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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 83

MARCUS BROWN,

Appellant.

20 Eagle Street
Albany, New York
October 19, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

AVA C. PAGE, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant
111 John Street
9th Floor
New York, NY 10038

WILLIAM H. BRANIGAN, ADA
DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
1 Hogan Place
New York, NY 10013

Brandon Deshawn
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar
2 is number 83, People v. Marcus Brown.

3 MS. PAGE: Good afternoon, Your Honors. May it
4 please the court. Ava Page from Appellate Advocates on
5 behalf of Marcus Brown.

6 I'd like three minutes for rebuttal, please.

7 CHIEF JUDGE WILSON: Yes.

8 MS. PAGE: Requiring Marcus Brown to register as
9 a sex offender when the SORA court, the prosecution, and
10 the Department of Corrections all agreed his offense was
11 devoid of any sexual motivation is irrational.

12 Mr. Brown was not accused of any sexual
13 misconduct. He was not indicted for any sexual misconduct.
14 During his incarceration - - -

15 JUDGE TROUTMAN: How is this different from Knox?

16 MS. PAGE: This case is different from Knox in
17 three crucial ways, Your Honor.

18 The first way it's different is that here we have
19 an explicit judicial finding from the fact finding court
20 that this offense was devoid of any sexual conduct or
21 motivation.

22 JUDGE CANNATARO: Wasn't that assumed in the Knox
23 decision?

24 MS. PAGE: Well, in Knox, Your Honor, the
25 prosecution in all three cases actually argued that the

1 possibility of a sexual motive could not be ruled out.

2 JUDGE CANNATARO: No. But when I got - - - when
3 it got to the Court of Appeals, there was an assumption
4 made in the decision that there was no sexual, you know,
5 dimension to the crime.

6 MS. PAGE: Yes, Your Honor. The court did make
7 that assumption, but it did not have the explicitly clear
8 judicial finding that was uncontested by the prosecution
9 that Mr. Brown has.

10 JUDGE GARCIA: So judicial finding makes that a
11 substantive due process violation when we were assuming it
12 in Knox? I - - - I have a hard time equating those two
13 things.

14 MS. PAGE: It is one of the factors that makes it
15 a substantive due process violation here, because it's
16 irrational to make someone register under SORA.

17 JUDGE GARCIA: Because it seems to me - - - we
18 assume they were making someone register under SORA without
19 a sexual component, and our focus was on the legislature
20 and what the legislature intended.

21 And we found that's what they intended, and we
22 assume there was no sexual component, and we said there was
23 no substantive due process violation. It seems your rule
24 would leave that in the hands of DOCCS or the Supreme Court
25 to override the legislative determination that we've upheld

1 in Knox.

2 MS. PAGE: No, Your Honor. The statute itself
3 would stand in kidnapping, and imprisonment offenses
4 against minors would still be presumptively registrable.

5 JUDGE HALLIGAN: So you're not asking us to
6 overturn Knox; you're claiming it's distinguishable. Is
7 that right?

8 MS. PAGE: Yes, Your Honor. If the court would
9 like to overturn Knox, obviously, we would invite that, but
10 the court - - -

11 JUDGE HALLIGAN: I didn't see that in your brief
12 there, just to clarify.

13 MS. PAGE: Yes. The court does not have to
14 overturn Knox to grant relief to Mr. Brown here. So
15 looking at the facts of the Knox cases, they are very, very
16 different than the facts in this case.

17 Not only was there no explicit judicial finding
18 that the offense was a completed, financially motivated
19 burglary and robbery that was devoid of sexual motivation,
20 which the prosecutor agreed with, but there was a
21 Department of Corrections finding that this offense
22 involved no sexual motive to such an extent, Mr. Brown was
23 not - - - was not permitted to participate in sex offender
24 treatment. None of the Knox defendants had that.

25 And then finally, Your Honors, looking at the

1 facts of the Knox cases compared to this case, it's clear
2 that the Knox cases are distinguishable.

3 JUDGE CANNATARO: Why is that?

4 MS. PAGE: Well in Knox, the first case involved
5 a defendant who tried to grab a stranger, eight-year-old
6 child, off a playground and who was stopped.

7 JUDGE GARCIA: To replace a child she had lost,
8 right?

9 MS. PAGE: That is what the court inferred from
10 the record, but there was no explicit - - -

11 JUDGE HALLIGAN: So - - -

12 MS. PAGE: - - - judicial determination.

13 JUDGE HALLIGAN: You would - - - you would draw a
14 distinction between stranger and - - - and family? And - -
15 - and if so, what's the basis on which it would be
16 appropriate for us to do that?

17 MS. PAGE: That's not the rule that we're asking
18 for, Your Honor. But in Knox, the court did rely on the
19 rates of sexual abuse and some non-family member
20 kidnappings to find that it was rational to - - -

21 JUDGE HALLIGAN: But if it' the basis - - -

22 MS. PAGE: - - - apply deception.

23 JUDGE HALLIGAN: Sorry. If it's the basis for
24 distinguishing it, I - - - I assume that you think it's a
25 distinction with a difference, right? So I'm just trying

1 to understand how are we on the record in this case
2 supposed to grapple with the question of, you know, what to
3 make of that study and - - - and whether that particular
4 factor makes a difference in terms of whether it's
5 irrational?

6 MS. PAGE: Sure. You don't have to grapple with
7 studies when you have the facts of an individual's case,
8 when it makes it clear that the hypothetical danger present
9 in some kidnappings and imprisonment did not happen here.

10 And looking at the second Knox case, Cintron,
11 that defendant had already committed sexual misconduct
12 against a child. He had already been convicted of it
13 before, and he had committed sexual misconduct in prison.

14 The third defendant in the Knox case, Jackson,
15 was a pimp who abducted a child to force the child's mother
16 to prostitute. So all of these offenses are very different
17 than what we have here, which is a completed, financially
18 motivated offense, where the SORA court found that Mr.
19 Brown's only motivation was to steal money from an adult,
20 that there was no sexual contact or motivation.

21 But the court itself stated, it felt constrained,
22 even though it did not find Mr. Brown to be a sex offender,
23 to require him to register under SORA, even though he
24 posed, and I'm quoting from the court's decision, "no risk
25 of sexual threat at all".

1 JUDGE GARCIA: So the court - - - the court
2 essentially, with the consent of the parties or maybe would
3 require the consent of the parties under the rule, I'm not
4 sure, but could overrule the legislators - - -
5 legislature's determination that this person should
6 register as a sex offender based on the specific facts of
7 the case and a finding by the court. Would that apply to
8 other sex offenses where the court just felt, you know,
9 there really wasn't a sexual motivation here, after all?

10 MS. PAGE: No, Your Honor. This would be an
11 extremely narrow category of cases.

12 JUDGE GARCIA: But why not? Why if the court
13 made a finding in another case and says, you know what, I -
14 - - I see this case, but I - - - I don't think there was a
15 sexual motivation here, it's a due process violation?

16 MS. PAGE: Well, because one, the court could
17 fashion the rule in a narrow way to only apply to
18 kidnappings and imprisonments when there's no other charge
19 or conviction of a sex crime. Then if someone is accused -
20 - -

21 JUDGE GARCIA: This has been labeled a sex crime,
22 registrable of crime by the legislature, so we're
23 essentially giving an override.

24 MS. PAGE: No. Because the statute remains the
25 same. This only allows the risk level court to determine

1 based on the specific facts of an individual's case if
2 there was clearly no sexual motivation or conduct, SORA
3 does not apply.

4 JUDGE GARCIA: If they found that in another
5 crime, we're arguably - - - you know, there always is. But
6 here, you know, I really don't think so. I think they got
7 it wrong. I believe this guy - - - I'm not going to
8 register you; that would be a due process violation there.
9 I'm finding there was no sexual motivation here.

10 MS. PAGE: Your Honor, and this is why this shows
11 that the SORA hearing is the perfect venue for this,
12 because at the SORA hearing, the court is already
13 determining registrability and determining someone's risk
14 of re-offense. So in - - -

15 JUDGE GARCIA: What if DOCCS said we don't know,
16 and the court said, no, I'm finding there isn't, what would
17 the rule be?

18 MS. PAGE: I'm sorry?

19 JUDGE GARCIA: What if the People objected or
20 DOCCS said, no, you know, there is a hint of it. We can't
21 be sure, but the court said, no, I looked at this and there
22 is none. What - - - who do we - - - who do we let make
23 that decision then?

24 MS. PAGE: Well, in that case - - - so here, we
25 have clearly an undisputed case that did not involve any

1 sexual motive. I think that needs to be in there. I think
2 the court should have been allowed to do what it was trying
3 to do, which is to exempt Mr. Brown.

4 JUDGE GARCIA: But what if don't, what's a split
5 decision down there?

6 MS. PAGE: If it is a contested case, Your Honor,
7 the prosecution and the SORA court are allowed to introduce
8 all relevant reliable hearsay evidence. This is already
9 the rule at all SORA hearings.

10 JUDGE GARCIA: What if they say, look, we just
11 don't know, could be, could not be, what you characterize
12 Knox says. And the judge says, no, you know, I don't think
13 so. Is that enough?

14 MS. PAGE: Well, at the SORA hearing, Your Honor,
15 the prosecution can introduce the complaint, the pre-
16 sentence investigation report, the grand jury minutes,
17 trial testimony. The court can even look at counts of
18 which the defendant was acquitted.

19 CHIEF JUDGE WILSON: I think what Judge Garcia is
20 getting at is how would you articulate the rule that you
21 would like us to adopt?

22 MS. PAGE: Okay. My proposed rule - - -

23 CHIEF JUDGE WILSON: Yeah.

24 MS. PAGE: - - - is that when it is undisputed
25 that a kidnapping or unlawful imprisonment offense was

1 devoid of any sexual conduct and devoid of any sexual
2 motivation, applying SORA is irrational - - -

3 CHIEF JUDGE WILSON: And by - - -

4 MS. PAGE: - - - and should be exempted.

5 CHIEF JUDGE WILSON: And by undisputed you mean,
6 the People agree, defense counsel agrees, the court agrees?

7 MS. PAGE: Yes.

8 CHIEF JUDGE WILSON: DOCCS or the board agrees?

9 MS. PAGE: Yes. That is the first part of the
10 rule that applies to us.

11 CHIEF JUDGE WILSON: So every - - - everybody
12 involved agrees?

13 MS. PAGE: Well, DOCCS doesn't need to be a
14 party, because it's the - - -

15 CHIEF JUDGE WILSON: Right. But it's the board -
16 - -

17 MS. PAGE: Yes.

18 CHIEF JUDGE WILSON: - - - the board's
19 recommendation.

20 MS. PAGE: Well, the court and the prosecution.
21 So that's the first part of this rule. The second - - -

22 CHIEF JUDGE WILSON: What happens if the board
23 has not agreed?

24 MS. PAGE: Well, the board - - - just in this
25 case - - -

1 CHIEF JUDGE WILSON: Yeah.

2 MS. PAGE: - - - the board said this offense
3 lacked a sexual motive, but they just automatically - - -

4 CHIEF JUDGE WILSON: Right.

5 MS. PAGE: - - - issue the paperwork.

6 CHIEF JUDGE WILSON: Right.

7 MS. PAGE: So I think it should be a judicial
8 finding after considering all the evidence. To address - -
9 -

10 JUDGE HALLIGAN: So if - - -

11 MS. PAGE: - - - Judge Garcia's - - -

12 JUDGE HALLIGAN: - - - the court - - - if the
13 court overrides the board and says there's no sexual
14 component, would that be enough in your view?

15 MS. PAGE: No. This - - - this rule would only
16 apply to a very, very, very narrow category of kidnapping
17 imprisonment cases when the person has not been charged
18 with.

19 JUDGE CANNATARO: Counsel, I'm sorry to take you
20 back several questions ago, but I just want to confirm in
21 your distinguishing of Knox from this case, the factors
22 that use the last one facts, are you saying that the fact
23 that the defendants - - - none of the defendants in Knox
24 were family members and that the defendant here is a family
25 member, that - - - that's not something that you're

1 pointing to as a relevant distinction.

2 MS. PAGE: It is a factor, Your Honor. I don't -
3 - - the three crucial distinctions I'm pointing to are the
4 explicit judicial finding, DOCs determination, and the
5 facts of this completed case as compared to the Knox cases.

6 So one of those facts in the case is that this
7 child was Mr. Brown's blood relative, his cousin that he
8 grew up with. So it doesn't - - - it doesn't strike the
9 same fear that the legislature had in making this
10 presumptively registrable to protect children from stranger
11 kidnapping.

12 JUDGE CANNATARO: Well, that's my concern,
13 though, because in terms - - - it's - - - I thought I
14 detected a suggestion in your brief that somehow the fact
15 that it was a family member, can - - - you know, just what
16 you said, that it doesn't raise the same level of concern.
17 But I don't know that the record supports that particular
18 contention. So I was - - - that's why I'm trying to
19 understand exactly where you stand on family member?

20 MS. PAGE: Yes, Your Honor. The reason that I
21 brought that up is because in Knox, it was largely based on
22 these two studies about rates of sexual abuse and some non-
23 family member kidnappings. However, I don't think it's
24 what makes us entitled to the relief that we want here.

25 JUDGE HALLIGAN: So if you - - - if you had

1 someone who was a family member but there was no judicial
2 finding that there was no sexual component, no sexual risk,
3 you would not have the same argument, I take it, that it's
4 irrational, that you - - -

5 MS. PAGE: Correct.

6 JUDGE HALLIGAN: - - - are presenting to us.

7 MS. PAGE: Correct, Your Honor. And I just - - -
8 I want to point out that in the fourteen and a half years
9 since Knox was decided, it's become clear that not only
10 this is a very narrow category of cases, but it's actually
11 quite straightforward to determine when an offense like
12 this is devoid of sexual motive.

13 In Eunice v. Robinson, a federal case from 2019,
14 and again, in Pennington v. Rosado, a federal case from
15 2022, the federal district courts considered applying SORA
16 to two defendants convicted of a non-sexual kidnapping of a
17 child. So registrable, same as Mr. Brown. The district
18 courts there held that it was irrational to apply SORA when
19 it was undisputed that the kidnapping lacked any sexual
20 motivation.

21 And New York State then exempted those two men
22 from registration, identically situated to Mr. Brown,
23 except those men had the money and access to sue in federal
24 court. That further underscores how irrational it is to
25 apply SORA to Mr. Brown.

1 JUDGE RIVERA: Do you - - - do you have sense of
2 the numbers of individuals that fit within this narrow
3 category we're talking about, this provision of the penal
4 law that then are required to register as sex offenders?

5 MS. PAGE: I can tell you anecdotally based on my
6 office's experience representing hundreds of SORA subject
7 people post-Knox. This is of all SORA cases. This is
8 probably 0.001 percent. I, myself, have had two of these
9 cases, this case and another one I just - - -

10 JUDGE RIVERA: We say these cases, just to be
11 clear, they are individuals who are convicted of this
12 particular - - - of these crimes that fall within this - -
13 - the definition of a sex offense crime, and who had no, in
14 your view, have no sexual motivation, sexual act, or that
15 they just were convicted of the crime. Because I'm - - -
16 I'm asking about the latter, just convicted of the crime.

17 MS. PAGE: Yes, just convicted. This - - - the
18 point 0.001 percent are people that are only registrable
19 because of an imprisonment or kidnapping offense, who have
20 no other sexual charges - - -

21 JUDGE RIVERA: Okay.

22 MS. PAGE: - - - or indictments on their records.
23 So not a case where someone committed a kidnapping or rape,
24 not a case where someone committed an imprisonment in
25 sexual abuse. Cases where the person is solely registrable



1 because of one count in the indictment they pled to that no
2 one seemed aware - - -

3 JUDGE SINGAS: This is like Knox. I mean, again,
4 I can't get away from - - - I don't see it being
5 distinguishable from Knox.

6 MS. PAGE: Well - - -

7 JUDGE SINGAS: And unlike the federal courts, we
8 can't decline to follow our own precedent.

9 MS. PAGE: Well, Your Honor, this court has never
10 hesitated to step in when SORA has impinged on an
11 individual's constitutional rights.

12 So even if this court finds that Knox was the
13 right decision, I think the years since have shown that the
14 SORA hearing is the place to make this determination, and
15 applying the enormous stigma and burdens of sex offender
16 registration on someone who has indisputably never
17 committed a sex crime nor tried to commit sexual misconduct
18 is simply unconscionable.

19 JUDGE RIVERA: May I ask, do you - - - from your
20 position in this case, do you agree with the way the court
21 in Knox defined the defendant's interest?

22 MS. PAGE: The - - - in that it's a substantial
23 liberty interest?

24 JUDGE RIVERA: Yes, but the way it continues to
25 define the interest about the mislabelling, do you agree

1 that that is a correct characterization of the interest?

2 MS. PAGE: I think that in the years - - -

3 JUDGE RIVERA: Is it narrow, is it broader, is it
4 different?

5 MS. PAGE: I think in the years since Knox, we
6 have become more aware of the dire consequences of sex
7 offender registration. The court in Knox said it was
8 merely a label that was no less worse than child predator.

9 But even the New York State Unified Court System
10 own - - - its own website now lists that sex offender
11 registration can lead to social disgrace, humiliation, the
12 loss of relationships, jobs, housing, verbal and physical
13 abuse. And in my brief, I addressed this extensively.

14 But even at a level one, which Mr. Brown is, in
15 one year alone, over 28,500 calls were made to the
16 registry. The majority of those were to the hotline where
17 level one's are listed, and they were made by potential
18 employers screening applicants.

19 So I think in the years since Knox, we, as a
20 society, have become aware that these burdens and
21 consequences are real, and they are lifelong.

22 JUDGE RIVERA: So you're saying that in - - - in
23 the almost 15 years since Knox, that if we now look at the
24 interest, it is one that perhaps has some broader - - - is
25 broader in reach than it was at the time the court

1 considered Knox?

2 MS. PAGE: Yes, Your Honor. And I - - - I would
3 also - - - I see my time is up. I would just like to
4 conclude that in Liden, which came after Knox, this court
5 held that allowing the risk level court to decide the
6 registrability issue is not just an efficient way to
7 proceed; it is good policy.

8 And it was precisely good policy in Liden, this
9 court held, because it avoids putting the court in the
10 uncomfortable position of deciding the risk level of
11 someone that the court is not convinced is a sex offender
12 within - - - within the meaning of the statute at all.
13 That is precisely what happened here.

14 CHIEF JUDGE WILSON: Thank you.

15 MR. BRANIGAN: Good afternoon, Your Honors.
16 William Branigan for the Office of District Attorney, Katz.
17 May it please the court.

18 Your Honor, this court should follow its own
19 precedent in Knox in holding that the automatic
20 registration requirement is rationally related to the
21 legislature's goal of protecting children, in particular,
22 protecting children from sex offenses.

23 JUDGE TROUTMAN: How does it protect the public
24 when there's no dispute? There was no sexual component or
25 motivation involved.

1 MR. BRANIGAN: Your Honor, as discussed in Knox,
 2 when there are certain kinds of offenses against children,
 3 and this comes from the original Jacob Wetterling Act in -
 4 - - in Congress, that certain crimes against children, that
 5 including unlawful imprisonment and kidnapping offenses,
 6 are related, or have shown to be related to - - -

7 JUDGE TROUTMAN: But when - - - when there's an
 8 actual factual finding - - -

9 MR. BRANIGAN: Well - - -

10 JUDGE TROUTMAN: - - - but there isn't. The risk
 11 that they're supposed to be protected are not present in a
 12 particular case.

13 MR. BRANIGAN: Again, Your Honor, this - - - this
 14 was already addressed in the Knox case. And the - - - the
 15 fact that there - - - this is an intentional part of the
 16 statute.

17 JUDGE TROUTMAN: But doesn't the Knox case deal
 18 with the issue of when it's not clear, there's a - - -
 19 there's a rational reason, the protection.

20 You don't have - - - there's a burden for the
 21 government to have to prove in each and every case, and
 22 sometimes they can't. But because there's a question mark,
 23 they should be registrable.

24 MR. BRANIGAN: Your Honor, the way that the - - -
 25 the Knox case was decided was explicitly on this issue of



1 whether the absence in the record of those cases or in the
2 absence of a finding of a sex offense in those cases - - -

3 JUDGE TROUTMAN: So in the Knox cases - - -

4 MR. BRANIGAN: You can - - -

5 JUDGE TROUTMAN: - - - you're saying there was no
6 dispute that there was no sexual component or motivation?

7 MR. BRANIGAN: Well, there was certainly no
8 dispute in the appellate record. Though the People might
9 have challenged that at some point. I don't know that.
10 But looking at the case itself, those were - - - those were
11 three cases where this is absent, and this specific issue
12 was raised as far as substantive due process.

13 And they said despite that, for the legislature,
14 and it's - - - under a rational basis test, could find that
15 the automatic registration requirement was necessary. So
16 if - - -

17 CHIEF JUDGE WILSON: Let me - - - let me - - -

18 MR. BRANIGAN: - - - if - - -

19 CHIEF JUDGE WILSON: Let me ask - - - let me ask
20 you this. Suppose, just hypothetically, that every time
21 one of these cases came up, the federal courts were going
22 to throw it out on habeas. Just - - - and that's not true,
23 but let's just take that assumption, okay, for a
24 hypothetical. Would that be a reason for us to think about
25 revisiting Knox?

1 MR. BRANIGAN: Well, no, for the following
2 reason. Your Honor, the - - - the problem with this - - -
3 what I have with these particular Southern District cases
4 here is it - - - it involves essentially the same case.
5 They're codefendants. It is a full kidnapping. The child
6 is a fourteen-year-old boy, I think, is taken. He is held
7 for several days. He's handcuffed.

8 CHIEF JUDGE WILSON: No, that's not my question.
9 Suppose it's cases with facts just like this. And we know
10 now, you know, fourteen years later after Knox, that the
11 federal courts are always going to throw this type of case
12 out on habeas, the narrow one described on this page.

13 Does that affect how we should think about our
14 prior precedent, whether we should carve out something to
15 avoid the federal courts from having to do that to us over
16 and over and over?

17 MR. BRANIGAN: Well, first, Your Honor - - - no,
18 Your Honor. This court should follow its own precedent.

19 But I would also say that here in addition to the
20 - - - to the facts of that case, and I would say that the
21 facts at issue in Eunice are the exact - - - is the exact
22 reason why we don't have - - - why we have an automatic
23 requirement, and we don't permit, or - - - or the
24 legislature did not permit factual findings and a possible
25 determination by a court. But those are - - - those are

1 Southern District cases.

2 The Second Circuit has not spoken on this; a
3 number of state courts have. This court chose to follow
4 those - - - those other state high courts that adopted a
5 strict - - -

6 JUDGE RIVERA: But it is one - - - it is one
7 thing to say the legislature could paint with a broad - - -
8 broad stroke, and it's another thing to say - - - but then
9 when presented with an actual factual case that does not
10 fall within any of the concerns that the legislature had,
11 it shows that there is no sexual motive or sexual act, that
12 - - - that there is no relief available to that individual
13 from what is clearly the stigma associated with this - - -
14 this compromising their liberty interest. It strikes me
15 these are two different things.

16 MR. BRANIGAN: Your Honor, there was - - - there
17 was a choice made, and the choice was made to include a
18 certain narrow category of crimes against children. And if
19 you look at the purpose of the statute, which involves,
20 basically, notice - - - giving notice to the public, to a
21 school, that they might have - - - they might have some - -
22 - someone who, under the statute that they passed, is a sex
23 offender, and - - - and to give notice.

24 And they intentionally included people who
25 committed unlawful imprisonment and kidnapping against

1 child, because the society - - - society, they chose - - -
2 they chose to give society that protection.

3 JUDGE RIVERA: Of a possible risk. But the
4 purpose of SORA, right - - - I agree with you is of course,
5 and we've said it before, to protect the public from sex
6 offenders.

7 But when you have an actual human being before
8 the court, there is - - - the conclusion is this is not a
9 sex offender, no sex act, no sex motivation involved in the
10 crime. Again, that strikes me as different from saying the
11 legislature could broadly include people and a crime within
12 SORA.

13 But once it's presented and someone falls outside
14 of the scope of the individuals you're actually concerned
15 about, that courts can give no relief to that person. So it
16 strikes me as two different things.

17 MR. BRANIGAN: But the legislature made the
18 determination that those categories of criminals, the
19 kidnapers and those committing child imprisonment, were
20 part of the group that they wanted to protect society
21 against. And they did that, again, on - - -

22 JUDGE RIVERA: Sure. Oh, I don't disagree with
23 you there. But - - - but one can do that without imposing
24 the label of a sex offender, which is an inaccurate
25 characterization of the individual's criminal act. You - -



1 - you can label them a robber, a burglar, a thief, whatever
2 you want to label them.

3 MR. BRANIGAN: Your Honor - - -

4 JUDGE RIVERA: This is about labeling them a sex
5 offender from here on out - - -

6 MR. BRANIGAN: Correct, Your Honor.

7 JUDGE RIVERA: - - - in that sense, right? That
8 nothing involved in the crime is any way associated with
9 the sexual component.

10 MR. BRANIGAN: Correct, Your Honor.

11 And - - - and this - - - this was specifically
12 held in Knox that that labeling itself did not violate a
13 substantive due process or the liberty interest on a
14 rational basis - - - on a rational basis test.

15 It said that the legislature could if it had
16 wanted to label its sex offenders and child predators. It
17 chose not to do that. And it has not done that since - - -
18 since the Knox decision came out and has not either - - -
19 either changed the labeling or - - - or created this type
20 of process, where there would be a determination made by
21 the original court, which I think would be original court
22 from the judgment, but the original court to say whether
23 the - - - whether this was a registrable offense or not.

24 So they chose not to have that process. And that
25 was - - - that was rationally related to the legislature's



1 objection under due process.

2 JUDGE SINGAS: Was this a plea?

3 MR. BRANIGAN: This is a plea, Your Honor.

4 JUDGE SINGAS: And was it a plea to the entire
5 indictment?

6 MR. BRANIGAN: It was a plea to the entire
7 indictment. So that's why there was - - - you - - - you
8 have the - - - well, you have a pleas to the - - - the
9 burglary and robbery and to both of the unlawful
10 imprisonment counts.

11 If the court has no further questions, the People
12 rely on the brief.

13 Thank you, Your Honors.

14 CHIEF JUDGE WILSON: Thank you.

15 MS. PAGE: We're not challenging the validity of
16 the statute; we're simply asking for the same principle
17 that this court upheld in David W and in Liden.

18 JUDGE GARCIA: But Counsel, I don't see how
19 you're not asking us to overrule Knox. Here's the holding
20 in Knox - - - the holding.

21 But even on the assumption that there was no
22 actual or potential sexual aspect in any of these crimes,
23 we hold that defendant's constitutional rights have not
24 been violated.

25 And the difference, I think, you're explaining to

1 us is the difference between we assume the record says that
2 there's no potential actual sexual component to these
3 crimes where the record actually says. Isn't that the only
4 difference here?

5 MS. PAGE: I mean, that in and of itself is a
6 gigantic difference. You have an explicit - - -

7 JUDGE GARCIA: We assume the record says, and in
8 this case the record actually says.

9 MS. PAGE: I mean, yes, that's a huge difference.
10 Assuming and not knowing is the very thing the legislature
11 was concerned about in making these presumptively
12 registrable. When we - - -

13 JUDGE GARCIA: But we weren't assuming we didn't
14 know; we were assuming it said affirmatively there was
15 none.

16 MS. PAGE: Exactly, Your Honor. But assuming is
17 different than knowing. And here, not only did the
18 prosecution agree, which they did not in Knox. But we have
19 the SORA court that reviewed every single piece of evidence
20 in this case.

21 JUDGE GARCIA: So wherever we assume a fact as
22 part of our holding, if the fact is proved in a later case,
23 it's a different case.

24 MS. PAGE: I don't think you have to make such a
25 broad rule. But I think in this case, there is the

1 difference between an explicit court finding by a fact
 2 finding court, and this court being left to assume because
 3 it was never found, it does - - - it outweighs the
 4 relevance of studies and statistics that we know that in
 5 Marcus Brown's case, there was no sexual motivation, that
 6 the prosecutor agreed, that the court agreed, that the
 7 prison agreed, that makes it irrational to - - - to apply
 8 sex offender registration.

9 JUDGE RIVERA: Is - - - is there another
 10 difference in Knox - - - granted it's not the - - - the
 11 primary statement by the court, that equates those
 12 particular parties labeled as sex offenders as child
 13 predators. How is this defendant a child predator?

14 MS. PAGE: He's not. This - - - the court made
 15 that explicit finding. The child was not targeted. He was
 16 not abused. He was not abducted. He was not - - -

17 JUDGE SINGAS: It didn't happen with Knox as
 18 well. There weren't child predators in Knox. In Knox,
 19 they were being extorted for money. They weren't - - -
 20 there was no finding that they were child predators.
 21 Again, you know, the - - - regardless of the value of Knox
 22 in whether we should revisit it, distinguishing it here, I
 23 find very difficult, because it was the same scenario.
 24 They were also not child predators.

25 JUDGE GARCIA: And the Cintron criminal history

1 goes only to the argument he made for a level departure.
2 They didn't factor that in at all in the original
3 constitutional analysis.

4 MS. PAGE: Well, Your Honor, the - - - the SORA
5 court should and does look at someone's background to see
6 if they have ever committed sexual crime.

7 JUDGE GARCIA: You're trying to distinguish Knox
8 based on the sexual background of Cintron who locked his
9 partner or something in the apartment with their kids.

10 And you say, well, Cintron had a sexual
11 conviction, convicted for a sex crime, but the court didn't
12 consider that at all in the analysis of the
13 constitutionality of the designation. It considered it
14 only in the argument Cintron separately made for departure.

15 MS. PAGE: Yes, Your Honor. But it was a fact to
16 that case that the SORA court could have considered, were
17 Cintron to get a hearing on whether he should have to
18 register. So - - -

19 JUDGE HALLIGAN: Counsel, wasn't - - - wasn't the
20 child here, if I'm remembering correctly from the record,
21 held at gunpoint?

22 MS. PAGE: The - - - yes. That's what the
23 unlawful imprisonment count was based on the presence of a
24 gun at the - - -

25 JUDGE HALLIGAN: And so how does that sync with

1 your argument that the child was not targeted at all?

2 MS. PAGE: That was the SORA court's finding,
3 Your Honor. And my argument is that this is a sex offender
4 registry. So if the legislature wanted to create it - - -
5 to create crimes against children registry, this would be a
6 harder lift, but this a sex offender list.

7 CHIEF JUDGE WILSON: How can we distinguish Knox
8 an on additional ground? Maybe I missed it. I thought you
9 said this earlier, that in Knox, what the assumption was,
10 was that the crimes had no sexual component. And that here
11 there was a finding from the SORA court - - - court that
12 Mr. Brown posed no risk of sexual offense.

13 MS. PAGE: Yes, Your Honor.

14 CHIEF JUDGE WILSON: Those seem like different
15 things to me.

16 MS. PAGE: Yes. Thank you. Those are very
17 different things. Because I don't think - - - I mean, none
18 of the Knox defendants had those, and the same certainly
19 cannot be said for at least Cintron and Jackson. I also
20 think it's important to know - - -

21 JUDGE GARCIA: But that's a finding that SORA
22 court makes all the time, right, what's the risk of re-
23 offense? And that can go to what your level is. But now
24 we're going to use it to distinguish Knox and say you don't
25 have to register at all.

1 MS. PAGE: In this very narrow category of cases,
2 due process demands that if someone is not a sex offender
3 and has never committed any sexual misconduct, that the
4 court be allowed to exempt them, yes.

5 And I think it's very important to note that New
6 York State itself has exempted at least two people who
7 should be registering under SORA.

8 Eunice and Pennington were exempted by New York
9 State of kidnapping a minor with no sexual component from
10 registration. That's had no effect on state law. It
11 certainly had no effect on federal law. And we just ask
12 that the same treatment - - - the same chance to be applied
13 to Mr. Brown, who had an explicit court finding.

14 He does not pose a risk of sexual threat. He - -
15 - he did not commit any sexual misconduct nor tried to.

16 This court in David W said, striking down an
17 automatic SORA designation without opportunity to be heard,
18 that due press - - - due process requires that the state
19 bear the burden of proving, at some meaningful time, that
20 the defendant deserves the SORA classification assigned.

21 So if we are simply saying what the SORA court
22 found in this case didn't matter, what the prosecution
23 agreed to didn't matter, that is a due process deprivation.
24 It is irrational. It conflicts with federal court
25 decisions. It conflicts with New York State's own

1 exemption of identically situated defendants that had more
2 money than Mr. Brown and were able to pursue the case in
3 federal court. That is irrational and it is
4 unconstitutional.

5 CHIEF JUDGE WILSON: Thank you.

6 MS. PAGE: Thank you.

7 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Marcus Brown, No. 83 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: October 25, 2023

