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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE EX REL. RIVERA,

Appellant,

-against-

No. 47

SUPERINTENDENT, WOODBOURNE  
CORRECTIONAL FACILITY,

Respondent.

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20 Eagle Street  
Albany, New York  
May 17, 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:

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Traci Goff  
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case is number 47,  
2 People ex rel. Rivera v. Superintendent.

3 MR. ELGARTEN: Good afternoon, Your Honors.  
4 Kerry Elgarten for Mr. Rivera. I'd like to reserve two  
5 minutes for rebuttal.

6 CHIEF JUDGE WILSON: You have to give counsel - -  
7 - co-counsel - - - adversary a second to sit down.

8 MR. ELGARTEN: Sure.

9 CHIEF JUDGE WILSON: Go ahead.

10 MR. ELGARTEN: Subjecting Mr. Rivera to the  
11 cumulative effects of SORA and SARA for a crime that he - -  
12 - I'm sorry - - - committed in 1986 - - - I think I need  
13 some water - - - subjecting him to SORA and SARA violates  
14 the Ex Post Facto Clause. His crime was committed before  
15 either of those statutes existed, and the court - - - the  
16 Supreme Court has prescribed a way to analyze the situation  
17 where the law that's in effect is denominated as  
18 regulatory, but it has an impact on the person after their  
19 com - - - crime was committed, and it's the "intents-effect  
20 test". And applying - - - and that was in Smith v. Doe.  
21 And they did it in exactly this kind of a scenario and  
22 analyzing a sex offender registration scheme.

23 In that case, they found that there was no ex  
24 post facto violation, but they noted very specifically that  
25 one of the main concerns was whether there was affirmative

1 restraints, and they said, there, there were none. It was  
2 really just informational: registration and notification.

3 Here, New York had SORA; all of those impacts  
4 built over time even though, again, the crime was committed  
5 before SORA even existed, before there was such a thing as  
6 a sex offender.

7 And then when SARA came about and was then  
8 amended, the residency restriction came into play. And  
9 under that residency restriction, Mr. Rivera and hundreds  
10 of other people are not just banished from society into  
11 shelters, but they wind up in being detained and having  
12 their incarceration extended.

13 JUDGE SINGAS: And what's the effect of - - -

14 JUDGE HALLIGAN: Can I - - -

15 JUDGE SINGAS: - - - the parole conditions before  
16 SARA that impose some residency requirements? Does that  
17 change your analysis at all?

18 MR. ELGARTEN: No. So prior to SARA, you know,  
19 the Division of Parole was authorized to impose residency  
20 restrictions based on what they considered to be  
21 appropriate.

22 What makes this an ex post facto violation, and  
23 what ex post factor prohibits, is the enactment of laws.  
24 Congress shall make no laws - - - no - - - shall - - - no  
25 ex post facto laws. So previously there was authority and

1 rarely exercised, I'll - - - I'll say as well - - - I don't  
2 think we're going find situations where sex offenders prior  
3 to SARA were restricted from - - - in fact, even after SARA  
4 was enacted, those provisions were not imposed. And it was  
5 only later, about 2014 - - -

6 JUDGE CANNATARO: I'm not sure I understand the  
7 distinction. Wha - - - if a restriction is imposed on a  
8 parolee by operation of law, as opposed to being imposed by  
9 a department of probation or judge or something like that,  
10 what about that makes it ex post facto? Is it just the  
11 fact that it comes from a statute?

12 MR. ELGARTEN: It's largely that it comes from  
13 the statute and that it's mandatory. So everybody in these  
14 categories from Mr. Rivera that he's a - - -

15 JUDGE CANNATARO: But if it's imposed by some  
16 other source, it's still mandatory. If you violate the  
17 term of the - - - of the probation, you're still going to  
18 be subject to the same sorts of punishments that you would  
19 be if you violated a restriction that was imposed by  
20 statute, wouldn't you?

21 MR. ELGARTEN: Right, but the restriction here is  
22 imposed by law. The - - -

23 JUDGE GARCIA: But it's not in your case, is it?  
24 I mean, it could be if you commit a certain crime against a  
25 minor, but as I understand your client, it's possible he'll

1 be - - - have this condition, but it has to go through a  
2 SORA court to adjudicate him a level three. And the SORA  
3 court looks at a number of different factors, factors  
4 outlined in the REI, and ultimately will make a  
5 determination of what level that person is at. In this  
6 case a decision was made of a level three.

7 But the SORA court also has discretion, even if  
8 the points add up to level three, to go a two, which  
9 wouldn't put you in this category. So to me, this seems,  
10 then, more analogous to a probation officer who can look at  
11 this case and say, yeah, I'm going to put a residency  
12 restriction in because the SORA court is looking at  
13 different risk factors, including the crime, but other  
14 things as well, and the - - - for and against the departure  
15 argument and then making the determination, which then gets  
16 you the condition.

17 So I think the argument you're making would be  
18 stronger, wouldn't it, if this was a case where it was  
19 mandatory under the statute, but it's not.

20 MR. ELGARTEN: Well, it's mandatory under the  
21 statute once the level three determination is made.

22 JUDGE GARCIA: So is a parole condition mandatory  
23 under the - - -

24 MR. ELGARTEN: No, it - - - no, no.

25 JUDGE GARCIA: - - - parole statute once they put

1 it in and it's exercised in interest - - -

2 MR. ELGARTEN: No, no, it's not mandatory. A  
3 parole condition is not mandatory. A parole condition to  
4 stay away from certain - - -

5 JUDGE GARCIA: But by virtue of your conviction  
6 of your client, the SARA condition is not mandatory. It's  
7 not.

8 MR. ELGARTEN: The Department of Corrections'  
9 position here - - - DOCCS - - - is that they have to impose  
10 this - - -

11 JUDGE GARCIA: They have to once there's a  
12 determination made that your client's a level three - - -

13 MR. ELGARTEN: Correct.

14 JUDGE GARCIA: - - - by virtue of his  
15 conviction, unlike, say, conviction of a - - -

16 MR. ELGARTEN: Right.

17 JUDGE GARCIA: - - - a crime against a minor.  
18 He's not subject to SARA. He's not subject to SARA until a  
19 court determines that he's level three offender. So it's  
20 not a condition imposed because of his conviction.

21 MR. ELGARTEN: It's a - - - it's a condition  
22 imposed because of his co - - - of his level three  
23 adjudication upon his conviction and the - - - and the  
24 mandatory process - - - excuse me - - - that's involved  
25 with the SARA adjudication, whereas a parole condition is

1 just - - - first of all, I've - - - we included some cases  
2 in our reply. Here, everybody who's a level - - -  
3 adjudicated level three will automatically be subjected to  
4 the residency restriction.

5 JUDGE GARCIA: Everyone convicted of the crime  
6 your client was convicted of is not a level three by  
7 operation of law.

8 MR. ELGARTEN: Correct.

9 JUDGE GARCIA: So it's not a function of his  
10 conviction. It's a function - - -

11 MR. ELGARTEN: But if he - - -

12 JUDGE GARCIA: - - - of the determination - - -

13 MR. ELGARTEN: - - - didn't have the conviction -  
14 - -

15 JUDGE GARCIA: - - - of the SORA court.

16 MR. ELGARTEN: I - - - I - - - he has the - - -  
17 because of the conviction, he has to have the - - - the  
18 SORA hearing becau - - - at the result of the SORA hearing  
19 he is a level three offender in this case. And as a result  
20 of that, the Executive Law mandates that he be given this  
21 condition.

22 JUDGE HALLIGAN: Counsel, with respect to your  
23 analysis of excessiveness, you cite a number of cases in  
24 other jurisdictions that have found an ex post facto  
25 violation, right? But I'm not sure what we can make of

1 those. You are required to show clear proof that the  
2 effect is punitive if the intent is not punitive, right?  
3 And are you are asking us to somehow take judicial notice  
4 of those cases? I'm trying to understand where you think  
5 the evidence is that the condition is, in fact, excessive.

6 MR. ELGARTEN: The - - - in those cases there's a  
7 - - - in most of them, not all of them - - - most of them.  
8 Even some that don't have a residency restriction, they  
9 were found to be punitive and excessive.

10 JUDGE HALLIGAN: Right. But that's in the  
11 context of those courts looking at studies and data with  
12 respect to particular statutory regimes. And I'm not sure  
13 whether we have that in front of us. So how are we to  
14 answer the - - -

15 MR. ELGARTEN: Well, here - - - here, the results  
16 - - -

17 JUDGE HALLIGAN: - - - excessiveness question?

18 MR. ELGARTEN: - - - of the residence restriction  
19 is the paradigmatic punishment of imprisonment. Mr.  
20 Rivera's kept in prison for two extra years because - - -

21 CHIEF JUDGE WILSON: Well, there it seems - - -  
22 it seems to me you're making - - - correct me if I'm wrong  
23 - - - two sort of different arguments about the - - - when  
24 you're looking at the effect and of - - - and I think can  
25 agree were dispensing with the intent end, right? We're



1 just - - - we're just talking about effect?

2 MR. ELGARTEN: Yes.

3 CHIEF JUDGE WILSON: So in effect, it seems to me  
4 you're making two different arguments - - - in parallel. I  
5 don't think they're inconsistent. One is that SARA applied  
6 retroactively to everybody whose conviction occurred before  
7 SARA was enacted - - - we can even say before SORA and SARA  
8 were enacted; it doesn't matter - - - is subject to an  
9 unlawful ex post facto law. That's your broader claim.

10 And your narrower claim, as I understand it, is  
11 that anybody who, as a consequence - - - who again, was  
12 convicted before SARA/SORA - - - who as a consequence ends  
13 up being incarcerated for a point past the other - - - what  
14 otherwise would have been the release date because of the  
15 operation of SARA is suffering from an - - - an unlawful ex  
16 post facto law. Do I understand those correctly?

17 MR. ELGARTEN: So the first part, yes. And  
18 anybody who was is - - - who committed a crime before SORA  
19 or SARA went into effect is automatically being subjected  
20 to punitive effects that amount to a violation of ex post  
21 facto.

22 CHIEF JUDGE WILSON: No, no. Some - - - some of  
23 those - - - some of those people - - - let's say  
24 particularly people upstate - - - are released when they're  
25 supposed to be released, and even if there's a restriction

1 it doesn't really bite on them, right? I mean, it's not  
2 the case that everybody who is subject to SARA can't  
3 immediately find compliant housing.

4 MR. ELGARTEN: Right. My position is that Mr.  
5 Rivera - - - I mean, the case is about Mr. Rivera's finding  
6 below - - - by the judge below that - - - that ex post  
7 facto was violated.

8 JUDGE CANNATARO: But this is not an as-applied  
9 challenge, is it? I mean, you can't really do an as-  
10 applied challenge for this kind of case, can you?

11 MR. ELGARTEN: As - - - it's - - - well, every ex  
12 post facto is as applied to a person prior to certain  
13 amount of time. It - - -

14 JUDGE HALLIGAN: But the Supreme Court has said,  
15 in Seling, I think, that - - -

16 MR. ELGARTEN: Right.

17 JUDGE HALLIGAN: - - - that we can't consider it  
18 on a individual-by-individual basis - - -

19 MR. ELGARTEN: Right.

20 JUDGE HALLIGAN: - - - because that keeps us from  
21 deciding whether the statute is punitive. So I'm not sure  
22 how - - -

23 MR. ELGARTEN: Right. But when they're talking  
24 about individual basis, they're talking about idiosyncratic  
25 effects, if - - - if we look at the way cases have applied

1 it.

2 Here we're talking about the broad impact on  
3 hundreds of people that they are - - - as a result of the  
4 residence restriction are kept incarcerated for two - - -  
5 for extra amount of time, in this case, two years.

6 CHIEF JUDGE WILSON: That's what I'm  
7 characterizing as your narrower argument, right, which is  
8 that you have - - - you have broader ex post facto claim  
9 about everybody who's released, and can - - - and, you  
10 know, can't find - - - well, some of them can find housing.

11 But you have a narrower claim as to people who,  
12 as a result of the SARA restriction, are kept in prison.  
13 And so when we get to the question of whether something has  
14 a punitive effect - - - at least it seems to me you have a  
15 - - - however weak or strong your arguments are, you have a  
16 stronger argument as to the people who kept in prison than  
17 you do as to the broader class of people - - -

18 MR. ELGARTEN: Yes.

19 CHIEF JUDGE WILSON: - - - some of whom are - - -  
20 are not - - -

21 MR. ELGARTEN: No, I - - -

22 CHIEF JUDGE WILSON: - - - kept in prison.

23 MR. ELGARTEN: I agree, but the fact of the  
24 matter for Mr. Rivera is that his - - - his crime preceded  
25 SORA. So if somebody's crime preceded SARA but SORA was

1 already in effect, then we would have to discount any of  
2 the impact of SORA, which as I said - - - one second - - -  
3 but he pointed out - - -

4 CHIEF JUDGE WILSON: But he's not challenging - -  
5 - he's not challenging his registration status here. I  
6 mean - - - right? The - - - the way that SORA matters is  
7 only that it's the hook to get them into SARA for your  
8 purposes.

9 MR. ELGARTEN: I don't agree with that, but - - -  
10 but I - - - but I would say clearly the most - - - the  
11 largest impact, the greatest, most obvious punitive effect  
12 is the registration restriction, which comes about under  
13 SARA, and resulted in - - - and results - - - resulted for  
14 Mr. Rivera and many others in their incarceration.

15 JUDGE CANNATARO: I'm having a little bit of  
16 difficulty conceptualizing the nature of the punishment.  
17 When you do a standard intent-effects test - - - the  
18 effects part, you know, we're looking at the restriction  
19 and we're deciding whether it's really more punitive in  
20 nature or whether it relates to some legitimate regulatory,  
21 you know, nonpunitive purpose.

22 And I - - - you know, I don't have any trouble  
23 understanding that we need to do the analysis with respect  
24 to a residency restriction to determine whether it's  
25 punitive in nature or serves a legitimate purpose. But

1           there's nothing in SARA that requires - - - that says a  
2           person shall remain incarcerated. That, to me, seems to be  
3           just a consequence of the fact that you cannot meet  
4           whatever the restrictions are that have been placed on you.

5                       So are - - - do we have to hold SARA accountable  
6           for the fact that someone gets held back in a facility?  
7           Does that count against the regulatory regime?

8                       MR. ELGARTEN: Yes. So we look at the likely and  
9           foreseeable consequences. The as-applied analysis dis - -  
10          - you know, disallows some, you know, unique consequence  
11          for a particular individual. Here, this court has approved  
12          the idea of people being detained beyond their otherwise  
13          release date. So that - - - and there's hundreds of people  
14          to whom that applies. It is - - - it's a foreseeable and  
15          likely and common result. And so it - - - it is something  
16          that - - - that has to be - - -

17                      JUDGE CANNATARO: But as - - -

18                      MR. ELGARTEN: - - - addressed. It is - - -

19                      JUDGE CANNATARO: - - - Judge Wilson - - -

20                      MR. ELGARTEN: - - - is - - - does have to be  
21          contemplated in looking at the effects of this law.

22                      JUDGE CANNATARO: As Chief Judge Wilson  
23          mentioned, there are a large number of people - - - may - -  
24          - maybe even the majority of people who don't have that  
25          impact. They're not forced to stay behind in a facility

1 because they have no trouble finding SARA-compliant  
2 housing. So - - - so - - - so - - -

3 MR. ELGARTEN: I think that's a small number,  
4 actually, but - - -

5 JUDGE CANNATARO: I don't know. I really don't  
6 know where they're coming from. But the fact that there  
7 are those who don't have that problem, does that not sort  
8 of speak to the fact that that - - - it's not coming from  
9 the statute itself?

10 MR. ELGARTEN: No. So a - - - an effect doesn't  
11 have to be - - - to be considered an effect under the  
12 intents-effects test, an effect doesn't have to be  
13 universal. It doesn't have to apply to every single  
14 person. It has to apply to many people. It has to be  
15 common and foreseeable, and that's the way all of the - - -  
16 the Supreme Court talked about it. And that's the way the  
17 - - - the various other jurisdictions talked about it.

18 JUDGE GARCIA: Doesn't the Supreme Court - - -  
19 doesn't this fall arguably within what the Supreme Court  
20 has described, at least in the concurrence in *Seling*, as  
21 harsh executive implementation? That's the challenge,  
22 right? It's not required by the statute, but the way the  
23 executive branch is implementing it results in that  
24 detention you're talking about. And you can challenge  
25 that, and that has been challenged, and that challenge has

1           been rejected.

2                       So it seems like you're tagging on the  
3           implementation piece that we found is okay to say that's  
4           part of the statute. And I think maybe that's what Judge  
5           Cannataro's saying.

6                       MR. ELGARTEN: Well, it's not part of the  
7           statute. It's the effect of the statute because - - -

8                       JUDGE GARCIA: It's the way the - - -

9                       MR. ELGARTEN: - - - certainly - - -

10                      JUDGE GARCIA: - - - executive is implementing -  
11           - -

12                      MR. ELGARTEN: If this court had dec - - -

13                      JUDGE GARCIA: - - - the statute, right? The  
14           executive could decide, you know, not to release the - - -  
15           to - - - to here, but they could send them to someplace  
16           else upstate. But they could do a lot of different things.  
17           They chose to do that in order to avoid having to release  
18           somebody in violation of terms of SARA, but it's a choice  
19           that - - -

20                      MR. ELGARTEN: Right.

21                      JUDGE GARCIA: - - - the prison is making, not  
22           that's required by the statute.

23                      MR. ELGARTEN: The choice that DOCCS is making  
24           that this court has approved - - - that has been approved,  
25           that makes it an effect, that makes that imprisonment - - -

1 that prolonged imprisonment an ef - - - an effect of SARA.

2 JUDGE GARCIA: Well, the effect is to prolong the  
3 imprisonment, but it's necessarily a natural effect of - -  
4 - for ex post facto purposes, of the statute.

5 MR. ELGARTEN: But it - - - but it is exactly.  
6 The courts that analy - - - that engage in the intents-  
7 effect test look exactly to those kind of things, what is  
8 the impact on not this particular person who had lost his  
9 job after two days' notice, but whole classes people, large  
10 amounts. Not everybody's ever going to be suffering from  
11 the same kind of effects. But - - -

12 JUDGE CANNATARO: Counsel, are there really cases  
13 that talk about this extended - - - because I've read a  
14 number of intent-eff - - - intent/effect cases where they  
15 talk about residency restrictions, but my recollection is  
16 that the person doesn't have the ability to live around  
17 their support structure. They can't be with their family  
18 because their family is in a location that's, you know,  
19 exempted under the residency restriction. And that all  
20 makes perfect sense to me.

21 I don't specifically recall any case getting into  
22 an extended discussion about waiting - - - remaining  
23 incarcerated while you're having trouble finding residency-  
24 restriction-compliant housing. Is that really - - -

25 MR. ELGARTEN: Well - - -





1 JUDGE CANNATARO: - - - a dynamic in the case  
2 law?

3 MR. ELGARTEN: No, no. They - - - I think that's  
4 what distinct about New York's statutory scheme, and the  
5 effects of New York's statutory scheme is that people do in  
6 fact remain in prison, the ultimate punishment, the  
7 ultimate, the paradigmatic, the quintessential punishment  
8 as a result, in addition to those residential - - - the  
9 effects of the residence restriction that you're referring  
10 to where people can't live where they - - - where they want  
11 to live. And here, the effect is even more extreme that  
12 somebody actually remains incarcerated.

13 CHIEF JUDGE WILSON: Thank you, Counsel.

14 MR. BRADY: Good afternoon. May it please the  
15 court. It's undisputed that the legislature intended the  
16 schoolgrounds condition to be sig - - - civil regulation  
17 val - - - to manage the risk of harm posed by high risk sex  
18 offenders when they're on supervised release serving a  
19 sentence in the community. This civil intent is evident  
20 from the text and the legislative history, and this court  
21 implied as much in Johnson.

22 SARA made mandatory what the Board - - - Parole  
23 Board, that is - - - always had the discretion to do: that  
24 is condition release upon an appropriate housing in the  
25 community. Rational conditions on residency have never

1           been found to be considered punishment, even when those  
2           restriction temporarily prolong detention past an eligible  
3           release date because any liberty interest, a person serving  
4           a sentence while on supervised release is always subject to  
5           meeting a rational - - -

6                    JUDGE TROUTMAN:  So is - - -

7                    MR. BRADY:  - - - residency condition.

8                    JUDGE TROUTMAN:  - - - it your argument that just  
9           because it's mandatory doesn't make it improper?

10                   MR. BRADY:  Yes, Your Honor.  The fact that SARA  
11           now makes this specific cond - - - residency condition  
12           mandatory - - - even though the Board always had the power  
13           to do it - - - the fact that it's now mandatory with regard  
14           to a larger defined set - - - a set - - - high-risk sex  
15           offenders does not transform this rational parole condition  
16           into punishment.

17                    It is true that in the past, for this petitioner  
18           and others who have - - -

19                    JUDGE RIVERA:  But - - - but - - - but keeping  
20           individuals incarcerated, that is the quintessential  
21           punishment.

22                    MR. BRADY:  Well, Your Honor, I was going to say  
23           that it's true that in - - - in the - - - in the past, at  
24           least, for this petitioner and for others, the re - - - who  
25           are trying to find housing in the densely populated New

1 York City area that - - - SARA has had an unintended  
2 consequences of prolonging their release.

3 But that consequence - - - that unintended  
4 consequence is something that fluctuates over time, and it  
5 cannot be the basis for granting an ex post facto  
6 challenge, which is necessarily a facial challenge. And as  
7 an example - - -

8 CHIEF JUDGE WILSON: So let me - - - let me - - -

9 MR. BRADY: - - - of the fluctu - - -

10 CHIEF JUDGE WILSON: Let me ask you a  
11 hypothetical. Suppose - - - so Mr. Rivera was - - - he in  
12 fact was ser - - - sentenced to twenty to life, right? So  
13 suppose that ten years after his sentence, the legislature  
14 passes a law that says anybody who's sentenced to twenty to  
15 life has to serve a minimum of forty to life. That's ex  
16 post facto?

17 MR. BRADY: That'd be classic ex post facto.

18 CHIEF JUDGE WILSON: Even though - - - even  
19 though the Parole Board could have kept him for forty?

20 MR. BRADY: You - - - if there - - - if you're  
21 changing the terms of his sentence - - - the minimum terms  
22 of his sentence - - - say it was a twenty-year minimum and  
23 you're making it a - - - a thirty- or forty-year minimum,  
24 you know, that's classically increasing the - - - his  
25 sentence. That would be a classic - - -

1 CHIEF JUDGE WILSON: Yeah, I mean, here - - -

2 MR. BRADY: - - - ex post facto.

3 CHIEF JUDGE WILSON: - - - but the - - - you  
4 know, part of the argument that I'm hearing is it's okay to  
5 keep Mr. Rivera in as a result of SARA because the Parole  
6 Board could have kept him in for longer anyway.

7 MR. BRADY: No, that's not - - - that's not what  
8 I'm trying to say, Your Honor.

9 CHIEF JUDGE WILSON: Okay.

10 MR. BRADY: First of all, I just wanted to - - -  
11 to get out that - - - that the changing circumstances with  
12 respect to finding SARA-compliant housing in New York City.  
13 The - - - DOCCS - - - the Department of Correctional  
14 Services has a working agreement with the New York City  
15 Department of Homeless Services to place twelve people in  
16 the City on a monthly basis.

17 CHIEF JUDGE WILSON: Yeah.

18 Two of those people are - - -

19 JUDGE HALLIGAN: You don't - - - you don't  
20 suggest that that means that there is no one who is  
21 incarcerated because they can't find SARA-complaint housing  
22 at any given time, I don't think?

23 MR. BRADY: No, what I - - - what I wanted to  
24 point out was that - - - and it's been by meeting reference  
25 here today, or certainly by counselor, that in like - - -

1 there's been a reference to cases like in 2019 where there  
2 was - - - people said there were like 300 people who were  
3 held back from finding SARA-complaint housing. I can  
4 report at least as of right now - - - as of May 1st,  
5 there's no bottleneck for people who need purely SARA-  
6 complaint housing for New York City.

7 As of May 1st, there were approximately forty-six  
8 people either in a RTF or at DOCCS waiting for New York  
9 City SARA-complaint housing, but of those forty-six, the  
10 overwhelming majority of people who couldn't be placed in  
11 SARA-complaint housing because they had other needs. They  
12 needed to be in a nursing home or because they had  
13 detainers from ICE or other jurisdictions.

14 So in fact, as of May 1st, although there were  
15 twelve beds available for - - - made available to DOCCS  
16 from - - - from New York City DHS, DOCCS was only able to  
17 fill five of those beds because the remaining people who  
18 needed SARA-compliant housing, you know, are - - - don't  
19 qualify. There are - - - there are other things - - -

20 JUDGE RIVERA: So - - - so - - -

21 MR. BRADY: - - - holding them back. So I - - -

22 JUDGE RIVERA: So if the court - - - so if the  
23 court agreed on the ex post facto argument, it really  
24 wouldn't destabilize DOCCS, wouldn't have that kind of an  
25 eff - - - big impact, something you could easily deal with?

1 MR. BRADY: I - - - I think this shows - - -

2 JUDGE RIVERA: This is not like you're opening  
3 the doors of - - - to 10,000 people? That's what you've  
4 just said, that it's a - - - it's only double digits.

5 MR. BRADY: If the court found it an ex post  
6 facto law?

7 JUDGE RIVERA: Wouldn't it only apply to the  
8 forty-six people you're talking about and perhaps - - -

9 MR. BRADY: Well, it wouldn't necessarily - - -

10 JUDGE RIVERA: - - - not because they have other  
11 needs?

12 MR. BRADY: - - - apply - - - apply to them at  
13 all. It would only apply to people who were convicted  
14 before 2005.

15 JUDGE RIVERA: Well, I thought that's - - - I  
16 thought that these were the numbers you were trying to  
17 compare. Perhaps I've misunderstood your argument.

18 MR. BRADY: I - - -

19 JUDGE RIVERA: Because then I don't understand  
20 what you're referring to. If you don't think it has  
21 relevance to his argument, why - - -

22 MR. BRADY: Let me take another stab at it - - -

23 JUDGE RIVERA: Okay.

24 MR. BRADY: - - - Your Honor.

25 So in 2019 this court made reference to - - - I -

1 - - I believe it was - - - was Your Honor's dissent - - -

2 CHIEF JUDGE WILSON: Right.

3 MR. BRADY: - - - actually - - - that there were  
4 295 people who - - - who were being held back from - - -  
5 from housing past their release dates.

6 JUDGE RIVERA: Uh-huh.

7 MR. BRADY: And what I'm suggesting to the court  
8 - - - or telling the court is that as of May 1st there were  
9 - - - there were forty-six people who needed some-SARA  
10 complaint housing, but of those forty-six the majority of -  
11 - - we're talking about New York City.

12 CHIEF JUDGE WILSON: Right. And - - -

13 MR. BRADY: Of those forty-six, the majority had  
14 other things that were holding them up from finding that  
15 SARA-complaint housing. And - - -

16 CHIEF JUDGE WILSON: So what you're saying is  
17 when we look at the effect presently of SARA, there is no  
18 incarcerer - - - or you know, carceral effect of it now is  
19 what you're saying. And if we reduced your forty-six by  
20 the number of people who couldn't be released anyway for  
21 other reasons, and then we further somehow reduce that  
22 number based on the people who were convicted before the  
23 enactment of SORA and SARA, there might actually be  
24 nothing?

25 MR. BRADY: I don't know what the numbers are of

1 people who - - -

2 CHIEF JUDGE WILSON: Very small.

3 MR. BRADY: - - - who are - - - who are subject  
4 to SARA whose convictions pre-dated 2005. That's - - -  
5 that's not in this record.

6 CHIEF JUDGE WILSON: Right. But who - - - well,  
7 neither is I think what you just told us.

8 MR. BRADY: No, it isn't, but I thought - - -

9 CHIEF JUDGE WILSON: Right.

10 MR. BRADY: - - - the court would want - - -

11 CHIEF JUDGE WILSON: Yes.

12 MR. BRADY: - - - to know that the bottleneck - -  
13 - at least currently - - -

14 JUDGE GARCIA: Right. But if we declare - - -

15 MR. BRADY: - - - was - - - was really - - -

16 JUDGE GARCIA: - - - this an ex post facto  
17 violation, then it doesn't apply to anyone, whether or not  
18 they're waiting for housing in New York City or not. It  
19 just wouldn't apply. It's not only - - - we're not going  
20 to declare this an ex post facto problem only for those  
21 people convicted before a certain date who also are waiting  
22 for housing.

23 MR. BRADY: Well, I - - - I believe the argument  
24 is that as - - - as an ex post - - - it's ex post facto  
25 because it increased the punishment as of 2005 - - -



1 JUDGE GARCIA: Right.

2 MR. BRADY: - - - for people who were convicted  
3 before that time. So I - - -

4 JUDGE GARCIA: This ruling, if you - - - if we  
5 were to make it, would apply to anyone with that issue, not  
6 only the subset of people who can't find housing and are  
7 detained longer than their release date.

8 MR. BRADY: Oh, yes, yes, yes. People - - - it  
9 would apply to people who - - - who are living in the  
10 community or convicted before that time who haven't had any  
11 problem getting housing.

12 JUDGE HALLIGAN: But - - - so is your view that  
13 we could not find an ex post facto violation only as to  
14 those individuals who are incarcerated because they can't  
15 find SARA-complaint housing - - - along the lines of your  
16 adversary's argument that that's the quintessential  
17 punishment, that it's either everyone convicted prior to  
18 2000 or 2005 or no one. Is that your view?

19 MR. BRADY: My answer - - - I would say that this  
20 is a facial challenge, so it would have to be under all  
21 circumstances that it could not be - - - be constitutional.  
22 So - - - so to say to only - - - to do it - - - to only  
23 focus on those people whose detention has been prolonged  
24 would be an as-applied challenge would be inappropriate  
25 because it really ultimately wouldn't answer the question.

1 It would depend - - - that would depend on the individual  
2 circumstances of people. There could've been people being  
3 held for a month. There could be people held for a year  
4 and half. I mean, it wouldn't - - - it wouldn't  
5 definitively resolve the question, as the Supreme Court  
6 said in *Seling*, of whether or not SARA is an ex post facto  
7 law.

8 JUDGE HALLIGAN: Okay. Can I ask you the flip  
9 question that I asked your adversary about the  
10 excessiveness? So your adversary points to some decisions,  
11 including from the Sixth Circuit, and a couple of sources,  
12 including a Justice Department report, which conclude that  
13 residency restrictions have no empirical evidence that  
14 support their efficacy.

15 And so in looking at your brief, it seems to me  
16 that in response, you say, well, the legislature intended  
17 for the statute to be civil, and the Supreme Court has  
18 allowed broadly for restrictions on sex offenders. I'm  
19 wondering if you can point me to any place in your brief  
20 where you respond to the empirical evidence point  
21 specifically regarding the efficacy of the restrictions.

22 MR. BRADY: I don't recall offhand if we  
23 responded specifically to the empirical - - - the empirical  
24 evidence point, but I would say that, you know, what those  
25 studies show is that there is little support for the

1 efficacy of - - - of these - - - of these kinds of  
2 restrictions. But I would say that the absence of support  
3 for these kind of restrictions doesn't really mean that  
4 they're irrational. You know, that's the - - -

5 JUDGE HALLIGAN: Well, that's not the question.  
6 Isn't the question whether it's excessive? I mean, if  
7 there is some evidence which suggests they have some  
8 ameliorative effect, you know, that would be one thing, but  
9 if there's no evidence, then that seems to me relevant to  
10 the excessiveness inquiry.

11 MR. BRADY: Well - - - well, the - - - okay.  
12 Your Honor, there's two - - - I'd like to answer that in  
13 two ways. One is with respect to some of the cases from  
14 other jurisdictions, like People v. Betts from Michigan,  
15 upon which he relies greatly, that case, and many of the  
16 cases that he cites, are SORA cases. They're pure SORA  
17 cases. And in those jurisdictions, the residency  
18 restriction was imposed as part of a SORA regime. Those -  
19 - - it would apply to people who - - - whose had completed  
20 their sentences, who had - - - whose liberty interest was  
21 very different from those who - - - in New York who are  
22 subject to SARA. In New York people - - - people are  
23 subject to SARA only while they're on supervised release,  
24 only while they're serving - - - serving a sentence in the  
25 community.

1           In the People v. Betts case and the other SORA  
2 cases from other jurisdictions cited by counsel, all those  
3 cases have a different type of liberty interest. Those are  
4 people whose sentences are complete. And that - - - those  
5 - - - that's why those cases have no relevancy to this  
6 analysis.

7           JUDGE CANNATARO: Can you just - - -

8           MR. BRADY: This - - -

9           JUDGE CANNATARO: Oh, I'm sorry. I - - - I  
10 didn't mean to interrupt you. But I just wanted - - - your  
11 light is on. I just wanted you to finish your thought  
12 about the rationality or lack thereof with respect to the  
13 absence of empirical data supporting the efficacy of a resi  
14 - - - of a residency restriction because it really did  
15 impress that your adversary had frankly a lot of empirical  
16 data suggesting that these restrictions don't serve any  
17 legitimate nonpunitive purpose. And you don't seem to have  
18 any.

19           MR. BRADY: Well, honestly, because this court  
20 has already held in per - - - People v. John - - - People -  
21 - - I'm sorry - - - People ex rel. Johnson, where the court  
22 had those studies before it that this was a rational  
23 condition. It was rational that the temporary confinement  
24 of sex offenders while on a waiting list for SARA-compliant  
25 housing was rationally related to the government's call - -

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JUDGE CANNATARO: So that question has been answered; it doesn't matter as a precedent?

MR. BRADY: All I'm saying is that's a legislative choice. This court recognized as much in Johnson. The court said that the difficulties in obtaining SARA-complaint housing don't sever the re - - - the - - - this rational connection.

As far as the empirical studies, this court - - - the court - - - the majority cited them but didn't find them persuasive, and I would - - - I would suggest that's - - that's a legislative choice. The legislature could have made many choices, but this is the tools they choose to - - - to restrict access to sex offenders while somebody is serving a sentence in the community.

Your Honor, as far as, like, excessiveness, I wanted to say that this is proportional because it only applies to people who are on supervised release, only people who are serving their sentences in the community. And with respect to somebody like petitioner, it applies to someone who - - - who a court has already determined is a level three sex offender. That is, he poses the highest risk of reoffending. And again, it only applies while they're serving a sentence in the community.

And I would like to note that, you know, it's not

1 absolute that the two - - - this statute also gives a  
2 parole officer permission to allow someone subject to - - -  
3 to this condition to enter a school, to work a school with  
4 a parole officer's permission. So it's tailored to - - -  
5 you know, it's tailored to - - - to be proportional. It's  
6 not excessive, given the fact that someone's serving a  
7 sentence and there are some exceptions that can be applied  
8 in individual circumstances.

9 CHIEF JUDGE WILSON: Thank you, Counsel.

10 MR. ELGARTEN: Regarding the notion that this  
11 condition terminates at the end of the sentence, that  
12 actually supports our position that's in fact part of the  
13 sentence, that it's a mandatory condition of release  
14 imposed for people who are lev - - - level one or two with  
15 child victims or level three. And it's actually because  
16 the parole conditions are only coextensive with the length  
17 of the sentence, it shows that it resembles - - - and in  
18 fact, here, is part of parole, which is part of punishment,  
19 which shows that this is punitive, which shows that  
20 violates ex post facto.

21 Regarding the excessiveness of the condition,  
22 we've pointed out studies, growing body of research,  
23 jurists that have said that - - - and concluded that - - -  
24 that these restrictions really don't serve the purpose that  
25 they're intended to, that's there's no evidence that they

1 do that.

2 JUDGE SINGAS: Is this - - - is that our job,  
3 though, to look at these studies and analyze them?  
4 Shouldn't the legislature actually be conducting hearings  
5 and asking for experts and deciding whether the methodology  
6 used in these studies is something that can be relied upon?  
7 Like, is that really what we - - -

8 MR. ELGARTEN: I think in the context - - -

9 JUDGE SINGAS: - - - should be doing?

10 MR. ELGARTEN: - - - of previous case - - - of  
11 the Johnson case - - - due process, substantive due  
12 process, that - - - that maybe that is the more appropriate  
13 thing.

14 But here we're looking at the punitive effect,  
15 and so - - - and what - - - and what's prescribed is that  
16 we look to see is the - - - the sanction excessive with  
17 regard to its purpose. And if we know that it seems to be  
18 excessive with regard to its purpose, then it's appropriate  
19 for ex post facto consideration, even if this court found  
20 it - - - you know, just accepted it at face value because  
21 it had been a legislative decision in Johnson.

22 And I - - - and as far excessiveness goes, it's  
23 particularly noteworthy here that this rule applies to  
24 level three offenders regardless of whether there was a chi  
25 - - - this is a child access - - - protecting children.

1 But Mr. Rivera's crime had nothing to with children, and so  
2 the excessiveness - - -

3 JUDGE GARCIA: But the level three - - -

4 MR. ELGARTEN: - - - is even magnified in this  
5 context.

6 JUDGE GARCIA: - - - level three determination by  
7 the court is risk to the community, right? That's why  
8 you're classified as a level three. So it seems rational  
9 to say if you're that level of a risk to the community that  
10 you're a level three, which is the highest, that this is a  
11 reasonable condition that you can't live near children.

12 If you're a risk of reoffending - - - the highest  
13 risk of reoffending in sex crimes, isn't it rational to  
14 say, well, at least we won't - - - put on a condition where  
15 you're not going to have access to children?

16 MR. ELGARTEN: Well, if the condition worked - -  
17 - if the - - - if the - - - it was effectuating the intent  
18 of the legislature to protect children, maybe, but where  
19 it's not working at all - - - or there's no evidence that  
20 it's protecting children at all, imposing it on someone who  
21 doesn't - - - has no - - - we have no particular reason to  
22 believe will have any da - - - be any danger to children,  
23 to me heightens the excessiveness.

24 JUDGE GARCIA: And your point - - - I think the  
25 distinction you make with Johnson and substantive due



1 process standard and all is a good one, but the standard  
2 here for ex post facto is you bear the burden of showing by  
3 the clearest proof that the statutory scheme is so punitive  
4 in either purpose or effect as to negate the State's  
5 intention. So really your burden to come forward with that  
6 level of proof - - - and I think it's the same argument in  
7 response to that that was the Johnson argument.

8 MR. ELGARTEN: I would say maybe - - - maybe it's  
9 a close call based on the restriction alone - - - the  
10 residency restriction, although it's our position that even  
11 if people weren't winding up incarcerated as a result, that  
12 there would - - - it would still be an ex post facto  
13 violation for someone who committed their crime before SORA  
14 or SARA happened. But - - - I lost my train of thought.

15 CHIEF JUDGE WILSON: So the people who wind up  
16 incarcerated - - -

17 MR. ELGARTEN: Yeah, right. Right. For people  
18 who wind - - - that's sort of the tipping point that makes  
19 it, like, obvious and makes it clear by the clearest terms  
20 that, in fact, ex post facto - - - that there is, in fact,  
21 an ex post facto violation.

22 CHIEF JUDGE WILSON: Thank you, Counsel.

23 (Court is adjourned)

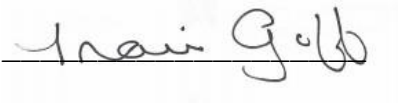
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C E R T I F I C A T I O N

I, Traci Goff, certify that the foregoing transcript of proceedings in the Court of Appeals of People ex rel. Rivera v. Superintendent, Woodbourne Correctional Facility, No. 47 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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