APPENDIX

Volume II

TABLE OF CONTENTS

APPENDIX F

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

The People of the State of New York,
ex rel. Luis Bonilla, DIN# 16A2855,
NYSID# 08547635Y,

Petitioner,

WRIT OF
HABEAS CORPUS

-against-

INDEX NO.
2020/51174

Superintendent, Fishkill Correctional
Facility; New York State Department of
Corrections and Community Supervision,
Respondents.

- X

Dutchess County Courthouse
10 Market Street
Poughkeepsie, New York 12601
June 25, 2020

BEFORE: HONORABLE CHRISTIE J. ACKER
Justice of the Supreme Court

APPEARANCES:

THE LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
Attorneys for Petitioner
199 Water Street
New York, New York 10038
BY: PAULINE SYRNIK, ESQ.
and
ANDREA YACKA-BIBLE, ESQ.

LETITIA JAMES
ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorneys for Respondents
One Civic Center Plaza, Suite 401
Poughkeepsie, New York 12601
BY: HEATHER RUBINSTEIN, ESQ.

Jennifer DeCelestino
Senior Court Reporter

Again, your Honor, this case is solely about one individual, Mr. Bonilla. Your Honor does not need to decide anything regarding the faith of the agreement between DHS and DOCCS. That question is not before the Court today. We ask your Honor to order DOCCS to release Mr. Bonilla to an intake office where DHS has confirmed a SARA compliant bed would be given to him.

Thank you so much.

THE COURT: Okay. Thank you, everybody. It's 2:37, 2:36. I'm going to take about 15 minutes, and my hope is to be able to issue a decision on the record at about 2:50 to 2:55.

Okay. Thank you.

(Whereupon, a recess was taken.)

THE COURT: This shall constitute the decision and order of this Court.

Petitioner Luis Bonilla commenced this habeas corpus proceeding seeking to be immediately released from Fishkill Correctional Facility, where he is currently being housed in what has been designated a residential treatment facility or "RTF". In April of 2016, Petitioner was convicted and sentenced to a four-year determinant term as well as five years of post-release supervision. Because Petitioner had

been designated a Level 2 sex offender and his crime was committed against a minor, he is subject to the residency requirements of Executive Law 259-c(14), otherwise known as the Sexual Assault Reform Act or SARA. As a result of this, upon release, Petitioner must reside at an address that is more than 1,000 feet from school grounds.

The writ alleges that because Petitioner is indigent and cannot afford SARA compliant housing, he is completely reliant upon the New York City shelter system. He maintains that instead of releasing him to a New York City shelter operated by the Department of Homelessness Services, also known as DHS in this decision, when he reached his maximum expiration date, Respondent DOCCS transferred Petitioner to Fishkill's RTF. It is uncontested that Petitioner reached the maximum expiration date for his determinate sentence on August 10th, 2019, over 10 months ago, and he remains at Fishkill RTF.

By decision dated June 9th, 2020, I scheduled a hearing to determine whether Petitioner can be immediately released to a New York City DHS shelter. The hearing commenced on June 24th, 2020 and continued to today, June 25th, 2020. Petitioner presented two witnesses, Yvonne Tinsley-Ballard and

Deborah Diamant.

Ms. Tinsley-Ballard is an associate commissioner for New York City DHS and she oversees shelter operations. She testified about the 1981 Callahan Consent Decree which she described as mandating DHS to provide shelter to anyone who requests it. Although the Callahan Consent Decree predates SARA, she testified that the decree requires DHS to find shelter for SARA restricted individuals as well. In fact, Ms. Tinsley-Ballard testified that if a person who required SARA compliant housing presented to a DHS shelter, DHS cannot deny them and must find them a SARA compliant bed. Notably, she clearly stated that DHS will find SARA compliant beds for these individuals even if there were no vacancies. Her testimony also established that there is an agreement between DHS and DOCCS, where DHS reserves 10 SARA compliant beds per month for inmates being released by DOCCS.

Petitioner also called Deborah Diamant, who is a Director of Government Relations and Legal Affairs for the Coalition of the Homeless. The coalition is a not for profit that is, as relevant herein, the Court appointed monitor of single adult homeless shelters in New York City based upon the

Callahan Consent Decree. Her testimony was largely cumulative of Ms. Tinsley-Ballard's, and she also confirmed that the Callahan Consent Decree mandates that DHS find SARA compliant housing for those who present at the shelter seeking such housing. She had further testified as to the vacancies and available beds indicating that only one period in the last two weeks where there were no vacant beds.

Respondent called one witness, Stacey Dorsey, the Reentry Manager for DOCCS for Manhattan and Staten Island as well as the DOCCS/DHS liaison. Among other duties, Mr. Dorsey is responsible for placing every DOCCS releasee with SARA restrictions who seeks housing with DHS. She also testified about the agreement between DOCCS and DHS where 10 SARA restricted persons are chosen by DOCCS per month and sent to DHS. According to Ms. Dorsey, these individuals are chosen from the RTF and held past lists maintained by DOCCS. Those individuals on said list who have been held the longest past their maximum expiration date or CR, which I believe is conditional release date, are the ones chosen each month to be brought to DHS, and to be clear, I know that the CR date is for the held past list, the maximum expiration is for the RTF list. There was no

evidence presented whether the agreements between DHS and DOCCS is a written one, when such agreement began, or whether the terms of the agreement have changed since its inception. There was no testimony that DOCCS is prohibited from bringing more than 10 individuals per month to DHS.

After hearing the testimony, the Court finds that all witnesses were credible, mutual and very competent. I have no doubt that DOCCS and DHS are doing their best to comply with the law. However, I also note that I am only deciding this writ by Mr. Bonilla. This is not a class action, and if it were, my decision may well be different. Further, I am determining that DHS is not a necessary party as I am not ordering DHS to do anything. Petitioner has established that if he was brought to DHS, DHS will find him SARA compliant housing. Respondents have not provided this Court with any evidence to the contrary, nor have they established that DHS shelter housing would be noncompliant with Petitioner's post-release restrictions. Respondents' arguments are focused more on the convenience of DOCCS and DHS and their concern about Petitioner leap-frogging ahead of others, which is irrelevant in this habeas corpus proceeding for Mr. Bonilla. As Respondent

routinely brings SARA restricted releasees to DHS, it is obvious that DHS maintains SARA housing which has been found acceptable by Respondent. As for any concern that Petitioner may not provide correct information regarding his SARA status at intake to DHS, Respondent can process Petitioner and communicate with DHS in the same manner as it does with the 10 releasees that are brought to DHS each month. In sum, all of the concerns raised by Respondents are either irrelevant to this particular writ or the Court can address those concerns by way of this order. Indeed, the terms of this order are intended to track the procedures already in place for releasees from DOCCS to DHS.

Accordingly, Petitioner has established that SARA compliant housing is available to him. Petitioner has demonstrated by a preponderance of the evidence that he is entitled to immediate release to a DHS shelter and his Petition is granted to this extent. Respondent shall process Petitioner in accordance with the agreement that they have in place with DHS so that the Petitioner may be discharged on or before July 1st, 2020. Respondent shall discharge Petitioner, transport him and provide DHS with all information about Petitioner as it would normally

proceed pursuant to its agreement. Petitioner must submit an order on notice in conformity with this decision.

As I indicated, this shall constitute the decision and order of this Court.

Before we close, is there anything further?

MS. SYRNIK: Your Honor, I would just like to note if it would be possible to e-mail us an e-certified copy of the decision to us and to Respondents and to DOCCS so that they are able to as quickly as possible process the paperwork for his release?

THE COURT: You can -- the intention is that this Court's decision was done on the record. So, when you submit the order, you can state for the decision stated on the record, and you can order a copy of the transcript from the Court Reporter.

MS. SYRNIK: Thank you so much, your Honor.

THE COURT: Okay. Is there anything else before we close?

You're muted, Heather.

MS. RUBINSTEIN: Thank you for the Respondents, your Honor. Thank you.

THE COURT: I want to thank the attorneys very much. I appreciate that it is not easy to do

this kind of hearing remotely. I want to express my deep gratitude to Jennifer, the Court Reporter, and thank you for making my job easy in terms of proceeding on this hearing.

So, I hope everybody has a nice weekend. I would like you to submit an order on notice to Mr. Rubinstein, and you can upload it, and if there are any comments, of course, Mr. Rubinstein, please let us know right away regarding any objections to the proposed order.

I can so order the transcript, and whoever pays for it, you can work that out, or whoever is ordering it is paying for it. Okay?

MS. SYRNIK: Thank you, your Honor.

* * *

Dated: _____

So Ordered:

_____
Hon. Christi J. Acker
Justice Supreme Court

This is to certify that the foregoing is an accurate transcription of my stenographic notes as transcribed by me.

_____
JENNIFER DECELESTINO

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

ORIGINAL

The People of the State of New York *ex. rel.*

ANGEL ORTIZ,
DIN # 08-A-4974 & NYSID # 05394060J,

Petitioner,

- against -

DENNIS BRESLIN, Superintendent of Queensboro Correctional Facility, and NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

WRIT OF HABEAS CORPUS

~~Index~~ SP No. 113-2018

TO: SUPERINTENDENT BRESLIN, Queensboro Correctional Facility

YOU ARE HEREBY commanded to produce the body of Angel Ortiz, who is by you imprisoned and detained, together with the time and cause of such imprisonment, before a Justice of the Supreme Court, Queens County, at the Courthouse thereof, at 9:30 a.m. on the 24 day of July, 2018, for the Court to inquire into and determine the legality of Mr. Ortiz's continued detention.

WITNESS, Hon. JOHN B. LATELLA, one of the Justices of said Court on the 25 day of June, 2018.

SEYMOUR W. JAMES, JR.
Will A. Page, *Of Counsel*
The Legal Aid Society, Criminal Appeals Bureau
199 Water Street, New York, New York 10038

The within writ is hereby allowed this 25 day of June 2018.

SUPREME COURT JUSTICE
HON. JOHN B. LATELLA

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

The People of the State of New York *ex. rel.*

ANGEL ORTIZ,
DIN 08-A-4974 & NYSID # 05394060J,

Petitioner,

- against -

DENNIS BRESLIN, Superintendent of Queensboro Correctional Facility, and NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS

S.P. ~~Index~~ No. 113-2018

STATE OF NEW YORK
COUNTY OF NEW YORK | *ss.*:

WILL A. PAGE, Esq., of counsel to SEYMOUR W. JAMES, JR., Esq. and The Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, New York, New York 10038, represents petitioner, Mr. Angel Ortiz, in this petition for a writ of habeas corpus pursuant to Article 70 of the C.P.L.R. This petition is submitted on Mr. Ortiz's behalf, *see* C.P.L.R. § 7002(a), because he is illegally imprisoned and restrained in his liberty in the county where this petition has been filed, and any further delay will cause him additional material injury.

As his attorney and pursuant to C.P.L.R. §§ 2106 & 7002(c), I set forth the following pertinent factual allegations, which are within my knowledge or are based upon information and belief, along with the enclosed affirmation in support of the writ:

1. In June 2008, petitioner pleaded guilty to one count of robbery in the first degree, P.L. § 160.15(3), and one count of attempted sexual abuse in the first degree, P.L. §§ 110.00 and 130.65(1).

2. He was sentenced to a determinate term of imprisonment of 10 years followed by 5 years of post-release supervision ("PRS"). No one ever informed Mr. Ortiz that the State would attempt to treat his 10- and 5-year distinct terms as one bulk term of imprisonment.

3. Petitioner was subsequently adjudicated a Level III under the Sex Offender Registration Act ("SORA") registration scheme with respect to that offense.

4. This petition seeks Mr. Ortiz's immediate release given respondents' ongoing failure to release him following the "maximum expiration" date ("ME date") of his sentence of incarceration, which was March 4, 2018.

5. Petitioner is currently incarcerated at the Queensboro Correctional Facility ("Queensboro" or "the facility") by respondent Superintendent BRESLIN.

6. The facility is located at 47-04 Van Dam Street, Long Island City, NY 11101-3081, which is in Queens County.

7. Respondents are illegally detaining Mr. Ortiz—and have done so since his "conditional release" date ("CR date") of September 28, 2016—because, in their view, they are entitled to hold him indefinitely, or at least until his term of PRS expires.

8. Indeed, respondents first illegally detained him in prison between his earned CR date and his ME date, and now continue that detention at an alleged Residential Treatment Facility ("RTF") in prison-like conditions during what should be his term of PRS. And, by ignoring his CR date and failing to credit that time, they have unilaterally extended his PRS from 2021 to 2023.

9. Respondents justify this ongoing detention by claiming that petitioner's Level III designation, combined with his period of PRS, subject him to the residency restrictions of the Sexual Assault Reform Act ("SARA"). Thus, because Mr. Ortiz does not have SARA-compliant housing available to him, respondents will not release him.

10. Mr. Ortiz recognizes that, pursuant to the Correction Law § 73(10), respondents could use an RTF as a "residence" for him, now that he has served his term of incarceration. But respondents are using Queensboro, designated by DOCCS as an RTF, as another prison, not as a residence.

11. At Queensboro, Mr. Ortiz is not free to come and go, to begin his reintegration into the community, to begin rebuilding his life, or to interact with his family. He has received no treatment during his illegal detention; he has no access to programs; and, he is prohibited from seeing his daughter.

12. Petitioner, therefore, remains unlawfully confined at the facility because respondents will not release him into the community for his period of post-*release* community supervision.

13. No previous writs have been filed seeking the relief requested herein, and no federal court or judge has exclusive jurisdiction over this controversy.

14. A notice of appeal has been filed with regard to the SORA adjudication that resulted in Mr. Ortiz's Level III designation, but that appeal has not been perfected at this time.

15. Petitioner's ongoing illegal detention is unjustifiable, given that respondents have ignored two mandated release dates: first, Mr. Ortiz's CR date of September 28, 2016; and second, his ME date of March 4, 2018.

16. In total, his liberty has been unconstitutionally restricted for over 19 months.

Grounds for Petition

17. Petitioner seeks a writ of habeas corpus on the grounds that:

a. applying SARA's housing restrictions to keep him in custody beyond his ME date, in a purported RTF under conditions amounting to imprisonment, violates due process by infringing on his fundamental liberty rights, U.S. Const. amend. XIV; N.Y. Const. art. I, § 6;

b. his continued confinement past his maximum prison sentence constitutes cruel and unusual punishment, U.S. Const. amend. VIII; N.Y. Const. art. I, § 5; and

c. the statutory language makes clear that SARA does not apply to persons serving post-release supervision after completing their maximum prison term, only to persons on early release via parole or conditional discharge, and, even if it did, the RTF where he is confined does not satisfy the statutory requirements for an RTF.

Relief Requested

WHEREFORE, for the reasons stated above, provided in the attached Affirmation in Support, and argued in the attached Memorandum of Law, it is respectfully requested that this Court (a) consider the issue of petitioner's illegal detention as quickly as practicable to avoid Mr. Ortiz incurring any additional harm, (b) issue a writ of habeas corpus, directed to the respondents, for the purpose of inquiring into the legality of petitioner's continued detention and, ultimately, directing his release from the custody of the respondent Superintendent BRESLIN, and (c) grant petitioner such other and further relief which may be just and proper.

Dated: New York, New York
June 19, 2018

WILL A. PAGE
The Legal Aid Society
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

The People of the State of New York *ex. rel.*

ANGEL ORTIZ,
DIN 08-A-4974 & NYSID # 05394060J,

Petitioner,

- against -

DENNIS BRESLIN, Superintendent of Queensboro Correctional Facility, and NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

AFFIRMATION IN SUPPORT OF A WRIT OF HABEAS CORPUS

~~Index~~ S.P. No. 113-2018

STATE OF NEW YORK
COUNTY OF NEW YORK | *ss.*:

WILL A. PAGE, Esq., an attorney duly admitted to the practice of law in this State and not a party to the instant action, does hereby subscribe and affirm under penalty of perjury the following to be true pursuant to C.P.L.R. § 2106:

1. I am of counsel to SEYMOUR W. JAMES, JR., Esq., The Legal Aid Society, Criminal Appeals Bureau, the attorney of record herein.

2. I have read the foregoing petition and the following affirmation and know their contents. The contents of the petition and affirmation are true to my knowledge, except as to matters alleged to be upon information and belief, and as to those matters, I believe them to be true.

3. The sources of information upon which I have based those beliefs are conversations had with petitioner, documents prepared by the New York State Department of Corrections and Community Supervision, and other attached documents.

4. Included with this affirmation are what I believe to be true and correct copies of the following exhibits:

Exhibit A:	CRIMS Report & Parole Documentation
Exhibit B:	Minutes from SORA Proceeding
Exhibit C:	Photos of "H." & Proof of Custody
Exhibit D:	Inmate Locator Report
Exhibit E:	DOCCS Directive (Queensboro Facility)
Exhibit F:	Areas Off-limits Due to SARA
Exhibit G:	*Matter of Luis Rodriguez v. Tina Stanford, N.Y. Bd. of Parole*, No. 2017/0773 (Sup. Ct. Jefferson Co. July 27, 2017) (Respondent's Affirmation)
Exhibit H:	*People ex rel. Scarberry*, No. 3963/2014 (Sup. Ct. Dutchess Co. Nov. 21, 2014) (Decision/Order)
Exhibit I:	*People ex rel. Joe*, No. 7985/2014 (Sup. Ct. Columbia Co. Oct. 30, 2014) (Decision/Order)

5. I make this writ and accompanying submissions on petitioner's behalf because he is incarcerated outside the county in which my office is located.

6. To the extent the Court seeks additional evidence on the allegations made herein, petitioner requests to be present at a hearing where such evidence and testimony can be introduced.

Background & Relevant History

7. Petitioner is almost 50 years old. He grew up in Manhattan, with his mother, and has lived in New York City for most of his life. He has an 11-year-old daughter, referred to herein as "H."

8. Mr. Ortiz and his mother share custody over and are jointly responsible for H., who was born shortly before petitioner began serving his prison sentence for the underlying offense. (*See* Exh. C [Photos of H. & Proof of Custody].)

9. During his ten years of incarceration, Mr. Ortiz has been able to develop and to maintain a meaningful relationship with H., through letters, phone calls, and prison visits. It is his sincere wish to return to the community so that he may provide for his daughter and support her in every way possible as she enters adolescence.

10. In 1994, when Mr. Ortiz was in his mid-20s, he was convicted of attempted sodomy in the first degree. For that offense, he was designated a Risk Level II under SORA upon his release from prison in 2001.

11. During his re-entry, Mr. Ortiz did his best to apply himself. He ultimately achieved full-time employment, both in the culinary and commercial transport fields, and entered into an adult relationship.

12. But, in 2008, Mr. Ortiz relapsed into addiction. He was accused of sexually threating a pizza delivery man during the course of a robbery designed to secure money in order to obtain drugs. On June 12, 2008, he pleaded guilty to one count of robbery in the first degree, P.L. § 160.15(3), and one count of attempted sexual abuse in the first degree, P.L. §§ 110.00 and 130.65(1).

13. He was sentenced to a determinate term of imprisonment of 10 years followed by 5 years of post-release supervision.

14. On March 4, 2018, he completed serving the determinate 10-year prison term. (*See* Exh. A [CRIMS Report & Parole Documentation].)

Prison Record for Current Term of Incarceration

15. Petitioner's record while incarcerated demonstrates his commitment to rehabilitation. Not only did he complete an aggression replacement training, but he took part in alcohol and substance abuse treatment. While petitioner has struggled with substance abuse in the past, he has remained sober since the underlying offense in this case, which took place in 2008.

16. Moreover, and particularly relevant to the circumstances of his continued confinement, he successfully completed sex offender treatment in September 2015. Through treatment, he learned about his "power and control issues" and how to prevent reoffending behavior. (*See* Exh. B, at 17-21 [Minutes from SORA Proceeding].)

17. Petitioner also has a very good disciplinary record. During his 10 years in prison, he received just two tickets, both for minor, Tier II infractions. (*See* Exh. B, at 13 [Inmate Disciplinary History].)

18. Based on his strong record in prison, he earned good time credit and was entitled to early, conditional release in September 2016. (*See* Exh. A [Parole Documentation (Time Allowance Review)].)

SORA Hearing for Current Offense

19. At a SORA hearing on October 11, 2016 (which took place after Mr. Ortiz's conditional release date of September 28), petitioner was adjudicated a Risk Level III, or a high risk for re-offense.

20. That determination was made in spite of Mr. Ortiz's acceptance of responsibility for his actions, strong record of rehabilitation, and the other factors cited by his counsel at the hearing. Specifically, counsel warned that adjudicating Mr. Ortiz a Level III would result in his incarceration being extended—*i.e.*, a further punishment, contrary to the accepted rationale that SORA is regulatory, not punitive. (*See* Exh. B, at 15-17 [minutes].)

21. As predicted by counsel, Mr. Ortiz was detained well-beyond his conditional release date and remains incarcerated today.

Custody Conditions

22. Petitioner reached his ME date on March 4, 2018, but even after fully serving his entire prison term, he was not released into the community.

Fishkill RTF

23. Instead, on February 23, 2018, two weeks shy of his ME date, he was transferred to Fishkill Correctional Facility ("Fishkill"), designated by DOCCS as an RTF.

24. Not only has petitioner's transfer into the RTF system resulted in extending his period of incarceration, but it has also isolated him from his family.

25. His daughter, who visited him before his move to Fishkill, was informed by DOCCS that she cannot visit him so long as he is confined in an RTF, because minors are not allowed inside RTFs.

26. Further, his living conditions at Fishkill were no different than the prison in which he was incarcerated prior to his transfer.

27. When he arrived at Fishkill, he was given an orientation about the RTF program, but was not placed in the RTF Unit.

28. Upon information and belief, actual RTF programs are overcrowded and underfunded. And, the RTF Unit at Fishkill is no exception.

29. Because the RTF was full, Mr. Ortiz was placed on the waiting list.

30. The special housing unit for the RTF at Fishkill is Unit 12-1, but petitioner was housed in Unit 2. That unit is a general population unit for inmates who are serving regular prison terms.

31. There, everyone has a cubicle with a bed. There is a day room with a television, and petitioner had access to a library. But there was no treatment or job training provided.

32. In fact, it was not until seven weeks after his transfer that he was enrolled in RTF required therapeutic programming. But his enrollment in the programming was short lived (only four days).

Queensboro RTF

33. On April 20, 2018, petitioner was sent to Queensboro, where he remains to this day. (*See* Exh. D [Inmate Locator].)

34. The conditions at Queensboro are no better than at Fishkill.

35. At Queensboro, Mr. Ortiz is assigned to Unit 5-North, which houses the general population of the prison. Within the unit, there is an area next to the "police bubble" (a centralized observation area from which correction officers keep an eye on inmates and their activities) where Mr. Ortiz and about 20 others in the RTF program are housed together.

36. This area is not separated from the rest of Unit 5-North in any way. Rather, it is a part of the larger dormitory-style unit.

37. There, Mr. Ortiz and the others sleep on bunks beds identical to those in the rest of the unit. They also have one gray locker each, just like the rest of the general prison population.

38. He and his fellow detainees are referred to as "inmates" by the corrections officers at the facility.

39. Mr. Ortiz has his meals in the mess hall with the general prison population. He uses the same bathrooms, showers, and recreation room as the rest of the prison population. He is subject to the same inmate count and random searches as the inmates in the general prison population.

40. Indeed, Mr. Ortiz has the same privileges, including phone, mail, and packages, as the regularly incarcerated inmates in the general population.

41. Unlike the general population inmates, however, Mr. Ortiz and others warehoused in the RTF program may be selected to leave the Queensboro Facility for several hours to work. Queensboro is, in fact, styled as a work-release facility. (*See* Exh. E [Queensboro Directive].)

42. Mr. Ortiz, however, has only been chosen for that work a handful of times.

43. When he or other inmates leave Queensboro on "work release," the participants spend the day unloading trucks for a nearby police facility. They are accompanied, at all times, by armed corrections officers.

44. Otherwise, he and the other RTF inmates spend their days cleaning the grounds at Queensboro: sweeping, mopping, and collecting trash. In this work, they are also accompanied, at all times, by corrections officers.

45. They are paid $10 per day.

46. Mr. Ortiz does not have access to any treatment or programs that would prepare him for his release into the community.

47. Corrections officers have informed Mr. Ortiz and the other RTF detainees that if they refuse to comply with orders or voice their dissatisfaction with the lack of treatment provided, they will receive a Tier III ticket, be sent back to Fishkill, and be placed at the bottom of the list for release.

48. In short, no therapeutic programming is provided, and petitioner is under constant threat of extended incarceration.

49. Having the rare opportunity to participate in off-site work is the only thing that distinguishes Mr. Ortiz from the general prison population. But in contrast to the regular population, Mr. Ortiz is not allowed to visit with his daughter because he is housed in the RTF.

50. Nevertheless, petitioner has been told by DOCCS officials that he and others like him who are being held at Queensboro past their ME dates are actually on parole. He has even met with a Manhattan-based parole officer.

51. Yet Petitioner has none of the freedom associated with post-release supervision or parole and is not receiving any RTF-appropriate treatment.

52. Moreover, he is subject to the prison disciplinary system, rather than receiving the due process protections that would accompany alleged violations of parole.

53. With the exception of the off-site work assignments, Mr. Ortiz is not permitted to leave the facility. And when he does leave the facility, he is accompanied by corrections officers at all times.

54. Simply put, his term of PRS has been converted into incarceration.

55. Queensboro RTF is not Mr. Ortiz's "residence"—it is his prison.

56. While Mr. Ortiz would certainly welcome having a home, residence, or shelter that he could reside in during his re-entry into the community, he would rather be homeless, *i.e.*, transient or living on the street, than have to remain incarcerated.

57. At least then, in his words, the "endless nightmare" would finally be over.

Dated: New York, New York
June 19, 2018

WILL A. PAGE
The Legal Aid Society
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

The People of the State of New York *ex. rel.*

ANGEL ORTIZ,
DIN 08-A-4974 & NYSID # 05394060J,

Petitioner,

- against -

DENNIS BRESLIN, Superintendent of Queensboro Correctional Facility, and NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

MEMORANDUM OF LAW
IN SUPPORT OF
PETITION FOR A
WRIT OF HABEAS CORPUS

Petitioner Angel Ortiz completed his maximum, 10-year term of incarceration on March 4, 2018, yet he remains in custody. Respondents—the New York State Department of Corrections and Community Supervision ("DOCCS") and the Superintendent of Queensboro Correctional Facility—are continuing to hold him in *de facto* prison conditions rather than releasing him to the community for his term of post-release supervision ("PRS") despite the fact that he has fully-served his prison sentence.

Respondents have extended petitioner's confinement for one reason: he has not accomplished the nearly impossible task of obtaining New York City housing that is compliant with the Sexual Assault Reform Act ("SARA"), *i.e.*, housing that is not within 1,000 feet of a school or child care facility. Indeed, respondents kept petitioner in prison for an extra year and a half between his earned Conditional Release ("CR") date and his Maximum Expiration ("ME") date for the same reason. During that time, they did little to nothing to help him find housing. Their decision to further detain petitioner, at this point for three months past his ME date, without a hearing violates procedural due process. But more importantly, confining petitioner in a Residential Treatment Facility ("RTF") that functions as a prison rather than a treatment center or residence, even though SARA does not apply to individuals serving PRS (*see infra* Point III), violates his substantive due process rights (*see infra* Point I) and constitutes cruel and unusual punishment (*see infra* Point II). U.S. Const. amends. XIV, VIII; N.Y. Const. art. I, §§ 5, 6.

Therefore, the writ should be issued and petitioner released.

FACTS ALLEGED

The facts set forth in the accompanying petition and affirmation in support of the petition are hereby incorporated in their entirety.

ARGUMENT

I. Petitioner's Confinement in the RTF vis-à-vis SARA Violates Substantive Due Process by Depriving Him of His Fundamental Liberty, Specifically His Right to Serve His Term of Post-Release Supervision in the Community.

Petitioner's incarceration was the result of his 2008 conviction, and the sentence he received at that time is the one and only source for determining the length of his punishment. After all, "it is well settled that a jailor's authority to confine a prisoner begins and ends with the sentence pronounced by the judge." *Francis v. Fiacco*, No. 15 Civ. 901 (MAD/ATB), 2018 WL 1384499, at *18 (N.D.N.Y. Mar. 16, 2018); *see Vitek v. Jones*, 445 U.S. 480, 493 (1980) ("a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement"). A determinate sentence, such as the one imposed on petitioner, is comprised of two distinct components: a specific period of imprisonment, and a specific period of post-release supervision. P.L. § 70.45(1). The Penal Law mandates release to community supervision at the end of the imposed term of imprisonment, *i.e.*, at the ME date. Donnino, Supplementary Practice Commentary, P.L. § 70.45. Yet, despite reaching his ME date and completing his 10-year term of incarceration on March 4, 2018, respondents have not released petitioner from confinement.

Although it is true that "[a]s long as the conditions or *degree* of confinement to which [a] prisoner is subjected is *within* the sentence imposed," the liberty

interests protected by due process are not implicated, *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (emphasis added), where the State chooses to unilaterally extend a term of incarceration by converting PRS into additional prison time, the protections of due process apply with full force. Indeed, it is a longstanding common-law principle that "a prisoner has a right to serve his sentence continuously and in a timely manner, and to resettle after he has served his sentence without the fear that the government . . . will reincarcerate him," or illegally detain him, after he completes his sentence. *Vega v. United States*, 493 F.3d 310, 318 (3d Cir. 2007) (discussing this common-law doctrine when considering whether to provide credit against a term of incarceration for time spent at liberty resulting from a mistaken release). Once his term of imprisonment is complete, "a prisoner should have his chance to re-establish himself and live down his past." *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930); *see also Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) ("[t]he government is not permitted to delay the expiration of the sentence").

This principle—that one should be released upon the completion of his or her term of incarceration without fear of re-incarceration—is deeply-rooted in our criminal justice system. Every day, countless defendants in New York City accept a sentence of "time served" in exchange for a guilty plea based on the understanding by all parties that the plea entitles them to immediate release

because of the time they have already spent in jail. Put simply, it would be unconscionable to accept such a plea without ensuring that the defendant is aware of exactly the potential incarceration—and supervision—associated with that plea. *See Ex parte Eldridge*, 106 P. 980, 981 (Okla. 1910) ("The essential part of the judgment is the punishment, and the amount thereof"). That is why the Court of Appeals requires the vacatur of pleas where a defendant is never informed that PRS will accompany an agreed-to sentence. *People v. Estremera*, 30 N.Y.3d 268, 270 (2017) (citing *People v. Catu*, 4 N.Y.3d 242, 245 (2005)).

Against this backdrop, it should not be controversial to expect that once petitioner served his full prison term he was entitled to release. Mr. Ortiz pleaded guilty and accepted a determinate sentence comprised of prison time and a period of supervision in the community. Given the clear distinction between a term of imprisonment and a term of PRS, when he completed the former, he was entitled to begin the latter. Respondents, however, have effectively merged his term of incarceration with his term of post-release supervision,[1] ignoring that they are without the authority to do so and that such a merger is unconstitutional. Due process and fundamental fairness mandate petitioner's release into the community so that he may begin serving his period of supervision in a timely manner.

[1] If a guilty plea to a 10-year determinate sentence followed by 5 years of *post-release* supervision simply means up to 15 years of potential prison time, then defendants should be so advised prior to entering guilty pleas.

A. Petitioner has a protected liberty interest in serving his term of PRS in the community rather than behind bars.

Respondent's conversion of petitioner's term of post-*release* supervision into ongoing incarceration is, undeniably, a substantial infringement on his fundamental liberty rights. "[T]he Due Process Clause contains a substantive component that bars arbitrary, wrongful government actions" that impinge on protected liberty interests "'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *see U.S. v. Salerno*, 481 U.S. 739, 746 (1987). Indeed, "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. U.S.*, 463 U.S. 354, 361 (1983) (internal quotation marks omitted). Courts are careful not to "minimize the importance and fundamental nature" of the individual's right to liberty, *Salerno*, 481 U.S. at 750, even where his or her liberty interest is less extensive than that enjoyed by someone who has never been convicted of a crime and is not subject to a prison sentence.

As relevant here, an individual who has reached his or her ME date has the same fundamental liberty interest as a parolee. *Victory v. Pataki*, 814 F.3d 47, 60 (2d Cir. 2016); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Although the imposition of "[p]ostrelease supervision is significant," *Catu*, 4 N.Y.3d at 245, just like a parolee, petitioner has a fundamental liberty interest in being free from conditions resembling confinement during his term of PRS:

> Th[at] liberty . . . enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, *his condition is very different from that of confinement in a prison*.

Morrissey, 408 U.S. at 481-82 (emphasis added); *see also In re Taylor*, 343 P.3d 867, 879 (Cal. 2015) ("The parolee is not incarcerated; he is not subjected to a prison regimen [or] to the rigors of prison life . . . . The parolee lives among people who are free to come and go when and as they wish. Except for the conditions of parole, he is one of them.").

As petitioner has reached the ME date of the confinement portion of his determinate sentence, he has a liberty interest, protected by due process, in being released to post-release supervision.

B. Respondents are infringing on that liberty interest by holding petitioner at the RTF and extending his term of confinement.

Respondent DOCCS is improperly using SARA to keep petitioner (and many others) from enjoying that liberty. Under SARA, Executive Law § 259-c(14), a person under supervision for a sex offense cannot be within 1,000 feet of a school (or other child care-related facility) if he or she is designated a Risk

Level III under SORA or if the complainant was under the age of 18.[2] The stated purpose of these restrictions, which courts have interpreted to be residency restrictions,[3] is to protect children from sexual predators. *Devine v. Annucci*, 150 A.D.3d 1104, 1106 (2d Dep't 2017). The restrictions are so broad, however, as to make most of New York City off-limits to those subject to them. (*See* Exh. F (map of off-limit areas)); *see also In the Matter of Berlin v. Evans*, 31 Misc. 3d 919 (Sup. Ct. N.Y. Co. 2011) (the 77-year-old petitioner was barred from most parts of New York City, and the court found application of SARA to him violated the *ex post facto* clause), *appeal taken but dismissed*, 103 A.D.3d 405 (1st Dep't 2013) (due to petitioner's death).

The chance that a sex offender subject to SARA will find a suitable apartment in New York City not within 1,000 feet of a school is "probably non-existent." *People v. McFarland*, 35 Misc. 3d 1243(A) (Sup. Ct. N.Y. Co. 2012), *rev'd on other grounds*, 120 A.D.3d 1121 (1st Dep't 2014). Given this housing

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[2] Executive Law § 259-c(14) provides: "where a person serving a sentence for an offense defined in article [130], [135] or [263] of the penal law or section 255.25, 255.26 or 255.27 of the penal law" against a minor "or such person has been designated a level three . . . pursuant to [168-l(6)] of the correction law, 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 [P.L. § 220.00(14)], or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen . . . ." (emphasis added).

[3] "Courts have interpreted [SARA's provisions] as creating a residency restriction prohibiting certain classes of sex offenders from living within 1,000 feet of a school." *People v. Diack*, 24 N.Y.3d 674, 682 (2015).

shortage, respondents turn to Penal Law § 70.45 to justify extending petitioner's term of incarceration by warehousing him and many others in so-called RTFs.

Under Penal Law § 70.45, the board of parole is authorized to impose, as a condition of PRS, that an individual be transferred to an RTF for a period not exceeding six months. *Id.* § 70.45(3). The statute makes clear, however, that the time spent at the RTF cannot amount to confinement. *Id.* (during that time, the individual would "participate in the programs of [the] facility"). More specifically, Correction Law § 73(10) provides that DOCCS may use an RTF "as a *residence* for persons who are on community supervision." (emphasis added); *see also* Corr. L. § 2(31) (defining the broad term "community supervision" to encompass all forms of release, including "temporary release, presumptive release, parole, conditional release, post-release supervision or medical parole"). Therefore, consistent with the statutory language, due process, and an individual's fundamental liberty interest in being free from confinement, the additional six months may be spent in an RTF *only* if it is used as a residence and if rehabilitative programming is provided.

While respondent DOCCS may claim that petitioner has been transferred to an RTF and is serving only six months of PRS there, the reality is that he continues

to be confined in prison with no end in sight.[4] When he was sent to Fishkill's RTF, he was housed with the general prison population, where he was subject to the same conditions as any other inmate. Now that he is at Queensboro, he fares no better. He is still housed with the general prison population; and he is still subject to most of the same prison rules and regulations. *See also infra* Point III.B (Queensboro is not an RTF). Critically, he is not free to leave the facility when he chooses—or even during standard daylight hours—as he would be if it was truly a residence rather than a prison. Indeed, some aspects of his life are even more restricted than when he was in prison: he has been denied visitation with his daughter, because respondents claim minors are prohibited from entering RTFs.

Adding insult to injury, petitioner's continued imprisonment has deprived him of a meaningful opportunity to find the type of housing that would effectuate his release. Unlike a person actually serving PRS, he is not free to search the internet for listings, to visit apartments that are on the market, or to access a phone where potential landlords could contact him. Thus, warehousing him at the so-called RTF infringes on his freedom as a parolee, as well as his freedom to interact with his family, in a ceaseless, self-perpetuating cycle: they cannot visit him, and he cannot leave to visit them.

[4] Given respondents' disregard for Mr. Ortiz's previous "release" dates, petitioner has no faith that he will be released prior to the end of his term of PRS. And notably, because they ignored his earned conditional release, respondents have extended his term of PRS from 2021 to 2023.

When the court imposed petitioner's sentence, there were two distinct portions: a period of confinement (10 years) and a period of supervision in the community (5 years). The prison portion reflects the court's judgment and authorizes the custody of petitioner. *Earley v. Murray*, 451 F.3d 71, 74 (2d Cir. 2006). Since his ME date of March 4, 2018 (and possibly at his CR date of September 28, 2016), petitioner has had a fundamental liberty interest in not being confined. Yet to this day, he remains unlawfully detained by respondents in a correctional facility where he is treated as a prisoner, not a resident.

Respondents cannot unilaterally adjust petitioner's sentence. He was not sentenced to a blanket term of 15 years of imprisonment to be delineated in whatever fashion respondents wish. By ignoring the meaningful distinction between PRS and confinement, respondents are substantially infringing on petitioner's protected liberty interest.

C. Respondents' decision to hold petitioner at the RTF in prison-like conditions is fundamentally unfair and, in any event, is not narrowly tailored to the goal of protecting children, as required to justify the infringement on his liberty.

Because respondents have infringed on petitioner's fundamental liberty interests, substantive due process affords heightened protection, requiring the state to show that the infringement is narrowly tailored to serve a compelling state interest—*i.e.*, respondents must satisfy strict scrutiny review. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Federal courts have consistently applied

strict scrutiny to conditions of supervised release restricting the liberty interests of someone under post-incarceration supervision. *See, e.g.*, *U.S. v. Reeves*, 591 F.3d 77, 82-83 (2d Cir. 2010) ("assuming *arguendo* that the goal of the condition [requiring parolee notify any potential romantic partner of his sex offender status] is the protection of children, [the court] conclude[s] that it is not narrowly tailored since it applies to any significant romantic relationship"); *U.S. v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (Sotomayor, J.) ("If the liberty interest at stake is fundamental [such as the parent-child relationship], a deprivation of that liberty is "reasonably necessary" only if the deprivation is narrowly tailored to serve a compelling government interest."); *Doe v. Lima*, 270 F. Supp. 3d 684, 702 (S.D.N.Y. 2017) ("strict scrutiny [applies] to restrictions on liberty incident to post-prison supervisory regimes, whether denominated as parole (as in New York State) or as supervised release (as in the federal system)").

And recently, a federal district court considering the Colorado SORA statute, which does not even have residency restrictions, held that the statute "enter[ed] the 'zone of arbitrariness'" such that its enforcement became "fundamentally unfair." *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1234-35 (D. Colo. 2017) (appeal pending). Colorado's statute provided only for broad public disclosure of registrants' personal information. *Id.* at 1234. Yet, because of the rampant misuse of the information, such disclosure deprived individuals of their

right to privacy and violated their liberty interests in living, working, associating with their families and friends, and circulating in society. *Id.* at 1234-35.

Like a parolee, petitioner has a fundamental liberty interest in being free from confinement, a freedom that includes gainful employment, association with family and friends, and reintegration with the community outside of a prison. Therefore, respondents' decision to hold him indefinitely at an RTF must be narrowly tailored to the compelling government interest at stake—the protection of children—in order to be a constitutionally permissible infringement on that freedom. But petitioner presents no particular risk to children, as his instant offense was not committed against a minor. And nothing justifies separating petitioner from his daughter. Thus, respondents cannot defend their unilateral extension of petitioner's term of incarceration. In fact, by relying on SARA as an excuse to extend petitioner's confinement, respondents demonstrate that they have done nothing to narrowly tailor the infringement towards that supposed goal.[5]

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[5] Even if the court finds that 'strict scrutiny' review does not apply to petitioner's liberty interest as curtailed by § 259-14(c), it should still find that the statute was unconstitutionally applied to petitioner. "[T]he State Constitution's Due Process Clause [] provide[s] greater protection than its federal counterpart." *People v. LaValle*, 3 N.Y.3d 88, 127 (2004); *accord Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979) (court should "balanc[e] the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement").

Under intermediate scrutiny, the state must show that the statute is "substantially related" to the achievement of important government interests. *Anonymous v. Rochester*, 13 N.Y.3d 35, 48 (2009) (requirement ensures "that the validity [of the statute] is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate assumptions"). Here, however, the nexus between the infringement upon petitioner's liberty rights and the goal of protecting minors cannot even be deemed substantial.

Significantly, as time passes and evidence accumulates in the wake of various states enacting SARA-like residency restrictions, social scientists have found no linkage between the restrictions and rates of sex offenses targeting children. Thus, experts have largely concluded that residency restrictions "should not be considered a viable strategy for protecting communities." Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 Just. Res. & Pol'y 59, 61 (2007). For instance, in Iowa, residency restrictions were found to have no impact on either the rate of sex crimes or the number of child victims.[6] Studies in Colorado and Florida also showed that sex offenders living within 1,000 to 2,500 feet of a school or daycare did not reoffend more often than those who lived farther away.[7]

At this point in time, it is obvious that residency restrictions "are unlikely to deter sex offenders from committing new sex crimes[.]" Levenson & Hern, at 61. Indeed, consistent with the mounting research, courts have begun to acknowledge the arbitrariness of imposing such restrictions. For example, in striking down Michigan's SORA's residency restrictions on *ex post facto* grounds, the Sixth

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[6] *See* Adkins, G., Huff, D. & Stageberg, P., Iowa Dep't of Human Rights Div. of Criminal & Juvenile Justice Planning & Statistical Analysis Ctr., *The Iowa Sex Offender Registry & Recidivism* 16 (2000).

[7] *See* Assoc. for the Trtmt. of Sexual Abusers, *Sexual Offender Residence Restrictions*, at 2 (Aug. 2, 2014); Zandberger, P., Levenson, J.S., & Hart, T., *Residential Proximity to Schools and Daycares: An empirical analysis of sex offense recidivism*, CRIM. J. & BEHAVIOR, 37(5), at 482-502 (2010) (Florida); Colorado Sex Offender Mgmt. Bd., *White Paper on the Use of Residence Restrictions as a Sex Offender Management Tool*, at 2 (June 2009).

Circuit highlighted the absence of any record suggesting "that residential restrictions have any beneficial effect on recidivism rates." *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016); *see also The Pointless Banishment of Sex Offenders*, New York Times, September 8, 2015 ("there is not a single piece of evidence that [residency restrictions] actually" protect children);[8] *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, New York Times, August 21, 2014.[9]

In New York, the Appellate Division, Third Department, has recognized that residency requirements not only do nothing to protect the public, but they *impede* public safety. *People ex rel. Green v. Superintendent of Sullivan Corr. Fac.*, 137 A.D.3d 56, 60 (3d Dep't 2016). That is because "offenders are less likely to recidivate when they are provided with suitable housing and employment." *Id.*; *see also Matter of State of New York v. Floyd Y.*, 56 Misc. 3d 271, fns. 2, 3, 4 (Sup. Ct. N.Y. Co. 2017) (Conviser, J.). Given the recognized failings of SARA's restrictions, they cannot be used to keep an offender confined beyond his or her ME date unless the offender presents an acute threat to children. Petitioner does not. The SORA hearing court found that he presented a high risk of reoffending in

[8] Available at https://www.nytimes.com/2015/09/08/opinion/the-pointless-banishment-of-sex-offenders.html (last visited June 18, 2018).

[9] 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 visited June 18, 2018).

general, but made no specific finding regarding his risk to children (and his instant offense did not involve a minor).

Rather, by imposing SARA's housing restrictions on individuals who are ready to begin their terms of PRS, respondents are creating an obstacle to release. And it is an obstacle that these individuals, who have served their prison time, cannot surmount because they have none of the resources necessary to seek and obtain the rare but required SARA-compliant housing. Perhaps someone with unlimited economic resources would not be hindered; but for the vast majority, the imposition of SARA results in an automatic extension of their confinement even though the statute—on its face—does not apply to those, like petitioner, serving PRS *after* completing their term of incarceration. *See infra* Point III.A.[10]

Moreover, respondents' actions short-circuit one of the few benefits available to individuals in petitioner's situation. Under New York City Code, because Mr. Ortiz intends to reside in the City and is a single resident with no assets or means of financial support, the City is *required* to provide him with shelter that is SARA-compliant. *See* 18 N.Y.C.R.R. 352.36(a)(4)(iv), (b). Because

[10] The Court of Appeals in *People v. Diack*, 24 N.Y.3d 674 (2015), mentioned post-release supervision during its analysis of whether SARA's restrictions preempted more severe local restrictions. *Id.* at 681 ("Executive Law § 259–c(14) was added to require the Parole Board to impose the school grounds mandatory condition on offenders . . . who are released on parole, who are conditionally released *or who are subject to a period of post-release supervision*") (emphasis added). The Court, however, provided no justification for including PRS and did not discuss the text of the statute or the difference between early release and release after serving a full prison term. This dicta, which was irrelevant to the question at hand in *Diack*, was likely an error and does not control the statutory interpretation of § 259–c(14).

respondents have preemptively detained Mr. Ortiz, in no small part due to the limited nature of SARA-complaint shelters in the City, he cannot even attempt to exercise his right to such shelter or demand the City live up to its obligations.

* * *

Keeping petitioner confined beyond his ME date simply for not having a SARA-compliant address is an extreme infringement on his fundamental liberty to be free from confinement, as well as his rights to associate with family and friends and to form other enduring attachments of normal life. *See Morrissey*, 408 U.S. at 482. As the Supreme Court of California recently held with respect to "the mandatory residency restrictions of [California's] Jessica's Law, as applied to registered sex offenders on parole in San Diego County":

> [B]lanket enforcement of [such restrictions] cannot survive even the more deferential rational basis standard of constitutional review. Such enforcement has imposed harsh and severe restrictions and disabilities on the affected parolees' liberty and privacy rights, however limited, while producing conditions that hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has infringed the affected parolees' basic constitutional right to be free of official action that is unreasonable, arbitrary, and oppressive.

In re Taylor, 343 P.3d 867, 879 (Cal. 2015) (buffer zone at issue was 2,000 feet).

Placing petitioner in an RTF, under conditions that amount to confinement rather than simply as a residence, does not cure these substantive due process violations;[11] therefore, Mr. Ortiz is entitled to immediate release.

II. Petitioner's Continued Confinement After His Term of Incarceration Also Violates the Eighth Amendment Prohibition on Cruel and Unusual Punishment.

"[C]onfinement in a prison pursuant to a conviction but beyond the term of a sentence seems . . . quintessentially punitive" and, thus, risks running afoul of the Eighth Amendment. *Sample v. Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989); *see also Com. v. Baker*, 295 S.W.3d 437, 446 (Ky. 2009) ("the 'magnitude of the restraint' involved in residency restrictions is sufficient for a lack of individual assessment to render the statute punitive"). While a *de minimis* delay in releasing an inmate from confinement may be acceptable by Eighth Amendment standards, a prolonged delay of multiple months, as here, constitutes cruel and unusual punishment. *Calhoun v. New York State Div. of Parole Officers*, 999 F.2d 647, 654 (2d Cir. 1993).

It is difficult to conceive of anything more cruel than respondents' abrogation of petitioner's right to liberty at the conclusion of his judicially imposed term of incarceration simply because *the State* has failed, over a period of 19 months, to secure housing that it considers suitable for his release. *See Gonzalez v.*

[11] In any event, such confinement cannot last more than six months under New York's scheme.

Annucci, 149 A.D.3d 256, 263 (3d Dep't 2017) (citing Correction Law § 201(5)) (there is an "affirmative statutory obligation to assist offenders in the process of finding housing"). The length of his incarceration must relate to the offense, and some level of criminal culpability is required to impose a term of incarceration. For that reason, the United States Supreme Court struck down a 90-day jail term for "be[ing] addicted to the use of narcotics" as in conflict with the Eighth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). The Court explained:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Id. at 667 (the court analogized being addicted to drugs to catching a virus in order to emphasize the lack of control a defendant has over the allegedly culpable act).

In the same way, petitioner has, in essence, been convicted—with no procedural due process whatsoever[12]—of not having SARA-suitable housing and been sentenced to additional prison time on top of the ten years he already served. Respondents' actions are tantamount to declaring homelessness or poverty to be a crime. And, as the Court of Criminal Appeals in Alabama has held, it violates the prohibition against cruel and unusual punishment to require "a sex offender [to]

[12] It is as though respondents are attempting to effectuate civil confinement but without employing the necessary procedures. *Compare Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) ("We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to *proper procedures* and evidentiary standards.") (emphasis added).

provide an 'actual address at which he or she will reside'" prior to his release for precisely that reason—because doing so would effectively require him serve additional jail time while he searches, in vain, for housing. *State v. Adams*, 91 So. 3d 724, 738-39 (Ala. Crim. App. 2010) (holding such a requirement "punishes the defendant solely for his status of being homeless"); *see also Vann v. State*, 143 So. 3d 850, 862 (Ala. Crim. App. 2013) (under the new version of the law passed in the wake of *State v. Adams*, "the sex offender is not required to provide a specific street or route address of a fixed place to live where mail can be received, which would be impossible for an indigent homeless offender"). Such a penalty, which is currently being imposed on petitioner for a situation outside of his control, cannot be countenanced under Eighth Amendment jurisprudence.

Moreover, petitioner was never informed that his term of PRS could amount to another term of incarceration under a different name. Nor could the State or the sentencing judge have constitutionally imposed such a sentence. *See Furman v. Georgia*, 408 U.S. 238, 241 (1972) ("It is [] settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature."); *see also Solem v. Helm*, 463 U.S. 277, 286 (1983) (sentences imposed must be proportional); *Peterson v. Tomaselli*, 469 F. Supp. 2d 146, 163 (S.D.N.Y. 2007) ("it may be argued that it is not 'cruel and unusual' to hold a prisoner [past his CR date] for *up to his* [ME date], unless that sentence is

grossly disproportionate to the crime committed") (emphasis added); *cf. State v. Myers*, 22 Misc. 3d 809, 820 (Sup. Ct. Albany Co. 2008) (when analyzing the State's attempt to hold a class of individuals in prison for "orderly" resentencing, the court found it persuasive and problematic that "the end result" of the litigation "could be the continued incarceration of individuals, some of whom have already served and completed their sentences").

Petitioner is, therefore, entitled to his immediate release.

III. SARA Does Not Apply to Offenders on PRS; And, Queensboro RTF Does Not Satisfy the Statutory Requirements for an RTF—It is a Prison.

Petitioner's ongoing detention by respondents at the Queensboro RTF is also illegal because the statutory language makes it clear that SARA does not apply to persons on PRS after serving a full prison term. Moreover, even if it did, this RTF does not qualify as a "residential treatment facility" pursuant to the statutory requirements for such facilities because none of the required treatment or programs are provided. Therefore, petitioner is entitled to immediate release.

A. SARA does not apply to petitioner, who is serving a term of PRS.

Petitioner is not subject to SARA because SARA applies to those released *early* either on parole or on conditional release, not to those serving PRS after the expiration of their term of incarceration. It is a well-recognized canon of statutory construction that general statutes yield to more specific ones, especially to resolve

conflicts between statutes. *See United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) ("more recent and specific provisions . . . apply [should] they [] conflict with [an] older [] statute"); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("Specific terms prevail over the general in the same or another statute"); *Dutchess Cnty. Dep't of Social Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153-54 (2001) (these are "well-established rule[s] of statutory construction"). The SARA specific portion of Executive Law § 259-c is no exception, and indeed limits who can be subject to SARA's residency restrictions.

The text of the SARA statute, Executive Law § 259-c(14), explicitly limits its application to those "released *on parole or conditionally released* pursuant to *subdivision one or two* of this section." (emphasis added). Subdivisions one and two of Executive Law § 259-c concern inmates who "may be released on parole or on medical parole," § 259-c(1), or who "may be presumptively released, conditionally released or subject to a period of post-release supervision under an indeterminate or determinate sentence of imprisonment," § 259-c(2). While the Legislature authorized the Board of Parole to determine the conditions of release for those "subject to a period of post-release supervision," Exec. L. § 259-c(2), the legislature specifically chose to limit those subject to SARA, one particularly onerous condition of release, to those released early. Exec. L. § 259-c(14) ("on parole or conditionally released"). Thus, the statute's plain, legislatively-imposed

language narrows the scope of the residency restrictions to those subject to supervision on early release. *See* Exec. L. § 259-c(14); P.L. § 65.10; *see also* N.Y. State Assembly Bill No. A8894 (June 17, 2005); N.Y. State Senate Bill No. 479-A.

PRS in this context is a distinct category of supervision separate and apart from parole, conditional release, and other forms of early release. This is made apparent by the definition of "community supervision," which includes various forms of release: "the supervision of individuals released into the community on temporary release, presumptive release, parole, conditional release, post-release supervision or medical parole." Corr. L. § 2(10); Exec. L. § 259(3). Petitioner is certainly subject to community supervision: he is supposed to be serving his term of PRS. However, he was neither paroled nor conditionally released. Instead, he was improperly transferred to Fishkill RTF immediately before his ME Date, *not* on his conditional release date or on a parole date, and he is being held now in Queensboro RTF long after the expiration of his term of incarceration.

Where the Legislature has intended to address only some of the distinct forms of release, it has explicitly enumerated which ones: *e.g.*, by authorizing the Board of Parole or DOCCS to grant "presumptive release" and "conditional release," Corr. L. § 206; to grant "presumptive release" to nonviolent inmates, Corr. L. § 806; to grant "temporary release," Corr. L. § 855; to grant "medical parole," Exec. L. §§ 259-r, 259-s; to grant "parole," Exec. L. § 259-c(1); to

determine the conditions of release for those "presumptively released, conditionally released or subject to a period of post-release supervision" under an indeterminate or determinate sentence, Exec. L. § 259-c(2); and to apply SARA to those "released on parole or conditionally released," Exec. L. § 259-c(14).

At the time of SARA's original enactment in 2000, the Legislature recognized a legal right to serve PRS in the community, and authorized a limited, maximum six-month stay in an RTF as a transition to living in the community for those who DOCCS felt needed it. P.L. § 70.45(3). At the same time, it recognized the privileged nature of parole and conditional release, authorizing the use of RTFs to house individuals on those—and only those—two forms of release at any point in time, for any length of time (up to the individuals' ME dates), and for any reason. Indeed, Correction Law § 73 gives the commissioner a wide range of power over inmates housed in RTFs.

For example, § 73(5) provides that "[t]he commissioner may at any time and for any reason transfer *an inmate* from a residential treatment facility to another correctional facility." (emphasis added). But while this subsection clearly applies to individuals sent to an RTF who are still serving the incarceration portion of their sentence, it cannot apply to a parolee or a person on PRS who has reached his or her ME date—they are no longer "inmates" and cannot simply be transferred back to another prison. Their return to a correctional facility must satisfy the due

process requirements governing parole or PRS revocation, despite the threats made by the correctional officers to petitioner and others held at the RTF regarding Tier III tickets and a return to Fishkill. *See Bennett v. Annucci*, No. 2016-07219, 2018 N.Y. Slip Op. 04319, 2018 WL 2945673, at *1 (2d Dep't June 13, 2018) (parolee held at RTF is "subject to the conditions of PRS and [can] properly be charged with a violation of those conditions," which requires a revocation hearing).

Finally, when the Legislature amended SARA in 2005 to add Level III offenders and to establish the 1,000 foot perimeter around schools, it again chose to exclude PRS from its application. Both in the Title of the 2000 act and in the Memorandum in Support of Legislation in 2005, the Legislature confirmed that SARA applied only to certain sex offenders "placed on conditional release or parole." And these statutory provisions make sense. Indeed, imagine the absurdity of releasing an inmate on, *e.g.*, medical parole for treatment only to find that he cannot be housed at any medical facility because of SARA restrictions.

Release on PRS is a legal *right*, not a privilege to be earned. (*See supra* Point I.)[13] Once Mr. Ortiz reached his judicially-imposed ME date, there had to be a time limit on the amount of time he could be held in an RTF (though, still, only

[13] In fact, discussing PRS and conditional release in other litigation, DOCCS has conceded that "there is a clear and obvious difference where one group of inmates has a *right* to release, versus a group that does not." *Matter of Luis Rodriguez v. Tina Stanford, N.Y. Bd. of Parole*, No. 2017/0773, Respondent Affirmation in Opposition to Motion to Amend the Petition and In Opposition to the Amended Petition ¶ 18 (emphasis in original) (Exh. G).

as a residence) if needed. Applying SARA for the full length of his term of PRS would hinder that limitation, and indeed his rehabilitation. By contrast, parole and conditional release are privileges, as individuals continue to serve their underlying prison terms, which is reconcilable with SARA's application.

"Parole," "conditional release," "post-release supervision," and "community supervision" are not interchangeable at DOCCS' whim. The Legislature did not authorize the Board to apply SARA to any individuals other than those "released on parole or conditionally released"—not to those on "temporary release," "presumptive release," "medical parole," or as relevant here "post-release supervision." *See* Exec. L. §§ 259-c(14), 259(3). Unless SARA is amended, this Court cannot, as respondents have, read PRS into the SARA statute.

B. Queensboro does not qualify as an RTF, given the conditions of confinement to which petitioner is subject.

Finally, placing petitioner in a correctional facility designated by DOCCS as an RTF does not satisfy substantive due process. The conditions imposed on petitioner in the RTF must be consistent with his protected liberty interests. *See People v. Correa*, 15 N.Y.3d 213, 233 (2010) (statutes should be interpreted and applied so as to avoid "constitutional infirmity"). Here, the RTF should function only as petitioner's residence. Corr. L. § 73(10). But in any event, the RTF must also be, in fact, a "residential treatment facility," which Queensboro is not.

The status of persons in RTFs vary greatly.[14] They may have served the entire confinement portion of their sentence or they may still be serving that portion and "soon be eligible for release on parole," "will become eligible for community supervision," or have "one year or less remaining to be served under his or her sentence." Corr. L. § 2(6). Understandably, the RTF conditions imposed on them will vary with their status.

Correction Law § 73(2) provides that "[t]he department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities." The Department "shall supervise such *inmates* during their participation in activities outside any such facility and at all times while they are outside any such facility." *Id.* (emphasis added). Certainly inmates who are serving the confinement portion of their sentence may justifiably be subject to supervision at all times outside the RTF, but parolees and persons under post-release supervision cannot be subject to such conditions. They should be able to work outside without an armed guard hovering over them. Indeed, as previously explained, § 73(10) requires that when "persons

[14] An RTF 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." Corr. L. § 2(6) (emphasis added). "[T]he 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 . . . ." Corr. L. § 73(1) (emphasis added).

who are on community supervision" are provided housing at an RTF, it should be treated as a "residence."

As multiple courts have found, Fishkill, Queensboro, and other correctional facilities that are designated as RTFs function, in reality, as prisons. *See, e.g.*, *People ex rel. Scarberry*, No. 3963/2014, at 2 (Sup. Ct. Dutchess Co. Nov. 21, 2014) (Rosa, J.) (Exh. H) (holding that "[w]hile there are distinctions in the daily schedule and treatment of RTF [Fishkill] residents and the general population of inmates at the FCF, these are *de minimis* and insufficient to satisfy the requirements of C.L. § 2(6) and § 73," and that petitioner, while nominally housed at the Fishkill RTF, was "still a prisoner"); *People ex rel. Joe*, No. 7985/2014 (Sup. Ct. Columbia Co. Oct. 30, 2014) (Hudson C.F. is not an RTF) (Exh. I); *People ex rel. Davis v. Superintendent*, 11 Misc. 3d 1072(A) (Sup. Ct. Seneca Co. 2006) ("Habeas corpus relief is not only available to one in prison but also to one 'otherwise restrained in his liberty.'. . . That Willard is not defined as a 'correctional facility' [] is of no moment. It is the reality of the circumstances and not the title ascribed to them that matters.").

The goal of RTFs is "the rehabilitation and total reintegration into the community" of its "residents." Corr. L. § 73(3); *see* Corr. L. § 201(7) (DOCCS "shall encourage apprenticeship training of such persons through the assistance and cooperation of industrial, commercial and labor organizations"), § 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"); *see also* 7 N.Y.C.R.R. § 1.5(m); 9 N.Y.C.R.R. § 8002.7(d)(4). In furtherance of those goals, DOCCS is to assign each RTF resident to a specific program geared toward those ends, Corr. L. § 73(3), and secure appropriate education, on-the-job training, and employment for them, Corr. L. § 73(2).

However, the *only* job petitioner has been offered is that of a "porter" inside the walls of the correctional facility, which consists of ministerial janitorial work and is the *same job* offered to inmates serving their sentences. It involves no training. Similarly, the only community reintegration and education program offered is the same that is offered to all inmates preparing to transition out of custody (Transitional Phase III programming). It involves no job-readiness preparation inside or outside of prison walls. Nor can unloading trucks, albeit outside the facility, a handful of times honestly be viewed as job-readiness preparation. Petitioner is already trained as a driver and in the culinary arts, but respondents are doing nothing to capitalize on his re-entry potential in those fields.

The other programs that DOCCS lists as available at Queensboro generally are, in fact, *not* available to residents of the *RTF* portion of the facility. And, absent an effective system that allows petitioner to find compliant housing, respondents cannot indefinitely confine him pursuant to SARA under what must be

a pretext of assistance. By now, 19 months after Mr. Ortiz was due to be released, respondents should have found him the necessary housing. Instead, as a parolee in name alone, he is being more accurately called an inmate by the prison staff and threatened daily with re-incarceration further away from the city.

In sum, merely naming a prison an RTF does not make it one. *Cf. Ek v. United States*, 308 F. Supp. 1155, 1157 (S.D.N.Y. 1969) ("It may be true that 'stone walls and iron bars do not a prison make,' in song; but where, as here, petitioner [continues to be] incarcerated . . ., it is disingenuous to contend that he has not been 'imprisoned.'").

* * *

Respondents certified petitioner's good time and told him he was eligible for release on September 28, 2016. Then, after ignoring that deadline, they moved the target to March 4, 2018. They have now had over 19 months to help Mr. Ortiz find SARA-compliant housing, but they have failed to do so. They cannot be allowed to continue on this path and, based on a misreading of SARA and the Correction Law, extend petitioner's imprisonment indefinitely.

CONCLUSION

FOR ALL OF THE REASONS STATED HEREIN, PETITIONER IS ENTITLED TO HIS IMMEDIATE RELEASE; THERFORE, THIS COURT SHOULD ISSUE THE WRIT AND GRANT ANY OTHER RELIEF DEEMED PROPER.

Dated: New York, New York
June 19, 2018

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

The People of the State of New York *ex. rel.*

ANGEL ORTIZ,
DIN 08-A-4974 & NYSID # 05394060J,

Petitioner,

- against -

DENNIS BRESLIN, Superintendent of Queensboro Correctional Facility, and NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

AFFIRMATION IN FURTHER SUPPORT OF AND IN REPLY TO RESPONDENTS' OPPOSITION TO A WRIT OF HABEAS CORPUS

S.P. No. 113-2018

Justice Latella

STATE OF NEW YORK
COUNTY OF NEW YORK | *ss.*:

WILL A. PAGE, Esq., an attorney duly admitted to the practice of law in this State and not a party to the instant action, does hereby subscribe and affirm under penalty of perjury the following to be true pursuant to C.P.L.R. § 2106:

1. I am of counsel to JUSTINE LUONGO, Esq., The Legal Aid Society, Criminal Appeals Bureau, the attorney of record herein.

2. I make the following affirmation in further support of Mr. Ortiz's petition for a writ of habeas corpus and in reply to the opposition filed by respondents on August 20, 2018. (*See* Affirmation of Yan Fu in Opp'n to Petition ("Opp'n").) This supplemental affirmation incorporates the allegations made in petitioner's June 25, 2018 petition, and provides additional details and evidence concerning Mr. Ortiz's custody.

3. As will be explored below, the constitutional grounds for granting the writ remain compelling, and were only cursorily addressed by respondents.

4. Moreover, the conditions and circumstances surrounding Mr. Ortiz's prolonged detention at Queensboro Correctional Facility are not as respondents have described them.

5. Included with this affirmation are what I believe to be true and correct copies of the following exhibits:

> Exhibit J: Letter from Deputy Commissioner Ana Enright to Mr. Ortiz regarding the end of petitioner's period of post-release supervision, dated August 13, 2018.
>
> Exhibit K: Redacted and coded excerpts from internal DOCCS spreadsheets documenting the status of various individuals on the "Active RTF" list as a result of SARA housing restrictions, obtained through related litigation.
>
> Exhibit L: Response from ORC Caceres to petitioner regarding Mr. Ortiz's repeated requests to be released from imprisonment to a shelter, dated August 4, 2018.

6. Mr. Ortiz has also provided an affidavit further detailing the conditions of his confinement. (*See* Affidavit of Angel Ortiz dated August 30, 2018 ("Ortiz Aff.").)

7. To the extent the Court seeks additional evidence on any of the allegations made as part of this petition, petitioner reiterates his request to be present at a hearing where such evidence and testimony can be introduced.

8. Should respondents release Mr. Ortiz from custody prior to the hearing, which is currently scheduled for September 5, 2018, petitioner requests that the Court convert this action to a proceeding pursuant to Article 78 to address the issues that are not rendered moot by his release.

9. Examples of these persistent issues include a) the inappropriateness of Queensboro as an RTF for sex offenders detained pursuant to SARA, (*see* Exhibit E), and b) the unconscionable extension of Mr. Ortiz's term of PRS. (*Compare* Exhibit A (original end date listed as Sept. 28, 2021), *with* Exhibit D (revised end date listed as Mar. 2, 2023); *see also* Exhibit J.)

Custody Conditions Akin to Imprisonment

10. Mr. Ortiz describes the situation at the RTF as "frightening" and "tense." (*See* Ortiz Aff. at ¶¶13-14.)

11. This is unsurprising given that the SORA-registered individuals involuntarily confined at the RTF ("SARA-RTF inmates") are lumped together with non-RTF prisoners serving "regular" time. (*Id.* at ¶13.)

12. Rather than a therapeutic environment, the prison is replete with gang activity and threats being made against the SARA-RTF inmates. (*Id.* at ¶15.)

13. As for programming, Mr. Ortiz continues to be utilized as part of a "work crew," but he and the others do not receive any sex offender therapy or drug abuse treatment. (*Id.* at ¶¶17-20.)

14. The staff at Queensboro explained to the SARA-RTF inmates that "because of all the litigation" Queensboro and Parole were required to provide "something," which is one program, an Aggression Replacement Therapy course, once every two weeks. (*Id.* at ¶¶21-22.) The affidavit provided by the Deputy Superintendent of Programs, Mr. Barometre, submitted by respondents in opposition to the petition, confirms this bi-weekly "programming" as "arranged by the Community Supervision staff." (Affidavit of Delta Barometre ("Barometre Aff.") at ¶8.)

15. But respondents tacitly admit that the SARA-RTF inmates are not receiving any appropriate or worthwhile residential treatment. Instead, these SARA-RTF inmates are provided the opportunity to unload boxes and clean for $10 a day. (Opp'n at ¶23; Barometre Aff. at ¶6.)

16. While Mr. Barometre describes this opportunity as "more than any inmate can earn in the prison vocational programs," (Barometre Aff. at ¶6), an RTF is supposed to provide re-entry services, not exploit the manual labor of forced residents at a substandard hourly wage (less than $2 per hour). (*See* Exhibit E ("The principal objectives of the Reentry Services Program are to provide inmates . . . with an opportunity to finalize their release plans, to work toward family and community reintegration, and to strive for an orderly transition back into society. In addition, inmates in the program are prepared by representatives from both public and private sectors to make use of those resources upon release.")); *see also* Correction Law § 73(3) ("Programs [are] directed toward the rehabilitation and total reintegration into the community of persons transferred to a[n] [RTF]").

17. Yet respondents fail to address the explicit exclusion of those convicted of sex offenses from receiving RTF-related re-entry services per the DOCCS Directive for Queensboro. (*See* Exhibit E ("To be eligible for the Queensboro Correctional Facility Reentry Services Program, an inmate: . . . *5. Must not have a conviction for a sex offense*") (emphasis added).)

18. Instead, they disingenuously suggest that "it is undisputed that such programs are offered at Queensboro," without providing the material caveat that Mr. Ortiz and others in his situation are by definition excluded from that programming. (*See* Opp'n at ¶23.)

19. Queensboro is a corrections facility that may provide RTF services to some of its residents, but SARA-RTF inmates receive no "treatment," and the facility is not functioning as a "residence." (*See also* Ortiz Aff. ¶¶4, 12, 16, 23.) Thus, it cannot be considered a suitable RTF placement for petitioner. *See* C.L. § 73(3) & (10).

Confinement at the Faux RTF Violates Substantive Due Process

20. Continuing Mr. Ortiz's period of incarceration past the maximum expiration date of his sentence (his "ME date") in this environment does not comport with substantive due process for all of the reasons already argued. (*See* Mem. in Supp. of Pet. at 3-21.)

21. Although Mr. Ortiz's liberty interests are constrained, contrary to respondents' contention, (*see* Opp'n at ¶18), the liberty that he retains cannot be unilaterally extinguished. *See Williams v. Dep't of Corr. & Cmty. Supervision*, 136 A.D.3d 147, 164 (1st Dep't 2016) (those "subject to SARA" have "conditional liberty" that is constrained by "special conditions of parole"). *See also Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own, he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment").

22. Mr. Ortiz is entitled to exist in "condition[s] [] very different from that of confinement in a prison." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *see also Werner v. Wall*, 836 F.3d 751, 767 (7th Cir. 2016) (Hamilton, C.J., dissenting in part) (citing *Morrissey*) ("even a parolee, whose liberty is conditional and constrained, cannot have his parole revoked and his liberty taken away without due process of law").

23. As it stands, respondents feel comfortable imposing special conditions of *imprisonment*, which cannot be countenanced under substantive due process, particularly when the only act of which Mr. Ortiz is now guilty is an act of omission driven by circumstance—failure to find housing due to lack of resources. (*See* Exhibit L (acknowledging Mr. Ortiz was only held because he lacked SARA compliant housing)); *see also Robinson v. California*, 370 U.S. 660 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold").

24. Strict scrutiny applies to these deprivations, rather than the more relaxed rational basis test or intermediate scrutiny, because Mr. Ortiz has completed his term of incarceration. *See also Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) ("once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency").

25. In fact, as of the date of the hearing in this matter, petitioner will have completed his entire term of incarceration *and* the maximum six month period of enrollment at an RTF.

26. Respondent recasts the question as one relating to the permissibility of SARA restrictions in general, which is governed by the rational basis test. (*See* Opp'n at ¶18.)

27. The question here, however, is not whether SARA restrictions can be imposed, but instead is whether those restrictions can be used to entirely extinguish Mr. Ortiz's liberty and keep him in prison.

28. Simply put, it would be unconscionable to subject Mr. Ortiz—who is now definitively on post-release supervision—to the same conditions as someone who has just begun serving a term of incarceration.[1]

29. Indeed, his fundamental liberty to associate with his family, now that he has technically been "released" to the community under supervision, has also been unduly restricted—more so than when he was actually in prison—because DOCCS failed to address the issues surrounding his ability to see his daughter for nearly the entire six months of his RTF confinement. *Doe v. Lima*, 270 F. Supp. 3d 684, 702 (S.D.N.Y. 2017) ("strict scrutiny [applies] to restrictions on liberty incident to post-prison supervisory regimes, whether denominated as parole (as in New York State) or as supervised release (as in the federal system)").

[1] An example from Wisconsin is strikingly similar to Mr. Ortiz's situation:

> For more than a year neither Werner nor anyone helping him could find lawful and suitable housing for him. Werner was [therefore] kept in custody pursuant to [a] policy that the defendants adopted and enforced. That policy was unconstitutional and contrary to state law even when it was issued in 2002.

Werner v. Wall, 836 F.3d 751, 766 (7th Cir. 2016) (Hamilton, C.J., dissenting in part). The majority of the Seventh Circuit panel addressing Mr. Werner's claims appeared to agree with Judge Hamilton that constitutional principles were implicated—and likely violated. *See id.* at 761 (majority) ("we think that *Kingsley*, *McNeil*, and *Baker* suggest that substantive due process principles are implicated here") (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (analyzing the greater due process protections applicable to pretrial detainees); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249 (1972) ("A confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation."); *Baker v. McCollan*, 443 U.S. 137, 145 (1979) (but a "detention of three days over a New Year's weekend does not and could not amount to such a deprivation")). Nevertheless, the majority opted to extend qualified immunity to the defendants on the basis that the precise contours of the constitutional claim were not clearly established, thus avoiding the un-briefed issue of exactly *how* Mr. Werner's substantive due process rights were violated. *See id.* at 759-61 (majority).

DOCCS' Prolonged Delay in Addressing Visitation Issues

30. The records provided as part of respondents' opposition to this petition document the arbitrary restriction of Mr. Ortiz's family visitation. Queensboro "RTF" is supposed to assist with "family and community reintegration," but Mr. Ortiz was kept from speaking with and seeing his daughter for almost his entire period of confinement (March to August).

31. Indeed, once he was sent to the RTF, and conditions of parole were imposed despite his continued incarceration, Mr. Ortiz was told that he had to cease communicating with his daughter entirely. (*See* Opp'n, Ex. A [Chronos] (entry dated Mar. 15, 2018).)

32. He sought assistance with the issue at that time, and many times thereafter, but has only recently begun to see any progress. (*Id.*, Ex. A (entries dated May 11, 2018, May 25, 2018, June 12, 2018, July 6, 2018, and July 20, 2018 (at the end of July, parole confirmed that his daughter wants to see him)); Ortiz Aff. ¶10.)

33. Respondents claim that they are arranging for Mr. Ortiz to be able to visit with his daughter, (Opp'n at ¶19), but in reality they have been dragging their feet since March. It was not until a week ago, August 25, 2018, that petitioner was able to visit with her. (Ortiz Aff. at ¶¶9-11.)

34. Thus, his punishment is worse at the "RTF" than when he was in traditional "prison" where he could at least freely exercise his fundamental right to associate with his daughter.

DOCCS' Perfunctory Assistance With Finding Compliant Housing

35. Respondent claims that Mr. Ortiz's continued confinement at the RTF is not a punishment (Opp'n at ¶20 ("Petitioner is not being punished"))—but the homelessness penalty being exacted by the State cannot seriously be considered anything else. *See Sample v. Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989) ("[C]onfinement in a prison pursuant to a conviction but beyond the term of a sentence seems . . . quintessentially punitive").

36. Part of that penalty is the perpetuation of his situation. So long as Mr. Ortiz is living behind bars, without the ability to research potential living situations, visit apartments, speak with managers and leasing agents, or become gainfully employed, then there is no way he can ever secure SARA-compliant housing.

37. DOCCS claims to be "diligently assisting" him to find suitable housing, but their own records render their diligence suspect.

38. As part of an ongoing class action litigation focused on DOCCS' treatment of the many individuals in this predicament, DOCCS has produced snapshots of the RTF population that show the "efforts" expended by re-entry to locate housing for those confined at the RTFs. (*See* Exhibit K.)

39. What these snapshots reveal is that DOCCS' "diligent assistance" consists of doing a task they should have done already: to prepare for the release of individuals convicted of sex offenses, DOCCS should already know which temporary locations, particularly shelters and hotels, are SARA-complaint *and* affordable—and which are not.

40. Unfortunately, the snapshots show that DOCCS a) does not know that information and b) is only now, and very slowly, accumulating that necessary knowledge at the expense of all the SARA-RTF inmates.

41. Thus, Ms. Hernandez's statement that she and her staff "have investigated at least 26 locations where we might find housing for Petitioner," (Affidavit of Christina Hernandez, MSW ("Hernandez Aff.") at ¶12), to "assist[] him in attempting to locate housing" that is SARA-compliant, (*id.* at ¶2), is misleading at best.

42. The vast majority of the "locations" that she has "investigated" are hotels—and they are the same hotels she and her staff investigate in an excruciatingly slow and piecemeal fashion *for a large group of inmates*.

43. It appears that DOCCS randomly identifies one or two hotels every few weeks and then determines whether a particular hotel is near a school. On the rare occasion when a hotel is *not* near a school, DOCCS determines whether it would be cost-prohibitive to house those subject to SARA there.

44. These results are written into multiple SARA-RTF inmates' logs.

45. Ms. Hernandez's affidavit describes hotels that Re-Entry Manager Stacey Dorsey investigated "for potential immediate placement of Petitioner," (*id.* at ¶5), and nearly every example provided is the *same hotel* listed on multiple other SARA-RTF inmates snapshot reports for that time period. (*Compare, e.g.*, Opp'n, Ex. A (entry dated July 23, 2018) (the Blue Moon Hotel is "non-compliant"), *with* Exhibit K at 005797 (the "07132018 Active RTF Spreadsheet") (showing the same excuse for at least 10 individuals detained in RTFs).

46. Based on these records, one must conclude that DOCCS is looking up the address for one hotel, finding out that the hotel is non-compliant, and logging that result into various prisoners' logs.

47. Looking at the reverse potential outcome exemplifies why this approach is only an illusion of assistance: would DOCCS be able to release all of the SARA-RTF inmates that same day into the same location? Certainly not.

48. But it is difficult to understand why DOCCS even needs to check the addresses of hotels in the New York City area in the first place, given that most of these hotels have been in existence for quite some time[2] and the scarcity of SARA-compliant housing has been well-documented and recognized by DOCCS since at least 2012.[3]

49. It is not as though public schools and playgrounds are changing locations or regularly closing down on a weekly basis.[4]

50. Nor should the expensive nature of some of these hotels, for example the Omni Berkshire, come as a surprise. (*Compare* Opp'n, Ex. A (entry dated Mar. 14, 2018), *with* Exhibit K at 005530-32 (providing the same note that the rates are too high at the Omni for at least 12 inmates' logs).)[5]

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[2] For example, the "award-winning NYC boutique hotel" known as the Blue Moon Hotel has been functioning in the same location for at least a decade. *See* Blue Moon Hotel (Introduction), *available at* https://www.bluemoonboutiquehotel.com/en-us/introduction.

[3] "Clusters of sex offenders living in boarding houses like Horizon Hope, cheap motels and homeless shelters have become common in the decade since New York implemented statewide residency restrictions for many sex offenders under parole supervision." Jie Jenny Zou, *Housing the Unwanted*, THE NEW YORK WORLD (Mar. 19, 2015), *available at* http://jiejennyzou.com/wp-content/uploads/2012/05/nyw_housing_the_unwanted.pdf.

[4] Generally speaking, the NYC Department of Education closes schools down at scheduled periods of time, such as at the end of the school year. *See, e.g.*, DOE Announces Plan To Close 14 Public Schools (Dec. 18, 2017), *available at* https://newyork.cbslocal.com/2017/12/18/bronx-stabbing-school-closing/.

[5] The average nightly rate of the Omni Berkshire is "$250 - $771" according to one popular travel website. TripAdvisor, *available at* https://www.tripadvisor.com/Hotel_Review-g60763-d113300-Reviews-Omni_Berkshire_Place-New_York_City_New_York.html.

51. The reasonable conclusion to draw from this information is that respondents, despite being aware of the housing crisis for years, have never bothered to find effective placements for those on SARA. Ms. Hernandez admits as much when she discusses four meetings she had in October and November *of 2017* surrounding the lack of suitable housing. (Hernandez Aff. at ¶3.) But whether DOCCS finally started looking for solutions (a year ago) is irrelevant: Mr. Ortiz is entitled to release now.

52. It is possible to draw another conclusion from the evidence: given that DOCCS might have to pay for such a hotel placement for the duration of an individual's post-release supervision, or force them back into an overcrowded RTF, the allegedly "diligent" hotel search may simply be a strategy to "look busy" until space opens up at a SARA-compliant shelter.

53. In either case, calling a random smattering of hotels, many of which may not even be traditional "shelter" hotels,[6] is not an appropriate way to secure housing—particularly for people that have served their sentences and are only being detained because they lack resources to find specialized housing.

54. In fact, when Mr. Ortiz attempted one year ago to do the exact same thing that DOCCS now claims is suitable assistance—check the availability at a local hotel—he was informed that only private residences would be considered. (*See* Opp'n, Ex. A (entry dated Sept. 15, 2017).)

[6] The practice of housing New York City's homeless citizenry in hotels is nothing new. *See, e.g.*, *Homeless Put Into Hotels For Tourists*, N.Y. TIMES (Aug. 28, 1991), *available at* https://www.nytimes.com/1991/08/28/nyregion/homeless-put-into-hotels-for-tourists.html. DOCCS should be well-aware of the a) cost of these hotels, b) location of these hotels, and c) ultimate suitability of such hotels based on cost and location.

55. In any event, putting aside the absurdity of this piecemeal check-and-log process, it can hardly be called diligent to do a single search on behalf of multiple individuals. And it certainly cannot be considered individualized and affirmative. *See Gonzalez v. Annucci*, 149 A.D.3d 256, 264 (3d Dep't 2017) ("passive approach of leaving the primary obligation to locate housing to an individual confined in a medium security prison facility . . ., without access to information or communication resources beyond that afforded to other prison inmates, falls far short of the spirit and purpose of the legislative obligation imposed upon DOCCS to assist in this process").

56. A single hotel address lookup, even once or twice a week, applied to a large group of people that are being held in ongoing confinement despite the expiration of their sentences cannot be considered genuine assistance.

57. As in *Gonzalez*, "[t]here 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[.]" *Id.*

58. And, although Ms. Hernandez is only concerned with the time period beginning in February 2018, Mr. Ortiz has been held since his earned conditional release date of September 28, 2016.

59. A review of the Chrono Report entries reveals that the near-total assistance provided to Mr. Ortiz during that time (September 2016 until March 2018) consisted of sending Stacey Dorsey emails, often with months passing between check-ins. Parole would inquire as to whether any placements had become available, and Ms. Dorsey would invariably respond in the same negative fashion. (*See* Opp'n, Ex. A (entries for Feb. 2, 2017 & Feb. 7, 2017; May 22, 2017; July 11, 2017; Sept. 1, 2017; Dec. 15, 2017; Feb. 23, 2018 ("Reentry does not have resources that meet requested criteria")).)

60. These Chrono Reports demonstrate that no serious effort was made to secure housing for Mr. Ortiz since he was denied his conditional release. Rather, DOCCS has invented a new way to deny conditional release to those convicted of sex offenses: a penalty for lacking the resources to secure SARA-compliant housing.[7]

61. Thus, DOCCS has abrogated its responsibility to assist on an individual level and is merely putting on a façade of assistance.

62. Mr. Ortiz would gladly live in SARA-compliant housing if it existed, and there has been no showing that he willfully refuses to pay for such housing or to seek it out. (*See* Ortiz Aff. ¶¶25-26); *cf. Tate v. Short*, 401 U.S. 395, 400 (1971) ("We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.").

63. If respondents cannot find housing for Mr. Ortiz after nearly two years of "diligence," then the task is surely impossible—and Mr. Ortiz is being detained without hope of release.

64. In sum, it is cruel and unusual for respondents to punish him for his lack of resources. *See, e.g.*, *State v. Adams*, 91 So. 3d 724, 738-39 (Ala. Crim. App. 2010) (Alabama appellate court agreed that requiring a "a sex offender [to] provide an 'actual address at which he or she will reside'" prior to his release "punishes the defendant solely for his status of being homeless").

[7] Notably, DOCCS does not otherwise indicate that parole will be revoked if someone becomes homeless. *See* Parole Handbook ("The Division may assist you in locating programs that may be available to provide a temporary place to live if you become homeless"), *available at* http://www.doccs.ny.gov/Parole_Handbook.html. Nor does SORA create any penalty for not having a residence, only for failing to keep the local authorities apprised of an address change. *See* Corr. Law § 168-t ("Any such failure to register or verify may also be the basis for revocation of parole pursuant to section two hundred fifty-nine-i of the executive law").

DOCCS' Failure to Credit Mr. Ortiz for the Time Between His CR and ME Dates

65. Adding insult to the injury Mr. Ortiz has suffered, DOCCS justifies extending his period of PRS from 2021 to 2023 even though he has been held in prison conditions these past two years.

66. Deputy Commissioner of Community Supervision, Ana Enright, explains that Mr. Ortiz was held past his conditional release date because he did not have suitable housing. (*See* Exhibit J (dated Aug. 13, 2018).)

67. She then asserts that, because he could not be "admitted" to an RTF until the expiration of his sentence, his PRS term did not begin until that time. (*Id.*)

68. Thus, from DOCCS' perspective, the 17 months of "good time" that Mr. Ortiz earned are simply erased as a result of his indigence and bad luck.

69. Tellingly, the Chrono Reports again conflict with DOCCS' assertions.

70. Starting as of October 26, 2016, Mr. Ortiz was catalogued as being "in RTF status" with "no viable residence proposed." (*See* Opp'n, Ex. A (entry dated Oct. 26, 2016).) This makes sense, given that the statute specifically authorizes holding someone at an RTF (though only for six months) when they are about to be "conditionally released"—which is the only way DOCCS could continue to hold Mr. Ortiz despite his earned good time. (*See* Pet., Ex. A); *see also* Penal Law § 70.45(3); Correction Law § 73(1).

71. Indeed, that is why he was assigned parole officers who would contact Stacey Dorsey once he reached and passed his C.R. date.

72. Of course, Ms. Dorsey inevitably responded to any housing inquiry that no "SARA compliant beds" were available." (Opp'n, Ex. A (entries dated Feb. 2, 2017 (by P.O. S. Hamme) & Feb. 7, 2017 (by S. Dorsey).)

73. Nevertheless, it defies logic to categorize Mr. Ortiz as "in RTF status" as of his conditional release date, and have parole officers searching for suitable housing, only to then claim that Mr. Ortiz began his post-release supervision in March 2018 at the expiration of his determinate sentence.

74. It is unconscionable, and certainly an additional cruel and unusual punishment, to fail to account for the additional 17 months he spent *in prison* (October 2016 through February 2018) because DOCCS failed to assist him in finding housing.

Six-Months After His Maximum Expiration Date is Long Enough

75. As respondent admits, Mr. Ortiz reaches his six month anniversary of RTF confinement at the beginning of September. (Opp'n at ¶13.) Therefore, at that time, DOCCS must either release him or use the RTF as a residence.

76. This result is not contrary to the Second Department's recent decision, aptly noted by respondents, addressing ongoing "placement" at an RTF.

77. In *People ex rel. McCurdy v. Warden, Westchester Cty. Corr. Facility*, the court "construe[ed] the relevant statutes together" and determined that Correction Law § 73(10) and Penal Law § 70.45(3) are not in conflict. *McCurdy*, 2018 N.Y. Slip. Op. 05777, No. 2016-01838, 2018 WL 3862986, at *2 (2d Dep't Aug. 15, 2018).

78. The panel explained that, "[b]y 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." *Id.* (emphasis added).

79. The court also held that, per Corr. L. § 73(10), "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 . . . into residential treatment facility *housing* in the event such offender is unable to locate SARA-compliant community housing." *Id.* (emphasis added).

80. But the court, which took pains to use "familiar principles of statutory construction," *id.* at *1 (citation omitted), was entirely silent on the difference between "participation in the programs of a[n] [RTF]," authorized by P.L. § 70.45(3), and using an RTF as a "residence" or "housing," which the panel found to be temporarily allowable for periods past the six month mark. C.L. § 73(10); *McCurdy*, 2018 WL 3862986, at *2 ("residential treatment facility *housing*") (emphasis added).

81. If the plain meaning of the statute is afforded any weight, then it must mean that there is a distinction between the period of time when DOCCS can place someone on PRS in RTF programming (with related confinement), and the period of time when the RTF may serve as a shelter or housing. *Compare* C.L. § 73(1) (authorizing the transfer of "inmates" to RTFs where they must be "in custody" and "under [] supervision" at all times), *with* C.L. § 73(10) (authoring the use of an RTF as a "residence for persons" on community supervision where they will be "subject to conditions of community supervision" as imposed by DOCCS while they "reside in such a facility").

82. Mr. Ortiz has reached that latter point in time when, under New York's statutory scheme, he has become a person again, as opposed to an inmate.

83. If the court does not order his immediate release into the community, then at the very least he should be allowed to treat Queensboro as a residence—albeit with a curfew, like other shelters—rather than a prison.

84. Forcing individuals to potentially serve out their entire term of post-release supervision behind bars and under constant supervision by corrections officers, whether the facility is called an RTF or a prison, must be viewed as an unreasonable restriction of these individuals' liberty interests and as an additional cruel and unusual punishment.

Conclusion

85. Mr. Ortiz should be in the community serving his period of PRS, but respondents have converted PRS into incarceration.

86. Turning a 10-year determinate sentence with a 5-year period of post-release supervision into a potentially 15-year term of incarceration does not comport with substantive due process.

87. Moreover, such a conversion of PRS into imprisonment on the basis of economic status, or homelessness, is a cruel and unusual punishment.

88. For both of these reasons, the Court should order Mr. Ortiz's immediate release, as his continued detention is constitutionally infirm.

89. At minimum, the Court should direct respondents to treat the RTF as a "residence," or as "housing," which is all that Correction Law § 73(10) allows. *See McCurdy*, 2018 WL 3862986, at *2 ("residential treatment facility housing").

90. Mr. Ortiz should be free to come and go, to look for employment and suitable housing, subject to a reasonable curfew, rather than DOCCS treating him, as they have been, as an imprisoned inmate.

Dated: New York, New York
August 31, 2018

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

The People of the State of New York *ex. rel.*

ANGEL ORTIZ,
DIN 08-A-4974 & NYSID # 05394060J,

Petitioner,

- against -

DENNIS BRESLIN, Superintendent of Queensboro Correctional Facility, and NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

AFFIDAVIT OF ANGEL ORTIZ

S.P. No. 113-2018

Justice Latella

STATE OF NEW YORK
COUNTY OF NEW YORK | *ss.*:

ANGEL ORTIZ, being duly sworn, does hereby state under penalty of perjury the following to be true:

1. I am the petitioner named in caption above, and my counsel filed this petition for a writ of habeas corpus on my behalf. It is my desire to be present at the hearing that will be held in this matter, particularly if the Court wishes to hear directly about these events from me.

2. I now verify the contents of the original petition, with a few minor clarifications, and provide the additional details contained herein. I have also provided my counsel with copies of letters and documents, which I have received during my incarceration.

3. As of the date of this affidavit, I have not been released into the community.

4. Every day that passes since DOCCS held me past my conditional release date has left me feeling more isolated and hopeless.

5. Still, prior to the maximum expiration date of my sentence, I thought it could not get any worse. I assumed that once my entire prison term expired I would be released.

6. Nothing could have prepared me for what happened once I "maxed out."

7. When I was transferred to Fishkill and told I would be placed on a "waitlist" for the RTF there rather than being released, I was despondent.

8. Then, after my counsel scheduled a legal call with me, I was suddenly placed into RTF programming at Fishkill—the same day. I was very surprised, and I honestly thought that maybe the situation was going to improve. But, three days later, I was transferred to Queensboro RTF.

9. At Fishkill and, until very recently, at Queensboro, I have been unable to see or call my daughter. This also surprised me: I have always been allowed to speak and visit with her at the prisons that housed me over the last 10 years.

10. I repeatedly asked the rehabilitation coordinators why I could not communicate with her. Staff at the RTFs informed me that minors are not allowed at RTFs without parole's permission. But my parole officers all but ignored my requests until very recently.

11. On August 25, 2018, my daughter was finally allowed to visit me. It was the first time that I could speak freely with her since my transfer to Queensboro.

12. That is not, however, the only downside of the Queensboro prison. Not only has my access to my daughter been severely restricted, but the RTF environment is, in many ways, more dangerous than prison.

13. It is very frightening, because we are housed in a designated area within the general prison population, and the corrections officers have told me that "they" know why "we" (the sex offenders) are here at Queensboro.

14. It is also a very tense situation for my fellow RTF sex offender "residents" because of the lack of programming, uncertainty of when or if we will ever be released, and mix of our unit with the non-sex offender population.

15. I have been threatened by gang-affiliated inmates because of my conviction for a sex offense. Also, I have seen fights break out between the sex offender residents, because tensions are high and many of us feel hopeless.

16. While the guards are not generally armed when we are outside cleaning the facility grounds, they are armed while we are on work release and under their supervision. We are made to feel like we do not belong on the outside of the prison walls. We are called "inmate" and treated like any other prisoner. On a daily basis, someone asks me where I am "locked."

17. I have also not received any useful programming since DOCCS decided to keep me in prison after my conditional release date.

18. I have not received any additional sex offender therapy or aftercare, and I have not been able to take part in substance abuse treatment.

19. At Queensboro, I am part of a "work crew" and get to clean, sweep, or unload boxes, but I do not get to search for housing or jobs.

20. I do not get to learn any useful skills or prepare for re-entry. I am trained in the culinary arts and have a lapsed commercial driver's license, but those areas of my skillset have not been explored to prepare me for finding a job.

21. Once, when the group of us "sex offender RTF inmates" were complaining about the lack of programs, the corrections officers and parole officers told us that they would be providing us with one program, an ART (Aggression Replacement Therapy) course that would meet every other week.

22. They said that they had to provide something to us because of all the litigation that is happening against DOCCS because of what they are doing to us (keeping all of us past our CR and ME dates). But I completed ART while I was serving my determinate sentence—in 2013.

23. Being confined at Queensboro prison, aside from being dangerous, is overwhelmingly disheartening.

24. I know that I have made many mistakes in my life, but I thought that once I served my time I would finally get to make amends, to move on with my life, to try to be the father that my daughter needs in her life.

25. I am truly sorry that I have no funds or outside resources that will allow me to find SARA-compliant housing from inside this prison. If I was wealthy, then I would gladly pay whatever I could to remain in housing that is acceptable to DOCCS. Or, if I am released, I will do whatever it takes to get a job and start paying for SARA-compliant housing.

26. But I can never hope to find housing, or to pay for such housing, if I am confined at Queensboro earning $10 a day.

27. All I want to do is begin the process of reintegrating with the community where I was born, where I have lived for most of my life, and where my family lives. I have served my time, and I am nearly 50 years old.

28. I hope that you will release me from prison to my mother and daughter, and to what remains of my life.

Sworn to before me this
30 day of August 2018

Will A. Page, Esq.
Attorney and Counselor at Law
State of New York
Notary Commission: 02PA6371484
Qualified in Kings County
Expiration: Feb. 26, 2022

8-30-18
ANGEL ORTIZ
Petitioner