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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE EX REL. CHANCE MCCURDY,

Appellant,

-against-

WARDEN, ET AL.,

NO. 73
(Papers sealed)

Respondents.

20 Eagle Street
Albany, New York
October 13, 2020

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

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 73.

3 Counsel?

4 MR. HARPAZ: Your Honor, may I reserve one minute
5 for rebuttal?

6 CHIEF JUDGE DIFIORE: Of course.

7 MR. HARPAZ: Thank you. Good afternoon, may it
8 please the court.

9 Your Honors, as we speak, hundreds of people
10 serving post-release supervision are trapped in custody
11 indefinitely for want of a place to live more than 1,000
12 feet from a school. This situation is illegal and it's
13 unnecessary. It is not authorized by statute, and as my
14 colleagues will address shortly, it does not pass
15 constitutional muster.

16 The statutory argument involves the interplay
17 between Correctional Law 73(10) and Penal Law 70.45(3).
18 Before I delve into it, to be very clear, the authority
19 that DOCCS seeks in this case is indefinite confinement in
20 a residential treatment facility for up to the maximum
21 expiration of the post-release supervision period. Because
22 while the Second Department held and DOCCS agrees that they
23 must release someone as - - - if a SARA-compliant residence
24 does become available, if one doesn't, that's it. You
25 would have to serve the entire period of post-release



1 supervision in a residential treatment facility.

2 So with that in mind, the statutory argument
3 starts off with originally enacted Correction Law 73(10)
4 back in 1970, which - - - and at that point, there were two
5 different entities, the Board of Division of Parole and the
6 Department of Correctional Services, provided that there
7 could be an agreement between the two, if the Board - - -
8 if the Board of Parole wanted it that the Department of
9 Correctional Services would house someone in a residential
10 treatment facility who was on parole or conditional
11 release.

12 JUDGE STEIN: So - - - so when it - - - focusing
13 on that argument and - - - and - - - and on that statute,
14 it - - - does your argument require us to accept that there
15 - - - there was this gap in the statutory framework for
16 many years, which allowed the pro - - - the parole division
17 to place people in residential treatment facilities, but
18 did not allow - - - well, at least for the six months,
19 right, but did - - - on - - - only authorized the
20 Department of Correctional Services to use the RTFs as a
21 residence, but not for people that were on PRS?

22 MR. HARPAZ: That - - -

23 JUDGE STEIN: Is that - - - that - - -

24 MR. HARPAZ: That - - - that is, in fact - - -

25 JUDGE STEIN: We would have to find that. We



1 would have to find - - -

2 MR. HARPAZ: But - - -

3 JUDGE STEIN: - - - that they were acting
4 illegally for all those years, correct?

5 MR. HARPAZ: But it's true. In other words,
6 there's no question. They don't - - - my adversary does
7 not dispute that this was the case. They simply say no one
8 - - - everybody assumed that DOCCS had the authority. But
9 DOCCS didn't have the authority. So there was this gap - -
10 -

11 JUDGE STEIN: But where - - - where do - - -
12 where do you - - - where do you get that from?

13 MR. HARPAZ: I get it - - - I get it from - - -

14 JUDGE STEIN: Well, is there - - - is there
15 anything in the legislative history or anything that - - -
16 that would - - - would indicate that?

17 MR. HARPAZ: Well, no, I'm getting it from the
18 actual language of the - - - of the statutes. In other
19 words, 70.45(3), enacted in 1998, provided - - - gave the
20 Board of Parole authority to mandate up to a six-month
21 period of - - - of stay in a residential treatment facility
22 at the beginning of the PRS term. Correction Law 73(10)
23 only provided authority for the commissioner of then DOCS
24 to house someone in a residential treatment facility who
25 was on parole or conditional release, not post-release



1 supervision.

2 JUDGE WILSON: Is your argument helped at all by
3 Correction Law - - - over here, sorry. Masks make it
4 difficult. Is your argument helped at all by Correction
5 Law 2(6) that defines residential treatment facility, and
6 includes in the people who may be - - - or limits the
7 people who may be included there to people who are out on
8 parole who are on conditional release? That is, is - - -
9 is 73(10) a sort of backwards way of adding to 2(6)?

10 MR. HARPAZ: Well, it's interesting you - - -
11 you've referred to Correction Law 2(6), because in fact, it
12 doesn't - - - to this day doesn't mention post-release
13 supervision. It's never been amended. Why? Go figure.
14 But - - - but I - - - I - - - I - - - yes, I do think that
15 - - - that prior to the 2011 amendment of Correction Law
16 73(10), there was a total congruence between the definition
17 under Correction Law 2(6) and correction - - - and
18 Correction Law 73(10) about using RTFs for people on parole
19 or conditional release, not post-release supervision.

20 And - - - one thing I want to add, though, is
21 that - - - if you - - - if you presume that the 2011
22 amendment to Correction Law 73(10) gave authority to
23 confine individuals in RTFs serving post-release
24 supervision, why did the legislature - - - indefinitely - -
25 - why did the legislature bother to enact 70.45(3), since



1 the - - - all they need to do was precisely what they did
2 in 2011, and just simply expand 73(10) to cover people in
3 post-release supervision?

4 They were making it clear that - - - that post-
5 release supervision had a limit on how long you could
6 confine somebody in an RTF, six months at the very
7 beginning of the PRS term. There's no further authority to
8 do that, and correctional - - - the amendment to Correction
9 Law 73(10) was not intended to do that.

10 Your Honors, I do want to address, because I
11 think it's important - - -

12 JUDGE FAHEY: Well, just hold - - - hold on a
13 second, would you? On - - - on 70.45(3), is - - - is the
14 core of your argument based on the court's interpretation
15 of the phrase "notwithstanding"?

16 MR. HARPAZ: I don't think so.

17 JUDGE FAHEY: No? Tell me why not.

18 MR. HARPAZ: I mean, Correction Law 70 - - - I'm
19 sorry. Correct - - - Penal Law 70.45(3), which I'm now
20 going to - - - I apologize.

21 JUDGE FAHEY: No, it's all right. Take a second.

22 MR. HARPAZ: Yeah, right.

23 JUDGE FAHEY: Yes, take a second.

24 MR. HARPAZ: "Shall withstand the conditions" - -
25 - "notwithstanding any other provision of law." Right.



1 "The Board of Parole may impose as a condition of PRS" - -
2 - "following release" if they serve it in an RTF. I don't
3 - - - what other provision of law are we talking about that
4 would change the meaning of that, that would provide
5 authority that previous - - - that didn't exist to house
6 someone in an RTF? It's not - - - it wasn't there until
7 2011. It simply never - - - it - - - the authority didn't
8 exist for the commissioner of the Department of
9 Correctional Services to do that.

10 JUDGE FAHEY: Let -- - let me just take a - - -
11 a little - - - a side turn here for a second, all right.
12 SARA-compliant housing. There's four SARA-compliant DHS
13 shelters in New York City right now, right? Yes.

14 MR. HARPAZ: I believe that's correct. Or there
15 may be some - - -

16 JUDGE FAHEY: Well, let's - - - let's assume for
17 now. That's - - - that's what I gleaned from all these
18 cases, is that apparently there are four.

19 Outside the City, do you have any idea what the
20 number is? Outside the four (sic) boroughs?

21 MR. HARPAZ: I - - - I - - - I do not - - - I do
22 not have that information.

23 JUDGE FAHEY: Okay.

24 MR. HARPAZ: I imagine - - -

25 JUDGE FAHEY: Is there a geographic limit - - -



1 because the way I understand DOCCS' argument, well, is this
2 - - - this - - - one of the arguments is - - - I don't know
3 if it's disingenuous or not - - - but it is argued that
4 there's a lot of other places you can go besides the bo - -
5 - the four boroughs. And - - - and why aren't those being
6 pursued?

7 MR. HARPAZ: Well, often they are pursued - - -

8 JUDGE FAHEY: Um-hum.

9 MR. HARPAZ: - - - and DOCCS turns them down,
10 because they say, if you're re - - - if you resided in New
11 York City or supervised in New York City before you came
12 into DOCCS' custody, that's where you have to go back to
13 live.

14 JUDGE FAHEY: So in other words, if - - - if
15 you're - - - if you're arrested and convicted in Queens,
16 then - - - then you have to go back to one of the four
17 boroughs? You can't go to Elmira, New York?

18 MR. HARPAZ: You - - -

19 JUDGE FAHEY: And you can't go to D - - - there's
20 no DHS shelter that you can go in Chemung or St. Lawrence
21 County, where - - - where certainly, you're not going to be
22 within 1,000 feet of any school, quite often. It would be
23 much easier, my point is, to meet the geographic
24 requirements if there wasn't a restriction to where the
25 prisoners had to go back to. Is that correct?



1 MR. HARPAZ: Yes, Your Honor, and - - - and
2 general speaking, our - - -

3 JUDGE FAHEY: You see, that's an important point,
4 that's, I think, misunderstood, because it's assumed that
5 logically, the whole state would apply, but a point of
6 fact, it does not apply.

7 MR. HARPAZ: There's - - - there's nothing
8 preventing a person from requesting to - - - you know, a
9 residence outside of the five boroughs, but generally
10 speaking, it's not - - - it's simply not granted. You're
11 from New York. You're going back to New York. You're
12 going to need a place to live in the New York City - - - in
13 the five-borough area.

14 JUDGE RIVERA: Is that, in part, because of the
15 tension with the interest to facilitate reentry into your
16 community - - - community with which you are familiar?

17 MR. HARPAZ: It - - - it could be. You know, I
18 don't - - - I don't pretend to know the innerworkings of
19 DOCCS and how they view this, but it's certainly that could
20 be one - - -

21 JUDGE RIVERA: Well, the legislature obviously,
22 in some of these statutes, has an interest in facilitating
23 reentry, right, promoting reentry?

24 MR. HARPAZ: DOCCS has - - - yes, they do. And I
25 think - - - I - - - I agree with the notion that - - - that



1 if - - - if an individual was able to come up with the
2 SARA-compliant residence somewhere in New York State, the
3 notion that they need to be held in an RTF because it's not
4 acceptable to them to live anywhere outside of the City - -
5 -

6 JUDGE RIVERA: But I - - - I - - - I could see in
7 part, the - - - the tension, especially when the individual
8 has family and a support network that would, of course,
9 promote - - -

10 MR. HARPAZ: Sure.

11 JUDGE RIVERA: - - - reentry.

12 MR. HARPAZ: Sure.

13 JUDGE RIVERA: And - - - and the kinds of
14 programs that might be available that DOCCS might think are
15 really very important to that person's successful reentry
16 that might not be available outside of that - - -

17 MR. HARPAZ: Yes.

18 JUDGE RIVERA: - - - community. But again, that
19 - - - that is not for us to decide in that sense, right,
20 so.

21 MR. HARPAZ: Yeah.

22 JUDGE RIVERA: That - - - that's to decide based
23 on where the person may say, well, I'm willing to live
24 there, but if you need certain services and they're not
25 available, that may very well be a factor.



1 I just want to clarify something. You are not
2 taking the position that DOCCS cannot use, under - - -
3 under the Penal Law 70.45(3) - - - subdivision 3 - - - that
4 - - - that DOCCS can't use that six-month period when
5 someone is unable to find SARA-compliant housing? In other
6 words, if that's the sole reason - - - you're not taking
7 the position if that's the sole reason you can't even rely
8 on this Penal Law provision, correct?

9 MR. HARPAZ: That's correct. And in fact, I
10 agree with my adversary that, in fact, 70.45(3) does not
11 say that if you have a SARA-compliant residence, DOCCS must
12 release you.

13 JUDGE RIVERA: Um-hum.

14 MR. HARPAZ: It gives the Board the authority to
15 impose up to this maximum six-month stay for - - -

16 JUDGE RIVERA: Um-hum.

17 MR. HARPAZ: - - - any reason it deems
18 appropriate, having to do with the reentry of the
19 individual into the community. So - - - so there's that.

20 But I - - - I do want - - - before my time is up,
21 I do - - -

22 CHIEF JUDGE DIFIORE: Does that authority apply,
23 Counsel - - - excuse me for interrupting - - - does that
24 auth - - - same authority apply for someone who is released
25 on post-release super - - - supervision, goes to the RTF



1 for the first six months for the reentry services, released
2 back into the community, violates post-release supervision,
3 reincarcerated, and now he's going to be rereleased again?
4 Does the six-month period - - - reentry period under
5 70.45(3) apply?

6 MR. HARPAZ: No. No, Your Honor, because the
7 statute is clear. And if I could just look at it. It
8 says, "may impose a condition of PRS" - - - "that for a
9 period not exceeding six-month immediately following
10 release from the underlying term of imprisonment." So it
11 means at the very beginning of the PRS term. When you
12 violate your PRS term and you're returned as a PRS
13 violator, you are - - - you are not serving your prison
14 term; you're serving a time assessment for violating the
15 PRS term. It's long past the six-month period at the very
16 beginning of the PRS term.

17 So 70.45(3), and - - - and my adversary agrees
18 with that, does not provide authority in the case of
19 someone like Chance McCurdy, who was returned as a PRS
20 violator. So - - -

21 JUDGE STEIN: So - - - but why - - - why can't we
22 find that the Correction Law allows DOCCS to send Mr.
23 McCurdy back to an RTF to be used as a residence for - - -
24 un - - - until such time as SARA-compliant housing becomes
25 available? Why - - - what's the problem with that?



1 MR. HARPAZ: Your - - - Your Honor, that's a
 2 great segue to the point I was going to be making before my
 3 time ran out, which is, I want to commend Your Honors to
 4 the amicus brief by Prisoners' Legal Services, because I
 5 think there's a lot of wisdom in that. And it talks about
 6 not just what the effect of the amendment in 2011 was on
 7 Correction Law 73(10), but what the initial intent was when
 8 it was first enacted in 1970.

9 And as PLS points out, there's two classes of
 10 people covered by Correction Law 73. Subdivisions 1
 11 through 9 deal with inmates; subdivision 10 deals with
 12 people who are on parole, conditional, or community
 13 supervision. And it speaks of using - - - and - - - and we
 14 know these are different people, because, for instance,
 15 Correction Law 73(5) gives DOCCS the authority, the
 16 commissioner at any point in time to transfer someone from
 17 an RTF back into a prison setting. You certainly - - -
 18 that would be completely illegal for a person serving post-
 19 release supervision who has not violated their PRS term;
 20 there is no legal authority to put them back in prison and
 21 DOCCS knows that.

22 JUDGE STEIN: Well, that's a different question,
 23 and that question's not before us - - -

24 MR. HARPAZ: But - - -

25 JUDGE STEIN: - - - how - - - how we would



1 interpret that.

2 MR. HARPAZ: No, but - - - but my point is that
3 one can interpret 73(10) precisely as it - - - as it looks,
4 that simply, if there is no other place for someone to
5 live, but they have a right to be released, they can use -
6 - - DOCCS can afford them the opportunity to use the RTF as
7 a residence.

8 JUDGE STEIN: Oh.

9 MR. HARPAZ: And what that means is not the
10 conditions laid out in subdivisions 1 through 9.

11 What that simply means is, you should be free to
12 come and go, essentially as you choose, subject to the
13 various conditions that would be put on you. Meaning a
14 curfew, you've got to be in the RTF at this point in the
15 evening; you can't leave until this point in the morning,
16 just like would be the case if you were in a residence in
17 the community. You have to observe the SARA condition.
18 You have to abide by all rules and regulations when you're
19 in the R - - - I mean, that would be a reading that would
20 not find there is authority to confine, to limit, to place
21 someone in the custody of DOCCS in the RTF.

22 JUDGE RIVERA: So then what does that mean? Let
23 me just follow up on this. So let's say the opening in the
24 shelter opens up, not - - - not permanent housing, but the
25 opening in the shelter opens up. Does this individual now



1 get to choose? I'd rather - - - you know, the shelter's
2 dangerous; I don't want to go there. I'm - - - I'd rather
3 stay here, since this is a "residence".

4 MR. HARPAZ: No, I think that - - - that, at that
5 point in time, DOCCS would have absolutely the authority to
6 say, look, this was a temporary setup, because you had no
7 SARA-compliant residence, so there's one now, so you got to
8 go to it.

9 JUDGE RIVERA: Or - - - or perhaps it has no
10 authority to hold you here, whether you call it a residence
11 or otherwise?

12 MR. HARPAZ: Well, no authority - - -

13 JUDGE RIVERA: The - - - the authority to provide
14 this space. This space is going to go to someone else for
15 whom it is authorized to provide - - -

16 MR. HARPAZ: Right, no authority for them to hold
17 you there, but by the same token, no right for you to say,
18 I insist on my right to stay in the RTF; I don't want to go
19 to a shelter.

20 JUDGE RIVERA: Well, until I find permanent
21 housing, yeah.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 JUDGE FAHEY: Can - - - can I - - - Judge, I - -
24 - I'm sorry?

25 CHIEF JUDGE DIFIORE: Yes, of course.



1 JUDGE FAHEY: I - - - I just want to ask one
2 short question. The Supreme Court had a particular remedy
3 that didn't involve re - - - release. What - - - what
4 remedy are you asking for here?

5 MR. HARPAZ: Since Mr. McCurdy has long since
6 been released - - -

7 JUDGE FAHEY: Right.

8 MR. HARPAZ: - - - I think one thing the court
9 could do is convert this matter to a motion for a
10 declaratory judgment - - -

11 JUDGE FAHEY: Um-hum.

12 MR. HARPAZ: - - - pursuant to CPLR 103(c), and
13 then, you know, make a determination as to the scope of the
14 authority or lack of authority that exists in this case for
15 DOCCS to confine an individual serving PRS in an RTF who is
16 more than six months past the beginning of the PRS term.
17 Obviously, I would be asking the court to find there is no
18 such authority.

19 JUDGE FAHEY: Thank you.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MR. HARPAZ: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MS. MURDUKHAYEVA: May it please the court, Ester
24 Murdukhayeva for DOCCS.

25 The only question presented in this case is



1 whether DOCCS has the statutory authority to temporarily
2 place a person on post-release supervision in a statutorily
3 compliant RTF after the first six months of post-release
4 supervision have expired. The plain text of Correction Law
5 - - -

6 JUDGE RIVERA: So - - - so then what do you make
7 of that language in 70 - - - well, of the word, in 70.45(3)
8 that Judge Fahey was pointing to, "notwithstanding"?

9 MS. MURDUKHAYEVA: Certainly, Your Honor. The
10 notwithstanding clause means that any - - - any other
11 statutory authority that would displace the Board of Parole
12 from being able to impose a mandatory six-month residency
13 is - - - is superseded by the language in 70.45(3).

14 JUDGE RIVERA: Um-hum.

15 MS. MURDUKHAYEVA: In other words, the
16 notwithstanding clause is triggered only when there's
17 another provision that creates a conflict. The
18 notwithstanding clause by itself does not create the
19 conflict.

20 JUDGE RIVERA: And why - - -

21 JUDGE WILSON: Well, let me - - - let me - - -

22 JUDGE RIVERA: - - - isn't there conflict when
23 you've got another provision that's - - - that doesn't have
24 a - - - a maximum amount of time?

25 MS. MURDUKHAYEVA: Well, Your Honor, because



1 these two provisions serve two different purposes, and they
2 are two different sources of authority. The Second
3 Department was correct to read both of these statutes as
4 having independent meaning.

5 Section 70.45(3) authorizes a mandatory six-month
6 RTF term on any person, whether or not they're subject to
7 SARA or another type of residency restriction and whether
8 or not that person has or does not have housing that
9 complies with that residency restriction.

10 Correction 73 - - - Correction Law 73.10 is
11 simply a different type of authority. It allows DOCCS to
12 use RTFs as residences during a term of community
13 supervision, which is itself defined to expressly include
14 post-release supervision. And what DOCCS is doing here is
15 using that authority to provide housing on a temporary
16 basis.

17 JUDGE WILSON: Coun - - -

18 MS. MURDUKHAYEVA: That's the only question
19 before this court.

20 JUDGE WILSON: Counsel, could I ask you about the
21 "provided however" language that proceeds the
22 notwithstanding, because we have go back a little bit. The
23 SARA statute, as I read it, doesn't reach people on PRS,
24 right?

25 MS. MURDUKHAYEVA: The Executive Law 259-c(14)



1 does not refer to PRS.

2 JUDGE WILSON: Okay.

3 MS. MURDUKHAYEVA: Yes.

4 JUDGE WILSON: And the way you get to that is you
5 say, but PL 70.45(3) says that people on PRS - - - the
6 Board can treat people on PRS the same way that it treats
7 people on conditional release or parole. And so that - - -
8 and they can impose the same kinds of restrictions. With
9 me so far?

10 MS. MURDUKHAYEVA: Sure.

11 JUDGE WILSON: Okay. That, though, is then
12 followed by the "provided however notwithstanding," and I -
13 - - I want to focus on "provided however." Is that a
14 restriction on the ability of the power of the Board?
15 Because that's, I think, a reasonable way to read "provided
16 however."

17 MS. MURDUKHAYEVA: Well, I think it is a
18 restriction on the ability of the Board to impose this
19 mandatory term of RTF housing, where irrespective of
20 whether a person has a residency restriction or is subject
21 to that type of - - - that type of condition, the Board is
22 limited in imposing this mandatory term of RTF residency
23 for those six months.

24 I don't think that this provision displaces
25 sources of authority that talk about RTFs in other



1 contexts. And this - - - the use of Correction Law 73(10)
 2 in this type of context is a different context. This is a
 3 situation where a person was out in the community,
 4 violated, was - - - was required to do a drug treatment
 5 program, and then was rereleased to post-release
 6 supervision without a residence.

7 The position that DOCCS was in in that
 8 circumstance is that if it released Mr. McCurdy into the
 9 community without a SARA-compliant residence, the agency
 10 would be violating its statutory mandate to enforce SARA,
 11 and Mr. McCurdy would be in violation and at risk of
 12 rearrest because he would be in the community without a
 13 SARA-compliant residence. So the Correction Law 73(10)
 14 authority allows DOCCS to deal with this problem that can
 15 arise at any point during a person's term of post-release
 16 supervision.

17 The reason why there is no temporal limitation is
 18 not because DOCCS is using this authority to impose a
 19 permanent condition of release; DOCCS is using this as a
 20 stopgap, and that is the only - - -

21 JUDGE RIVERA: But - - - but isn't - - - but
 22 isn't part of the problem created by this arrangement
 23 between DOCCS and DHS and the City? And as Judge Fahey
 24 pointed out, of course, someone could be allowed to live in
 25 a different part of the state, where perhaps they don't



1 have the kinds of challenges they would in trying to return
2 to their community in the City.

3 MS. MURDUKHAYEVA: Well, Your Honor, several - -
4 -

5 JUDGE RIVERA: So how - - - how is not of DOCCS'
6 own making, is what I'm trying to say.

7 MS. MURDUKHAYEVA: It - - - it is not, Your
8 Honor. As this court said in Gonzalez, the responsibility
9 for placing indigent sex offenders in shelter housing falls
10 upon local departments of social service. And in this
11 case, it is - - - New York City operates a local department
12 of social service. I won't - - - before I - - - I get into
13 this, I will note that we have removed in the Ortiz case to
14 strike the - - -

15 JUDGE RIVERA: Yes, I know that.

16 MS. MURDUKHAYEVA: Yes, so assuming that the
17 court considers the extra record evidence on which all of
18 this based, the - - - what - - - what the extra record
19 evidence - - -

20 JUDGE RIVERA: Well, we'd probably consent to
21 create -- it is - - - is public documentation, but go
22 ahead.

23 MS. MURDUKHAYEVA: What the extra record evidence
24 makes clear is that DHS is the one that is responsible for
25 placing offenders into the shelter system, and DH - - -



1 DOCCS cannot compel DHS to accept offenders.

2 JUDGE WILSON: But - - - so let me ask you about
3 the decree then. Why isn't the whole problem here really a
4 problem of the City violating its decree? I mean, isn't
5 that's what's really happened here?

6 MS. MURDUKHAYEVA: Your Honor, I don't represent
7 the City, and I - - - I - - - that decree is not at issue
8 in this case. If the petitioners believe that the City is
9 obligated to accept all of the SARA-restricted offenders
10 that need housing, that claim is properly brought against
11 DHS, who is not a party to this case.

12 And one other point that I would make in this - -
13 -

14 JUDGE FAHEY: Can - - - can I ask a question
15 before you move on to the other point? Can - - - is there
16 a reading that you could offer to us that doesn't read out
17 the six-month limitation that's in 70.45(c)?

18 I - - - I've tortured through this, and it seems
19 to me that we're in a situation where we're being required
20 to pursue a legal reading of statutes that appear to be at
21 cross-purposes, at least partially, to solve what's really
22 an administrative problem, which aren't enough beds in New
23 York City to deal with people that are being released, and
24 so that's why we're in this situation where we have .1
25 percent available beds, and we're got 200 or 300 people



1 that are - - - are - - - are being incarcerated longer than
2 the six months, because there's really no place to put
3 them.

4 So is there a reading that DOCCS is offering that
5 says this - - - the six-month limitation is still valid and
6 - - - and we're compliant with it?

7 MS. MURDUKHAYEVA: Certainly, Your Honor. I
8 think the six-month limitation is valid, when DOCCS imposes
9 that condition as a mandatory six-month term of residence,
10 regardless of whether someone is subject to housing
11 restrictions.

12 So if DOCCS - - - if the Board has an individual,
13 and determines that individual need - - - needs more
14 programming before they're able to reintegrate into the
15 community, they must - - - they must go to a residential
16 treatment facility for six months, whether or not they have
17 other housing that is compliant. That is subject to a six-
18 month limitation and has been subject to a six-month
19 limitation.

20 JUDGE FAHEY: Uh-huh. Are people then renewed
21 after six months if they're - - - if they're still on PRS
22 and kept longer? I'm not aware of that being the case.

23 MS. MURDUKHAYEVA: Well, I think the - - - the -
24 - - the people - - - you mean, the people that are subject
25 - - -



1 JUDGE FAHEY: Um-hum.

2 MS. MURDUKHAYEVA: - - - to this condition
3 because of - - -

4 JUDGE FAHEY: Sure.

5 MS. MURDUKHAYEVA: No, Your - - - no, Your Honor.

6 JUDGE FAHEY: Okay.

7 MS. MURDUKHAYEVA: I - - - when - - - when DOCCS
8 uses - - -

9 JUDGE FAHEY: So the six-month limitation isn't
10 being complied with, then. You see, I - - - I - - - I - -
11 - I'm really struggling to find some instance where you
12 clearly comply with the six-month limitation to meet
13 what's, in many ways, I think an unfair burden placed on
14 DOCCS to solve a problem that may be higher than your pay
15 grade, to put it fairly.

16 MS. MURDUKHAYEVA: I appreciate that, Your Honor.
17 I think Correction Law 73(10) is used as a sort of stopgap
18 authority in those circumstances. DOCCS is not saying that
19 under Correction Law 73(10) it can use the RTF as a
20 permanent residence for a person.

21 JUDGE STEIN: Do - - - do you agree that part of
22 the problem is whether it's, as a practical matter, true or
23 whether it's a perception but, you know, we've - - - we've
24 heard arguments, and I'm not sure any of them are before us
25 today, but that there's no change in status, so the



1 question about what happens when the six months is up,
2 okay. And so then the authority under the Penal Law no
3 longer exists to keep this person in an RTF.

4 But now, we're going to go the Corrections (sic)
5 Law, and we're going to say, but we can't release you,
6 because - - - because you - - - you don't have SARA-
7 compliant housing; therefore, we're going to temporarily
8 keep you here, until you find the housing. But as a
9 practical matter, the argument is being made that there is
10 no difference between how that person is treated after the
11 end of the six-month period and the continuation under a
12 different statutory authority.

13 Is - - - does that make sense?

14 MS. MURDUKHAYEVA: I - - - I understand that,
15 Your Honor. And I think some of these issues are explored
16 in the Ortiz case, maybe a little bit more clearly than
17 they are in here, because this is just the statutory issue.
18 I think my response to that would be that a person's post-
19 release supervision is determined by the scheme that the
20 legislature has imposed on post-release supervision.

21 And in this case, the legislature has expressly
22 envisioned that post-release supervision may be served in a
23 residential treatment facility for at least part of the
24 time, and has defined residential treatment facility to
25 require certain types of programming and to require certain

1 types of conditions.

2 I would return to the question that Judge Wilson
3 raised about Section 2 - - - Correction Law Section 2(6),
4 and whether or not that definition of residential treatment
5 facility excludes persons on post-release supervision. It
6 - - - it does not for several reasons. I think the first
7 is that the statute's reference to persons who are on
8 parole or conditional release or will soon be eligible for
9 parole is a description of the type of programming that
10 should be available in a residential treatment facility and
11 not a limitation on who may be housed in a residential
12 treatment facility.

13 I would also note that Correction Law 73(1)
14 provides that the commissioner may transfer any inmate of a
15 correctional facility who is eligible for community
16 supervision, which would include people on post-release
17 supervision to a residential treatment facility. So there
18 is no statutory limitation on the use of residential
19 treatment facilities for persons on post-release
20 supervision. To the contrary, the legislature expressly
21 envisioned that.

22 JUDGE RIVERA: So I want to go back to something
23 you said before. I may have misunderstood you. It sounded
24 like you were saying that pursuant to holding or - - - or
25 having someone reside in a - - - in a residential treatment



1 facility under the authority of 70.45(3) of the Penal Law,
2 that they are also going to be provided with programming.
3 Is that correct?

4 MS. MURDUKHAYEVA: That - - -

5 JUDGE RIVERA: Is that the way you view it? That
6 during those six months, there's also programming that's
7 provided. It's not simply a residence. It's that there's
8 programming that's going to be provided, because this is to
9 facilitate reentry.

10 MS. MURDUKHAYEVA: Correct, Your Honor, and
11 because the use - - - the term "residential treatment
12 facility" is defined under government statutes by
13 referencing - - -

14 JUDGE RIVERA: One - - - one would - - - one
15 would think so. So let me ask you this. So at least for
16 purposes of this case, the kind of individuals we're
17 talking about, do they get that programming?

18 MS. MURDUKHAYEVA: People - - - persons in RTFs
19 do receive programming. I think the - - - the regular - -
20 -

21 JUDGE RIVERA: Even though they are solely there
22 because they don't have a SARA-compliant residence to go
23 to?

24 MS. MURDUKHAYEVA: Yeah, yes, they do. They are
25 - - - they are - - - they participate in work programming.



1 They are eligible for educational opportunities. There is
2 treatment and other types of programming that is available.
3 Again, I think this issue is actually not squarely - - - is
4 certainly not squarely presented in this case. I don't
5 even think it's squarely presented in the Ortiz case - - -

6 JUDGE RIVERA: Ortiz.

7 MS. MURDUKHAYEVA: - - - but there are cases that
8 do - - - that do deal with this issue. The Alcantara case
9 has now reached final judgment, and the parties have cross-
10 appealed on that case. There was another case from the
11 Second Department recently, the Alvarez case, which
12 resolved these issues with respect to the Queensboro RTF -
13 - -

14 JUDGE RIVERA: Yeah.

15 MS. MURDUKHAYEVA: - - - where both Mr. McCurdy
16 and Mr. Ortiz were housed.

17 JUDGE FAHEY: Well, Alcantara was the Albany
18 County case?

19 MS. MURDUKHAYEVA: It was.

20 JUDGE FAHEY: The miscellaneous case. Has - - -
21 it hasn't gone - - - they haven't argued in the Third
22 Department, have they?

23 MS. MURDUKHAYEVA: No, the parties have filed
24 notices of cross-appeal, but I believe neither side has
25 accepted that.



1 JUDGE FAHEY: No, I just wanted to make sure I
2 didn't miss it. Okay.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 MS. MURDUKHAYEVA: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel?

6 MR. HARPAZ: All right. Your Honors, I want to
7 end with the fact that we're talking about the rights of
8 liberty here. And it is now an ave - - - there's an
9 average wait now of approximately one year in - - - in - -
10 - confined in an RTF before someone can actually be
11 released to the community. That period of time has been
12 getting lar - - - growing larger and larger and larger ever
13 since this crisis began in 2014, when DOCCS realized that
14 homeless shelters were subject to the SARA restriction as
15 well.

16 And I do want to say that when we're talking
17 about competing statutes and the - - - the SARA law, it
18 would not on its face violate the SARA law for DOCCS to
19 release an individual to the New York City shelter system,
20 imposing the SARA condition, but refraining from arresting
21 that individual for violating it if no comp - - - SARA-
22 compliant homeless - - -

23 JUDGE RIVERA: So - - - so is that your response
24 to - - - to what I think DOCCS' real argument here that,
25 you know, they - - - they know that New York City's shelter



1 system cannot accommodate all of the individuals who are
2 subject to SARA. And so, rather than have exactly what
3 you've described, which is someone goes, go to a shelter
4 system, there's no bed for them, they're out on the street,
5 maybe they're near the school, maybe they're not - - - in
6 any event, there's the very high risk of violation of SARA.

7 Is your - - - your response to that is, then just
8 don't - - - don't find them in violation of SARA?

9 MR. HARPAZ: My - - - my response is twofold. On
10 the one hand, I'm not at - - - it's not at all clear after
11 the decision in Bonilla that, in fact, the City DHS would
12 not be able to accommodate everyone who needs a SARA-
13 compliant shelter space. But even if that is not the case,
14 my position is that the statute that - - - Executive Law
15 259-c(14) on its face mandates the imposition of the SARA -
16 - - of the 1,000-foot school zone exclusion restriction.
17 It does not speak to enforcement of that condition.

18 JUDGE STEIN: Counsel, doesn't that create some
19 problems, though, for the high court of the state to say,
20 it just says you have to impose it, but don't worry about
21 enforcing it, we - - - you know, we'll - - - we'll just
22 turn - - - turn the other way because there are these
23 administrative problems and encourage you not to enforce
24 what the law says you must impose? That to me, is - - - is
25 more than a little problematic.



1 MR. HARPAZ: Your Honor, that was true from 2005
2 to 2014. When an individual didn't have a SARA-compliant
3 residence they found, DOCCS would release them to the New
4 York City shelter system, because they didn't think
5 homeless shelters were subject to the SARA restriction for
6 nine years. There's no evidence any child was ever
7 endangered by that.

8 But my point is this. I'm not suggesting that
9 DOCCS and this court simply say, yes, well, the - - - throw
10 up our hands and - - - and look the other way. What I'm
11 suggesting is that when you balance the rights of liberty
12 against the compliance with the SARA law, you have to - - -
13 you look at strict terms of the statute, and DOCCS can
14 impose the condition, make a requirement that the
15 individual, if they are not immediately granted a SARA-
16 compliant bed when they are presented to DHS, where - - -
17 you know - - - at the first opportunity, must move into a
18 SARA-compliant shelter space as soon as that opportunity
19 arises; otherwise, they will be subject to arrest for
20 violating the SARA condition.

21 I think that - - - that that's a balancing
22 between the rights of liberty and the enforcement of the
23 SARA law that really should - - - should be struck in favor
24 of - - - of the rights of liberty.

25 And I would note on the PRS question, there's an



1 amicus from - - - from Center for Appellate Litigation, but
2 I've included some of that in - - - in my own brief, and by
3 saying that Penal Law 70.45(3) makes an individual subject
4 to SARA who's on PRS, you're importing through the back
5 door what the legislature did not put in through the front
6 door, and it is not by the language, it is - - - DOCCS is
7 not establishing the condition, the SARA condition.

8 The legislature has established the SARA
9 condition. If the legislature didn't put PRS in it, it's
10 not there, and it would, for that additional reason, not
11 technically violate the SARA law to release someone serving
12 PRS to the City shelter system, even if no immediate compli
13 - - - SARA-compliant bed space is available. And again,
14 we're talking about human liberty.

15 And you know, if the legislature messed this up,
16 and intended to include PRS in the SARA law, let them fix
17 it, and at the same time, let them fix the mess they've
18 created with having a law that has produced, you know,
19 untold misery for - - - for countless human beings who are
20 - - - who are deprived of their liberty, through no fault
21 of their own.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 MR. HARPAZ: Thank you.

24 (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 The People ex rel. Chance McCurdy v. Warden, Westchester County Correctional Facility, et al., No. 73 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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