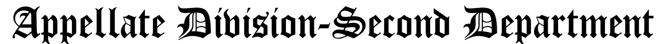
To be argued by

CAMILLA HSU
(15 minutes requested)

New York Supreme Court



Appellate Division-Second Department

IN THE MATTER OF LUIS ALVAREZ,

Petitioner-Appellant,

Appellate Division
Dkt. No. 4287/19

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

- against -

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

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

After reaching the maximum expiration date of his sentence in October 2017, Mr. Alvarez, adjudicated a Low Risk sex offender at a risk level determination hearing, was not released from prison to begin the period of post-release supervision imposed by the sentencing judge in his case. Instead, he remained unlawfully incarcerated at Fishkill and then Queensboro Correctional Facilities for more than half a year until his release in June 2018.

Across the course of the roughly eight months Mr. Alvarez spent in prison after he had finished his sentence, Respondent invoked two different statutes—Penal Law § 70.45(3) and Correct. Law §73(10)—to justify his continued detention. In fact, neither statute authorizes detention under the conditions, or for the duration, that Mr. Alvarez, and many others like him, experienced. As argued in Point I, the Queensboro facility in which he spent months ostensibly on community supervision was for him, and would be for anyone with a sex offense conviction, simply a general confinement facility. The lower court erred in declining to review this claim. As argued in Point IV, Correct. Law § 73(10) does not authorize Respondent to circumvent the six month limitation on RTF detention for people on post-release supervision. The lower court erred in denying this claim.

To this day, with Mr. Alvarez's period of post-release supervision still running, Respondent continues to impose a residency restriction pursuant to the Sexual Assault Reform Act ("SARA") on him. But, Mr. Alvarez is not lawfully subject to SARA's

restrictions. As argued in Point II, SARA on its face does not apply to people, like him, who are released to a term of PRS upon reaching the maximum expiration date of their incarceratory sentence, and the lower court erred in determining that this claim, which relates to an active condition of Mr. Alvarez's post-release supervision, was moot. In Point III, Mr. Alvarez argues that this case should be remanded for review of his equal protection claim, a claim which the lower court did not address in its decision and order.

QUESTIONS PRESENTED

1. Whether Mr. Alvarez's claim that Queensboro Correctional Facility may not serve as a residential treatment facility for people with sex offense convictions was moot and, if so, whether it should have been reviewed under the exception to mootness doctrine.

   Supreme Court answered: Yes and did not reach the subsequent question.

2. Whether SARA lawfully applies to people, like Mr. Alvarez, whose post-release supervision has commenced after the maximum expiration of the incarceratory sentence.

   Supreme Court answered: Yes.

3. Whether this case should be remanded for the lower court to decide Mr. Alvarez's equal protection claim.

   Supreme Court did not decide the claim.

4. Whether Correct. Law § 73(10) authorized detention at a residential treatment facility for more than six months past the maximum expiration date of Mr. Alvarez's determinate sentence.

   Supreme Court answered: Yes

FACTUAL AND PROCEDURAL HISTORY

The Proceedings in Dutchess County: Initial Filings and Motions to Transfer and Supplement

In preparation for Mr. Alvarez's release from prison, the Board of Examiners of Sex Offenders scheduled a risk level determination hearing for January 27, 2017. See Sex Offender Registration Act ("SORA") Order, R42. On April 19, 2017, the SORA court determined that Mr. Alvarez posed a low risk to re-offend. See id. He was then ten days shy of his conditional release date, but it would be more than a year before he was in fact released.

Mr. Alvarez had pled guilty on January 26, 2016, to one count of sexual abuse in the first degree, under Penal Law § 130.65(4). See Verified Petition, dated 10-27-17, R15. He had been 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 fourth-degree weapon possession plea under a separate indictment. See id. 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. See id., R15-16. Still in a prison uniform and surrounded by barbed wire, he filed an Article 78 petition in Supreme Court, Dutchess County. He sought release from Fishkill Correctional Facility, transfer to a genuine residential treatment facility ("RTF") or approved housing in the community, and assistance in securing housing. See id., R20-21.

In his original petition, he argued that Fishkill was not an RTF as defined under Correct. Law §§ 2(6) and 73 because it was not in or near New York City, the community in which he intended to reside; did not exist within a community and so was not "community-based"; did not provide programs aimed at rehabilitation and reintegration; did not provide education, training, or employment; and did not allow him the opportunity to leave the facility for rehabilitative activities. See id., R24-27. 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). See id., R28-31. 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. See id., R31-32.

In its Affirmation and Return, Respondent argued that Mr. Alvarez's placement was authorized under Penal Law § 70.45(3) as a condition of post-release supervision; that DOCCS had satisfied its obligation to assist with finding housing because parole officers in Brooklyn were in the process of investigating residences for Mr. Alvarez and four residences had been considered; that an agreed procedure between Respondent and the Department of Homeless Services ("DHS") meant that Respondent could not secure housing for Mr. Alvarez by taking him to DHS's intake shelter; that Fishkill had legally been designated as an RTF; that, at 60 miles distance from New York City, it was close enough to meet the statutory definition; that Fishkill was no less "community-based" than another facility that had been found to

satisfy the statutory requirements; that the programming there was sufficient under the statute; that, as to the equal protection claim, the classifications that had led to Mr. Alvarez's continued detention were not suspect ones and so were subject only to rational basis review; and that there was a rational basis for imposing the condition that Mr. Alvarez remain at Fishkill. See Affirmation and Return, dated 11-28-17, R87-97.

Mr. Alvarez filed a reply, arguing that the exhibits attached to Respondent's affirmation and return demonstrated that Respondent had taken only minimal action to find housing for Mr. Alvarez and had for several months taken no action at all; that Respondent's exhibits demonstrated that the action taken had been for a wider population, not for Mr. Alvarez in particular; that Respondent's return showed that DHS was obligated to provide housing for Mr. Alvarez; that Respondent had not provided Mr. Alvarez with programming at Fishkill, as required by the plain language of the relevant statute; and that wealth-based discrimination in this context should be treated with heightened scrutiny. See Reply Affirmation, dated 12-12-17, R163-68.

On or about December 22, 2017, Mr. Alvarez was transferred to Queensboro Correctional Facility, where he continued to live as an inmate, without meaningful programming, access to resources to facilitate his community reintegration, or assistance with finding housing. He then filed a Motion to Transfer Venue to Queens County and a Motion to Supplement with a Proposed Supplemental Petition. See Motion to Transfer Venue, dated 1-24-18, R171, and Motion for Leave to

Supplement, dated 1-24-18, R188. Respondent did not oppose either motion, and the court granted both. See Respondent's Response to Motions for Leave to Supplement and to Transfer, R233, and Decision and Order on Motions To Transfer and for Leave to Supplement, R234.

The Proceedings in Queens County: Supplemental Petitions, Affirmation and Return, Reply, Letters to the Court, and Decision and Order

In Queens County, on April 25, 2018, Mr. Alvarez filed the supplemental petition he had previously proposed in Dutchess County. See Proposed Supplemental Petition, R206-32, and Supplemental Petition, dated 4-25-18, R237-64. In it, he 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 Respondent's own directive concerning Queensboro explicitly precluded anyone with a sex offense conviction from participating in the RTF programming there; that at Queensboro he was still not receiving the assistance with securing housing to which he was entitled; and that at the new facility he was still being deprived of equal protection of law on the basis of his poverty. See Supplemental Petition, R237-56.

At that point, Mr. Alvarez had been detained for over half a year past his maximum expiration date. Even Respondent's own rationale for his continued detention was no longer applicable. With no release in sight, Mr. Alvarez filed a Second Supplemental Petition with Respondent's consent on May 8, 2018. See

Second Supplemental Petition, dated 5-8-18, R265-66. In that petition, he argued that Respondent had no authority to hold him at Queensboro any longer because the six months permitted under the provision Respondent had cited to continue to detain him—Penal Law § 70.45(3)—had already elapsed. See id., R276. He also argued that a harmonious reading of the plain text of Penal Law § 70.45(3) and Correct. Law § 73(10), the reading urged by standard canons of interpretation, and the legislative history all showed that both statutes authorized at most six months' detention at an RTF. See id., R277-86 Lastly, he argued that on the face of the statute, and according to the legislative history and the common sense distinctions between PRS and other forms of release, SARA did not apply to people, like him, serving PRS after fully completing their prison terms. See id., R286-89.

On June 8, 2018, Respondent finally released Mr. Alvarez from Queensboro. See Affirmation and Return, dated 7-25-18, R321. Thereafter, Respondent filed an Affirmation and Return, arguing that Mr. Alvarez's petition was moot. See id., R320-21. As to the merits of the claims, Respondent argued that Correct. Law § 73(10) authorized Mr. Alvarez's detention for a period of time in excess of six months, claiming that the plain language of that statute alone allowed it and that the legislative history supported it. See id., R323-26. Respondent further noted that some of the other courts to have decided the issue had concluded that such detention was permitted. See id., R326. As to Mr. Alvarez's arguments about Queensboro's failure to serve as an RTF for him, Respondent argued that because he held a job that was

more remunerative than other jobs in correctional facilities, Mr. Alvarez was in fact housed in an RTF. See id., R327. As to Mr. Alvarez's argument that SARA was not applicable to people on post-release supervision who had completed their incarceratory sentences, Respondent argued that he was estopped from advancing the claim and that a correct reading of the statute would import language from a different subsection to cover people in Mr. Alvarez's position.

In his reply, dated August 7, 2018, Mr. Alvarez asked the court to review the petition under the exception to mootness doctrine, because it involved important and novel issues likely to recur and evade review. See Reply, dated 8-7-18, R361-64. He also urged that reading the text of Penal Law § 70.45(3) and Correct. Law § 73(10) together made it clear that the former's six-month limit applied to the latter, since the former applied "notwithstanding any other provision of law" and the latter showed that the Commissioner could only place people on community supervision at RTFs if the Board of Parole also imposed conditions on those people, and the Board was without power to apply more than six months of RTF residence as a PRS condition. See id., R364-67. He also argued that Respondent's own response to his circumstances, including invoking a separate basis (Penal Law § 70.45(3)) for detention and working to find addresses outside of RTFs, showed that Respondent did not believe it had the power under Correct. Law § 73(10) to place Mr. Alvarez at an RTF for more than six months. See id., R366-67. Finally, he argued that the reading of SARA urged by Respondent was incorrect because it rendered several

words meaningless. See id., R367-68. He noted the affidavit of the Queensboro Deputy Superintendent of Programs appended to Respondent's Affirmation and Return only reinforced the point that Queensboro was not an RTF for him by (a) not refuting his showing that he was ineligible to participate in the RTF programs there; and (b) showing that the sole distinction between his situation and that of an inmate was that he was compensated more for his manual labor than an inmate would be. See id. The matter was fully submitted on August 9, 2018. See Respondent's Letter to the court, dated 8-21-18, R372.

On August 21, 2018, Respondent wrote to the court advising it of this Court's binding decision in McCurdy v. Warden, Westchester County, 164 A.D.3d 692 (2nd Dept. 2018), holding that placement at an RTF for more than six months into the period of post-release supervision is authorized under Correct. Law § 73(10). See Respondent's Letter to the court, R372. Mr. Alvarez in turn wrote to the court, requesting review of the petition in spite of the decision in McCurdy. See Petitioner's Letter to the court, R376.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN DECLINING TO REVIEW MR. ALVAREZ'S NOVEL, SUBSTANTIAL CLAIM THAT THE QUEENSBORO CORRECTIONAL FACILITY COULD NOT FUNCTION AS AN RTF FOR ANYONE WITH A SEX OFFENSE CONVICTION.

The lower court ruled that Mr. Alvarez's claim that Queensboro could not function as an RTF for him or anyone else with a sex offense conviction was moot, and provided no explanation for its denial of review under the exception to mootness doctrine. This claim presents a novel and substantial issue that is likely to recur and evade review, and so this Court should reverse the lower court's erroneous decision not to review it.

A. Even if moot, the claim should have been reviewed.

A court may reach the merits of a case where there is "(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 N.Y.2d 707, 714-15 (1980). Such review may be appropriate even if determination of the petition will no longer directly affect the rights of the parties. See id.

The issue here is likely to recur. Indeed Respondent's own return indicates that

significant numbers of people are being held at RTFs after their maximum expiration dates. See Affirmation and Return, dated 11-27-17, R95-96 (indicating that even though his maximum expiration date had come and gone, Mr. Alvarez was far back in the line of people held because of SARA restrictions and therefore not likely to be placed in the next shelter bed that became available). Respondent's assertions about the prevalence of these issues are amply corroborated by the numerous petitions for release filed by people held in correctional facilities after the commencement of their periods of post-release supervision. See, e.g., People ex rel. Tony Simmons v. Sup't, Hudson Correct. Facility, Index No. 8291/14 (Sup. Ct. Columbia Cty. Feb. 18, 2015); People ex rel. Nikko Simmons v. Sup't, Fishkill Correct. Facility, Index No. 4771/14 (Sup. Ct. Dutchess Cty. Nov. 18, 2014); People ex rel. Scarberry v. Connolly, Index No. 3963/14 (Sup. Ct. Dutchess Cty. Nov. 28, 2014); People ex rel. Kahn v. Sup't, Hudson Correct. Facility, Index No. 7925/14 (Oct. 1, 2014); People ex rel. Green v. Sup't, Sullivan Correct. Facility, 137 A.D.3d 56 (3rd Dept. 2016)(acknowledging "difficulty in finding acceptable housing for sex offenders"); see also Joseph Goldstein, Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates, N.Y. Times, Aug. 22, 2014, available at https://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html (last accessed September 20, 2019). For the purposes of the Hearst test, then, repetition is highly likely.

This issue commonly evades review because Respondent may unilaterally decide to release or transfer petitioners at any point during the pendency of the litigation and thus avoid judicial review. Where, as here, a party asserts mootness after voluntarily ceasing the challenged conduct, a controversy as to the legality of the conduct may still exist to be determined. See Puerto v. Doar, 142 A.D.3d 34, 43-44 (1st Dept. 2016), citing U.S. v. W.T. Grant Co., 345 U.S. 629, 632 (1950). Challenges to forms of detention that are by their nature "often brief and temporary" may well evade review. Mental Hygiene Legal Servs. v. Ford, 92 N.Y.2d 500, 505 (1998). Review of moot claims regarding RTF detention after sentence expiration is critical because of "the transient nature of these types of claims—they generally remain viable only for a matter of months … Moreover, whether petitioners and those similarly situated are released from the RTF to the community is largely in the control of the State respondents." Alcantara v. Annucci, 55 Misc.3d 1216(A), 2017 N.Y. Slip Op. 50610(U), *4 (Sup. Ct. Albany Cty. Feb. 24, 2017). The time it takes to litigate an Article 78 proceeding of this kind means that Respondent can moot cases before they are reviewed, and certainly before an appeal is decided. In this way, the incarceration of people like Mr. Alvarez beyond the conclusion of the incarceratory sentence imposed by the court avoids judicial scrutiny and so this prong of the Hearst test is met.

The Third Department reached the merits of a moot habeas petition challenging an issue it found to satisfy the third prong of the Hearst test: continued detention in a

correctional facility past the petitioner's maximum expiration date where the petitioner had not secured SARA-compliant housing and ostensibly could not be transferred to an RTF because of a mental health concern. See Green, 137 A.D.3d at 57-58. Recognizing that that issue was "significant" and would "typically evade appellate review and [was] likely to recur given the prevalence of mental health issues among the state's prison population and the recognized difficulty of securing acceptable housing for risk level III sex offenders," the court converted the action to one for declaratory judgment, and entered a declaratory judgment in the petitioner's favor. See id. at 58 and 60.

To be sure, in Kirkland v. Annucci, 150 A.D.3d 736 (2d Dept. 2017), this Court held that it was not an improvident exercise of discretion for lower court to decline to review Article 78 petition challenging sex offender's detention at an RTF after petitioner had been released to outside housing. But the lower court in this case gave no indication that it in fact even considered exception to mootness review. Had the lower court applied the exception to mootness test, it would have found it satisfied in this case.

The Court of Appeals recently found the exception to mootness test satisfied Gonzalez v. Annucci, 32 N.Y.3d 461 (2018), proceeding to review a moot claim relating to the assistance DOCCS must provide to people placed at RTFs because of SARA residency restrictions. The Gonzalez Court reasoned that the RTF issue in that case was likely to recur because of the dearth of housing for sex offenders; likely to evade

review "given the transitory duration of placement at the RTFs"; and novel and substantial because they had to do with DOCCS's statutory obligations to assist people in those placements with securing housing. Gonzalez, 32 N.Y.3d at 470-71.

This claim in this case is likely to recur and evade review for precisely the same reasons as the claim in Gonzalez. Moreover, the claim here, just like the one in Gonzalez, presents a substantial question about the statutory assistance DOCCS renders to people who find themselves in the dire situation of having completed their sentences without being freed. This case presents a novel question about Respondent's obligations in these circumstances: Can a facility whose own directives preclude people convicted of sex offenses from participating in RTF programming serve as an RTF for those same precluded people? Can, in other words, a mere warehouse be a community reentry residence? It is a question that no appellate court has answered. Other courts have considered the adequacy of other facilities to serve as RTFs. See Affirmation and Return, dated 11-27-17, R93 (collecting cases). But none has considered a facility with an explicit prohibition on the petitioner receiving the services that define an RTF. Indeed, Respondent did not contend below that any such review had occurred, or present arguments against review of this claim under exception to mootness doctrine. See Affirmation and Return, dated 7-25-18, R322-23, R327 (arguing mootness, but not addressing exception to mootness review; citing cases in which this Court did not reach the question of whether Fishkill Correctional Facility was functioning as an RTF).

This claim satisfies the test for review under exception to mootness doctrine. This Court should reverse the lower court's erroneous decision not to address the merits of the claim

B. According to Respondent's own directives, Queensboro cannot serve as an RTF for people, like Mr. Alvarez, who have been convicted of sex offenses.

Across the course of this litigation, Respondent invoked two different statutes—Penal Law § 70.45(3) and Correct. Law § 73(10)—to justify Mr. Alvarez's continued detention. See Affirmation and Return, dated 11-28-17, R87, and Affirmation and Return, dated 7-25-18, R323-26. Under both of those statutes, the prisoner must be held not just at a correctional facility, but at an RTF that provides special, tailored programming aimed at helping people re-enter a specific community. See Penal Law § 70.45(3), Correct. Law §§ 73(10), 2(6). But Mr. Alvarez did not conclude his period of incarceration in an RTF. Instead, he was held at a facility—Queensboro—that could not serve as an RTF for him because its own rules made anyone with a sex offense conviction ineligible to participate in its RTF programming.

The RTF designation is not simply a label whose application alone transforms the nature of a correctional facility. Rather, to qualify as an RTF under Correct. Law § 2(6), a facility must be a "community based residence in or near a community where employment, educational and training opportunities are readily available for persons [on post-release supervision] who intend to reside in or near that community when released." (emphasis added). To merit the designation, the facility must provide

"programs directed toward the rehabilitation and total reintegration into the community of persons," and each RTF resident must "be assigned a specific program geared toward those ends and shall receive a written memorandum detailing such program." Correct. Law § 73.

These programs may have been provided to other inmates at Queensboro who had been convicted of non sex offenses, but all the necessary RTF characteristics were, for Mr. Alvarez, absent from his time in the facility. As Respondent's own account of Mr. Alvarez's circumstances and Respondent's own directives make clear, Queensboro could not serve as an RTF for him or anyone else with a sex offense conviction. For sex offenders, it is a general confinement facility.

Queensboro had two designations when Mr. Alvarez was housed there. It functioned as a general confinement facility and an RTF.[1] The RTF designation was added in 2012 specifically in order that Respondent could begin offering a particular reentry services program, and not for any other purpose. See N.Y. Reg. Text 7 NYCRR 100.83, Proposed Rulemakings, 2012 NY REG TEXT 302526 (NS) (August 29, 2012) (explaining that an RTF designation was necessary "in order to implement a new, reintegration program for certain offenders"). The reentry program that was

[1] In 2019, after Mr. Alvarez's release from Queensboro, the facility gained a third designation as a work release facility. See N.Y. Reg Text 7 NYCRR 100.83, Emergency/Proposed Rulemakings, 2019 NY REG TEXT 528008 (NS) (July 10, 2019) (Adding classification as work release facility to Queensboro in order to compensate for the closure of the work release program at Lincoln Correctional Facility). Because there is no dispute that Mr. Alvarez was neither housed at a work release facility nor eligible to be so housed at any relevant time, the work release function of Queensboro is not further discussed.

implemented after Queensboro's designation as an RTF has as its principal goals to give participants "an opportunity to finalize their release plans, to work toward family and community reintegration, and to strive for an orderly transition back to society." Supplemental Petition, dated 4-25-18, Exhibit 3, R264. The program also brings in "representatives from both public and private sectors" to educate participants about how to avail themselves of resources once released. See id. That reentry services program—the defining attribute of the RTF at Queensboro—is explicitly not available to people like Mr. Alvarez, under DOCCS Directive #0077, because the eligibility rules require that participants have no sex convictions. See id.

Accordingly, at Queensboro, Mr. Alvarez did not receive, nor could anyone convicted of a sex offense have received, RTF services. He left the facility in prison uniform and under guard to work as a porter and meet with a parole officer (although not his assigned parole officer). See Supplemental Petition, dated 4-25-18, R244-46. Otherwise, he was not provided with any programming. He did not receive "a written memorandum" detailing his programming as required under Correct. Law § 73(3). See id. He did not meet with "representatives from the public and private sectors" about community reintegration services. See id. He did not "finalize his release plans." See id.

Below, Respondent did not dispute either that Mr. Alvarez had not received a detailed memorandum explaining the specific RTF programming he was to receive, or that sex offenders were in fact ineligible for the reintegration program that prompted

Queensboro's RTF designation. <u>See</u> Affirmation and Return, dated 7-25-18, R327. Instead, Respondent asserted, via an affidavit from a superintendent at Queensboro, that Mr. Alvarez was part of a "work crew program" tasked with performing "manual labor, such as outside clearance and porter duties." <u>Id.</u>, Exhibit B, R335. Respondent also averred that "[a]lthough this work [was] frequently performed on the grounds of Queensboro, the RTF residents [were] sometimes taken off grounds to perform particular duties." <u>Id.</u> Respondent notably did not assert that regular inmates did not also perform the same manual labor job that Mr. Alvarez had been assigned. That Mr. Alvarez was paid "more" was the sole distinction that Respondent drew between his situation and that of regular inmates. <u>Id.</u> This pay disparity alone, according to Respondent, was sufficient to transform Mr. Alvarez's confinement into residential treatment.

But a different payscale is not residential treatment. It is not the program that Respondent described when it applied for an RTF designation for Queensboro, and it does not satisfy the requirements of Correct. Law § 73. This Court should reverse the lower court's erroneous decision to deem this claim moot and not even to apply the exception to mootness test to determine whether review was appropriate. Review would have shown that, consistent with its own policy, Respondent does not provide RTF services to sex offenders at Queensboro. This Court should declare Queensboro unfit to serve as an RTF for people with sex offense convictions.

POINT II

BECAUSE SARA DOES NOT LAWFULLY APPLY TO PEOPLE, LIKE MR. ALVAREZ, SERVING POST-RELEASE SUPERVISION ONLY AFTER SERVING THEIR FULL PRISON TERMS, THE LOWER COURT ERRED IN DENYING THIS CLAIM.

This Court should reverse the lower court's erroneous ruling that Mr. Alvarez'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" or the lower court's proffered alternative basis for denial: that the claim was "not properly before [it]" because Mr. Alvarez "did not challenge the imposition of [the SARA residency restriction] condition by the Board of Parole." Decision and Order, dated 11-29-18, R2. Since the claim was not moot and, in fact, review would have shown that SARA did not apply to Mr. Alvarez, or people like him, who began serving post-release supervision after having reached their maximum expiration dates, the lower court erred when it Mr. Alvarez the relief he requested.

A. This claim, concerning an active condition of Mr. Alvarez's PRS, was not moot at the time of the lower court's review and still is not.

Embedded in the lower court's assertion that an exception to mootness finding was not warranted is the premise that the SARA applicability claim is moot, since of course an exception to mootness inquiry begins only when a claim is moot. That premise is false. A claim that directly affects the rights of parties whose interest is "an immediate consequence of the judgment" is not moot. Hearst, 50 N.Y.2d at 714. For

example, an issue relating to good time credit is not moot as long as post-release supervision is still running. See Gonzalez, 32 N.Y.3d at 490 n. 3. Here, Mr. Alvarez's seven year term of post-release supervision began running at his maximum expiration date of October 5, 2017, and is therefore still active. As such, the question of the applicability of SARA currently affects him personally and so not only was not moot at the time of the lower court's decision, but still is not moot. There was therefore no need for the lower court to engage in exception to mootness analysis and no basis for a denial on mootness grounds.

B. The lower court could have granted the declarative relief Mr. Alvarez asked for.

The lower court's alternative ground for denying the claim--that Mr. Alvarez had not challenged the imposition of SARA residency restrictions in his petitions and that the question of the applicability of the restrictions was therefore not before the court—is similarly unfounded. Mr. Alvarez had requested relief that the court could have granted.

In his Second Supplemental Petition, filed before his release, he requested release to approved housing as well as such relief as the court deemed "just, proper, and equitable based on" his filings. Second Supplemental Petition, dated 5-8-18 (at 3), R270. In his Reply, filed after Respondent released him, Mr. Alvarez requested that the matter be converted to an action for a declaratory judgment. See Reply Affirmation, dated 8-7-18, R362. When the meaning or "substance of a law … is

challenged," the proper vehicle for that challenge is an action for declaratory judgment. Highland Hall Apartments, LLC v. New York State Div. of Housing and Community Renewal, 66 A.D.3d 678, 681 (2nd Dept. 2009); see also Doorley v. DeMarco, 106 A.D.3d 27, 38 (4th Dept. 2013) (declaratory relief appropriate for District Attorney who brought Article 78/declaratory judgment hybrid action arising from judge's admission of ineligible defendants into diversion program in order to clarify to which defendants the diversion statute applied). Here, Mr. Alvarez properly sought to challenge to whom SARA's residency restrictions applied through a declaratory judgment action. The lower court had the power to convert the matter to such an action. See Green, 137 A.D.3d at 58 (where petitioner had not secured SARA-compliant housing before his maximum expiration date and ostensibly could not be transferred to an RTF because of a mental health concern, reviewing under exception to mootness doctrine, converting the action to one for declaratory judgment, and entered a declaratory judgment in the petitioner's favor) and Matter of Amerada Hess Corp. v. Lefkowitz, 82 A.D.2d 882, 882-883 (2nd Dept. 1981)(rather than dismissing a matter brought under the wrong vehicle, converting an Article 78 proceeding to a declaratory judgment action). There was thus no impediment to deciding the claim, and the lower court should have granted it.

C. The statutory text makes clear that SARA's residency restriction does not apply to people, like Mr. Alvarez, who are released to PRS only after fully completing their prison terms.

A plain reading of SARA makes clear that it applies only to people released to parole or "conditionally released" to PRS—not those who, like Mr. Alvarez, have been released to PRS only after completing their full prison terms. In any event, to the extent that the Court might believe the statute is ambiguous, SARA's legislative history, and the different purposes undergirding mandatory PRS following completion of a sentence, on the one hand, and discretionary parole and conditional release to cut short a sentence, on the other, demonstrate why SARA does not cover people like Mr. Alvarez.

When interpreting a statute, a court's "primary consideration 'is to ascertain and give effect to the intention of the Legislature.'" Matter of DaimlerChrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660 (2006) (quoting Riley v. Cnty. of Broome, 95 N.Y.2d 455, 463 (2000)). To do so, a court "turn[s] first to its text as the best evidence of the Legislature's intent." Polan v. State of N.Y. Ins. Dep't, 3 N.Y.3d 54, 58 (2004). Thus, "[a]s a general rule, the statute's plain language is dispositive." Id.

From this principle, it follows that "[w]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." Matter of Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs., 5 N.Y.3d 36, 42-43 (2005) (citations omitted); accord Matter of Brown v. N.Y. State Racing and

Wagering Bd., 60 A.D.3d 107, 116-17 (2nd Dept. 2009) ("We are guided by the maxim *expressio unius est exclusio alterius*, that the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended."). Furthermore, a "statute should be construed to avoid rendering any of its provisions superfluous." Kimmel v. State of N.Y., 29 N.Y.3d 386, 393 (2017) (citation omitted). In summary, then, a court "must 'construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of statutes.'" People ex rel. Jenkins v. Piscotti, 52 A.D.3d 1207, 1208-09 (4th Dept. 2008) (quoting People v. Hernandez, 98 N.Y.2d 8, 10 (2002)).

Executive Law § 259-c(14) provides, in pertinent part, that SARA applies to certain sex offender registrants[2] who are "released on parole or conditionally released pursuant to subdivision one or two of this section." Subdivision one deals with the Parole Board's duty to determine which inmates will be paroled. Subdivision two, in turn, outlines the Parole Board's power to determine the conditions of release for three distinct categories of people: those who "may be [1] presumptively released, [2] conditionally released or [3] subject to a period of post-release supervision[.]"

"Conditionally released" does not mean released with conditions. Instead, "conditionally released" is a term of art that means securing one's early release from

[2] SARA applies to people serving sentences for enumerated offenses who are "designated a level three sex offender" or whose victim was under age eighteen. Exec. Law § 259-c(14).

prison based on accumulated "good time" credits. See Penal Law § 70.40(b) (describing conditional release). Thus, like parole and presumptive release, conditional release is a discretionary mechanism used to release individuals from prison prior to the maximum expiration of their sentence.

PRS, in contrast, is not a mechanism to cut short a sentence. Instead, PRS is a mandatory part of a determinate sentence: an individual serves a determinate period of incarceration, followed by a set period of PRS. See Penal Law § 70.45 ("When a court imposes a determinate sentence it shall in each case state not only the term of imprisonment, but also an additional period of post-release supervision," which "shall commence upon the person's release from imprisonment").

If an individual serving a determinate sentence accumulates sufficient "good time credits," they may be conditionally released to their PRS term prior to their maximum release date. Such individuals are properly subject to SARA, as they have been "conditionally released" to PRS. See Exec. Law §§ 259-c(14), (2).

However, not all individuals serving PRS have been "conditionally released." Some prisoners, like Mr. Alvarez, serve every day of the incarceratory portion of their sentence. Then, upon reaching their maximum release date, they are released to serve the PRS component of their sentence. Those individuals are not covered under SARA, since they were never "conditionally released"; they served their full prison terms.

Such is the case here. Mr. Alvarez served every day of his prison sentence, and only then was released to his mandatory five year term of PRS. His release can in no way be considered conditional. And thus, Exec. Law § 259-c(14) plainly does not apply to him.

The legislature's limitation of the scope of subdivision fourteen to a subset of everyone released, conditionally or otherwise, pursuant to subdivision two, is dispositive. It leaves no room for "interpretive contrivances to broaden the scope and application of [the] statute[]." Kimmel, 29 N.Y.3d at 386. The legislature is fully capable of explicitly applying statutes to people serving PRS, see, e.g., Mental Hygiene Law § 10.03(g)(1) (applying civil commitment law to certain people "subject to supervision by the division of parole, whether on parole or on post-release supervision"),[3] or using the catch-all term "community supervision" to encapsulate all forms of release, see Exec. Law § 259(3) ("'Community supervision' means the supervision of individuals released into the community on temporary release, presumptive release, parole, conditional release, post release supervision or medical parole); Correct. Law § 203(2) (discussing DOCCS' duties prior to certain registrants' "release to community supervision").[4] That the legislature did not do so here requires

[3] See also Correct. Law § 203(1) (discussing residency regulations for "level two or level three sex offenders released on presumptive release, parole, conditional release or post-release supervision"); Correct. Law § 205 ("The department may grant to any person a merit termination of sentence from presumptive release, parole, conditional release or release to post-release supervision").

[4] Indeed, the legislature used the term "community supervision" three times in N.Y. Exec. Law § 259-c itself. See § 259-c(6), (12), (13).

an "irrefutable inference" that the legislature intentionally chose to separately delineate conditional release, presumptive release, and post-release supervision in subdivision two, and to apply SARA to only those "conditionally released" pursuant that subdivision. See Town of Riverhead, 5 N.Y.3d at 42-43.

Fundamental differences between parole and conditional release, on the one hand, and PRS, on the other, further illuminate why the legislature did not apply SARA to people serving PRS after completing their sentences. "Although parole [and conditional release] and PRS are administered and enforced pursuant to the same DOP rules and regulations, there are many practical differences between parole and post-release which stem from the different penological purposes which they serve." People ex rel. Harper v. Warden, Rikers Is. Correct. Facility, 21 Misc.3d 906, at 911 n.7 (Sup. Ct. Bronx Cnty. 2008). Parolees "are, in essence, convicted criminals who are released from prison before the expiration of their term, under supervision, and who are allowed to remain outside the penal institution only on stated conditions." People v. Dyla, 142 A.D.2d 423, 439 (2nd Dept. 1988). Similarly, conditional release through "the giving of good time credits . . . is a matter of legislative grace" to "reward good behavior." People ex rel. McNeill v. N.Y. State Bd. of Parole, 57 A.D.2d 876, 877 (2nd Dept. 1977). Yet in contrast, "the purpose of PRS is to facilitate an ex-inmate's transition to the civilian community *following* completion of his

term of imprisonment." Harper, 21 Misc.3d at 911 n.7 (citations omitted); see also N.Y. Bill Jacket, 1998 S.B. 7820, Ch. 1 (1998) ("Post-release supervision enables the imposition and enforcement of conditions on offenders to promote their successful reintegration into the community."). Accordingly, the legislature determined that restrictions that may be warranted for people who have been discretionarily released early from their prison terms are ill-suited for individuals like Mr. Alvarez, who have served their full sentences and are reintegrating into their communities, and did not apply the SARA restrictions to the latter group.

D. No appellate court has squarely considered or decided this issue.

Contrary to the lower court's contention, the question of the applicability of SARA to people on PRS after having served their full incarceratory sentences has not been decided by appellate courts. Citing People v. Diack, 24 N.Y.3d 674 (2015), the lower court asserted that "[c]ourts 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." The Diack Court held that "a series of laws regulating registered sex offenders, including" SARA, the Sex Offender Registration Act ("SORA"), the Sex Offender Management and Treatment Act ("SOMTA"), and chapter 568 of the Laws of 2008 (addressing housing for sex offender registrants), together established a "comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring of registered sex offenders," which preempted local residency restrictions. Diack, 24 N.Y.3d at 677,

679. In the course of its discussion, the Court noted that SARA applied to people "who are released on parole, who are conditionally released or who are subject to a period of post release supervision (PRS)." Id. at 681. This language was dicta that does not bind this Court.

The scope of the SARA statute was essential to the Court's holding that New York's series of laws regulating sex offenders preempted local residency restrictions, but the determination that SARA applied to people serving a term of PRS after serving their full incarceratory term was not. The Court would have reached the same conclusion regardless of whether it determined that SARA applied to those people. Diack rested on the legislature's clear intent to "occupy the entire field" of sex offender management, not on which sex offenders the legislature chose to manage in which ways. See Diack, 24 N.Y.3d at 680. Indeed, the defendant in Diack—a Level 1 registrant who had completed his parole term—was not covered under SARA. Id. at 685. Yet, the Court concluded, "that does not mean that" the legislature chose "not to enact a comprehensive legislative scheme" in this area. Id. Thus, a determination that SARA covered people serving PRS after completing their full prison terms was not essential to the Court's holding.

But, in any event, language necessary to one decision does not necessarily control another. A case "is precedent only as to those questions presented, considered and squarely decided." People v. Bourne, 139 A.D.2d 210, 216 (1st Dept. 1988). Even when uttered by the Court of Appeals, "an extraneous, gratuitous and

casually expressed statement, particularly in a case where the issue was neither argued nor factually relevant, can carry no controlling weight." Id.; see also People v. Machado, 90 N.Y.2d 187, 193 (1997) (case cited by defendant not controlling where "the Court was not asked to determine, nor did it," the question presented); Jimenez v. Walker, 458 F.3d 130, 142 (2d Cir. 2006) (dicta, "no matter how strong or how characterized" are "not and cannot be binding").

The question presented here is whether SARA applies to people, like Mr. Alvarez, who are serving PRS only after completing their full prison terms. That question was never raised, briefed, nor squarely decided in Diack. As such, passing references to PRS constitute nonbinding-dicta that do not control here.

Accordingly, the lower court's erroneous ruling that Mr. Alvarez's claim regarding the inapplicability of SARA's restrictions to people, like Mr. Alvarez, serving PRS after completing their prison terms, was moot and unreviewable should be reversed.

POINT III

THE MATTER SHOULD BE REMANDED TO THE LOWER COURT FOR IT TO DECIDE MR. ALVAREZ'S EQUAL PROTECTION CLAIM

The lower court failed to issue a decision as to Mr. Alvarez's equal protection claim. The claim was laid out in his original petition, disputed by Respondent in its original affirmation and return, and further discussed in Mr. Alvarez's original reply. See Verified Petition, dated 10-27-17, R31-33; Affirmation and Return, dated 11-28-

17, R96-97; Reply, dated 12-12-17, R167-68. The two supplemental petitions were explicitly intended to supplement, not supplant, the original petition. In both, Mr. Alvarez asked the court to issue a decision that took into account the original Dutchess County petition. See Supplemental Petition, dated 4-25-18, R246-47; Second Supplemental Petition, dated 5-8-18, R272. Given that the equal protection claim was nonetheless not ultimately decided, the Court should remand this matter for the lower court to issue a ruling on it.

POINT IV

THE LOWER COURT ERRED IN DECIDING THAT, FOR PEOPLE ON PRS, CORRECT. LAW § 73(10) AUTHORIZED RTF DETENTION EXCEEDING THE SIX MONTH CAP CODIFIED IN PENAL LAW § 70.45(3).

Citing this Court's holding in McCurdy v. Warden, Westchester County, 164 A.D.3d 629 (2nd Dept. 2018), that Correct. Law § 73(10) authorizes continued detention at an RTF past the six months allowed under Penal Law § 70.45(3), the lower court denied Mr. Alvarez's claim arguing to the contrary. Respectfully, Mr. Alvarez submits that that case was wrongly decided. He also notes that the case is to be reviewed by the Court of Appeals. See McCurdy v. Warden, Westchester County, 32 N.Y.3d 1084 (2018) (granting leave to appeal); .

The lower court did not discuss mootness in connection with its decision on this claim. See Decision and Order, dated 11-29-18, R5. As a threshold matter, it bears noting, however, that this claim is not moot for the very same reason that Mr.

Alvarez's claim regarding SARA applicability is not: since his term of post-release supervision is still running, the decision on this claim will have a direct consequence for him. See supra POINT II. If housing in the community in which he resides during his term of PRS is initially deemed SARA compliant, but comes to be deemed non-compliant, because of, for example, the opening of a new school location, Respondent's reading of Correct. Law § 73(10) would allow for him to be held at an RTF again. He would again be subject, for as long as it took for new suitable housing to be found, to exactly the same conditions as a regular inmate, except that, for his manual labor, he would be compensated more. See supra Point I. That cannot be the outcome the legislature intended. The lower court should have granted Mr. Alvarez's claim and issued a declaratory judgment—the relief that Mr. Alvarez requested, see supra POINT I—that Correct. Law § 73(10) does not authorize Respondent to place people on PRS in RTFs for more than six months.

The text of Penal Law § 70.45(3) and Correct. Law § 73(10) make it clear that the latter is bound by the six month time limit in the former. First, Penal Law § 70.45(3), and its six month limit on RTF placement for people on PRS, applies "notwithstanding any other provision of law." When the legislature wrote Correct. Law § 73(10), it did nothing to qualify the overriding applicability of Penal Law § 70.45(3). To the contrary, the legislature pronounced its intent not to impinge on the Board's authority through the creation of the new DOCCS agency. See Second Supplemental Petition, dated 5-8-18, R284. Second, the legislature did not create RTF placement authority for the

Commissioner independent of the Board. Instead, under Correct. Law § 73(10), people whom the Commissioner decides to place at RTFs "shall be subject to conditions of community supervision imposed by the board." Correct. Law § 73(10) (emphasis added). So, the Commissioner does not have the power to place supervisees at RTFs and then simply leave them there for the rest of their community supervision. Instead, the Board must impose conditions in each and every case. Since, pursuant to P.L. § 70.45(3), the Board cannot impose a condition of more than six months of RTF placement on people on post-release supervision, the Commissioner's power with respect to post-release supervision is also cabined by the six-month limit. For these reasons, this Court should reverse the lower court's ruling denying this claim.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE LOWER COURT'S DECISION SHOULD BE REVERSED; QUEENSBORO DECLARED UNFIT TO SERVE AS AN RTF FOR PEOPLE WITH SEX OFFENSE CONVICTIONS; SARA DECLARED INAPPLICABLE TO PEOPLE ON PRS AFTER SERVING THEIR FULL SENTENCES; THE PETITION REMANDED FOR THE LOWER COURT TO DECIDE THE EQUAL PROTECTION CLAIM; AND THE SCOPE OF THE COMMISSIONER'S POWER TO PLACE PEOPLE ON PRS AT RTFS UNDER CORRECT. LAW § 73(10) DECLARED LIMITED TO SIX MONTHS.

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

The brief was prepared in Microsoft Word, using a 14-point Garamond font, except for footnotes, which appear in a 12 point Garamond font, and totaled 8,109 words irrespective of the Table of Contents and the Table of Authorities.

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

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In the Matter of LUIS ALVAREZ	:	
Petitioner-Appellant,	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	:	
	:	
- against -		Appellate Division
	:	Docket No. 2019-04287
ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,	:	
	:	
Respondent-Respondent.		

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STATEMENT PURSUANT TO CPLR RULE 5531

1. The docket number in the court below was 3123-18.

2. The original parties are as they appear above.

3. This action was commenced in Supreme Court, Dutchess County, and transferred by order of that court to Supreme Court, Queens County.

4. This action was commenced in Dutchess County by a Notice of Petition and Verified Petition on October 27, 2017. Respondent filed an Affirmation and Return on November 28, 2017. Mr. Alvarez filed a reply on December 12, 2017. Mr. Alvarez then filed a Motion to Transfer Venue and a Motion for Leave to Supplement along with a Proposed Supplemental Petition on January 24, 2018. Respondent did not oppose transfer or supplementing. The court ordered the

action transferred to Queens County on March 30, 2018. Mr. Alvarez filed a Supplemental Petition in Queens County on April 4, 2018. On consent, Mr. Alvarez filed a Second Supplemental Petition on May 8, 2018. Respondent filed an Affirmation and Return on July 25, 2019. Mr. Alvarez filed a Reply on August 7, 2018. Respondent wrote a letter to the court on August 21, 2018. Mr. Alvarez wrote a responsive letter to the court on August 22, 2018.

5. The object of this action is to obtain review for questions bearing on illegal incarceration and the imposition of highly onerous conditions of community supervision without statutory authority.
6. This appeal is from a final order of the Supreme Court, Queens County dated November 15, 2018, and entered on November 28, 2018 (Pineda-Kirwan, J.).
7. This appeal is by the reproduced full record method.

106 A.D.3d 27, 962 N.Y.S.2d 546, 2013 N.Y. Slip Op. 01937

**1 In the Matter of Sandra Doorley, Petitioner-Plaintiff
v
John L. DeMarco et al., Respondents-Defendants.

Supreme Court, Appellate Division, Fourth Department, New York
March 22, 2013

CITE TITLE AS: Matter of Doorley v DeMarco

SUMMARY

Proceeding pursuant to CPLR article 78 and declaratory judgment action (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondents Honorable John L. DeMarco and Honorable John R. Schwartz to comply with CPL 216.00 (1), and for other relief.

HEADNOTES

Limitation of Actions
Four-Month Statute of Limitations
Hybrid CPLR Article 78 Proceeding and Declaratory Judgment Action

([1]) Petitioner District Attorney's hybrid CPLR article 78 proceeding and declaratory judgment action, which sought mandamus, prohibition and a declaratory judgment, in effect, to prohibit respondent judges from allowing respondent criminal defendants and other criminal defendants not meeting the eligibility requirements to participate in the judicial diversion program, was timely. The statute of limitations for proceedings seeking mandamus or prohibition is four months (CPLR 217). In regard to the declaratory judgment action, if the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then that period applies. Because petitioner properly sought a writ of prohibition, the four-month statute of limitations also applied to the declaratory judgment action. Here, each of the decisions by respondent judge with regard to admitting respondent criminal defendants to the judicial diversion program was rendered within four months of the commencement date.

Proceeding against Body or Officer
Mandamus
When Remedy Appropriate

([2]) Mandamus to compel was not an appropriate remedy in petitioner District Attorney's proceeding seeking an order directing respondent judges to deny respondent criminal defendants' participation in the judicial diversion program on the ground that they did not meet the eligibility criteria of CPL 216.00 (1). The remedy of mandamus is available to compel a government entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion. Under the statutory scheme of CPL article 216, a court has discretion in determining whether to allow a defendant into the judicial diversion program, as is indicated by the language in CPL 216.05 (4) providing that "an eligible defendant may be allowed to participate." Thus, the court's duties under article 216 are not ministerial in nature.

Proceeding against Body or Officer
Prohibition
When Remedy Available

([3]) Petitioner District Attorney had a clear legal right to the relief of prohibition in a proceeding seeking to prohibit respondent judges from allowing respondent ***28** criminal defendants to participate in the judicial diversion program on the ground that they did not meet the eligibility criteria of CPL 216.00 (1). Prohibition is available in cases where judicial authority is challenged when a court acts or threatens to act either without jurisdiction or in excess of its authorized powers. An action in excess of the court's power is one that impacts the entire proceeding. The appealability of the issue is a factor for consideration when determining whether the remedy is appropriate. Here, the judicial diversion program eligibility determination was not appealable. Moreover, the judge's determinations affected the entire proceedings inasmuch as the criminal defendants were diverted from the normal criminal proceedings.

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Proceeding against Body or Officer
Prohibition
Trial Judge's Failure to Comply with Criminal Procedure Statute

([4]) Respondent judge acted in excess of his authority in a matter over which he had jurisdiction when he allowed respondent criminal defendants to participate in the judicial diversion program notwithstanding that the defendants did not meet the eligibility criteria of CPL 216.00 (1). Where language of a statute is clear and unambiguous, courts must give effect to its plain meaning. Section 216.00 (1) identifies an "[e]ligible defendant" for acceptance into the judicial diversion program as a person charged with any controlled substance offenses under Penal Law articles 220 or 221 or offenses specified in CPL 410.91 (5) and neither of the criminal defendants was charged with any of those offenses. Here, despite the unambiguous language of the statute, the judge chose to examine the nature and purpose of the statute and concluded that the proper interpretation was to permit the criminal defendants entry into judicial diversion. The judge specifically found that because the defendants were not ineligible for the program based on the exclusions provided in CPL 216.00 (1) (a) and (b), it was within his discretion to determine whether they were eligible. However, had the legislature intended all nonviolent offenders who committed crimes because of their drug addiction to be eligible for judicial diversion, it could have easily so stated. CPL 216.00 (1) was not rendered ambiguous by its reference to a subdivision that had been repealed prior to the effective date of section 216.00 (1). The reference was simply a typographical error and courts have uniformly interpreted the reference as citing to the subdivision following the repealed one. Moreover, that a plain reading leaves prosecutors with the discretion to indict individuals only for crimes that render them ineligible for judicial diversion is not a basis for a court to exceed its legal authority.

Declaratory Judgments
When Remedy Appropriate
Trial Judge's Failure to Comply with Criminal Procedure Statute

([5]) Petitioner District Attorney was entitled to a judgment declaring that only criminal defendants who meet the criteria of CPL 216.00 (1) are eligible for participation in the judicial diversion program. A declaratory judgment is available in cases where a constitutional question is involved or the legality of the meaning of a statute is in question and no question of fact is involved. In a case involving a criminal court ruling, the ruling must have an obvious effect extending far beyond the matter pending before the court so that it is likely that the issue will rise again with the same result in other cases. Here, respondent judge relied on the same reasoning in determining that two unrelated criminal defendants were entitled to participate in the judicial diversion program notwithstanding that they did not meet the eligibility criteria of CPL 216.00 (1).

***29 RESEARCH REFERENCES**

Am Jur 2d, Criminal Law § 867; Am Jur 2d, Declaratory Judgments §§ 14, 15, 37, 48, 68, 185; Am Jur 2d, Mandamus §§ 2, 6, 19, 25, 45, 46, 51, 52; Am Jur 2d, Prohibition §§ 3, 6, 8, 10, 11, 27, 41, 45, 49, 80.

Carmody-Wait 2d, Proceeding Against a Body or Officer §§ 145:14, 145:19, 145:81, 145:136, 145:144, 145:164–145:168, 145:182, 145:806, 145:807, 145:812, 145:813, 145:882; Carmody-Wait 2d, Declaratory Judgments §§ 147:3, 147:7, 147:17, 147:32, 147:131.

LaFave, et al., Criminal Procedure (3d ed) §§ 26.2, 26.6.

McKinney's, CPLR 217; CPL 216.00 (1); 216.05 (4); 410.91.

NY Jur 2d, Article 78 and Related Proceedings §§ 81, 115, 118–121, 139–141, 147, 160, 164, 166, 173, 174, 184; NY Jur 2d, Criminal Law: Procedure §§ 2991, 2998, 3023, 3062; NY Jur 2d, Declaratory Judgments and Agreed Case §§ 18, 58, 155, 159; NY Jur 2d, Penal and Correctional Institutions § 273.

Siegel, NY Prac §§ 436, 437, 558, 559, 566.

ANNOTATION REFERENCE

See ALR Index under Criminal Procedure Rules; Declaratory Judgments or Relief; Limitation of Actions; Mandamus; Prohibition Writ; Sentence and Punishment.

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APPEARANCES OF COUNSEL

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Honorable John L. DeMarco, Rochester, respondent-defendant pro se.
Timothy P. Donaher, Public Defender, Rochester (*James Eckert* of counsel), for respondents-defendants Dalana J. Watford and another.
Cyrus R. Vance, Jr., New York City (*Victoria M. White* of counsel), for District Attorneys Association of the State of New York, amicus curiae.

*30 OPINION OF THE COURT

Centra, J.P.

I

Petitioner-plaintiff, the District Attorney of Monroe County (petitioner), commenced this original hybrid CPLR article 78 proceeding and declaratory judgment action against respondents-defendants Honorable John L. DeMarco and Honorable John R. Schwartz (respondent judges), as **2 well as against respondents-defendants Dalana J. Watford and Annie Pearl Pugh, both criminal defendants (respondent defendants). Respondent defendants were charged by indictments with various criminal offenses and, after arraignment, were accepted in the judicial diversion program by Judge DeMarco. Respondent defendants' cases were thereafter transferred to Judge Schwartz. Petitioner opposes judicial diversion for respondent defendants and seeks, inter alia, mandamus to compel respondent judges to comply with CPL 216.00 (1), a judgment prohibiting respondent judges from allowing respondent defendants to participate in the judicial diversion program, and a judgment declaring that only defendants meeting the criteria set forth in CPL 216.00 (1) are eligible for the judicial diversion program. The criminal matters concerning respondent defendants were stayed pending the outcome of this proceeding/action. We now conclude that the petition/complaint should be granted in part.

II

As part of the Drug Law Reform Act of 2009, the New York State Legislature enacted CPL article 216, which created a judicial diversion program allowing selected felony offenders, whose substance abuse or dependence was a contributing factor to their criminal conduct, to undergo alcohol and substance abuse treatment rather than be sentenced to a term of imprisonment. After the arraignment of an "eligible defendant," an authorized court determines whether to allow the defendant to participate in judicial diversion (CPL 216.05 [1]; *see* CPL 216.05 [4]; *People v DeYoung*, 95 AD3d 71, 73-74 [2012]).

CPL 216.00 (1) defines an " '[e]ligible defendant' " for judicial diversion as

> "any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law ***31** or any other specified offense as defined in subdivision four of section 410.91 of this chapter . . . ."

Subdivisions (1) (a) and (b) of CPL 216.00, which do not apply here, list certain defendants who are not eligible for judicial diversion, such as defendants with a previous violent felony conviction. Penal Law articles 220 and 221 relate to controlled substances offenses and offenses involving marihuana, respectively, and CPL 410.91 sets forth the parameters for a sentence of parole supervision. Notably, CPL 410.91 (4) was repealed as of April 7, 2009, prior to the effective date of CPL 216.00; that subdivision of CPL 410.91 had imposed a requirement that the People consent to a sentence of parole supervision for a specified offense that was a class D felony. It appears that the reference to CPL 410.91 (4) was merely a typographical error and that the legislature meant to cite CPL 410.91 (5), which lists the specified offenses (*see* Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 216.00, 2012 Cumulative Pocket Part at 69-70). The specified offenses listed in CPL 410.91 (5) include offenses such as burglary in the third degree (Penal Law § 140.20) and criminal mischief in the second degree (§ 145.10).

In Monroe County, Judge DeMarco arraigns all felony indictments containing charges that are not expressly excluded by CPL 216.00 (1) (a) or (b). If Judge DeMarco determines that a defendant is eligible for judicial diversion and the defendant wishes to participate in that program, the case is transferred to Judge Schwartz, who monitors compliance with the alcohol or substance abuse treatment.

III **3

Watford was charged by an indictment with four counts of falsifying business records in the first degree (Penal Law § 175.10), three counts of identify theft in the second degree (§

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190.79 [1]), and one count of identify theft in the third degree (§ 190.78 [1]). The People alleged that Watford, on various dates in 2010, assumed the identities of four individuals in order to obtain cable services. After arraignment, Judge DeMarco ordered Watford to undergo a substance abuse evaluation over the People's objection. Watford thereafter moved for admission into judicial diversion, which the People opposed. On April 25, 2012, Judge DeMarco granted the motion and allowed Watford to be admitted into judicial diversion (*People v Watford*, 36 Misc 3d 456, 461-462 [2012]). Watford thereafter pleaded guilty to the charges in the indictment and signed a judicial diversion ***32** contract. Watford was promised a misdemeanor conviction and a sentence of no more than three years of probation if she successfully completed judicial diversion. In the event that Watford failed to complete judicial diversion, she would be sentenced to an indeterminate term no greater than 2 to 4 years' incarceration. Watford's case was then transferred to Judge Schwartz to monitor her compliance with her judicial diversion contract.

In May 2012, Watford was charged by a second indictment with identity theft in the second degree (Penal Law § 190.79 [1]). The People alleged that "on or about and between" January 5 and 9, 2012, Watford assumed the identity of another individual and obtained in excess of $500. After arraignment, Judge DeMarco on June 20, 2012 again allowed Watford into judicial diversion. She pleaded guilty to the charge and signed a judicial diversion contract with the same terms as the prior contract.

Pugh was charged by an indictment with promoting prison contraband in the first degree (Penal Law § 205.25 [1]), assault in the third degree (§ 120.00 [1]), and petit larceny (§ 155.25). The People alleged that, on May 12, 2012, Pugh stole property from a grocery store, caused physical injury to a security guard, and knowingly and unlawfully introduced a cell phone into the Monroe County Jail. On August 8, 2012, Judge DeMarco accepted her into judicial diversion for the reasons he had outlined in his decision in the Watford matter. Pugh thereafter pleaded guilty to the charges and signed a judicial diversion contract. If successful in judicial diversion, Pugh would receive a misdemeanor conviction and a sentence of three years' probation. If unsuccessful, she would receive a sentence of one year in jail.

IV

Petitioner commenced this original proceeding/action on August 24, 2012 seeking, inter alia, (1) a judgment pursuant to CPLR 7803 (1), i.e., mandamus to compel, directing respondent judges to deny respondent defendants' participation in the judicial diversion program; (2) a judgment pursuant to CPLR 7803 (2), i.e., writ of prohibition, prohibiting respondent judges from allowing respondent defendants to participate in the judicial diversion program; and (3) a judgment pursuant to CPLR 3001 declaring that only defendants who meet the criteria of CPL 216.00 (1) are eligible for participation in the judicial diversion program. Petitioner contended that respondent defendants were not eligible for judicial diversion because they did not meet the criteria of CPL 216.00 (1).

***33** Respondent defendants submitted answers, in which they asserted that a determination that a defendant is eligible for judicial diversion is never a ministerial act, and always involves the exercise of the court's discretion; the respondent judges did not act in excess of their jurisdiction or authorized powers; and the outcome of each case is fact-specific. Watford alleged as an affirmative defense that the proceeding/action was untimely. Judge DeMarco submitted an answer and raised three objections: the petition/complaint failed to state a claim; the claims were not the proper subject of a CPLR article 78 proceeding; and the proceeding/action was time- ****4** barred. Judge Schwartz has elected not to appear.

V

([1]) Initially, we reject the timeliness objection. Petitioner commenced this hybrid proceeding/declaratory judgment action pursuant to CPLR article 78 and CPLR 3001, respectively. The statute of limitations for a proceeding seeking mandamus to compel is four months (*see* CPLR 217; *Town of Webster v Village of Webster*, 280 AD2d 931, 933-934 [2001]), as it is for a proceeding seeking prohibition (*see* CPLR 217; *Matter of Holtzman v Marrus*, 74 NY2d 865, 866 [1989]; *Matter of Holtzman v Goldman*, 71 NY2d 564, 568 n 1 [1988]). To determine the statute of limitations for a declaratory judgment action, we must "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought" (*Solnick v Whalen*, 49 NY2d 224, 229 [1980]; *see Bennett Rd. Sewer Co. v Town Bd. of Town of Camillus*, 243 AD2d 61, 66 [1998]). If the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then we must use that period (*see Solnick*, 49 NY2d at 229-230). As explained below, petitioner properly seeks a writ of prohibition, and thus that four-month statute of limitations also applies to the declaratory judgment action (*see Matter of Riverkeeper, Inc. v Crotty*, 28 AD3d 957,

960 [2006]; *see generally* *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

Judge DeMarco's decision granting Watford's motion for admission into judicial diversion on the first indictment was issued April 25, 2012, and his decision granting her admission into judicial diversion on the second indictment was made on June 20, 2012. His decision granting Pugh admission into judicial diversion was made on August 8, 2012. Petitioner commenced this original proceeding/action in this Court on August ***34** 24, 2012, which was within the four-month statute of limitations, and this proceeding/action is therefore timely.

VI

"[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see Matter of Maron v Silver*, 14 NY3d 230, 249 [2010], *rearg dismissed* 16 NY3d 736 [2011]). A party seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the [judge] to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]; *see Matter of Harper v Angiolillo*, 89 NY2d 761, 765 [1997]).

([2]) We conclude that the remedy of mandamus to compel is not appropriate here, and thus that part of the petition/complaint seeking that relief should be denied. The statutory scheme of CPL article 216 establishes that a court has discretion in determining whether to allow a defendant into the judicial diversion program. For example, CPL 216.05 (4) provides that when an authorized court determines "that an eligible defendant should be offered alcohol or substance abuse treatment . . . , an eligible defendant *may* be allowed to participate in the judicial diversion program offered by this article" (emphasis added). Inasmuch as a court's duties under CPL article 216 are not ministerial in nature, mandamus to compel does not apply.

VII

Because of its extraordinary nature, a writ of prohibition lies only where there is a clear legal right to that relief (*see Matter of Pirro v Angiolillo*, 89 NY2d 351, 356 [1996]). Prohibition is available when "a court—in cases where judicial authority is challenged—acts or threatens to act ****5** either without jurisdiction or in excess of its authorized powers" (*Holtzman*, 71 NY2d at 569; *see Pirro*, 89 NY2d at 355). Prohibition does not lie to correct trial errors; the difference between a trial error and an action in excess of the court's power is that the latter impacts the entire proceeding (*see Holtzman*, 71 NY2d at 569).

> "When a petitioner seeks relief in the nature of prohibition pursuant to CPLR 7803 (2), the court must ***35** make a two-tiered analysis. It must first determine whether the issue presented is the type for which the remedy may be granted and, if it is, whether prohibition is warranted by the merits of the claim" (*id.* at 568).

Whether to grant prohibition is within the discretion of the court (*see Matter of Soares v Herrick*, 20 NY3d 139, 145 [2012]; *Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]).

([3]) Here, petitioner alleges that Judge DeMarco lacked the power to grant respondent defendants acceptance into judicial diversion and seeks to prohibit enforcement of his orders. Although the appealability or nonappealability of an issue is not dispositive (*see Holtzman*, 71 NY2d at 570), it is a factor to consider when determining whether prohibition is an appropriate remedy (*see Rush*, 68 NY2d at 354; *Matter of Doe v Connell*, 179 AD2d 196, 198 [1992]). Here, the People are unable to appeal a judicial diversion eligibility determination (*see generally* CPL 450.20). Moreover, Judge DeMarco's determinations affected the entire proceedings inasmuch as respondent defendants were diverted from the normal criminal proceedings. We therefore conclude that petitioner has a clear legal right to the relief of prohibition.

We now consider whether Judge DeMarco acted in excess of his authorized powers in a matter over which he has jurisdiction. CPL 216.00 (1) provides as follows:

> " 'Eligible defendant' means any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter, provided, however, a defendant is not an 'eligible defendant' if he or she:
>
> "(a) within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, has

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previously been convicted of: (i) a violent felony offense as defined in section 70.02 of the penal law or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision ***36** one of section eight hundred three of the correction law, or (iii) a class A felony offense defined in article two hundred twenty of the penal law; or

"(b) has previously been adjudicated a second violent felony offender pursuant to section 70.04 of the penal law or a persistent violent felony offender pursuant to section 70.08 of the penal law. ****6**

"A defendant who also stands charged with a violent felony offense as defined in section 70.02 of the penal law or an offense for which merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law for which the court must, upon the defendant's conviction thereof, sentence the defendant to incarceration in state prison is not an eligible defendant while such charges are pending. A defendant who is excluded from the judicial diversion program pursuant to this paragraph or paragraph (a) or (b) of this subdivision may become an eligible defendant upon the prosecutor's consent."

Thus, the first paragraph of CPL 216.00 (1) lists who is an " '[e]ligible defendant' " for acceptance into judicial diversion. It is undisputed that respondent defendants were not charged with any offenses under Penal Law article 220 or 221, or any specified offense in CPL 410.91. In our opinion, that ends the inquiry, and respondent defendants are not eligible for judicial diversion. It is well settled that " '[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning' " (*People v Kisina*, 14 NY3d 153, 158 [2010]; *see People v Williams*, 19 NY3d 100, 103 [2012]). Likewise, "statutory interpretation always begins with the words of the statute" (*People v Levy*, 15 NY3d 510, 515 [2010]).

Despite the unambiguous language of the statute, Judge DeMarco chose to examine the nature and purpose of the statute and concluded that the proper interpretation of the statute was to permit respondent defendants entry into judicial diversion (*Watford*, 36 Misc 3d at 457-461). Specifically, Judge DeMarco found that, because respondent defendants were not ineligible for judicial diversion pursuant to CPL 216.00 (1) (a) and (b), it was within his discretion to determine whether they were eligible for judicial diversion, even though they also did not qualify for that program pursuant to the criteria set forth in ***37** CPL 216.00 (1) and 410.91 (5) (*Watford*, 36 Misc 3d at 458). That was error. " '[C]ourts must construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of the statutes' " (*People v Pagan*, 19 NY3d 368, 370 [2012]). "Because the clearest indicator of legislative intent is the statutory text . . . , and the text of [CPL 216.00 (1)] is clear and unambiguous with respect to the matter in question, we need not explore the legislative history behind that statute . . . in an attempt to discern a contrary intent" (*People v Skinner*, 94 AD3d 1516, 1518 [2012] [internal quotation marks omitted]).

Simply put, had the legislature intended all nonviolent offenders who committed crimes because of their drug addiction to be eligible for judicial diversion, it could have easily so stated. "It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning . . . Courts cannot correct supposed errors, omissions or defects in legislation" (*Meltzer v Koenigsberg*, 302 NY 523, 525 [1951] [internal quotation marks omitted]).

Respondent defendants contend that the statute is ambiguous because it refers to CPL 410.91 (4), which was repealed at the time CPL 216.00 was enacted, and thus the statute must be interpreted by examining the purpose of the legislation. It is true, as pointed out earlier, that the statute contains what appears to be simply a typographical error. Instead of referring to CPL 410.91 (5), which lists specified offenses, it refers to CPL 410.91 (4), which as respondent defendants correctly note was repealed prior to the effective date of this statute. We conclude, however, that the defect does not render the statute ambiguous. Courts have uniformly interpreted the citation to CPL 410.91 (4) to be a citation to CPL 410.91 (5) (*see e.g. People v DeYoung*, 95 AD3d 71, 73 [2012]; *People v Caster*, 33 Misc 3d 198, 200 [2011]; *see also* Peter Preiser, ****7** Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 216.00, 2012 Cumulative Pocket Part at 69-70).

Respondent defendants also object to a plain reading of the statute because such a reading would give prosecutors sweeping authority to indict individuals only for crimes that would render them ineligible for judicial diversion, and the intent of the legislature was to give courts the discretion to decide who should be allowed into judicial diversion. Judge DeMarco was also troubled by that prospect (*Watford*, 36 Misc 3d at 460 ["it is ***38** incomprehensible

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that the legislature intended to give prosecutors, rather than judges, the final say as to who gets considered for the program and who does not"]). It is well settled, however, that prosecutors have "broad discretion to decide what crimes to charge" (*People v Urbaez*, 10 NY3d 773, 775 [2008]; *see People v Lawrence*, 81 AD3d 1326, 1326 [2011], *lv denied* 17 NY3d 797 [2011]). There is no indication in this case that the prosecutor sought to indict respondent defendants with only non-eligible offenses. In any event, even if we disagreed with the People's exercise of discretion, that is not a basis for a court to "exceed its legal authority and base [its determination of] eligibility [for judicial diversion] upon an unindicted charge" (*Caster*, 33 Misc 3d at 204).

([4]) Thus, we conclude that, by refusing to comply with the plain language of CPL 216.00 (1), Judge DeMarco acted in excess of his authority in matters over which he has jurisdiction (*see Matter of Green v DeMarco*, 87 AD3d 15, 20 [2011]; *Matter of Cosgrove v Ward*, 48 AD3d 1150, 1151 [2008]).

VIII

([5]) Finally, we agree with petitioner that she is also entitled to declaratory relief (*see Green*, 87 AD3d at 20). "Although a declaratory judgment often revolves around a particular set of facts, [t]he remedy is available in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (*Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 150 [1983], *cert denied* 464 US 993 [1983] [internal quotation marks omitted]). Additionally, the "criminal court's ruling must have an obvious effect extending far beyond the matter pending before it so that it is likely that the issue will arise again with the same result in other cases" (*id.* at 152). Judge DeMarco relied on his decision in *Watford* in similarly determining that Pugh was entitled to judicial diversion even though she was not charged with an eligible offense. Thus, "it can be assumed that the issue presented here will recur in other prosecutions and that [Judge DeMarco] will decide the issue in the same way" (*Green*, 87 AD3d at 20).

IX

Accordingly, we conclude that those parts of the petition/complaint seeking relief in the nature of a writ of prohibition and declaratory relief should be granted and that part ***39** of the petition/complaint seeking relief in the nature of mandamus to compel should be denied. Consequently, respondent judges should be prohibited from granting respondent defendants' motions to be allowed to participate in judicial diversion, from accepting their guilty pleas and their judicial diversion contracts, and from taking any further action on respondent defendants' cases in judicial diversion. Further, a judgment should be entered declaring that respondent judges admit only those defendants meeting the criteria set forth in CPL 216.00 (1) into the judicial diversion program.

Peradotto, Carni, Sconiers and Whalen, JJ., concur.

It is hereby ordered that said petition/complaint insofar as it seeks relief in the nature of a writ of prohibition and declaratory relief is unanimously granted without costs, the petition/complaint insofar as it seeks relief in the nature of mandamus to compel is denied, and it is ordered, adjudged and decreed that respondents-defendants Honorable John L. DeMarco and Honorable John R. Schwartz shall admit only those defendants meeting the criteria set forth in CPL 216.00 (1) into the judicial diversion program.

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32 N.Y.3d 461, 117 N.E.3d 795, 93 N.Y.S.3d 236, 2018 N.Y. Slip Op. 08057

**1 In the Matter of Miguel Gonzalez, Respondent-Appellant,
v
Anthony J. Annucci, as Acting Commissioner of Corrections and Community Supervision, Appellant-Respondent.

Court of Appeals of New York
121
Argued October 16, 2018
Decided November 27, 2018

CITE TITLE AS: Matter of Gonzalez v Annucci

SUMMARY

Cross appeals, as of right and by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered March 23, 2017. The Appellate Division, with two Justices dissenting, modified, on the law, a judgment of the Supreme Court, Albany County (Judith A. Hard, J.; op 56 Misc 3d 1203[A], 2015 NY Slip Op 52034[U] [2015]), entered in a proceeding pursuant to CPLR article 78, which had dismissed the petition. The modification consisted of partially converting the matter to a declaratory judgment action and declaring that (1) when a person whose prison sentence has expired and who is subject to the mandatory condition set forth in Executive Law § 259-c (14) is placed in a residential treatment facility pursuant to Penal Law § 70.45 (3) and Correction Law § 73 (10), the Department of Corrections and Community Supervision has an affirmative obligation pursuant to Correction Law § 201 (5) to provide substantial assistance to the person in locating appropriate housing; and that (2) the services provided to petitioner by the Department of Corrections and Community Supervision in locating such appropriate housing during his placement in the residential treatment facility at the Woodbourne Correctional Facility between September 30, 2014, and his subsequent release on February 4, 2015, were not adequate to satisfy that duty. The Appellate Division affirmed the judgment as modified.

Matter of Gonzalez v Annucci, 149 AD3d 256, modified.

HEADNOTES

Prisons and Prisoners
Conditional Release
Duty to Assist Sex Offenders in Obtaining Appropriate Housing—Exception to Mootness Doctrine

([1]) The Appellate Division properly invoked the exception to the mootness doctrine to reach the issues raised on petitioner sex offender's appeal from the judgment dismissing his CPLR article 78 proceeding asserting that respondent Department of Corrections and Community Supervision failed to provide him with assistance in locating housing compliant with the Sexual Assault Reform Act (SARA) prior to his conditional release and alleging that ***462** the residential treatment facility (RTF) to which he was transferred did not comply with Correction Law §§ 2 and 73. The exception has been invoked to consider substantial and novel issues that are likely to be repeated and will typically evade review. Based on the dearth of SARA-compliant housing in New York City, and the resulting need for placement of sex offenders in RTFs for a period of no more than six months pursuant to Penal Law § 70.45, there was a clear likelihood that the issue would be repeated. Moreover, given the transitory duration of placement at RTFs, the issues presented were likely to evade review. Finally, the issues presented were novel and substantial, raising the extent of respondent's statutory obligation to provide assistance in obtaining SARA-compliant housing.

Prisons and Prisoners
Conditional Release
Duty to Assist Inmates on Community Supervision in Securing Housing—No Heightened Duty to Provide Sex Offenders with Substantial Assistance

([2]) The Department of Corrections and Community Supervision (DOCCS), which must "assist" inmates on or eligible for community supervision to secure housing pursuant to Correction Law § 201 (5), does not have a heightened duty to provide sex offenders residing in a residential treatment facility with substantial assistance in identifying appropriate housing. DOCCS' obligation under section 201 is a general duty, expansive in scope and applicable to all inmates in the state prison system on or eligible for community supervision. Such a general duty

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cannot be defined by the intractable problems presented by inmates convicted of sex offenses who must obtain housing compliant with the Sexual Assault Reform Act in a limited market without financial resources. Moreover, the statutory obligation to provide assistance is not restricted to providing housing, but equally applies to assistance in securing employment, education and vocational training for all inmates on or eligible for community supervision. It is unreasonable and impracticable to interpret this general duty of providing “assist[ance]” as imposing the burden on DOCCS of substantial assistance with respect to this broader class of inmates to secure each inmate housing, educational or vocational training, and employment. DOCCS' interpretation of its obligation as satisfied when it actively investigates and approves residences that have been identified by inmates and when it provides the inmates with adequate resources to allow them to propose residences for investigation and approval is therefore consistent with the plain language of the statute as well as the larger statutory framework.

Prisons and Prisoners
Conditional Release
Duty to Assist Sex Offenders in Obtaining Appropriate Housing

([3]) Respondent Department of Corrections and Community Supervision met its obligation under Correction Law § 201 (5) to “assist” petitioner sex offender in securing housing compliant with the Sexual Assault Reform Act (SARA) prior to his conditional release. The record demonstrated that petitioner met biweekly with an offender rehabilitation coordinator regarding SARA-compliant housing and also met several times with his parole officer. Petitioner was able to propose 58 residences which respondent investigated for SARA compliance. Respondent also affirmatively identified at least two housing options for petitioner—one was rejected by petitioner on the basis that he could not afford it and the other was the shelter where he was ultimately housed. The record reflected that respondent provided more than passive assistance, given that it affirmatively contacted other agencies and providers on petitioner's behalf because of his financial needs. Moreover, petitioner was successfully placed through respondent's efforts.

***463** Prisons and Prisoners
Conditional Release
Sex Offender's Transfer to Residential Treatment Facility Based on Inability to Secure Appropriate Housing

([4]) In petitioner sex offender's CPLR article 78 proceeding challenging respondent Department of Corrections and Community Supervision's determination to place petitioner in a residential treatment facility (RTF) based on his inability to secure housing compliant with the Sexual Assault Reform Act prior to his conditional release, the Appellate Division correctly held that there was insufficient record evidence to establish that respondent's determination was irrational or that the conditions of petitioner's placement at the facility were in violation of respondent's statutory or regulatory obligations. The record adequately established that, based on institutional considerations, the facility was the closest available RTF in which to place petitioner. Additionally, the record demonstrated that petitioner was accorded the rights of a resident of an RTF, as opposed to an inmate.

RESEARCH REFERENCES

Am Jur 2d Administrative Law § 461; Am Jur 2d Pardon and Parole § 94; Am Jur 2d Penal and Correctional Institutions § 207.

Carmody-Wait 2d Declaratory Judgments § 147:24; Carmody-Wait 2d Proceeding Against a Body or Officer §§ 145:1590, 145:1621.

McKinney's, CPLR art 78; Correction Law §§ 2; 73; 201 (5); Penal Law § 70.45.

NY Jur 2d Appellate Review § 614; NY Jur 2d Article 78 and Related Proceedings §§ 103, 415; NY Jur 2d Penal and Correctional Institutions §§ 337, 339, 353, 359, 400.

Siegel, NY Prac § 612.

ANNOTATION REFERENCE

See ALR Index under Moot and Abstract Matters; Parole, Probation, and Pardon; Prisons and Prisoners; Sentence and Punishment; Sexual Relations and Offenses.

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POINTS OF COUNSEL

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I. The assistance issue is moot and the Appellate Division erred in applying the exception ***464** to the mootness doctrine to reach the merits. (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707; *Coleman v Daines*, 19 NY3d 1087; *Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570; *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801; *Matter of Vogler v Smith*, 48 NY2d 974; *Matter of Williams v Department of Corr. & Community Supervision*, 136 AD3d 147, 29 NY3d 990; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707; *Matter of Chenier v Richard W.*, 82 NY2d 830; *Wisholek v Douglas*, 97 NY2d 740; *Matter of Lopez v Evans*, 25 NY3d 199.) II. The New York State Department of Corrections and Community Supervision satisfied its duty to assist petitioner to secure Sexual Assault Reform Act-compliant housing. (*People v Diack*, 24 NY3d 674; *People ex rel. Green v Superintendent, Sullivan Corr. Facility*, 137 AD3d 56; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539; *Matter of O'Brien v Spitzer*, 7 NY3d 239; *Matter of Cardew v Fischer*, 115 AD3d 1193, 23 NY3d 904; *Matter of Boss v New York State Div. of Parole*, 89 AD3d 1265.)

Pappalardo & Pappalardo, LLP, Scarsdale (*Jill K. Sanders* of counsel), and *Robert S. Dean, Center for Appellate Litigation*, New York City, for respondent-appellant.

I. The New York State Department of Corrections and Community Supervision's (DOCCS) determination to place Miguel Gonzalez at the Woodbourne residential treatment facility (RTF) failed to comply with DOCCS' statutory and regulatory obligations, as the conditions at the Woodbourne RTF were virtually indistinguishable from continued incarceration in a prison facility. (*Matter of Reisman v Codd*, 54 AD2d 878; *Matter of Cacchioli v Hoberman*, 31 NY2d 287; *Matter of Meier v Board of Educ. Lewiston Porter Cent. Sch. Dist.*, 106 AD3d 1531; *New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194; *Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd.*, 97 AD3d 1044; *Matter of School Adm'rs Assn. of N.Y. State v New York State Dept. of Civ. Serv.*, 124 AD3d 1174.) II. An inmate in New York State Department of Corrections and Community Supervision's (DOCCS) custody should not lose his earned good time credit for being unable to locate Sexual Assault Reform Act-compliant housing in his community, where DOCCS fails to assist him with locating such housing. (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900; *Matter of Breeden v Donnelli*, 26 AD3d 660; *Matter of Boss v New York State Div. of Parole*, 89 AD3d 1265; *Matter of Billups v New York State Div. of Parole, Chair*, 18 AD3d 1085; *Matter of Wright v Travis*, 297 AD2d 842; ***465** *Stern v Gepo Realty Corp.*, 289 NY 274; *Griffin v Illinois*, 351 US 12; *People v Saffore*, 18 NY2d 101; *Wolff v McDonnell*, 418 US 539.) III. The Appellate Division did not err in holding that the New York State Department of Corrections and Community Supervision (DOCCS) is obliged to “substantially assist” sex offenders subject to the Sexual Assault Reform Act residency restriction who have been placed in a residential treatment facility in securing approved housing, nor did it err in holding that DOCCS failed to meet its duty to assist Miguel Gonzalez in identifying and securing approved housing. IV. The Appellate Division did not err in applying the exception to the mootness doctrine. (*People v Diack*, 24 NY3d 674; *People ex rel. Green v Superintendent of Sullivan Corr. Facility*, 137 AD3d 56; *Matter of Williams v Department of Corr. & Community Supervision*, 43 Misc 3d 356, 136 AD3d 147; *Callahan v Carey*, 307 AD2d 150; *People ex rel. O'Connor v Berbary*, 195 Misc 2d 36; *Matter of David C.*, 69 NY2d 796; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707; *People ex rel. DeLia v Munsey*, 26 NY3d 124; *People ex rel. McManus v Horn*, 18 NY3d 660; *Matter of State of New York v Cuevas*, 49 AD3d 1324.)

Justine Luongo, The Legal Aid Society, New York City (*Robert C. Newman* of counsel), and *Karen Murtagh, Prisoners' Legal Services of New York*, Albany (*James Bogin* of counsel), for The Legal Aid Society and another, amici curiae.

I. The Appellate Division correctly invoked the exception to the mootness doctrine. (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707.) II. The Appellate Division correctly held that the New York State Department of Corrections and Community Supervision did not satisfy its “affirmative and significant” statutory duty to provide housing assistance to Miguel Gonzalez. (*Matter of Kirkland v Annucci*, 150 AD3d 736; *Matter of Colon v Annucci*, 151 AD3d 1061; *People v Diack*, 24 NY3d 674.) III. The Court should vacate the Appellate Division's holding that Miguel Gonzalez failed to demonstrate that the operation of Woodbourne “residential treatment facility” was non-compliant with applicable statutes. (*Matter of Bennett v Annucci*, 162 AD3d 765.)

OPINION OF THE COURT

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Chief Judge DiFiore.

The primary issue presented on appeal is whether the Appellate Division erred in holding that the Department of Corrections and Community Supervision (DOCCS), which must "assist" ***466** inmates on or eligible for community supervision to secure housing pursuant to Correction Law § 201 (5), has an obligation to provide sex offenders residing in a residential treatment facility (RTF) with substantial assistance in identifying appropriate housing. We hold that the Court erred in imposing a heightened duty of substantial assistance on DOCCS, and conclude that the agency met its statutory obligation to assist petitioner in this particular case.

I.

Petitioner was convicted, upon his guilty plea, of rape in the second degree under Penal Law § 130.30 (1). He was sentenced to a determinate sentence consisting of 2½ years' imprisonment followed by 3 years' postrelease supervision (PRS). The maximum expiration date of his prison sentence was September 30, 2014. In early May 2014, petitioner was advised by the Time Allowance Committee at Franklin Correctional Facility that his accumulated good time credit amounted to four months and 10 days and that he was eligible for conditional release ****2** to PRS on May 20, 2014. Had petitioner been released on his conditional release date, the maximum expiration date of his PRS would have been three years from that date, or May 20, 2017.

Based on the sex offense for which petitioner was convicted and the fact that the victim of the offense was 14 years old at the time of the offense, petitioner's supervisory release was subject to the mandatory condition set forth in the Sexual Assault Reform Act (SARA) prohibiting him from residing within 1,000 feet of school grounds (*see* Executive Law § 259-c [14]; Penal Law §§ 220.00 [14]; 65.10 [4-a] [a]). In accordance with this statutory requirement, one month prior to petitioner's conditional release date, the Board of Parole imposed a special condition on his release. That condition required petitioner to propose an appropriate SARA-compliant residence to be investigated and approved by DOCCS. Petitioner identified one potential residence prior to his May 2014 conditional release date but that residence did not qualify as SARA-compliant housing. Since he was unable to satisfy the mandatory condition of his supervisory release, DOCCS held him in custody beyond his May 20, 2014 conditional release date. Petitioner continued to identify potential residences and discuss them with his parole officer, but none of the proposed residences he identified satisfied the mandatory special condition. As a result, ***467** petitioner lost all of his good time credit, and DOCCS kept petitioner incarcerated until September 30, 2014, the maximum expiration date for the imprisonment portion of his determinate sentence. Accordingly, the expiration date of his three-year term of PRS, the remaining portion of his determinate sentence, was extended to September 30, 2017. Prior to his release, petitioner was adjudicated a level one sex offender.

Because petitioner was unable to identify a suitable residence by his maximum expiration date, the Board of Parole imposed, as a condition of his PRS, that petitioner be transferred to Woodbourne Correctional Facility—a residential treatment facility (*see* Penal Law § 70.45 [3]; Correction Law § 2 [6]). Specifically, under Penal Law § 70.45 (3), the Board of Parole is authorized to require, as a condition of PRS, that an inmate be transferred to and participate in the programs of an RTF for a period of no more than six months upon his or her release from the underlying term of imprisonment. Woodbourne is a medium security correctional facility that DOCCS has designated for use as an RTF (*see* 7 NYCRR 100.50 [c] [2]). Petitioner remained at Woodbourne until February 4, 2015, when he was released on supervision to a SARA-compliant shelter in Manhattan.

In December 2014, petitioner commenced this CPLR article 78 proceeding asserting that DOCCS failed to provide him with assistance in locating housing. He also challenged the agency's determination to designate Woodbourne as an RTF, asserting, among other things, that the facility did not comply with the statutory requirements of an RTF under Correction Law §§ 2 and 73 and that he was therefore being held in an illegal RTF. [1] In addition, petitioner asserted that the determination to deprive him of all of his good time credit was made in violation of lawful procedure and due process. [2]

In disputing that Woodbourne was a legal RTF, petitioner argued that he was effectively being incarcerated in a facility ***468** that was not community-based as it was well outside of the Manhattan community to which he planned to ****3** return. He also claimed he was confined under the same restrictions as inmates who were serving their prison sentences at that same medium security facility. Petitioner further maintained that he did not receive any rehabilitative programming directed toward his reintegration into the community while at Woodbourne as required by Correction Law § 73. Although he admittedly participated in

Woodbourne's RTF program for a portion of his stay at that facility, he claimed that the program was no different from the “Phase Three” program he had already completed as part of his sentence of imprisonment—a program that was required to be completed by all inmates prior to their release from incarceration. Petitioner's participation in the RTF program apparently terminated when he began his assignment to an outside work crew.

In support of his claim that DOCCS did not provide him with assistance in locating SARA-compliant housing, petitioner alleged that he was assigned to a Poughkeepsie-area parole officer and not one from New York City. Petitioner was permitted to leave the Woodbourne facility to make weekly visits to the parole officer but objected to the fact that he was under the supervision of correction officers at all times. He asserted that, at those visits, the parole officer would merely ask him whether he had located any suitable housing. Petitioner acknowledged that the parole officer affirmatively proposed a single housing option for him—a therapeutic community in Staten Island at a monthly cost of $620, which petitioner rejected as he could not afford it. He essentially contended that DOCCS' assistance was insufficient in light of the circumstances of his continued incarceration at the RTF, including his limited access to the telephone and lack of access to the Internet.

In opposition, DOCCS maintained that petitioner was retained beyond his conditional release date because he was unable to satisfy the special condition imposed by the Board of Parole—the SARA residency requirement—and, based on his continued inability to find a suitable residence, he was properly transferred to Woodbourne as a condition of his PRS on his maximum expiration date. DOCCS provided an affidavit from a supervising offender rehabilitation coordinator (SORC) who averred that, in general, RTF inmates “meet and collaborate with DOCCS staff with greater frequency than non-sex-offender inmates, with an emphasis on identifying lawful and ***469** otherwise appropriate residences.” Moreover, the SORC referenced the DOCCS directive requiring that all parolees subject to SARA residency restrictions meet with offender rehabilitation coordinators and that these coordinators “submit any new residence proposals for investigation by Community Supervision field personnel on a priority basis.” The SORC also asserted that petitioner, as an RTF resident, earned higher wages than the Woodbourne inmates and that the bulk of those earnings were placed into a housing fund for petitioner that was exempt from garnishment by DOCCS.

As to rendering assistance to petitioner, DOCCS also submitted entries from its case management system (CMS) detailing many of the proposed residences identified by petitioner for investigation by DOCCS and why these residences were rejected for lack of SARA compliance. Notably, an entry dated November 28, 2014, states that petitioner had proposed 58 potential residences since March 2014. DOCCS identified nine dates on which petitioner had met with SORCs regarding SARA-compliant housing and 14 dates on which its personnel had recorded efforts to investigate residences for SARA compliance on petitioner's behalf. The CMS entries also indicate that petitioner was referred to parole reentry services.

Significantly, DOCCS also provided an affidavit from counsel to the Board of Parole, who affirmed that, in addition to investigating the residences proposed by petitioner for SARA-compliance, DOCCS' staff reached out to other agencies, including the local Department of Social Services, to ascertain whether they could provide housing for petitioner. An assistant commissioner for population management at DOCCS provided the reasons for petitioner's placement at Woodbourne explaining in her affidavit that, although there were RTFs that were closer to Manhattan, Woodbourne was the closest appropriate option for petitioner based on the programming that was available as well as staffing considerations. The affidavit also explained that DOCCS partners with the Department of Homeless Services (DHS) in New York City to obtain suitable housing for indigent sex offenders who are returning to the city upon release. According to the affidavit, there are only four SARA-compliant DHS locations in New York City that accept parolees and individuals are accepted as space becomes available, with individuals who have been held the longest in RTFs being placed first.

Supreme Court denied the petition (56 Misc 3d 1203[A], 2015 NY Slip Op 52034[U] [Sup Ct, Albany County 2015]). Notwithstanding ***470** that petitioner had not yet completed his three-year term of PRS, the court concluded that his arguments were moot and that the exception to mootness did not apply. The court went on to conclude that, even if the issues were not moot, the petition should be denied on the merits. ****4**

The Appellate Division agreed that the majority of the issues (except for petitioner's challenge to the loss of his good time credit, as the PRS term was still ongoing when the Court

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issued its decision) were moot, but held that the exception to mootness applied and reached the merits. The Court modified, on the law, by partially converting the matter to a declaratory judgment action and declaring that DOCCS has an affirmative statutory obligation to provide "substantial assistance" to inmates who have been placed in an RTF and who are subject to the mandatory residency restrictions in SARA in locating appropriate housing, and that DOCCS failed to satisfy its statutory duty to petitioner in this case (149 AD3d 256, 264 [3d Dept 2017]). As to petitioner's remaining arguments, the Court held that it was not irrational for DOCCS to withhold petitioner's good time credit while he was unable to locate SARA-compliant housing prior to the expiration of his prison sentence and that DOCCS' decision to transfer petitioner to Woodbourne upon completion of the prison sentence was not irrational or in violation of the agency's statutory and regulatory obligations.

Two Justices dissented in part and would have held that petitioner received adequate assistance in finding SARA-compliant housing. DOCCS appealed to this Court as of right (CPLR 5601 [a]) and we granted petitioner's motion for leave to cross-appeal.

II.

([1]) We reject DOCCS' assertion that the Appellate Division erred in invoking the exception to mootness to reach the issues raised on appeal. "In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). We have, however, invoked the exception to mootness to consider substantial and novel issues that are likely to be repeated and will typically evade review (*see Hearst Corp.*, 50 NY2d at 714-715). Based on the dearth of SARA-compliant housing in New York City, and the resulting need for placement of sex offenders in RTFs for a ***471** period of no more than six months pursuant to Penal Law § 70.45, there is a clear likelihood that this issue will be repeated. Moreover, given the transitory duration of placement at the RTFs, the issues presented are likely to evade review (*see City of New York v Maul*, 14 NY3d 499, 507 [2010]). Finally, the issues presented are novel and substantial, raising the extent of DOCCS' statutory obligation to provide assistance in obtaining SARA-compliant housing. We therefore address the merits.[3]

III.

As noted above, the primary issue presented is the extent of DOCCS' obligation to assist inmates in obtaining housing under Correction Law § 201 (5). "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). However, "[w]here ****5** the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997] [internal quotation marks and citation omitted]). Here, the statutory language is clear and no deference is required.

([2]) Under Correction Law § 201 (5), DOCCS "shall assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, educational or vocational training, and housing." There is nothing set forth in the statutory language of section 201 (5) that imposes a heightened duty upon DOCCS to provide substantial assistance to an inmate seeking housing (*cf.* Correction Law § 73 [2] [DOCCS "shall be responsible for securing appropriate ***472** education, on-the-job training and employment for inmates transferred to (RTFs)"]). In interpreting the statute to require substantial assistance, the Appellate Division attempted to cabin what it viewed as DOCCS' greater responsibility to assist sex offenders residing in RTFs. DOCCS' obligation under section 201 cannot be so narrowly viewed because it is a general duty, quite expansive in scope and applicable to all inmates in the state prison system on or eligible for community supervision. Such a general duty cannot be defined by the intractable problems presented by inmates convicted of sex offenses who must obtain SARA-compliant housing and must do so in a very limited market without financial resources. Moreover, the statutory obligation to provide assistance is not restricted to providing housing, but equally applies to assistance in securing employment, education and vocational training for all inmates on or eligible for community supervision. It is unreasonable and impracticable to interpret this general duty of providing "assist[ance]" as imposing the burden on DOCCS of substantial assistance with respect to this broader class of inmates to secure each inmate housing, educational or vocational training, and employment.

We disagree with the Appellate Division majority's reasoning that DOCCS has an obligation to provide substantial

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assistance to inmates in petitioner's situation, in part, because of DOCCS' separate obligation to "investigat[e] and approv[e] the residence" of level two and three sex offenders (Correction Law § 203 [1]; Executive Law § 243 [4]), and that, in light of this existing obligation, the "additional affirmative statutory obligation" to provide assistance under Correction Law § 201 (5) would be rendered meaningless if satisfied by the investigation and approval of residences proposed by the inmate (149 AD3d at 263). First, we note that petitioner is a level one sex offender and, therefore, Correction Law § 203 (1) and Executive Law § 243 (4) do not apply to him. Those statutes cannot render section 201 (5) meaningless with respect to petitioner. In any event, Correction Law § 203 (1) and Executive Law § 243 (4) cannot be read to support the heightened burden on DOCCS that the Appellate Division would impose.

In *People v Diack*, we recognized that the State, in an effort to preempt rules imposed by individual localities to curtail the housing of sex offenders in their jurisdictions, assumed the responsibility for "maint[aining] and locat [ing]" acceptable housing for sex offenders and that regulations were promulgated ***473** to address this "enormous challenge" (24 NY3d 674, 684 [2015]). Indeed, those regulations—promulgated by the Division of Parole, the Division of Probation and Correctional Alternatives, and the Office of Temporary and Disability Assistance—acknowledge the enormous difficulty in finding appropriate housing for sex offenders, but they do not impose specific obligations on DOCCS beyond DOCCS' duty to investigate and approve residences for level two and three sex offenders (*see* 9 NYCRR 8002.7). By statute and regulation, for the indigent sex offender, it is the local Department of Social Services (DSS) that has the obligation to determine the placement of level two and three sex offenders in shelters (*see* Social Services Law § 20 [8] [b]; 18 NYCRR 352.36 [b]).[4] Through this scheme, the ****6** legislature required DSS, in placing the sex offender in shelters, to consider factors other than the mere availability of shelter, including the "investigation and approval of such placement by [DOCCS]" for public safety reasons (Social Services Law § 20 [8] [b] [v]; Correction Law § 203 [1]; Executive Law § 243 [4]). The legislation requiring the agencies to consider such factors was intended, in part, to specifically address the warehousing of level two and three sex offenders residing in SARA-compliant housing in concentrated locations and the resulting risk to public safety in those neighborhoods (L 2008, ch 568).

In contrast, under the plain language of section 201, DOCCS' obligation with respect to all inmates on or eligible for community supervision is to provide assistance in a general manner and certainly does not alleviate the ultimate obligation on the inmate to locate housing.[5] This assistance owed by DOCCS to the general population of inmates about to be released from ***474** state prison is unrelated to its particularized duty governed by Correction Law § 203 (1) and Executive Law § 243 (4) to assure the placement in housing by DSS of level two and three sex offenders consistent with the overarching concern of public safety. Even in this latter situation where these sex offenders have been designated for separate treatment, DOCCS is given a law enforcement task of investigation and is not the government agency that places a sex offender in any housing.

In sum, Correction Law § 201 (5) requires DOCCS to assist inmates prior to release and under supervision to secure housing. DOCCS has interpreted its obligation under the statute as satisfied when it actively investigates and approves residences that have been identified by inmates and when it provides the inmates with adequate resources to allow them to propose residences for investigation and approval. This interpretation is consistent with the plain language of the statute as well as the larger statutory framework. While the agency is free, in its discretion, to provide additional assistance to inmates in locating SARA-compliant housing —particularly where an inmate is nearing the maximum expiration date or is residing in an RTF with the associated restrictions on the ability to conduct a comprehensive search —there is no statutory basis in Correction Law § 201 (5) for imposing such an obligation. ****7**

([3]) As to whether DOCCS met its obligation in this particular case, the record demonstrates that petitioner met biweekly with an ORC regarding SARA-compliant housing and also met several times with his parole officer. Petitioner was able to propose 58 residences which DOCCS investigated for SARA-compliance. The agency also affirmatively identified at least two housing options for petitioner in New York City—one was rejected by petitioner on the basis that he could not afford it and the other was the shelter in Manhattan where he was ultimately housed. Certainly, the record reflects that DOCCS ***475** provided more than passive assistance, given that it affirmatively contacted other agencies and providers on petitioner's behalf because of his financial needs. Indeed, petitioner was successfully placed with New York City's DHS through DOCCS' efforts, which

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were adequate to meet its statutory obligation to provide assistance.

([4]) Finally, we agree with the Appellate Division that there was insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations. [6] Notably, the record adequately establishes that, based on institutional considerations, Woodbourne was the closest available RTF in which to place petitioner. Additionally, the record demonstrates that petitioner was accorded the rights of a resident of an RTF, as opposed to an inmate.

The parties' remaining contentions are without merit.

Accordingly, the order of the Appellate Division should be modified, without costs, in accordance with this opinion and, as so modified, affirmed.

Rivera, J. (concurring in part and dissenting in part). I join sections I through III of the dissent, and agree fully with Judge Wilson's analysis and discussion of the proper interpretation of the Department of Corrections and Community Supervision's duty to assist petitioner Miguel **8 Gonzalez pursuant to Correction Law § 201 (5), and the need for a hearing on petitioner's challenge to his placement at the Woodbourne Correctional Facility based on his claim that it failed to meet the requirements of a residential treatment facility. However, I agree with the majority (majority op at 471 n 3) that the exception to the mootness doctrine does not apply to petitioner's good time credit claim. That issue remains open.

Wilson, J. (dissenting). Suppose you were moving to New York City and were looking for a place to live. As tens of thousands do each year, you turn to a real estate agent for assistance. You tell your agent the maximum rent you can afford and that you need an apartment within a certain proximity of a school, the subway and a park. The agent, however, does not *476 give you a map of possible locations, or a set of listings, or even suggestions as to neighborhoods. Instead, the agent insists you play a game of real-estate Battleship: you guess an address, and the agent will tell you "hit" or "miss," depending on whether, based on the agent's inscrutable interpretation of your criteria, the address has a suitable apartment. After 58 misses and no hits, the agent finally proposes an apartment to you—one far outside of your price range. One more thing: until you win the game, *you cannot leave*. Have you been "assisted"?

According to the majority, this Kafkaesque [1] treatment is what the legislature meant when it imposed a duty on the New York State Department of Corrections and Community Supervision (DOCCS) to "assist inmates eligible for community supervision . . . to secure . . . housing" (Correction Law § 201 [5]). Thus, DOCCS claims it "assisted" Miguel Gonzalez to secure housing by providing him occasional access to a phone and periodically telling him that each residence he proposed was unsatisfactory. What's more, although Mr. Gonzalez's impeccable conduct while imprisoned earned him a substantial amount of good-time credit, he was stripped of that credit because he lost DOCCS's unwinnable game of real-estate Battleship. I am certain the legislature intended neither the process nor the result here, and therefore dissent.

**9 I.

Mr. Gonzalez was employed as a guard at a middle school. After he left that employment, he had a sexual relationship with an underage former student of that school. He pleaded guilty to second-degree statutory rape on January 5, 2012. On April 3, 2012, he was sentenced to a determinate 2½ years in prison followed by three years' postrelease supervision (PRS). His maximum term of imprisonment was set at September 30, 2014. While in prison, he acquired "good-time credit" (*see* Correction Law § 803 [1] [a]) that advanced his release date to May 20, 2014.

Mr. Gonzalez committed a serious crime and received a sentence deemed appropriate by the court, the People and Mr. Gonzalez. He then did what our corrections system aspires: he made an earnest effort to reform himself. He was a model inmate, fulfilling every rehabilitation program recommended to him, committing no disciplinary infractions, and accruing the *477 maximum possible good-time credit (*see* Correction Law § 803 [1] [c]). He expressed a "high level [of] remorse, and has completed sex offender treatment, to which he responded very well and was found to be highly motivated" (*People v Gonzalez*, Sup Ct, NY County, Aug. 11, 2014, FitzGerald, J., indictment No. 2222/2011, slip op at 7-8). When the time came to assign Mr. Gonzalez a Sex Offender Registration Act (SORA) risk level, [2] the SORA court determined him to be a level one offender, the level reserved for offenders who pose the lowest possible risk to the community (*id*). Notably, the court emphasized Mr.

Gonzalez's "supportive family and friends," noting that they were "important factors in rehabilitation" (*id.*; *accord e.g.* Rebecca L. Naser & Nancy G. La Vigne, *Family Support in the Prisoner Reentry Process: Expectations and Realities*, 43 J Offender Rehabilitation [No. 1] 93 [2006]).

As a level one sex offender, Mr. Gonzalez was subject to the Sexual Assault Reform Act (SARA) for the duration of his postrelease supervision period. SARA provides, in relevant part, that the parole "board shall require, as a mandatory condition of [postrelease supervision], that such sentenced offender shall refrain from knowingly entering into or upon any school grounds . . . or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen" (Executive Law § 259-c [14]). "School grounds" here means "any area accessible to the public located within one thousand feet of the real property boundary line" of any school (Penal Law § 220.00 [14]). DOCCS interprets SARA to permit it to detain all sex offender inmates (including level one offenders) until one of two events occurs: (a) the inmate secures housing that is at least 1,000 feet from any school and meets other DOCCS criteria; or (b) the inmate's postrelease supervision period terminates.

As Mr. Gonzalez's release date neared, DOCCS—fully aware of the restrictions placed on Mr. Gonzalez by its interpretation of SARA—did nothing to identify suitable housing for him. Instead, when his May 20, 2014 release date arrived, DOCCS ***478** revoked his good-time credit because DOCCS had yet to approve any of the housing options Mr. Gonzalez had proposed. By revoking the good-time credit, DOCCS then retained Mr. Gonzalez in prison until his maximum expiration date of September 30, 2014, and then "released" him to postrelease supervision in the Woodbourne Correctional Facility—a prison also designated as a residential treatment facility (RTF) (7 NYCRR 100.50 [c] [2]). Four months after that, DOCCS moved him into a homeless shelter on Randall's Island. Mr. Gonzalez's first choice was to live with his parents, who also wanted him to reside with them in their home, but DOCCS deemed that address unacceptable. By eliminating Mr. Gonzalez's good-time credit, DOCCS also extended the end of his postrelease supervision from May 20, 2017, to September 30, 2017. ****10**

Indeed, that DOCCS entertained Mr. Gonzalez's proposal to live in New York City in the first place (despite it being, as the majority explains, "a very limited market [for those] without financial resources" [majority op at 472]) likely stemmed from a rehabilitative motive that is, as I explain below, central to the legislature's directive under Correction Law § 201. As is true for more dangerous sex offenders (*see* Correction Law § 203 [1] [d]), exiling Mr. Gonzalez to some other part of the state—far away from the "supportive family and friends" the SORA court emphasized—would increase the risk that he might reoffend and disrupt his journey towards total social reintegration. Yet despite the importance of those networks, DOCCS swiftly denied Mr. Gonzalez's proposal to live with his parents. [3] It is hard to tell whether the irony or poor public policy is more striking: instead of permitting Mr. Gonzalez to live with his parents, DOCCS lengthened his prison stay and forced him into one of the four homeless shelters meant to accommodate every sex offender in New York City, including the highest-risk level three offenders. Which situation would best further his rehabilitation and reintegration and protect New York's children?

***479 II.**

The majority concludes that the above conduct satisfied DOCCS's duty under Correction Law § 201 (5) to "assist" Mr. Gonzalez to "secure . . . housing." In so concluding, the majority takes issue with the Appellate Division's articulation of DOCCS's duty: namely, that DOCCS must render "substantial" assistance, which the majority interprets (wrongly) as a "heightened" duty (majority op at 466) on DOCCS, above and beyond that imposed by the statute.

Insofar as the majority thinks that the Appellate Division erred in applying the word "substantial" to describe DOCCS's duty to assist Mr. Gonzalez (majority op at 472), [4] or that the Appellate Division erred in applying the various level two and three sex-offender laws to Mr. Gonzalez's case, the majority misses the point—the question is not what label to put on DOCCS's duty to its inmates, but the content (i.e., "substance") of that duty. More significantly, the majority's reasoning rests on the false premise that whatever "duty" means, it must mean the same for every inmate and the same for every obligation. We have not construed duties that way in any other area of law: doing so makes no sense.

Although the majority rejects the Appellate Division's understanding of the word "assist," [5] it never explains just what it understands "assist" to mean. Instead, the best it can offer is that whatever "assist" means, when DOCCS ****11** "actively investigates and approves residences that have been identified by inmates and when it provides the inmates with adequate resources to allow them to propose

residences for investigation and approval" (majority op at 474), then DOCCS's actions are "adequate to meet its statutory obligation" (majority op at 475). Whence comes that conclusion is a mystery.

Instead, to understand "assist," I would look to the legislature's "express purpose" for Correction Law § 201: "promot[ing] ***480** . . . inmates' successful and productive reentry into society" (L 2011, ch 62, § 1, part C, § 1, subpart A, § 1; *cf. Riley v County of Broome*, 95 NY2d 455, 463 [2000]; McKinney's Cons Laws of NY, Book 1, Statutes § 122). DOCCS itself was created to "provide for a seamless network for the care, custody, treatment and supervision of a person, from the day a sentence of state imprisonment commences, until the day such person is discharged from supervision in the community" (L 2011, ch 62, § 1, part C, § 1, subpart A, § 1).

The statutory scheme of the Penal Law and Correction Law as a whole should also inform our construction of the word "assist" (*see Matter of M.B.*, 6 NY3d 437, 447 [2006]; *People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). That scheme evinces a consistent effort to provide incentives for rehabilitation ("correction," if you will) and full integration into society, which also illuminates the way in which the legislature understood the word "assist."

Thus, incarcerated persons will earn time credit for "good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program" (Correction Law § 803 [1] [a]), transitioning into a "residential treatment facility" that is a "community based residence . . . where employment, educational and training opportunities are readily available for persons who are on parole [or postrelease supervision]" (Correction Law § 2 [6]). DOCCS must "encourage apprenticeship training" (Correction Law § 201 [7]) of inmates who might benefit from it. Once released, inmates have a statutory protection from discrimination by employers and others on the basis of their criminal records (*see e.g.* Correction Law § 752; Executive Law § 296 [15]-[16]). In all respects, the statutory scheme is one that seeks systematically to remove from the willing inmate the disabilities of past crimes and imprisonment, but recognizes DOCCS's assistance is vital to enhancing the prospects for rehabilitation and reintegration.[6]

***481** Viewed in the context of the legislature's statements of intent and the overall statutory scheme, Correction Law § 201 (5)'s mandate that DOCCS "shall assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, educational or vocational training, and housing" requires DOCCS to take adequate measures to support an inmate's acquisition of the three items (employment, education, and housing) that the legislature has determined are most conducive to promoting "inmates' successful and productive reentry into society" (L 2011, ch 62, § 1, part C, § 1, subpart A, § 1).

As the majority acknowledges when it describes DOCCS's duty in terms of "adequate resources" (majority op at 474), for "assistance" to be "assistance" it must be at least "adequate." Adequate assistance, or "adequate resources," ****12** will differ depending on the needs of each individual. Surely DOCCS need not provide resources regarding SARA-compliant housing for parolees not subject to SARA at all. Likewise, I hope the majority would agree that DOCCS would fail to "assist" a paraplegic inmate if DOCCS gave the inmate a list of potential residences consisting exclusively of fourth-floor walk-ups. DOCCS appears to agree: in its reply to the amicus brief of the Legal Aid Society, DOCCS explains that its assistance to each inmate "depends on dynamic and individualized variables" that, presumably, yield different levels of "assistance" for each inmate depending on inmate needs.[7] In all cases the duty on DOCCS is the same—it simply must apply the same duty to the individualized circumstance of each inmate.

The majority fears that the Appellate Division's "substantial assistance" phrasing (which, to me, simply means "adequate assistance") would impose an "unreasonable and impracticable" requirement on DOCCS to "*secure* each inmate [eligible for community supervision] housing, educational or vocational ***482** training, and employment" (majority op at 472 [emphasis added]). That is not what the Appellate Division said. Instead, it simply recognized that because "assistance" worthy of the term will vary depending on the inmate, a set of inmates with readily-known legal disabilities (sex offenders subject to SARA) require more (and more specialized) housing assistance from DOCCS than others, and those returning to New York City will require different (perhaps more, perhaps less) assistance than those returning to a rural area. The legislature also did not instruct DOCCS to "secure" housing for inmates nearing release—it expressly instructed DOCCS to "assist inmates . . . to secure" housing. Had the legislature wanted DOCCS to secure housing for inmates upon release, it easily could have said so. "Assist" means less than "secure," but more than nothing. Indeed, individualized assistance is the most sensible

implementation of a duty to "assist" because giving those who require less assistance than average only the assistance they require frees up resources for more needy inmates. Leona Helmsley did not need housing (or vocational or educational) assistance upon her release from prison. Mr. Gonzalez did. The fact that the statutory duty as to both is the same does not mean that identical efforts will meet that duty.

It is neither "unreasonable" nor "impracticable" to conclude that DOCCS must make an individualized determination as to whether an inmate nearing release needs certain types of assistance to be able to "secure . . . housing," and then to take adequate steps to provide that assistance. Although the majority complains that anything other than "assistance in a general manner" to "all inmates" would "alleviate the ultimate obligation on the inmate to locate housing" (majority op at 473), that is precisely what "assistance" is supposed to do: alleviate ("to make [something, such as suffering] more bearable")[8] the burdens on the inmate's search for housing imposed by that inmate's individual circumstances —in Mr. Gonzalez's case, the burden imposed on him by DOCCS's interpretation of SARA. Adequate assistance requires DOCCS to address proactively the particular needs of an inmate as to the three items on the legislature's list, without eliminating the obligation of inmates to make their own efforts as well.

However, as the Appellate Division found, DOCCS failed to "assist" Mr. Gonzalez even in the narrowest sense of the term. ***483** The Appellate Division's factual findings, largely uncontroverted by DOCCS (and unreviewable by us even were they controverted), are worth quoting at length (*Matter of Gonzalez v Annucci*, 149 AD3d 256, 262-264 [3d Dept 2017] [emphasis added]):

> "[V]irtually the only 'assistance' offered to petitioner involved waiting for him—then confined in an RTF located within the walls of a medium security prison, without access to the Internet, without the ability to leave the facility to visit libraries, housing ****13** offices or potential residences, and with strictly limited access to telephone and correspondence privileges—to identify potential residences and to then investigate his proposals . . . [F]rom the submissions of both parties, it clearly appears that [the meetings DOCCS arranged with counselors or others] were geared primarily to the investigation and approval of residences that petitioner had somehow managed to identify. These meetings failed to include *any* affirmative assistance in locating such housing in the first place, such as the provision of information about potential residence opportunities, SARA-compliant areas or neighborhoods, referrals to community agencies or opportunities beyond those offered to regular inmates to use a telephone, computer or other resources to research residence opportunities . . . .
>
> "DOCCS officials did little or nothing to assist petitioner, and . . . his efforts were entirely fruitless as the officials disapproved each and every one of the 58 potential residences that petitioner had found. . . . There is nothing in the record to indicate that officials provided petitioner with any manner of aid, such as other suggestions, referrals, information or any other form of affirmative assistance until his name eventually came up on the waiting list for placement in the SARA-compliant homeless shelter to which he was ultimately transferred."

As the record in this case vividly demonstrates, the principal assistance DOCCS provided to Mr. Gonzalez was allowing him periodically to submit a list of guesses to a parole officer whose function was to enter those guesses into a computer and report ***484** back that Mr. Gonzalez had failed yet again. DOCCS did not give him access to its system to allow him to search for himself; it did not provide him a map, a list of potential neighborhoods, or even a hint as to how to look for available compliant housing. DOCCS stated at oral argument that it will not provide a map showing SARA-compliant geographic locations within New York City because the "situation [is] in flux." Putting aside the infrequency with which schools move, DOCCS's response is unsatisfactory: DOCCS could have provided an updated map at each meeting, with a caveat as to the dynamism of the situation. DOCCS also acted arbitrarily when it categorically rejected homeless shelters when Mr. Gonzalez proposed them at the start of his incarceration at the RTF, but suddenly placed him in one four months later.[9] DOCCS was likewise unable to explain why its own Directive No. 9222, which authorizes emergency funds for housing in New York City, was unavailable to assist Mr. Gonzalez, instead simply waving the directive away as part of its "comprehensive housing assistance policies"; an Orwellian term for policies designed to restrict the housing Mr. Gonzalez can access. Indeed, DOCCS actively hindered *others* from assisting Mr. Gonzalez when it refused to allow Mr. Gonzalez's own mother to propose potential addresses to DOCCS counsellors, instead insisting she deliver the addresses to Mr. Gonzalez, who then had to wait until his next biweekly meeting with the DOCCS officer to ask that those locations be evaluated.

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Far from providing "adequate resources," the majority's own standard for assistance (majority op at 474), DOCCS provided Gonzalez with nothing. DOCCS itself admits it did nothing whatsoever to assist Mr. Gonzalez to secure housing while Mr. Gonzalez was serving his determinate sentence, even though the duty to "assist" is imposed on DOCCS by statute on the first day of Mr. Gonzalez's sentence. [10] As the Appellate Division put it: "[i]f such **14 efforts, without more, are all that is required, *485 then the additional affirmative statutory obligation to assist offenders in the process of finding housing . . . is without meaning" (149 AD3d at 263).

It is irrelevant that, in a different statutory scheme (Correction Law § 203 and its cousins) the majority and I agree is not applicable to level one offenders like Mr. Gonzalez, "DOCCS is given a law enforcement task of investigation" and does not "place[ ] a sex offender in any housing" (majority op at 473-474). As its own name indicates, the Department of Corrections and Community Supervision was expressly created by the legislature to do multiple things—imprison and rehabilitate, restrict inmates' freedom and prepare them to exercise it again, and provide "a seamless network for the care, custody, treatment and supervision of a person" (L 2011, ch 62, § 1, part C, § 1, subpart A, § 1). The majority's relegation of DOCCS to "law enforcement" buries DOCCS's rehabilitative mission—to help inmates to find the essential attributes of a socially beneficial life (a job, a home, and education).

The picture that emerges in this case, even from the majority's sketching, is one in which DOCCS is mired in some complex interagency and interjurisdictional politics over sex-offender housing. That might be a satisfactory answer to DOCCS and the various jurisdictions and agencies with which it interacts but is of no consequence to the legislature's command that DOCCS assist Mr. Gonzalez and is not even cold comfort for Mr. Gonzalez. The legislature emphasized the rehabilitative purpose of Correction Law § 201; we should not now deny it.

****15 III.**

Although I agree with the Appellate Division's holding as to DOCCS's failure to provide adequate housing assistance to Mr. Gonzalez, I believe it, and the trial court, erred in not permitting discovery and proper fact-finding to determine whether *486 Mr. Gonzalez's placement in the Woodbourne RTF was contrary to law. [11]

Whether Mr. Gonzalez's placement in the Woodbourne RTF pursuant to Penal Law § 70.45 (3) was lawful depends, in part, on whether the Woodbourne RTF complied with the requirements of RTFs when Mr. Gonzalez was there. The RTF to which DOCCS assigns a prisoner must be "a community based residence 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]), and must provide "appropriate education, on-the-job training and employment" as well as "[p]rograms directed toward the rehabilitation and total reintegration into the community" for inmates transferred there (Correction Law § 73 [2], [3]) and permit residents "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]).

The parties dispute whether Woodbourne RTF did, in fact, comply with those requirements when Mr. Gonzalez was sent there. [12] Mr. Gonzalez alleges he was never allowed to leave; DOCCS replies that he never asked to leave. Mr. Gonzalez claims the work program on which DOCCS assigned him in the Woodbourne RTF was in fact the same program that inmates had access to; DOCCS disputes this and argues Mr. Gonzalez got a better deal than inmates. DOCCS claims Mr. *487 Gonzalez had access to a special RTF therapeutic program; Mr. Gonzalez claims this program was identical to prison programming. These are material facts—if Mr. Gonzalez is right, Woodbourne RTF was in every way identical to a prison (except, perhaps, for more opportunity to see one's parole officer); if DOCCS was right, Woodbourne RTF was truly a transitional treatment program. These facts are eminently triable. Indeed, similar claims are being tried with respect to the Fishkill RTF right now (*see* **16 *Alcantara v Annucci*, 55 Misc 3d 1216[A], 2017 NY Slip Op 50610[U] [Sup Ct, Albany County 2017]). CPLR 7804 (h) requires a trial on disputed questions of material fact (*see e.g. Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 [2015]) and that is what should have happened here—not, as occurred below, a terse affirmance based on "limited record evidence" (*Matter of Gonzalez v Annucci*, 149 AD3d 256, 262 [3d Dept 2017]) that the majority, equally as tersely, approves today. Indeed, the majority's conclusion that "the

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record demonstrates that petitioner was accorded the rights of a resident of an RTF, as opposed to an inmate" (majority op at 475) sounds like a conclusion by a trier of fact—except that the facts have not been developed and this Court does not try facts (NY Const, art VI, § 3 [a]). I would therefore reverse and remand for the development of a record on this claim.

IV.

The most striking feature of DOCCS's actions in this case is not simply that they were unlawful, but that they were unmoored to the legislature's expressed penological policy. This is most vividly on display when we come to consider Mr. Gonzalez's entitlement to the good-time credit he earned.

I agree with the majority that the good-time credit issue is moot (majority op at 471 n 3), but conclude that it falls into the mootness exception. Mr. Gonzalez makes two claims: first, that had he not been stripped of his earned good-time credit, he would have been moved to the RTF four months early, starting the six-month RTF clock substantially earlier; second, that his PRS was lengthened unduly (by the amount of his wrongfully deprived good-time credit). I agree with the majority that offenders with longer periods of PRS could bring the second claim, so that it is not likely to evade review, and does not fall within the mootness exception. Mr. Gonzalez's first, RTF-placement-timing claim does fall within the exception, however: it is capable of repetition but will evade our review.

***488** The majority posits a long-sentence offender whose claim would avoid mootness. The lengthiest term of imprisonment for felony sex offenders likely to see release in their lifetimes is a determinate sentence of 25 years (Penal Law § 70.80 [4] [a] [i]). Good behavior allowances are capped at one seventh of the sentence proper for determinate sentences (Correction Law § 803 [1] [c]), which is about 3.6 years for a 25-year sentence. It took almost exactly four years for Mr. Gonzalez's case to reach us. Thus, even for an offender with a very lengthy determinate sentence who earned the maximum allowable credit, the case would be moot by the time it arrived here. Accordingly, Mr. Gonzalez's first claim (above) is likely to recur but will evade review and is thus subject to the mootness exception (*City of New York v Maul*, 14 NY3d 499 [2010]).

Good-time credits are provided to inmates to encourage them to comply with prison rules and work towards rehabilitation while imprisoned (*Matter of Amato v Ward*, 41 NY2d 469, 475 [1977] ["(i)t is a penological commonplace that it is necessary to provide positive incentives for good behavior in prison"]). DOCCS stripped Mr. Gonzalez of that credit solely because, while he was still in prison, before his transfer to an RTF, he could not locate SARA-compliant housing on his own. DOCCS concedes, and the record shows, it provided no housing assistance whatsoever to Mr. Gonzalez during that time; DOCCS's efforts, as it describes them, came later.

The deprivation was not conducted "in accordance with law" (Correction Law § 803 [4]). The legislature permits credits to be "withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned" (Correction Law § 803 [1] [a]). Nowhere in the statute is DOCCS permitted to revoke good-time credit because all the RTF spaces it has budgeted for are filled at the time an inmate's conditional release date rolls around, or because inmates are unable to find SARA-compliant housing in a location the majority acknowledges is extraordinarily constrained. DOCCS can point to no failure to "perform properly in the duties or program assigned" except, perhaps, Mr. Gonzalez's inability to provide DOCCS with a potential address when there was no hope that any address he proposed within the five boroughs would be approved. It cannot be lawful to condition good behavior credit on the fulfilment of an impossible condition, which is what DOCCS did here. Mr. Gonzalez earned his credit and did nothing to ***489** merit its revocation; "every prisoner who earns the credit is entitled to benefit from it" (*People ex rel. Ryan v Cheverko*, 22 NY3d 132, 138 [2013] [emphasis omitted]).

Even if that deprivation was not ultra vires, it was arbitrary and capricious and accordingly violated due process. Although DOCCS has discretion in revoking good-time credits when an inmate's behavior warrants it, arbitrary or capricious revocation violates an inmate's due process rights (*Matter of* ****17** *Laureano v Kuhlmann*, 75 NY2d 141, 146 [1990]). Here, DOCCS's revocation was either based on Mr. Gonzalez's failure to fulfil an impossible condition or on factors entirely outside Mr. Gonzalez's control. This is the essence of arbitrary conduct.

Instead, had DOCCS released Mr. Gonzalez to any homeless shelter in New York City, the City would have been required to find him a bed, because the City guarantees (and indeed must guarantee) housing for every homeless person who requests it (*see Callahan v Carey*, 307 AD2d 150, 151 [1st Dept 2003] [describing the August 1981 consent decree

requiring New York City to provide temporary shelter to homeless individuals]; *cf.* 18 NYCRR 352.36 [a] [4] [iii] [obliging local governments to provide temporary housing assistance for sex offenders]) and when, after all, DOCCS belatedly elected to discharge Mr. Gonzalez to such a shelter anyway.[13] According to DOCCS, it revoked Mr. Gonzalez's good-time credit and later placed him in the Woodbourne Correctional Facility because DOCCS and New York City have an agreement that restricts the flow of sex offenders to be released to homeless shelters. The existence of that agreement provides no basis to strip Mr. Gonzalez of his good-time credit. Likewise, it would not have harmed DOCCS to have transferred Mr. Gonzalez to the Woodbourne RTF in May, granting him his good-time credit. Doing so would have allowed the credit to shorten his term of PRS as well, with the result that he could leave the SARA-compliant homeless shelter four months earlier. Indeed, DOCCS now says, effectively, that it will revoke good-time credits for sex offenders planning to ***490** return to New York City —which, of course, will reduce the incentive of such sex offenders to earn them and/or to return to the place where they have a support network, further impeding DOCCS's rehabilitative mission.

What DOCCS has done to Mr. Gonzalez is neither statutorily authorized nor penologically justified. It should not stand. I accordingly dissent.

Judges Stein, Fahey, Garcia and Feinman concur; Judge Rivera concurs in part and dissents in part for the reasons stated in sections I through III of Judge Wilson's dissenting opinion; Judge Wilson dissents in an opinion.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

1 A residential treatment facility is defined as

> "[a] correctional facility consisting of a community based residence 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]).

2 Petitioner also sought his immediate release from custody but dropped that claim after he was released to SARA-compliant housing.

3 The issue of the loss of petitioner's good time credit was not moot at the time the Appellate Division rendered its decision—when petitioner was still serving PRS and any error in the calculation of time required for his supervision could be corrected. However, the issue became moot when petitioner completed his PRS term in September 2017. This claim does not fall within the exception to mootness because it is unlikely to evade review, given that other sex offenders subject to the same SARA residency requirement—particularly those subject to a lengthy term of PRS (*see* Penal Law § 70.45 [2-a] [containing range of 3 to 25 years of PRS for felony sex offenses])—can raise the challenge to the loss of good time credit while they remain on PRS.

4 We note that petitioner, who represents he is indigent, has not included either the local DSS or the Office of Temporary and Disability Assistance in this proceeding. In light of the petitioner's limited selection of parties, the dissent's claim that a released sex offender could be dropped off at "any homeless shelter" in New York City because a 1981 consent decree provides housing for every homeless person (*see* dissenting op at 489) is not an issue that can be reached on this appeal (*compare Alcantara v Annucci*, 55 Misc 3d 1216[A], 2017 NY Slip Op 50610[U] [Sup Ct, Albany County 2017] [including the New York City Department of Social Services and New York City Human Resources Administration as defendants]).

5 The dissent posits that, because petitioner is a level one sex offender, he could live with his parents in non-SARA-compliant housing or be released to any homeless shelter in New York City (*see* dissenting op at 478 and n 3, 489). The SARA-residency requirement, which is imposed 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 (Penal Law § 65.10 [4-a]), is a mandatory condition of petitioner's PRS (Penal Law § 70.45 [3]). The legislature was clearly concerned with the release of the sex offender back into a community and accordingly imposed a duty on the parole officer to actually supervise the parolee, which requires knowledge of the parolee's residence and that same is not in violation of the conditions of release. The dissent's suggestions of how to remediate the "impossible" problem generated by the SARA housing restrictions generally ignore the point of SARA-compliant housing—to wit, keeping sex offenders such as petitioner, convicted of sexually assaulting a minor, 1,000 feet from children in school areas.

6 We note that similar claims relating to Fishkill Correctional Facility as an RTF are pending in discovery

proceedings before Albany County Supreme Court (*see Alcantara v Annucci*, 55 Misc 3d 1216[A], 2017 NY Slip Op 50610[U] [Sup Ct, Albany County 2017]).

1 *See e.g.* Franz Kafka, The Trial 50-57 (Mike Mitchell translator, Oxford World's Classics 2009).

2 SORA requires all persons convicted of various sex crimes to be classified, in a judicial proceeding, as being a level one, two, or three sex offender (where one is the least serious ranking). For example, in general level one offenders must register annually with the State for 20 years, while level two and three offenders must register once a year for life (Correction Law § 168-h). Level three offenders must also personally verify their residences every 90 days with local law enforcement (*id.*).

3 Indeed, I note that, even if Mr. Gonzalez's parents' home was within 1,000 feet of a school, the home was not an "area accessible to the public," and therefore his presence in his parents' home would not have violated SARA. Although this functionally would amount to house arrest for the period of his PRS, he may well have preferred that to functional house arrest in the homeless shelter into which he was ultimately placed.

4 "Substantial" means "consisting of or relating to substance"; "not imaginary or illusory" (*see* Merriam-Webster Online Dictionary, substantial [https://www.merriam-webster.com/dictionary/substantial]). It may also mean "important" or "essential," but the question here is not which of these meanings the Appellate Division had in mind when using the word, but whether what DOCCS did is what the legislature directed it to do.

5 I agree with the majority that we do not defer to DOCCS to define "assist" (majority op at 471), because it is a "matter of pure legal interpretation" rather than a concept for which agency expertise would be relevant (*cf. Matter of Teachers Ins. & Annuity Assn. of Am. v City of New York*, 82 NY2d 35, 42 [1993]).

6 Indeed, at least as a general matter, DOCCS understands the legislature's rehabilitative goals. DOCCS describes its own mission as "[e]nhanc[ing] public safety by having incarcerated persons return home under supportive supervision less likely to revert to criminal behavior," and "improv [ing] public safety by providing a continuity of appropriate treatment services in safe and secure facilities where all inmates' needs are addressed and they are prepared for release, followed by supportive services for all parolees under community supervision to facilitate a successful completion of their sentence" (New York State Department of Corrections and Community Supervision, The Departmental Mission, http://www.doccs.ny.gov/mission.html).

7 DOCCS makes this point while arguing that the mootness exception does not apply to this case because each inmate's situation is different. That argument might well have had force had DOCCS not also revealed, in the course of this litigation (and indeed in its very briefing to this Court), that it was not considering level one offenders in any individualized way in the course of providing housing assistance, but simply subjecting them to the precisely the same housing policy they would apply to the most dangerous level three offender.

8 Merriam-Webster Online Dictionary, alleviate (https://www.merriam-webster.com/dictionary/alleviate).

9 I note that the Legal Aid Society, in an amicus brief to this Court, provides fuller information on DOCCS's policies and practices that, while not part of the record in this case, nonetheless support the Appellate Division's findings: the nonprofit providers on DOCCS's list of "Re-Entry Resources" do not provide SARA-compliant housing and DOCCS simply calls landlords, asks if housing is available, and writes down the inevitable "no" they get without further investigation or dialogue.

10 The duty to assist under Correction Law § 201 encompasses housing, educational and vocational training, and employment. That duty is triggered when an inmate becomes "eligible" for community supervision. In accordance with our decision in *People v Sparber* (10 NY3d 457 [2008]), postrelease supervision is an integral part of a determinate sentence (*see also* Penal Law § 70.45). DOCCS's duty under section 201, therefore, attaches at the time of sentencing, although, again, different duties and different inmates will require different and differently-timed efforts on DOCCS's part. For example, an inmate serving a 10-year determinate sentence will not need housing assistance until release approaches but may need vocational training or education to commence near the start of incarceration.

11 I agree with the majority that Mr. Gonzalez's challenge is not to whether Woodbourne complied with RTF rules when it was designated an RTF in 1984 (*cf.* 7 NYCRR 100.50 [c] [2]) but rather whether Woodbourne RTF complied with statutes and regulations pertaining to RTFs set out in Correction Law §§ 2 (6) and 73 when it housed Mr. Gonzalez. If a court found that as a matter of law Woodbourne RTF did not presently meet the statutory criteria for being an RTF, DOCCS would be without power to confine Mr. Gonzalez there during his

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PRS period (no matter what it provided to the contrary in 7 NYCRR 100.50 [c] [2]). Once Mr. Gonzalez's challenge is so understood, I believe this Court to be unanimous that there is no obstacle to our consideration of the merits of that claim.

12 As a necessary step in its mootness analysis, the majority holds (majority op at 470-471) that Penal Law § 70.45 (3) allows DOCCS to place an inmate serving PRS after a definite sentence in an RTF for a maximum of six months, "notwithstanding any other provision of law" (*cf.* McKinney's Cons Laws of NY, Book 1, Statutes §§ 223, 238). I agree with the majority that, as a result, Mr. Gonzalez's RTF placement claim is subject to the mootness exception.

13 The majority answers that Mr. Gonzalez cannot raise this claim in this litigation, having not sued the City (unlike the plaintiffs in ****18** *Alcantara v Annucci* [55 Misc 3d 1216(A), 2017 NY Slip Op 50610(U) (Sup Ct, Albany County 2017)], who unsuccessfully sued the City under somewhat different circumstances). Indeed so. But Mr. Gonzalez can, and has, raised the claim that DOCCS's policy of stripping him of his good behavior credit based on the behavior of other governmental actors is unlawful, and that DOCCS has adopted a policy of refusing to accept homeless shelters until suddenly it does, represents just such a hindrance.

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50 N.Y.2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400

In the Matter of Hearst Corporation et al., Appellants,
v.
John J. Clyne, as Judge of the County Court of Albany County, et al., Respondents.

Court of Appeals of New York
Argued March 27, 1980;
decided July 3, 1980

CITE TITLE AS: Matter of Hearst Corp. v Clyne

SUMMARY

Appeal, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 16, 1979, which, in a proceeding pursuant to CPLR article 78, dismissed a petition to declare illegal the closing of a courtroom to the press by respondents without a hearing during the entry of a guilty plea by a defendant and to enjoin respondents from granting such closure orders in the future without a hearing.

In March of 1979, respondent County Court Judge was conducting a joint suppression hearing in the criminal case of two defendants who had been indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. The hearings were closed to the public and press on the motion of the defendants, without objection by the prosecutor and without a hearing. Petitioner newspaper reporter knew the hearings were closed and the courtroom doors locked, but was sufficiently interested in the proceedings to periodically walk by the courtroom to observe whatever she could. On March 7, during one of these periodic observations, the reporter noticed the attorney for one of the defendants standing outside the courtroom door. On the assumption that something other than a suppression hearing was in progress, she tried the courtroom door but found it locked. She then learned that the Judge, behind closed doors, had heard and granted a motion to close a proceeding during which one of the defendants was expected to enter a plea, which he did do during the proceeding. The Judge refused petitioners' request for a transcript of the plea proceeding or to direct the court stenographer to read back the minutes of the proceeding. On March 12, prior to trial, the other defendant also entered a plea of guilty before respondent Judge. Thereafter, he permitted the petitioners to obtain a copy of the transcript of the closed plea proceeding. The Appellate Division concluded that the closure was a proper exercise of the trial court's discretion and dismissed the petition.

The Court of Appeals reversed and remitted to the Appellate ***708** Division for dismissal, holding, in an opinion by Judge Wachtler, that the case is moot and that there is no sufficient reason for the court to consider the merits of the appeal since the court has recently set forth the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and the press.

Matter of Hearst Corp. v Clyne, 71 AD2d 966, reversed.

HEADNOTES

Appeal
Academic and Moot Questions

([1]) Although an appeal will generally be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment, the exception to the doctrine of mootness permits the courts to preserve for review cases which involve: (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. Accordingly, an appeal from an order dismissing a petition to declare illegal the closing of a courtroom to the press by respondent County Court Judge without a hearing during the entry of a guilty plea by a defendant and to enjoin respondent from granting such closure in the future without a hearing, must be dismissed as moot where the plea was concluded and the transcript of said proceeding furnished to the petitioners, a newspaper and a newspaper reporter, before they brought said petition, since the rights of the parties cannot be affected by the determination of the appeal; moreover, no sufficiently useful purpose would be served by retaining the appeal notwithstanding its mootness, since the Court of Appeals has recently set forth the requirements that must be fulfilled

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before a judicial proceeding in this State may be closed to the public and the press.

Crimes
Right to Public Trial

([2]) All judicial proceedings, both civil and criminal, are presumptively open to the public; moreover, a proceeding at which a criminal defendant enters a plea of guilty is a substitute for a trial.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

4 NY Jur 2d, Appellate Review §§301, 326, 327, 348

10 Carm-Wait 2d, Appeals in General §§ 70:262, 70:297, 70:298; 11 Carm-Wait 2d, Appeals to the Court of Appeals § 71:112

Judiciary Law §4

5 Am Jur 2d, Appeal and Error §§ 761-763, 768; 21 Am Jur 2d, Criminal Law §§ 257-262; 75 Am Jur 2d, Trial § 42

Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 151, 154

2 Am Jur Proof of Facts 495, Bias or Prejudice ***709**

1 Am Jur Trials 303, Controlling Trial Publicity

ANNOTATION REFERENCES

Right of accused to have press or other media representatives excluded from criminal trial. 49 ALR3d 1007.

Propriety of exclusion of press or other media representatives from civil trial. 79 ALR3d 401.

POINTS OF COUNSEL

Peter L. Danziger for appellants. I. The Sixth Amendment of the United States Constitution guarantees petitioners the right to attend guilty plea proceedings. *(People v Selikoff,* 35 NY2d 227; *Henderson v Morgan,* 426 US 637; *Boykin v Alabama,* 395 US 238; *People v Gina M. M.,* 40 NY2d 595; *People v Seaton,* 19 NY2d 404; *Matter of Oliver,* 333 US 257; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368.) II. The First and Fourteenth Amendments of the United States Constitution guarantee petitioners the right to attend plea proceedings. *(Gannett Co. v De Pasquale,* 443 US 368; *New York Times Co. v Sullivan,* 376 US 254; *Mills v Alabama,* 384 US 214; *Gitlow v New York,* 268 US 652; *Landmark Communications v Virginia,* 435 US 829; *Houchins v KQED, Inc.,* 438 US 1; *Nebraska Press Assn. v Stuart,* 427 US 539; *Saxbe v Washington Post Co.,* 417 US 843.) III. Petitioners' right to attend a plea proceeding is guaranteed by the freedom of speech and press clause of the New York State Constitution. *(Matter of Madole v Barnes,* 20 NY2d 169; *East Meadow Community Concerts Assn. v Board of Educ.,* 19 NY2d 605; *Matter of Figari v New York Tel. Co.,* 32 AD2d 434; *Pickering v Board of Educ.,* 391 US 563; *People v Jones,* 47 NY2d 409; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Matter of Oliver v Postel,* 30 NY2d 171; *Matter of United Press Assns. v Valente,* 308 NY 71; *Matter of New York Times Co. v Starkey,* 51 AD2d 60.) IV. The common law of New York recognizes the right of petitioners to attend plea proceedings. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Lee v Brooklyn Union Pub. Co.,* 209 NY 245; *People v Jones,* 47 NY2d 409; *People v Jones,* 87 Misc 2d 931, 57 AD2d 1082, 44 NY2d 76; *Matter of Rudd v Hazard,* 266 NY 302; *Crain v United States,* 162 US 625; *Maryland v Baltimore Radio Show,* 338 US 912.) V. Section 4 of the Judiciary Law of this State requires that guilty plea proceedings remain open ***710** to the public. *(Matter of O'Connell,* 90 Misc 2d 555; *Lee v Brooklyn Union Pub. Co.,* 209 NY 245; *Matter of United Press Assns. v Valente,* 308 NY 71; *Matter of Oliver v Postel,* 30 NY2d 171; *Craig v Harney,* 331 US 367; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368.) VI. Closure of the plea proceeding without granting petitioners an opportunity to be heard violated petitioners' constitutional, statutory and common-law rights. *(People v Hinton,* 31 NY2d 71; *United States v Bell,* 464 F2d 667, 409 US 991; *Carroll v Princess Anne,* 393 US 175; *Stuart v Palmer,* 74 NY 183; *Near v Minnesota,* 283 US 697; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Freedman v Maryland,* 380 US 51; *United States v Schiavo,* 504 F2d 1, cert den *sub nom. Ditter v Philadelphia Newspapers,* 419 US 1096; *Matter of New York Times Co. v Starkey,* 51 AD2d 60.)

Robert G. Lyman, County Attorney (William J. Conboy, II, of counsel), for John J. Clyne, respondent. I. This appeal must be dismissed upon the ground that no substantial constitutional question is directly involved. *(Matter of Westchester Rockland Newspapers v Leggett,* 70 AD2d 1066.) II. This proceeding presents neither questions likely to recur nor issues of sufficient importance and interest to justify

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this court's entertaining same. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Matter of Oliver v Postel,* 30 NY2d 171; *People v Jelke,* 308 NY 56.) III. These petitioners-appellants waived any rights which they may have had to object to the closure in issue. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368.) IV. The plea proceeding at issue herein was in fact a pretrial proceeding and not the equivalent of a trial. *(Boykin v Alabama,* 395 US 238; *People v Serrano,* 15 NY2d 304; *People v Seaton,* 19 NY2d 404; *People v Gina M. M.,* 40 NY2d 595; *People ex rel. Steckler v Warden of City Prison,* 259 NY 430; *Maurer v People,* 43 NY 1; *People v Anderson,* 16 NY2d 282; *People v Jones,* 87 Misc 2d 931, 57 AD2d 1082, 44 NY2d 76.) V. The order of exclusion at issue herein was a necessary and proper exercise of judicial discretion. VI. The trial court in the plea proceeding at issue had the inherent power to close the courtroom. VII. The closure at issue herein did not deprive petitioners-appellants of any due process.

Sol Greenberg, District Attorney (George H. Barber of counsel), for Sol Greenberg, respondent. I. A criminal defendant ***711** and the people of the State of New York are entitled to the unimpaired right of a fair trial. *(Sheppard v Maxwell,* 384 US 333; *Nebraska Press Assn. v Stuart,* 427 US 539; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Matter of Murchison,* 349 US 133; *People v McLaughlin,* 150 NY 365; *Estes v Texas,* 381 US 532; *People v Thomas,* 47 NY2d 37.) II. The Sixth Amendment does not require public attendance at a guilty plea. *(Marshall v United States,* 360 US 310; *Michelson v United States,* 335 US 469; *Matter of Rudd v Hazard,* 266 NY 302.) III. The First Amendment does not guarantee public attendance at a guilty plea. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370.) IV. The New York State Constitution does not require public access to a guilty plea. *(People v Nicholas,* 35 AD2d 18.) V. There are exceptions to the general rule in New York that trials should be public. *(Matter of Rudd v Hazard,* 266 NY 302.) VI. Section 4 of the Judiciary Law does not require all Criminal Court proceedings to be public. *(Matter of Oliver v Postel,* 30 NY2d 171; *United Press Assns. v Valente,* 308 NY 71; *People v Nicholas,* 35 AD2d 18; *People v Rickenbacker,* 50 AD2d 566.) VII. The closure of the guilty plea proceeding without notice was proper and necessary. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370; *People v Darden,* 34 NY2d 177; *People v Devine,* 80 Misc 2d 641.) VIII. In the event courtroom was not closed and defendant Du Bray could not obtain a fair trial in Albany County, he would have been required to request a change of venue or surrender his right to a jury trial. *(Marshall v United States,* 360 US 310; *Michelson v United States,* 335 US 469; *Patterson v Colorado,* 205 US 454; *Sheppard v Maxwell,* 384 US 333.) IX. There was no alternative that would have preserved the fair trial rights of defendant Du Bray other than the closure of the courtroom during defendant Marathon's guilty plea. *(Nebraska Press Assn. v Stuart,* 427 US 539.)

Robert C. Bernius for Binghamton Press Company, Inc., and others, *amici curiae.* I. This court should articulate specific guidelines which disfavor *in camera* proceedings. *(People v Jones,* 47 NY2d 409; *Matter of Oliver,* 333 US 257; *United States v Cianfrani,* 573 F2d 835; *Levine v United States,* 362 US 610; *Reynolds v United States,* 98 US 145; *Estes v Texas,* 381 US 532; *Sheppard v Maxwell,* 384 US 333; *Nebraska Press Assn. v Stuart,* 427 US 539; *People v Hinton,* 31 NY2d 71.) II. *Amici's* guidelines achieve the appropriate balance. *(United States v Cores,* 356 US 405; *People v Goldswer,* 39 NY2d 656; ***712** *People v Moore,* 46 NY2d 1; *People v Briggs,* 38 NY2d 319; *Pennekamp v Florida,* 328 US 331; *Carroll v Princess Anne,* 393 US 175; *Shuttlesworth v Birmingham,* 394 US 147; *Fuentes v Shevin,* 407 US 67; *Mullane v Central Hanover Bank & Trust Co.,* 339 US 306; *Boddie v Connecticut,* 401 US 371.) III. *Amici's* guidelines are constitutionally mandated. *(Duncan v Louisiana,* 391 US 145; *Shapiro v Thompson,* 394 US 618; *Poe v Ullman,* 367 US 497; *Harper v Virginia Bd. of Elections,* 383 US 663; *Matter of Winship,* 397 US 885; *Moore v East Cleveland,* 431 US 494; *Yick Wo v Hopkins,* 118 US 356.)

OPINION OF THE COURT

Wachtler, J.

The petitioners in this article 78 proceeding are the publisher of the Albany *Times-Union,* a daily newspaper, and Shirley Armstrong, a reporter for that newspaper. The respondent, John J. Clyne, is a Judge of the Albany County Court.

In March of 1979 Judge Clyne was conducting a joint suppression hearing in the criminal case of Alexander Marathon and William Du Bray, who had been indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. The hearings were closed to the public and press on the motion of the defendants, without objection by the prosecutor and without a hearing. Armstrong, the court reporter for the *Times-Union,* knew the hearings were closed and the courtroom doors locked, but was sufficiently interested in the proceedings to periodically walk by the courtroom to observe whatever she could.

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On March 7, during one of these periodic observations, Armstrong noticed the attorney for Du Bray, one of the codefendants, standing outside the courtroom door. On the assumption that something other than a suppression hearing was in progress Armstrong tried the courtroom door but found it locked. She then learned from Du Bray's attorney that Judge Clyne, behind closed doors, had heard and granted a motion to close a proceeding during which Marathon was expected to enter a plea. The reporter, Armstrong, then knocked on the courtroom door. There was no response. After about 15 minutes the doors opened and she learned from Judge Clyne that Marathon had indeed entered a guilty plea. ***713** The Judge, however, refused petitioners' request for a transcript of the plea proceeding or to direct the court stenographer to read back the minutes of the proceeding.

On March 12, prior to trial, the other defendant, Du Bray, also entered a plea of guilty before Judge Clyne. Thereafter Judge Clyne permitted the petitioners to obtain a copy of the transcript of the closed plea proceeding; that transcript has now been furnished to them and forms a part of the record on this appeal.

The transcript of the closed proceeding held March 7, which is the sole concern of this appeal, indicates that at the very commencement of the already closed suppression hearing which had been adjourned from March 5, Marathon's attorney orally moved to close the courtroom to all persons except Marathon, his attorney, and court personnel. The District Attorney joined the motion. Without taking evidence or hearing argument from anyone Judge Clyne immediately granted the motion, even excluding the codefendant Du Bray and his attorney from the courtroom, and had the doors secured. In sworn testimony Marathon then confessed his own participation in the crime for which he was indicted, inculpated his codefendant Du Bray, and was permitted to enter a plea of guilty to one count of the indictment.

The petitioners brought this proceeding seeking a declaration that the closure of the plea taking was illegal, and for an injunction prohibiting such closures in the future unless members of the press are afforded an opportunity to be heard.

The Appellate Division concluded that the closure was a proper exercise of the trial court's discretion and dismissed the petition. Petitioners appealed. We conclude that the case is moot and that there is no sufficient reason for this court to consider the merits of the appeal; however, for the reasons which follow, the order of the Appellate Division should be reversed and remitted for dismissal.

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 State Ind. Comm.,* 224 NY 13, 16; *California v San Pablo & Tulare R. R.,* 149 US 308, 314-315). This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological ***714** strictures which inhere in the decisional process of a common-law judiciary.

Our particular concern on this appeal is with that facet of the principle which ordinarily precludes courts from considering questions which, although once live, have become moot by passage of time or change in circumstances. In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment. On the facts of the instant case, where the underlying plea proceeding had been long concluded and the transcript had been furnished to the petitioners at the time this action was commenced (cf. *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 436) we conclude that the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot. Because we conclude that the appeal is moot it may not properly be decided by this court unless it is found to be within the exception to the doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable (see *Roe v Wade,* 410 US 113, 125).

([1])In this court the exception to the doctrine of mootness has been subject over the years to a variety of formulations. [1] However, examination of the cases in which our court has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the ***715** 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. After careful review we are persuaded that the case before us presents no questions the fundamental underlying principles of which have not already been declared by this court, and that this case is, therefore,

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not of the class that should be preserved as an exception to the mootness doctrine.

1 "[N]ovel and important question of statutory construction" *(Le Drugstore Etat Unis v New York State Bd. of Pharmacy,* 33 NY2d 298, 301); "of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well" *(East Meadow Community Concerts Assn. v Board of Educ.,* 18 NY2d 129, 135); "only exceptional cases, where the urgency of establishing a rule of future conduct is imperative and manifest will justify a departure from our general practice" *(Matter of Lyon Co. v Morris,* 261 NY 497, 499); question of "importance and interest and because of the likeliness that they will recur" *(Matter of Jones v Berman,* 37 NY2d 42, 57); "question of general interest and substantial public importance is likely to recur" *(People ex rel. Guggenheim v Mucci,* 32 NY2d 307, 310); question "of major importance and [that] will arise again and again" *(Matter of Rosenbluth v Finkelstein,* 300 NY 402, 404); questions of "general interest, substantial public importance and likely to arise with frequency" *(Matter of Gold v Lomenzo,* 29 NY2d 468, 476); "importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 437); "crystalizes a recurring and delicate issue of concrete significance" *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 376).

We acknowledge, as we have before, the very substantial character of the interests represented by the petitioners in this proceeding. We also note that questions such as the one posed may occasionally escape review. It is for this reason that on occasion we have entertained appeals even though the issues in the particular controversy have been resolved. However, as our court only recently has set forth in some detail the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and press, no sufficiently useful purpose would be served in this instance by our retaining the appeal notwithstanding that the underlying controversy is now moot.

([2])It has, of course, long been the law in this State that all judicial proceedings, both civil and criminal, are presumptively open to the public (Judiciary Law, § 4; *Lee v Brooklyn Union Pub. Co.,* 209 NY 245) and that a proceeding at which a criminal defendant enters a plea of guilty is indisputedly a substitute for a trial *(People ex rel. Carr v Martin,* 286 NY 27, 32). Indeed, in *Matter of Gannett Co. v De Pasquale* (43 NY2d 370) it was only by distinguishing the pretrial and evidentiary nature of the proceeding at issue that this court could conclude that such a proceeding should ordinarily be closed to the public and press *(Gannett, supra,* at p 380). We were careful to note in *Gannett* (at p 378) that, "In the case now before us, the Trial Judge was not presiding over a trial on the merits".

In *Matter of Westchester Rockland Newspapers v Leggett,* (48 NY2d 430, supra.*;),* which was decided by this court after the decision of the Appellate Division in the instant case and which was obviously not available to inform either the trial or the appellate court, the issue was closure of a pretrial competency hearing. In that case even the pretrial nature of the proceeding was considered insufficient to nullify the presumption that all judicial proceedings are to be open. Thus the dissent is flatly incorrect in its statement that by dismissing ***716** this appeal for mootness we are disposed to permit trials to be closed to the public on the same basis as pretrial proceedings. On the contrary, we have distinguished between pretrial and trial closures and expressed our consciousness of the danger inherent in permitting too casual a closure of even pretrial proceedings: "At the present time, in fact in most criminal cases, there are only pretrial proceedings. Thus if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors" *(Matter of Westchester Rockland Newspapers v Leggett, supra,* at p 440).

([1])Our decisions in *Gannett (supra)* and *Leggett (supra)* laid down the procedural framework within which the possibility of closure must be considered. [2] We conclude, therefore, that inasmuch as the principles governing fair trial- free press issues which might have been developed by consideration of the instant case have already been largely declared by our decisions in *Gannett* and *Leggett,* in this instance there is no sufficient reason to depart from the normal jurisprudential principle which calls for judicial restraint when the particular controversy has become moot.

2 In *Gannett* we stated that in determining the propriety of closure in a particular case the court "should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" (43 NY2d 370, 381). That precatory language in *Gannett* was the foundation for the mandate of *Leggett (supra,* at p 442) which spelled out in as

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much detail as a common-law court may, the procedure to be followed by a trial court which is confronted with a request for closure of a criminal proceeding.

More than that, we are convinced that there is a good reason in the circumstances of this case not to entertain this appeal for the purpose of extrapolating or refining the principles which we have declared. The closing of the plea hearing here occurred while the appeal from our *Gannett* decision was pending before the United States Supreme Court and some months before our decision in the *Leggett* case.[3] We cannot conclude that the trial court would have followed the procedures which he did or that he would necessarily have reached the same conclusion had our decision in *Leggett* preceded the hearing. While we can anticipate that the implementation of the principles that we have declared will not always be easy, we have no reason to question the readiness or capacity of the ***717** Judges at nisi prius to seek to implement them appropriately with diligence, faithfulness and imagination. We conceive our jurisprudential role in this field as one of supervising and monitoring the dispositions made by our lower courts after we declare the applicable principles, rather than retrospectively appraising conduct of Trial Judges that preceded our declarations.

3 We also note that the appeal in *Richmond Newspapers v Virginia* (448 US ___, 48 USLW 3241) is now pending before the Supreme Court.

Other considerations also support our conclusion that this appeal should not be entertained. We are concerned with the vitality and fundamental soundness of our jurisprudence.

The engine of the common law is inductive reasoning. It proceeds from the particular to the general. It is an experimental method which builds its rules in tiny increments, case-by-case. It is cautious advance always a step at a time. The essence of its method is the continual testing and retesting of its principles in "those great laboratories of the law, the courts of justice" (Smith, Jurisprudence, p 21).[4]

4 (Cf. Cardozo, The Nature of the Judicial Process, p 25: "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seem to have behind them the power and pressure of the moving glacier.")

Conscious judicial restraint is essential--its absence diminishes the craftsmanship of the courts and debases the judicial product. A common-law Judge will not reach to decide a question not properly before him. Nor will he attempt to state a broad rule except when absolutely required--and then it will be cast in terms which permit it to be moulded in light of the experience of those who must work with it. A newly articulated rule should not be immediately recast "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible" *(Smith,* Jurisprudence, p 21).

Finally, it must be explicitly stated that in dismissing the present appeal as moot we express no view on the merits. Our disposition here is not to be read as any withdrawal from, addition to, or elaboration on our opinions in *Gannett* and *Leggett.* It is entirely incorrect to suggest otherwise. Nor should our dismissal be interpreted as presaging a disposition to decline on grounds of mootness to entertain appeals in future fair-trial, free-press cases. We recognize, of course, that cases in this area of the law, because of considerations of timing, would often, even usually, evade review if appeals were uniformly to be dismissed for mootness. We shall continue ***718** to resolve each case in this field on the basis of its individual characteristics and merits, only one aspect of which will be its mootness, if moot it is.

Concluding as we do that the appeal is moot and not of a character which should be preserved for review, the appeal should be dismissed. In this case, however, because the Appellate Division had no opportunity to consider the matter in light of our decision in *Leggett (supra)* we should reverse and remit with directions to dismiss solely on the ground of mootness, in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent (see *Matter of Adirondack League Club v Board of Black Riv. Regulating Dist.,* 301 NY 219, 223; cf. *United States v Munsingwear,* 340 US 36, 39; *United States v Alaska S. S. Co.,* 253 US 113, 115).

Meyer, J.

(Concurring).

I concur fully in Judge Wachtler's opinion and write only because where the dissent finds implications in that opinion which "do not bode well for the future of public trials in this State" (p 723), I find in the dissent suggestions which, if they become the governing rule, may adversely affect the individual's right to a fair trial.

I, of course, do not suggest that the media are to be regularly, or even often, excluded from the courtroom. What I am urging

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is that the problem must be analyzed not in terms of categories and classifications but of the rights affected, and that, without a very much clearer demonstration that the public's interest cannot be reasonably protected without infringing individual rights than has been made, the rights of the individual on trial may not be subordinated to the rights of the public to know what goes on in a courtroom or how the system of justice is functioning.

The genius of the American constitutional experiment has been the protections it affords individuals against oppression by the majority, whether in the form of star chamber proceedings or of stadium trials, the result of either of which is an equally foregone conclusion. Important as it is that justice *appear* to the public to be done, in final analysis the public is grossly disserved if it not *in fact* be done in each individual case.

Resolution of the instant case, were it to be decided on the merits, would turn not on whether the taking of a guilty plea is the equivalent of a trial or more nearly a preliminary ***719** proceeding, or whether the fair trial rights at stake were those of the pleading defendant or his codefendant. The fact is, as both we and the United States Supreme Court have recognized, that there are occasions when parts of trials, as well as of pretrial proceedings, may constitutionally be closed *(Gannett Co. v De Pasquale,* 443 US 368, 388, n 19, and cases cited; *People v Jones,* 47 NY2d 409; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 377-378, affd 443 US 368), though as we have made clear the discretion to do so is to be "sparingly exercised and then, only when unusual circumstances necessitate it" *(People v Hinton,* 31 NY2d 71, 76; accord: *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 441). Closure during trial, moreover, will usually be to protect some interest of a third person or the public, rather than of the person on trial [1] (to protect the public interest in not revealing the identity of an informer, *People v Jones, supra; People v Hinton, supra;* see Proposed Code of Evidence for the State of New York, § 510; to protect the life of a witness or shield him or her from embarrassment, *People v Hagan,* 24 NY2d 395, cert den 396 US 886; *People v Smallwood,* 31 NY2d 750; *United States ex rel. Smallwood v La Valle,* 377 F Supp 1148, affd 508 F2d 837, cert den 421 US 920; see Judiciary Law, § 4; to protect the interests of the defendant and the public in orderly trial, *United States ex rel. Orlando v Fay,* 350 F2d 967).

1 Hearings preliminary in nature (e.g., suppression) are sometimes permitted during trial. For purposes of present discussion they should be classed as preliminary, but as indicated in the text the difference is not determinative. What is determinative is the effect on individual rights of what will be revealed.

Nor can I accept the dissent's assumption that there is an "absence of prejudice" to codefendant Du Bray in permitting Marathon's guilty plea to be taken in open court. Short of publishing a confession by Du Bray before it has been ruled admissible, nothing could be more devastating to his rights than Marathon's accusatory words. Given in a plea proceeding, such words are usually the *quid pro quo* for some favor of the law, generally a lesser sentence. To permit such information to get to potential jurors without the prophylaxis of cross-examination pointedly indicating the self-serving nature of the accusation is materially to disadvantage such a codefendant, for cross-examination when it does occur will be less effective than it would have been had the accusation not come to the jury in advance of trial and with the imprimatur of the press. ***720** It is possible to disadvantage such a codefendant in an additional way which cannot be known before trial. It is not unknown for a person in Marathon's position to recant when called to testify at his codefendant's trial. In such a case his statement about the codefendant at his own guilty plea "may be received only for the purpose of impeaching" him "and does not constitute evidence in chief" (CPL 60.35, subd 2). While the Trial Judge must so instruct the jury (id.*),* such an instruction, of questionable psychological value in any event, [2] will be even less effective than usual because the accusation came to the jury in advance of trial and with the imprimatur of the press.

2 For Mr. Justice Jackson that such an instruction could overcome the prejudice involved was a "naive assumption" which "all practicing lawyers know to be unmitigated fiction" *(Krulewitch v United States,* 336 US 440, 453 [concurring opn]; see, also, *Bruton v United States,* 391 US 123, 128-136; *Jackson v Denno,* 378 US 368, 388; Kalven & Zeisel, American Jury, p 128).

The problem that arises when the issue is discussed in terms of categories rather than effect on individual rights is well illustrated by the present case. The dissent sees the closure here involved as casting "a veil of secrecy over the major component of the criminal justice system" (p 728) and the fact that the pleading defendant might implicate his codefendant as insufficient justification for closure (p 727). In my view there is a ready means of protecting the public's interest in the Marathon- Du Bray trials without sacrificing Du Bray's clear right not to have the jury pool for his trial, scheduled to begin a few days later, tainted by media accounts of Marathon's

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plea statements implicating him, and the number of plea proceedings in which, to protect the rights of a codefendant, closure of part or all of the plea proceeding might occur is an insignificant part of the criminal justice system. So far as the record and briefs reveal (including the brief of *amici* which catalogues a number of recent closures) this is the first such case.

The tension between public and individual interests that arises over an issue such as whether by closing so much of a plea proceeding as relates to him a codefendant should be protected against revelation in advance of his trial of the pleading defendant's accusations against him, arises not because of the presence of media representatives in the courtroom, but because it is a constitutional absolute that what transpires in open court is public property and may be immediately ***721** disseminated. Responsible media often will delay publication nonetheless,[3] but quite properly are unwilling to permit the invasion of First Amendment rights that would be involved in permitting the courts to tell them when they can publish. Yet, just as not all Judges are exemplars of their craft, neither are all editors able to perceive in their highly competitive profession the value to individual rights of delaying publication. The antidote for the nonexemplary Judge is to keep courtrooms open to the fullest extent consistent with individual rights. The antidote for the unresponsive or irresponsible editor is to close the courtroom when there is a real probability that publication of what is to be revealed in the courtroom will materially prejudice the defendant on trial, because in no other constitutionally acceptable way can his rights be protected.

3 That effective news reporting is possible notwithstanding delay is clear from the *New York Times'* handling of the *Franzese* case *(United States v Franzese,* 392 F2d 954, vacated in part and remanded *sub nom. Giordano v United States,* 394 US 310). In that case the *Times* honored the Trial Judge's request and withheld until conclusion of the trial reporting on what occurred in the courtroom out of the presence of the jury. It then printed a roundup story concerning the trial, including the material earlier withheld *(New York Times,* March 4, 1967, p 28, cols 4-8).

I, of course, do not ignore the existence of procedures such as change of venue, change of venire, continuance, waiver of jury, sequestration, some of which are discussed by the Supreme Court in *Nebraska Press Assn. v Stuart* (427 US 539, 563), as alternatives to prior restraint. But I cannot accept the concept that these possibilities, most of which[4] involve denigration of defendant's constitutional protections are acceptable alternatives (cf. *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 444, supra.;*; Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 380, affd 443 US 368, supra.;).

4 Sequestration is the exception, but it involves a potential of jury resentment at being locked up for the duration of the trial which makes it likewise unacceptable as an alternative (cf. *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 444, supra.;).

In my view the Bills of Rights set forth in article I of the New York State Constitution and the first 10 amendments to the United States Constitution become a mockery when, because of publicity, a court must say to a man on trial for his life or for his liberty, you are entitled to a speedy trial, but not yet. You are entitled to trial by a jury, unless you fear that pretrial publicity has so adversely affected the impartiality of those who will be called as potential jurors that you ***722** dare not risk the result. You are entitled to a trial by a jury of your neighbors, but not those nearby. You are entitled to confront and cross-examine witnesses, but not those whose testimony is given through the newspapers. You are entitled to exclude improperly seized matter from the jury as evidence, but not as a news story. The more is this so when what we deal with is not prior restraint on publication as in *Stuart,* but denial of access for a limited time as to a limited part of the proceeding, and when we impose upon the defendant seeking closure not only the burden of showing that such procedures will not "dispel prejudice", but also what impact the prejudicial information will have on the jury pool, in light of its size, the extent of the media coverage and the effect of that coverage on the public at large (see *Matter of Westchester Rockland Newspapers v Leggett, supra,* at p 447 [Cooke, Ch. J., concurring]). Bearing in mind that "none are more lowly-- none more subject to potential abuse--and none with more at stake than those who have been indicted and face criminal prosecution in our courts" (ibid., at p 444 [Wachtler, J., majority opn]), I conclude that the required showing presses to the outer limits of, if it does not exceed, due process requirements for all but the wealthy defendant.

Delayed access does not affect the rights of the public or of the media in any similar way. As suggested in *Gannett* (43 NY2d, at p 381) and ordered in *Westchester Rockland Newspapers* (48 NY2d, at p 445), a full transcript of the plea proceeding in this matter was made and was furnished to appellant as soon as the danger to Du Bray's interest was past. Perhaps consideration should be given to (1) equipping one

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courtroom in each courthouse with videotape equipment so that any closed portion of a trial or pretrial proceeding can be recorded in a way that will make available to the media with all the nuances of voice and gesture exactly what transpired while the courtroom was closed, (2) requiring that any closed proceeding be held in that courtroom and videotaped in its entirety, (3) putting the operation of the videotape equipment and the retention of the tapes in the hands of a public commission independent of the courts or other members of the criminal justice system and subject to court order only as to time of release, which would, in any event, be required to be not later than a few days after the trial of defendant or a codefendant ends (cf. Uniform Rules of Criminal Procedure, rule 714, 10 ULA 317). Though no objective evidence of which ***723** I am aware indicates the need for the procedure suggested, I recognize the importance of assuring our citizens that the judicial process is above suspicion, and believe any resulting inconvenience to the system to be more than offset if we thereby assure the constitutional rights of individuals accused.

Use of the suggested procedure together with the preliminary hearing mandated by the *Gannett* and *Westchester Rockland Newspapers* cases will preserve both the rights of the public (and the media in the interest of the public) to the free flow of information about the courts and the "most fundamental of all freedoms," [5] the right of an accused individual to a fair trial.

5 (*Estes v Texas,* 381 US 532, 540: "We have always held that the atmosphere essential to the preservation of a fair trial--the most fundamental of all freedoms--must be maintained at all costs.")

Chief Judge Cooke

(Dissenting).

A majority of the court today in effect sanctions the exclusion of the public and the press from a guilty plea proceeding in a criminal case. Because closure of a plea proceeding is tantamount to closure of a trial itself, and because the tacit implications of the court's decision do not bode well for the future of public trials in this State, I must respectfully dissent. [1]

1 It should never be forgotten that the concept of a public trial has its genesis in concern for protection of the accused (see *People v Hinton,* 31 NY2d 71; *Gannett Co. v De Pasquale,* 443 US 368, 406 [Blackmun, J., concurring and dissenting]).

The present article 78 proceeding stems from a criminal proceeding in Albany County. In September of 1978, Alexander Marathon and William Du Bray were indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. Although the case did attract media attention, the publicity does not appear to have been substantial. Nonetheless, when a joint suppression hearing was convened on March 5, 1979, defendants moved for exclusion of the public. The court granted the motion, without objection by the prosecutor, and without conducting a hearing, and ordered the doors to the courtroom locked.

During the course of the closed suppression hearing, defendant Marathon decided to enter a guilty plea. While the courtroom was still locked, and the public and reporters barred, Marathon's counsel moved to close the courtroom during the plea proceeding. The District Attorney joined in the motion, and the Judge again ordered closure, stating only ***724** that "In the exercise of discretion and in the interests of justice, I will close the courtroom at this time to all non-Court personnel". Later the court explained that it closed the plea proceeding because it was likely that Marathon would implicate Du Bray, rendering it difficult to select an impartial jury when Du Bray came to trial.

Petitioner Armstrong, a reporter for the Albany *Times-Union,* was aware of the closed suppression hearing, and allegedly made periodic checks of the courtroom where she believed the hearing was being conducted. She first learned of the closed plea proceeding from the attorney for Du Bray, who was excluded from the proceeding and was standing outside the courtroom.

Ms. Armstrong visited the Judge in his chambers, and he confirmed that a guilty plea had been entered. The Judge indicated that a transcript of the proceeding would be available in a few days, but denied Ms. Armstrong's request to have the stenographer read the minutes to her. The next day, petitioners delivered a letter to the Judge protesting the closure and requested either an immediate transcript or an order directing the court reporter to relate the minutes of the proceeding. This request was denied.

On the following Monday, Du Bray entered a plea of guilty. Ms. Armstrong was then permitted to purchase a copy of

the minutes taken at Marathon's plea. Shortly thereafter, this proceeding was instituted.

At the outset, I cannot agree that the proceeding should be dismissed for mootness. As the court has but recently reaffirmed regarding closure orders, "we have traditionally retained jurisdiction, despite a claim of mootness, because of the importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 436-437). By now rejecting this exception to the mootness doctrine, the majority has provided a precedent to effectively insulate closure orders from legal challenge. Indeed, since we have previously cautioned trial courts against staying the criminal proceeding while collateral review of a closure order proceeds *(Matter of Merola v Bell,* 47 NY2d 985, 987- 988), the closure order will be moot and evade review in all but the rarest of instances.

No persuasive reason has been given for now overruling the ***725** mootness exception for closure orders so recently recited and recognized in *Matter of Gannett Co. v De Pasquale* (43 NY2d 370, affd 443 US 368) and *Westchester Rockland.* [2] Indeed, the majority furnishes no explanation whatsoever as to why the mootness exception applied in those cases falls short of reaching the situation in this matter, but notes somewhat cryptically that future cases may or may not be moot. Perhaps more unsettling is the absence of guidelines by which to evaluate mootness in these proceedings. If the court is unwilling to apply the mootness exception here, where a novel and not insubstantial issue is presented, it is difficult to predict when the exception will again be invoked. Such *ad hoc,* unexplained decision making is not in harmony with the best interests of our system of jurisprudence.

2 As the majority correctly notes, the mootness exception recognized in *Gannett* and *Leggett* applies in instances where an important issue is capable of recurring while evading review *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 436-437, supra.;*;* *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 376, supra.;*;* see *Matter of Carr v New York State Bd. of Elections,* 40 NY2d 556, 559; see, also, *Matter of United Press Assns. v Valente,* 308 NY 71, 76). Since *Leggett* presented an issue substantially similar to *Gannett,* the retention of jurisdiction in *Leggett* apparently represents a policy decision by the court to continue to apply the mootness exception in closure cases. Alternatively, the court may have viewed *Leggett* as presenting a novel question, even after *Gannett.* Under either rationale, the mootness exception applies here.

Nor do I agree that the "principles governing fair trial-free press issues *** have already been largely declared by our decisions in *Gannett"* (majority opn, at p 716) and in *Westchester Rockland Newspapers v Leggett (supra,* at pp 439-442). Undoubtedly, *Westchester Rockland* and *Gannett* establish the procedural and substantive rules to be followed when dealing with a motion to close *pretrial* proceedings. Those guidelines do not cover the situation here, as a guilty plea proceeding is simply not *pretrial* in nature. Rather, it is a substitute for and the legal and practical equivalent of the trial itself. A plea of guilty establishes "guilt of the crime charged as incontrovertibly as a verdict of a jury upon a trial" *(People ex rel. Carr v Martin,* 286 NY 27; see, e.g., *People v Krennen,* 264 NY 108, 109; *People ex rel. Hubert v Kaiser,* 206 NY 46, 53). The plea is in itself a conviction (e.g., *People v Jones,* 44 NY2d 76, 82-83, citing *Boykin v Alabama,* 359 US 238). "Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence" *(Kercheval v United States,* 274 US 220, 223). Thus, ***726** by stating that *Westchester Rockland* and *Gannett* are controlling, the court is effectively holding that trials may be closed to the public on the same basis as pretrial proceedings.

And the court may not sidestep this significant issue by merely asserting that *Westchester Rockland* recognized a distinction between trial and pretrial proceedings, for the fact remains that *Westchester Rockland* articulated substantive standards for only pretrial proceedings. Today's decision must be construed as indorsing the application of those same standards to trial closures, and thereby sustaining the constitutionality of excluding the public and press from a trial itself. The fallacy in this holding is demonstrated by the Supreme Court's retention of jurisdiction--at least for the present--in a case where the trial was closed to the public *(Richmond Newspapers v Virginia,* 448 US ___, 48 USLW 3241). That action signals a strong possibility that the closing of a trial presents a substantial Federal constitutional question, even after *Gannett* upheld pretrial closure. It is thus difficult to fathom the majority's efforts to avoid a question with such momentous constitutional and societal impact. [3]

3 It is also difficult to understand how the majority can find this proceeding moot and yet effectively rule on the merits of the trial closure. By finding *Westchester Rockland* controlling, as discussed, the majority has held

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that a trial may constitutionally be closed, in instances not previously permitted.

This is especially disturbing because the rationale for excluding the public from pretrial proceedings does not justify closure of plea hearings.[4] This court has a number of times reviewed the serious conflict which gave rise to the pretrial closure controversy. On the one hand, the public is possessed of a right to open judicial proceedings.[5] Not only is this right deeply rooted in our history *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 445, supra.; [concurring opn]), but it is mandated by the clear long-standing command of the Legislature: "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the ***727** same" (Judiciary Law, § 4). At the same time, there are instances, however rare, where pretrial publicity may effectively destroy the accused's right to a fair trial (see *Sheppard v Maxwell,* 384 US 333). The precise point at which the public right to know must give way to the defendant's right to a fair trial has and will continue to spark lively debate (compare *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 443-444, with id., at pp 445-448, supra.;).

4 The two are not the same but are separate and distinct and they do not mix or merge. A justifiable closure of the suppression hearing did not envelop the plea for by nature and law there was a cessation of the former before the initiation of the latter.

5 In *People v Hinton* (31 NY2d 71, supra.;*),* it was well stated at page 73: "Public trials, of necessity, serve a twofold purpose. They safeguard an accused's right to be dealt with fairly and not to be unjustly condemned *** and concomitantly serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and *lettre de cachet* *** Not only the defendant himself, but also the public at large has a vital stake in the concept of a public trial."

But we can all agree as to the possible source of the potential prejudice at pretrial suppression hearings. Because the very purpose of such proceedings is to determine the admissibility of evidence, they "are often a potent source for the revelation of evidence which is both highly prejudicial to the defendant's case and not properly admissible at trial" *(Matter of Westchester Rockland Newspapers v Leggett, supra,* at p 439). If the hearing is open, and the case is well publicized, it is possible that the evidence will be disclosed to potential jurors but ultimately excluded from use at trial. This could subvert the very purpose of the hearing.

By contrast, none of these possible dangers attend when the plea proceeding is opened to public view. Given a defendant's voluntary decision to admit his guilt in open court, and the fact that the plea proceeding will quickly ripen into a conviction, the possibility of a defendant's rights being impaired by the presence of the public and the press is almost nonexistent. And, even if it be assumed that concern for a codefendant's rights would ever warrant closure of a plea, the *mere* fact that the pleading defendant *might* implicate his cohort is insufficient justification. It is true, of course, that the defendant's statements at the plea, if they implicate the codefendant, would be prejudicial. But all evidence which suggests guilt is highly prejudicial. This does not mean that all inculpatory evidence must be enjoined from pretrial disclosure. The narrow rationale for considering closure of the suppression hearing is that the damaging evidence may prove to be inadmissible at trial. There is no reason to suppose that the evidence uncovered at a plea hearing would be inadmissible at the later trial of a codefendant. Indeed, more often than not, the defendant who pleaded can probably be expected to testify at the codefendant's trial--possibly for the prosecution, possibly for the defense. It follows that there is no *ipso facto* basis for overriding the command of section 4 of the Judiciary Law with respect to plea proceedings. ***728**

In addition to the absence of prejudice, the public has a compelling stake in open plea proceedings. "Publicity, not secrecy, in arraignment, plea and judgment is part of our tradition" *(Matter of Rudd v Hazard,* 266 NY 302, 307). Especially in modern times, when guilty pleas account for most criminal dispositions, it is particularly egregious to close the courtroom doors on these proceedings. In some areas of the State, guilty pleas make up three fourths of all criminal dispositions (Twenty-Second Ann Report of NY Judicial Conference, 1977, p 56). And, in any calendar year, guilty pleas may constitute 90-95% of all convictions obtained State-wide (see id., at p 58). To exclude the public from plea proceedings of codefendants is thus to exclude the public from the workings of a substantial part of the criminal justice system.[6]

6 Even more troubling is the possibility of closure of a plenary trial where one defendant is to be tried separately from and before his codefendant.

The beneficial aspects of an open criminal justice system have been often enough discussed to need no repetition here (see,

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e.g., *Gannett Co. v De Pasquale,* 443 US 368, 407, 421-422, 427-433, supra.; [Blackmun, J., concurring and dissenting]; Friendly, Crime and Publicity; Note, The Right to Attend Criminal Hearings, 78 Col L Rev 1308). But it would not be amiss to note that if the plea is insulated from public view, the public may be deprived of their most effective method of determining whether elected officials are enforcing the law "with vigor and impartiality" *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 437, supra.;). And, casting a veil of secrecy over the major component of the criminal justice system may well lead our citizens to view the judicial process with a suspicious eye (see *People v Hinton,* 31 NY2d 71, 73, supra.;). It is not enough that justice be done. It must be perceived as being done in the eyes of the public.

Finally, it bears emphasis that the closure motion in the present case was entertained in secret, with no representative of the public or media afforded an opportunity to voice opposition. Moreover, the motion was granted in summary fashion without any showing in support of it. These procedures cannot be sanctioned *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 442, supra.;). The majority's explanation--that closure occurred prior to the *Westchester Rockland* case--is unacceptable. Even prior to *Westchester Rockland* it was clear that closure could not be ordered absent some ***729** showing of potential prejudice *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 376-381, affd 443 US 368, supra.;). Here, there was none. And, it had also been stated in *Gannett* that "the courts should of course afford interested members of the news media an opportunity to be heard *** to determine the magnitude of any genuine public interest" (43 NY2d, at p 381). Since the closure in this case occurred after the procedural guidelines in *Gannett* were promulgated, the majority's explanation of the improprieties does not bear scrutiny. Thus, the procedural irregularities alone would warrant reversal.

Accordingly, the judgment of the Appellate Division should be reversed.

Judges Jasen, Gabrielli, Jones and Fuchsberg concur with Judge Wachtler; Judge Meyer concurs in a separate opinion; Chief Judge Cooke dissents and votes to reverse in another opinion.

Judgment reversed, without costs, and matter remitted to the Appellate Division, Third Department, with directions to dismiss the proceeding solely on the ground of mootness. ***730**

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Distinguished by Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 ex rel. HSBC Bank USA, Nat. Ass'n v. Nomura Credit & Capital, Inc., N.Y.Sup., May 10, 2013

66 A.D.3d 678, 888 N.Y.S.2d 67, 2009 N.Y. Slip Op. 07255

**1 In the Matter of Highland Hall Apartments, LLC, Appellant
v
New York State Division of Housing and Community Renewal et al., Respondents. 151 Purchase Street Associates, LLC, Proposed Appellant.

Supreme Court, Appellate Division, Second Department, New York
October 6, 2009

CITE TITLE AS: Matter of Highland Hall Apts., LLC v New York State Div. of Hous. & Community Renewal

HEADNOTES

Declaratory Judgments
When Remedy Appropriate

Declaratory judgment action rather than proceeding pursuant to CPLR article 78 was proper vehicle for resolving challenge to resolution which declared that Emergency Tenant Protection Act of 1974 (L 1974, ch 576) applied to buildings owned by petitioner; accordingly, Supreme Court should have determined that insofar as declaratory and injunctive relief was sought against City and tenants, proceeding was governed by six-year catch-all limitations period of CPLR 213 (1) and was timely interposed.

Proceeding against Body or Officer
Mandamus

Parties
Substitution of Parties

Belkin Burden Wenig & Goldman, LLP, New York, N.Y. (Sherwin Belkin, Magda L. Cruz, and Kristine L. Grinberg of counsel), for petitioner-appellant and proposed petitioner-appellant.
Gary R. Connor, New York, N.Y. (Kathleen Lamar of counsel), for respondent New York State Division of Housing and Community Renewal.
DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y. (Kevin J. Plunkett, Stefanie A. Bashar, and Kristen Kelley Wilson of counsel), for respondents City of Rye, Robert Jackson, Michael McGuinn, Daniel Kressler, Doug Florin, Emily Florin, Alfred Vitiello, Matthew Thomas, Erica Metkiff, Mary Dirugeris, Ann Lodge, and William Thoesen.

In a proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent New York State Division of Housing and Community Renewal to render an administrative determination as to the rent regulatory status of the building known as 151 Purchase Street in Rye, in which the petitioner alternatively seeks, pursuant to CPLR 103, in effect, to deem the petition to be a complaint and the proceeding to be an action for a judgment declaring that a resolution adopted by the City of Rye at a special meeting on February 25, 2006 was unconstitutional to the extent that it determined that the building known as 151 Purchase Street in Rye was subject to the Emergency Tenant Protection Act of 1974 (ETPA) (McKinney's Uncons Laws of NY § 8621 *et seq.* [L 1974, ch 576]), or to treat this proceeding as a hybrid proceeding pursuant to CPLR article 78 and action for declaratory relief, the petitioner Highland Hall Apartments, LLC, and the proposed petitioner, 151 Purchase Street Associates, LLC, appeal from so much of an order and judgment (one paper) of the Supreme Court, Westchester County (Bellantoni, J.), entered July 15, 2008, as granted those branches of the motion of the respondents City of Rye, Robert ***679** Jackson, Michael McGuinn, Daniel Kressler, Doug Florin, Emily Florin, Alfred Vitiello, Matthew Thomas, Erica Metkiff, Mary Dirugeris, Ann Lodge, and William Thoesen which were pursuant to CPLR 3211 (a) (5) to dismiss the proceeding insofar as asserted against them on the grounds that it was time-barred and that the petitioner lacked standing to bring the proceeding, denied that branch of the cross motion of the proposed petitioner, 151 Purchase Street Associates, LLC, which was to be substituted for Highland Hall Apartments, LLC, as the petitioner, and dismissed the proceeding. ****2**

Ordered that the appeal by the petitioner from so much of the order and judgment as denied that branch of the cross motion of the proposed petitioner which was to be substituted in the proceeding is dismissed, as the petitioner is not aggrieved by

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that portion of the order and judgment (*see* CPLR 5511); and it is further,

Ordered that the order and judgment is modified, on the law, (1) by deleting the provision thereof granting that branch of the motion of the respondents City of Rye, Robert Jackson, Michael McGuinn, Daniel Kressler, Doug Florin, Emily Florin, Alfred Vitiello, Matthew Thomas, Erica Metkiff, Mary Dirugeris, Ann Lodge, and William Thoesen which was pursuant to CPLR 3211 (a) (5) to dismiss the proceeding insofar as asserted against them as time-barred and substituting therefor a provision denying that branch of the motion, (2) by deleting the provision thereof denying that branch of the petition which was, in effect, to deem the petition to be a complaint and the proceeding to be an action for a judgment declaring that the resolution adopted by the City of Rye at a special meeting on February 25, 2006, is unconstitutional to the extent that it determined that the building known as 151 Purchase Street in Rye was subject to the Emergency Tenant Protection Act of 1974 (L 1974, ch 576) and substituting therefor a provision granting that branch of the petition, and (3) by deleting the provision thereof denying that branch of the cross motion of the proposed petitioner which was to be substituted for Highland Hall Apartments, LLC, as the petitioner, and substituting therefor a provision granting that branch of the cross motion; as so modified, the order and judgment is affirmed insofar as reviewed, the petition is reinstated and converted into a complaint, and the proceeding is converted into an action for a judgment declaring that the subject resolution is unconstitutional to the extent that it determined that the building known as 151 Purchase Street in Rye was subject to the Emergency Tenant Protection Act, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings on the complaint; and it is further, ***680**

Ordered that one bill of costs is awarded to the proposed petitioner payable by the respondents City of Rye, Robert Jackson, Michael McGuinn, Daniel Kressler, Doug Florin, Emily Florin, Alfred Vitiello, Matthew Thomas, Erica Metkiff, Mary Dirugeris, Ann Lodge, and William Thoesen, and one bill of costs is awarded to the respondent New York State Division of Housing and Community Renewal, payable by the petitioner and the proposed petitioner.

The petitioner Highland Hall Apartments, LLC (hereinafter Highland Hall) is the former owner of two buildings located at 131 Purchase Street and 151 Purchase Street, respectively, in the City of Rye. The building located at 131 Purchase Street has approximately 99 housing units, and the building at 151 Purchase Street has 10 housing units. In February 2006 the City adopted a resolution in which it declared that the Emergency Tenant Protection Act of 1974 (L 1974, ch 576) applied to the buildings owned by Highland Hall, specifically listed as 131 Purchase Street and 151 Purchase Street, which it defined together as the "Highland Hall Property."

Subsequently, by letter dated December 2006, Highland Hall requested an administrative determination from the New York State Division of Housing and Community Renewal (hereinafter the DHCR) as to the rent regulatory status of the building located at 151 Purchase Street. In its request, Highland Hall contended, inter alia, that the resolution was unconstitutional as applied to the 151 Purchase Street building and that it should not apply to that building since it only contained 10 housing units. In May 2007 the DHCR Rent Administrator issued an order (hereinafter the DHCR order) finding that the DHCR lacked jurisdiction to entertain a challenge to the validity of the resolution. In June 2007 Highland Hall filed a petition for administrative review (hereinafter PAR) of the DHCR order. While the PAR was pending, Highland Hall conveyed the 151 Purchase Street building to the proposed petitioner 151 Purchase Street Associates, LLC (hereinafter Associates). In October 2007 the DHCR Deputy Commissioner determined that the Rent Administrator had properly concluded that the DHCR did not have jurisdiction to entertain a challenge to the validity of the resolution and denied the PAR.

On or about December 27, 2007 Highland Hall commenced the instant proceeding, requesting, inter alia, as alternative relief, that the proceeding be treated as a hybrid proceeding pursuant to CPLR article 78 to compel the DHCR to render an administrative determination as to the rent regulatory status of the 151 Purchase Street building and an action for a declaration ***681** that the ****3** resolution was arbitrary, unreasonable, and unconstitutional to the extent that it determined that the 151 Purchase Street building was subject to the ETPA. Thereafter, the City and the individually-named respondents (hereinafter the tenants) moved to dismiss the petition on the grounds that Highland Hall lacked standing, the petition was untimely, and the petition failed to state a cause of action. In response, Associates cross-moved, inter alia, to be substituted for Highland Hall as the petitioner. After hearing oral argument, the Supreme Court granted the motion to dismiss on the grounds that the petition was time-barred by the four-month statute of limitations applicable to CPLR

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article 78 proceedings and that Highland Hall lacked standing, since it did not own the 151 Purchase Street building when it commenced the proceeding. The court also, inter alia, denied that branch of Associates' cross motion which was to be substituted for Highland Hall as the petitioner, and determined that it did not have the authority to compel the DHCR to resolve the regulatory status of the 151 Purchase Street building since such action was not a ministerial function. Highland Hall and Associates appeal.

A CPLR article 78 proceeding is the proper vehicle for seeking review of the procedures followed in the adoption of a statute, law, or ordinance (*see Matter of Save the Pine Bush v City of Albany,* 70 NY2d 193, 202 [1987]). However, where the substance of the law, "its wisdom and merit" (*Matter of Voelckers v Guelli,* 58 NY2d 170, 177 [1983]), or its constitutionality, is challenged, then the proper procedure is to commence an action for a declaratory judgment (*see New York City Health & Hosps. Corp. v McBarnette,* 84 NY2d 194 [1994]; *P & N Tiffany Props., Inc. v Village of Tuckahoe,* 33 AD3d 61, 64 [2006]). Contrary to the Supreme Court's determination, a declaratory judgment action rather than a proceeding pursuant to CPLR article 78 is the proper vehicle for resolving the instant challenge to the resolution (*see Matter of Huntington Hills Assoc., LLC v Town of Huntington,* 49 AD3d 647, 648 [2008]; *Matter of Jones v Amicone,* 27 AD3d 465, 470 [2006]; *see also Martin Goldman, LLC v Yonkers Indus. Dev. Agency,* 12 AD3d 646, 648 [2004]). Accordingly, the Supreme Court should have determined that insofar as declaratory and injunctive relief was sought against the City and the tenants, this proceeding is governed by the six-year catch-all limitations period of CPLR 213 (1) and was timely interposed. Thus, that branch of the motion of the City and the tenants which was to dismiss the proceeding as time-barred should have been denied.

Since the proper vehicle to challenge the resolution is a ***682** declaratory judgment action, the Supreme Court properly dismissed that branch of the petition which sought relief pursuant to CPLR article 78 in the nature of mandamus against DHCR. The remedy of mandamus is available "to compel the performance of a ministerial, nondiscretionary act where there is a clear legal right to the relief sought" (*Matter of Savastano v Prevost,* 66 NY2d 47, 50 [1985]; *see* CPLR 7803 [1]; *Matter of Burch v Harper,* 54 AD3d 854, 855 [2008]; *Matter of Joy Bldrs., Inc. v Ballard,* 20 AD3d 534 [2005]). Moreover, the act sought to be compelled must be based upon a "specific statutory authority mandating performance in a specified manner" (*Matter of Peirez v Caso,* 72 AD2d 797 [1979]). Pursuant to the ETPA, DHCR is designated as the sole administrative agency to administer the regulation of residential rents as provided in the ETPA after a municipality has declared the existence of a housing emergency (*see* McKinney's Uncons Laws of NY § 8628 [a]). However, the ETPA does not provide DHCR with the authority to review the validity of or annul a municipality's resolution or declaration implementing the ETPA.

As Highland Hall, in effect, conceded, it lacked standing since it did not own the 151 Purchase Street building at the time of commencement of this proceeding. Consequently, the present owner of the building, Associates, cross-moved, inter alia, to be substituted as petitioner for Highland Hall. "[A]n amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense" (*JCD Farms v Juul-Nielsen,* 300 AD2d 446 [2002] [internal quotation marks omitted]; *see Matter of Shelter Is. Assn. v Zoning Bd. of Appeals of Town of Shelter Is.,* 57 AD3d 907, 908 [2008]; *Fulgum v Town of Cortlandt Manor,* 19 AD3d 444, 446 [2005]). Consequently, the Supreme Court should have granted that branch of the cross motion which was for that relief. Rivera, J.P., Skelos, Balkin and Leventhal, JJ., concur.

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29 N.Y.3d 386, 80 N.E.3d 370, 57 N.Y.S.3d 678, 130 Fair Empl.Prac.Cas. (BNA) 131, 2017 N.Y. Slip Op. 03689

**1 Betty L. Kimmel, Respondent,
v
State of New York et al., Appellants.
Emmelyn Logan-Baldwin,
Interested Party-Respondent.

Argued October 20, 2016; reargued March 21
36
2017; decided May 9, 2017

CITE TITLE AS: Kimmel v State of New York

SUMMARY

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 25, 2014. The Supreme Court awarded plaintiff and her former attorney, Emmelyn Logan-Baldwin, a sum certain pursuant to a stipulation as to the amount of the attorney's fees and expenses award. The appeal brings up for review a prior nonfinal order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 18, 2010. The Appellate Division order, insofar as brought up for review, (1) reversed that part of an order of that Supreme Court which had denied those parts of the motions of plaintiff and Emmelyn Logan-Baldwin for an award of attorneys' fees and expenses; and (2) remitted to Supreme Court to determine whether plaintiff and/or Emmelyn Logan-Baldwin were entitled to such fees and expenses, and, if so, the reasonable amount of those fees and expenses.

Kimmel v State of New York, 76 AD3d 188, affirmed.

HEADNOTE

State
Equal Access to Justice Act
Prevailing Party in Sex Discrimination Action against State Eligible to Recover Legal Fees and Expenses

Plaintiff, a former State Trooper who prevailed in an action in Supreme Court against the State under the Human Rights Law for sex discrimination in employment by a state agency in which she had sought money damages and injunctive relief, was eligible to recover reasonable attorneys' fees and expenses under the New York State Equal Access to Justice Act (CPLR art 86).

RESEARCH REFERENCES

Am Jur 2d Costs §§ 58–60.

Carmody-Wait 2d Actions by or Against the State §§ 126:138, 126:140.

McKinney's, CPLR art 86.

NY Jur 2d Costs in Civil Actions §§ 198, 199; NY Jur 2d State of New York §§ 210–213.

*387 ANNOTATION REFERENCE

See ALR Index under Attorneys' Fees; Costs of Action; Equal Access to Justice Act; Successful Party.

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Query: EAJA & "plain language" & award /4 attorney /2 fee

POINTS OF COUNSEL

Jaeckle Fleischmann & Mugel, LLP, Buffalo (*Mitchell J. Banas, Jr.* and *Bradley A. Hoppe* of counsel), for appellants. I. CPLR article 86 by its express terms applies only to actions seeking "judicial review" of state agency action and not plenary actions seeking compensatory damages. (*Tompkins v Hunter*, 149 NY 117; *Bright Homes v Wright*, 8 NY2d 157; *Matter of Alfonso v Fernandez*, 167 Misc 2d 793; *Matter of Dachenhausen v Crosson*, 154 Misc 2d 132; *Matter of 2421 Realty Co. v New York State Div. of Hous. & Community Renewal*, 193 AD2d 571; *Matter of Hickey v Sinnott*, 179 Misc 2d 573; *Matter of Walker v Novello*, 36 AD3d 1100; *Hernandez v Hammons*, 98 NY2d 735; *Schaffer v Evans*, 57 NY2d 992; *Koerner v State of N.Y., Pilgrim Psychiatric Ctr.*, 62 NY2d 442.) II. The stated purpose of CPLR article 86 to provide equal access to the courts is not implicated at bar because Betty L. Kimmel already had ample incentive and opportunity to pursue her claims. (*Matter of Wittlinger v Wing*, 99 NY2d 425.) III. The dissenters at the

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Appellate Division correctly found that CPLR article 86 does not apply to actions under the Human Rights Law seeking compensatory damages. (*Matter of Sutka v Conners*, 73 NY2d 395.) IV. The legislative history was properly considered by the trial court to determine the scope and purpose of CPLR article 86 and compels the conclusion that article 86 is not applicable here. (*Riley v County of Broome*, 95 NY2d 455; *Matter of Pirro v Angiolillo*, 89 NY2d 351; *Abood v Hospital Ambulance Serv.*, 30 NY2d 295; *Matter of City of New York v State of New York*, 282 AD2d 134, 98 NY2d 740; *Matter of Sigety v Ingraham*, 29 NY2d 110; *Matter of Jennings v Commissioner, N.Y.S. Dept. of Social Servs.*, 71 AD3d 98; *Rozell v Ross-Holst*, 576 F Supp 2d 527; *Insinga v Cooperatieve Centrale Raiffeisen Boerenleenbank B.A.*, 478 F Supp 2d 508; *McIntyre v Manhattan Ford, LincolnMercury*, 176 Misc 2d 325; *Adorno v Port Auth. of N.Y. & N.J.*, 685 F Supp 2d 507.)

***388** *Harris Beach PLLC*, Pittsford (*A. Vincent Buzard* of counsel), and *Harriet L. Zunno*, Hilton, for Betty L. Kimmel, respondent.

I. The Equal Access to Justice Act (CPLR art 86) (EAJA) does not exclude actions brought under the New York State Human Rights Law by the plain meaning of the language of the EAJA statute. (*Matter of Rochester Community Sav. Bank v Board of Assessors of City of Rochester*, 248 AD2d 949, 92 NY2d 811; *Ferrick v State of New York*, 198 AD2d 822; *Matter of Patchogue Scrap Iron & Metal Co. v Ingraham*, 57 Misc 2d 290; *Matter of Capruso v New York State Police*, 300 AD2d 27; *Tompkins v Hunter*, 149 NY 117; *Matter of Alfonso v Fernandez*, 167 Misc 2d 793; *Koerner v State of N.Y., Pilgrim Psychiatric Ctr.*, 62 NY2d 442; *Treanor v Metropolitan Transp. Auth.*, 414 F Supp 2d 297; *Dortz v City of New York*, 904 F Supp 127.) II. The appellate court properly concluded that because of the plain and clear language of the statute, the award of attorneys' fees is proper under CPLR article 86 and that there is no need to resort to the legislative history to discern the intent of the legislature (*McCluskey v Cromwell*, 11 NY 593; *People ex rel. Bockes v Wemple*, 115 NY 302; *Schoonmaker v Hoyt*, 148 NY 425; *Matter of Rathscheck*, 300 NY 346; *New Amsterdam Cas. Co. v Stecker*, 3 NY2d 1; *Matter of Greer v Wing*, 95 NY2d 676; *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435.)

Harris Beach PLLC, Pittsford (*A. Vincent Buzard, Svetlana K. Ivy* and *Allison A. Bosworth* of counsel), for Emmelyn Logan-Baldwin, respondent.

I. The Appellate Division correctly held that under a plain reading of the statute, the Equal Access to Justice Act (CPLR art 86) applies to this action. (*Matter of Polan v State of N.Y. Ins. Dept.*, 3 NY3d 54; *Riley v County of Broome*, 95 NY2d 455; *Matter of Pan Am. World Airways v New York State Human Rights Appeal Bd.*, 61 NY2d 542; *Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y.*, 62 NY2d 763; *Matter of One Niagara LLC v City of Niagara Falls*, 78 AD3d 1554; *Matter of Top Tile Bldg. Supply Corp. v New York State Tax Commn.*, 94 AD2d 885; *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55; *Pajak v Pajak*, 56 NY2d 394; *Matter of Capruso v New York State Police*, 300 AD2d 27; *Ferrick v State of New York*, 198 AD2d 822.) II. The Appellate Division's decision is consistent with the purpose and spirit of the Equal Access to Justice Act, while the State's interpretation is contrary to it. (*Matter of Hernandez v Barrios-Paoli*, 93 NY2d 781; *Matter of Daniel C.*, 63 NY2d 927; ***389** *Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346; *Matter of Wittlinger v Wing*, 99 NY2d 425; *Sosebee v Astrue*, 494 F3d 583; *Matter of Beechwood Restorative Care Ctr. v Signor*, 11 AD3d 987, 5 NY3d 435.) III. The Appellate Division correctly held that the legislative history of the Equal Access to Justice Act confirms that the right of the prevailing party to be awarded legal fees applies in any civil action against the State. (*Matter of Roosevelt Raceway v Monaghan*, 9 NY2d 293; *Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367; *Matter of Delmar Box Co. [Aetna Ins. Co.]*, 309 NY 60; *Frontier Ins. Co. v State of New York*, 160 Misc 2d 437, 197 AD2d 177, 87 NY2d 864; *Schultz v Harrison Radiator Div. Gen. Motors Corp.*, 90 NY2d 311; *Matter of Lloyd v Grella*, 83 NY2d 537; *Matter of Holmes v Winter*, 22 NY3d 300; *Weiner v City of New York*, 19 NY3d 852; *Matter of Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 93 NY2d 729.)

Empire Justice Center, Albany (*Saima A. Akhtar* and *Susan C. Antos* of counsel) and *Legal Services of Central New York*, Syracuse (*Samuel Young* of counsel), for Empire Justice Center and another, amici curiae.

I. The Appellate Division correctly found that the plain language of the Equal Access to Justice Act (CPLR art 86) entitled plaintiff to recover attorney's fees. (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48; *Simon v Usher*, 17 NY3d 625; *Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577; *Jiggetts v Grinker*, 75 NY2d 411; *Tambe v Bowen*, 839 F2d 108; *Edwards v McMahon*, 834 F2d 796.) II. The Equal Access to Justice Act (CPLR art 86) does not demand the limitations that defendants propose. III. The appellate decision should be upheld because broad reading of the Equal Access to Justice Act (CPLR art 86) safeguards access to justice. IV. Limiting the Equal Access to Justice Act (CPLR art 86) to

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administrative appeals will compromise the ability of legal services providers to vindicate the constitutional rights of low-income people. (*Matter of Graves v Doar*, 87 AD3d 740; *Coleman v Daines*, 79 AD3d 554; *Matter of Brown v Wing*, 170 Misc 2d 554; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52; *Matter of Johnson v Blum*, 83 AD2d 731; *Matter of Corr v Westchester County Dept. of Social Servs.*, 33 NY2d 111; *Matter of Aumick v Bane*, 161 Misc 2d 271; *Matter of Gunn v Blum*, 48 NY2d 58; *Matter of Tormos v Hammons*, 259 AD2d 434; *Matter of Shvartszayd v Dowling*, 239 AD2d 104.)

***390 OPINION OF THE COURT**

Chief Judge DiFiore.

Under the Equal Access to Justice Act (CPLR art 86; hereinafter EAJA), in certain circumstances a court may award reasonable attorneys' fees and costs to a prevailing plaintiff or petitioner in a suit against the State. In this appeal we are asked to decide whether the EAJA permits the award of attorneys' fees and costs to a prevailing plaintiff in an action against the State under the Human Rights Law for sex discrimination in employment by a state agency. We conclude that it does.

I.

From 1980 through 1994, plaintiff Betty Kimmel worked as a New York State ****2** Trooper. During plaintiff's tenure, she was assigned to several different police stations, often as the first woman to serve as a State Trooper at that station. In 1995, plaintiff filed a complaint alleging that she was subjected to discrimination, sexual harassment, and retaliation based on her sex and was exposed to a hostile work environment. She sought back pay, front pay, benefits, compensatory damages, reasonable attorneys' fees, and an injunction restraining defendants from continuing their discriminatory practices. Defendants included the State of New York and the New York State Division of State Police (collectively, the State defendants), along with individual defendants not relevant to this appeal.

According to the complaint, and supporting exhibits, coworkers posted lewd cartoons portraying plaintiff naked and engaged in various sexual acts, suggested that plaintiff perform sexual acts on them and other coworkers and engaged in other harassing and hostile conduct, including a physical assault on plaintiff, which required emergency room treatment and doctor-ordered work leave.

Throughout the course of plaintiff's 14-year tenure, she made repeated complaints. In 1982, plaintiff made a sexual harassment claim under article 9 of the New York State Police Administrative Manual, but the harassment continued. When she was assaulted by a coworker in 1993, plaintiff requested a formal hearing, but was dissuaded from moving forward when her request to have a private attorney present was denied and her union representative suggested that she would not receive a fair hearing. Despite plaintiff's efforts, neither her supervisors ***391** nor her Troop Commanders put a stop to her coworkers' offensive behavior. Plaintiff repeatedly sought legal assistance, but had difficulty finding an attorney to take her case.

In 1995, plaintiff commenced this litigation. The State defendants denied that the agency had engaged in any wrongdoing whatsoever, and asserted as a defense that "[a]ll actions taken by the defendants were official acts taken in the exercise of their discretion." Over the next 10 years, the State defendants repeatedly engaged in what the Appellate Division characterized as "obstructionist and delaying tactics" (261 AD2d 843, 845 [4th Dept 1999]), including their failure to comply with basic discovery requests. Eventually, based on their continued defiance of court orders, the Appellate Division struck the State defendants' answers (*see* 286 AD2d 881, 883 [4th Dept 2001]).

When the case went to trial over a decade after the complaint was filed, plaintiff prevailed and received a jury award of over $700,000. The jury award included past lost earnings of $160,000; past lost retirement earnings of $60,000; future lost retirement earnings of $491,000; and past pain and suffering of $87,000. Plaintiff's current and former counsel then sought ****3** attorneys' fees and costs under the EAJA.

Supreme Court held that attorneys' fees and costs could not be awarded in this action because the EAJA did not apply "where a plaintiff has recovered compensatory damages for tortious acts of the State and its employees."

The Appellate Division reversed in a split decision, holding that a plain reading of the EAJA and its definition of the term "action" compelled the conclusion that the EAJA applies to this case (76 AD3d 188, 191-194 [4th Dept 2010]). Although the Appellate Division noted that resort to the legislative history was unnecessary, it nonetheless observed that the legislative history supported its position. The Court concluded that if the legislature had not intended the EAJA to

cover this type of case, then the legislature, and not the Court, was the appropriate body to resolve the issue (*see* 76 AD3d at 196).

The dissent would have concluded that "the 'spirit and purpose of the legislation,' as gleaned from the statutory context and the legislative history," demonstrated that the EAJA should be applied only to review of administrative actions (*id.* at 199 [citation omitted]).

***392** Supreme Court subsequently entered a final judgment awarding plaintiff and her former counsel attorneys' fees and expenses. Defendants now appeal as of right pursuant to CPLR 5601 (d), bringing the prior nonfinal Appellate Division order up for our review.

II.

We look "first to the plain language of the statute[ ] as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568 [2004]). New York's EAJA is located in article 86 of the CPLR. CPLR 8601 (a) provides in relevant part:

> "except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in *any civil action brought against the state*, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (emphasis added).

CPLR 8602 defines the term "Action" as "any civil action or proceeding brought to seek judicial review of an action of the state as defined in subdivision (g) of this section, including an appellate proceeding, but does not include an action brought in the court of claims" (CPLR 8602 [a]). Subdivision (g) defines "State" as "the state or any of its agencies or any of its officials acting in his or her official capacity" (CPLR 8602 [g]).

Thus, there are only two express limitations on the expansive term "any civil action." First, in CPLR 8601 (a), the phrase "except as otherwise specifically provided by statute" makes clear that the EAJA applies "only where another statute does not specifically ****4** provide for counsel fees" (*Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 443 [2005]). It is undisputed that the Human Rights Law did not provide attorneys' fees at the time this suit was brought and was not amended to provide such fees until 2015 (*see* Executive Law § 297, as amended by L 2015, ch 364).[1] Second, in ***393** CPLR 8602 (a), the definition of "action" excludes actions commenced in the Court of Claims. This case was brought in Supreme Court pursuant to Executive Law § 297 (9), not in the Court of Claims. Accordingly, neither limitation on "any civil action" applies here.

We have repeatedly held that "the word '*any*' means 'all' or 'every' and *imports no limitation*" (*Zion v Kurtz*, 50 NY2d 92, 104 [1980] [emphasis added]). Ignoring both that precedent and the "or" in the statutory definition ("*any* civil action *or* proceeding brought to seek judicial review" [emphasis added]), the State defendants argue that the term "judicial review" in the definition of "action" places another express limitation on "any civil action," thereby excluding cases, like this one, that seek compensatory damages. According to the State defendants, the term judicial review modifies both "any civil action" and "proceeding" and, therefore, restricts EAJA awards to prevailing parties in CPLR article 78 proceedings, as well as a limited subset of civil actions seeking review of a state agency's administrative actions. We disagree.

In interpreting the term "action" we are guided by the principle that a statute should be construed to avoid rendering any of its provisions superfluous (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 587 [1998]). Neither article 78 proceedings nor declaratory judgment actions against the State can be brought in the Court of Claims (*see* CPLR 3001, 7804; *cf.* Court of Claims Act § 9 [9-a]), instead they must be brought in Supreme Court. Likewise, the Court of Claims does not have jurisdiction over actions for injunctive relief (*see* Court of Claims Act § 9; *Psaty v Duryea*, 306 NY 413, 416 [1954]). Under the State defendants' interpretation, therefore, the statutory exclusion for "an action brought in the court of ****5** claims" would have no meaning (CPLR 8602 [a]).[2]

Additionally, before the EAJA was enacted, we held that Human Rights Law claims seeking monetary relief against the ***394** State could be brought in Supreme Court (*see Koerner v State of N.Y., Pilgrim Psychiatric Ctr.*, 62 NY2d 442, 449 [1984]). When the legislature enacted the EAJA five years later, it is presumed to have known of our decision (*see Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 169 [1985]); thus, the Court of Claims exclusion was not intended to exclude Human Rights Law claims from eligibility for an EAJA award. Indeed, in *Koerner*, we observed that discrimination is "all the more invidious . . . when it is practiced by the State" (62 NY2d at 448), providing

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the legislature with all the more reason to permit Human Rights Law claims such as this one to be eligible for an award of attorneys' fees under the EAJA.

Other principles of statutory interpretation guide our reading as well. Where the legislature has addressed a subject and provided specific exceptions to a general rule—as it has done here—the maxim *expressio unius est exclusio alterius* applies (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 240 at 412-413 ["where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned"]). The State defendants ask us to create yet another exception to the statutory term "any civil action." To do so, however, would give effect to an assumed legislative intent by judicial construction.

The State defendants offer an additional explanation for how the term "judicial review" impacts the phrase "any civil action or proceeding brought to seek judicial review of an action of the state" (CPLR 8602 [a]). They argue that the term "judicial review" is used to clarify that there can be no fees awarded with respect to agency proceedings that take place *before* the aggrieved individual, small business, or not-for-profit entity goes into court to appeal—by way of "judicial review" (i.e., *court* review)—an adverse agency ruling. Indeed, both the State defendants and plaintiff's former counsel agree that the term "judicial review" was used to clarify that EAJA fee awards are not available in connection with administrative agency proceedings that *precede* court review (*see e.g. Matter of Greer v Wing*, 95 NY2d 676, 680 [2001]). We agree. By interpreting "judicial review" in this way—to modify solely the term "proceeding"—this portion of the ****6** definition of "action" is harmonized with the ***395** rest of the definition and the Court of Claims exclusion is not rendered meaningless.[3]

Our conclusion is also consistent with the EAJA's statutory scheme. CPLR 8600 provides that the "intent" of the EAJA was to create a mechanism comparable to that in the federal Equal Access to Justice Act (federal EAJA), which is set forth in 28 USC § 2412 (d). The federal EAJA provides:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in *any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action*, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust" (28 USC § 2412 [d] [1] [A] [emphasis added]).

The federal EAJA undisputedly applies to "any civil action" brought against the United States except for those sounding in tort. In our statute, the Court of Claims exclusion is the equivalent of the federal exclusion of tort actions, since tort claims against the State can only be brought in the Court of Claims.[4] Likewise, our EAJA's ****7** reference to a "proceeding brought to seek judicial review" was meant to mirror similar language in the federal EAJA. The dissent ignores the fact that the phrase ***396** in the federal EAJA "including proceedings for judicial review of agency action" was not even in the federal EAJA when it was first enacted, but was added in 1985 to overrule a federal decision, which held that the federal EAJA did not apply to *court review* of administrative agency rulings (*see* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct [Part One]*, 55 La L Rev 217, 230 and n 75 [Nov. 1994], citing to *National Wildlife Fedn. v Federal Energy Regulatory Commn.*, 870 F2d 542, 543 [9th Cir 1989]). Indeed, the addition of this phrase in the federal EAJA was intended to clarify the *expansiveness* of the statute's coverage by acknowledging that agency rulings reviewed by the courts, as well as all other civil actions with the exception of tort actions, were eligible for awards. Thus, our reading of "proceeding brought to seek judicial review" in the EAJA is entirely consistent with its federal counterpart.

Further, at the time our EAJA was passed, federal courts in New York had already held that the federal EAJA was a remedial statute (*see Barriger v Bowen*, 673 F Supp 1167, 1169 [ND NY 1987]; *Environmental Defense Fund, Inc. v Watt*, 554 F Supp 36, 41 [ED NY 1982]).[5] New York's EAJA is a remedial statute as well. As such, it should be "liberally construed to carry out the reforms intended and to promote justice" (McKinney's Cons Laws of NY, Book 1, Statutes § 321), and "interpreted broadly to accomplish [its] goals" (*People v Brown*, 25 NY3d 247, 251 [2015]; *see also Matter of Scanlan v Buffalo Pub. School Sys.*, 90 NY2d 662, 676 [1997]; *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 24 [1984]).[6]

The purpose of the EAJA is "[t]o *encourage* individuals, small businesses and not-for-profit corporations *to challenge*

state action when it lacks substantial justification by allowing them to recover fees and litigation expenses" (Assembly Mem, Bill Jacket, L 1989, ch 770 at 10 [emphasis added]). The State defendants' ***397** restrictive interpretation of "any civil action" is inconsistent with these goals. Moreover, we have held that limitations should not be read into such remedial statutes "unless the limitation[s] proposed [are] 'clearly expressed' " (*Brown*, 25 NY3d at 251, quoting *People v Sosa*, 18 NY3d 436, 440-441 [2012]). As noted, there are only two clear exclusions from the term "any civil action" and the State defendants' proposed limitation for cases seeking monetary damages is not one of them.

III.

The legislative history from 1989, when the EAJA became law, demonstrates that the EAJA was "targeted at those businesses and individuals . . . who often lack the resources necessary to vindicate their civil and legal rights" (Letter from New York Lawyers for the Public Interest, Inc., Bill Jacket, L 1989, ch 770 at 46). Although the plain language of the statute provides the best evidence of legislative intent, "the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear [because] [t]he primary goal of the court in interpreting a statute is to determine and implement the Legislature's intent" (*Matter of Tompkins County Support Collection Unit v Chamberlin*, 99 NY2d 328, 335 [2003] [internal quotation marks and citations omitted]).

Here, the legislative history also leads to the conclusion that "any civil action" means what it says, subject to the express exclusions in the statute. While article 78 proceedings were undoubtedly a focus of interest in the bill, and some portions of the legislative history reflect this, the legislative history also supports our conclusion that the statute permits an award of attorneys' fees and costs to the plaintiff in this case.

Notably, the 1989 bill that subsequently was codified as CPLR article 86 differed from earlier versions of the statute —all vetoed by the governor—in important ways. Most of the earlier versions applied only to small businesses and not individuals; one excluded claims brought by "state employees"; one defined "judicial review" as "an appeal of agency action"; and, as the governor's vetoes of these earlier bills indicated, all failed to establish a policy of providing New York's poor with access to the courts (*see e.g.* Governor's Veto Message No. 71 of 1983, 1983 NY Legis Ann at 460-461). The legislature made very different choices when it drafted and passed the EAJA as we now know it: individual plaintiffs and petitioners are ***398** covered with no exclusion for state employees; there is no limiting definition of "judicial review"; and the clear intent is to advance individuals' "civil rights" (the very words used in supporting materials in the bill jacket) ****8** as well as other rights. We conclude that the earlier bills shed light on the critical differences that make the EAJA that *did* pass a true vehicle for improved access to justice for those who would otherwise be unable to afford a lengthy legal battle with a state actor.

Even the legislative history cited by the dissent supports this case's eligibility for fees under the EAJA. For example, in Governor Mario Cuomo's memorandum approving the bill, the governor commented that the statute authorized a fee award to "certain plaintiffs or petitioners who prevail in litigation reviewing State agency action or inaction when the State's position in the case is not substantially justified" and that its purpose was to "improv [e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle" against the State (Governor's Mem approving L 1989, ch 770, 1989 Legis Ann at 335-336). That, of course, was the situation here. The State defendants defended the agency's inaction in failing to address rampant sex discrimination in its ranks on the ground that the agency's official acts were within its discretion. At the same time, their dilatory and obstructive conduct in the litigation seemed designed to wear down plaintiff and exhaust her resources.

The dissent concludes that "[w]ithin all the legislative history over the course of the decade in which the EAJA was contemplated and developed, there is no discussion of a drastic change in the statute's purpose or applicability from its earlier incarnations" (dissenting op at 410-411). This is incorrect. The Report of the Association of the Bar of the City of New York described the change from earlier versions in some detail:

> "Bills denominated 'Equal Access to Justice' Acts have been passed by both houses of the state legislature during the past several years, only to be vetoed by the Governor. Those bills, however, were not truly Equal Access to Justice Acts because, although they assisted small businesses regulated by state agencies, they failed to confer any benefits on low income individuals seeking to enforce civil and legal rights through the courts. As Governor Cuomo's 1983 veto message stated, 'This bill does not ***399** establish a policy of enabling the poor to gain access to the judicial forum.' The EAJA in its current form would be the first bill to reach the Governor's desk that directly promotes equal access to justice by significantly

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> lowering economic barriers that currently prevent many individuals from contesting irrational an [d] illegal State government action" (Assn of the Bar of the City of NY, Report on Legislation, Bill Jacket, L 1989, ch 770 at 57).

Additionally, other proponents of the EAJA, such as the State Bar Association, praised the 1989 bill as "designed to accomplish precisely what its title suggests—enhanced access to the courts for those who historically have been unable to make use of the judicial process simply because they lacked financial resources" (Letter from NY St Bar Assn, ****9** Bill Jacket, L 1989, ch 770 at 48). These proponents further heralded its passage as timely given the then-recent findings of the Marrero Committee (*see id.* at 49), which was constituted "to study the extent of the unmet need for civil legal services among the poor in New York State and to recommend ways to improve the availability of those services" (Victor Marrero, *Committee to Improve the Availability of Legal Services—Final Report to the Chief Judge of the State of New York*, 19 Hofstra L Rev 755, 756 [Summer 1991]). The Committee's Preliminary Report, which was issued while the EAJA was under consideration, concluded that "the critical problem of underrepresentation of the poor . . . 'jeopardize [d] both the welfare of poor persons and the legitimacy of the legal system itself' " (Letter from NY St Bar Assn, Bill Jacket, L 1989, ch 770 at 49, quoting Marrero Committee Preliminary Report).

Moreover, as noted in the governor's signing statement, the 1989 EAJA differed from EAJA bills he had vetoed in the past because, in addition to opening up the EAJA to individuals to vindicate their civil and other legal rights, it had "necessary safeguards" absent from prior versions of the bill (Governor's Mem approving L 1989, ch 770, Bill Jacket, L 1989, ch 770 at 20, 1989 Legis Ann at 336). Specifically, the governor noted the "appropriate limits" on the classes of individuals and entities that can seek EAJA awards, including the $50,000 net worth requirement (*id.*).[7] The governor also observed that the 1989 version limited fees and costs to those cases where the State's ***400** position was not " 'substantially justified' " and to an amount that was deemed " 'reasonable' " (*id.* at 20). Thus, our interpretation does not "open the floodgates" since these various restrictions keep them firmly shut to all but the neediest and most deserving plaintiffs and petitioners.

In discussing these restrictive "necessary safeguards" placed on EAJA awards, the governor referred to the federal EAJA and cited the differences between the federal statute and New York's EAJA. The federal EAJA undeniably applies to all civil actions, except those where costs and fees are already provided for by another statute and tort actions. If the governor understood the EAJA to apply to a subset of civil actions that was more limited than the federal statute's coverage, he surely would have noted it in discussing these important restrictions, given the emphasis placed on safeguards that would lessen the financial burden on the State. The governor's failure to mention any such limitation in the 1989 bill provides further support for the conclusion that there was no such limitation.

Several other proponents and opponents of the bill observed that the EAJA was ****10** modeled after the federal EAJA (Bill Jacket, L 1989, ch 770 at 11, 23, 25, 27, 39). Yet not one stated that the EAJA excluded virtually all civil actions —as the State argues it does. To the contrary, several of the submissions in the Bill Jacket describe the EAJA as applicable to all civil actions brought against the State with the exception of those commenced in the Court of Claims or tort actions, consistent with the federal EAJA (*see* Bill Jacket, L 1989, ch 770 at 49, 53). Similarly, a report from the Association of the Bar of the City of New York stated that the EAJA applied to "prevailing parties in civil proceedings, with the exception of tort actions, against the State" (*id.* at 55).

Finally, attorneys' fees and costs are now specifically provided for under the Human Rights Law in cases of housing discrimination and in cases of sex discrimination in credit or employment (L 2015, ch 364, § 1). The 2015 amendment reflects the legislature's acknowledgment that fee-shifting provisions are appropriate in the area of Human Rights Law violations. The amendment also means that attorneys' fees in certain civil actions and proceedings brought under the Human Rights Law ***401** alleging sex discrimination will no longer be subject to the EAJA's limiting requirements but to the separate requirements set forth in the Human Rights Law itself. Contrary to the dissent's position, the enactment of the 2015 amendment does not mean that litigants prior to that time had no recourse to EAJA; rather, the amendment allows for attorneys' fees without the limiting requirements that EAJA imposes.

IV.

In sum, the plain language, legislative history and remedial nature of the EAJA together demonstrate that this civil action is eligible for an award of attorneys' fees. We hold that for cases commenced before the effective date of the 2015 amendment to the Human Rights Law, the EAJA permits the award of attorneys' fees and costs to a prevailing plaintiff

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in an action against the State under the Human Rights Law for sex discrimination in employment by a state agency. The plain language of the statute, which is supported by the legislative history, compels the conclusion that “any civil action” encompasses cases brought under the Human Rights Law. It is not for this Court to engraft limitations onto the plain language of the statute. Indeed, “[t]his Court should be very cautious in interpreting statutes based on what it views as a better choice of words when confronted with an explicit choice made by the Legislature” (*Matter of Orens v Novello*, 99 NY2d 180, 190 [2002]). We agree with the Appellate Division that we may “not legislate under the guise of interpretation and, if application of the EAJA to this action is an unintended result of the plain language of the statute, then that is a consequence best left to the Legislature to evaluate and, if necessary, resolve” (76 AD3d at 196 [internal quotation marks and citations omitted]).

Accordingly, the judgment appealed from, and order of the Appellate Division insofar as brought up for review, should be affirmed, with costs.

Wilson, J. (concurring in the result). I believe the CPLR 8602 (a) language defining “action” as “any civil action or proceeding brought to seek judicial review of an action of the state” is facially ambiguous (although slightly suggestive of review of administrative decision-making). However, I agree with the dissent's conclusion that the legislative history, coupled with the explicit exclusion of actions in the Court of Claims, supports the proposition that the Equal Access to ***402** Justice Act (CPLR art 86) was intended to address CPLR article 78 proceedings and other actions seeking injunctive or other equitable relief rather than monetary damages. Nevertheless, because of the peculiar facts of this case and the admissions made by the State at oral argument, I agree in the result reached by the plurality for the following reasons.

Ms. Kimmel filed her lawsuit in 1995 after suffering widespread gender discrimination and sexual harassment within the New York State Police, where she had been employed as a State Trooper for 14 years. She sought not merely damages for herself, but also declaratory and injunctive relief to benefit all women on the force who suffered such discrimination. As chronicled in numerous decisions of the lower courts, and reiterated in the plurality and dissent, the State Police shirked its disclosure obligations and endlessly stonewalled Ms. Kimmel. After 12 years of the State's obstructionist and delaying tactics, and as a sanction for the gross misconduct of the State in this litigation, Supreme Court struck the State's ****11** answers and entered judgment in Ms. Kimmel's favor on the claims for money damages. At that point, she had still been utterly frustrated in her efforts to obtain discovery from the State to which she was entitled and which was relevant to all her claims, whether for damages or injunctive relief. Prior to that point, Ms. Kimmel's lawsuit could fairly be characterized as one seeking both money damages for herself and injunctive relief for herself and others; subsequent to it, the proceedings have largely been to pursue an award of attorney's fees, less the cost of the trial on damages after the court struck the State's answers.

At oral argument, counsel for the State repeatedly responded that a plaintiff in a Supreme Court proceeding not under article 78 but in a lawsuit brought under the Human Rights Law against a State agency and “looking for injunctive relief . . . is seeking judicial review” and “article 86 would apply in such a situation,” even if that situation included a plea for both injunctive relief and money damages. Thus, the State has conceded, if only for the purposes of this case, the Equal Access to Justice Act entitles Ms. Kimmel to recover attorneys' fees for any portion of her lawsuit related to her claim for injunctive relief, including her efforts to reform the discriminatory practices of the State Police to the benefit of other women.

That concession operates in two ways. First, it is an admission by the State that, at least in this case, a civil Human ***403** Rights Law action filed in Supreme Court can meet the statutory definition of “judicial review of an action of the state.” Because the record before the Court in this case would be the same regardless of the nature of the prayer for relief, the State's concession is wholly incompatible with its contention that “judicial review” is limited to article 78 suits challenging administrative decision-making and can never apply to a suit under the Human Rights Law.

Second, counsel for the State's concession means that Ms. Kimmel, who sued a State agency under the Human Rights Law for both money damages for herself and injunctive relief benefitting herself and others, is entitled to recover some amount of attorney's fees. Although the State advocated apportioning the fees between those allocable to her claim for money damages and those allocable to her claims for injunctive and declaratory relief, those portions of the suit are, in this case, indistinguishable as a result of the State's egregious discovery abuses and the attendant unusual

procedural history. Thus, the result of the plurality's opinion is the same result I would reach, albeit for a different reason.

Therefore, I would affirm.

Garcia, J. (dissenting). I agree with the plurality that the conduct of the defendants in this case was ****12** egregious. That plaintiff received truly reprehensible treatment, however, does not entitle her attorneys to recoup fees under a statute that does not, and has never been used to, provide for such an award in this type of case.

I.

Plaintiff, one of the first women to become a state trooper in New York, experienced years of discrimination and harassment during her employment by defendants State of New York and the New York State Division of State Police. This long period of mistreatment included vandalism of plaintiff's property, the posting of offensive cartoons depicting plaintiff performing sexual acts, and a physical attack by a coworker that placed her in the emergency room. After attempts to seek redress of these wrongs internally, plaintiff filed suit in 1995 alleging sex discrimination, sexual harassment, retaliation, and hostile work environment and seeking $15,000,000 in damages as well as back pay, front pay, benefits, injunctive relief, and reinstatement. Before the suit was filed, plaintiff obtained two attorneys, ***404** one of whom (Emmelyn Logan-Baldwin) had extensive experience in discrimination law cases. Both attorneys signed a contingency fee contract with plaintiff, agreeing to share one third of any award received.

Plaintiff's complaint attached numerous exhibits that documented the harassment she experienced. In response to plaintiff's complaint, the State defendants denied wrongdoing. After "obstructionist" and dilatory conduct on the part of the State, a Court later found that defendants "ha[d] repeatedly disobeyed discovery orders of Supreme Court and [the Appellate Division]" and so struck defendants' answer (286 AD2d 881, 882-883 [4th Dept 2001]; 261 AD2d 843, 845 [4th Dept 1999]). Judgment was entered in plaintiff's favor on the issue of liability. [1]

In 2005, after a dispute arose, plaintiff fired Emmelyn Logan-Baldwin. [2] After her former attorney refused to provide plaintiff with the case file, plaintiff and her remaining attorney moved to obtain the file and her former attorney cross-moved for a lien. A judge ordered plaintiff's former attorney to turn ****13** the case file over to plaintiff's remaining attorney and placed a charging lien on any proceeds recovered in the pending suit. At that point, the former attorney's bill for her services was approximately $490,000.

On the eve of trial in 2006, in a letter responding to a general question about fees posed by the trial judge "[a] few months ago," plaintiff's remaining attorney raised for the first time the theory that the case might qualify for a fee award under the Equal Access to Justice Act (CPLR art 86) (EAJA). In the letter, that attorney inquired about "defendants' position concerning settlement" "in light of this information [that plaintiff may be entitled to fees]" and stated that any "[s]erious settlement talks really means getting beyond a 6 figure amount[ ]." The parties did not reach a settlement. After a trial on damages in 2006, a jury awarded plaintiff approximately $800,000 total for lost past earnings, lost past retirement earnings, ***405** lost future retirement benefits, and past pain and suffering.

In 2008, plaintiff, her remaining attorney, and her former attorney moved for attorneys' fees and expenses under the EAJA. The former attorney asked for more than $1,000,000 in attorneys' fees, including "enhanced fees" of $180,663 for what she described as " 'bad faith' and frivolous and dilatory conduct of the State of New York and the New York State Police in their defense of plaintiffs' claims." [3] Supreme Court denied the motion, finding that the EAJA did not apply to plaintiff's claim for compensatory damages. A divided Appellate Division reversed, holding that plaintiff's claim was eligible for attorneys' fees under the EAJA (76 AD3d 188 [2010]). This holding was based on the Appellate Division majority's determination that the plain meaning of the EAJA compelled a conclusion that it applied to this case; that the statute's Court of Claims exclusion would be superfluous if the EAJA was limited to CPLR article 78 proceedings and declaratory judgment actions because those actions cannot be brought in the Court of Claims anyway; and that the legislative history supported its interpretation. Two Justices dissented, noting conversely that the statute's plain meaning and legislative history demonstrated that the EAJA was inapplicable to plaintiff's suit.

II.

The EAJA, which also bears the title "Counsel Fees and Expenses in Certain Actions Against the State," provides that "a court shall award to a prevailing party . . . fees and other expenses incurred by such party in any civil action brought

against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (CPLR 8601 [a]). Section 8602 provides corresponding definitions for ****14** terms in the statute and defines "action" as "any civil action or proceeding brought to seek judicial review of an action of the state as defined in subdivision (g) of this section, including an appellate proceeding, but does not include an action brought in the court of claims" (CPLR 8602 [a]).

The crux of this dispute concerns the clause "any civil action or proceeding brought to seek judicial review" and whether ***406** that includes suits for compensatory damages. Essentially, the plurality reads the statute to say "any civil action or *any* proceeding brought to seek judicial review" (*see* plurality op at 393). Yet the definition of "civil action" enacted by the legislature limits the EAJA's applicability to either civil actions brought to seek judicial review of an action of the state, or proceedings brought to seek judicial review of an action of the state. This limitation accordingly cabins the applicability of the EAJA to actions seeking to challenge an action taken by a state agency or one of its officials acting in his or her official capacity, including article 78 proceedings, declaratory judgment actions involving state agency rulings, and actions seeking injunctive relief from state agency rulings.

This interpretation is consistent with the other provisions of CPLR article 86. The statute provides in section 8601 (a) that "[w]hether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action." But there is no such "record before the agency or official" in plenary actions seeking principally compensatory damages like the instant action. Consistent with this provision, "position of the state" is defined as "the act, acts or failure to act from which judicial review is sought" (*see* CPLR 8602 [e]). Likewise, section 8602 defines "fees and other expenses" as those "incurred in connection with an administrative proceeding and judicial action," further demonstrating that the statute applies only to suits challenging state administrative action.

The plurality supports its argument for a broad reading of the EAJA with an assertion that under a narrow interpretation, the statute's provision carving out "an action brought in the court of claims" is superfluous (plurality op at 393-395). The Appellate Division majority also noted that, under the interpretation outlined above, "the language excluding actions commenced in the Court of Claims would be unnecessary inasmuch as such proceedings do not generally fall within that court's limited jurisdiction" (76 AD3d at 192). But this provision is "unnecessary" under either interpretation. The Court of Claims Act specifically bars attorneys' fees (*see* Court of Claims Act § 27). Even under the plurality's interpretation of the EAJA, therefore, the Court of Claims "carve out" is superfluous. Accordingly, in light of the language used in the remainder of the statute, as well as the legislative history supporting a narrow ***407** interpretation, this language must be attributed to a redundancy on the part of the legislature and not as an indication that the statute should be read broadly. "[R]edundancy is hardly unusual in statutes addressing costs," and "[t]he canon against surplusage is not an absolute rule" (*Marx v General Revenue Corp.*, 568 US 371, 385 [2013] [internal quotation marks omitted]).[4] The carve out for the Court of Claims merely reiterates that compensatory damage claims—required in nearly every case to be brought in the Court of Claims—do not qualify for attorney's fees under the EAJA.

The fact that Human Rights Law (HRL) cases may be brought in Supreme Court does not affect this interpretation. Before we decided *Koerner v State of N.Y., Pilgrim Psychiatric Ctr.* (62 NY2d 442 [1984]), this case would have originated in the Court of Claims, because money damages are not otherwise available against the State in Supreme Court; *Koerner* created a narrow exception, pursuant to which Human Rights Law cases may be brought in either Supreme Court or the Court of Claims. While the legislature is "presumed to have known of our decision" in *Koerner* (plurality op at 394), the general impression at the time, which remains true in all other contexts outside the HRL, was that the State could not be sued for monetary damages in Supreme Court. Moreover, the EAJA, as a fee-shifting statute in derogation of the common law, must be strictly construed (*see Matter of Peck v New York State Div. of Hous. & Community Renewal*, 188 AD2d 327, 327-328 [1st Dept 1992]).[5] The statute's plain language, with its express limitation on what constitutes a "civil action" eligible for fees, otherwise establishes that the statute is not applicable to employment discrimination actions for compensatory damages.[6]

***408** **III.**

Despite the Appellate Division majority's belief that "there is no need to resort to legislative history to discern the intent of the Legislature" (76 AD3d at 194), it is appropriate to consider legislative history even where a statute's plain

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meaning is clear (*see* ****16** *Riley v County of Broome*, 95 NY2d 455, 463-464 [2000]). Such review is particularly appropriate where, as here, multiple judges have expressed diametrically opposed views of that "plain meaning."

The legislative history unambiguously supports an interpretation of the statute as limited to judicial review of agency action. The legislature began attempting to pass some statutory mechanism for providing attorneys' fees to prevailing parties challenging unjust state agency action beginning in 1982. The legislature noted the "tremendous power in [the state's] ability to impose fines, suspend or revoke licenses or compel or restrict the activities of regulated entities" and that suits contesting these actions are extremely costly (1982 NY Assembly Bill A11940-A [Mar. 1982]). There is no dispute that this version of the bill only applied to review of state agency action. The bill was vetoed in large part because of cost concerns and breadth, as were the similar 1983 and 1984 draft bills.

The 1986 bill, drafted more narrowly than the previous bills, continued to address only state agency action, and again was vetoed, at least in part, because of cost concerns. While these bills over time became increasingly more narrow to address concerns over breadth and cost, the overall purpose remained the same—reimbursement for costs incurred in challenging state agency action. Although the plurality finds the legislative history of the earlier draft bills indicative of support for a broad interpretation of the EAJA in light of the differences among the previous bills and the final version (plurality op at 397-399), there is no legislative history suggesting a broadening of the bill's applicability in terms of the type of "action" for which fees could be awarded. [7]

Moreover, the legislative history surrounding the passage of the 1989 bill "compel[s] a conclusion that the Legislature ***409** intended that the EAJA would be utilized to seek attorneys' fees and expenses in an action that involved [judicial] review of an administrative action of the State," as the dissent below noted (76 AD3d at 201). In Governor Cuomo's memorandum of approval of the bill, he commented that the statute

> "authorize[d] a court to award attorneys' fees to certain plaintiffs or petitioners who prevail in litigation reviewing State *agency action or* ****17** *inaction* when the State's position in the case is not substantially justified. . . .
>
> "It is a worthwhile experiment in improving access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification" (Governor's Approval Mem, Bill Jacket, L 1989, ch 770 at 20 [emphasis added]).

Likewise the bill's sponsor noted that the bill was requested in order to "protect such parties from *unfair agency enforcement actions*" in light of the "prohibitive cost of contesting" "an action taken against them by a State agency" (Letter from Sponsor, Bill Jacket, L 1989, ch 770 at 6 [emphasis added]). The "prime Senate sponsor" of the bill acknowledged that it was intended to provide attorneys' fees for litigants "that were successful in challenging unwarranted state actions" (Letter from Sponsor, Bill Jacket, L 1989, ch 770 at 5). Another letter of support speaks to the bill's purpose in providing "a mechanism for overcoming the economic barriers that frequently prevent poor persons from contesting *erroneous agency actions*" (Letter from NY St Bar Assn, Bill Jacket, L 1989, ch 770 at 48 [emphasis added]). In fact, the letter relied upon by the Appellate Division majority to support their interpretation stated that "the legislation would provide an incentive to State agencies to reach more considered determinations" (Letter from Assn of the Bar of the City of NY, Bill Jacket, L 1989, ch 770 at 54). These statements would be wholly illogical and inexplicable if plenary actions seeking to recover compensatory damages were eligible for fee awards under the statute.

Striking a similar theme, the Budget Report on Bills submitted to the Governor in opposition to the EAJA stated that the bill's purpose was to allow legal fees "when . . . individuals or ***410** entities appeal an unjustifiable ruling of a State agency, board or commission" and that the bill "provides a means of redress for individuals, small businesses, and not-for-profit corporations in situations where a State agency, board or commission has given an unfavorable ruling without good cause" (Budget Report on Bills for 1989 NY Assembly Bill A3313-B, Bill Jacket, L 1989, ch 770 at 22). The arguments in support of the bill recounted in this budget report noted that the bill "would encourage individuals, small businesses and not-for-profit corporations to seek redress when they feel the State has made a ruling that unjustly affects them" (*id.* at 23). This language reflects an understanding of the statute as limited to actions challenging a state agency ruling or determination. While plaintiff argues that the budget report is of no use in determining the statute's goal because it was not before the Assembly or Senate when the bill was passed, the budget report was presented to the Governor before he approved the passage of the bill. This interpretation of the budget report is also consistent with the letter sent by the bill's sponsor to the Governor after the budget report was

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issued, noting that the "fiscal impact" of the bill would be minimal "if State agencies are using their *regulatory* powers responsibly and judiciously" (Letter from Sponsor dated Sept. 21, 1989, Bill Jacket, L 1989, ch 770 at 7). As noted above, the Governor in vetoing prior iterations of this legislation was particularly concerned with costs and would certainly have been misled by this budget analysis. **18

The legislative history demonstrates both the legislature's and Governor's continued concern with the bill's cost. This concern is borne out by the statute's final product; in particular, section 8604 requires annual reporting describing the "number, nature and amount of each award in the previous fiscal year." The bill's expected annual cost was less than $500,000, and its major purpose was to help those "whose rights have been violated but whose potential damage awards may not have been enough to induce lawyers to fight City Hall" (*Matter of Wittlinger v Wing*, 99 NY2d 425, 431 [2003]). It is difficult to align this concern with plaintiff's $15 million demand for compensatory damages. Indeed two lawyers, without any apparent expectation of fee recovery from the state, signed contingency fee agreements with plaintiff.

Within all the legislative history over the course of the decade in which the EAJA was contemplated and developed, there is no discussion of a drastic change in the statute's purpose or *411 applicability from its earlier incarnations. All involved in the 1989 bill's passage assumed it was of limited applicability to judicial review of agency actions and not one statement in the record contradicts that conclusion.

Plaintiff also argues that the federal EAJA supports her interpretation because CPLR 8600 states that the EAJA was intended "to create a mechanism comparable to that in the federal Equal Access to Justice Act." This argument fails for several reasons. First, despite the plurality's suggestion that the federal EAJA contains a similar definition of civil action, the federal EAJA in fact uses different language (plurality op at 395-396). Under the federal statute, the phrase "any civil action" is plainly not limited to those seeking judicial review, as the statute identifies "any civil action" as "including," among other things, "proceedings for judicial review of agency action" (28 USC § 2412 [d] [1] [A]), necessarily signaling that the phrase "any civil action" is a broad and inclusive term. This inclusive language reflects the broader applicability of that statute, in comparison with the state version, which limits an award of fees only to "any civil action or proceeding brought to seek judicial review" (CPLR 8602 [a]). We have recognized that "although the State EAJA purports to be modeled after the Federal act, the Legislature departed from the Federal model in certain significant respects" and, thus, the use of different language in the state EAJA "evinces an intent" to have a stricter or more narrow statute than the federal counterpart (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 353-354 [1995]). Here, the legislature's choice to depart from the language of the federal statute reflects a conscious decision to limit the application of the state EAJA.[8] Moreover, the **19 federal EAJA would not apply to plaintiff's claim here, as title VII of the Civil Rights Act of 1964 includes an attorneys' fees provision (42 USC § 2000e-5 [k]).

The legislature's recent amendment to the Human Rights Law, awarding attorneys' fees to prevailing parties in certain *412 discrimination suits, echoes this federal scheme and further undermines plaintiff's interpretation. The change reflects a legislative belief that, prior to the amendment, fees were not recoverable in gender-based discrimination actions. In fact, the sponsors' memorandum for the amendment is devoid of reference to the EAJA and refers to the fact that "[u]nder existing law . . . many who are discriminated against cannot afford to hire an attorney and never seek redress" (Sponsors' Mem, L 2015, ch 364). The legislature's understanding at the time of the HRL amendments that individuals in similar situations to plaintiff were not able to recover attorneys' fees for Human Rights Law claims further supports a narrow interpretation of the statute's limitations. Instead, the plurality's opinion opens the door to awards of attorneys' fees in numerous other actions, exclusively against the State, for compensatory damages not contemplated by the holding herein and not subject to fees under the revised provisions of the Human Rights Law.

IV.

The meaning of article 86 has been plain to courts in this State for the past 28 years. New York courts have applied article 86 only in the context of article 78 proceedings, declaratory judgment actions, and actions for injunctive relief. In more than 70 published cases contemplating article 86, courts have considered it exclusively in the context of actions seeking judicial review of agency administrative actions. For example, Supreme Court, Erie County granted attorneys' fees to a petitioner in an article 78 proceeding seeking to annul a determination of an administrative law judge of the State Office of Children and Family Services sustaining a

maltreatment report against petitioner (*Wright v New York State Off. of Children & Family Servs.*, 2003 NY Slip Op 51083[U] [Sup Ct, Erie County 2003]). Likewise, the Second Department addressed whether attorneys' fees were owed to a petitioner in an article 78 proceeding challenging the termination of petitioner's personal care benefits by the Westchester County Department of Social Services (*Matter of Barnett v New York State Dept. of Social Servs.*, 212 AD2d 696 [2d Dept 1995]). Similarly, in annual reports issued pursuant to section 8604 from 2004 through ****20** 2014, all included awards were granted in cases that fit this description. For example, in fiscal year 2014, each of the reported suits awarding attorneys' fees pursuant to the EAJA involved a challenge to state agency action (*see* Letter from ***413** Thomas DiNapoli to Governor Cuomo re Article 86 Report [Nov. 13, 2014]). These cases demonstrate the type of litigation to which the statute is intended to apply, in which a plaintiff with limited resources and a limited potential monetary recovery would need assistance "fighting City Hall." During the same period, in more than 10 annual reports made of fee awards under the EAJA, there is no record of a single case in which plaintiff attempted to obtain attorneys' fees under article 86 in a suit seeking predominantly compensatory damages—until now.

V.

The facts of this case are compelling, both as to the injuries suffered by the plaintiff and the conduct engaged in by the defendant.[9] But in response the plurality establishes a rule that will have repercussions well beyond awarding fees to this particular plaintiff's attorneys. The plurality does this in contradiction to the plain meaning of the statute, the unequivocal legislative history, and the interpretation given to the statute by courts and litigants for the past 28 years. Their motives in doing so are understandable, but the rule created is nevertheless unsupportable.

Accordingly, I dissent.

Judges Rivera and Acosta[10] concur; Judge Wilson concurs in the result in a separate concurring opinion; Judge Garcia dissents in an opinion in which Judge Stein concurs; Judge Fahey taking no part.

Judgment appealed from, and order of the Appellate Division insofar as bought up for review, affirmed, with costs.

FOOTNOTES

1 Although they do not limit the phrase "any civil action," other provisions in the EAJA place limitations on fee awards. CPLR 8601 (a) provides that fees will not be awarded when the State's position is "substantially justified" or when "special circumstances make an award unjust." Individual plaintiffs and petitioners must have a net worth of $50,000 or less at the time the case was commenced, excluding the value of their principal residences, in order to be eligible for fees (*see* CPLR 8602 [d]). The lower courts determined that plaintiff met all of these strict requirements, and their applicability is not before us in this appeal.

2 The dissent argues that the statutory exclusion for "an action brought in the court of claims" is superfluous in any event because the Court of Claims Act already bars attorneys' fees (*see* dissenting op at 406-407). But the EAJA's Court of Claims exclusion was necessary and avoided any suggestion that EAJA's attorneys' fees provision conflicted with or abrogated the Court of Claims bar.

3 Notably, the State defendants concede elsewhere that "judicial review" is often given a broad definition. For example, they cite Black's Law Dictionary's definition, which includes "[a] court's power to review the actions of other branches . . . of government" (Black's Law Dictionary 976 [10th ed 2014]). Our decision in *Matter of Pan Am. World Airways v New York State Human Rights Appeal Bd.* (61 NY2d 542, 548 [1984]), likewise uses the term "judicial review" to mean review by a court without reference to an agency decision—indeed, we pointed out in that case that the Human Rights Law expressly permits either administrative review through the Human Rights Division or, as an alternative, "judicial review."

4 As the parties agree, and contrary to the Supreme Court's holding, claims brought under the Human Rights Law are not tort claims (*Margerum v City of Buffalo*, 24 NY3d 721, 730 [2015] [concluding no notice of claim requirement applies because "(h)uman rights claims are not tort actions under (General Municipal Law §) 50-e and are not personal injury, wrongful death, or damage to personal property claims under (General Municipal Law §) 50-i"]).

5 Additionally, since the federal EAJA's passage, other federal courts have consistently concluded that it is a remedial statute (*see e.g. Phillips v Shinseki*, 581 F3d 1358, 1367 [Fed Cir 2009], citing *Scarborough v Principi*, 541 US 401, 406-407 [2004]).

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6 Fee-shifting statutes that provide fees to the prevailing party in derogation of the common-law rule are generally interpreted narrowly (*see e.g.* *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]). However, when interpreting a fee-shifting statute that is remedial in nature, we have held that the statute may nonetheless be interpreted broadly (*see* *Graham Ct. Owners Corp. v Taylor*, 24 NY3d 742, 750-751 [2015]).

7 New York's $50,000 requirement was the most restrictive of any of the other 29 states that approved state EAJAs around this time, many of which placed no restrictions on an individual's wealth (*see* Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 Chi-Kent L Rev 547, 561-562 [1995]).

1 In 2002, the parties entered into a stipulation pursuant to which defendants agreed to pay more than $76,000 of plaintiff's attorneys' fees to resolve a sanctions motion.

2 The former attorney's high fee requests led in part to a breakdown in the attorney-client relationship. Plaintiff attested that "[f]rom May 2004 to March 2005 [the former attorney's] bill increased by 50% . . . I cannot pay this bill." She also stated that the former attorney "would continually file appeals, motions, etc. without ever conferring" with plaintiff and that plaintiff believed some of these actions "were unnecessary."

3 Legislators and the Governor were particularly concerned about attorneys seeking enhanced fees when considering passage of the EAJA (*see* Letter from Sponsor, Bill Jacket, L 1989, ch 770 at 8).

4 Nor does our interpretation violate the principle of "*expressio unius est exclusio alterius*" (plurality op at 394). A narrow reading of the EAJA gives the limitation on "any civil action" its intended meaning based on the statute's language.

5 It is true that "limitations should not be read into . . . remedial statutes 'unless the limitation[s] proposed [are] "clearly expressed" ' " (plurality op at 397). The definition of "action" in section 8602 (a) clearly expresses such a limitation.

6 The concurrence argues that the State conceded at oral argument that the EAJA entitles plaintiff to recover fees for that portion of her lawsuit that related to her claim for injunctive relief (concurring op at 402-403). Any such concession "is not binding on this Court" (*People v Sincerbeaux*, 27 NY3d 683, 689 n 3 [2016]).

7 The Report of the Association of the Bar of the City of New York does not suggest a change in the statute's purpose (*see* plurality op at 398-399), but instead discusses the value that the final bill adds by "significantly lowering economic barriers that currently prevent many individuals from contesting irrational an[d] illegal State government action" (Assn of the Bar of the City of NY, Report on Legislation, Bill Jacket, L 1989, ch 770 at 57). This statement does not evince awareness of an intent to change the types of cases eligible for fees under the EAJA and indeed speaks to reigning in problematic agency action.

8 The fact that this language was not in the federal EAJA when it was first enacted demonstrates how broader language is necessary to expand the scope of the EAJA. Moreover, the federal EAJA is broader than our state version in another manner—it allows for recovery by a prevailing party whether the action is brought "by or against the United States or any agency" (28 USC § 2412 [a] [1]), while our EAJA is limited to only actions "brought against the state" (CPLR 8601 [a]). The plurality's decision to read the state EAJA as "entirely consistent with its federal counterpart" (plurality op at 396) is not supported by the language of the statute or our precedent.

9 Alternative remedies exist to punish and prevent the dilatory conduct engaged in by the State, including sanctions. In fact, as discussed, State defendants in this case were sanctioned multiple times and settled one such motion by agreeing to pay more than $76,000 in attorneys' fees.

10 Designated pursuant to NY Constitution, article VI, § 2.

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150 A.D.3d 736, 54 N.Y.S.3d 40, 2017 N.Y. Slip Op. 03514

**1 In the Matter of Franklin Kirkland, Appellant,
v
Anthony J. Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision, Respondent.

Supreme Court, Appellate Division, Second Department, New York
1356/15, 2015-06006
May 3, 2017

CITE TITLE AS: Matter of Kirkland v Annucci

***737 HEADNOTE**

Appeal
Academic and Moot Questions

Robert S. Dean, New York, NY (Julia Busetti of counsel), for appellant.
Eric T. Schneiderman, Attorney General, New York, NY (Anisha Dasgupta, Holly A. Thomas, and Andrew Rhys Davies 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 Fishkill Correctional Facility, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Dutchess County (Rosa, J.), dated June 11, 2015, which granted the respondent's motion to dismiss the petition and, in effect, dismissed the proceeding.

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

In 2011, the petitioner was convicted of criminal sexual act in the second degree and was sentenced to a determinate term of imprisonment of five years, to be followed by five years of postrelease supervision. He reached the maximum expiration date of his prison sentence on March 31, 2015. At that time, the New York State Department of Corrections and Community Supervision (hereinafter DOCCS) transferred him to Fishkill Correctional Facility (hereinafter Fishkill), 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, as 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 Fishkill to either a residential treatment facility, as defined by Correction Law § 2 (6), or to approved housing in the community. During the pendency of the proceeding, DOCCS transferred the petitioner to a shelter in Brooklyn. The Supreme Court granted the respondent's pre-answer motion to dismiss the petition, and, in effect, dismissed the proceeding. The court concluded 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 ****2** 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 ***738** tribunal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]). "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 [2012] [citation omitted]; *see Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 576 [2014]; *Matter of Hearst Corp. v Clyne*, 50 NY2d at 714). Here, since the petitioner received the ultimate relief he was seeking, the Supreme Court properly concluded that the proceeding had been rendered academic. Moreover, the court did not improvidently exercise its discretion in declining to invoke an exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d at 714-715). Significantly, as demonstrated by the petitioner's submissions, that court had determined the merits of at least two other CPLR article 78 petitions involving similarly-situated inmates, and thus the issues raised are not evading judicial review (*see id.*). Rivera, J.P., Hall, Roman and Brathwaite Nelson, JJ., concur.

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82 A.D.2d 882, 440 N.Y.S.2d 306

In the Matter of Amerada Hess Corporation, Respondent,
v.
Joel Lefkowitz, as Presiding Supervisor of the Town of Brookhaven, et al., Appellants

Supreme Court, Appellate Division, Second Department, New York
127NE
June 22, 1981

CITE TITLE AS: Matter of Amerada Hess Corp. v Lefkowitz

HEADNOTE

ACTIONS
FORM OF ACTION

([1]) Conversion to correct form --- Petitioner seeks review of denial of its application to rezone certain of its leased property under ‘floating zone‘ provision --- Such review, however, cannot be had in article 78 proceeding, for it is of legislative action; appropriate vehicle for such review is action for declaratory judgment --- Notwithstanding inappropriateness of article 78 proceeding, petition need not be dismissed, but, rather, proceeding is deemed converted to action for declaratory judgment (see CPLR 103, subd [c]).

In a proceeding pursuant to CPLR article 78 to review a determination of the Town Board of the Town of Brookhaven denying petitioner's application to have certain of its leased property rezoned under a “floating zone” provision, the appeal (by permission) is from an order of the Supreme Court, Suffolk County (Baisley, J.), dated October 30, 1980, which denied the appellants' motion to dismiss the petition.

Order modified, on the law, by adding thereto a provision converting the proceeding into an action for a declaratory judgment with the petition deemed the complaint. As so modified, order affirmed, without costs or disbursements.

Appellants' time to answer isextended ***883** until 20 days after service upon them of a copy of the order to be made hereon with notice of entry. Petitioner seeks review of a denial of its application to rezone certain of its leased property under a “floating zone” provision. Such review, however, cannot be had in an article 78 proceeding, for it is of legislative action (see *Jaffe v Burns*, 64 AD2d 692; *Matter of Southern Dutchess Country Club v Town Bd. of Town of Fishkill*, 25 AD2d 866, affd 18 NY2d 870; 2 Anderson, New York Zoning Law & Practice [2d ed], § 22.15, p 203). The appropriate vehicle for such review is an action for a declaratory judgment *(Jaffe v Burns, supra; Ajamian v Town Bd. of Oyster Bay*, 38 AD2d 551). Notwithstanding the inappropriateness of an article 78 proceeding, the petition need not be dismissed. Rather, the proceeding is deemed converted to an action for a declaratory judgment (see CPLR 103, subd [c]). We have considered appellants' remaining contentions and find them to be without merit.

Mollen, P. J., Damiani, Gulotta and Cohalan, JJ., concur.

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60 A.D.3d 107, 871 N.Y.S.2d 623, 2009 N.Y. Slip Op. 00204

**1 In the Matter of Chris Brown, Respondent
v
New York State Racing and Wagering Board et al., Appellants.

Supreme Court, Appellate Division, Second Department, New York
12103/06, 2007-07303
January 13, 2009

CITE TITLE AS: Matter of Brown v New York State Racing & Wagering Bd.

SUMMARY

Appeal from an order and judgment (one paper) of the Supreme Court, Nassau County (Roy S. Mahon, J.), entered July 12, 2007 in a proceeding pursuant to CPLR article 78. The order and judgment, insofar as appealed from, denied that branch of the motion of respondent New York State Racing and Wagering Board pursuant to CPLR 3211 (a) (5) to dismiss the proceeding as time-barred, granted the petition and enjoined respondent from preventing petitioner from practicing routine equine dentistry.

Matter of Brown v New York State Racing & Wagering Bd., 2007 NY Slip Op 34400(U), affirmed.

HEADNOTES

Limitation of Actions
Four-Month Statute of Limitations

([1]) A CPLR article 78 proceeding challenging the determination of respondent New York State Racing and Wagering Board preventing petitioner, an unlicensed veterinary assistant, from performing routine equine dentistry on thoroughbred race horses without a veterinary license was timely commenced on July 28, 2006 within the applicable four-month limitations period (CPLR 217 [1]). While petitioner was first advised at a December 1, 2005 investigative interview conducted by respondent that he could no longer practice equine dentistry absent a veterinary technician license issued by the New York State Education Department (NYSED), respondent's determination did not become final and binding so as to trigger the statute of limitations period until July 15, 2006 when respondent, after receiving clarification on the matter from NYSED, notified petitioner's supervising veterinarian that petitioner could no longer work as an equine dentist. The transcript of the investigative inquiry indicated that no official decision had been rendered at that time, and that the matter was not yet fully resolved. Consequently, until July 15, 2006 it would have been reasonable for petitioner to believe that respondent had not made a final determination and could change its position on the issue.

Physicians and Surgeons
Veterinarians
Veterinary License Not Required to Perform Routine Equine Dentistry

([2]) The New York State Racing and Wagering Board was enjoined from preventing petitioner, an unlicensed veterinary assistant, from performing routine equine dentistry on thoroughbred race horses without a veterinary license. The routine equine dentistry practices undertaken by petitioner did not qualify as "diagnosing" or "treating" the horses so as to fall within the veterinary licensure requirements (*see* Education Law §§ 6701, 6702). Rather, the equine dentistry performed by petitioner constituted ordinary nonmedical lay care and maintenance, on a par with services provided by groomers, trainers ***108** and blacksmiths. The New York statutory scheme does not include dentistry or the treatment of dental conditions in the definition of veterinary medicine. Education Law § 6705 (8), which expressly permits licensed dentists acting under the personal supervision of a licensed veterinarian to provide dental care to an animal without a veterinary license, was only intended to allow licensed dentists to perform actual "diagnosis" and "treatment" of dental conditions affecting animals and should not be interpreted as otherwise requiring a license in veterinary medicine or veterinary technology in order to provide routine equine dentistry and maintenance (*see* Education Law § 6713 [1]).

RESEARCH REFERENCES

Am Jur 2d, Limitation of Actions §§ 90, 147, 148; Am Jur 2d, Veterinarians §§ 2, 3, 6.

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Carmody-Wait 2d, Proceeding Against a Body or Officer §§ 145:182, 145:190, 145:192–145:194, 145:1206.

McKinney's, CPLR 217 (1); Education Law §§ 6701, 6702, 6705 (8); 6713 (1).

NY Jur 2d, Article 78 and Related Proceedings §§ 148, 156, 159; NY Jur 2d, Physicians, Surgeons, and Other Healers §§ 97, 99, 103.

Siegel, NY Prac §§ 35, 566.

ANNOTATION REFERENCE

Validity, construction, and effect of statutes or regulations governing practice of veterinary medicine. 8 ALR4th 223.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: veterinarian /s license & limitation

APPEARANCES OF COUNSEL

Andrew M. Cuomo, Attorney General, New York City (*Michael S. Belohlavek* and *Laura R. Johnson* of counsel), for appellants.
Michael Aronow, Sands Point, for respondent.
Barbara J. Ahern, Troy, for New York State Veterinary Medical Society, amicus curiae.

OPINION OF THE COURT

Dillon, J.

This appeal raises a simple question that lends itself to a less than simple answer. We are asked to determine whether individuals must be licensed veterinarians to lawfully provide certain dental services to horses. Apparently, no New York appellate ***109** court has ever addressed this issue. We hold, based upon our interpretation of Education Law article 135, that the practice of routine equine dentistry, as performed by the petitioner, does not require a veterinary license.

****2 I. Relevant Facts**

The petitioner, Chris Brown, has been engaged in the practice of routine equine dentistry since 1975. Brown has never been licensed by the State of New York in veterinary medicine nor in veterinary technology. In 1975, Brown obtained a certificate from the Cornell Cooperative Extension Program in Equine Management and Dentistry. He also possessed a license as a "veterinary assistant" issued by a nonparty, the New York Racing Association, Inc. (hereinafter the Racing Association), from 1973 to March 8, 2006, when Brown failed to renew the license.

A veterinary assistant works under the supervision of a licensed veterinarian. As a veterinary assistant, Brown performed routine equine dentistry and maintenance on thoroughbred racehorses stabled at New York Racing Association racetracks such as Aqueduct, Belmont Park, and Saratoga. Routine equine dentistry and maintenance was defined by Brown as consisting of the filing and floating (i.e., smoothing) of horses' teeth and the removal of baby caps from horses' mouths, using various types of files and an oral speculum to keep the horses' mouths open. It also includes the visual inspection of horses' mouths, and if cuts are discovered, the application of salt, a tincture of myrrh, or baking soda. Brown does not administer medications or drugs. According to deposition testimony in this case, unlike human teeth, horse teeth never stop growing; thus, periodic trimming of the teeth is required. Routine equine dentistry also enables horses to better chew and digest oats and to more comfortably and authoritatively bite down on their bit while racing.

During his career, Brown has worked on thoroughbreds owned by, among others, the Queen of England and the Crown Prince of Saudi Arabia, and upon various winners of the Kentucky Derby and the Belmont Stakes. The record does not contain any information that Brown's routine equine dentistry and maintenance has ever been deficient. To the contrary, his services have been requested by many of the greatest owners and trainers in thoroughbred racing and by veterinarians.

Brown was directed by letter dated July 11, 2005, to appear for an "investigative interview" at the office of the appellant, ***110** the New York State Racing and Wagering Board (hereinafter the Racing and Wagering Board). He also was directed to bring with him to the interview any documents qualifying him to perform work as an equine dentist.

The investigative interview was conducted on December 1, 2005. Brown testified under oath as to his training and experience in equine dentistry. He produced a copy of his veterinary assistant license. At the conclusion of the interview, the investigator advised Brown that absent a veterinary technician license issued by the New York State Education Department (hereinafter NYSED), which Brown

never obtained, he could no longer practice equine dentistry. The investigator made clear, however, that his instruction not to perform equine dentistry was not an official decision on the issue, as the matter was not yet resolved.

On July 15, 2006, Dr. James Hunt, the veterinarian who supervised Brown at the time, was advised by the Racing and Wagering Board that Brown could no longer work as a veterinary assistant or dental technician.

On July 28, 2006, Brown commenced this proceeding pursuant to CPLR article 78 in the Supreme Court, Nassau County, against the Racing and Wagering Board and NYSED to enjoin the Racing and Wagering Board from preventing him from practicing equine dentistry. The Racing and Wagering Board moved to dismiss the petition on the ground that the proceeding was untimely commenced beyond the four-month statute of limitations measured from the December 1, 2005, investigative interview. The Racing and Wagering Board also argued that the petition failed to state a cause of action since NYSED had administratively determined in a letter dated July 6, 2006, that only licensed veterinarians and licensed dentists can perform actual dental services and ****3** procedures upon animals.

The Supreme Court conducted a hearing on the petition on May 23, 2007. Brown's evidence consisted of his own testimony, as well as the testimony of six horse trainers and three licensed veterinarians. The veterinarians, Dr. Albert Cowser Saer, Dr. Russell Cohen, and Dr. Donald Baker, testified that equine dentistry is akin to routine nonveterinary services such as those performed by groomers who apply liniments and bandages to wounds and prepare feed with medication and blacksmiths who take care of foot abscesses and infection, cut and file hooves with a rasp or paring knife, and apply horseshoes. The trainers testified that they routinely treat horse wounds with poultices ***111** and liniments, add supplements and oral medications to feed, and provide leg therapy treatment, without being licensed veterinarians or veterinary technicians. Various witnesses testified that veterinarians are called in to treat serious wounds, administer anesthesia or tranquilizers, administer medications by needle, render diagnoses, and treat infections, digestive problems, or colic. Dr. Baker, whom Brown called as a rebuttal witness, distinguished routine dental trimming performed by Brown on horses from human dentistry, which involves X rays, diagnoses, invasive procedures with drilling, and treatment. All of the veterinarians proffered by Brown testified that, in their opinions, equine dentistry was routine care or prophylactic trimming, not veterinary “diagnosis” or “treatment.”

The Racing and Wagering Board presented one witness at the hearing, Dr. Lance Karcher, a veterinarian. Dr. Karcher testified that according to the American Veterinary Medical Association (hereinafter the Association), and in his own opinion, equine dentistry was “within the realm of veterinary medicine.” The relevant portion of the Association's manual, which was read into evidence, states that equine dentistry “encompasses all aspects of diagnosis, treatment, and prophylaxis of any and all equine dental conditions and diseases” and as such, “falls within the purview of veterinary medicine.” Dr. Karcher testified that he has observed instances where horses suffered as a result of the incomplete work of lay dental individuals, and that the use of hand files to trim teeth has become antiquated.

In the order and judgment appealed from, the Supreme Court, inter alia, found that the proceeding was timely and the petition stated a cause of action, and granted the petition to enjoin the Racing and Wagering Board from preventing Brown from practicing routine equine dentistry. The court found that the dental services provided by Brown “do not involve matters of judgment reserved exclusively for licensed veterinarians, but rather address themselves to ordinary and standard care necessary for the good health and well-being of the horse.” (2007 NY Slip Op 34400[U], *5.) We affirm insofar as appealed from.

II. The Timeliness of the Proceeding

([1]) The instant proceeding was timely commenced within the controlling four-month statute of limitations of CPLR 217 (1).

CPLR article 78 review is available within four months of when the administrative determination to be reviewed becomes final and binding upon the petitioner (*see* CPLR 217 [1]; 7803 ***112** [3]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165 [1991]; *Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72 [1989]). A determination becomes “final and binding” when two requirements are met; namely, completeness (finality) of the determination, and the exhaustion of administrative remedies (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). The parties dispute whether a final determination was rendered on December 1, 2005, when Brown was told to cease the practice of equine dentistry

at the conclusion of the investigative inquiry, or on July 15, 2006, when Brown learned that he could no longer work under the supervision of Dr. Hunt. **4

The plain language contained in the transcript of the December 1, 2005, investigative inquiry reveals that no official decision had been rendered at that time and that the matter was not yet fully resolved. Between December 1, 2005, and July 15, 2006, it would have been reasonable for Brown to believe that the Racing and Wagering Board could change its position on the issue (*see Matter of Jones v Amicone*, 27 AD3d 465, 468 [2006]). There was no clear final determination of the Racing and Wagering Board until July 15, 2006, when Brown learned unequivocally that he could not work as an equine dentist, even under the supervision of a licensed veterinarian (*see generally Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998] [a pragmatic evaluation must be made whether the decisionmaker has arrived at a definite position]; *Matter of Raffaele v Town of Orangetown*, 224 AD2d 430, 431 [1996] [petitioner's employment status was unclear until the date when she was unequivocally advised that she would not be permitted to return to her job]).

Indeed, the lack of a final determination by the Racing and Wagering Board until mid-July 2006 is supported by facts in the record. After Brown was advised at the conclusion of the December 1, 2005, inquiry that no official decision was rendered, the Racing and Wagering Board sought an opinion from NYSED on whether persons not licensed as veterinarians or veterinary technicians could perform animal dentistry. Frank Munoz, the Executive Director of NYSED, responded by letter dated July 6, 2006, that, given the interpretation by NYSED of the Education Law, only licensed veterinarians, veterinary technicians, and dentists could treat equine teeth. The Munoz letter was stamped "Received" by the Racing and Wagering Board on July 13, 2006. ***113** Dr. James Hunt, the veterinarian who supervised Brown's work at that time, was advised on July 15, 2006, two days after the Racing and Wagering Board received the Munoz letter, that Brown was no longer eligible to act as a veterinary assistant or dental technician.

The sequence of the Racing and Wagering Board's receipt of the Munoz letter on July 13, 2006, and its notification to Dr. Hunt on July 15, 2006, evidences that until that point in time, the Board was still clarifying for itself whether or not Brown could practice equine dentistry. Since the Racing and Wagering Board apparently waited to contact Dr. Hunt until after it received clarification or confirmation from NYSED that Brown could not perform equine dentistry, the Racing and Wagering Board cannot simultaneously claim in this proceeding that its advice to Brown at the investigative inquiry on December 1, 2005, was final and binding so as to trigger the statute of limitations.

The proceeding was commenced within four months after July 15, 2006. The parties challenging the timeliness of the proceeding, in this case the Racing and Wagering Board and NYSED, bear the burden of establishing their statute of limitations defense (*see Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d at 73; *Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 126-127 [1969]; *Matter of Raffaele v Town of Orangetown*, 224 AD2d at 431). The circumstances here do not permit the Racing and Wagering Board and NYSED to meet their burden on the issue of untimeliness and the Supreme Court properly denied the application to dismiss the proceeding pursuant to CPLR 3211 (a) (5).

III. Brown's Services Do Not Violate Education Law Article 135

([2]) Article 135 of the Education Law, sections 6700-6714, entitled "Veterinary Medicine and Animal Health Technology," governs the veterinary medicine and technology profession. Education Law § 6702 provides that the practice of veterinary medicine is limited to licensed veterinarians and to other persons specifically exempted from the law.* Licensed veterinarians are **5 permitted under Education Law § 6702 (2) to employ "veterinary technicians" to assist in the practice of the profession. ***114** "Veterinary medicine" is defined in Education Law § 6701, in relevant part, as "diagnosing, treating, operating, or prescribing for any animal disease, pain, injury, deformity or physical condition." By contrast, a person who practices the profession of "veterinary technology" is defined in Education Law § 6708 (1), in pertinent part, as a person who is "employed . . . under the supervision of a veterinarian to perform such duties as are required in carrying out medical orders as prescribed by a licensed veterinarian requiring an understanding of veterinary science, but not requiring [veterinary licensure]."

The Education Law recognizes another class of "unlicensed persons" who

> "may provide supportive services to a veterinarian, including but not limited to administering oral or topical medications, incidental to and/or concurrent with such veterinarian personally performing a service or procedure,

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provided such supportive services do not require a knowledge of veterinary science" (Education Law § 6713 [1]).

Read together, Education Law §§ 6701, 6702, 6708 and 6713 divide veterinary caregivers into three categories that represent a sliding scale of training and responsibility; namely, licensed veterinarians, veterinary technicians, and unlicensed persons providing supportive services. The license held by Brown as a "veterinary assistant," while issued by the Racing Association, has no legal foundation in the Education Law.

The parties to this appeal dispute whether or not the equine practices undertaken by Brown qualify as "diagnosing" or "treating" so as to fall within veterinary licensure requirements of Education Law §§ 6701 and 6702. The Racing and Wagering Board, NYSED, and the New York State Veterinary Medical Society (hereinafter the Society), which has submitted an amicus brief, maintain that Brown's admitted activities fall within the scope of diagnosis and treatment. The Society specifically argues that legislative purposes are served by requiring veterinarians to perform equine dental services, as veterinarians conduct complete physical examinations before rendering medical services, maintain detailed records of findings and treatment, take continuing education courses, are subject to state oversight, and, as veterinarians, can better detect dental diseases that should not go untreated. Brown argues, as he did before the Supreme Court, that routine equine dentistry constitutes ordinary nonmedical lay care and maintenance, on a par ***115** with services provided by groomers, trainers, and blacksmiths. Brown also argues that from 1975 to 2006, he practiced routine equine dentistry under his license as a veterinary assistant, and that applicable rules and regulations never required equine dentists to possess a license in either veterinary medicine or veterinary technology.

As a threshold matter, we consider whether the courts are required to defer to the construction given to the Education Law by NYSED, as expressed in the correspondence of Executive Director Frank Munoz dated July 6, 2006, and as explained by Dr. Karcher during the hearing. In the Munoz correspondence, the Education Department rendered an opinion that an unlicensed individual (*see* Education Law § 6713 [1]) can only perform supportive services which do not involve knowledge of veterinary science and which are incidental to or concurrent with services personally performed by a veterinarian. Animal dentistry, the Education Department and Dr. Karcher conclude, has historically been viewed as the practice of veterinary medicine, and lay equine dentists do not fall within the defined exceptions of Education Law § 6705.

When a statute is ambiguous and requires interpretation, the construction given to the statute by an administrative agency responsible for its administration should be upheld by the courts (*see Matter of Robins v Blaney*, 59 NY2d 393, 399 [1983]), unless the agency's interpretation is irrational, unreasonable, or inconsistent with the governing statute (*see* ****6** *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419 [1996]; *see also Matter of Kransdorf v Board of Educ. of Northport-E. Northport Union Free School Dist.*, 81 NY2d 871, 874 [1993]; *Matter of Westhampton Nursing Home v Whalen*, 60 NY2d 711, 713 [1983]; *Matter of Fain v Brooklyn Coll. of City Univ. of N.Y.*, 112 AD2d 992, 993-994 [1985]). However, when a " 'question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required' " (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997], quoting *Matter of Toys "R" Us v Silva*, 89 NY2d at 419). In such instances, courts should construe clear and unambiguous statutory language as to give effect to the plain meaning of the words used (*see Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90, 102 [2006, Ciparick, J., dissenting]; *Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998]; *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d at 106-107).

Here, the Legislature has not defined the key words contained in Education Law § 6701, i.e., "diagnosing" and "treating." We ***116** do not find the terms "diagnosing" and "treating" to be ambiguous. The terms easily lend themselves to their common meanings (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 232; *Matter of Vernon Woods Dev. Corp. v Pucillo*, 134 AD2d 597, 598 [1987]).

The term "treat" is defined as conduct "to care for (as a patient or part of the body) medically or surgically" (Webster's Third New International Dictionary 2435 [2002]). "Medically" is defined as "of, relating to, or concerned with physicians or with the practice of medicine often as distinguished from surgery" (*id.* at 1402). Further, "diagnose" is defined as "to identify (as a disease or condition) by symptoms or distinguishing characteristics" (*id.* at 622; *see State of New York v Abortion Information Agency*, 37 AD2d 142, 145 [1971], *affd on op below* 30 NY2d 779 [1972]). There being no ambiguity in the operative statutory terms, we must

necessarily deem the pertinent provisions of the Education Law as subject to pure legal interpretation and give effect to their plain meaning, without necessarily deferring to the interpretation advanced by NYSED.

We agree with the Supreme Court that terms such as "diagnose" and "treat" connote "a therapeutic regimen designed to correct an illness, disease, ailment or condition" exclusively by a licensed veterinarian, and that a contrary interpretation would "blur the distinction between licensed veterinary care and responsible equine health care and maintenance." (2007 NY Slip Op 34400[U] at *5.)

The Legislature, in enacting Education Law § 6701, noticeably makes no mention of dentistry in its definition of veterinary medicine. In this regard, the veterinary language of Education Law § 6701 represents a marked departure from parallel statutes of sister states in our region. New Jersey requires veterinary licensure for any person engaged in "veterinary medicine, surgery [and/or] *dentistry*" (NJ Stat Ann §§ 45:16-5, 45:16-9 [emphasis added]). Connecticut uses phraseology identical to that of New Jersey (Conn Gen Stat § 20-197). In Pennsylvania, veterinary medicine is defined to specifically include the treatment of "dental conditions" (63 Pa Stat Ann § 485.3 [10] [i]). Yet, New York, in enacting Education Law §§ 6701 and 6702, makes no inclusion of dentistry or the treatment of dental conditions in its definition of veterinary medicine. Had the Legislature intended to include animal dentistry within the scope of veterinary medicine, it could have expressly done so, as have other states. We are guided by the ***117** maxim expressio unius est exclusio alterius, that the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended (*see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 74, 240; *Pajak v Pajak*, 56 NY2d 394, 397 [1982]; *Matter of Sweeney v Dennison*, 52 AD3d 882 [2008]). While the Legislature is free to amend Education Law §§ 6701 and 6702 in the future to expressly include animal dentistry within their scope, under the current law Brown is not required to possess a ****7** license in veterinary medicine or veterinary technology in order to provide routine equine dentistry and maintenance (*see* Education Law § 6713 [1]).

Under the common meaning of the terms "diagnosis" and "treatment," Brown has not engaged in conduct violative of the statutes. The record is devoid of evidence that Brown's care and maintenance of horses ever included the diagnosis of diseases or conditions by symptoms or distinguishing characteristics. Additionally, his services do not constitute treatment of conditions "medically" or "surgically." Rather, Brown's equine dentistry has apparently been limited to the routine and periodic filing and smoothing of ever-growing horse teeth, the application of salt, a tincture of myrrh, or baking soda to cuts in horses' mouths or tongues, and the nonsurgical removal of "baby caps" to allow incoming "adult" teeth to mature. These tasks are similar to the level of routine care and maintenance provided by groomers, trainers, and blacksmiths to other parts of the horses' bodies, and the performance of those tasks does not require licensure in veterinary medicine or veterinary technology (*see* 5 Ed Dept Rep 249, 250 [1966] [tattooing of dogs not limited to licensed veterinarians as it is not related to the diagnosis or treatment of an animal disease]).

The Racing and Wagering Board and NYSED further argue that under Education Law § 6705 (8), licensed dentists may practice veterinary medicine without a veterinary license, so long as the dentist works under the supervision of a licensed veterinarian. They claim that Education Law § 6705 (8) would have no purpose if providing equine dentistry is not included within the definition of "veterinary medicine." However, in our view, Education Law § 6705 (8) is intended to allow licensed dentists to perform actual "diagnosis" and "treatment" of dental conditions affecting animals, such as the insertion of crowns and dentures (*accord* 3 Ed Dept Rep 268, 269 [1963]), and, by extension, the administration of prescription medications, and the performance of surgery and procedures that ***118** require the training and judgment of someone licensed in dentistry. Here, Brown renders no "diagnosis" or medical "treatment" services requiring dental or veterinary licensure and therefore falls outside the intended scope and purpose of Education Law § 6705 (8).

In light of the foregoing, the order and judgment is affirmed insofar as appealed from.

Rivera, J.P., Covello and Angiolillo, JJ., concur.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs to the respondent.

FOOTNOTES

* Persons exempted from Education Law § 6702 (1) are specifically defined in Education Law § 6705, which is not applicable here.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Zitterbart v. American Suzuki Motor Corp., Md.App., October 7, 2008

7 N.Y.3d 653, 860 N.E.2d 705, 827 N.Y.S.2d 88, 2006 N.Y. Slip Op. 09322

**1 In the Matter of DaimlerChrysler Corporation et al., Appellants
v
Eliot Spitzer, as Attorney General of the State of New York, et al., Respondents.
In the Matter of the Arbitration between General Motors Corporation, Appellant, and James Warner, Respondent

Court of Appeals of New York
Argued November 14, 2006
Decided December 14, 2006

CITE TITLE AS: Matter of DaimlerChrysler Corp. v Spitzer

SUMMARY

Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 1, 2005. The Appellate Division affirmed a judgment of the Supreme Court, Albany County (Joseph R. Cannizzaro, J.; op 6 Misc 3d 228), which had dismissed the petition in a proceeding pursuant to CPLR article 78.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 1, 2005. The Appellate Division (1) reversed, on the law, a judgment of the Supreme Court, Albany County (Louis C. Benza, J.; op 5 Misc 3d 968), which had partially granted petitioner's application pursuant to CPLR 7511 to vacate an arbitration award to the extent that the application sought a new hearing; (2) denied the petition to vacate; (3) granted respondent's motion to confirm the award; and (4) reinstated the arbitration award.

Matter of DaimlerChrysler Corp. v Spitzer, 26 AD3d 88, affirmed.

Matter of General Motors Corp. (Warner), 24 AD3d 869, affirmed.

HEADNOTE

Motor Vehicles
Lemon Law
New Car Lemon Law

The purchaser of a new motor vehicle is entitled to a "repair presumption" and can seek relief under the New Car Lemon Law (General Business Law § 198-a) when it can be demonstrated that the vehicle has been subject to repair four or more times within a prescribed time period and that the same substantial defect continues to exist (General Business Law § 198-a [d]). The consumer need not establish that the vehicle remains defective at the time of trial or arbitration. Under the statute, a consumer's eligibility for recovery hinges on whether the manufacturer was unable to repair the vehicle after a ***654** reasonable number of attempts (General Business Law § 198-a [c] [1]). There is no indication that the vehicle's condition on the date of trial or arbitration has any relevance.

RESEARCH REFERENCES

Am Jur 2d, Consumer Product Warranty Acts §§ 49–51; Am Jur 2d, Statutes §§ 84, 85, 113–115, 124.

McKinney's, General Business Law § 198–a.

NY Jur 2d, Sales and Exchanges of Personal Property §§ 186, 192; NY Jur 2d, Statutes §§ 101, 102, 108.

ANNOTATION REFERENCE

Validity, construction, and effect of state motor vehicle warranty legislation (lemon laws). 88 ALR5th 301.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: lemon /2 law /p repair /3 presumption

POINTS OF COUNSEL

Rose Law Firm, PLLC, Albany (*Paul A. Feigenbaum, Keith B. Rose* and *Justin E. Proper* of counsel), for appellants

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in the first above-entitled proceeding. I. The Legislature's inclusion of the phrase "continues to exist" in the present tense evidences a clear intent that the condition continue to exist at the time of the arbitration hearing or trial to recover under the repair attempt provision, regardless of whether more than four attempts to repair occurred. (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Tompkins v Hunter,* 149 NY 117; *People ex rel. Harris v Sullivan,* 74 NY2d 305; *Blanco v American Tel. & Tel. Co.,* 90 NY2d 757; *Enright v Eli Lilly & Co.,* 77 NY2d 377; *People v Heine,* 9 NY2d 925; *Bright Homes v Wright,* 8 NY2d 157; *Matter of Schmidt v Roberts,* 74 NY2d 513; *People v Finnegan,* 85 NY2d 53; *United States v Wilson,* 503 US 329.) II. The construction of the statute by the Appellate Division violates additional rules of statutory construction by ignoring the phrase "or more." (*Matter of SIN, Inc. v Department of Fin. of City of N.Y.,* 71 NY2d 616; *Matter of Tonis v Board of Regents of Univ. of State of N.Y.,* 295 NY 286; *People v Gallina,* 66 NY2d 52; *Matter of Van Patten v La Porta,* 148 AD2d 858.) III. The different treatment of the repair provision and the days out of service provision confirms the error below. (*Heard v Cuomo,* 80 NY2d 684; ***655** *Matter of Long v Adirondack Park Agency,* 76 NY2d 416; *People v Schulz,* 67 NY2d 144; *Matter of Albano v Kirby,* 36 NY2d 526; *Waddell v Elmendorf,* 10 NY 170; *Matter of Friss v City of Hudson Police Dept.,* 187 AD2d 94; *Kurlander v Incorporated Vil. of Hempstead,* 31 Misc 2d 121.) IV. The statute's legislative history does not support the Appellate Division's construction of the "repair attempt" provision. (*Sega v State of New York,* 60 NY2d 183; *People v Tychanski,* 78 NY2d 909; *Blanco v American Tel. & Tel. Co.,* 90 NY2d 757.)

Eliot Spitzer, Attorney General, New York City (*Thomas G. Conway, Caitlin J. Halligan, Michelle Aronowitz, Jane M. Azia, Matthew J. Barbaro, Stephen Mindell* and *Herbert Israel* of counsel), respondent pro se in the first above-entitled proceeding. Proof of an existing defect at the time of arbitration or trial is not a prerequisite to consumer recovery under the Lemon Law. (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Rosner v Metropolitan Prop. & Liab. Ins. Co.,* 96 NY2d 475; *Matter of White v County of Cortland,* 97 NY2d 336; *Jensen v General Elec. Co.,* 82 NY2d 77; *Motor Veh. Mfrs. Assn. of U.S. v State of New York,* 75 NY2d 175; *Matter of Hynson [American Motors Sales Corp.--Chrysler Corp.],* 164 AD2d 41; *Levine v American Motors Corp.,* 134 Misc 2d 1088; *Matter of Bay Ridge Toyota v Lyons,* 272 AD2d 397; *Kucher v DaimlerChrysler Corp.,* 9 Misc 3d 45; *Barnhart v Thomas,* 540 US 20.)

Hiscock & Barclay, LLP, Albany (*Mark W. Blanchfield* of counsel), for New York State Dispute Resolution Association, respondent in the first above-entitled proceeding. The New York State Dispute Resolution Association was entitled to abide the Attorney General's construction of the statute. (*Matter of Salvati v Eimicke,* 72 NY2d 784.)

Rose Law Firm, PLLC, Albany (*Paul A. Feigenbaum, Keith B. Rose* and *Justin E. Proper* of counsel), for appellant in the second above-entitled proceeding. I. The Legislature's inclusion of the phrase "continues to exist" in the present tense evidences a clear intent that the condition continue to exist at the time of the arbitration hearing or trial to recover under the repair attempt provision, regardless of whether more than four attempts to repair occurred. (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Tompkins v Hunter,* 149 NY 117; *People ex rel. Harris v Sullivan,* 74 NY2d 305; *Blanco v American Tel. & Tel. Co.,* 90 NY2d 757; *Enright v Eli Lilly & Co.,* 77 NY2d 377; *People v Heine,* 9 NY2d 925; *Bright Homes v Wright,* 8 NY2d 157; *Matter of Schmidt v Roberts,* 74 NY2d 513; ***656** *People v Finnegan,* 85 NY2d 53; *United States v Wilson,* 503 US 329.) II. The construction of the statute by the Appellate Division violates additional rules of statutory construction by ignoring the phrase "or more." (*Matter of SIN, Inc. v Department of Fin. of City of N.Y.,* 71 NY2d 616; *Matter of Tonis v Board of Regents of Univ. of State of N.Y.,* 295 NY 286; *People v Gallina,* 66 NY2d 52; *Colbert v International Sec. Bur.,* 79 AD2d 448; *Matter of Gerald R.M.,* 12 AD3d 1192; *Matter of Van Patten v La Porta,* 148 AD2d 858.) III. The different treatment of the repair provision and the days-out-of-service provision confirms the error below. (*Heard v Cuomo,* 80 NY2d 684; *Matter of Long v Adirondack Park Agency,* 76 NY2d 416; *People v Schulz,* 67 NY2d 144; *Matter of Albano v Kirby,* 36 NY2d 526; *Waddell v Elmendorf,* 10 NY 170; *Matter of Friss v City of Hudson Police Dept.,* 187 AD2d 94; *Kurlander v Incorporated Vil. of Hempstead,* 31 Misc 2d 121.) IV. The statute's legislative history does not support the Appellate Division's construction of the "repair attempt" provision. (*Sega v State of New York,* 60 NY2d 183; *People v Tychanski,* 78 NY2d 909; *Matter of Bay Ridge Toyota v Lyons,* 272 AD2d 397; *Blanco v American Tel. & Tel. Co.,* 90 NY2d 757.)

Sadis & Goldberg, LLC, New York City (*Douglas R. Hirsch, Francis Bigelow, David Kasell* and *Jarret Kahn* of counsel), for respondent in the second above-entitled proceeding. I. As demonstrated by the rules of statutory construction, liability under the Lemon Law is not contingent upon the condition of the vehicle at the time of hearing or trial. (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Matter of Mills v Staffking [Hidden Val.],* 271 AD2d 146; *Kucher v DaimlerChrysler Corp.,* 9 Misc 3d 45; *Barclay*

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Knitwear Co. v King'swear Enters., 141 AD2d 241; *Matter of DaimlerChrysler Corp. v Spitzer,* 6 Misc 3d 228, 26 AD3d 88; *Matter of White v County of Cortland,* 97 NY2d 336; *Motor Veh. Mfrs. Assn. of U.S. v State of New York,* 75 NY2d 175.) II. The Appellate Division correctly interpreted the words "or more" as ensuring that consumers who exceed the minimum number of repair attempts are entitled to the presumption. (*Matter of DaimlerChrysler Corp. v Spitzer,* 26 AD3d 88; *Hadden v Consolidated Edison Co. of N.Y.,* 45 NY2d 466.) III. The repair-attempt provision and the days-out-of-service provision use different language because they address two different repair scenarios. (*Matter of DaimlerChrysler Corp. v Spitzer,* 6 Misc 3d 228; *Kurlander v Incorporated Vil. of Hempstead,* 31 Misc 2d 121; *McKuskie v Hendrickson,* 128 NY 555.) IV. The Lemon Law's use of the present tense verb ***657** "continues" does not compel the conclusion that the defect must exist at the time of trial. (*Fortune v Scott Ford,* 175 AD2d 303; *Jandreau v La Vigne,* 170 AD2d 861; *Jason v Summerfield,* 214 F2d 273; *Matter of Cario v Sobol,* 157 AD2d 172; *Ohio Val. Envtl. Coalition v Horinko,* 279 F Supp 2d 732.) V. Decisions from other courts demonstrate that the Appellate Division's interpretation of the Lemon Law is correct.

OPINION OF THE COURT

Graffeo, J.

The purchaser of a new motor vehicle is entitled to a "repair presumption" and therefore can seek relief under the New Car Lemon Law when the consumer can demonstrate that the vehicle has been subject to repair four or more times within a prescribed time period and the same substantial defect continues to exist. The common issue in these two appeals is whether a consumer, who claims the benefit of the presumption, must also establish that the vehicle remains defective at the time of trial or arbitration. We conclude that the statute does not require such a showing and therefore affirm the orders of the Appellate Division so holding.

NEW CAR LEMON LAW

In 1983, the Legislature enacted the New Car Lemon Law (General Business Law § 198-a) "to provide New York consumers greater protection than that afforded by automobile manufacturers' express limited warranties or the Federal Magnuson-Moss Warranty Act" (*Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 179 [1990]). The statute obligates manufacturers to repair, without charge, any new motor vehicle which fails to conform to all express warranties during the first 18,000 miles of operation or for two years immediately following delivery of the vehicle, whichever comes first (*see* General Business Law § 198-a [b] [1]). If, within this time frame, a manufacturer is unable to correct a defect that "substantially impairs" the value of the vehicle "after a reasonable number of attempts," the manufacturer--at the consumer's option--must either replace the vehicle or accept the return of the vehicle in exchange for a refund of the purchase price (General Business Law § 198-a [c] [1]).

Under the statute, a presumption that the consumer has met the "reasonable number of attempts" requirement arises in two circumstances: if the same defect has been subject to repair ***658** "four or more times" but "continues to exist"--commonly termed the "repair presumption" (General Business Law § 198-a [d] [1]); or if the vehicle has been out of service for a total of 30 or more days--referred to as the "days-out-of-service presumption" (General Business Law § 198-a [d] [2]). The triggering of either presumption does not ensure that a consumer will recover. A manufacturer may attempt to rebut the presumption and is afforded an affirmative defense when it can show either that the defect "does not substantially impair" the vehicle's value or the condition resulted from "abuse, neglect or unauthorized modifications or alterations of the motor vehicle" (General Business Law § 198-a [c] [3] [i], [ii]).

As originally enacted, the New Car Lemon Law required consumers to commence a legal action to obtain relief from manufacturers (*see* General Business Law § 198-a [j]). In 1986, the Legislature amended the statute to give consumers the option of resolving disputes by arbitration and directed the Attorney General to establish and supervise the arbitration hearing process (*see* General Business Law § 198-a [k]). In addition to promulgating regulations that govern the relevant procedures (*see* 13 NYCRR part 300), the Attorney General created a written ****2** consumer's guide to Lemon Law procedures and standard forms for use in arbitration. Beginning in 1987, the consumer's guide and forms stated that a consumer would be eligible for a refund or replacement vehicle only when the purchaser could demonstrate that a defect still existed as of the date of arbitration. But in 2002, in response to *Matter of Bay Ridge Toyota v Lyons* (272 AD2d 397 [2d Dept 2000]), [1] the Attorney General reconsidered his interpretation of General Business Law § 198-a (d), and concluded that the presence of a defect at the time of arbitration or trial was not a prerequisite for recovery. In accordance with this view, the Attorney General amended the

consumer guide and forms, effective in 2003, to explain that a consumer may be entitled to relief if, within the first 18,000 miles or two years, the vehicle was subject to four or more unsuccessful repair attempts or out of service for 30 days, notwithstanding that the condition was subsequently repaired.

659** ***MATTER OF DAIMLERCHRYSLER CORPORATION V SPITZER

Petitioners DaimlerChrysler Corporation, General Motors Corporation and Saturn Corporation (collectively, the manufacturers) object to the Attorney General's new interpretation of the statute to the extent that it permits consumers relying on the repair presumption to seek relief when their vehicles have been fixed after more than four attempts. The manufacturers commenced CPLR article 75 proceedings to vacate a series of arbitration awards in which the arbitrators had applied the Attorney General's new construction of the repair presumption in granting relief to consumers.[2] The courts vacated the awards, determining that a consumer relying on the repair presumption must demonstrate that the defect "continues to exist" at the time of the arbitration hearing.[3]

Relying on these decisions, the manufacturers brought this CPLR article 78 ****3** proceeding to enjoin the Attorney General and respondent New York State Dispute Resolution Association from using the new interpretation of General Business Law § 198-a (d) (1) in the Lemon Law arbitration system.[4] Supreme Court denied the petition and dismissed this proceeding. The Appellate Division affirmed. We granted the manufacturers leave to appeal.

MATTER OF GENERAL MOTORS CORPORATION (WARNER)

In March 2003, respondent James Warner bought a new truck from a dealership known as LaQua's 481. The vehicle was manufactured by petitioner General Motors Corporation. Shortly after acquiring the truck, Warner discovered a transmission problem, which LaQua attempted to fix on five occasions between April and November 2003. In December 2003, Warner filed a request for arbitration under the New Car Lemon Law. After a hearing, the arbitrator found that there had been four or more attempts to repair the same defect and that the problem persisted following the fourth attempt. The arbitrator awarded Warner a refund of approximately $30,000.

***660** General Motors brought this article 75 proceeding to vacate the award, arguing that Warner could not prevail unless he demonstrated that LaQua's final repair attempt proved unsuccessful such that the vehicle remained defective at the time of the commencement of the arbitration hearing. Supreme Court granted the petition to the extent it sought a new hearing to determine whether the problem had in fact been remedied prior to the hearing. The Appellate Division reversed and reinstated the arbitration award. We granted General Motors leave to appeal.

ANALYSIS

In these cases, the manufacturers contend that a plain reading of the repair presumption in General Business Law § 198-a (d) (1) requires a consumer to establish that the defect continues to exist at the time of trial or arbitration. They submit that the Legislature must have intended such a result based on the placement of the phrase "continues to exist" in the statute. Under their reading of the provision, a consumer may seek Lemon Law relief after four unsuccessful repair attempts but, if a consumer voluntarily decides to give the manufacturer additional repair opportunities that prove successful in eliminating the problem, the consumer is precluded from recovery. We disagree.

When presented with a question of statutory interpretation, our primary consideration "is to ascertain and give effect to the intention of the Legislature" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000] [internal quotation marks and citation omitted]). The ****4** statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *Matter of State of New York v Ford Motor Co.*, 74 NY2d 495, 500 [1989]). At the same time, because the New Car Lemon Law is remedial in nature, it should be liberally construed in favor of consumers (*see Matter of White v County of Cortland*, 97 NY2d 336, 339 [2002]). And where, as here, "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency"--in this case, the Attorney General's office (*Matter of Gruber [New York City Dept. of Personnel--Sweeney]*, 89 NY2d 225, 231 [1996] [internal quotation marks and citation omitted]).

***661** The substantive remedy provision of the New Car Lemon Law states, in relevant part:

> "If, within [the first 18,000 miles or two years], the manufacturer or its agents or authorized dealers are unable to repair or correct any defect or condition which substantially impairs the value of the motor vehicle to the consumer *after a reasonable number of attempts*, the manufacturer, at the option of the consumer, shall replace the motor vehicle with a comparable motor vehicle, or accept return of the vehicle from the consumer and refund to the consumer the full purchase price" (General Business Law § 198-a [c] [1] [emphasis added]).

Under this statute, a consumer's eligibility for recovery hinges on whether the manufacturer was unable to repair the vehicle after a reasonable number of attempts. Nothing in this section indicates that the vehicle's condition on the date of trial or arbitration has any relevance.

The New Car Lemon Law gives tangible meaning to the phrase "reasonable number of attempts" through the repair and days-out-of-service presumptions. Specifically, General Business Law § 198-a (d) provides:

> "It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if:
>
> "(1) the same nonconformity, defect or condition has been subject to repair *four or more times* by the manufacturer or its agents or authorized dealers . . . but such nonconformity, defect or condition ****5** *continues to exist*; or
>
> "(2) the vehicle is out of service by reason of repair of one or more nonconformities, defects or conditions for a cumulative total of thirty or more calendar days" (emphasis added).

Construing these two presumptions together with the substantive remedy provision (*see Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 581 [2006]), it is obvious that subdivision (d) simply quantifies the minimum that presumptively amounts to a reasonable number of repair attempts. Although the manufacturers concede that a consumer whose vehicle has been out of service for 30 or more days gains the ***662** presumption regardless of whether the vehicle is fixed after the 30-day mark (*see* General Business Law § 198-a [d] [2]), they argue that a consumer relying on the repair presumption (General Business Law § 198-a [d] [1]) must show that the defective condition continues at the time of trial or arbitration.

We do not read the repair presumption as requiring a consumer to establish that the vehicle defect continued to exist until the trial or hearing date. Rather, the plain language of the provision obligates a consumer to demonstrate that the vehicle was subject to repair at least four times and that the same defective condition remained unresolved after the fourth attempt. Therefore, once a consumer has met the four-repair threshold, the presumption arises regardless of whether the manufacturer later remedies the problem. After four attempts, it is presumed that the manufacturer has been given a reasonable number of opportunities to fix the vehicle. The determination of whether a reasonable number of attempts took place for a consumer to recover does not turn on whether the car was ultimately repaired. If the Legislature intended to condition recovery on such a requirement, it easily could have said so. [5]

Contrary to the manufacturers' argument, our interpretation gives meaning to all of the statutory language in the context of the statute as a whole. The requirement that the defect "continues to exist" is simply another way of saying that the fourth repair attempt was unsuccessful. Without that language, a consumer could meet the presumption even if the defect was repaired on the fourth visit. The phrase "or more" clarifies that consumers may opt to bring their vehicles for repair more than four times yet still retain eligibility for Lemon Law relief. The ****6** Legislature likely included the phrase "or more" in the days-out-of-service presumption for the same reason. In short, it is clear that the Legislature intended to create two bright-line presumptions by which a consumer can demonstrate that the manufacturer was accorded a reasonable number of attempts to alleviate the problem; neither presumption is dependent upon a showing that the defect was not repaired at the time of trial or arbitration.

This interpretation is also consistent with the remedial nature of the New Car Lemon Law. The statutory construction posited ***663** by the manufacturers would restrict its salutary objectives by effectively requiring a consumer to leave the new vehicle in an inoperable or malfunctioning state in order to preserve the right to seek Lemon Law relief. As the Appellate Division aptly observed:

> "[T]he average consumer, who is typically obligated to make monthly car payments and rely on the car for employment, should not be forced to continue to drive a defective new vehicle until the date of adjudication simply to preserve his or her rights under the New Car Lemon Law.

> Nor does the average consumer have the luxury of simply casting a new, albeit defective, vehicle aside while awaiting disposition of a New Car Lemon Law action or proceeding" (26 AD3d 88, 92 [2005]).

Finally, the result we reach today is buttressed by the legislative history of the New Car Lemon Law, which indicates that a consumer's eligibility for relief under the statute arises upon a fourth unsuccessful repair attempt. The sponsors' memorandum in support of the legislation states:

> "Presently, the Magnuson-Moss Act has a so-called 'lemon provision' which entitles the consumers to repair [or] replacement of a defective product. Unfortunately, the Magnuson-Moss Act fails to define a reasonable number of attempts to remedy defects. This bill contains clearly expressed guidelines in determining when a 'reasonable number' of repair attempts has been surpassed" (Sponsors' Mem, Bill Jacket, L 1983, ch 444).

It further explains that the New Car Lemon Law would require "the manufacturer to replace the automobile or refund to the consumer the full purchase [price] after four attempts have been made to repair the car or after the car has been out of service for a total of 30 or more days" (*id.*). In contrast, nothing in the legislative history indicates an intention to require consumers to leave ****7** their vehicles in disrepair pending arbitration or trial.

Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Ciparick, Rosenblatt, Read, Smith and Pigott concur.

In each case: Order affirmed, with costs.

FOOTNOTES

1 In *Lyons*, the Second Department held that, under an analogous provision of the Used Car Lemon Law (General Business Law § 198-b [c] [2] [b]), once a car had been out of service for 15 days, a presumption arose that the manufacturer was afforded a reasonable number of attempts to repair the defect, regardless of "whether the car was presently operable" (272 AD2d at 397).

2 The Attorney General was not a party to any of these proceedings.

3 In some of these proceedings, the courts granted the petitions in their entirety, finding that the vehicles had in fact been repaired before the hearing date. In others, the courts granted the petitions to the extent of remitting the matter for a new arbitration hearing to determine whether the defect had been repaired.

4 The New York State Dispute Resolution Association administers the Lemon Law arbitration program under the Attorney General's supervision.

5 Had the Legislature desired to immunize manufacturers from Lemon Law liability when they repaired a vehicle, it likely would have included such language in either the substantive remedy provision (General Business Law § 198-a [c] [1]) or as an affirmative defense (*see* General Business Law § 198-a [c] [3]).

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Village of Chestnut Ridge v. Town of Ramapo, N.Y.A.D. 2 Dept., August 14, 2007

5 N.Y.3d 36, 832 N.E.2d 1169, 799 N.Y.S.2d 753, 2005 N.Y. Slip Op. 04618

**1 In the Matter of Town of Riverhead, Appellant, et al., Petitioner
v
New York State Board of Real Property Services et al., Respondents

Court of Appeals of New York
Argued May 3, 2005
Decided June 9, 2005

CITE TITLE AS: Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.

SUMMARY

Appeal, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 20, 2004, in a proceeding pursuant to CPLR article 78 (initiated in the Appellate Division pursuant to RPTL 1218). The Appellate Division dismissed the petition to review a determination of respondent State Board of Real Property Services which had set a segment special equalization rate for a portion of respondent Town of Southampton located in respondent Riverhead Central School District.

Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs., 7 AD3d 934, affirmed.

HEADNOTE

Parties
Capacity to Sue

Petitioner town, which was part of a school district, lacked capacity to bring a proceeding contesting the segment special equalization rate set by the State Board of Real Property Services for another municipality in the same school district. RPTL 1218, which authorizes judicial review of state equalization rates "upon application of the county, city, town or village for which the rate or rates were established," applies not only to state equalization rates but also to segment special equalization rates, which are a subset of state equalization rates. RPTL 1218 specifically limits the capacity to challenge the State Board's determination to the municipality "for which the rate or rates were established."

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, State and Local Taxation §§ 727, 732.

Carmody-Wait 2d, Judicial Review of Assessments and Taxes §§ 146:42, 146:43.

McKinney's, RPTL 1218.

NY Jur 2d, Taxation and Assessment §§ 493, 497, 501.

New York Real Property Service § 60.30.

ANNOTATION REFERENCE

See ALR Index under Municipal Corporations; Taxes.

*37 FIND SIMILAR CASES ON WESTLAW

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POINTS OF COUNSEL

Scott DeSimone, Peconic, for appellant.
Appellant Town of Riverhead has capacity and standing to seek judicial review of respondent New York State Board of Real Property Services' determination establishing a segment special equalization rate for the Town of Southampton segment of the Riverhead Central School District. (*Matter of Graziano v County of Albany,* 3 N.Y.3d 475; *City of New York v State of New York,* 86 NY2d 286; *Community Bd. 7 of Borough of Manhattan v Schaffer,* 84 NY2d 148; *Matter of City of New York v City Civ. Serv. Commn.,* 60 NY2d 436; *Matter of Board of Educ. of Roosevelt Union Free School Dist. v Board of Trustees of State Univ. of N.Y.,* 282 AD2d 166; *Matter of Hellerstein v Assessor of Town of Islip,* 37 NY2d 1; *Matter of Colella v Board of Assessors of County of Nassau,* 95 NY2d 401; *Matter of Transactive Corp. v New York State Dept. of Social Servs.,* 92 NY2d 579; *Matter of Schulz v State of New York,* 81 NY2d 336; *Boryszewski v Brydges,* 37 NY2d 361.)
Eliot Spitzer, Attorney General, Albany (*Robert M. Goldfarb, Caitlin J. Halligan, Daniel Smirlock* and *Nancy A. Spiegel*

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of counsel), for New York State Board of Real Property Services, respondent.

I. RPTL 1218 governs judicial review of the New York State Board of Real Property Services' determination of a segment special equalization rate. (*Matter of Town of Greenburgh v New York State Bd. of Real Prop. Servs.,* 275 AD2d 787; *Matter of Town of Middletown v State Bd. of Real Prop. Servs.,* 272 AD2d 657, 95 NY2d 761; *Matter of Nolan v Lungen,* 61 NY2d 788; *Matter of Fry v Village of Tarrytown,* 89 NY2d 714; *Matter of Majestic Collectibles v Spitzer,* 307 AD2d 296; *Matter of Reitman v Sobol,* 225 AD2d 823.) II. Petitioner Town of Riverhead lacks capacity and standing to sue under RPTL 1218 to challenge the New York State Board of Real Property Services' determination of a segment special equalization rate for a different municipality. (*Matter of Graziano v County of Albany,* 3 NY3d 475; *City of New York v State of New York,* 86 NY2d 286; *Community Bd. 7 of Borough of Manhattan v Schaffer,* 84 NY2d 148; *Patrolmen's Benevolent Assn. of City of N.Y. v City of New York,* 41 NY2d 205; *People v Brancoccio,* 83 NY2d 638; *Matter of Colella v Board of Assessors of County of Nassau,* 95 NY2d 401; ***38** *Matter of City of New York v City Civ. Serv. Commn.,* 60 NY2d 436; *Matter of Board of Educ. of Roosevelt Union Free School Dist. v Board of Trustees of State Univ. of N.Y.,* 282 AD2d 166; *Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761; *Matter of Axelrod v Sobol,* 78 NY2d 112.)

Eileen A. Powers, Town Attorney, Southampton, for Town of Southampton, respondent.

Appellant Town of Riverhead lacks both capacity and standing to seek judicial review of respondent New York State Board of Real Property Services' determination establishing a special segment equalization rate for that segment of the Town of Southampton which is located within the Riverhead Central School District. (*Community Bd. 7 of Borough of Manhattan v Schaffer,* 84 NY2d 148; *County of Albany v Hooker,* 204 NY 1; *Matter of Colella v Board of Assessors of County of Nassau,* 95 NY2d 401; *Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761; *Matter of Dairylea Coop. v Walkley,* 38 NY2d 6; *Matter of Axelrod v Sobol,* 78 NY2d 112; *Boryszewski v Brydges,* 37 NY2d 361; *Matter of Schulz v State of New York,* 81 NY2d 336; *Matter of Transactive Corp. v New York State Dept. of Social Servs.,* 92 NY2d 579.)

Riverhead Central School District, respondent precluded.

David O. Wright, Yorktown Heights, for Sheldon Feiner and others, amici curiae.

I. One town has standing to challenge another town's equalization rate under RPTL 1314. (*Matter of Town of Smithtown v Moore,* 11 NY2d 238; *Matter of Wisseman v New York State Bd. of Equalization & Assessment,* 212 AD2d 196, 87 NY2d 804; *Matter of City of Oswego v New York State Bd. of Real Prop. Servs.,* 280 AD2d 99, 96 NY2d 711.) II. Individual taxpayers have standing. (*Matter of Colella v Board of Assessors of County of Nassau,* 95 NY2d 401; *Matter of Dudley v Kerwick,* 52 NY2d 542.) III. Not allowing standing in this context raises constitutional questions. (*Killeen v New York State Off. of Real Prop. Servs.,* 253 AD2d 792; *Saratoga County Chamber of Commerce v Pataki,* 100 NY2d 801; *Stuart v Palmer,* 74 NY 183; *Foss v City of Rochester,* 65 NY2d 247.)

OPINION OF THE COURT

Graffeo, J.

We are asked in this case to determine whether a town that is part of a school district may contest the segment special equalization rate set by the State Board of Real Property Services for another municipality in the same school district. Based on our review of the relevant ****2** statutes, we conclude that the ***39** Town of Riverhead lacks capacity to bring this proceeding and therefore affirm the dismissal of the petition.

The levy and collection of school taxes for the support of public school districts is governed by the Real Property Tax Law. Where the boundaries of a school district are coterminous with a municipality, school authorities levy taxes based on the valuations of real property from the latest assessment roll of that city or town (*see* RPTL 1302 [1]). [1] But most of the school districts in New York State include all or portions of several municipalities. Hence, these school districts collect taxes from municipalities or segments of municipalities that may have varying levels of assessments. To effectuate the fair allocation of taxes among these municipalities, the State Board of Real Property Services is required annually to establish a state equalization rate for each municipality in the state (*see* RPTL 202 [1] [b]). [2] The state equalization rate is the ratio of the locally-determined assessed value of taxable real property within a municipality to the State Board's estimate of the true market value of that property (*see* RPTL 102 [19]; 1202 [1] [a]). In other words, the state equalization rate represents the percentage of true market value at which a municipality assesses its real property.

In order to apportion tax levies for a school district encompassing more than one municipality, the Real Property Tax Law directs a district superintendent to determine the full valuation of real property for each segment of the

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municipalities included in the school district by dividing the taxable assessed valuation of the real property in that part of the municipality by the state equalization rate established for the entire municipality (*see* RPTL 1314 [1] [a]). Where a municipality's state equalization rate does not accurately reflect the level of assessment within a particular segment of a school district (thereby resulting in a disproportionate tax burden), the ****3** State Board is authorized to calculate a special equalization rate for that segment (*see* RPTL 1226, 1314 [2]). The State Board may undertake such an adjustment ***40** only where there would "be at least a 10 percent change in the share of the levy of at least one segment of the taxing jurisdiction as the result of the use of the segment special equalization rate in place of the equalization rate which would otherwise be used for purposes of apportionment" (9 NYCRR 186-5.5 [a]).

In this case, the Riverhead Central School District is comprised of portions of the towns of Riverhead, Southampton and Brookhaven. In May 2002, the Town of Southampton applied to the State Board for a segment special equalization rate. [3] In its application, Southampton indicated that residential property in other parts of the town had been assessed at a significantly lower percentage of market value than residential property in the Riverhead school district segment. This disparity occurred because market values in the segment had not increased as dramatically as values in other parts of the town since Southampton's previous reassessment in 1992. Southampton further explained that it was planning to conduct a reassessment for its 2004 assessment roll and that the requested segment special equalization rate would be a temporary measure to ensure equitable apportionment of school taxes until the reassessment process was completed.

The State Office of Real Property Services (ORPS) analyzed the application and agreed with Southampton, finding that "the ratio of assessed value to sales price for the residential property in the Riverhead School District segment of the town is significantly higher than the ratio in the town as a whole." [4] Recognizing that the state equalization rate for ****4** Southampton was 2.37% in 2001, ORPS recommended that the State Board establish a segment special equalization rate of 3.01% for that portion of Southampton in the Riverhead Central School District. ***41** [5] ORPS found that application of the new segment special equalization rate would reduce the share of the tax levy for the Southampton segment of the school district by 17.9%, thereby satisfying the 10% threshold. Concomitantly, the new rate would increase the revenue share to be raised from the Brookhaven and Riverhead portions of the school district by 4.3%. After providing Brookhaven and Riverhead with notice and an opportunity to be heard at State Board meetings held to consider Southampton's application--during which Riverhead offered testimony and written submissions--the State Board approved the 3.01% special equalization rate for the Southampton segment.

In November 2002, the Town of Riverhead and Edward Densieski, an owner of real property in the Riverhead segment of the school district, commenced a CPLR article 78 proceeding in Supreme Court seeking to annul the State Board's segment special equalization rate determination. The court dismissed the proceeding for lack of subject matter jurisdiction, concluding that the proceeding should have been initiated in the Appellate Division in accordance with RPTL 1218. [6]

Riverhead and Densieski then brought this article 78 proceeding in the Appellate Division. The State Board and Southampton opposed the petition, arguing that Riverhead lacked both capacity and standing to sue, and that Densieski lacked standing. The Appellate Division ****5** agreed and dismissed the proceeding. We granted Riverhead leave to appeal. [7]

Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review. The issue of capacity often arises when a governmental entity seeks to bring suit (*see Matter of Graziano v County of Albany*, 3 NY3d 475, 478-479 [2004]). "Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete ***42** statutory predicate" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155-156 [1994]). An express grant of authority is not always necessary. Rather, capacity may be inferred as a necessary implication from the powers and responsibilities of a governmental entity, "provided, of course, that there is no clear legislative intent negating review" (*id.* at 156 [citation and internal quotation marks omitted]).

Relevant to this controversy, section 1218 of the Real Property Tax Law, the sole statute authorizing judicial review of equalization rates, provides, in part:

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> "A final determination of the state board relating to state equalization rates may be reviewed by commencing an action in the appellate division of the supreme court in the manner provided by article seventy-eight of the civil practice law and rules upon application of the county, city, town or village for which the rate or rates were established."

Contrary to Riverhead's contentions, we conclude that RPTL 1218 applies not only to state equalization rates but also to segment special equalization rates. Section 1218 broadly authorizes review of State Board determinations "relating to" state equalization rates. Segment special equalization rates are a subset of state equalization rates--both reflect the percentage of full value at which real property situated in a given locale is assessed. Furthermore, the statute contemplates review of "the rate or rates" established for a specific municipality. Inasmuch as each municipality is assigned a single state equalization rate, the reference to "rates" evinces an intent that section 1218 apply to all species of state equalization rates, including segment special equalization rates (*see Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 5 AD3d 783 [2d Dept 2004]; *Matter of City of Oswego v New York State Bd. of Real Prop. Servs.*, 280 AD2d 99, 101 [3d Dept 2001], *lv denied* 96 NY2d 711 [2001]). ****6**

Because RPTL 1218 specifically limits the capacity to challenge the State Board's determination to the municipality "for which the rate or rates were established," Riverhead necessarily lacks capacity to challenge the State Board determination granting Southampton a segment special equalization rate.[8] "[W]here a law expressly describes a particular act, thing or ***43** person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (McKinney's Cons Laws of NY, Book 1, Statutes § 240, Comment, at 411-412; *see also Community Bd. No. 4 [Manhattan] v Board of Estimate of City of N.Y.*, 88 AD2d 832, 833 [1st Dept 1982], *affd for reasons stated* 57 NY2d 846 [1982]). In light of the express limitation set forth in RPTL 1218, the necessary implication doctrine advanced by Riverhead is not applicable.

Inasmuch as we conclude that Riverhead lacks capacity to challenge Southampton's segment special equalization rate, we have no need to address whether Riverhead has standing under the facts and circumstances of this case.

Accordingly, the judgment of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Read and R.S. Smith concur.

Judgment affirmed, with costs. ****7**

FOOTNOTES

1. In New York, each municipality is authorized to assess property at market value or at some fraction of market value. Regardless of the level of assessment a municipality chooses, all assessments within the municipality are required to be a uniform percentage of market value (*see* RPTL 305 [2]).

2. State equalization rates are used for purposes other than the determination of school taxes, such as the distribution of state aid and the establishment of debt limits (*see* Office of Real Property Services, *Understanding the Equalization Rate* < http://www.orps.state.ny.us/pamphlet/ under_eqrates.pdf> [last updated Nov. 21, 2003], cached at < http://www.courts.state.ny.us/reporter/webdocs/ under_eqrates.pdf>).

3. An aggrieved taxpayer or a municipality in which the segment lies may submit a request to the State Board for a segment special equalization rate (*see* 9 NYCRR 186-5.3 [b]). The request must contain, among other things, "information sufficient to support a determination that application of the State equalization rate for the prior roll or a special equalization rate for the current roll to the segment would be inequitable" (9 NYCRR 186-5.3 [b] [3]). The State Board may also initiate a review process to determine whether a segment special equalization rate is warranted (*see* 9 NYCRR 186-5.3 [a]).

4. ORPS is the agency that carries out the policies and programs of the five-member State Board (*see* RPTL 201 [1]). The State Board is authorized to delegate a number of its functions to ORPS, including the evaluation of a request for a segment special equalization rate (*see* RPTL 202 [2] [b]).

5. To illustrate, application of Southampton's state equalization rate of 2.37% to a parcel situated in the school district segment assessed at $2,370 would indicate a market value of $100,000 ($2,370 divided by .0237). In contrast, utilization of the segment special equalization

rate of 3.01% for the same property results in a market value of $78,737 ($2,370 divided by .0301).

6 Although Riverhead and Densieski filed a notice of appeal from this order, they failed to perfect the appeal.

7 Densieski did not seek leave to appeal to this Court. Hence, we have no occasion to address whether he had standing to commence this proceeding.

8 Section 65 of the Town Law also does not aid Riverhead. That statute generally provides a town with the capacity to bring a proceeding "for the benefit or protection of the town, in any of its rights or property" (Town Law § 65 [1]). Here, although application of Southampton's segment special equalization rate will ultimately shift some of the overall tax burden to property owners in the Riverhead segment of the school district, no property or right of the town itself appears to be at stake (*County of Albany v Hooker*, 204 NY 1, 16-17 [1912]; *People v Ingersoll*, 58 NY 1, 29 [1874]; *Matter of Esopus Prop. Holders Residing Within New Paltz Cent. School Dist. v Potter*, 60 AD2d 948 [3d Dept 1978]). In any event, RPTL 1218, the more specific statute, takes precedence over section 65 of the Town Law, a general provision.

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164 A.D.3d 692, 83 N.Y.S.3d 520, 2018 N.Y. Slip Op. 05777

**1 The People of the State of New York ex rel. Chance McCurdy, Respondent,
v
Warden, Westchester County Correctional Facility, Respondent, and New York State Department of Corrections and Community Supervision, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2016-01838, 3585/15
August 15, 2018

CITE TITLE AS: People ex rel. McCurdy v Warden, Westchester County Corr. Facility

HEADNOTE

Crimes
Sex Offenders
Postrelease Supervision—Placement in Residential Treatment Facility Housing

Barbara D. Underwood, Attorney General, New York, NY (Anisha S. Dasgupta, Holly A. Thomas, Karen W. Lin, and Ester Murdukhayeva of counsel), for respondent-appellant.
The Legal Aid Society, New York, NY (Elon Harpaz of counsel), for petitioner-respondent.

In a habeas corpus proceeding, which was converted into a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Corrections and Community Supervision, which placed the petitioner, a level three sex offender, in a residential treatment facility during the period of his postrelease supervision, the New York State Department of Corrections and Community Supervision appeals from a judgment of the Supreme Court, Westchester County (Barbara Gunther Zambelli, J.), dated January 11, 2016. The judgment granted the petition to the extent of directing the New York State Department of Corrections and Community Supervision to arrange for the petitioner's transfer to the Queensboro Correctional Facility and to assign him to a wait list for a New York City Department of Homeless Services facility that is compliant with the requirements of the Sexual Assault Reform Act.

Ordered that the judgment is reversed, on the law, without costs or disbursements, the petition is denied, and the proceeding is dismissed on the merits.

In 2014, the petitioner was convicted of attempted sexual abuse in the first degree and was sentenced to three years in prison, followed by five years of postrelease supervision. By the time the petitioner was received into state custody, he had already accrued sufficient time in a local jail to satisfy the full determinate term of his three-year sentence. He was subsequently adjudicated a level three sex offender pursuant to the Sex Offender Registration Act (hereinafter SORA) (*see* Correction Law art 6-C). While residing in the community, the petitioner violated his curfew, and his postrelease supervision ***693** status was revoked. As an alternative to incarceration, the Department of Corrections and Community Supervision (hereinafter DOCCS) agreed to re-release the petitioner to postrelease supervision upon his successful completion of a 90-day DOCCS drug treatment program. However, upon the petitioner's completion of the program, he failed to identify any housing that complied with the requirement of the Sexual Assault Reform Act (hereinafter SARA) that level three sex offenders reside more than 1,000 feet from any school grounds (*see* Executive Law § 259-c [14]; Penal Law § 220.00 [14] [b]; **2 *People v Diack*, 24 NY3d 674, 681-682 [2015]; *People ex rel. Green v Superintendent of Sullivan Corr. Facility*, 137 AD3d 56, 58 [2016]; *Matter of Williams v Department of Corr. & Community Supervision*, 136 AD3d 147, 151 [2016]). As a result, DOCCS placed the petitioner in a DOCCS residential treatment facility at the Fishkill Correctional Facility and thereafter at an residential treatment facility at the Queensboro Correctional Facility.

In October 2015, while residing at the Queensboro Correctional Facility, the petitioner was arrested on a parole warrant for violating the terms of his postrelease supervision by absconding from a community work program and was thereafter incarcerated in the Westchester County Correctional Facility. In November 2015, the petitioner commenced a habeas corpus proceeding challenging his incarceration at the Westchester County Correctional Facility pending a final parole revocation hearing. The petitioner contended that his violation of his postrelease supervision while residing at the Queensboro Correctional Facility was a nullity because DOCCS lacked authority under SARA, Correction Law § 73 (10), or Penal Law § 70.45 (3) to place him in a residential treatment facility upon his completion of the DOCCS drug treatment program. The Supreme Court, based upon its determination that the petitioner was not

entitled to immediate release given the petitioner's lack of community-based SARA-compliant housing, converted the writ to a proceeding pursuant to CPLR article 78, and granted the petition to the extent of directing DOCCS to arrange for the petitioner's transfer to the Queensboro Correctional Facility and to assign him to a wait list for a New York City Department of Homeless Services facility that is compliant with the requirements of SARA. DOCCS appeals, and we reverse.

To resolve the issues raised in this case, we turn to "familiar principles of statutory construction" (*Matter of County of Orange [Al Turi Landfill, Inc.]*, 75 AD3d 224, 234 [2010]). " 'Statutes which relate to the same subject matter must be ***694** construed together unless a contrary legislative intent is expressed' " (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234, quoting *Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 153 [2001]). "The courts must 'harmonize the various provisions of related statutes and . . . construe them in a way that renders them internally compatible' " (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234, quoting *Matter of Aaron J.*, 80 NY2d 402, 407 [1992]). "In the case of a conflict between a general statute and a special statute governing the same subject matter, the general statute must yield" (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234; *see Matter of Brusco v Braun*, 84 NY2d 674, 681 [1994]). "Finally, '[a] construction rendering statutory language superfluous is to be avoided' " (*Matter of County of Orange [A1 Turi Landfill, Inc.]*, 75 AD3d at 234, quoting *Matter of Branford House v Michetti*, 81 NY2d 681, 688 [1993]).

Applying these principles here, no conflict arises between the three statutes at issue regarding DOCCS's authority to place the petitioner, a level three sex offender, into a residential treatment facility housing pending his identification of SARA-compliant community housing during the period of his postrelease supervision. By its terms, Penal Law § 70.45 (3) permits DOCCS to require an offender subject to a term of postrelease supervision to spend the first six months of his or her postrelease supervision in residential treatment facility housing as a transitional period prior to re-entry into the community.

The 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 § 73 (10) "to use any residential treatment facility as a residence for persons who are on community supervision." The term "community supervision" is defined as "the supervision of individuals released into the community on temporary release, presumptive release, parole, conditional release, post release supervision or medical parole" (Correction Law § 2 [31]).

Thus, construing the relevant statutes together, DOCCS has authority to temporarily place a level three sex offender who has already completed more than six months of his or her postrelease supervision, as did the petitioner in this case, into residential treatment facility housing in the event such offender is unable to locate SARA-compliant community housing. Moreover, it is clear that DOCCS's authority to keep such an offender in residential treatment facility housing ends when the offender successfully identifies or otherwise obtains SARA- ***695** compliant community housing. Mastro, J.P., Roman, Barros and Iannacci, JJ., concur.

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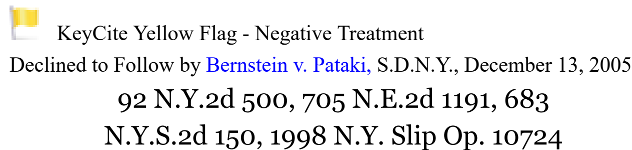

92 N.Y.2d 500, 705 N.E.2d 1191, 683 N.Y.S.2d 150, 1998 N.Y. Slip Op. 10724

Mental Hygiene Legal Services, on Behalf of Aliza K., Respondent,
v.
Michael Ford, Appellant.

Court of Appeals of New York
150
Argued October 15, 1998;
Decided December 3, 1998

CITE TITLE AS: Mental Hygiene Legal Servs. v Ford

SUMMARY

Appeal, pursuant to CPLR 5601 (c), from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered September 11, 1997, which modified, on the law, and, as modified, affirmed an order and judgment (one paper) of the Supreme Court (Stanley S. Ostrau, J., upon decision of Kristin Booth Glen, J.), entered in New York County in a consolidated habeas corpus proceeding and declaratory judgment action, granting a motion by plaintiff for summary judgment, denying a motion by defendant to dismiss the complaint pursuant to CPLR 3211, declaring that a hearing provision must be read into 14 NYCRR 57.2 such that no transfer of any person pursuant to that section may take place prior to a judicial hearing, declaring that at all such hearings, defendant hospital bears the burden of proving by clear and convincing evidence that the person it seeks to transfer pursuant to 14 NYCRR 57.2 meets the substantive standard for hospitalization in a secure facility as set forth in 14 NYCRR 57.2, granting plaintiff's habeas corpus petition, and permanently staying plaintiff's transfer to a secure facility. The modification consisted of declaring that a transfer to a secure facility implicates a liberty interest, that where, as here, such a transfer is based on security concerns, narrowly connected to the patient's delusion, rather than a general medical diagnosis that the patient is a danger to herself or others, due process requires prior judicial review of the transfer, and that the absence of a hearing requirement in 14 NYCRR 57.2 does not violate the constitutional guarantee of equal protection, remanding for a new hearing to consider whether the hospital's evidentiary burden has been satisfied here, and continuing the interim stay already existing pending disposition of the ordered hearing. Defendant stipulated for judgment absolute to be entered against him in the event of affirmance.

Mental Hygiene Legal Servs. v Ford, 242 AD2d 417, reversed.

HEADNOTES

Appeal
Academic and Moot Questions

([1]) A combined habeas corpus proceeding and declaratory judgment action commenced on behalf of an involuntarily committed civil patient hospitalizedat ***501** a civil mental health facility of the State Office of Mental Health (OMH), which seeks to block her transfer to a secure OMH facility or to obtain her release alleging that she had a right to a judicial hearing prior to a nonemergency transfer to a secure OMH facility will not be dismissed as moot because Supreme Court has ordered her release. Even if the patient's present status renders the case moot as to her, the exception to the mootness doctrine for issues that are likely to recur applies. The Mental Hygiene Law contemplates that involuntary hospitalization in a mental health facility is often brief and temporary. That statute and its implementing regulations require frequent periodic review of a patient's status, and the release of the patient unless OMH is granted successive court orders authorizing retention (*see,* Mental Hygiene Law § 9.33; 14 NYCRR 57.4 [b]). Thus, this is the kind of case that is likely to recur, will typically evade review, and is substantial and novel.

Incapacitated and Mentally Disabled Persons
Involuntary Commitment
Liberty Interest of Civil Patient Transferred from Nonsecure to Secure Facility

([2]) The transfer of an involuntarily committed civil patient hospitalized at a civil mental health facility of the State Office of Mental Health (OMH) to a secure OMH facility, where all patients are subject to heightened security irrespective of their conduct and where a high percentage of the patients have been transferred from the criminal justice system as incompetent to stand trial (*see,* CPL art 730) or are committed as a result

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of having been found not criminally responsible by reason of mental disease or defect (*see,* CPL 330.20), implicates a liberty interest which triggers rights to procedural due process because the stigma of being a patient at the secure facility may be greater than that of being hospitalized at the civil mental health facility.

Incapacitated and Mentally Disabled Persons
Involuntary Commitment
Due Process of Law--Liberty Interest of Civil Patient Transferred from Nonsecure to Secure Facility

([3]) In a proceeding involving the potentially stigmatizing transfer of an involuntarily committed civil patient hospitalized at a civil mental health facility of the State Office of Mental Health (OMH) to a secure OMH facility, the requirements of due process were satisfied with respect to petitioner's liberty interest. The patient is being transferred to an OMH facility, not a correctional facility, and prior to the transfer request she was already confined to the Intensive Psychiatric Service unit of the nonsecure facility and her behavior required periods of enforced seclusion. Moreover, the secure facility permits freer movement of patients such as petitioner who require close supervision (14 NYCRR 57.1). Thus, petitioner has not established that her liberty interest was as severely affected as it would be by transfer to a penal, security-oriented facility operated by the Department of Correctional Services.

Incapacitated and Mentally Disabled Persons
Involuntary Commitment
Due Process of Law--Risk of Erroneous Deprivation of Liberty Interest of Civil Patient Transferred from Nonsecure to Secure Facility

([4]) In a proceeding involving the potentially stigmatizing transfer of an involuntarily committed civil patient hospitalized at a civil mental health facility of the State Office of Mental Health (OMH) to a secure OMH facility, the record does not substantiate the existence of any serious risk of an erroneous deprivation of the patient's liberty interest under the current transfer procedures of the Mental Hygiene Law and regulations such as would violate ***502** due process. Under the regulatory scheme, the transfer decision is primarily one of professional medical judgment as to the most appropriate therapeutic setting (14 NYCRR 57.1), and a patient for whom an application has been made has the rights of notice and complete disclosure of the documents submitted with the application, is afforded legal representation at all stages of the administrative process, and is entitled to a full review of the transfer by a qualified independent psychiatrist. At each stage, the patient and the patient's representative are entitled to submit opposing arguments and any pertinent countervailing evidence. The record does not substantiate the existence of any serious risk that these procedures give rise to erroneous transfer determinations. Nor has there been a showing that the additional safeguard of a judicial hearing would significantly reduce the possibility of an erroneous transfer decision. Shifting from mental health professionals to Judges the determination of which therapeutic environment is most appropriate would not significantly add assurance against the risk of an erroneous decision. Moreover, in the case of a violent mentally ill patient, security concerns are inextricably linked to considerations of professional medical judgment, and it is not the province of the courts to weigh the degrees of medical and security considerations which may go into any individual transfer decision.

Incapacitated and Mentally Disabled Persons
Involuntary Commitment
Due Process of Law--Governmental Interest in Not Holding Judicial Hearing Prior to Transfer of Civil Patient from Nonsecure to Secure Facility

([5]) In a proceeding involving the potentially stigmatizing transfer of an involuntarily committed civil patient hospitalized at a civil mental health facility of the State Office of Mental Health (OMH) to a secure OMH facility, the procedures required by 14 NYCRR part 57 satisfy the requirements of procedural due process in all respects, notwithstanding the lack of a judicial hearing prior to the nonemergency transfer to a secure OMH facility. The government in this case has a strong interest in avoiding the significant administrative and fiscal burdens which would result from the necessity of holding a prior judicial hearing each time an involuntary patient objects to being transferred to a secure facility.

Incapacitated and Mentally Disabled Persons
Involuntary Commitment

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Equal Protection of Laws--Different Procedures for Determining Appropriateness of Transfer Decisions for Civil and Criminal Patients at Mental Health Facilities

([6]) An involuntarily committed civil patient hospitalized at a civil mental health facility of the State Office of Mental Health (OMH), who was transferred, without a judicial hearing, to a secure OMH facility due to a substantial risk that she might cause physical harm to other persons (14 NYCRR part 57), was not denied equal protection because persons found not responsible for criminal conduct by reason of mental disease or defect are entitled to a judicial hearing under CPL 330.20 for purposes of determinations of whether they suffer from a dangerous mental disorder or are otherwise mentally ill. Since 14 NYCRR part 57 and CPL 330.20 address different classes of persons posing different legal concerns, a rational basis exists for having different procedures to determine the appropriateness of transfer decisions. ***503**

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Appellate Review, § 646; Mentally Impaired Persons, §§ 3, 5, 12, 20, 24-26, 28.

McKinney's, CPL 330.20; art 730; Mental Hygiene Law § 9.33.

14 NYCRR part 57.

NY Jur 2d, Appellate Review, §§ 637, 638; Criminal Law, §§ 2576, 2577; Infants and Other Persons Under Legal Disability, §§ 78, 85-89, 97-99.

ANNOTATION REFERENCES

See ALR Index under Appeal and Error; Incompetent and Insane Persons; Moot and Abstract Matters.

POINTS OF COUNSEL

Dennis C. Vacco, Attorney-General, New York City (*Thomas D. Hughes, Barbara G. Billet* and *John W. McConnell* of counsel), for appellant.

The majority in the Court below erred in concluding that the nonemergency transfer of an involuntarily admitted Office of Mental Health (OMH) patient to a secure OMH facility pursuant to 14 NYCRR 57.2 for reasons including security of patients, staff and the public, implicates a liberty interest requiring a pretransfer judicial hearing. (*Savastano v Nurnberg,* 77 NY2d 300; *Mathews v Eldridge,* 424 US 319; *Project Release v Prevost,* 551 F Supp 1298, 722 F2d 960; *Fhagen v Miller,* 29 NY2d 348, 409 US 845; *Parham v J. R.,* 442 US 584; *Washington v Harper,* 494 US 210.)

Karen Gomes Andreasian, New York City, and *Marvin Bernstein* for respondent.

Due process and equal protection require a pretransfer judicial hearing in all nonemergency transfers pursuant to 14 NYCRR part 57. (*Town of Massena v Niagara Mohawk Power Corp.,* 45 NY2d 482; *Mitchell v New York Hosp.,* 61 NY2d 208; *Matter of Zaiac,* 279 NY 545; *Parochial Bus Sys. v Board of Educ.,* 60 NY2d 539; *Matter of Kesselbrenner v Anonymous,* 33 NY2d 161; *People ex rel. Jesse F. v Bennett,* 242 AD2d 342; *People ex rel. Schreiner v Tekben,* 160 Misc 2d 724, *affd sub nom. People ex rel. Richard S. v Tekben,* 219 AD2d 609; *Jackson v Indiana,* 406 US 715; *Covington v Harris,* 419 F2d 617; *Lake v Cameron,* 364 F2d 657.)

OPINION OF THE COURT

Levine, J.

Aliza K. is an involuntarily committed civil patient hospitalized ***504** at Manhattan Psychiatric Center (MPC), a civil mental health facility of the State Office of Mental Health (OMH). She was charged with aggravated harassment after having already served two sentences for stalking, threatening and harassing her former employer (with whom she apparently at one time had a romantic involvement) and the staff of his business. The new charges were dismissed after she was found unfit to proceed to trial. Aliza K. was then transferred from the criminal detention facility at Rikers Island pursuant to CPL 730.40. On March 14, 1994, she was admitted into MPC pursuant to Mental Hygiene Law § 9.33. She was diagnosed as suffering from an erotomanic delusional disorder, which caused her to believe that her former employer still loved her and to compulsively seek contact with him. The employer had to obtain an order of protection against her, and despite the order, at MPC Aliza K. repeatedly stated that she would never stop pursuing him. Following some physical altercations with hospital staff, she was transferred to the Intensive Psychiatric Service unit of MPC, a locked ward which is reserved for the most violent patients.

On May 3, 1995, MPC requested that Aliza K. be transferred to Kirby Forensic Psychiatric Center (Kirby), one of the two secure OMH facilities in the State (*see,* 14 NYCRR 57.1). Aliza K.'s treating psychiatrist prepared a clinical summary

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giving the medical reasons for the transfer application. According to that summary, Aliza K. had made 10-20 calls to her former employer's business or home each day, and she assaulted staff when they tried to prevent her from using the telephone to call him. She also threatened people at her employer's place of business who tried to shield him from her calls. She wrote to him daily, writing his surname as her last name on the return address, as if she were married to him. She repeatedly tried to kick down the nursing station door to gain access to the telephone inside. Her behavior required her to be kept in seclusion and to be given emergency medication to modify her aggressive physical behavior. On a daily basis, she had to be physically restrained by staff in attempts to prevent injury to others. The one time she was outside the Intensive Psychiatric Service unit in the last 14 months, she threw a large rock at an employee's head and tried to escape. She stated that she would hurt anyone who got in the way of her reuniting with her former employer.

On May 5, 1995, the OMH Commissioner authorized the transfer to Kirby and, as required by 14 NYCRR 57.2, notified ***505** Mental Hygiene Legal Services (MHLS) of the transfer. When petitioner objected to the transfer, the Commissioner appointed another psychiatrist who was independent from the hospital to evaluate her. After the independent psychiatrist examined Aliza K. and interviewed the treating psychiatrist at MPC who had prepared the clinical summary, she confirmed that the determination to issue a transfer order was medically justified.

On May 10, 1995, Aliza K. commenced this proceeding by serving MPC with a writ of habeas corpus to block the transfer or to obtain her release, claiming that she had a right to a judicial hearing prior to a nonemergency transfer to a secure OMH facility. Supreme Court converted the proceeding into a declaratory judgment action and consolidated that action with the writ. The court, after enjoining the transfer, granted her motion for summary judgment on both due process and equal protection grounds, and declared that a hearing provision must be read into 14 NYCRR 57.2 so that no transfer of any person could take place prior to a judicial hearing. The Appellate Division rejected petitioner's equal protection argument but agreed on due process grounds that a judicial hearing was required prior to a transfer (242 AD2d 417). The Appellate Division concluded that since the primary motivation for the transfer was not a general medical diagnosis but rather security concerns, a judicial hearing was required prior to a nonemergency transfer to a secure OMH facility. The case was appealed as of right upon stipulation for judgment absolute (CPLR 5601 [c]), and we now reverse.

([1]) Initially, we reject Aliza K.'s contention that the case should be dismissed because it has become moot. On October 8, 1998, Aliza K. was still residing at MPC, having never been transferred to Kirby because of the decisions of the courts below. After a retainer hearing on whether she should remain in custody at all (*see,* Mental Hygiene Law § 9.33), Supreme Court ordered her release from OMH. OMH appealed the order, and on October 13, 1998, the parties stipulated to a two-week stay of the release order to permit OMH to prepare a discharge plan.

Even if Aliza K.'s present status renders this appeal moot as to her, the exception to the mootness doctrine for issues that are likely to recur applies. The Mental Hygiene Law contemplates that involuntary hospitalization in a mental health facility is often brief and temporary. That statute and its implementing regulations require frequent periodic review of a patient's status, and the release of the patient unless OMH isgranted ***506** successive court orders authorizing retention (*see,* Mental Hygiene Law § 9.33; 14 NYCRR 57.4 [b]). It follows that this is the kind of case that falls within the exception in that it is likely to recur, will typically evade review, and is substantial and novel (*see, Matter of Chenier v Richard W.,* 82 NY2d 830, 832). Therefore, we turn to the merits of the case.

The administrative rules governing the nonemergency transfers of involuntarily committed patients to secure facilities are set forth in 14 NYCRR part 57. Under those regulations, the director of the transferring hospital is required to submit a written request to the Commissioner of OMH demonstrating that (1) there is a substantial risk that the patient may cause physical harm to other persons, (2) reasonable efforts at treatment have been made without eliminating that risk, and (3) the patient needs the close supervision provided at a secure facility (14 NYCRR 57.2 [a]). A copy of the director's request, together with a copy of 14 NYCRR part 57, must be provided to the patient, MHLS and the patient's nearest relative if known (§ 57.2 [a] [3]). If the Commissioner finds that the application sets forth facts justifying the transfer, the director again must notify the patient, MHLS and the patient's closest relative.

The patient or anyone on the patient's behalf has the opportunity to object to the transfer with "appropriate written arguments supported by documents, statements, and

affidavits” (§ 57.2 [c]). Upon objection to the transfer by the patient or the patient's representative, the transfer is stayed until the Commissioner designates a qualified and independent psychiatrist to interview the patient and other knowledgeable parties, and to prepare a report and recommendation regarding the transfer (§ 57.2 [d]). The report is provided to the Commissioner, the patient and the patient's representatives, and they are afforded the opportunity to comment upon it and to submit additional evidence in opposition to the transfer (*id.*). Before the transfer takes place, the Commissioner must notify all the interested parties of the decision, and the transfer is stayed for at least 24 hours to enable the patient to take any legal action deemed appropriate (*id.*). The patient may initiate a CPLR article 78 proceeding to challenge the transfer (§ 57.6).

([2]) Unlike MPC, all the patients at Kirby are continuously subject to heightened security irrespective of their conduct. Also, because a high percentage of the patients at Kirby are transferred from the criminal justice system as incompetent to stand trial (*see,* CPL art 730) or are committed as a result of ***507** having been found not criminally responsible by reason of mental disease or defect (*see,* CPL 330.20), the stigma of being a patient at Kirby may be greater than that of being hospitalized at MPC. Thus, Aliza K.'s transfer implicates a liberty interest which triggers rights to procedural due process (*see, Matter of Kesselbrenner v Anonymous,* 33 NY2d 161, 167; *Vitek v Jones,* 445 US 480, 494). We conclude, however, that the requirements of due process were satisfied under the circumstances of this case.

In determining what process is constitutionally due Aliza K. regarding her transfer to a secure mental health facility, we weigh the three factors identified in *Mathews v Eldridge* (424 US 319):

“[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail” (*id.,* at 334-335).

First, we consider the liberty interest at stake. On the record before us, this is not a situation, like *Matter of Kesselbrenner v Anonymous* (*supra,* 33 NY2d, at 166), where the patient is being transferred to a “penal, security-oriented facility” operated by the Department of Correction. Critical to the *Kesselbrenner* decision that the transfer violated the petitioner's due process rights was that Department of Mental Hygiene facilities afforded significantly greater freedom to civilly committed patients than the Department of Correction facility (*id.*). Indeed, we noted that the facility in question had been characterized as “ 'no different from a jail' ” (*id.,* at 167).

([3]) Here, Aliza K. is being transferred to an OMH facility, not a correctional facility. Prior to the transfer request, Aliza K. was already confined to the Intensive Psychiatric Service unit of MPC and her behavior required periods of enforced seclusion. Indeed, the transfer regulations contain an express finding that by reason of its trained staff and perimeter security, the Kirby facility “permit[s] *freer* movement” of patients such as Aliza K. who require close supervision (14 NYCRR 57.1 [emphasis supplied]). There was no record evidence to refute the accuracy of that finding in this case. Thus, petitioner ***508** has not established that her liberty interest was as severely affected as that considered in *Kesselbrenner.*

The second *Mathews v Eldridge* inquiry required here is the risk of an erroneous deprivation of Aliza K.'s liberty interest under the current transfer procedures of the statute and regulations, and the likely value of the additional procedural safeguard urged here of a pretransfer judicial hearing.

([4]) In *Savastano v Nurnberg,* the Court reviewed the regulatory criteria for a transfer under 14 NYCRR 517.4 (d) (1), and concluded that “the decision to transfer reflects primarily a *medical* judgment about the kind of facility that would best serve the patient's therapeutic needs” (*Savastano v Nurnberg,* 77 NY2d 300, 308 [emphasis in original]). Here, as well, under the regulatory scheme, the transfer decision is primarily one of professional medical judgment as to the most appropriate therapeutic setting (14 NYCRR 57.1). Whether security concerns also play a role in the transfer decision is irrelevant since “such concerns are relevant to decisions regarding treatment” (*Savastano v Nurnberg,* at 309). Kirby and its sister secure psychiatric center

“have the staff and physical surroundings to enable them to offer such programs and services to patients requiring closer supervision than can be given at other hospitals. Patients whose behavior is such as to raise the likelihood of their causing harm to others cannot be given the care and treatment they require at such other hospitals since, for the protection of

other patients and staff of such hospitals, they must be kept in closed wards and even in seclusion" (14 NYCRR 57.1).

As already noted, a patient for whom an application has been made has the rights of notice and complete disclosure of the documents submitted with the application, is afforded legal representation at all stages of the administrative process, and is entitled to a full review of the transfer by a qualified independent psychiatrist. At each stage, the patient and the patient's representative are entitled to submit opposing arguments and any pertinent countervailing evidence. The record does not substantiate the existence of any serious risk that these procedures give rise to erroneous transfer determinations.

Likewise, there has been no showing that the additional safeguard of a judicial hearing would significantly reduce the ***509** possibility of an erroneous transfer decision. Here, as in *Savastano,* we conclude that shifting from mental health professionals to Judges the determination of which therapeutic environment is most appropriate would not significantly add assurance against the risk of an erroneous decision (*Savastano v Nurnberg, supra,* at 309). As the Supreme Court has noted, "[c]ommon human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real" (*Parham v J. R.,* 442 US 584, 609).

We disagree with the conclusion of the Appellate Division that a judicial hearing was required because the "transfer [was] based on security concerns, narrowly connected to the patient's delusion" (242 AD2d, at 418, *supra*). The statement could be interpreted as a conclusion that no considerations of the treatment of the patient's condition were involved in this transfer decision. Such a conclusion would be entirely unsupported by the record. As already noted, the report of the treating psychiatrist in support of the transfer application recites in detail that her medical condition was deteriorating, and that her behavior necessitated prolonged periods of seclusion and use of emergency medication. The director of MPC opined that the management of her treatment could be more appropriately discharged in a secure facility. Their professional assessments of Aliza K.'s condition and treatment needs were confirmed by an independent psychiatrist.

On the other hand, the Appellate Division decision may be premised on a conclusion that "the *primary* motivation for the transfer was a security concern ... rather than a medical concern" (242 AD2d, at 419, *supra* [emphasis supplied]). Here, the court erred as a matter of law. Contrary to the view of the Appellate Division, in the case of a violent mentally ill patient, security concerns are inextricably linked to considerations of professional medical treatment, as expressly pointed out in the regulatory findings. As already noted, 14 NYCRR 57.1 itself states that patients such as Aliza K. are medically benefitted by a transfer to Kirby because Kirby's specially trained staff and perimeter security permit freer movement and the possibility of therapies which would not be available at a hospital like MPC. Thus, it is not the province of the courts to weigh the degrees of medical and security considerations which may go into any individual transfer decision. Consequently, the decision to transfer Aliza K. is properly viewed as a medical decision, just as was the transfer at issue in *Savastano.* ***510**

([5]) Finally, as to the third prong of the *Mathews v Eldridge* inquiry, the government in this case has a strong interest in avoiding "the significant administrative and fiscal burdens which would result from the necessity of holding a prior judicial hearing each time an involuntary patient objects to being transferred" to a secure facility (*Savastano v Nurnberg, supra,* at 309). As we noted in *Savastano,* and the United States Supreme Court pointed out in *Parham,* requiring mental hospital professional staff to defend their clinical decisions in time-consuming judicial hearings diverts already scarce resources from the care and treatment of the mentally ill (*Savastano v Nurnberg,* at 310; *Parham v J. R., supra,* 442 US, at 605-606). Thus, the procedures required by 14 NYCRR part 57 satisfy the requirements of procedural due process in all respects (*see also, Vitek v Jones, supra,* 445 US, at 494-495).

([6]) We also find meritless the argument that the petitioner was denied equal protection because persons found not responsible for criminal conduct by reason of mental disease or defect are entitled to a judicial hearing under CPL 330.20 for purposes of determinations of whether they suffer from a dangerous mental disorder or are otherwise mentally ill. Since 14 NYCRR part 57 and CPL 330.20 address different classes of persons posing different legal concerns, a rational basis exists for having different procedures to determine the appropriateness of transfer decisions. Thus, in this respect we agree with the Appellate Division that Supreme Court erred in finding a deprivation of equal protection here.

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Accordingly, the order of the Appellate Division should be reversed, without costs, the petition for a writ of habeas corpus should be denied, and judgment should be granted declaring that 14 NYCRR 57.2 is not rendered unconstitutional by virtue of its failure to provide for a hearing prior to transfer of a patient from a nonsecure to a secure OMH facility.

Chief Judge Kaye and Judges Bellacosa, Smith, Ciparick and Wesley concur.
Order reversed, etc. ***511**

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137 A.D.3d 56, 25 N.Y.S.3d 375, 2016 N.Y. Slip Op. 00417

**1 The People of the State of New York ex rel. William Green, Appellant
v
Superintendent of Sullivan Correctional Facility et al., Respondents.

Supreme Court, Appellate Division, Third Department, New York
521148
January 21, 2016

CITE TITLE AS: People ex rel. Green v Superintendent of Sullivan Corr. Facility

SUMMARY

Appeal from a judgment of the Supreme Court, Sullivan County (Frank J. LaBuda, J.), entered April 27, 2015 in a proceeding pursuant to CPLR article 70. The judgment denied, without a hearing, petitioner's application for a writ of habeas corpus.

HEADNOTES

Appeal
Academic and Moot Questions
Habeas Corpus—Exception to Mootness Doctrine

([1]) In a habeas corpus proceeding in which the petition became moot during the pendency of the appeal when petitioner was released from a correctional facility to an approved residence, the exception to the mootness doctrine allowed review of whether respondent Department of Corrections and Community Supervision was authorized to retain petitioner, a risk level three sexually violent offender under the Sex Offender Registration Act, in a maximum security facility more than eight months past his maximum expiration date where petitioner had not secured suitable housing for his risk level three status (*see* Executive Law § 259-c [14]), and where release to a residential treatment facility (*see* Penal Law § 70.45 [3]; Correction Law § 73 [10]) was dependent on pending medical clearance by the Office of Mental Health. The exception to the mootness doctrine applied as the issue presented was significant, would typically evade appellate review and was likely to recur given the prevalence of mental health issues among the state's prison population and the recognized difficulty in securing acceptable housing for risk level three sexually violent offenders.

Crimes
Sex Offenders
Level Three Sex Offenders—Residency Requirements at Maximum Expiration Date

([2]) When a risk level three sex offender under the Sex Offender Registration Act reaches his or her maximum expiration date, the Department of Corrections and Community Supervision (DOCCS) must release the individual to either an approved residence (*see* Executive Law § 259-c [14]) or to a residential treatment facility (RTF) (*see* Penal Law § 70.45 [3]; Correction Law § 73 [10]). Where an individual needs mental health treatment not otherwise available at an RTF, DOCCS must, prior to the release date, seek a court order authorizing continued hospitalization pursuant to Mental Hygiene Law article 9 or admission to a secure treatment facility pursuant to Mental Hygiene Law article 10 (*see* Correction Law § 404).

RESEARCH REFERENCES

Am Jur 2d, Appellate Review § 602; ***57** Am Jur 2d, Habeas Corpus and Postconviction Remedies §§ 63, 64; Am Jur 2d, Mentally Impaired Persons §§ 7, 125, 137.

Carmody-Wait 2d, Appeals in General §§ 70:343, 70:344; Carmody-Wait 2d, Habeas Corpus §§ 139:135, 139:136.

McKinney's, Correction Law §§ 73 (10); 404; Executive Law § 259-c (14); Penal Law § 70.45 (3).

NY Jur 2d, Appellate Review §§ 638, 639; NY Jur 2d, Criminal Law: Procedure § 3183; NY Jur 2d, Habeas Coprus § 125; NY Jur 2d, Penal and Correctional Institutions §§ 34, 45, 359, 401, 425.

ANNOTATION REFERENCE

See ALR Index under Habeas Corpus; Incompetent or Insane Persons; Moot and Abstract Matters; Sexual Relations and Offenses.

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APPEARANCES OF COUNSEL

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Eric T. Schneiderman, Attorney General, Albany (*Martin A. Hotvet* of counsel), for respondents.

OPINION OF THE COURT

Lynch, J.

Appeal from a judgment of the Supreme Court (LaBuda, J.), entered April 27, 2015 in Sullivan County, which denied petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing.

In 2013, petitioner was convicted of attempted sexual abuse in the first degree, unlawful imprisonment in the second degree (two counts), endangering the welfare of a child and public lewdness and was sentenced to three years in prison, followed by seven years of postrelease supervision (hereinafter PRS). He was subsequently adjudicated a risk level three sexually violent offender pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C). It is not disputed that petitioner was not released either on his conditional release date or on February 17, 2015, his maximum expiration date. In March ***58** 2015, he commenced this habeas corpus proceeding challenging his continued incarceration at Sullivan Correctional Facility, a maximum security facility (*see* 7 NYCRR 100.117). Supreme Court denied the application on the grounds that petitioner had not secured suitable housing in light of his status as a risk level three sex offender (*see* Executive Law § 259-c), and that petitioner's release to a residential treatment facility (hereinafter RTF) (*see* Penal Law § 70.45 [3]) was dependent upon pending medical clearance by the Office of Mental Health. ****2** Petitioner now appeals.

([1]) In October 2015, during the pendency of this appeal, Supreme Court issued an order directing petitioner to receive and accept assisted outpatient treatment pursuant to Mental Hygiene Law § 9.60, and he was released from Sullivan Correctional Facility to an approved residence. Accordingly, because petitioner is no longer in custody, we agree with respondents that his petition seeking a writ of habeas corpus is moot (*see People ex rel. Lashway v Wenderlich*, 118 AD3d 1199, 1200 [2014]). We find, however, that the issue presented—whether respondent Department of Corrections and Community Supervision (hereinafter DOCCS) was authorized to retain petitioner in a maximum security facility past his maximum expiration date—is significant, will typically evade appellate review and is likely to recur given the prevalence of mental health issues among the state's prison population and the recognized difficulty in securing acceptable housing for risk level three sex offenders. As such, we conclude that the exception to the mootness doctrine applies (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; *Matter of Lopez v Evans*, 25 NY3d 199, 204 n 3 [2015]). Because petitioner no longer requires relief pursuant to CPLR article 70, we will convert the proceeding to an action for declaratory judgment (*see* CPLR 103 [c]; *People ex rel. DeLia v Munsey*, 26 NY3d 124, 129 n 2 [2015]; *People ex rel. McManus v Horn*, 18 NY3d 660, 663-664 n 2 [2012]; *Matter of State of New York v Cuevas*, 49 AD3d 1324, 1326 [2008]).

There is no dispute here that, due to petitioner's status as a risk level three sex offender, his release was subject to the mandatory condition that he have suitable housing located more than 1,000 feet from school grounds (*see* Executive Law § 259-c [14]; *People v Diack*, 24 NY3d 674, 681 [2015]). Further, petitioner concedes that the Board of Parole (hereinafter the Board) was authorized to order, on January 15, 2015, that he ***59** be transferred to an RTF (*see* Penal Law § 70.45 [3]; Correction Law § 73 [10]). In response to the petition, respondents explain that petitioner was assigned, but never actually transferred, to Woodbourne Correctional Facility, an RTF, due to an unspecified mental health condition.* Accordingly, there is no dispute that petitioner remained confined in a maximum security correctional facility for more than eight months past the expiration of his three-year determinate sentence. Respondents provide no convincing authority for this unilateral decision, nor do we discern any.

([2]) We have previously held that the Board has discretion to deny parole release to an inmate who has not secured an approved residence on his or her conditional release date (*see Matter of Boss v New York State Div. of Parole*, 89 AD3d 1265, 1266 [2011]). In contrast, we recently held that DOCCS does not have the authority to retain an inmate beyond the inmate's maximum expiration date in order to

finalize the terms of PRS, because it was conclusively bound by the sentence and commitment order (*Miller v State of New York*, ****3** 124 AD3d 997, 999 [2015]). In *Miller*, however, the inmate was convicted of a drug-related charge and, thus, was not subject to the Sex Offender Registration Act residency mandate. Under the circumstances presented, we find that when a risk level three sex offender reaches his or her maximum expiration date, DOCCS must release the individual to either an approved residence or to an RTF. Where an individual needs mental health treatment not otherwise available at an RTF, DOCCS must, prior to the release date, seek a court order authorizing continued hospitalization pursuant to Mental Hygiene Law article 9 or admission to a secure treatment facility pursuant to Mental Hygiene Law article 10 (*see* Correction Law § 404).

We reject respondents' argument that DOCCS was statutorily authorized to continue petitioner's incarceration even throughout the entire PRS period if an approved residence could not be located. A person released to PRS remains "in the legal custody ***60** of [DOCCS]" (Executive Law § 259-i [2] [b]), but the term "legal custody" is expressly distinct from "imprisonment in the custody of [DOCCS]" (*id.*; *see e.g. People v Brown*, 25 NY3d 247, 250 [2015]). Moreover, respondents' interpretation conflicts with Executive Law § 259-c (14), which authorizes a transfer to an RTF of a person "released" and subject to a period of PRS. We also recognize that Correction Law § 112 empowers DOCCS with extensive authority to manage and control a person's release into the community, but the statute makes a specific distinction between inmates confined in a correctional facility (*see* Correction Law § 112 [1]) and persons released on community supervision (*see* Correction Law § 112 [2]).

We are mindful that the dilemma presented is no doubt a consequence of the difficulty in finding acceptable housing for sex offenders (*see People v Diack*, 24 NY3d at 682-684). Public safety unquestionably remains the primary concern in the management of sex offenders, but the "accepted wisdom in the criminal justice community and among experts that offenders are less likely to recidivate when they are provided with suitable housing and employment" is also recognized (Governor's Mem approving L 2008, ch 568, 2008 McKinney's Session Laws of NY at 1669; *see* 9 NYCRR 8002.7 [c], [e]). Accordingly, we reiterate that, although petitioner is obligated to identify suitable housing, DOCCS remains statutorily obligated to assist in the process (*see* Correction Law §§ 201 [5]; 203 [1]; Executive Law § 243 [4]; 9 NYCRR 365.3 [d] [5]; 8002.7 [d] [5]).

Garry, J.P., Rose, Devine and Clark, JJ., concur.

Ordered that the judgment is reversed, on the law, without costs, proceeding converted to an action for declaratory judgment and it is declared that where a person's sentence has expired and his or her release is subject to the mandatory condition set forth in Executive Law § 259-c (14), that person must be released to either suitable housing or a residential treatment facility pursuant to Penal Law § 70.45 (3) and Correction Law § 73 (10) or be subject to the provisions of Correction Law § 404.

FOOTNOTES

* The record includes conflicting affidavits indicating that petitioner was transferred to an RTF and that he was not transferred because the proposed RTF could not accommodate his purported mental health needs. Woodbourne Correctional Facility is a medium security correctional facility used for confinement and as an RTF (*see* 7 NYCRR 100.50). Respondents do not explain why petitioner could not be transferred to another RTF (*see generally* 7 NYCRR part 100), in particular, Mid-State Correctional Facility, which is classified as an RTF "to temporarily house certain parolees in accordance with [Correction Law § 73 (10)]" (7 NYCRR 100.111 [d]).

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21 Misc.3d 906, 870 N.Y.S.2d 692, 2008 N.Y. Slip Op. 28394

**1 The People of the State of New York ex rel. Matthew Harper, Petitioner
v
Warden, Rikers Island Correctional Facility, et al., Respondents.

Supreme Court, Bronx County
October 14, 2008

CITE TITLE AS: People ex rel. Harper v Warden, Rikers Is. Correctional Facility

HEADNOTE

Crimes
Sentence
Postrelease Supervision—Vacatur of Unlawfully Imposed Term of Postrelease Supervision and Parole Violation Warrant

Vacatur of the period of postrelease supervision (PRS) that had been unlawfully imposed upon petitioner and of the parole violation warrant issued by the New York State Division of Parole (DOP) for petitioner's alleged violation of the PRS, which warrant was not the sole reason for his detention, was proper and did not have the practical effect of commuting the underlying sentence. By vacating the PRS warrant, DOP was not divested of jurisdiction over petitioner, and vacatur of the warrant had no effect on the aggregate underlying sentence pursuant to which petitioner might have been released to parole had he not been released to the unlawful PRS. There was no basis upon which to presume that petitioner would have been on parole, and not incarcerated, when he allegedly engaged in the conduct for which the PRS warrant was issued. Consequently the PRS warrant did not interrupt the running of any term of imprisonment to which petitioner was subject as part of his aggregate underlying sentence.

RESEARCH REFERENCES

Am Jur 2d, Criminal Law §§ 739, 764, 860, 871; Am Jur 2d, Pardon and Parole §§ 129, 132, 136, 152.

Carmody-Wait 2d, Criminal Procedure §§ 172:3893, 172:3894, 172:3898, 172:4138, 172:4171.

LaFave, et al., Criminal Procedure (3d ed) § 26.6.

NY Jur 2d, Criminal Law: Procedure §§ 3178, 3179; NY Jur 2d, Penal and Correctional Institutions § 287.

ANNOTATION REFERENCE

See ALR Index under Parole, Probation, and Pardon; Sentence and Punishment.

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APPEARANCES OF COUNSEL

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*907 OPINION OF THE COURT

Barbara F. Newman, J.

By decision and order dated August 27, 2008 (hereinafter the 8/27/08 order), this court, inter alia, converted the above-captioned action from a special proceeding under article 70 of the Civil Practice Law and Rules to a special proceeding under CPLR article 78. Upon conversion the court granted the petition to the extent and only to the extent that the period of postrelease supervision (hereinafter PRS), which had been unlawfully imposed upon petitioner by respondent New York State Department of Correctional Services (hereinafter DOCS), and parole violation warrant number 577098, which had been issued by respondent New York State Division of Parole (hereinafter DOP) for his alleged violation of said PRS, which warrant was among the reasons, but not the sole cause and pretense, for his detention, were vacated. The petition was otherwise denied. Respondents now move for leave to reargue and ask that upon reargument the court rescind that aspect of its decision and order in which it vacated the warrant. Petitioner opposes.

The court has reviewed the applicable law and the following documents: (1) respondents' motion to reargue dated September 5, 2008; (2) respondents' exhibit A; (3) petitioner's affirmation in opposition to motion to reargue

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dated February [1] 7, 2008; and (4) respondents' affirmation in reply to affirmation in opposition to motion to reargue dated September 19, 2008.

Upon consideration of all of the foregoing, and for the reasons that follow, the motion for leave to reargue is granted and upon reargument the court adheres to its determination on petitioner's original application. (CPLR 2221 [f].)

Factual Background **2

On December 22, 1998, petitioner was sentenced in Supreme Court, Albany County, to an indeterminate term of imprisonment of 2⅓ to 7 years upon his conviction for criminal sale of a controlled substance in the fifth degree (Penal Law § 220.06 [hereinafter the 1998 sentence]). On January 22, 2001, petitioner was sentenced in Supreme Court, Richmond County, to a determinate term of imprisonment of five years upon his conviction by his plea of guilty to one count of criminal possession of a weapon in the third degree (Penal Law § 265.02 [4]), and an indeterminate ***908** term of imprisonment of 3½ to 7 years upon his conviction by plea of guilty to attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), those sentences to run concurrently with each other (hereinafter the 2001 sentence). Although the imposition of a period of PRS was required by law on petitioner's conviction for criminal possession of a weapon in the third degree, the 2001 sentence as pronounced by the sentencing court did not include a period of PRS. The commitment order by which custody of, and authority to detain, petitioner was given to DOCS following the 2001 sentence did not include a notation that a period of PRS had been imposed by the sentencing court. On February 2, 2007, DOCS itself imposed a five-year period of PRS and released petitioner to PRS under the supervision of DOP. On April 30, 2008, DOP caused parole violation warrant number 577098 (hereinafter the PRS warrant), charging petitioner with violating various conditions of his PRS, to be executed against him. As of August 27, 2008 (the date of the 8/27/08 order), petitioner was also being held on a criminal charge related to his arrest in Kings County for his alleged possession of a loaded, defaced firearm.

Discussion

Respondents' motion for leave to reargue is granted because it concerns an issue which was arguably raised [2] but not addressed in the consideration and determination of petitioner's application, and the motion does not include any matter of fact not offered on that application. (*See* CPLR 2221 [d] [2].) Although petitioner had originally sought relief under CPLR article 70, he was not entitled to habeas corpus release because the PRS warrant was not the sole cause and pretense of his detention; he was also being held on the criminal charge pending in Kings County. (CPLR 7010 [a]; *see also People ex rel. Santoro v Hollins*, 273 AD2d 829 [4th Dept 2000]; ***909** *People ex rel. Russell v Artuz*, 265 AD2d 512 [2d Dept 1999].) Rather than dismiss the action, the court converted it to a special proceeding under CPLR article 78 (*see* CPLR 7803 [2]; *Matter of Sapp v Payant*, 17 Misc 3d 1110[A], 2007 NY Slip Op 51903[U] [Sup Ct, Erie County 2007]; *Matter of Pan v New York State Dept. of Correctional Servs.*, 16 Misc 3d 1101[A], 2007 NY Slip Op 51209[U] [Sup Ct, Kings County 2007]). In its determination on the ****3** converted petition the court held that the 2001 sentence did not include a period of PRS (*People v Sparber*, 10 NY3d 457 [2008]), that the putative PRS which DOCS had purportedly imposed was unlawful and thus a nullity (*Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 362 [2008]), and that petitioner could not be incarcerated for violating the conditions of a nonexistent period of PRS (*People ex rel. Lewis v Warden, Otis Baum Correctional Ctr.*, 51 AD3d 512 [1st Dept 2008]). Therefore, the court vacated both the putative PRS and the PRS warrant which DOP issued for violations of the putative PRS. On the instant motion respondents "submit that the Court overlooked the import of the fact that Petitioner has time remaining on his underlying sentence" (motion to reargue at 4), and contend that in vacating the PRS warrant, "the Court's . . . decision has the practical effect of commuting Petitioner's court-imposed underlying sentence" (*id.* at 6).

Upon reargument the court finds that it neither overlooked nor misapprehended any matter of fact or law and that the determination of the previously unaddressed "de facto commutation" issue would not have altered its determination on petitioner's application. By no rational reading of it, does the court's 8/27/08 order have the practical effect of commuting any aspect of petitioner's "underlying sentence." [3] The court's 8/27/08 order was limited and specific. Only the putative PRS was declared a nullity and the detention of petitioner for violating it was declared improper. Indeed, the legality of the 1998 and 2001 sentences was not even at issue in the determination of petitioner's application, [4] nor was any motion to commute either of those sentences on any other ground part of the application. Among other things, the intent and effect of the 8/27/08 order was to

determine precisely what sentence had been ***910** imposed by the sentencing court in 2001, and if PRS was part of it. This court determined that the sentencing court had imposed a determinate term of imprisonment without imposing PRS. The PRS warrant was vacated by this court because its only basis was DOP's finding that petitioner had violated the conditions of a period of PRS which, in fact, had never existed.

Respondents' de facto commutation argument is founded upon their speculation as to events which they speculate might have occurred had DOCS not unlawfully imposed and DOP not unlawfully enforced the putative PRS. They contend that since petitioner “still had more than 6 years remaining on his underlying sentence when he was released from DOCS custody on February 2, 2007, he would still be subject to the supervision of [DOP] when he was not in custody” (*id.* at 5) and, therefore, “[i]f he is no longer a ‘person released to post-release supervision,’ then he is a ‘paroled or conditionally released [5] person’ ” (*id.* at 6). Accordingly, respondents argue, “his terms of imprisonment would have continued to run upon his release from DOCS custody to parole ****4** supervision, but would have been interrupted each time he was declared delinquent by [DOP] . . . , including pursuant to the instant parole warrant.” (*Id.* at 4-5.) By vacating the PRS warrant, respondents conclude, the court divested DOP of “all jurisdiction” (*id.* at 6) over petitioner and somehow denigrated the sentence, or sentences, pursuant to which petitioner “would” have been released to parole. In order to erase these perceived consequences, respondents request “that the Court reverse the portion of the decision vacating the parole warrant” (*id.* at 6), thereby reinstating the warrant as a basis pursuant to which petitioner may be detained. However, the simple unassailable fact is that petitioner was not released to parole supervision on his underlying case so he could not have violated any conditions thereof for which a parole violation warrant could lawfully have been issued. [6] “In effect,” as petitioner's counsel puts it, respondents are “asking this Court ***911** to transfer the post release warrant to some phantom period of parole supervision.” (Affirmation in opposition to motion to reargue at 2.)

Vacatur of the PRS warrant had and will have no effect on the aggregate underlying sentence pursuant to which petitioner might have been released to parole. The fatal flaw in respondents' argument to the contrary can perhaps be traced to their mistaken contention that release to PRS equals release to parole. Although parole and PRS are administered and enforced pursuant to the same DOP rules and regulations, there are many practical differences between parole and postrelease which stem from the different penological purposes which they serve. [7] One fundamental difference which is determinative here is that release to postrelease supervision upon an inmate's completion of the incarceration component of a determinate sentence is mandatory (Penal Law § 70.45 [1]; *see also People ex rel. O'Connor v Berbary*, 195 Misc 2d 36 [2002] [holding that a correctional facility's continued confinement of an inmate beyond the maximum expiration date of the incarceration component of a determinate sentence based upon DOP's refusal to release him to PRS was unlawful]), while whether and when an inmate serving an indeterminate sentence is released to parole supervision are within the absolute discretion of the parole board (Penal Law § 70.40 [1] [a]; *see also Matter of Hines v State Bd. of Parole*, 293 NY 254, 257 [1944] [“so long as the Board violates no positive statutory requirement, its discretion is absolute and beyond review in the courts”]; *People ex rel. Stevenson v Warden of Rikers Is.*, 24 AD3d 122, 123 [1st Dept 2005] [“There is no federal or state constitutional right to be released to parole supervision before serving a full sentence”]).

Therefore, even assuming arguendo that on February 2, 2007, the day he was released by DOCS to the putative PRS, petitioner was eligible to be considered and had applied for release to parole ***912** supervision as part of his aggregate underlying sentence—an assumption for which there is ****5** no evidentiary support in the record—there is no basis upon which to presume that absent the putative PRS the parole board in the exercise of its absolute discretion would have granted his application, much less that petitioner would have been released on the same date. Thus, there is no basis upon which to presume, as respondents speculate, that petitioner would have been “on parole,” and not incarcerated, when he allegedly engaged in the conduct for which the PRS warrant was issued. Consequently, the PRS warrant did not interrupt the running of any term of imprisonment to which petitioner was subject as part of his aggregate underlying sentence [8] and since the PRS warrant itself had no effect upon petitioner's underlying sentence, vacating the warrant has no effect either. The integrity and terms of the 1998 sentence, the indeterminate portion of the 2001 sentence, and the incarceration component of the determinate portion of the 2001 sentence remain as they were on the day each was pronounced and are unaffected by the 8/27/08 order. Clearly, petitioner's underlying sentence has not been commuted.

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Nor has vacatur of the warrant divested DOP of its jurisdiction with respect to petitioner; DOP merely has not yet lawfully [9] exercised its statutory powers and authority to supervise him outside the confines of a correctional facility by releasing him to parole (*see* Executive Law § 259-a [4]). The 8/27/08 order did not, and the court does not now, determine the time remaining on the underlying indeterminate terms of imprisonment imposed by the 1998 and 2001 sentences as of the date petitioner was released to the putative PRS, nor whether nullification of the putative PRS has had an effect upon the running of those terms of imprisonment, [10] nor whether they have expired in the ***913** interim. [11] If those terms of imprisonment have not expired, presumably petitioner will be confined in a correctional facility until the board of parole determines that he should or should not be released to parole supervision. (*See* Executive Law § 259-c [1], [5].) Nothing the court has done in its August 27, 2008 decision in any way affects DOP's independently existing jurisdiction or its powers or authority to supervise petitioner should he be granted parole.

Accordingly, for the foregoing reasons, respondents' motion for leave to reargue is granted and upon reargument the court adheres to its determination on petitioner's original application, including that parole violation warrant number 577098 is vacated insofar as it related to an alleged violation of the putative PRS and only as to that detainer.

FOOTNOTES

1 Obviously, this is a typographical error. The court presumes that this document was signed by petitioner's counsel on September 7, 2008.

2 Respondents contend that the issue which they now seek leave to reargue was raised in their cross motion to transfer, submitted in opposition to the original petition, where they stated: "Petitioner still has 6 years and 3 months left on his underlying sentence. Therefore, Petitioner would not be entitled to immediate release from custody even if his PRS was nullified." (*See* motion to reargue at 2, quoting respondents' cross motion ¶ 6.) In fact, that statement was made in support of respondents' contention that petitioner was not entitled to a writ of habeas corpus; nowhere in their original submissions did respondents argue, as they do now, that vacating the PRS warrant, as petitioner requested, would have the practical effect of commuting the underlying sentence.

3 The court understands that by "underlying sentence" respondents refer to the aggregate term of imprisonment petitioner was required to serve on the 1998 and 2001 sentences, which respondents contend had to run consecutively (*see* motion to reargue at 3), as calculated by DOCS.

4 Rather, the legality of the actions of DOCS and DOP, which were not authorized by those "court-imposed" sentences, was at issue.

5 Respondents do not speculate further whether, absent the putative PRS, petitioner would have been "paroled" or "conditionally released." In fact, the distinction is meaningless because an inmate in petitioner's situation could not have been "conditionally released prior to the date on which such person [was] first eligible for discretionary parole release." (Penal Law § 70.40 [1] [b].)

6 Petitioner cannot be incarcerated for violating the conditions of a nonexistent period of parole supervision. (*Cf. People ex rel. Lewis v Warden, Otis Baum Correctional Ctr.*, *supra* [parole warrant which alleged a violation of a nonexistent period of PRS was not a valid basis for detention].)

7 "Parolees are, in essence, convicted criminals who are released from prison *before* the expiration of their term, under supervision, and who are allowed to remain outside the penal institution only on stated conditions." (*People v Dyla*, 142 AD2d 423, 439 [2d Dept 1988] [emphasis supplied].) In contrast, the purpose of PRS is to facilitate an ex-inmate's transition to the civilian community *following* completion of his term of imprisonment. (*See People ex rel. O'Connor v Berbary*, 195 Misc 2d 36, 37-38 [2002] [discussing statutory purposes of PRS and quoting from legislative memoranda].) Indeed, "[a] determinate sentence of imprisonment does not allow for parole." (Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 70.45, at 396 [2004 ed].)

8 Although it is true, as respondents note, that a term of imprisonment continues to run while an inmate is released to parole supervision (Penal Law § 70.40 [1] [a]), and is interrupted during any period in which he is found to have violated parole (Penal Law § 70.40 [3] [a]), petitioner was not on parole.

9 DOP's supervision of petitioner during the putative PRS was not lawful.

10 On the one hand, the putative PRS was a nullity ab initio, so the underlying indeterminate terms have not

been "held in abeyance until the successful completion of [a] period of post-release supervision" pursuant to Penal Law § 70.45 (5) (a). Yet, on the other hand, for the duration of his release to the putative PRS petitioner was not incarcerated; nor was he on parole, so he did not "continue service" of the underlying indeterminate terms of imprisonment pursuant to Penal Law § 70.40 (1) (a).

11 If they have expired, neither DOCS nor DOP has authority to detain petitioner further on the basis of the 1998 or 2001 sentences.

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52 A.D.3d 1207, 860 N.Y.S.2d 358, 2008 N.Y. Slip Op. 05132

****1** The People of the State of New York ex rel. Tommy L. Jenkins, Respondent
v
Richard J. Piscotti, Sheriff of Wayne County, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
June 6, 2008

CITE TITLE AS: People ex rel. Jenkins v Piscotti

HEADNOTE

Parole
Presumptive Release

Executive Law § 259-j (3-a), which requires termination of certain sentences after two years of unrevoked parole, is not applicable to presumptive releasees; Correction Law § 806 (7), which provides that "[a]ny reference to parole and conditional release in this chapter shall also be deemed to include presumptive release," is not applicable to Executive Law § 259-j (3-a).

Andrew M. Cuomo, Attorney General, Albany (Owen Demuth of counsel), for respondent-appellant.
Ronald C. Valentine, Public Defender, Lyons (Gary Muldoon of counsel), for petitioner-respondent.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), entered January 25, 2007. The judgment sustained the writ of habeas corpus and, inter alia, ordered respondent to release petitioner from his custody.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Respondent appeals from a judgment sustaining the writ of habeas corpus and, inter alia, ordering respon ***1208** dent to release petitioner from his custody on the ground that petitioner had not committed a parole violation. The record establishes that in January 2001 petitioner was convicted of criminal sale of a controlled substance in the third degree in violation of Penal Law § 220.39 (1) and was sentenced to an indeterminate term of incarceration of 4½ to 9 years. He was released on presumptive release in April 2004 but in October 2006 he was charged with operating a motor vehicle without a license. It is undisputed that the operation of a motor vehicle by petitioner without the written permission of his parole officer violated one of the conditions of his presumptive release.

County Court granted the petition pursuant to Executive Law § 259-j (3-a) upon determining that more than two years had elapsed since petitioner's release and that petitioner's release had not been revoked during that period of time. The court reasoned that, although Executive Law § 259-j (3-a) requires termination of certain sentences after two years of unrevoked "parole," that section "should not be construed to grant presumptive releasees fewer rights than parolees." The court further reasoned that Correction Law § 806 (7), which provides that "[a]ny reference to parole and conditional release in this chapter shall also be deemed to include presumptive release," should be applied to Executive Law § 259-j (3-a) because there was no indication that the Legislature intended to exclude presumptive releasees from the benefit in section 259-j (3-a) provided to individuals on parole. ****2**

We reverse. Petitioner was released from the custody of the Department of Correctional Services pursuant to the presumptive release program for nonviolent inmates (*see* Correction Law § 806 [1]), and he therefore was not on parole. Contrary to the court's determination, Correction Law § 806 (7) is not properly read in conjunction with Executive Law § 259-j (3-a) inasmuch as they were enacted at different times and do not cross-reference each other. Correction Law § 806 (7) was made effective in 2003, while Executive Law § 259-j (3-a) was made effective in 2005. Moreover, Correction Law § 806 (7) applies to any reference to parole and conditional release "in this chapter," and Executive Law § 259-j (3-a) plainly is not a part of "this chapter."

To the extent that petitioner contends that the outcome is incongruous, we agree with him that to differentiate between those individuals who were released by way of parole rather than by way of presumptive release is a technical distinction without a substantive basis. Nevertheless, we are bound by the rules of statutory construction, pursuant to which we must ***1209** " 'construe clear and unambiguous statutes

as enacted and may not resort to interpretative contrivances to broaden the scope and application of statutes' ” (*People v Hernandez*, 98 NY2d 8, 10 [2002]). Executive Law § 259-j expressly treats parolees and presumptive releasees separately, while Correction Law § 806 (7) provides that “[a]ny reference to parole and conditional release in this chapter shall also be deemed to include presumptive release” and thus expressly treats parolees, conditional releasees and presumptive releasees in the same manner. We are bound by that express language in the absence of a legislative intent to construe the statutes otherwise, and we note in particular that Executive Law § 259-j and Correction Law § 800 *et seq.* have been the subject of multiple legislative amendments in the last decade. We therefore cannot conclude that the failure to include presumptive releasees in Executive Law § 259-j (3-a) was mere inadvertence on the part of the Legislature, rendering it subject to judicial amendment “to prevent inconsistency, unreasonableness and unconstitutionality” (McKinney's Cons Laws of NY, Book 1, Statutes § 363, Comment, at 527; *see also Elmy v City of Amsterdam*, 25 AD3d 1038, 1040 [2006], *lv denied* 6 NY3d 713 [2006]). Present—Smith, J.P., Lunn, Fahey, Pine and Gorski, JJ. [*See* 2006 NY Slip Op 30179(U).]

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139 A.D.2d 210, 531 N.Y.S.2d 899

The People of the State of New York, Respondent,
v.
Terrence Bourne, Appellant.

Supreme Court, Appellate Division,
First Department, New York
33419
July 21, 1988

CITE TITLE AS: People v Bourne

SUMMARY

Appeal from a judgment of the Supreme Court (Thomas B. Galligan, J.), rendered May 21, 1985 in New York County, convicting defendant, upon his plea of guilty, of manslaughter in the first degree and sentencing him to a term of imprisonment of from 8 13 to 25 years.

HEADNOTES

Crimes
Appeal
Waiver of Right to Appeal--Interest-of-Justice Jurisdiction of Appellate Division

([1]) A waiver of the right to appeal a criminal conviction, entered by a defendant as a condition to a negotiated plea, does not bar that defendant from invoking the unique, historically recognized, “constitutionalized” power *(see*, NY Const, art VI, §4 [k]) of the Appellate Division to review his sentence as a matter of discretion in the interest of justice; neither is the Appellate Division limited or restricted in the same way the trial court is when it finds a negotiated sentence to be unfair, since the Legislature has provided that the prosecutor's consent to a plea is required at the trial level, which necessarily permits the prosecutor to impose lawful conditions which the trial court may not disregard, whereas the Legislature has not seen fit to impose similar restrictions on the power of the Appellate Division to reduce a sentence in the interests of justice. The Appellate Division has not only an interest in seeing that justice is done, but a duty to correct injustices presented under its interest-of-justice jurisdiction; the State has no legitimate interest in preserving a sentence that is unjust. Moreover, it may not be argued that a reduction of a sentence in the interest of justice undermines the finality of a plea conviction, since the Appellate Division may impose a legally authorized lesser sentence (CPL 470.20 [6]), and not even a remand for resentencing will be required.

Courts
Dicta--Lack of Precedential Value

([2]) In determining whether a defendant may waive his right to appeal, the argument that the Court of Appeals impliedly decided that a defendant could waive review of his sentence is unavailing, since law is made not by what was said, but by what was decided, and what was said is not evidence of what was decided unless it relates to the question presented for decision; a case, therefore, is precedent only as to those questions presented, considered and squarely decided. Accordingly, where the Court of Appeals was not presented with, nor did it decide, the effect of a waiver on the Appellate Division's ability to review a sentence in its discretion, its dicta regarding waiver can carry no controlling weight.

Crimes
Sentence
Excessive or Harsh Sentence

([3]) In a homicide prosecution, defendant's negotiated sentence of 8 13to 25 years in prison, which he received as part of a plea bargain whereby he was convicted of manslaughter in the first degree, was not unfair where the facts ***211** reveal that a strong case for second degree murder could have been presented; inasmuch as the murder conviction would expose defendant to a penalty ranging from 15 years to life to 25 years to life, the sentence defendant received was very favorable.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Appeal and Error, § 4 et. seq.

Carmody-Wait 2d, Courts and Their Jurisdiction § 2:168 *et seq.*; Appeals to the Appellate Division § 72:2.

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CLS, CPL 470.20 (6); NY Const, art VI, §4 (k).

NY Jur 2d, Courts and Judges, §§263-265.

APPEARANCES OF COUNSEL

Ralph Fabrizio of counsel *(Carol Gette* with him on the brief; *Robert M. Morgenthau, District Attorney*, attorney), for respondent.
Andrea Hirsch of counsel *(Philip L. Weinstein*, attorney), for appellant.

OPINION OF THE COURT

Carro, J.

Express waivers, the "intentional relinquishment or abandonment of a known right" *(Johnson v. Zerbst*, 304 US 458, 464) are ordinarily given effect if "knowingly and voluntarily made" *(Barker v. Wingo*, 407 US 514, 529) and not in violation of public policy *(Hadden v. Consolidated Edison Co.*, 45 NY2d 466, 469). Without a doubt, defendant asserts cogent arguments, which deserve our careful attention, as to why this court should scrutinize more closely the growing prosecutorial practice of exacting as a condition to a negotiated plea the waiver of the right to appeal. *(See, People v. Ventura*, 139 AD2d 196, 201 [1988].) This case, however, presents an altogether independent issue, which though not addressed by the parties on this appeal, once determined will resolve the question of the reviewability of defendant's sentence despite his express waiver of the right to appeal. That issue is whether a waiver of the right to appeal a judgment operates not only as a waiver of our "law" jurisdiction but also of our interest of justice jurisdiction to review and modify sentences in our discretion.

([1])We now hold that a waiver of the right to appeal a ***212** criminal conviction, entered by a defendant as a condition to a negotiated plea, does not bar that defendant from invoking the unique, historically recognized "'constitutionalized'" power *(People v. Pollenz*, 67 NY2d 264, 268) of this court to review his sentence as a matter of discretion in the interest of justice. In so holding, we are mindful of the fact that recently a different panel of this very court and earlier decisions of our fellow Departments have upheld such waivers and dismissed appeals seeking appellate review of sentences as excessive. *(See, People v. Cooks*, 135 AD2d 455 [1st Dept]; *People v. Harvey*, 124 AD2d 943 [3d Dept]; *People v. Davison*, 108 AD2d 820 [2d Dept].) Reconsideration of these decisions is warranted, indeed, compelled, by the fact that it does not appear that the effect of these waivers on our sentence review powers has ever been analyzed or even addressed. We take this opportunity to do so now. But first, a brief review of the facts of this case is in order.

On April 26, 1985, defendant pleaded guilty to manslaughter in the first degree to cover an indictment charging him with murder in the second degree. A condition of the plea, which carried a promise of an 8 13-to-25-year sentence, was that defendant waive his right to appeal the judgment. At the allocution, when the court inquired whether defendant was prepared to waive his right to appeal, defendant responded that he was not. However, after conferring with counsel, defendant then admitted his intent to waive his right to appeal. Defendant was sentenced in accordance with the terms of the negotiated plea. Defendant now seeks review of his sentence as excessive, thereby invoking the interest of justice jurisdiction of this court.

This interest of justice jurisdiction is exclusive to criminal appeals. Thus, while our jurisdiction in civil cases is itself generous in that it permits appellate review of most nonfinal and final orders and judgments pertaining to pretrial and trial proceedings, a reversal or modification must be grounded upon the law (i.e., preserved errors), the facts, or a combination of both. (CPLR 5501 [a], [c].) In criminal cases, on the other hand, while interim appeals are not, except under extraordinary circumstances, permitted (CPL 450.10, 450.20; *Matter of State of New York v. King*, 36 NY2d 59, 64), our jurisdiction is nevertheless extremely liberal in that we may reverse or modify, upon the law, the facts or as a matter of discretion in the interest of justice, or a combination of the above. (CPL 470.15 [3].) Even more extraordinary is our explicitly authorized ***213** power, when reviewing a sentence in our discretion, not only to adjudge it to be excessive, but to ourselves impose some legally authorized lesser sentence. (CPL 470.15 [6] [b]; 470.20 [6].)

A brief historical review of this power illuminates its invulnerability to the attack presented in this case. The Appellate Division of the Supreme Court of New York came into existence in 1894 (NY Const of 1894, art VI, §§ 1, 2), for the express purpose of exercising appellate jurisdiction over the Trial and Special Terms of the Supreme Court and any legislatively established inferior courts. *(Waldo v. Schmidt*, 200 NY 199, 202.)[*] Soon after its creation and before it was specifically given any express statutory grant of jurisdictional power to reduce sentences, the Appellate Division exercised, as inherently given, the power to review

the claimed harshness of sentences in the interest of justice. *(People v. Thompson*, 60 NY2d 513, 520, citing *People v. Miles*, 173 App Div 179.)

* The Supreme Court of the State of New York originated by statute on May 6, 1691, and continued in existence up to the adoption of the first State Constitution of 1777, in which it was recognized as "existing". *(In re Steinway*, 159 NY 250, 255-257; 28 NY Jur 2d, Courts and Judges, § 3, at 26.) In creating the Appellate Division in 1894, the Legislature was merely vesting it with the appellate jurisdiction previously exercised by the General Term of the Supreme Court. *(People v. Pollenz*, 67 NY2d 264, 268.)

In *People v. Miles (*supra.*)* the Appellate Division, Third Department, reasoned that because sentencing was a naturally vested power of the Supreme Court, it was thereby inherently subject to review under the general appellate powers of the Appellate Division. Furthermore, the court said, "any determination of a trial judge or justice which is unjust in its relation to the crime of which the defendant stands convicted is within the power of the Supreme Court [Appellate Division] to correct" *(*supra., at 185). This inherent power to review and correct was subsequently expressly codified in section 543 of the Code of Criminal Procedure, and later in 1971, when the Legislature adopted the current Criminal Procedure Law, that power to review and reduce sentences in the interest of justice was continued in CPL 470.15 (6) (b) and 470.20 (6). Finally, this power, originally recognized as inherent, was deemed "constitutionalized" by NY Constitution, art VI, §4 (k), which grants to the Appellate Divisions all the jurisdiction possessed by them by statute on the effective date of that article (Sept. 1, 1962), including the jurisdiction given ***214** them by CPL 470.15 and 470.20. *(People v. Pollenz*, supra., 67 NY2d, at 268.) The *Pollenz* court determined that this jurisdiction may not be legislatively limited or conditioned by law *(*supra.*)*.

Neither is this court limited or restricted in the same way the trial court is when it finds a negotiated sentence to be unfair. In *People v. Thompson* (60 NY2d 513) the court, after reviewing the history of and noting the expansiveness and uniqueness of our sentence review powers, held that the requirement established in *People v. Farrar* (52 NY2d 302) that a trial court must afford the prosecutor an opportunity to withdraw consent to a plea when it finds a negotiated sentence to be excessive, does not apply to the Appellate Division's power to reduce a sentence in the interest of justice (60 NY2d 513, esp 519-521, supra.*)*. The court based its decision on the fact that the statute at issue in *Farrar* (CPL 220.10 [3], [4]), requiring the consent of the People and the trial court in negotiated pleas, was simply inapplicable to the Appellate Division, which upon a distinctively different and independent statutory basis has the power to review and reduce a sentence in its discretion and in the interest of justice, irrespective of the bargained for terms of the plea. *(People v. Thompson*, supra., at 519.)

The court summarized its holding, using words that are equally dispositive of the issue herein, as follows: "In sum, our decision in this case, as in *Farrar*, is dictated by the applicable statutes. The Legislature has provided that the prosecutor's consent to a plea is required at the trial court level *which necessarily permits the prosecutor to impose lawful conditions which the trial court cannot disregard. The Legislature, however, has not seen fit to impose similar restrictions on the Appellate Division's power to reduce a sentence in the interests of justice* and impose a lesser one if a majority of the court concludes that the sentence imposed was unduly harsh under the circumstances." *(People v. Thompson*, supra., at 521 [emphasis added].)

The import of these words to the facts herein, where the waiver of an appeal was a condition to the plea, cannot be mistaken. We are entitled to conclude from the *Thompson* holding, as well as from the constitutionally protected nature of our power and duty to review sentences in the interest of justice, that even assuming the voluntary and knowing nature of defendant's waiver, the fact of the waiver does not prohibit the defendant from invoking our interest of justice jurisdiction, ***215** nor does it restrict this court from disregarding the waiver and as a matter of discretion reviewing the alleged excessiveness of the sentence.

Our exclusively granted interest of justice jurisdiction to review and modify even lawfully imposed sentences exists precisely to correct unjust sentences, and this review defendant cannot waive. There can be no doubt that when an unjust sentence has been imposed, something in the process of administering criminal justice has gone awry. Equally irrefutable is the fact that this court has not only an interest in seeing that justice is done, but a duty to correct injustices presented under our interest of justice jurisdiction. The State, on the other hand, has no legitimate interest in preserving a sentence that is unjust. The People may have a legislatively validated role in plea negotiations, nearly like a veto power, but they enjoy no such role at the appellate level when it

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relates to our power to review and modify sentences. *(See, People v. Thompson*, supra., 60 NY2d, at 521.)

We hasten to add that we do not view this broad power as giving us license to exercise it in a manner that is "capricious and whimsical, affirming when we feel like it, and reversing when we feel like it." *(People v. Kidd*, 76 AD2d 665, 667.) What it does mean is that just as "we do not overstep the line when we exercise our 'interest of justice' powers on the basis of so fundamental a consideration as guilt or innocence" *(*supra., at 667), neither do we overstep it when we exercise our unique powers to review and, if warranted, modify that which next to a determination of guilt has the most significant impact on a defendant--the punishment meted out for his crime.

Neither can the State argue that a reduction of a sentence in the interest of justice undermines the finality of a plea conviction. Since this court itself can impose a legally authorized lesser sentence (CPL 470.20 [6]), not even a remand for resentencing will be required. While we note that the People are apt to have "frustrate[d] *** expectations" as to what the punishment should be *(People v. Thompson*, supra., at 520), we remind them that the occurrence of appellate reduction of a negotiated sentence is "a minimal one, which presumably is taken into account or discounted at the time of the plea negotiations" *(*supra., at 520).

([2])A final point to address before reaching the merits is the assertion that the Court of Appeals in *People v. Thompson (*supra.*)* impliedly decided that a defendant could waive his ***216** statutory right to appellate review of his sentence at the time he pleads guilty *(*supra., at 520). Law is made not "by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates to the question presented for decision." *(People ex rel. Metropolitan St. Ry. Co. v. State Bd. of Tax Commrs.*, 174 NY 417, 447.) A case, therefore, is precedent only as to those questions presented, considered and squarely decided. *(Empire Sq. Realty Co. v. Chase Natl. Bank*, 181 Misc 752, 755, *affd* 267 App Div 817, *lv denied* 267 App Div 901.) In *Thompson*, the court was not presented with, nor did it decide, the effect of a waiver on this court's ability to review a sentence in its discretion.

Furthermore, while the dicta of a Court of Appeals decision may carry considerable weight in guiding lower courts in their determinations *(see, e.g., Gimbel Bros. v. White*, 256 App Div 439, 442), an extraneous, gratuitous and casually expressed statement, particularly in a case where the issue was neither argued nor factually relevant, can carry no controlling weight. *(Cf., Garofano Constr. Co. v. City of New York*, 180 Misc 539, 540, *affd* 266 App Div 960.) Such is the case with respect to the dicta in *Thompson (*supra.*)*. After stating that Thompson had a statutory right of appellate review of his sentence, the court casually added that defendant had not waived that right when he pleaded guilty, citing an analogously supportive *People v. Williams* (36 NY2d 829), which upheld the waiver of the right to appeal a suppression ruling. The Court of Appeals did not rule in *Williams*, nor has it yet ruled, on the waiver of the right to appeal a sentence. We strongly doubt, particularly in light of the later *Pollenz* decision (67 NY2d 264, supra.*)* which noted the "constitutionalized" nature of our power in this area, that the Court of Appeals in *Thompson* meant to foreclose discussion on a question as important as this in such a casual, unelaborated manner, without benefit of full argument. The courts of this State simply do not so offhandedly establish legal principles.

([3])This finally brings us to the merits of defendant's argument that his sentence of 8 13 to 25 years for this manslaughter conviction was unfair. Defendant's argument is wholly unpersuasive. After his initial attempt to stab the decedent during an argument was thwarted, defendant proceeded to walk to a hardware store, where he stole a knife, and returned to the decedent's place of employment, intending to continue his attack. Not finding him there, he searched through the financial district area of Manhattan until he did ***217** find the victim and killed him. These facts make out a strong case for murder in the second degree, which carries with it a sentence penalty ranging from 15 years to life to 25 years to life. The terms of this negotiated plea, reducing the crime to manslaughter in the first degree with a promised sentence of 8 13 to 25 years, therefore, were very favorable in light of the facts of this crime.

Accordingly, the judgment of the Supreme Court, New York County (Thomas B. Galligan, J.), rendered May 21, 1985, convicting defendant, after a plea of guilty, of manslaughter in the first degree, and sentencing him to an indeterminate term of imprisonment of from 8 13 to 25 years, is affirmed.

Asch, J.

(Dissenting).

Defendant moved to suppress confessions and out-of-court identifications of two eyewitnesses to the killing of Eugene

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Curry. After the suppression hearing but before any decision by Criminal Term on his motions, defendant offered to plead guilty to the reduced charge of manslaughter in the first degree in return for a sentence of 8 13 to 25 years. As a specific part of this plea bargain, the defendant agreed to waive his right to a decision on the suppression motions and also his right to appeal his sentence. Defendant was thereafter sentenced to the promised term.

On this appeal, defendant contends that his waiver of his right to appeal his sentence was ineffective because it was not knowing and voluntary. He also contends that such waivers are void, in any event, as against public policy.

A majority of this court, in affirming defendant's conviction, indicate their agreement with these contentions. While I would also affirm if the merits were to be reached in this matter, I feel that defendant's waiver of his statutory right to appeal his sentence was entirely proper and, accordingly, I would dismiss the appeal herein.

Initially, I note that defendant's waiver was clear and unequivocal. Thus, the court told defendant "[i]t's also a condition of this plea that you waive appeal in this case, do you understand that?" When defendant said "[y]es, Your Honor", the court continued, "[a]re you prepared to do that?", and defendant answered "[n]o, I'm not". However, after an off-the-record conference with his attorneys, defendant agreed to waive his appeal.

Although defendant attributes his first answer to his "initial reluctance", it appears from the record that he simply did not understand what the Judge had meant. Thus, after his first ***218** negative response, one of his lawyers interjected in explanation to defendant, "[h]e's asking you if you are prepared to waive your appeal". After his conference with his attorneys, the misunderstanding was cleared up but, even if defendant's contention of an initial reluctance on his part is correct, the record is clear it was overcome by an unequivocal waiver after the conference with his attorneys.

The Judge advised defendant of his waiver of the right to appeal and the defendant acknowledged he understood. Such inquiry by the court has been found sufficient to waive constitutional rights *(see, Boykin v. Alabama*, 395 US 238; *People v. Harris*, 61 NY2d 9) and, a fortiori, should suffice for waiver of the right to appeal, which is a statutory right. Further, defendant has failed to raise the instant claim in the trial court, nor has he moved to withdraw his guilty plea. Consequently, he cannot now raise this issue on appeal *(People v. McGourty*, 125 AD2d 417).

Defendant further contends that he "may" have believed at the plea that, even without a waiver, his right to challenge his sentence was limited by CPL 450.10 and 450.15, which have now been held to violate the New York State Constitution *(People v. Pollenz*, 67 NY2d 264). The short answer to this is that neither defendant nor his attorneys expressed this as a reason for agreeing to the waiver. In any event, the People sought a waiver of defendant's right to appeal any suppression decision even though, under the circumstances here, an appeal was forfeited *(People v. Fernandez*, 67 NY2d 686). Likewise, the People were entitled to seek and obtain a waiver of his right to appeal his sentence, even though the statute *at the time* limited such right solely to one to apply for permission to appeal. By so doing, the People insulated themselves from any challenge to the constitutionality of the statutes, certainly an understandable and prudent practice.

Defendant's second contention is that his waiver of the right to appeal his sentence is void as against the public policy of this State. In support of this he cites *People v. Ramos* (30 AD2d 848), where the court struck down the validity of conditioning the defendant's plea upon his forfeiture of his right to appeal. In fact, this 3 to 2 decision of the Second Department held that public policy would be offended if a defendant agreed to waive appeal of any aspect of his conviction. That case, in which, if the plea were vacated, the defendant would have been subjected to a potential death sentence following jury trial, was distinguished, on the facts, by the same Appellate ***219** Division in *People v. Irizarry* (32 AD2d 967, *affd* 27 NY2d 856) which, however, upheld an agreement to waive an appeal pursuant to a plea bargain. In any event, *Ramos* (and *Irizarry* to the extent it followed *Ramos)* were overruled implicitly in *People v. Davison* (108 AD2d 820) when the Second Department declared: "Defendant made a knowing and intelligent waiver of his right to appeal as a condition of the pleas *(see, People v. Gray*, 75 AD2d 826). Under such circumstances the appeals are dismissed" *(*supra., at 821).

The Third Department, in *People v. Harvey* (124 AD2d 943, *lv denied* 69 NY2d 746), recently held that a waiver by a defendant of his right to appeal from his sentence would be given effect. In so doing, it noted that it had earlier found in *People v. Jandrew* (101 AD2d 90) that, after a plea of guilty, a defendant's right to appeal from a sentence or from the denial of a suppression motion is statutory and not of constitutional dimension, and thus a waiver of appeal from a suppression

motion was valid. This holding was reaffirmed by that court in *People v. Lucas* (106 AD2d 821) and the Third Department held the same reasoning should apply to a waiver of the right to appeal from a sentence *(People v. Harvey*, supra., at 943).

The Fourth Department, in *People v. Durant* (101 AD2d 1008), also dismissed a similar appeal, holding that a defendant may properly be held to a waiver of the right to appeal.

This court has most recently joined our sister Departments and expressly held that, where a defendant clearly waives his right to appeal from the sentence, the appeal should be dismissed *(see, People v. Cooks*, 135 AD2d 455).

While the Court of Appeals has not explicitly endorsed this view, it impliedly found that waiver of a sentence appeal would be proper. Thus, in *People v. Thompson* (60 NY2d 513), the court held that a reduction of a negotiated sentence by the Appellate Division did not mandate a remand to the trial court to afford the prosecutor an opportunity to withdraw consent to the plea. The *Thompson* court noted that defendants have a statutory right to appeal to the Appellate Division's discretionary power to reduce a sentence in the interest of justice, which Thompson "did not expressly waive *** at the time he pleaded guilty" *(*supra., at 520). The *Thompson* court, in support of this proposition that otherwise appealable issues may be expressly waived, cited *People v. Williams* (36 NY2d 829, *cert denied* 423 US 873). There, the Court of Appeals recognized that a waiver of the right to appeal a ***220** decision on a suppression motion, another statutory right, was valid as long as it was knowing and voluntary.

Knowing and voluntary waivers of nonconstitutional rights have never been held to be against public policy by the Court of Appeals. In fact, it has upheld waivers of appellate claims when the waivers were conditions of plea bargains. In *People v. Stephens* (52 NY 306, 310-311), an oral agreement by the Attorney-General not to appeal the sustaining of a demurrer to a complaint was held binding. In *People v. Esajerre* (35 NY2d 463, 466) and *People v. Williams (*supra.*)*, the court upheld waivers of the right to appeal denial of suppression motions.

Finally, the failure by the majority to dismiss this appeal outright constitutes a finding by them that defendant's waiver was ineffective and void. However, the procurement by the People of this waiver of the right to appeal the sentence was a *sine qua non* of the plea bargain. Consequently, since the plea bargain was induced by this waiver, the plea must now be vacated *(People v. Rice*, 25 NY2d 822, 823).

The People note that they had an overwhelmingly strong case, including defendant's confessions corroborated by a number of eyewitnesses, and would have been willing to try defendant for murder. Instead of risking conviction of murder after trial, by promising to waive appeal of his sentence defendant managed to avoid a life sentence and reduce the minimum term by at least half. Thus, vacatur of the waiver mandates vacatur of the plea and return of the People and defendant to their original positions. Affirmance herein gives defendant the benefit of his plea bargain while simultaneously depriving the People of one of the benefits for which they bargained.

Sandler and Milonas, JJ., concur with Carro, J.; Murphy, P. J., and Asch, J., dissent in an opinion by Asch, J.
Judgment, Supreme Court, New York County, rendered on May 21, 1985, affirmed. ***221**

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142 A.D.2d 423, 536 N.Y.S.2d 799

The People of the State of New York, Respondent,
v.
Willie Dyla, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
1879E
December 30, 1988

CITE TITLE AS: People v Dyla

SUMMARY

Appeal from a judgment of the Nassau County Court (Raymond Harrington, J.), rendered May 16, 1984, upon a verdict convicting defendant of murder in the second degree (three counts) and burglary in the first degree.

HEADNOTES

Crimes
Arrest
Probable Cause--Arrest of Parolee by Parole Officer

([1]) The arrest of a parolee by his parole officer was based upon probable cause to believe that the parolee had violated certain conditions of his parole where one of those conditions was that the parolee disclose any contact he may have with the police, and where it became apparent to the parole officer during an interview with the parolee that the latter was persisting in his failure to admit that he had had contact with the police, a contact which the parole officer was sure had occurred, having previously spoken with the police. Accordingly,the arrest of the parolee by his parole officer was not an unreasonable seizure in contravention of constitutional standards (US Const 4th Amend, 14th Amend; NY Const, art I, §12).

Crimes
Arrest
Warrantless Arrest of Parolee by Parole Officer--Suppression of Confession

([2]) In a prosecution for murder and burglary, even if the arrest of defendant parolee is considered illegal because no parole violation warrant had been issued *(see*, Executive Law §259-i [3] [a] [i]; 9 NYCRR 8004.2), the arrest did not amount to an unreasonable seizure and did not violate any of defendant's constitutional rights; accordingly, exclusion of defendant's subsequent confession to the police is not an appropriate remedy. Exclusion from evidence of a voluntary confession is warranted only when it is shown that the confession was obtained in violation of a constitutionally protected right of the accused, and no such violation occurred because parolees have no constitutional right to be arrested only pursuant to a warrant. Violation of the aforementioned statute requiring the issuance of a parole violation warrant does not require suppression of the confession since that statute is not jurisdictional, is not meant to protect the privacy of the public, affects no substantial right, and is purely a technical requirement. The Constitution does not require the suppression of evidence gathered as a result of a seizure which is not unreasonable and, hence, not unconstitutional, solely on the grounds that the seizure may be considered violative of some State statute, ordinance or regulation, where no bad faith is shown on the part of the police and where the statute in question is not designed to implement Fourth Amendment rights.

Crimes
Confession
Dissipation of Possible Illegal Taint

([3]) In a prosecution for murder and burglary, even assuming that the warrantless arrest of defendant parolee by his parole officer was so illegal as to warrant the application of the exclusionary rule, any taint caused by the ***424** arrest had dissipated prior to defendant's subsequent confession to the police, where the parole officer was not acting as an agent for the police, where the confession was preceded by a knowing and intelligent waiver of defendant's *Miranda* rights, and where there was a significant intervening event which occurred between the time of defendant's initial arrest and the time of his confession, i.e., defendant had been released after his initial arrest and was, thus, essentially free to choose between going with the police or not. A reasonable person in defendant's position at the time of his transfer from the

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parole office to police headquarters would have thought himself free to leave, so that at that point defendant was not in custody. Moreover, whatever misconduct may have been committed by the parole officer in arresting defendant without a warrant cannot be attributed to the homicide detectives who scrupulously respected defendant's rights at every turn; the parole officer was not acting as a conduit for the police and the arrest for a parole violation was not a pretext for the arrest of defendant on a charge of homicide.

Crimes
Arrest
Custodial or Noncustodial Status of Defendant

([4]) In a prosecution for murder and burglary in which defendant parolee was arrested by his parole officer without a warrant and then turned over to the custody of homicide detectives, the fact that defendant learned that he failed a polygraph test administered pursuant to the homicide investigation did not transform his noncustodial status into a custodial one, since defendant had been specifically advised by the polygraph examiner that he was free to leave police headquarters at any time and that in the eyes of the law the results of the polygraph test were worthless; the fact that defendant failed the polygraph merely elevated defendant's status as a suspect "a little bit more", and it cannot be inferred that the police considered defendant to be in custody at that point since a reasonably intelligent and innocent man, under the circumstances, would not have concluded that, because of the polygraph test results alone, he would be physically restrained if he sought to leave. Therefore, defendant was not under arrest at that point.

Parole
Parole Violation Warrant
Requirement for Arrest by Parole Officer

([5]) There is no rule of constitutional law which requires that a warrant must be issued prior to the arrest of a parolee known to have committed a parole violation, and it would be anomalous to hold that parolees have a constitutional right to be arrested only upon a warrant, while probationers, whose status is comparable, do not have a similar right, particularly since as a general matter parolees are guilty of more serious crimes than those who receive probation. The requirement that the arrest of a parole violator be preceded by the issuance of a warrant (Executive Law §259-i [3] [a] [i]) is more in the nature of a procedural or "housekeeping" rule than a requirement designed to protect individual liberty, and the type of warrant in question is not one issued by a neutral Magistrate, but is issued by an administrative officer who is basically a colleague of the officer who is seeking the warrant *(see*, 9 NYCRR 8004.2 [b]). Moreover, the failure to obtain a parole violation warrant is particularly excusable where no decision had been made by the parole officer as to whether to revoke parole until the parolee was actually in the presence of the officer.

Crimes
Right to Remain Silent
Subjective Belief of Defendant

([6]) In a prosecution for murder and burglary, there is no merit to defendant's argument that his statements to police were extracted in ***425** violation of his privilege against self-incrimination on the grounds that he subjectively believed that if he did not tell the truth, his parole would be revoked; even assuming that the defendant had such a perception, it would not have been a reasonable one, because the State may not punish a parolee for invoking his Fifth Amendment privilege by revoking his parole.

Crimes
Confession
Interrogation Technique--Use of Polygraph

([7]) In a prosecution for murder and burglary, the interrogation techniques employed by the police were not violative of due process; there was no abuse of a polygraph test since there is no evidence that the polygraph examiner deceived defendant with respect to the accuracy of the procedure or with respect to his own conclusions as to defendant's veracity.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Evidence, §§ 529, 542, 543.

CLS, Executive Law § 259-i (3)(a)(i); NY Const, art I, §12; US Const 4th Amend.

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NY Jur 2d, Criminal Law, §§120-134, 142, 1722, 1989.

ANNOTATION REFERENCES

Admissibility of pretrial confession in criminal case--Supreme Court cases. 22 L Ed 2d 872.

APPEARANCES OF COUNSEL

Andrew F. Plasse for appellant, and appellant *pro se*.
Denis Dillon, District Attorney (Anthony J. Girese and *Bruce E. Whitney* of counsel), for respondent.

OPINION OF THE COURT

Bracken, J.

([1]- [3])The defendant, Willie Dyla, committed a murder while released from prison on parole. He now claims that the confession that he made to Nassau County homicide detectives must be suppressed because it was preceded by an illegal arrest. We hold that the arrest of Dyla by a parole officer was based upon probable cause to believe that Dyla had violated certain conditions of parole, and that even if the arrest must be considered illegal because no parole violation warrant had been issued *(see*, Executive Law §259-i [3] [a] [i]; 9 NYCRR 8004.2), it did not amount to an unreasonable seizure and did not violate any of Dyla's constitutional rights, so that exclusion of the confession is not an appropriate remedy. We also find that, even assuming that the illegality of the arrest was ***426** of such a magnitude as to warrant the application of the exclusionary rule, any taint caused by the arrest had dissipated prior to Dyla's confession. The County Court was therefore correct in denying Dyla's motion to suppress. There being no merit to the remainder of Dyla's contentions, the judgment of conviction should be affirmed.

I

After a trial by jury, at which his confession to police was admitted into evidence against him, Dyla was found guilty of the murder of Valerie Abney. The victim died as the result of asphyxiation due to strangulation on March 28, 1982. The evidence adduced at trial established beyond any reasonable doubt that during the course of his burglary of the victim's apartment Dyla caused the victim's death by gagging her and placing a belt around her neck.

Detectives Gary Abbondandelo and Robert Dempsey, both members of the Nassau County Homicide Squad, were assigned to conduct an investigation shortly after the discovery of the victim's body on March 29, 1982. Abbondandelo learned from another detective that Dyla was known to have been a friend of the victim. On March 31 Abbondandelo went to 46 Elm Avenue, Dyla's residence, and left his card with one of Dyla's neighbors. At 9:25 A.M. the following day, April 1, Dyla telephoned Detective Abbondandelo and agreed to meet with him at police headquarters in Mineola on April 2. However, Dyla failed to keep that appointment.

Further investigation revealed that Dyla had been on parole at the time of the murder. On April 2, 1982, Detective-Sergeant Kenney informed Dyla's parole officer, Robert Burford, that Dyla was wanted for questioning in connection with a homicide investigation, and that Dyla had been contacted by Abbondandelo on April 1. Dyla's failure to inform Burford of this contact constituted a violation of one of the conditions of his parole.

Detective Dempsey met with Burford on April 3 and informed Burford that the police had been unsuccessful in locating Dyla at 46 Elm Street, his last known address. The police had learned from Dyla's former paramour that Dyla had left that address, and that his whereabouts were unknown. On April 7, Dyla's mother was contacted and stated that she, too,was unaware of Dyla's whereabouts.

On April 8, Dyla telephoned Burford and informed him that ***427** he had entered a residential drug program in New York City. Dyla was instructed to report to the parole office in Hempstead on April 12. Burford then informed Lieutenant Spillane of the Nassau County Homicide Squad that Dyla was due to report to the parole office in Hempstead on April 12.

Dyla arrived at the parole office in the company of a companion at 10:15 A.M. on April 12. Burford interviewed Dyla for several minutes concerning his change of address and change in drug treatment programs. After it became apparent that Dyla was persisting in his failure to admit that he had had contact with the police, Burford decided to arrest him for a violation of parole. Dyla was then handcuffed to a chair. It is clear that Burford had not, as of that time, obtained a parole violation warrant.

Detectives Abbondandelo and Dempsey arrived at Burford's office at approximately 11:00 A.M. The handcuffs were removed as soon as the detectives arrived, although it is not clear whether Abbondandelo asked Burford to remove them. Abbondandelo informed both Dyla and Burford that Dyla

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was not being placed under arrest for the homicide. However, Dyla was requested to accompany the detectives to police headquarters in Mineola for questioning. Dyla agreed to go, and his companion was allowed to accompany them. It is important to note that Burford testified that he would not have allowed Dyla to leave his office if Dyla had refused to cooperate with the police.

At police headquarters, Dyla was questioned about the Abney homicide, and initially gave an exculpatory account of his whereabouts on March 28. Dyla then agreed to take a polygraph test. At approximately 12:50 P.M. Dyla was introduced to Detective Sergeant Edward Goutink, the polygraph examiner, who informed Dyla of his *Miranda* rights, and who also told Dyla that the results of the polygraph test were not admissible as evidence. Goutink emphasized, however, that any incriminating statements made during the test could be admitted into evidence. Dyla submitted to the polygraph test after a knowing and voluntary waiver of his rights.

At the conclusion of the test, Detective Goutink informed Dyla that he "was absolutely convinced after analyzing the charts that he had lied ... and that, in fact, he had killed Valerie Abney". Goutink then engaged Dyla in an hour-long conversation which centered on the beneficial consequences that flow from one's confrontation with and admission of guilt. ***428**

At approximately 5:00 P.M., Detectives Abbondandelo and Dempsey were informed by Goutink that Dyla had failed the polygraph test. Dyla was then taken back to the Homicide Squad office. Dyla was again read his *Miranda* rights, which he again waived. Abbondandelo reminded Dyla that he had failed the polygraph and that Goutink's opinion was that he was involved in the murder of Valerie Abney. The two detectives then resumed their questioning of the defendant.

During this portion of the interrogation, Abbondandelo discussed Dyla's "drug problem" with him.Dempsey then began to talk about Dyla's "family problems", with Dyla keeping his head down and looking at the floor. Dempsey then asked Dyla to look into his eyes, and, at approximately 6:25 P.M., Dyla raised his head, began to sob, and said "yes, man, I did it, I killed her".

II

After having made subsequent and more elaborate confessions, both oral and in writing, Dyla was formally arrested and charged with the murder of Valerie Abney. He was later indicted by a Nassau County Grand Jury for murder in the second degree (three counts), robbery in the first degree, and burglary in the first degree.

Dyla made several pretrial motions, two of which (a motion dated July 13, 1982, and a *pro se* motion dated May 2, 1982) contained applications for the suppression of his statements to police. It was argued in the affidavits supporting these motions that "Dyla was arrested without probable cause and that any statements and evidence [obtained] subsequent to this improper arrest must be suppressed".

After a pretrial hearing, the County Court, in a decision entered February 2, 1984, denied Dyla's motions for the suppression of the statements. In its decision, the County Court found, among other things, that when Parole Officer Burford handcuffed Dyla to the chair in the parole office on April 12, 1982, he had not as yet made a decision as to whether to revoke Dyla's parole. [1] The court found that it was ***429** for this reason that no parole violation warrant had been obtained. The court further concluded that, although Dyla had been placed in custody when he was handcuffed *(cf., People v Tirado*, 69 NY2d 863, *on remand* 117 AD2d 874; *People v Brnja*, 50 NY2d 366, 372), he was in effect released from custody when he agreed to leave with the police. Thus, the court held that Dyla's right to be free from unreasonable seizures (US Const 4th, 14th Amends; NY Const, art I, §12) had not been violated.

1 We disagree with this particular finding of fact. The record of Officer Burford's testimony indicates that at the time that he handcuffed Dyla he *had* decided to initiate parole revocation procedures. Our finding in this regard bolsters the conclusion reached by the court that Parole Officer Burford was not acting as an agent for the police, but was working independently. We also infer that, had Burford not shortly thereafter agreed to release Dyla to the police, a parole violation warrant would have been obtained.

At Dyla's first trial, the court dismissed the robbery count, and the jury was unable to reach a verdict as to the remaining counts submitted to them. Dyla was retried and was found guilty of three counts of murder in the second degree, and burglary in the first degree. On May 16, 1984, Dyla was sentenced to concurrent sentences of 25 years to life for the three murder counts and of 6 to 12 years for the burglary count. This appeal followed.

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III

Dyla argues that he was illegally arrested by Parole Officer Burford on April 12, 1982, because no parole violation warrant had been obtained pursuant to the applicable law (Executive Law §259-i [3] [a] [i]; 9 NYCRR 8004.2). From this premise, Dyla concludes that his subsequent confession must be suppressed as the "fruit" of an illegal arrest *(see, Taylor v Alabama*, 457 US 687; *Rawlings v Kentucky*, 448 US 98; *Dunaway v New York*, 442 US 200, 206-211; *Brown v Illinois*, 422 US 590, 597-599; *Wong Sun v United States*, 371 US 471, 479-486; *People v Rogers*, 52 NY2d 527, 532-533, *cert denied* 454 US 898, *reh denied* 459 US 898).

([1], [2])There are at least two flaws in this argument. The more basic of these is that the arrest of Dyla by his parole officer, which was unquestionably based on probable cause to believe that he had committed multiple parole violations, was not an unreasonable seizure in contravention of the standards set forth in the Federal or State Constitution (US Const 4th, 14th Amends; NY Const, art I, §12). Although the arrest could be viewed as unauthorized under State law in that no parole violation warrant had been obtained, it does not follow that the exclusionary rule should be applied as a remedy for ***430** this nonconstitutional irregularity. This issue will be discussed further in section V (infra.).

([3])The second flaw in Dyla's argument is that, even if we were to assume that the absence of a parole violation warrant rendered Dyla's arrest an unconstitutional seizure, there is support in the record for the County Court's finding that the taint caused by this illegality was dissipated prior to the time that Dyla confessed.

It is established Fourth Amendment doctrine that the mere fact that a confession is made after an unconstitutional arrest does not warrant application of the exclusionary rule. The taint of an unconstitutional arrest may be dissipated prior to the making of a custodial confession *(see, Nardone v United States*, 308 US 338, 341; *see also, Rawlings v Kentucky*, supra., at 106-110; *Brown v Illinois*, supra., at 600-604; *Wong Sun v United States*, supra., at 491-492; *People v Graham*, 90 AD2d 198, 200-203, *cert denied* 464 US 896, *reh denied* 464 US 1005). Although a knowing and voluntary waiver by a defendant of his *Miranda* rights will not alone operate to dissipate the taint of an unconstitutional arrest, such a waiver, along with several other factors, is to be considered in deciding whether such taint has been sufficiently purged, so as to allow admission of the otherwise voluntary confession *(see, Rawlings v Kentucky*, supra., at 107-108; *Brown v Illinois*, supra., at 601-605; *Dunaway v New York*, supra., at 216-219; *People v Conyers*, 68 NY2d 982, 983).

In the present case, Dyla's confession was preceded by a knowing and intelligent waiver of his *Miranda* rights, which is demonstrated by the evidence contained in the record of the pretrial hearing.

Equally as germane to the resolution of this issue is the fact that there was a significant intervening event which occurred between the time of Dyla's initial arrest and the time of his confession. Specifically, the court found that Dyla was released after his illegal arrest and was thus essentially free to choose between going with the police or going elsewhere. Under this interpretation of the evidence, Dyla's incipient parole revocation proceeding had been completely abandoned once Dyla agreed to speak with the police. This view of the evidence is supported by testimony, including that of Detective Abbondandelo, who stated that if, after having left the parole office and while on the way to police headquarters, Dyla had requested to be released, he "would have let him go". From this evidence ***431** and considering all of the other circumstances revealed in the record, it could be found that a reasonable person in Dyla's position, at the time of his transfer from the parole office to police headquarters, would have thought himself free to leave, so that at that point he was not in custody *(see, People v Hicks*, 68 NY2d 234, 240; *People v Yukl*, 25 NY2d 585, 589, *mot to amend remittitur denied* 26 NY2d 845, 883, *cert denied* 400 US 851; *People v Wroblewski*, 109 AD2d 39, 42, *affd* 67 NY2d 933, *cert denied* 479 US 845; *People v Bailey*, 140 AD2d 356). We therefore affirm the County Court's finding of fact that Dyla was released from the custody of his parole officer immediately after he expressed a willingness to cooperate with the police. [2] Given the fact that Dyla was released from the custody of his parole officer, any taint caused by the supposedly unconstitutional arrest must be deemed to have been dissipated prior to Dyla's confession *(see, Nardone v United States*, supra. *People v Rogers*, 52 NY2d 527, supra.*)*.

[2] As we noted, certain testimony of Parole Officer Burford suggests that the parole revocation procedure might have been resumed, and that Dyla might have been returned to his custody, if Dyla had at any point stopped cooperating with police. However, Burford's view of the situation does not necessarily coincide either with that of the police officers or with that of Dyla himself, or,most importantly, with the view which a reasonable man in Dyla's position would have had. Even if we

were to find that Dyla was not free to go after his transfer to the police, but was instead given the Hobson's choice of whether to be in custody at the parole office or at police headquarters, so that he was in fact in custody continuously, we could still hold suppression unwarranted for the reasons discussed in section V of this opinion.

Furthermore, there is another factor, consideration of which necessitates the conclusion that the taint caused by Dyla's original arrest had been attenuated by the time he confessed. In *Brown v Illinois* (422 U.S. 590, 604, supra.*)*, the Supreme Court of the United States identified the "flagrancy of the official misconduct" as one of the factors to be considered in deciding a taint-attenuation issue *(see also, Rawlings v Kentucky*, supra., at 109-110). In the present case, whatever misconduct may have been committed by parole officer Burford in arresting Dyla without a warrant cannot be attributed to the homicide detectives who scrupulously respected Dyla's rights at every turn.

The case of *People v Martinez* (37 NY2d 662) is illustrative. In that case, the defendant was arrested after police officers had discovered a gun in a car in which he was a passenger during the course of an illegal stop. The illegally seized gun ***432** was held to be subject to suppression in the ensuing weapons prosecution as the fruit of an unconstitutional seizure. However, certain statements made by the defendant to homicide detectives, who interviewed him while he was in custody after his arrest but in connection with an entirely separate investigation, were held admissible. The court relied in part on the good faith of the homicide detectives who had not participated in the illegal stop in holding that suppression of the defendant's statements was not warranted in the homicide prosecution *(see also, People v Conyers*, 68 NY2d 982, supra. [good faith of officers who arrested the defendant in home without warrant prior to decision in *Payton v New York*, 445 US 573, relevant to attenuation issue]; *People v Morales*, 42 NY2d 129, 137; *People v Minley*, 112 AD2d 712, *affd* 68 NY2d 952).

In this connection, we note that the County Court's finding of fact that the homicide detectives in this case were operating completely independently of the parole officer is supported by the evidence and is thus affirmed. Parole Officer Burford's arrest of Dyla was for parole purposes only; he was not acting as a "conduit" for the police *(cf., People v Mackie*, 77 AD2d 778; *People v Candelaria*, 63 AD2d 85, 90), and the arrest for a parole violation was not a "pretext" for the arrest of Dyla on a charge of homicide *(cf., People v Cypriano*, 73 AD2d 902; *see also, People v Frankos*, 110 AD2d 713). Therefore, whatever constitutional taint may have been caused by Dyla's arrest without a parole violation warrant was sufficiently attenuated prior to Dyla's confession.

IV

Even if we were to assume that the arrest of Dyla without a parole violation amounted to an unconstitutional seizure, any taint caused by that arrest was dissipated once the homicide squad detectives, who had played no role in the illegal arrest, obtained the consent of Dyla's parole officer to allow Dyla to be released so that he could assist them in their investigation. However, on appeal Dyla raises the separate contention that, even if he were to be considered as having been released from custody at that stage, he was later taken back into custody after he was informed that he had failed the polygraph test. This is an issue with respect to which we do not have the benefit of specific findings of fact by the County Court.

In deciding whether Dyla was in custody after he learned of the results of the polygraph test, we must consider whether, ***433** under those circumstances, a reasonable person would have considered himself unable to leave at that point *(People v Hicks*, supra. *People v Yukl*, supra. *People v Patrick*, 130 AD2d 687, 688, *lv denied* 70 NY2d 753; *People v Hall*, 125 AD2d 698, 700). Although he had been informed that the polygraph results were not admissible in evidence *(People v Leone*, 25 NY2d 511), Dyla, even had he been totally innocent, might well have reasonably believed that, based on the results of the polygraph, the police would not permit him to leave, at least until he could somehow demonstrate his innocence *(see,People v Johnson*, 112 Misc 2d 590, 593).

([4])Considering all the circumstances of this case, we conclude that Dyla's learning of the polygraph test results did not transform his noncustodial status into a custodial one. He had been specifically advised by the polygraph examiner that he was free to leave police headquarters at any time and he had been repeatedly told that in the eyes of the law the results of polygraph tests were worthless. Detective Abbondandelo testified that Dyla's having failed the polygraph merely elevated Dyla's status as a suspect "a little bit more"; it cannot be inferred from this testimony that the police considered Dyla to be in custody at that point. A reasonably intelligent (and innocent) man, under these circumstances, would not have concluded that, because of the polygraph test results alone, he would be physically restrained if he sought to leave. Dyla was therefore not under arrest at this point.

In light of this finding of fact, we need not address the question whether, as the People argue, the results of the polygraph test, in combination with other factors, gave rise to probable cause to arrest.

V

([2])At this stage, it is appropriate to recall our earlier observation that the defendant's major argument, i.e., that the taint of his illegal arrest requires the suppression of his subsequent statements, suffers from an infirmity even more basic than those previously discussed. This infirmity arises from the erroneous assumption that the exclusionary rule applies where the illegal police conduct in question violates statutory (in this case, Executive Law §259-i) but not constitutional precepts, particularly where there is no bad faith shown on the part of the police, and where the statute in question is not designed to implement Fourth Amendment rights. The ***434** exclusion from evidence of a voluntary confession is warranted pursuant to New York statutory and constitutional law only when it is shown that the confession has been obtained in violation of a constitutionally protected right of the accused. In the present case, no such violation occurred, simply because parolees have no constitutional right to be arrested only pursuant to a warrant. [3]

3 Although a parole officer is a "peace officer" (CPL 2.10 [23]) authorized to make warrantless arrests for an "offense" under defined circumstances *(see*, CPL 140.25), the People do not argue, and we therefore do not decide, whether a violation of parole constitutes an "offense" *(see*, Penal Law §10.00 [1]) so that the warrantless arrest may be validated on this basis.

A

We are inclined to hold that neither the Federal nor the State Constitutions (US Const 4th, 14th Amends; NY Const, art I, §§6, 12), according to their language and history, require the suppression of evidence gathered as a result of a "seizure" which is not "unreasonable" and hence not unconstitutional, solely on the grounds that the seizure may be considered violative of some State statute, ordinance or regulation. The proposition that the Due Process Clause of either the Federal or State Constitutions (US Const 14th Amend; NY Const, art I, §6) requires suppression of evidence, even where no violation of any provision contained in those Constitutions has occurred*(e.g.*, US Const 4th Amend; NY Const, art I, §12) is, in our view, questionable. We acknowledge that precedent exists which could be interpreted as supporting that proposition. However, we find that precedent contrary to more persuasive precedent which holds that such a proposition is incorrect.

In two cases decided before *Mapp v Ohio* (367 U.S. 643), the United States Supreme Court held that evidence gathered in violation of certain statutory limitations should be suppressed *(Miller v United States*, 357 US 301; *United States v Di Re*, 332 US 581). In *Miller* (supra., at 306, n 5), the Supreme Court ordered the suppression of evidence seized after police officers forcefully entered the defendant's premises, without first announcing their "authority and purpose" pursuant to the applicable District of Columbia statute *(see also, Sabbath v United States*, 391 US 585). In *Di Re* (supra.), the Supreme Court ordered the suppression of evidence seized by an officer incident to an arrest which was technically illegal because it ***435** violated a former New York State statute which permitted a police officer to make a warrantless arrest for a misdemeanor only if he believed that the misdemeanor had occurred in his presence.

It is important to note that both *Miller* (supra.) and *Di Re* (supra.) were Federal prosecutions. It is clear that, in suppressing the evidence seized in violation of these particular statutes, the Supreme Court was not establishing any rule of Federal constitutional law which would be binding on the States; instead, the Supreme Court was acting in its supervisory capacity over the Federal courts *(see, Street v Surdyka*, 492 F2d 368; 1 LaFave, Search and Seizure § 1.5 [b], at 106-107 [2d ed]). It is also important to note that the more recent case of *United States v Caceres* (440 U.S. 741, supra. [holding that suppression is not warranted as a remedy for violation of Internal Revenue Service regulations]), while possibly distinguishable from *Miller* (supra.) *(see, United States v Caceres*, supra., at 755, n 21), could be viewed as inconsistent with it.

We do not believe that the Supreme Court has ever held that, as a matter of Federal due process (US Const 14th Amend), State criminal courts must always suppress evidence which has been gathered in a manner consistent with the Federal Constitution, but in violation of some State law or ordinance, however technical. We recognize that there is dicta in the plurality decision in *Ker v California* (374 US 23, 37-38) which suggests that evidence seized pursuant to an arrest which was violative of State law (because the police officers had not announced their authority and purpose before entering the defendant's premises *[cf., Miller v United States*, supra.*])*,

must be suppressed in a State court prosecution, even though the arrest would not have been considered unconstitutional. This statement was, as noted, purely dicta, since the plurality in *Ker* concluded that the "knock and announce" statute at issue in that case had, in fact, not been violated.

It is interesting to note, however, that in *People v Floyd* (26 NY2d 558, 563) the Court of Appeals interpreted the *Ker* case as having given "constitutional dimension ... to the statutory and common-law requirements for notice on breaking into and entering premises for purposes of effecting an ... arrest". Thus, in *Floyd (supra)*, the Court of Appeals ordered the suppression of evidence which was gathered pursuant to an arrest which was effected in violation of New York's so-called "knock and announce" statute *(see*, CPL 120.80 [4]; 140.15 [4]). This was done, apparently, on the assumption that ***436** a violation of that statute necessarily constituted a violation of the Federal and State Constitutions (US Const 4th, 14th Amends; NY Const art I, §12; *see also, State v Valentine*, 264 Ore 54, 504 P2d 84, 85, *cert denied* 412 US 948; *see, contra, State v Vrtiska*, 225 Neb 454, 406 NW2d 114, 121, *cert denied* __ US __, 108 S Ct 180 *[Ker* did not hold that the Federal Constitution requires officers to "knock and announce" prior to entrance into premises]). However, in *People v Payton* (45 NY2d 300, 314-315, *revd on other grounds* 445 U.S. 573), the Court of Appeals held that suppression was not warranted where there occurred a technical violation of the so-called "knock and announce" rule.

The case of *People v Caliente* (12 NY2d 89, 93-95) might also lend itself as support for the rule that suppression is required where evidence is seized in violation of statute, although not in violation of the Federal Constitution. In *Caliente* (supra.), the Court of Appeals ordered the suppression of evidence seized as incidental to a warrantless misdemeanor arrest which, because the misdemeanor had in fact not occurred in the presence of the officer, was illegal under former New York law. While the Court of Appeals stated that "it may well be true" *(People v Caliente*, supra.,at 95) that probable cause to arrest existed, the court did not make explicit whether it considered the arrest to have been a reasonable and hence constitutional "seizure". Thus, it is not absolutely clear that the suppression of evidence ordered by the *Caliente* court rested on the basis of a statutory violation *alone*.

If cases such as *Caliente* (supra.) and *Floyd* (supra.) were construed as having announced an all-embracing rule of law requiring the suppression of all evidence seized in compliance with the Federal Constitution,but in violation of statute, then such a rule would be in direct conflict with other cases in which the Court of Appeals has explicitly held that suppression is not required as a remedy for merely statutory violations. In *People v Dinan* (11 NY2d 350, *remittitur amended* 11 NY2d 1057, *cert denied* 371 U.S. 877), for example, the Court of Appeals held that evidence gathered by way of a wiretap, which was illegal because it violated a Federal statute,could be used in the courts of this State, because it had not been gathered in violation of the Federal Constitution. "A distinction was drawn in [the *Dinan]* case between the violation of a Federal statute and the violation of a constitutional prohibition" *(People v Corbo*, 17 AD2d 351, 356). "[E]vidence captured by the police contrary to laws other than the Fourth Amendment ***437** may be accepted by the State courts" *(Sackler v Sackler*, 15 NY2d 40, 43, citing *Schwartz v Texas*, 344 US 199; *People v Dinan*, supra.). "[T]he exclusionary rule has been held to be in force only as a sanction to the constitutional protection against unreasonable searches and seizures afforded by the Fourth Amendment to the United States Constitution and not to be required in case of a mere statutory violation" *(Sackler v Sackler*, supra., at 46 [Van Voorhis, J., dissenting]).

This court has also recognized the distinction to be drawn between constitutional and statutory limitations when it comes to application of the exclusionary rule. In *People v Varney* (32 AD2d 181, 182) the court, in an opinion by then Presiding Justice Beldock, refused to suppress evidence seized pursuant to a defective search warrant because "[t]he infirmity of the search warrant herein [was] not constitutional in nature but [was] a failure to comply with a statutory requirement".

The idea that the suppression of evidence seized in violation of statutory rules is generally not necessary in the absence of a constitutional violation is borne out in several areas. For example, although CPL 140.20 (1) and 120.90(1) require arresting police officers to bring arrestees before a court for arraignment "without unnecessary delay", violation of these sections has never been held to require the suppression of confessions made during a prearraignment delay which, strictly speaking, would not have been absolutely necessary *(see, People v Hopkins*, 58 NY2d 1079, 1081; *People v Dairsaw*, 46 NY2d 739; *People v Dobranski*, 112 AD2d 541). Most jurisdictions interpret similar statutes in this way *(see, e.g., O'Neal v United States*,411 F2d 131, 136-137; *People v Porter*, 742 P2d 922 [Colo]; *State v Wiberg*, 296 NW2d 388 [Minn]).

New York courts also have agreed with the view that evidence seized pursuant to a warrant which improperly authorizes a nighttime search, in violation of statute, need not be suppressed *(People v Glen*, 30 NY2d 252, 262; *United States v Anderson*, 851 F2d 384; *United States v Searp*, 586 F2d 1117, 1121-1122; *United States v Burke*, 517 F2d 377; *Gamble v State*, 473 So 2d 1188, 1195-1196 [Ala]; *State v Brock*, 294 Ore 15, 653 P2d 543; *Commonwealth v Johnson*, 315 Pa Super 579, 462 A2d 743; *see also, People v Frange*, 109 AD2d 802 [failure to return warrant in timely manner "ministerial" error not warranting suppression]; *People v Varney*, 32 AD2d 181; *People v Crispell*, 110 AD2d 926, 927 ["technical" defects in ***438** warrant do not require suppression]; *People v Vara*, 117 AD2d 1013; *People v Hernandez*, 131 AD2d 509).

In *Matter of Emilio M.* (37 NY2d 173), the Court of Appeals held it was error to suppress a confession which had been taken from a juvenile suspect in violation of Family Court Act former § 724, even though, as observed by the court in *Matter of Luis N.* (112 AD2d 86), compliance with the statute would have been possible. In *People v Coffey* (12 NY2d 443, 453) the Court of Appeals stated that it was doubtful whether a violation of a statute which required an arresting officer to advise the arrestee of the cause for the arrest would make the arrest illegal "to the extent of making seized evidence inadmissible" *(cf., Ford v State of New York*, 21 AD2d 437, 440).

On the other hand, we must acknowledge the existence of precedent, in different areas, where suppression has been ordered, although no unconstitutional violation appears to have occurred. In certain cases, for example, suppression has been ordered where evidence had been seized pursuant to a warrant issued by a court which lacked territorial jurisdiction *(see, e.g., People v Hickey*, 40 NY2d 761; *cf., People v Fishman*, 40 NY2d 858; *cf., United States v Comstock*, 805 F2d 1194 [5th Cir]; *People v Mordell*, 55 Mich App 462, 223 NW2d 10). In contrast, courts in most other States hold that where a police officer exceeds his territorial jurisdiction, evidence gathered as a result is not necessarily subject to suppression *(see, People v Vigil*, 729 P2d 360 [Colo]; *People v Hamilton*, 666 P2d 152, 155-156 [Colo]; *People v Wolf*, 635 P2d 213 [Colo]; *State v Bonds*, 98 Wash 2d 1, 653 P2d 1024, *cert denied* 464 U.S. 831; *State v Schinzing*, 342 NW2d 105 [Minn]; *State v Rocheleau*, 142 Vt 61, 451 A2d 1144, 1147; *State v Fixel*, 744 P2d 1366 [Utah]).

As the foregoing discussion reveals, no sweeping statement may be made with respect to the application of the exclusionary rule to evidence seized in violation of statute. Perhaps it is necessary to distinguish between statutes which relate to jurisdiction *(see, e.g., People v Hickey*, supra.) and statutes which are purely procedural. It may also be necessary to distinguish between statutes which protect the public-at-large from police intrusions *(e.g.*, "knock and announce" statutes such as that under review in *People v Floyd [supra]*, and *People v Payton [supra]*, or statutes governing the nighttime execution of search warrants) and statutes which have no such purpose. Perhaps we can do no better than distinguish between statutes which are designed to protect substantial ***439** privacy interests and statutes which are not. There is, however, a distinct trend in this area of the law toward a recognition that suppression of evidence is not always appropriate as a remedy for violations of technical rules which do not implicate Fourth Amendment rights *(see, e.g., United States v Benevento*, 836 F2d 60; *United States v Janik*, 723 F2d 537, 548; *State v Jones*, 127 NH 515, 503 A2d 802, 806 [suppression not warranted for violation of "knock and announce" statute]; *Rodriguez v Superior Ct.*, 199 Cal App 3d 1453, 245 Cal Rptr 617 [violation of rules concerning nighttime execution of warrants]; *see also, Commonwealth v Lyons*, 397 Mass 644, 492 NE2d 1142, 1145; *State v Eubanks*, 283 NC 556, 196 SE2d 706, 709; *City of Kettering v Hollen*, 64 Ohio St 2d 232, 416 NE2d 598; *State v Sundberg*, 611 P2d 44 [Alaska]).

Focusing, then, on the narrow question of whether a violation of the statute requiring the issuance of a parole violation warrant (Executive Law §259-i [3] [a] [i]) requires suppression in this case, we conclude that it does not.As more fully outlined below, this statute is not jurisdictional, it is not meant to protect the privacy of the public and it affects no substantial right. It is purely a technical requirement, the violation of which should not result in the exclusion of evidence. "Suppression of evidence resulting from [an] illegal, but not unconstitutional, arrest is not mandated" (2 Ringel, Searches & Seizures, Arrests and Confessions § 23.9, at 23-50 [2d ed]). Exclusion of evidence obtained as a result of a statutory violation should be suppressed only if the statute "confers a substantial right" which "relate[s] rather closely to Fourth Amendment protections" (1 LaFave & Israel, Criminal Procedure § 3.1 [e], at 146; *see also*, 1 LaFave, Search and Seizure § 1.5 [b], at 101-110 [2d ed]).

B

([5])Parolees are, in essence, convicted criminals who are released from prison before the expiration of their term, under supervision, and who are allowed to remain outside the penal institution only on stated conditions. Violation of these conditions results in revocation of parole. "If a parole condition is violated, this forms an independent ground to reincarcerate the individual based on the prior conviction" *(Faheem-El v Klincar*, 841 F2d 712, 724). Recognition of the necessity that parolees be closely supervised in order to protect the public has caused the courts to declare that the Fourth ***440** Amendment protection to be afforded a parolee is significantly less than that which would be afforded to an ordinary civilian *(e.g., People v Huntley*, 43 NY2d 175 [upholding warrantless search of parolee's property in absence of probable cause]). There is no rule of constitutional law which requires that a warrant must be issued prior to the arrest of a parolee known to have committed a parole violation.

For the purposes of determining the scope of their State or Federal constitutional rights, parolees and probationers have generally been treated alike *(see, Gagnon v Scarpelli*, 411 US 778; *Morrissey v Brewer*, 408 US 471). Neither the *Gagnon* nor the *Morrissey* case, which set forth the minimal due process rights of parolees and probationers in connection with revocation proceedings, holds that warrants must in all cases be obtained prior to arrest. There are, in fact, both State and Federal statutes, which have never been declared unconstitutional, which expressly state that probationers may be arrested without the issuance of a warrant *(see*, CPL 410.50; 18 USC § 3653).It would be anomalous to hold that parolees have a constitutional right to be arrested only upon a warrant, while probationers do not have a similar right, particularly since, as a general matter, parolees are guilty of more serious crimes than those who receive probation *(see, Faheem-El v Klincar*, supra.) so that parolees should arguably be regulated more closely than probationers. It may also be viewed as anomalous to hold that, in the case of suspected parole or probation violators, arrests may not be conducted without a warrant, while as a matter of constitutional law, searches may *(see, Griffin v Wisconsin*, 483 US 868, 107 S Ct 3164; *cf., People v Jackson*, 46 NY2d 171), even though with respect to ordinary criminal suspects, warrantless arrests are usually more easily justified than warrantless searches. [4]

4 Generally, a warrantless search of a suspect's home in the absence of exigent circumstances will be found to be unconstitutional even though probable cause existed *(see, Coolidge v New Hampshire*, 403 US 443; *People v Payton*, 45 NY2d 300, 309, *revd on other grounds* 445 US 573). However, there is, in general, no requirement that police officers obtain a warrant prior to arresting a suspect upon probable cause to believe he has committed a crime *(see, United States v Watson*, 423 US 411, 414-419; *Carroll v United States*, 267 US 132, 156).

That a parolee has no constitutional right to be arrested only upon a warrant is further illustrated by the fact that some jurisdictions have, or had, statutes which expressly authorize the warrantless arrest of parole violators *(see, e.g.,* ***441** *Battle v State*, 254 Ga 666, 333 SE2d 599, 603-604; *Kellogg v State*, 94 Wash 2d 851, 621 P2d 133, 136-137; *People v Weathers*, 40 Ill App 3d 211, 351 NE2d 882, 884).In fact, such arrests were authorized under New York law pursuant to Correction Law former § 829 *(see*, L 1968, ch 658, § 3, repealed by L 1977, ch 904, § 2; *see, People ex rel. Calloway v Skinner*, 33 NY2d 23, 33).

The requirement that the arrest of a parole violator be preceded by the issuance of a warrant (Executive Law §259-i [3] [a] [i]) is more in the nature of a procedural or "housekeeping" rule than a requirement designed to protect individual liberty. The type of warrant in question is not one issued by a neutral Magistrate;rather, it is issued by an administrative officer who is basically a colleague of the officer who is seeking the warrant *(see*, 9 NYCRR 8004.2 [b]). The failure to obtain a parole violation warrant is particularly excusable where, as in the present case, no decision had been made by the parole officer as to whether to revoke parole until the parolee was actually in the presence of the officer. It has been stated that it would be "absurd" to expect a probation officer to obtain a warrant in order to arrest a probationer who is committing a violation in the officer's presence (Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 410.50, at 262). The same is true with respect to the arrest of a parolee whose violation (e.g., the failure to report police contact) occurs in the presence of a parole officer during an interview.

We are also persuaded by the reasoning expressed in those cases in which it has been held that the exclusionary rule should not apply to the fruits of an arrest which is made in contravention of a State statute authorizing warrantless misdemeanor arrests in the presence of the arresting officer *(see, State v Eubanks*, 283 NC 556, 196 SE2d 706, 708-709, supra.; *State v Allen*, 2 Ohio App 3d 441, 442 NE2d 784, 786; *People v Burdo*, 56 Mich App 48, 223 NW2d 358, 360-361). The right of a misdemeanant to be arrested only upon a warrant where his crime took place outside the presence of a

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police officer is certainly no less fundamental than the right of a parole violator to be arrested only upon a warrant, even where his violation of parole occurs, as it did here, in the presence of his parole officer. It is absolutely clear to us that neither "right" is of constitutional dimension and that a violation of such a right therefore does not warrant the application of the exclusionary rule. ***442**

In short, not one of the defendant's constitutional rights were violated in this case. The officers principally responsible for inducing the defendant to confess committed no violations of his rights. The only transgression which occurred was the short-lived arrest of the defendant by his parole officer and this misstep amounts at most to a violation of a procedural statute, rather than to an invasion of the defendant's constitutional right to be free of unreasonable searches or seizures. The harm which would be done to the interests of society at large by the imposition of the exclusionary rule under these circumstances far outweighs the value of any increased discipline which might result among parole officers who are contemplating the making of warrantless parole violation arrests. The suppression of evidence in this case is required neither by the State Constitution nor by any State statute, and we decline to exercise whatever inherent"supervisory power" we may have to nonetheless order suppression. "[I]n certain circumstances the interest of society is better served by having relevant and material evidence admitted in criminal cases than ... through the exclusion of evidence unlawfully acquired" *(People v Stith,* 69 NY2d 313, 318, citing *Nix v Williams,* 467 US 431, 442-443; *see also, People v McGrath,* 46 NY2d 12, 31; *People v Rogers,* 52 NY2d 527, supra.*)*. We conclude that the initial arrest of Dyla by his parole officer on April 12, 1982, did not constitute a violation of his constitutional right to be free of unreasonable seizures. Even if the arrest was in technical violation of Executive Law § 259-i (3) (a) (i), suppression of defendant's subsequent confession is not warranted either as a matter of our supervisory power over the trial courts or as a matter of State statute, or as a matter of Federal or State constitutional law. For this reason, in addition to those outlined in sections III and IV, supra., we conclude that the defendant's motion to suppress was properly denied.

VI

([6], [7])The defendant raises several other points, both in the brief of assigned counsel and in his *pro se* brief. These have all been examined and found to be without merit. We note specifically that there is no merit to the defendant's argument that his statements to police were extracted in violation of his privilege against self-incrimination on the grounds that he subjectively believed that if he did not tell the truth, his parole would be revoked. Even assuming that the defendant ***443** had such a perception, it would not have been a reasonable one, because the State may not punish a parolee for invoking his Fifth Amendment privilege by revoking his parole *(see, Minnesota v Murphy,* 465 US 420, 438-440). Further, we find that the interrogation techniques employed by police were not violative of due process *(see generally, People v Tarsia,* 50 NY2d 1, 11-13; *People v Anderson,* 42 NY2d 35, 38; *see also, People v Baity,* 139 AD2d 521; *People v Madison,* 135 AD2d 655). Specifically, there was no abuse of the polygraph, since there is no evidence that the polygraph examiner deceived the defendant with respect to the accuracy of the procedure, or with respect to his own conclusions as to the defendant's veracity *(see, People v Gerald,* 128 AD2d 635, 636 [misuse of polygraph one factor in determining voluntariness of post polygraph confession]; *People v Zehner,* 112 AD2d 465; *People v Knighton,* 91 AD2d 1077, 1078; *People v Cavagnaro,* 88 AD2d 938; *cf., People v Leonard,* 59 AD2d 1).

The defendant's claim based on double jeopardy is likewise without merit *(see, Matter of Napoli v Supreme Ct.,* 33 NY2d 980). The judgment under review should accordingly be affirmed.

Mangano, J. P., Lawrence and Spatt, JJ., concur.
Ordered that the judgment is affirmed. ***444**

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KeyCite Yellow Flag - Negative Treatment
Distinguished by People v. Alonso, N.Y., May 3, 2011

98 N.Y.2d 8, 770 N.E.2d 566, 743 N.Y.S.2d 778 (Mem), 2002 N.Y. Slip Op. 03736

The People of the State of New York, Respondent,
v.
Bulmaro Hernandez, Appellant.

Court of Appeals of New York
Argued March 13, 2002;
Decided May 7, 2002

CITE TITLE AS: People v Hernandez

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Term of the Supreme Court in the First Judicial Department, entered April 6, 2001, which, among other things, (1) reversed, on the law, an order of the Criminal Court of the City of New York, New York County (Arthur M. Schack, J.), dismissing a misdemeanor complaint charging defendant with resisting arrest, disorderly conduct, and consumption of alcohol in a public place, (2) reinstated the accusatory instrument, and (3) remanded the case to Criminal Court for further proceedings.

HEADNOTE

Crimes
Appeal
Matters Appealable--Dismissal of Local Criminal Court Accusatory Instrument

The Appellate Term of the Supreme Court had no jurisdiction to entertain the People's appeal from an order dismissing, pursuant to CPL 140.45, a local criminal court accusatory instrument. No appeal lies from a determination made in a criminal case unless specifically provided for by statute. CPL 450.20 (1) only authorizes an appeal by the People from an order dismissing an accusatory instrument if the order was entered "pursuant to [CPL] 170.30, 170.50, or 210.20." In contrast, the Legislature has not provided the People with any right of appeal from CPL 140.45 dismissals. In a case of an arrest under a warrant, the information or felony complaint underlying the warrant is filed with, and examined for sufficiency by, a local criminal court before the arrest. However, when an arrest is made without a warrant, the arraignment court should have the power to reject the accusatory instrument since the arraignment is the court's first opportunity to examine it.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Appellate Review §§ 230, 245, 247.

Carmody-Wait 2d, Criminal Procedure §§ 172:1981, 172:1983, 172:3254.

McKinney's, CPL 140.45, 450.20 (1).

NY Jur 2d, Criminal Law §§ 936, 3159.

ANNOTATION REFERENCES

See ALR Index under Appeal and Error; Criminal Procedure Rules; Indictments and Informations. ***9**

POINTS OF COUNSEL

Legal Aid Society Criminal Appeals Bureau, New York City (*Deepa Rajan* and *Andrew C. Fine* of counsel), for appellant. I. The court below should have dismissed the People's appeal because it lacks jurisdiction to hear appeals from a court's oral order dismissing an accusatory instrument pursuant to CPL 140.45. (*People v Machado,* 182 Misc 2d 194; *People v Coppa,* 57 AD2d 189, 45 NY2d 244; *People v Laing,* 79 NY2d 166; *People v Stevens,* 91 NY2d 270; *People v Santos,* 64 NY2d 702; *Matter of State of New York v King,* 36 NY2d 59; *People v Williams,* 186 Misc 2d 705, 96 NY2d 789; *People v Keeffe,* 50 NY2d 149; *People v Holmes,* 206 AD2d 542; *People v Herrara,* 171 AD2d 85.) II. Criminal Court properly dismissed the misdemeanor complaint on oral motion, where the People failed to establish reasonable cause to believe appellant committed the offenses of consumption of alcohol in a public place, disorderly conduct, resisting arrest, or any other offenses. (*People v Dumas,* 68 NY2d 729; *People v Pagan,* 273 AD2d 952; *People v Tarka,* 75 NY2d 996; *People v Alejandro,* 70 NY2d 133; *People v McRay,* 51 NY2d 594; *People v Jennings,* 69 NY2d 103; *County of Riverside v McLaughlin,* 500 US 44; *Gerstein v Pugh,* 420 US 103; *People ex rel. Maxian v Brown,* 164 AD2d 56.)
Robert M. Morgenthau, District Attorney, New York City (*Suzanne M. Herbert* and *Mary C. Farrington* of counsel), for respondent.

I. The court below had jurisdiction to review the procedurally flawed dismissal of the Criminal Court complaint filed against defendant. (*People v Coppa,* 45 NY2d 244; *People v Littles,* 188 AD2d 255; *People v Harmon,* 181 AD2d 34; *People v Ainsworth,* 106 AD2d 357; *People v Keeffe,* 50 NY2d 149; *People v Dumas,* 68 NY2d 729; *People v Herrara,* 171 AD2d 85; *People v Holmes,* 206 AD2d 542; *People v Holmes,* 178 AD2d 437; *Gerstein v Pugh,* 420 US 103.) II. Criminal Court's dismissal of the accusatory instrument against defendant was improper. (*Matter of State of New York v King,* 36 NY2d 59; *Matter of Duckman,* 92 NY2d 141; *People v Witkowski,* 90 AD2d 723; *People v Douglass,* 60 NY2d 194; *People v Machado,* 182 Misc 2d 194; *People v Dumas,* 68 NY2d 729; *People v Allen,* 92 NY2d 378; *People v Alejandro,* 70 NY2d 133; *People v Cintron,* 95 NY2d 329; *People v Bakolas,* 59 NY2d 51.)

OPINION OF THE COURT

Wesley, J.

As the result of a warrantless arrest, defendant was charged in a misdemeanor complaint with consumption of alcohol in a ***10** public place, disorderly conduct and resisting arrest. The trial court dismissed the complaint pursuant to CPL 140.45. That section requires dismissal when an accusatory instrument filed pursuant to warrantless arrest provisions is facially insufficient and the "court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file" a sufficient accusatory instrument (CPL 140.45). The People appealed pursuant to CPL 450.20 (1) and the Appellate Term reversed and reinstated the accusatory instrument. The Appellate Term was in error.

No appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute (*see People v Stevens,* 91 NY2d 270, 277 [1998]). In the context of CPL 450.20, we have stated that "[c]ourts must construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of statutes. This is especially so in one of the most highly structured and highly particularized articles of procedure--appeals. Where a statute delineates the particular situations in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.' The words and numerical references and incorporations in CPL 450.20 could not be plainer ..." (*People v Laing,* 79 NY2d 166, 170-171 [1992] [citations and internal quotation marks omitted]).

CPL 450.20 (1) only authorizes an appeal from an order dismissing an accusatory instrument if the order was entered "pursuant to section 170.30, 170.50, or 210.20." In contrast, the Legislature has not provided the People with any right of appeal from CPL 140.45 dismissals. As the legislative history of CPL 140.45 explains, "in a case of an arrest under a warrant, the information or felony complaint underlying the warrant is filed with, and examined for sufficiency by, a local criminal court before the arrest," whereas, when an arrest is made without a warrant, since the arraignment "is the court's first opportunity to examine it, it should have the power to reject it on that occasion" (Commn Staff Notes, reprinted following NY Cons Laws Serv, CPL 140.45, at 186; *see also People v Machado,* 182 Misc 2d 194 [Crim Ct, Bronx County 1999]). Thus, the Appellate Term had no jurisdiction to entertain the People's appeal. ***11**

Accordingly, the order of the Appellate Term should be reversed and the case remitted to that court for dismissal of the appeal.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Rosenblatt and Graffeo concur.
Order reversed and case remitted to the Appellate Term, First Department, with directions to dismiss the appeal taken to that court. ***12**

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90 N.Y.2d 187, 681 N.E.2d 409, 659 N.Y.S.2d 242, 1997 N.Y. Slip Op. 05532

The People of the State of New York, Appellant,
v.
William Machado, Respondent.

Court of Appeals of New York
117
Argued May 6, 1997
Decided June 10, 1997

CITE TITLE AS: People v Machado

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 24, 1996, which (1) reversed, on the law, an order of the Supreme Court (James G. Starkey, J.; opn 159 Misc 2d 94), entered in Kings County, denying a motion by defendant pursuant to CPL 440.10 to vacate a judgment of that court (James G. Starkey, J.), rendered upon a verdict convicting defendant of kidnapping in the second degree and assault in the second degree, (2) granted defendant's motion, and (3) ordered a new trial.

People v Machado, 228 AD2d 700, reversed.

HEADNOTES

Crimes
Disclosure
Failure to Produce--iRosario--i Material--Standard of Review When CPL 440.10 Motion Made before Exhaustion of Direct Appeal

([1]) *Rosario* claims (*People v Rosario,* 9 NY2d 286; CPL 240.45 [1] [a]) raised by way of CPL 440.10 motions made before direct appeal is exhausted should be rejected unless the violation prejudiced defendant. Courts cannot broaden the scope of the remedy afforded by CPL 440.10 beyond what the Legislature unambiguously specified. The unambiguous terms of CPL 440.10 (1) (f) require that a defendant making a CPL 440.10 motion--preappeal or postappeal--seeking to vacate a judgment of conviction on *Rosario* grounds demonstrate prejudice resulting from the violation. Society's interest in the finality of a judgment of conviction is different when defendant's direct appeal is pending from when defendant's appeal has been concluded. Of greater concern, however, is the language of the statute and the anomaly in its interpretation that would result from variations in the time it takes to resolve an appeal in the Appellate Divisions were a per se reversal rule to apply to CPL 440.10 motions made before defendant's appeal had been exhausted and the requirement of prejudice to apply to postappeal CPL 440.10 motions. Moreover, the test of prejudice in the *Rosario* context safeguards both the interest in fairness to defendants and the interest in assuring the People's careful discharge of their disclosure obligation.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Criminal Law, §§ 774, 830. ***188**

Carmody-Wait 2d, Criminal Procedure §§ 172:1905, 172:1918, 172:3144, 172:3145.

CPL 440.10.

NY Jur 2d, Criminal Law, §§ 1575, 3061, 3062.

ANNOTATION REFERENCES

See ALR Index under Criminal Procedure Rules; Disclosure.

POINTS OF COUNSEL

Charles J. Hynes, District Attorney of Kings County, Brooklyn *(Seth M. Lieberman, Roseann B. MacKechnie* and *Leonard Joblove* of counsel), for appellant.
Because defendant's *Rosario* claim was raised in a CPL 440.10 motion, defendant had to establish that he was prejudiced by the *Rosario* violation. Moreover, because the court below did not determine whether the *Rosario* violation in fact prejudiced defendant, this case should be remanded to the court below for a determination of that question. *(People v Jackson,* 78 NY2d 638; *People v Finnegan,* 85 NY2d 53; *People v Tychanski,* 78 NY2d 909; *Matter of Jose R.,* 83 NY2d 388; *People v Banch,* 80 NY2d 610; *Flynt v Ohio,* 451 US 619; *Corey v United States,* 375 US 169; *Kuhlmann v Wilson,* 477 US 436; *Teague v Lane,* 489 US 288; *Engle v Isaac,* 456 US 107.)
Judith Stern, New York City, and *Daniel L. Greenberg* for respondent.

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Because the *Rosario* claim at issue was raised prior to the exhaustion of defendant's direct appeal, the court below properly applied a per se error rule to reverse the conviction. *(People v Jackson,* 78 NY2d 638; *People v Novoa,* 70 NY2d 490; *People v Banch,* 80 NY2d 610; *People v Baghai-Kermani,* 84 NY2d 525; *People v Pepper,* 53 NY2d 213; *People v Samuels,* 49 NY2d 218; *People v Morales,* 37 NY2d 262; *People ex rel. Cadogan v McMann,* 24 NY2d 233; *Batson v Kentucky,* 476 US 79; *Teague v Lane,* 489 US 288.)

OPINION OF THE COURT

Chief Judge Kaye.

On direct appeal from a judgment of conviction, reversal is required when the prosecution has failed to turn over *Rosario* material. On CPL 440.10 motions made after direct appeal has been concluded, however, for vacatur of a conviction a defendant must demonstrate prejudice--meaning a reasonable possibility ***189** that the prosecution's failure to make *Rosario* disclosure materially contributed to the verdict. This appeal raises yet another novel question in our *Rosario* jurisprudence: which of the two standards applies when a CPL 440.10 motion is made *before* a defendant's direct appeal has been exhausted--the "per se" rule, or a requirement of prejudice? We conclude that a uniform standard governs CPL 440.10 motions, and remit to the Appellate Division to determine whether defendant has been prejudiced by the *Rosario* violation.

Facts

On the morning of February 22, 1988, defendant, wielding a knife, seized his estranged wife, Lydia Machado, as she was leaving her mother's house in Brooklyn and threw her into his van. As defendant began to drive away, Machado's brother, Edwin Morales, grabbed hold of the driver's side window of the van. Morales was carried down the block until he apparently hit the pole of a street sign. Morales died a short time later as a result of internal injuries he sustained from the impact.

For the next several hours, defendant drove through the tri-State area with Machado, forcing her onto the floor of the van, and punched and kicked her. At one point he stopped, bound her hands with a belt, gagged her and held a knife to her throat, drawing blood. Following a chase by helicopter and ground units, the police apprehended defendant in Brooklyn. Later that day, Machado spoke with the police, and at 11:00 P.M. gave an audiotaped statement to an Assistant District Attorney. Subsequently, at a hospital, she reported that her left eye and back were bruised and that she was suffering from pain in her left arm, but she was not treated for any injuries to her wrist or a knife wound on her neck.

Defendant was charged with two counts of murder in the second degree (Penal Law § 125.25 [2], [3]), one count of kidnapping in the second degree (Penal Law § 135.20) and two counts of assault in the second degree (Penal Law § 120.05 [2], [6]). A jury acquitted defendant of the murder and assault with a dangerous instrument counts, but found him guilty of the kidnapping and felony assault counts. On January 4, 1990, defendant was sentenced to concurrent terms of imprisonment of 8 1/3 to 25 years on the kidnapping count and 2 1/3 to 7 years on the assault count. Twenty days later, defendant filed a notice of appeal from his judgment of conviction.

In August 1990, the People for the first time provided defendant with a copy of a report authored by Detective Michael ***190** Russell (the Russell Report), who had investigated Morales's death and had testified for the People at trial. The report form, entitled "Brooklyn Detective Area Confidential Report," contained instructions on how to prepare the report and a one-paragraph summary of the events of February 22, 1988, concluding with the line: "Mrs. Machado sustained minor injuries and refused Medical aid."

Defendant perfected his appeal on February 2, 1992, contending that the People's failure to deliver the Russell Report before trial constituted a *Rosario* violation. There was, however, no record before the court related to the claimed violation; on October 30, 1992 defendant's motion to enlarge the record to include the Russell Report was denied by the Appellate Division. While his direct appeal was pending, on November 13, 1992 defendant filed a CPL 440.10 motion--the subject of this appeal.

In his motion, defendant argued that because he had moved to vacate the judgment of conviction before exhaustion of his direct appeal, a "per se error" standard applied to the claimed *Rosario* violation. The People opposed the motion, contending that the Russell Report was not *Rosario* material and that, even if it was, defendant was required to show that he had been prejudiced by the People's failure to disclose the report. On January 15, 1993, Supreme Court conducted a hearing on defendant's CPL 440.10 motion, at which Russell and Machado testified.

Meanwhile, on December 28, 1992, the Appellate Division unanimously affirmed defendant's conviction (188 AD2d 665), noting that the Russell Report was not part of the appellate record and that defendant's *Rosario* claim would more appropriately be raised by a CPL 440.10 motion. On March 16, 1993, defendant's application for leave to appeal to this Court was denied (81 NY2d 888).

Months later, Supreme Court denied defendant's CPL 440.10 motion (159 Misc 2d 94), concluding that the report was not *Rosario* material and that even if it was defendant failed to demonstrate a reasonable possibility that nondisclosure contributed to the verdict. On defendant's appeal, the Appellate Division reversed and vacated the conviction (228 AD2d 700). The court held that the Russell Report was *Rosario* material, and that, because defendant's CPL 440.10 motion was filed before exhaustion of his direct appeal, the violation itself required reversal. A Judge of this Court granted the People's leave application. ***191**

In this Court, the People have abandoned their claim that the Russell Report was not *Rosario* material. Thus, the issue before us is the standard applicable to *Rosario* violations raised by CPL 440.10 motions before exhaustion of defendant's direct appeal.

Analysis

Motivated by the "right sense of justice," this Court 36 years ago in *People v Rosario* (9 NY2d 286, 289, *cert denied* 368 US 866) established a new rule regarding the disclosure of statements by prosecution witnesses. Before *Rosario,* a trial court determined which documents were relevant to the defense and ordered production accordingly; where discovery was erroneously denied the appellate court applied a harmless error test. *Rosario* changed the practice by requiring the People to turn over pretrial statements of prosecution witnesses, leaving it for the single-minded counsel for the accused rather than trial courts to determine the value of those statements to the defense.

With harmless error still the standard, this equilibrium continued for 15 years, until *People v Consolazio* (40 NY2d 446, *cert denied* 433 US 914). *Consolazio* articulated a rule of per se reversal, in order to assure the People's scrupulous adherence to their obligation to turn over *Rosario* material (40 NY2d at 454, *supra; see also, People v Jones,* 70 NY2d 547, 551-553; *People v Perez,* 65 NY2d 154, 159-160). The price for the People's failure to disclose prior statements of their own witnesses thus became automatic reversal of the conviction, a standard this Court has continued during the past two decades to apply to *Rosario* claims raised on direct appeal (*see, e.g., People v Banch,* 80 NY2d 610; *People v Young,* 79 NY2d 365; *People v Ranghelle,* 69 NY2d 56).

In formulating these principles, which balanced the various societal and individual interests involved, the Court was guided solely by its own precedents, as a matter of common law. Although the Legislature codified the *Rosario* rule (CPL 240.45 [1] [a]), it prescribed no other standard of review.

People v Jackson (78 NY2d 638), however, presented a different calculus. In *Jackson,* the Court was asked to decide whether the automatic reversal rule also should apply to *Rosario* claims raised in a CPL 440.10 motion, after defendant's direct appeal had been concluded--in that case a full three years after defendant's direct appeal had been exhausted. There, for the ***192** first time the Court was faced with the task of harmonizing the common-law *Rosario* rule with a statute, the enactment of a coequal branch of government. Noting that *Rosario* was not based on State or Federal constitutional principles, but rather on our own balancing of interests, we acknowledged in *Jackson* that CPL 440.10 involved new policy considerations.

As determined in *Jackson,* the controlling statute is CPL 440.10 (1) (f), which provides that a judgment may be vacated on the ground that the conduct at issue is "improper and prejudicial." Thus, the Court observed, the statute explicitly affords a remedy only if the defendant can demonstrate prejudice. Moreover, just as the *Rosario* rule reflected the Court's balancing of interests, CPL 440.10 represented the Legislature's own weighing, and reflected the Legislature's overriding concern about society's interest in the finality of judgments. Agreeing with the Legislature that this finality interest was "formidable," and concluding that fairness to defendants would not be unduly compromised by an inquiry into prejudice, we refused to "eviscerate the language of CPL 440.10 (1) (f)" and held that a prejudice standard--not a per se rule--was applicable to *Rosario* violations raised by postappeal CPL 440.10 motions (*People v Jackson,* 78 NY2d, at 647, *supra*).

The issue before us concededly presents yet another balance of factors, and neither party offers a wholly satisfactory answer as to where the line should be drawn. We are persuaded, however, that the better course is to apply *Jackson: Rosario* claims raised by way of CPL 440.10 motions made

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before direct appeal is exhausted should be rejected unless the violation prejudiced defendant.

As in *Jackson,* analysis centers on the relevant statute, and the requirement of prejudice in CPL 440.10 (1) (f). Courts, of course, cannot broaden the scope of the remedy afforded by CPL 440.10 beyond what the Legislature unambiguously specified (78 NY2d at 641, 647-648, *supra;* McKinney's Cons Laws of NY, Book 1, Statutes § 73, at 149-150). To adopt defendant's argument, moreover, would give the word "prejudicial" in CPL 440.10 (1) (f) one meaning in a preappeal context and another in a postappeal context. Thus, "fulfilling our duty as common-law Judges to interpret statutory language" (78 NY2d at 647, *supra*), we conclude that the unambiguous terms of CPL 440.10 (1) (f) require that a defendant making a CPL 440.10 motion--preappeal or postappeal--seeking to vacate a judgment of conviction on *Rosario* grounds demonstrate prejudice resulting from the violation. ***193**

We recognize that society's interest in the finality of a judgment of conviction is different when defendant's direct appeal is pending from when defendant's appeal has been concluded. Of greater concern, however, is the language of the statute and the anomaly in its interpretation that would result were we to accept defendant's argument. Apart from the fact that defendant's interpretation would ascribe two different meanings to the very same statutory word, an anomaly would arise from variations in the amount of time it takes to resolve an appeal in the Appellate Divisions. Where the appellate backlog is greater a defendant would have an increased opportunity for per se reversal. Application of CPL 440.10 (1) (f) should be uniform, wherever defendant's appeal is pending.

Additionally, we are satisfied that the test of prejudice in the *Rosario* context--a "reasonable possibility" that the nondisclosure materially contributed to the verdict--safeguards both the interest in fairness to defendants and the interest in assuring the People's careful discharge of their disclosure obligation. The "reasonable possibility" test is, after all, "perhaps the most demanding test yet formulated" for harmless error analysis (*see, People v Crimmins,* 36 NY2d 230, 240-241). And we have recognized that the "reasonable possibility" test "properly encourages compliance" with the People's *Brady* obligations (*People v Vilardi,* 76 NY2d 67, 77). That should be no less true with respect to the People's *Rosario* obligations.

As a final argument in favor of a per se standard defendant contends that *People v Novoa* (70 NY2d 490)--which preceded *Jackson*--is controlling. However, as is abundantly clear from the Court's opinion, in *Novoa* the Court was not asked to determine, nor did it, what standard of review should apply to CPL 440.10 motions. *Jackson* represented the next step in the progression of these cases, putting before us the question whether *Rosario* claims raised in a postappeal CPL 440.10 motion--like those raised on direct appeal--were subject to the per se error rule. While defendant points to language in *Jackson* describing *Novoa,* the fact remains that the issue we now confront simply was not before us in *Novoa* or in *Jackson.* Resolving for the first time the question of the legal standard applicable to CPL 440.10 motions made *before* defendant's appeal has been exhausted, we decide in favor of uniformity for CPL 440.10 motions.

It remains for us to apply that legal standard to the facts before us. Because the Appellate Division ruled that the People's failure to disclose the Russell Report warranted ***194** automatic vacatur of defendant's conviction, the court did not determine whether that failure, in fact, prejudiced defendant. The case must therefore be remitted to the Appellate Division for a determination of whether there was a reasonable possibility that failure to turn over the *Rosario* material contributed to the verdict against defendant (*People v Jackson,* 78 NY2d at 650, *supra*).

Accordingly, the order of the Appellate Division should be reversed, and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with this opinion.

Judges Titone, Bellacosa, Smith, Levine, Ciparick and Wesley concur.
Order reversed, etc. ***195**

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Maimonides Medical Center v. First United American Life Ins. Co., N.Y.Sup., February 22, 2012

3 N.Y.3d 54, 814 N.E.2d 789, 781 N.Y.S.2d 482, 33 Employee Benefits Cas. 1015, 2004 N.Y. Slip Op. 05765

****1** In the Matter of Charlene Polan, Appellant
v
State of New York Insurance Department, Respondent

Court of Appeals of New York
Argued June 1, 2004
Decided July 1, 2004

CITE TITLE AS: Matter of Polan v State of N.Y. Ins. Dept.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 2, 2003. The Appellate Division, with two Justices dissenting, affirmed an order and judgment (one paper) of the Supreme Court, New York County (Robert D. Lippmann, J.), entered in a proceeding pursuant to CPLR article 78, which had denied the petition to annul respondent's determination that the group disability insurance policy administered by petitioner's employer did not discriminate against her by reason of mental disability and, therefore, did not violate Insurance Law § 4224 (b) (2).

Matter of Polan v State of N.Y. Ins. Dept., 3 AD3d 30, affirmed.

HEADNOTE

Insurance
Disability Insurance
Disparate Coverage of Physical and Mental Disabilities Not Violative of Antidiscrimination Statute

The long-term disability insurance plan offered by petitioner's employer to all employees at the same premium did not violate the antidiscrimination provision in Insurance Law § 4224 (b) (2) by failing to afford equivalent coverage for mental and physical disabilities. Under the policy, coverage for physical disabilities extended until the disabled employee reached age 65 or the disability ceased, while coverage for mental disabilities, such as the one petitioner suffered from, was limited to 24 months absent hospitalization or institutionalization. Section 4224 (b) (2) does not require an insurer to offer the same benefits for all ailments unless statistically or empirically justified. It proscribes limitations on coverage "solely because of" a particular disability, rather than limitations on coverage "for" a particular disability. There was no legislative intent to insure parity of benefits for mental and physical disabilities.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Insurance §§ 43, 551, 556, 1475.

Couch on Insurance (3d ed) §§ 69:32, 69:43.

McKinney's, Insurance Law § 4224 (b) (2).

NY Jur 2d, Insurance § 978.1.

ANNOTATION REFERENCE

See ALR Index under Health and Accident Insurance. ***55**

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Query: disability /4 insurance /p anti-discrimination

POINTS OF COUNSEL

Stein & Schonfeld, Garden City (*Robert L. Schonfeld* and *Seth P. Stein* of counsel), for appellant.
Insurance Law § 4224 (b) (2) applies to insurance policies limiting coverage on the basis of mental disability, and the courts below and the State Insurance Department erred in not applying the statute to the insurance policy at issue. (*Matter of Theroux v Reilly,* 1 NY3d 232; *Matter of Raritan Dev. Corp. v Silva,* 91 NY2d 98; *Riley v County of Broome,* 95 NY2d 455; *Matter of Cahill v Rosa,* 89 NY2d 14; *Scheiber v St. John's Univ.,* 84 NY2d 120; *Crane Neck Assn. v New York City/Long Is. County Servs. Group,* 61 NY2d 154; *Sparkes v Morrison & Foerster Long-Term Disability Ins. Plan,* 129 F Supp 2d 182; *Matter of Yolanda D.,* 88 NY2d 790; *Health Ins. Assn. of Am. v Harnett,* 44 NY2d 302; *People ex rel. Lewis v Safeco Ins. Co. of Am.,* 98 Misc 2d 856.)

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Eliot Spitzer, Attorney General, New York City (*David Lawrence III* and *Michael S. Belohlavek* of counsel), for respondent.

I. All available indicia of legislative intent, including the plain language of Insurance Law § 4224 (b) (2), its legislative history, and insurance industry custom and practice, demonstrate that the statute is not intended to require parity in the level of benefits made available to the physically and mentally disabled. (*Matter of Albano v Board of Trustees,* 98 NY2d 548; *Matter of Dworman v New York State Div. of Hous. & Community Renewal,* 94 NY2d 359; *Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Patrolmen's Benevolent Assn. of City of N.Y. v City of New York,* 41 NY2d 205; *Matter of Tompkins County Support Collection Unit v Chamberlin,* 99 NY2d 328; *McNeil v Time Ins. Co.,* 205 F3d 179; *El-Hajj v Fortis Benefits Ins. Co.,* 156 F Supp 2d 27; *Riley v County of Broome,* 95 NY2d 455; *Equal Empl. Opportunity Commn. v Staten Is. Sav. Bank,* 207 F3d 144; *Rogers v Department of Health & Envtl. Control,* 174 F3d 431.) II. The circumstances surrounding Insurance Law § 4224 (b) (2)'s enactment are wholly inconsistent with a legislative intent to require a parity of benefits to the mentally and physically disabled. (*Equal Empl. Opportunity Commn. v CNA Ins. Cos.,* 96 F3d 1039; *Equal Empl. Opportunity Commn. v Staten Is. Sav. Bank,* 207 F3d 144.)

New York Lawyers for the Public Interest, Inc., New York City ***56** (*Marianne Engelman Lado, Pauline H. Yoo, James George Felakos* and *Janet L. Steinman* of counsel), for Association of the Bar of the City of New York, amicus curiae.

I. Insurance Law § 4224 (b) (2) prohibits discrimination in the provision of benefits on the basis of disability. (*Feinstein v Bergner,* 48 NY2d 234; *Matter of Yolanda D.,* 88 NY2d 790; *Chabner v United of Omaha Life Ins. Co.,* 994 F Supp 1185; *Astoria Fed. Sav. & Loan Assn. v Solimino,* 501 US 104; *Matter of Binghamton GHS Empls. Fed. Credit Union v State Div. of Human Rights,* 77 NY2d 12; *Mowczan v Bacon,* 92 NY2d 281; *People v Sheppard,* 54 NY2d 320; *Matter of Hernandez v Barrios-Paoli,* 93 NY2d 781; *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v Norris,* 463 US 1073.) II. The public policy of narrowly limiting the circumstances under which persons belonging to historically disfavored classes can be subject to disparate treatment is incorporated into the antidiscrimination provisions of the New York Insurance Law. (*Scheiber v St. John's Univ.,* 84 NY2d 120; *Matter of Cahill v Rosa,* 89 NY2d 14; *Nevada Dept. of Human Resources v Hibbs,* 538 US 721; *Olmstead v L.C.,* 527 US 581; *Hazen Paper Co. v Biggins,* 507 US 604; *School Bd. of Nassau County, Fla. v Arline,* 480 US 273; *Bragdon v Abbott,* 524 US 624; *Elaine W. v Joint Diseases N. Gen. Hosp.,* 81 NY2d 211; *Lovejoy-Wilson v NOCO Motor Fuel, Inc.,* 263 F3d 208; *Chabner v United of Omaha Life Ins. Co.,* 225 F3d 1042.) III. Petitioner-appellant's reading of Insurance Law § 4224 (b) (2) as requiring that any distinctions in benefits based on mental disability must be supported by actuarial or experiential data is consistent with the Insurance Law and the State's regulation of the insurance industry. (*Blue Cross & Blue Shield of Cent. N.Y. v McCall,* 89 NY2d 160; *Matter of Binghamton GHS Empls. Fed. Credit Union v State Div. of Human Rights,* 77 NY2d 12; *Matter of Health Ins. Assn. of Am. v Corcoran,* 154 AD2d 61; *Health Ins. Assn. v Harnett,* 44 NY2d 302.)

OPINION OF THE COURT

Read, J.

Insurance Law § 4224 (b) (2) prohibits an insurer from limiting the coverage available to an individual on account of a physical or mental disability unless permitted by law or regulation and statistically or empirically justified. We are asked to decide whether a long-term disability plan open to both disabled and nondisabled employees on the same terms violates this provision ***57** by failing to afford equivalent coverage for mental and physical disabilities. For the reasons that follow, we conclude that it does not.

I. **2

Petitioner Charlene Polan's employer provided its employees with a number of benefits, including short- and long-term disability insurance coverage. Under the group policy issued by the insurer to petitioner's employer, coverage for physical disabilities extended until the disabled employee reached age 65 or the disability ceased. Coverage for disabilities caused by "mental and nervous disorders or diseases," however, was limited to 24 months unless the disabled employee was hospitalized or institutionalized at the end of this time period, in which event benefits continued until the employee was no longer confined.

Petitioner suffers from a chronic psychiatric disability and has been unable to work since March 24, 1994. In February 1995, the insurer accepted and approved her claim for long-term disability benefits retroactive to September 16, 1994. Although petitioner continued to suffer from a psychiatric disability, her long-term disability benefits terminated after September 8, 1996 because of the 24-month limitation.

In June 2000, petitioner commenced an action against her employer and the insurer, alleging that the 24-month limitation violates Insurance Law § 4224 (b) (2). Supreme Court dismissed the action, determining that section 4224 (b) (2) does not provide a private right of action, and is more appropriately enforced by the Superintendent of Insurance of the State of New York.

Petitioner then filed a complaint against the insurer with the New York State Insurance Department. She protested that the insurer had violated section 4224 (b) (2) by "treat[ing] mental disability differently from other disabilities without actuarial or experiential basis." The Department rejected petitioner's complaint, agreeing with the insurer that section 4224 (b) (2) does not mandate equal benefits for mental and physical disabilities, and that petitioner was afforded the same benefits as all other employees participating in her employer's group plan.

Petitioner then challenged the Department's determination in this CPLR article 78 proceeding in Supreme Court. She sought vacatur of the rejection and an order directing the Department to consider whether the difference in duration of benefits for long-term physical and mental disabilities was supported bysound ***58** actuarial or experiential data. Concluding that the policy did not violate Insurance Law § 4224 (b) (2) by providing more extended coverage for physical disabilities than for mental disabilities, Supreme Court denied the petition and dismissed the proceeding. The Appellate Division, with two Justices dissenting, affirmed (3 AD3d 30 [1st Dept 2003]), and so do we.

II.

When interpreting a statute, we turn first to its text as the best evidence of the Legislature's intent. As a general rule, a statute's plain language is dispositive (*see Riley v County of Broome*, 95 NY2d 455 [2000]). Further, deference to an administrative agency's "special competence or expertise" does not come into play where, as is the case here, we are called upon to decide a question of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" (****3** *Matter of Gruber [New York City Dept. of Personnel--Sweeney]*, 89 NY2d 225, 231 [1996]).

Insurance Law § 4224 (b) (2) provides, in pertinent part, that

> "(b) No insurer doing in this state the business of accident and health insurance* . . . shall . . .
>
> "(2) refuse to insure, refuse to continue to insure or limit the amount, extent or kind of coverage *available to an individual*, or charge a different rate for the same coverage *solely because of* the physical or mental disability, impairment or disease, or prior history thereof, *of the insured or potential insured*, except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related to actual or reasonably anticipated experience" (emphasis added).

Nothing in this antidiscrimination provision requires an insurer to offer the same benefits for all ailments unless statistically or empirically justified.

Section 4224 (b) (2) proscribes limitations on coverage "solely because of" a particular disability, rather than limitations on coverage "for" a particular disability (*see McNeil v Time Ins. Co.*, 205 F3d 179, 184 n 5 [5th Cir 2000] [interpreting a Texas statute similar to Insurance Law § 4224 (b) (2) and stating thatif ***59** "because of" a disability meant "for" a disability, insurers would be required "to have an actuarial basis or past experience in support of every limitation on coverage for anything that could be construed as a handicap"]). Indeed, New York's Insurance Law consistently refers to insurance coverage "for" an insured risk rather than "because of" that risk (*see e.g.* Insurance Law § 1117 [f] [1] ["coverage for long term care services"]; § 3216 [i] [6]-[12] ["coverage for" followed by such insured risks as "in-patient hospital care," "home care," "pre-admission tests," "in-patient surgical care," "maternity care," "hospital, surgical or medical care," "physician services" and "prescribed drugs"]; § 3234 [a] [added by L 1993, ch 731, § 69] ["coverage for hospital or medical expenses"]).

Thus, in order to discriminate against "an individual" and to do so "solely because of" a disability, the insurer must somehow limit an individual's coverage by reason of that individual's disability. Here, the insurer did not adopt the 24-month limitation "solely because of" petitioner's mental disability; the limitation preceded her disability. Nor was petitioner otherwise discriminated against. She was eligible for the same long-term disability coverage at the same premium as were all other employees participating in her employer's group plan (*see McNeil*, 205 F3d at 184 ["As long as (the insurer) offered (the plaintiff) the same policy it offered everyone else, (the insurer) has not violated

(the antidiscrimination statute), even assuming it knew (the plaintiff) had AIDS"]). ****4**

Insurance Law § 4224 (b) (2) is similar to the antidiscrimination statutes of several other states, including Maine and Texas. Courts have generally declined to interpret these statutes to require equivalent coverages for mental and physical disabilities (*see e.g. McNeil*, 205 F3d 179 [2000], *supra*; *Pelletier v Fleet Fin. Group, Inc.*, 2000 WL 1513711, *4, 2000 US Dist LEXIS 16456, *13 [D NH, Sept. 19, 2000] [holding that, although Maine's antidiscrimination insurance statute requires insurers to provide coverage on the same terms and conditions to disabled and nondisabled persons unless sound actuarial evidence justifies different benefits, "(t)he statutory language . . . does not limit the kind of coverage that an insurer can offer"]; *see also El-Hajj v Fortis Benefits Ins. Co.*, 156 F Supp 2d 27, 33 [D Me 2001] [holding that Maine's antidiscrimination insurance statute "neither implies nor suggests that insurers must treat the mentally disabled in the same way that it treats the physically disabled"]).

Tellingly, the Legislature chose to place the antidiscrimination provision in Insurance Law article 42, which governs insurers, ***60** rather than in article 32, which mandates terms and conditions of insurance policies. For example, section 3221 provides that an insurance policy that "provides reimbursement for psychiatric or psychological services . . . [performed] by physicians, psychiatrists or psychologists" must, if requested by the policyholder, "provide the same coverage to insureds for such services when performed by a [certified] social worker" (Insurance Law § 3221 [*l*] [4] [A]). Similarly, section 3221 provides that "[e]very group or blanket policy . . . which provides hospital, surgical or medical coverage shall include coverage for maternity care . . . to the same extent that coverage is provided for illness or disease under the policy" (§ 3221 [k] [5] [A] [i]). Section 3221, unlike any provision in article 42, specifies coverage of various conditions or services, i.e., "the diagnosis and treatment of mental, nervous or emotional disorders or ailments" (§ 3221 [*l*] [5] [A]); "the diagnosis and treatment of chemical abuse and chemical dependence" (§ 3221 [*l*] [6] [A]); "equipment and supplies for the treatment of diabetes" (§ 3221 [k] [7] [A]); cancer screening (§ 3221 [*l*] [11]); and nursing home care (§ 3221 [*l*] [2]). The extensive list of statutorily mandated benefits in article 32 and the absence of any comparable list in article 42 cuts against petitioner's argument that the Legislature intended section 4224 (b) (2) to require equivalent coverage for physical and mental disabilities.

III.

Section 4224 (b) (2) was enacted in 1994 (L 1994, ch 713) to expand the protections of Insurance Law § 3234, enacted the previous year (L 1993, ch 601) to prohibit insurers from refusing to issue a policy (or cancelling or declining to renew a policy) to an individual with a history of breast cancer (Governor's Mem approving L 1993, ch 601, 1993 McKinney's Session Laws of NY, at 2909). In approving the bill enacting section 3234, Governor Mario M. Cuomo observed that it was "too narrow in scope" because its protections were not afforded to survivors of other diseases (*id.*). Accordingly, he directed the Superintendent of Insurance and the Commissioner of Health to develop legislation to address the needs of the "situations overlooked" by the 1993 legislation (*id.* at 2910). ****5**

The following year, the Legislature enacted Insurance Law § 4224 (b) (2). In his approval memorandum, the Governor observed that the bill enacting this provision was intended to expand the access and eligibility protections of section 3234 to ***61** "ensure that coverage and benefits are offered to all insureds on a non-discriminatory basis" (Governor's Mem approving L 1994, ch 713, 1994 McKinney's Session Laws of NY, at 3013). Likewise, Senator Dean G. Skelos, the bill's Senate sponsor, stated in relevant part that

> "this legislation amends section 4224 of the Insurance Law in regard to the *eligibility* for any life, health and disability insurance. Specifically, the bill prohibits insurance companies from unfairly discriminating by refusing to issue, renew, or limit the extent, amount or kind of coverage due to any physical or mental disability" (Bill Jacket, L 1994, ch 713, at 5 [first emphasis added]).

Assemblyman Charles O'Shea, the legislation's Assembly sponsor, observed that the bill "not only prohibit[s] the refusal to issue or cancel a policy, but also prohibit[s] the limiting of benefits covered" (Sponsor's Mem, Bill Jacket, L 1994, ch 713, at 8). As pointed out by the Department, the statute's proscription against "limit[ing] the amount, extent or kind of coverage" in this context does not mean, as petitioner argues, that an insurer must provide the same benefits for all disabilities. Rather, section 4224 (b) (2) forbids an insurer from limiting coverage by providing less generous benefits to a disabled individual than to a nondisabled individual.

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The National Association of Insurance Commissioners (NAIC) Model Regulation on Unfair Discrimination in Life and Health Insurance on the Basis of Physical or Mental Impairment, which section 4224 (b) (2) mirrors, further supports this view. Section 3 of the Model Regulation describes an act or practice constituting unfair discrimination by a life or health insurer as

> "refusing to insure, or refusing to continue to insure, or limiting the amount, extent or kind of coverage available to an individual, or charging a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience" (4 NAIC Model Laws, Regulations and Guidelines, at 887-1 [July 1993]).

The Drafting Note to the Model Regulation makes it clear that

> "[t]he regulation is *not intended to mandate theinclusion* ***62** *of particular coverages*, such as benefits for normal pregnancy, *or of levels of benefits such as for mental illness*, in a company's policies or contracts. In virtually every state, mandates of any coverages or benefits are the subject of separate legislation. The model unfair trade practices act has never been interpreted to provide the basis for such mandates but rather to assure that such coverage and benefits as are offered by insurers are provided on a ****6** basis which is not unfairly discriminatory among individuals of the same class" (*id.* [emphasis added]).

Petitioner and the dissenting Justices contend that "there is no evidence that the . . . Legislature relied upon or endorsed the NAIC Drafting Note in enacting Insurance Law § 4224 (b) (2)." (3 AD3d at 39-40.) But in determining what the Legislature--which enacted the NAIC language almost verbatim--intended, it is reasonable to consider NAIC's statement of the Model Regulation's purpose. Notably, this statement is completely consistent with the statutory language.

In short, section 4224 (b) (2)'s legislative history belies any legislative intent to insure parity of benefits for mental and physical disabilities. Instead, section 4224 (b) (2) extended section 3234's protections for individuals with a history of breast cancer to survivors of other diseases by insuring that a given insurance plan affords disabled and nondisabled individuals equal access to and eligibility for the same benefits.

IV.

Finally, we find the federal courts' analysis of analogous federal antidiscrimination provisions to be persuasive. The federal Courts of Appeals have repeatedly concluded that the Americans With Disabilities Act ([ADA] 42 USC § 12101 *et seq.*), which prohibits discrimination in employee benefits and public accommodations "because of . . . disability" (§ 12112 [a]; § 12182 [a]), does not mandate equivalent benefits for physical and mental disabilities (*see e.g. Ford v Schering-Plough Corp.*, 145 F3d 601, 608 [3d Cir 1998] ["So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities"]; *Equal Empl. Opportunity Commn. v CNA Ins. Cos.*, 96 F3d 1039, 1044 [7th Cir 1996] [observing that a 24-monthlimit ***63** for mental disability benefits "may or may not be an enlightened way to do things, but it (is) not discriminatory in the usual sense of the term"]; *Krauel v Iowa Methodist Med. Ctr.*, 95 F3d 674, 678 [8th Cir 1996] [noting that excluding one disability from coverage is not a disability-based distinction violating the ADA so long as the exclusion applies equally to all individuals]; *Parker v Metropolitan Life Ins. Co.*, 121 F3d 1006, 1015 [6th Cir 1997] [noting that "the ADA does not mandate equality between individuals with different disabilities"]; *Kimber v Thiokol Corp.*, 196 F3d 1092, 1102 [10th Cir 1999] [adopting the reasoning of the other circuits and holding that "the ADA does not prohibit an employer from operating a long term disability benefits plan which distinguishes between physical and mental disabilities"]; *Lewis v Kmart Corp.*, 180 F3d 166, 170 [4th Cir 1999] [holding that "the ADA does not require a long-term disability plan that is sponsored by a private employer to provide the same level of benefits for mental and physical disabilities"]; *Weyer v Twentieth Century Fox Film Corp.*, 198 F3d 1104, 1116 [9th Cir 2000] [noting that "there is no discrimination under the (ADA) where disabled individuals are given the same opportunity as everyone else, so insurance distinctions that apply equally to all employees cannot be ****7** discriminatory"]).

Like these federal courts, we are unwilling to infer a legislative intent when to do so would upset longstanding industry practice. As the Second Circuit remarked in *Equal Empl. Opportunity Commn. v Staten Is. Sav. Bank* (207 F3d 144, 149 [2d Cir 2000]) "the historic and nearly universal practice inherent in the insurance industry [is to

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provide] different benefits for different disabilities." Because an interpretation that Insurance Law § 4224 (b) (2) accords the parity of benefits sought by petitioner "would require far-reaching changes in the way the insurance industry does business," we are "reluctant to infer such a mandate for radical change absent a clearer legislative command" (*id.*).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and R.S. Smith concur.

Order affirmed, with costs.

FOOTNOTES

* Insurance Law § 1113 (a) (3) defines "accident and health insurance" to include, among other things, the disability insurance at issue in this appeal.

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142 A.D.3d 34, 34 N.Y.S.3d 409, 2016 N.Y. Slip Op. 04463

****1** In the Matter of Carol Puerto, Respondent-Appellant,
v
Robert Doar, as Commissioner of the New York City Human Resources Administration, et al., Appellants-Respondents.

Supreme Court, Appellate Division, First Department, New York
16114, 402224/11
June 9, 2016

CITE TITLE AS: Matter of Puerto v Doar

SUMMARY

Cross appeals from an order of the Supreme Court, New York County (Lucy Billings, J.), entered on or about April 25, 2013. The order, insofar as appealed from as limited by the briefs, (1) granted the petition to annul a determination of the New York State Office of Temporary and Disability Assistance, dated April 19, 2011, upholding the decision of the New York City Human Resources Administration (HRA), dated January 12, 2011, which reduced petitioner's public assistance benefits on the ground that she missed a scheduled appointment, to the extent of declaring that 18 NYCRR 385.11 (a) (2) and certain notices issued thereunder violate Social Services Law § 341 (1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and (2) granted the municipal respondent's motion to dismiss the petition to the extent of dismissing the claim that HRA's conciliation and conference procedures violate Social Services Law § 341 (1) by not allowing a public assistance recipient to avoid sanctions by curing noncompliance with work activities.

Matter of Puerto v Doar, 42 Misc 3d 563, modified.

HEADNOTES

Social Services
Public Assistance
Reduction of Benefits—Applicability of Exception to Mootness Doctrine

([1]) Where petitioner's public assistance benefits were reduced based on her failure to attend a mandatory assessment appointment, and her proceeding for declaratory and injunctive relief challenging the actions of respondent city and state agencies was rendered moot when, after petitioner commenced the proceeding, the agencies withdrew the notice of decision reducing petitioner's benefits and restored her benefits to the full amount, petitioner's claims met the standard for the mootness exception and the circumstances warranted judicial review. The practices and procedures of respondent city agency in regard to informing public assistance recipients of employment requirements and the sanction process, and their lawfulness, presented a controversy that was likely to recur both with respect to petitioner, who continued to be a recipient of public assistance, and with respect to thousands like her. The issues presented are rarely reviewed by the courts because pro se litigants at the administrative hearing level are not equipped to raise complex legal issues at their hearings. If, in those few cases in which public ***35** assistance recipients retain counsel to bring issues before a court, the city and state agencies can moot them out by vacating a fair hearing decision and restoring some lost benefits, then the issues will always evade review.

Social Services
Public Assistance
Challenges to Reduction of Benefits—Notices—Specification of Actions to Avoid Benefits Reduction

([2]) In a proceeding commenced after petitioner's public assistance benefits were reduced based on her failure to attend a mandatory assessment appointment, Supreme Court erred in finding that respondent city agency's conciliation notification and notice of decision, as well as the governing regulation (18 NYCRR 385.11 [a] [2]), violated Social Services Law § 341 (1) by failing to advise public assistance recipients that compliance with assessments, employment planning and assigned work activities is action they may take to avoid a reduction in assistance as the statute contains no such requirement. Section 341 (1) (a) and (b) provide that the conciliation notification, and, in the event conciliation is unsuccessful, the notice of decision, shall indicate "the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits." But the statute, on its face, does not require that recipients be expressly told they can avoid a reduction in assistance by asserting their

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compliance with required work activities. The regulation and notices closely tracked the statute, and every requirement set forth in section 341 was incorporated into the notices.

Social Services
Public Assistance
Reduction of Benefits—Notices—Specification of Actions to Avoid Benefits Reduction

([3]) In a proceeding commenced after petitioner's public assistance benefits were reduced based on her failure to attend a mandatory assessment appointment, respondent city agency's conciliation and conference procedures following the notice of decision did not violate Social Services Law § 341 (1) by failing to advise petitioner that she could participate in work activities prospectively to avoid a reduction in assistance as the statute does not require the agency to give sanctioned public assistance recipients a chance to cure their noncompliance. The statutory regime of which section 341 (1) is a part provides for a system of tiered sanctions. The regime provides opportunities to cure, particularly for first offenders, as well as minimum sanction periods for repeat offenders. But while section 341 (1) requires that notices inform sanctioned recipients of "the necessary actions that must be taken to avoid a pro-rata reduction," it does not grant all offenders an immediate right to cure noncompliance.

Social Services
Public Assistance
Reduction of Benefits—Duty to Review Case Record before Issuing Decision—"Autoposting"

([4]) In a proceeding commenced after petitioner's public assistance benefits were reduced based on her failure to attend a mandatory assessment appointment, respondent city agency had to be given the opportunity to answer before a final determination could be issued concerning whether its computerized "autoposting" system, which automatically imposed a sanction reducing petitioner's public assistance benefits due to the failure to attend such an appointment, violated 18 NYCRR 358-4.1. Under 18 NYCRR 358-4.1 (a), "[a] social services agency must review . . . actions to determine whether the action is correct based upon available evidence included in the applicant's or recipient's case record." 18 NYCRR 358-4.1 (b) provides that only after review ***36** of the case record can the agency send a notice of decision informing an applicant or recipient of the action to be taken. Here, the autoposting system automatically issued a notice of decision taking adverse action without any employee or officer reviewing petitioner's case record or investigating her case. Nevertheless, insofar as petitioner sought declaratory and injunctive relief prohibiting the city agency's use of autoposting, rather than a reversal of the decision to reduce her benefits, final determination of the issue was premature.

RESEARCH REFERENCES

Am Jur 2d, Appellate Review §§ 596, 602; Am Jur 2d, Welfare Laws §§ 28, 29, 104, 105.

Carmody-Wait 2d, Appeals in General §§ 70:343, 70:344.

McKinney's, Social Services Law § 341 (1).

18 NYCRR 358-4.1 (a), (b); 385.11 (a) (2).

NY Jur 2d, Appellate Review §§ 638, 639; NY Jur 2d, Public Welfare and Elder Assistance §§ 42, 459, 461.

Siegel, NY Prac § 525.

ANNOTATION REFERENCE

See ALR Index under Appeal and Error; Moot and Abstract Matters; Welfare Benefits.

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Legal Services NYC-Bronx, Bronx (*Sienna Fontaine* of counsel), for respondent-appellant.

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OPINION OF THE COURT

Acosta, J.

****2** At issue in this case is the validity of the notice of conciliation and the notice of decision that public assistance recipients receive informing them of their failure to participate in mandatory ***37** assessments and employability plans. The specific question is whether 18 NYCRR 385.11, and the above-mentioned notices approved by the New York State Office of Temporary and Disability Assistance (OTDA),[1] violate Social Services Law § 341 because the notices fail to state affirmatively that a valid reason for not attending a mandatory assessment is that on the scheduled date of the assessment the recipient was participating in an approved training program. The notices also do not offer recipients a chance to cure their noncompliance prospectively. For the reasons stated below, we hold that the notices comply with Social Services Law § 341 (1).

Public assistance programs in New York City, including the State's family assistance program (*see* Social Services Law §§ 2 [18], [19]; 348; 349), are administered by the New York City Human Resources Administration (HRA)[2] under OTDA's supervision. To receive public assistance under the family assistance program, nonexempt recipients "must be engaged in work" (Social Services Law § 335-b [5] [a]; 18 NYCRR 385.2 [f]). To carry out this mandate, local social services districts assign recipients to work activities (Social Services Law § 336; 18 NYCRR 385.9 [a]). HRA's employment plan defines "engaged in work" as "[c]ompliance with assessment, employment planning, all activities included in the individual's Employment/Self-Sufficiency plan including . . . any of the work activities listed [elsewhere in the HRA employment plan]." Recipients who willfully and without good cause[3] fail to participate in assessments and employability plans are subject to reductions in their public assistance benefits.[4]

Petitioner, a recipient of public assistance benefits from HRA, was participating in a city-approved training program in 2010. She was sent a notice, dated November 26, 2010, to attend a "Mandatory Training Assessment Group [TAG] Appointment" on December 9, 2010, at 9:00 a.m., to "discuss [her] employment goals," but she never received the notice, because it was not addressed properly. Instead, on December 9, petitioner went to work, as HRA required her to do under the training program.

Apparently, HRA, by way of a computerized system known as "autoposting," automatically posted an infraction. Petitioner ***38** alleges that the infraction automatically triggered the issuance of a "Conciliation Notification."[5] On December 26, 2010, HRA mailed petitioner the conciliation notification instructing her to appear at its office on January 8, 2011, at 9:00 a.m., "to explain to a Conciliation Worker why [she] did not report or cooperate" with work requirements. The conciliation notification informed petitioner that she should be prepared to show "good cause" for having failed to "comply[ ] with a work requirement." It provided "examples of good reasons" for failing to comply, including but "not limited to" the following circumstances: that her child was "sick on the day of the work activity," that she "had a household emergency," that she did not have child care for a child under 13, and that she was ****3** "unable to participate due to a domestic violence situation." The notification did not give, as an example of good cause, the fact that she was participating in an HRA-mandated training program. HRA again failed to address the notice to petitioner's address. Consequently, petitioner did not appear for the conciliation interview on January 8, 2011.

On January 12, 2011, HRA mailed petitioner a notice of decision (NOD). The NOD stated that the agency had determined that petitioner "willfully did not complete" "employment requirement(s)," by failing to attend the interview on December 9, 2010, and that petitioner had failed to respond to the conciliation notification. The NOD stated that petitioner's public assistance benefits would be reduced from $753 to $502 per month, effective January 23, 2011. The NOD advised petitioner that, if she disagreed with HRA's decision, she could request a "conference," or "informal meeting," with HRA, or a "State Fair Hearing," at which she could be represented by counsel. This time HRA addressed the NOD properly.

On February 4, 2011, petitioner requested a fair hearing, which was held on March 11, 2011, before an OTDA hearing officer. Petitioner appeared pro se. Petitioner testified that she never received the TAG interview letter, and that, had she received the letter, she would have informed HRA that she had to go to her internship on the scheduled date of December 9, 2010.

By decision dated April 19, 2011, OTDA upheld HRA's decision, finding that HRA had correctly determined that petitioner ***39** "willfully and without good cause failed

or refused to comply with employment requirements." In particular, OTDA found that, although petitioner "contended at the hearing that [she] did not comply because she is already engaged in approved Agency activity, [her] testimony is not credible because [her] overall testimony was not persuasive in light of the Agency evidence provided." OTDA held that petitioner's "failure to comply must be deemed willful in that [she] was fully aware of the appointment in issue but did not attend without providing good cause for failure to do so." OTDA did not address petitioner's contention that she did not receive the TAG interview notice or conciliation notification because those documents were mailed to an incomplete address, i.e., an address that did not include her apartment number.

The conciliation notification and NOD were sent pursuant to the statutory mandate of Social Services Law § 341. Entitled "Conciliation; refusal to participate," Social Services Law § 341 (1) provides:

> "(a) Consistent with federal law and regulations and this title, if a participant has failed or refused to comply with the requirements of this title, the social services district shall issue a notice in plain language indicating that such failure or refusal has taken place and of the right of such participant to conciliation to resolve the reasons for such failure or refusal to avoid a pro-rata reduction in public assistance benefits for a period of time set forth in [Social Services Law § 342]. *The notice shall indicate the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title and the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits*. The notice shall indicate that the participant has seven days to request conciliation with the district regarding such failure or refusal in the case of a safety net participant and ten days in the case of a family assistance participant. *The notice shall also include an explanation in plain language of what would constitute good cause for non-compliance and examples of acceptable forms of evidence that may warrant an exemption from work activities, including evidence of domestic violence, and physical or* ***40** *mental health limitations that may be provided at the conciliation conference to demonstrate such good cause for failure to comply with the requirements of this title*. If the participant does not contact the district within the specified number of days, the district shall issue ten days notice of intent to discontinue or reduce assistance, pursuant to regulations of the department. Such ****4** notice shall also include a statement of the participant's right to a fair hearing relating to such discontinuance or reduction. If such participant contacts the district within seven days in the case of a safety net participant or within ten days in the case of a family assistance participant, it will be the responsibility of the participant to give reasons for such failure or refusal.
>
> "(b) Unless the district determines as a result of such conciliation process that such failure or refusal was willful and was without good cause, no further action shall be taken. If the district determines that such failure or refusal was willful and without good cause, the district shall notify such participant in writing, in plain language and in a manner distinct from any previous notice, by issuing ten days notice of its intent to discontinue or reduce assistance. *Such notice shall include the reasons for such determination, the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title, the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits, and the right to a fair hearing relating to such discontinuance or reduction*. Unless extended by mutual agreement of the participant and the district, conciliation shall terminate and a determination shall be made within fourteen days of the date a request for conciliation is made in the case of a safety net participant or within thirty days of the conciliation notice in the case of a family assistance participant" (emphasis added).

The notice of conciliation incorporates the requirements set forth in Social Services Law § 341 (1) (a) (*see* 18 NYCRR 385.11). As relevant on this appeal, the notice informs the recipient of what constitutes good cause for failure to complete ***41** a work requirement (Social Services Law § 341 [1] [a]; 18 NYCRR 385.12 [c] [1]). Examples of good cause for failing to comply with a work requirement include, but are not limited to, "circumstances beyond the individual's control," such as illness, lack of child care, family emergency, and domestic violence (18 NYCRR 385.12 [c] [1]).

The notice of decision likewise tracks the requirements set forth in Social Services Law § 341. Specifically, it informs the recipient that public assistance benefits are being temporarily reduced or terminated (Social Services Law § 341 [1] [b]; 18 NYCRR 385.11 [a] [3], [4] [i]). It identifies the specific instance of noncompliance, and advises the recipient of "the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits" (Social Services Law § 341 [1] [b]; 18 NYCRR 385.11 [a] [2]). It also explains the reasons for the district's determination and informs the recipient of her right to request a fair hearing before her

benefits can be discontinued or reduced (Social Services Law § 341 [1] [b]; 18 NYCRR 385.11 [a] [3]; *see also* 18 NYCRR 385.12 [a] [2] [iii] [d]). Unlike the conciliation notice, however, the notice of decision is not required to provide examples of good cause for the missed work activity (*see* Social Services Law § 341 [1] [b]).

Petitioner commenced this hybrid CPLR article 78 proceeding and declaratory judgment action in Supreme Court, New York County, seeking, among other things, the reversal of the OTDA determination and HRA's reduction of her benefits; a declaration that the conciliation notification and NOD violate Social Services Law § 341 by failing to inform participants of "the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits"; and an injunction barring OTDA and HRA from sanctioning public assistance recipients until the conciliation notification and NOD are amended to conform with Social Services Law § 341.

After the petition was filed, HRA investigated the TAG notice and conciliation notification, and determined that they omitted petitioner's apartment number and therefore did not contain her complete address. HRA accordingly withdrew its determination, and OTDA correspondingly vacated its determination. HRA deleted the employment sanction from ****5** petitioner's case record, restored her full public assistance benefits, and paid her $2,008 in retroactive benefits covering the period of February 4 through October 3, 2011. HRA also updated its records to ensure that all future notices sent to petitioner would include her full address.

***42** OTDA served an answer in which it argued that the agencies' remedial actions rendered petitioner's claims moot. OTDA also argued that the conciliation notification and NOD complied with Social Services Law § 341 and 18 NYCRR 385.11. OTDA further contended that petitioner's challenges to the conciliation notification and NOD were dehors the administrative record, since she never raised them at the agency level or administrative hearing.

By notice dated April 6, 2012, in lieu of answer, HRA cross-moved to dismiss the petition, arguing, among other things, that its corrective actions had rendered petitioner's claims moot.

Supreme Court denied the petition in part and granted it in part (42 Misc 3d 563 [2013]). The court granted HRA's motion to dismiss the petition "only to the extent of dismissing the claim that [HRA's] conciliation and conference procedures violate Social Services Law § 341 (1) by not allowing a public assistance recipient to participate in work activities prospectively to avoid a reduction in assistance after a failure or refusal to participate" (*id.* at 578-579). The court similarly dismissed petitioner's claim that OTDA "violated Social Services Law § 341 (1) by approving conciliation and conference procedures that do not allow a recipient to participate in work activities prospectively to avoid a reduction in assistance after a failure or refusal to participate" (*id.* at 579).

The court, however, granted the petition "to the following extent":

> "The court declares and adjudges that 18 NYCRR 385.11 (a) (2), insofar as it omits that a showing of compliance with assessments, employment planning, and assigned work activities is action a public assistance recipient may take to avoid a reduction in assistance, violates Social Services Law § 341 (1) (a). [OTDA] shall amend 18 NYCRR 385.11 (a) (2) to require that a conciliation notice notify a recipient of her right to show compliance with assessments, employment planning, and assigned work activities. The court declares and adjudges that, insofar as [HRA's] conciliation notification and notice of decision omit that a showing of compliance with all assessments, employment planning, and assigned work activities is action a public assistance recipient may take to avoid a reduction in ***43** assistance, [OTDA] has approved notices that violate Social Services Law § 341 (1). [OTDA] shall disapprove conciliation notices and notices of decision that fail to notify a recipient of her right to show compliance with assessments, employment planning, and assigned work activities" (*id.* [citations omitted]). [6]

In addition, the court opined that HRA's use of "autoposting"—the use of a computerized system that "automatically imposes a sanction . . . due to a failure to attend an ****6** employment or work activity appointment"—likely violates 18 NYCRR 358-4.1 (a), which calls for "review" of reductions of public assistance benefits "to determine whether the action is correct based upon available evidence" (*id.* at 569). Nonetheless, the court declined to rule on this issue before HRA served an answer and discovery with respect to its autoposting procedures.

Initially, this Court must decide whether this matter is moot. Generally, courts may not pass on moot questions (*Matter*

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of Hearst Corp. v Clyne, 50 NY2d 707 [1980]). However, "[w]here . . . a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]; *see also Hearst Corp.*, 50 NY2d at 714 ["an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment"]). As the United States Supreme Court noted in *United States v W. T. Grant Co.* (345 US 629, 632 [1953]):

> "Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case ***44** moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement" (citations and footnote omitted).

Moreover, a court may adjudicate an otherwise moot matter that "satisfies the three critical conditions to the mootness exception in that it presents an issue that (1) is likely to recur, (2) will typically evade review and (3) is substantial and novel" (*Matter of Chenier v Richard W.*, 82 NY2d 830, 832 [1993]). Where these requirements are met, a court may "reach the moot issue even though its decision has no practical effect on the parties" (*Saratoga County Chamber of Commerce*, 100 NY2d at 811).

([1]) Here, petitioner's claims meet the standard for the mootness exception. There is a likelihood of repetition of the controversy, since petitioner continues to be a recipient of public assistance and continues to be subject to the public assistance sanction process, including conciliation and autoposting, which led to HRA's erroneous determination sanctioning her. As petitioner notes, in New York City alone, from July 2012 to June 2013, on average there were 15,269 public assistance recipients a month in sanction status for an employment-related infraction. [7] The practices and procedures of HRA in regard to the employment requirements and process, and their lawfulness, present a controversy that without a doubt is likely to recur both with respect to petitioner and with respect to thousands like her. Indeed, the dissent acknowledges that the "issues of the sufficiency of the contents of the notices that were sent to petitioner, and the propriety of generating those notices by means of 'autoposting,' may be likely to recur," and that the issues are substantial and novel. The dissent ***45** nonetheless disagrees with our position that these issues will typically evade review. Contrary to the dissent, however, the issues presented by this case are rarely reviewed by the courts, because pro se litigants at the ****7** administrative hearing level are not equipped to raise complex legal issues at their hearings. If, in those few cases in which public assistance recipients retain counsel to bring these issues before a court, HRA and OTDA can moot them out by vacating a fair hearing decision and restoring some lost benefits, then these issues will truly always evade review.

That HRA had a "good faith" interest in settling petitioner's claim when it determined that the notices were sent to the wrong address is beside the point. Petitioner's case was settled only after Legal Services filed an article 78 proceeding; petitioner actually lost at her fair hearing even though she explained that the notices were sent to the wrong address. Nor does it matter whether respondents have a valid reason for settling or whether they do so to avoid review. The fact remains that the issue will typically evade review. The dissent makes much of the fact that petitioner noted that there were five pending cases that raise similar issues dating back to 2010. Six years later, and with hundreds of thousands of public assistance recipients in sanction status for an employment-related infraction, however, the issues have not been decided. In fact, four of those five cases settled. The fifth case, *Smith v Berlin* (index No. 400903/10 [Sup Ct, NY County]), is still pending. However petitioner notes that, although she alleges similar deficiencies in the notices as in the *Smith* case, she also alleges that HRA's procedures are deficient because there is no opportunity to avoid sanction either during conciliation or after the notice of decision has been issued, a claim that the petitioner in *Smith* does not raise. *Smith* also does not challenge HRA's use of autoposting.

Last, it is unfair to dismiss the petition at this juncture when the issue as to whether autoposting violates 18 NYCRR 358-4.1 is still pending.

Turning to the merits, we find that the notices at issue do not violate the applicable regulatory scheme. In reviewing these notices, we are mindful that "[t]he standard for judicial review of an administrative regulation is whether the regulation

has a rational basis and is not unreasonable, arbitrary or capricious" (*Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331 [1995]), ***46** or contrary to the statute under which it was promulgated (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]). The party challenging a regulation has the heavy burden of establishing that "it is so lacking in reason for its promulgation that it is essentially arbitrary" (*Matter of Marburg v Cole*, 286 NY 202, 212 [1941]; *Matter of Consolation Nursing Home*, 85 NY2d at 331-332).

([2]) Applying this standard, we hold that the court erred in finding that 18 NYCRR 385.11 (a) (2) violates Social Services Law § 341 (1) (a), insofar as it omits that a showing of compliance with assessments, employment planning, and assigned work activities is action that a public assistance recipient may take to avoid a reduction in assistance. The provision on which the court relied requires the agency to issue "a notice in plain language" indicating that the participant's "failure or refusal" to comply with work requirements has taken place, and "the right of such participant to conciliation to resolve the reasons for such failure or refusal" (Social Services Law § 341 [1] [a]).

The statute specifies that the notice "shall indicate the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title *and the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits*" (Social Services Law § 341 [1] [a] [emphasis added]). It is the italicized language that the court most particularly relied on in concluding that the statute requires the agency to advise a public assistance recipient that she may avoid sanction by showing that she did in fact comply with work requirements.

Section 341 (1) (b) similarly directs the agency, in the event conciliation is unsuccessful, to issue a notice of decision stating

> "the reasons for such determination, the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title, the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits, and ****8** the right to a fair hearing relating to such discontinuance or reduction."

But, as noted above, it does not require that the notice of decision give examples of good cause.

The regulation and notices closely track the statute, which focuses on how a recipient can demonstrate good cause for having ***47** failed to comply with work requirements. In fact, every requirement set forth in Social Services Law § 341 is incorporated into the notices. The crux of Supreme Court's holding is that the regulation and notices do not satisfy a requirement that recipients be expressly told that they can avoid sanction by asserting compliance. The statute on its face, however, simply contains no such requirement. This is particularly true for the notice of decision, because Social Services Law § 341 (1) (b) does not require that the notice give examples of good cause. Under these circumstances, this Court cannot find that 18 NYCRR 385.11 and the notices were unreasonable or arbitrary.

([3]) Supreme Court correctly found, however, that Social Services Law § 341 (1) does not require the agency to give sanctioned public assistance recipients a chance to cure their noncompliance. Petitioner contends that the statute's requirement that notices state "the necessary actions that must be taken to avoid a pro-rata reduction" in benefits means that the agency must inform sanctioned recipients of the "actions" they can take to avoid losing benefits. The companion statute, Social Services Law § 342, sets forth a system of progressive periods of benefits reductions. Under this system, first offenders may end sanctions simply by complying with the work requirement. Moreover, repeat offenders must suffer reduced benefits for at least three months and thereafter until they comply (Social Services Law § 342 [2] [a]-[c]). This progressive scheme is referred to in section 341 itself, which directs the agency to send a sanctioned recipient "whose failure to comply has continued for three months or longer a written reminder of the option to end a sanction after the expiration of the applicable minimum sanction period by terminating the failure to comply" (Social Services Law § 341 [5] [a]).

In other words, viewed as a whole, the statutory regime of which section 341 (1) is a part provides for a system of tiered sanctions. The regime does indeed provide for opportunities to cure, particularly for first offenders. It also provides for minimum sanction periods for repeat offenders. Section 341 (1), however, does not grant all offenders an immediate right to cure noncompliance. Thus, the court correctly dismissed petitioner's claim that the conciliation procedures and conference procedures following a notice of decision violate Social Services Law § 341 (1) by not allowing a public assistance recipient to participate in work

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activities prospectively to avoid a reduction in assistance after a failure or refusal to participate.

[4] ***48** Although we hold that the conciliation notices comport with the relevant regulatory scheme, we note that HRA's errors resulted at least in part from autoposting. We find it troubling that HRA took adverse action without any employee or officer reviewing petitioner's case record or investigating her case, particularly since 18 NYCRR 358-4.1 (a) provides that "[a] social services agency must *review* . . . actions to determine whether the action is correct based upon available evidence included in the applicant's or recipient's case record" (emphasis added). 18 NYCRR 358-4.1 (b), provides that only after that review of the case record, is HRA to send a NOD informing an applicant or recipient of the action to be taken: "Where it is determined that the intended action is correct after review, the social services agency must send to the applicant/recipient a notice."

Insofar as petitioner seeks declaratory and injunctive relief prohibiting HRA's use of autoposting, rather than the reversal pursuant to CPLR article 78 of HRA's decision to reduce her public assistance, which occurred as a consequence of the use of autoposting, HRA is entitled to answer before a final determination of this claim is made upon a motion for summary judgment or after an opportunity for disclosure and a trial (CPLR 3212 [f]; 7804 [f]; *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 103 [1984]; *Matter of Camacho v Kelly*, 57 AD3d 297, 298-299 [1st Dept 2008]). ****9**

Accordingly, the order of the Supreme Court, New York County (Lucy Billings, J.), entered on or about April 25, 2013, which, insofar as appealed from as limited by the briefs, granted the petition to annul a determination of the New York State Office of Temporary and Disability Assistance, dated April 19, 2011, upholding the decision of the New York City Human Resources Administration, dated January 12, 2011, which reduced petitioner's public assistance benefits on the ground that she missed a scheduled appointment, to the extent of declaring that 18 NYCRR 385.11 (a) (2) and certain notices issued thereunder violate Social Services Law § 341 (1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and granted HRA's motion to dismiss the petition to the extent of dismissing the claim that HRA's conciliation and conference procedures violate Social Services Law § 341 (1) by not allowing a public assistance recipient to avoid sanctions by curing ***49** noncompliance with work activities, should be modified, on the law, to vacate the declaration that 18 NYCRR 385.11 (a) (2) and certain notices issued thereunder violate Social Services Law § 341 (1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and declare that 18 NYCRR 385.11 (a) (2) and the subject notices do not violate Social Services Law § 341 (1), and otherwise affirmed, without costs.

Friedman, J.P. (dissenting). While I do not disagree with the majority's discussion of the substantive issues raised on this appeal, I respectfully dissent from the disposition of the appeal on the ground that petitioner's claims for relief were already moot by the time the matter was submitted to Supreme Court for determination. Further, contrary to the majority's position, no exception to the mootness doctrine applies. Accordingly, we should reverse the order appealed from, grant the municipal respondent's cross motion to dismiss the petition as moot, and dismiss the proceeding.

The record shows, and petitioner does not dispute, that, promptly after this proceeding under CPLR article 78 was commenced in August 2011, the City investigated the matter and found that it had mailed the conciliation notification and subsequent notice of decision to an incomplete address, from which the number of petitioner's apartment had been omitted. The City accordingly determined that it had erred in finding, based on petitioner's failure to respond to these notices, that she had not complied with applicable work requirements. Pursuant to this determination, both the City and the State vacated the determinations adverse to petitioner, as reflected in the amended decision, dated October 12, 2011, that was issued by the State Office of Temporary and Disability Assistance. [1] The City followed up by deleting the employment sanction from petitioner's case record, restoring her full public assistance benefits, and paying her retroactive benefits for the period when her benefits had been reduced. The City also updated its records to ensure that future notices would be sent to petitioner's full address.

***50** As the City argued in support of its cross motion to dismiss, long before the matter was ****10** submitted to the court for adjudication on April 19, 2012, and before the court issued its decision and order on March 27, 2013, the foregoing actions by respondents "mooted the petition as to both the injunctive and declaratory relief sought" (*Matter of Santiago v Berlin*, 111 AD3d 487, 487 [1st Dept 2013]). The mere possibility that petitioner could be subjected in the future

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to notices with improper contents, generated by insufficient internal procedures, as alleged in the petition, is speculative and does not suffice to constitute a live controversy between this particular petitioner and respondents. Petitioner has been made whole, there are no other charges pending against her, and there may never again be any charges against her. Hence, there is no live controversy between petitioner and respondents, and this Court's determination does not "carr[y] immediate, practical consequences for the parties" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]). Further, petitioner, no longer having any personal stake in the outcome of the legal dispute raised by the petition, cannot manufacture an actual controversy by asserting a claim for declaratory relief (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006], *appeal dismissed* 9 NY3d 1003 [2007]).

I respectfully disagree with the majority's conclusion that Supreme Court properly considered this matter under the exception to the mootness doctrine for a matter that "presents an issue that (1) is likely to recur, (2) will typically evade review and (3) is substantial and novel" (*Matter of Chenier v Richard W.*, 82 NY2d 830, 832 [1993]). While the issues of the sufficiency of the contents of the notices that were sent to petitioner, and the propriety of generating those notices by means of "autoposting," may be likely to recur, there is no reason to expect that these issues, substantial and novel though they may be, will typically evade review. The gravamen of petitioner's argument to the contrary, which the majority accepts, is that respondents will systematically "moot . . . out [claims presenting these issues] by vacating a fair hearing [determination] and restoring some lost benefits" in each case in which litigation is commenced. However, the record contains no evidence that respondents have been engaging in a practice of deliberately withdrawing sanctions determinations for the purpose of perpetually evading judicial review of the general practices challenged in this proceeding.

***51** Further, the record establishes that, in this particular case, respondents had a legitimate reason, unconnected to petitioner's arguments concerning the sufficiency of the contents of the notices and the propriety of autoposting, for settling her individual claim. Specifically, petitioner avers that the notices in question did not reach her, leading ultimately to the now-withdrawn adverse determination, because the municipal respondent admittedly sent out those notices with an incomplete address. Thus, respondents had a good faith reason for settling petitioner's particular claim without conceding the merits of her arguments that are the asserted basis for the application of the exception to the mootness doctrine. There is no basis in the record for inferring that respondents' reversal of the sanctions against petitioner was motivated by a plan to evade judicial review of the general practices challenged by the petition. [2]

While petitioner and the majority point to the great number of city residents who receive public assistance benefits as an indication that the issues of the propriety of the general practices under challenge here are likely to recur, this only underscores the point that these issues are likely to reach this Court in other cases that, unlike this one, have not been mooted. I see no merit in ****11** petitioner's contention that public assistance recipients will typically be unable to retain counsel or otherwise challenge adverse sanction determinations. As petitioner herself reports, as of the date of her petition, there were at least five pending proceedings, dating back to 2010, in which the same issues were being litigated. [3] The important issues that petitioner has raised should be determined in a case ***52** brought by an individual who still has a personal stake in the determination of those issues at the time a court determines them. Since petitioner had no such stake at the time the order under review was rendered, that order should be reversed and the petition dismissed.

Renwick and Moskowitz, JJ., concur with Acosta, J.; Friedman, J.P., dissents in an opinion in which Andrias, J., concurs.

Order, Supreme Court, New York County, entered on or about April 25, 2013, modified, on the law, to vacate the declaration that 18 NYCRR 385.11 (a) (2) and certain notices issued thereunder violate Social Services Law § 341 (1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and declare that 18 NYCRR 385.11 (a) (2) and the subject notices do not violate Social Services Law § 341 (1), and otherwise affirmed, without costs.

FOOTNOTES

1. The state respondent is Elizabeth Berlin, as Executive Deputy Commissioner of OTDA.

2. The municipal respondent is Robert Doar, as Commissioner of HRA.

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3 Social Services Law § 341 (1) (a); 18 NYCRR 385.11 (a) (4) (i).

4 Social Services Law §§ 335 (3); 342; 18 NYCRR 385.6 (a); 385.12.

5 According to OTDA, the conciliation notice used in this case was created by HRA and approved by OTDA.

6 Supreme Court ruled on this issue with respect to OTDA because it answered and did not seek disclosure. The court noted that it was inconceivable how further development of the record would show whether "18 NYCRR 385.11 (a) (2), in 2010 or since, requir[ed] that a conciliation notice notify a recipient of her right to show compliance with assessments, employment planning, and assigned work activities, to avoid a reduction in assistance" (42 Misc 3d at 572). Supreme Court, therefore, treated the petition regarding 18 NYCRR 385.11 (a) (2) as a motion for summary judgment (CPLR 409 [b]; *Matter of Hotel 71 Mezz Lender, LLC, v Rosenblatt*, 64 AD3d 431, 432 [1st Dept 2009]).

7 2013 Statistical Report on the Operations of New York State Public Assistance Programs, Table 23 at 46, available at http://otda.ny.gov/resources/legislative-report/2013-Legislative-Report.pdf, cached at http://www.nycourts.gov/reporter/webdocs/2013-Legislative-Report.pdf.

1 The amended decision directed the City Human Resources Administration to "[w]ithdraw its Notice of Intent [to sanction petitioner]," to "[t]ake no further action on its Notice of Intent," and to "[r]estore any Public Assistance lost by [petitioner] as a result of such Notice, retroactive to the date of the Agency's action." The amended decision further directed the City to comply with these directives "immediately."

2 Respondents do not contend that a notice is valid even if it does not reach the intended recipient due to the sending agency's failure to address the notice accurately or completely. If either respondent were making that argument, I would agree that the exception to the mootness doctrine should be applied.

3 The majority asserts, based on information not contained in the record, that four of the five cases have been settled, and that the petitioner in the fifth case has not raised all of the issues raised by the instant petitioner. As to the cases that have settled, the majority does not describe the particular facts of those cases in sufficient detail to enable us to determine whether the respondents had a reason to settle those matters other than the desire to avoid review of the issues contested in this matter. If these issues are truly endemic to the system, petitioner's able counsel in this proceeding, or a similar legal services organization, should have no difficulty finding a case that can be prosecuted to final adjudication where there has been no settlement or, alternatively, the settlement is attributable to the respondents' desire to avoid judicial review of these issues. To reiterate, given the independent reasons respondents had for settling the instant matter, the record of this case does not demonstrate any desire on the part of respondents to avoid judicial review of the contested issues.

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KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Castle v. United States, N.D.N.Y., December 18, 2017

95 N.Y.2d 455, 742 N.E.2d 98, 719 N.Y.S.2d 623, 2000 N.Y. Slip Op. 10304

Betty A. Riley et al., Appellants,
v.
County of Broome et al., Respondents.
John P. Wilson, Appellant,
v.
State of New York, Respondent.

Court of Appeals of New York
131, 132
Argued October 17, 2000;
Decided November 21, 2000

CITE TITLE AS: Riley v County of Broome

SUMMARY

Appeal, in the first above-entitled action, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 6, 2000, which affirmed a judgment of the Supreme Court (Patrick D. Monserrate, J.), entered in Broome County, upon a verdict rendered in favor of defendants.

Appeal, in the second above-entitled action, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered February 16, 2000, which affirmed a judgment of the Court of Claims (Thomas J. McNamara, J.), dismissing the claim.

Riley v County of Broome, 263 AD2d 267, affirmed.

Wilson v State of New York, 269 AD2d 854, affirmed.

HEADNOTES

Negligence
Violation of Statutory Duty
Rules of Road--Exemption for Hazard Vehicles Engaged in Highway Work-- Recklessness Standard of Care

([1]) Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road" and limits the liability of their owners and operators to reckless disregard for the safety of others. The language of section 1103 and related statutes pertaining to emergency vehicles is clear: all vehicles "actually engaged in work on a highway," just as all emergency vehicles engaged in emergency situations, are exempt from the rules of the road. Accordingly, plaintiffs in personal injury actions that arose from collisions with a street sweeper cleaning a street and a snowplow clearing snow, may not recover absent a showing that those vehicles were being operated in a reckless manner. The exemption for hazard vehicles is not limited to the stopping, standing and parking regulations of Vehicle and Traffic Law § 1202 (a), since the plain language of section 1103 (b) excuses all vehicles "actually engaged in work on a highway" from the rules of the road, regardless of their classification.

Statutes
Construction
Legislative History--Rules of Road--Exemption for Hazard Vehicles

([2]) It is appropriate to examine the legislative history of a statute even though the language of a statute is clear. While the words of a statute arethe ***456** best evidence of the Legislature's intent, and as a general rule, unambiguous language of a statute is alone determinative, the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear. Varying concerns may bear on the weight to be given legislative history, but they do not justify abandoning the long tradition of using all available interpretive tools to ascertain the meaning of a statute. The history of Vehicle and Traffic Law § 1103 (b) explicates the legislative intention to create a broad exemption from the rules of the road for all vehicles engaged in highway construction, maintenance or repair, regardless of their classification. The exemption turns on the nature of the work being performed-- not on the nature of the vehicle performing the work.

Negligence
Violation of Statutory Duty

Rules of Road--Exemption for Hazard Vehicles Engaged in Highway Work-- Recklessness Standard of Care

([3]) Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road" and limits the liability of their owners and operators to reckless disregard for the safety of others. An amendment to the statute removed the unqualified exemption such vehicles enjoyed and imposed the recklessness standard. Inasmuch as identical language in Vehicle and Traffic Law § 1104 (e) has been held to impose a standard of recklessness, general principles of statutory construction militate against imposing a different standard. Nor is there anything in the context or history of the statutes indicating that different meanings were intended. Although section 1103 (b) uses the phrase "due regard" as well as "reckless disregard" to describe the standard, the Legislature's specific reference to reckless disregard would be unnecessary and, in fact, inexplicable if the conventional criterion for negligence--reasonable care under the circumstances--were the intended standard. Thus, the only way to apply the statute is to read its general admonition to exercise "due care" in light of its more specific reference to "recklessness."

Negligence
Violation of Statutory Duty
Rules of Road--Exemption for Hazard Vehicles Engaged in Highway Work-- Work Area

([4]) Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road" and limits the liability of their owners and operators to reckless disregard for the safety of others. The protections of section 1103 (b) do not apply solely to vehicles operating in a designated "work area" as defined in Vehicle and Traffic Law § 160. Section 1103 (b) states that a vehicle "actually engaged in work on a highway" is exempt from the rules of the road. The statute does not require that a vehicle be located in a designated "work area" in order to receive the protection. Significantly, section 160 was not enacted until 1984--long after section 1103 (b) was adopted. Thus, there is no credible argument that the Legislature only had designated "work areas" in mind when it adopted section 1103 (b).

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Am Jur 2d, Automobiles and Highway Traffic, §§ 278, 1033, 1034.

McKinney's, Vehicle and Traffic Law §§ 160, 1103 (b); § 1104 (e); § 1202 (a). ***457**

NY Jur 2d, Automobiles and Other Vehicles, §§ 639, 641, 704, 748, 957.

ANNOTATION REFERENCES

See ALR Index under Automobiles and Highway Traffic.

POINTS OF COUNSEL

Thomas F. Cannavino, Endicott, for appellants in the first above-entitled action.

I. This Court should not extend the qualified privilege for emergency vehicles to hazard vehicles. (*McDonald v State of New York,* 176 Misc 2d 130; *Saarinen v Kerr,* 84 NY2d 494; *Somersall v New York Tel. Co.,* 74 AD2d 302, 52 NY2d 157; *Cottingham v State of New York,* 182 Misc 2d 928; *Szczerbiak v Pilat,* 90 NY2d 553; *Bliss v State of New York,* 179 Misc 2d 549; *Abood v Hospital Ambulance Serv.,* 30 NY2d 295; *LaMotta v City of New York,* 130 AD2d 627; *Mattera v Avis Rent A Car Sys.,* 245 AD2d 274; *Kerwin v County of Broome,* 134 AD2d 812.) II. The 1974 amendments to Vehicle and Traffic Law § 1103 (b) did not expand the qualified privilege provided for emergency vehicles under Vehicle and Traffic Law § 1104 to hazard vehicles. (*Stanton v State of New York,* 26 NY2d 990; *Saarinen v Kerr,* 84 NY2d 494; *Strobel v State of New York,* 36 AD2d 485, 30 NY2d 629; *Thain v City of New York,* 35 AD2d 545, 30 NY2d 524; *Dunn v State of New York,* 34 AD2d 267.) III. The statutory language of Vehicle and Traffic Law § 1103 (b) specifically limits the qualified privilege for hazard vehicles to parking restrictions provided for in subdivision (a) of section 1202 of the Vehicle and Traffic Law. IV. Even assuming that a qualified privilege exists for hazard vehicles under Vehicle and Traffic Law § 1103 (b), it would only apply to "rules of the road" violations. (*McDonald v State of New York,* 176 Misc 2d 130; *Bliss v State of New York,* 179 Misc 2d 549; *Gonzalez v Iocovello,* 93 NY2d 539; *Szczerbiak v Pilat,* 90 NY2d 553; *Sorensen v Nazarian,* 175 AD2d 417; *Kelley v State of New York,* 24 AD2d 831, 21 NY2d 901; *Gurecki v State of New York,* 18 Misc 2d 527; *Malanify v Pauls Trucking Co.,* 27 AD2d 622, 19 NY2d 804; *Gaynor v State of New York, Dept. of Pub. Works,* 61 AD2d 1086; *Beardsley v State of New York,* 57 AD2d 1061.) V. Respondents were

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required by State regulations to display appropriate traffic control devices. (*Zecca v State of New York,* 247 AD2d 776; *Bliss v State of New York,* 179 Misc 2d 549; *McDonald v State of New York,* 176 Misc 2d 130.) ***458**

William L. Gibson, Jr., County Attorney of Broome County, Binghamton (*Robert G. Behnke* of counsel), for respondents in the first above-entitled action.

I. The trial court correctly charged the jury that the reckless disregard standard of Vehicle and Traffic Law § 1103 applied in this case. (*McDonald v State of New York,* 176 Misc 2d 130; *Cottingham v State of New York,* 182 Misc 2d 928; *Saarinen v Kerr,* 84 NY2d 494; *Szczerbiak v Pilat,* 90 NY2d 553; *Somersall v New York Tel. Co.,* 52 NY2d 157.) II. The reckless disregard standard applies to all facets of defendants' street sweeping activity. (*Martin v Miller,* 255 AD2d 816; *Szczerbiak v Pilat,* 90 NY2d 553.) III. The court below properly charged that the reckless disregard standard applied to alleged violations of uniform manual of traffic control devices. (*Bliss v State of New York,* 179 Misc 2d 549.)

Lockwood & Golden, Utica (*Lawrence W. Golden* and *B. Brooks Benson* of counsel), for appellant in the second above-entitled action.

I. The court below erred in holding that the operator of the State snowplow engaged in customary plowing along a highway was liable only for "reckless disregard" under Vehicle and Traffic Law § 1103 (b), contrary both to legislative intent and public policy. (*Cottingham v State of New York,* 182 Misc 2d 928; *Saarinen v Kerr,* 84 NY2d 494; *Campbell v City of Elmira,* 84 NY2d 505; *Rust v Reyer,* 91 NY2d 355; *Sherman v Robinson,* 80 NY2d 483; *D'Amico v Christie,* 71 NY2d 76; *Hechter v New York Life Ins. Co.,* 46 NY2d 34; *Matter of Sullivan Co.,* 289 NY 110; *Jones v City of Albany,* 151 NY 223; *Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577.) II. The court below erred in holding that the standard of "reckless disregard" in Vehicle and Traffic Law § 1103 (b) need not be pleaded as an affirmative defense. (*Culhane v State of New York,* 180 Misc 2d 61; *McDonald v State of New York,* 176 Misc 2d 130; *Dinerman v Poehlman,* 237 AD2d 483; *Liu v New York City Police Dept.,* 216 AD2d 67; *Dwyer v Mott,* 87 Misc 2d 965; *Bragg v Genesee County Agric. Socy.,* 84 NY2d 544; *Ferres v City of New Rochelle,* 68 NY2d 446; *Saarinen v Kerr,* 84 NY2d 494; *Pellegrino v New York City Tr. Auth.,* 177 AD2d 554; *Somersall v New York Tel. Co.,* 74 AD2d 302, 52 NY2d 157; *Stewart v Volkswagen of Am.,* 181 AD2d 4.)

Eliot Spitzer, Attorney General, Albany (*Robert M. Goldfarb, Preeta D. Bansal, Daniel Smirlock* and *Peter G. Crary* of counsel), for respondent in the second above-entitled action.

I. A snowplow engaged in plowing snow from a highway is a vehicle ***459** "actually engaged in work on a highway" subject to the reckless disregard standard of care in Vehicle and Traffic Law § 1103 (b). (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Saarinen v Kerr,* 84 NY2d 494; *McDonald v State of New York,* 176 Misc 2d 130; *Cottingham v State of New York,* 182 Misc 2d 928; *People v Foster,* 73 NY2d 596; *People v Finnegan,* 85 NY2d 53, 516 US 919.) II. The statutory burden of proof set forth in Vehicle and Traffic Law § 1103 (b) is not an affirmative defense which must be pleaded under CPLR 3018 (b). (*Ferres v City of New Rochelle,* 68 NY2d 446; *Gill v Montgomery Ward & Co.,* 284 App Div 36; *Mayers v D'Agostino,* 58 NY2d 696; *Dinerman v Poehlman,* 237 AD2d 483, 90 NY2d 838, 808; *Liu v New York City Police Dept.,* 216 AD2d 67, 87 NY2d 802, 517 US 1167; *McDonald v State of New York,* 176 Misc 2d 130; *Culhane v State of New York,* 180 Misc 2d 61; *Sims v Town of Ramapo,* 177 Misc 2d 302; *Rogoff v San Juan Racing Assn.,* 77 AD2d 831, 54 NY2d 883.)

OPINION OF THE COURT

Chief Judge Kaye.

([1]) These appeals call upon us to do what increasingly is asked of courts in this age of statutes: interpret the words of a legislative enactment which the contesting parties construe differently. In particular, we are asked whether Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road," and whether it limits the liability of their owners and operators to reckless disregard for the safety of others. We conclude that defendants correctly read the statute, and we hold--as did the courts before us--that the vehicles here were exempt from the rules of the road and their liability limited to reckless conduct.

Riley v County of Broome

Defendant Garwood A. Young, an employee of the Broome County Highway Division, was operating a street sweeper on West Colesville Road in the Town of Kirkwood. Young was driving two or three miles per hour, with the sweeper straddling the shoulder and the road. Plaintiff Betty Riley was also driving on West Colesville Road, in the same direction as the street sweeper. As Riley reached the top of a hill, she saw a "huge patch of fog"--actually a cloud of dirt and dust created by the sweeper--and collided with the sweeper.

Riley and her husband brought this action against Young and the County, alleging that the sweeper caused the accident. ***460** At trial, the court held--over Riley's objection--that, under Vehicle and Traffic Law § 1103 (b), the applicable standard of care was whether defendants conducted themselves "in such a way so as not to recklessly disregard the safety of others." The court then charged the jury on that standard. The jury returned a verdict in favor of defendants, finding no recklessness in the operation of the sweeper. In a comprehensive opinion by Justice Anthony J. Carpinello, the Appellate Division affirmed, holding that under Vehicle and Traffic Law § 1103 (b), all vehicles engaged in "highway maintenance" are exempt from the rules of the road and subject only to a recklessness standard (263 AD2d 267, 273).

Wilson v State of New York

Claimant John Wilson was driving west from Canajoharie to Utica on Route 5, traveling at 30 to 35 miles per hour. Moderate to heavy snow was falling, rendering visibility poor. Two snowplows owned by the State were operating near the intersection of Route 5 and Route 167, one behind the other in the eastbound passing lane on Route 5. As Wilson approached the intersection, the first snowplow stopped to make a wide turn, and the second snowplow--driven by William Hunt--made a left turn inside the first plow in an attempt to enter Route 167 North. Although Hunt looked, he did not see Wilson's car approaching, and his snowplow collided with Wilson's car.

Wilson then brought the present action against the State of New York. The case proceeded to trial before the Court of Claims. At the close of the evidence, the State moved to dismiss, arguing that Wilson had failed to establish that the accident was the result of recklessness. The court granted the motion, holding that a recklessness standard applied because the snowplow was involved in work on a highway within the meaning of Vehicle and Traffic Law § 1103 (b), and that the evidence was insufficient to meet that standard. The Appellate Division affirmed, holding that since the snowplow qualified as a vehicle "actually engaged in work on a highway" under section 1103 (b), the recklessness standard applied, and the evidence failed to establish that Hunt had acted recklessly (269 AD2d 854).

The "Hazard Vehicle" Exemption

On appeal to this Court, Riley and Wilson (claimants) contend that Vehicle and Traffic Law § 1103 (b) does not ***461** exempt "hazard vehicles"--like snowplows and street sweepers--from the rules of the road.[1] Rather, they assert that section 1103 (b) exempts such vehicles only from the stopping, standing and parking regulations of Vehicle and Traffic Law § 1202 (a). We agree with the trial courts and the Appellate Division that section 1103 (b) exempts all vehicles "actually engaged in work on a highway"--including the vehicles here--from the rules of the road.

1 Vehicle and Traffic Law § 117-a defines "hazard vehicle" as follows: "Every vehicle owned and operated or leased by a utility, whether public or private, used in the construction, maintenance and repair of its facilities, every vehicle specially equipped or designed for the towing or pushing of disabled vehicles, every vehicle engaged in highway maintenance, or in ice and snow removal where such operation involves the use of a public highway and vehicles driven by rural letter carriers while in the performance of their official duties." "Hazardous operation" is defined as the "operation, or parking, of a vehicle on or immediately adjacent to a public highway while such vehicle is actually engaged in an operation which would restrict, impede or interfere with the normal flow of traffic" (Vehicle and Traffic Law § 117-b).

Some degree of risk, of course, is inherent in travel on public highways. Certain classes of vehicles--like snowplows and street sweepers--are intended to minimize the risk by keeping the roadways clean and safe for everyone. While serving an important public function, however, those vehicles may themselves cause risks to ordinary motorists with whom they share the road. Over the years, courts and legislatures have struggled to define the rules under which these vehicles may operate and the standard of care they owe to others.

At common law, all vehicles, including emergency vehicles, were held to an ordinary negligence standard (*see, e.g., Farley v Mayor of City of N. Y.,* 152 NY 222, 227-228 [1897]; *Garrett v City of Schenectady,* 268 NY 219, 223-224 [1935]; *Ottmann v Village of Rockville Centre,* 275 NY 270, 273 [1937]).[2] But the common law also recognized that the level of care owed by emergency and road work vehicles must be tempered by the nature of their work. Fire trucks, for instance, were permitted to drive at the "greatest practicable speed," since the "safety of property and the protection of life may ... depend upon celerity of movement" (*Farley v Mayor of City of N. Y., supra,* at 227). In addition, many emergency vehicles were, by statute, given the right of way (*see, id.*). Nevertheless, the common law required that such vehicles exercise their right of

way ***462** "with care and caution ... measured by the purpose and necessity of the right" (*Hashey v Board of Fire Commrs. of Roosevelt Fire Dist.,* 192 NYS2d 767, 769-770 [Sup Ct, Nassau County]).

2 This accorded with the common-law rule in other jurisdictions (*see,* Annotation, *Liability for Injury or Damage Caused by Snowplowing or Snow Removal Operations and Equipment,* 83 ALR4th 5).

In 1957, the Legislature enacted what is now title VII of the Vehicle and Traffic Law (§ 1100 *et seq.*), creating a uniform set of traffic regulations, or the "rules of the road" (*see,* L 1957, ch 698). That legislation was intended to update and replace the former traffic regulations, and bring them into conformance with the Uniform Vehicle Code adopted in other states (*see,* Mem in Support, Bill Jacket, L 1957, ch 698, at 35-37).

The Vehicle and Traffic Law states that the rules of the road apply to all vehicles unless otherwise provided by law (*see,* Vehicle and Traffic Law §§ 1101, 1103 [a]). Except for the provisions regarding driving under the influence of drugs or alcohol, however, the rules of the road explicitly do *not* apply to "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" (Vehicle and Traffic Law § 1103 [b]).[3] Section 1103 (b) adds that Vehicle and Traffic Law § 1202 (a), which regulates stopping, standing and parking, does not apply to "hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation." Similarly, Vehicle and Traffic Law § 1104 exempts "emergency vehicles," such as ambulances, police vehicles and fire vehicles (*see,* Vehicle and Traffic Law § 101), engaged in emergency operations from the rules of the road, subject to specified conditions.

3 Section 1103 (b) states in its entirety: "Unless specifically made applicable, the provisions of this title, except the provisions of sections eleven hundred ninety-two through eleven hundred ninety-six of this chapter, shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation. The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others."

The language of these statutes seems clear: all vehicles "actually engaged in work on a highway"--just as all emergency vehicles engaged in emergency operations--are exempt from ***463** the rules of the road. In the cases at hand, the street sweeper and the snowplow were engaged in "work on a highway." The street sweeper was cleaning the street; the snowplow was clearing the road during a snowstorm. Thus, the Appellate Division correctly held that section 1103 (b) exempts both vehicles from the rules of the road.

We reject claimants' contention that designated "hazard vehicles" are exempt *only* from the stopping, standing and parking regulations of section 1202 (a), even when they are engaged in work on a highway. Section 1103 (b) says no such thing. Rather, by its plain language, section 1103 (b) excuses all vehicles "actually engaged in work on a highway" from the rules of the road, regardless of their classification. To be sure, the statute also gives protection to designated "hazard vehicles" engaged in "hazardous operation" (as defined by sections 117-a and 117-b), excusing them from the stopping, standing and parking rules of section 1202 (a). But the statute nowhere states that "hazard vehicles" are a distinct class from "work vehicles," nor does it deny "hazard vehicles" the special protection given to all vehicles actually engaged in road work.[4]

4 To the extent that *Somersall v New York Tel. Co.* (74 AD2d 302, 307-309, *revd on other grounds* 52 NY2d 157) holds otherwise, that decision is not to be followed.

The legislative history of section 1103 (b) confirms this plain language reading.

([2]) We note at the outset that it is appropriate to examine the legislative history even though the language of section 1103 (b) is clear. The primary consideration of courts in interpreting a statute is to "ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177). Of course, the words of the statute are the best evidence of the Legislature's intent. As a general rule, unambiguous language of a statute is alone determinative (*see, Matter of Washington Post*

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Co. v New York State Ins. Dept., 61 NY2d 557, 565). Nevertheless, the legislative history of an enactment may also be relevant and "is not to be ignored, even if words be clear" (McKinney's Cons Laws of NY, Book 1, Statutes § 124, at 252). " 'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law " which forbids its use, however clear the words may appear on "superficial examination" ' " ***464** (*New York State Bankers Assn. v Albright,* 38 NY2d 430, 437). Pertinent also are "the history of the times, the circumstances surrounding the statute's passage, and ... attempted amendments" (McKinney's Cons Laws of NY, Book 1, Statutes § 124, at 253). Varying concerns may bear on the weight to be given legislative history (*see generally,* Abner J. Mikva and Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process, at 27-41 [1997]), but they do not justify abandoning this Court's long tradition of using all available interpretive tools to ascertain the meaning of a statute.

Here, the history of section 1103 (b) explicates the legislative intention to create a broad exemption from the rules of the road for all vehicles engaged in highway construction, maintenance or repair, regardless of their classification. In 1954, the Committee that proposed the original version of the statute stated that the law was intended to exempt from the rules of the road all teams and vehicles that "build highways, repair or maintain them, paint the pavement markings, remove the snow, sand the pavement and do similar work" (*see,* 1954 NY Legis Doc No. 36, at 35). Thus, the exemption turns on the nature of the work being performed (construction, repair, maintenance or similar work)--not on the nature of the vehicle performing the work.

Further, the legislative history shows that the reference to "hazard vehicles" in section 1103 (b) is wholly unrelated to the provision excusing vehicles engaged in road work from the rules of the road. Notably, the original version of section 1103 (b), enacted in 1957, exempted vehicles "engaged in work on a highway" from the rules of the road, and did *not* contain any separate provisions concerning hazard vehicles (*see,* L 1957, ch 698, § 4).[5] In 1970, the Legislature amended the Vehicle and Traffic Law to create the "hazard class" of vehicles, enacting section 117-a defining hazard vehicles, and amending section 1103 (b) to exempt hazard vehicles from the standing, stopping ***465** and parking regulations (*see,* L 1970, ch 197). The Memorandum in Support of that amendment explained that it was intended to clear up confusion as to the meaning of different "flashing colored lights," and thus four distinct classes of vehicles were created (emergency vehicles, hazard vehicles, privately owned vehicles of volunteer firemen and privately owned vehicles of volunteer ambulance drivers), each of which is identified by a different colored flashing light (*see,* Bill Jacket, L 1970, ch 197, at 4). The amendment was not intended to curtail the exemption for any vehicles-- including "hazard vehicles"--engaged in work on a highway (*see,* Dugan Letter, Bill Jacket, L 1970, ch 197, at 16 [noting the exemption of hazard vehicles and emergency vehicles from the rules of the road]).

5 The original version of section 1103 (b) stated in its entirety: "Unless specifically made applicable, the provisions of this title shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to vehicles operated by public service corporations while actually engaged in work on the installation or maintenance of public service facilities on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such work."

Thus, we conclude that section 1103 (b) exempts from the rules of the road all vehicles actually engaged in work on a highway, including the "hazard vehicles" in the cases before us.

The Standard of Care

We next turn to the standard of care owed to other drivers by vehicles "actually engaged in work on a highway." Originally, section 1103 (b) provided such vehicles with an unqualified exemption from the rules of the road (*see,* L 1957, ch 698, § 4). In a 1974 amendment, the Legislature added the following sentence to that section:

"The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with *due regard for the safety of all persons* nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their *reckless disregard for the safety of others*" (L 1974, ch 223, § 1) (emphasis added).

([3]) The legislative history explains that this amendment was designed to soften the outright exemption of vehicles engaged in road work from the rules of the road, allowing

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them to drive at any speed or in any manner "which suits their fancy, without any prohibition from the Vehicle and Traffic Law" (*see,* Mem of Senator Frank Padavan, Bill Jacket, L 1974, ch 223, at 4). For ***466** example, under the original version of the statute, "a snow plow could be operated well above the speed limit and through red lights ... without regard for the safety of other persons" (Mem of Dept of Motor Vehicles, Bill Jacket, L 1974, ch 223, at 7). The Legislature therefore amended section 1103 (b) to impose "a minimum standard of care" on operators of such vehicles (Padavan Mem, *op. cit.,* at 4).

In *Saarinen v Kerr* (84 NY2d 494), we held that Vehicle and Traffic Law § 1104 (e)--which contains identical language requiring emergency vehicles to act with "due regard for the safety of all persons" and holding drivers responsible for "the consequences of [their] reckless disregard for the safety of others"-- imposes a standard of recklessness. Specifically, this Court held that, under section 1104 (e), a plaintiff seeking to recover for injuries caused by an emergency vehicle must show that " 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" (*id.,* at 501 [quoting Prosser and Keeton, Torts § 34, at 213 [5th ed]).

Section 1103 (b) imposes the same recklessness standard on vehicles actually engaged in work on a highway. The language here is the same language that we held in *Saarinen* to impose a recklessness standard. To be sure, as claimants point out, the statute uses the phrase "due regard" as well as "reckless disregard" to describe the standard. But as we stated in *Saarinen,* "the Legislature's specific reference to ... *reckless disregard* ... would be unnecessary and, in fact, inexplicable if the conventional criterion for negligence--reasonable care under the circumstances--were the intended standard" (*Saarinen v Kerr, supra,* at 501) (emphasis in original). Thus, "the only way to apply the statute is to read its general admonition to exercise 'due care' in light of its more specific reference to 'recklessness' " (*id.,* at 501-502; *see also, Bliss v State of New York,* 95 NY2d ___ [decided today]).

We decline claimants' invitation to read the "due regard" and "reckless disregard" language in section 1103 (b) differently from our reading of those very words in section 1104 (e). As a general principle of statutory construction, "whenever a word is used in a statute in one sense and with one meaning, and subsequently the same word is used in a statute on the same subject matter, it is understood as having been used in the same sense" (McKinney's Cons Laws of NY, Book 1, Statutes § 236, at 402). ***467**

Nor is there anything in the context or history of the statutes indicating that different meanings were intended. In fact, the history of section 1103 (b) confirms that the Legislature intended to subject vehicles engaged in road work to the same standard of care as emergency vehicles. The Attorney General's memorandum in support of the 1974 amendment states that the bill "extends the standard of care presently applicable to drivers of authorized emergency vehicles under § 1104 ... to persons engaged in maintenance and hazardous operations" (Lefkowitz Mem, Bill Jacket, L 1974, ch 223, at 2). In addition, Senator Padavan's supporting memorandum states that the amendment imposes a standard "similar to that imposed on operators of authorized emergency vehicles" (Padavan Mem, *op. cit.,* Bill Jacket, at 4). Many other memoranda in the bill jacket confirm this understanding (*see,* Department of Transportation Mem, Bill Jacket, L 1974, ch 223, at 5; Department of Motor Vehicles Mem, Bill Jacket, L 1974, ch 223, at 6; New York State Police Mem, Bill Jacket, L 1974, ch 223, at 8; Association of Towns Mem, Bill Jacket, L 1974, ch 223, at 10). Undeniably then, the 1974 amendment was intended to subject vehicles engaged in road work to the same recklessness standard applicable to emergency vehicles under section 1104 (e) (*see, McDonald v State of New York,* 176 Misc 2d 130, 139 [Ct Cl]).

Claimants urge that, as a matter of logic and fairness, vehicles engaged in road work should not enjoy the same level of protection as emergency vehicles, like police cars, fire trucks and ambulances. As we stated in *Saarinen,* the protection given to emergency vehicles under section 1104 (e) "represents a recognition that the duties of police officers and other emergency personnel often bring them into conflict with the rules and laws that are intended to regulate citizens' daily conduct," and that emergency personnel require a "qualified privilege to disregard those laws where necessary to carry out their important responsibilities" (*Saarinen v Kerr, supra,* at 502). The Court recognized, however, that giving emergency personnel this qualified privilege "will inevitably increase the risk of harm to innocent motorists and pedestrians," and "will necessarily escalate the over-all risk to the public at large"--an increased risk justified by the necessity of accomplishing an "immediate, specific law enforcement or public safety goal" (*id.,* at 502).

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As claimants point out, it is unclear that the increased risk to the public is similarly justified for all vehicles engaged in road work. Indeed, criticizing protections given to non-emergency ***468** vehicles under pre-1957 law, the Joint Legislative Committee that was convened to revise the Vehicle and Traffic Law also observed that the "reason for extending emergency privileges to non-emergency vehicles ... is not apparent. ... The danger to highway users and true emergency vehicles is greatly increased by the special status which is unnecessarily given to non-emergency vehicles" (1954 NY Legis Doc No. 36, at 35). The trial court in *Gawelko v State of New York* (184 Misc 2d 581 [Ct Cl]) echoed that concern, questioning the present law:

"Why, for example, should rural letter carriers or tow truck drivers be permitted, in the course of their work, to speed, drive on the wrong side of the road, ignore pedestrian rights and vehicular rights-of-way, and disregard traffic signs and signals--all without sirens or lights being employed--while the driver of an ambulance or civil defense vehicle must employ both lights and bells or sirens in order to be exempt from any rules of the road?" (*Id.,* at 584; *see also, Cottingham v State of New York,* 182 Misc 2d 928, 942 [Ct Cl].)

Apt as those concerns may be, the Legislature has spoken clearly, giving vehicles engaged in road work the benefit of the same lesser standard of care as emergency vehicles. Any change in that standard, therefore, must come from the Legislature, not the courts.

Work Area

([4]) Finally, there is no merit to claimants' argument that the protections of section 1103 (b) apply solely to vehicles operating in a designated "work area" as defined in Vehicle and Traffic Law § 160. Section 1103 (b) states that a vehicle "actually engaged in work on a highway" is exempt from the rules of the road. The statute does not require that a vehicle be located in a designated "work area" in order to receive the protection. Significantly, section 160 was not enacted until 1984--long after section 1103 (b) was adopted. Thus, there is no credible argument that the Legislature only had designated "work areas" in mind when it adopted section 1103 (b).

Claimants' remaining arguments are without merit.

Accordingly, in each case the order of the Appellate Division should be affirmed, with costs. ***469**

Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur.
In each case: Order affirmed, with costs. ***470**

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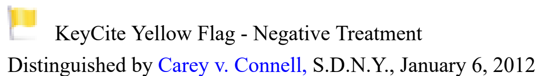
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458 F.3d 130
United States Court of Appeals,
Second Circuit.

Luis JIMENEZ, Petitioner-Appellant,
v.
Hans WALKER, Superintendent of Auburn Correctional Facility, Respondent-Appellee.

Docket No. 03-2980-PR.
|
Argued: Oct. 31, 2005.
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Decided: July 31, 2006.

Synopsis
Background: Following affirmance of his murder conviction on direct appeal, 245 A.D.2d 304, 670 N.Y.S.2d 118, petitioner sought writ of habeas corpus. The United States District Court for the Eastern District of New York, Jack B. Weinstein, Senior District Judge, 2003 WL 22952842, denied relief, and petitioner appealed.

Holdings: The Court of Appeals, John M. Walker, Jr., Chief Judge, held that:

[1] conclusive presumption that certain state decisions rest on merits of federal law claims and are not procedurally defaulted may be applied in determining whether decision is "on the merits" for purpose of deference under Antiterrorism and Effective Death Penalty Act (AEDPA);

[2] AEDPA deference was owed to state court judgment rejecting federal claim as "either unpreserved for appellate review or without merit;"

[3] decision rejecting constitutional claim regarding exclusion of evidence was not contrary to clearly established federal law;

[4] decision was not unreasonable application of federal law; and

[5] cumulative error claim was not fairly presented to state court.

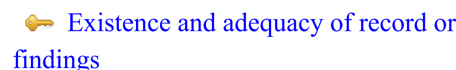
Affirmed.

West Headnotes (21)

[1] **Habeas Corpus**
Determination

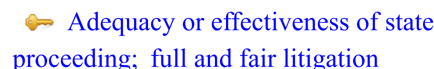
Existence of an adequate and independent procedural bar is not jurisdictional in habeas cases, but rather is a defense that the State is obligated to raise and preserve. 28 U.S.C.A. § 2254.

16 Cases that cite this headnote

[2] **Habeas Corpus**
 Existence and adequacy of record or findings

When the state court articulates its reasons for rejecting a federal claim on its merits, habeas court reviews those reasons; when a state court fails to articulate the rationale underlying its rejection of a federal claim, however, habeas review focuses on the state court's ultimate decision. 28 U.S.C.A. § 2254(d).

30 Cases that cite this headnote

[3] **Habeas Corpus**
 Adequacy or effectiveness of state proceeding; full and fair litigation

Conclusive presumption that state-court decision rests on merits of federal claim, applicable when decision fairly appears to rest primarily upon federal law and there is no plain statement otherwise, which was developed in procedural default context, also applies to determination under Antiterrorism and Effective Death Penalty Act (AEDPA) of whether a state-court adjudication is "on the merits" and therefore entitled to deference. 28 U.S.C.A. § 2254(d).

282 Cases that cite this headnote

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[4] **Habeas Corpus**
Adequacy or effectiveness of state proceeding; full and fair litigation

When examining the basis of a state court's adjudication of a federal claim, to determine whether decision is one "on the merits" to which deference applies, federal habeas court should examine (1) the face of the state-court opinion, (2) whether the state court was aware of a procedural bar, and (3) the practice of state courts in similar circumstances. 28 U.S.C.A. § 2254(d).

242 Cases that cite this headnote

[5] **Habeas Corpus**
State Determinations in Federal Court

If state court judgment fairly appears to rest primarily on state procedural law, no Antiterrorism and Effective Death Penalty Act (AEDPA) deference is due such decisions. 28 U.S.C.A. § 2254(d).

168 Cases that cite this headnote

[6] **Habeas Corpus**
Adequacy or effectiveness of state proceeding; full and fair litigation

State court judgment rejecting federal claim as "either unpreserved for appellate review or without merit" was an "adjudication" within meaning of Antiterrorism and Effective Death Penalty Act (AEDPA) provision requiring deference to state court judgments representing an "adjudicat[ion] on the merits," even though state court failed to provide reasoning for its decision, where state court disposed of claim and reduced its disposition to judgment. 28 U.S.C.A. § 2254(d).

152 Cases that cite this headnote

[7] **Habeas Corpus**
Adequacy or effectiveness of state proceeding; full and fair litigation

Antiterrorism and Effective Death Penalty Act (AEDPA) deference was due a state court judgment rejecting claim as "either unpreserved for appellate review or without merit" on basis that "either/or" adjudication rested on merits of federal claim in absence of plain statement to contrary. 28 U.S.C.A. § 2254(d).

102 Cases that cite this headnote

[8] **Habeas Corpus**
Federal Review of State or Territorial Cases

Habeas Corpus
Federal or constitutional questions

In determining whether state court's rejection of federal claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Supreme Court precedent, habeas court may look only to holdings of the Supreme Court, as opposed to its dicta, and only to the Supreme Court's holdings as of the time of the relevant state-court decision. 28 U.S.C.A. § 2254(d).

43 Cases that cite this headnote

[9] **Criminal Law**
Necessity and scope of proof

For exclusion of evidence to violate constitutional right to present a complete defense at a criminal trial by denying the accused a fundamentally fair trial, the evidence must be material, in the constitutional sense that it creates a reasonable doubt that did not otherwise exist as evaluated in the context of the entire record. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[10] **Criminal Law**
Necessity and scope of proof

Right to present a defense is not unlimited; criminal defendant must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

[11] **Habeas Corpus**

Exclusion of evidence

Although federal habeas corpus relief does not lie for errors of state law, the exclusion of evidence pursuant to an evidentiary rule may not be arbitrary or disproportionate to the purpose that the rule is designed to serve. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254.

1 Cases that cite this headnote

[12] **Habeas Corpus**

Federal Review of State or Territorial Cases

When applying Antiterrorism and Effective Death Penalty Act (AEDPA) unreasonable application clause to silent state-court opinions, habeas court reviews outcomes, not reasoning. 28 U.S.C.A. § 2254.

7 Cases that cite this headnote

[13] **Habeas Corpus**

Exclusion of evidence

If excluded evidence in state trial would have created otherwise nonexistent reasonable doubt, its exclusion satisfies the substantial and injurious reversible-harm standard for relief in federal habeas action. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

2 Cases that cite this headnote

[14] **Habeas Corpus**

Exclusion of evidence

State court's rejection of claim that petitioner was denied meaningful defense by exclusion of evidence that murder victim was carrying commercial amount of drugs in his pocket, on basis that such evidence would have supported claim that victim was killed as result of drug deal gone bad rather than argument with petitioner, was not contrary to clearly established federal law. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

Cases that cite this headnote

[15] **Habeas Corpus**

Federal Review of State or Territorial Cases

An increment of incorrectness beyond error is required to allow habeas relief on ground that state court decision was an unreasonable application of clearly established federal law, and although the increment need not be great, habeas court must be able to adequately identify why state court decision is objectively unreasonable. 28 U.S.C.A. § 2254.

26 Cases that cite this headnote

[16] **Habeas Corpus**

Exclusion of evidence

State court's silent rejection of claim that petitioner was denied meaningful defense by exclusion of evidence that murder victim was carrying commercial amount of drugs in his pocket was not unreasonable application of clearly established federal law; evidence would not so plainly have created reasonable doubt as to render decision to contrary unreasonable, notwithstanding petitioner's theory of defense that victim was killed by another in drug deal gone bad. 28 U.S.C.A. § 2254(d)(1).

4 Cases that cite this headnote

[17] **Habeas Corpus**

Exhaustion of State Remedies

Habeas Corpus

Comity or jurisdiction

Exhaustion requirement for habeas relief is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. 28 U.S.C.A. § 2254.

64 Cases that cite this headnote

[18] **Habeas Corpus**

Sufficiency of Presentation; Fair Presentation

Exhaustion requirement for federal habeas relief is not satisfied unless the federal claim has been fairly presented to the state courts. 28 U.S.C.A. § 2254(b)(1).

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41 Cases that cite this headnote

[19] **Habeas Corpus**
Sufficiency of Presentation; Fair Presentation
Habeas Corpus
Availability of Remedy Despite Procedural Default or Want of Exhaustion

Under the procedural-default doctrine, when a prisoner has exhausted his state remedies but has not given the state courts a fair opportunity to pass on his federal claims, the prisoner has procedurally defaulted his claims and is ineligible for federal habeas relief absent a showing of cause and prejudice or a fundamental miscarriage of justice. 28 U.S.C.A. § 2254(b)(1).

65 Cases that cite this headnote

[20] **Habeas Corpus**
Necessity and sufficiency of identification of federal constitutional issue

Habeas petitioner did not fairly present cumulative error claim to state court, as required to exhaust claims, by using term "was exacerbated by" as transitional phrase to shift between two other claims in his appellate brief or by using plural noun "rulings" in brief's summary to describe two trial court actions that allegedly violated his due process rights. 28 U.S.C.A. § 2254(b)(1).

24 Cases that cite this headnote

[21] **Habeas Corpus**
Criminal Prosecutions
Habeas Corpus
Availability at time of petition

Habeas petitioner procedurally defaulted on cumulative error claim where petitioner failed to fairly present claim in state court and could no longer do so under state rules. 28 U.S.C.A. § 2254(b)(1).

70 Cases that cite this headnote

Attorneys and Law Firms

***132** Joel A. Brenner, East Northport, NY, for Petitioner-Appellant.

Richard A. Brown, District Attorney, John M. Castellano and Donna Aldea, Assistant District Attorneys, Queens County, Kew Gardens, NY, submitted a brief for Respondent-Appellee.

***133** Before WALKER, Chief Judge, FEINBERG and CARDAMONE, Circuit Judges.

Opinion

JOHN M. WALKER, JR., Chief Judge.

Petitioner-appellant Luis Jimenez ("petitioner") appeals from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge),* entered on November 4, 2003, denying his petition for a writ of habeas corpus. Jimenez presses two claims on appeal: (1) the state court's exclusion of evidence that the murder victim was carrying five ounces of heroin in his pocket denied Jimenez his right to present a meaningful defense and (2) the cumulative effect of trial-court errors denied Jimenez his right to a fundamentally fair trial. Respondent-appellee Hans Walker, Superintendent of Auburn Correctional Facility ("respondent" or "state"), contends that the heroin evidence was constitutionally excluded and that the cumulative-error claim is procedurally defaulted and meritless.

We hold as follows: (1) the conclusive presumption laid out by the Supreme Court in *Harris v. Reed* and *Coleman v. Thompson* applies to the determination under 28 U.S.C. § 2254(d) of whether an adjudication is "on the merits"; (2) "AEDPA deference" under 28 U.S.C. § 2254(d) is due to a state court's rejection of a federal claim as "either unpreserved for appellate review or without merit" because this court has interpreted *Harris* and *Coleman* to deem such "either/or" adjudications as resting on the merits of the petitioner's federal claim, *see Fama v. Comm'r of Corr. Servs.,* 235 F.3d 804 (2d Cir.2000); (3) habeas relief may not issue regarding Jimenez's present-a-defense claim because the state court's rejection of that claim did not "result[ ] in a decision that was contrary to" or "involve[ ] an unreasonable application of" clearly established Supreme Court precedent, *see* 28 U.S.C. § 2254(d)(1); and (4) the district court properly denied habeas relief regarding Jimenez's cumulative-error claim because

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Jimenez did not properly exhaust state remedies on this claim by fairly presenting the claim to the state courts, may no longer do so, and has not overcome this procedural default by showing either cause and prejudice or a fundamental miscarriage of justice. We therefore AFFIRM the judgment of the district court.

BACKGROUND

On October 4, 1993, Elkin Cardona was shot and killed while standing on a street in Queens, New York. Luis Jimenez was tried and convicted for his murder. The criminal proceedings surrounding his conviction are relevant to this appeal.

I. Trial

At Jimenez's murder trial, Margie Cardona, who is the victim's widow, and Juan Barrera, who is Margie Cardona's brother and who lived with Margie and the victim, testified for the prosecution as follows. On the day of the shooting, the victim and Margie Cardona gave Jimenez a ride from Queens to Manhattan. During the ride, the victim became upset with Jimenez and argued with him, although the mood did lighten later that day. Around 9:00 that evening, back in his home in Queens, the victim received a page on his beeper and left with Barrera in the victim's van to meet Jimenez. The victim picked up Jimenez and drove to a street in Flushing, Queens, where all three got out. At a payphone on the corner, Jimenez dialed a phone number two or three times and told the group that he had a wrong phone number. Jimenez announced that he was going to his apartment, which was a few blocks away, to get the right number and walked away.

***134** According to Barrera, about ten minutes later, while the victim and Barrera were waiting on the street for Jimenez to return, Barrera saw Jimenez driving his old, white van slowly toward them. Barrera testified that the van passed them and made a U-turn at the next intersection and that upon returning, a concealed person in the passenger's seat extended a gun out the passenger window and opened fire at the victim and Barrera. Ballistics reports indicate that at least eleven 0.9 mm bullets and one 0.380 mm bullet were fired. The victim and Barrera ducked behind some cars, and Barrera then ran away down the street. The victim died at the scene, apparently killed by the single 0.380 mm slug.

Barrera returned to the crime scene after removing his sweatshirt and spoke to an officer without revealing his knowledge of the shooting. Although Barrera had told Margie Cardona what happened, she likewise did not immediately tell the police what she knew. Both eventually did volunteer information about the shooting to the police.

Other evidence was introduced at trial. The jury heard that the police located Jimenez's van in its parking lot near the crime scene but did not recover any inculpatory evidence upon searching it. The van was apparently owned, though not registered, by Jimenez's father-in-law, who had been convicted of drug and weapons crimes and who testified that Jimenez did not drive the van on the day of the shooting. A lobby attendant in a building near the van's designated parking spot testified that he thought the van was present in the parking lot at the time of the shooting.

Further evidence contradicted Barrera's testimony for the prosecution. A teenager who resided in an apartment overlooking the crime scene testified that three people-not two-were standing on the street when a van pulled up and began shooting at them. The teenager also testified that the van had no side windows, whereas Jimenez's father-in-law testified that his van had side windows. Another child who lived nearby testified that two people-not just Barrera-fled down the street after the shooting, one briefly displaying an object that appeared to be a gun. And ballistics evidence suggested that shots were fired from the sidewalk as well as the street.

At the crime scene, the police found a plastic bag containing five ounces [1] of heroin-evidently worth thousands of dollars-in the pants pocket of the victim. At Jimenez's trial, the prosecutor moved *in limine* to prohibit any mention of this heroin evidence before the jury. In response, Jimenez argued that the evidence was relevant because it would tend to prove the defense theory that the victim was killed by someone involved in or related to a drug deal that was to occur that night, not because of an argument with Jimenez earlier in the day, and that Barrera falsely implicated Jimenez in the shooting out of fear that Barrera himself would be charged with drug crimes or with murder. The trial court ruled that the heroin evidence lacked any probative value and granted the prosecutor's motion *in limine* to exclude the evidence. Jimenez was then tried and convicted of crimes including murder in the second degree. The trial court sentenced him to imprisonment for 20 years to life for the murder.

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1 The parties do not agree whether the heroin weighed four or five ounces. The amount is immaterial to our analysis.

II. Post-trial Proceedings

Jimenez appealed his conviction to the New York Supreme Court, Appellate Division, ***135** pressing his claim that the trial court's exclusion of the heroin evidence deprived him of his constitutional right to present a meaningful defense. The Appellate Division affirmed Jimenez's conviction, summarily dismissing his challenge to the heroin-evidence exclusion as one of several contentions that were "either unpreserved for appellate review or without merit." *People v. Jimenez,* 245 A.D.2d 304, 670 N.Y.S.2d 118, 118 (App.Div.1997). Leave to appeal to the New York Court of Appeals was denied. *People v. Jimenez,* 91 N.Y.2d 927, 670 N.Y.S.2d 408, 693 N.E.2d 755 (1998).

III. Federal Habeas Proceedings

Jimenez timely applied for a writ of habeas corpus in the United States District Court for the Eastern District of New York. In his application, Jimenez argued that he was denied his right to present a defense by the trial court's exclusion of the heroin evidence. The district court found that the state trial court did not err in ruling the heroin evidence irrelevant because "it was reasonable for the trial court to hold that the narcotics evidence was too remote to the question of petitioner's guilt or innocence to be probative." *Jimenez v. Walker,* No. 00-cv-3599, 2003 WL 22952842, at *10 (E.D.N.Y. Nov.4, 2003). The district court therefore held that "[h]abeas corpus relief on this ground is not warranted." *Id.* The issue did, however, earn a certificate of appealability, as did the issue whether "because of the paucity of evidence to convict, other errors or exercises of discretion by the trial court denied petitioner a fair trial." *Id.* at *14. This appeal followed.

DISCUSSION

Jimenez presses two claims on appeal. First, he claims that the trial court violated his due process right to present a meaningful defense by excluding evidence that the police found five ounces of heroin in the victim's pants pocket. Second, he claims that cumulative trial-court error violated his right to due process.

In evaluating Jimenez's claims, we review de novo the district court's denial of the writ. *Jones v. Stinson,* 229 F.3d 112, 117 (2d Cir.2000). We hold that although the Appellate Division's resolution of the first claim may have been erroneous, it was not so erroneous as to be objectively unreasonable. As a result, Jimenez is ineligible for habeas relief regarding this claim. *See* 28 U.S.C. § 2254(d)(1). We deny the writ on the second claim because Jimenez did not properly exhaust the claim in state court and may no longer do so.

I. The Due Process Right to Present a Defense

A. AEDPA Deference

Because Jimenez filed his habeas application after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"), we must first decide whether we owe "AEDPA deference" to the state courts' resolution of Jimenez's present-a-defense claim because the claim "was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d).[2] The Appellate Division rejected this claim by stating that it was among claims that were "either unpreserved for appellate review or without merit." *Jimenez,* 670 N.Y.S.2d at 118.

2 As we have noted, § 2254(d) may more accurately be called a "limitation on relief" than a deferential "standard of review." *See Cotto v. Herbert,* 331 F.3d 217, 229 n. 4 (2d Cir.2003).

***136** Our case law on whether AEDPA deference applies when confronted by such language has confused some observers. Indeed, this court has labeled our decisions in this area a "mare's nest." *Shih Wei Su v. Filion,* 335 F.3d 119, 125 (2d Cir.2003). That confusion might be what led us in *Shih Wei Su* to opine that "our cases seem to contemplate situations in which, because of uncertainty as to what the state courts have held, no procedural bar exists and yet no AEDPA deference is required." *Id.* at 126 n. 3. Jimenez argues that this is such a case.

The confusion in our opinions centers around the fundamental question of how to interpret what state courts have done when their decisions remain somewhat opaque. Our review of answers to this question begins before the 1996 enactment of AEDPA, when federal habeas courts were already determining whether state courts had disposed of a federal claim on its merits or, alternatively, on a state procedural ground. The inquiry then arose in the context of the adequate-and-independent-state-ground doctrine, under which federal courts may not review the judgment of a state court that "rests on a state-law ground that is both 'independent' of the merits

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of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed,* 489 U.S. 255, 260, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Because this doctrine applies on federal habeas review and because the state-law ground may be a procedural bar, *id.* at 261-62, 109 S.Ct. 1038, federal habeas courts often speak of an "adequate and independent procedural bar" to federal review of a claim or simply of a "procedurally barred" federal claim. We use these terms interchangeably.

Recognizing that it can sometimes be difficult to decide whether a state court rested its judgment on the merits of the federal claim or on an independent procedural rule, the Supreme Court created a conclusive presumption to guide the inquiry. The presumption was created for administrative convenience, predicting easily and accurately the actual basis of a state court's decision in most cases at the expense of error in a "small number of cases." *Coleman v. Thompson,* 501 U.S. 722, 737, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Harris,* 489 U.S. at 264-65, 109 S.Ct. 1038; *see Jones,* 229 F.3d at 117-18. But because the Supreme Court created this predictive presumption before Congress enacted AEDPA, the Court has not decided whether its presumption, designed in the procedural-bar context to predict the basis of a state-court decision, applies to the seemingly parallel inquiry under AEDPA of whether a state-court decision is "on the merits."

If the presumption does apply under AEDPA, we would be confronted with the "binary" situation noted by *Ryan v. Miller,* 303 F.3d 231, 246 (2d Cir.2002), and labeled as such by *Messiah v. Duncan,* 435 F.3d 186, 197 n. 5 (2d Cir.2006), in which we either apply AEDPA deference to review a state court's disposition of a federal claim or refuse to review the claim because of a procedural bar.[3] But if the presumption does not apply under AEDPA, it is possible that a different test fashioned for the AEDPA inquiry could result in our deeming a state court to have decided a federal claim on its merits (negating the ***137** existence of a procedural bar) while simultaneously deeming the state court's decision to not rest on the merits of the federal claim (negating AEDPA deference). Such dissonance would make little sense, *see DeBerry v. Portuondo,* 403 F.3d 57, 70-72 (2d Cir.2005) (Walker, C.J., concurring),[4] but it would nonetheless be the law of our circuit until this court en banc or the Supreme Court altered it.

3 Assuming, of course, that the independent state procedural bar is adequate to support the judgment, not excused by a showing of either cause and prejudice or a fundamental miscarriage of justice, and raised by the respondent. *Trest v. Cain,* 522 U.S. 87, 89, 118 S.Ct. 478, 139 L.Ed.2d 444 (1997); *Coleman,* 501 U.S. at 730, 111 S.Ct. 2546; *Harris,* 489 U.S. at 262, 109 S.Ct. 1038; *Cotto,* 331 F.3d at 239, 247.

4 Perhaps such a result would make sense if the Supreme Court meant the *Harris* presumption to maximize prisoner relief from federal habeas courts. But the Court has announced its reasons for creating the presumption, and its predictive and administrative foundations do not disclose such a purpose.

We also note a textual basis for concluding that the procedural-bar doctrine's *Harris* presumption applies under AEDPA: "[F]ederal court caselaw applying the procedural [bar] doctrine customarily distinguishes between 'rulings on the merits' and dismissals on procedural grounds ... [and] Congress is presumed to be aware of such customary judicial usage of a term" when it enacts a statute such as AEDPA. Randy Hertz & James S. Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 32.2, at 1422 (4th ed.2001). Presumably, then, the term "on the merits" in AEDPA takes the same meaning as it does in the procedural-bar context, bringing along the *Harris* presumption.

A thorough review of our cases, with careful attention paid to distinguishing holdings from dicta, reveals that they do not chart such divergent courses. As explained below, although we have never explicitly stated that the *Harris* presumption applies to the AEDPA-deference determination, our holdings are consistent with that result and do not create the tension noted in *Shih Wei Su* and relied upon by Jimenez. But before reviewing our case law, we describe the *Harris* presumption in more detail.

1. The *Harris* conclusive presumption

This presumption finds its roots in *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), in which the Supreme Court held that

> when ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it

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did because it believed that federal law required it to do so.

Long, 463 U.S. at 1040-41, 103 S.Ct. 3469. In Harris, the Supreme Court observed that habeas review "presents the same problem of ambiguity [in state-court decisions] that this Court resolved in Michigan v. Long," explaining that "[f]aced with a common problem, we adopt a common solution." Harris, 489 U.S. at 262, 263, 109 S.Ct. 1038. The Harris Court explicitly "extend[ed] to habeas review the 'plain statement' rule [of Long] for determining whether a state court has relied on an adequate and independent state ground." Id. at 265, 109 S.Ct. 1038. Accordingly, we call the Long presumption as applied in habeas actions the "Harris presumption."

The Supreme Court reaffirmed the Harris presumption two years later in Coleman, emphasizing the presumption's requirement that the state court's decision "must fairly appear to rest primarily on federal law or to be interwoven with federal law." Coleman, 501 U.S. at 735, 111 S.Ct. 2546. In other words, before applying the Harris presumption, a federal habeas court must have "good reason" to doubt that the decision rests on an independent and adequate state ground. Id. at 739, 111 S.Ct. 2546. Although this requirement traces back to Long, we call it the "Coleman requirement" or the "Coleman ***138** requisite to federal merits review" because of its emphasis by the Coleman Court.

To decide whether this requirement was met, the Coleman Court looked to the relevant state-court opinion, which granted the prosecution's motion to dismiss a petition for appeal, as well as to the prosecution's moving papers, which argued for dismissal on the sole basis of a procedural bar.[5] The Supreme Court held that the state court's decision " 'fairly appears' to rest primarily on *state* law," id. at 740, 111 S.Ct. 2546, and therefore that the requirement was not met. Thus, the Harris presumption did not apply, and the petition was dismissed as procedurally barred.

5 Thus, Coleman instructs us that a court may look behind the face of the opinion to decide whether the Coleman requirement is met, i.e., whether a state-court decision fairly appears to rest on or to be interwoven with federal law.

In sum, under Harris and Coleman, federal habeas courts should distinguish between two mutually exclusive categories of state-court decisions disposing of a federal claim:

(1) state-court decisions that fairly appear either to rest primarily on federal law or to be interwoven with federal law and

(2) state-court decisions that fairly appear to rest primarily on state procedural law.

See id. at 739-40, 111 S.Ct. 2546. Absent a clear and express statement of reliance on a state procedural bar, the Harris presumption applies to decisions in the first category and deems them to rest on federal law. The merits of the federal claim are therefore reviewable in federal court. The Harris presumption does not apply to decisions in the second category, which show themselves to rest on an independent state procedural bar. When the state court's decision rests on an independent procedural bar, either by a plain statement negating the Harris presumption or by the absence of any indication that federal law was the basis for the state-court decision, a federal court must still determine whether that state procedural ground is adequate to support the judgment. *See* id. at 745, 111 S.Ct. 2546 (considering, after finding that a state decision rested on an independent state procedural bar, whether the state ground was adequate to support the judgment, and resolving the question on waiver grounds). If it is, a federal court may not review the judgment unless the habeas petitioner shows both cause and prejudice or a fundamental miscarriage of justice. Id. at 750, 111 S.Ct. 2546; Harris, 489 U.S. at 262, 109 S.Ct. 1038.

2. Second Circuit procedural-bar case law

After the Supreme Court decided Harris and Coleman, we began to speak on their application. The first relevant opinion to do so was Quirama v. Michele, 983 F.2d 12 (2d Cir.1993). In Quirama, we extended Coleman slightly by expanding the behind-the-opinion facts to which we look in deciding whether the Coleman requirement is met. We were presented there with a state court's decision affirming without explanation the petitioner's conviction. Id. at 13. Although the face of the state court's opinion was silent,[6] we looked behind the opinion to both the state court's awareness of a procedural bar and the state court's practice when faced with ***139** such a bar. We noted (1) that the government argued to the state court that the federal claims were meritless as well as procedurally barred because they were not raised in the trial court and (2) that New York state courts permit review of such claims only sparingly. Id. Accordingly, we held that the Coleman requirement was not met because the state court's silent decision appeared to rest on a state procedural bar.

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Thus, the *Harris* presumption did not apply, and we could not review the claims absent a showing of cause and prejudice or a fundamental miscarriage of justice. *Id.* at 14.

6 *Quirama* did not mention the presumption of *Ylst v. Nunnemaker,* 501 U.S. 797, 802, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991), regarding silent opinions. But because the petitioner there did not raise his federal claim in state trial court, there seems to have been no explained decision prior to the state appellate court's decision, and therefore the *Ylst* presumption would not apply.

This holding was a slight extension of *Coleman.* The *Coleman* Court found that the state court's decision fairly appeared to rest primarily on state procedural grounds because the state court had granted a motion to dismiss that was based solely on procedural law. *Coleman,* 501 U.S. at 740, 111 S.Ct. 2546. In *Quirama,* the state court affirmed the conviction upon briefs that argued the merits as well as a state procedural bar; we looked not only to the briefs but also to the practice of state courts, a fact that *Coleman* did not examine, to decide whether the *Coleman* requirement was met. *Quirama,* 983 F.2d at 14. Thus, *Quirama* instructs us to consider three factors (or "clues" as the Supreme Court called them in *Ylst v. Nunnemaker,* 501 U.S. 797, 802, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)) to determine whether the *Coleman* requisite to the *Harris* presumption is met: (1) the face of the state-court opinion, (2) whether the state court was aware of a procedural bar, and (3) the practice of state courts in similar circumstances.

Some time after *Quirama,* we decided *Fama v. Commissioner of Correctional Services,* 235 F.3d 804 (2d Cir.2000), which concerns the "either/or" type of opinion presented today. In *Fama,* we answered the question whether a state court's decision that rejects a federal claim as "either unpreserved for appellate review or without merit" rests on an adequate and independent state procedural bar. *Id.* at 809-11. After reviewing our case law, we held that decisions using the "either/or" language are deemed to rest on federal law under the *Harris* presumption, rendering the federal claim reviewable:

> We today decline to extend *Quirama* to those cases in which an opinion of the state court speaks, however cursorily, to the question of whether the state or federal ground was the basis for decision. And we explicitly hold that when a state court uses language such as "[t]he defendant's remaining contentions are either unpreserved or without merit," the validity of the claim is preserved and is subject to federal review. When it uses such language, the state court has not adequately indicated that its judgment rests on a state procedural bar, *see Harris,* 489 U.S. at 263, 109 S.Ct. 1038, 103 L.Ed.2d 308, and its reliance on local law is not clear from the face of the court's opinion. *See Coleman,* 501 U.S. at 735, 111 S.Ct. 2546, 115 L.Ed.2d 640.

Fama, 235 F.3d at 810-11 (footnote omitted). To be sure, *Fama* did not explicitly decide whether the *Coleman* requisite was met. In the quotation above, the citation to *Coleman* refers only to the no-clear-statement requirement of the *Harris* presumption, which requires that " 'the adequacy and independence of any possible state law ground is not clear from the face of the opinion.' " *Coleman,* 501 U.S. at 735, 111 S.Ct. 2546 (quoting *Long,* 463 U.S. at 1040-41, 103 S.Ct. 3469). Although the face of the state court's opinion constrains the clear-statement inquiry, both the Supreme Court in *Coleman* and this court in *Quirama* looked behind the face of the state court's opinion to decide whether the *Coleman* requirement was met.

Yet *Fama* appears to have implicitly decided that the *Coleman* requirement is ***140** met when the state court issues a terse "either/or" rejection of a federal claim. *Fama's* statement that it was declining to "extend" *Quirama* implies that even if circumstances behind the opinion indicate that it rests on a procedural bar (as in *Quirama),* the "either/or" language introduces uncertainty sufficient to render the decision "interwoven with federal law" and therefore to satisfy the *Coleman* requirement. To be sure, *Fama* admits of multiple readings. For example, because *Fama* does not describe any of the behind-the-opinion circumstances that *Coleman* and *Quirama* instruct us to examine, *Fama,* 235 F.3d at 810-11, it may be taken that there were no useful behind-the-opinion clues to the basis of the state court's decision (otherwise we would not have been silent on the matter). In that event, we simply held that in the absence of such clues, a state court's "either/or" language satisfies the *Coleman* requirement. Another possibility is that we simply did not consider whether the *Coleman* requisite to federal merits review was present because the parties did not argue the point; this would explain why we did not cite the *Coleman* requirement in stating our holding. *Id.* But because *Fama* does discuss *Quirama's* reliance on the absence of the *Coleman* requirement, *id.* at 810, and because *Fama* stated that it was declining to "extend" *Quirama, id.,* we read *Fama* to hold that the *Coleman* requirement is met by an "either/or" state-court opinion under any possible circumstances.

3. Second Circuit AEDPA-deference case law

The balance of the relevant case law concerns the test for whether AEDPA deference under 28 U.S.C. § 2254(d) is due to a state court's adjudication of a claim because the adjudication is "on the merits." As discussed below, we have directed courts to examine the same three clues to make this determination that courts examine to establish whether the *Coleman* requirement in the procedural-bar context is met. And we have also strongly suggested that the *Harris* presumption applies to the § 2254(d) "on the merits" test. Finally, we have never held that AEDPA deference is not due to an "either/or" decision, which *Fama* says is on the merits for procedural-bar purposes, [7] alleviating any concern of doctrinal tension such as that expressed in *Shih Wei Su,* 335 F.3d at 126 n. 3.

7 *Fama* did not decide whether AEDPA deference applied.

a. *Sellan v. Kuhlman*

In *Sellan v. Kuhlman,* 261 F.3d 303 (2d Cir.2001), we began to identify a test for whether a state court's decision is "on the merits" for AEDPA purposes. *Sellan* decided two AEDPA-deference questions, which could have been better distinguished. The first question is whether some minimum level of explanation is necessary for a state court to have "adjudicated on the merits" a claim for AEDPA purposes. We answered that question in the negative, holding that a "state court adjudicates a state prisoner's federal claim on the merits when it (1) disposes of the claim on the merits, and (2) reduces its disposition to judgment." *Id.* at 312 (quotation and alteration marks omitted).

[1] This ruling left us with a second question: how to determine whether a disposition is "on the merits." The respondent in *Sellan* had not argued that a procedural bar existed, [8] so we did not ***141** consider the possibility that the *Harris* presumption might apply to this determination. But, even without looking to that body of law, we adopted a test requiring examination of the same three clues that *Quirama* would have us consider when determining whether the *Coleman* requirement is met: (1) the state court's opinion, (2) whether the state court was aware of a procedural bar, and (3) the practice of state courts in similar circumstances. *Id.* at 314. [9]

8 Because the existence of an adequate and independent procedural bar is not jurisdictional in the habeas context, a federal court is not required to raise it *sua sponte;* rather, it is "a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Trest,* 522 U.S. at 89, 118 S.Ct. 478 (alteration and quotation marks omitted).

9 Our exact phrasing of the test gave the factors in the reverse order: "(1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds." *Sellan,* 261 F.3d at 314.

In *Sellan,* we applied this test to a state court's order that disposed of the petitioner's motion for a writ of coram nobis with the statement, "Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is ORDERED that the motion is denied." *People v. Sellan,* No. 9152 (N.Y.App.Div. Jan. 25, 1990), *quoted in* *Sellan,* 261 F.3d at 308. We held that because (1) the opinion disposed of the motion as "denied" and (2) a procedural bar was not argued or available, the state court's adjudication was "on the merits." *Sellan,* 261 F.3d at 314. Accordingly, we applied the AEDPA deference mandated by 28 U.S.C. § 2254(d)(1), and we denied habeas relief, finding that although "we might well be inclined to grant the writ" under pre-AEDPA de novo review, id. at 310, the petitioner's habeas claim "was not so strong that it was unreasonable for the coram nobis court to [reject it]," *id.* at 317.

Our holding in *Sellan* is consistent with an understanding that the Supreme Court's *Harris* presumption applies under AEDPA. *Sellan's* three-part test simply lists the clues to which we look under *Quirama* in deciding whether the *Coleman* requirement (that the state court's decision fairly appears to rest primarily on federal law or to be interwoven with federal law) is met. In circumstances such as *Sellan's*, the state-court decision "fairly appears" to rest primarily upon federal law, establishing the *Coleman* requirement, and because there is no plain statement otherwise, the *Harris* presumption conclusively deems the decision to rest on the merits of the federal claim. Thus, no adequate and independent procedural bar supports the state court's decision, and we afford AEDPA deference to the state court's adjudication.

After we announced the *Sellan* test, three cases followed that discussed AEDPA deference in the context of a state court's disposition of claims as "either unpreserved or without merit,"

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leading us to subsequently comment that "apparent tension" had resulted. *Messiah,* 435 F.3d at 197 n. 5. But, as we explain below, even if some of the pronouncements in these cases create tension, their holdings do not.

b. *Ryan v. Miller*

The first of the three cases is *Ryan v. Miller,* 303 F.3d 231 (2d Cir.2002). There, we were confronted with a state court's opinion rejecting Ryan's Sixth Amendment claim with the language, "The defendant's remaining contentions are either unpreserved for appellate review or without merit." *People v. Ryan,* 215 A.D.2d 786, 627 N.Y.S.2d 410, 411 (App.Div.1995), *quoted in Ryan,* 303 F.3d at 245-46. We decided to "read the state court's opinion as having adjudicated Ryan's claim on its merits" because (1) there was nothing on ***142** the face of the state court's opinion to indicate that the claim was decided on procedural grounds and (2) it was undisputed that no procedural bar existed. *Ryan,* 303 F.3d at 246 (citing *Aparicio v. Artuz,* 269 F.3d 78, 94 (2d Cir.2001) (citing *Sellan,* 261 F.3d at 312)). We explained that any other result would be inconsistent with entertaining the claim at all:

> There is no reason ... to doubt that AEDPA applies in this situation because the only alternative to finding the claim adjudicated on the merits would be finding the claim procedurally barred, in which case we would not have entertained the claim in the first instance (absent a showing of cause and prejudice).

Id. Thus, for the first time, we linked the AEDPA-deference determination with the procedural-bar determination, reasoning that the classification of a state-court decision presents a binary circumstance-with AEDPA deference down one path and a procedural bar down the other. And *Ryan's* result is consistent with *Fama,* which, while admittedly ignoring the background circumstances, also concluded that an "either/or" state-court decision rested on the merits of the petitioner's federal claim.

c. *Miranda v. Bennett*

In the second of the three cases, *Miranda v. Bennett,* 322 F.3d 171 (2d Cir.2003), we considered whether AEDPA deference would be due to a state court's rejection of two federal claims as "unpreserved for appellate review, without merit, or [not requiring] reversal." *People v. Miranda,* 243 A.D.2d 584, 665 N.Y.S.2d 507, 508 (App.Div.1997), *quoted in Miranda,* 322 F.3d at 179. We opined that AEDPA deference was not warranted because the state court's disjunctive language "does not reveal whether a particular remaining claim was rejected on the ground that it was unpreserved or on the ground that it lacked merit, and the record does not make it clear that either claim was rejected for lack of merit." *Miranda,* 322 F.3d at 179. But this conclusion about the deference due to the state court's decision of those claims was dicta, not essential to the decision in *Miranda* remanding the case to the district court for clarification of why it denied the habeas petition regarding those claims. *Id.* at 182. Rather, the remand was required, we said, because the federal district court had simply adopted as its opinion the respondent's memorandum of law that posited alternative grounds, "leav[ing] the district court's ruling ambiguous" as to the basis for denying relief on the two relevant federal claims and frustrating the review function of the courts of appeals. *Id.* at 176, 175-179. [10]

[10] *See also Rudenko v. Costello,* 322 F.3d 168, 170 (2d Cir.2003) ("As discussed in opinions we file today in *Miranda v. Bennett,* ... we conclude that in some cases a district court's adoption of the opinions of the state appellate court and of the State's contentions opposing the respective habeas petitions does not provide this Court with sufficient information to conduct a meaningful appellate review....").

We do not suggest that we may ignore the AEDPA-deference pronouncements in this case because they are dicta. Dicta deserve close consideration; emphatic dicta, all the more. *See United States v. Garcia,* 413 F.3d 201, 232 n. 2 (2d Cir.2005) (Calabresi, J., concurring). But dicta "[are] not and cannot be binding. Holdings-what is necessary to a decision-are binding. Dicta-no matter how strong or how characterized-are not." *Id.; accord Carroll v. Lessee of Carroll,* 57 U.S. (16 How.) 275, 286-87, 14 L.Ed. 936 (1853) (Curtis, J.) ("[I]f [a point of law] might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question ***143** is not a decision."). [11] Thus, although *Miranda's* AEDPA-deference pronouncements are not binding, we nonetheless consider their persuasiveness.

11 *See generally* Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court,* 23 Ariz. St. L.J. 915, 926-27 (1991) (noting that the binding force of the result in a case derives from the "unique sense of responsibility that comes from knowing that a legal pronouncement will have consequences for an actual dispute"). We note that dicta in *Shih Wei Su* inaccurately characterized *Miranda* as having "held" that no AEDPA deference was due. *Shih Wei Su,* 335 F.3d at 126 n. 3.

We ultimately cannot find *Miranda's* AEDPA dicta persuasive because there is a fine but firm line between situations like *Miranda's* and situations like those in the case that *Miranda* relied upon for support, *Boyette v. Lefevre,* 246 F.3d 76 (2d Cir.2001). *Boyette* governs situations in which the state court has announced one or more reasons for its rejection of a claim on the merits; *Boyette* tells us that, when a state court has articulated its reasons for rejecting some elements of a federal claim, AEDPA deference applies only to the elements that the state court discussed. Thus, a federal court may grant the writ under AEDPA if the adjudication of the discussed elements was objectively unreasonable and the adjudication of the undiscussed elements was simply erroneous. *Id.* at 91; *see also Wiggins v. Smith,* 539 U.S. 510, 529, 535-36, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (proceeding in this manner, finding § 2254(d) to be satisfied by an objectively unreasonable state-court application of law regarding one element of a claim and stating that § 2254(d) does not circumscribe federal habeas review of a second element not discussed by the state courts).[12]

12 This is not to necessarily endorse the rule of *Wiggins* and *Boyette.* Indeed, one might well question why the extent of the state court's explanation changes the nature of federal habeas review as constrained by § 2254(d). Rather, § 2254(d)(1) might best be read as being satisfied by a finding of unreasonable error as to any one element of a federal claim, regardless of how many elements the state court discussed. After all, § 2254(d)(1) speaks of a decision that "involved an" unreasonable application of law, not a decision that "consists entirely of" unreasonable applications of law.

[2] But *Boyette* did not hold that a silent opinion is not entitled to AEDPA deference under § 2254(d). Indeed, to so extend *Boyette's* rule would undermine *Sellan's* holding that an unexplained state-court disposition of a claim can be entitled to AEDPA deference. *Sellan,* 261 F.3d at 311-12. Creating such conflict is unnecessary because *Sellan* and *Boyette* can coexist: when the state court articulates its reasons for rejecting a federal claim on its merits, we review those reasons; when "a state court fails to articulate the rationale underlying its rejection" of a federal claim on its merits, we focus our review on the state court's ultimate decision. *Id.* In sum, because the rule announced in *Miranda's* dicta was not supported by *Boyette's* holding, and given that *Miranda* did not consider how its AEDPA rule would square with procedural-bar rules, we are unable to find *Miranda's* rule persuasive.[13]

13 We note that any intimation from *Boyette's* citation to *Washington v. Schriver,* 240 F.3d 101, 109-10 (2d Cir.2001), that a silent state-court opinion is not "on the merits" was rendered a nonprecedential *sub silentio* holding when we withdrew our *Washington* opinion and filed an amended opinion that expressly reserved decision on whether AEDPA deference can apply to a silent opinion. *See Washington v. Schriver,* 255 F.3d 45, 55 (2d Cir.2001). Indeed, shortly after we filed the amended opinion in *Washington* reserving the issue, we decided in *Sellan* that AEDPA deference is no less due to unexplained rulings than to explained rulings. *Sellan,* 261 F.3d at 311-14.

144 d. *DeBerry v. Portuondo

The third of the three AEDPA-deference cases is *DeBerry v. Portuondo,* 403 F.3d 57 (2d Cir.2005), in which we were presented with a state court's decision affirming the petitioner's conviction and rejecting his federal claims as "either unpreserved for appellate review or without merit," *People v. DeBerry,* 234 A.D.2d 470, 651 N.Y.S.2d 559, 560 (App.Div.1996), *quoted in DeBerry,* 403 F.3d at 61. We first held that under *Fama,* the state court's decision did not rest on a procedural bar. *DeBerry,* 403 F.3d at 64-66. We then moved to the question whether AEDPA deference applied, noting that "the distinction between AEDPA and pre-AEDPA standards is not crucial." *Id.* at 68. Accordingly, we did not feel constrained to decide whether AEDPA deference applied. Instead, we noted that the state trial court did adjudicate the claims on the merits, that *Miranda* would not allow us to find an adjudication on the merits by the Appellate Division, and that AEDPA review therefore might or might not apply. *Id.* at 67-68. Thus, like *Miranda's* discussion, *DeBerry's* AEDPA discussion was dicta, not essential to the decision. *See Messiah,* 435 F.3d at 197 n. 5 (labeling *DeBerry's* dicta as such). And, for the reasons given above regarding *Miranda,* we are not persuaded to follow *DeBerry's* language.[14]

14 We note that *DeBerry* did reconcile *Fama* and *Miranda* doctrinally, stating that "[i]t is self-evident, we believe, that a state court can fail to clearly express its reliance on a procedural basis while, at the same time, not adjudicating the claim on the merits [as required for AEDPA deference to apply]." *DeBerry,* 403 F.3d at 67 n. 7. We do not doubt this as a descriptive matter; a state court surely might rely on a procedural bar without broadcasting this to the world. But while *DeBerry* explained that *Miranda's* dicta could apply, it did not explain why it makes sense for that dicta to apply.

* * *

This brings us to the state of the relevant law today: In the adequate-and-independent-state-ground line of cases, *Quirama* tells us to look to three clues to decide if the *Coleman* requirement of the *Harris* presumption is met, and *Fama* held that a state court's "either/or" rejection of a federal claim meets the *Coleman* requirement when the behind-the-opinion clues show a merits disposition, when the clues are indeterminate, and even when they show a procedural disposition-those clues simply do not matter in the *Fama* analysis because the "either/or" language rules the day. In the AEDPA-deference line of cases, *Sellan* instructs us to examine the three *Quirama* clues to decide whether a disposition rests on the merits. *Ryan* established that AEDPA deference applies to an "either/or" state-court adjudication where nothing on the face of the state court's opinion indicates that the claim was decided on procedural grounds and no state procedural bar exists, reasoning that the only alternative to finding that AEDPA deference applies is treating the claim as procedurally barred. Contrary dicta in two further cases, *Miranda* and *DeBerry,* proves unpersuasive. In sum, although no case has explicitly held that the *Harris* presumption applies to the "on the merits" inquiry under AEDPA, *Ryan* strongly implies that it does, and none of our holdings are inconsistent with that conclusion. [15]

15 Although not of precedential force, it is interesting that some of our cases have assumed without explanation that the *Harris* presumption applies for purposes of AEDPA deference under 28 U.S.C. § 2254(d). For example, in *Jones v. Stinson,* we applied the *Harris* presumption to deem an ambiguous state-court decision to rest on the merits of the petitioner's federal claim for procedural-bar purposes and then seamlessly proceeded to hold that AEDPA deference limited our review of the petitioner's claim. 229 F.3d at 117-19. Two recent cases have followed the same pattern. *See Brown v. Miller,* 451 F.3d 54, 56-57, 59 (2d Cir.2006) (applying the *Harris* presumption to find that a state-court procedural ruling interwoven with a federal claim was not procedurally barred and, without further discussion, reviewing the federal claim under AEDPA's deferential standard); *Green v. Travis,* 414 F.3d 288, 296 (2d Cir.2005) (reasoning that "[h]aving determined that Green did not procedurally default his *Batson* challenge, we apply the standards of review contained in 28 U.S.C. § 2254.").

*145 4. Our holding: *Harris* guides the AEDPA inquiry

[3] Today, we explicitly hold what *Ryan* strongly implies: The conclusive presumption set forth by the Supreme Court in *Harris* and *Coleman* applies to the determination under 28 U.S.C. § 2254(d) of whether a state-court adjudication is "on the merits." The Supreme Court designed the *Harris* presumption to predict efficiently and accurately the basis of a state court's adjudication, and federal courts undertake this same inquiry under AEDPA facing the same circumstances that motivated the Supreme Court to create and apply the presumption in the first place. We see in the Supreme Court's cases no reason why the *Harris* presumption would not apply to the AEDPA-deference determination, nor do we see any reason to apply a different test that could create logically incongruous results. Moreover, in enacting AEDPA, Congress was presumably aware of the customary judicial usage of "on the merits" in the procedural-bar context and intended that term to have the same meaning under the AEDPA, bringing along the *Harris* presumption. *See supra* note 4.

[4] **[5]** Thus, when examining the basis of a state court's adjudication of a federal claim, a federal habeas court in this circuit should examine the three clues laid out in *Coleman, Quirama,* and *Sellan* [16] to classify the decision as either:

16 To reiterate, the three clues to the basis of a state court's decision are (1) the face of the state-court opinion, (2) whether the state court was aware of a procedural bar, and (3) the practice of state courts in similar circumstances.

(1) fairly appearing to rest primarily on federal law or to be interwoven with federal law or

(2) fairly appearing to rest primarily on state procedural law.

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See *Coleman,* 501 U.S. at 739-40, 111 S.Ct. 2546. Absent a clear and express statement of reliance on a state procedural bar, the *Harris* presumption applies to decisions in the first category and deems them to rest on the merits of the federal claim. Such decisions are not procedurally barred and must be afforded AEDPA deference as adjudications "on the merits" under 28 U.S.C. § 2254(d). The *Harris* presumption does not apply to decisions in the second category, which show themselves to rest on an independent state procedural bar. Nor does it apply to decisions in the first category which contain a clear statement of reliance on a state procedural bar. No AEDPA deference is due to these decisions, but the state may successfully assert that habeas relief is foreclosed provided that the independent state procedural bar is adequate to support the judgment and that neither cause and prejudice nor a fundamental miscarriage of justice is shown.[17]

17 If the state waives the right to make this argument, *see* *Trest,* 522 U.S. at 89, 118 S.Ct. 478, and no AEDPA deference is due, we apply pre-AEDPA standards. *See* *Aparicio,* 269 F.3d at 93.

The effect of these rules is to present federal habeas courts with a binary circumstance: we either apply AEDPA deference to review a state court's disposition of a federal claim or refuse to review the claim because of a procedural bar properly raised.[18] *See* ***146** *Messiah,* 435 F.3d at 197 n. 5. The middle ground envisioned by *Shih Wei Su,* 335 F.3d at 126 n. 3, does not exist.

18 Assuming that the independent state procedural bar is adequate to support the judgment and not excused by a showing of either cause and prejudice or a fundamental miscarriage of justice. *Coleman,* 501 U.S. at 730, 111 S.Ct. 2546; *Harris,* 489 U.S. at 262, 109 S.Ct. 1038; *Cotto,* 331 F.3d at 239, 247.

5. AEDPA deference in this case

[6] AEDPA deference under § 2254(d) is due to the Appellate Division's rejection of Jimenez's present-a-defense claim if that judgment was an "adjudicat[ion] on the merits." 28 U.S.C. § 2254(d). Under *Sellan,* we hold that the Appellate Division "adjudicated" Jimenez's present-a-defense claim: Although the state court failed to provide reasoning for its decision, it disposed of the claim and reduced its disposition to judgment. *Sellan,* 261 F.3d at 312. This leaves the question whether the Appellate Division's disposition was "on the merits."

[7] Were we unbound by precedent, we would now examine the three clues to the basis of the state court's decision and classify the decision as one that either meets or fails the *Coleman* requisite. But *Fama* has already made that classification, binding us today. *Fama* held that a state court's rejection of a federal claim as "either unpreserved for appellate review or without merit" meets the *Coleman* requisite regardless of background circumstances-clues unimportant under *Fama*. *Fama,* 235 F.3d at 810-11. Such an "either/or" decision is deemed to rest on the merits of the federal claim under the *Harris* presumption because there is no plain statement to the contrary. *Id.* Because we hold that the *Harris* presumption also applies to the AEDPA-deference inquiry, *Fama* requires us to hold that the Appellate Division's adjudication of Jimenez's claim was on the merits for purposes of § 2254(d). Accordingly, AEDPA deference applies.

B. Applying AEDPA Deference to Jimenez's Claim

[8] Under § 2254(d), we decide whether the Appellate Division's rejection of Jimenez's present-a-defense claim "resulted in a decision that was contrary to" or "involved an unreasonable application of" clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1).[19] In making this determination, we may look only to the holdings of the Supreme Court, as opposed to its dicta, and only to the Supreme Court's holdings as of the time of the relevant state-court decision-December 1, 1997. *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

19 A petitioner may also satisfy § 2254(d) by showing that subsection (d)(2) is met, but that provision, which concerns the state court's factual determinations, is not in dispute here.

1. Clearly established federal law

[9] The constitutional right to present a complete defense at a criminal trial was clearly established at the time of the Appellate Division's decision. *See* *Taylor v. Illinois,* 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *Rock v. Arkansas,* 483 U.S. 44, 51-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). For the exclusion of evidence to violate this right by denying the accused a fundamentally fair trial, the evidence must be "material," in the constitutional sense that it "creates a

reasonable doubt that did not otherwise exist" as evaluated "in the context of the entire record." *United States v. Agurs,* 427 U.S. 97, 112-13, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification ***147** for a new trial." *Id.* But "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 113.

[10] **[11]** As with many rights, the right to present a defense is not unlimited. The criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers,* 410 U.S. at 302, 93 S.Ct. 1038. The defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor,* 484 U.S. at 410, 108 S.Ct. 646. Although "federal habeas corpus relief does not lie for errors of state law," *Estelle v. McGuire,* 502 U.S. 62, 67, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (quotation marks omitted), the exclusion of evidence pursuant to an evidentiary rule "may not be arbitrary or disproportionate" to the purpose that the rule is designed to serve, *Rock,* 483 U.S. at 55-56, 107 S.Ct. 2704.

[12] **[13]** Finally, in habeas actions, trial errors are subject to harmless-error review. *Brecht v. Abrahamson,* 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). If excluded evidence would create otherwise nonexistent reasonable doubt, its exclusion satisfies the "substantial and injurious" reversible-harm standard. *Kyles v. Whitley,* 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). In sum, we conclude that Jimenez's present-a-defense claim is based upon clearly established federal law as determined by the Supreme Court. The Constitution prohibits the pointless or arbitrary exclusion of material evidence.

2. "Contrary to"

[14] We hold that the Appellate Division's decision of Jimenez's present-a-defense claim was not contrary to clearly established federal law as determined by the Supreme Court. The Appellate Division did not arrive at a conclusion of law opposite to one reached by the Supreme Court, *Williams,* 529 U.S. at 405, 120 S.Ct. 1495, nor did it reach a result different from one reached by the Supreme Court on materially indistinguishable facts, *id.* at 406, 120 S.Ct. 1495.

3. "Unreasonable application"

[15] When applying § 2254(d)'s "unreasonable application" clause to silent state-court opinions, we review outcomes, not reasoning. *Sellan,* 261 F.3d at 311-12. For a writ of habeas corpus to issue, we must conclude not only that the trial court's exclusion of the heroin evidence was unconstitutional but that it was so plainly unconstitutional that it was objectively unreasonable for the Appellate Division to conclude otherwise. *Williams,* 529 U.S. at 409-10, 412, 120 S.Ct. 1495. An "increment of incorrectness beyond error is required" to allow habeas relief, *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir.2000), and although "the increment need not be great," *id.,* we must be able to "adequately identify why [we] found the [state-court] decision ... to be 'objectively unreasonable,' " *Fuller v. Gorczyk,* 273 F.3d 212, 219 (2d Cir.2001).

[16] In applying these standards, Jimenez's possible use of the excluded heroin evidence is relevant. Jimenez informs us that he was to defend his case with the following theory: The victim was involved in a drug deal that went bad on the night of his murder, a drug deal about which Barrera and Margie Cardona knew and that Barrera may have facilitated. Barrera and Cardona falsely implicated Jimenez for either or both of two reasons: (1) Barrera and Cardona were afraid of being charged with drug crimes or (2) Barrera ***148** himself arranged for the victim's murder for drug-related reasons and wanted to shift the blame.

On direct review, we might be inclined to find that the heroin evidence was material to Jimenez's defense. The heroin evidence is certainly "probative" in the evidentiary sense of the word because it makes the truth of Jimenez's theory more likely than without the evidence. And the heroin evidence might be foundational to Jimenez's defense, as opposed to merely collateral, because Jimenez had no other direct evidence that drugs were involved in the events on the night of the murder. Evidence of commercial amounts of heroin could support an inference that Barrera and the victim were at a drug sale, which could support an inference that Barrera was afraid of being prosecuted with drug crimes, which might support an inference that Barrera chose to falsely implicate Jimenez in the shooting, possibly because drug dealings had in fact motivated Barrera to orchestrate the shooting. And the inference of a drug sale could help unite other pieces of evidence-namely, testimony placing a third person with a gun at the shooting and evidence suggesting that two guns were brandished and fired that night.

But we cannot hold that the heroin evidence would have so plainly created reasonable doubt that a conclusion to the contrary would be objectively unreasonable. The Appellate Division could have reasonably concluded that the foregoing chain of inferences in Jimenez's materiality argument is simply too tenuous and that even with the heroin evidence admitted, the jury would still have discounted the testimony supporting Jimenez's theory. We do not find that conclusion objectively unreasonable.

Because the state court's decision was silent and because we hold that it was not objectively unreasonable to deem the heroin evidence constitutionally immaterial, we need not apply § 2254(d)(1) to the second element of Jimenez's claim, which asks whether the trial court's exclusion of the evidence was arbitrary. *See Sellan,* 261 F.3d at 317 (holding that § 2254(d)'s "unreasonable application" clause was not met upon finding that the state court's silent adjudication of one element of the petitioner's claim was objectively reasonable, without determining whether its silent resolution of the second element was unreasonable).[20] Federal law renders Jimenez ineligible for a writ of habeas corpus premised upon this claim. *See* 28 U.S.C. § 2254(d)(1).

20 As we have explained, *see supra* note 12, it might make more sense for courts to read § 2254(d) as being satisfied by a finding of unreasonable error as to any one element of a federal claim, rather than requiring objectively unreasonable error as to every element of a silently adjudicated claim.

II. Jimenez's Cumulative-Error Claim

Jimenez claims that cumulative trial-court error produced a trial setting that was fundamentally unfair, thereby depriving him of his constitutional right to due process. *See Taylor v. Kentucky,* 436 U.S. 478, 487 n. 15, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). We deny a writ of habeas corpus on this claim because Jimenez did not fairly present this claim to the state courts and may no longer do so. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999).

[17] [18] [19] Before a state prisoner may obtain a writ of habeas corpus from a federal court, the prisoner must exhaust his remedies in state court. 28 U.S.C. § 2254(b)(1); *O'Sullivan,* 526 U.S. at 842, 119 S.Ct. 1728. The exhaustion requirement "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state ***149** judicial proceedings," *Rose v. Lundy,* 455 U.S. 509, 518, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), and "is not satisfied unless the federal claim has been 'fairly presented' to the state courts," *Daye v. Att'y Gen.,* 696 F.2d 186, 191 (2d Cir.1982) (en banc). To prevent a prisoner from exhausting his claims by simply letting the time run on state remedies, the Supreme Court "crafted a separate waiver rule-or as it is now commonly known-the procedural default doctrine." *O'Sullivan,* 526 U.S. at 853, 119 S.Ct. 1728 (Stevens, J., dissenting). Under the procedural-default doctrine, when a prisoner has exhausted his state remedies but has not given the state courts a fair opportunity to pass on his federal claims, the prisoner has procedurally defaulted his claims and is ineligible for federal habeas relief absent a showing of "cause and prejudice" or "a fundamental miscarriage of justice." *Id.* at 854, 119 S.Ct. 1728 (internal citations omitted).

[20] The state contends that Jimenez did not fairly present his cumulative-error claim to the state courts. We agree. Jimenez did not present the cumulative-error claim to the Appellate Division in any of the four modes contemplated by this court in *Daye,*[21] nor did he alert the Appellate Division of that claim in another manner. *See Solis v. Garcia,* 219 F.3d 922, 930 (9th Cir.2000) ("Solis' petition did not label his cumulative error claim as an 'issue' in the contents section, nor did he argue the claim or cite authority for it. Because Solis cited no authority and made no argument, the government reasonably did not address Solis' cumulative error claim in its brief either, leaving the [state court] with no argument from either side.").

21 Those modes are:

(a) reliance on pertinent federal cases employing constitutional analysis,

(b) reliance on state cases employing constitutional analysis in like fact situations,

(c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and

(d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Daye, 696 F.2d at 194.

Jimenez contends that he fairly presented the claim by using in his brief to the Appellate Division the transition phrase "was exacerbated by" to shift between argument of his *Brady* claim and argument of his evidence-exclusion claim, as well as by using the plural noun "rulings" in the brief's summary section to describe the two trial-court decisions that he contended violated his due process rights. These two isolated phrases do not give the state court fair notice of a distinct

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cumulative-error claim and simply serve as a transition and a summarization. We hold that Jimenez did not fairly present his cumulative-error claim to the state courts.

[21] Jimenez's claim is now exhausted because state remedies are no longer available. Jimenez has already taken his one direct appeal, and this claim is procedurally barred from consideration in a collateral attack on his conviction. *See* N.Y.Crim. Proc. Law § 440.10(2)(c). Accordingly, because Jimenez has not "*properly* exhausted" his state remedies by fairly presenting his claim to the state courts, *O'Sullivan,* 526 U.S. at 848, 119 S.Ct. 1728, and may no longer do so, we agree with the respondent that Jimenez has procedurally defaulted his cumulative-error claim. Because Jimenez has not attempted to show either cause and prejudice for the default or a fundamental miscarriage of justice, he is ineligible for habeas relief on his cumulative-error claim. *See Murray v. Carrier,* 477 U.S. 478, 495-96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

*150 CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment denying Jimenez's petition for a writ of habeas corpus.

All Citations

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73 S.Ct. 894
Supreme Court of the United States

UNITED STATES
v.
W. T. GRANT CO. et al.

No. 532.
|
Argued and Submitted April 9, 1953.
|
Decided May 25, 1953.

Synopsis
Civil actions brought by government to enjoin violations of the Clayton Act prohibitions against interlocking corporate directorates. The United States District Court for the Southern District of New York, 112 F.Supp. 336, treated defendants' motions to dismiss the actions as moot as being motions for summary judgment and granted same, and the government appealed. The United States Supreme Court, Mr. Justice Clark, held that no genuine issue as to any material fact had been presented.

Affirmed.

Mr. Justice Douglas and Mr. Justice Black dissented.

West Headnotes (21)

[1] Antitrust and Trade Regulation
Jurisdiction and Venue
Administrative jurisdiction vested in Federal Trade Commission for enforcement of Clayton Act prohibitions against interlocking corporate directorates is not exclusive and District Court properly entertained suit to enjoin violations of statute. Clayton Act, §§ 8, 11, 15, 15 U.S.C.A. §§ 19, 21, 25.

5 Cases that cite this headnote

[2] Federal Courts
Voluntary cessation of challenged conduct
Voluntary cessation of allegedly illegal conduct does not deprive tribunal of power to hear and determine case, that is, does not make the case moot.

625 Cases that cite this headnote

[3] Federal Courts
Mootness
To say that a case has become "moot" means that defendant is entitled to dismissal as a matter of right.

105 Cases that cite this headnote

[4] Antitrust and Trade Regulation
Presumptions and burden of proof
When defendants, in action to restrain violation of anti-trust laws, are shown to have settled into continuing practice violative of anti-trust laws, court will not assume that practice has been abandoned without clear proof. Clayton Act, § 8, 15 U.S.C.A. § 19.

26 Cases that cite this headnote

[5] Injunction
Voluntary cessation or undertaking of conduct
It is duty of court to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit and there is probability of resumption.

52 Cases that cite this headnote

[6] Injunction
Mootness and ripeness; ineffectual remedy
Suit for injunctive relief may be moot if defendant can demonstrate that there is no reasonable expectation that wrong sought to be enjoined will be repeated, but his burden is a heavy one.

479 Cases that cite this headnote

[7] **Injunction**
Mootness and ripeness; ineffectual remedy
Defendant's disclaimer of any intention to revive wrongful practices sought to be enjoined will not suffice to make case moot, but it is one of factors to be considered in determining appropriateness of granting injunction against now-discontinued acts.

52 Cases that cite this headnote

[8] **Injunction**
Voluntary cessation or undertaking of conduct
Along with its power to hear case, court's power to grant injunctive relief survives discontinuance of illegal conduct.

112 Cases that cite this headnote

[9] **Injunction**
Prospective, preventive, or future-oriented nature of remedy
Injunction
Presumptions and burden of proof
Purpose of injunction is to prevent future violations and it can be utilized even without a showing of past wrongs, but moving party must satisfy court that relief is needed.

142 Cases that cite this headnote

[10] **Injunction**
Clear, likely, threatened, anticipated, or intended injury
Determination necessary to granting of injunctive relief is existence of some cognizable danger of recurrent violations, and something more than a mere possibility is necessary to keep case alive.

459 Cases that cite this headnote

[11] **Antitrust and Trade Regulation**
Injunction
Federal Courts
Review of federal district courts
In suit to enjoin future violations of Clayton Act prohibitions against interlocking corporate directorates, chancellor's discretion is necessarily broad and a strong showing of abuse must be made to reverse it. Expediting Act, § 2, 15 U.S.C.A. § 29; Clayton Act, §§ 8, 11, 15 U.S.C.A. §§ 19, 21; Fed.Rules Civ.Proc. rules 12(b) (6), 56, 28 U.S.C.A.

16 Cases that cite this headnote

[12] **Injunction**
Voluntary cessation or undertaking of conduct
To be considered on issue as to appropriateness of granting injunction against now-discontinued acts are bona fides of expressed intent to comply, effectiveness of discontinuance, and, in some cases, character of past violations.

91 Cases that cite this headnote

[13] **Federal Courts**
Review of federal district courts
To overturn chancellor's determination that there was no factual dispute, as to existence of threat of future violation, such as might prevent granting of summary judgment for defendants in government's suit to enjoin violations of Clayton Act prohibition against interlocking corporate directorates, government would have to demonstrate to federal Supreme Court that there was no reasonable basis for chancellor's decision. Expediting Act, § 2, 15 U.S.C.A. § 29; Clayton Act, §§ 8, 11, 15 U.S.C.A. §§ 19, 21; Fed.Rules Civ.Proc. rules 12(b) (6), 56, 28 U.S.C.A.

13 Cases that cite this headnote

[14] **Antitrust and Trade Regulation**
Presumptions and burden of proof
Individual proclivity to violate Clayton Act prohibitions against interlocking corporate directorates would not have to be inferred from fact that three violations were charged in suit to enjoin conduct prohibited by that statute,

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particularly in view of fact that government had only recently attempted systematic enforcement of the prohibitions. Clayton Act, § 8, 15 U.S.C.A. § 19.

3 Cases that cite this headnote

[15] Injunction
Voluntary cessation or undertaking of conduct

Postponement of suit is as indicative of doubt on prosecutor's part as of intransigence on defendant's part.

2 Cases that cite this headnote

[16] Federal Courts
Securities regulation

Question as to how much contrition should be expected of defendant charged with violating Clayton Act prohibitions against interlocking corporate directorates is better addressed to discretion of trial court, and same can be said of his limited disclaimer of future intent.

11 Cases that cite this headnote

[17] Antitrust and Trade Regulation
Injunction

Assuming that corporations were properly joined as defendants in government's suit to enjoin violations of Clayton Act prohibitions against interlocking corporate directorates, Supreme Court's conclusion that there was no abuse of discretion in refusing injunctive relief against individual defendant would apply a fortiori in their case, where none of corporations appeared to have engaged in more than one alleged violation and affidavits filed with their motions to dismiss indicated that they were ignorant of government's interest in interlocks until suits were filed. Clayton Act, § 8, 15 U.S.C.A. § 19.

111 Cases that cite this headnote

[18] Antitrust and Trade Regulation
Monopolization or attempt to monopolize

In proceedings on defendants' motions to dismiss as moot actions by government to enjoin violations of Clayton Act prohibitions against interlocking corporate directorates, which motions were treated by district judge as being for summary judgment, district judge could have found that there was no significant threat of future violation and that there was no factual dispute about existence of such threat. Expediting Act, § 2, 15 U.S.C.A. § 29; Clayton Act, §§ 8, 11, 15 U.S.C.A. §§ 19, 21; Fed.Rules Civ.Proc. rules 12(b) (6), 56, 28 U.S.C.A.

27 Cases that cite this headnote

[19] Antitrust and Trade Regulation
Injunction

In proceedings on defendants' motions to dismiss as moot actions by government to enjoin violations of Clayton Act prohibitions against interlocking corporate directorates, which motions were treated by district judge as being for summary judgment, trial judge did not abuse his discretion in refusing injunctive relief. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.; Clayton Act, § 8, 15 U.S.C.A. § 19.

61 Cases that cite this headnote

[20] Federal Courts
Voluntary cessation of challenged conduct

Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.

133 Cases that cite this headnote

[21] Injunction
Voluntary cessation or undertaking of conduct

A discontinuance of wrongful conduct does not alone warrant denial of injunctive relief.

18 Cases that cite this headnote

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Opinion

Mr. Justice CLARK delivered the opinion of the Court.

For the first time since the enactment of the Clayton Act in 1914 the Court is called upon to consider s 8's prohibitions against interlocking corporate directorates. [1] The Government appeals from judgments dismissing civil actions brought against Hancock and three pairs of corporations which he served as a director, W. T. Grant Co. and S. H. Kress & Co., Sears Roebuck & Co. and Bond Stores, Inc., and Kroger Co. and Jewel Tea Co., Inc. Alleging that the size and competitive relationship of each set of companies brought the interlocks within the reach of s 8, the complaints asked the court to order the particular interlocks terminated and to enjoin future violations of s 8 by the individual and corporate defendants. Soon after the complaints were filed, Hancock resigned from the boards of Kress, Kroger and Bond. Disclosing the resignations by affidavit, all of the defendants then moved to dismiss the actions as moot. Treated as motions for summary judgment, [2] they were granted by the District Judge. His concluded that there is not 'the ***631** slightest threat that the defendants will attempt any future activity in violation of s 8 (if they have violated it already) * * *.' 112 F.Supp. 336, 338. The Government brought this direct appeal under s 2 of the Expediting Act, 32 Stat. 823, as amended, 62 Stat. 989, 15 U.S.C.(Supp. V) s 29, 15 U.S.C.A. s 29, contending that the cases were not rendered moot by Hancock's resignations and that it was an abuse of discretion for the trial court to refuse any injunctive relief.

1 Sec. 8.
'* * * No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * *' 38 Stat. 730, 15 U.S.C. s 19, 15 U.S.C.A. s 19.

2 Fed.Rules Civ.Proc. 12(b)(6), 56, 28 U.S.C.A.

[1] Appellees suggest, without arguing the point in extenso, that the judgment should be affirmed because s 11 of the Clayton Act vests exclusive s 8 enforcement powers in the Federal Trade Commission. [3] Section 11 does authorize the ****897** Commission to enforce s 8. But any inference that administrative jurisdiction was intended to be exclusive falls before the plain words of s 15: 'The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this ***632** Act * * *.' 15 U.S.C. s 25, 15 U.S.C.A. s 25. And the cases have spoken of Congress' design to provide a scheme of dual enforcement for the Clayton Act. United States Alkali Export Ass'n v. United States, 1945, 325 U.S. 196, 208, 65 S.Ct. 1120, 1127, 89 L.Ed. 1554; Standard Oil Co. of California and Standard Stations v. United States, 1949, 337 U.S. 293, 310, note 13, 69 S.Ct. 1051, 1060, 93 L.Ed. 1371. Appellees' failure to press the point denotes its merits. The District Court properly entertained the suits.

3 's 11. Authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested * * * in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
'Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing * * *. If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * * (15 U.S.C., Supp. V, s 21.)'

[2] **[3]** **[4]** **[5]** Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and

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determine the case, i.e., does not make the case moot. United States v. Trans-Missouri Freight Ass'n, 1897, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; Walling v. Helmerich & Payne, Inc., 1944, 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29; Hecht Co. v. Bowles, 1944, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754. A controversy may remain to be settled in such circumstances, United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 448, e.g., a dispute over the legality of the challenged practices. Walling v. Helmerich & Payne, Inc., supra; Local 74 United Brotherhood of Carpenters, etc., v. National Labor Relations Board, 1951, 341 U.S. 707, 715, 71 S.Ct. 966, 970, 95 L.Ed. 1309. The defendant is free to return to his old ways. [4] This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. United States v. Trans-Missouri Freight Ass'n, supra, 166 U.S. at pages 309, 310, 17 S.Ct. 546, 547. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, National Labor Relations Board v. General Motors Corp., 2 Cir., 1950, 179 F.2d 221. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement. [5]

4 Cf. United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, 1916, 239 U.S. 466, 36 S.Ct. 212, 60 L.Ed. 387.

5 'When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws, courts will not assume that it has been abandoned without clear proof. * * * It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.' United States v. Oregon State Medical Society, 1952, 343 U.S. 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978.

***633** **[6]** **[7]** The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' [6] The burden is a heavy one. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts.

6 United States v. Aluminum Co. of America, supra, 148 F.2d at page 448.

[8] **[9]** **[10]** **[11]** **[12]** Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. Hecht Co. v. Bowles, supra; ****898** Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 1916, 242 U.S. 202, 37 S.Ct. 105, 61 L.Ed. 248. The purpose of an injunction is to prevent future violations, Swift & Co. v. United States, 1928, 276 U.S. 311, 326, 48 S.Ct. 311, 314, 72 L.Ed. 587 and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

The facts relied on by the Government to show an abuse of discretion in this case are these: Hancock's three interlocking directorates viewed as three distinct violations, his failure to terminate them until after suit was ***634** filed despite five years of administrative attempts to persuade him of their illegality, his express refusal to concede that the interlocks in question were illegal under the statute and his failure to promise not to commit similar violations in the future.

[13] **[14]** **[15]** **[16]** Were we sitting as a trial court, this showing might be persuasive. But the Government must demonstrate that there was no reasonable basis for the District Judge's decision. [7] In this we think it fails. An individual proclivity to violate the statute need not be inferred from the fact that three violations were charged, particularly since it is only recently that the Government has attempted systematic enforcement of s 8. [8] The District Court was not dealing with a defendant who follows one adjudicated violation with others. The only material before the District Judge on the supposed five years of administrative persuasion could easily support an inference that during that time the defendant and the Department of Justice were each trying to determine the legality of his directorships. The Government's remedy under the statute was plain. Postponement of suit indicates doubt on the prosecutor's part as much as intransigence on the defendant's. How much contrition should be expected of a defendant is hard for us to say. This surely is a question better addressed to the discretion of the trial court. The same can be said of the limited disclaimer of future intent.

7 Cf. United States v. United States Gypsum Co., 1950, 340 U.S. 76, 89, 71 S.Ct. 160, 169, 95 L.Ed. 89, on review of particular anti-trust decree provisions.

8 See Kramer, Interlocking Directorships and the Clayton Act After 35 Years, 59 Yale L.J. 1266.

[17] Assuming with the Government that the corporations were properly joined as defendants,[9] the conclusion that there was no abuse of discretion in refusing injunctive relief against Hancock applies a fortiori in their case. ***635** None of the corporations appeared to have engaged in more than one alleged violation. And affidavits filed with the motions to dismiss indicated that these defendants were ignorant of the Government's interest in the interlocks until the suits were filed. Indeed the emphasis on this branch of the case is placed on the refusal of relief against Hancock. The failure to point to circumstances compelling further relief against the corporations speaks for itself.

9 We should not be understood as deciding whether corporations can violate s 8 or, for other reasons, be enjoined under the statute.

[18] **[19]** Essentially, the Government's claim is that it was deprived of a trial on the relief issue. But at no time was objection raised to the procedure by which the case was handled. Of course summary judgment procedure could not have been employed were there a 'genuine issue as to any material fact'. Fed.Rules Civ.Proc. 56. However, after the defendants had moved to dismiss, the Government elected ****899** not to file any countervailing affidavits or amend its complaint and stated on oral argument that the truth of the defendants' affidavits was not questioned. To frame a factual dispute, that left the complaint, the only relevant paragraph of which reads: '16. The defendants have threatened to continue and will continue the aforesaid violation of Section 8 of the Clayton Act unless the relief prayed for herein is granted.' (Emphasis added.) 'The aforesaid violation(s),' the specific interlocks, had been voluntarily terminated and intention to resume them had been negatived under oath. As to the prayer that the defendants be enjoined from any future violations of s 8, the complaint alleged no threatened violations other than those specifically charged. In these circumstances, the District Judge could decide that there was no significant threat of future violation and that there was no factual dispute about the existence of such a threat.

We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial ***636** court's refusal to award injunctive relief. Moreover, the court stated its dismissals 'would not be a bar to a new suit in case possible violations arise in the future.' The judgments are affirmed.

Affirmed.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

Monopoly and restraints of trade are sometimes the products of practices and devices as ingenious as the minds of men. Sometimes they follow a blunt and direct course as is involved in the acquisition of the assets of a competitor—a way of growth of monopoly power to which the decisions of the Court have given a powerful impetus and encouragement. See especially United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533. More subtle are interlocking arrangements between directorates. This can accomplish disastrous consequences, as Mr. Justice Brandeis pointed out forty years ago. Interlocking directorates between companies which compete stifle the competition. Or to use the words of Mr. Justice Brandeis, the practice substitutes 'the pull of privilege for the push of manhood.'[1] Moreover, those entwined relations are the stuff out of which concentration of financial power over American industry was built and is maintained. Mr. Justice Brandeis gave one example:[2]

1 See Brandeis, The Endless Chain, Harpers' Weekly, Dec. 6, 1913, p. 13, quoted in Lief, The Brandeis Guide to the Modern World, p. 111.

2 See his testimony in Hearings, H.R.Committee on the Judiciary, 63d Cong., 2d Sess., on Trust Legislation, vol. 2, p. 922, quoted in Lief, op. cit., supra, note 1, p. 113.

'They, the bankers, control the railroads, and controlling the railroads, they were able to control the issue and sale of securities. Being bankers, they bought those securities at a price which they had a ***637** part in fixing or could have a part in fixing. They sold those securities, as bankers, to insurance companies in which they were able to exercise some control as directors. They got the money with which to buy those securities from railroads through their control of the great banking institutions, and then, in their capacity of having control of the railroads, they utilized that money to purchase from great corporations, like the Steel Corporation, what the railroads needed, and in their capacity as controlling other corporations they bought from the Steel Corporation again, and so on until we had the endless chain.'

The web that is woven may tie many industries, insurance companies, and financial houses together into a vast and friendly alliance that takes the edge off competition.

That condition is aggravated here. The interlocking control in the present case is ****900** not indirect. Mr. Hancock served as a director for each of three sets of companies which, on the state of the pleadings before us, we must assume to have been competitive. The fact that he resigned under the pressure of these proceedings should not dispose of the case. We are dealing here with professionals whose technique for controlling enterprises and building empires was fully developed and well known long before Mr. Justice Brandeis was crying out against the evils of 'the money trust.' Mr. Hancock is and has been for some years a partner in the investment banking firm of Lehman Bros. In 1940 he testified that when Lehman Bros. did financing for a company it was their 'traditional practice' to ask for representation on the board of directors.[3]

3 Hearings, Temporary National Economic Committee, 76th Cong., 3d Sess., Pt. 24, p. 12400.

It therefore seems to me that a District Judge, faced with violations such as were involved here, would want ***638** to know first, how investment bankers built their empires; second, how this particular firm built its own empire; third, the effect of these banker empires on competition between the companies which are tied to them.

The fact that the Lehman partner resigned to avoid a decision on the merits has little, if any, relevancy to the issue in the case, for we are here concerned with the proclivity of the house to indulge in the practice.

The relevant issues have never been weighed in this case. The District Court's ruling would be entitled to a presumption of validity if those various factors had been considered. But the District Court made no such considered judgment. It disposed of the case on the basis of mootness, a ruling now conceded to be erroneous. The case should go back for a consideration of the nature and extent of the web which this investment banking house has woven over industry and its effect on the 'elimination of competition' within the meaning of s 8 of the Clayton Act.[4] Unless we know that much, we are in no position to judge the service an injunction against future violations may do. Unless we know that much, we are in no position to carry out Woodrow Wilson's policy expressed in s 8 of the Clayton Act that those interlocking directorates should be prevented which make 'those who affect to compete in fact partners and masters of some whole field of business.' Message, Joint Session of the Houses of Congress, Jan. 20, 1914.

4 In United States v. Sears, Roebuck & Co., D.C., 111 F.Supp. 614, decided April 28, 1953, the court ruled that Congress intended by s 8 'to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.'

All Citations

345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303

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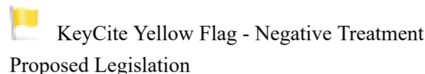
KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Correction Law (Refs & Annos)
Chapter 43. Of the Consolidated Laws (Refs & Annos)
Article 1. Short Title; Definitions

McKinney's Correction Law § 2

§ 2. Definitions

Effective: March 31, 2011
Currentness

When used in this chapter, unless otherwise expressly stated or the context or subject matter otherwise requires, the following terms have the following meanings:

1. “Department” means the state department of corrections and community supervision;

2. “Commissioner” means the state commissioner of corrections and community supervision;

3. “Commission” means the state commission of correction;

4. (a) “Correctional facility”. Any place operated by the department and designated by the commissioner as a place for the confinement of persons under sentence of imprisonment or persons committed for failure to pay a fine. Except as provided in paragraph (b) of this subdivision, whenever reference has been or hereafter will be made in any statute, judgment, sentence, commitment, court order or otherwise to a state prison, state reformatory, reception center, diagnostic center or other institution or facility in the department, such reference shall be deemed to mean “correctional facility”.

(b) The term “correctional facility” shall not, however, be deemed to mean or to include any place operated by the department for the care and confinement of persons who have been found to be mentally defective or mentally ill by a court and who are confined in such place pursuant to an order of a court based upon such finding.

(c) Whenever the term “institution” is used in this chapter or elsewhere in such context as to mean an institution in the department, such term shall be deemed to include correctional facilities and any other place operated by the department as a place for the confinement of persons.

5. “Reception center”. A correctional facility for reception, classification and program-planning for purposes of confinement, treatment and transfer.

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6. “Residential treatment facility”. A correctional facility consisting of a community based residence 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.

7. “Detention center”. A correctional facility for the temporary detention of persons taken into custody upon violation of parole or upon violation of a condition of release, or of persons being transferred from other correctional facilities, or of persons who are assigned to other correctional facilities for confinement but whose presence is required in court or for some other purpose at a location that is distant from the institution of confinement.

8. “Correctional Camp”. A correctional facility consisting of a camp maintained for the purpose of including conservation work in the program of inmates.

9. “Diagnostic and treatment center”. A correctional facility operated for the purpose of providing intensive physical, mental and sociological diagnostic and treatment services including pre-parole diagnostic evaluation, where requested by the board of parole, and scientific study of the social and mental aspects of the causes of crime.

10. “General confinement facility”. A correctional facility for confinement and treatment of persons under institutional programs oriented to education, vocational training and industry.

11. “Work release facility”. A facility designated by the commissioner as an institution that may conduct a work release program.

12. “Superintendent”. The chief administrative officer of a correctional facility. Whenever the term “warden” appears in this chapter in such context as to mean an officer of a state correctional facility, such reference shall be deemed to mean “superintendent”.

13. “Infant” or “minor” means a person who has not attained the age of eighteen years.

14. [Eff. until Sept. 1, 2020, pursuant to L.1986, c. 554, § 5.] “Community treatment facility.” A residential chemical dependence facility approved as provided in section 32.01 of the mental hygiene law or pursuant to section 32.31 of such law used exclusively to provide substance abuse treatment services to persons eligible pursuant to section seventy-two-a of this chapter and who are otherwise eligible for temporary release pursuant to subdivision two of section eight hundred fifty-one of this chapter. These facilities shall be separate and distinct so as not to replace existing substance abuse treatment services.

15. “Shock incarceration correctional facility”. A correctional facility designated by the commissioner as an institution that may conduct a shock incarceration program.

16. (a) “Local correctional facility.” Any place operated by a county or the city of New York as a place for the confinement of persons duly committed to secure their attendance as witnesses in any criminal case, charged with crime and committed for trial or examination, awaiting the availability of a court, duly committed for any contempt or upon civil process, convicted of

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any offense and sentenced to imprisonment therein or awaiting transportation under sentence to imprisonment in a correctional facility, or pursuant to any other applicable provisions of law.

(b) Whenever the term "jail", "penitentiary" or "workhouse" is used in this chapter, such term shall be deemed to mean local correctional facility.

(c) Whenever the term "sheriff" is used in this chapter, such term shall be deemed to include the warden, superintendent, or other person in charge of a local correctional facility.

17. "Alcohol and substance abuse treatment facility." A correctional facility designed to house medium security inmates as defined by department rules and regulations and operated for the purpose of providing intensive alcohol and substance abuse treatment services. Such services shall ensure comprehensive treatment for alcoholism and substance abuse to inmates who have been identified by the commissioner or his or her designee as having had or presently having a history of alcoholism or substance abuse. Such services shall be provided in the facility in accordance with minimum standards promulgated by the department after consultation with the division of alcoholism and alcohol abuse and the division of substance abuse services.

18. [Eff. until Sept. 1, 2020, pursuant to L.1992, c. 55, § 427, subd. (q) and L.1994, c. 60, § 46, subd. (c). See, also, subd. 18 below.] "Alcohol and substance abuse treatment correctional annex." A medium security correctional facility consisting of one or more residential dormitories, which provide intensive alcohol and substance abuse treatment services to inmates who: (i) are otherwise eligible for temporary release, or (ii) stand convicted of a felony defined in article two hundred twenty or two hundred twenty-one of the penal law, and are within six months of being an eligible inmate as that term is defined in subdivision two of section eight hundred fifty-one of this chapter including such inmates who are participating in such program pursuant to subdivision six of section 60.04 of the penal law. Notwithstanding the foregoing provisions of this subdivision, any inmate to be enrolled in this program pursuant to subdivision six of section 60.04 of the penal law shall be governed by the same rules and regulations promulgated by the department, including without limitation those rules and regulations establishing requirements for completion and those rules and regulations governing discipline and removal from the program. No such period of court ordered corrections based drug abuse treatment pursuant to this subdivision shall be required to extend beyond the defendant's conditional release date. Such treatment services may be provided by one or more outside service providers pursuant to contractual agreements with the department, provided, however, that any such provider shall be required to continue to provide, either directly or through formal or informal agreement with other providers, alcohol and substance abuse treatment services to inmates who have successfully participated in such provider's incarcerative treatment services and who have been presumptively released, paroled, conditionally released or released to post release supervision under the supervision of the department and who are, as a condition of such release, required to participate in alcohol or substance abuse treatment. Such incarcerative services shall be provided in the facility in accordance with minimum standards promulgated by the department after consultation with the office of alcoholism and substance abuse services. Such services to parolees shall be provided in accordance with standards promulgated by the department after consultation with the office of alcoholism and substance abuse services. Notwithstanding any other provision of law, any person who has successfully completed no less than six months of intensive alcohol and substance abuse treatment services in one of the department's eight designated alcohol and substance abuse treatment correctional annexes having a combined total capacity of two thousand five hundred fifty beds may be transferred to a program operated by or at a residential treatment facility, provided however, that a person under a determinate sentence as a second felony drug offender for a class B felony offense defined in article two hundred twenty of the penal law, who was sentenced pursuant to section 70.70 of such law, shall not be eligible to be transferred to a program operated at a residential treatment facility until the time served under imprisonment for his or her determinate sentence, including any jail time credited pursuant to subdivision three of section 70.30 of the penal law, shall be at least nine months. The commissioner shall report annually to the temporary president of the senate and the speaker of the assembly commencing January first, two thousand twelve the number of inmates received by the department during the reporting period who are subject to a sentence which

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includes enrollment in substance abuse treatment in accordance with subdivision six of section 60.04 of the penal law, the number of such inmates who are not placed in such treatment program and the reasons for such occurrences.

18. [Eff. Sept. 1, 2020, pursuant to L.1992, c. 55, § 427, subd. (q) and L.1994, c. 60, § 46, subd. (c). See, also, subd. 18 above.] “Alcohol and substance abuse treatment correctional annex.” A medium security correctional facility consisting of one or more residential dormitories which provide intensive alcohol and substance abuse treatment services to inmates who: (i) are otherwise eligible for temporary release, or (ii) stand convicted of a felony defined in article two hundred twenty or two hundred twenty-one of the penal law, and are within six months of being an eligible inmate as that term is defined in subdivision two of section eight hundred fifty-one of this chapter including such inmates who are participating in such program pursuant to subdivision six of section 60.04 of the penal law. Notwithstanding the foregoing provisions of this subdivision, any inmate to be enrolled in this program pursuant to subdivision six of section 60.04 of the penal law shall be governed by the same rules and regulations promulgated by the department, including without limitation those rules and regulations establishing requirements for completion and those rules and regulations governing discipline and removal from the program. No such period of court ordered corrections based drug abuse treatment pursuant to this subdivision shall be required to extend beyond the defendant's conditional release date. Such treatment services may be provided by one or more outside service providers pursuant to contractual agreements with the department, provided, however, that any such provider shall be required to continue to provide, either directly or through formal or informal agreement with other providers, alcohol and substance abuse treatment services to inmates who have successfully participated in such provider's incarcerative treatment services and who have been presumptively released, paroled, conditionally released or released to post release supervision under the supervision of the department and who are, as a condition of such release, required to participate in alcohol or substance abuse treatment. Such incarcerative services shall be provided in the facility in accordance with minimum standards promulgated by the department after consultation with the office of alcoholism and substance abuse services. Such services to parolees shall be provided in accordance with standards promulgated by the department after consultation with the office of alcoholism and substance abuse services. The commissioner shall report annually to the majority leader of the senate and the speaker of the assembly commencing January first, two thousand twelve the number of inmates received by the department during the reporting period who are subject to a sentence which includes enrollment in substance abuse treatment in accordance with subdivision six of section 60.04 of the penal law, the number of such inmates who are not placed in such treatment program and the reasons for such occurrences.

19. “Vocational and skills training facility” means a correctional facility designated by the commissioner to provide a vocational and skills training program (“VAST”) to inmates who need such service before they participate in a work release program. The VAST facility shall provide intensive assessment, counseling, job search assistance and where appropriate academic and vocational instruction to program participants. Such assistance may include an assessment of any inmate's education attainment level and skills aptitudes; career counseling and exploration; the development of a comprehensive instructional plan including identification of educational and training needs that may extend beyond the date of entry into work release; instructional programs including GED preparation or post-secondary instruction as appropriate; occupational skills training; life skills training; employment readiness including workplace behavior; and job search assistance. The department and the department of labor shall jointly develop activities providing career counseling, job search assistance, and job placement services for participants. Nothing contained in this section shall be deemed to modify the eligibility requirements provided by law applicable to inmates participating in a work release program.

20. “Drug treatment campus” means a facility operated by the department to provide a program of intensive drug treatment services for individuals sentenced to parole supervision sentences pursuant to section 410.91 of the criminal procedure law or for certain parole violators. All such treatment services shall be provided by, or with the approval of and pursuant to a plan developed in conjunction with, the office of alcoholism and substance abuse services, and which plan shall include but not be limited to provision for an appropriate continuum of care that includes a needs assessment and treatment services for individuals while at this facility and upon discharge from such facility, including an enhanced aftercare program. Notwithstanding the foregoing,

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in the event that a person sentenced to parole supervision pursuant to section 410.91 of the criminal procedure law requires a degree of medical care or mental health care that cannot be provided at a drug treatment campus, the department, in writing, shall notify the person, provide a proposal describing a proposed alternative-to-the-drug-treatment-campus program, and notify him or her that he or she may object in writing to placement in such alternative-to-the-drug-treatment-campus program. If the person objects in writing to placement in such alternative-to-the-drug-treatment-campus program, the department shall notify the sentencing court, provide such proposal to the court, and arrange for the person's prompt appearance before the court. The court shall provide the proposal and notice of a court appearance to the prosecutor, the person and the appropriate defense attorney. After considering the proposal and any submissions by the parties, and after a reasonable opportunity for the prosecutor, the person and counsel to be heard, the court may modify its sentencing order accordingly, notwithstanding the provisions of section 430.10 of the criminal procedure law. A person who successfully completes an alternative-to-the-drug-treatment-campus program within the department shall be treated in the same manner as a person who has successfully completed the drug treatment campus program, as set forth herein and in section 410.91 of the criminal procedure law.

21. “Residential mental health treatment unit” means housing for inmates with serious mental illness that is operated jointly by the department and the office of mental health and is therapeutic in nature. Such units shall not be operated as disciplinary housing units, and decisions about treatment and conditions of confinement shall be made based upon a clinical assessment of the therapeutic needs of the inmate and maintenance of adequate safety and security on the unit. Such units shall include, but not be limited to, the residential mental health unit model, the behavioral health unit model, the intermediate care program and the intensive intermediate care program. The models shall be defined in regulations promulgated by the department in consultation with the commissioner of mental health consistent with this subdivision and section four hundred one of this chapter. Inmates placed in a residential mental health treatment unit shall be offered at least four hours a day of structured out-of-cell therapeutic programming and/or mental health treatment, except on weekends or holidays, in addition to exercise, and may be provided with additional out-of-cell activities as are consistent with their mental health needs; provided, however, that the department may maintain no more than thirty-eight behavioral health unit beds in which the number of hours of out-of-cell structured therapeutic programming and/or mental health treatment offered to inmates on a daily basis, except on weekends or holidays, may be limited to only two hours. Out-of-cell therapeutic programming and/or mental health treatment need not be provided to an inmate for a brief orientation period following his or her arrival at a residential mental health treatment unit. The length of such orientation period shall be determined by a mental health clinician but in no event shall be longer than five business days.

22. “Mental health clinician” means a psychiatrist, psychologist, social worker or nurse practitioner who is licensed by the department of education and employed by the office of mental health.

23. “Segregated confinement” means the disciplinary confinement of an inmate in a special housing unit or in a separate keeplock housing unit. Special housing units and separate keeplock units are housing units that consist of cells grouped so as to provide separation from the general population, and may be used to house inmates confined pursuant to the disciplinary procedures described in regulations.

24. “Joint case management committee” means a committee composed of staff from the department and the office of mental health. Such a committee shall be established at each level one and level two facility. Each committee shall consist of at least two clinical staff of the office of mental health and two officials of the department. The purpose of such committee shall be to review, monitor and coordinate the behavior and treatment plan of any inmate who is placed in segregated confinement or a residential mental health treatment unit and who is receiving services from the office of mental health.

25. “Joint central office review committee” means a committee comprised of central office personnel from the department and the office of mental health as designated by the respective commissioners.

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26. “Treatment team” means a team consisting of an equal number of individuals from the department and the office of mental health who are assigned to a residential mental health treatment unit and who will review and determine each inmate's appropriateness for movement through the various program phases, when applicable. The treatment team shall also review, monitor and coordinate the treatment plans for all inmate participants.

27. “Level one facility” means a correctional facility at which staff from the office of mental health are assigned on a full-time basis and able to provide treatment to inmates with a major mental disorder. The array of available specialized services include: residential crisis treatment, residential day treatment, medication monitoring by psychiatric nursing staff, and potential commitment to the central New York Psychiatric Center.

28. “Level two facility” means a correctional facility at which staff from the office of mental health are assigned on a full-time basis and able to provide treatment to inmates with a major mental disorder, but such disorder is not as acute as that of inmates who require placement at a level one facility.

29. “Level three facility” means a correctional facility at which staff from the office of mental health are assigned on a part-time basis and able to provide treatment and medication to inmates who either have a moderate mental disorder, or who are in remission from a disorder, and who are determined by staff of the office of mental health to be able to function adequately in the facility with such level of staffing.

30. “Level four facility” means a correctional facility at which staff from the office of mental health are assigned on a part-time basis and able to provide treatment to inmates who may require limited intervention, excluding psychiatric medications.

31. “Community supervision” means the supervision of individuals released into the community on temporary release, presumptive release, parole, conditional release, post release supervision or medical parole.

Credits

(L.1929, c. 243. Amended L.1970, c. 475, § 1; L.1970, c. 476, § 1; L.1972, c. 567, § 1; L.1974, c. 921, § 1; L.1983, c. 418, §§ 1, 2; L.1986, c. 554, § 1; L.1987, c. 261, § 8; L.1987, c. 604 § 2; L.1989, c. 338, § 7; L.1990, c. 681, § 4; L.1992, c. 55, § 284; L.1994, c. 60, §§ 41, 44; L.1994, c. 63, § 130; L.1995, c. 3, § 21; L.1999, c. 558, § 26, eff. Oct. 5, 1999; L.2004, c. 738, § 1, eff. Dec. 14, 2004; L.2004, c. 738, § 2; L.2008, c. 1, § 2; L.2009, c. 56, pt. AAA, § 1, eff. April 7, 2009; L.2010, c. 82, § 1, eff. May 18, 2010; L.2011, c. 62, pt. C, subpt. A, § 1-a, eff. March 31, 2011; L.2011, c. 62, pt. C, subpt. A, § 2.)

McKinney's Correction Law § 2, NY CORRECT § 2
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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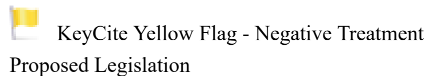
KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Correction Law (Refs & Annos)
Chapter 43. Of the Consolidated Laws (Refs & Annos)
Article 4. Establishment of Correctional Facilities, Commitments to Department and Custody of Inmates (Refs & Annos)

McKinney's Correction Law § 73

§ 73. Residential treatment facilities

Effective: March 31, 2011
Currentness

1. The commissioner may transfer any inmate of a correctional facility who is eligible for community supervision or who will become eligible for community supervision within six months after the date of transfer or who has one year or less remaining to be served under his or her sentence to a residential treatment facility and such person may be allowed 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. While outside the facility he or she shall be at all times in the custody of the department and under its supervision.

2. The department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility.

3. Programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established. Each inmate shall be assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her.

4. If at any time the superintendent of a residential treatment facility is of the opinion that any aspect of the program assigned to an individual is inconsistent with the welfare or safety of the community or of the facility or its inmates, the superintendent may suspend such program or any part thereof and restrict the inmate's activities in any manner that is necessary and appropriate. Upon taking such action the superintendent shall promptly notify the commissioner and pending decision by the commissioner, the superintendent may keep such inmate under such security as may be necessary.

5. The commissioner may at any time and for any reason transfer an inmate from a residential treatment facility to another correctional facility.

6. Where a person who is an inmate of a residential treatment facility absconds, or fails to return thereto as specified in the program approved for him or her, he or she may be arrested and returned by an officer or employee of the department or by any peace officer, acting pursuant to his or her special duties, or police officer without a warrant; or a member of the board of parole or an officer designated by such board may issue a warrant for the retaking of such person. A warrant issued pursuant to this

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subdivision shall have the same force and effect, and shall be executed in the same manner, as a warrant issued for violation of community supervision.

7. The provisions of this chapter relating to good behavior allowances and conditional release shall apply to behavior of inmates while assigned to a residential treatment facility for behavior on the premises and outside the premises of such facility and good behavior allowances may be granted, withheld, forfeited or cancelled in whole or in part for behavior outside the premises of the facility to the same extent and in the same manner as is provided for inmates within the premises of any facility.

8. The state board of parole may grant parole to any inmate of a residential treatment facility at any time after he or she becomes eligible therefor. Such parole shall be in accordance with provisions of law that would apply if the person were still confined in the facility from which he or she was transferred, except that any personal appearance before the board may be at any place designated by the board.

9. The earnings of any inmate of a residential treatment facility shall be dealt with in accordance with the procedure set forth in section eight hundred sixty of this chapter.

10. The commissioner is authorized to use any residential treatment facility as a residence for persons who are on community supervision. Persons who reside in such a facility shall be subject to conditions of community supervision imposed by the board.

Credits

(Added L.1970, c. 476, § 9. Amended L.1980, c. 843, § 197; L.2011, c. 62, pt. C, subpt. B, § 8, eff. March 31, 2011.)

McKinney's Correction Law § 73, NY CORRECT § 73
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.03

§ 10.03 Definitions

Effective: November 13, 2018
Currentness

As used in this article, the following terms shall have the following meanings:

(a) “Agency with jurisdiction” as to a person means that agency which, during the period in question, would be the agency responsible for supervising or releasing such person, and can include the department of corrections and community supervision, the office of mental health, and the office for people with developmental disabilities.

(b) “Commissioner” means the commissioner of mental health or the commissioner of developmental disabilities.

(c) “Correctional facility” means a correctional facility as that term is defined in section two of the correction law.

(d) “Counsel for respondent” means any counsel that has been retained or appointed for respondent, or if no other counsel has been retained or appointed, or prior counsel cannot be located with reasonable efforts, then the mental hygiene legal service.

(e) “Dangerous sex offender requiring confinement” means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.

(f) “Designated felony” means any felony offense defined by any of the following provisions of the penal law: assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10, gang assault in the second degree as defined in section 120.06, gang assault in the first degree as defined in section 120.07, stalking in the first degree as defined in section 120.60, strangulation in the second degree as defined in section 121.12, strangulation in the first degree as defined in section 121.13, manslaughter in the second degree as defined in subdivision one of section 125.15, manslaughter in the first degree as defined in section 125.20, murder in the second degree as defined in section 125.25, aggravated murder as defined in section 125.26, murder in the first degree as defined in section 125.27, kidnapping in the second degree as defined in section 135.20, kidnapping in the first degree as defined in section 135.25, burglary in the third degree as defined in section 140.20, burglary in the second degree as defined in section 140.25, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, arson in the first degree as defined in section 150.20, robbery in the third degree as defined in section 160.05, robbery in the second degree as defined in section 160.10, robbery in the first degree

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as defined in section 160.15, promoting prostitution in the second degree as defined in section 230.30, promoting prostitution in the first degree as defined in section 230.32, compelling prostitution as defined in section 230.33, sex trafficking of a child as defined in section 230.34-a, disseminating indecent material to minors in the first degree as defined in section 235.22, use of a child in a sexual performance as defined in section 263.05, promoting an obscene sexual performance by a child as defined in section 263.10, promoting a sexual performance by a child as defined in section 263.15, or any felony attempt or conspiracy to commit any of the foregoing offenses.

(g) "Detained sex offender" means a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either:

(1) A person who stands convicted of a sex offense as defined in subdivision (p) of this section, and is currently serving a sentence for, or subject to supervision by the division of parole, whether on parole or on post-release supervision, for such offense or for a related offense;

(2) A person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed pursuant to article seven hundred thirty of the criminal procedure law, but did engage in the conduct constituting such offense;

(3) A person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense;

(4) A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article;

(5) A person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively; or

(6) A person who has been determined to be a sex offender requiring civil management pursuant to this article.

(h) "Licensed psychologist" means a person who is registered as a psychologist under article one hundred fifty-three of the education law.

(i) "Mental abnormality" means a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.

(j) "Psychiatric examiner" means a qualified psychiatrist or a licensed psychologist who has been designated to examine a person pursuant to this article; such designee may, but need not, be an employee of the office of mental health or the office for people with developmental disabilities.

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(k) “Qualified psychiatrist” means a physician licensed to practice medicine in New York state who: (1) is a diplomate of the American board of psychiatry and neurology or is eligible to be certified by that board; or (2) is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.

(l) “Related offenses” include any offenses that are prosecuted as part of the same criminal action or proceeding, or which are part of the same criminal transaction, or which are the bases of the orders of commitment received by the department of correctional services in connection with an inmate's current term of incarceration.

(m) “Release” and “released” means release, conditional release or discharge from confinement, from community supervision by the department of corrections and community supervision, or from an order of observation, commitment, recommitment or retention.

(n) “Respondent” means a person referred to a case review team for evaluation, a person as to whom a sex offender civil management petition has been recommended by a case review team and not yet filed, or filed by the attorney general and not dismissed, or sustained by procedures under this article.

(o) “Secure treatment facility” means a facility or a portion of a facility, designated by the commissioner, that may include a facility located on the grounds of a correctional facility, that is staffed with personnel from the office of mental health or the office for people with developmental disabilities for the purposes of providing care and treatment to persons confined under this article, and persons defined in paragraph five of subdivision (g) of this section. Personnel from these same agencies may provide security services, provided that such staff are adequately trained in security methods and so equipped as to minimize the risk or danger of escape.

(p) “Sex offense” means an act or acts constituting: (1) any felony defined in article one hundred thirty of the penal law, including a sexually motivated felony; (2) patronizing a person for prostitution in the first degree as defined in section 230.06 of the penal law, aggravated patronizing a minor for prostitution in the first degree as defined in section 230.13 of the penal law, aggravated patronizing a minor for prostitution in the second degree as defined in section 230.12 of the penal law, aggravated patronizing a minor for prostitution in the third degree as defined in section 230.11 of the penal law, incest in the second degree as defined in section 255.26 of the penal law, or incest in the first degree as defined in section 255.27 of the penal law; (3) a felony attempt or conspiracy to commit any of the foregoing offenses set forth in this subdivision; or (4) a designated felony, as defined in subdivision (f) of this section, if sexually motivated and committed prior to the effective date of this article.

(q) “Sex offender requiring civil management” means a detained sex offender who suffers from a mental abnormality. A sex offender requiring civil management can, as determined by procedures set forth in this article, be either (1) a dangerous sex offender requiring confinement or (2) a sex offender requiring strict and intensive supervision.

(r) “Sex offender requiring strict and intensive supervision” means a detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement.

(s) “Sexually motivated” means that the act or acts constituting a designated felony were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor.

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Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2010, c. 168, § 6, eff. July 13, 2010; L.2010, c. 405, § 10, eff. Nov. 11, 2010; L.2011, c. 62, pt. C, subpt. B, § 118-a, eff. March 31, 2011; L.2015, c. 368, § 34, eff. Jan. 19, 2016; L.2018, c. 189, § 19, eff. Nov. 13, 2018.)

McKinney's Mental Hygiene Law § 10.03, NY MENT HYG § 10.03

Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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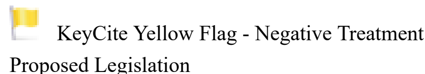

Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 70. Sentences of Imprisonment (Refs & Annos)

McKinney's Penal Law § 70.40

§ 70.40 Release on parole; conditional release; presumptive release

Effective: March 31, 2011

Currentness

1. Indeterminate sentence.

(a) [Eff. until Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, par. (a) below.] Release on parole shall be in the discretion of the state board of parole, and such person shall continue service of his or her sentence or sentences while on parole, in accordance with and subject to the provisions of the executive law and the correction law.

(i) [Eff. until Sept. 1, 2020, pursuant to L.1997, c. 435, § 76, subd. 6, par. a.] A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled from the institution in which he or she is confined at any time after the expiration of the minimum or the aggregate minimum period of the sentence or sentences or, where applicable, the minimum or aggregate minimum period reduced by the merit time allowance granted pursuant to paragraph (d) of subdivision one of section eight hundred three of the correction law.

(ii) A person who is serving one or more than one determinate sentence of imprisonment shall be ineligible for discretionary release on parole.

(iii) A person who is serving one or more than one indeterminate sentence of imprisonment and one or more than one determinate sentence of imprisonment, which run concurrently may be paroled at any time after the expiration of the minimum period of imprisonment of the indeterminate sentence or sentences, or upon the expiration of six-sevenths of the term of imprisonment of the determinate sentence or sentences, whichever is later.

(iv) A person who is serving one or more than one indeterminate sentence of imprisonment and one or more than one determinate sentence of imprisonment which run consecutively may be paroled at any time after the expiration of the sum of the minimum or aggregate minimum period of the indeterminate sentence or sentences and six-sevenths of the term or aggregate term of imprisonment of the determinate sentence or sentences.

(v) Notwithstanding any other subparagraph of this paragraph, a person may be paroled from the institution in which he or she is confined at any time on medical parole pursuant to section two hundred fifty-nine-r or section two hundred fifty-nine-s of the

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executive law or for deportation pursuant to paragraph (d) of subdivision two of section two hundred fifty-nine-i of the executive law or after the successful completion of a shock incarceration program pursuant to article twenty-six-A of the correction law.

(a) [Eff. Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, par. (a) above.] (i) [Eff. Sept. 1, 2020, pursuant to L.1997, c. 435, § 76,subd. 6, par. a.] A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled from the institution in which he or she is confined at any time after the expiration of the minimum or the aggregate minimum period of imprisonment of the sentence or sentences or after the successful completion of a shock incarceration program, as defined in article twenty-six-A of the correction law, whichever is sooner. Release on parole shall be in the discretion of the state board of parole, and such person shall continue service of his or her sentence or sentences while on parole, in accordance with and subject to the provisions of the executive law and the correction law.

(ii) A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled from the institution in which he or she is confined at any time after the expiration of the minimum or the aggregate minimum period of the sentence or sentences.

(b) [Eff. until Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, par. (b) below.] A person who is serving one or more than one indeterminate or determinate sentence of imprisonment shall, if he or she so requests, be conditionally released from the institution in which he or she is confined when the total good behavior time allowed to him or her, pursuant to the provisions of the correction law, is equal to the unserved portion of his or her term, maximum term or aggregate maximum term; provided, however, that (i) in no event shall a person serving one or more indeterminate sentence of imprisonment and one or more determinate sentence of imprisonment which run concurrently be conditionally released until serving at least six-sevenths of the determinate term of imprisonment which has the longest unexpired time to run and (ii) in no event shall a person be conditionally released prior to the date on which such person is first eligible for discretionary parole release. The conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law.

Every person so released shall be under the supervision of the state department of corrections and community supervision for a period equal to the unserved portion of the term, maximum term, aggregate maximum term, or period of post-release supervision.

(b) [Eff. Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, par. (b) above.] A person who is serving one or more than one indeterminate sentence of imprisonment shall, if he or she so requests, be conditionally released from the institution in which he or she is confined when the total good behavior time allowed to him or her, pursuant to the provisions of the correction law, is equal to the unserved portion of his or her maximum or aggregate maximum term. The conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law.

Every person so released shall be under the supervision of the department of corrections and community supervision for a period equal to the unserved portion of the maximum, aggregate maximum term, or period of post-release supervision.

(c) [Repealed Sept. 1, 2020, pursuant to L.1997, c. 435, § 76, subd. 6.] A person who is serving one or more than one indeterminate sentence of imprisonment shall, if he or she so requests, be released from the institution in which he or she is confined if granted presumptive release pursuant to section eight hundred six of the correction law. The conditions of release shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law. Every person so released shall be under the supervision of the department of corrections and community supervision for a period equal to the unserved portion of his or her maximum or aggregate maximum term unless discharged in accordance with law.

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2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days, and is eligible for release according to the criteria set forth in paragraphs (a), (b) and (c) of subdivision one of section two hundred seventy-three of the correction law, may, if he or she so requests, be conditionally released from the institution in which he or she is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, or a local conditional release commission established pursuant to article twelve of the correction law, provided, however that where such release is by a local conditional release commission, the person must be serving a definite sentence with a term in excess of one hundred twenty days and may only be released after service of ninety days of such term. In computing service of ninety days, the credit allowed for jail time under subdivision three of section 70.30 of this article shall be calculated as time served. A conditional release granted under this subdivision shall be upon such conditions as may be imposed by the parole board, in accordance with the provisions of the executive law, or a local conditional release commission in accordance with the provisions of the correction law.

Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the department of corrections and community supervision or a local probation department and in the custody of the local conditional release commission in accordance with article twelve of the correction law, for a period of one year. The local probation department shall cause complete records to be kept of every person released to its supervision pursuant to this subdivision. The department of corrections and community supervision may supply to a local probation department and the local conditional release commission custody information and records maintained on persons under the supervision of such local probation department to aid in the performance of its supervision responsibilities. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance.

3. Delinquency.

(a) When a person is alleged to have violated the terms of presumptive release or parole and the state board of parole has declared such person to be delinquent, the declaration of delinquency shall interrupt the person's sentence as of the date of the delinquency and such interruption shall continue until the return of the person to an institution under the jurisdiction of the state department of corrections and community supervision.

(b) When a person is alleged to have violated the terms of his or her conditional release or post-release supervision and has been declared delinquent by the parole board or the local conditional release commission having supervision over such person, the declaration of delinquency shall interrupt the period of supervision or post-release supervision as of the date of the delinquency. For a conditional release, such interruption shall continue until the return of the person to the institution from which he or she was released or, if he or she was released from an institution under the jurisdiction of the state department of corrections and community supervision, to an institution under the jurisdiction of that department. Upon such return, the person shall resume service of his or her sentence. For a person released to post-release supervision, the provisions of section 70.45 shall apply.

(c) Any time spent by a person in custody from the time of delinquency to the time service of the sentence resumes shall be credited against the term or maximum term of the interrupted sentence, provided:

(i) that such custody was due to an arrest or surrender based upon the delinquency; or

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(ii) that such custody arose from an arrest on another charge which culminated in a dismissal or an acquittal; or

(iii) that such custody arose from an arrest on another charge which culminated in a conviction, but in such case, if a sentence of imprisonment was imposed, the credit allowed shall be limited to the portion of the time spent in custody that exceeds the period, term or maximum term of imprisonment imposed for such conviction.

Credits

(L.1965, c. 1030. Amended L.1967, c. 324, § 3; L.1971, c. 425, § 1; L.1972, c. 295, § 1; L.1973, c. 468, §§ 1, 2; L.1973, c. 478, § 1; L.1975, c. 148, § 1; L.1978, c. 481, § 26; L.1979, c. 467, §§ 1, 2; L.1987, c. 261, § 6; L.1989, c. 79, §§ 5, 6; L.1992, c. 55, § 286; L.1995, c. 3, §§ 18, 19; L.1997, c. 435, § 45, eff. Aug. 20, 1997; L.1998, c. 1, §§ 12 to 14, eff. Aug. 6, 1998; L.2003, c. 62, pt. E, §§ 12 to 14, eff. May 15, 2003, deemed eff. April 1, 2003; L.2009, c. 56, pt. J, § 7, eff. April 7, 2009; L.2009, c. 56, pt. SS, §§ 4, 5, eff. April 7, 2009; L.2011, c. 62, pt. C, subpt. B, §§ 127-c, 127-d-1, 127-f to 127-h, eff. March 31, 2011; L.2011, c. 62, pt. C, subpt. B, §§ 127-d, 127-e.)

McKinney's Penal Law § 70.40, NY PENAL § 70.40
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version's Validity Called into Doubt by Waters v. Dennison, N.Y.Sup., Feb. 23, 2007

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 70. Sentences of Imprisonment (Refs & Annos)

McKinney's Penal Law § 70.45

§ 70.45 Determinate sentence; post-release supervision

Effective: May 14, 2019
Currentness

1. In general. When a court imposes a determinate sentence it shall in each case state not only the term of imprisonment, but also an additional period of post-release supervision as determined pursuant to this article. Such period shall commence as provided in subdivision five of this section and a violation of any condition of supervision occurring at any time during such period of post-release supervision shall subject the defendant to a further period of imprisonment up to the balance of the remaining period of post-release supervision, not to exceed five years; provided, however, that a defendant serving a term of post-release supervision for a conviction of a felony sex offense, as defined in section 70.80 of this article, may be subject to a further period of imprisonment up to the balance of the remaining period of post-release supervision. Such maximum limits shall not preclude a longer period of further imprisonment for a violation where the defendant is subject to indeterminate and determinate sentences.

1-a. When, following a final hearing, a time assessment has been imposed upon a person convicted of a felony sex offense who owes three years or more on a period of post-release supervision, imposed pursuant to subdivision two-a of this section, such defendant, after serving three years of the time assessment, shall be reviewed by the board of parole and may be re-released to post-release supervision only upon a determination by the board of parole made in accordance with subdivision two of section two hundred fifty-nine-i of the executive law. If re-release is not granted, the board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same. If a time assessment of less than three years is imposed upon such a defendant, the defendant shall be released upon the expiration of such time assessment, unless he or she is subject to further imprisonment or confinement under any provision of law.

2. Period of post-release supervision for other than felony sex offenses. The period of post-release supervision for a determinate sentence, other than a determinate sentence imposed for a felony sex offense as defined in paragraph (a) of subdivision one of section 70.80 of this article, shall be five years except that:

(a) such period shall be one year whenever a determinate sentence of imprisonment is imposed pursuant to subdivision two of section 70.70 of this article or subdivision nine of section 60.12 of this title upon a conviction of a class D or class E felony offense;

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(b) such period shall be not less than one year nor more than two years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision two of section 70.70 of this article or subdivision nine of section 60.12 of this title upon a conviction of a class B or class C felony offense;

(c) such period shall be not less than one year nor more than two years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision three or four of section 70.70 of this article upon conviction of a class D or class E felony offense or subdivision ten of section 60.12 of this title;

(d) such period shall be not less than one and one-half years nor more than three years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision three or four of section 70.70 of this article upon conviction of a class B felony or class C felony offense or subdivision eleven of section 60.12 of this title;

(e) such period shall be not less than one and one-half years nor more than three years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision three of section 70.02 of this article or subdivision two or eight of section 60.12 of this title upon a conviction of a class D or class E violent felony offense or subdivision four, five, six, or seven of section 60.12 of this title;

(f) such period shall be not less than two and one-half years nor more than five years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision three of section 70.02 of this article or subdivision two or eight of section 60.12 of this title upon a conviction of a class B or class C violent felony offense.

2-a. Periods of post-release supervision for felony sex offenses. The period of post-release supervision for a determinate sentence imposed for a felony sex offense as defined in paragraph (a) of subdivision one of section 70.80 of this article shall be as follows:

(a) not less than three years nor more than ten years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision four of section 70.80 of this article upon a conviction of a class D or class E felony sex offense;

(b) not less than five years nor more than fifteen years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision four of section 70.80 of this article upon a conviction of a class C felony sex offense;

(c) not less than five years nor more than twenty years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision four of section 70.80 of this article upon a conviction of a class B felony sex offense;

(d) not less than three years nor more than ten years whenever a determinate sentence is imposed pursuant to subdivision three of section 70.02 of this article upon a conviction of a class D or class E violent felony sex offense as defined in paragraph (b) of subdivision one of section 70.80 of this article;

(e) not less than five years nor more than fifteen years whenever a determinate sentence is imposed pursuant to subdivision three of section 70.02 of this article upon a conviction of a class C violent felony sex offense as defined in section 70.80 of this article;

(f) not less than five years nor more than twenty years whenever a determinate sentence is imposed pursuant to subdivision three of section 70.02 of this article upon a conviction of a class B violent felony sex offense as defined in section 70.80 of this article;

(g) not less than five years nor more than fifteen years whenever a determinate sentence of imprisonment is imposed pursuant to either section 70.04, section 70.06, or subdivision five of section 70.80 of this article upon a conviction of a class D or class E violent or non-violent felony sex offense as defined in section 70.80 of this article;

(h) not less than seven years nor more than twenty years whenever a determinate sentence of imprisonment is imposed pursuant to either section 70.04, section 70.06, or subdivision five of section 70.80 of this article upon a conviction of a class C violent or non-violent felony sex offense as defined in section 70.80 of this article;

(i) such period shall be not less than ten years nor more than twenty-five years whenever a determinate sentence of imprisonment is imposed pursuant to either section 70.04, section 70.06, or subdivision five of section 70.80 of this article upon a conviction of a class B violent or non-violent felony sex offense as defined in section 70.80 of this article; and

(j) such period shall be not less than ten years nor more than twenty years whenever any determinate sentence of imprisonment is imposed pursuant to subdivision four of section 70.07 of this article.

3. Conditions of post-release supervision. 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; provided that, notwithstanding any other provision of law, the board of parole may 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 as that term is defined in subdivision six of section two of the correction law. Upon release from the underlying term of imprisonment, the person shall be furnished with a written statement setting forth the conditions of post-release supervision in sufficient detail to provide for the person's conduct and supervision.

4. Revocation of post-release supervision. An alleged violation of any condition of post-release supervision shall be initiated, heard and determined in accordance with the provisions of subdivisions three and four of section two hundred fifty-nine-i of the executive law.

5. Calculation of service of period of post-release supervision. A period or periods of post-release supervision shall be calculated and served as follows:

(a) A period of post-release supervision shall commence upon the person's release from imprisonment to supervision by the department of corrections and community supervision and shall interrupt the running of the determinate sentence or sentences of imprisonment and the indeterminate sentence or sentences of imprisonment, if any. The remaining portion of any maximum or aggregate maximum term shall then be held in abeyance until the successful completion of the period of post-release supervision or the person's return to the custody of the department of corrections and community supervision, whichever occurs first.

(b) Upon the completion of the period of post-release supervision, the running of such sentence or sentences of imprisonment shall resume and only then shall the remaining portion of any maximum or aggregate maximum term previously held in abeyance

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be credited with and diminished by such period of post-release supervision. The person shall then be under the jurisdiction of the department of corrections and community supervision for the remaining portion of such maximum or aggregate maximum term.

(c) When a person is subject to two or more periods of post-release supervision, such periods shall merge with and be satisfied by discharge of the period of post-release supervision having the longest unexpired time to run; provided, however, any time served upon one period of post-release supervision shall not be credited to any other period of post-release supervision except as provided in subdivision five of section 70.30 of this article.

(d) When a person is alleged to have violated a condition of post-release supervision and the department of corrections and community supervision has declared such person to be delinquent: (i) the declaration of delinquency shall interrupt the period of post-release supervision; (ii) such interruption shall continue until the person is restored to post-release supervision; (iii) if the person is restored to post-release supervision without being returned to the department of corrections and community supervision, any time spent in custody from the date of delinquency until restoration to post-release supervision shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any; and (iv) if the person is ordered returned to the department of corrections and community supervision, the person shall be required to serve the time assessment before being re-released to post-release supervision. In the event the balance of the remaining period of post-release supervision is six months or less, such time assessment may be up to six months unless a longer period is authorized pursuant to subdivision one of this section. The time assessment shall commence upon the issuance of a determination after a final hearing that the person has violated one or more conditions of supervision. While serving such assessment, the person shall not receive any good behavior allowance pursuant to section eight hundred three of the correction law. Any time spent in custody from the date of delinquency until return to the department of corrections and community supervision shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article. The maximum or aggregate maximum term of the sentence or sentences of imprisonment shall run while the person is serving such time assessment in the custody of the department of corrections and community supervision. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any.

(e) Notwithstanding paragraph (d) of this subdivision, in the event a person is sentenced to one or more additional indeterminate or determinate term or terms of imprisonment prior to the completion of the period of post-release supervision, such period of post-release supervision shall be held in abeyance and the person shall be committed to the custody of the department of corrections and community supervision in accordance with the requirements of the prior and additional terms of imprisonment.

(f) When a person serving a period of post-release supervision is returned to the department of corrections and community supervision pursuant to an additional consecutive sentence of imprisonment and without a declaration of delinquency, such period of post-release supervision shall be held in abeyance while the person is in the custody of the department of corrections and community supervision. Such period of post-release supervision shall resume running upon the person's re-release.

Credits

(Added L.1998, c. 1, § 15, eff. Aug. 6, 1998. Amended L.2004, c. 738, § 35, eff. Jan. 13, 2005; L.2007, c. 7, § 33, eff. April 13, 2007; L.2007, c. 56, pt. E, §§ 4, 5, eff. April 9, 2007, deemed eff. April 1, 2007; L.2008, c. 141, § 3, eff. June 30, 2008; L.2011, c. 62, pt. C, subpt. B, § 127-j, eff. March 31, 2011; L.2019, c. 31, § 2, eff. May 14, 2019.)

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McKinney's Penal Law § 70.45, NY PENAL § 70.45
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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Unreported Disposition
55 Misc.3d 1216(A), 57 N.Y.S.3d 674 (Table), 2017 WL 1838729 (N.Y.Sup.), 2017 N.Y. Slip Op. 50610(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera and David Sotomayor, Petitioners,
v.
Anthony J. Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision, Tina M. Stanford, Commissioner, New York State Board of Parole, Steven R. Banks, Commissioner, New York City Department of Social Services and New York City Human Resource Administration, Respondents.

Supreme Court, Albany County
2534-16
Decided on February 24, 2017

CITE TITLE AS: Alcantara v Annucci

ABSTRACT

Crimes
Sex Offenders
Release to Community—Material issue of fact existed whether Fishkill Residential Treatment Facility programming complied with Penal Law conditions on postrelease supervision.

Alcantara v Annucci, 2017 NY Slip Op 50610(U). Crimes—Sex Offenders—Release to Community—Material issue of fact existed whether Fishkill Residential Treatment Facility programming complied with Penal Law conditions on postrelease supervision. Correction Law § 73 (Residential treatment facilities). (Sup Ct, Albany County, Feb. 24, 2017, Hartman, J.)

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OPINION OF THE COURT

Denise A. Hartman, J.

Petitioners, six individuals who were convicted of sex offenses, commenced this self-styled CPLR article 78 proceeding against respondents Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS), and Tina M. Stanford, Commissioner of the New York State Board of Parole (collectively, State respondents), and Steven R. Banks, Commissioner of the New York City Department of Social Services and the New York City Human Resources Administration (collectively, City respondents), challenging their continued confinement at a DOCCS facility after the expiration of their determinate sentences.

Petitioners claim that they have been illegally confined in a facility designated by DOCCS as a residential treatment facility at the Fishkill Correctional Facility, instead of being released to the community under post-release supervision, beyond the six-month period prescribed by statute as a result of respondents' inadequate efforts to find them suitable

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housing that complies with the Sexual Assault Reform Act (Executive Law § 259-c [14] [SARA]). They further claim that the residential treatment facility where they were unlawfully confined is not community-based and does not provide re-integration opportunities as required by statue. And they claim that the City respondents "are complicit" in this illegality because they have failed to provide enough shelter locations in New York City to accommodate the release of petitioners and other offenders with SARA-compliant housing. While styling their claims as an article 78 petition, they seek declaratory and injunctive relief, as well as class certification.

The State and City respondents have answered and moved to dismiss. For the reasons stated below, respondents' motions are granted in part and denied in part. The Court concludes that the petition presents issues that are novel and of public importance, and capable of repetition yet evading review. The Court denies the petition to the extent that it claims petitioners were unlawfully detained at the Fishkill Residential Facility beyond the six-month period prescribed by Penal Law § 70.45 (3). The Court also denies the petition insofar as it seeks relief against the City respondents.

With regard to petitioners' claim that the Fishkill Residential Treatment Facility does not offer programming and employment opportunities in compliance with the statutes governing residential treatment facilities, the Court finds that petitioners have raised material questions of fact. The Court will convert the proceeding to a declaratory judgment action to allow that claim ***2** to proceed. Because the Court concludes that a declaratory judgment will adequately protect the interests of similarly situated offenders, it denies the application for class certification. The Court will, however, permit liberal amendment of the pleadings to add new parties to prosecute that claim.

BACKGROUND

Petitioners were convicted of sex offenses that resulted in determinate prison sentences followed by specified periods of post-release supervision. Petitioners Richard Alcantara, David Sotomayor, and Lester Classon completed their determinate terms of imprisonment, but were required to remain in DOCCS's custody at the Fishkill Residential Treatment Facility (Fishkill RTF) for several months beyond the six-month post-release supervision period authorized by Penal Law § 70.45 (3) due to delays in finding SARA-compliant housing before they were released to the community. Petitioners Jackson Metellus, Cesar Molina and Carlos Rivera were previously confined in the Fiskill RTF but are now being detained as a result of parole violation proceedings commenced against them due to misbehavior while they were confined there. Petitioners assert that they are representative of persons who allegedly have been or are being illegally detained at the designated residential treatment facilities at the Fishkill Correctional Facility and at Woodbourne Correctional Facility.

Petitioners' Timely Release Claims

Petitioners claim that they were illegally detained in the Fishkill RTF beyond the six-month period prescribed by statute. Penal Law § 70.45 (3) authorizes the Board of Parole 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." Petitioners claim that the State respondents, as a matter of law, lack statutory authority to detain them in an RTF beyond the six-month period authorized by Penal Law § 70.45. In addition, petitioners' offenses render them subject to the provisions of the Sexual Assault Reform Act (SARA), which prohibit them from living or entering within 1,000 feet of school grounds when they are released to the community (Executive Law § 259-c [14]). Petitioners claim that even if the State respondents had authority to detain them beyond this six-month period, they did so unlawfully because State and City respondents have not met and are not meeting their statutory obligations to help them find SARA-compliant housing.

The State respondents argue that Correction Law § 73 (10) provides independent authority to confine persons subject to post-release supervision ***3** in residential treatment facilities beyond the six-month period authorized by Penal Law § 70.45 (3). Further, respondents maintain that they have made reasonable efforts to assist petitioners and other persons subject to SARA restrictions obtain suitable housing.

Petitioners' RTF Compliance Claim

DOCCS has designated certain areas at the Fishkill and Woodbourne Correctional Facilities to be residential treatment facilities (7 NYCRR 100.50 [c] [2], 100.90 [c] [3]; DOCCS Directive Nos. 0051, 0059). Petitioners claim that despite the designation, the facilities do not comply with governing statutes. Correction Law § 2 (6) defines a "residential treatment facility" as a "correctional facility

consisting of a community based residence 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." Residents of such facilities may be "allowed to go outside the facility during reasonable and necessary hours" and are entitled to "appropriate education, on-the-job-training and employment" (Correction Law § 73 [1], [2] and [3]). Petitioners contend that the RTFs at Fishkill and Woodbourne are located many miles from their home communities, and therefore are not "community based residences." Further, petitioners claim, they are treated much the same as persons serving prison sentences, there is little or no opportunity for employment, education, or training in the communities near these facilities, and there is inadequate opportunity for on-the-job training and employment within the facilities themselves.

Petitioners' Motion for Class Certification

Petitioners propose two classes. They propose Class 1 to be comprised of "persons who have completed their sentence of incarceration, are now serving their post release supervision sentences, are subject to the SARA residency restriction, and who are currently required to reside at one of the purported RTFs." They propose subclass 1a to be comprised of "members of Class 1 who have been required to reside at one of the purported RTFs for more than six months beyond the end of their term of imprisonment." And they propose Class 2 to be comprised of "persons who are currently required to reside at the purported RTFs after completing a parole/PRS violation time assessment imposed by an Administrative Law Judge."

The petition alleges that the number of persons in DOCCS-designated residential treatment facilities has hovered between 80 and 95 over the past couple of years. And it asserts that the median length of stay beyond the six- ***4** month statutory period was 61 days, but that nine inmates had been detained for more than six months beyond the six-month statutory period.

Procedural Issues Raised by Respondents' Motions to Dismiss Mootness

Respondents argue that the petition is moot. They contend that this proceeding is moot as to petitioners Alacantera, Sotomayor, and Classon because they are no longer confined in the Fishkill RTF and are now residing in SARA-compliant housing in New York City. They argue further that this proceeding is moot as to petitioners Metellus, Rivera, and Molina because they are now confined as a result of parole revocation proceedings commenced against them while they were residing at the Fishkill RTF. The Court agrees that, technically, these claims are moot.

But the fact that the claims of all six petitioners are mooted by their change in status only underscores the transient nature of these types of claims--they generally remain viable only for a matter of months. Moreover, whether petitioners and those similarly situated are released from the RTF to the community is largely in the control of the State respondents. It is true, as demonstrated by the cases cited below, that similar claims have been adjudicated time and time again, both in article 78 proceedings and habeas corpus proceedings. But the courts have reached conflicting results, and the parties have pointed to no appellate authority resolving these issues. It appears that the claims may have become moot before the appellate courts can review them. The Court concludes that at least some of the issues presented in this case are novel, of public importance, and capable of repetition yet evading review, and will address them here pursuant to the exception to the mootness doctrine (*Hearst Corp. v Clyne*, 50 NY2d 707, 714--715 [1980]; *see People ex rel. Green v Superintendent of Sullivan Correctional Facility*, 137 AD3d 56, 58 [3d Dept 2016]).

Pending Proceedings and Collateral Estoppel

The respondents argue also that the claims of petitioners Molina, Metellus, and Rivera should be dismissed because they previously commenced article 78 proceedings in Dutchess County Supreme Court against the State respondents raising similar claims, all of which have now been resolved against them at the supreme court level. But in each of those proceedings, petitioners challenged the jurisdictional basis for parole revocation determinations, alleging that the Fishkill RTF is not a "legitimate" residential treatment facility and that they in fact were inmates in a secure prison, not under parole supervision. The courts denied their petitions on the ground that DOCCS had duly designated the Fishkill Correctional Facility as a residential treatment facility pursuant to ***5** Penal Law § 70.45 (3) and 7 NYCRR 100.90 (c) (3). The courts found no occasion to go further and address the specific claim raised here-- that the Fishkill RTF does not meet the statutory criteria for an RTF (*see Matter of Molina v Annucci*, Sup Ct, Dutchess County, September

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30, 2016, Foreman, J., index No. 302/2016, **6--7; *Matter of Metellus v Annucci*, Sup Ct, Dutchess County, August 18, 2016, Posner, J., index No. 563/2016; *Matter of Rivera v Annucci*, Sup Ct, Dutchess County, June 21, 2016, Brands, J., index No. 412/2016). Nor did the courts squarely address petitioners' claims that the State respondents had no authority to hold them beyond six months. While the court in *Matter of Molina v Annucci*, discussed that issue, it was an alternative holding and therefore dictum (**7--8). Thus, the identical issues were not actually and necessarily decided in these prior cases; they cannot be given collateral estoppel effect (*see Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]).

Standing to Raise Issues Related to Woodbourne Correctional Facility

The Court agrees with the State respondents that petitioners lack standing to raise their RTF-compliance with regard to the Woodbourne RTF, either individually or in a representative capacity. Petitioners argue that, like the Fishkill RTF, the Woodbourne RTF is not community-based and does not provide opportunities required by statute. But the petition does not allege that any of the petitioners were confined to the Woodbourne RTF. And their argument that the RTF-compliance claim is imbued with questions of fact undermines their argument that any decision in this case would be determinative of the Woodbourne RTF-compliance claim. Furthermore, petitioners' timely-release claims may be determined without regard to the RTF where a similarly situated person resides. The Court therefore dismisses all claims related to the Woodbourne RTF.

Respondents' Motion to Dismiss the Verified Amended Petition

Finally, the Court grants the State respondents' motion to dismiss the verified amended petition. Petitioners cannot add new parties in an article 78 proceeding without obtaining leave of the court (*see* CPLR 401; *Matter of Czajka v Dellehunt*, 125 AD3d 1177, 1181 [3d Dept 2015]). In any event, petitioners have stated that they do not wish to pursue the verified amended petition because the newly named petitioners have been released or transferred from the Fishkill RTF.

Merits of Petitioners' Claims

Petitioners' Timely Release Claims

Petitioners argue that respondents have detained them in a residential treatment facility beyond the six-month period authorized by statute. Their argument has two parts. First, petitioners maintain that, as a matter of law, the ***6** State respondents lack statutory authority to hold them in a residential treatment facility beyond six months. Second, they claim that even if there were such authority, the respondents have unlawfully detained them in a residential treatment facility beyond the six-month period due to respondents' failure to fulfill their statutory mandate to assist them in finding SARA-compliant housing.

Petitioners have requested declaratory and injunctive relief, which are unavailable in an article 78 proceeding (CPLR 7803 [1], [2], [3]). Because the Court rejects petitioners' timely release claims on the merits within the context of the article 78 proceeding, it finds no occasion to convert their timely release claims to an action for declaratory and injunctive relief.

The Timely Release Claim as a Matter of Law

The Court rejects petitioners' argument that as a matter of law the State respondents have no authority to confine petitioners in a residential treatment facility for more than six months after the expiration of their determinate sentence of imprisonment. Penal Law § 70.45 (3) authorizes the Board of Parole, with respect to any individual sentenced to a determinate sentence followed by a period of post-release supervision, 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." This section permits the Board of Parole to impose as a mandatory condition of post-release supervision the requirement of residence and participation in a residential treatment facility on individuals who have completed their determinate sentence, regardless of whether there may be suitable housing and treatment plans in the community at large.

Correction Law § 73 is broader. Subdivision (1) authorizes the Commissioner of DOCCS to confine certain individuals who are or who will soon be eligible for community supervision at a residential treatment facility:

"The commissioner may transfer any inmate of a correctional facility who is eligible for community supervision or who will become eligible for community supervision within six months

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after the date of transfer or who has one year or less remaining to be served under his or her sentence to a residential treatment facility and such person may be allowed 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. While outside the facility he or she shall be at all times in the custody of the department and under its supervision."

But subdivision (10) also authorizes the Commissioner of DOCCS to use a residential treatment facility as a residence for other persons who are "on community supervision":

"The commissioner is authorized to use any residential treatment facility as a residence for persons who are on community supervision. Persons who reside in such a facility shall be subject to conditions of community supervision imposed by the board."

The Penal Law and Correction Law provisions can be "'harmonize[d]'" and "'construe[d] in a way that renders them internally compatible'" (*Matter of Mariah Corrigan v NY State Off. of Children and Family Servs.*, __ NY3d __, 2017 Slip Op 01020 [February 9, 2017], quoting *Matter of Dutchess County Dept. of Social Servs. ex rel. Day v Day*, 96 NY2d 149, 153 [2001]). Penal Law § 70.45 (3) plainly authorizes the Board of Parole to mandate six months of confinement in a residential treatment facility upon completion of a determinate sentence as a condition of release to post-release supervision. Correction Law § 73 does not allow long-term mandatory confinement in a residential treatment facility, but it appears to allow DOCCS to use the residential treatment facility as a stop-gap residence for persons who are on community supervision under certain circumstances, such as when persons are unable to meet the conditions of community supervision imposed by the Board of Parole. For example, although the issue was uncontested, the Appellate Division, Third Department in *People ex rel. Green v Superintendent of Sullivan Correctional Facility* ordered a convicted sex offender who had completed his term of imprisonment more than six months earlier to "be released to either suitable [SARA-compliant] housing or a residential treatment facility pursuant to Penal Law § 70.45 (3) and Correction Law § 73 (10)" (137 AD3d at 60).

Reading the two statutes together in this way does not render the six-month limitation of Penal Law § 70.45 (3) "devoid of meaning," as petitioners argue. Once the six-month period authorized by Penal Law § 70.45 (3) lapses, under Correction Law § 73, DOCCS may require the person to remain in such a facility only until he, with appropriate assistance from DOCCS, complies with the Board of Parole's requirements for an approvable release plan, including suitable housing. Once such conditions are satisfied, DOCCS would have no ability to require confinement in the designated residential treatment facility. It would make no sense to read Penal Law § 70.45 (3) as a limitation on DOCCS's authority to house sex offenders who have been unable to find suitable housing in a residential treatment facility, where no such limitation is placed on its ability to detain others who are eligible for release to the community but who are unable to comply with conditions imposed by the Board of Parole.

Indeed, the majority of trial court decisions addressing this issue have held that Correction Law § 73 (10) provides authority to hold sex offenders beyond six months when suitable housing has not yet been arranged (*e.g.*, *Matter of Phillips v NY State Bd. of Parole*, Sup Ct, Dutchess County, January 22, 2016, Pagones, J., index No. 3622/2015, *2; *People ex rel. Roldan v Superintendent, Hudson Corr. Facility*, Sup Ct, Columbia County, June 4, 2015, Nichols, J., index No 8430-15, **1--2; *People ex rel. Johnson v Superintendent, Fishkill Corr. Facility*, 47 Misc 3d 984, 988--989 [Sup Ct, Dutchess County 2015]; *People ex rel. White v Superintendent*, 45 Misc 3d 1202[A], [Sup Ct, Sullivan County 2014]; *People ex rel. Anderson v Superintendent, Fishkill Corr. Facility*, Sup Ct, Dutchess County, November 17, 2014, Pagones, J., index No 3878/2014, *3; *People ex rel. Vega v Superintendent, Fishkill Corr. Facility,* Sup Ct, Dutchess County, October 27, 2014, Sproat, J., index No. 3759/2014, *3; *but see People ex rel. McCurdy v Warden, Westchester County Corr. Facility*, Sup Ct, Westchester County, January 11, 2016, Zambelli, J., index No. 15/3558, **7--8, *appeal pending*; *People ex rel. Scarberry v Connolly*, Sup Ct, Dutchess County, November 21, 2014, Rosa, J., index No. 3963/14). Accordingly, the Court denies petitioners' application to compel the State respondents to release petitioners and other offenders from residential treatment facilities upon the expiration of six months regardless of whether they have found suitable housing.

Timely Release Claim Based on Alleged Failure to Help Locate SARA-Compliant Housing

Petitioners' second timeliness claim is that, even if the State respondents have authority to confine petitioners in a residential treatment facility beyond six months, the

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continued confinement of petitioners was unlawful because respondents have not met their statutory obligations to help petitioners find SARA-compliant housing.

"The department shall assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, educational or vocational training, and housing" (Correction Law § 201 [5]; *see* Correction Law § 203 [1]; Executive Law § 243 [4]; 9 NYCRR 365.3 [d] [v], 8000.1 [b] [5], 8002.7 [d] [v]). The Appellate Division, after recently noting the dilemma facing DOCCS when sex offenders are unable to find SARA-compliant housing, reiterated that DOCCS must meaningfully assist sex offenders in their endeavors to find suitable housing:

"Public safety unquestionably remains the primary concern in the management of sex offenders, but the 'accepted wisdom in the criminal justice community and among experts that offenders are less likely to recidivate when they are provided with suitable housing and employment' ***7** is also recognized . . . . Accordingly, we reiterate that, although petitioner is obligated to identify suitable housing, DOCCS remains statutorily obligated to assist in the process."

(*People ex rel. Green*, 137 AD3d at 60 [internal quotation marks omitted]; *see People v Diack*, 24 NY3d 674, 682--683 [2015]; *cf. Matter of Boss v NY State Div. of Parole*, 89 AD3d 1265, 1266 [3d Dept 2011] [rejecting contention that DOCCS had a duty to secure acceptable housing for parolee]).

Petitioners have pointed to no statute or regulation that requires DOCCS to identify suitable housing in the first instance or to ensure that suitable housing is available when an inmate is eligible to be released to the community. In other words, petitioners have not demonstrated that they have a clear legal right to an order requiring DOCCS to identify or ensure the provision of SARA-compliant housing once the six-month period set forth in Penal Law § 70.45 (3) has lapsed; thus there is no basis for this Court to grant petitioners' application for systemic relief in the form of mandamus to compel.

The Court can, however, review whether DOCCS has acted arbitrarily and capriciously or contrary to law in detaining individual sex offenders due to its failure to meaningfully assist them in their efforts to find SARA-compliant housing in an article 78 proceeding, or it may do so in the context of a petition for writ of habeas corpus, but such challenges must be determined based on the circumstances of each case (*see e.g., Matter of Boss*, 89 AD3d at 1266; *Matter of Phillips*, at *2; *Matter of Gonzalez v Annucci*, Sup Ct, Albany County, July 9, 2015, Hard, J., index No. 6610-14, **11--12; *People ex rel. White*, 45 Misc 3d 1202[A]; *People ex rel. Khan v Superintendent, Hudson Corr. Facility*, Sup Ct, Columbia County, October 1, 2014, Koweek, J., index No. 7925-14, *6).

Here, the State respondents submitted an affidavit outlining their efforts to help locate SARA-compliant housing for petitioners, supported by records memorializing meetings and communications with petitioners. Respondents explain that persons about to be released to the community meet at least bi-weekly with the Offender Rehabilitation Coordinator at the facility where they are confined to help identify suitable housing when they are released to the community. After the inmate proposes a potential residence, the coordinator communicates, "on a priority basis," with an assigned parole officer in the community who then ascertains the suitability of the proposed residence, both for compliance with SARA and otherwise (DOCCS's Pre-Release Screening Policy and Procedure [February 25, 2014, rev October 21, 2014]; *see* Correction Law § 203). Once suitable housing is identified, the coordinator and parole officer work together to prepare the necessary documents so that the offender can be released to the community pursuant to a post-release supervision plan.In addition, according to the affidavit of DOCCS Associate Commissioner of Population ***8** Management Ann Marie McGrath, DOCCS has "partnered" with the New York City Department of Homeless Services to help provide housing in SARA-compliant shelters in New York City. When spaces become available at these shelters, offenders who have resided for the longest time in a DOCCS-designated residential treatment facility are given priority. A parole officer accompanies the offender to the City's Bellevue Men's Shelter to complete the intake process and then travels with him to the SARA-compliant residence, where he is assigned a new parole officer.

Respondents have produced printouts documenting communications regarding petitioners and their attempts to ascertain the suitability of any proposed residences. It is true that this documentation often recites merely that petitioners have proposed no potential residence, and this Court has concerns about whether DOCCS should be doing more when an offender languishes unreasonably long in a designated residential treatment facility, given its prison-like environment. But here, the process worked to help three of the petitioners find suitable housing, albeit several months after the statutory six-month period lapsed, in shelters operated

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by the City respondents after petitioners were unable to propose suitable housing, and the three others were detained for alleged parole violations. Under these circumstances, petitioners have not demonstrated that respondents acted arbitrarily or capriciously or contrary to law by confining them at the Fishkill RTF until they found SARA-compliant housing.

Fishkill RTF-Compliance Claim

Petitioners claim that while DOCCS has designated the Fishkill Correctional Facility as a residential treatment facility, residents are treated as prison inmates and are not provided reintegration programming required by law. The Court concludes that there are questions of fact on this issue, and declines to grant the State respondents' motion to dismiss petitioners' RTF compliance claim. Moreover, because appropriate article 78 relief cannot be awarded on this claim, the Court converts the article 78 proceeding to a declaratory judgement action to further litigate this claim.

The purpose of a residential treatment facility is to prepare those who have completed or are about to complete their terms of imprisonment for reintegration into the community. Correction Law § 2 (6) defines “residential treatment facility” as:

“6. A correctional facility consisting of a community based residence 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 ***9** release on parole who intend to reside in or near that community when released.”

This purpose is further reflected in Correction Law § 73 (1), (2), and (3):

“1. The commissioner may transfer any inmate of a correctional facility who is eligible for community supervision or who will become eligible for community supervision within six months after the date of transfer or who has one year or less remaining to be served under his or her sentence to a residential treatment facility and such person may be allowed 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. While outside the facility he or she shall be at all times in the custody of the department and under its supervision.”

“2. The department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility.”

“3. Programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established. Each inmate shall be assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her.”

DOCCS has designated a number of facilities throughout the State as residential treatment facilities. Among them, DOCCS has designated the Fishkill Correctional Facility, a medium security facility located in the City of Beacon in Dutchess County, as a “general confinement facility,” a “work release facility,” and a “residential treatment facility” (7 NYCRR 100.90 [c] [3]; Directive No. 0051). DOCCS asserts that it has designated the Fishkill RTF as a residential treatment facility based on its relative proximity to New York City and other communities where offenders intend to return, programming availability, and the adequacy of staffing for work crews.

Petitioners claim, however, that while in the Fishkill RTF, they were treated as inmates in a prison-like setting, far from the communities where they intend to return; that they were not offered meaningful programming or work opportunities; and that they were required to repeat classes offered in prison and given menial assignments such as janitorial work within the prison confines for just a couple of hours each day. They aver that RTF residents are subject to the same institutional rules and disciplinary proceedings as inmates in general ***10** confinement, and share the same gym, exercise yard and mess hall. They wear the same green uniforms and are subject to the same daily count as inmates in the general population. They claim they are offered the same programming as the inmates in general confinement. Petitioners assert that the only employment offered to RTF residents is a “porter pool,” where they are able to perform menial janitorial jobs for a couple hours per day; and that they generally are unable to obtain permission to participate in work details outside of the facility.

The State respondents counter that they are committed to providing education and training to RTF residents, and they point to Directive No. 0051, which lists the programs available at the facility. Respondents assert that they offer an RTF work program that is not available to inmates, where RTF residents are paid $10 per day, a rate far higher than that paid to inmates. RTF residents are transported from the facility once each week to visit parole officers. The Fishkill Correctional Facility contains a "sex offender dorm" that houses 29 RTF residents separately from the general population (petitioners claim the dorm area is insufficient to accommodate all similarly situated RTF residents). As petitioners point out, the State respondents have provided few other specific factual averments to counter the allegations in the petition about the kinds of programming and work opportunities available to RTF residents.

The litigants also point to conflicting decisions on this issue. In some cases, the courts, looking beyond DOCCS's designation, have rejected claims that Fishkill RTF is essentially the same as a prison and not a true residential treatment facility that complies with the statutes (*Matter of Bennett v Annucci*, Sup Ct, Dutchess County, June 3, 2016, Egitto, J., index No. 214/2016, *6; *Matter of Phillips*, at *3). On the other hand, at least one judge has held after an evidentiary hearing that Fishkill Correctional Facility did not meet the statutory requirements for a residential facility (*see People ex rel. Scarberry*, at *4; *People ex rel. Simmons v Superintendent, Fishkill Correctional Facility*, Sup Ct, Dutchess County, August 15, 2014, Rosa, J., index No. 3803/14). [1]

This Court concludes that petitioners have alleged a claim for a declaration that the Fishkill RTF does not comply with the statutes governing residential treatment facilities. The Court also concludes that questions of fact preclude a decision on this issue based solely on the conflicting accounts set forth in the parties' papers. The Court will therefore convert this claim to a declaratory judgment action and hold an evidentiary hearing before resolving petitioners' Fishkill RTF compliance claim.

Claim Against the City Respondents

Petitioners seek declaratory and injunctive relief against the City respondents. As with the timely release claims, the Court has analyzed the claims against the City respondents within the context of the article 78 proceeding and, ruling against the petitioners on the merits, finds no occasion to convert that portion of the petition that asserts claims against the City respondents to an action.

Petitioners allege that the City respondents have failed to meet their legal obligation to provide housing assistance to them and those similarly situated, in violation of 18 NYCRR 352.36 (a) (4) (iii), which states: "All social service districts are required by statute, regulation and directive to arrange temporary housing assistance for eligible homeless individuals, including those who are sex offenders." In addition, petitioners rely on a consent decree issued in *Callahan v Carey* (New York County, October 18, 1979, index No. 42582-79), which states: "The City defendants shall provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter." Petitioners allege that the City Department of Homeless Services has instituted a policy of accepting only ten new individuals subject to SARA each month, notwithstanding their capacity to house more.

The City respondents assert that they operate numerous shelters, which provide beds for just under 13,000 single adults. Many of the shelters have programming for sub-populations with specific needs. The City respondents operate seven SARA-compliant shelters for single adult men. They collaboratively work with DOCCS and parole officers to help provide SARA-compliant housing for sex offenders who are eligible for post-release supervision. They assert that they no longer limit their reception to ten offenders per month and have worked to open up additional space in approved shelters.

The City respondents argue further that they are working with DOCCS to reasonably find shelter for petitioners and those similarly situated after balancing the concerns reflected in the regulations. They point to ***11** 18 NYCRR 352.36 (a) (4) (ii) and (vi), which provide:

"(ii) All reasonable efforts should be made to avoid an ill-advised concentration of sex offenders in certain neighborhoods and localities. What constitutes such a concentration will depend on many factors, and may vary depending on housing availability and the locality and community. In addition, it is sometimes safer to house sex offenders together. Law enforcement, probation, and parole officers may more effectively monitor offenders, and service providers may more easily offer transitional services to

offenders in these congregate settings. Further, some social service officials and departments rely on congregate housing for sex offenders who seek emergency shelter because of the limited, or lack of other housing options available for this population. All public officials who are responsible for finding or approving housing for sex offenders should recognize that an over-concentration of sex offenders may create risks and burdens on the surrounding community, and that their responsibility is to make judgements that are reasonable under the circumstances."

"(vi) Decisions as to the housing and supervision of sex offenders should take into account all relevant factors and no one factor will necessarily be dispositive. These factors should include, but not be limited to, the factors enumerated in the statute, the risk posed by the offender, the nature of the underlying offense, whether housing offenders together or apart is safer and more feasible, the most effective method to supervise and provide services to offenders, and the availability of appropriate housing, employment, treatment and support."

Indeed, after balancing these factors, the City respondents in collaboration with the State respondents placed three named petitioners (Classen, Sotomayor, and Alcantara) in DHS's approved shelters. The City respondents assert that they have received no shelter applications from the other named petitioners.

The Court therefore rejects petitioners' request for a court order requiring the City respondents to open up 75 additional SARA-compliant shelter beds. The Court has already rejected petitioners' systemic timely release claim because they have not shown that DOCCS acted unlawfully in detaining them beyond six months where they reasonably investigated all proposed alternatives and when those proved unsuitable, assisted petitioners in obtaining placement in shelters operated by the City respondents. The Court concludes similarly that petitioners have not shown a clear legal right to the systemic relief they seek against the City respondents.

Motion for Class Certification

The Court has concluded that DOCCS has authority to detain petitioners and other sex offenders, just as it does others who are subject to conditions set by the Parole Board, in residential treatment facilities beyond the six-month period set forth in Penal Law § 70.45 (3); and that petitioners did not show that respondents acted arbitrarily or capriciously or contrary to law by holding them longer than that while it helped them find SARA-compliant housing. Thus, there is no need to consider petitioners' application for class certification concerning their timely release claims.

The issue of class certification remains, however, concerning petitioners' Fishkill RTF-compliance claim. Petitioners propose Class 1 to be comprised of "persons who have completed their sentence of incarceration, are now serving their post release supervision sentences, are subject to the SARA residency restriction, and who are currently required to reside at one of the purported RTFs." And they propose Class 2 to be comprised of "persons who are currently required to reside at the purported RTFs after completing a parole/PRS violation time assessment imposed by an Administrative Law Judge." Given the Court's ruling above, the Court will limit its consideration of each proposed class to persons who are required to reside at the Fishkill RTF.

CPLR 901 (a) sets forth five prerequisites to class certification:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

"These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*City of NY v Maul*, 14 NY3d 499, 508 [2010]). The determination of whether a lawsuit qualifies as a class action under the statutory criteria "'ordinarily rests within the sound discretion of the trial court'" (*id.* at 509, quoting *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]). The Court finds that the statutory criteria of commonality and typicality are met; the others warrant further discussion.

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The question whether this limited claim that the Fishkill RTF is not statutorily compliant meets the criterion of numerosity is a close question. The parties' submissions establish that the Fishkill RTF involves 29 beds for sex ***12** offenders in dorm-like setting, although petitioners allege that it does not accommodate all sex offenders who are required to reside there pursuant to Penal Law § 70.45 (3) or Correction Law § 70 (10). Of course, the number of such sex offenders who are subject to the allegedly unlawful conditions at the Fishkill RTF each year is greater than that due turnover when some are released to the community. In light of petitioners' assertion that most residents are released to the community within 61 days after the six-month period has expired, the Court finds that roughly 50 residents each year are likely to be similarly situated to the petitioners. Arguably, this number meets the numerosity criterion for granting class certification (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]).

Next, the question whether the named petitioners will fairly and adequately protect the interests of the class requires some discussion, now that three of them have been released from the Fishkill RTF and the other three are being detained for parole violations. The named petitioners may lose interest in prosecuting this case, and in testifying at an evidentiary hearing about the programming and conditions at the Fishkill RTF. This concern, however, may be cured at least in part by allowing the liberal substitution or the addition of parties who are still being detained at the Fishkill RTF. And petitioners are represented by experienced counsel with adequate resources to represent the class and who have made serious efforts to litigate this claim. Arguably, petitioners meet the adequacy of representation criterion.

The final question is whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The State respondents argue that it is not superior in light of the "government operations rule" because the proposed class of litigants will be protected by principles of stare decisis (*see Jones v Berman*, 37 NY2d 42, 57 [1975]; *De Zimm v NY State Bd. of Parole*, 135 AD2d 66, 68 [3d Dept 1988]). In response, petitioners rely on *Hurrell-Harring v State of New York* (81 AD3d 69, 74--76 [3d Dept 2011]), where the Third Department eschewed the government operations rule in favor of class action as the superior mechanism for addressing system-wide failure to provide adequate indigent defense counsel.

But the claim in this case is unlike the widespread, systemic deficiencies alleged in *Hurrell-Harring*. The claim here is limited to the conditions at a single correctional facility that affect several dozens, not thousands, of potential complainants. Furthermore, the concerns driving the Third Department to "conclude that the unique circumstances of [that] case render a class action superior to other methods of adjudicating [that] controversy" are not present here (*id.* at 76). Rather, where, as here, the defendants are State agencies, a ***13** declaratory judgment, combined with the doctrine of stare decisis, will adequately protect the rights of the named plaintiffs and those similarly situated (*see DeZimm*, 135 AD2d at 68). Class certification is not the superior method for litigating the sole claim remaining in this case. As a result, the Court declines to grant class certification.

Accordingly, it is

Ordered that all claims regarding Woodbourne Correctional Facility are dismissed;

Ordered that all claims against the City respondents are denied and the petition is dismissed as to them;

Ordered that petitioners' claims that the State respondents unlawfully detained them at the Fishkill Correctional Facility's Residential Treatment Facility beyond the six-month period prescribed by Penal Law § 70.45 (3) are denied and those claims are dismissed;

Ordered that the State respondents' motion to dismiss is otherwise denied;

Ordered that petitioners' motion for class certification is denied;

Ordered that, petitioners' claim that the Fishkill Correctional Facility's Residential Treatment Facility fails to comply with the statutes governing residential treatment facilities because it does not offer adequate programming or employment opportunities is converted to a declaratory judgment action;

Ordered that a fact-finding hearing on the declaratory judgment claim is set for March 31, 2017, at 9:30 a.m.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to petitioners' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and

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Order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

Dated: February 24, 2017

Albany, New York

____

Denise A. Hartman

Acting Supreme Court Justice

Papers Considered

Petitioners

1. Order to Show Cause and Verified Petition

2. Notice of Amended Motion for Class Certification

3. Affirmation of Matthew Freimuth in Support of Amended Motion forClass Certification, with Exhibit

4. Memorandum of Law in Support of Motion for Class Certification

5. Memorandum of Law in Support of Amended Motion for ClassCertification

6. Reply Memorandum of Law in Further Support of Verified Petition

7. Reply Memorandum of Law in Further Support of Motion for Class Certification

8. Unreported Decisions in Support of Reply Memorandum of Law in Support of Petition

State Respondents

1. Affirmation of Terrence X. Tracy in Opposition to Petition

2. Affidavit of Anne Marie McGrath in Opposition to Petition

3. Affidavit of Steven Claudio

4. Exhibits to Tracy Affirmation, McGrath Affidavit, and Claudio Affidavit, A--V

5. Memorandum of Law in Opposition to Petition

6. Affirmation of Terrence X. Tracy in Opposition to Class Certification,with Exhibits A--E

7. Affirmation of Richard Lombardo in Opposition to Class Certification,with Exhibits A--D

8. Memorandum of Law in Opposition to Class Certification

9. Notice of Motion to Dismiss Amended Petition and Affirmation in Support, with Exhibits A--B

City Respondents

1. Commissioner Banks's Verified Answer

2. Memorandum of Law in Support of Answer

3. Affirmation of Eric Porter in Support of Answer, with Exhibit A

4. Affirmation of Tonie Baez in Support of Answer

5. Affirmation of Lesley Mbaye in Opposition to Class Certification, withExhibit A

6. Notice of Motion to Dismiss Verified Petition, with Affirmation ofLesley Mbaye and Exhibit A

FOOTNOTES

1 *Cf. People ex rel. Joe v Superintendent, Hudson Corr. Facility*, Sup Ct, Columbia County, October 17, 2014, Mott, J., index No. 7985-14, **4--5 (holding that the Hudson Correctional Facility does not comply with statute governing RTFs because it is not in or near New York City and does not offer adequate programming); *People ex rel. Kahn*, at * 7 (same). *Compare Matter of Gonzalez*, **13--14 (Woodbourne Correctional Facility complies with statute governing RTFs) *with Matter of Muniz v Uhler*, 2014 NY Slip Op 33134(U), **13--14 (Sup Ct, Franklin County 2014) (Woodbourne Correctional Facility does not comply with statute governing RTFs because it is not in or near Bronx County and does not offer adequate programming).

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32 N.Y.3d 1084, 114 N.E.3d 1085, 90 N.Y.S.3d 632 (Mem), 2018 N.Y. Slip Op. 90472

The People of the State of New York
ex rel. Chance McCurdy, Appellant,
v
Warden, Westchester County
Correctional Facility, et al., Respondents.

Court of Appeals of New York
2018-960

Submitted October 9, 2018
Decided December 11, 2018

CITE TITLE AS: People ex rel. McCurdy v Warden, Westchester County Corr. Facility

Reported below, 164 AD3d 692.

Motion for leave to appeal granted. Motion for poor person relief granted.

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57 A.D.2d 876, 394 N.Y.S.2d 230

The People of the State of New York ex rel. Terence McNeil, by Joel M. Golub, Respondent,
v.
New York State Board of Parole et al., Appellants.
The People of the State of New York ex rel. Kenneth Davis, Respondent,
v.
New York State Board of Parole et al., Appellants

Supreme Court, Appellate Division, Second Department, New York
May 9, 1977

CITE TITLE AS: People ex rel. McNeil v New York State Bd. of Parole

In habeas corpus proceedings, the appeals are from (1) so much of a judgment of the Supreme Court, Dutchess County, dated June 30, 1976, as, in the first above-captioned proceeding, held subdivision 5 of section 803 of the Correction Law to be unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution, and (2) a further judgment of the same court, dated July 15, 1976, which, in the second above-captioned proceeding, *inter alia*, reached a similar conclusion as to the constitutionality of the aforesaid statute. Judgment dated June 30, 1976 reversed insofar as appealed from, on the law, without costs or disbursements, and the provision directing that petitioner be allowed "good behavior credits " is deleted therefrom.

HEADNOTE

PARODE
REVOCATION

([1]) Good behavior time allowance --- Constitutional law --- In habeas corpus proceedings, judgments which held subdivison 5 of section 803 of Correction Law to be unconstitutional as violative of equal protection clause of Fourteenth Amendment to United States Constitution, reversed, on law --- State, relying upon subdivision 5 of section 803, refused to permit petitioners to earn good time credits (up to one third of their sentences) against remainder of their respective maximum terms --- Subdivision 5 of section 803 provides that parole or conditional release violator who is returned to prison with less than one year remaining on his maximum term, is ineligible for good behavior time credit; petitioners argue that section discriminates, for purposes of good time eligibility, between those who have more than one year left to serve and those who have less; that distinction is wholly arbitrary and does not rationally serve any legitimate State policy, and that since fundamental right, viz., liberty, is involved, 'strict scrutiny' test should be employed in analyzing statute, rather than 'rational basis' test --- At stake is not individual's fundamental right to liberty; giving of good time credits to inmate is matter of legislative grace (see Correction Law, § 803, subd 1); prisoners have no constitutional right to release prior to maximum expiration date of their sentence; fact that Legislature saw fit to reward good behavior in no way makes opportunity to earn good time credits, and thus secure earlier release date, fundamental right --- Statutory provision does not work denial of equal protection since rational basis exists for its enactment.

Judgment dated July 15, 1976 reversed, on the law, without costs or disbursements, and proceeding dismissed.

The petitioner in the first above-captioned proceeding was released on parole from the Wallkill Correctional Facility on November 25, 1974. On January 15, 1976, following a parole revocation hearing, he was confined to the Greenhaven Correctional Facility as a parole violator and was ordered to be held for the 8 months and 18 days which were remaining on his sentence. The petitioner in the second above-captioned proceeding was conditionally released from the Elmira Correctional Facility on August 27, 1975. Subsequently, he was held to have been in violation of the terms of his release by the Parole Board and was ordered incarcerated until his maximum release date, in nine months and nine days. The State, in each instance relying upon subdivision 5 of section 803 of the Correction Law, refused to permit petitioners to earn good time credits (up to one third of their sentences) against the remainder of their respective maximum terms. In separate proceedings, each petitioner sought his release and attacked the statutory provision in question as being unconstitutional as violative of his right to equal protection of the laws. In each proceeding, a judgment was entered holding the statute to be unconstitutional on this ground and ***877** permitting each petitioner to be credited with any good behavior allowances to which he may have been entitled since his subsequent incarceration. Subdivision 5 of section 803

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of the Correction Law provides that a parole or conditional release violator who is returned to prison with less than one year remaining on his maximum term, is ineligible for good behavior time credit. The petitioners argue that the section discriminates, for purposes of good time eligibility, between those parole or conditional release violators who have more than one year left to serve and those who have less. They maintain that the distinction is wholly arbitrary and does not rationally serve any legitimate State policy. Moreover, they maintain that since a fundamental right, viz., liberty, is involved, we should employ the ”strict scrutiny“ test in analyzing the statute, rather than the ”rational basis“ test. The former test necessitates that there be a ”compelling State interest“ which demands different treatment and that no less restrictive method be available to satisfy such interests (see, e.g., *Memorial Hosp. v Maricopa County*, 415 U.S. 250). We disagree. At stake is not the individual's fundamental right to liberty. Rather, the giving of good time credits to an inmate is a matter of legislative grace (see Correction Law, § 803, subd 1). Prisoners have no constitutional right to release prior to the maximum expiration date of their sentences. The fact that the Legislature saw fit to reward good behavior in no way makes the opportunity to earn good time credits, and thus secure an earlier release date, a fundamental right. *People ex rel. Wayburn v Schupf* (39 NY2d 682) is not to the contrary. There, in upholding the constitutionality of section 739 of the Family Court Act, which authorizes pretrial detention of youths charged as juvenile delinquents where a serious crime is involved, the court prefaced its remarks by stating that the ”strict scrutiny“ test should be applied since the individual's fundamental right to liberty was impinged upon. Clearly, as noted previously, such is not the case here. Turning to the merits of the cases here, we find that the statutory provision in question does not work a denial of equal protection since a rational basis exists for its enactment. In a legislative memorandum accompanying passage of this and a related statute (L 1969, ch 270), ample rationale for the one-year distinction is given as follows (NY Legis Ann, 1969, pp 32-33): ”The amendments to Sections 803 and 805 of the Correction Law would restrict the re-release of conditional release violators. These amendments are proposed on the basis of experience with the existing legislation concerning conditional release. Present legislation permits any number of opportunities for conditional release from state institutions provided that an inmate will agree to the terms of conditional release and will accept a period of supervision. Experience, however, has shown that some inmates have no intention of abiding by the terms of conditional release but merely agree to accept the terms to obtain immediate release. Such insincere acceptance is made with the knowledge that they will again be eligible for re-release regardless of their conduct under supervision. This is best demonstrated by example where an inmate has earned sufficient 'good time' to permit his application for conditional release at a point where there are 11 months remaining on his total sentence. The sentence ceases to run upon acceptance of conditional release and the conditional release is required to remain under supervision for a period of one year. Where the conditional releasee completes his period of supervision, the sentence is terminated. The difficulty, however, develops in those cases where the individual has no intention of completing his period of supervision, but obtains conditional release only for the purpose of resuming either criminal or antisocial behavior. These persons, of course, are cited for violation of the ***878** terms of conditional release and are returned to the institution. They, however, earn 'good time' on the 11 months or remaining portion of the sentence (that is one-third of the remaining portion of the sentence is deducted and the prisoner must serve only two-thirds of the 11 months before becoming eligible for conditional release again) and are re-released, with approximately three or four months remaining on their sentence. The performance under supervision is again repeated and they are once again returned but earn 'good time' on the balance of the sentence permitting re-release with a balance of about one month remaining on the sentence. This purposeless and costly procedure has occurred with no benefit to the community or to the individual. The individual who abuses the conditional release procedure, in fact, enjoys his 'ability' to 'frustrate' Parole Officers who are responsible for supervision and ridicules the inability of the Board of Parole to prevent re-release in an effective manner. The Board of Parole is required to provide a hearing regarding each violation and in many instances, where a few months remain on the sentence, learn that the violator has again applied for re-release. Some of these individuals subject the Board to ridicule pointing out that they don't care what the Board thinks and, further, that they will obtain release as often as they wish with no intention of making a serious effort towards adjustment. The amendments to Section 803 and 805 of the Correction Law will eliminate the repetitious and purposeless release of those persons who abuse the conditional release procedure. The amendment in no way will affect the sincere person who wishes to prove that he is prepared to make an effort to benefit from supervision. Conditional Releasees, generally speaking, are the poor parole risks, and parole violators who present the greatest potential as a threat to the community. Failure to provide effective control of this group encourages their misconduct to the detriment of the

community.“ Moreover, in our opinion, the recent decision of *Matter of Foster v Smith* (52 AD2d 1088), in which the Fourth Department, in a detailed memorandum, held that the provision in question did not violate the equal protection clause, but rather was rationally designed to serve a legitimate State policy, as detailed in the 1969 legislative memorandum, was correctly decided. Accordingly, we hold that subdivision 5 of section 803 of the Correction Law has a rational basis and is thus not violative of the equal protection clause.

Hopkins, J. P., Margett, Damiani and Rabin, JJ., concur. [87 Misc 2d 497.]

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Correction Law (Refs & Annos)
Chapter 43. Of the Consolidated Laws (Refs & Annos)
Article 8. Community Supervision (Refs & Annos)

McKinney's Correction Law § 201

§ 201. Authority and responsibility for community supervision

Effective: July 18, 2012
Currentness

<[See, also, § 201 in Article 7-A, Parole System in Certain Cities, ante.]>

1. The department shall have responsibility for the preparation of reports and other data required by the state board of parole in the exercise of its independent decision making functions.

2. In accordance with the provisions of this chapter, the department shall supervise inmates released to community supervision, except that the department may consent to the supervision of a released inmate by the United States parole commission pursuant to the witness security act of nineteen hundred eighty-four.

3. To facilitate the supervision of all inmates released to community supervision, the commissioner shall consider the implementation of a program of graduated sanctions, including but not limited to the utilization of a risk and needs assessment instrument that would be administered to all inmates eligible for community supervision. Such a program would include various components including approaches that concentrate supervision on new releases, alternatives to incarceration for technical parole violators and the use of enhanced technologies.

4. The department shall conduct such investigations as may be necessary in connection with alleged violations of community supervision.

5. The department shall assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, educational or vocational training, and housing.

6. The department shall have the duty to provide written notice to inmates prior to release to community supervision or pursuant to subdivision six of section 410.91 of the criminal procedure law of any requirement to report to the office of victim services any funds of a convicted person as defined in section six hundred thirty-two-a of the executive law, the procedure for such reporting and any potential penalty for a failure to comply.

7. The department shall encourage apprenticeship training of such persons through the assistance and cooperation of industrial, commercial and labor organizations.

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8. The department may establish a community supervision transition program, which is hereby defined as community-based residential facilities designed to aid community supervision violators to develop an increased capacity for adjustment to community living. Presumptive releasees, parolees, conditional releasees and those under post-release supervision who have either (a) been found pursuant to article twelve-B of the executive law to have violated one or more conditions of release in an important respect, or (b) allegedly violated one or more of such conditions upon a finding of probable cause at a preliminary hearing or upon the waiver thereof may be placed in a community supervision transition facility. Placement in such a facility upon a finding of probable cause or the waiver thereof shall not preclude the conduct of a revocation hearing, nor, absent a waiver, operate to deny the releasee's right to such revocation hearing.

9. [Expires and deemed repealed Sept. 1, 2020, pursuant to L.2011, c. 62, pt. C, subpt. A, § 49, subd. (c).] (a) The department shall collect a fee of thirty dollars per month, from all persons over the age of eighteen who after the effective date of this subdivision are supervised on presumptive release, parole, conditional release or post-release supervision. The department shall waive all or part of such fee where, because of the indigence of the offender, the payment of said fee would work an unreasonable hardship on the person convicted, his or her immediate family, or any other person who is dependent on such person for financial support.

(b) The supervision fee authorized by this subdivision shall not constitute nor be imposed as a condition of community supervision.

(c) In the event of non-payment of any fees that have not been waived, the department may seek to enforce payment in any manner permitted by law for enforcement of a debt owed to the state; provided, however, such enforcement shall not include use of any private debt collection agency or service.

(d) Nothing contained in this subdivision affects or limits the provisions of section two hundred fifty-nine-mm of the executive law, relating to out-of-state parole supervision. Prior to a transfer of parole supervision to another state, the department shall eliminate any supervision fee imposed pursuant to this subdivision. The department may collect a fee, pursuant to this subdivision and regulations promulgated thereunder, from any person whose parole supervision is transferred to this state from another.

(e)(i) Notwithstanding any other law, rule or regulation to the contrary, and except as provided for in subparagraph (ii) of this paragraph, the supervision fee authorized by this subdivision shall not be collected by the parole officer of a person on community supervision. The department may promulgate rules and regulations to establish alternative methods for payment of such supervision fee by persons on community supervision.

(ii) At any reporting location not under the dominion and control of the department, the parole officer may be authorized to collect the supervision fee.

10. The department shall have the power to grant and revoke certificates of relief from disabilities and certificates of good conduct as provided for by law.

11. In any case where a person is entitled to jail time credit under the provisions of paragraph (c) of subdivision three of section 70.40 of the penal law, to certify to the person in charge of the institution in which such person's sentence is being served the amount of such credit.

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12. The department shall supervise all persons who are released and subject to a regimen of strict and intensive supervision and treatment pursuant to article ten of the mental hygiene law. The department shall issue and periodically update rules and regulations concerning the supervision of such persons in consultation with the office of sex offender management in the division of criminal justice services and the office of mental health.

13. The department shall perform such other functions as are necessary and proper in furtherance of the objective of maintaining an effective, efficient and fair system of community supervision.

14. The commissioner shall promulgate such regulations as are necessary and proper for the efficient performance of the functions set forth in this article. He or she shall have the authority to contract with public or private agencies for the performance of the functions set forth in this section as are necessary or appropriate to promote the efficient performance of such responsibilities, except the functions defined in subdivisions one, two, four, ten and twelve of this section.

15. The commissioner shall provide an annual report to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and minority leader of the assembly, commencing January first, two thousand twelve. Such report shall include but not be limited to the number of persons: released to community supervision and the release type; supervised on community supervision during the preceding year; whose community supervision was revoked; returned to incarceration for conviction of a new felony committed while on community supervision; transferred out of state pursuant to the Interstate Compact for Adult Supervision. In addition, the commissioner shall provide other available information regarding community supervision to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and minority leader of the assembly upon request.

Credits

(Added L.2011, c. 62, pt. C, subpt. A, § 32, eff. March 31, 2011. Amended L.2012, c. 201, § 1, eff. July 18, 2012.)

McKinney's Correction Law § 201, NY CORRECT § 201
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Correction Law (Refs & Annos)
Chapter 43. Of the Consolidated Laws (Refs & Annos)
Article 8. Community Supervision (Refs & Annos)

McKinney's Correction Law § 203

§ 203. Regulations for release of certain sex offenders

Effective: March 31, 2011
Currentness

<[See, also, § 203 in Article 7-A, Parole System in Certain Cities, ante.]>

1. The commissioner shall promulgate rules and regulations that shall include guidelines and procedures on the placement of sex offenders designated as level two or level three offenders pursuant to article six-C of this chapter. Such regulations shall provide instruction on certain factors to be considered when investigating and approving the residence of level two or level three sex offenders released on presumptive release, parole, conditional release or post-release supervision. Such factors shall include the following:

(a) the location of other sex offenders required to register under the sex offender registration act, specifically whether there is a concentration of registered sex offenders in a certain residential area or municipality;

(b) the number of registered sex offenders residing at a particular property;

(c) the proximity of entities with vulnerable populations;

(d) accessibility to family members, friends or other supportive services, including, but not limited to, locally available sex offender treatment programs with preference for placement of such individuals into programs that have demonstrated effectiveness in reducing sex offender recidivism and increasing public safety; and

(e) the availability of permanent, stable housing in order to reduce the likelihood that such offenders will be transient.

2. The department shall have the duty, prior to the release to community supervision of an inmate designated a level two or three sex offender pursuant to the sex offender registration act, to provide notification to the local social services district in the county in which the inmate expects to reside, when information available or any other pre-release procedures indicates that such inmate is likely to seek to access local social services for homeless persons. The department shall provide such notice, when practicable, thirty days or more before such inmate's release, but in any event, in advance of such inmate's arrival in the jurisdiction of such local social services district.

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Credits

(Added L.2011, c. 62, pt. C, subpt. A, § 32, eff. March 31, 2011.)

McKinney's Correction Law § 203, NY CORRECT § 203

Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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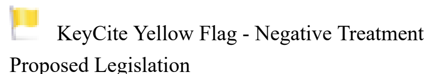
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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Correction Law (Refs & Annos)
Chapter 43. Of the Consolidated Laws (Refs & Annos)
Article 8. Community Supervision (Refs & Annos)

McKinney's Correction Law § 205

§ 205. Merit termination of sentence and discharge from presumptive release, parole, conditional release and release to post-release supervision

Effective: March 31, 2011
Currentness

<[See, also, § 205 in Article 7-A, Parole System in Certain Cities, ante.]>

1. The department may grant to any person a merit termination of sentence from presumptive release, parole, conditional release or release to post-release supervision prior to the expiration of the full term or maximum term, provided it is determined by the department that such merit termination is in the best interests of society, such person is not required to register as a sex offender pursuant to article six-C of this chapter, and such person is not on presumptive release, parole, conditional release or release to post-release supervision from a term of imprisonment imposed for any of the following offenses, or for an attempt to commit any of the following offenses:

(a) a violent felony offense as defined in section 70.02 of the penal law;

(b) murder in the first degree or murder in the second degree;

(c) an offense defined in article one hundred thirty of the penal law;

(d) unlawful imprisonment in the first degree, kidnapping in the first degree, or kidnapping in the second degree, in which the victim is less than seventeen years old and the offender is not the parent of the victim;

(e) an offense defined in article two hundred thirty of the penal law involving the prostitution of a person less than nineteen years old;

(f) disseminating indecent material to minors in the first degree or disseminating indecent material to minors in the second degree;

(g) incest;

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(h) an offense defined in article two hundred sixty-three of the penal law;

(i) a hate crime as defined in section 485.05 of the penal law; or

(j) an offense defined in article four hundred ninety of the penal law.

2. A merit termination granted by the department under this section shall constitute a termination of the sentence with respect to which it was granted. No such merit termination shall be granted unless the department is satisfied that termination of sentence from presumptive release, parole, conditional release or post-release supervision is in the best interest of society, and that the parolee or releasee, otherwise financially able to comply with an order of restitution and the payment of any mandatory surcharge previously imposed by a court of competent jurisdiction, has made a good faith effort to comply therewith.

3. A merit termination of sentence may be granted after two years of presumptive release, parole, conditional release or release to post-release supervision to a person serving a sentence for a class A felony offense as defined in article two hundred twenty of the penal law. A merit termination of sentence may be granted to all other eligible persons after one year of presumptive release, parole, conditional release or release to post-release supervision.

4. The department must grant termination of sentence after three years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for a class A felony offense defined in article two hundred twenty of the penal law, and must grant termination of sentence after two years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for any other felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law.

5. The commissioner, in consultation with the chairman of the board of parole, shall promulgate rules and regulations governing the issuance of merit terminations of sentence and discharges from presumptive release, parole, conditional release or post-release supervision to assure that such terminations and discharges are consistent with public safety. The board of parole shall have access to merit termination application case files and corresponding decisions to assess the effectiveness of the rules and regulations in ensuring public safety. Such review will in no manner effect the decisions made with regard to individual merit termination determinations.

Credits
(Added L.2011, c. 62, pt. C, subpt. A, § 32, eff. March 31, 2011.)

McKinney's Correction Law § 205, NY CORRECT § 205
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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Unconstitutional or PreemptedNegative Treatment Vacated by Devine v. Annucci, N.Y.A.D. 2 Dept., May 24, 2017

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

McKinney's Consolidated Laws of New York Annotated
Executive Law (Refs & Annos)
Chapter Eighteen. Of the Consolidated Laws
Article 12-B. State Board of Parole (Refs & Annos)

McKinney's Executive Law § 259-c

§ 259-c. State board of parole; functions, powers and duties

Effective: October 1, 2018
Currentness

The state board of parole shall: 1. [Eff. until Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 below.] have the power and duty of determining which inmates serving an indeterminate or determinate sentence of imprisonment may be released on parole, or on medical parole pursuant to section two hundred fifty-nine-r or section two hundred fifty-nine-s of this article, and when and under what conditions;

1. [Eff. Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 above.] have the power and duty of determining which inmates serving an indeterminate sentence of imprisonment may be released on parole, or on medical parole pursuant to section two hundred fifty-nine-r of this article, and when and under what conditions;

2. [Eff. until Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 below.] have the power and duty of determining the conditions of release of the person who may be presumptively released, conditionally released or subject to a period of post-release supervision under an indeterminate or determinate sentence of imprisonment;

2. [Eff. Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, subd. d. See, also, subd. 1 above.] have the power and duty of determining the conditions of release of the person who may be conditionally released or subject to a period of post-release supervision under an indeterminate or reformatory sentence of imprisonment and of determining which inmates serving a definite sentence of imprisonment may be conditionally released and when and under what conditions;

3. determine, as each inmate is received by the department, the need for further investigation of the background of such inmate. Upon such determination, the department shall cause such investigation as may be necessary to be made as soon as practicable, the results of such investigation together with all other information compiled by the department and the complete criminal record and family court record of such inmate to be filed so as to be readily available when the parole of such inmate is being considered;

4. establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision;

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5. through its members, officers and employees, study or cause to be studied the inmates confined in institutions over which the board has jurisdiction, so as to determine their ultimate fitness to be paroled;

6. have the power to revoke the community supervision status of any person and to authorize the issuance of a warrant for the re-taking of such persons;

7. Deleted by L.2011, c. 62, pt. C, subpt. A, § 38-b, eff. March 31, 2011.

8. have the power and perform the duty, when requested by the governor, of reporting to the governor the facts, circumstances, criminal records and social, physical, mental and psychiatric conditions and histories of inmates under consideration by the governor for pardon or commutation of sentence and of applicants for restoration of the rights of citizenship;

9. for the purpose of any investigation in the performance of duties made by it or any member thereof, have the power to issue subpoenas, to compel the attendance of witnesses and the production of books, papers, and other documents pertinent to the subject of its inquiry;

10. have the power to authorize any members thereof and hearing officers to administer oaths and take the testimony of persons under oath;

11. make rules for the conduct of its work, a copy of such rules and of any amendments thereto to be filed by the chairman with the secretary of state;

12. to facilitate the supervision of all inmates released on community supervision the chairman of the state board of parole shall consider the implementation of a program of graduated sanctions, including but not limited to the utilization of a risk and needs assessment instrument that would be administered to all inmates eligible for parole supervision. Such a program would include various components including the use of alternatives to incarceration for technical parole violations;

13. transmit a report of the work of the state board of parole for the preceding calendar year to the governor and the legislature annually. Such report shall include statistical information regarding the demographics of persons granted release and considered for release to community supervision or deportation, including but not limited to age, gender, race, ethnicity, region of commitment and other relevant categories of classification and commitment;

14. notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25, 255.26 or 255.27 of the penal law 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 subdivision six of section one hundred sixty-eight-l of the correction law, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such

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sentenced offender may, with the written authorization of his or her parole officer and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the parole officer and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

15. Notwithstanding any other provision of law to the contrary, where a person is serving a sentence for an offense for which registration as a sex offender is required pursuant to subdivision two or three of section one hundred sixty-eight-a of the correction law, 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 subdivision six of section one hundred sixty-eight-l of the correction law or the internet was used to facilitate the commission of the crime, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as mandatory conditions of such release, that such sentenced offender shall be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when such offender is over the age of eighteen, provided that the board may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child. Nothing in this subdivision shall be construed as restricting any other lawful condition of supervision that may be imposed on such sentenced offender. As used in this subdivision, a "commercial social networking website" shall mean any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

15-a. Notwithstanding any other provision of law, where a person is serving a sentence for a violation of section 120.03, 120.04, 120.04-a, 125.12, 125.13 or 125.14 of the penal law, or a felony as defined in paragraph (c) of subdivision one of section eleven hundred ninety-three of the vehicle and traffic law, if such person is released on parole or conditional release the board shall require as a mandatory condition of such release, that such person install and maintain, in accordance with the provisions of section eleven hundred ninety-eight of the vehicle and traffic law, an ignition interlock device in any motor vehicle owned or operated by such person during the term of such parole or conditional release for such crime. Provided further, however, the board may not otherwise authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of the vehicle and traffic law.

16. determine which inmates serving a definite sentence of imprisonment may be conditionally released from an institution in which he or she is confined in accordance with subdivision two of section 70.40 of the penal law.

17. within amounts appropriated, appoint attorneys to serve as its legal advisors. Such attorneys shall report directly to the board, provided, however, that administrative matters of general applicability within the department shall be applicable to such attorneys.

Credits

(Added L.1977, c. 904, § 3. Amended L.1989, c. 79, § 4; L.1992, c. 55, § 287; L.1995, c. 3, § 38; L.1998, c. 1, §§ 22, 23, eff. Aug. 6, 1998; L.2000, c. 1, § 8, eff. Feb. 1, 2001; L.2001, c. 62, § 14, eff. June 25, 2001; L.2003, c. 62, pt. E, § 7, eff. May 15, 2003, deemed eff. April 1, 2003; L.2005, c. 544, § 2, eff. Sept. 1, 2005; L.2006, c. 96, § 1, eff. June 7, 2006, deemed eff. Oct. 1, 2005; L.2006, c. 320, § 23, eff. Nov. 1, 2006; L.2008, c. 67, § 9, eff. April 28, 2008; L.2009, c. 56, pt. J, § 8, eff. April 7,

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2009; L.2009, c. 56, pt. N, § 2, eff. April 7, 2009, deemed eff. March 1, 2009; L.2009, c. 496, § 11, eff. Dec. 18, 2009; L.2010, c. 56, pt. A-1, § 14, eff. June 22, 2010; L.2011, c. 62, pt. C, subpt. A, § 38-b; L.2018, c. 292, § 1, eff. Oct. 1, 2018.)

McKinney's Executive Law § 259-c, NY EXEC § 259-c
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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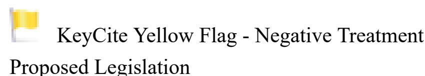
KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Penal Law § 130.65

§ 130.65 Sexual abuse in the first degree

Effective: November 1, 2011
Currentness

A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact:

1. By forcible compulsion; or

2. When the other person is incapable of consent by reason of being physically helpless; or

3. When the other person is less than eleven years old; or

4. When the other person is less than thirteen years old and the actor is twenty-one years old or older.

Sexual abuse in the first degree is a class D felony.

Credits
(L.1965, c. 1030. Amended L.2000, c. 1, § 41, eff. Feb. 1, 2001; L.2011, c. 26, § 1, eff. Nov. 1, 2011.)

McKinney's Penal Law § 130.65, NY PENAL § 130.65
Current through L.2019, chapter 315. Some statute sections may be more current, see credits for details.

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

THE PEOPLE OF THE STATE OF NEW YORK,
EX REL MOHAMMED KAHN, DIN 11-R-2775
NYSID #01434795K

Petitioner,

-against-

SUPERINTENDENT, Hudson Correctional
Facility, NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

Index No. 7925-14
RJI No. 10-14-0483

DECISION AND ORDER

This is a return on a Writ of Habeas Corpus signed by this Court on September 3, 2014. The Writ was served personally on the Superintendent of Hudson Correctional Facility on September 8, 2014, and upon the Attorney General of the State of New York, personally, on the same date. A Return to the Writ was received from the Attorney General's Office on September 23, 2014. A Reply from Petitioner's counsel was received September 25, 2014.

FACTS

Mr. Khan was convicted of Sexual Abuse in the First Degree, Forcible Touching

and Endangering the Welfare of a Child as a result of a jury trial. He was sentenced on August 1, 2011, to serve a determinate sentence of 3 years with 5 years post release supervision. His maximum release date was July 1, 2014. On or before July 1, 2014, according to the attachments of the Attorney General's Return, the Department of Corrections transferred Mr. Khan to Hudson Correctional Facility, which, according to an internal e-mail, is viewed as a residential treatment facility. The e-mail goes on to state "RTF inmates will serve their parole supervision time in DOCCS pending an approved residence that is verified to be located outside of the Penal Law 220.00 (14) definition of school grounds."

The last sentence of the June 18, 2014, e-mail states as follows:

"While the parolee is in the custody of DOCCS, he\she is subject to all the same rules and regulations which govern any inmate, as well as any conditions he may have signed with community supervision."

Attached to the e-mail is an unsigned acknowledgment by Mr. Khan that under the provisions of his conditions of release, special conditions have been imposed, which will remain in effect until the termination of his legal period of supervision. The notice contains, in capital letters the following statements:

Pursuant to the authority conferred upon the New York State Board of parole under Section 70.45 (3) of the Penal Law to impose conditions of release upon an individual serving a determinate sentence who is to be released to serve a period of post-release supervision as a condition of your post-release supervision you shall be transferred to and participate in the programs of residential treatment facility as that term is defined by Corrections Law Section 2 (6) 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.

Mr. Khan has alleged, without contradiction, that he has been incarcerated in the Hudson Correctional Facility, a medium security prison, together with inmates who have not yet reached their conditional or maximum release date and is currently subject to the same institutional rules as all other inmates and to disciplinary infractions for violating these rules. Mr. Khan has not been offered any programming, much less a program designed to ease his transition back to the community. He works as a janitor cleaning the entranceway to the prison for $1.50 per week.

Both sides agree that Mr. Khan has submitted for review and inspection several different addresses, including the residence of his wife and two children (ages 13 and 5), which have been rejected by the State. Although he has asked permission to live with his family, whose residence is claimed to be more than 1000 feet away from any school, there has been no decision with regard to that request as of the writing of this Decision. In the interim, he remains an inmate of the New York State Department of Corrections, being treated like any other inmate in that medium security facility.

DISCUSSION

It is clear that Mr. Khan has been classified as a level one sex offender pursuant to the Sex Offender Registration Act. He is, therefore, subject to the restrictions imposed by the Sexual Assault Reform Act of 2000, which, among other things, prohibit him from living within 1000 feet of a school or place where children congregate while on post-release supervision.[1] It is also clear that the Board of Parole is authorized to establish conditions of post-release supervision and may include as a condition of post-release supervision that an offender be subject to programs of a residential treatment facility as that term is defined in subdivision 6, § 2 of the Correction Law.[2]

"Residential treatment facility" is in turn defined as:

> A correctional facility consisting of a community-based residence 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 will soon be eligible for release on parole who intend to reside <u>in or near that community when released</u>.[3] (Emphasis supplied.)

Without making any attempt to demonstrate that the Hudson Correctional Facility

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[1]Penal Law §220.00 (14)

[2]New York Penal Law §70.45 (3)

[3]Corrections Law §2 (6)

has been designated as a residential treatment facility nor, any attempt to contradict the factual assertions submitted by Mr. Khan and his counsel relative to the absence of any programs or educational and training opportunities, the Department of Corrections asserts, without any evidence, that Mr. Khan is in fact in a residential treatment facility. It argues, that because it has the authority to transfer him to such a facility for a period of up to 6 months, the challenge to his incarceration by means of a Writ of Habeas Corpus is without merit because he is not subject to immediate release.

This argument might have merit if there was evidence that the facility in which he is presently confined meets the criteria set forth in Section 73 of the Corrections Law. The criteria for such a facility include:

> the ability to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation in accordance with the program established for him or her;[4]
>
> the securing of appropriate education, on-the-job training and employment, including supervision of inmates during their participation of activities outside any such facility and at all times while they are outside any such facility;[5]
>
> the establishment of programs directed toward rehabilitation and total integration into the community and the assignment of a specific program to each inmate by the superintendent of the facility with a written

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[4]Corrections Law §73 (1)

[5]Corrections Law §73 (2)

memorandum of such program delivered to the inmate.[6]

The Commissioner is clearly authorized to use any residential treatment facility as a residence for persons on community supervision. However, nothing that has been supplied by the Department of Corrections contradicts the assertion of Mr. Khan that he is treated like every other inmate in the Hudson Correctional Facility with no access to programs, on-the-job training or employment. Nothing that has been supplied by the Commissioner would suggest there is any difference in Mr. Khan's situation than with any other inmate still serving their time. Nor has the Commissioner supplied evidence of "an agreement" between him and the Chairman of the Board of Parole for the use of this particular facility as a residential treatment facility.[7] Finally, nothing has been suggested that Mr. Khan absconded from the facility or that the program assigned to the individual (if any there be) is inconsistent with the welfare or safety of the community or of the facility or its inmates such as to require suspension and restrict the inmate's activities in any manner that is necessary and appropriate.[8]

This Court is, therefore, left to conclude that the Hudson Correctional Facility is not really a residential treatment facility as defined by the statute and that the

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[6]Corrections Law §73 (3)

[7]Corrections Law §73 (10)

[8]Corrections Law §73 (4)

Commissioner's designation of it as such does not change its true nature. Furthermore, all of the evidence supplied indicate that Mr. Khan's community is located in Brooklyn, New York, which is some 120 miles away from the Hudson Correctional Facility and not "in or near the community in which he intends to reside." Therefore, Mr. Khan has not been properly held pursuant to the authority of Penal Law §70.45 (3).

Use of a Writ of Habeas Corpus pursuant to Article 70 of the CPLR to inquire into the cause of such detention is, therefore, deemed appropriate. Jurisdiction has been established and Respondents have been put on notice and have submitted a return. Because there are no facts in dispute, and notice has been properly given pursuant to CPLR §7009, there is no need to hold a hearing. (CPLR §7009(c). Based upon the Affidavits submitted, it is clear that Mr. Khan is in custody[9] and as such, this Court has the authority to inquire as to the legality of his detention.

The Commissioner, through counsel, appears to take the position that because of the post-release supervision requirements of Penal Law §70.45, the burden rests upon the convicted Defendant to establish a suitable residence and that he may be properly confined for up to 6 months in a residential treatment facility until such time as he supplies an approved residence. (Affirmation of Joshua E. McMahon, paragraphs 17

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[9]No argument to the contrary has been advanced by the Commissioner.

through 20). This position ignores the statutory duty of the Parole Board to assist the individual in locating such a residence. This is reflected in 9 NYCRR §8002 and, in particular, §8002.7. Among the criteria set forth in that Section are:

> The states coordinated and comprehensive approach also recognizes the necessity to provide emergency shelter to individuals in need, including those who are sex offenders, and the importance of stable housing and support in allowing offenders to live in and reenter the community and become law-abiding and productive citizens. (§8002.7(c))

Subdivision d provides, in part,:

> (1) Not all sex offenders are equally dangerous. Some sex offenders may pose a high risk of committing a new sexual crime; others may pose only a low risk;
>
> (3) All social services districts are required by statute, regulation and direct it to arrange temporary housing assistance for eligible homeless individuals, including those were sex offenders;
>
> (4) To reduce recidivism it is important that offenders be able to reenter society and become productive and law-abiding citizens whenever possible. A stable living situation and access to employment and support services are important factors that can help offenders who successfully reenter society.
>
> (6) Decisions as to the housing and supervision of sex offenders should take into account all relevant factors, and no one factor will necessarily be dispositive. These factors should include, but not be limited to, the factors enumerated in the statute, the risk posed by the offender, the nature of the underlying offense, whether housing offenders together or apart is safer and more feasible, the most effective method to supervise and provide services to offenders, and the availability of appropriate housing, employment, treatment and support.

This regulation goes on to distinguish the level of care that the Board of Parole is obligated to perform as it relates to housing selections for individuals that have been categorized as level II or level III sex offenders. (§8002.7 (e) and(f). The implication, of course, is that a lower level of scrutiny and care would apply to those individuals categorized as a level I sex offender. In general, the division of parole is charged, among other things, with the duty to:

> Assist inmates eligible for parole or conditional release and inmates on parole or conditional release to secure employment, educational, or vocational training, and encourage apprenticeship training of such persons through the assistance and cooperation of industrial, commercial, and labor organizations. (9 NYCRR §8000.1 (9)(5)).

In this case, Mr. Khan has presented proof that he can return to his own residence where his wife and two children await him. It is asserted, without contradiction, that the new residence of his wife and children does not violate the strictures contained in Penal Law §220.00 (14).[10] Notwithstanding the foregoing, the Board of Parole has yet to suggest any place of residence in the community from which Mr. Khan originates. The net result is an extension of Mr. Khan's sentence in prison (not an RTF), beyond the maximum expiration date of his sentence, without authority. Cf. People ex rel O'Connor

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[10]Exhibit B to Verified Petition for Writ of Habeas Corpus

v. Berbary, 195. Misc.2d 36 (Sup. Ct. Erie County 2002).[11]fn 12.

In summary, the Writ of Habeas Corpus is granted and the Petitioner is ordered to be released within 10 days from the date of this Decision if he has not otherwise been placed with a legitimate residential treatment facility operated by the New York State Department of Corrections that meets the statutory criteria contained in Section 73 of the Corrections Law. In the event that he is transferred to a legitimate residential treatment facility, within said 10-day period, proof of such transfer shall be supplied to the Court and to attorney for the Petitioner. In the absence of such transfer and proof of the same, Petitioner's attorney shall present a copy of this Decision and Order to the Superintendent of the Hudson Correctional Facility. Attorney for the Petitioner is also directed to furnish to the New York State Board of Parole, the address where the Petitioner shall reside in such event, the occupants of said residence, and the name of the prospective employer and date of employment, if any, upon such re-employment.

The original Decision and Order is being mailed to Jan Hoth, Esq. The

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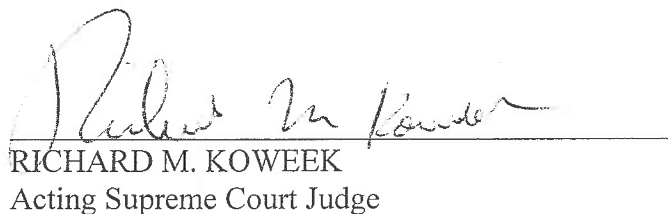
[11]This case is, therefore, distinguishable from the recently decided opinion of the Hon. Frank J LaBuda, People of the State of New York ex rel Raheem White v. Superintendent of Woodbourne Correctional Facility, (2014 N.Y., slip Op, 5142 2 (U), Sullivan County, September 25, 2014). In that case, the Court determined that the Defendant, a level III sex offender had been appropriately confined to the Woodbourne residential treatment facility, which actually offered educational classes, vocational training opportunities, sex offender counseling, industrial training and transitional services. The application for a Writ of Habeas Corpus was denied.

original Motion papers are being sent to the Columbia County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry, or notice of entry.

This is the Decision and Order of this Court.

DATED: Oct 1, 2014
Claverack, New York



RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Verified Petition for Writ of Habeas Corpus for Mohammed Khan by his attorney Jan Hoth, Esq., dated August 27, 2014, together with Exhibits "A" through "E";

2. Return of Joshua E. McMahon, Assistant Attorney General, dated September 19, 2014, with exhibits "A" through "D";

3. Letter of Jan Hoth, Esq., dated September 22, 2014.

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

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THE PEOPLE OF THE STATE OF NEW YORK
EX REL. ANTHONY SCARBERRY,
Petitioner,

DECISION, ORDER AND JUDGMENT

-against-

Index No: 3963/14

WILLIAM CONNOLLY, Superintendent of Fishkill Correctional Facility, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
Respondents.

---x

On April 30, 2014 the petitioner completed his sentence and began his post-release supervision. Pursuant to Penal Law §70.45(3) the petitioner may be held in a residential treatment facility ("RTF") for up to, "not exceeding," six months. The six months ended October 30, 2014.

On September 12, 2014 the court converted petitioner's *habeas corpus* proceeding to an Article 78 proceeding and set it down for a hearing to be held October 9, 2014 to determine whether the respondents were compliant with the Corrections Law and Penal Law provisions regarding petitioner's RTF program status. No one appeared for that hearing.

On October 31, 2014, in this court's decision and order denying the petitioner's motion to reargue the order converting this to an Article 78 proceeding, the hearing was rescheduled for November 3, 2014. However, the petitioner sought an adjournment which was granted to November 7, 2014. The October 31, 2014 order specifically directs that a hearing be conducted to determine whether the Fishkill Correctional Facility ("FCF") is housing petitioner in an RTF that "consists of a community based residence in or near a community where employment, educational and training opportunities are readily available" to the extent required by Correctional Law §2(6) and §73. If petitioner were not released, then it was further ordered that respondents' counsel be prepared to demonstrate why the petitioner should not have been released on October 30, 2014, the expiration date of the six month period immediately following fulfillment of petitioner's underlying term of

imprisonment, and per PL §70.45(3). The court questioned under what authority respondents allege the petitioner is held.

The court rejects respondents' counsel's argument that the Commissioner of the Department of Corrections and Community Supervision ("DOCCS") has more authority under Correction Law §73(1) and (10) to hold an inmate on post release supervision ("PRS") or a "releasee on community supervision" in an RTF than does the Board of Parole under PL §70.45(3), and specifically disagrees with respondents' counsel's conclusion that "Penal Law §70.45(3) has no effect as a limitation. . ." particularly where that statute provides that an inmate may be held in an RTF for a period of time "not exceeding six months." What is in contradiction to respondents' assertion is counsel's statement that although the former New York State Department of Corrections and New York State Division of Parole were merged by statute in 2011, the legislative intent preserved the New York State Board of Parole's independent authority to act. This court agrees that was the legislative intent and therefore it is only logical that PL §70.45(3) is applicable to both branches, if you will, of the DOCCS. If not, then the parole board's limitation under PL §70.45(3) to send an individual on PRS to an RTF for a period of time not exceeding six months would be devoid of meaning.

Respondents' counsel acknowledges that Mr. Scarberry has been held for more than six months (six months and approximately 3 weeks) and further acknowledges that he has not been given a written statement of an RTF program designed for him as required by statute. [CL §73(3)]. While there are distinctions in the daily schedule and treatment of RTF residents and the general population of inmates at the FCF, these are *de minimis* and insufficient to satisfy the requirements of CL §2(6) and §73.

According to the petitioner's testimony, he is treated much the same as inmates in the general population. While he is in a separate dorm, he still wears prison uniforms, and uses the same commissary, mess hall, and sick hall as the rest of the population. While he is transported without cuffs or shackles to court, to his parole officer in Poughkeepsie, and to work at the storehouse Monday through Friday from 7:30 a.m. until 2:30 p.m., he is not otherwise allowed to leave the FCF grounds. He pointed out that the storehouse he works at is on the FCF grounds, that he is with five other RTF inmates and DOCCS employees, and that his only contact with outside individuals is those driving the delivery trucks which he unloads into the storehouse. The storehouse is located approximately 500 yards outside the correctional facility security fence but it is still surrounded by a fence the only opening of which is the gate for the vehicles to go through.

The petitioner pointed out that Nassau County was his home. It is the county of conviction. It is the county to which he intends to return. He testified that there is a program there that he believes would be compliant, that he has requested that his supervising offender rehabilitation coordinator look into it, but has not gotten a response. The petitioner pointed out that he lives in a hostile environment because other inmates refer to his dorm as the "sex offender dorm." He testified that he is not getting assistance locating housing that is compliant with the Sexual Assault Reform Act ("SARA"). He testified that no one from Nassau County or outside FCF has spoken to him. He is still a prisoner.

Petitioner's second witness was Anne Marie McGrath, who also testified on behalf of the respondents. She is Assistant Commissioner in charge of population management for DOCCS. She is in charge of intake classification and movement. She authorized the retention of the petitioner in an RTF beyond the six months provided for by PL §70.45(3) because, she said, he did not have SARA compliant housing, and had not yet finished his period of post release supervision. She said it is not her responsibility to track how post release supervision time is spent. She noted several RTFs in the New York City area which are closer to Nassau County, including the Queensboro Correctional Facility, but gave a reason why each of them was not appropriate, in her opinion, for the petitioner.

The second witness to testify on behalf of the respondents was David Howard, a Senior Offender Rehabilitation Coordinator. He testified that he is familiar with the petitioner, that petitioner is on post release supervision, that he must have a SARA compliant residence before being released, that as a participant in the RTF program he meets with a counselor every two weeks as opposed to regular inmates who meet once per month, that he goes to the parole office in Poughkeepsie, that he is an RTF program which started November 3, 2014. He states it is a 28 day program with nine modules and that it is different than "Phase 3" which all inmates transitioning out of the correctional facility go through, as it is specifically designed for sex offenders though some topics are the same. The petitioner had maintained that it was virtually the same program he had already been through. Mr. Howard explained each of the nine modules including the first, giving the releasee information on registering as a sex offender; the second, how to find jobs; the third, healthy relationships and activities; the fourth, life skills; the fifth, available community resources; the sixth through eighth, which he states were not specifically for sex offenders and the ninth, which deals with and identifies triggers for relapse and that within the RTF it is specific for sex offenders. He testified that an offender rehabilitation coordinator that is an employee of DOCCS runs the program.

Mr. Howard testified that Mr. Scarberry is in the community project program and works at the storehouse, though he acknowledged that is on the FCF grounds. He stated that it is specific for the RTF inmates. He testified that it is different from the job program for other inmates in that most inmates in the general population are in the gates of the facility except for those working to take care of the grounds. He testified that the petitioner gets paid $10.00 per day which is substantially higher than other inmates who get $5.00 per day or less. He pointed out that Parole Office Stewart from the Manhattan Bureau of Special Services checks in every Monday at the work site and that the petitioner seeks his parole officer every Tuesday in Poughkeepsie although inmates in the general population see theirs less frequently. Mr. Howard testified that no housing that the petitioner proposed has been approved either because it would not have sex offenders or it was not SARA compliant. He is aware that none of the petitioner's family will house him. He confirmed what Assistant Commissioner McGrath stated which is that the housing that petitioner is in at Dorm 12-1 is for RTF participants only in the work release program. He stated that if petitioner had SARA compliant housing he would be released although he would have to wait two business days. He testified that if released now the petitioner would have nowhere to go and wouldn't be compliant with his post release supervision terms.

Mr. Howard acknowledged that Nassau County was the county of petitioner's conviction. He testified that the petitioner could be in an approved treatment program off facility grounds and come back to the facility only at night but that he has not seen this happen with anyone yet. He acknowledged that the petitioner is not able to leave the FCF grounds, that he has to abide by FCF rules, and commissary and mess hall schedules. He testified that he did not know whether anything regarding petitioner's living conditions had changed between his RTF program and being an inmate in the general population. The only differences he could cite is that there is a dorm for those in the RTF program, that they work outside the main security fence, have more frequent contact with a parole officer, have higher pay, and have offender rehabilitation coordinator meetings.

The court notes respondents' counsel's letter sent by fax yesterday indicating that petitioner will be transferred to the Queensoboro Correctional Facility "for the release to the community in Nassau County, his county of conviction, on November 24, 2014." By fax received today, petitioner's counsel asks that this matter not be dismissed as moot as this is an important and recurring issue affecting numerous RTF designees in the FCF and other correctional facilities. This court agrees. Therefore, it is hereby

ORDERED that the petition is granted to the extent that this court finds that DOCCS has failed to perform a duty enjoined on it by law in that petitioner is not in a compliant RTF program. Therefore, pursuant to CL §73, the respondents shall forthwith transfer Mr. Scarberry to a community based RTF with statutorily compliant programs, or see to it that he is placed in SARA compliant housing. A conference will be held before this court on December 3, 2014 at 9:45 a.m to ensure compliance with this order unless proof of such transfer or placement is provided to the court on or before December 2, 2014 at 12:00 p.m. Transfer to the Queensboro Correctional Facility may satisfy these requirements.

This constitutes the decision, order and judgment of the court.

Dated: November 21, 2014
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

Sophia Heller, Esq.
Karen Murtagh, Executive Director
Prisoners' Legal Services of New York
41 State Street, Suite M112
Albany NY 12207

State of New York
Office of the Attorney General
Attn: Barry Kaufman, Assistant Attorney General
One Civic Center Plaza, 4th Floor
Poughkeepsie NY 12601

Pursuant to 22 NYCRR 671.5, please be advised that you have the right to appeal, or to apply for permission to appeal, this order to the Appellate Division. Your notice of appeal must be filed at the Dutchess County Clerk's Office, 22 Market Street, Poughkeepsie, New York 12601. Upon proof of your financial inability to retain counsel and pay the cost and expenses of the appeal, you have the right to apply to the appellate court for assignment of counsel and leave to prosecute the appeal as a poor person. CPLR Section 5513 provides that an appeal may be taken, or motion for permission to appeal may be made, within thirty (30) days after the entry and service of any order or judgment from which the appeal is taken, or sought to be taken, and written notice of its entry.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. TONY SIMMONS, DIN 11-A-0596,

Index No. 8291-14
RJI No. 10-14-0698

Petitioner,

-against-

DECISION AND ORDER

SUPERINTENDENT, Hudson Correctional Facility, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

This is a return of a Writ of Habeas Corpus signed by this Court on December 30, 2014. The Petitioner appeared personally and by counsel, The Center for Appellate Litigation, Leticia M. Olivera, Esq., of counsel. The Respondent also appeared through the Attorney General, Louis Jim, Esq., of counsel, and submitted, on the return date of the Petition, a Return, an Affirmation of Terrence X. Tracy, Counsel to the New York State Board of Parole, with Exhibits and an Affidavit of Allegra Mussen, a Supervising Offender Rehabilitation Coordinator located at the Hudson Correctional Facility, also with Exhibits.

The Court heard oral argument from Petitioner and Respondent and reserved decision. Thereafter, at the Court's prompting, Petitioner's counsel caused to be served

upon the District Attorney of New York County and the District Attorney of Columbia County, a copy of the Writ of Habeas Corpus in order to comply with the notice requirements contained in CPLR §7009(a)(3). In subsequent correspondence, the Court advised both offices that they had until February 13, 2015, within which to state a position. No writing was received from the Columbia County District Attorney and the New York County District Attorney specifically took no position to supplement the arguments previously made by the Attorney General's Office and Counsel for the New York State Department of Corrections and Community Supervision.

FACTS

Tony Simmons (hereinafter "RELATOR") was convicted of two counts of Sexual Act in the Third Degree, in violation of Penal Law §130.40; five counts of Sexual Abuse in the Second Degree 130.60(1) and five counts of Sexual Act in the Third Degree, in violation of section 130.55(1) of the Penal Law. He was sentenced to a term of 4 years with 10 years of post-release supervision. The date of his sentence was February 1, 2011.

The Relator completed his sentence and reached his maximum expiration date, on November 24, 2014. However, because he was classified as a Level II Sex Offender pursuant to Correction Law Article 6-c, he is subject to the residency restriction codified

in Section 259-c (14) of the Executive Law and of the rules and regulations promulgated thereafter.[1]

Upon the completion of his sentence, the Relator was transferred from the Clinton Correctional Facility to the Hudson Correctional Facility on November 24, 2014. The Commissioner had, by designation, designated the Hudson Correctional Facility as a residential treatment facility.[2] The Relator is housed in protective custody, together with other inmates who have not yet reached their conditional release date or their maximum release date. He is being kept in the Hudson Correctional Facility because, according to the Respondents, of his inability to satisfy the Parole Board's special condition that he supply to them, in accordance with Section 259-c (14) of the Executive Law, a residence located outside the Penal Law definition of school grounds.[3] The Relator is from Bronx County and seeks to return there. Bronx County is approximately 100 miles away from

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[1]NYCRR §8002.7

[2]7 NYCRR §100.75

[3]Penal Law §220.00 (14) defines school grounds to mean: in or on, or with in 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 1000 feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within 1000 feet of the real property boundary line comprising any such. For the purposes of this section, an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.

the Hudson Correctional Facility.

ARGUMENT

The Petitioner argues that the New York State Department of Correction and Community Services (DOCCS) is unlawfully incarcerating the Relator under the false pretext of claiming to house him in a Residential Treatment Facility (RTF). They contend that Hudson Correctional Facility (HCF) does not comply with the statutory definition of a Residential Treatment Facility.[4] They argue as follows:

1. HCF is not in or near Bronx County, but rather more than 100 miles away. They argue further that the Department of Parole has assigned the Relator a parole officer from the Bronx II area office, thus recognizing the Relator's intent to return to Bronx County. Because it is a significant distance away from the Bronx, one of the goals of social reintegration is being thwarted. It is, therefore, in violation of Corrections Law Section 2 (6) and Section 73. The latter Section contains ten subparagraphs that further define the characteristics of a Residential Treatment Facility.

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[4]Corrections Law §2 (6) defines an RTF as: "a correctional facility consisting of a community-based residence 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 will soon be eligible for release on parole who intend to reside in or near that community when released".

2. The Relator is being treated like all other inmates, other than the fact that he is in protective custody and is, therefore, in a separate building on the grounds of HCF.

3. The Relator is not receiving services that are supposed to characterize a legitimate RTF program, including "programs directed towards the rehabilitation and total reintegration into the community of a person transferred to an RTF". These are supposed to include the securing of appropriate education, on-the-job training and employment.[5]

4. In the event that the Court determines that the form of the proceeding is inappropriate, it requests that the Court convert the action to a Petition pursuant to Article 78 of the CPLR and find that DOCCS failed to perform a duty enjoined upon it by law.

The Respondent argues that the Writ of Habeas Corpus should be denied because the Petitioner is not entitled to immediate release. They contend that the placement of the Relator in HCF is lawful because:

1. The Hudson Correctional Facility has been lawfully designated as a Residential Treatment Facility; (see fn. 2, supra).

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[5]Corrections Law §73(2), (3).

2. The Relator was convicted of one or more of offenses that obligate the Board of Parole to impose a mandatory condition of parole release preventing that individual from residing anywhere in the community that might violate Penal Law Section 220.00 (14). (See fn. 3, supra). Such limitations were imposed upon the Relator under the authority of the Executive Law §259-c (14).[6]

3. They concede, that due to "security concerns", because he is in protective custody, the Relator has been "unable to participate in the RTF therapeutic group and/or RTF Community Project."[7] He has only been afforded a nine module workbook, which she describes as a "self driven workbook program."[8]

4. The Relator has the burden of providing a residence in the community in compliance with the foregoing Section, and because of his failure to do so, he is properly

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[6]This Section provides that "where a person serving a sentence for an offense defined in Article 130...of the Penal Law, and the victim of such offense was under the age of 18 at the time of such offense or such person has been designated a Level III Sex Offender...is released...pursuant to subdivision 1 or 2 of this Section, the board of parole shall require, as a mandatory condition of such release that such...offender shall refrain from knowingly entering into or upon any school grounds...or any other facility or institution primarily used for the care and treatment of persons under the age of 18 while one or more of such persons under the age of 18 are present...."

[7]Affidavit of Allegra Mussen, Supervising Offender Rehabilitation Coordinator, sworn to January 12, 2015, at paragraph 11.

[8]Mussen Affidavit, at paragraph 12.

held in the aforesaid RTF. Therefore, they argue, his confinement is neither unlawful nor improper. Accordingly, his current confinement is in full compliance with Penal Law §70.45(3), and the Petition for a Writ of Habeas Corpus should be denied.

5. They reject the notion that any portion of the law imposes upon the Board of Parole a duty to affirmatively identify or secure a residence in the community for an offender and cite several cases that they believe support this proposition.

DISCUSSION

There has been an ongoing problem, in the court's experience, with the ability of the Department of Corrections and Community Services in placing convicted sex offenders in the community after they have achieved their maximum release date to comply with Executive Law 259-c (14) and Corrections Law Sections 2(6) and 73. These latter Sections define and describe the characteristics of a Residential Treatment Facility.

It is undisputed that DOCCS, through the Division of Parole, has a right, or, the duty, to impose an additional condition on prospective parolees who are Level I, II or III Sex Offenders relative to their living arrangements. It is likewise undisputed that the Commissioner may, and in this case, has, designated HCF as a RFT. Finally, the Division

of Parole has the authority to retain designated sex offenders for an additional six months in such RFTs for such education and treatment that these programs may afford. The problem lies in their inability to persuade this court that the Hudson Correctional Facility has, in fact, established a RTF that meets the requirements of Correction Law §73 as it relates to Mr. Simmons. For the reasons set forth hereafter, this Court concludes that it has not.

As mentioned earlier, Corrections Law §2 (6) states, in its definition, that an RTF is "[a] facility consisting of a community-based residence 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." (Emphasis supplied.)

Similarly, §73 (1) of the Corrections Law states that an inmate transferred to a residential treatment facility

> may be allowed 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. While outside the facility he or she shall be at all times in the custody of the department and under its supervision.

Subdivision 2 of the same Section states that

> the department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility.

Finally, subdivision 3 of this Section provides that the Commissioner shall establish

> programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility...Each inmate shall be assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her.

In this case, the Relator testified, and the Commissioner, through its papers conceded, that the only "program" that has been established for this particular inmate has been the "residential treatment facility program participant workbook".[9] While she suggests that there exists a " therapeutic group and\or RTF Community Project" she concedes that he has not participated in it. Nor does the Commissioner supply any information regarding an attempt to involve the Relator in on-the-job training or employment outside of that facility.

Most significantly, the Respondent does not suggest that HCF is located "in or

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[9]Exhibit "A" to Affidavit of Allegra Mussen.

near the community" where the Relator will reside when released. Indeed, Respondents avoid the subject of proximity entirely. At least one Court has held that this defect alone is enough to declare the inmates incarceration illegal.[10]

This Court is aware of the physical layout of the Hudson Correctional Facility, having inspected the same pursuant to its duties as a Superior Court Judge. The location of the wing in which inmates receiving protective custody are housed is close to the wing that houses other inmates not so protected. It is difficult to understand the explanation offered by the Respondents regarding their failure to include inmates in the protective custody wing in such programs developed by the Superintendent regarding the securing of appropriate education, on-the-job training and employment. All it would take is for the counselor to walk through the parking lot. Nor do they offer evidence of a memorandum of such program for that particular inmate. Finally, nothing has been suggested that the Relator has absconded from this facility, or that any programs that might have been assigned to him are inconsistent with the welfare or safety of the community or the facility or its inmates such as to require suspension and restrict the inmate's activities in any manner that might be necessary or appropriate.[11]

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[10]Muniz v. Uhler, 2014 WL 699, 1640 (N.Y.S.) 2014 N.Y. Slip Op 33 3134 (Sup. Ct. Franklin County).

[11]Corrections Law, §73 (4).

Based upon the evidence before it, this Court is left to conclude, once again,[12] that the Hudson Correctional Facility does not comply with its own statutory requirements as it relates to this particular inmate and that, therefore, Tony Simmons, is not being properly held pursuant to the authority of Penal Law §70.45 (3).

The use of a Writ of Habeas Corpus pursuant to Article 70 of the CPLR to inquire into the cause of the Relator's detention is deemed appropriate. Although not raised by any of the parties, the Court required attorneys for both sides to state a position with regard to the applicability of and compliance with CPLR §7009(a)(3). In response, the Petitioner supplied proof, after the fact, of service of the Petition for Writ of Habeas Corpus and the papers upon which it was based upon the District Attorney of Columbia County and the District Attorney of New York County. Neither District Attorney's Office has offered any arguments to supplement those advanced by the Attorney General and Counsel for DOCCS. The Respondents have not challenged the use of a Writ of Habeas Corpus nor raised any issue concerning the late compliance with CPLR §7009(a)(3). Accordingly, the Court concludes that jurisdiction over all of the parties is completed.

The Writ of Habeas Corpus is granted and the Petitioner is ordered to be placed

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[12]See People ex rel. Kahn v. Superintendent Hudson Correctional Facility New York State Department of Corrections and Community Supervision, Index #7925 – 14, Columbia County Supreme Court, unreported.

from Hudson Correctional Facility to an RTF that is in compliance with the mandates of Correction Law Section 2 (6) ("in or near Bronx County") and Section 73. In the alternative, they are directed to see to it that the Petitioner is promptly placed in housing in compliance with Executive Law Section 259-c (14), or housing that is otherwise appropriate in the estimation of department staff.

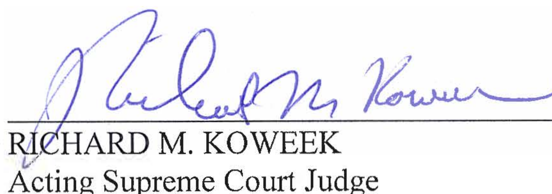
This order shall take effect 10 days from the date it is served upon the Respondents with Notice of Entry.

The original Decision and Order is being mailed to Leticia M. Olivera, Esq. The original Motion papers are being sent to the Columbia County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

Counsel is not relieved from the provision of that rule regarding the filing, entry, or notice of entry.

This is the Decision and Order of this Court.

DATED: February 18, 2015
Hudson, New York



RICHARD M. KOWEEK
Acting Supreme Court Judge

Papers Considered:

1. Verified Petition for Writ of Habeas Corpus dated December 19, 2014, together with Exhibits "A" through "E"; Writ of Habeas Corpus dated December 30, 2014,; Order to Produce dated December 30, 2014;

2. Return of Attorney General's Office by Louis Jim, Esq., dated January 14, 2015;

3. Affirmation of Terrence X. Tracy, Esq., dated January 12, 2015, together with Exhibits "A" through "E"; and

4. Affidavit of Allegra Mussen sworn to January 12, 2015, together with Exhibits "A" through "E".

DM

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

____x

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. NIKKO SIMMONS,

Petitioner,

DECISION, ORDER AND JUDGMENT

-against-

Index No: 4771/14

SUPERINTENDENT, Fishkill Correctional Facility, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

____x

Petitioner brings this application seeking *habeas corpus* relief, or in the alternative, converting this matter to a proceeding pursuant to Article 78 of the CPLR. Petitioner claims he is being unlawfully detained at the Fishkill Correctional Facility ("FCF"). Petitioner served a five year determinate sentence and was released to post-release supervision on or about May 28, 2013. Thereafter, he pled guilty to violating a condition of his release and was given a 12 month time assessment which he completed on July 12, 2014. On that date, DOCCS' Superintendent William Connolly recommended that petitioner be designated to a residential treatment facility ("RTF") because he had yet to secure a residence "outside of the Penal Law definition of school ground." On June 16, 2014, DOCCS' Acting Commissioner invoked her alleged authority under Correction Law §73(10) to place petitioner in an RTF "until such time as [he] proposed and DOCCS has approved" a Sexual Assault Reform Act ("SARA") compliant residence. Petitioner claims he was not released to an RTF and should have received assistance finding housing. Petitioner previously brought a proceeding pursuant to CPLR Article 70 seeking *habeas corpus* relief on this same basis. By decision, order and judgment dated August 15, 2014 this court denied the petition without prejudice to renew if suitable housing were not located within 60 days and granted petitioner leave to bring an Article 78 proceeding to challenge respondents' determination that he is in an RTF, that is, in a program at the FCF which is RTF compliant.

The petitioner, Nikko Simmons, is serving five years of post-release supervision ("PRS") pursuant to Penal Law §70.45 (2-a). His expiration date is May 26, 2018. The Board of Parole has

the authority to transfer Mr. Simmons upon his release to post-release supervision to an RTF as that term is defined in Correction Law §2(6). PL §70.45(3).

Per CL §73(1) and PL §70.45(5)(a), a person in an RTF remains in the custody of, and is to be supervised by, the Department of Corrections and Community Services ("DOCCS") which since 2011 encompasses the Board of Parole. The petitioner was transferred to the FCF which is a designated RTF per 7 NYCRR §100.90.

Per CL§73(2) DOCCS must secure education, on the job training and employment for an inmate, like Mr. Simmons, who is serving post-release supervision in a designated RTF program. Per CL §73(3) each inmate under these circumstances shall be assigned a specific program and a written copy shall be given to that inmate. The RTF may be a correctional facility. A correctional facility is defined at CL §2(4). An RTF is defined at CL §2(6) as "[a] correctional facility consisting of **a community based residence** 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**." There is no definition in the Correction Law or the Penal Law of "community based." Absent a controlling statutory definition, the court must construe the statutory terms according to their usual and commonly understood meaning. Orens v. Novello, 99 NY2d 180, 185-86 (2002); Rosner v. Metropolitan Prop. & Liab. Ins. Co., 96 NY2d 475, 479. Dictionary definitions may be used to aid in determining the meaning of a word or phrase. Orens v. Novello, 99 NY2d at 186. The petitioner's dorm in the RTF is not a "community based residence."

Even if it could rationally be argued that the FCF is a community based correctional facility with a statutorily compliant RTF, per CL §2(6), the petitioner is entitled to be in an RTF in the community in which he intends to reside. It is undisputed that the petitioner intends to reside in Manhattan. It is also undisputed that the petitioner has not been the beneficiary of education, on the job training, employment, or a specific program assigned to him to integrate him back into the community in which he intends to reside, as required by CL §73. The most respondents' counsel could offer is that DOCCS is "doing the best they can." As of October 27, 2014 or November 3, 2014, the petitioner was finally assigned a job in the correctional facility for $10.00 per day. However, respondents' counsel did not refute that petitioner had not yet worked. She could not refute that only a "**DRAFT**" of a copy of a category and table of contents of programs was provided, which was referred to as a nine step module. Respondents could not dispute that no specific program was established for Mr. Simmons. That is what is required by the statute. Nor could respondents' counsel refute that Mr. Simmons was not receiving education other than two 2 hour classes that he had been to the Monday and Tuesday before the scheduled court date, nor that he was not receiving on the job training or help locating housing, or any of the other services required. Respondents' counsel repeatedly stated that she did not know with respect to Mr. Simmons whether he had received any such additional services. It was unrefuted that petitioner was undergoing the same type of transitional program as did every inmate transitioning out of the facility and as was the same as that which he had already been through nearing the end of his term. Nothing that has been offered by the respondents contradicts petitioner's assertion that he is still substantially treated like non-RTF

inmates in the FCF, kept behind razor-wire fences in a medium security prison 60 miles away from Manhattan, the community to which he intends to return.

Pursuant to PL §70.45(3) petitioner is subject to post-release supervision for five years and placement in an RTF for " **a period not exceeding six months...**" (emphasis added). It is the respondents' contention that respondents are not limited to the six months of post-release supervision set forth in PL §70.45(3) but instead that DOCCS has the right to keep the petitioner in an RTF for the entirety of the five years of his post-release supervision portion of his sentence and that therefore, he is not illegally detained. Respondents claim this is authorized by CL §73(10). However, that would divest of meaning the six month limit imposed by PL §70.45(3), and would serve to give the Commissioner of DOCCS power neither authorized by statute nor intended by the legislature. Based on the legislative history of §70.45, PRS must be imposed by the sentencing court and supervised by the Division of Parole. It is the responsibility of the Board of Parole to establish and impose conditions of post-release supervision. PL §70.45(3); Executive Law §§259-c(2); 259-i(3); People v. Monk, 21 NY3d 27 (2013). The merger of the former Department of Correctional Services and the Division of Parole was done to reduce costs, bureaucracy and create more integrated services. The Board of Parole, however, continued to operate as an independent body and maintained its existing functions and authority. The merger did not give the Commissioner powers under the Correction Law previously given to the Board of Parole under the Penal Law and Executive Law. Thus, even accepting respondents' contention that the Commissioner is authorized to place petitioner in an RTF following the expiration of his determinate term, such period could not exceed six months.

Since the petitioner's six months in an RTF began on July 12, 2014, petitioner is not entitled to release until January 12, 2015. Therefore *habeas corpus* relief is denied. The court notes that petitioner failed to comply with the provisions of CPLR §7009(a)(3) requiring notice of this proceeding to the offices of the district attorney in the counties of conviction and incarceration. However, based upon the undisputed allegations that petitioner is not in a compliant RTF program, it is hereby

ORDERED that this matter is converted to a proceeding pursuant to CPLR Article 78 [CPLR §103(c)]. It is further

ORDERED that petitioner is not barred from proceeding under Article 78 based on a failure to exhaust available administrative remedies. While generally a party objecting to the act of an administrative agency is required to exhaust available administrative remedies before being permitted to litigate in court, see Young Men's Christian Assn. v. Rochester Pure Waters Dist., 37 NY2d 371 (1975), exceptions exist. The exhaustion rule is not an inflexible one and need not be followed when an agency's action is challenged as either unconstitutional, wholly beyond its granted power, when resorting to an administrative remedy would be futile or when its pursuit would cause irreparable injury. See Usen v. Sipprell, 41 AD2d 251 (4th Dept. 1973); Pierne v. Valentine, 291 NY 333 (1943); see also Watergate II Apts. v. Buffalo Sewer Auth., 46 NY2d 52 (1978). This court *sua sponte* converted this proceeding to an Article 78 proceeding. Moreover, it is clear from respondents'

opposition that they are resolute in their position that the Fishkill Correctional Facility RTF fully comports with Correction Law §2(6). Under such circumstances, the court finds that exhaustion would be futile, and that the delay in pursuing an administrative remedy would cause petitioner irreparable injury. It is further

ORDERED that upon the undisputed allegations, this court finds that DOCCS has failed to perform a duty enjoined on it by law in that petitioner is not in a compliant RTF program. Therefore, pursuant to CL §73, the respondents shall forthwith transfer Mr. Simmons to a community based RTF with statutorily compliant programs, or see to it that he is placed in SARA compliant housing. According to the petitioner's counsel, there is a process pursuant to which petitioner's parole officer would contact the appropriate authority at Bellevue Hospital in Manhattan to obtain an appointment for petitioner to be interviewed and placed. Counsel asserted, and it was unrefuted, that there are three SARA compliant shelters in New York City with a bed available for petitioner. A conference will be held before this court on December 3, 2014 at 9:45 a.m. to ensure compliance with this order unless proof of such transfer or placement is provided to the court on or before December 2, 2014 at 12:00 p.m.

This constitutes the decision, order and judgment of the court.

Dated: November 18, 2014
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to 22 NYCRR 671.5, please be advised that you have the right to appeal, or to apply for permission to appeal, this order to the Appellate Division. Your notice of appeal must be filed at the Dutchess County Clerk's Office, 22 Market Street, Poughkeepsie, New York 12601. Upon proof of your financial inability to retain counsel and pay the cost and expenses of the appeal, you have the right to apply to the appellate court for assignment of counsel and leave to prosecute the appeal as a poor person. CPLR Section 5513 provides that an appeal may be taken, or motion for permission to appeal may be made, within thirty (30) days after the entry and service of any order or judgment from which the appeal is taken, or sought to be taken, and written notice of its entry.

NY Bill Jacket, 1998 S.B. 7820, Ch. 1

New York Bill Jacket, 1998 Senate Bill 7820

1998
Governor of New York
221st Legislature, 1998 Regular Session

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APPROVAL # 25 CHAPTER 1

LAWS OF 1998 __________ MEMORANDUM NO. __________

SENATE BILL 7820 ASSEMBLY BILL __________

_______________ _______________

7820

IN SENATE

June 18, 1998

Introduced by Sens. VOLKER, DeFRANCISCO, BRUNO, ALESI, BALBONI, COOK, FARLEY, FUSCHILLO, GOODMAN, HANNON, HOLLAND, JOHNSON, KUHL, LACK, LARKIN, LAVALLE, LEIBELL, LIBOUS, MALTESE, MARCELLINO, MARCHI, MAZIARZ, MEIER, NOZZOLIO, PADAVAN, PRESENT, RATH, SALAND, SEWARD, SKELOS, SPANO, STAFFORD, TRUNZO, VELELLA, WRIGHT -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the penal law, the executive law and the criminal procedure law, in relation to eliminating parole for first-time violent felony offenders; establishing periods of post-release supervision for violent felony offenders; and providing for victim notification of certain inmate releases, and to repeal subdivision 4 of section 70.02 of the penal law and section 149-a of the correction law relating thereto

In Assembly 11453 by Rules (***)

DATE RECEIVED BY GOVERNOR:

7/30

ACTION MUST BE TAKEN BY:

8/11

DATE GOVERNOR'S ACTION TAKEN:

AUG 6 1998

SENATE VOTE 57 Y 4 N HOME RULE MESSAGE _____ Y _____ N

DATE 6/18/98

BILL IS DISAPPROVED

ASSEMBLY VOTE _____ Y _____ N

DATE __________

DATE __________

____

COUNSEL TO THE GOVERNOR

Senate Vote Bill: S7820 Date: 06/18/1998 Aye - 57 Nay - 4

Aye Abate	Aye Alesi	Aye Balboni	Aye Breslin
Aye Bruno	Aye Connor	Aye Cook	Aye DeFrancisco
Aye Dollinger	Aye Farley	Aye Fuschillo	Aye Gentile
Aye Gold	Aye Gonzalez	Aye Goodman	Aye Hannon
Aye Hoffmann	Aye Holland	Aye Johnson	Aye Kruger
Aye Kuhl	Aye Lachman	Aye Lack	Aye Larkin
Aye LaValle	Aye Leibell	Nay Leichter	Aye Libous
Aye Maltese	Aye Marcellino	Aye Marchi	Aye Markowitz
Aye Maziarz	Aye Meier	Aye Mendez	Nay Montgomery
Aye Nanula	Aye Nozzolio	Aye Onorato	Aye Oppenheimer
Aye Padavan	Aye Paterson	Aye Present	Aye Rath
Aye Rosado	Aye Saland	Aye Sampson	Aye Santiago
Aye Seabrook	Aye Seward	Aye Skelos	Nay Smith
Aye Spano	Aye Stachowski	Aye Stafford	Aye Stavisky
Aye Trunzo	Aye Velella	Aye Volker	Nay Waldon
Aye Wright			

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NEW YORK STATE ASSEMBLY

TWO HUNDRED TWENTY-FIRST SESSION

REPRINT

DATE: 07/29/1998

DATE: 07/29/1998

TIME: 04:45:51PM

BILL: S7820 (A11453) R.R. NO: 1604 SPONSOR: VOLKER

Eliminates parole for first-time violent felony offenders; repeals certain provisions of the penal law and correction law relating thereto

Y	**Abbate PJ**	*Y*	*Fessenden DJ*	**Y**	**Norman C**
Y	*Acampora PL*	*Y*	*Flanagan JJ*	*Y*	*Nortz HR*
Y	*Alfano TW*	**Y**	**Galef SR**	*Y*	*Oaks RC*
Y	*Anderson RR*	**Y**	**Gantt DF**	*Y*	*O'Connell M*
Y	**Arroyo CE**	**NAY**	**Genovesi AJ**	*Y*	*O'Neil CA*
NAY	**Aubry JL**	**NAY**	**Glick DJ**	**NAY**	**Ortiz FW**
Y	*Bacalles JG*	**NAY**	**Gottfried RN**	*Y*	*Ortloff C*
Y	*Barraga TF*	**Y**	**Grannis A**	**Y**	**Parment WL**
NAY	**Bea SD**	**NAY**	**Green RL**	**Y**	**Perry NN**
Y	*Becker GR*	**NAY**	**Greene A**	**Y**	**Pheffer AI**
Y	*Bonacic JJ*	**Y**	**Griffith E**	**Y**	**Pillittere JT**
Y	**Boyland WF**	**Y**	**Gromack AJ**	*Y*	*Prentiss RG*
Y	*Boyle PM*	*Y*	*Guerin JJ*	**Y**	**Pretlow JG**
Y	**Bragman MJ**	**Y**	**Gunther JE**	**NAY**	**Ramirez R**
NAY	**Brennan JF**	**Y**	**Harenberg PE**	*Y*	*Ravitz J*
EOR	**Brodsky RL**	*Y*	*Herbst M*	*Y*	*Reynolds TM*
Y	*Brown HC*	**ABS**	**Hikind D**	**NAY**	**Rivera PM**
Y	**Butler DJ**	**Y**	**Hill EH**	**Y**	**Robach JE**
Y	*Butler MW*	**Y**	**Hochberg AG**	**Y**	**Sanders S**
Y	*Calhoun N*	**Y**	**Hoyt WB**	**NAY**	**Scarborough W**

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Y	**Canestrari RJ**	**NAY**	**Jacobs RS**	**Y**	**Schimminger RL**
Y	**Carrozza AM**	**Y**	**John SV**	*Y*	*Seaman DE*
Y	*Casale PM*	*Y*	*Johnson J*	**Y**	**Seminerio AS**
Y	**Christensen JK**	**Y**	**Katz M**	**Y**	**Sidikman DS**
NAY	**Clark BM**	**Y**	**Kaufman SB**	**Y**	**Smith RA**
Y	**Cohen A**	**Y**	**Keane RJ**	*Y*	*Spano MJ*
Y	**Colman S**	*Y*	*Kirwan TJ*	*Y*	*Stephens WH*
Y	**Colton W**	**Y**	**Klein J**	*Y*	*Straniere RA*
Y	**Connelly EA**	**Y**	**Koon D**	**NAY**	**Stringer SM**
Y	*Conte JD*	*Y*	*Labriola SL*	**NAY**	**Sullivan EC**
Y	**Cook VE**	**Y**	**Lafayette IC**	*Y*	*Sullivan F*
Y	*Crouch CW*	**Y**	**Lentol JR**	**Y**	**Sweeney RK**
Y	**Crowley J**	*Y*	*Little EO*	*Y*	*Tedisco J*
Y	**Cummings PG**	**Y**	**Lopez VJ**	*Y*	*Thiele FW*
Y	*D'Andrea RA*	**Y**	**Luster MA**	**Y**	**Tocci RC**
NAY	**Davis G**	**Y**	**Magee B**	**Y**	**Tokasz P**
Y	**Denis NA**	*Y*	*Mahoney BJ*	**Y**	**Tonko PD**
Y	**Destito RM**	*Y*	*Manning PR*	**Y**	**Towns DC**
Y	**Diaz R**	**Y**	**Matusow NC**	*Y*	*Townsend DR*
Y	**DiNapoli TP**	**Y**	**Mayersohn N**	**NAY**	**Vann A**
Y	*Dinga JJ*	**Y**	**Mazzarelli DJ**	**Y**	**Vitaliano EN**
Y	**Dinowitz J**	**Y**	**McEneny JJ**	*Y*	*Warner RJ*
Y	*Doran CJ*	*Y*	*McGee PK*	**Y**	**Weinstein HE**
Y	**Englebright S**	**Y**	**McLaughlin BM**	**Y**	**Weisenberg H**
Y	**Espaillat A**	*Y*	*Miller JM*	**Y**	**Weprin M**
NAY	**Eve AO**	**Y**	**Millman JL**	*Y*	*Wertz RC*
Y	**Farrell HD**	**Y**	**Morelle JD**	*Y*	*Winner GH*
Y	*Faso JJ*	*Y*	*Murray KP*	*Y*	*Wirth SL*
Y	**Feldman D**	*Y*	*Nesbitt CH*	**NAY**	**Wright KL**

Y	*Ferrara D*	**Y**	**Nolan CT**	**Y**	**Mr. Speaker**

YEAS: 128 **NAYS:20**

CONTROL: 89204672

ERTIFICATION: / S / Francine M. Misasi

CLERK OF THE ASSEMBLY

LEGEND: Y=YES, NAY=NO, NV=ABSTAIN, ABS=ABSENT, ELB=EXCUSED FOR LEGISLATIVE BUSINESS, EOR=EXCUSED FOR OTHER REASONS

CHAPTER 1

APPROVAL # 25

STATE OF NEW YORK

EXECUTIVE CHAMBER

ALBANY 12224

AUG 6 1998

MEMORANDUM filed with the Senate Bill Number 7820, entitled:

"AN ACT to amend the penal law, the executive law and the criminal procedure law, in relation to eliminating parole for first-time violent felony offenders; establishing periods of post-release supervision for violent felony offenders; and providing for victim notification of certain inmate releases, and to repeal subdivision 4 of section 70.02 of the penal law and section 149-a of the correction law relating thereto"

APPROVED

This Governor's Program Bill is entitled "Jenna's Law," in memory of Jenna Grieshaber, a young nursing student who was murdered last year in Albany. The bill amends the Penal Law, the Executive Law and the Criminal Procedure Law to end discretionary and conditional parole for first-time violent felony offenders, authorize determinate sentences for such offenders, and lengthen the minimum sentences of imprisonment that can be imposed. In addition, the bill requires that all violent felony offenders sentenced to state prison complete a period of post-release supervision. Like my Sentencing Reform Act of 1995, which ended parole for repeat violent felony offenders, Jenna's Law reflects two of my core beliefs about the sound administration of our criminal justice system: (i) those who commit violent crimes must receive stiff sentences to incapacitate them and to deter others; and (ii) violent criminals must actually serve those sentences and must not be released early.

Jenna's Law eliminates parole for first-time violent felony offenders and requires them to serve at least six-sevenths of their determinate sentences. Under current law, first-time violent felony offenders may receive discretionary parole after serving as little as one-half their maximum sentence; if denied discretionary parole under current law, they may be conditionally released before the expiration of their maximum term based on good behavior credit. Under Jenna's Law, first-time violent felony offenders may not receive good time credit in excess of one-seventh of their sentence; thus, they are not eligible for release from confinement until they have served at least six-sevenths of their determinate sentence. For this reason alone, under Jenna's Law

first-time violent felony offenders sentenced to state prison will serve more time in prison. To illustrate, an offender sentenced to an indeterminate prison term of five to ten years may be released after just 5 years. In contrast, under Jenna's Law a first-time violent felony offender who receives a determinate prison term of 10 years must serve at least six-sevenths of that term, 8½ years, before being eligible for release.

Another benefit of Jenna's Law is that victims of violent crime and their families and friends will know with considerable precision the amount of prison time that will actually be served. Under current law, first-time violent felony offenders receive indeterminate sentences, leaving victims, their families, the community and the offender without explicit knowledge regarding the offender's sentence. Determinate sentencing under Jenna's Law means “truth-in-sentencing,” which will reduce the anxiety victims suffer from not knowing when their assailants will be released and provides a more accurate assessment of the balance between crimes and penalties. Furthermore, defined and truthful sanctions have a greater capacity to deter future crime.

Since virtually all of violent felony offenders will eventually be released, the need to successfully reintegrate them into society is obvious. Without the authority to supervise violent felony offenders after release from incarceration, and without the ability to reincarcerate those who violate the terms of their release, the state's only option for intervention is to await the commission of new crimes by released offenders. Under current law, a violent felony offender who receives neither discretionary parole nor conditional parole is released into the community without any post-release supervision whatsoever. In contrast, Jenna's Law mandates that all violent felony offenders serve a term of supervision after release from prison. Post-release supervision enables the imposition and enforcement of conditions on offenders to promote their successful reintegration into the community and provides opportunities for early intervention, including reincarceration, if an offender's behavior threatens the safety of the community.

Victims of violent crime deserve the maximum amount of support and protection that we can provide. In this additional respect, Jenna's Law is a triumph for justice. Jenna's Law enables victims to receive notification of each and every change in an offender's custodial status. To enhance the safety and confidence of everyone, Jenna's Law builds upon Megan's Law by establishing an automated telephone system to enable a victim, his or her family, a witness or any member of the public to obtain information relating to the crime and sentence of a particular inmate and, upon the release of an inmate, information concerning his or her location, along with the address and telephone number of the regional parole office.

With the signing of Jenna's Law, which will be Chapter 1 of the Laws of 1998, we take another large step toward securing public safety. Over time, Jenna's Law will prevent thousands of crimes. As we remember and mourn Jenna, we must also celebrate the love that inspired her parents and sister to fight so courageously to ensure that from her death Jenna's Law would arise and save countless lives.

The bill is approved.

BILL MEMORANDUM

Bill Number: A. 11453

Sponsor: RULES (At the Request of M. of A. SILVER)

Summary:

The bill establishes determinate sentencing for first-time violent felony offenders, and requires they serve a minimum of six-sevenths of such determinate sentence. Additionally, for Class B, C and D violent felony offenses, the bill increases the minimum sentence of imprisonment which a court can impose. Furthermore, all violent felony offenders will be required to serve a period of post-release supervision. Finally, the bill creates a new Victim/Public Services Office which will be responsible for operating a “900” telephone number to inform members of the general public about released felons.

Justification:

This legislation provides a comprehensive response to violent crime by mandating determinate sentences for first-time violent offenders. With the enactment of this legislation, prison sentences will more precisely reflect the time inmates actually serve in prison. By advancing a comprehensive series of reforms, including tough new penalties for violent crime and stringent post-release supervision, the bill will make New York's communities safer.

Fiscal Impact:

There will be a minimal fiscal impact in future years.

Effective Date:

This act shall take effect immediately; provided, however, that Sections 1 through 39 of this act shall apply to offenses committed on or after September 1, 1998.

/CCR

C - 1

THE SENATE

STATE OF NEW YORK

ALBANY 12247

DALE M VOLKER

59TH DISTRICT

CHAIRMAN

COMMITTEE ON CODES

VICE CHAIRMAN

MAJORITY CONFERENCE

PLEASE RESPOND

□ ALBANY OFFICE

ROOM 708

LEGISLATIVE OFFICE BUILDING

ALBANY, NEW YORK 12247

518-455-3471

□ DISTRICT OFFICE

620 MAIN STREET

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EAST AURORA, NEW YORK 14052

716-655-0993

□ DISTRICT OFFICE

ROOM 109

LIVINGSTON COUNTY OFFICE BUILDING

GENESEO, NEW YORK 14454

716-243-7589

August 4, 1998
Hon. James M. McGuire
Executive Chamber
State Capitol
Albany, New York 12224

Re: S.7820

Dear Mr. McGuire:

This is in response to your request for comment on the above referenced legislation pending before the Governor for approval, and to submit the enclosed memorandum in support of the bill.

Senator Volker urges the Governor's approval, and I hope you will feel free to contact me if I can be of any assistance to you or your staff in preparing your recommendation.

Sincerely,

John R. Drexelius

Counsel

JRD:ho

Enc.

C-1

STATE OF NEW YORK

OFFICE OF THE ATTORNEY GENERAL

DENNIS C. VACCO

Attorney General

August 5, 1998

Hon. George E. Pataki
Governor
Executive Chamber

State Capitol
Albany, New York 12224

Re: S.7820/A.11453

Dear Governor Pataki:

I am writing to express my strong support for enactment of the above-captioned bill, which has passed the Senate and Assembly and is currently before you.

S.7820, or "Jenna's Law," as it has come to be known, would establish determinate sentences for first time violent felony offenders and would require the incarceration of such offenders for longer periods by mandating that they serve at least six-sevenths of their determinate sentences. The bill would also increase the minimum sentence of imprisonment that a court could impose for class B, C and D violent felonies. Felony offenders would also be required to serve a period of post-release supervision under the terms of S.7820. Finally, the bill would expand victim notification when persons convicted of violent felonies and certain other offenses are released, escape, or are released to the supervision of the Division of Parole.

Since taking office in 1995, you and I have repeatedly called for the elimination of parole for first time violent felons. As Chairman of the New York State Sentencing Reform Commission, I have wholeheartedly supported enactment of "Jenna's Law," and held public hearings in Syracuse and Staten Island to elicit comment on this common sense proposal.

The Senate majority, under the leadership of Senator Bruno, has also seen the need for this critical legislation, and has passed versions of this bill in each of the last three years. Unfortunately, it took the tragic death of a young nursing student -- Jenna Grieshaber -- and the tireless efforts of her grieving parents, to finally persuade the Assembly majority to act on this measure.

In the past three years, under your leadership, New York has made tremendous strides in returning rationality and common sense to our criminal justice system. The rights of victims are finally being returned to their proper place -- ahead of the "rights" of criminals. And these changes in the law have resulted in dramatic drops in the state's crime rate.

The historic Sentencing Reform Act of 1995 signaled the first step in the right direction -- sentences were lengthened for violent felons, "truth in sentencing" was established and discretionary release on parole for second-time violent felony offenders was eliminated. "Jenna's Law" will build on these successes and will make New York an even safer place to live. In fact, coupled with the 1995 reforms, it is estimated that "Jenna's Law" will spare as many as 48,000 New Yorkers each year from becoming crime victims. Simply put, tougher laws mean that fewer crimes are committed.

Finally, it is my hope that we can continue to build from here, and that we will continue our commitment to making our streets and communities safer. The time has come to revamp our outdated juvenile justice system and to pass tougher sexual assault laws, and I am confident that we will soon tackle these critical issues as well.

For all of the foregoing reasons, I respectfully urge you to sign into law S.7820 -- "Jenna's Law."

Sincerely,

DENNIS C. VACCO

ATTORNEY GENERAL

DCV:jdb

C-1

THE CITY OF NEW YORK

OFFICE OF THE MAYOR

NEW YORK, N.Y. 10007

July 31, 1998

S.7820 - by Senator Volker, DeFrancisco, Bruno, et al. (at request of the Governor)

AN ACT to amend the penal law, the executive law and the criminal procedure law, in relation to eliminating parole for first-time violent felony offenders; establishing periods of post-release supervision for violent felony offenders; and providing for victim notification of certain inmate releases, and to repeal subdivision 4 of section 70.02 of the penal law and section 149-a of the correction law relating thereto

APPROVAL RECOMMENDED

Hon. George E. Pataki
Governor of The State of New York
Executive Chamber
Albany, New York 12224

Dear Governor Pataki:

The above-referenced bill is now before you for executive action.

This bill would eliminate indeterminate sentences for first-time violent felony offenders, except in certain domestic violence cases where judges may impose indeterminate sentences for a battered spouse; establish determinate sentencing for first-time violent felony offenders; increase sentencing ranges for first-time violent felony offenders; impose "truth-in-sentencing" requirements for first-time violent felony offenders to ensure that they serve at least 6/7ths of their determinate sentence; and provide for statutory periods of post-release parole supervision, with judicial discretion in setting periods of post-release supervision for first-time violent felony offenders. The bill would also authorize certain violent felony offenders to serve their first six months of supervision following release from prison in a post release transition facility and require that determinate sentences be imposed in whole or half-year increments for violent felony offenders.

Moreover, the bill would establish enhanced penalties for offenders who have violated terms of their post-release supervision. For example, an offender could be returned to prison for a minimum of six months, regardless of the balance of their supervision period. Or, the offender could receive up to the maximum of the balance of that supervision period, not to exceed five years.

Additionally, the bill provides for the Department of Correctional Services to establish an automated telephone system to allow a victim, family member of a victim, a witness or any member of the general public to access information relating to the crime, sentence and release date of a person serving a sentence in a State prison.

Finally, the bill requires the Division of Parole to provide a victim, family member of a victim, a witness or any member of the general public to access information relating to the community of residence of a person under its supervision as well as the address and telephone number of the regional parole office to which such person has been assigned.

Despite historic decreases in crime in New York City during the past five years, current State laws governing parole undermine the City's attempts to combat serious felony offenses. Last year, released inmates violated parole so frequently that parole violators and conditional release violators accounted for 23 percent of all admissions to the State prison system. A recent State Department of Corrections study of inmates released to parole in 1993 concluded that 44 percent of parolees were returned to State prison within three years of their release. Because current parole laws have led to the inappropriate early release of many violent felons from prison, police are arresting the same habitual criminals over and over again. In fact, parolees have

committed so many crimes that the New York City Police Department has projected that there would be approximately 12,000 fewer major crimes in New York City alone if the State were to end parole in its entirety.

While the City favors determinate sentencing for all felons, not just violent felony offenders, the City supports this bill as it represents a crucial step toward the ultimate goal of "truth-in-sentencing." The proposed parole reforms would result in more certainty about the time to be served when an offender is sentenced, in that, the bill limits discretion to reduce terms of imprisonment. By permitting the discretionary process to wholly dictate the timing of release of prisoners, current law devalues the severity of the sentences that have been imposed. This bill represents an important step toward improving a system that is simply not working, by denying discretionary parole releases, setting determinate sentences, and providing post-release supervision, for all first-time violent felony offenders.

The public-especially the victims of violent felony offenses-is entitled to a criminal justice system that gives them a sense of security in knowing that penalties have been imposed with certainty.

Accordingly, it is urged that this bill be approved.

Very truly yours,

RUDOLPH W. GIULIANI, Mayor

By:

Criminal Justice Coordinator

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

42 WEST 44TH STREET

NEW YORK, NY 10036-6689

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GENERAL COUNSEL

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***

DENICE M. LINNETTE

DIRECTOR OF LEGISLATIVE AFFAIRS

(212) 302-6655

***

MEMORANDUM

TO: Governor's Counsel's Office

Senate and Assembly Codes Committee

Members, Senate Majority Counsel's Office

Assembly Majority Counsel's Office

FROM: Denice Linnette, Esq.

DATE: July 20, 1998

RE: "Jenna's Law"/Rockefeller Drug Law Reform

Attached you will find the following report on Proposed Legislation to Mandate Determinate Sentencing for First-Time Violent Felons and to Make Adjustments in the Rockefeller Drug Laws, by the Committee on Criminal Law. Since the issue was unresolved this legislative session, please consider the attached recommendations, as you prepare for the 1999 Legislative Session.

If you have any questions, please give me a call.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Report on Proposed Legislation to Mandate Determinate Sentencing for First-Time Violent Felons and to Make Adjustments in the Rockefeller Drug Laws

by The Committee on Criminal Law

Both the State Senate and the Assembly have proposed legislation to require determinate sentencing, and increase the mandatory minimum sentences, for first-time violent felony offenders; furthermore, both versions would add a period of post-release supervision onto the determinate sentence. The Assembly version additionally makes adjustments to the Rockefeller drug laws. In essence, the Assembly bill would allow nonviolent low-level drug offenders who successfully complete a year to eighteen months of approved drug treatment to avoid harsh príson sentences.

In our view, while both the Senate and the Assembly bills are capable of being improved, the Assembly version in particular has much to recommend it and deserves serious consideration.

I. Summary of Proposed Legislation, Insofar as It Pertains to First-Time Violent Felons, Post-Release Supervision, and the Rockefeller Drug Laws

A. Elimination of Parole for Non-Predicate Violent Felony Offenders

Both the Senate and Assembly versions would eliminate discretionary parole release for first-time violent felons and mandate determinate sentences instead. (In 1995 the Legislature made this change for predicate violent felons.) Both versions would change the current scheme of indeterminate sentences as follows:

	Current Indeterminate	Proposed Determinate

	least severe	**most severe**	
Class B VFO	3 - 6	12 ½ - 25	between 5 & 25
Class C VFO	2 ¼ - 4 ½	7 ½ - 15	between 3 ½ & 15
Class D VFO	not required	3 ½ - 7	between 2 & 7
Class E VFO	not required	2 - 4	between 1 ½ & 4

Both versions leave unaltered the availability of currently existing non-prison sentences for first-time violent D and E felons.

The Assembly version would give the sentencing judge the discretion to impose a less-severe indeterminate sentence where he or she determines that defendant was acting in response to the victim's domestic abuse.

B. Institution of Post-Release Supervision

Both versions would require that all determinate sentences be followed by a period of "post-release supervision." In the Senate version, that period would be five years for most violent felonies, three years for D and E violent felonies, and life for violent felony sex offenses. In the Assembly version, the judge decides on a fixed term of post-release supervision from a specified range: between two and one-half to five years for a Class B violent felony; between two and four years for a Class C; and between one and one-half and three years for a Class D or E. There is no separate period for sex offenses in the Assembly version.

C. Adjustment to the Rockefeller Drug Laws

Although the Senate version makes no provision for alternatives to incarceration for nonviolent felons, the Assembly version takes a major step in this direction. That version proposes that when a defendant is convicted of a non-A-I drug felony, the court may, upon the defendant's consent and after hearing from the People, defer sentencing for up to eighteen months. If the defendant successfully completes a specified drug treatment program of at least one year's duration, the court may impose the appropriate statutory sentence for the next lowest felony. If the defendant is a second felony offender, the court may sentence the defendant as if he or she were a first felony offender. Only low-level drug felons without a history of violent crime are eligible for this treatment.

If the court determines that the defendant has successfully completed the drug program, the benefits to the defendant under this bill are enormous. To take an example: Normally, a defendant convicted of a street-level narcotics sale, the Class B felony of third-degree drug sale, must receive an indeterminate sentence of at least four and one-half to nine years if he or she is a second felony offender. Under the Assembly bill, upon successfully completing one year of drug treatment, the defendant may be sentenced as if he or she were a Class C first felony offender - and thus avoid a prison sentence entirely.

Even Class A-I drug felons may benefit significantly. Upon conviction, a low-level trafficker, without a history of violent crime, may be remanded to a prison drug program for a period of eighteen months. If treatment is successful, he or she may be sentenced, as a first time felon, to an indeterminate sentence as low as two to six years or, if a predicate felon, to a sentence as low as three to six years. Considering that the alternative is at least fifteen years to life, that is an enormous benefit to the defendant.

II. Conclusions

We believe that the Assembly bill, while amenable to improvement, deserves serious consideration.

1. In our view, both the Senate and Assembly versions unjustifiably eliminate a judge's discretion at the low end of the sentencing range for each degree of violent crime. [FN1] While the desire to provide for harsher treatment of even first-time violent felons is understandable, that goal can be accomplished by setting a lower sentencing floor for each degree of crime.

For example, under current law, a youth without any prior record, convicted of a robbery during which his more-culpable accomplice displays what appears to be a handgun, will be sentenced for a Class B violent felony. The indeterminate sentencing

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range is now three to six years at the lowest and twelve and one-half to twenty-five years at the most. In other words, the judge would select a minimum term of between three and twelve and one-half years. Under the Senate and Assembly bills, the judge would have to select a determinate sentence of somewhere between five and twenty-five years. Discretion is thus taken away from the judge to impose a sentence at the low end of the sentencing range. In our view, the judge should be allowed to select a determinate sentence from the three to twenty-five year range. This will allow the judge to be lenient in the rare case where such leniency is required.

The Assembly bill recognizes that there will be unusual cases, such as those concerning battered women lashing out against their abusers, where the proposed determinate sentencing structure would be overly harsh. There will be other such unusual cases not covered by the domestic violence rubric, and any sentence reform should take that possibility into account.

2. The Assembly bill at least partially addresses the danger that if state prison time for first-time violent felons is increased, a vast expenditure of public funds might be required to expand prison space. The Assembly bill, by creating an alternative to the harsh prison terms currently mandated for low-level drug offenders, recognizes that if violent felons are incarcerated for longer periods, nonviolent felons may have to be incarcerated for shorter periods, lest the necessity for more prisons create an extraordinary long-term burden on State taxpayers.

The proposed modification of the Rockefeller drug laws would be even more effective in freeing up prison space for violent felons if its ameliorative effects were also retroactive: current nonviolent State prisoners serving time for low-level drug felonies should be eligible to apply for resentencing or early release if, in the judge's view, he or she successfully completes a one-year prison drug treatment program.

3. Finally, we endorse the Assembly's view that the Rockefeller drug laws need to be modified, and that the increase in State prison time for violent felons should be tied to such modification. If low-level and non-violent drug felons successfully complete certified one-year-or-more drug treatment programs, they should, consistent with the Assembly bill, be eligible to avoid extended prison terms. The Assembly's move in this direction should be encouraged.

Committee on Criminal Law

James A. Yates, *Chair*

Andrew Richman, *Secretary*

Daniel R. Alonso

Bonnie M Baker

James M. Branden [FNa1]

William M. Brodsky [FNa1]

J. Gilmore Childers

Catherine A. Christian

Fred Cohn

Daniel P. Conviser

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Andrea Likwornik Weiss

Hon. Franklin R. Weissberg

Carolyn P. Wilson

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June 1998

[FN1]. See "Report on Proposed Determinate Sentences for Non-Predicate Violent Felony Offenders," *The Record of the Association of the Bar of the City of New York*, Vol. 52, No. 6 (October 1997) p. 717.

[FNa1]. Member, Subcommittee on "Violent Offender Sentencing."

[FNaa1]. Chair, Subcommittee on "Violent Offender Sentencing."

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STATE OF NEW YORK

7820

IN SENATE

June 18, 1998

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

Introduced by Sens. VOLKER, DeFRANCISCO, BRUNO, ALESI, BALBONI, COOK, FARLEY, FUSCHILLO, GOODMAN, HANNON, HOLLAND, JOHNSON, KUHL, LACK, LARKIN, LAVALLE, LEIBELL, LIBOUS, MALTESE, MARCELLINO, MARCHI, MAZIARZ, MEIER, NOZZOLIO, PADAVAN, PRESENT, RATH, SALAND, SEWARD, SKELOS, SPANO, STAFFORD, TRUNZO, VELELLA, WRIGHT -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the penal law, the executive law and the criminal procedure law, in relation to eliminating parole for first-time violent felony offenders; establishing periods of post-release supervision for violent felony offenders; and providing for victim notification of certain inmate releases, and to repeal subdivision 4 of section 70.02 of the penal law and section 149-a of the correction law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The penal law is amended by adding a new section 60.12 to read as follows:

§ 60.12 Authorized disposition; alternative indeterminate sentence of imprisonment; domestic violence cases.

1. Notwithstanding any other provision of law, where a court is imposing sentence pursuant to section 70.02 upon a conviction for an offense enumerated in subdivision one of such section, other than an offense defined in article one hundred thirty of this chapter, and is authorized or required pursuant to such section to impose a determinate sentence of imprisonment for such offense, the court, upon a determination following a hearing that (a) the defendant was the victim of physical, sexual or psychological abuse by the victim or intended victim of such offense, (b) such abuse was a factor in causing the defendant to commit such offense and (c) the victim or intended victim of such offense was a member of the same family or household as the defendant as such term is defined in subdivision one of section 530.11 of the criminal procedure law, may, in lieu of imposing such determinate sentence of imprisonment, impose an indeterminate sentence of imprisonment in accordance with subdivisions two and three of this section.

2. The maximum term of an indeterminate sentence imposed pursuant to subdivision one of this section must be fixed by the court as follows:

(a) For a class B felony, the term must be at least six years and must not exceed twenty-five years;

(b) For a class C felony, the term must be at least four and one-half years and must not exceed fifteen years;

(c) For a class D felony, the term must be at least three years and must not exceed seven years; and

(d) For a class E felony, the term must be at least three years and must not exceed four years.

3. The minimum period of imprisonment under an indeterminate sentence imposed pursuant to subdivision one of this section must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

§ 2. Paragraph (b) of subdivision 3 of section 70.00 of the penal law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(b) [Where the sentence is for a violent felony offense as defined in subdivision one of section 70.02, the minimum period shall be fixed by the court pursuant to subdivision four of section 70.02.] Where the sentence is for a class B felony offense specified in subdivision two of section 220.44, the minimum period must be fixed by the court at one-third of the maximum term imposed and must be specified in the sentence. Where the sentence is for any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

§ 3. Subdivision 4 of section 70.00 of the penal law, as amended by chapter 238 of the laws of 1983, is amended to read as follows:

4. Alternative definite sentence for class D, E, and certain class C felonies. When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, or to a class C felony specified in article two hundred twenty or article two hundred twenty-one, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

§ 4. Subdivision 6 of section 70.00 of the penal law, as added by chapter 3 of the laws of 1995, is amended to read as follows:

6. Determinate sentence. [When] Except as provided in subdivision four of this section and subdivisions two and four of section 70.02, when a person is sentenced as a violent felony offender pursuant to section 70.02 or as a second violent felony offender pursuant to section 70.04 or as a second felony offender on a conviction for a violent felony offense pursuant to section 70.06, the court must impose a determinate sentence of imprisonment in accordance with the provisions of such sections and such sentence shall include, as a part thereof, a period of post-release supervision in accordance with section 70.45.

§ 5. Paragraph (a) of subdivision 2 of section 70.02 of the penal law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(a) Except as provided in subdivision six of section [70.00] 60.05, the sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be [an indeterminate] a determinate sentence of imprisonment which shall be in whole or half years. [Except as provided in subdivision six of section 60.05, the maximum] The term of such sentence must be in accordance with the provisions of subdivision three of this section [and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section].

§ 6. Paragraphs (b) and (c) of subdivision 2 of section 70.02 of the penal law, as amended by chapter 291 of the laws of 1993, are amended to read as follows:

(b) Except as provided in subdivision [five] six of section 60.05 and subdivision four of this section, the sentence imposed upon a person who stands convicted of a class D violent felony offense, other than the offenses of criminal possession of a weapon in the third degree as defined in subdivisions four and five of section 265.02 and criminal sale of a firearm in the second degree as defined in section 265.12, must be in accordance with the applicable provisions of this chapter relating to sentencing for class D felonies provided, however, that where a sentence of imprisonment is imposed which requires a commitment to the state department of correctional services, such sentence shall be a determinate sentence in accordance with paragraph (c) of subdivision three of this section.

(c) Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offenses of criminal possession of a weapon in the third degree as defined in subdivisions four and five of section 265.02, or criminal sale of a firearm in the second degree as defined in section 265.12 or the class E violent felonies of attempted criminal possession of a weapon in the third degree as defined in subdivisions four and five of section 265.02

must be a sentence to [an indeterminate] a determinate period of imprisonment, or, in the alternative, a definite sentence of imprisonment for a period of no less than one year, except that:

(i) the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of the offense for a class A misdemeanor defined in this chapter, if the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such sentence would be unduly harsh and that the alternative sentence would be consistent with public safety and does not deprecate the seriousness of the crime; and

(ii) the court may apply the provisions of paragraphs (b) and (c) of subdivision [five] four of this section when imposing a sentence upon a person who has previously been convicted of a class A misdemeanor defined in this chapter in the five years immediately preceding the commission of the offense.

§ 7. Subdivision 3 of section 70.02 of the penal law, as amended by chapter 233 of the laws of 1980, is amended to read as follows:

3. [Maximum term] Term of sentence. The [maximum] term of [an indeterminate] a determinate sentence for a violent felony offense must be fixed by the court as follows:

(a) For a class B felony, the term must be at least [six] five years and must not exceed twenty-five years; [and]

(b) For a class C felony, the term must be at least [four] three and one-half years and must not exceed fifteen years[.];

(c) For a class D felony, the term must be at least two years and must not exceed seven years; and

(d) For a class E felony, the term must be at least one and one-half years and must not exceed four years.

§ 8. Subdivision 4 of section 70.02 of the penal law is REPEALED.

§ 9. Subdivision 5 of section 70.02 of the penal law, as amended by chapter 233 of the laws of 1980, paragraph (b) as amended by chapter 291 of the laws of 1993, is amended to read as follows:

[5.] 4. (a) Except as provided in paragraph (b) of this [section] subdivision, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose [an indeterminate] a determinate sentence of imprisonment [pursuant to section 70.00].

(b) In any case in which the provisions of paragraph (a) [hereof] of this subdivision or the provisions of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than [an indeterminate] a determinate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that the alternate sentence is consistent with public safety and does not deprecate the seriousness of the crime and that one or more of the following factors exist:

(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or

(ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or

(iii) possible deficiencies in proof of the defendant's commission of an armed felony.

(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) [hereof] of this subdivision, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that [an indeterminate] a determinate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on

the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.

§ 10. The opening paragraph of subdivision 3 of section 70.30 of the penal law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

The term of a definite sentence, a determinate sentence, or the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:

§ 11. Subdivision 5 of section 70.30 of the penal law is amended to read as follows:

5. Time served under vacated sentence. When a sentence of imprisonment that has been imposed on a person is vacated and a new sentence is imposed on such person for the same offense, or for an offense based upon the same act, the new sentence shall be calculated as if it had commenced at the time the vacated sentence commenced, and all time credited against the vacated sentence shall be credited against the new sentence. In any case where a vacated sentence also includes a period of post-release supervision, all time credited against the period of post-release supervision shall be credited against the period of post-release supervision included with the new sentence. In the event a period of post-release supervision is not included with the new sentence, such period shall be credited against the new sentence.

§ 12. Paragraph (b) of subdivision 1 of section 70.40 of the penal law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(b) A person who is serving one or more than one indeterminate or determinate sentence of imprisonment shall, if he so requests, be conditionally released from the institution in which he is confined when the total good behavior time allowed to him, pursuant to the provisions of the correction law, is equal to the unserved portion of his term, maximum term or aggregate maximum term; provided, however, that (i) in no event shall a person serving one or more indeterminate sentence of imprisonment and one or more determinate sentence of imprisonment which run concurrently be conditionally released until serving at least six-sevenths of the determinate term of imprisonment which has the longest unexpired time to run and (ii) in no event shall a person be conditionally released prior to the date on which such person is first eligible for discretionary parole release. The conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law.

Every person so released shall be under the supervision of the state board of parole for a period equal to the unserved portion of the term, maximum term, [or] aggregate maximum term, or period of post-release supervision.

§ 13. Paragraph (a) of subdivision 3 of section 70.40 of the penal law is amended to read as follows:

(a) When a person [has] is alleged to have violated the terms of [his] parole and the state board of parole has declared such person to be delinquent, the declaration of delinquency shall interrupt the person's sentence as of the date of the delinquency and such interruption shall continue until the return of the person to an institution under the jurisdiction of the state department of [correction] correctional services.

§ 14. Paragraph (b) of subdivision 3 of section 70.40 of the penal law, as amended by chapter 79 of the laws of 1989, is amended to read as follows:

(b) When a person [has] is alleged to have violated the terms of his conditional release or post-release supervision and has been declared delinquent by the board having supervision over such person or the local conditional release commission, the declaration of delinquency shall interrupt the period of supervision or post-release supervision as of the date of the delinquency [and]. For a conditional releasee, such interruption shall continue until the return of the person to the local correctional facility located in the jurisdiction of the commission having custody of such person or, if he was released from an institution under the jurisdiction of the state department of correctional services, to an institution under the jurisdiction of that department. Upon such return, the person shall resume service of his sentence. For a person released to post-release supervision, the provisions of section 70.45 shall apply.

§ 15. The penal law is amended by adding a new section 70.45 to read as follows:

§ 70.45 Determinate sentence; post-release supervision.

1. In general. Each determinate sentence also includes, as a part thereof, an additional period of post-release supervision. Such period shall commence as provided in subdivision five of this section and a violation of any condition of supervision occurring at any time during such period of post-release supervision shall subject the defendant to a further period of imprisonment of at least six months and up to the balance of the remaining period of post-release supervision, not to exceed five years. Such maximum limits shall not preclude a longer period of further imprisonment for a violation where the defendant is subject to indeterminate and determinate sentences.

2. Period of post-release supervision. The period of post-release supervision for a determinate sentence shall be five years, except that such period shall be three years whenever a determinate sentence of imprisonment is imposed pursuant to section 70.02 of this article upon a conviction for a class D or class E violent felony offense; provided, however, that when a determinate sentence is imposed pursuant to section 70.02 of this article, the court, at the time of sentence, may specify a shorter period of post-release supervision of not less than two and one-half years upon a conviction for a class B or class C violent felony offense and a shorter period of post-release supervision of not less than one and one-half years upon a conviction for a class D or class E violent felony offense.

3. Conditions of post-release supervision. 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; provided that, notwithstanding any other provision of law, the board of parole may 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 as that term is defined in subdivision six of section two of the correction law. Upon release from the underlying term of imprisonment, the person shall be furnished with a written statement setting forth the conditions of post-release supervision in sufficient detail to provide for the person's conduct and supervision.

4. Revocation of post-release supervision. An alleged violation of any condition of post-release supervision shall be initiated, heard and determined in accordance with the provisions of subdivisions three and four of section two hundred fifty-nine-i of the executive law.

5. Calculation of service of period of post-release supervision. A period or periods of post-release supervision shall be calculated and served as follows:

(a) A period of post-release supervision shall commence upon the person's release from imprisonment to supervision by the division of parole and shall interrupt the running of the determinate sentence or sentences of imprisonment and the indeterminate sentence or sentences of imprisonment, if any. The remaining portion of any maximum or aggregate maximum term shall then be held in abeyance until the successful completion of the period of post-release supervision or the person's return to the custody of the department of correctional services, whichever occurs first.

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(b) Upon the completion of the period of post-release supervision, the running of such sentence or sentences of imprisonment shall resume and only then shall the remaining portion of any maximum or aggregate maximum term previously held in abeyance be credited with and diminished by such period of post-release supervision. The person shall then be under the jurisdiction of the division of parole for the remaining portion of such maximum or aggregate maximum term.

(c) When a person is subject to two or more periods of post-release supervision, such periods shall merge with and be satisfied by discharge of the period of post-release supervision having the longest unexpired time to run; provided, however, any time served upon one period of post-release supervision shall not be credited to any other period of post-release supervision except as provided in subdivision five of section 70.30 of this article.

(d) When a person is alleged to have violated a condition of post-release supervision and the division of parole has declared such person to be delinquent: (i) the declaration of delinquency shall interrupt the period of post-release supervision; (ii) such interruption shall continue until the person is restored to post-release supervision; (iii) if the person is restored to post-release supervision without being returned to the department of correctional services, any time spent in custody from the date of delinquency until restoration to post-release supervision shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any; and (iv) if the person is ordered returned to the department of correctional services, the person shall be required to serve a time assessment of at least six months before being re-released to post-release supervision. In the event the balance of the remaining period of post-release supervision is six months or less, such time assessment shall be six months unless a longer period is authorized pursuant to subdivision one of this section. The time assessment shall commence upon the issuance of a determination after a final hearing that the person has violated one or more conditions of supervision. While serving such assessment, the person shall not receive any good behavior allowance pursuant to section eight hundred three of the correction law. Any time spent in custody from the date of delinquency until return to the department of correctional services shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article. The maximum or aggregate maximum term of the sentence or sentences of imprisonment shall run while the person is serving such time assessment in the custody of the department of correctional services. Any time spent in custody solely pursuant to such delinquency after completion of the maximum or aggregate maximum term of the sentence or sentences of imprisonment shall be credited to the period of post-release supervision, if any.

(e) Notwithstanding paragraph (d) of this subdivision, in the event a person is sentenced to one or more additional indeterminate or determinate term or terms of imprisonment prior to the completion of the period of post-release supervision, such period of post-release supervision shall be held in abeyance and the person shall be committed to the custody of the department of correctional services in accordance with the requirements of the prior and additional terms of imprisonment.

(f) When a person serving a period of post-release supervision is returned to the department of correctional services pursuant to an additional consecutive sentence of imprisonment and without a declaration of delinquency, such period of post-release supervision shall be held in abeyance while the person is in the custody of the department of correctional services. Such period of post-release supervision shall resume running upon the person's re-release.

§ 16. Subdivision 2 of section 259-a of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

2. The division shall cause complete records to be kept of every person on parole [or], conditional release or post-release supervision. Such records shall contain the aliases and photograph of each such person, and the other information referred to in subdivision one of this section, as well as all reports of parole officers in relation to such persons. Such records shall be maintained by the division and may be made available as deemed appropriate by the chairman for use by the department of correctional services, the division, and the board of parole. Such records shall be organized in accordance with methods of filing and indexing designed to insure the immediate availability of complete information about such persons.

§ 17. Subdivision 4 of section 259-a of the executive law, as amended by chapter 79 of the laws of 1989, is amended to read as follows:

4. In accordance with the provisions of this chapter, the division shall supervise inmates released on parole or conditional release, or to post-release supervision, except that the division may consent to the supervision of a released inmate by the United States parole commission pursuant to the witness security act of nineteen hundred eighty-four.

§ 18. Subdivision 5 of section 259-a of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

5. The division shall conduct such investigations as may be necessary in connection with alleged violations of parole [or], conditional release or post-release supervision.

§ 19. Subdivision 6 of section 259-a of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

6. The division shall assist inmates eligible for parole or conditional release and inmates who are on parole [or], conditional release or post-release supervision to secure employment, educational or vocational training.

§ 20. Subdivision 8 of section 259-a of the executive law, as amended by chapter 451 of the laws of 1984, is amended to read as follows:

8. The division may establish a parole transition program which is hereby defined as community-based residential facilities designed to aid parole [and], conditional release or post-release supervision violators develop an increased capacity for adjustment to community living. Parolees [and], conditional releasees and those under post-release supervision who have either (i) been found pursuant to section two hundred fifty-nine-i of this article to have violated one or more conditions of release in an important respect, or (ii) who have allegedly violated one or more of such conditions upon a finding of probable cause at a preliminary hearing or upon the waiver thereof may be placed in a parole transition facility. Placement in a parole transition facility upon a finding of probable cause or the waiver thereof shall not preclude the conduct of a revocation hearing, nor, absent a waiver, operate to deny the releasee's right to such revocation hearing.

§ 21. Paragraph (a) of subdivision 9 of section 259-a of the executive law, as added by chapter 55 of the laws of 1992, is amended to read as follows:

(a) The division shall collect a fee of thirty dollars per month, from all persons over the age of eighteen who after the effective date of this subdivision are supervised on parole [or], conditional release or post-release supervision by the division. The division shall waive all or part of such fee where, because of the indigence of the offender, the payment of said fee would work an unreasonable hardship on the person convicted, his or her immediate family, or any other person who is dependent on such person for financial support.

§ 22. Subdivision 2 of section 259-c of the executive law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

2. have the power and duty of determining the conditions of release of the person who may be conditionally released or subject to a period of post-release supervision under an indeterminate or determinate sentence of imprisonment;

§ 23. Subdivision 6 of section 259-c of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

6. have the power to revoke the parole [or], conditional release or post-release supervision status of any person and to authorize the issuance of a warrant for the re-taking of such persons;

§ 24. Section 259-e of the executive law, as amended by chapter 34 of the laws of 1985, is amended to read as follows:

§ 259-e. Institutional parole services. The division shall provide institutional parole services. Subject to the authority of the chairman, these shall include preparation of reports and other data required by the state board of parole in the exercise of its functions with respect to release on parole [and], conditional release or post-release supervision of inmates. Employees of the division who collect data, interview inmates and prepare reports for the state board of parole in institutions under the jurisdiction of the department of correctional services shall not work under the direct or indirect supervision of the head of the institution.

§ 25. Subdivision 1 of section 259-f of the executive law, as amended by chapter 34 of the laws of 1985, is amended to read as follows:

1. Employees in the division who perform the duties of supervising inmates released on parole [or], conditional release or post-release supervision, and employees who perform professional duties in institutions and who are assigned to provide institutional parole services pursuant to section two hundred fifty-nine-e of this article, shall be parole officers.

§ 26. Paragraph (b) of subdivision 2 of section 259-i of the executive law, as amended by chapter 230 of the laws of 1986, is amended to read as follows:

(b) Persons paroled [and], conditionally released or released to post-release supervision from an institution under the jurisdiction of the department of correctional services or the department of mental hygiene shall, while on parole [or], conditional release or post-release supervision, be in the legal custody of the division of parole until expiration of the maximum term or period of sentence, or expiration of the period of supervision, including any period of post-release supervision, or return to the custody of the department of correctional services, as the case may be.

§ 27. The subdivision heading of subdivision 3 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

Revocation of parole [and], conditional release and post-release supervision.

§ 28. Subparagraphs (i), (ii) and (iii) of paragraph (a) of subdivision 3 of section 259-i of the executive law, subparagraph (i) as amended by chapter 3 of the laws of 1995, subparagraph (ii) as amended by chapter 262 of the laws of 1987 and subparagraph (iii) as amended by chapter 843 of the laws of 1980, are amended to read as follows:

(i) If the parole officer having charge of a paroled or conditionally released person or a person released to post-release supervision or a person received under the uniform act for out-of-state parolee supervision shall have reasonable cause to believe that such person has lapsed into criminal ways or company, or has violated one or more conditions of his parole, conditional release or post-release supervision, such parole officer shall report such fact to a member of the board of parole, or to any officer of the division designated by the board, and thereupon a warrant may be issued for the retaking of such person and for his temporary detention in accordance with the rules of the board. The retaking and detention of any such person may be further regulated by rules and regulations of the division not inconsistent with this article. A warrant issued pursuant to this section shall constitute sufficient authority to the superintendent or other person in charge of any jail, penitentiary, lockup or detention pen to whom it is delivered to hold in temporary detention the person named therein; except that a warrant issued with respect to a person who has been released on medical parole pursuant to section two hundred fifty-nine-r of this article and whose parole is being revoked pursuant to paragraph (h) of subdivision four of such section shall constitute authority for the immediate placement of the parolee only into the custody of the department of correctional services to hold in temporary detention. A warrant issued pursuant to this section shall also constitute sufficient authority to the person in charge of a drug treatment campus, as defined in subdivision twenty of section two of the correction law, to hold the person named therein, in accordance with the procedural requirements of this section, for a period of at least ninety days to complete an intensive drug treatment program mandated by the board of parole as an alternative to parole or conditional release revocation, or the revocation of post-release supervision, and shall also constitute sufficient authority for return of the person named therein to local custody to hold in temporary detention for further revocation proceedings in the event said person does not successfully

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complete the intensive drug treatment program. The board's rules shall provide for cancellation of delinquency and restoration to supervision upon the successful completion of the program.

(ii) Whenever a paroled or conditionally released person or a person under post-release supervision or a prisoner received under the uniform act for out-of-state parolee supervision has, pursuant to this paragraph, been placed in any county jail or penitentiary, or a city prison operated by a city having a population of one million or more inhabitants, the state shall pay to the city or county operating such facility the actual per day per capita cost as certified to the state commissioner of correctional services by the appropriate local official for the care of such person and as approved by the director of the budget. The reimbursement rate shall not, however, exceed thirty dollars per day per capita and forty dollars per day per capita on and after the first day of April, nineteen hundred eighty-eight.

(iii) A warrant issued for a parole [or], a conditional release or a post-release supervision violator may be executed by any parole officer or any officer authorized to serve criminal process or any peace officer, who is acting pursuant to his special duties, or police officer. Any such officer to whom such warrant shall be delivered is authorized and required to execute such warrant by taking such person and having him detained as provided in this paragraph.

§ 29. Paragraph (b) of subdivision 3 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

(b) A person who shall have been taken into custody pursuant to this subdivision for violation of one or more conditions of parole [or], conditional release or post-release supervision shall, insofar as practicable, be incarcerated in the county or city in which the arrest occurred.

§ 30. Subparagraphs (i), (ii), (iii) and (iv) of paragraph (c) of subdivision 3 of section 259-i of the executive law, subparagraph (i) as amended by chapter 413 of the laws of 1984, subparagraphs (ii) and (iv) as added by chapter 904 of the laws of 1977 and subparagraph (iii) as amended by chapter 432 of the laws of 1989, are amended to read as follows:

(i) Within fifteen days after the warrant for retaking and temporary detention has been executed, unless the releasee has been convicted of a new crime committed while under [his present] parole [or], conditional release or post-release supervision, the board of parole shall afford the alleged parole [or], conditional release or post-release supervision violator a preliminary revocation hearing before a hearing officer designated by the board of parole. Such hearing officer shall not have had any prior supervisory involvement over the alleged violator.

(ii) The preliminary parole [or], conditional release or post-release supervision revocation hearing shall be conducted at an appropriate correctional facility, or such other place reasonably close to the area in which the alleged violation occurred as the board may designate.

(iii) The alleged violator shall, within three days of the execution of the warrant, be given written notice of the time, place and purpose of the hearing unless he is detained pursuant to the provisions of subparagraph (iv) of paragraph (a) of this subdivision. In those instances, the alleged violator will be given written notice of the time, place and purpose of the hearing within five days of the execution of the warrant. The notice shall state what conditions of parole [or], conditional release or post-release supervision are alleged to have been violated, and in what manner; that such person shall have the right to appear and speak in his own behalf; that he shall have the right to introduce letters and documents; that he may present witnesses who can give relevant information to the hearing officer; that he has the right to confront the witnesses against him. Adverse witnesses may be compelled to attend the preliminary hearing unless the prisoner has been convicted of a new crime while on supervision or unless the hearing officer finds good cause for their non-attendance.

(iv) The preliminary hearing shall be scheduled to take place no later than fifteen days from the date of execution of the warrant. The standard of proof at the preliminary hearing shall be probable cause to believe that the parolee [or], conditional releasee or person under post-release supervision has violated one or more conditions of his parole [or], conditional release or post-release supervision in an important respect. Proof of conviction of a crime committed [subsequent to release on parole or conditional release] while under supervision shall constitute probable cause for the purposes of this section.

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§ 31. Subparagraph (vi) of paragraph (c) of subdivision 3 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

(vi) At the conclusion of the preliminary hearing, the hearing officer shall inform the alleged violator of his decision as to whether there is probable cause to believe that the parolee [or], conditional releasee or person on post-release supervision has violated one or more conditions of his release in an important respect. Based solely on the evidence adduced at the hearing, the hearing officer shall determine whether there is probable cause to believe that such person has violated his parole [or], conditional release or post-release supervision in an important respect. The hearing officer shall in writing state the reasons for his determination and the evidence relied on. A copy of the written findings shall be sent to both the alleged violator and his counsel.

§ 32. Paragraph (d) of subdivision 3 of section 259-i of the executive law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(d) If a finding of probable cause is made pursuant to this subdivision either by a determination at a preliminary hearing or by the waiver thereof, or if the releasee has been convicted of a new crime while under [his present] parole [or], conditional release or post-release supervision, the board's rules shall provide for (i) declaring such person to be delinquent as soon as practicable and shall require reasonable and appropriate action to make a final determination with respect to the alleged violation or (ii) ordering such person to be restored to parole, conditional release or post-release supervision under such circumstances as it may deem appropriate or (iii) when a parolee [or], conditional releasee c. person on post-release supervision has been convicted of a new felony committed while under [his present parole or conditional release] such supervision and a new indeterminate or determinate sentence has been imposed, the board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction and a copy of the commitment shall accompany said notification. The inmate's next appearance before the board shall be governed by the legal requirements of said new indeterminate or determinate sentence, or shall occur as soon after a final reversal of the conviction as is practicable.

§ 33. Subparagraph (iv) of paragraph (f) of subdivision 3 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

(iv) The alleged violator shall be given written notice of the rights enumerated in subparagraph (iii) of paragraph (c, of this subdivision as well as of his right to present mitigating evidence relevant to restoration to parole, conditional release or post-release supervision and his right to counsel.

§ 34. Subparagraph (vi) of paragraph (f) of subdivision 3 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

(vi) At the revocation hearing, the charges shall be read and the alleged violator shall be permitted to plead not guilty, guilty, guilty with explanation or to stand mute. As to each charge, evidence shall be introduced through witnesses and documents, if any, in support of that charge. At the conclusion of each witness's direct testimony, he shall be made available for cross-examination. If the alleged violator intends to present a defense to the charges or to present evidence of mitigating circumstances, the alleged violator shall do so after presentation of all the evidence in support of a violation of parole, conditional release or post-release supervision.

§ 35. Subparagraph (ix) of paragraph (f) of subdivision 3 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

(ix) If the presiding officer is not satisfied that there is a preponderance of evidence in support of the violation, he shall dismiss the violation, cancel the delinquency and restore the [parolee or conditional releasee] person to parole, conditional release or post-release to supervision.

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§ 36. Subparagraphs (x) and (xi) of paragraph (f) of subdivision 3 of section 259-i of the executive law, as amended by chapter 166 of the laws of 1991, are amended to read as follows:

(x) If the presiding officer is satisfied that there is a preponderance of evidence that the alleged violator violated one or more conditions of release in an important respect, he or she shall so find. [The] For each violation so found, the presiding officer may (A) direct [the violator's reincarceration and fix a date for consideration by the board for re-release on parole or conditional release, as the case may be; (B) as an alternative to reincarceration, direct the violator's placement in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision; or (C) direct that the parolee or conditional releasee be restored to supervision] that the parolee, conditional releasee or person serving a period of post-release supervision be restored to supervision; (B) as an alternative to reincarceration, direct the parolee, conditional releasee or person serving a period of post-release supervision be placed in a parole transition facility for a period not to exceed one hundred eighty days and subsequent restoration to supervision; (C) in the case of parolees or conditional releasees, direct the violator's reincarceration and fix a date for consideration by the board for re-release on parole or conditional release, as the case may be; or (D) in the case of persons released to a period of post-release supervision, direct the violator's reincarceration for a period of at least six months and up to the balance of the remaining period of post-release supervision, not to exceed five years. Where a date has been fixed for the violator's re-release on parole or conditional release, as the case may be, the board or board member may waive the personal interview between a member or members of the board and the violator to determine the suitability for re-release; provided, however, that the board shall retain the authority to suspend the date fixed for re-release and to require a personal interview based on the violator's institutional record or on such other basis as is authorized by the rules and regulations of the board. If an interview is required, the board shall notify the violator of the time of such interview in accordance with the rules and regulations of the board. If the violator is placed in a parole transition facility or restored to supervision, the presiding officer may impose such other conditions of parole [or], conditional release, or post-release supervision as he may deem appropriate, as authorized by rules of the board.

(xi) If the presiding officer sustains any violations, he must prepare a written statement, to be made available to the alleged violator and his counsel, indicating the evidence relied upon and the reasons for revoking parole, conditional release or post-release supervision, and for the disposition made.

§ 37. Paragraph (g) of subdivision 3 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

(g) Revocation of parole [or], conditional release or post-release supervision shall not prevent re-parole or re-release provided such re-parole or re-release is not inconsistent with any other provisions of law.

§ 38. Paragraph (i) of subdivision 3 of section 259-i of the executive law, as added by chapter 412 of the laws of 1980, is amended to read as follows:

(i) Where there is reasonable cause to believe that a parolee [or], conditional releasee or person under post release supervision has absconded from supervision the board may declare such person to be delinquent. This paragraph shall not be construed to deny such person a preliminary revocation hearing upon his retaking, nor to relieve the division of parole of any obligation it may have to exercise due diligence to retake the alleged absconder, nor to relieve the parolee or releasee of any obligation he may have to comply with the conditions of his release.

§ 39. Paragraph (a) of subdivision 4 of section 259-i of the executive law, as added by chapter 904 of the laws of 1977, is amended to read as follows:

(a) Except for determinations made upon preliminary hearings upon allegations of violation of parole [or], conditional release or post-release supervision, all determinations made pursuant to this section may be appealed in accordance with rules promulgated by the board. Any board member who participated in the decision from which the appeal is taken may not participate in the resolution of that appeal. The rules of the board may specify a time within which any appeal shall be taken and resolved.

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§ 40. Section 259-j of the executive law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

§ 259-j. Discharge from parole and conditional release. [If] Except where a determinate sentence or a sentence with a maximum term of life imprisonment was imposed for a felony other than a felony defined in article two hundred twenty of the penal law, if the board of parole is satisfied that an absolute discharge from parole or from conditional release is in the best interests of society, the board may grant such a discharge prior to the expiration of the full term or maximum term to any person who has been on unrevoked parole or conditional release for at least three consecutive years. A discharge granted under this section shall constitute a termination of the sentence with respect to which it was granted. No such discharge shall be granted unless the board of parole is satisfied that the parolee, otherwise financially able to comply with an order of restitution and the payment of any mandatory surcharge previously imposed by a court of competent jurisdiction, has made a good faith effort to comply therewith.

§ 41. Section 380.50 of the criminal procedure law is amended by adding two new subdivisions 4 and 5 to read as follows:

4. Regardless of whether the victim requests to make a statement with regard to the defendant's sentence, where the defendant is committed to the custody of the department of correctional services upon a sentence of imprisonment for conviction of a violent felony offense as defined in section 70.02 of the penal law or a felony defined in article one hundred twenty-five of such law, within sixty days of the imposition of sentence the prosecutor shall provide the victim with a form, prepared and distributed by the commissioner of the department of correctional services, on which the victim may indicate a demand to be informed of the escape, absconding, discharge, parole, conditional release or release to post-release supervision of the person so imprisoned If the victim submits a completed form to the prosecutor, it shall be the duty of the prosecutor to mail promptly such form to the department of correctional services.

5. Following the receipt of such form from the prosecutor, it shall be the duty of the department of correctional services, at the time such person is discharged, paroled, conditionally released or released to post-release supervision, to notify the victim of such occurrence by certified mail directed to the address provided by the victim. In the event such person escapes or absconds from a facility under the jurisdiction of the department of correctional services, it shall be the duty of such department to notify immediately the victim of such occurrence at the most current address or telephone number provided by the victim in the most reasonable and expedient possible manner. In the event such escapee or absconder is subsequently taken into custody by the department of correctional services, it shall be the duty of such department to notify the victim of such occurrence by certified mail directed to the address provided by the victim within forty-eight hours of regaining such custody. In no case shall the state be held liable for failure to provide any notice required by this subdivision.

§ 42. Notwithstanding any other provision of law, by January 1, 1999, the department of correctional services shall establish an automated telephone system that a victim, family member of a victim, a witness or any member of the general public may call to obtain information relating to the crime and sentence of an inmate who is serving a determinate or indeterminate sentence of imprisonment. The department of correctional services, in consultation with the department of motor vehicles, shall also develop a public awareness campaign and disseminate information regarding the availability of the automated telephone system in conjunction with licensing and motor vehicle registration, application and renewal procedures of the department of motor vehicles. In addition, by April 1, 1999, the division of parole, in cooperation with the department of correctional services, shall implement a program to provide a victim, family member of a victim, a witness, or any member of the general public with access to information concerning the community of residence of a person who has been paroled, conditionally released or released to post-release supervision and the address and telephone number of the regional parole office to which such person has been assigned.

§ 43. Section 149-a of the correction law is REPEALED.

§ 44. This act shall take effect immediately; provided, however that sections one through thirty-nine of this act shall apply to offenses committed on or after September 1, 1998, offenses committed prior to such date shall be governed by the provisions of law in effect at the time the offense was committed; provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act

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and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

REPEAL NOTE.--Section eight of this act repeals subdivision 4 of section 70.02 of the penal law, relating to indeterminate sentencing of violent felony offenders. Section forty-three of this act repeals section 149-a of the correction law, relating to victim notification of certain inmate releases.

Image 1 within document in PDF format.

NY Bill Jacket, 1998 S.B. 7820, Ch. 1

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The New York Times

Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates

By Joseph Goldstein

Aug. 21, 2014

Dozens of sex offenders who have satisfied their sentences in New York State are being held in prison beyond their release dates because of a new interpretation of a state law that governs where they can live.

The law, which has been in effect since 2005, restricts many sex offenders from living within 1,000 feet of a school. Those unable to find such accommodations often end up in homeless shelters.

But in February, the Department of Corrections and Community Supervision, which runs the prisons and parole system, said the 1,000-foot restriction also extended from homeless shelters, making most of them off limits because of the proximity of schools.

The new interpretation has had a profound effect in New York City, where only 14 of the 270 shelters under the auspices of the Department of Homeless Services have been deemed eligible to receive sex offenders. But with the 14 shelters often filled to capacity, the state has opted to keep certain categories of sex offenders in custody until appropriate housing is found.

About 70 of the 101 sex offenders being held are New York City residents, prison authorities said. Some have begun filing habeas corpus petitions in court, demanding to be released and claiming the state has no legal authority to hold them.

The onus of finding a suitable residence upon release is on the sex offender; the state authorities will consider any residence proposed, but will reject it if it is too close to a school or violates other post-release supervision conditions.

Before February, those who could not find suitable housing would typically be released to shelters like the men's intake center at 30th Street and First Avenue in Manhattan, once known as the Bellevue Men's Shelter.

But the corrections department changed its approach this year, after reports by a state senator, Jeffrey D. Klein, detailing how sex offenders were living within 1,000 feet of a school, often in homeless shelters. Prison authorities say they are holding the sex offenders until the shelter system notifies them of additional space in the few shelters far enough away from schools, such as on Wards Island.

"We are continuously monitoring and updating policies to further improve public safety, and Senator Klein's inquiry was a trigger for a review," corrections department officials said in a statement.

The agency said that while it did "not in any way seek to hold offenders in prison," it would not release certain categories of sex offenders to residences within 1,000 feet of a school.

"In New York City," the agency added, "that is a challenge, as many of the sex offender cases are undomiciled upon release."

Nationwide, cities and states have grappled with what to do with sex offenders after they have served their prison sentences. Various jurisdictions, including New York State, have procedures for sending the most serious or mentally ill offenders, often child molesters, to confinement in psychiatric hospitals. Other sex offenders who have been deemed fit for release must often live as transients, exiled from their families' homes if they are too close to schools or parks. In some places, the offenders formed encampments in trailers, as in Southampton, in Suffolk County, or below a causeway, as in Miami.

But the situation in New York is now presenting a new twist: The various residency restrictions that have consigned many sex offenders to life as transients are now being interpreted to require their continued incarceration.

Among those affected is Carlos Bonilla, 65, who completed a two-year sentence for sexually abusing a 13-year-old girl and taking photos of two girls in their underwear, and who has filed a lawsuit seeking his release. He had planned to move in with his brother, Pedro, but the state authorities denied the request after finding four schools within 1,000 feet of the home on Bryant Avenue in the Longwood section of the Bronx, according to notes cited in court papers by the supervising offender rehabilitation coordinator handling his case.

Mr. Bonilla also proposed living with William, another brother, but William said he could not "have the inmate live with him, as he only has one room and already has a roommate," according to the coordinator's notes. As of late June, the notes indicated an intention to "continue to make weekly inquiries regarding alternate proposed addresses."

Mr. Bonilla's lawsuit, filed by the Legal Aid Society, cited "the wholesale warehousing of sex offenders that is now occurring" because the corrections department has not found housing for these individuals that is located more than 1,000 feet from a school.

In legal papers responding to Mr. Bonilla's habeas petition, an assistant attorney general, Michael G. McMartin, acknowledged that Mr. Bonilla was "serving his post-release supervision" in the custody of the corrections department until an approved residence could be found.

Lawyers who represent sex offenders have prepared a map showing that nearly all of Manhattan is off limits to sex offenders.

The shelter on Wards Island does not have a school within 1,000 feet, but it nonetheless presents another issue: its proximity to the dozens of ball fields on adjacent Randalls Island, where children, often from private schools across the city, come to play.

A spokesman for the city's Department of Homeless Services, Christopher Miller, said the city's shelters were housing some 238 sex offenders in shelters at least 1,000 feet from schools. But so far the city has not indicated when it will have room to house more.

"We have a limited number of beds in a limited number of facilities" in compliance with the Sexual Assault Reform Act, which imposes the 1,000-foot limitation, Mr. Miller said.

The state's position is that it has the legal authority to continue holding the sex offenders — who generally either have reached the end of their full prison terms, or have been approved for release on parole or because of credit for good behavior — because they are largely subject to post-release supervision by the state. In the past, that has typically meant unannounced home visits by parole officers as well as restrictions on Internet use and interactions with minors.

"Our goal is to work with the Division of Homeless Services and inmates to find appropriate housing that meets the necessary legal standards and ensures public safety," the prison agency said. In the meantime, the agency said, it "will not release homeless offenders" until a suitable residence is available to them.

A version of this article appears in print on Aug. 22, 2014, Section A, Page 18 of the New York edition with the headline: Housing Rules Keep Sex Offenders in Prison Beyond Release Dates

2019 NY REG TEXT 528008 (NS)

New York Regulation Text - Netscan
7 NYCRR 100.83, 106
Emergency/Proposed Rulemakings
July 10, 2019
Effective: June 24, 2019
Department of Corrections and Community Supervision

Reclassification of Correctional Facilities

The classification of Collins and Queensboro Correctional Facilities as Work Release facilities.

7 NYCRR 100.83

7 NYCRR 100.83

7 NYCRR 100.106

7 NYCRR 100.106

Department of Corrections and Community Supervision

EMERGENCY/PROPOSED

RULE MAKING

NO HEARING(S) SCHEDULED

Reclassification of Correctional Facilities

I.D. No. CCS-28-19-00003-EP

Filing No. 594

Filing Date: 2019-06-24

Effective Date: 2019-06-24

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Proposed Action: Amendment of sections 100.83 and 100.106 of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Finding of necessity for emergency rule: Preservation of public safety.

Specific reasons underlying the finding of necessity: § 100.83

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Lincoln Correctional Facility is currently designated as the Work Release Facility in the NYC Region. This facility will close in September. To maintain continuity of services and prevent interruption in the meaningful services provided to inmates through Work Release and Temporary Release in the NYC Region it is necessary to immediately designate Queensboro Correctional Facility as a Facility with a Work Release Program. Such designation requires classification under Title 7 NYCRR § 100.83.

§ 100.106

The requirement of additional Work Release beds in the western region of the state is a result of an increase of proposed Furlough addresses by inmates to this area. Presently, Rochester Correctional Facility is the only male facility for Work Release placement in the western region. Additional beds are immediately required to meet the demand for this meaningful program in the Western Region. Accordingly, Collins Correctional has been classified as a facility with a Work Release Program by the Commissioner. The facility will add 45 beds to the Western Region's program. This designation requires classification under Title 7 NYCRR § 100.106.

With the designations of these two Work Release Facilities, the Department can continue to offer the Work Release Program to inmates thus affording them the opportunity to seek employment, reside with supportive family/friends, and engage in programs and supportive transitional services to his or her home community. Work Release participants are supported and guided by facility staff and Parole Officers.

Subject: Reclassification of Correctional Facilities.

Purpose: The classification of Collins and Queensboro Correctional Facilities as Work Release facilities.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 21, 2019.

Text of rule and any required statements and analyses may be obtained from: Cathy Sheehan, Acting Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue, Harriman State Campus, Albany, NY 12226-2050, (518) 457-4951, email: Rules@DOCCS.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement

1. Statutory Authority:

Article 26, section 852, subdivision 3 of the Correction Law provides that Work Release Programs may be established only at institutions classified by the Commissioner as Work Release Facilities.

2. Legislative Objectives:

Establish additional Work Release Facilities in compliance with Article 26, section 852, subdivision 3 of the Correction Law to meet the needs of inmates eligible for work release.

3. Needs and Benefits:

Lincoln Correctional Facility is currently designated as the Work Release Facility in the NYC Region. This facility will close in September 2019. To maintain continuity of services and prevent interruption to the meaningful services provided to inmates through Work Release and Temporary Release in the NYC Region it is necessary to immediately designate Queensboro Correctional Facility as a Facility with a Work Release Program. Such designation requires classification under Title 7 NYCRR § 100.83.

Also, the need for additional Work Release beds in the Western Region of the State is a result of an increase of proposed Furlough addresses by inmates to this area. Presently, Rochester Correctional Facility is the only male facility for Work Release placement in the Western Region. Additional beds are immediately needed to meet the demand for this meaningful program in the Western Region. Accordingly, Collins Correctional has been classified as a facility with a Work Release Program by the Commissioner. The facility will add 45 beds to the Western Region's program. This designation requires classification under Title 7 NYCRR § 100.106.

With the designations of these two Work Release Facilities, the Department can continue to offer the Work Release Program to inmates thus affording them the opportunity to seek employment, reside with supportive family/friends, and engage in programs and supportive transitional services to his or her home community. Work Release participants are supported and guided by facility staff and Parole Officers.

4. Costs:

(a) This proposed rulemaking imposes no costs on any local agency.

(b) As the proposed rulemaking does not apply to private parties, no costs are imposed on private parties.

(c) DOCCS assumed the associated repurposing costs.

5. Local Government Mandates:

This rulemaking imposes no program, service, duty or responsibility on any county, city, town, village, school district, or other special district. It applies only to designated officials of the Department.

6. Paperwork:

This rulemaking will not add any new reporting requirements, including forms or other paperwork.

7. Duplication:

There is no overlap or conflict with any other legal requirements of the State or Federal government.

8. Alternatives:

Queensboro was chosen to provide operation in the NYC region and is the only remaining DOCCS facility in operation that can provide services to the large number of inmates seeking Work Release in New York City. Collins was chosen to provide support to the Western Region based on available bed space and the demand for such programs in this region. The demand currently exceeds existing space.

9. Federal Standards:

There are no federal standards that apply to the proposed rulemaking.

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10. Compliance Schedule:

Both of these facilities are targeted to immediately operate Work Release Programs so the Department can appropriately house and care for the Work Release population. DOCCS will make every effort to expedite this rule making in accordance with SAPA procedures as approvals are received.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal classifies specific New York State Department of Corrections and Community Supervision correctional facilities as Work Release facilities.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice since the proposed rule will have no impact upon rural areas, nor does the proposed rule impose any reporting, recordkeeping or other compliance requirements upon rural areas. The proposed rule applies only to the designation of already existing facilites.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice, for the proposed rule will have no adverse impact upon jobs or employment opportunities, nor does the proposed rule impose any reporting, recordkeeping or other compliance requirements upon employers. The proposed rule applies only to the classification of Correctional Facilities as Work Release facilities.

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2012 NY REG TEXT 302526 (NS)

New York Regulation Text - Netscan
7 NYCRR 100.83
Proposed Rulemakings
August 29, 2012
Department of Correctional Services

Queensboro Correctional Facility

Add the additional designation of residential treatment facility to the functions performed by Queensboro Correctional Facility.
7 NYCRR 100.83

7 NYCRR 100.83

Department of Corrections and Community Supervision

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Queensboro Correctional Facility

I.D. No. CCS-35-12-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of section 100.83(c) of Title 7 NYCRR.

Statutory authority: Correctional Law, sections 70 and 73

Subject: Queensboro Correctional Facility.

Purpose: Add the additional designation of residential treatment facility to the functions performed by Queensboro Correctional Facility.

Text of proposed rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue - Harriman State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Rules@Doccs.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

*_Regulatory Impact Statement_*

Statutory Authority

Sections 70 and 73 of the Correction Law require that the commissioner designate each correctional facility and residential treatment facility in the rules and regulations of the department.

Legislative Objective

By vesting the commissioner with this rulemaking authority, the legislature intended that each facility designation specify the facility name and location, gender and age range of the inmates, security level, and functions served.

Needs and Benefits

This proposal will add the additional designation of residential treatment facility, as set forth in Correction Law Section 73, to the functions performed by Queensboro Correctional Facility in order to provide a new, reintegration program to certain offenders who are technical parole violators, who have been returned to the Department's custody, and who are nearing rerelease. As set forth in Correction Law Section 2(6), a residential treatment facility is a correctional facility consisting of a community based residence 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 soon will be eligible for release on parole who intend to reside in or near that community when released. The Department intends to develop a new transitional reintegration program at Queensboro for certain technical parole violators who have been returned to the Department's custody for a technical rule violation, and who have a set release date. The technical parole violators to be part of the program will have been committed from the New York City area, Nassau, Suffolk, Westchester or Rockland Counties. The new program will aim to link these technical parole violators to community resources and services that are designed to promote their rehabilitation and successful transition back to their home communities, where they will again be placed on community supervision.

For a number of years, Queensboro had been designated as a residential treatment facility, but at the time it was used for an entirely different purpose; namely, for inmates who had been successful participants in the work release program, or who had successfully completed Phase I of the CASAT Program, as authorized by Correction Law Section 2(18). Queensboro was returned to its current exclusive use as a general confinement facility when these functions were assumed by other correctional facilities in New York City. To reflect its actual use at the time, in 2010, the Department repealed the designations for Queensboro, both as a residential treatment facility and as a work release facility. In order to implement this new program, it is necessary that Queensboro again be designated as a residential treatment facility, in addition to its present designation and use as a general confinement facility.

Costs

a. To regulated parties: None.

b. To agency, the state and local governments: It is anticipated that this pilot project will present a fiscal savings to the agency, the state and local governments.

c. Source of information: By diverting certain offenders into the Residential Treatment Facility following the issuance of a parole violation warrant, the offender will spend significantly less time in the local correctional facility. It will not be necessary for the offender to be held pending a final adjudication on the charged violation.

The Community Supervision Violator pilot project is also expected to have a significant cost savings for the agency and the state. When an offender agrees to participate in the pilot program, the agency will not incur the costs associated with either the preliminary or the final violation hearing. Furthermore, a period of 45-days of Residential Treatment Facility participation is, in most cases, going to be significantly shorter then the length of imprisonment associated with a revocation and return to custody.

Local Government Mandates

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There are no new mandates imposed upon local governments by this proposal.

Paperwork

There are no additional reports or paperwork expected from this proposal.

Duplication

This proposed rule does not duplicate any existing State or Federal requirement.

Alternatives

No alternatives were considered as facility designations in the rules and regulations are required by Correction Law.

Federal Standards

There are no minimum standards of the Federal government for this or similar subject area.

Compliance Schedule

The Department of Corrections and Community Supervision will achieve compliance with the proposed rule immediately.

*_Regulatory Flexibility Analysis_*

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal adds an additional function to the classification of Queensboro Correctional Facility.

*_Rural Area Flexibility Analysis_*

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal adds an additional function to the classification of Queensboro Correctional Facility.

*_Job Impact Statement_*

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal adds an additional function to the classification of Queensboro Correctional Facility.

End of Document

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