APL 2018-00220

Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK, ex. rel. Chance McCurdy,
Warrant #661993, NYSID #01458006-Q,

Petitioner-Appellant,

- against -

WARDEN, WESTCHESTER COUNTY CORRECTIONAL FACILITY, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents-Respondents.

BRIEF OF AMICI CURIAE

PAUL SKIP LAISURE
APPELLATE ADVOCATES
111 John Street
New York, NY 10038

DAVID C. SCHAPP
CHIEF DEFENDERS ASSOCIATION OF NEW YORK
290 Main Street - Suite 350
Buffalo, NY 14202

JAN HOTH
Attorney for Amici Curiae
ROBERT S. DEAN
CENTER FOR APPELLATE LITIGATION
120 Wall Street - 28th Floor
New York, NY 10005

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STATEMENT OF INTEREST

The Center for Appellate Litigation ["the Center"] is a non-profit, public-defense firm. The Center represents indigent defendants appealing their convictions to the First Department and this Court. Over the past eight years, the Center has become one of New York State's leading SORA law practices. In addition to representing clients at risk assessment hearings and petitions for risk assessment modifications, in both the trial and appellate courts, the Center's attorneys have filed several Article 78 petitions and state habeas petitions challenging the interpretation and application SORA and its progeny.

Appellate Advocates is a non-profit public defender organization which represents individuals who have been convicted of both felonies and misdemeanors in Brooklyn, Queens, and Staten Island and are assigned to our office by the court. Our main work is appeals, but we have expanded our practice over time to include special projects including Post-Conviction Relief motions and hearings in cases involving the Sexual Offender Registration Act and the Sexual Assault Reform Act. When our clients are improperly subjected to SORA registration and SARA reporting and/or continued incarceration, there is no defense provider able to intervene on their behalf other than our Office. Since registration, reporting, and continued incarceration are all significant restrictions on our clients' liberty, we are obligated to act.

The Chief Defenders Association of New York is a membership organization of appointed public and conflict defenders, executive directors of nonprofit indigent defense offices, and assigned counsel administrators throughout the state. It advocates for executive and legislative policy measures that will promote the fair treatment of indigent criminal defendants.

STATUTES INVOLVED

McKinney's Executive Law § 259-c. State board of parole; functions, powers and duties

The state board of parole shall: 1. . . . have the power and duty of determining which inmates serving an indeterminate or determinate sentence of imprisonment may be released on parole, or on medical parole pursuant to section two hundred fifty-nine-r or section two hundred fifty-nine-s of this article, and when and under what conditions;

* * *

2. . . . have the power and duty of determining the conditions of release of the person who may be presumptively released, conditionally released or subject to a period of post-release supervision under an indeterminate or determinate sentence of imprisonment;

* * *

14. notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty, one

hundred thirty-five or two hundred sixty-three of the penal law or section 255.25, 255.26 or 255.27 of the penal law and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her parole officer and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the parole officer and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender. (emphasis

added).

STATEMENT OF FACTS

On July 17, 2004, when Chance McCurdy was convicted of attempted sexual abuse in the first degree, he had already served his prison term while in local pre-trial custody. Although he was deemed to have begun his three-year term of post-release supervision ["PRS"] on July 8, 2014, Mr. McCurdy was not released from prison because he was unable to locate housing compliant with the Sexual Assault Reform Act ["SARA"]. After residing in a residential treatment facility ["RTF"] for nearly five months, Mr. McCurdy found SARA compliant housing and was released to the community.

Four months later, Mr. McCurdy pleaded guilty to violating the terms of his PRS and was given a 12-month assessment. Alternatively, he was promised that he would be released upon completing a 90-day drug treatment program. Mr. McCurdy successfully completed the drug program in June 2015, but was not released. Instead, he was transferred to an RTF.

Thereafter, Mr. McCurdy, through counsel, filed a petition for a writ of habeas corpus arguing that DOCCS lacked the authority to place him in an RTF after he successfully completed drug treatment because he had already served the six-month limitation on incarceration in an RTF set by statute. The lower court agreed and ordered DOCCS to place Mr. McCurdy in a SARA compliant shelter

or put his name at the top of a waiting list. The matter was then converted to an Article 78 proceeding and the court's order was stayed pending the Attorney General's appeal.

The Appellate Division, Second Department, reversed the lower court's order, determining that DOCCS had acted lawfully. According to the Appellate Division, DOCCS had the authority to place an individual who was beyond their initial six months of PRS in an RTF, but that authority ended when the offender successfully identified or otherwise obtained SARA-compliant housing.

On appeal to this Court, Mr. McCurdy again argues that DOCCS had no authority to place him in an RTF. In making this argument, Mr. McCurdy pointed to the absence of any reference to PRS in Executive Law § 259-c(14) as proof that SARA "bears no relation to CL § 73.10 or Penal Law §70.45(3)." Mr. McCurdy specifically noted that he was not "contend[ing] [] that SARA cannot be applied to individuals serving [PRS] as [he] did not [raise] that argument [below]."

SUMMARY OF THE ARGUMENT

Over the last twenty years, the New York State Legislature has enacted a number of laws designed to monitor convicted sex offenders, prevent recidivism, and protect the public. In addition to changes to the substantive crimes and the enactment of certain measures to assist and treat the victims of sexual assault, the laws have also included restrictions on a convicted sex offender's movement.

In 1996, The Sex Offender Registration Act ["SORA"] went into effect. See Correction Law § 168. This law, designed to protect the public from "the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior," set forth the rules and regulations for monitoring convicted sex offenders. See L 1995, ch. 192 § 1.

In 2000, the Sexual Assault Reform Act ["SARA"] went into effect. SARA created many changes in the law, but of relevance here, it created a mandatory restriction on the movement of certain convicted sex offenders. With a focus on individuals who prey upon children, and with a continued eye toward preventing recidivism, the Legislature created a mandatory restriction preventing offenders who have been convicted of enumerated crimes against individuals under eighteen years of age from entering upon school grounds, or facilities or institutions used primarily for the care and treatment of persons under eighteen when one or more persons under eighteen are in the facility or institution. See L 2000, ch 1; Exec § 259-c(14).

By its terms, the application of SARA was limited to those offenders "conditionally released"—not those who have been released to PRS after completing their full prison terms. In 2005, Executive Law § 259-c(14) was amended to broaden the definition of school grounds and extend the mandatory

restriction to persons serving a sentence for an enumerated offense who have been "designated a level three sex offender pursuant to subdivision six of section 168-I of the correction law." See L 2005 ch. 544, A.8894; Exec § 259-c(14). Notably, the language of Executive Law § 259-c(14) was not amended to broaden its scope to include those offenders released to PRS after completing their full prison term. Having brought post-release supervision into being in 1998, the legislature was aware of its existence as a separate category of release. Its omission from the language of the statute, both when it was enacted in 2000 and amended in 2005, is clear evidence that the legislature did not intend SARA to apply to those released to PRS after completing their full prison term.

Although not raised before the trial court or Appellate Division, the question of whether SARA residency restrictions cover those on PRS raises a pure question of statutory interpretation and thus, the Court may reach it. See, e.g., Richardson v. Fiedler Roofing, Inc., 67 N.Y.2d 246, 250 (1986) (finding this Court may "address" a "question of statutory interpretation" even though "it was not presented below") (citing Telaro v. Telaro, 25 N.Y.2d 433, 439 (1969)). It is critical that this Court resolve this threshold question before considering the additional contentions of the parties. If not, this Court risks issuing an advisory opinion.

This issue permeates every case challenging both SORA and SARA

irrespective of whether the parties litigated it. See, e.g., Gonzalez v. Annucci, 32 N.Y.3d 461, 473 n.5 (2018) (during discussion of DOCCS duty to aid inmates in finding SARA compliant housing the Court noted that SARA-residency requirement is a mandatory condition of PRS); People v. Diack, 24 N.Y.3d 674 (2015) (during discussion of whether SORA and SARA pre-empted local residency laws the Court noted that SARA applied to people "who are released on parole, who are conditionally released or who are subject to a period of post release supervision (PRS))." Accordingly, lower courts need guidance on this dispositive question of statutory construction.

ARGUMENT

SARA DOES NOT LAWFULLY APPLY TO PEOPLE RELEASED TO POST-RELEASE SUPERVISION AFTER COMPLETING THEIR FULL PRISON TERMS.

A plain reading of SARA makes clear that it applies only to people released to parole or "conditionally released," not those who have been released to PRS after completing their full prison terms. In any event, to the extent that the Court might believe the statute is ambiguous, SARA's legislative history, and the different purposes undergirding mandatory PRS following completion of a sentence, on the one hand, and discretionary parole and conditional release to cut short a sentence, on the other, demonstrate why SARA does not cover people who are released to PRS after serving their sentence.

A. The Statutory Text Makes Clear That SARA's Residency Restriction Does Not Apply to People Who Are Released to PRS After Fully Completing Their Prison Terms.

When interpreting a statute, a court's "primary consideration 'is to ascertain and give effect to the intention of the Legislature.'" Daimler Chrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660 (2006) (quoting Riley v. Cnty. of Broome, 95 N.Y.2d 455, 463 (2000)). To do so, a court "turn[s] first to its text as the best evidence of the Legislature's intent. Polan v. State of N.Y. Ins. Dep't, 3 N.Y.3d 54, 58 (2004). Thus, "[a]s a general rule, the statute's plain language is dispositive." Id.; United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (When "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917) (internal quotations omitted)); accord McKinney's Statutes § 76 ("[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation"); Statutes § 94 ("[t]he language of an enactment should be given its plain meaning . . . and [a] court should neither limit nor extend plain language").

From this principle, it follows that "[w]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or

excluded." Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs., 5 N.Y.3d 36, 42-43 (2005) (citations omitted); accord Brown v. N.Y. State Racing and Wagering Bd., 60 A.D.3d 107, 116-17 (2d Dep't 2009) ("We are guided by the maxim *expressio unius est exclusio alterius*, that the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended.") (citations omitted). Furthermore, a "statute should be construed to avoid rendering any of its provisions superfluous." Kimmel v. State of N.Y., 29 N.Y.3d 386, 393 (2017) (citation omitted). In summary, then, a court "must 'construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of statutes.'" People ex rel. Jenkins v. Piscotti, 52 A.D.3d 1207, 1208-09 (4th Dep't 2008) (quoting People v. Hernandez, 98 N.Y.2d 8, 10 (2002)).

Executive Law § 259-c(14) provides, in pertinent part, that "where a person serving a sentence for an [enumerated] offense . . . is released on parole or conditionally released pursuant to subdivision [] two of this section," the Board of Parole shall require them not to enter within 1,000 feet of school grounds.

Subdivision two, in turn, outlines the Parole Board's power to determine the conditions of release for three categories of people: those who "may be [1] presumptively released, [2] conditionally released or [3] subject to a period of post-release supervision[.]"

Thus, the express terms of the statute make clear that it does not apply to persons released to post-release supervision after completing their sentence. And, although post-release supervision is specifically covered by subdivision two, it does not automatically follow that SARA applies to all people released to post-release supervision. Instead, by its very terms, SARA is limited to people "conditionally released" to post-release supervision. Exec. Law § 259-c(14) (emphasis added). Ignoring the modifier "conditionally"—and applying SARA to anyone who is simply "released pursuant to subdivision [two]"—would render the term "conditionally released" superfluous, in violation of statutory construction principles. See Kimmel, 29 N.Y.3d at 393.

"Conditionally released" does not mean released with conditions. Instead, "conditionally released" is a term of art that means securing one's early release from prison based on accumulated "good time" credits. See Penal Law § 70.40(b) (describing conditional release). Thus, like parole and presumptive release, conditional release is a discretionary mechanism used to release individuals from prison prior to the maximum expiration of their sentence.

PRS, in contrast, is not a mechanism to cut short one's sentence. Instead, PRS is a mandatory part of a determinate sentence: an individual serves a determinate period of incarceration, followed by a set period of PRS. See Penal Law § 70.45(1) ("When a court imposes a determinate sentence it shall in each

case state not only the term of imprisonment, but also an additional period of post-release supervision," which "shall commence upon the person's release from imprisonment").

If an individual serving a determinate sentence accumulates sufficient "good time credits," they may be conditionally released to their PRS term prior to their maximum release date. Such individuals are properly subject to SARA, as they have been "conditionally released" to PRS. See Exec. Law §§ 259-c(14), (2).

However, not all individuals serving PRS have been "conditionally released." Some prisoners serve every day of the incarceratory portion of their sentence. Then, upon reaching their maximum release date, they are released to serve the PRS component of their sentence. Those individuals are not covered under SARA, because they were never "conditionally released;" they served their full prison terms.

The legislature's decision to limit SARA cannot be ignored simply because of the theory that expanding SARA as far as possible is consistent with its public safety purpose. The legislature's failure to apply subdivision fourteen to everyone released, conditionally or otherwise, pursuant to subdivision two is dispositive:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it

> frustrates, rather than effectuates, legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987); see also Holloway v. United States, 526 U.S. 1, 18 (1999) (Scalia, J., dissenting) ("[E]very statute intends not only to achieve certain policy objectives, but to achieve them by the means specified. Limitations upon the means employed to achieve the policy goal are no less a 'purpose' of the statute than the policy goal itself. Under [a contrary] analysis, any interpretation of the statute that would broaden its reach would further the purpose the Court has found. Such reasoning is limitless and illogical.") (citing Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 135-136 (1995)).

The State cannot prosecute all conduct that seems to implicate "evils" similar to those identified in the statutory text, only to later claim: "we are acting consistently with legislative purpose." See Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). A statute that bans the sale of "cookies and soda" is, no doubt, intended to target the evil of "unhealthy food." But it does not ban the sale of "ice cream," no matter how "unhealthy" that dessert may be. The same logic defeats Respondent's effort to expand section 259-c's reach beyond its clear limitations under the guise of "legislative intent."

Analysis of Exec. Law § 259-j(3-a) is instructive here. Sweeny v. Dennison,

the Third Department considered whether § 259-j(3-a), which at the time only provided for merit terminations for people serving "unrevoked parole," should be interpreted to apply to people serving unrevoked presumptive release as well. 52 A.D.3d 882, 883 (3d Dep't 2008). The Third Department concluded that, "as its plain meaning indicates," the statute was "limited to parolees alone." Id. Throughout § 259-j, "the Legislature consistently distinguished between the various forms of supervised release from prison—i.e., presumptive release, supervised release from prison and postrelease supervision." Id. Thus, "[c]learly, if the Legislature had intended to include presumptive releases within the embrace of Executive Law § 259-j(3-a), it would have done so." Id. at 884.[1] Interpreting the same statute, the Fourth Department added that, even if differentiating "between those individuals who were released by way of parole rather than by way of presumptive release is a technical distinction without a substantive basis," the court was "bound by the rules of statutory construction" since the provision "expressly treats parolees and presumptive releasees separately." People ex. rel. Jenkins v. Piscotti, 52 A.D.3d 1203, 1208-09 (4th Dep't 2008).

The same analysis applies here. The legislature is fully capable of explicitly applying statutes to people serving PRS, see, e.g., Mental Hygiene Law

[1] Exec. Law § 259-j was subsequently amended to "expressly include presumptive releases within its sentence termination provisions." Forshey v. State, 113 A.D.3d 985, 985 (3d Dep't 2014).

§ 10.03(g)(1) (applying civil commitment law to certain people "subject to supervision by the division of parole, whether on parole or on post-release supervision"),[2] or using the catch-all term "community supervision" to encapsulate all forms of release, see Exec. Law § 259(3) ("'Community supervision' means the supervision of individuals released into the community on temporary release, presumptive release, parole, conditional release, post-release supervision or medical parole); Correction Law § 203(2) (discussing DOCCS' duties prior to certain registrants' "release to community supervision").[3] That the legislature did not do so here requires an "irrefutable inference" that the legislature intentionally chose to separately delineate conditional release, presumptive release, and post-release supervision in subdivision two, and to apply SARA to only those "conditionally released" pursuant that subdivision. See Town of Riverhead, 5 N.Y.3d at 42-43.

Nor is there any merit to Respondent's suggestion that Penal Law § 70.45(3) "incorporates by reference all of the conditions authorized in the executive law, including SARA's mandatory school-grounds condition" [Resp. Br

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[2] See also Correction Law § 203(1) (discussing residency regulations for "level two or level three sex offenders released on presumptive release, parole, conditional release or post-release supervision"); Correction Law § 205 ("The department may grant to any person a merit termination of sentence from presumptive release, parole, conditional release or release to post-release supervision").

[3] Indeed, the legislature used the term "community supervision" three times in Exec. Law § 259-c itself. See § 259-c(6), (12), (13).

at pp.36-37]. Penal Law § 70.45(3) provides that "the board of parole shall establish and impose conditions of post-release supervision in the same manner and to the same extent as it may . . . in accordance with the executive law upon person who are granted parole or conditional release." This section does not subject people on PRS to the same conditions as people on parole or conditional release, or to the entire Executive Law. It merely establishes that, just as the Parole Board may establish and impose conditions on parolees and conditional releasees to the extent allowed under the Executive Law, it may likewise establish and impose conditions on people serving PRS within the Executive Law's limits. Executive Law § 259-c(14), in turn, limits SARA to people who have been paroled or "conditionally released." Accordingly, the subsequent, more specific, language in § 259-c(14) overrides the general language in § 70.45(3). See Dutchess Cnty Dep't of Social Services ex. rel. Day v. Day, 96 N.Y.2d 149, 154 (2001) (stating "well-established rule of statutory construction provides that a prior general statute yields to a later specific or special statute").

B. Although the Legislative Intent Is Clear from the Language of the Statute, the Legislative History Supports the Conclusion That SARA's Residency Restriction Does Not Apply to People Released to PRS After Fully Serving Their Sentence.

If the Court determines that Exec. Law § 259-c(14) is ambiguous, it must consider the statute's legislative history to determine whether it covers people who were released to PRS only after fully serving their sentences. See Roberts v.

Tishman Speyer Prop. L.P., 13 N.Y.3d 270, 286 (2009) (citation omitted). SARA's legislative history demonstrates that the legislature did not intend to apply SARA to people serving PRS after completing their full prison terms.

SARA's legislative history materials consistently refer to the law's intent to "prohibit sex offenders placed on conditional release or parole from entering upon school grounds[.]" N.Y. Spons. Memo, 2005 A.B. A8894 (2005) (emphasis added); see also N.Y. Assem. B. Summ., 2005 A.B. A8894 (2005) (same); N.Y. Assem. B. Status, 2005 A.B. A8894 (2005) (same). The legislature has amended § 259-c thirteen times, including subdivision fourteen. At no point did the legislature ever alter subdivision fourteen to apply to people on post-release supervision—even by simply changing "conditionally released pursuant to subdivision one or two of this section" to "released pursuant to subdivision one or two of this section."

Fundamental differences between parole and conditional release, on the one hand, and PRS, on the other, illuminate why the legislature did not apply SARA to people released to PRS after completing their sentences. "Although parole [and conditional release] and PRS are administered and enforced pursuant to the same DOP rules and regulations, there are many practical differences between parole and post-release which stem from the different penological purposes which they serve." People ex rel. Harper v. Warden, Rikers Is. Corr.

Facility, 21 Misc.3d 906, 911 n.7 (NY Sup. Ct., Bronx Cnty. 2008). Parolees "are, in essence, convicted criminals who are released from prison before the expiration of their term, under supervision, and who are allowed to remain outside the penal institution only on stated conditions." People v. Dyla, 142 A.D.2d 423, 439 (2d Dep't 1988). Similarly, conditional release through "the giving of good time credits . . . is a matter of legislative grace" to "reward good behavior." People ex rel. McNeill v. N.Y. State Bd. of Parole, 57 A.D.2d 876, 877 (2d Dep't 1977). Yet in contrast, "the purpose of PRS is to facilitate an ex-inmate's transition to the civilian community following completion of his term of imprisonment." Harper, 21 Misc.3d at 911 n.7 (citations omitted); see also N.Y. Bill Jacket, 1998 S.B. 7820, Ch. 1 (1998) ("Post-release supervision enables the imposition and enforcement of conditions on offenders to promote their successful reintegration into the community."). Accordingly, the legislature determined that restrictions that may be warranted for people who have been discretionally released early from their prison terms are ill-suited for individuals who have served their full sentences and are reintegrating into their communities.

* * *

Accordingly, this Court should decide that SARA's restrictions do not apply to people released to PRS after completing their prison terms.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE APPELLATE DIVISION'S DECISION SHOULD BE REVERSED.

Respectfully submitted,

JAN HOTH
Attorney for Amici Curiae
Robert S. Dean
Center for Appellate Litigation
120 Wall Street - 28th Floor
New York, NY 10005
December 18, 2019

Paul Skip Laisure
Appellate Advocates
111 John Street
New York, NY 10038

David C. Schapp
Chief Defenders Association of New York
290 Main Street - Suite 350
Buffalo, NY 14202

PRINTING SPECIFICATIONS STATEMENT

1. The following statement is made in accordance with Court of Appeals Rule 500.13(c).

2. *Amicis's* brief was prepared with Word Perfect 10 using a point 14, Garamond font.

3. There are 4,000 words in this document irrespective of the Cover Page, Table of Contents, Table of Authorities, and Signature Page.

Dated: December 18, 2019
New York, New York

Jan Hoth, *Attorney for Amici*