SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of the Application of

LUIS ALVAREZ (DIN 16A0694, NYSID 09694706J),

Petitioner-Appellant,

v.

ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Respondent-Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

No. 2019-04287

Index No. 3123/18
Supreme Court
Queens County

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

BLAIR J. GREENWALD, an attorney duly admitted to practice in the courts of this State, affirms the following under penalty of perjury:

1. I am an Assistant Solicitor General in the Office of Letitia James, Attorney General of the State of New York, and counsel for respondent Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS). I make this affirmation in opposition to petitioner Luis Alvarez's Motion

for Permission to Appeal Pursuant to C.P.L.R. § 5602 (Lv. Mot.) to the Court of Appeals.

2. I make this affirmation based on my experience litigating this appeal, my review of the record in this matter and the records of this Office, and my conversations with attorneys in this Office and at DOCCS.

3. Alvarez is a certified sex offender currently serving a seven-year term of post-release supervision (PRS). As required by the Sexual Assault Reform Act of 2000 (SARA), the New York State Board of Parole directed that Alvarez reside at least one thousand feet from school grounds during his PRS term. Because Alvarez had not secured SARA-compliant housing in the community by the start of his PRS, DOCCS exercised its statutory authority to provide Alvarez with interim housing at a residential treatment facility (RTF).

4. Alvarez filed this C.P.L.R. article 78 proceeding challenging his RTF placement and requesting transfer to a different RTF or release to an appropriate residence. While his petition was pending, he moved to a SARA-compliant residence in the community. Supreme Court, Queens County (Pineda-Kirwan, J.), then dismissed his article 78 petition, and this Court unanimously affirmed.

5. Alvarez now seeks leave to appeal, rehashing his arguments that he did not receive adequate programming at the RTF, and that SARA's housing restriction applies only to sex offenders on parole or conditional release and not those on PRS. As this Court already correctly concluded, Alvarez failed to establish as a factual matter that he received inadequate RTF programming, and the plain statutory language shows that SARA applies to PRS. This Court should deny Alvarez's leave motion because this Court's decision does not conflict with any prior appellate decisions or raise any potentially meritorious issue of public importance. *See* 22 N.Y.C.R.R. § 500.22(b)(4).

BACKGROUND[1]

6. The Sexual Assault Reform Act of 2000 (SARA) requires the Board of Parole to impose a mandatory condition of release on certain sex offenders that prohibits them from residing within one thousand feet of school property. *See* Executive Law § 259-c(14); *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 466 (2018); *People v. Diack*, 24 N.Y.3d 674, 682

[1] The full background of this case is set forth in respondent's original brief on appeal. See Br. for Resp't at 4-13. The following summary is offered for the Court's convenience.

(2015). Although Executive Law § 259-c(14) refers to sex offenders subject to parole or conditional release, SARA also applies to qualifying sex offenders who are serving a term of PRS. This is because Penal Law § 70.45 requires the Board of Parole to "establish and impose conditions of post-release supervision *in the same manner and to the same extent* as it may establish and impose conditions in accordance with the executive law upon persons who are granted parole or conditional release." Penal Law § 70.45(3) (emphasis added).

7. Separately, Correction Law § 73 authorizes DOCCS "to use any residential treatment facility as a residence for persons who are on community supervision," including PRS, and provides that "[p]ersons who reside in such a facility shall be subject to conditions of community supervision imposed by the board." Correction Law § 73(10); *see id.* § 2(31). An RTF is defined as a "correctional facility consisting of a community based residence," which is located "in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release," among others. *Id.* § 2(6). An individual housed at an RTF is permitted "to go outside the facility during reasonable and necessary hours to engage in any activity

reasonably related to his or her rehabilitation and in accordance with the program established for him or her." *Id.* § 73(1). "While outside the facility," an RTF resident "shall be at all times in the custody of the department and under its supervision." *Id.* DOCCS is "responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities" and is required to "supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility." *Id.* § 73(2).

8. In 2013, when Alvarez was thirty-five, he victimized a minor under the age of thirteen. (Record on Appeal (R.) 92, 99, 332.) He pleaded guilty to first-degree sexual abuse and was sentenced to three years' incarceration and seven years' PRS.[2] (R. 15, 99.)

9. Prior to Alvarez's release to PRS, the Board of Parole imposed various PRS conditions on him, including the mandatory SARA condition requiring Alvarez to reside at least one thousand feet away from school grounds during his PRS. (R. 101-108.)

[2] His PRS term will expire in October 2024. *See* DOCCS, *Inmate Lookup*, http://nysdoccslookup.doccs.ny.gov/ (DIN 16A0694).

10. In October 2017, Alvarez was released to PRS subject to those conditions. (R. 38.) Because he was unable to secure a SARA-compliant community residence at that time, DOCCS transferred him to the RTF at Fishkill Correctional Facility to commence his PRS. (R. 38; *see* R. 106-108, 110.) Two months later, Alvarez was transferred to the RTF at Queensboro Correctional Facility. (*See* R. 175.)

11. In late 2017, Alvarez filed this article 78 proceeding. In his petition, he argued that his experiences at Queensboro did not satisfy the statutory requirements for an RTF—alleging that Queensboro was not providing him with education, employment, or on-the-job training, and that Queensboro policies precluded him from participating in one particular program that would satisfy RTF programming requirements. (R. 245-246; *see* R. 264 (describing Reentry Services Program).) In a supplemental petition, Alvarez also argued that SARA's residency restriction applies only to those on parole or conditional release, and not to those on PRS like Alvarez. (*See* R. 286-289.) As relief, Alvarez's petitions requested transfer to a different RTF or release to an appropriate residence. (R. 237-238, 265-266; *see also* R. 7-8.)

12. In June 2018, Alvarez moved from Queensboro RTF to SARA-compliant housing in New York City. (R. 321.)

13. Noting that Alvarez had received the relief he sought, Supreme Court dismissed the proceeding as moot. *See* Lv. Mot., Ex. A, Short Form Order & Judgment (Sup. Ct. Queens County Nov. 15, 2018).

14. This Court unanimously affirmed the dismissal of the petition. *See Matter of Alvarez v. Annucci*, 186 A.D.3d 704 (2d Dep't 2020). The Court first determined that Alvarez's claims could be reached under the exception to the mootness doctrine. *See id.* at 705-06. The Court then rejected Alvarez's claims on the merits. The Court determined that Alvarez failed to demonstrate he had received inadequate RTF programming such "that the conditions of [his] placement at Queensboro were in violation of DOCCS's statutory or regulatory obligations." *Id.* at 706. As for Alvarez's argument that SARA does not apply to PRS, the Court concluded that contention was "without merit." *Id.*

REASONS THAT LEAVE SHOULD BE DENIED

15. This Court's unanimous decision affirming the dismissal of Alvarez's article 78 proceeding provides no basis for leave to appeal to the Court of Appeals.

16. Alvarez's motion for leave to appeal merely rehashes arguments—rejected by this Court—that (i) he received inadequate programming at Queensboro RTF and (ii) SARA does not apply to PRS. The first issue is not of broad importance, the second is plainly lacking in merit, and neither implicates a conflict with other appellate decisions.

17. As this Court recognized, the first issue raises only fact-specific questions on this record about the conditions of Alvarez's individual placement at Queensboro RTF, *see Matter of Alvarez*, 186 A.D.3d at 706, and thus does not implicate broader legal issues of statewide importance warranting leave to appeal. In Supreme Court, Alvarez repeatedly characterized his claim as an individualized challenge to the alleged inadequacy of the Queensboro RTF *for him*.[3] He also

[3] (*See, e.g.*, R. 241 (Queensboro "is not an RTF for Mr. Alvarez"), 252 (Queensboro "is not a statutorily-compliant RTF for him"), 251 ("Queensboro is not a lawful RTF for Mr. Alvarez" (capitalization modified)), 242 ("Mr. Alvarez is not held at a facility that functions as an

argued that Queensboro did not provide sufficient RTF services *for him*, contending that the specific programming he received was insufficient to satisfy Correction Law § 73(2)'s requirement that an RTF provide him with "appropriate education, on-the-job training, and employment."[4]

18. This Court correctly rejected those claims as unsupported by the record and the Correction Law. *See Matter of Alvarez*, 186 A.D.3d at 706. The record demonstrated that Alvarez was employed as a porter, that he was "assigned to a work crew program directed toward the rehabilitation and total reintegration into the community of RTF residents," and that he worked both on the grounds of the correctional facility as well as "off grounds." (R. 335; *see* R. 252-253, 368-369.) The record further demonstrated that through these jobs, Alvarez earned "more than any inmate can earn in the prison vocational programs"

RTF for him . . . because he is not receiving RTF services"), 368 ("Queensboro is not an RTF for Mr. Alvarez" (capitalization modified)).)

[4] Contrary to Alvarez's contention, the Court did not conclude that this question was "novel and substantial." *See* Lv. Mot. at 6. The Court instead recognized that similar questions had been presented in other cases. *See Matter of Alvarez*, 186 A.D.3d at 705. The Court likewise did not find a significant question presented by Alvarez's claim that Queensboro was not a legitimate RTF for Alvarez specifically. *Id.* at 706. That fact-specific issue is not a broad matter of statewide importance supporting leave to appeal. *See* 22 N.Y.C.R.R. § 500.22(b)(4).

(R. 336). Alvarez thus failed to show that his experiences at Queensboro RTF fell short of providing "appropriate education, on-the-job training, and employment." Correction Law § 73(2); *see also, e.g.*, *Matter of Gonzalez*, 32 N.Y.3d at 468-69, 475 (rejecting similar challenge to Woodbourne RTF where petitioner "admittedly participated in Woodbourne's RTF program" and an outside work crew, and "earned higher wages than" Woodbourne prison inmates).

19. In his leave motion, Alvarez attempts to reframe his challenge as a broader claim that Queensboro does not function as an RTF for any sex offenders who "receive higher rate of pay than inmates, but no other programming whatsoever outside or inside the prison walls," and who are prohibited from participating in a particular reentry program. Lv. Mot. at 3. However, Alvarez did not present that broad claim in Supreme Court or in his appeal to this Court, and therefore has not preserved it for review by the Court of Appeals. *See, e.g.*, *Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359 (2003); *Brown v. City of New York*, 60 N.Y.2d 893, 894 (1983). Alvarez admitted in his brief to this Court that he left the facility to work as a porter and to meet with a parole officer (Br. for Pet'r-Appellant at 17)—which is consistent with other evidence in the

record showing that RTF residents at Queensboro are "assigned to a work crew program directed toward the rehabilitation and total reintegration into the community," including work performed both on and off the grounds of the facility. (R. 335.) And Alvarez never alleged below that all sex offenders at the Queensboro RTF fail to receive appropriate programming and employment. His presentations to Supreme Court made clear that his challenge concerned *his* ability to participate in a particular reentry program, as well as the work opportunities that Queensboro made available to him in particular. (*See* R. 245-246, 251-253, 368-369.) The record does not contain any evidence indicating that the exclusion of sex offenders from one particular reentry services program renders the Queensboro RTF inadequate for all sex offenders, regardless of what additional programming and employment they each individually receive.

20. In addition, resolution of whether Alvarez received adequate programming at Queensboro RTF would not affect the outcome of this case. Even if he did receive inadequate programming while at Queensboro RTF, he has since been released to SARA-compliant housing in the community: the very relief he sought in his article 78 petitions. (R. 237-238,

265-266; *see also* R. 7-8.) There is no reason to grant leave to appeal on a question that would have no effect on the outcome of this case.

21. Alvarez's second issue for leave, the applicability of SARA to persons on PRS, also does not merit further review. Plain statutory language makes clear that SARA applies to such persons, leaving no serious questions to resolve. *See* 22 N.Y.C.R.R. § 500.22(b)(4). This Court recognized as much when it rejected Alvarez's SARA argument as "without merit," *Matter of Alvarez*, 186 A.D.3d at 706—a ruling that does not conflict with any other appellate decision, *see* 22 N.Y.C.R.R. § 500.22(b)(4).

22. As this Court explained in detail in *Matter of Khan v. Annucci*, "SARA's school-grounds requirement unambiguously applies equally to certain sex offenders serving periods of PRS beyond the maximum date of their release from prison as it does to those 'on parole or conditionally released.'" 2020 N.Y. Slip Op. 04946, at *2 (2d Dep't 2020) (quoting Executive Law § 259-c(14)). Executive Law § 259-c(14) mandates imposition of the school-grounds requirement for certain sex offenders on parole or conditional release, and Penal Law § 70.45(3) "provides that the 'board of parole shall establish and impose conditions of post-release

supervision *in the same manner and to the same extent* as it may establish and impose conditions in accordance with the executive law upon persons who are granted parole or conditional release.'" *Matter of Khan,* 2020 N.Y. Slip Op. 04946, at *2 (emphasis added) (quoting Penal Law § 70.45(3)). This unambiguous statutory language "is also consistent with the legislative purpose behind SARA's school-grounds requirement"—namely, "SARA's legislative purpose of affording 'protection to children from the risk of recidivism by certain ... sex offenders,' regardless of the means by which those offenders obtained release from prison." *Id.* (citation omitted).

23. Nor does the Court's decision in this case conflict with other appellate decisions. The decision is consistent with this Court's reasoning in *Matter of Khan*. And it is consistent with and confirmed by the Court of Appeals' decision in *Matter of Gonzalez*. That case similarly recognized that the Penal Law requires SARA's school-grounds condition to be applied to covered sex offenders on PRS, citing Penal Law § 70.45(3) in explaining that the SARA residency restriction "is a mandatory condition of petitioner's PRS." *Matter of Gonzalez*, 32 N.Y.3d at 473 n.5.

WHEREFORE, it is respectfully requested that this Court deny Alvarez's Motion for Leave to Appeal.

Dated: New York, New York
October 9, 2020

BLAIR J. GREENWALD

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AFFIRMATION OF SERVICE

Blair J. Greenwald affirms upon penalty of perjury:

I am over eighteen years of age and an Assistant Solicitor General in the office of the Attorney General of the State of New York, attorney for the Respondent herein. On October 9, 2020, I served, with consent of opposing counsel or the opposing party, the accompanying Affirmation in Opposition to Motion for Leave to Appeal by sending one portable document format copy by electronic mail as complete and effective personal service upon the following named person(s):

Camilla Hsu
Center for Appellate Litigation
120 Wall Street, 28th Floor
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chsu@cfal.org

Blair J. Greenwald

From: Camilla Hsu
To: Greenwald, Blair
Subject: Re: Consent to email service in Matter of Alvarez v. Annucci, No. 2019-4287 (2d Dep"t)
Date: Wednesday, September 23, 2020 11:12:17 AM

[EXTERNAL]

Hi Blair,

Thanks. I will consent to email service of your response papers to this address.

Camilla

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Center for Appellate Litigation
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Pronouns: she/her/hers

From: Greenwald, Blair <Blair.Greenwald@ag.ny.gov>
Sent: Wednesday, September 23, 2020 10:58 AM
To: Camilla Hsu <chsu@cfal.org>
Subject: Consent to email service in Matter of Alvarez v. Annucci, No. 2019-4287 (2d Dep't)

Camilla,

I consent to email service of your appeal or leave to appeal papers for this case, which you can email to this address. Would you also consent to email service of our response papers?

Thanks,
Blair

Blair J. Greenwald
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