STATE OF NEW YORK
COURT OF APPEALS

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.

Mot. No. 2021-19

Appellate Division
Second Department
No. 2019-04287

Supreme Court
Queens County
Index No. 3123/18

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

The Appellate Division, Second Department unanimously denied the underlying C.P.L.R. article 78 petition, which challenges petitioner Luis Alvarez's temporary placement in a residential treatment facility (RTF) during a period of post-release supervision (PRS) when Alvarez was unable to find housing that complied with the requirements of the Sexual Assault Reform Act of 2000 (SARA). Alvarez now seeks leave to appeal, asking this Court to review (i) whether he received sufficient programming at Queensboro RTF, and (ii) whether SARA applies to persons on PRS.

This Court should deny Alvarez's motion for leave to appeal. The Second Department's decision does not conflict with any decision of this Court or of another Department of the Appellate Division, and Alvarez's leave motion does not raise any potentially meritorious issue of public importance. Alvarez's challenge to the programming he received at Queensboro RTF raises only fact-specific and case-specific issues. And the plain statutory language of SARA and the Penal Law show that SARA's mandatory housing restriction applies to persons on PRS.

BACKGROUND

A. Statutory Background

1. Correction Law § 73

Correction Law § 73 authorizes the Department of Corrections and Community Supervision (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" of parole. Correction Law § 73(10); *see id.* § 2(31); *People ex rel. McCurdy v. Warden, Westchester County Corr. Facility*, 2020 N.Y. Slip Op. 06933, at *1 (N.Y. 2020). 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 and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released." Correction Law § 2(6); *see People ex rel. McCurdy*, 2020 N.Y. Slip Op. 06933, at *3.

Section 73 sets forth numerous substantive requirements for RTFs. 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," and "[w]hile outside the facility he or she shall be at all times in the custody of the department and under its supervision." Correction Law § 73(1). 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); *see People ex rel. McCurdy*, 2020 N.Y. Slip Op. 06933, at *5.

2. The Sexual Assault Reform Act of 2000 (SARA)

SARA, codified at Executive Law § 259-c(14), requires the Board of Parole to impose a 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); *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 2020 N.Y. Slip Op. 06934, at *4 (N.Y. 2020). Although the statute refers to sex offenders subject to parole or conditional release, SARA also applies to covered 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); *see People ex rel. McCurdy*, 2020 N.Y. Slip Op. 06933, at *3.

B. Factual and Procedural History[1]

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' imprisonment and seven years' PRS. (R. 15, 99.) The PRS conditions that the Board of Parole imposed on Alvarez included the mandatory SARA condition requiring Alvarez to reside at least one thousand feet away from school grounds during his PRS. (R. 101-108.)

In October 2017, Alvarez's term of imprisonment expired. (R. 38.) Because Alvarez was unable to secure a SARA-compliant community residence at that time, the Board of Parole transferred him to the RTF at Fishkill Correctional Facility to commence his PRS there.[2] (R. 38, 110.)

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[1] The full background of this case is set forth in the respondent's brief to the Second Department, a copy of which was submitted with Alvarez's leave motion. The following summary is offered for the Court's convenience.

[2] His PRS term will expire in October 2024. (*See* R. 39.)

In December 2017, Alvarez was transferred to the RTF at Queensboro Correctional Facility. (*See* R. 175.) There, Alvarez was employed as a porter and "assigned to a work crew program directed toward the rehabilitation and total reintegration into the community of RTF residents," which included work both on and off the grounds of the facility. (R. 335; *see* R. 252-253, 368-369.) Through these jobs, Alvarez earned "more than any inmate can earn in the prison vocational programs." (R. 336.)

In late 2017, Alvarez filed this article 78 proceeding. In a verified petition filed in Supreme Court, Queens County, he argued that the programming he received at Queensboro RTF did not satisfy statutory requirements. In particular, he alleged that Queensboro was not providing him with education, employment, or on-the-job training, and that Queensboro policies precluded him from participating in a particular RTF program. (R. 245-246; *see* R. 264 (describing Reentry Services Program).) In a supplemental petition, Alvarez argued that SARA's housing restriction applies only to sex offenders 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 a residence in the community. (R. 237-238, 265-266; *see also* R. 7-8.)

In June 2018, while the action was pending in Supreme Court, Alvarez was released from Queensboro RTF to SARA-compliant housing in New York City. *See* Aff. in Supp. of Mot. for Permission to Appeal ("Lv. Mot.") at 6. Noting that Alvarez had received the relief he requested, Supreme Court dismissed the proceeding as moot. *See id.*, Ex. A, Short Form Order & Judgment (Sup. Ct. Queens County Nov. 15, 2018).

The Appellate Division, Second Department unanimously affirmed the dismissal of the petition. The court first concluded that Alvarez's claims could be reached under the exception to the mootness doctrine; it then rejected his claims on the merits. *See Matter of Alvarez v. Annucci*, 186 A.D.3d 704, 705-06 (2d Dep't 2020). The court determined that Alvarez had failed to demonstrate that 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 persons on PRS, the court concluded that the argument was "without merit." *Id*.

Alvarez then moved in the Second Department for leave to appeal those two issues. The court denied his motion. *See* Lv. Mot., Ex F, Decision & Order on Mot. (2d Dep't Nov. 20, 2020).

REASONS FOR DENYING LEAVE

ALVAREZ DOES NOT IDENTIFY ANY APPELLATE CONFLICT OR MERITORIOUS ISSUE OF PUBLIC IMPORTANCE WARRANTING REVIEW BY THIS COURT

Alvarez's leave motion argues (i) that he received inadequate programming at Queensboro RTF and (ii) that SARA's mandatory housing restriction does not apply to persons on PRS. The first issue is not of broad public importance, the second is plainly lacking in merit, and neither implicates a conflict with any decision of this Court or among the Departments of the Appellate Division. Leave should thus be denied. *See* 22 N.Y.C.R.R. § 500.22(b)(4).

A. Alvarez's Fact-Specific Challenge to His Experience at Queensboro Is Not Leaveworthy.

Alvarez's challenge to the sufficiency of the programming he received at Queensboro RTF is not leaveworthy for at least two reasons.

First, that issue implicates only case-specific and fact-specific questions, not any broader legal issues of statewide importance. In Supreme Court, Alvarez repeatedly presented his claim as a challenge to his *individual* experience at the Queensboro RTF.[3] He argued that Queensboro did not provide sufficient RTF services *for him*, contending that the specific programming he received was insufficient to satisfy the statutory requirement that an RTF provide "appropriate education, on-the-job training, and employment." Correction Law § 73(2). The Second Department properly considered and rejected

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[3] (*See, e.g.*, R. 241 (Queensboro "is not an RTF for Mr. Alvarez"), 242 ("Mr. Alvarez is not held at a facility that functions as an RTF for him . . . because he is not receiving RTF services"), 251 ("Queensboro is not a lawful RTF for Mr. Alvarez" (capitalization modified)), 252 (Queensboro "is not a statutorily-compliant RTF for him"), 368 ("Queensboro is not an RTF for Mr. Alvarez" (capitalization modified)).)

Alvarez's fact-specific claims in light of the record evidence.[4] *Matter of Alvarez*, 186 A.D.3d at 706.

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, alleging that conditions at Queensboro RTF are "identical to those in general confinement" and that Queensboro prohibits sex offenders from participating in a particular reentry program that is available to other inmates. Lv. Mot. at 8-10. (*See* R. 264.) But Alvarez did not present that broader claim to the trial court and therefore has not preserved it for review by this Court. *See, e.g.*, *Parkin v. Cornell Univ.*, 78 N.Y.2d 523, 530-31 (1991); *Brown v. City of New York*, 60 N.Y.2d 893, 894 (1983).

Alvarez never alleged below that *all* sex offenders at the Queensboro RTF fail to receive appropriate programming and

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[4] Contrary to Alvarez's contention, the Second Department did not conclude that this fact-specific question was "novel and substantial." *See* Lv. Mot. at 8-9. The court recognized that objections to particular programming at various RTFs had been presented in other cases, *see Matter of Alvarez*, 186 A.D.3d at 706, but did not find that Alvarez's objections to his particular programming were of broad statewide importance.

employment. Alvarez's presentation to Supreme Court made clear that his challenge was based on *his* inability to participate in a particular reentry program, and *his* complaints regarding the other employment opportunities provided to him in particular. (*See* R. 245-246, 251-253, 368-369.) In any event, 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. *See* Correction Law § 73(3).

Second, Alvarez cannot show that the Second Department's analysis of RTF conditions conflicts with any decisions of this Court or another Department of the Appellate Division. In *Matter of Gonzalez v. Annucci*, this Court rejected a challenge raised by a petitioner at Woodbourne RTF who received RTF programming and was part of an outside work crew where he "earned higher wages than" Woodbourne prison inmates. 32 N.Y.3d 461, 468-69, 475 (2018). Here, similarly, Alvarez was employed as a porter and "assigned to a work crew program directed toward the rehabilitation and total

reintegration into the community of RTF residents," which included work both on and off the grounds of the facility and paid "more than any inmate can earn in the prison vocational programs." (R. 335-336; *see* R. 252-253, 368-369.) The Second Department correctly concluded that Alvarez, like the petitioner in *Gonzalez*, failed to demonstrate that his experience at Queensboro RTF violated statutory requirements to provide "appropriate education, on-the-job training, and employment." Correction Law § 73(2).

Alvarez misplaces his reliance on this Court's recent decision in *People ex rel. McCurdy*. In *McCurdy*, this Court distinguished between (i) individuals housed at RTFs for the first six months of PRS pursuant to Penal Law § 70.45 and (ii) individuals housed at RTFs after six months pursuant to Correction Law § 73(10)—explaining that DOCCS has statutory authority to require participation in RTF programming for the first group but not the second. *People ex rel. McCurdy*, 2020 N.Y. Slip Op. 06933, at *5. That distinction has no bearing here, because the Second Department assumed that Alvarez was entitled to RTF programming and still

concluded that he failed to show his programming was inadequate.[5] *See Matter of Alvarez*, 186 A.D.3d at 706.

B. There Is No Appellate Conflict Regarding SARA's Application to Persons on Post-Release Supervision, and Alvarez Raises No Serious Challenge to Such Application.

Alvarez's challenge to the applicability of SARA to persons on PRS likewise does not warrant further review. This Court has previously recognized that, in light of Penal Law § 70.45(3), the SARA residency restriction "is a mandatory condition of petitioner's *PRS*." *Matter of Gonzalez*, 32 N.Y.3d at 473 n.5 (emphasis added) (citing Penal Law § 70.45(3)). Executive Law § 259-c(14) requires the Board of Parole to apply the SARA condition to covered sex offenders who are "on parole or conditionally released." Executive Law § 259-c(14). The Penal Law, in turn, directs that the Board "shall establish and impose conditions of post-release supervision

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[5] Alvarez admits (Lv. Mot. at 10) that his case presents a different issue than that presented in *People ex rel. Johnson*, where this Court addressed whether application of the SARA condition violates substantive due process or constitutes cruel and unusual punishment, *see* 2020 N.Y. Slip Op. 06934, at *2-3.

in the same manner and to the same extent" as the Board does under the Executive Law for those on "parole or conditional release." Penal Law § 70.45(3) (emphasis added). That language unambiguously requires the SARA condition to be applied to covered sex offenders on PRS.[6]

As the Second Department recently explained, this plain language reading of SARA and the Penal Law is "consistent with . . . 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." *Matter of Khan v. Annucci*, 186 A.D.3d 1370, 1373 (2d Dep't 2020) (citation omitted).

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[6] In *People ex rel. McCurdy*, this Court rejected an argument that PRS is distinct from other forms of supervision and cannot be subject to stringent conditions of release, *see* 2020 N.Y. Slip Op. 06933, at *6—undermining Alvarez's argument here that SARA should apply only to parole and conditional release and not to the purportedly "distinct" scheme of PRS (Lv. Mot. at 12).

CONCLUSION

For the foregoing reasons, the Court should deny the motion for leave to appeal.

Dated: New York, New York
January 8, 2021

Respectfully submitted,

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