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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF GONZALEZ,

Respondent-Appellant,

-against-

NO. 121
(papers sealed)

ANTHONY J. ANNUCCI,

Appellant-Respondent.

20 Eagle Street
Albany, New York
October 16, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

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1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is Matter of Gonzalez v. Annucci.

3 Counsel?

4 MS. EVERETT: May it please the court, Ester
5 Murdukhayeva for the acting commissioner. May I reserve
6 two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may.

8 MS. MURDUKHAYEVA: Thank you.

9 The Third Department's decision should be
10 reversed for three reasons. First, the court erroneously
11 applied the mootness exception to reach the merits of Mr.
12 Gonzalez's claims. Second, the court imposed an extra
13 statutory obligation on DOCCS to provide substantial
14 housing assistance. And third, the court disregarded the
15 record evidence of the extensive assistance that DOCCS did
16 provide to Mr. Gonzalez, including assistance that
17 ultimately secured Mr. Gonzalez a residence in a SARA-
18 compliant shelter.

19 JUDGE FEINMAN: So - - - so let's start with the
20 mootness issue. What's the standard for looking at whether
21 or not they've - - - have erred in - - - in applying it?

22 MS. MURDUKHAYEVA: Certainly.

23 JUDGE FEINMAN: Standard of review.

24 MS. MURDUKHAYEVA: Yes, Your Honor. The
25 exception to moot - - - whether a court correctly applied



1 the exception to mootness doctrine is a question of law,
 2 because the exception only applies if all three Hearst
 3 factors have been satisfied. So applying the exception in
 4 the absence of the Hearst factors would either be an error
 5 of law or an abuse of discretion as a matter of law, and
 6 the - - - and - - -

7 JUDGE FEINMAN: Um-hum.

8 MS. MURDUKHAYEVA: - - - and this court has
 9 jurisdiction to reach that question.

10 JUDGE FEINMAN: So why is it an abuse of
 11 discretion?

12 MS. MURDUKHAYEVA: The reason it is an abuse of
 13 discretion in this case is that, at a minimum, these issues
 14 are not evading review. And the reason that we know
 15 they're not evading review is that similar issues are being
 16 litigated in trial courts. Mr. Gonzalez's brief describes
 17 numerous Article 78 and habeas petitions that have reached
 18 these issues on the merits. There is a current - - -
 19 currently pending case in Albany County that is resolving
 20 similar questions, and that court has scheduled an
 21 evidentiary hearing and extensive discovery has been taken
 22 in that case.

23 The Appellate Divisions have, in fact, reached
 24 issues on the - - - reached cases on the merits involving
 25 the conditional release and housing assistance issues, and



1 since this case has been briefed, the Second Department has
2 reached the merits of - - - in three cases in RTF-related
3 issues - - - in RTF-related cases, involving different
4 issues. But those cases show that these types of issues
5 can be adjudicated both in the trial court and the
6 Appellate Division in a timely fashion.

7 So the fact that these issues are not evading
8 review means that the Hearst factors simply have not been
9 met. In addition, the Hearst factor which requires the
10 issue to be substantial or legal in nature, significant in
11 nature, has not been met.

12 As we explain in our brief, the disposition of
13 all of these questions is a fact-specific inquiry. The
14 question is whether DOCCS has satisfied particular duties
15 in particular - - - particular individualized factual
16 circumstances. The disposition of those claims involve
17 applying lots of facts. But that means that the
18 disposition will not be binding in every future case.

19 Where this court has previously applied the
20 mootness exception has to been to legal questions, such as
21 whether mental competency is a conditioned precedent for a
22 parole-revocation hearing. The court's disposition of that
23 issue would be binding in the same way in every case going
24 forward, in a way that a disposition in this case simply
25 would not be.



1 And for that reason, the Third Department erred
2 in applying the exception to even reach the merits of these
3 issues.

4 JUDGE FEINMAN: Okay, so let's move forward,
5 then. Assume we don't agree with you on that, then what?

6 MS. MURDUKHAYEVA: Certainly, and I'd like to
7 start with the merits of our appeal, which is on the
8 housing assistance issue. The Third Department's housing
9 assistance holding is flawed for a number of different
10 reasons. They - - - the Third Department both misstated
11 the correct legal standard and misapplied the legal
12 standard to the facts of this case.

13 With respect to the legal standard the Third
14 Department articulated, the court erred in stating that the
15 standard is substantial assistance, because the term
16 "substantial" does not exist in the statute. And the court
17 also erred in implying that DOCCS' assistance is a - - - a
18 primary obligation to identify potential residences in the
19 first instance. The legislature was very specific in using
20 the word "assist", which has a dictionary definition and a
21 common understanding of being a secondary duty.

22 JUDGE RIVERA: So - - - so what's DOCCS' position
23 as to what - - - how much you have to do? Put aside that
24 you might do more. What's the bare minimum you have to do
25 to satisfy the standard as DOCCS interprets the statute?



1 MS. MURDUKHAYEVA: Certainly, Your Honor. DOCCS'
2 position is that "assist" means that DOCCS must investigate
3 and approve residences and provide sufficient resources to
4 the offender, so that the offender can identify and propose
5 residences in the first instance.

6 JUDGE RIVERA: So what would those resources be?
7 What's the bare minimum you have to do?

8 MS. MURDUKHAYEVA: Well, Your Honor, the - - -
9 it's hard to answer that question, because the steps that
10 DOCCS takes to provide assistance of a particular type, and
11 not provide assistance of a different type, is a question
12 of reasonableness. And that reasonableness must be
13 evaluated in light of the circumstances.

14 JUDGE RIVERA: Yeah, but there has to be some
15 categories. Like in resources, does that mean you have to
16 give them a list of agencies? There has to be some
17 meaning. It - - - it can't be sort of a - - - well, it
18 depends on whatever the individual needs. Across the
19 board, individuals will need particular categories. So
20 give me some sense of what that would mean.

21 MS. MURDUKHAYEVA: So one sense that I can give
22 is going through the assistance that DOCCS did provide in
23 this case to Mr. Gonzalez, because that assistance was
24 sufficient and meaningful and affirmative. DOCCS staff - -
25 -



1 JUDGE RIVERA: By the way, is that the standard,
2 it has to be meaningful assistance?

3 MS. MURDUKHAYEVA: Well, it has to be sufficient
4 to satisfy the statute. But in this case - - --

5 JUDGE RIVERA: Well, you've used meaningful.
6 What - - - why did you add that word?

7 MS. MURDUKHAYEVA: I used the word meaningful,
8 because what the Third Department appears to imply is that
9 the assistance would not be sufficient unless it resulted
10 in Mr. Gonzalez securing a residence. And we disagree that
11 the standard is only met if a person secures a residence.

12 JUDGE WILSON: Does DOCCS - - - does DOCCS have a
13 map of New York City that shows what areas would be SARA-
14 compliant?

15 MS. MURDUKHAYEVA: Your Honor, DOCCS has an
16 algorithm that it has access to, where you can input an
17 address and determine if an address would be SARA-
18 compliant. The reason why maps are not necessarily a
19 reasonable alternative is that this is a situation in flux.
20 If a new school opens up or if a daycare center opens up -
21 - -

22 JUDGE FAHEY: But - - - but why not simply take
23 them - - - take it - - - take someone who's eligible to the
24 DHS in - - - in the City directly before their maximum time
25 expires and then they're going to be in a SARA-compliant



1 facility within the City of New York? Why not just do
2 that?

3 MS. MURDUKHAYEVA: So, Your Honor, the reason why
4 that is not a reasonable alternative is that DHS - - - the
5 - - - New York City's Department of Homeless Services is in
6 constant communication with DOCCS. And DOCCS knows that
7 DHS is only making a certain number of beds available in
8 SARA-compliant shelters at a given time.

9 JUDGE RIVERA: So if someone who needs a SARA-
10 compliant residence shows up, what - - - what are they
11 going to do? They're going to turn them away?

12 MS. MURDUKHAYEVA: Your Honor, I can't speak for
13 New York City. New York City is not a party to this case.
14 My understanding based on DOCCS' communications with DHS
15 and the way this partnership has been administered is that
16 DHS will only make a certain number of beds in SARA-
17 compliant shelters available.

18 JUDGE RIVERA: Yeah, I understand. But what - -
19 - you - - - you're already - - - you've - - - have already
20 made a decision not to allow someone to go directly to seek
21 this assistance on an understanding with the City, without
22 knowing what indeed - - - I think this is what you're
23 saying - - - without knowing what indeed might be their
24 practice, policy, their legal obligations?

25 MS. MURDUKHAYEVA: Well, the question of how New



1 York City interprets its legal obligation is a question
2 that is presented for New York City. But DOCCS'
3 understanding is that - - -

4 JUDGE RIVERA: No, it - - - it's for you, because
5 if you've decided, well, our understanding is they won't
6 make a bed available and they'll let us know when there's a
7 bed available, and therefore we hold them, you're - - -
8 you're making that decision based on what you believe is
9 going to be what they do, and the next part of that would
10 be that what they do is indeed appropriate under the law,
11 that they could indeed not provide these services.

12 MS. MURDUKHAYEVA: Well, the level of assistance
13 that DOCCS would have to provide in any given case would
14 have to be reasonable, and it should not be futile. If
15 DOCCS' view, based on what DHS has communicated to DOCCS,
16 is that - - -

17 JUDGE FAHEY: You know, I - - - I do recognize
18 it's a difficult thing to judge that. I think - - - to be
19 fair to you. I think that it's diff - - - to - - - to
20 judge what amount of assistance is reasonable or fair. One
21 of the ways of looking at it, though, would be to say, how
22 successful is this system that we have right now? In other
23 words, is it working? Is it doing what it's supposed to be
24 doing?

25 And that's what I struggle with here, because I -



1 - - I've been to a number of the prisons. I recognize the
2 nature of - - - of both the seriousness and the difficulty
3 of the job that DOCCS has. But you have to wonder, the - -
4 - this system that they have now just simply isn't working.
5 It's not - - - it's not solving the problem
6 administratively that the Agency has. And in that
7 situation, wouldn't it be clear that you have to step up
8 your game, alter the way that we've been approaching this?

9 MS. MURDUKHAYEVA: Well, Your Honor, I think in
10 this case, the assistance that DOCCS provided ultimately
11 was successful, because Mr. Gonzalez was released.

12 JUDGE FAHEY: Maybe it was or it wasn't in this
13 case. That's a fair response. But - - - but what I'm
14 wondering is, is how - - - how many people are - - - are
15 actually affected by this right now?

16 MS. MURDUKHAYEVA: My understanding is that as of
17 October 1st, there are approximately 175 individuals in our
18 case - - -

19 JUDGE FAHEY: Okay.

20 JUDGE STEIN: But is that just SARA?

21 MS. MURDUKHAYEVA: These are individuals who are
22 subject to SARA and - - -

23 JUDGE STEIN: Okay, but - - - but whatever your
24 obligation is, however that - - - that is expressed in
25 legal terms, that doesn't just apply to people subject to



1 SARA, does it? Doesn't it apply to everyone who is
2 released - - -

3 MS. MURDUKHAYEVA: That's correct. The - - -

4 JUDGE STEIN: - - - on community supervision?

5 MS. MURDUKHAYEVA: The obligation under
6 Subsection 201(5) applies to all individuals on community
7 supervision. This particular problem has arisen as a
8 result of SARA's application and the limited availability
9 of housing in New York City, where many of these
10 individuals hope to return.

11 JUDGE STEIN: Can I just ask you this? Could you
12 solve one problem? Maybe not getting housing faster, but
13 the - - - the good-time-credit problem. Why couldn't - - -
14 can't these inmates be transferred to the residential
15 treatment facilities when their - - - their first - - -
16 their - - -

17 CHIEF JUDGE DIFIORE: Conditional.

18 JUDGE STEIN: - - - conditional release date
19 comes up?

20 MS. MURDUKHAYEVA: So, Your Honor, I have a
21 couple of answers to that. One answer - - - and this
22 really highlights our mootness concerns here - - - is that
23 DOCCS now has made the shelter waiting list available for
24 individuals who are eligible for conditional release. So
25 DOCCS' current policy is that any individual who is

1 eligible for conditional release is now eligible for
2 release to a shelter. And this - - -

3 JUDGE STEIN: That's to a shelter, but if there's
4 no shelter available, they remain in the correctional
5 facility, rather than - - - as I understand it; maybe I'm -
6 - - I'm not understanding it correctly - - - if they get
7 moved to the RTF, then their post-release supervision time
8 starts running. What - - - what's the problem with that?

9 MS. MURDUKHAYEVA: Certainly, and I - - - I will
10 answer that question, but just to finish my prior response
11 about the mootness. The reason why we think the mootness
12 exception is really inapplicable here is that this court
13 would be adjudicating based on allegations made four years
14 ago about policies that have changed, and this is the very
15 nature of the prohibition on reaching - - - giving advisory
16 opinions.

17 JUDGE STEIN: But doesn't that work both ways,
18 because if you keep changing your - - - your process, then
19 - - - then they'll never be - - - they'll never get to the
20 court before they become moot, so but anyway.

21 MS. MURDUKHAYEVA: Certainly. And to - - -

22 JUDGE STEIN: If you could just please answer - -
23 -

24 MS. MURDUKHAYEVA: - - - to answer your question
25 about why they are not being released to RTFs, the statutes



1 governing conditional release are very clear that that is
2 up to the discretion of DOCCS. Penal Law Section 70.4(2)
3 provides that an individual is not eligible for conditional
4 release when they cannot satisfy that condition.

5 JUDGE RIVERA: So - - -

6 MS. MURDUKHAYEVA: Now, DOCCS - - -

7 JUDGE RIVERA: So let me ask this. So - - - so
8 the individual is asked when? When are - - - when are you
9 asking them - - - or when do they have to tell DOCCS?

10 MS. MURDUKHAYEVA: So when they become eligible
11 for conditional release at - - -

12 JUDGE RIVERA: So let's say they say, well, I'm
13 going to the homeless shelter on the Lower East Side.
14 That's where I'm going; that's my neighborhood. I don't
15 have an apartment; I'm going right to that shelter.

16 MS. MURDUKHAYEVA: So DOCCS cannot release an
17 individual to that shelter - - -

18 JUDGE RIVERA: Why not?

19 MS. MURDUKHAYEVA: - - - without confirming that
20 the shelter will accept them.

21 JUDGE RIVERA: But the reality is you don't know
22 that until the person shows up.

23 MS. MURDUKHAYEVA: Well, we - - -

24 JUDGE RIVERA: That's the way the shelter system
25 works. You don't know until they show up. A bed might



1 open by the time they get there.

2 MS. MURDUKHAYEVA: What we do know is that there
3 are only four SARA-compliant shelters in the City, and DHS
4 has taken the position that it will only make a limited
5 number of beds available in those given shelters. And New
6 York - - - again, I don't want to speak for New York City,
7 because they're not a party to this case, but New York City
8 was a party in the Alcantara proceeding in Albany County,
9 and the claims against New York City were dismissed.

10 And one of the things that New York City argued
11 is that it also has an obligation under state law not to
12 cluster sex offenders in individual settings, because there
13 are public-safety concerns. So to the extent New York City
14 is administering its Homeless Services system in a
15 particular way, that people like Mr. Gonzalez feels is un -
16 - - not compliant with the law, those claims are brought
17 against New York City. They cannot - - - that burden
18 cannot be brought upon DOCCS.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MS. MURDUKHAYEVA: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MS. SANDERS: Good afternoon, Your Honors. May
23 it please the court, as this is a cross-appeal, may I
24 reserve two minutes for a rebuttal?

25 CHIEF JUDGE DIFIORE: Yes, you may.



1 MS. SANDERS: For Miguel Gonzalez, Pappalardo &
2 Pappalardo, by Jill Sanders.

3 Mr. Gonzalez should have been released on May
4 20th of 2014. Yet he was held for an additional eight
5 months and fifteen days in prison-like facilities. He was
6 not - - -

7 JUDGE STEIN: Why is it not reasonable to hold
8 him, or anyone, I suppose, if - - - if they haven't met the
9 conditions of their release, one of which is to have
10 appropriate housing?

11 MS. SANDERS: As the judges of this bench did
12 point out when my adversary was arguing, the condition was
13 impossible. They did not allow him access to the New York
14 City shelter system. He comes from New York. His crime of
15 conviction is from Manhattan. He wanted to return to his
16 community.

17 JUDGE STEIN: Is - - - is showing up at the
18 doorstep, is that the only way to - - - to find out if - -
19 - if - - - if you can get a bed?

20 MS. SANDERS: The New York City policy, the DHS
21 policy, is that they will house anybody who comes to find
22 shelter. It is their responsibility to find shelter,
23 whether it be putting him in one of the four SARA-compliant
24 shelters, or finding a hotel that is SARA-compliant and
25 accessing emergency funds - - -



1 JUDGE RIVERA: Is that - - - is that a policy or
2 a settlement? Are they - - - is that the way they've
3 interpreted the law? To your knowledge, to the extent you
4 can say.

5 MS. SANDERS: To my knowledge, it's based on what
6 was indicated in the briefs, that there is some sort of
7 partnership that has been entered into between DOCCS - - -

8 JUDGE STEIN: But DOCCS says that - - - that they
9 won't do it with these inmates, because they're not
10 homeless. They actually have a place. They're either in a
11 correctional facility or in RTF. So does - - - does your
12 answer to that take that into consideration?

13 MS. SANDERS: Well, DOCCS could have put Mr.
14 Gonzalez or other similarly situated individuals in one of
15 the RTFs that are in New York City, in which they would be
16 in their community and they would be allowed to go out
17 during reasonable hours to look for housing, employment, or
18 other programs. However, that option was not pursued,
19 despite DOCCS conceding that they did have a small RTF crew
20 at the Lincoln Residential Treatment Facility. There are
21 two other RTFs in New York City, Queensborough and Lincoln.

22 JUDGE GARCIA: Counsel, what would - - - again,
23 the question being asked of your adversary - - - what would
24 be the rule, because the language in the Appellate Division
25 as to what efforts need to be taken seems to provide, let's



1 say, limited guidance here. "The efforts are
2 discretionary, beyond the reach of judicial review, unless
3 they're irrational, arbitrary, and capricious, and the
4 majority could not specify the particular actions that
5 DOCCS should have taken."

6 So how do we review whether they should have
7 brought him to this facility or which facility should have
8 moved him in the first place? What's our standard for
9 reviewing the efforts made by DOCCS?

10 MS. SANDERS: As my adversary discussed, there is
11 a plain meaning to the word "assistance" and that means to
12 provide money, resources, information - - -

13 JUDGE GARCIA: But what judgment do - - - how do
14 we apply our judgment as this court to say either, on a
15 global basis, the system isn't working, or to say in this
16 particular case, you know, moving him here, that was
17 assistance; not moving him here, that wasn't assistance.
18 Wha - - - how do we review that?

19 MS. SANDERS: To - - -

20 JUDGE GARCIA: Unless we have to apply an
21 arbitrary-and-capricious standard, which, as you know, is a
22 very difficult standard to meet.

23 MS. SANDERS: It is, but I think that the Third
24 Department found it correctly that this - - - simply
25 checking an address to see if it's SARA-compliant is not



1 assistance. It's not meaningful assistance. It's not
2 substantial assistance.

3 JUDGE GARCIA: There were a number of other steps
4 laid out, particularly in the dissent below, and we would
5 have to go through each one of those things and determine
6 that all-in-all, or each one, it was arbitrary and
7 capricious not to do something else?

8 MS. SANDERS: I think you could look at various
9 steps that were suggested by the dissent, and anyone of
10 those that could have been used, if it - - - if it wasn't -
11 - - looking at it as a whole, they didn't take any - - -
12 any of those steps. That means that it's arbitrary and
13 capricious.

14 JUDGE GARCIA: But they took a num - - - they did
15 a number of things, at least according to the dissent, that
16 - - - there were a number of things they did do here. So -
17 - - aside from what you've mentioned, so how do we weigh
18 all those things and then say, in this particular case,
19 what they did was arbitrary and capricious as a matter of
20 law?

21 MS. SANDERS: In this particular case, they took
22 Mr. Gonzalez from a prison facility to a parole officer in
23 Poughkeepsie, which was not in his home community. They
24 had him sit with that parole officer. He said to that
25 parole officer whether he had found new addresses or not.



1 That parole officer was not familiar with his community.
2 She was not familiar with any of New York City, and she did
3 not propose any addresses except for one, which was in - -
4 - which was unaffordable to somebody who was indigent.

5 None of that can add up to assistance, meaningful
6 assistance, or substantial assistance - - - certainly not
7 substantial assistance. With regard to that substantial
8 assistance, I believe that the Appellate Division did
9 correctly identify that is what the standard should be.
10 There's various laws that are applied to sex offenders that
11 are not - - -

12 JUDGE STEIN: That's not what the statute says.
13 So I mean, why - - - why are we adding "substantial" to it?
14 Don't - - - isn't it just necessary to determine what
15 "assistance" means?

16 MS. SANDERS: Well, if we look at the legislative
17 scheme, which this court did do previously in the Diack
18 case, there's various laws that apply specifically to this
19 particular population. We're talking about SORA, SARA, Sex
20 Offender Management Act - - -

21 JUDGE STEIN: But we're not just talking about
22 them, are we?

23 MS. SANDERS: In this particular case, when - - -

24 JUDGE STEIN: In this case, we are, but wha - - -
25 how - - - how do we make a rule - - - given the statute

1 that we're looking at, how do we make a rule that only
2 applies to - - - to persons under SARA and - - - and not to
3 all people on post-release supervision?

4 MS. SANDERS: Because there are certain laws and
5 regulations that apply specifically to this population.

6 JUDGE STEIN: But not the - - - not the - - - not
7 the ones we're looking - - - well, some of them are, but
8 those don't refer to housing so much as they do to
9 training, and - - - and employment, and that sort of thing,
10 so - - -

11 MS. SANDERS: Right. So for all people who are
12 subject to DOCCS custody, yes, there is a level of
13 assistance that must be - - -

14 JUDGE FAHEY: So what - - - what form - - -

15 MS. SANDERS: - - - applied.

16 JUDGE STEIN: Why is this different?

17 JUDGE FAHEY: Go ahead, Judge.

18 MS. SANDERS: Because it - - -

19 JUDGE STEIN: Sorry.

20 MS. SANDERS: Because it is. There's various
21 laws referring to - - - Chapter 568 of the laws of 2008,
22 which specifically dealt with the housing of sex offenders.
23 The legislature recognized that there is a special need in
24 this particular population in which various factors have to
25 be considered. Because it is so difficult to house this

1 particular set of offenders, we have a countervailing duty
2 that is imposed upon DOCCS that they have to do more.

3 JUDGE FAHEY: So what remedy are you asking us to
4 make? What rule should be coming out of our decision?

5 MS. SANDERS: That the Appellate Division was
6 correct in - - - in applying a substantial-assistance
7 standard.

8 JUDGE FAHEY: Well, we're - - - see - - -

9 MS. SANDERS: That here, they did not do that.

10 JUDGE FAHEY: See -- - so that means if DOCCS
11 checks on fifty-eight residences, that's insubstantial, but
12 the implication would be if they check at sixty-five, it's
13 substantial. Do you see that - - - that that kind of a
14 rule is - - - is relatively meaningless, particularly for
15 the Court of Appeals to be applying? So I - - - so I'm
16 asking you, is there a remedy here that that you're asking
17 us - - -

18 MS. SANDERS: That it - - -

19 JUDGE FAHEY: - - - for?

20 MS. SANDERS: That it has to be more than just
21 simply the checking of residences. That there has to be
22 affirmative assistance. A - - - assistance refers to
23 sharing the burden of trying to locate housing. It's not
24 just merely checking whether an address is approved or not.
25 It must be something else. Bringing in - - -



1 JUDGE FAHEY: Well - - - well, the - - - the idea
2 - - -

3 JUDGE FEINMAN: So that brings us back to Judge -
4 - - I'm sorry.

5 JUDGE FAHEY: No, that - - - that's all right,
6 Judge, go ahead.

7 JUDGE FEINMAN: It brings us back to Judge
8 Rivera's question, which is, so what is it they need to do?

9 MS. SANDERS: Right.

10 JUDGE FEINMAN: Do they have to give you a list
11 of these are twelve places that you should go look at? Do
12 they have to give you internet access?

13 MS. SANDERS: Yes. Judge, there's - - -

14 JUDGE FEINMAN: Like what exactly - - - and this
15 is really what Judge Fahey, I think, is asking, is what is
16 it that constitutes substantial assistance, assuming the
17 word "substantial" actually is properly read into the
18 statute?

19 MS. SANDERS: One of the things that would have
20 been very helpful is when he was meeting with a parole
21 officer, he could have met with a parole officer who was
22 familiar with where he was going. That - - - that doesn't
23 - - - that person - - -

24 JUDGE FEINMAN: So they should transfer him to a
25 local facility - - -



1 MS. SANDERS: Yes.

2 JUDGE FEINMAN: - - - down in New York - - -

3 MS. SANDERS: The statute requires that a
4 residential treatment facility actually be in its - - - in
5 - - - in the community where he intends to reside. Here,
6 he was a hundred miles away from home. And he was meeting
7 with a parole officer who was not familiar with New York
8 City.

9 With regard to the map, that was a suggestion.

10 JUDGE RIVERA: You mean, some kind of assistance
11 that is designed to achieve - - - even if it doesn't, but
12 is designed to achieve the goal of finding a SARA-compliant
13 residence. Is that where you're going with this?

14 MS. SANDERS: Yes, because a parole officer who
15 works with this community will know where - - - what has
16 worked for other people. These parole officers are aware
17 of the neighborhoods where searching for housing may
18 actually turn up housing.

19 These maps, they do exist. Whether DOCCS has
20 them or not, they can be created. Provide him references
21 to community organizations so that they can help them find
22 housing.

23 JUDGE FEINMAN: So - - -

24 JUDGE RIVERA: And then - - - and then how long
25 can this go on? Right, it's difficult - - - you've - - -



1 you've conceded - - -

2 MS. SANDERS: It is difficult.

3 JUDGE RIVERA: - - - it's very difficult to find
4 - - -

5 MS. SANDERS: Yes.

6 JUDGE RIVERA: - - - especially in the City area.
7 How long can this go on?

8 MS. SANDERS: Well, I think that while it is true
9 that he can be held in a residential treatment facility for
10 at least six months, which is what's at issue here, there
11 has been argument elsewhere that they can be held longer,
12 but I don't think that was an issue, necessarily, in this
13 case, because he was only held under Penal Law 70.45(3),
14 which was the six-month limitation - - -

15 JUDGE RIVERA: Um-hum.

16 MS. SANDERS: - - - but certainly, if he had been
17 placed in his community, in a compliant residential
18 treatment facility, he would have been able to not only
19 have better help from his parole officer, but also be able
20 to help himself, by going out to look for housing, by going
21 out to look for employment.

22 JUDGE RIVERA: So - - - so you agree, then, when
23 his conditional release date comes up, if all he says is,
24 I'm going to the homeless shelter on the Lower East Side,
25 that they don't have to release him at that point? Like



1 they could put him in a different placement.

2 MS. SANDERS: I think given the unique set of
3 circumstances that is facing all of the individuals subject
4 to SARA, the indigent sex offenders with this residency
5 restriction, that it's not sufficient to say that they
6 couldn't have transferred him to an RTF, just because it's
7 in their discretion.

8 They have made a condition of his conditional
9 release impossible by - - - I don't want to say the word
10 colluding - - - but entering into a partnership with DHS,
11 by which he can't access the shelter systems by which - - -

12 JUDGE RIVERA: So should they have let him go to
13 try and find a bed in a shelter, in my hypothetical?

14 MS. SANDERS: They should have brought him to DHS
15 and negotiated with DHS about where he was going to be put,
16 whether it was to access those emergency funds, which are
17 available to this particular set of - - - of offenders, or
18 whether it was to place him in one of those - - - those
19 three facilities that are in New York City, which are
20 residential treatment facilities.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 Counsel, why wouldn't DOCCS - - - when they
23 transferred this gentleman, why wouldn't they transfer him
24 to a RTF in New York City?

25 MS. MURDUKHAYEVA: Your Honor, the reason for why



1 Mr. Gonzalez was placed in the Woodbourne RTF is explained
2 in the affidavit of Anne Marie McGra - - - McGrath, which
3 is in the record, and the reason is programming and
4 staffing and resource limitations. And DOCCS is within its
5 discretion to take those issues into account when deciding
6 where to place somebody.

7 I think it would be difficult for this court to
8 decide, as a matter of law, that DOCCS cannot consider
9 those issues in ma - - - in determining where to place
10 someone. And the limitations at issue at that time made a
11 - - - spaces in the New York City RTFs unavailable for Mr.
12 Gonzalez.

13 JUDGE FAHEY: Well, is it - - - wasn't - - -
14 wasn't he an L-1? Is that correct?

15 MS. MURDUKHAYEVA: He was, Your Honor.

16 JUDGE FAHEY: Well, jeez, if an L-1 doesn't
17 qualify for that, who would qualify? It - - - of the
18 universe of people you have, they're going to be an L-1, L-
19 2, or L-3. So let's say the L-1 is the, theoretically, the
20 - - - the most likely to be released. Why wouldn't that
21 person qualify?

22 MS. MURDUKHAYEVA: I - - - I'm sorry, Your Honor.
23 I don't understand what you're - - -

24 JUDGE FAHEY: Why wouldn't DOCCS - - -

25 MS. MURDUKHAYEVA: Qualified for what?



1 JUDGE FAHEY: Why wouldn't DOCCS take the action
2 to release that kind of person directly to DHS? If anybody
3 would qualify of the universe of the people they have, this
4 person is going to qualify.

5 MS. MURDUKHAYEVA: No, Your Honor, because DOCCS
6 - - - SARA prohibits DOCCS from releasing someone who is
7 subject to SARA.

8 JUDGE FAHEY: No, no, I - - - I understand that.
9 The - - - but we're back to the why not simply go to the
10 shelter and - - - and negotiate directly to release him?

11 MS. MURDUKHAYEVA: The reason is that that
12 negotiation has already happened to the extent DOCCS has
13 been communicating with DHS, and DHS has informed DOCCS
14 about the number of beds it will make available. It would
15 be futile to require DOCCS to take individuals when they
16 know what the result is going to be, because DHS has told
17 us what the result is going to be. And DHS told the court
18 in the Alcantara proceeding what its position is.

19 JUDGE STEIN: Do you know what the - - -

20 JUDGE RIVERA: What - - - what's the result going
21 to be?

22 JUDGE STEIN: - - - the status is in Alcantara?

23 MS. MURDUKHAYEVA: I'm - - - I'm so - - -

24 JUDGE STEIN: Do you know what the status is of
25 that case?



1 MS. MURDUKHAYEVA: Yes, Your Honor. The court -
2 - - the decision was rendered in February 2017. There's
3 been about a year and a half of discovery. There's no
4 evidentiary hearing that has been scheduled yet. I believe
5 it's the plaintiff's - - - the plaintiffs are required to
6 request an evidentiary hearing date when they are ready for
7 it.

8 JUDGE STEIN: Thank you.

9 JUDGE RIVERA: What's the result going to be,
10 that you said, we already know what the result's going to
11 be? What - - - what is that?

12 MS. MURDUKHAYEVA: My understanding is DHS will
13 not accept that person because DHS has said these are the
14 number of beds that we have made available, and DOCCS'
15 policy to provide those beds to individuals who have been
16 in an RTF, passed their mas - - - maximum expiration date
17 for the longest is a reasonable decision within their
18 discretion.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.
20 Counsel?

21 MS. SANDERS: Judges, I wanted to touch briefly
22 on mootness, because it wasn't something I discussed
23 before. I know that Judge Stein brought this up with
24 regard to the voluntary cessation. As my adversary
25 indicated, there had been some change in policies.



1 However, there's nothing stopping them from going back to
2 these policies in which we're never going to get out of
3 this situation. There are people - - - there are - - -

4 JUDGE FEINMAN: Yeah, but let me ask you this,
5 because - - - and I - - - and I didn't get a chance to ask
6 your adversary, because it just occurred to me.

7 MS. SANDERS: Yes.

8 JUDGE FEINMAN: Isn't there a wrinkle here by the
9 court having converted this from a regular Article 78 to a
10 declaratory judgment? And - - - and if - - - if it had not
11 done that, would the mootness analysis be the same?

12 MS. SANDERS: I think that the mootness analysis
13 is the same regardless of what the act - - - action would
14 be. The mootness standard is, as it's set forth in - - -
15 in the Hearst case, and then here, I think we've - - - we
16 certainly demonstrated that it's capable of repetition. I
17 don't think there's a dispute with regard to that. While
18 the individual cases may be very slightly different, the
19 policies are the same regardless of the level of where
20 they're coming from. It's applied to any person who is
21 subject to SARA.

22 Across the board, people are being held past
23 their release dates. They're being held - - - being
24 deprived of their good time, and they're being held in
25 these nonconforming RTFs, which are razor-wire fences,



1 where these people are wearing inmate uniforms, and living
2 in general population, and not getting any meaningful
3 difference between imprisonment and - - - and release.

4 JUDGE RIVERA: But let's say they can't release
5 them, because they know that there's not going to be a bed
6 for them. There's no place for them to go. They say, we
7 already know that's the outcome of this. It'd be futile,
8 and not - - - not within the purpose and the intent of the
9 statute.

10 MS. SANDERS: As to the good-time issue, or the
11 RTF issue?

12 JUDGE RIVERA: I'm sorry, on the RTF issue.

13 MS. SANDERS: Yeah, well, with regard to that,
14 Judge, I would submit that there's a constellation of
15 factors that go towards what is an RTF. And here, DOCCS
16 has not met any of those. They haven't allowed these
17 individuals to have meaningful work opportunities,
18 educational programs. They are not allowed to leave.
19 They're not allowed to go out and look for their own
20 housing or employment. And they're not treated in any way
21 that is - - - is actually really different from regular
22 inmates.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MS. SANDERS: Thank you, Judges.

25 (Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Gonzalez v. Anthony J. Annucci, No. 121 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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