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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 62

DONOVAN BUYUND,

Respondent.

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20 Eagle Street  
Albany, New York  
October 6, 2021

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

JULIAN JOIRIS, ADA  
DISTRICT ATTORNEY'S OFFICE  
Attorney for Appellant  
Renaissance Plaza  
350 Jay Street  
Brooklyn, NY 11201-2908

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

Karen Schwarzlose  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 62, People of  
2 the State of New York versus Donovan Buyund.

3 Counsel?

4 MR. JOIRIS: Good afternoon. Julian Joiris for  
5 the People, Appellant.

6 I'd like to reserve two minutes rebuttal.

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. JOIRIS: Under this Court's holding in  
9 Gravino, the defendant's SORA certification cannot be part  
10 of his sentence. The defendant in Gravino was not told  
11 anything about SORA at the time of her plea. Nonetheless,  
12 the plea was valid.

13 Were a SORA certification part of the sentence,  
14 at the very least, she would have had to be told, you will  
15 be certified as a sex offender. You will be a registered  
16 sex offender as a result of this plea.

17 As a matter of fact, that's what the dissent in  
18 Gravino argued -- arguing that -- well, maybe we don't need  
19 to tell you all the details about the risk level, the exact  
20 registration obligations because we can't know that at the  
21 time of the plea. But surely, we should tell you that you  
22 will be certified.

23 JUDGE GARCIA: Counsel, would your position be  
24 different -- you know, here, there were certainly offences  
25 charged that would qualify, right? Attempted first degree



1 rape, I think was charged here. And this is a result of a  
2 plea bargain where everyone agrees, you'll take this  
3 burglary count, and you'll be subject to SORA.

4 Would it be different if there were no charges  
5 that were actually subject to SORA, and the same plea is  
6 entered into?

7 MR. JOIRIS: No, that would not make the  
8 certification part of the sentence.

9 JUDGE GARCIA: Now, you could still say, you're  
10 out of luck. You know, you pled to an offense that's not a  
11 SORA offense, but you know, you're going to register for  
12 SORA.

13 MR. JOIRIS: I mean, that would sound like a  
14 relatively strong case for interest of justice review in  
15 the Appellate Division, but in terms of falling under the  
16 illegal sentence exception and presenting an issue of law,  
17 no. That would still not present an issue of law.

18 JUDGE WILSON: So did Gravino come up on an  
19 ineffective assistance claim?

20 MR. JOIRIS: I believe it may have, Your Honor,  
21 but off the top of my head, I don't recall. I'm sorry.

22 JUDGE WILSON: Okay. If -- if that's right --  
23 well, let me put it this way, was -- was preservation  
24 raised in Gravino?

25 MR. JOIRIS: So what was decided in Gravino --



1 JUDGE WILSON: I mean, I'm trying to get at what  
2 the parties were arguing. I -- I think -- and I don't want  
3 to -- I'm not a hundred percent sure about this, that it  
4 came up on an ineffective assistance claim, which wouldn't  
5 have required preservation anyway. And there was no  
6 argument about preservation.

7 Does that -- if that's right, would that change  
8 your interpretation of Gravino?

9 MR. JOIRIS: No, it wouldn't, Your Honor.

10 JUDGE WILSON: Okay.

11 MR. JOIRIS: Because still the holding of Gravino  
12 remains, it doesn't matter that you weren't told. That's  
13 still a valid plea. And if -- right. So that -- that has  
14 the same impact, regardless of how procedurally it came up  
15 on the question of whether the SORA certification is part  
16 of the sentence or not, because however it comes up  
17 procedurally, obviously you have to be told of the  
18 sentence, in order to have a valid plea.

19 JUDGE WILSON: So is -- is the mandatory DNA fee  
20 a part of the sentence?

21 MR. JOIRIS: No. Mandatory fees and surcharges  
22 are not part of the sentence.

23 JUDGE WILSON: So then if a good -- this is sort  
24 of like Judge Garcia's question. If -- if the court  
25 imposed a mandatory fee for something that didn't exist at



1 all, it has to be preserved?

2 MR. JOIRIS: In order for this court to have --

3 JUDGE WILSON: Yeah.

4 MR. JOIRIS: -- jurisdiction, yes.

5 JUDGE WILSON: Yeah.

6 MR. JOIRIS: For -- the Appellate Division  
7 obviously has broader jurisdiction. But like the vast  
8 majority of claims, this would be subject to the  
9 preservation requirement. And I think this is a -- a  
10 particularly strong case for seeing why that would be the  
11 case because as was mentioned before, right, there were  
12 certainly in this case, offenses that were indisputably  
13 SORA registerable.

14 So if this had been brought up, the plea could've  
15 been worked out to something that was indisputably  
16 registerable. And again, for the other circumstances, the  
17 Appellate Division does have interest of justice  
18 jurisdiction.

19 So allowing this to fall into the illegal  
20 sentence category, you know, I don't know -- I can't say  
21 that it was gamesmanship in this case, but to hold that in  
22 addition to, you know, being contrary to Gravino, that  
23 would be to invite gamesmanship in future cases.

24 JUDGE FAHEY: So, am I correct to say that the --  
25 if we find that the SORA certification issue was



1 unpreserved, in essence we're saying that it -- that this  
2 was not an illegal sentence. It will go back, but the  
3 underlying issue -- I think it's the burglary as a -- a --  
4 a sexually registerable felony; is that correct?

5 MR. JOIRIS: Burglary as a sexually motivated  
6 felony.

7 JUDGE FAHEY: A registerable felony for a SORA  
8 hearing. That'll go back and you can bring that issue.  
9 They -- they could bring that issue up again in the hearing  
10 itself, couldn't you, at the SORA certification hearing  
11 again? Not the sentence, but at the SORA certification  
12 hearing?

13 MR. JOIRIS: So I don't know that there --

14 JUDGE FAHEY: In other words, the issue -- the  
15 issue won't be lost. It'll just be brought up then. And  
16 it -- it would be in a different posture, but nonetheless,  
17 the underlying issue itself would still be available for  
18 the defendant to bring up.

19 MR. JOIRIS: So I -- I know that defendants do  
20 sometimes bring these claims at the SORA hearing stage.

21 JUDGE FAHEY: Uh-huh.

22 MR. JOIRIS: My view of it is that -- that --

23 JUDGE FAHEY: Well, that would certainly obviate  
24 any need to deal with the preservation issue on whether or  
25 not there was an illegal sentence, right?



1                   You see what -- what I'm saying here is --

2                   MR. JOIRIS:    Yes.

3                   JUDGE FAHEY:   I'm saying maybe he's got an  
4                   argument.  Maybe he doesn't.  What -- what I'm wondering is  
5                   does he have a way to bring that up outside of -- what I  
6                   see is a relatively convoluted procedural approach to get  
7                   at the underlying issue.

8                   See what I'm saying?

9                   MR. JOIRIS:    So I do believe the proper time to  
10                  bring this up is on direct appeal.  Now, if this Court were  
11                  to find that it's not part of the sentence --

12                  JUDGE FAHEY:   Uh-huh.

13                  MR. JOIRIS:   -- the remedy would be to remit for  
14                  the Appellate Division to --

15                  JUDGE FAHEY:   Exercise interest of justice  
16                  jurisdiction, should they choose to do so, right?

17                  MR. JOIRIS:   Absolutely, Your Honor.

18                  JUDGE FAHEY:   And then even if you lose there  
19                  though, of course you still could go ahead and -- and in a  
20                  SORA certification hearing, bring the issue up then.

21                  MR. JOIRIS:   So I don't think there is a  
22                  mechanism for that.  I believe -- because it's part of the  
23                  judgment, it should be raised on direct appeal.

24                  JUDGE CANNATARO:  But it certainly happens,  
25                  doesn't it?  At the SORA level assessment hearing, claims



1 are made that these are not registerable offenses.

2 MR. JOIRIS: Yes, it certainly happens. I'm of  
3 the view that that's not a -- a procedurally proper way.  
4 I -- it's -- the judges in the trial courts seem to vary.

5 JUDGE FAHEY: No, I -- I understand. No, I --  
6 I -- I'm not deciding on the legitimacy of your procedural  
7 argument. It's a legitimate argument. But I'm just  
8 wondering is the underlying issue itself preserved and --  
9 as to the nature of the offense being the sexually  
10 motivated felony. And it would seem to me that it would  
11 be, that you could make that argument there.

12 MR. JOIRIS: So I don't -- I don't think it's  
13 preserved in the sense of preserved for appellate review.

14 JUDGE FAHEY: Uh-huh.

15 MR. JOIRIS: Because this wasn't brought up at  
16 all at the sentencing. So the -- that is why I believe  
17 that if this doesn't fall into the illegal sentence  
18 exception, that this is outside of this Court's  
19 jurisdiction, and there -- doesn't present a -- a question  
20 of law, if that answers your question, Your Honor.

21 JUDGE FAHEY: Thank you. Yes, it does. Thank  
22 you.

23 JUDGE WILSON: So in -- in the -- in the  
24 Appellate Division -- the Appellate Division decision  
25 expressly says the People did not challenge the



1 preservation, right?

2 MR. JOIRIS: No. The People did argue that it  
3 was unpreserved. We -- we argued --

4 JUDGE WILSON: Well, I'm reading from it. We --  
5 "The People do not contend the defendant's waiver of the  
6 right to appeal precludes from appealing the certification  
7 as a sex offender."

8 MR. JOIRIS: Right. That was about the -- the  
9 waiver of the right to appeal, not about whether it was  
10 preserved in the sense of was a -- an objection made at the  
11 sentencing. And I -- I see I have the red light. So --

12 CHIEF JUDGE DIFIORE: Thank you.

13 MR. JOIRIS: Thank you.

14 CHIEF JUDGE DIFIORE: Counsel?

15 MS. PAGE: Good afternoon, Your Honors. Eva Page  
16 for Donovan Buyund.

17 What the prosecution is asking the Court to do in  
18 this case is to ignore decades of precedent regarding  
19 statutory interpretation to expand the correction law.  
20 This is a dangerous invitation that should be rejected  
21 because it would blur the line between the judiciary and  
22 the legislature.

23 JUDGE GARCIA: Should we give you -- your  
24 defendant his plea back?

25 MS. PAGE: No, Judge. That's not what we're



1 asking for here. And unlike the defendants in Gravino, Mr.  
2 Buyund never challenged the voluntariness of his plea.

3 JUDGE GARCIA: But it seems to me in pleading out  
4 these sex offenses, part of the bargain was registration,  
5 then nothing said at sentencing, and then there's an  
6 appeal. And then it's -- it's not a registerable offense.

7 So wouldn't the equitable remedy here be to put  
8 them -- parties back in the position they were in before  
9 this was imposed?

10 MS. PAGE: No, Your Honor. This -- Mr. Buyund is  
11 not seeking to withdraw his plea. He is still serving his  
12 prison term and will serve his post-release supervision  
13 term. The remedy here is because he was illegally  
14 certified as a sex offender for an unenumerated offense.  
15 The remedy is what the Appellate Division applied, which is  
16 to vacate the portion of his sentence that is illegal.

17 And this Court has -- has held over and over that  
18 the plain language of the statute must be given effect, and  
19 that courts cannot amend statute by inserting words that  
20 aren't there. So they --

21 JUDGE RIVERA: Counsel? Counsel? I'm -- I'm on  
22 the screen. Hi.

23 MS. PAGE: Hi.

24 JUDGE RIVERA: Could that -- in your view, could  
25 a defendant raise this issue at the SORA hearing?



1 MS. PAGE: I think he could. Yes, Your Honor.  
2 And the six cases from the Supreme Courts we presented to  
3 this Court show that some defendants have raised this claim  
4 at the SORA hearing.

5 However, five cases, the Supreme Court agreed  
6 with the Appellate Division's holding here, but in one  
7 case, the outlier case, Hernandez, the Supreme Court  
8 followed the prosecution's reasoning.

9 And so I think that this confusion among the  
10 lower courts of how to correctly apply the statute calls  
11 out for this Court's decision today.

12 JUDGE CANNATARO: So getting back to the statute,  
13 given that -- that the -- the provision of the penal law  
14 that's in dispute was part of a larger legislative package  
15 under SOMTA, where it seems to not fit in with -- with the  
16 mental hygiene law amendment, and the correction amendment.

17 Doesn't that seem like a situation that cries out  
18 for a reinterpretation of what it is exactly the  
19 legislature intended to do, notwithstanding the language of  
20 the statute?

21 MS. PAGE: No, Your Honor. The clearest indicator  
22 of the legislature's intent is the plain language of  
23 Correction Law 168-a(2). And the Appellate Division  
24 considered the people's argument that this would lead to  
25 absurd results, maybe the memo indicated they intended to



1 make all sexually motivated felonies subject to SORA, but  
2 the --

3 JUDGE CANNATARO: And the fact that concurrently  
4 enacted legislation explicitly said, sexually motivated  
5 offenses are to be included as part of the SORA process,  
6 just doesn't factor into that analysis at all because --  
7 you know, it -- it occurs to me you don't even have to add  
8 words to the penal law section. You just have to drop a  
9 line and everything makes much more sense.

10 MS. PAGE: Well, Your Honor, the -- the  
11 correction law defining what is subject to SORA and what is  
12 not was actually amended after SOMTA and the mental hygiene  
13 law, I believe. And also, if this Court looks at the  
14 entirety of the correction law, it's clear that the  
15 legislature has been very specific in determining what  
16 crimes to include and what crimes to exclude.

17 So there are many crimes involving sexual  
18 misconduct or motivation, but the legislature has  
19 specifically excluded from SORA. And that includes sexual  
20 abuse in the third degree, forcible touching, promoting  
21 prostitution in the second and third degree, patronizing a  
22 prostitute in the third degree, unlawful surveillance in  
23 the second degree.

24 So consider for instance, forcible touching. If  
25 a defendant is convicted of touching a seventeen-year-old



1 woman's vagina on the street, he is subject to SORA. If he  
2 were to do the same thing, but the woman had just turned  
3 eighteen, he would not be subject to SORA under the  
4 statute.

5 So some of us may think that that's absurd, and  
6 those are both clearly sex offenses that should be subject  
7 to SORA, but the legislature has the right to determine  
8 what crimes are exempt and which are to be included.  
9 And --

10 JUDGE CANNATARO: But 168 actually says, sexually  
11 motivated felonies. It's the -- those words appear in the  
12 correction law.

13 MS. PAGE: Yes, Your Honor. And they are limited  
14 by the language in front of it, which says the foregoing  
15 section. So all the enumerated crimes, which are sexually  
16 motivated felonies, are subject to SORA, the same way it  
17 limits which hate crimes and crimes of terrorism are  
18 subject to SORA.

19 And the problem with the standard that the  
20 prosecution is asking the Court to adopt is that it would  
21 allow every judge in the State of New York to substitute  
22 their subjective determination of what should be a sex  
23 offense, or what the legislature might've intended to be a  
24 sex offense for the black letter of the law.

25 And this would lead to a chaotic unworkable



1 standard where a judge -- take for instance, unlawful  
2 surveillance in the second degree. It's also a felony  
3 where the legislature chose to make certain subsections not  
4 SORA subject.

5 So consider a defendant that's convicted of  
6 putting a hidden camera in a gym changing room, recording  
7 people naked and posting that footage on the internet for  
8 the purpose of making money. So that's currently not  
9 enumerated. A judge in New York County could look at that  
10 crime and say, well, this is not enumerated, therefore I  
11 cannot make this defendant subject to SORA.

12 But a judge in a different county or even that  
13 same courtroom could, applying the People's logic here,  
14 argue that's absurd. This is clearly a sex offense. This  
15 is a gross invasion of privacy. The legislature's intent  
16 in passing SOMTA was to protect the public from sex  
17 offenders and to provide monitoring. And I think this is  
18 the exact type of crime that calls out for SORA.

19 JUDGE SINGAS: But isn't this different,  
20 Counselor, because when we read it in accordance with  
21 SOMTA, which says that it is amending the lists of  
22 registerable crimes so that a defendant convicted of a  
23 sexually motivated felony will be required to register. So  
24 there's really no guesswork there.

25 Aren't we allowed to interpret and to -- isn't



1 construction part of our domain?

2 MS. PAGE: When the law is unclear or ambiguous  
3 or would lead to absurd results. In this case, I would  
4 argue that the law is clear and this Court has clearly  
5 stated that when the language of the statute is clear, it  
6 must be applied. And the Court is not permitted to divine  
7 legislative intent.

8 JUDGE CANNATARO: But if we adhere to your  
9 interpretation, you effectively read the passage that Judge  
10 Singas just quoted from out of existence because sexually  
11 motivated felonies will not be registerable.

12 MS. PAGE: That's not true, Your Honor. The  
13 statute -- subsection 3 as it stands, specifically  
14 enumerates which sexually motivated felonies are subject to  
15 SORA.

16 Actually, the prosecution's argument would have  
17 this Court write into --

18 JUDGE CANNATARO: Oh, no, they just list a number  
19 of felonies that are subject to SORA, but the -- the sexual  
20 motivation is a separate part of the penal code, isn't it?

21 MS. PAGE: Well, under the way the statute's  
22 currently written, there are six sexually motivated  
23 felonies that are enumerated, and twenty that are not.

24 So the People's argument would have this Court  
25 not only add in at least twenty unenumerated offenses to



1 the statute that the legislature did not see fit to  
2 include, but also add in --

3 JUDGE CANNATARO: So in that effect of your  
4 argument is that essentially there are six registerable  
5 sexually motivated felonies, and -- and the second part of  
6 the list, if it's -- if -- if the sexual motivation count  
7 or part is appended to, it would not qualify?

8 MS. PAGE: My argument is that the way the  
9 statute is written, the legislature specifically lists  
10 which crimes are subject to SORA and which are not, and  
11 that we cannot assume that those that are excluded are  
12 meant to be registerable. And in fact, we should --  
13 there's an inference that that which is excluded and such a  
14 detailed statute as this, is meant to be excluded. And --

15 JUDGE FAHEY: Can -- can I ask you the same  
16 question that I asked opposing counsel. Let's say we  
17 disagree with you. On preservation we say that this is not  
18 an illegal sentence, and it had to be preserved. Can you  
19 go back at a SORA certification hearing and raise the  
20 underlying issue again?

21 MS. PAGE: I think it could be raised, Your  
22 Honor, but I think this is really an issue that cries out  
23 for the Court's resolution today. And I would just briefly  
24 note that this Court has continually held that  
25 certification is part of the sentence and has never allowed

1 an illegal sentence to stand.

2 JUDGE FAHEY: Yeah. I -- I understand your  
3 argument.

4 CHIEF JUDGE DIFIORE: Well, to your argument  
5 there, I just want to tease that. I was going to -- I  
6 wanted to go back to this, but looking at paragraph 1(a) of  
7 Section 168-d, the last sentence says, "Failure to include  
8 the certification in the judgment of conviction shall not  
9 relieve a sex offender of the obligation imposed by this  
10 article."

11 Doesn't that defeat your argument that  
12 certification is part of the sentence?

13 MS. PAGE: Not at all, Your Honor. To me, that  
14 is clearly distinguishing between certification and later  
15 registration requirements, which are collateral.

16 So certification, which is imposed at sentencing,  
17 which must be imposed at sentencing, is part of the  
18 sentence, just like someone's predicate status. But the  
19 SORA registration requirements, which this Court considered  
20 in Gravino are clearly collateral. They only commence when  
21 a defendant is released from prison after he has served his  
22 sentence.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 JUDGE SINGAS: How do you reconcile Windham,  
25 though?



1 I'm sorry, Judge.

2 MS. PAGE: I'm sorry, Your Honor?

3 JUDGE SINGAS: How do you reconcile our holding  
4 in Windham, where we held that the risk level determination  
5 is not part of the defendant's sentence?

6 MS. PAGE: I think that squares perfectly with  
7 the result we're asking the Court to come to today. The  
8 SORA risk level is a civil proceeding that occurs when the  
9 defendant is about to be released from prison, and  
10 determines what his registration and notification  
11 requirements are.

12 Certification happens at sentencing, becomes part  
13 of the uniform and commit sheet. And in fact, the Court is  
14 mandated to enter it at sentencing if the defendant is  
15 convicted of a sex offense, as defined by Correction Law  
16 168-a(2).

17 JUDGE CANNATARO: And how do you contain Gravino?  
18 I think you said it, but I sort of missed it. Could you  
19 just explain? Because I know it says that it happens  
20 during sentencing, but it seems fairly explicit that it's  
21 not actually part of the sentence.

22 MS. PAGE: Well, Your Honor, in Gravino, both  
23 defendants pled guilty to enumerated sex offenses, so they  
24 never challenged the propriety of their certification.  
25 Their certification was clearly legal. The defendants in



1 Gravino tried to take their plea back when they found out  
2 about the registration requirements in terms of having  
3 their picture on the internet, all of the notification that  
4 would come after they got out of prison.

5 And this Court held in Gravino that registration  
6 is a civil, collateral consequence that does not -- is not  
7 part of the sentence and does not make a plea involuntary.

8 But I think it's important to note that the same  
9 Court that decided Gravino, thereafter, the same justices  
10 decided Smith, where the Court reiterated that  
11 certification as a sex offender is part of the sentence  
12 because it happens temporally at sentencing. The judge is  
13 mandated to apply it at sentencing. And it's unlike a  
14 registration hearing, which is not part of the criminal  
15 case, but is a civil proceeding that happens when the  
16 defendant is about to be released from prison.

17 Does that answer Your Honor's question?

18 JUDGE CANNATARO: I do. I'm just going back to  
19 Smith for -- for that unequivocal statement that you're  
20 referring to.

21 MS. PAGE: It's --

22 JUDGE CANNATARO: But you can move along.

23 MS. PAGE: It's in -- it's in footnote 2, Your  
24 Honor.

25 And -- and my point in bringing up Smith is that



1 Gravino was decided by the same justices that decided  
2 Smith, which clearly show an informed court differentiating  
3 between certification, which is part of the sentence, and  
4 registration, which is a collateral consequence.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 JUDGE CANNATARO: Wait. Oh, I'm sorry, Judge.

7 CHIEF JUDGE DIFIORE: Yes. Go ahead, Judge  
8 Cannataro.

9 JUDGE CANNATARO: It -- it seems as if the  
10 footnote in Smith quotes as authority, Hernandez, and I  
11 don't think Hernandez actually says what this footnote  
12 claims it says.

13 MS. PAGE: Well, Your Honor, in Hernandez, the  
14 Court did hold that certification as a sex offender is the  
15 judge -- is part of the judgment of conviction.

16 JUDGE CANNATARO: Judgment.

17 MS. PAGE: And -- yes. And --

18 JUDGE CANNATARO: Different than sentence.

19 MS. PAGE: But in Smith, the Court, also who had  
20 just decided Gravino, considered this again, and reiterated  
21 it is not only part of the judgment. It is part of the  
22 sentence.

23 So just like predicate status, if someone is  
24 illegally sentenced as a mandatory persistent, we -- the  
25 courts automatically remove that part of the sentence and



1 sentence the defendant legally.

2 So our argument is that certification is just  
3 like predicate status. And an illegal certification for a  
4 crime that's not a sex offense is part of the sentence and  
5 cannot stand.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 MS. PAGE: Thank you.

8 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

9 MR. JOIRIS: Thank you, Your Honor. I just want  
10 to make clear what our argument is about why the  
11 defendant's reading of the statute is unreasonable. It's  
12 not that, well sexually motivated felonies exist and  
13 therefore anyone would want to make those registerable,  
14 therefore they must be registerable.

15 It is -- the legislature put this language in  
16 referencing sexually motivated felonies into 168-a, and if  
17 it doesn't make sexually motivated felonies registerable,  
18 it doesn't do anything. It neither expands nor contracts  
19 the -- the category of registerable sex offenses. All the  
20 sexually motivated felonies that are referenced in that  
21 provision separately, they were already in there. They  
22 were already registerable. And they're already enumerated.

23 So what is unreasonable is not that -- well,  
24 there -- there's the word sexually motivated in there,  
25 therefore they must be registerable. What is unreasonable



1 is imputing of the legislature --

2 JUDGE RIVERA: So Counsel? Counsel? What's the  
3 point of the specificity in the statute? Why list -- why  
4 have a partial list? What's the point of that?

5 MR. JOIRIS: So SORA originally listed specific  
6 enumerated offenses, about six of those offenses, once the  
7 category of sexually motivated felony was created, could  
8 become also sexually motivated felonies.

9 Now -- sorry. Are -- are you asking essentially  
10 the -- why the literal reading of the statute says, or at --  
11 -- committed as, that it does --

12 JUDGE RIVERA: I'm -- I'm just trying to  
13 understand your argument. As I understand it, you're  
14 saying that the legislature developed one broad category,  
15 and so we should ignore the express -- explicit category,  
16 which seems to me, contrary to the rules of construction.  
17 But I'm just trying to understand what -- what you think  
18 the legislative goal or intent is, given the language that  
19 you're referring to.

20 Why have enumerated -- why -- why -- why keep  
21 that? Why not repeal that? Why -- why not make clear that  
22 now you mean all of them?

23 MR. JOIRIS: That would've certainly been a  
24 clearer way of drafting the statute. And there's no  
25 argument that if you read the statute in a blindly literal



1 way, the only sexually motivated felony --

2 JUDGE RIVERA: Well, aren't -- isn't that what  
3 we're supposed to do, to read the statute when it's clear  
4 and unambiguous on -- on its face?

5 MR. JOIRIS: That is certainly the starting  
6 point, Your Honor. But my argument is that when the --

7 JUDGE RIVERA: Well, when -- where -- where have  
8 we ever said that's not -- that that's the starting point  
9 and there's many more steps to be taken?

10 MR. JOIRIS: I -- I believe I cite two or three  
11 cases in my brief, Your Honor, for the proposition that  
12 when it -- when the literal reading leads to an  
13 unreasonable result, then the Court can step in and -- and  
14 do something other than the literal reading. And --

15 JUDGE RIVERA: So -- and it's -- it's  
16 unreasonable -- I just want to clarify. It's unreasonable  
17 because certainly the legislature would have wanted to  
18 cover all of these sex offenses, or because we looked to  
19 some other statute, and we can intuit that that's what it  
20 meant?

21 MR. JOIRIS: First, it is unreasonable because if  
22 this clause referencing sexually motivated felonies doesn't  
23 make them all registerable, it does nothing. Then it just  
24 says, things are registerable that already, independently  
25 enumerated, were registerable.



1           So that -- it's not reasonable to impute to the  
2 legislature a -- a desire to put in language that does  
3 nothing. So that is really the core of it.

4           In addition to this, we do have the language, I  
5 believe which was alluded to during my adversary's  
6 argument, from the introducer's memo, the governor's memo,  
7 the division of budget memo, all saying 168-a has been  
8 amended to make all sexually motivated felonies  
9 registerable under Megan's Law, SORA. But -- but really  
10 the unreasonableness of the reading comes from the fact  
11 that the literal reading -- again, it -- it would just say  
12 things are registerable that already were registerable.  
13 And it would therefore be redundant.

14           CHIEF JUDGE DIFIORE: Thank you, Counsel.

15           MR. JOIRIS: Thank you, Your Honor.

16           (Court is adjourned)

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

I, Karen Schwarzlose, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Donovan Buyund, No. 62 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers  
Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001

Date: October 13, 2021

