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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KASCKAROW,

Appellant,

-against-

BOARD OF EXAMINERS OF SEX OFFENDERS (papers sealed)
OF THE STATE OF NEW YORK,

No. 56

Respondent.

20 Eagle Street
Albany, New York 12207
March 23, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 56, Matter of
2 Kasckarow v. Board of Examiners of Sex Offenders of
3 the State of New York.

4 Counsel, would you like any rebuttal time?

5 MS. PERVUKHIN: Yes, please, two minutes.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.

7 Go ahead.

8 MS. PERVUKHIN: The only question before
9 this court is whether Mr. Kasckarow's 1999 nolo plea
10 with adjudication withheld from Florida qualifies as
11 a conviction for purposes of New York's - - -

12 CHIEF JUDGE LIPPMAN: Why - - - why doesn't
13 it follow in New York that the nolo contendere is a -
14 - - is a equivalent of a conviction?

15 MS. PERVUKHIN: Well, the - - - the best
16 place to look for an answer to that question is the
17 statute itself. The statute says that only convicted
18 offenders are required to register. It says that
19 convictions that are set aside pursuant to law do not
20 qualify as convictions. And in subsection F, which
21 is a separate discussion, it says that convictions
22 that are overturned on appeal or vacated pursuant - -
23 -

24 CHIEF JUDGE LIPPMAN: So does that - - -

25 MS. PERVUKHIN: - - - to a gubernatorial

1 pardon - - -

2 CHIEF JUDGE LIPPMAN: - - - do those - - -
3 does that language deal with - - -

4 MS. PERVUKHIN: - - - are also not
5 convictions.

6 CHIEF JUDGE LIPPMAN: - - - nolo
7 contendere?

8 MS. PERVUKHIN: Well, nolo pleas
9 specifically are not mentioned. But they talk about
10 pleas being set aside pursuant by law.

11 JUDGE READ: What about our decision in
12 Daiboch? Why doesn't Daiboch control this and say
13 that the nolo contendere is a conviction of a crime
14 to which the plea was taken?

15 MS. PERVUKHIN: That's an excellent
16 question, Your Honor. That case deals with the nolo
17 contendere plea standing alone, and our point is that
18 this - - -

19 JUDGE READ: So is it that adjudication
20 piece of it that you think makes a difference?

21 MS. PERVUKHIN: Correct. This - - - this
22 disposition was never a nolo contendere plea standing
23 alone. It was always coupled with an adjudication
24 withheld. And the whole purpose of the adjudication
25 withheld under Florida law is to protect people from

1 the consequences - - -

2 JUDGE RIVERA: But they still have to
3 register.

4 JUDGE STEIN: Right. But in - - -

5 MS. PERVUKHIN: - - - of a criminal - - -

6 JUDGE STEIN: In Florida this particular
7 person has to register for life. So does - - - isn't
8 that some indication of the impact of this
9 adjudication withheld?

10 MS. PERVUKHIN: No, that's a - - - that's a
11 reflection of Florida Sexual Predator Law, which is
12 radically different from New York's law. Now, New
13 York made very different public policy legislative
14 determinations. They determined that certain
15 offenders don't belong on New York's registry.

16 For example, people who are youthful
17 offenders, they might enter a plea, but then
18 afterwards with the youthful offender adjudication,
19 they're not a convicted person.

20 JUDGE STEIN: Did - - - did he get - - -

21 MS. PERVUKHIN: They do not have to
22 register.

23 JUDGE STEIN: Did he apply for and/or get
24 youthful offender sta - - - status in Florida?

25 MS. PERVUKHIN: Well, Florida, confusingly,

1 has a statute which is completely unrelated to
2 anything in this case that is named a "youthful
3 offender statute". And as we discuss at great
4 length, it's just a red herring. The disposition - -
5 - the noncriminal disposition - - - that appellant
6 ended up with is effectively the Florida equivalent.
7 This is someone who can still vote - - -

8 JUDGE RIVERA: I'm sorry. Isn't there - -
9 - isn't there a statute to get relief for this kind
10 of crime in Florida?

11 MS. PERVUKHIN: Yes.

12 JUDGE RIVERA: Or is that the statute
13 you're talking about?

14 MS. PERVUKHIN: No, I'm just talking about
15 the actual disposition - - -

16 JUDGE RIVERA: No, no, but isn't there a
17 separate statute to get relief - - -

18 MS. PERVUKHIN: There is a - - -

19 JUDGE RIVERA: - - - from one - - - from
20 the registration?

21 MS. PERVUKHIN: There is the separate Romeo
22 and Juliet statute; however, my client is indigent.
23 And in order for him to appeal under that statute,
24 would - - - which I believe was passed in the many,
25 many years since 1997, he would need to have a public

1 defender in the State of Florida. He's not a
2 resident of Florida.

3 JUDGE READ: How does the Florida plea
4 compare - - - compare to an Alford plea?

5 MS. PERVUKHIN: Again, the Alford plea is
6 really focusing on the - - - you know, the - - - the
7 first part, the entry of a plea.

8 JUDGE READ: That - - - that counts as a
9 conviction in New York, right?

10 MS. PERVUKHIN: Correct. But this is a
11 situation where we're talking about the adjudication
12 being withheld. There was never any entry of
13 judgment.

14 JUDGE FAHEY: I thought, though, in Florida
15 that a nolo plea without adjudication in Florida for
16 sentencing purposes is considered a conviction?

17 MS. PERVUKHIN: For some sentencing
18 purposes, but not for others.

19 JUDGE FAHEY: I see.

20 MS. PERVUKHIN: So conviction is a term of
21 art. It doesn't have any one meaning. It depends on
22 the statute.

23 JUDGE PIGOTT: Well, why - - - why do we -
24 - -

25 MS. PERVUKHIN: The statute we need to be

1 looking at - - - I'm sorry, Your Honor.

2 JUDGE PIGOTT: Go ahead, finish. It's
3 okay.

4 MS. PERVUKHIN: The statute we need to be
5 looking at is SORA. And SORA does not require people
6 who do not have these adjudications to register. And
7 in fact, in New York, for other purposes, this
8 particular disposition has been held not to be a
9 conviction within the meaning of other similar New
10 York law. So for example, in Farabell, where there's
11 a statute where you can't become a police officer if
12 you're convicted of a felony.

13 CHIEF JUDGE LIPPMAN: Yeah, but doesn't
14 SORA have different public policy considerations than
15 that - - - that kind of situation?

16 MS. PERVUKHIN: Yes, but I think that the
17 legislature very carefully took those public policy
18 considerations, you know, in mind when it determined
19 that youthful offenders should not register. The
20 only convicted individuals - - -

21 JUDGE STEIN: But when does - - -

22 MS. PERVUKHIN: - - - should register.

23 JUDGE STEIN: - - - when does a conviction
24 take place? Is it when - - - when there's a plea, or
25 is it after sentencing?

1 MS. PERVUKHIN: It's at sentence. So if
2 there's a plea, it's not - - - under New York law, if
3 there's a plea, it's not a judgment of conviction
4 until sentence is entered.

5 JUDGE STEIN: Don't we have some case law
6 that says otherwise - - -

7 MS. PERVUKHIN: Oh - - -

8 JUDGE STEIN: - - - in New York?

9 MS. PERVUKHIN: Well, for - - -

10 JUDGE STEIN: For example, maybe not of
11 this court, but Matter of Smith?

12 MS. PERVUKHIN: Oh, yeah, Matter of Smith
13 v. Devane is a Third Department case which we believe
14 is completely wrongly decided, because it's
15 absolutely unquestioned from time immemorial,
16 youthful offender adjudications are not convictions.
17 They're not convictions for - - - it says so right in
18 the statute, that they're not convictions. They're
19 not convictions for - - -

20 JUDGE STEIN: That case involved the
21 deferred adjudication out of Texas.

22 MS. PERVUKHIN: Yes, correct. But if the
23 reasoning of Smith v. Devane were correct, and the
24 entry of a guilty plea counted as a conviction before
25 the sentence, then that would mean that all youthful

1 offenders, under the logic of Smith v. Devane, would
2 also have to register as sex offenders, but we know
3 for a fact that that's not what the legislature
4 intended.

5 There's cases - - - Floyd, Jusino, Victor
6 J. - - - that I cite, that say youthful offenders
7 don't have to register. Every year there's bills
8 that are introduced in front of the legislature to
9 expand the reach of SORA to youthful offenders. The
10 legislature has rejected every single one of those
11 bills.

12 CHIEF JUDGE LIPPMAN: So your - - - your
13 main point is that - - - that the defendant here is
14 the equivalent of a youthful offender?

15 MS. PERVUKHIN: My main point is - - -

16 CHIEF JUDGE LIPPMAN: I mean you're citing
17 all this that's - - - let's assume you're right.
18 It's that your defendant is - - - is - - - is - - -
19 should be put in the shoes of a youthful offender?

20 MS. PERVUKHIN: Well, I think that the
21 court doesn't necessarily need to make that specific
22 determination in order to rule in our favor. There's
23 many other types of dispositions, like the ACD, like
24 treatment court pleas, where somebody enters a plea
25 that after a period of interim probation is later set

1 aside by the court. There are many - - -

2 JUDGE STEIN: How is this con - - - if - -
3 - if the conviction wasn't the plea, how are you
4 saying that it has been set aside?

5 MS. PERVUKHIN: Well, it's been set aside
6 because there was never any adjudication entered.
7 There was an interim period - - -

8 JUDGE STEIN: So but there's never anything
9 then in your argument - - -

10 MS. PERVUKHIN: Correct.

11 JUDGE STEIN: - - - to set aside.

12 MS. PERVUKHIN: Correct. There's - - -
13 there's no - - - there's no - - -

14 JUDGE STEIN: So how could it be both?

15 MS. PERVUKHIN: There's no preci - - -
16 look, there's no precise equivalent to - - - between
17 the New York and the Florida - - -

18 JUDGE STEIN: Okay, you're arguing either -
19 - - I'm not understanding - - - either that there
20 never was a conviction, sort of, or that the
21 conviction was set aside. So - - -

22 MS. PERVUKHIN: Well, in the alternative -
23 - -

24 JUDGE STEIN: - - - how could it be both?

25 MS. PERVUKHIN: - - - either there was

1 never a conviction, or even if this could possibly be
2 construed as a conviction, it was set aside. So
3 either way - - -

4 JUDGE FAHEY: The heart of it is, is that
5 in New York law this would be an A misdemeanor,
6 right? These acts would be A misdemeanor - - - what
7 is it - - - sexual misconduct. And that because of
8 his history, he'd have a mandatory YO; therefore
9 there would be no conviction.

10 MS. PERVUKHIN: That's - - - that's
11 certainly one of my arguments, and - - - and the - -
12 - you know, the - - -

13 JUDGE RIVERA: But - - - but doesn't - - -
14 isn't the statute have a provision that avoids this
15 kind of - - - let's figure out the functional
16 equivalent and just says, let's look at - - - see if
17 there's a conviction? And if that state considers it
18 a conviction, then our issue is whether or not
19 Florida considers it a conviction?

20 MS. PERVUKHIN: Yes, but - - -

21 JUDGE RIVERA: Isn't that what this boils
22 down to?

23 MS. PERVUKHIN: Yes, but that's not what
24 the statute says. It was perfectly within the
25 purview of the legislature to say, you know what we

1 want? A super clear, super easy-to-apply rule.
2 We're just going to have a full reciprocity
3 provision. And there are states that have decided to
4 do that - - - that have elected to do that. They say
5 anyone who appears on a out-of-state sex offender
6 registry, they come to our state, they should be on
7 our registry.

8 That's not the law that the legislature
9 passed. They specifically included an extra
10 provision in addition to appearing on another's state
11 registry. In addition to being a "convicted
12 offender" for the purposes of another state's sex
13 offender law.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.
15 You'll - - - you'll have your rebuttal. Let's hear
16 from your adversary.

17 Counselor?

18 MR. PLATTON: May it please the court,
19 Claude Platton on behalf of Board of Examiners of Sex
20 Offenders. As an initial matter, I would move to
21 expand the record to include the materials recently
22 obtained from the Florida authorities - - -

23 CHIEF JUDGE LIPPMAN: You'll - - - you'll
24 put your - - - your - - - your motion in.

25 MR. PLATTON: Absolutely, Your Honor. When

1 the Florida court accepted Mr. Kasckarow's no contest
2 plea, it determined that the plea was voluntary and
3 had a factual basis.

4 JUDGE PIGOTT: What plea did you say?

5 MR. PLATTON: His no contest, nolo
6 contendere, plea. The court then sentenced Mr.
7 Kasckarow to probation, but checked a box on the
8 sentencing order withholding adjudication, thereby
9 permitting him to be relieved of certain consequences
10 of the conviction.

11 JUDGE PIGOTT: It's a nolo contendere with
12 adjudication withheld.

13 MR. PLATTON: That's right, Your Honor.

14 JUDGE PIGOTT: So there's no adjudication.

15 MR. PLATTON: The term "adjudication
16 withheld" is a misleading term that's caused some
17 confusion in Florida law, but the Florida Supreme
18 Court has made clear that it is a conviction, that
19 there's a - - - there's a voluntary plea, acceptance
20 of the plea, a determination of guilt, and the
21 imposition, in this case, of - - - of a sentence in
22 terms of a probation - - -

23 JUDGE PIGOTT: No, I - - - I understand
24 your plea, but that the adjudication is withheld and
25 - - - and I think your opponent's argument is, if

1 they withheld the adjudication, what are we doing up
2 here adjudicating it?

3 MR. PLATTON: Well, I think what - - -
4 what's being withheld is something akin to the formal
5 entry of judgment, for example, or there's a
6 conviction - - -

7 JUDGE PIGOTT: Like an ACD?

8 MR. PLATTON: No, it's different from an
9 ACD. There's a plea. There's - - - there's a
10 conviction. There could be criminal punishment. In
11 an ACD, if - - - if the person offends again - - -

12 JUDGE PIGOTT: If all that's true, what is
13 the adjudication that is being withheld?

14 MR. PLATTON: I think what's being withheld
15 is, is that for certain - - - for certain - - - in
16 certain con - - - contexts, the offender can claim
17 not to have been convicted.

18 JUDGE PIGOTT: What are those?

19 MR. PLATTON: Primarily the civil
20 consequences of a conviction. So he can report on an
21 employment application that he wasn't convicted. He
22 doesn't lose the right to vote or to possess a
23 firearm. The only criminal context in which it's not
24 counted as a conviction is the Florida courts have
25 decided as a policy matter that this shouldn't count

1 as a conviction if - - - as an aggregate - - -
2 aggravating factor for the death penalty.

3 JUDGE PIGOTT: If you apply - - - if you
4 apply for a job in Florida, and they say, have you
5 ever been convicted of a crime, he would answer no?

6 MR. PLATTON: He could answer no. But if
7 he commits another criminal offense, he's absolutely
8 considered - - -

9 JUDGE PIGOTT: If he - - -

10 MR. PLATTON: - - - to be convicted of a
11 crime.

12 JUDGE PIGOTT: - - - if he applies for a
13 job in New York, and they say have you ever been
14 convicted of a crime, how does he answer?

15 MR. PLATTON: I think that would be a hard
16 question, but maybe he'd be able to say that he - - -
17 he wasn't. But it's clear that he is - - -

18 JUDGE RIVERA: With an explanation,
19 perhaps?

20 MR. PLATTON: Perhaps. But it's clear that
21 that he has to register for life as a sex offender;
22 that is a conviction, and that it does carry that
23 consequence. And there's absolutely no reason - - -
24 there's nothing missing from this - - - from this
25 disposition that would require the board or this

1 court to overlook this as a conviction for purposes
2 of sex offender registration.

3 JUDGE PIGOTT: Judge Schmidt seemed to
4 indicate that there ought to be something, because he
5 apparently, you know, was impressed with the petition
6 that was filed in this court.

7 MR. PLATTON: I'm sorry, Your Honor?

8 JUDGE PIGOTT: The - - - the Supreme Court,
9 when he - - - when Judge Schmidt made the decision?

10 MR. PLATTON: Yes.

11 JUDGE PIGOTT: He seemed to - - - he seemed
12 to - - - I don't want to say "wrestle with" - - - but
13 he seemed to think that there ought to be provisions
14 for situations like this particular person in the
15 State of New York.

16 MR. PLATTON: Right. Well, he - - -
17 assuming - - - he assumed for purposes of - - - of
18 the case that the fed - - - the offense was, as Mr.
19 Kasckarow characterized it to be. We've - - - as
20 we've said, we have some grave doubts about whether
21 that was, in fact - - -

22 JUDGE PIGOTT: We're dealing - - -

23 MR. PLATTON: - - - but - - -

24 JUDGE PIGOTT: - - - we're dealing with the
25 record we've got - - -

1 MR. PLATTON: That's right.

2 JUDGE PIGOTT: - - - and based on that
3 record, this judge said, you know, you've got a very
4 attractive client - - - or person, I guess, and you
5 know, and - - - and the idea that he's going to have
6 to register for twenty-five years up here makes no
7 sense.

8 MR. PLATTON: Well, Justice Schmidt said
9 that the legislature should consider some kind of a
10 safety valve. He made clear that he rec - - - he
11 recognized that SORA doesn't require that kind of a
12 fine-grain policy balancing or comparative analysis
13 like Mr. Kasckarow would want us - - - this court to
14 do, that - - - that the legislature has provided,
15 instead, for a broad reciprocity provision that
16 requires that if an offender is convicted of a felony
17 in another state, he'll be required to register here.

18 JUDGE RIVERA: But she says it's not full
19 reciprocity.

20 MR. PLATTON: That's right.

21 JUDGE RIVERA: What - - - what's your
22 response to that?

23 MR. PLATTON: Well, it's not, but the one
24 limitation is that the offense has to be a felony.
25 So the legislature made a judgment that that should

1 be the dividing line, made no other dividing lines.
2 And any rule giving effect to - - - to a conviction
3 in a - - - in another state, is going to have to - -
4 - to try to proximate what the effect would be if the
5 person had been convicted of an offense here.

6 There's no perfect rule, and the one the
7 legislature chose was one that relied on the - - -
8 the discretion of the prosecutors and the sentencing
9 courts in the other state, the judgment of those
10 actors in the other state, that this is a person
11 dangerous enough to require registration, and to
12 credit that, rather than having potentially what
13 would be a more fine-grain but under-inclusive test,
14 the kind Mr. Kasckarow is asking for.

15 JUDGE RIVERA: If - - - if he had indeed
16 proceeded under the statute that allows him to get
17 relief and had been granted relief, you're not taking
18 the position that he'd have to register nonetheless?

19 MR. PLATTON: No, he wouldn't have to
20 register in that case.

21 JUDGE RIVERA: Because at that point,
22 Florida has relieved him from - - -

23 MR. PLATTON: That's right. And - - - and
24 - - - and we think it - - - that speaks volumes that
25 Mr. Kasckarow hasn't - - - has not pursued that

1 avenue of relief, but that is - - - is one that - - -
2 that was available to him - - -

3 JUDGE RIVERA: Because until that time, he
4 stands convicted.

5 MR. PLATTON: That's right. That's right.
6 He's - - - and - - - and - - - if - - - and the - - -
7 to set aside - - - the language about setting aside
8 in - - - in SORA clearly contemplates that if - - -

9 JUDGE PIGOTT: Can I ask you again? I
10 thought you said if he applied for a job in Florida,
11 and they ask if you've been convicted of a crime, the
12 answer would be no.

13 MR. PLATTON: That's correct.

14 JUDGE PIGOTT: All right. And we're going
15 to - - - we're going to - - - we're not going to
16 accept that finding by Florida. We're going to say
17 even though he could apply for a job with Avis Rent-
18 a-Car in Florida, and the answer is no, and he gets
19 the job, and he can drive up here and drive back, and
20 do whatever he wants, but if he applied for the same
21 job at the Avis in New York City, he'd have to say,
22 yes, I have.

23 MR. PLATTON: Well, I - - - I think I said
24 I don't know exactly what his obligation would be to
25 answer that question truthfully on an employment

1 application. But Florida has drawn a line and said,
2 he doesn't need to say that he was convicted for
3 purposes - - -

4 JUDGE PIGOTT: Which would indicate that
5 it's not a serious crime in their view. And I'm - -
6 - I'm wondering what SOR - - - what the SORA board
7 did. Did they consider it, or did they simply, you
8 know, look down their column and somehow decide that
9 this - - - this person has to register? Do we know
10 what - - - what the SORA board's consideration was?

11 MR. PLATTON: Well, I think that the board
12 - - - the board considered that there was a criminal
13 disposition - - -

14 JUDGE PIGOTT: No, do we know what they
15 did? In other words, is there a record of what the
16 SORA board - - - in other words, do they sit around
17 in a room and say that the sex offender - - -

18 MR. PLATTON: There's no - - -

19 JUDGE PIGOTT: - - - registration board is
20 now in - - -

21 MR. PLATTON: There's no formal record,
22 Your Honor, but the criteria that the board takes, or
23 as we've said in our brief very clear, if there's a
24 criminal disposition in Florida that leads to a
25 requirement to register, the board will credit that,

1 even if there's been a - - -

2 JUDGE PIGOTT: So they - - - they make the
3 determination that if you - - - I'm - - - I'm just -
4 - - I'm stuck on this employment thing, because it
5 seems to me that it's really, really important if
6 you're going to hire somebody for your daycare
7 center, and - - - and someone applies and you ask if
8 they've been convicted of a crime, they ought to list
9 that they were, in fact, required to register under
10 the sex offender registration in Florida - - -

11 MR. PLATTON: Well, that - - - that's - - -

12 JUDGE PIGOTT: - - - but you're saying they
13 do not.

14 MR. PLATTON: Well, that's exactly why a
15 person would be required to register under SORA, as
16 well, and in that way - - -

17 JUDGE PIGOTT: Well, you're saying that.
18 What I'm say - - -

19 MR. PLATTON: Yes.

20 JUDGE PIGOTT: - - - just my - - - I - - -
21 just my thought. They don't think it's that
22 important. They said this person can - - - can teach
23 daycare, he could - - - you know, he could do - - -
24 coach JV basketball at the high school, he can do
25 whatever he wants down here, we don't care. And he

1 comes up to New York, and we say, oh, whoa, whoa,
2 whoa, wait a minute. You know, maybe Florida isn't -
3 - - isn't that interested in what - - - what you did,
4 but we are, and we're deeming this a felony
5 conviction.

6 MR. PLATTON: Well - - -

7 JUDGE PIGOTT: Does that seem incongruous
8 to you?

9 MR. PLATTON: No, that's - - - that's not
10 the - - - the situation, Your Honor - - - Judge
11 Pigott. He - - -

12 JUDGE READ: He did have to register in
13 Florida, right?

14 JUDGE RIVERA: Yeah.

15 MR. PLATTON: He would have to register in
16 Florida and then - - -

17 JUDGE RIVERA: And - - - and counsel, if he
18 doesn't answer an employment application question
19 have you been convicted, if it asks are you a
20 registered sex offender, he's got to say yes.

21 MR. PLATTON: He would, and they - - - they
22 would prevent him - - -

23 JUDGE RIVERA: - - - and they could find
24 that out anyway.

25 MR. PLATTON: They could. He's available

1 on a public web site. It would prevent him from
2 working in a daycare. It would prevent him,
3 presumably, from coaching a JV basketball team. The
4 - - - the Florida does regard his conduct as - - - as
5 dangerous. It does prevent him from - - - from doing
6 a number of these things. He - - - but for other
7 contexts - - -

8 JUDGE FAHEY: But it does create certain
9 cognitive dissonance to think you could get a gun or
10 - - - or work in a child protection agency and - - -
11 and you wouldn't have to reveal this. It does - - -
12 you can see how that - - -

13 MR. PLATTON: Well, perhaps, but the - - -
14 right, but it's not the case that Florida doesn't
15 regard this as serious. We don't know the underlying
16 facts here. All we know is that a prosecutor and a
17 ju - - - and a court - - - a sentencing court - - -
18 thought that Mr. Kasckarow should be on the sex
19 offender registry in Florida and that that was
20 necessary to protect the public in Florida. And when
21 he came to New York, it's perfectly reasonable that
22 SORA would - - - would credit those decisions and
23 require him to register here as well to fulfill the
24 public safety concerns of SORA.

25 JUDGE ABDUS-SALAAM: If - - - counsel, if -

1 - - if this - - - if his Florida crime was equivalent
2 to YO here, would he be required to register here?

3 MR. PLATTON: Well, the - - - the mandatory
4 YO mechanism is only available in the - - - the local
5 criminal courts. And if - - - if a prosecutor here
6 was concerned that someone shouldn't be a mandatory
7 YO, they have the option to charge the case in a
8 superior court and - - - where it would be a
9 discretionary determination.

10 So, Mr. Kasckarow is incorrect, that New
11 York has a blanket policy that anyone who committed
12 the conduct that he's claimed he's committed would be
13 treated as a YO. It would be in the discretion of
14 the prosecutor and the court.

15 JUDGE PIGOTT: No, he's saying it's a
16 misdemeanor. It would've been local criminal court.
17 It would have been a mandatory YO.

18 MR. PLATTON: It generally would be, I - -
19 - but I think there - - - it remains open to the
20 prosecutor, if he's concerned - - -

21 JUDGE PIGOTT: Yeah, but that doesn't
22 happen.

23 MR. PLATTON: It may not - - - it may
24 generally not be the case, but the point is New York
25 and Florida have different approaches, both of which

1 arrive at the same result, which is, in general, this
2 is a - - - a felony - - - a criminal offense. It's a
3 registerable offense. New York has a YO process. In
4 Florida there's a Romeo and Juliet statute. There's
5 no difference between - - - in - - - in policy - - -

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 MR. PLATTON: - - - between the two states.

8 CHIEF JUDGE LIPPMAN: Thank.

9 MR. PLATTON: Thank you.

10 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

11 MS. PERVUKHIN: Yes, I'd like to make
12 several points. First of all, in order to make an
13 adjudication withheld, there has to be a formal
14 finding by the Florida court that someone is not
15 likely to engage in criminal conduct again.

16 JUDGE PIGOTT: He can - - - he can apply
17 for an override or something like that in Florida,
18 can he not, to get out of - - - out from under this?

19 MS. PERVUKHIN: Well, he in the - - - in
20 terms of the sex offender registry, potentially yes,
21 but the point is, just by virtue of the disposition
22 he already has, the court already has determined that
23 he's not - - -

24 JUDGE PIGOTT: Well, the only reason I ask
25 that, is it seems to me - - -

1 MS. PERVUKHIN: Yeah.

2 JUDGE PIGOTT: - - - that you've got - - -
3 you know, you're asking us and the other courts and I
4 guess the SORA board, to make a complicated decision
5 because of all of - - - all that we discussed here
6 about how they do things in Florida. Wouldn't it
7 make more sense to go down to Florida, get the
8 override, get it - - - just as he did on his
9 probation - - - get it done, and then come back up
10 and say, I'm not registered in Florida.

11 MS. PERVUKHIN: That would make perfect
12 sense if we had a full reciprocity provision, but we
13 don't.

14 JUDGE PIGOTT: No, but even if - - - even
15 if you fix your - - - your Florida situation, get
16 your paper, bring it up here and say, I'm done in
17 Florida; I shouldn't be - - - I should be done here.

18 MS. PERVUKHIN: I mean, first of all, you
19 know, as an indigent offender, he's in New York.
20 He's in our jurisdiction. The only question before
21 this court is his status under New York law, not his
22 situation in Florida.

23 JUDGE PIGOTT: Okay.

24 MS. PERVUKHIN: And in fact, we don't have
25 a full reciprocity provision, nor is the only

1 difference between full reciprocity a felony. In
2 fact, there's also an additional provision that the
3 attorney general has repeatedly tried to write out of
4 the law, which is the requirement that there be a
5 conviction. There's plenty of states that say, look,
6 if you have any kind of a disposition, and there's
7 any kind of penal consequence, that's good enough for
8 us; we want you on the registry.

9 New York is different. We want a judgment
10 of conviction, because we want to make sure that only
11 the most serious offenders who, in the legislature's
12 view, pose a real risk are the ones who end up on the
13 registry.

14 And again, just addressing Judge - - -
15 Justice Schmidt. He - - - he felt that this was
16 manifestly unfair. The purpose of the law is to
17 protect - - -

18 JUDGE RIVERA: But there - - - but - - -
19 but a statement that suggests that the legislature
20 might want to take another look - - -

21 MS. PERVUKHIN: Well, that - - - that - - -

22 JUDGE RIVERA: - - - is - - - is not what
23 we're focused on.

24 MS. PERVUKHIN: Well, really the reason
25 that he ruled the way that he did, was because that

1 court was constrained by Smith v. Devane, which was a
2 Third Department case, which was completely wrongly
3 decided. It goes contrary to a whole lot of other
4 precedent.

5 JUDGE STEIN: Why wouldn't it be for the
6 legislature to decide if it wanted something
7 different?

8 MS. PERVUKHIN: Well, the legislature has
9 decided. The legislature wouldn't need to pass a
10 Romeo and Juliet provision, because it already has.
11 Youthful offenders don't have to register. They're
12 mandatory YOs. They don't have to register. It
13 would be a redundant provision for New York to have
14 to pass that - - -

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 MS. PERVUKHIN: There's one other thing. I
17 - - - I would request a little - - -

18 CHIEF JUDGE LIPPMAN: Counsel, very, very,
19 very quickly.

20 MS. PERVUKHIN: - - - a little extra time
21 to respond to the eleventh hour - - -

22 CHIEF JUDGE LIPPMAN: No, no, no. Counsel,
23 do you have anything else? You want to finish your
24 thought to - - -

25 MS. PERVUKHIN: Yes, I - - - I would like

1 to argue that I think that the attorney general
2 should be precluded from filing a motion to expand
3 the record.

4 CHIEF JUDGE LIPPMAN: Counsel, we - - - we
5 will - - - we are going to take their - - - their
6 motion and we'll decide it. Thank you, counselor.

7 Thank you both.

8 (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 Kasckarow v. Board of Examiners of Sex Offenders of the State of New York, No. 56, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: March 30, 2015