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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 134

FREDERICK DIAZ,

Respondent.

20 Eagle Street
Albany, New York
November 13, 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

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal number 134, People
2 v. Frederick Diaz.

3 MR. ANDERSON: Good afternoon, and may it please
4 the Court, Paul Anderson for the People. May I please
5 reserve two minutes for rebuttal?

6 CHIEF JUDGE DIFIORE: Two minutes, sir?

7 MR. ANDERSON: Yes. Yes, Your Honor, thank you.

8 Looking at the plain text of the statute, the
9 legislature contemplated two types of out-of-state
10 registries, those that are under-inclusive of New York laws
11 - - -

12 CHIEF JUDGE DIFIORE: Counsel, is there any
13 authority confirming that defendant was labeled a sex
14 offender by virtue of the fact that he had to register
15 under Virginia's act?

16 MR. ANDERSON: Well, if you take a look at the
17 actual Virginia registry, the website itself - - - it's run
18 by the Virginia State Police, and it says - - - it's www -
19 - -- www.sexoffend - - - sex-offender.vsp.virginia.gov.

20 It - - - it combines all of these offenses as a
21 sex-offender registry. If you go through that website, it
22 even says if you murder someone under fifteen, that
23 constitutes a sex offense that would require you to
24 register.

25 So in essence, by - - - by having to go on that



1 registry, he was registered as a sex offender.

2 JUDGE GARCIA: What if it was just a crimes-
3 against-children registry?

4 MR. ANDERSON: If - - -

5 JUDGE GARCIA: All crimes against children - - -

6 MR. ANDERSON: If it - - -

7 JUDGE GARCIA: - - - and that's it was, how would
8 it work?

9 MR. ANDERSON: Well, Your Honor, if it was just a
10 registry for crimes against children, if it was bifurcated
11 in some way such as - - -

12 JUDGE GARCIA: No, let's say not bifurcated, just
13 crimes against children, any crime against a child, you
14 have to register in Virginia. How would that work?

15 MR. ANDERSON: Then if - - - that would not be a
16 sex offender. That would not be a sex offender registry.

17 JUDGE GARCIA: What if you have a sex offender in
18 that registry?

19 MR. ANDERSON: Excuse me?

20 JUDGE GARCIA: One of the crimes against a child
21 is a sex assault against a child, and it's in the registry,
22 but the registry is called crimes against children. How
23 would that work?

24 MR. ANDERSON: It's a - - - if he - - - we're
25 really splitting, I guess, like how - - - the title of the



1 registry itself. And the statute does - - - the New York
2 statute does say register as a sex offender - - -

3 JUDGE GARCIA: Right.

4 MR. ANDERSON: - - - out of state. If he has to
5 register and he - - - and it's just crimes-against-children
6 registry, I would say that no, he doesn't have to register
7 in New York, because the registry in the foreign
8 jurisdiction is simply a crimes-against-children registry.

9 JUDGE WILSON: And if it's called - - - and if
10 it's called a sex offense registry, and it includes, for
11 example, the - - - the other state has a requirement that
12 parents who neglect or abuse their own children but not in
13 a sexual way, also wind up in the registry because the
14 state's - - - the other state's purpose is keeping anybody
15 who maltreats a child or neglects a child in any way away
16 from, let's say, teaching or childcare positions, what
17 happens then? And let's say it has the same URL that you
18 just gave us?

19 MR. ANDERSON: So if - - - if it has the same
20 URL? Sorry - - -

21 JUDGE WILSON: Yeah.

22 MR. ANDERSON: Oh. If it's - - - if the registry
23 is titled a crime - - - only a crimes-against-children
24 registry - - -

25 JUDGE WILSON: No, that's not my question.



1 MR. ANDERSON: Okay, I'm sorry. I misunderstood.

2 JUDGE WILSON: If it's titled sex offense, but it
3 includes abuse and neglect of children?

4 MR. ANDERSON: Then yes, that - - - he would have
5 to register - - -

6 JUDGE WILSON: Have to register.

7 MR. ANDERSON: - - - as a sex offender. He would
8 have to register as a sex offender, and he - - - when he
9 moved to New York, the statute - - -

10 JUDGE STEIN: So is it the - - - is the title of
11 the registry that is controlling here or does it somehow
12 have to do with whether it is federally compliant with - -
13 - you know, with the federal registration acts?

14 MR. ANDERSON: I bel - - - I believe you'd look
15 at the title if the registry as well - - - and the statute,
16 as well as the intent behind it. So for example, if you
17 look at the federal registry, the Adam Walsh Act and the
18 Jacob Wetterling Act, those two named children were
19 homicide victims. There's no evidence that Adam Walsh was
20 ever sexually assaulted when - - - when he was killed by
21 Ottis Toole.

22 So there is that back - - - in that background
23 the idea that if you can - - - you can have a registry to
24 protect children, both from - - -

25 JUDGE GARCIA: What if it's crimes against, you



1 know - - - sex abuse of children and, you know, crimes
2 against the elderly, combined in one registry, and the URL
3 says, you know, sex offender registry, and if you commit,
4 you know, an assault against someone over the age of
5 eighty-five, you have to register as a sex offender?

6 MR. ANDERSON: If it's the same registry, then he
7 has - - -

8 JUDGE GARCIA: But does that really make any
9 sense? How does that further the purpose of SORA?

10 MR. ANDERSON: Well, it doesn't have - - - it
11 doesn't - - - a statute can still - - - can be clumsy and
12 it could still be Constitutional. It has to be - - - the
13 burden here is rational basis, a paradigm of judicial
14 restraint as to - - -

15 JUDGE GARCIA: Forget about - - -

16 MR. ANDERSON: - - - constitutionally - - -

17 JUDGE GARCIA: - - - substantive due process for
18 a second - - -

19 JUDGE FEINMAN: Yeah, put the Constitutional
20 argument aside; just focus on the statute.

21 JUDGE GARCIA: Yeah.

22 MR. ANDERSON: Okay. So can you ask your
23 question again?

24 JUDGE GARCIA: So if you have - - - it says, you
25 know, if you have to register as a sex offender in another



1 state, and you have this registry that has crimes against -
2 - - crimes against children - - - sex crimes against
3 children and crimes against the elderly. And they combine
4 it in one, and for convenience sake, they say you have to
5 register as a sex offender if you assault a - - - you know,
6 someone over the age of eighty-five.

7 And then your view would be under our SORA
8 registration statute, the person who assaulted someone over
9 the age of seventy-five or eighty-five has to register in
10 New York as a sex offender?

11 MR. ANDERSON: Yes, Your Honor.

12 JUDGE WILSON: All right, so let me - - -

13 MR. ANDERSON: For the cont - - - the idea here
14 is the continuity of supervision here. The outward purpose
15 of the New York Sex Offender Registry Act to keep - - - so
16 that when an individual - - - to put full faith and credit
17 - - -

18 JUDGE GARCIA: New York could do that. New York
19 could say murd - - - child murderers or people who assault
20 the elderly need to register in New York. They could
21 certainly do that. And that would be a very different
22 case. But they've put out a statute that has a particular
23 continuity of registration element in it for sex offenders,
24 for child sex offenders.

25 So - - - and sex offenders. So I - - - I don't



1 understand, you know, the continuity of supervision
2 argument, if our supervision isn't over those types of
3 crimes, and the New York legislature has made a
4 determination not to do that.

5 MR. ANDERSON: Well, the New York legislature has
6 made a determination that if you commit a felony in an out
7 - - - in an out-of-New York jurisdiction, and you have to
8 register in that jurisdiction as a sex offender, when you
9 move to New York, you have to register.

10 JUDGE FEINMAN: All right, so now we're talking
11 about as a sex offender. And - - - and is it your position
12 that you can never look to what the foreign jurisdiction
13 terms or labels as a sex offender?

14 MR. ANDERSON: I would say if there's going to be
15 a rule going forward on how to evaluate out-of-state pe - -
16 - felonies coming in, it would consider if the New York
17 State legislature made this a crime in New York requiring
18 to register tomorrow - - - let's say tomorrow across the
19 street they decide if you kill someone under fifteen, you
20 have to register as a sex offender. If that is rational,
21 then it's still rational for us to give credit to
22 Virginia's determination that when someone - - -

23 JUDGE GARCIA: But wouldn't that be a very - - -

24 MR. ANDERSON: - - - comes in - - -

25 JUDGE GARCIA: - - - different situation if



1 Virginia - - - there was evidence that Virginia did that
2 other than the fact that in their registry they say you
3 have to register as a sex offender. But they've bifurcated
4 their registry into two different components.

5 I think it would be a different case and perhaps
6 a question for your adversary if Virginia had one registry
7 and it was a sex offender registry, and Virginia made a
8 determination that if you murder someone - - - child - - -
9 you know, someone under the age of fifteen, you belong on
10 that registry. That's a different issue.

11 But it doesn't seem to me from reading this that
12 Virginia made that determination. Virginia made a
13 determination that they want people who killed children
14 under the age of fifteen to register.

15 MR. ANDERSON: As a sex offender on their
16 registry. It's the same registry. It's not like Utah that
17 bifurcates the white collar crimes on a separate - - -

18 JUDGE WILSON: So - - - so let me - - - let me
19 see how far your argument goes.

20 MR. ANDERSON: Okay.

21 JUDGE WILSON: South Carolina makes the - - - in
22 its words - - - the abominable crime of buggery a felony.

23 MR. ANDERSON: Okay.

24 JUDGE WILSON: People who violate that statute
25 must register as sex offenders. That's not a crime in New



1 York. What happens?

2 MR. ANDERSON: It - - -

3 JUDGE WILSON: That person must register here?

4 MR. ANDERSON: Under the text of 168-a, yes, he
5 would have to register. And that statute is presumed
6 Constitutional here. It is not so out - - - it is not so
7 outlandish to the purpose of registration at - - - to be -
8 - -

9 JUDGE FAHEY: Well, let me ask you this.

10 MR. ANDERSON: - - -irrational.

11 JUDGE FAHEY: Could you distinguish between the
12 registration and the act itself? In other words, let's say
13 that the act of buggery in South Carolina was - - - was a
14 felony and it was a compounding felony that could be
15 considered in New York; we could look behind that and say
16 that's not a violation of the law in New York; it doesn't
17 meet any compatible elements of the crime.

18 Would that be different in looking to the effect
19 of - - - of something that's clearly not a crime in New
20 York, as - - - for a sentence enhancement purpose as
21 opposed to registry purposes? Is - - - is there a
22 distinction between looking at the crime and looking at the
23 registry?

24 MR. ANDERSON: Well, I - - - I guess you're
25 trying to like make an essential-elements comparison.



1 JUDGE FAHEY: Um-hum.

2 MR. ANDERSON: To be honest? No. It's - - - the
3 - - - you can look at the essential elements. That's the
4 sub (1) within 168-a(2)(d). But then you have sub (2) here
5 where if you have to register - - - if you commit a felony
6 in an out-of-state jurisdiction and you have to register in
7 that jurisdiction for that felony as a sex offender, when
8 you move to New York, that supervision should follow you
9 into New York.

10 JUDGE STEIN: What you're saying is the whole
11 purpose of this was to get away from having to look at each
12 individual act - - -

13 MR. ANDERSON: Yes, Your Honor. In fact - - -

14 JUDGE STEIN: Right?

15 MR. ANDERSON: - - - as this court pointed out in
16 Knox, the legislature could have found that it's too
17 cumbersome.

18 JUDGE RIVERA: But see, that's - - - that's the
19 problem. That - - - this is not - - - what you're saying
20 is not what the statute says. The statute does say to
21 register as a sex offender, but what you're really arguing
22 is for us to read this as "is required to register on a
23 sex-offender registry". That's really what you want us to
24 read into the statute, and that's not what it says.

25 And the Virginia statute is not - - - doesn't



1 refer to a sex-offender registry. Right? It's called the
2 Sex Offender and Crimes Against Minors Registry. It's not
3 a sex-offender registry. And nowhere does it say when you
4 register on this you are registering solely as a sex
5 offender.

6 MR. ANDERSON: If I could - - -

7 JUDGE RIVERA: And - - -

8 MR. ANDERSON: - - - briefly answer? While the
9 statute does - - - does say crimes against children and sex
10 offender, as I've noted, if you go to the web - - - to the
11 actual registry itself, it is sex offender - - -

12 JUDGE FEINMAN: Well, but let's look at the text
13 of the Virginia Code. I mean, if you look at the text of
14 the Virginia Code, in several places, you know, it talks
15 about sexual violent offender or murderer. And in another
16 place it talks about, you know, registration or
17 re-registration as a sex offender, sexually violent
18 offender, or murderer; which seems to me to suggest that
19 those three things are not the same thing.

20 MR. ANDERSON: Well, Your Honor, if they had
21 split - - - it's the same registry though, even if - - - if
22 you commit one, two, or three - - -

23 JUDGE FEINMAN: Yeah, but you're right back where
24 Judge - - -

25 MR. ANDERSON: - - - it's all on the same - - -



1 JUDGE FEINMAN: - - - Rivera was asking you about
2 - - -

3 MR. ANDERSON: Yes, and but he (sic) - - -

4 JUDGE FEINMAN: - - - between registry and - - -
5 and as a sex offender.

6 MR. ANDERSON: Briefly, sorry. As soon as you're
7 on the registry - - -

8 JUDGE RIVERA: The title is chosen by the
9 legislature, the URL is not. So we have to go by the
10 statute, and the statute's title - - -

11 MR. ANDERSON: Yes, Your Honor.

12 JUDGE RIVERA: - - - which shows that it's a dual
13 registry.

14 MR. ANDERSON: Well, if - - - it's not - - - it's
15 not a dual registry, Your Honor. It's the same registry.
16 You're up - - - you're listed as well with any other sex
17 offender, or what New York would consider a traditional sex
18 offense. You're there on the same registry, all together.
19 And when he moves to New York, it is rational for the
20 legislature to have deemed that that supervision should
21 have followed.

22 And I'll save for rebuttal.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 Counsel?

25 MS. EVERETT: Good afternoon. Abigail Everett



1 for respondent, Frederick Diaz.

2 Starting with the statutory interpretation
3 argument, New York's Correction Law is clear that it has to
4 be a felony in the other state and it has - - - you have to
5 be required to register "as a sex offender". The language
6 is clear. And if you look at the purpose - - -

7 CHIEF JUDGE DIFIORE: Does that language indicate
8 that the legislature intended to include everyone who is
9 required to register on a SORNA-compliant registry? The
10 language "register as a sex offender"?

11 MS. EVERETT: It in - - - it in - - - the New
12 York State legislature intended that everybody who commits
13 a felony in another jurisdiction and is required to
14 register in that jurisdiction as a sex offender - - - I'm
15 not sure I understood exactly the distinction you were
16 drawing.

17 CHIEF JUDGE DIFIORE: Well, if you're required to
18 register on a SORNA-compliant registry, is that indic - - -
19 does that demonstrate our legislature's intent?

20 MS. EVERETT: Well, I think we can have to take
21 the New York States legislative language at its face value
22 and the language it used was "as a sex offender". It
23 didn't say a registry that's compliant with the federal
24 law.

25 CHIEF JUDGE DIFIORE: Very literally.



1 MS. EVERETT: And I would point out that the two
2 statutes in the different states have different stated
3 legislative purposes.

4 JUDGE GARCIA: Counsel, what if Virginia had said
5 we think people who murder children under the age of
6 fifteen need to register as sex offenders, because we
7 believe there's a risk that if you do that and commit that
8 crime, it's a - - - you know, it's a threat as - - - that
9 you may sexually assault or offend against children in the
10 future?

11 MS. EVERETT: I think that case, which is
12 different, might satisfy the statutory interpretation
13 argument that I'm raising. I don't think it would satisfy
14 the substantive due process argument, because even - - -
15 this court held in Knox that you have a liberty interest -
16 - - a Constitutionally protected liberty interest in being
17 - - - having an accurate label, and - - -

18 CHIEF JUDGE DIFIORE: Did we - - - did we hold
19 that in Knox?

20 MS. EVERETT: Yes, you held - - -

21 CHIEF JUDGE DIFIORE: We assumed - - - okay.

22 MS. EVERETT: That it's a liberty interest. It's
23 not a fundamental right. But it does have a protected
24 liberty interest, and there has to be a rational basis for
25 it, particularly since in New York if you're - - -



1 JUDGE FEINMAN: Well, since we're there, on - - -
2 on the issue of what's rational or irrational under Knox,
3 what kind of correlation do you need?

4 MS. EVERETT: Well, on that point - - -

5 JUDGE FEINMAN: Is it one percent or is it
6 anything above zero is rational?

7 MS. EVERETT: I think that's really a question
8 for a statistician, and this record doesn't really provide
9 that. And I will say that the District Attorney, in their
10 reply brief, has pointed to a study for the first time in
11 their reply brief, that we didn't have a chance to contest,
12 so I would ask the court not to consider it.

13 JUDGE STEIN: But I thought - - -

14 MS. EVERETT: But I would also - - -

15 JUDGE STEIN: - - - Fronty (ph.) says that - - -
16 that you don't have to come forward, you don't - - - with
17 empirical data to show rationality. It can be a reasonable
18 speculation, even.

19 MS. EVERETT: Right. On the other hand, if you
20 look at the court's decision in Knox, it's certainly
21 abundant throughout the Knox decision that the court
22 recognized the very significant statistical correlation.

23 JUDGE STEIN: Well, it had it there, but they
24 didn't - - - never said the court in Knox said it was
25 required?



1 MS. EVERETT: Right. But I don't think that - -
2 -

3 JUDGE FAHEY: Normally, don't we just look to the
4 legislative purpose and findings to - - - to look for the
5 underlying rational basis?

6 MS. EVERETT: Well, the legislative purpose could
7 be clear, but if it's not rationally related - - -

8 JUDGE FAHEY: Right.

9 MS. EVERETT: - - - then - - -

10 JUDGE FAHEY: But that's - - - you're correct
11 about that. But that's not what we're talking about here.
12 The legislative purpose here was quite direct. It talked
13 about quickly apprehend sex offenders who are impaired by
14 lack of information about sex offenders who live within
15 their jurisdiction. This is to prevent them from knowing -
16 - - or to make sure that they know which sex offenders live
17 within the jurisdiction.

18 One of the most compelling arguments - - - so it
19 seems to me there was a clear rational legislative purpose,
20 they want to know who lives here who's a registered sex
21 offender. That's hardly irrational.

22 But let me just ask this question and you can
23 address it. One of the most compelling arguments for the
24 People seemed to be the escape-hatch problem. And I don't
25 see a way around that. It seems to me that - - - that



1 addressing that escape hatch problem is a very rational
2 type of legislative activity.

3 MS. EVERETT: Well, I think that if you look at
4 the legislative rubric, you'll see that actually New York
5 State protects what - - - its own interest in this regard.
6 The Correction Law states clearly that if it's somebody
7 that we require to register in New York, and they leave New
8 York, they still have to register.

9 JUDGE FAHEY: But that's not what we're talking
10 about here.

11 MS. EVERETT: Right, but - - -

12 JUDGE FAHEY: We're talking about someone who
13 comes from outside of the state, comes into New York, under
14 your rubric would not be required to register, then could
15 theoretically move back to Virginia and not be registered?

16 MS. EVERETT: Well, no, because in - - -

17 JUDGE FAHEY: Or say, move to Pennsyl - - -

18 MS. EVERETT: - - - Virginia law also says - - -

19 JUDGE FAHEY: Let me just finish. Or say, move
20 to Pennsylvania or some other state.

21 MS. EVERETT: Right.

22 JUDGE FAHEY: You see the problem?

23 MS. EVERETT: Well, actually, I think it's - - -
24 I understand that that's the People's main point. But I
25 don't think - - -



1 JUDGE FAHEY: Let me ask this.

2 MS. EVERETT: - - - it's really of concern - - -

3 JUDGE FAHEY: Let me - - - no, let me - - - let
4 me just stay on the point. Do you see that it's a problem?

5 MS. EVERETT: I don't think it's a problem,
6 because Virginia law says that if you move outside of the
7 Commonwealth, you still have to notify Virginia where
8 you've moved within ten days. So just as New York protects
9 its interests by requiring people under the Correction Law
10 to update their registration - - -

11 JUDGE STEIN: But the problem is enforcement of
12 that. And that - - - that, to me, is what the whole
13 registration process was aimed at in New York and - - - and
14 certainly in the federal law, is - - - is providing the
15 ability to follow and track people that we are concerned
16 with committing sexual acts against children.

17 MS. EVERETT: Right, but again, New York has - -
18 - does not wholesale accept the other states' registration
19 requirements. Number one, it requires it to be a felony.
20 If we only were concerned - - -

21 JUDGE STEIN: But how do we - - - how do we - - -

22 MS. EVERETT: - - - with tracking - - -

23 JUDGE STEIN: - - - inject other requirements
24 that the legislature hasn't?

25 MS. EVERETT: Right. But what I'm saying is that



1 since we don't help Virginia with respect to the many cases
2 of its - - - on its registry that are not felonies, the
3 same thing would apply - - - that's not their main concern.
4 They're capable of tracking their own people on the
5 registry. Their law provides that those people must update
6 their registration within ten days of moving. And there
7 are - - - the United States is perfectly capable, state to
8 state, in following people and in knowing that, you know,
9 that they're no longer at the address in Virginia that they
10 put down when somebody - - - an officer in Virginia goes to
11 that address and sees they're not there.

12 So that it's not the burden that the People have
13 posited - - -

14 JUDGE STEIN: But - - - but then can't they
15 assume that - - - that the state to which they've moved is
16 - - - is doing their part also?

17 MS. EVERETT: Well, to the extent that it's
18 somebody who New York State has - - - legislature has
19 identified a concern that we're willing to spend our
20 resources to track them and restrict where they live and
21 things like that, we're - - - the law - - - the Correction
22 Law currently provides for that.

23 And I would say that this is going to create
24 other problems. Because for example, in Virginia, they
25 make juveniles register. They make people who were



1 incompetent at the time they committed the crime register,
2 if you look at the Virginia statute.

3 Does New York really want to force those people
4 to register in New York as sex offenders? So that this
5 ruling the court is going to make today will have some
6 significant consequences down the road when those people
7 come forward and - - - and object to that.

8 CHIEF JUDGE DIFIORE: Counsel, would you get back
9 to Judge Fahey's question a moment about the escape hatch?
10 So if we were to find that people similarly situated to Mr.
11 Diaz did not have to register upon moving to New York, are
12 we not undermining the purpose of the federal statues like
13 the Jacob Wetterling Act, like the Pam Lyncher?

14 MS. EVERETT: Well, I would point out that the
15 federal statute does not require people to register on the
16 SORNA registry for crimes against children that - - - with
17 the exception of kidnapping and - - - and false
18 imprisonment are not sex offenses.

19 CHIEF JUDGE DIFIORE: But they set up a baseline,
20 right, of crimes and told - - -

21 MS. EVERETT: That's - - -

22 CHIEF JUDGE DIFIORE: - - - every state that you
23 could add additional crimes there, so - - -

24 MS. EVERETT: Right. But New York - - -

25 CHIEF JUDGE DIFIORE: - - - how - - -



1 MS. EVERETT: - - - first of all - - -

2 CHIEF JUDGE DIFIORE: - - - do we not undermine
3 what the - - - the federal legislation was attempting to
4 do?

5 MS. EVERETT: Well, as the People have
6 acknowledged, many states have not joined in the
7 reciprocity.

8 CHIEF JUDGE DIFIORE: Of course.

9 MS. EVERETT: And New York also has not wholesale
10 joined in it. So that New York's legislature has not
11 accepted that its paramount concern is reciprocity to
12 assist the Commonwealth of Virginia, because it does
13 require it to be a felony in the other state.

14 JUDGE STEIN: What about the concern that if we
15 have to look at every other state's registry and - - - and
16 at the actual crime committed and - - - and go find records
17 of - - - of the nature of the crime and whether there may
18 have been a sexual motivation or not? Is - - - don't - - -
19 don't we have an interest in New York to avoid the errors
20 that may occur? Isn't that exactly why we added to the
21 material-elements test?

22 MS. EVERETT: Well, but that wouldn't come into
23 play if Virginia had a single registry that was for sex
24 offenders.

25 JUDGE STEIN: But - - - but it - - - but it



1 doesn't. Okay? So the point is there is no single
2 registry in Virginia. So does that mean that anybody on
3 this - - - this combined registry then gets a free ticket
4 in New York?

5 MS. EVERETT: Well, first of all, you've got the
6 whole other part of the Correction Law in the New York
7 State statutory definition of a sex offender, which under
8 the North case you look at the elements, and you don't even
9 do a strict element analysis the way you would for, say, a
10 second-felony offender, you know, so that New York already
11 has a very broadly worded statute to look at crimes in
12 other states, whether or not we want them to register.

13 JUDGE FEINMAN: I mean, all you're - - - you're
14 really asking is for the SORA court, when the person is
15 brought in on a petition, to first ask the question: is
16 this something that requires registration, before you get
17 to the RAI and the whole point distribution?

18 MS. EVERETT: Right. I mean - - -

19 JUDGE FEINMAN: And - - -

20 MS. EVERETT: - - - there - - - it's very common
21 - - -

22 JUDGE FEINMAN: So I mean, this is not some
23 cumbersome process you're asking.

24 MS. EVERETT: This is really a threshold
25 determination. This is an easy way, if you have a sex



1 offender registry in another state, to know - - - and it's
2 a felony. They're still going to have to determine it's a
3 felony in the state, which will, of course, require some
4 research in the other state.

5 But if you can't invoke that, then you've got the
6 whole rest of the Correction Law available for New York to
7 determine that this is the kind of person that they feel
8 it's important to register under New York State Sex
9 Offender Registry. For that reason, we would ask the court
10 to affirm the opinion of the First Department; thank you.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 Counsel?

13 MR. ANDERSON: Yes. Very briefly, the - - - when
14 we're evaluating risk in SORA, we look at two things as the
15 legislature deems: the likelihood to reoffend and the
16 danger of that that poses to public - - - the public when
17 that person reoffends. Now, by focusing on felonies that
18 are out-of-state, the legislature could have deemed that
19 felonies are more serious than misdemeanors, and if you're
20 required to register out-of-state for a - - - committing a
21 felony, that should follow you in New York where the - - -
22 the public safety issue of if this person reoffends, what's
23 the danger to the public.

24 And here, it's absolutely reasonable for that to
25 happen. To - - -



1 JUDGE RIVERA: But the purpose of the statute
2 isn't to have a registry that's full, not just of sex
3 offenders, but anybody who's committed a terrible crime,
4 because another state doesn't - - - doesn't want to
5 administratively carry the burden of having two or three or
6 four registries. It has one merged registry.

7 MR. ANDERSON: Yeah, but for still having that
8 one merged registry, and by still distinguish - - - it's
9 still rational for the state - - -

10 JUDGE RIVERA: How does that not diminish the
11 value - - - let me put it that way - - - of the SORA
12 registry in New York, if you're listing people who are
13 clearly not sex offenders?

14 MR. ANDERSON: It doesn't diminish the value, no
15 more than the kidnapping cases in Knox. Those three
16 defendants, not one of them had a sexual element in there.

17 JUDGE RIVERA: Yeah, but that was already set out
18 in our statute.

19 MR. ANDERSON: Yes, Your Honor.

20 JUDGE RIVERA: You concede that this individual,
21 if this crime had been committed in New York, would not be
22 required to register?

23 MR. ANDERSON: Yes, Your Honor.

24 JUDGE RIVERA: Correct? All right.

25 MR. ANDERSON: Had this been - - - had he



1 committed this in New York, he would not have been required
2 to register in - - -

3 JUDGE RIVERA: So in the first - - -

4 MR. ANDERSON: - - - New York.

5 JUDGE RIVERA: - - - instance, New York doesn't
6 see - - - treat this person as a sex offender?

7 MR. ANDERSON: However, and taken - - -

8 JUDGE RIVERA: And apparently Virginia doesn't
9 either.

10 MR. ANDERSON: - - - but and taken in the sum of
11 all the cases of individuals moving from Virginia or
12 another state to New York, individuals who have to register
13 on the out-of-state registries and - - -

14 JUDGE RIVERA: Yeah, it's a terrible thing that
15 we have a right to travel and that people who commit
16 terrible crimes move from one jurisdiction across borders.
17 But the question is, what is the purpose of SORA? What is
18 it that you're trying to track? You're trying to track
19 people who are listed as sex offenders, not someone who is
20 on a sex-offender registry, but who is not someone who's
21 committed a sex offense.

22 MR. ANDERSON: Your Honor, that would then focus
23 on the next-step analysis, going into the RAI, what the
24 risk level should be. That's - - - at that stage, the SORA
25 court can step in and say okay, this - - - he's not likely



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to commit a sex offense there, or whatever the hearing there. But here we're just looking at that threshold determination of the SORA court asserting jurisdiction over this individual who has to already register out-of-state and moves to New York.

And the First Department was wrong in shifting the burden to the People to put forth evidence, statistical evidence that this person is more likely to offend.

As this court noted, the legislature - - - legislature could have rationally found the stas - - - statistics understate the problem, and it was wrong for the First Department to put the burden on the People.

And we ask that this court reverse. Thank you.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Frederick Diaz, No. 134 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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