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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. RAYMOND NEGRON,

Respondent,

-against-

NO. 76

SUPERINTENDENT, WOODBOURNE
CORRECTIONAL FACILITY,

Appellant.

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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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 76, ex rel. Negrón v.
3 Superintendent.

4 Counsel, given our public health protocols, I
5 assume you've been instructed to stay where you are and
6 argue from your table.

7 MR. GINSBERG: Very good. Thank you.

8 CHIEF JUDGE DIFIORE: Um-hum.

9 MR. GINSBERG: If I could reserve three minutes
10 for rebuttal, Your Honor?

11 CHIEF JUDGE DIFIORE: You may.

12 MR. GINSBERG: May it please the Court, the text
13 of SARA is awkward, unwieldy, and ambiguous and can be read
14 in two ways. SARA's history and its remedial purpose show
15 that it was intended to be read the State's way, namely as
16 applying to all level 3 sex offenders - - -

17 JUDGE GARCIA: Counsel - - -

18 MR. GINSBERG: - - - on community supervision.

19 JUDGE GARCIA: - - - in that reading - - - up
20 here.

21 MR. GINSBERG: Yes.

22 JUDGE GARCIA: In that reading, it seems to me
23 you have enumerated offenses, and then you have an
24 aggravator, right, under eighteen, as a victim. And the
25 question is, then, are we going to expand the pool within



1 those serving a sentence for the enumerated offenses to
2 include level 3, or are we going to create an entirely new
3 category of level 3 offenders subject to the mandatory
4 condition, right?

5 MR. GINSBERG: That's right.

6 JUDGE GARCIA: So if you look at Diack - - - and
7 I know you talk about it in your brief - - - the history of
8 kind of managing this sex offender process and - - - has
9 gone through SORA then SARA, but then also this Chapter
10 568, right, which came after SARA.

11 And 568 was meant to sort of address the problems
12 they were having with finding compliant housing,
13 particularly for level 2 and level 3 sex offenders. And
14 that - - - what - - - what became that legislation first
15 passed the Assembly in 2006.

16 So isn't it somewhat, as you would say,
17 counterintuitive to think that the legislature would expand
18 the pool of people subject to this additional restriction,
19 which in the legislative history of 568, they specifically
20 say exacerbates this problem that they were trying to
21 address, a mere year before they passed this legislation?

22 MR. GINSBERG: I don't think it's
23 counterintuitive, Your Honor. And the reason I don't think
24 it's counterintuitive is because when you look at the
25 legislative history of the 2005 SARA amendment itself, it



1 really embraces the State's reading of SARA as a remedial
2 statute that is - - -

3 JUDGE GARCIA: Well, I think you could read that
4 as a shorthand for a sex offender who's been convicted of
5 one of the enumerated offenses. I think you really have to
6 look at the text.

7 And you know, in - - - in that regard and 259-
8 c(15) is kind of an analogous provision - - - would you
9 read that provision which applies to pornography and
10 accessing the internet for pornography, or social media
11 sites - - - would you read the level 3 limitation the same
12 way for that statute?

13 MR. GINSBERG: I - - - well, first of all, that
14 was enact - - - the - - - the section - - - subdivision
15 (15) was enacted in 2008; it was enacted against a slightly
16 different background, with a slightly different legislative
17 history.

18 But I think I would say - - - oh, and also, as a
19 textual matter, if you break that down in sort of the
20 sentence diagrams that we did in our reply brief,
21 subdivision (15) would actually be (a) and (b) or (c) or
22 (d). It's got four conditions going on, as opposed to just
23 the three.

24 But I think that the SARA statute there - - - the
25 - - - the SARA-like statute there would be susceptible to



1 the same ambiguity, so one would have to consult the
2 legislative history of that provision and the purpose of
3 that provision to see what the legislature's actual intent
4 was.

5 And I think when you do that here, with
6 subdivision (14), it really does embrace the State's
7 reading. I understand - - -

8 JUDGE GARCIA: I saw - - - I saw a Supreme Court
9 decision, I think, out of Wyoming County, that made the
10 distinction based on the fact that there's a comma in (15),
11 after - - - you know, before you get to the limitation,
12 right?

13 So it says "of the correction law" - - - comma -
14 - - "and the victim of the offense was" - - - you know,
15 making it a somewhat different reading, which struck me as
16 - - - as interesting, particularly if you look at 65 - - -
17 Penal Law 65.10(4-a), which I think you described as a
18 parallel provision, which actually has commas in it, that
19 this provision doesn't.

20 So it seems to me, if I read 65.10 - - -
21 65.10(4-a), it gives me more of that pause that 65 - - -
22 that Section 15 has, because there's a comma before the
23 additional language.

24 MR. GINSBERG: You're right. It does give you
25 more of that pause. But I would think that there - - - I



1 think that there's a reason in the context of this statute
2 not to say that ambiguity is definitively foreclosed by
3 grammatical devices and grammatical precision.

4 I mean, SARA is an awkward statute on any
5 reading. It's supposed to complete the sentence "the State
6 Board of Parole shall", but it's actually a full sentence
7 in and of itself. It's kind of awkward to have the "is
8 released" clause after the list of criteria than before.

9 And if you want to talk about legislative
10 precision, there's a further oddity in the provision that
11 you mentioned, Your Honor, the probation provision. The
12 list of enumerated offenses is actually a little bit
13 different. I'm not sure if it was a typo or what it was.
14 But in the list of enumerated offenses for the - - - for
15 Penal Law 65, it talks about sec - - - Penal Law blah,
16 blah, blah, blah, or Article 235, whereas in the SARA
17 provision at issue here, it's the same thing except for
18 Article 135, instead of 235.

19 So I don't think this is a statute that's really
20 demarcated by attention to detail. And I think that's why
21 it's so important to consult its remedial purpose. And for
22 three reasons, the remedial purpose of SARA - - -

23 JUDGE STEIN: Well, but don't you have to
24 actually insert language into that provision that isn't
25 there so that it would - - - it would say something like,



1 you know, this - - - where a person is - - - is serving a
2 sentence for an enumerated offense, and the victim is less
3 than eighteen, or where a person has been designated a
4 level 3 sex offender." Wouldn't - - - wouldn't - - - don't
5 you have to really insert the "or where a person" in order
6 to get to the reading that you - - - that you propose?

7 MR. GINSBERG: You don't have to. That would be
8 a much cleaner way of doing it, among many cleaner ways and
9 more explicit ways of, frankly, adopting either side's
10 interpretation in this case.

11 JUDGE STEIN: And didn't it - - - didn't the
12 Fourth Department actually concede that you would be
13 rendering some language superfluous - - -

14 MR. GINSBERG: Well - - -

15 JUDGE STEIN: - - - if - - - if you follow your
16 proposed interpretation?

17 MR. GINSBERG: Yeah, I did see that language in
18 the Fourth Department opinion. But I don't think that's
19 right. They were focusing on the phrase "such person", in
20 what we've been describing as the (c) criterion of this
21 three criterion list.

22 But that phrase, "such person", does not become
23 superfluous on our reading. Something is superfluous if
24 you could strike it from the text and everything else would
25 be the same. The word "such" here does have a purpose on



1 our reading. It refers to the previous use of the word
2 "person", which is a person, in the clause "where a person"
3 that comes before the list of statutory criteria.

4 Now, to be sure, that use of "such" is not what
5 one might call a greatly particularizing use of the word
6 "such". It doesn't - - -

7 JUDGE RIVERA: Yeah, but it's not - - - no. It's
8 not just "a person". It's a person doing something.
9 Right? It's a person serving this sentence.

10 MR. GINSBERG: It can't - - -

11 JUDGE RIVERA: It's not a person in the ether
12 without some connection or relevance to something.

13 MR. GINSBERG: That is one reading. And perhaps
14 that's even the more natural reading. But that's not the
15 only reading. If you - - - if you think of the sta - - -
16 if you think of the - - -

17 JUDGE RIVERA: Because you're - - - you're really
18 arguing that it's beyond some mere drafting error or some
19 clumsiness or, gosh, we wish the legislature was a little
20 more precise. You're asking us to look at this and say the
21 legislature, understanding what is a - - - a common phrase
22 in legislation - - - it's not that there's something unique
23 about it - - - this common phrase of "such person", that -
24 - - and this is a typical, well-understood rule of
25 construction, would refer back - - - that somehow the



1 legislature ignored or chose to inject all of this
2 confusion into the statute. And that's my problem with
3 your construction.

4 MR. GINSBERG: Well, I - - -

5 JUDGE RIVERA: If it was a less - - - if it was a
6 term that perhaps is unusual and not so well-understood, I
7 think you would have a very different argument.

8 MR. GINSBERG: Well, I - - -

9 JUDGE RIVERA: But "such person" refers back to
10 something. And the person here is the person serving the
11 sentence, et cetera, et cetera.

12 MR. GINSBERG: Well, Your Honor, it depends on
13 where you put the sort of verbal stops in the sentence. If
14 you read the sentence - - - the - - - the SARA provision as
15 where a person a) serving a sentence for an enumerated
16 offense, and b) the victim of such offense was under
17 eighteen, or c) such person has been designated a level 3
18 sex offender, is released on community supervision.

19 JUDGE STEIN: But - - - but do you - - -

20 JUDGE RIVERA: But the "such person" goes back to
21 the person on the enumerated offenses.

22 MR. GINSBERG: No, then "such person" goes back -
23 - - if you - - - if you put - - - if you kind of think of a
24 letter A - - -

25 JUDGE RIVERA: Yes.



1 MR. GINSBERG: - - - as being placed in between
2 the word "person" and the word "serving", then "such
3 person" goes back to that person, that sort of referenced
4 person, listed at the beginning of the statute.

5 It does not add a lot of particularizing detail -
6 - -

7 JUDGE RIVERA: Well, no, then it would actually
8 say "a person".

9 MR. GINSBERG: Well, they could have said "a
10 person", but they didn't have to. And I think - - - I
11 can't - - - I don't think I can do much better than the
12 five federal Appellate decisions - - -

13 JUDGE RIVERA: I agree you can't do much better.
14 You're right.

15 JUDGE STEIN: So - - - so does it - - - does it
16 make sense, though, if you can parse the words, and you can
17 say, okay, it could be read this way or it could be read
18 that way, then let's just assume that you're right, it
19 could be read either way. I don't know if I agree with
20 you, but let's assume that that is the case. Don't you
21 have to look at - - - beyond that to - - - to what makes
22 sense?

23 So here, you would agree, for example, that there
24 are level 1 and level 2 sex offenders who have offended
25 against children only, right? And this doesn't apply to



1 them. And so - - -

2 MR. GINSBERG: Well, it - - - it applies to them
3 to the extent they're currently serving a sentence for an
4 enumerated offense.

5 JUDGE STEIN: Right. But - - - but in - - - in -
6 - - right. But to the - - - I'm saying that if they're not
7 serving an enumerated offense, it doesn't apply to them.
8 They're not subject to the - - - to the residency
9 restriction at all. Whereas any level 3, right, under your
10 interpretation, would be subject, regardless of whether
11 they offended against children. Right?

12 MR. GINSBERG: Well, here's why I think that - -
13 - yes, you're right, Your Honor. And let me tell you why
14 that's rational for the legislature to have done so, again,
15 to further the purpose of this remedial statute that this
16 Court's cases have always said is supposed to be read to -
17 - - to embrace its purpose, as far as the text allows.

18 There are three reasons, for that, and then I'll
19 try to reserve the remainder of my time. Number one, as a
20 group, level 3 sex offenders pose the highest risk of
21 recidivism and threat to public safety. And so it's - - -

22 JUDGE STEIN: Right, but - - - but couldn't the
23 legislature - - - again, getting back to just my previous
24 question - - - have considered how long ago it was that
25 they offended?



1 So here, again, you know, you could have a level
2 3 sex offender who hadn't offended for twenty-five, thirty
3 years. And couldn't the legislature have reasonably made
4 the determination that we don't have to worry about that
5 person?

6 MR. GINSBERG: Well, I just want to be clear. We
7 are talking about the - - - everyone in this case is
8 talking about folks who have - - - who are under DOCCS's
9 jurisdiction, and they're there because they've committed
10 some offense, even if it wasn't a sex offense against a
11 child.

12 But the legislature could have done that. What
13 they also could have done, which we think they did, and we
14 think this court's cases about how to read - - - read
15 remedial statutes compel the reading that they did - - -it
16 was rational for them to exercise caution to keep all level
17 3 sex offenders away from minors, whenever they came within
18 DOCCS's power and jurisdiction, to do so.

19 In applying SARA - - -

20 JUDGE GARCIA: But this is a mandatory condition,
21 right? So even if this doesn't apply, and you have a level
22 2 sex offender or a level 3, if their reading is correct,
23 and we were to affirm, the board could still impose this as
24 a condition based on the particular circumstances, right?

25 MR. GINSBERG: That's right, Your Honor. The



1 board can impose this on a case-by-case basis.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 Counsel?

4 MR. HARPAZ: Your Honors, the attempt to create -
5 - - to find ambiguity, in the phrase "such person" is quite
6 remarkable here. What I find most telling is that the
7 Fourth Department, in People ex rel. Garcia v. Annucci,
8 found ambiguity in the statute and said what it could mean,
9 and the Attorney General's Office has rejected that.

10 And by the same token, the Fourth Department has
11 rejected the Attorney General's Office attempted ambiguity,
12 because the Fourth Department said quite correctly, "such
13 person" is not a person. If they meant such per - - - if
14 they meant "a person", they would have said "a person".
15 "Such person" has to be something more than that.

16 And by the same token - - -

17 JUDGE FAHEY: That's so - - - you know, the
18 Second Circuit, I love the language they use. They said
19 "Such is a rather slippery word." It's a tough one.
20 That's very, very tough to be so definitive on that.

21 What I struggle with here is - - - is not the
22 application of that slippery word, but really if you get to
23 the legislative history, what does it mean? Can you
24 address that?

25 MR. HARPAZ: Certainly, Your Honor. I think that



1 the legislative history - - - let's - - - let's stay - - -
2 take a step back.

3 JUDGE FAHEY: Go ahead.

4 MR. HARPAZ: We had a statute enacted in the year
5 2000 that applied at the time to all levels of sex
6 offenders, including level 3 sex offenders who had
7 victimized a child. When the legislature amended the
8 statute in 2005 to add the provision "or such person has
9 been designated a level 3 sex offender", they were not
10 adding to the statute's purview level 3 sex offenders who
11 had victimized a child, because they were already part of
12 the statute. The people they were adding were level 3 sex
13 offenders with an adult victim.

14 It boggles the mind that the legislature enacted
15 a statute to protect children, initially, and focused it
16 solely on individuals who had victimized children,
17 something that is be - - - you know, makes perfect sense.
18 But then, according to the Attorney General's Office, when
19 it amended the statute to add level 3 sex offenders with an
20 adult victim, decided to impose even greater restrictions
21 on those offenders than had been imposed on individuals who
22 had actually victimized children, when in the first
23 iteration, they didn't think children needed any protection
24 from level 3 sex offenders with an adult victim.

25 It's simply - - -



1 JUDGE FAHEY: It seems there was a - - -

2 MR. HARPAZ: And if - - - if, in fact, that's
3 what the legislature intended to do, that they in fact were
4 having a departure from the initial statute, in - - -
5 insofar as they were going to henceforth subject level 3
6 sex offenders to greater restrictions than had previously
7 been imposed, there would surely have been something in the
8 legislative history of the 2005 amendment that would have
9 reflected that. There is nothing in the 2005 amendment
10 that reflects that.

11 Mr. Ginsberg is to - - - is putting everything on
12 the fact that, you know, various and sundry letters and - -
13 - and the enabling - - -

14 JUDGE FAHEY: There's a lot there - - -

15 MR. HARPAZ: - - - says - - -

16 JUDGE FAHEY: - - - you've got to - - -

17 MR. HARPAZ: - - - says - - -

18 JUDGE FAHEY: Slow down. Slow down.

19 MR. HARPAZ: Yeah.

20 JUDGE FAHEY: There's a lot there in the
21 legislative history.

22 MR. HARPAZ: There is - - -

23 JUDGE FAHEY: We've got - - - excuse me.

24 MR. HARPAZ: Sorry.

25 JUDGE FAHEY: That's okay. There's a - - - a New



1 York City Civil Liberties Union opposed it, because it
2 would apply to all persons designated L-3.

3 MR. HARPAZ: That's correct.

4 JUDGE FAHEY: Does that seem rather remarkable to
5 you?

6 MR. HARPAZ: Not at all.

7 JUDGE FAHEY: Okay.

8 MR. HARPAZ: What the Civil Liberties Union was
9 referring to was simply the fact that henceforth all level
10 3 sex offenders, not simply level 3 sex offenders with a
11 child victim - - -

12 JUDGE FAHEY: Um-hum.

13 MR. HARPAZ: - - - were going to be subject to
14 this prohibition. That's what that's a reference to. It
15 is not a reference to the - - - to the supposition that the
16 Civil Liberties Union thought that henceforth level 3 sex
17 offenders would have greater restrictions placed on them,
18 including those who had never victimized a child.

19 So when they say "all", they mean those with a
20 child victim, those without a child victim. That's all.
21 That incl - - - that's the whole - - - that's the total.

22 JUDGE FAHEY: Um-hum.

23 MR. HARPAZ: It had nothing to do with whether
24 that restriction was going to be imposed for life, for as
25 long as you are a level 3 sex offender and were on



1 community supervision for any crime, or whether it was only
2 going to be imposed as long as you were currently serving a
3 sentence for an offense designated in the statute.

4 JUDGE FAHEY: I see, thank you.

5 MR. HARPAZ: And - - -

6 JUDGE STEIN: If the - - - if - - - if the
7 legislature had wanted it to apply to all level 3 sex
8 offenders, regardless of whether they had committed an
9 enumerated crime - - - they were being released from that -
10 - - could they have put that in the executive law
11 provisions relating to level 3 sex offenders?

12 MR. HARPAZ: I suppose so. But - - - but I think
13 - - - I think what seems to me clear - - -

14 JUDGE STEIN: Well, in terms of how - - - you
15 know, how long they have to register for and, you know, all
16 those - - - all those things. Wouldn't it make sense to
17 put it there?

18 MR. HARPAZ: Certainly it would have made some
19 sense, and it's not there. But I think, if they had
20 actually intended, in this - - - in Executive Law
21 259-c(14), to make greater restrictions on all level 3 sex
22 offenders, if they had intended that, they simply would
23 have written the st - - - the amendment to say: where a
24 person has been designated - - - notwithstanding - - -
25 where a person has been designated a level 3 sex offender

1 or where a person serving a sentencing for an offense and
2 the victim is under - - - under - - - that's - - - it - - -
3 it would have been the simplest thing in the world to have
4 written the statute in a way that - - - that reflected the
5 alleged intent that DOCCS is claiming exists, and which
6 does not exist.

7 And I would - - - I would get back to "such
8 person", because you - - - you - - - there's no way to get
9 around it. This is not - - - "such" can sometimes be a
10 slippery term, I - - - I agree. It's not here.

11 You have a phrase "where a person serving a
12 sentence for an offense defined in", et cetera, et cetera,
13 et cetera. There's no - - -

14 JUDGE RIVERA: Well, it's a slippery - - -

15 MR. HARPAZ: - - - there's no breaks there.

16 JUDGE RIVERA: - - - it's a slippery - - - it's a
17 slippery term if you've got a few persons to choose from.
18 But there's only one person here.

19 MR. HARPAZ: Yes, Your Honor. It's - - - it can
20 be slippery where it - - - literally when you look back - -
21 -

22 JUDGE RIVERA: It's unclear who's the such person
23 they're referring to.

24 MR. HARPAZ: Who "such person" is, it may - - -
25 it can be unclear. Because - - -



1 JUDGE RIVERA: But that is not.

2 MR. HARPAZ: - - - it's not unclear here. It's
3 clear as day, as the Third Department found. And the
4 Fourth Department, which - - - you know, the Attorney
5 General's Office is not defending their interpretation - -
6 - said well, you can simply chop up that phrase, that
7 integrated phrase. We can chop it anywhere we want.

8 We can say "a person", "a person serving a
9 sentence", "a person serving a - - - a sentence for an
10 offense designated in", "a person serving a sentence for an
11 offense, and the victim is a" - - - no. That's not how - -
12 - how anyone would read this statute.

13 "Such person" is the only person it could be, a
14 person serving a sentence for an offense defined in.

15 CHIEF JUDGE DIFIORE: Thank you. Counsel.

16 Counsel?

17 MR. GINSBERG: Just a few points in rebuttal.
18 First on the textual point, I - - - I think I would have to
19 refer to this court's own characterization of SARA in the
20 Gonzalez case, where it said that SARA applies, "based on
21 either an offender's conviction of an enumerated offense
22 against an underage victim, or the offender's status as a
23 level 3 sex offender."

24 JUDGE STEIN: Did we have this issue before us in
25 that case?



1 MR. GINSBERG: It wasn't squarely before you.
2 But you did have occasion to parse the statute as you did.
3 And that's the result that - - - that you came up with. I
4 think that is, at least, some evidence of ambiguity.

5 I would like to turn, again, to the statute's
6 purpose. Applying SARA under the State's reading, would
7 cover actual child victimizers the petitioner's reading
8 omits. Mainly, it would cover level 3 sex offenders on
9 community supervision who have previously served a sentence
10 for an enumerated sex crime against a minor. Petitioner's
11 reading doesn't cover that.

12 The State's reading also covers, unlike
13 petitioner's reading, level 3 sex offenders on community
14 supervision who have previously served or are currently
15 serving a sentence for an unenumerated sex crime committed
16 against a minor.

17 And those sex crimes are heinous in their own
18 right. They include - - -

19 JUDGE STEIN: But if the legislature wanted to do
20 that, then all they have to do is take out the "enumerated"
21 - - - the language that they were serving that - - - that
22 they were most recently serving time for those offenses.

23 MR. GINSBERG: The legislature - - -

24 JUDGE STEIN: Right?

25 MR. GINSBERG: - - - could have done that. There



1 could - - - there's - - - there are any number of ways that
2 they could have written this statute differently or more
3 clearly, but the line that's being debated here is between
4 all level 3 sex offenders on community supervision and
5 those who are serving a sentence for an enumerated offense.

6 And - - - and drawing that dividing line
7 frustrates SARA's remedial purpose, because both enumerated
8 and unenumerated sex offenses can have minors as victims.

9 And I see my white light is on. So I'll try to
10 close with this. Just ten days before the legislature
11 amended SARA, it enacted the unenumerated offense of
12 compelling a minor into prostitution.

13 It is implausible to think that the legislature
14 wanted to exclude from SARA's domain a sex offender who is
15 in the highest general risk category and who is currently
16 on supervision for that very offense, again, compelling a
17 minor into prostitution; but that is what petitioner's
18 reading gets you. The State's reading should prevail.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 (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 Ex Rel. Raymond Negrón v. Superintendent, Woodbourne Correctional Facility, No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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