the public safety." Correction Law § 168-l(6).

In 2007, petitioner was convicted in Supreme Court, New York County, of robbery in the second degree and burglary in the third degree. (R. 106.) He was sentenced to an aggregate determinate term of 13 years' imprisonment and 5 years' post-release supervision ("PRS"), a form of community supervision, akin to parole, for inmates who have committed violent felony offenses. (R. 106.)

In 2017, petitioner reached the conditional release date of his sentence. (R. 40.) The New York State Board of Parole determined, however, that because petitioner was a level-3 sex offender, Executive Law § 259-c(14) of the Sexual Assault Reform Act ("SARA") required it to impose upon him the condition of release that he not knowingly enter "school grounds," *i.e.*, any area within 1,000 feet of school property. (R. 44-45.) However, petitioner had not proposed for consideration by DOCCS any residence that would allow him to live in compliance with that condition. (R. 47.) Indeed, petitioner had not proposed for DOCCS consideration any residence *at all*—other than the New York City homeless-shelter system, which DOCCS regarded as inappropriate for reasons apart from SARA. (R. 47.) Accordingly, petitioner was maintained in DOCCS custody. (R. 47.)

Petitioner commenced a proceeding for a writ of habeas corpus in Supreme Court, Franklin County. He alleged an entitlement to conditional release on the ground that Executive Law § 259-c(14) of SARA did not require that he be issued the school-grounds condition as a condition of release. (R. 22-32.) He argued that the provision only required that condition for inmates who are level-3 sex offenders and also are currently serving a sentence for a sex offense enumerated in the provision, which his crimes of incarceration—robbery and burglary—were not. (R. 22-32.)

On August 15, 2018, Supreme Court, Franklin County (Feldstein, A.J.), issued a decision denying relief. At the threshold, the court held that petitioner had no right to immediate release from DOCCS custody because he had not yet reached the maximum expiration date of his prison term. (R. 13.) The court accordingly converted the matter to a C.P.L.R. article 78 proceeding and addressed the SARA issue in that context. (R. 14.) Specifically, upon an examination of the text, purpose, and history of the provision, the court held that Executive Law § 259-c(14) is properly read to require the Board of Parole to impose the school-grounds condition as a condition of release for *all* level-3 sex-

offender inmates—not just upon those level-3 sex-offender inmates currently incarcerated for statutorily specified sex crimes. (R. 14-17.)

This appeal followed. (R. 4-6.) As of the date of the filing of this brief, petitioner remains in DOCCS custody. He is scheduled to reach the maximum expiration date of his sentence in September 2019, and then to begin serving his 5-year PRS term. (R. 40.)

ARGUMENT

Preliminarily—and petitioner makes no contrary argument—this matter was properly converted to a C.P.L.R. article 78 proceeding. "[I]t is the expiration of the maximum sentence, and not the conditional release date, that is required to establish *entitlement* to release in a habeas corpus proceeding." *People ex rel. D'Amico v. Lilley*, 59 N.Y.S.3d 910, 911 (3d Dept. 2017) (citing cases). And petitioner has not yet reached the maximum expiration date of his sentence. Indeed, he will not reach the maximum expiration of his determinate term of imprisonment until September 2019. (R. 40.)

Although the circumstances at the time of Supreme Court's decision, as opposed to circumstances that might develop in the future, are the relevant circumstances for purposes of determining the proper

vehicle for relief here, habeas relief would also be improper once petitioner reaches that September 2019 date, completes his prison term, and begins serving PRS term, *even if petitioner begins such service in a DOCCS residential treatment facility*. This is because one of the reasons that DOCCS has retained petitioner in custody is that he has not proposed any residence, other than a homeless shelter, for consideration by DOCCS as an approved residence upon release. (R. 47.) Petitioner does not argue that this reason was insufficient or otherwise improper to justify retention in custody.

Thus, the SARA issue, which petitioner presents as the crux of his appeal, should be addressed in the converted article 78 context. On that point, to be sure, Supreme Court's ruling conflicts with this Court's current precedent. Specifically, subsequent to Supreme Court's ruling, this Court held in *People ex rel. Negron v. Superintendent of Woodbourne Correctional Facility*, 170 A.D.3d 12 (3d Dept. 2019), and *Matter of Cajigas v. Stanford*, 169 A.D.3d 1168 (3d Dept. 2019), that Executive Law § 259-c(14) only requires the Board of Parole to impose the school-grounds condition upon those level-3 sex-offender inmates who are currently incarcerated for sex crimes enumerated in that provision. And

petitioner is currently incarcerated on other offenses: robbery and burglary. (R. 106.)

However, in both *Negron* and *Matter of Cajigas*, this Court recently granted leave to appeal to the Court of Appeals. 2019 N.Y. Slip Op. 70124(U) (3d Dept. 2019); 2019 N.Y. Slip Op. 70123(U) (3d Dept. 2019). Accordingly, to help avoid the potential for inconsistent decisions, this Court should hold the present appeal in abeyance until those cases are definitively resolved, and then dispose of the matter consistent with that definitive resolution. *Cf. Kubricky Constr. Corp. v. Bucon, Inc.*, 282 A.D.2d 796, 797 (3d Dept. 2001) (explaining that "[a] stay is appropriate where the decision in one action will determine the all the questions in the other action, and the judgment on one [case] will dispose of the controversy in both actions," so as to "serve the goals of preserving judicial resources and preventing an inequitable result"); *see People v. Robles*, 153 Misc. 2d 859, 860 (Sup. Ct. Kings County 1992) (explaining that the court had held a motion in abeyance pending the resolution of a relevant case in the Court of Appeals); *Lupo v. New York City Bd. of Transp.*, 200 Misc. 403, 404 (Sup. Ct. N.Y. County 1951) (same).

Alternatively, if this Court proceeds to decide this matter in accordance with its prior precedent while the *Negron* and *Matter of Cajigas* Court of Appeals cases on the same legal question remain pending, we respectfully suggest that it grant leave to appeal this matter to the Court of Appeals. DOCCS and the Board of Parole maintain that Executive Law § 259-c(14) is ambiguous and therefore should be read in accordance with its purpose and legislative history to require the school-grounds condition for *all* level-3 sex-offender inmates.

As remedial legislation, Executive Law § 259-c(14) "should be construed to carry out the reforms intended and to promote justice, and interpreted broadly to accomplish its goals," subject only to limitations that have been "clearly expressed." *Kimmel v. State of New York*, 29 N.Y.3d 386, 396-397 (2017). Although a court "looks first to the plain language of the statute," *id.* at 392, the relevant language here is ambiguous—and contains no "clearly expressed" limitation foreclosing the DOCCS's and the Board's interpretation.

That language states that the school-grounds condition is required "where a person serving a sentence for [one or more specified sex offenses] *and* the victim of such offense was under the age of eighteen at the time

of such offense *or* such person has been designated a level three sex offender pursuant to [SORA], is released on parole or conditionally released." Executive Law § 259-c(14) (emphases added). The "and/or" formulation of this provision creates ambiguity, because the meaning of the provision depends on which connecting word—the "and" or the "or"—takes precedence. And this ambiguity allows the provision reasonably to be read as DOCCS and the Board read it: as making the condition mandatory for the parole or conditional release of any inmate who is either (1) serving a sentence for an enumerated sex offense committed against a minor victim or (2) a level-3 sex offender. Indeed, the Court of Appeals (albeit for a point that was not case-dispositive) recently read the language exactly this way, describing the school-grounds condition as mandatory "based on *either* an offender's conviction of a specifically enumerated offense against an underage victim *or* the offender's status as a level three sex offender." *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 473 n.5 (2018) (emphases added).

Further, the purpose and history of § 259-c(14), which are "not to be ignored, even if words be clear," *Kimmel*, 29 N.Y.3d at 397, demonstrate that the Legislature intended this meaning, under which

the school-grounds condition is mandatory for the parole or conditional release of *all* level-3 sex-offender inmates. For example, the Sponsor's Memorandum for the bill introducing the language at issue here stated that the bill's purpose was "[t]o prohibit sex offenders placed on conditional release or parole from entering upon school grounds or other facilities *where the individual has been designated as a level three sex offender*"—with no mention of a limitation based upon the nature of the crimes for which the individual is currently incarcerated. Bill Jacket, L. 2005, ch. 544, at 4 (emphasis added).

Thus, ultimately, DOCCS's and the Board's interpretation of the statute should therefore be upheld, notwithstanding this Court's current precedent to the contrary.

CONCLUSION

This appeal should be held in abeyance pending the determinations in the Court of Appeals of the *Negron* and *Matter of Cajigas* cases and then resolved accordingly.

June 13, 2019

Respectfully submitted,

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