SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

In the Matter of LUIS ALVAREZ (DIN 16A0694, NYSID 09694706J),	
Petitioner-Appellant,	**NOTICE OF MOTION FOR PERMISSION TO APPEAL PURSUANT TO CPLR § 5602**
– against –	
ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,	
Respondent-Respondent.	

PLEASE TAKE NOTICE that, upon the annexed Affirmation and exhibits, the undersigned will move this Court, at 45 Monroe Place Brooklyn, NY 11201, on Tuesday, October 13, 2020, for an Order granting Petitioner permission to appeal in the above-captioned matter pursuant to CPLR § 5602.

Dated: New Haven, Connecticut
September 24, 2020

Yours, etc.,

CAMILLA HSU
Center for Appellate Litigation
120 Wall Street, 28th Floor
New York, NY 10005
Tel: (212) 577-2523 x517

TO: Motions Clerk
Supreme Court, State of New York
Appellate Division, Second Department
45 Monroe Place Brooklyn, NY 11201

Hon. Letitia James
Attorney General, State of New York
28 Liberty Street
New York, NY 10005
Attn: A.S.G. Blair Greenwald

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

In the Matter of LUIS ALVAREZ (DIN 16A0694, NYSID 09694706J),	:	
Petitioner-Appellant,	:	**AFFIRMATION IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL**
– against –	:	
ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,	:	
Respondent-Respondent.	:	

CAMILLA HSU, an attorney duly admitted to practice law in the Courts of this State, hereby shows and affirms under penalty of perjury:

1. I am affiliated with Robert S. Dean, Center for Appellate Litigation, which represented Mr. Alvarez *pro bono* in the trial court proceedings in the Dutchess and Queens County Supreme Courts and in his appeal to the Appellate Division, Second Department.

2. I submit this Affirmation and the accompanying exhibits in support of Mr. Alvarez's application to this Court for permission to appeal pursuant to CPLR § 5602.

3. Mr. Alvarez was granted poor person status by the Supreme Court, Dutchess County, in filing his petition for CPLR Article 78 relief and subsequently

by the Supreme Court, Queens County, when the matter was transferred to that venue; the trial court denied each of the claims Mr. Alvarez raised. See Exhibit A (Supreme Court, Queens County Decision). In Supreme Court, Mr. Alvarez proceeded *in forma pauperis* pursuant to CPLR § 1101(3). See Exhibit B (In Forma Pauperis Affidavit). Mr. Alvarez's financial condition has not improved since the granting of poor person relief below.

4. On August 19, 2020, this Court issued a decision affirming the trial court's decision that the petition be dismissed on different grounds from those invoked by the Supreme Court. See Exhibit C (Appellate Division, Second Department Decision) at 3. Finding that the Supreme Court should have applied the exception to mootness doctrine to review the merits of Mr. Alvarez's petition, this Court concluded, *inter alia*, that Mr. Alvarez had not shown that Queensboro Correctional Facility ("Queensboro") did not constitute a Residential Treatment Facility ("RTF") for people with sex offense convictions; that the conditions at the Queensboro RTF satisfied Respondent's statutory obligations; and that the Sexual Assault Reform Act ("SARA") provisions apply to people on post-release supervision after having served through to their maximum expiration date in prison. See id. Mr. Alvarez received notice of entry from Respondent by mail, in an envelope date stamped on August 27, 2020. See Exhibit D (Notice of Entry). This motion is timely filed. See CPLR §§ 5513(b), 2103(b)(2).

5. This Court has jurisdiction to decide this motion for leave to appeal as the case originated in the Supreme Court, Dutchess County, and was then transferred to Supreme Court, Queens County; Mr. Alvarez had an appeal as of right pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the CPLR; this Court finally determined the action, and its decision and order is not appealable to the Court of Appeals as a matter of right. See CPLR § 5602(a)(1)(i).

QUESTIONS PRESENTED

6. Two important questions are presented by this case:

   a. Whether a facility constitutes an RTF for sex offenders on post-release supervision when: (1) they receive a higher rate of pay than inmates, but no other programming whatsoever outside or inside the prison walls; and (2) by rule, they are prohibited from participating in re-entry programming.

   b. Whether SARA applies to a class of people who on the face of the statute do not fall within its ambit.

PROCEDURAL HISTORY

7. Mr. Alvarez pled guilty on January 26, 2016, to one count of sexual abuse in the first degree, under Penal Law § 130.65(4). He was sentenced on February 9, 2016, to three years' imprisonment with seven years of post-release supervision, to run concurrently with a one year sentence on a misdemeanor weapon

possession plea under a separate indictment. His conditional release date came and went, his maximum expiration date came and went, and Mr. Alvarez was not released to the New York City shelter residence he had proposed. He then filed an Article 78 petition in Supreme Court, Dutchess County seeking release from Fishkill Correctional Facility, transfer to a genuine RTF or approved housing in the community, and assistance in securing housing.

8. In his original petition, he argued that Fishkill was not an RTF as defined under Correct. Law §§ 2(6) and 73. He also argued that Respondent had failed to provide him with assistance in securing housing and so had abdicated its responsibilities under Correct. Law § 201(5). Lastly, he argued that his continued incarceration denied him equal protection of law, because he was being held simply for lack of funds to rent an apartment that Respondent would approve.

9. After the filing of the return and reply, on or about December 22, 2017, Mr. Alvarez was transferred to Queensboro Correctional Facility. He thereafter moved to Transfer Venue to Queens County and to supplement. Respondent did not oppose either motion, and the court granted both. In Queens County, in Supplemental Petitions, Mr. Alvarez urged that his placement at Queensboro was not authorized under Penal Law § 70.45(3), and that, for him, Queensboro was not an RTF within the meaning of Correct. Law §§ 2(6) and 73, because Queensboro explicitly precluded anyone with a sex offense conviction from participating in the

RTF programming there; he raised the same claims regarding lack of housing assistance and the equal protection claim as to Queensboro as he had as to Fishkill; he further claimed that Respondent had no authority to hold him at an RTF for more than six months past his maximum expiration date and that SARA did not justify his continued detention, because it did not apply to people like him who were serving PRS after fully completing their prison terms.

10. On June 8, 2018, Respondent released Mr. Alvarez from Queensboro and subsequently filed an Affirmation and Return arguing that Mr. Alvarez's petition was moot and disputing the merits of his claims.

11. After the submission of a reply and letters from the parties concerning this Court's decision in McCurdy v. Warden, Westchester County, 164 A.D.3d 692 (2nd Dept. 2018), the Supreme Court dismissed the petition as moot with regard to the claims challenging the applicability of SARA and the legitimacy of Queensboro as an RTF for people with sex offense convictions; denied the claim regarding the statutory authority for holding Mr. Alvarez for longer than six months past his maximum expiration date, citing this Court's decision in McCurdy; and did not rule on the equal protection claim.

12. Mr. Alvarez appealed to this Court, arguing that: (1) the exception to mootness doctrine should have been applied to the claim about the legitimacy of the Queensboro RTF urging a finding in his favor on that claim; (2) the SARA claim

was not moot and the statute still did not apply to him; (3) the exception to mootness doctrine likewise applied to his duration of RTF detention claim, which should have been granted; and (4) the case should be remanded for the lower court to decide his equal protection claim.

13. On August 19, 2020, this Court issued a decision affirming the trial court's decision that the petition be dismissed on different grounds from those invoked by the lower court. See Exhibit C at 3. Finding that the Supreme Court should have applied the exception to mootness doctrine to review the merits of Mr. Alvarez's petition, this Court concluded, that Mr. Alvarez had not shown that Queensboro did not constitute an RTF for people with sex offense convictions; that the conditions at the Queensboro RTF satisfied Respondent's statutory obligations; and that his remaining claims were unavailing.

14. The questions of Queensboro's legitimacy as an RTF for people convicted of sex offenses was raised below. See R251-53, 368-69; App. Br. for Pet. at 10-19. The question of the applicability of SARA was likewise raised below. See R286-89, 367-68; App. Br. for Pet. at 19-29. These questions are therefore preserved for review by the Court of Appeals.

ARGUMENT

15. The issues at hand are, as this Court noted, novel and substantial. See Exhibit B at 1-2. At stake are the rights people with sex offense convictions to be

free first from illegal incarceration, and then second from strictures that, by preventing them from living with loved ones, operate as crippling barriers to the shared community aim of successful reentry.[1] And as this Court further found, these issues are likely to recur and to evade review. See id. Respondent's filings in this matter are replete with references to the vast numbers of people ensnared at so-called RTFs by the imposition of SARA—their Article 78 filings, their fruitless searches for housing in New York City, the places they fill in a growing line to access the trickle of beds Respondent and the Department of Homeless Services make available each month. These references make clear the scale of the problem at hand. Does our statutory scheme countenance rendering so many people like Mr. Alvarez homeless, with severely diminished access to the support of family to reintegrate into society? Does it countenance detaining them at Queensboro well past the end of their sentences with no programming, and only a prison job for which they are paid some unspecified sum more than inmates? This Court should grant leave to appeal so that the Court of Appeals can decide these important questions.

[1] As respondent pointed out to the Court during the pendency of the appeal in this matter, the question of the applicability of SARA to people on PRS after fully serving their sentences has been presented to the Court of Appeals not in the main briefs, but in an amicus brief filed in People ex rel. McCurdy v. Warden, 32 N.Y.3d 1084 (2018). In his response to the amicus brief, the respondent in that matter argues that the Court of Appeals does not have jurisdiction to decide the SARA-applicability question in McCurdy. The Court of Appeals will hear argument in McCurdy on October 13, 2020. The question of whether placement of a sex offender on PRS at the Queensboro RTF comports with substantive due process and the Eighth Amendment's prohibition against cruel and unusual punishment will also be heard on October 13, 2020 in an appeal from this Court's decision in People ex rel. Ortiz v. Breslin, 183 A.D.3d 577 (2nd Dept. 2020). That case raises purely constitutional questions and does not present the issue in this case of whether the Queensboro RTF satisfies DOCCS' statutory obligations to sex offenders on PRS.

WHEREFORE, for the reasons stated above, it is respectfully requested that this Court grant permission to appeal on these two issues.

Dated: New Haven, Connecticut
September 24, 2020

Camilla Hsu

EXHIBIT A

Certification

STATE OF NEW YORK, COUNTY OF QUEENS, SS:

I, Audrey I. Pheffer, County Clerk and Clerk of Supreme Court Queens County,

do hereby certify that on March 11, 2019 I have compared

the document attached hereto,

3123/2018 ORDER/JUDGMENT filed 11/29/2018 page(s) 1-5.

with the originals filed in my office and the same is a correct transcript

therefrom and of the whole of such original in witness

whereto I have affixed my signature and seal.

Audrey I Pheffer

AUDREY I. PHEFFER
QUEENS COUNTY CLERK

Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN**
Justice

IA PART 36 05

----------X

IN THE MATTER OF LUIS ALVAREZ
(DIN 16A0694, NYSID 09694706J)

Petitioner(s),

Index No.: 3123/18
Motion Date: 8/9/18
Motion Cal. #: 2, 3
Seq. No.: 1, 2

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES, AND FOR RELIEF

-against-

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent(s).

----------X

FILED & RECORDED
NOV 29 2018
COUNTY CLERK
QUEENS COUNTY

The following papers read on this Article 78 proceeding by petitioner Luis Alvarez for a judgment in the nature of *mandamus* directing respondent to release petitioner from Queensboro Correctional Facility, on the grounds that said facility does not function as a residential treatment facility (RFT) under Correction Law §§2 (6) and 73; to either transfer petitioner to a legitimate RFT in his community pursuant to Penal Law §70.45(3) or release him to appropriate housing that complies with sex offender residency restrictions; and to assist petitioner with securing housing pursuant to Corrections Law §201(5) and 9 NYCCR 8002.7. In a separate second supplemental petition, petitioner seeks a judgment in the nature of *mandamus* directing respondent to release him from Queensboro Correctional Facility, where his incarceration at said facility under the pretext that he is placed in a RFT is unlawful and lacks statutory authority; and to release him to approved housing.

PAPERS	NUMBERED
Notice of Supplemental Petition-Verified Petition-Exhibits	1 - 4
Notice of Petition-Verified Petition-Exhibits	5 - 7
Answering-Affidavits-Exhibits	8 - 11
Notice of Second Supplemental Petition-Verified Petition-Exhibits	12 - 15
Answering-Affidavits-Exhibits	16 - 19
Replying	20 - 22

Upon the foregoing papers, and after conference, the petitions are consolidated for the purposes of a single judgment and are determined as follows:

This Article 78 proceeding was originally commenced in Duchess County on October 17, 2017, at which time petitioner Luis Alvarez was incarcerated at Fishkill Correctional Facility in Duchess County. Petitioner was transferred to Queensboro Correctional Facility located in Queens County, and the petitioner's motion for a change of venue and for leave to supplement the petition was granted, pursuant to a decision and order dated March 30, 2018. The first supplemental petition was thereafter filed in Queens County and a second supplemental petition was filed with the consent of respondent's counsel, pursuant to CPLR 3025 (b).

Respondent Anthony Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision (DOCCS) filed an affirmation and "return" in opposition to the initial petition which he referred to as a *habeas corpus* proceeding. Respondent thereafter served an answer in response to the second supplemental petition and all prior submissions, including the first supplemental petition and the original petition.

On January 26, 2016, Luis Alvarez, petitioner herein, pleaded guilty to one count of sexual abuse in the first degree, a Class D felony, (Penal Law §130.65.4), in full satisfaction of Bronx County Indictment Number 3315/14, and one count of criminal possession of a weapon in the fourth degree, a Class A misdemeanor (Penal Law §265.01), in full satisfaction of Bronx County Indictment Number 3224/14.[1] On February 9, 2016, Alvarez was sentenced to three years imprisonment with seven years of post-release supervision on the first degree sexual abuse plea, and one year of imprisonment on the fourth degree weapon possession plea, with the sentences to run concurrently. The court certified Alvarez as a sex offender pursuant to Correctional Law §168-d.

Petitioner's custody with the New York State prison system commenced on February 22, 2016. His conditional release date was April 29, 2017, and the maximum expiration date of his prison sentence was October 5, 2017. It is undisputed that during petitioner's incarceration he participated in various rehabilitative programs, and did not receive a single disciplinary infraction. On April 19, 2017, Alvarez was adjudicated a Level 1 sex offender and designated a sexually violent offender.

Prior to the maximum expiration date of his prison sentence, petitioner proposed that he be released to a shelter in the New York City area, where he was born and where his parents live. He did not propose the Bronx addresses of either of his parents, and said addresses are apparently not compliant with the Sexual Assault Reform Act of 2000 (SARA). His proposal of a shelter was rejected by the DOCCS.

The Board of Parole has the authority under Penal Law §70.45(3) to "impose as a condition of post-release supervision that for a period not exceeding six months immediately following release from the underlying term of imprisonment the person be transferred to and participate in the programs of a residential treatment facility [RTF]....". Here, the Board of Parole imposed such a condition on August 29, 2017, "until such time as a residence has been approved and such address has been verified to be located outside of the Penal Law definition of school grounds". Petitioner was transferred to Fishkill Correctional Facility on October 5, 2017, the same date that his maximum expiration date of his prison sentence expired. On December 22, 2017, he was transferred to Queensboro Correctional Facility.

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[1]Respondent has asserted that petitioner has served a determinate sentence as a result of his conviction by plea of one count of Sexual Abuse on the first degree (Penal Law §130.30 [1]) in Kings County, under case number 1405-2009 and two counts of Robbery in the 2nd degree (Penal Law §130.65 [04]). However, there is no evidence that petitioner entered such a plea in Kings County and the documentary evidence submitted herein pertains only to the plea entered by petitioner in the Supreme Court, Bronx County .

In his original and first supplemental petition, petitioner alleged that he remained incarcerated; that Fishkill Correctional Facility and Queensboro Correctional Facility were not lawful RFTs, as they failed to meet nearly all of the statutory requirements for such facilities under the Corrections Law; that he is not receiving RFT services; and that the DOCCS had failed to assist him in finding a SARA compliant address. In the original and first supplemental petitions, petitioner sought his release from said correctional facilities and release to approved housing.

In the second supplemental petition, petitioner alleges that he is currently and unlawfully incarcerated at Queensboro Correctional Facility; that more than six months have elapsed since his maximum expiration date, and that respondent does not have the authority to continue to hold him at an RTF; that his continued detention is not authorized by Correctional Law §73(10); that the SARA restrictions do not apply to him and do not authorize his continued detention. Petitioner seeks release from Queensboro Correctional Facility and release to approved housing.

Respondent's answer raises as a first objection in point of law that the relief sought is moot, as petitioner was released from Queensboro Correctional Facility on June 6, 2018, to suitable housing, so that there is no justiciable controversy over which the court has jurisdiction. As a second objection in point of law, respondent alleges that the DOCCS has the authority to require offenders on post-release supervision to reside in a RTF as long as needed. As a third objection in point of law, respondent alleges that Queensboro Correctional Facility is a proper RFT. As a fourth objection in point of law, respondent alleges that SARA applies to all offenders whose release conditions are set by the Board of Parole, including those on post-release supervision, and therefore applies to petitioner.

Petitioner's counsel in her reply affirmation asserts that the court should review the petition under the exception to mootness doctrine, on the grounds that the issues raised in the petition are likely to recur; the issues raised commonly evade review; and the petition raises significant and novel issues. Petitioner's counsel reiterates the arguments that he raised in the second supplemental petition.

Petitioner was released from Queensboro Correctional Facility to suitable housing on June 6, 2018, and he received the ultimate relief sought in the supplemental and second supplemental petitioners. Therefore, petitioner's challenges regarding his placement in Fishkill Correctional Facility and Queensboro Correctional Facility and the conditions of said placements are now moot (*see Matter of Kirkland v Annucci,* 150 AD3d 736 [2d Dept 2017]; *Matter of Gonzalez v Annucci*, 149 AD3d 256 [3d Dept 2017]; *People ex rel. Green v Superintendent of Sullivan Corr. Facility* , 137 AD3d 56, 58 [3d Dept 2016]).

Petitioner, however, requests that the merits of the second supplemental petition be considered under the exception to the mootness doctrine. This exception may apply where the circumstances of a case evince an overarching public interest in its adjudication, including "(1) a likelihood of repetition, either between the parties or among

other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *see City of New York v Maul*, 14 NY3d 499, 507 [2010]; *Matter of Elizabeth C. (Omar C.)*, 156 AD3d 193, 201 [2d Dept 2017]; *Matter of Kirkland v Annucci*, 150 AD3d 736 [2d Dept 2017]).

With respect to the issue of whether a sex offender on post-release supervision can be held over 60 days in an RTF, this issue has been determined by the Appellate Division, Second Department in *People ex rel. McCurdy v Warden, Westchester County Correctional Facility* (164 AD3d 692 [2d Dept 2018]). The court therein unequivocally held that "[t]he six-month limitation on residential treatment facility housing imposed by Penal Law § 70.45(3) does not conflict with, or limit, the application of DOCCS's authority under Correction Law §70(10) 'to use any residential treatment facility as a residence for persons who are on community supervision'". The Appellate Division's determination in *McCurdy* is binding on this court.

With respect to petitioner's claim regarding the applicability of SARA to him, the Board of Parole imposed a special condition on petitioner's post-release supervision, requiring that he acquire approved housing "located outside of the Penal Law definition of school grounds". The Penal Law defines "school grounds" as: "(a) . . . any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an 'area accessible to the public' shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants".

Courts have interpreted Section 220.00 (14) as creating a residency restriction prohibiting certain classes of sex offenders from living within 1,000 feet of a school (*see People v Diack*, 24 NY3d 674 [2015]). The practical effect is that any sex offender who is subject to the school grounds mandatory condition is unable to reside within 1,000 feet of a school or facility as defined in Penal Law § 220.00 (14).

The court finds that petitioner's claims regarding the applicability of SARA to sex offenders who are on post-release supervision do not warrant the finding of an exception to mootness. Here, the Board of Parole imposed a special condition on his post-release supervision on August 29, 2017. Neither the supplemental nor the second supplemental petition challenge the imposition of said special condition by the Board of Parole. The applicability of SARA to sex offenders on post-release supervision therefore is not properly before this court.

With respect to petitioner's claim that the DOCCS failed to satisfy its affirmative duty to assist him with securing housing, this claim is now moot. As the courts have considered the issue of meaningful assistance in securing housing, said issue is not novel and is not likely to evade judicial review (*see Gonzalez v Annucci,* 149 AD3d 256 [3d Dept 2017]; *Matter of Arroyo v Annuncci*, 2018 WL 4957508 [Sup Ct Albany County, 2018]; *see generally, People v Diack*, 24 NY3d 674, 682- 683[2015]). The exception to mootness doctrine therefore does not apply to this issue.

Finally, petitioner objects to Queensboro Correctional Facility being an RTF on the grounds that it does not serve as an RTF for him in particular, as he was unable to participate in certain programs at said facility, and was not afforded employment in the

surrounding community or educational training. Inasmuch as plaintiff has been released from said facility this claim is now moot, and petitioner has not raised any objections to mootness with respect to the provisions of Corrections Law §2 (6) and §73.

Accordingly, it is ORDERED and ADJUDGED that the relief sought in the supplemental petition and second supplemental petition is denied as moot, and the supplemental petition and second supplemental petition are dismissed.

This constitutes the JUDGMENT of this court.

Dated: November 15, 2018

DICCIA T. PINEDA-KIRWAN, J.S.C.

Audrey L Pheffer
CLERK

ENTERED
1:29 AM/PM
NOV 29 2018
COUNTY CLERK
COUNTY OF QUEENS

FILED & RECORDED
NOV 29 2018
COUNTY CLERK
QUEENS COUNTY

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS: CIVIL TERM

In the Matter of LUIS ALVAREZ (DIN 16A0694, NYSID 09694706J),	:	**CERTIFICATION PURSUANT TO CPLR § 1101(e) FOR POOR PERSON RELIEF**
Petitioner,	:	
- against -	:	
ANTHONY J. ANNUCCI, Acting Commissioner, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,	:	Index No. _____
Respondent.	:	

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

CAMILLA HSU, an attorney duly admitted to practice in the Courts of this State, does hereby affirm under the penalties of perjury that the following statements are true, except those made upon information and belief, which she believes to be true:

1. I am of counsel to Robert S. Dean, Center for Appellate Litigation,120 Wall Street, 28th Floor, New York, NY 10005, attorney for the Petitioner in the above-captioned litigation related to his continued incarceration by Respondent after his release date; enclosed is a copy of the Petition for C.P.L.R. Article 78 relief.

2. I make this certification pursuant to Section 1101(e) of the Civil Practice Law and Rules on behalf of Petitioner upon the ground that I have determined that Petitioner is unable to pay costs, fees, and expenses necessary to pursue this litigation.

3. Per section 1101(3) of the C.P.L.R., a motion is not required in order for Petitioner to be excused from paying the costs, fees, and expenses necessary to pursue this litigation, as Petitioner is represented by Center for Appellate Litigation, a non-profit organization which has as its primary purpose the furnishing of legal services to indigent

persons.

4. As Petitioner's attorney, I certify that I have determined that Petitioner is unable to pay the costs, fees and expenses necessary to prosecute or defend the action. As such, pursuant to C.P.L.R. § 1101(3), all fees and costs relating to the filing and service shall be waived without the necessity of a motion and the case shall be given an index number.

Dated: New York, New York
October 25, 2017

CAMILLA HSU

EXHIBIT C

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D63716
L/htr

_____AD3d_____

Argued - February 27, 2020

REINALDO E. RIVERA, J.P.
HECTOR D. LASALLE
BETSY BARROS
ANGELA G. IANNACCI, JJ.

2019-04287

DECISION & ORDER

In the Matter of Luis Alvarez, appellant,
v Anthony J. Annucci, etc., respondent.

(Index No. 3128/18)

Robert S. Dean, New York, NY (Camilla Hsu of counsel), for appellant.

Letitia James, Attorney General, New York, NY (Anisha S. Dasgupta and Blair J. Greenwald of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent, Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision, inter alia, to release the petitioner from Queensboro Correctional Facility, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Queens County (Diccia T. Pineda-Kirwan, J.), entered November 29, 2018. The order and judgment granted the respondent's motion to dismiss the petition and dismissed the proceeding.

ORDERED that the order and judgment is affirmed, without costs or disbursements.

In 2016, the petitioner was convicted of sexual abuse in the first degree and was sentenced to a determinate term of imprisonment of three years, to be followed by seven years of postrelease supervision. He reached the maximum expiration date of his prison sentence on October 5, 2017. At that time, the New York State Department of Corrections and Community Supervision (hereinafter DOCCS) transferred him to Fishkill Correctional Facility, then to Queensboro Correctional Facility (hereinafter Queensboro), which DOCCS has designated a residential treatment facility (*see* 7 NYCRR 100.90[c][3]).

The petitioner commenced this proceeding pursuant to CPLR article 78 to compel the

respondent, Anthony J. Annucci, Acting Commissioner of DOCCS, inter alia, to comply with his obligations pursuant to Correction Law § 201(5) and 9 NYCRR 8002.7 to assist the petitioner in finding housing located more than 1,000 feet from "school grounds" (Executive Law § 259-c[14]; Penal Law § 220.00[14]), and to release him from Queensboro to either a residential treatment facility, as defined by Correction Law § 2(6), or to approved housing in the community, in compliance with the residency restrictions of the Sexual Assault Reform Act of 2000 (L 2000, ch 1, as amended; hereinafter SARA). During the pendency of the proceeding, DOCCS transferred the petitioner to community housing. The Supreme Court granted the respondent's motion to dismiss the petition and dismissed the proceeding. The court concluded, inter alia, that the proceeding had been rendered academic by the petitioner's release to compliant housing, and that no exceptions to the mootness doctrine applied. The petitioner appeals, seeking reinstatement of the petition and a determination on the merits.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713; *see Matter of Abbygail G. [Christine Y.-Karen M.]*, 177 AD3d 878, 880). "Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries. Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [citation omitted]). Here, the contentions raised in connection with this proceeding have been rendered academic because the petitioner has been released from the residential treatment facility to community housing (*see Matter of Kirkland v Annucci*, 150 AD3d 736, 737-738). However, an exception to the mootness doctrine is warranted here.

"The mootness doctrine precludes courts from considering questions which, although once active, have become academic by the passage of time or by a change in circumstances" (*Matter of Melinda D.*, 31 AD3d 24, 28; *see Matter of Hearst Corp. v Clyne*, 50 NY2d at 714). "'If academic, an appeal is not to be determined unless it falls within the exception to the doctrine that permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would otherwise be nonreviewable'" (*Matter of Abbygail G. [Christine Y.-Karen M.]*, 177 AD3d at 880, quoting *Matter of Melinda D.*, 31 AD3d at 28; *see Matter of Hearst Corp. v Clyne*, 50 NY2d at 714). "'The exception to the mootness doctrine requires the existence of three common factors: (1) a likelihood the issue will repeat, either between the same parties or among other members of the public, (2) an issue or phenomenon typically evading appellate review, and (3) a showing of significant or important questions not previously passed upon'" (*Matter of Abbygail G. [Christine Y.-Karen M.]*, 177 AD3d at 880, quoting *Matter of Melinda D.*, 31 AD3d at 28; *see Matter of Hearst Corp. v Clyne*, 50 NY2d at 714).

Here, all three factors excepting this appeal from the mootness doctrine are present. The issue of whether a certain facility is a legitimate residential treatment facility has already resulted in litigation, is significant, and will typically evade appellate review due to the passage of time during which individuals subject to postrelease supervision, such as the instant petitioner, obtain SARA-compliant housing (*see Matter of Gonzalez v Annucci*, 32 NY3d 461, 470-471; *People ex rel. Rosario v Superintendent, Fiskill Correctional Facility*, 180 AD3d 920). Thus, the Supreme Court

should have applied the exception to the mootness doctrine and reached the merits of the petitioner's claims. However, we agree with the court's decision to dismiss the proceeding, albeit on different grounds than those stated by the court.

On this record, the petitioner has failed to demonstrate that Queensboro is not a legitimate residential treatment facility for sex offenders, or that DOCCS's determination to place him there was irrational. Moreover, the evidence fails to demonstrate that the conditions of the petitioner's placement at Queensboro were in violation of DOCCS's statutory or regulatory obligations (*see* Correction Law §§ 2[6], 73[2]).

The petitioner's remaining contentions are without merit.

RIVERA, J.P., LASALLE, BARROS and IANNACCI, JJ., concur.

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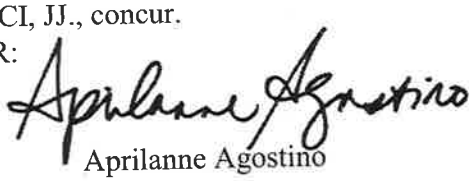

Aprilanne Agostino
Clerk of the Court

EXHIBIT D

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Liberty Street
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Camilla Hsu
Center for Appellate Litigation
120 Wall Street, 28th Floor
New York, NY 10005

10005-400328

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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L/htr

_____AD3d_____

Argued - February 27, 2020

REINALDO E. RIVERA, J.P.
HECTOR D. LASALLE
BETSY BARROS
ANGELA G. IANNACCI, JJ.

2019-04287

DECISION & ORDER

In the Matter of Luis Alvarez, appellant,
v Anthony J. Annucci, etc., respondent.

(Index No. 3128/18)

Robert S. Dean, New York, NY (Camilla Hsu of counsel), for appellant.

Letitia James, Attorney General, New York, NY (Anisha S. Dasgupta and Blair J. Greenwald of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent, Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision, inter alia, to release the petitioner from Queensboro Correctional Facility, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Queens County (Diccia T. Pineda-Kirwan, J.), entered November 29, 2018. The order and judgment granted the respondent's motion to dismiss the petition and dismissed the proceeding.

ORDERED that the order and judgment is affirmed, without costs or disbursements.

In 2016, the petitioner was convicted of sexual abuse in the first degree and was sentenced to a determinate term of imprisonment of three years, to be followed by seven years of postrelease supervision. He reached the maximum expiration date of his prison sentence on October 5, 2017. At that time, the New York State Department of Corrections and Community Supervision (hereinafter DOCCS) transferred him to Fishkill Correctional Facility, then to Queensboro Correctional Facility (hereinafter Queensboro), which DOCCS has designated a residential treatment facility (*see* 7 NYCRR 100.90[c][3]).

The petitioner commenced this proceeding pursuant to CPLR article 78 to compel the

respondent, Anthony J. Annucci, Acting Commissioner of DOCCS, inter alia, to comply with his obligations pursuant to Correction Law § 201(5) and 9 NYCRR 8002.7 to assist the petitioner in finding housing located more than 1,000 feet from "school grounds" (Executive Law § 259-c[14]; Penal Law § 220.00[14]), and to release him from Queensboro to either a residential treatment facility, as defined by Correction Law § 2(6), or to approved housing in the community, in compliance with the residency restrictions of the Sexual Assault Reform Act of 2000 (L 2000, ch 1, as amended; hereinafter SARA). During the pendency of the proceeding, DOCCS transferred the petitioner to community housing. The Supreme Court granted the respondent's motion to dismiss the petition and dismissed the proceeding. The court concluded, inter alia, that the proceeding had been rendered academic by the petitioner's release to compliant housing, and that no exceptions to the mootness doctrine applied. The petitioner appeals, seeking reinstatement of the petition and a determination on the merits.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713; *see Matter of Abbygail G. [Christine Y.-Karen M.]*, 177 AD3d 878, 880). "Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries. Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [citation omitted]). Here, the contentions raised in connection with this proceeding have been rendered academic because the petitioner has been released from the residential treatment facility to community housing (*see Matter of Kirkland v Annucci*, 150 AD3d 736, 737-738). However, an exception to the mootness doctrine is warranted here.

"The mootness doctrine precludes courts from considering questions which, although once active, have become academic by the passage of time or by a change in circumstances" (*Matter of Melinda D.*, 31 AD3d 24, 28; *see Matter of Hearst Corp. v Clyne*, 50 NY2d at 714). "'If academic, an appeal is not to be determined unless it falls within the exception to the doctrine that permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would otherwise be nonreviewable'" (*Matter of Abbygail G. [Christine Y.-Karen M.]*, 177 AD3d at 880, quoting *Matter of Melinda D.*, 31 AD3d at 28; *see Matter of Hearst Corp. v Clyne*, 50 NY2d at 714). "'The exception to the mootness doctrine requires the existence of three common factors: (1) a likelihood the issue will repeat, either between the same parties or among other members of the public, (2) an issue or phenomenon typically evading appellate review, and (3) a showing of significant or important questions not previously passed upon'" (*Matter of Abbygail G. [Christine Y.-Karen M.]*, 177 AD3d at 880, quoting *Matter of Melinda D.*, 31 AD3d at 28; *see Matter of Hearst Corp. v Clyne*, 50 NY2d at 714).

Here, all three factors excepting this appeal from the mootness doctrine are present. The issue of whether a certain facility is a legitimate residential treatment facility has already resulted in litigation, is significant, and will typically evade appellate review due to the passage of time during which individuals subject to postrelease supervision, such as the instant petitioner, obtain SARA-compliant housing (*see Matter of Gonzalez v Annucci*, 32 NY3d 461, 470-471; *People ex rel. Rosario v Superintendent, Fiskill Correctional Facility*, 180 AD3d 920). Thus, the Supreme Court

should have applied the exception to the mootness doctrine and reached the merits of the petitioner's claims. However, we agree with the court's decision to dismiss the proceeding, albeit on different grounds than those stated by the court.

On this record, the petitioner has failed to demonstrate that Queensboro is not a legitimate residential treatment facility for sex offenders, or that DOCCS's determination to place him there was irrational. Moreover, the evidence fails to demonstrate that the conditions of the petitioner's placement at Queensboro were in violation of DOCCS's statutory or regulatory obligations (*see* Correction Law §§ 2[6], 73[2]).

The petitioner's remaining contentions are without merit.

RIVERA, J.P., LASALLE, BARROS and IANNACCI, JJ., concur.

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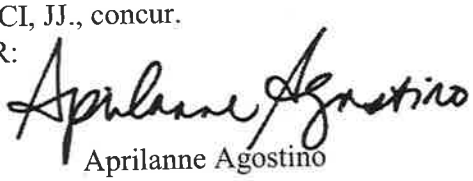

Aprilanne Agostino
Clerk of the Court

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

August 27, 2020

Camilla Hsu
Center for Appellate Litigation
120 Wall Street, 28th Floor
New York, NY 10005

Re: *Matter of Alvarez, Luis v. Annucci*, No. 2019-04287

Dear Camilla Hsu:

Please take notice that the enclosed is a true and correct copy of the Decision and Order entered on August 19, 2020 by the Office of the Clerk of the Appellate Division, Second Department in *Matter of Alvarez, Luis v. Annucci*, No. 2019-04287.

Please be advised that service of a cover letter together with an order or judgment constitutes service of that order or judgment with notice of entry. *Norstar Bank of Upstate N.Y. v. Office Control Sys., Inc.*, 78 N.Y.2d 1110 (1991).

Sincerely,

Oren L. Zeve
Assistant Solicitor General
212-416-8020

Encl.

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

In the Matter of LUIS ALVAREZ (DIN 16A0694, NYSID 09694706J),	:	
Petitioner-Appellant,	:	
– against –	:	**AFFIRMATION OF SERVICE**
ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,	:	
Respondent-Respondent.	:	

CAMILLA HSU, an attorney duly admitted to practice law in this state, does hereby affirm and show that on September 24, 2020, a copy of the within Motion for Permission to Appeal was served upon Hon. Letitia James, Attorney General, Attn: A.S.G. Blair Greenwald, via electronic mail, with Ms. Greenwald's prior consent to electronic service.

Dated: New Haven, Connecticut
September 24, 2020

_____
Camilla Hsu