State of New York
Court of Appeals

OPINION

No. 62
The People &c.,
Appellant,
v.
Donovan Buyund,
Respondent.

Julian Joiris, for appellant.
Ava C. Page, for respondent.

CANNATARO, J.:

On this appeal, we are asked to determine whether the illegal sentence exception to the preservation requirement applies when a defendant first raises on intermediate appeal a challenge to the legality of his certification as a sex offender subject to the requirements

of the Sex Offender Registration Act (SORA) (Correction Law art 6-C). We conclude that the statutory question reached by the Appellate Division was not properly preserved and that the illegal sentence exception does not apply, and therefore reverse.

I.

In June 2014, defendant Donovan Buyund entered the apartment of the victim while she slept. Defendant placed his hand over her mouth and his forearm on her chest, obstructing her breathing. Defendant exposed his penis and attempted to insert it into her vagina and mouth. As the victim tried to flee, she struggled with defendant and fell down a staircase.

Defendant was charged by indictment with burglary in the first degree as a sexually motivated felony (Penal Law §§ 130.91; 140.20 [2]), burglary in the first degree (Penal Law § 140.30 [2]), attempted rape in the first degree (Penal Law §§ 110.00; 130.35 [1]), and other related offenses. Defendant thereafter pleaded guilty to the top count of the indictment—burglary in the first degree as a sexually motivated felony—in exchange for a promised prison term of 11 years followed by 10 years of postrelease supervision. Most notably for present purposes, the court also advised defendant that he would have to register pursuant to SORA upon his release from prison. The People objected to the sentence as being too lenient. Defendant purportedly waived his right to appeal as part of the plea bargain.

Supreme Court thereafter sentenced defendant to the promised prison term and postrelease supervision requirement. As required by Correction Law § 168-d, the court

also certified defendant as a sex offender as that term is used in Correction Law § 168-a and informed him that he would be required to register with the Division of Criminal Justice Services (DCJS) before his release from prison. The certification was included in the order of commitment. Defendant did not object to his certification as a sex offender during the plea or at sentencing.

On appeal to the Appellate Division, defendant argued for the first time that his certification as a sex offender was unlawful because his crime of conviction is not an enumerated registerable sex offense under Correction Law § 168-a (2) (a). The People countered that defendant's argument was unpreserved and, in any event, meritless because Correction Law § 168-a (2) (a) (iii) includes sexually motivated felonies as defined in Penal Law § 130.91 among its list of registerable sex offenses.

The dispute at the Appellate Division focused on a 2007 amendment to the Correction Law, enacted as part of the Sex Offender Management and Treatment Act (SOMTA) (L 2007, ch 7, as amended) in order "to enhance public safety by allowing the State to continue managing sex offenders upon the expiration of their criminal sentences" (*see* Governor's Program Bill Mem, Bill Jacket, L 2007, ch 7 at 5; Senate Introducer's Mem in Support, Bill Jack, L 2007, ch 7 at 15). As relevant here, the legislature amended the definition of a SORA-registerable "sex offense" in Correction Law § 168-a (2) to read as follows:

> "(a) (i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 120.70, 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 230.34, 230.34-a, 250.50, 255.25, 255.26 and 255.27 or article two hundred sixty-three of the penal law, or section 135.05, 135.10, 135.20 or 135.25

> of such law relating to kidnapping offenses, provided the victim of such kidnapping or related offense is less than seventeen years old and the offender is not the parent of the victim, or section 230.04, where the person patronized is in fact less than seventeen years of age, 230.05, 230.06, 230.11, 230.12, 230.13, subdivision two of section 230.30, section 230.32, 230.33, or 230.34 of the penal law, or section 230.25 of the penal law where the person prostituted is in fact less than seventeen years old, or (ii) a conviction of or a conviction for an attempt to commit any of the provisions of section 235.22 of the penal law, or (iii) a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted as a hate crime defined in section 485.05 of the penal law or as a crime of terrorism defined in section 490.25 of such law *or as a sexually motivated felony defined in section 130.91 of such law*"

Correction Law § 168-a (2) (emphasis added). The 2007 amendment added the phrase "or as a sexually motivated felony defined in section 130.91 of such law," which is the language at the heart of the parties' dispute below.[1] Defendant argued that the added language limits the SORA-registerable crime of a sexually motivated felony to only those specified felonies that are both defined in section 130.91 and cited in the "foregoing sections" of Correction Law § 168-a (2) (a), namely subsections (i) and (ii) of that statute. This reading would exclude approximately 20 specified sexually motivated felonies listed

[1] The 2007 enactment also amended the Penal Law by adding a new crime under section 130.91 entitled "[s]exually motivated felony," which is committed "when [a person] commits a specified offense for the purpose, in whole or substantial part, of his or her own direct sexual gratification" (Penal Law § 130.91 [1]). The specified offenses include burglary in the first degree as defined in Penal Law § 140.30 (*see* Penal Law § 130.91 [2]). The amendment to the Correction Law discussed herein expressly references sexually motivated felonies as defined in Penal Law § 130.91.

in Penal Law § 130.91 from being SORA-registerable offenses, including burglary in the first degree as a sexually motivated felony.[2]

The Appellate Division agreed with defendant that under the "clear and unambiguous" language of Correction Law §168-a (2) (a) "burglary in the first degree as a sexually motivated felony is not a registerable sex offense under SORA" (179 AD3d 161, 169 [2d Dept 2019]). Rejecting the People's contention that the legislature made clear its intent that the purpose of amending the list of SORA-registerable crimes under Correction Law § 168 was "so that a defendant convicted of a sexually motivated felony will be required to register under Megan's Law [SORA]" (Governor's Program Bill Mem, Bill Jacket, L 2007, ch 7 at 6), the Court nonetheless concluded that, although "it may have been the intent of the legislature to require those individuals convicted of all the specified offenses under Penal Law § 130.91 (2) to register under SORA, the language of Correction Law § 168-a (2) (a) as amended did not effectuate that intent" (179 AD3d at 170).

Only after its statutory analysis did the Appellate Division address preservation. As to preservation, the Court stated that defendant's certification and the requirement that he register as a sex offender "violated his right to be sentenced as provided by law" (*id.*, citing *People v Fuller*, 57 NY2d 152, 156 [1982]), thereby impliedly holding that SORA certification is part of the sentence. The Court modified the judgment by vacating the

[2] Notwithstanding the holding below, these offenses are still defined in Penal Law § 130.91 as sexually motivated felonies and therefore require sentencing as felony sex offenses pursuant to Penal Law § 70.80.

requirements that defendant register as a sex offender and pay the sex offender registration fee, and otherwise affirmed (*id.* at 171).

A Judge of this Court granted the People leave to appeal (35 NY3d 1034 [2020]).

II.

Before this Court, the People assert that defendant failed to preserve his claim that he was not subject to certification as a sex offender under SORA. They argue that certification pursuant to SORA is not part of the sentence and, thus, a challenge to certification does not fall within the illegal sentence exception and, moreover, does not survive a valid waiver of the right to appeal.

"Because this Court's jurisdiction is limited to review of issues of law, our first task is to assess whether the arguments raised on appeal present questions that were preserved by specific objection in the trial court" (*People v Nieves*, 2 NY3d 310, 315 [2004]). "We have recognized 'a narrow exception to the preservation rule' where a court exceeds its powers and imposes a sentence that is illegal in a respect that is readily discernible from the trial record" (*id.*, quoting *Samms*, 95 NY2d at 56 [2000]; *see People v Santiago*, 22 NY3d 900, 903-904 [2013]). However, "not all claims arising during a sentencing proceeding fall within the exception" (*Nieves*, 2 NY3d at 315).

The applicability of the exception here depends on whether SORA certification is part of the sentence. In *People v Hernandez*, we held that certification as a sex offender

was appealable as part of the judgment of conviction (93 NY2d 261, 267 [1999]).[3] We reasoned that certification is "rendered in open court, together with other elements of disposition" and "form[s] an integral part of the conviction and sentencing" (*id.*). Moreover, we observed that SORA certification is effected by operation of law upon conviction, is pronounced at sentencing, and must be included in the order of commitment for those defendants sentenced to prison, "making the SORA certification an inescapable part of the *conviction*" and "definitionally incorporated within the judgment itself" (*id.* at 269 [emphasis added]). Noting that the issue presented was "the appealability, *as part of the judgment of conviction*, of [defendant's] certification as a 'sex offender,'" (*id.* at 265 [emphasis added]) we left open the question of whether certification was part of a defendant's sentence, stating that, "even assuming that SORA certifications were deemed not a part of the *sentence,* we are satisfied that they are certainly part of the *judgment*" (*id.* at 268).

The Court revisited *Hernandez* in *People v Smith*, which established that registration and notice requirements under New York City's Gun Offender Registration Act (GORA) "cannot be deemed a technical or integral part of a defendant's sentence nor be incorporated into the judgment of conviction" (15 NY3d 669, 674 [2010]).[4] Both *Hernandez* and *Smith*

[3] The SORA issue in *Hernandez* was preserved for appellate review, so no reviewability issue was present in that case (93 NY2d at 266).

[4] While the dissent perceives a lack of parallelism with our prior decisions discussing non-punitive consequences of a conviction that can take place at sentencing, such as orders of protection, there can be no doubt that the dissent fully embraces *Smith*, a case involving New York City's gun registration law. As to *Smith*, the dissent improperly elevates dicta in that decision to the status of a central tenet of our jurisprudence on what constitutes part of a criminal sentence.

state that a convicted defendant can appeal their SORA certification as a component of the judgment of conviction. In dicta contained in a footnote, the *Smith* Court further stated that certification as a sex offender under SORA "comprises part of the sentence" (15 NY3d at 674 n 2). This observation, however, was an overly expansive interpretation of the holding in *Hernandez* that certification as a sex offender is appealable as part of the *judgment of conviction*. In any event, the dicta in *Smith*, in addition to being unnecessary for resolution of the issues in *Smith*, did not expand upon the holding of *Hernandez*.

People v Nieves, involving orders of protection, is also instructive on the question of which claims fall within the illegal sentence exception. In *Nieves*, we concluded that, "[l]ike the SORA certification at issue in *Hernandez* . . . orders of protection issued at sentencing are part of the final adjudication of the criminal action involving defendant" and may be challenged on direct appeal from the judgment of conviction (2 NY3d at 315). We unanimously held that, although orders of protection issued at sentencing are "appealable as part of the judgment" (*id.* at 312), they are nevertheless "not a part of the sentence imposed" (2 NY3d at 316). In reaching this conclusion, we explained that the Criminal Procedure Law does not characterize orders of protection as a component of the sentence and that the relevant statutory scheme and legislative history indicate that the primary intent of orders of protection is nonpunitive (*see id.* at 316). As further indication of the nonpunitive nature of orders of protection, we observed that Title E of the Penal Law, which governs sentencing and "comprehensively addresses sentencing alternatives," makes no mention of orders of protection as a permissible sentence (*id.*). Therefore, we

held that the illegal sentence exception could not be applied to challenges to orders of protection.

Similarly, here, sex offender certification is effectuated by the court pursuant to Correction Law § 168-d and is not addressed in either the Criminal Procedure Law or Title E of the Penal Law. Certification for a defendant sentenced to a term of imprisonment, as here, is the initial step in a procedure under the SORA statutory scheme that is handled by prison officials, DCJS, and the Board of Examiners of Sex Offenders. Moreover, we have repeatedly stated that SORA and SOMTA are remedial civil statutes and not punitive in nature (*see People v Harnett*, 16 NY3d 200, 206 [2011]; *Matter of North v Board of Examiners of Sex Offenders of State of NY*, 8 NY3d 745, 752 [2007]; *People v Windham*, 10 NY3d 801, 802 [2008]; *Doe v Pataki*, 120 F3d 1263 [2d Cir 1997]; *see also Smith v Doe*, 538 US 84 [2003] [concluding that retroactive application of a sex offender registration requirement survived an *Ex Post Facto* Clause challenge as the regulatory scheme was nonpunitive]). Following our reasoning in *Nieves*, then, SORA certification is not part of a sentence and the illegal sentence exception to the preservation requirement does not apply to challenges to certification as a sex offender.

Our conclusion is supported by *People v Gravino*, in which we held that SORA registration and the terms and conditions of probation are collateral, rather than direct, consequences of a guilty plea, such that the court's failure to mention SORA during a plea proceeding does not render the defendant's guilty plea involuntary (14 NY3d 546, 559 [2010]). In *Gravino*, we explained that direct consequences are component elements of a sentence that have "a definite, immediate and largely automatic effect on a defendant's

punishment" whereas collateral consequences "are peculiar to the individual and generally result from the actions taken by agencies the court does not control" (*Gravino*, 14 NY3d at 553-554 [internal quotation marks and citations omitted]). We contrasted postrelease supervision, which under the Penal Law is a component of a sentence of imprisonment and an integral part of the punishment, to SORA registration, which we reiterated is a nonpenal consequence of a remedial statute intended to prevent future crime (*see id.* at 556). In addition, we observed that SORA risk-level determinations are not part of a defendant's sentence but rather are collateral consequences of a guilty plea, which depend on actions taken by an independent administrative agency and are unknown at the time the court accepts the guilty plea (*id.; see Windham*, 10 NY3d at 802).

From the foregoing, it is evident that the entire SORA statutory scheme is designed to have a remedial and non-penal effect. Significantly, SORA and its resultant obligations are not characterized as components of sentencing in the Criminal Procedure Law or referred to in Title E of the Penal Law as a permissible sentence. Moreover, under Correction Law § 168-d (1) (a), a court's "[f]ailure to include the certification in the order of commitment or the judgment of conviction shall not relieve a sex offender of the obligations imposed under [SORA]." Indeed, it is plain under Correction Law § 168-d that the certification and the inclusion thereof in the order of commitment for a defendant who receives a prison sentence constitutes the beginning of a statutory procedure that involves DCJS and culminates in a SORA hearing and risk determination, which in turn is subject to a civil appeal process. Defendant's attempt to isolate the consequences of the component parts of SORA—certification, registration, risk-level determination, and notification

requirements—and deem the court's initial certification to be part of the sentence is impractical and unworkable.[5] The consequences of SORA, as a whole, have already been determined to be collateral and nonpenal in this context. Thus, we conclude that SORA certification is not a part of a defendant's sentence. As such, defendant's statutory claim regarding the applicability of Correction Law § 168-a (2) (a) to the crime of burglary in the first degree as a sexually motivated felony does not fall within the illegal sentence exception to the preservation requirement and is therefore unreviewable in this Court. The Appellate Division may have authority to take corrective action in the interest of justice based upon defendant's unpreserved challenge to the legality of his certification as a sex offender, which it could also undoubtedly exercise in the rather unlikely event that a check-bouncer finds themself certified as a sex offender as postulated by the dissent. However, this Court does not have that authority and, thus, unlike the dissent, which determines that defendant's interpretation of the statute is correct, we do not consider the merits of defendant's argument.

[5] The Supreme Court of the United States' determination that sex offender registration and notification laws are nonpunitive "civil regulatory schemes" whose "retroactive application do[] not violate the *Ex Post Facto* Clause" furthers this point (*Smith*, 538 US at 105-106; *see Doe v Cuomo*, 755 F3d 105 [2d Cir 2014]). SORA registration and notification are not punishments such as incarceration, fines, or probation—they are imposed after the designated punishment and intended to protect the public (*see Pataki*, 120 F3d at 1283-1285). It follows that certification also would not violate the *Ex Post Facto* Clause and is not part of a defendant's sentence.

Accordingly, the order insofar as appealed from should be reversed and the case remitted to the Appellate Division, Second Department for further proceedings in accordance with the opinion herein.

WILSON, J. (dissenting):

The criminal laws itemize impermissible conduct and specify the consequences, sometimes quite serious, for violations. When a defendant is convicted of a crime, the court prescribes a sentence, constrained by what the legislature has specified. If a defendant's sentence is not within the bounds set out by the legislature, that defendant has a right to correction on appeal.

Donovan Buyund pled guilty to burglary in the first degree as a sexually-motivated felony. The legislature has not included that crime among those listed as requiring certification under the Sex Offender Registration Act (SORA). Nevertheless, at sentencing the court certified Mr. Buyund as a sex offender. Mr. Buyund's counsel did not object to that certification. On appeal, Mr. Buyund contends that, because the crime of conviction is not one to which SORA applies, that portion of the court's judgment is erroneous and should be stricken. The majority holds that Mr. Buyund cannot raise that issue on direct appeal because his counsel did not object at sentencing. The majority's logic would mean that someone convicted of, for example, passing a bad check and erroneously certified as a sex offender has no recourse unless that person objects at sentencing. That makes no sense and, as I explain later, is not consistent with our prior caselaw holding that the SORA *certification* (which occurs at sentencing) is part of a sentence—not to be confused with the SORA *registration* and *risk level determination*, which typically occur shortly before an incarcerated individual is released.

Several things have gone wrong in this case. Those are not good reasons to evade *stare decisis*:

- Mr. Buyund broke into his victim's home and attempted to rape her; she was able to fight him off. Should that crime be registerable under SORA? Probably—but that's not our job. For whatever reason—deliberate choice or inadvertence or careless drafting—the statutory language is quite clear that the crime of sexually motivated burglary is not statutorily specified as a crime to which SORA applies.

- Mr. Buyund was charged not just with the noncertifiable crime of sexually-motivated burglary, but also with, among other things, Attempted Rape in the First Degree (Penal Law §§ 110.00/130.35[1]) and Attempted Criminal Sexual Act in the First Degree (Penal Law §§ 110.00/130.50[1]), both of which are crimes that require SORA certification. Had the People offered a plea to one of those crimes, instead of (or in addition to) sexually-motivated burglary, and Mr. Buyund accepted, this appeal would not exist. Mr. Buyund could have received the same exact sentence had he pleaded to either of those crimes, and his SORA certification would be unquestioned.
- Nothing in the record suggests that the People, defense counsel or the sentencing court recognized that the crime to which Mr. Buyund pleaded was not subject to SORA.
- The People intimate that they did not want to offer Mr. Buyund this plea, and that the court pressured them to accept it (the implication being that, even though the People did not realize that the crime of conviction was not SORA certifiable, they would have required him to stand trial or plead to other crimes that, as luck would have had it, were SORA certifiable).
- Mr. Buyund does not want his entire plea vacated—he just wants the SORA certification stricken.

In these highly unusual circumstances (but not in the bad check circumstance), the proper way to resolve this appeal is to disregard Mr. Buyund's preference for vacating just

his SORA certification, and instead vacate his plea entirely. That would permit the People to re-prosecute him and seek a conviction, by plea or trial, to a SORA-certifiable crime with which he was charged. The proper remedy should not be determined by Mr. Buyund's wishes. If, on the other hand, Mr. Buyund means that he would rather withdraw his appeal than have his entire plea vacated, we should simply treat his appeal as withdrawn.

Instead, the majority disposes of the case on a preservation theory that both misinterprets our prior caselaw and throws the erroneously sentenced bad-check passer under the preservation steamroller. Because SORA registration is part of the sentence, if it has been unlawfully attached to a crime to which SORA does not apply, the sentence is illegal and appealable without preservation.

I

Mr. Buyund was unlawfully certified as a sex offender because the crime to which he pled guilty—burglary in the first degree as a sexually-motivated felony—is not among the exclusive list of crimes that require sex offender certification. SORA defines as a "sex offender" any person who is convicted of a "sex offense" or a "sexually violent offense" as those terms are defined by the statute (Correction Law § 168-a [2]). As relevant here, the definition of "sex offense" in Correction Law § 168-a (2) (a) includes three subparts. Subparts (i) and (ii) enumerate various penal law provisions and state that when a defendant is convicted of violating them or convicted of attempting to violate them, those convictions constitute sex offenses. Next, in subpart (iii), the statute includes in the definition of "sex offense" a "conviction of or a conviction for an attempt to commit any provisions *of the foregoing sections* committed or attempted . . . as a hate crime . . . or as a crime of terrorism

. . . or *as a sexually motivated felony* as defined in section 130.91 of [the Penal Law]" (Correction Law § 168-a [2] [a] [iii] [emphasis added]). The clause "of the foregoing sections" limits the sexually motivated felonies that count as registerable sex offenses to those specifically enumerated in subparts (i) and (ii) of the statute.

The People offer an interpretation of the Correction Law that would remove the statutory limit on the kinds of sexually motivated felonies that count as registerable sex offenses. To arrive at the People's interpretation, one would need to add a "(iv)" and strike "as" before "a sexually motivated felony." That is not how the statute reads.

Neither the People nor this Court can redraft the unambiguous provisions in the Correction Law; that is the legislature's job. As the Appellate Division unanimously concluded, the statute is not ambiguous. The plain meaning of the words in the statute is that "a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections" (i.e., subparts [i] and [ii]) "committed . . . as a sexually motivated felony" is a "sex offense" for SORA purposes. When a statute is clear and unambiguous, courts must give effect to its plain meaning (*People ex rel. Negron v Superintendent, Woodbourne Corr. Facility*, 2020 NY Slip Op 06935 [2020]; *People v Finnegan*, 85 NY2d 53, 58 [1995]). The statutory text is the clearest indicator of legislative intent and must be the starting point for any case of legislative interpretation (*Matter of Daimler Chrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]). When the words of a statute have a "definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add or take away from that meaning" (*People v Roberts*, 31 NY3d 406, 418 [2018]).

Mr. Buyund pled to burglary in the first degree as a sexually motivated felony, but because burglary in the first degree is not enumerated in subparts (i) or (ii), his sexually motivated felony does not constitute a "sex offense" that requires him to register as a sex offender. The majority avoids the statute's plain language by holding that Mr. Buyund cannot raise the error on direct appeal because he failed to object to it at sentencing.

II

Mr. Buyund argues that he was improperly certified as a sex offender and that the improper certification constitutes an unlawful sentence, triggering the exception to the general preservation rule. The majority holds that Mr. Buyund's claim does not fall under the unlawful sentence exception to the general preservation rule because it believes certification as a sex offender, though part of a defendant's judgment of conviction, is not part of a defendant's sentence.[1] I disagree.

Generally, questions of law regarding rulings or instructions of a criminal court must be preserved for our court to decide them. A defendant preserves a question of law "when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same" (CPL 470.05).

[1] Under the Criminal Procedure Law, "[a] judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence" (CPL 1.20 [15]). The Criminal Procedure Law defines "sentence" as the "imposition and entry of sentence upon a conviction" (CPL 1.20 [14]). Thus, a "judgment" includes both a conviction and the sentence for a defendant. The majority's determination that SORA certification is part of the judgment but not the sentence means that it believes certification is part of a defendant's (judgment of) conviction and not part of the defendant's sentence.

The preservation rule, however, is not absolute; we have identified a variety of important exceptions to the rule, recognizing that certain arguments and claims must have an ear in appellate courts even if they were not properly objected to in criminal court. One exception, relevant here, is triggered when the alleged error "involve[s] the '"essential nature" of the right to be sentenced as provided by law'" (*People v Samms*, 95 NY2d 52, 56 [2000], quoting *People v Letterlough*, 86 NY2d 259, 263 n 1 [1995]; *see also People v Fuller*, 57 NY2d 152, 156 [1982]). Thus, when a defendant claims a criminal sentence imposed is unlawful, that claim—a pure claim of law—requires no preservation (*id.*).

Our precedent makes clear that certification as a sex offender under SORA is part of a defendant's sentence. The cases cited by the majority for its determination that SORA certification is not part of the sentence demonstrate the opposite.

We have previously explained that the initial certification as a sex offender by the criminal court upon conviction "comprises part of a sentence," a holding "clearly articulated in *People v Hernandez*" (*People v Smith*, 15 NY3d 669, 674 n 2 [2010] [internal citations omitted]). The majority dismisses this unequivocal language in *Smith*, offering that *Smith* is both *dicta* and "an overly expansive interpretation of the holding in *Hernandez*" (majority op at 8). *Smith* correctly understood *Hernandez*; the majority does not.[2]

[2] The majority argues that this dissent "elevates dicta in [*Smith*] to the status of a central tenet of our jurisprudence on what constitutes part of a criminal sentence" (majority op at 7 n 4). I am not, however, relying on *Smith* for any holding; rather, as I discuss below, I rely on *Hernandez* itself for the holding that SORA certification is part of the criminal sentence. I discuss *Smith* because this Court in that decision, admittedly in unanimous *dicta*, properly describes the holding of *Hernandez*.

In *Hernandez*, we held that certification under SORA is appealable and reviewable on direct appeal (93 NY2d 261, 267 [1999]). The majority misreads *Hernandez* as "le[aving] open the question of whether certification was part of a defendant's sentence" (majority op at 7). In *Hernandez*, we recognized that the SORA certification "was treated and deemed by the [criminal] court as part of the plenary adjudication of defendant's conviction and sentence" (93 NY2d at 268). The People advanced two arguments to justify their position that SORA certification was not appealable; we rejected both as follows:

> "The People, on the other hand, characterize SORA certification as a nonsentence consequence of the conviction, a feature they also refer to as merely regulatory. The People additionally urge that appellate review of the dispositions prescribed under the Penal Law is distinguishable from what occurred here. This argument is unavailing because that formalistic regimentation would categorically preclude authorization for appellate review of SORA certifications merely as a result of their being prescribed within the Correction Law. We conclude that these positions and the reasons urged for them are not supportable in these circumstances" (*id.*).

In rejecting the People's argument that SORA certification is a nonsentence consequence of the conviction, we necessarily held that it is part of the sentence; no other interpretation is possible.

Without mentioning that holding, the majority instead calls attention to a subsequent passage in *Hernandez*, which the majority quotes as, "even assuming that SORA certifications were deemed not a part of the *sentence*, we are satisfied that they are certainly part of the *judgment*" (majority op at 7 [citing 93 NY2d at 268]). The majority argues that *Hernandez* left open whether certification is part of a defendant's sentence, relying on that quote. The quote, however, demonstrates that *Hernandez* was merely emphasizing that *even if* one adopted the People's argument—which the Court had emphatically rejected as

"not supportable"—the SORA certification would nevertheless be appealable. Far from keeping an issue open, the statement relied on by the majority is one in which the Court, having already rejected the People's argument, stated that the People would lose even if the Court had not rejected the People's principal argument.[3] *Smith*, therefore, and not the majority, correctly states the holding in *Hernandez*.[4]

III

We have distinguished between SORA's certification and its other requirements, and that distinction is key to understanding what our prior decisions say about which aspects of SORA are part of a criminal sentence. SORA's registration and risk-level determination requirements are not part of a sentence; SORA certification is.

The SORA process has different components. First, a defendant convicted of a crime that is a registerable SORA offense is "certified" as a sex offender by the court upon conviction (Correction Law § 168-d). Then, that person must register as a sex offender (Correction Law § 168-f). A risk level is attributed to the person (Correction Law § 168-

[3] The grammar of the quote in *Hernandez* shows that this Court believed SORA certification to be part of the sentence. The quote employs the subjunctive tense, which is "characteristically associated with subordinate clauses with a non-factual interpretation" (Rodney Huddleston and Geoffrey K. Pullum, The Cambridge Grammar of the English Language 88 [2002]). The quote uses the word "were" in the subjunctive tense, a use that is called "irrealis"—"a general term applying to verb moods associated with unreality (i.e. where the proposition expressed is, or may well be, false)" (*id.*; *see also* Doug Coulson, *More Than Verbs: An Introduction to Transitivity in Legal Writing*, 19 Scribes J Legal Writing 109-113 [2021]).

[4] For those at home keeping score, Judge Ciparick, the author of *Smith*, was in the (unanimous) majority in *Hernandez*.

n), and the person is also subject to certain notification requirements. We drew a distinction between SORA certification and its other components in *Hernandez,* when we distinguished the case's holding from an earlier case, *People v Stevens*. In *Stevens*, we held that the SORA risk-level determinations are not part of a person's sentence (93 NY2d at 270, discussing *People v Stevens*, 91 NY2d 270, 277, 279 [1998]). We distinguished *Stevens* by observing that certification, not subsequent risk-level determinations, were at issue in *Hernandez*. We emphasized that difference in *People v Smith*: "[t]he distinction between SORA registration and notice requirements, which we have held to be not part of a judgment of conviction and thus not appealable, and the initial certification as a sex offender by the trial court upon conviction, which we have held comprises part of a sentence, is clearly articulated in *People v Hernandez*" (*id.* at 674 n 2 [internal citations omitted]).

The distinction between certification and the other requirements under SORA is further evident in cases that followed *Hernandez*. In *People v Gravino*, we held that "because they are collateral rather than direct consequences of a guilty plea, Sex Offender Registration Act (SORA) registration and the terms and conditions of probation are not subjects that a trial court must address at the plea hearing" (14 NY3d 546, 550, 558 [2010]). The majority uses the *Gravino* holding to argue that "the entire SORA statutory scheme is designed to have a remedial and non-penal effect," rendering all of SORA, including

certification, separate from a defendant's sentence (majority op at 10).[5] Even putting aside that *Gravino* involved a completely different question—how much a defendant had to know about SORA to render a guilty plea valid—even as to that issue, *Gravino* discussed knowledge of the collateral consequences of registration and risk-level determinations that occur when a defendant nears release from prison—not certification itself, which takes place at sentencing:

> "The extent and nature of the conditions imposed on a SORA registrant--i.e., the consequences of SORA registration--turn upon the risk classification. . . . These consequences are not known at the time a court accepts a guilty plea, and therefore cannot have a ' "definite, immediate and largely automatic effect on [a] defendant's punishment" '" (14 NY3d at 556, citing *People v Catu*, 4 NY3d 242, 244 [2005], quoting *People v Ford*, 86 NY2d 397, 403 [1995]).

---

[5] The majority also relies on *People v Nieves* (2 NY3d 310 [2004]) for its argument that SORA's "remedial" nature indicates that sex offender certification is not a sentence (majority op at 8-9). In *Nieves*, the defendant contended that the orders of protection were unlawfully lengthy because, after the sentencing court entered them with fixed expiration dates based on the defendant's anticipated release date, DOCCS credited him with additional jail time, rendering the orders above the statutory maximum. He also contended that because he was acquitted of the assault charges, his shooting witnesses were not victims, but rather witnesses entitled to less protection from the court. We held that the challenges he raised to the protective orders could be raised on direct appeal, but needed to be preserved. As to preservation, we noted that an exception to the preservation rule exists "where a court exceeds its powers and imposes a sentence that is illegal in a respect that is readily discernible from the trial record." Unlike the clear error here, evident from the unmistakable statutory language in the Correction Law, neither error in *Nieves* would fall within the preservation exception. Further, as the Court noted, "appeal is neither the only nor the most desirable means for resolving a [protective order] expiration date issue" (*id.* at 317). We observed that the "better practice . . . is for a defendant seeking adjustment of such an order to request relief from the issuing court in the first instance" (*id.*). Here, the majority does not suggest any avenue by which someone wrongly certified as subject to SORA could timely challenge that determination—however wrong it was—if the problem was not recognized and objected to at sentencing. *Nieves*, of course, does not control this case, because it does not involve SORA, and it lacks parallelism relevant to our preservation doctrine inasmuch as a sentencing court can modify, on motion, a protective order, but may not have the ability to do so as to a SORA certification.

The same year as *Gravino*, we reemphasized the distinction between SORA certification and its other components in *People v Smith* (15 NY3d 669 [2010]). In *Smith*, we held that the registration and notice requirements of the Gun Offender Registration Act (GORA) were not "part of [a] defendant's sentence or subsumed within the judgment of conviction" (*id.* at 673). In reaching that decision, we specifically compared the GORA registration and notice requirements to those requirements in the SORA context, highlighting "[t]he distinction between SORA registration and notice requirements," which are not appealable, and "the initial certification as a sex offender," which is (*id.* at 674 n 2).

The majority deems "impractical and unworkable" any "attempt to isolate the[se] . . . component parts of SORA—certification, registration, risk-level determination, and notification requirements—and deem the court's initial certification to be part of the sentence" (majority op at 10-11). That distinction between certification and the other components of SORA, however, is exactly what we have recognized in our past decisions. The distinction is neither impractical nor unworkable; instead, it is the established law of our state. No one could colorably claim it impractical or unworkable to have appellate review of whether SORA applies to a particular crime. If courts cannot readily do that, we should get out of the statutory interpretation business entirely. Here, the Appellate Division had no such difficulty.

IV.

It can be easy to lose track of the stakes at hand when our decisions, as this one, conclude an issue is unpreserved—even though all that is involved here is the interpretation of a statute that is quite clear on its face. The legislature has clearly and unambiguously itemized an exclusive list of offenses that are registrable sex offenses (Correction Law § 168-a [2] [a]). The crime Mr. Buyund pleaded guilty to was not on that list, but he was nevertheless certified as a sex offender by the criminal court.[6]

No one at sentencing appears to have realized that the crime to which Mr. Buyund pled did not subject him to SORA. In a way, this case asks on whom that burden should fall. The majority says it should fall on Mr. Buyund. At least equally plausible, though, is that it should fall on the People: if they want a defendant to be subject to SORA, they should not agree to a plea to a crime that does not provide for SORA registration. Or perhaps the burden should fall on the sentencing court, to make sure that the crime of conviction is SORA-registerable if the plea agreement depends on that. A plea agreement is, essentially, a contract, though one with constitutional provisions built-in to protect the defendant. Even in an ordinary contract, when all the parties operate under a mutual mistake, the contract is voided and the parties are placed back in their pre-contract positions. That—rather than deciding that the defendant alone has the responsibility to

[6] For the majority, the solution for people like Mr. Buyund and the hypothetical bad check writer who are improperly certified as sex offenders and fail to object at sentencing is for the Appellate Division to exercise its interest of justice authority to correct the error. Although heartwarming to see the majority encourage our colleagues in the Appellate Division to exercise that power, that power does not affect what the law clearly states or what this Court may hear on appeal.

know what the law permits and must suffer the consequences—is not just the result required by *Hernandez* and *Smith*, but also the just result.

Order insofar as appealed from reversed and case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Judge Cannataro. Chief Judge DiFiore and Judges Fahey, Garcia and Singas concur. Judge Wilson dissents in an opinion, in which Judge Rivera concurs.

Decided November 23, 2021