

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

PEOPLE OF THE STATE OF NEW YORK

Robert S. Dean on behalf of

Andrew Allen, 88A-6829 ,

Petitioner,

-against-

LEROY FIELDS, SUPERINTENDENT FISHKILL C.F.,
ANTHONY ANNUCCI, COMMISSIONER, DOCCS,

Respondent(s).

Affirmation and Return

Index No: 51535/2020

Hon. Edward T. McLoughlin

Heather R. Rubinstein, an attorney admitted to practice before the courts of this state, affirms the following under the penalties of perjury:

1. I am an Assistant Attorney General of counsel to Letitia James, Attorney General of the State of New York, the attorney for respondents. I submit this affirmation and supporting exhibits as a return in opposition to this habeas corpus proceeding. Respondents deny all the allegations contained therein.

PRELIMINARY STATEMENT

2. Petitioner stands convicted of sexual abuse in the first degree. Petitioner was sentenced as a second felony offender. Exhibit 1.

3. Petitioner's instant offense involved the repeated sexual assault of his wife's ten - year old foster child. Petition ¶10.

4. At his July 29, 2020 reappearance before the Board for a parole release interview, Petitioner was still being held pending SARA compliance housing from his open date of March 11, 2019. As conceded by Petitioner, he was adjudicated as a Risk Level III offender, pursuant to the Sex Offender Registration Act ("SORA") (see Correction Law Article 6-C). Under SORA, a

Level III designation will be given “[i]f the risk of repeat offense is high and there exists a threat to the public safety.” (Correction Law § 168-1 (6)(c)).

5. Since petitioner’s instant offense is defined in article one hundred thirty of the Penal Law and was perpetrated upon a minor, he is subject to the requirements of Section 259-c(14) of the Executive Law¹ (SARA) and Section 70.45(3) of the Penal Law, which require the Board of Parole to impose a mandatory condition of post release supervision (PRS) prohibiting him from entering “school grounds” – defined as any area within one thousand feet of school property (Penal Law § 220.00) – and thus also from residing within one thousand feet of a school during his term of PRS. Compliance with SARA is a special condition of petitioner’s release PRS until SARA-compliant housing was secured. Exhibit 3.

6. As Petitioner has been determined to be a Level III offender under SORA, he is subject to Executive Law § 259-c(14), a component of New York’s Sexual Assault Reform Act, (“SARA”), (Chapter 1 of the Laws of 2000, § 8, as amended by Chapter 544 of the Laws of 2005, § 2), which requires that the Board impose a condition on his release prohibiting entry onto “school grounds,” as defined in Penal Law § 220.00 (14).

7. This restriction on the entry onto school grounds has been found to create an implicit restriction on residing within the area described by Penal Law §220.00 (14) (see Executive Law § 259-c(14); People v Diack, 24 NY3d 674, 682 (2015)). Thus, the Board will impose a special condition, referred to within the Department as the “SOH 220” special condition, as follows:

“I will propose a residence to be investigated by the Department of Corrections and Community Supervision and will assist the

¹ [N]otwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty... of the penal law and the victim of such offense was under the age of eighteen at the time of such offense, is released on parole or conditionally released..., 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.... Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

Department in any efforts it may make on my behalf to develop a residence.

If I am deemed a Level III risk pursuant to Article 6-C of the Correction Law - or - I am serving one or more sentences for committing or attempting to commit one or more offense(s) under Articles 130, 135 or 263 of the Penal Law or sections 255.25, 255.26 or 255.27 of the Penal Law and the victim of such offense(s) was under 18 years of age at the time of the offense(s), and as such I must comply with section 259-c(14) of the Executive Law, I will not be released until a residence is developed and it is verified that such address is located outside the Penal Law definition of school grounds and is approved by the Department.

8. In pertinent part, Executive Law § 259-c(14) provides:

‘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...’

9. Penal Law §220.00(14) provides:

‘School grounds’ means (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an “area accessible to the public” shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.”

10. As such, Petitioner cannot be released to the community without assurance that he would refrain from entering a “school ground” as defined above.

11. At the start of Petitioner’s PRS, Petitioner had not secured appropriate housing compliant with SARA and his other conditions of release. He was therefore placed at Fishkill Correctional Facility to begin serving his term of PRS. (*citing* Penal Law § 70.45(3)). Petitioner's

PRS is not completed until March 11, 2024. Exhibit 1. Petitioner has not secured appropriate housing, and DOCCS exercised its authority under Correction Law to continue housing Petitioner at the Fishkill Correctional Facility. *See* Chronology Exhibit 4.

12. Petitioner, now, seeks an order of immediate release based largely on COVID-19. Petitioner argues he is being unlawfully “detained and restrained” because of his placement at the Fishkill Residential Treatment Facility increases his risk of contracting COVID-19 and that risk violates his constitutional right against cruel and unusual punishment and deprives him of his constitutional right to life. As an initial matter, habeas is not the proper vehicle for those challenges. And in any event, Petitioner fails to support his factual allegations or his legal arguments. As of July 28, 2020, Petitioner did not seek medical parole. *See* Chronology, Exhibit 4.

13. For the reasons set forth below, the habeas petition should be denied in its entirety – including for the threshold reason that habeas relief is not available for Petitioner’s claims here. *See* People ex rel Gottlieb v Barometre, Index No. EF2321/2020, Orange CF. Appendix of Cases attached hereto as Exhibit 6.

**HABEAS RELIEF IS NOT AVAILABLE BECAUSE
PETITIONER IS NOT ENTITLED TO IMMEDIATE RELEASE**

14. Habeas relief is appropriate only where success on the merits of an inmate’s legal contentions would make him “entitled to immediate release” from custody. People ex rel. Cassar v. Margiotta, 150 AD3d 1254, 1256 (2d Dept. 2017); *see* People ex rel. Scharff v. Frost, 198 NY 110, 11 (1910); CPLR §7002(a).

15. A writ of habeas corpus may be sustained only when the petitioner is entitled to immediate release from custody. *See* People ex rel. Kaplan v Commissioner of Correction, 60 NY2d 648 (1983); People ex rel. Vansteenburgh v Wasser, 69 AD3d 1135 (3d Dept 2012).

Petitioner has been lawfully placed at a residential treatment facility to serve his PRS until SARA compliant housing has been located. People ex rel. McCurdy v. Warden, Westchester County Corr. Facility, 164 A.D.3d 692, 694-95 (2d Dept. 2018). Petitioner fails to make any argument challenging the validity of that placement. Petitioner was convicted of criminal sexual act and sexual abuse of a minor pursuant to Penal Law §§ 130.50, 130.65. Therefore, compliance with SARA's school grounds restriction is a mandatory condition of his release, and DOCCS cannot release Petitioner to the community until he has secured SARA compliant housing. See Matter of Gonzalez v Annucci, 32 NY3d 461, 466 (2018); People v. Diack, 24 NY3d 674, 682 (2015); See Executive Law §259-c(14). Penal Law §70.45(3) (requiring imposition of conditions of PRS in the same manner as conditions of parole or conditional release).

16. Petitioner does not directly challenge the applicability of the SARA condition or the validity of his confinement. Rather, Petitioner argues that his placement constitutes cruel and unusual punishment and violates his substantive due process right to life because the facility cannot protect him from contracting and (possibly) dying from COVID -19. He also makes misguided procedural due process and ex post facto arguments. But even if he successfully showed that the current protocols and conditions at the facility were constitutionally inadequate, he would not be entitled to immediate termination of his PRS sentence and release to the community, as he contends. People ex rel. Johnson v Superintendent, Adirondack Corr. Facility, 174 A.D.3d 992 (3d Dept. 2019. See People ex rel. Barnes v Allard, 25 AD3d 893, 894 (3d Dept. 2006 (even "deliberate indifference to [petitioner's] medical needs . . . would not entitle him to immediate release"); People ex rel. Sandson v Duncan, 306 AD2d 716, 716-717 (3d Dept. 2003)(same). While Petitioner may seek relief regarding changes to the conditions at the RTF, he is not entitled to an order terminating his PRS sentence. A challenge to inadequate conditions at a residential

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