STATE OF NEW YORK: SUPREME COURT
APPELLATE DIVISION: THIRD DEPARTMENT

To be argued by:
Michael E. Cassidy

Time Requested:
10 Minutes

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ROLAND GREEN, DIN # 07-A-3298,

Petitioner-Appellant,

for a Judgment Pursuant to Article 70 of the C.P.L.R.,

-against-

DARWIN LACLAIR, Superintendent, Franklin Correctional Facility, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, and NEW YORK STATE DIVISION OF PAROLE,

Respondents-Appellees.

BRIEF FOR PETITIONER-APPELLANT

Franklin County Supreme Court
Index No. 2018-0101
RJI No. 16-1-2018-0032.04

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QUESTION PRESENTED

Whether petitioner-appellant is subject to the New York Sexual Assault Reform Act ("SARA"), as set forth in Executive Law §259-c(14), and therefore must have a SARA-compliant address to which he can be released from custody even where he is not currently serving a sentence for any sex offense.

Answer Below: The Supreme Court, Franklin County, held that petitioner is subject to SARA, despite that he is not presently serving any sentence for a sex offense, concluding the legislature's intent was to subject him to SARA solely on the basis of his level 3 classification under the Sex Offender Registration Act (SORA) for a past and fully discharged sex offense sentence. The court so held but without any genuine and independent analysis or consideration of either the plain language of the statute or the legislative history. Record on Appeal (hereafter "R. __.") 11-17.

NATURE OF THE CASE

This is a state habeas corpus proceeding brought pursuant to Civil Practice Law and Rules (CPLR) Article 70.[1] Petitioner-appellant Roland Green (hereinafter "petitioner") seeks to compel DOCCS and Parole to immediately release him to supervised release in the community and specifically to the New York City shelter system. DOCCS and Parole have refused to actually release petitioner after

1 As noted below, the Supreme Court converted this habeas into an Article 78 proceeding.

granting him all his good time allowances and an open date for conditional release to parole supervision, based on the erroneous and legally insupportable contention that he is subject to the New York Sexual Assault Reform Act ("SARA") and therefore must have a SARA-compliant address to which he can be released. R. 19. Petitioner contends he is not subject to SARA at all because the statute unequivocally requires that an individual must *currently* be serving a sentence for a designated sex offense conviction, whereas petitioner's sentence on his sex offense conviction expired over 15 years ago. Because he therefore is not subject to SARA, DOCCS and Parole are obligated to release him from custody. R. 19.

Petitioner commenced this proceeding by filing a Verified Petition for Writ of Habeas Corpus and Writ on January 29, 2018. R. 18. On February 5, 2018, an Order to Show Cause was issued, in which petitioner was also granted permission to proceed as a poor person. R. 81-82. Following an administrative error, an Amended Order to Show Cause was then issued on March 5, 2018, which was thereafter timely served upon respondents. R. 83-85. On May 3, 2018, respondents submitted an Answer and Return. R. 86. On May 8, 2018, petitioner filed and served a Reply Affirmation. R. 128.

On August 15, 2018, the Supreme Court, County of Franklin (Hon. S. Peter Feldstein, Acting Supreme Court Justice) issued a Decision and Judgment denying the relief requested. Supreme Court first converted this habeas proceeding into a

CPLR Article 78 proceeding and then concluded petitioner is subject to SARA, and thereupon ordered the petition dismissed. R. 11-17. Following service of a copy of the decision with notice of entry (R. 7), petitioner timely filed and served a Notice of Appeal on September 10, 2018. R. 4.

SUMMARY OF ARGUMENT

Executive Law §259-c(14) aims to protect children by keeping designated sex offenders away from school grounds. When first enacted as part of the Sexual Assault Reform Act of 2000, the Executive Law provision (hereinafter referred to as "SARA") only targeted individuals who had actually committed a sex crime against a child. SARA provided that "where a person serving a sentence for an [enumerated] offense . . . and the victim of such offense was under the age of eighteen . . . is released," the Board of Parole must impose as a mandatory condition that the designated offender not knowingly enter upon school grounds. In 2005, the legislature amended SARA to include within its scope SORA-designated level three sex offenders, including those who had never victimized a child. The only issue and dispute in this proceeding is whether that amendment made SARA applicable to all level three sex offenders irrespective of whether they are also currently serving a sentence for a designated sex offense.

The 2005 amendment relating to SORA level three designees was accomplished solely by inserting the words "or such person is a level three sex offender" immediately following the original language referring to the age of the victim.[2] Use of the term "such person" was a grammatical shorthand referring back to the only previous reference in §259-c(14) to a person, which is the "person serving a sentence for an [enumerated] offense." Thus, the SARA statute, as amended, makes it as plain as the English language allows that a level three sex offender, just like a sex offender whose victim is a child, is subject to the school prohibition only if currently serving a sentence for an enumerated sex offense.

Petitioner Roland Green does not fall within that category at all. Although he certainly has been designated a level three sex offender under SORA, such designation was in connection with a crime and conviction whose sentence expired long ago and long before he began serving his present sentence for robbery and burglary. DOCCS and Parole nevertheless are applying SARA to him solely because of his SORA level three designation, which can only be done by an obvious facial misreading of the SARA language. Despite the statute's plain text, and despite the patent absurdity required to conclude that in amending the statute

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2 To be clear, the relevant statutory language now reads as follows, with the language added in the 2005 amendment underlined: "where a person serving a sentence for an [enumerated] offense . . . 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 . . . ." Executive Law §259-c(14).

in 2005 to include language involving level three sex offenders lawmakers could have intended SARA to apply to all level three sex offenders regardless of whether they victimized a child, DOCCS and Parole officials assert that all SORA-designated level three sex offenders are subject to the separate SARA residence restriction as long as they are to be under community supervision for any offense at all and not just an enumerated sex offense.

Remarkably, Supreme Court summarily agreed with DOCCS's interpretation. In doing so, and the only way in which it could do so, the court ignored the statutory plain text, principles of English common language and grammar, and the obvious and only reasonable legislative intent as expressed by that text: that level three sex offenders, regardless of the victim's age, are subject to the identical prohibition from entering school grounds as are sex offenders who have victimized a child. That is, that both targets of the SARA restrictions – sex offenders who specifically victimized a child and SORA-designated level three offenders regardless of the age of their victim – also need to be currently serving and seeking release upon an enumerated sex offense.

This Court should reverse Supreme Court's determination and declare that level three sex offenders, including both those whose victims were under age 18 and over age 18, are included within the purview of Executive Law §259-c(14) *if*

and only if they are also currently serving and seeking release to community supervision on a present and undischarged sentence for an enumerated sex offense.

STATEMENT OF FACTS

On June 7, 1989, petitioner was received into DOCCS custody upon conviction in New York County of rape in the first degree and robbery in the first degree, and following and in accordance with imposition of an indeterminate sentence of five (5) to fifteen (15) years. R. 19-20; 35. The victim of petitioner's sex offense was a minor child relative. R. 99; 110. Petitioner was released from DOCCS custody on that sentence on June 9, 2003, upon completion of the term by reaching the maximum expiration of that sentence upon that date. R. 20; 35. Based on this conviction, petitioner was also adjudicated a level three sex offender pursuant to the SORA, thereby mandating lifetime registration. R. 20.

Subsequently, on May 25, 2007, under New York County Indictment Number 5885-06, petitioner was convicted of robbery in the second degree and burglary in the third degree. Petitioner was sentenced to a determinate term of thirteen (13) years with five (5) years post release supervision on the robbery conviction and an indeterminate term of three and one-half (3½) to seven (7) years on the burglary conviction. Both sentences were ordered to run concurrently with one another. The date of these offenses was on August 27, 2006, over 3 years after

petitioner completed serving and fully discharging and satisfying his 1988 sex offense conviction in 2003. R. 20; 38.

On June 13, 2007, petitioner was received into DOCCS custody on his present non-sex offense sentence. R. 20; 40. In July 2017, petitioner appeared before the DOCCS Time Allowance Committee ("TAC") at Franklin Correctional Facility, and on August 2, 2017, TAC granted petitioner all available good time allowances, which determination was affirmed by both the facility superintendent and the DOCCS Commissioner's designee. R.20; 42. As a result, petitioner was afforded an open date of November 16, 2017, for conditional release to parole supervision. R.20; 40.

On November 9, 2017, Parole issued a Parole Board Release Decision Notice imposing conditions of release upon petitioner. These conditions included the assertion that he was subject to SARA and therefore must have a SARA-compliant address to which he can be released. Specifically, the Parole Board asserted that pursuant to Executive Law § 259-c(14) the mandatory residency special conditions apply to petitioner. R. 21; 44.

Petitioner was homeless prior to his present incarceration and anticipatorily will remain homeless upon release. Accordingly, he seeks to return to the New York City shelter system where he resided prior to his current incarceration, which is the residence he proposed to DOCCS and Parole officials. Notably, he seeks

return to the very same shelter where he previously was permitted to reside, even with his level three SORA designation. R. 21.

DOCCS and Parole rejected and disapproved petitioner's proposed residency return to New York City as a homeless person and to once again reside in the City's shelter system. Specifically, petitioner was informed that "Because you are a Level 3 Registered Sex Offender, Special Condition 28 and FC01 have been imposed. Special Condition 28 indicate[s] [sic] that you will abide by the mandatory condition imposed by the Sexual Assault Reform Act. Special Condition FC01 is the sex offender housing condition. You will not be released until a residence is approved and compliant with the Sexual Assault Reform Act." Petitioner was further informed that "shelters cannot be submitted as proposed addresses." See November 8, 2017, Memorandum to relator from C. Leonard, SORC [Senior Offender Rehabilitation Coordinator] at Franklin Correctional Facility. R. 47.

Despite his grant of all available good time allowances and approval for conditional release to parole supervision, petitioner remains confined in prison, now long-past his approved and open date for release. He remains imprisoned solely because he is indigent and a homeless individual who seeks to return to and reside in the New York City shelter system, but where he cannot locate or provide any other non-shelter address where he could reside that is more than 1000 feet

from a school, and because it would appear that DOCCS/Parole cannot locate such an address either. In short, despite otherwise complete approval by both DOCCS and Parole for long ago immediate release, petitioner remains in prison far beyond his open release date of November 16, 2017, strictly and solely because DOCCS/Parole is applying SARA to him.

Justice Feldstein of Franklin County Supreme Court issued a decision on August 15, 2018, denying petitioner relief and dismissing the proceeding. R. 11-17. Justice Feldstein, without analyzing a single word in the SARA statute, summarily determined that it was reasonable for DOCCS to conclude that SARA applies to all level three sex offenders eligible for release to community supervision for any crime and from service of any sentence at all, not just an enumerated sex offense as expressly set forth in the SARA statute.

ARGUMENT

THE SARA RESIDENCY RESTRICTIONS DO NOT APPLY TO PETITIONER BECAUSE HE IS NOT CURRENTLY SERVING A SEX OFFENSE, LET ALONE AN ENUMERATED ONE UNDER THE STATUTE.

It has been more than 15 years since petitioner entirely satisfied and completed serving a sentence for a sex offense enumerated in Executive Law §259-c(14) ("SARA"). Nonetheless, DOCCS and Parole insist and persist in subjecting him to SARA and blocking his release from prison solely on this basis,

because they interpret the provision as applying to all level three sex offenders seeking release to community supervision for any crime at all. As will be demonstrated, that interpretation here, which has now been wrongfully judicially-sanctioned, entirely flies in the face of the plain statutory text, text which inextricably links the individual's status as a level three sex offender with a current service of a sentence for an enumerated offense through the phrase "*such person* is a level three sex offender." (emphasis added). The only antecedent reference to this "person" is *the* "person serving a sentence for an [enumerated] offense."

As will also be shown, DOCCS' interpretation defies basic common sense. It would require the legislature, in amending the statute in 2005 adding the language about level three sex offenders, to have intended to create greater protection for children from potential sexual offenders who have never victimized a child than from those who actually have victimized a child. Therein lies the fundamental illogic of DOCCS' interpretation, which Supreme Court entirely overlooked and misunderstood.[3]

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3 Of particular note, the Supreme Court also fundamentally misunderstood petitioner's argument (Petition ¶ 27; R. 26-27) that "it defies common sense to think that the legislature concluded that children needed even more protection from level three sex offenders who had never victimized a child than it needed from sex offenders who had in fact victimized children." Specifically, the court characterized such argument as "disingenuous," because the victim of petitioner's 1988 sex offense was a young child. Decision and Order at 7; R. 17. By doing so, however, the court demonstrated that it failed to grasp and appreciate a central point of petitioner's argument. The age of petitioner's victim is both entirely irrelevant to the analysis and does not defeat or undermine petitioner's argument in the least. DOCCS seeks to apply SARA to all level three sex offenders, including those like petitioner whose victims were a child

For these reasons, Supreme Court's adoption and approval of DOCCS' interpretation of SARA is wrong and indefensible. It provides no recognition, understanding, or answer to SARA's plain text and instead confers an entirely unwarranted illogical and unreasonable legislative intent behind the 2005 statutory amendment. This Court must reverse Supreme Court's determination and declare unequivocally that the only individuals subject to the residency restrictions and other prohibitions in SARA (Executive Law §259-c(14)) while on community supervision are those *currently* serving a sex offense enumerated in the statute, irrespective of the age of the victim of such offense.

The statutory text is "the best evidence of legislative intent. As a general rule, a statute's plain language is dispositive." Polan v. State of New York Insurance Dept., 3 N.Y.3d 54, 58 (2004). Further, any special competence or expertise an administrative agency may have "does not come into play where . . . [the court is] called upon to decide a question of 'pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent.'" Id. (citation omitted); see also DeVera v. Elia, 152 A.D.3d 13 (3d Dep't 2017).

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as well as those designees whose victims were not a child and regardless of whether such level three sex offenders are currently serving a sex offense sentence, whereas DOCCS would only apply SARA to non-level three designated offenders whose victims were a child if such persons are currently serving a sex offense sentence. There is nothing "disingenuous" about identifying such a facially illogical reading of the statute. This is an important and critical nuance that clearly eluded Supreme Court, and yet which goes to the very heart of petitioner's argument. Quite possibly, and as it would appear, Supreme Court's difficulty here may stem from an assumption that all sex offenders whose victims were under the age of 18 are also designated level three under SORA. This is false assumption, however, as will be addressed below.

The plain text of Executive Law §259-c(14) is indeed dispositive here. The statute provides in relevant part that:

> where *a person* serving a sentence for an [enumerated] offense . . . 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 . . ., is released on parole or conditionally released . . . 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 . . . (emphasis added).

The text makes clear that any individual currently serving a sentence for an enumerated offense shall not enter school grounds, which is defined as coming within 1000 feet of a school (See Penal Law §220.00(14)), where either the individual's victim of that offense was a child or who is a level three sex offender. It genuinely is as simple as that. And the legislative intent is equally simple and apparent: to protect children from certain sex offenders by keeping the latter a safe distance away from schools.[4] Nothing in the statutory text could possibly lead to the conclusion that level three sex offenders regardless of the age of their victim have greater restrictions placed on them than sex offenders who have victimized a child. And yet, this is what DOCCS and Parole's interpretation would require. On the contrary, the prohibition is identical for both categories in the SARA test, those

4 Although SARA does not specifically reference a residency restriction, the law creating the referenced "buffer zone" around schools and other places frequented by children (see NY Penal Law § 220.00) has been interpreted to include travel near any residence and thus can severely limit the areas where individuals subject to the law may reside. Williams v. DOCCS, 136 A.D.3d 147, 151 (3d Dep't 2016).

whose victim was under the age of 18 and those designated level three under SORA. In short, any person who falls into either of the two categories – those whose victims were under age 18 or those who are designated a level three offender – and is *currently* serving a sentence for an enumerated sex offense must keep their distance from schools and thus are subject to the SARA residence restrictions.

The statutory language is so clear as to make it truly mystifying how anyone ever came to read the text as imposing a greater burden on all level three sex offenders, requiring that they alone, irrespective of the age of their victims, and not offenders who have victimized children, stay away from schools as long as they are serving community supervision for any offense, not just a sex offense enumerated in the statute. To rephrase that, Supreme Court below uncritically adopts DOCCS' twisted interpretation of the statute which would hold that SARA applies to 1) those currently serving an enumerated offense where the victim was under 18, and 2) all those designated level three sex offenders under SORA, irrespective both of whether they are currently serving an enumerated offense or whether their victims were children. There is no way to torture the text of Executive Law §259-c(14) to reach that patently absurd, and frankly offensive, conclusion, as the legislature wrote the law in a manner that is pellucidly clear.

The statutory subdivision begins with a clause that refers to "a person" who, in the present tense, "is serving a sentence" for one of many enumerated offenses. It then contains two restrictive modifiers of that initial clause: the victim of the offense was under the age of 18 or the person has been designated a level three sex offender. How do we know that these two categories modify the initial clause, rather than standing on their own, untethered to the requirement that the person is first one who is currently serving a sentence for an enumerated offense? The answer is the text, which makes it plain. The legislature linked the age of the victim to service of the sentence by using the conjunction "and," thus establishing that SARA applies to any individual currently serving a sentence for an enumerated offense where the victim of the crime was under the age of 18. Bear in mind, that linkage is not in dispute and never has been disputed, nor could it be, as the conjunction "and" forecloses any conceivable argument that the age of the victim is not linked to the individual's current service of a sentence for an enumerated offense.

The only dispute DOCCS has created here is with regard to those individuals designated a level three sex offender. However, the same linkage to current service of a sentence for an enumerated offense exists with respect to level three sex offenders as it exists to those whose victim was under 18. The legislature was just as careful and precise in linking the individual's status as a level three sex

offender with the requirement that he or she currently be serving a sentence for an enumerated offense. The legislature perfectly did so by employing the term "such person." Where the text reads "or such person has been designated a level three sex offender," it naturally raises the question: to whom does "such person" refer? Of course, the answer is so patently obvious that no controversy would even arise but for DOCCS' effort to contort the plain meaning of the statute. As a grammatical construct, the term "such" is shorthand for an antecedent reference to a specifically defined person. And there is only one prior reference to a person in §259-c(14): the "person serving a sentence for an [enumerated] offense." Thus when the legislature wrote "such person . . . ," that obviously was its shorthand for the "person" noted at the beginning of this sentence, namely, "a person serving a sentence for an [enumerated] offense. . . ." There simply is no other logical and sane way to interpret the text of Executive Law Section 259-c(14).

Accordingly, use of the term "such person" is conclusive, irrefutable proof that the legislature intended level three sex offenders to be subject to SARA only when currently serving a sentence for an offense enumerated in the statute. Were plain English not enough, the word "such" is also a legal term of art that refers back to something previously described, delineated or defined. Fowler's *A Dictionary of Modern English Usage, Second Edition,* defines *such* thusly: "A useful device in drafting legal documents, where precision is all important, is to

use *such* in the sense of as defined above, so as to avoid ambiguity without having to repeat the defining words." (emphasis added). Could it be any simpler or clearer? Anyone who has ever practiced law well understands that when a term like "such person" or "such offense" is used, one goes back to the last preceding reference to that thing about which "such" refers. Here, the last reference to a "person," indeed the only previous reference to a person in Executive Law §259-c(14), is to the "person" serving a sentence for an enumerated offense. It is precisely as Fowler's states; the legislature used *such* to avoid ambiguity without having to repeat the defining words.

As if it were even necessary, there is yet more in the text that precludes any reasonable doubt that SARA only applies to individuals currently serving a sentence for an enumerated offense. After describing the individuals included within its scope, the statute then states that "the board shall require . . . that *such sentenced offender* shall refrain from knowingly entering into or upon any school grounds." (emphasis added). Once again, the common usage of the word "such" is employed. So who is "such sentenced offender?" In the first instance, it can only be the person serving a sentence for an [enumerated] offense" because that is the only previous reference in §259-c(14) to an offender with a sentence. Again, on that basis alone, SARA too can only apply to individuals presently serving a sentence for an enumerated sex offense, not all SORA-designated level three sex

offenders who had once served a sentence for a sex offense but are no longer serving such a sentence.

And, of course, "such sentenced offender" does not refer to every person serving a sentence for an enumerated offense. Rather, the term is shorthand for the qualifiers that preceded it as well. Thus "such sentenced offender" applies to a person released on (or seeking to be released upon) parole or conditional release from a sentence for an enumerated offense, either whose victim was under 18 or who is designated as a level three sex offender. Linguistically and grammatically, there is no other way to understand the text. It is only through the mental and linguistic gymnastics and contortions of DOCCS and Parole officials that there is any issue presented at all.

As delineated earlier, the legislative intent behind the 2005 amendment's inclusion of level three sex offenders in the SARA law is just as clear as the statutory text itself. When initially enacted in 2000, SARA only applied to sex offenders serving a sentence for an enumerated offense who had victimized a person under the age of 18. Not surprisingly, the legislature obviously believed at the time that sex offenders who had actually victimized a child were the individuals from whom children needed protection. Thus, when initially enacted, level three sex offenders who had victimized a child were already included in the statute's purview. In 2005, the legislature decided that level three sex offenders

who had not victimized a child posed a significant enough risk to justify their inclusion in Executive Law §259-c(14) as well. As a result, the legislature amended the SARA law by inserting the wording about level three sex offenders.[5] The intent, which again should be obvious to all, was to place level three sex offenders who had never victimized a child on the same footing as sex offenders who had victimized a child, by requiring them to stay away from school grounds. And what does it mean to place them on the "same footing?" Clearly, it means so long as such individuals are currently serving a sentence for an enumerated offense, as that is what SARA already and originally mandated for those who had victimized a child. There is nothing in the 2005 amendment that altered that original mandate either, as that original language remained undisturbed.

Respondent's contrary position requires the unsound and illogical conclusion that the legislature, after initially determining that children required no special protection from level three sex offenders, decided to subject individuals who had *never* victimized a child to *greater* restrictions than those placed on sex offenders who actually had victimized children. There is no reason the legislature would have reached that conclusion, which is contrary to common sense, and certainly not after the legislature quite reasonably had determined, when it first enacted SARA, that young people required protection only from some sex

5 Perhaps worth noting, they did not also amend the SORA statute to impose any residency or other restrictions upon level three sex offenders.

offenders who had victimized children, not from sex offenders who had not. Indeed, the entire purpose of the SARA restrictions here is aimed at protecting and shielding children from potential sexual assault. If considered dispassionately, it becomes as well immediately clear just how incongruent and offensive to that purpose is DOCCS' and Parole's interpretation and application of SARA.

The text of §259-c(14) is thus in perfect harmony with the obvious legislative intent. Under the circumstances, it is baffling how a contrary interpretation could possibly have been reached by DOCCS and Parole or by the judge who dismissed this habeas petition. Yet respondents, and thus the court below, would have one read into the statute that the same SARA restrictions apply to every single level three sex offender seeking supervised release, including not only those who had never victimized a child, but also those serving and seeking release from any prison sentence at all, not just a sentence for a sex offense. Such interpretation is not only utterly irrational, it is breathtaking.

One would think that respondents' papers and the court's decision would point to language in the text of SARA, somehow overlooked by petitioner, which establishes that the legislature in fact intended to subject all SORA level three-designated sex offenders to SARA when they are on parole or conditional release for any crime at all, not just on release from an enumerated sex offense. But that is

not the case at all. One may scour respondents' papers and the court's decision in vain for any such reference or evidence.

Indeed, perhaps the single most remarkable thing about both respondents' papers and the court's decision is their complete failure to genuinely address the text of SARA. After all, this case is all about statutory construction. Yet below respondents studiously ignored the text of §259-c(14) in its answer to the habeas petition, and effectively so did the court in its decision. That silence is eloquent testimony to the unambiguous wording of the statute. Indeed, it seems virtually impossible for the legislature to have drafted language that would have made it any clearer that level three sex offenders are subject to SARA only when they are serving a sentence for an enumerated offense. Perhaps, instead of employing the term "such person," the legislature could have written for a second time a "person serving a sentence for an offense defined in . . . ." But that would have read and sounded jarringly repetitive and simply further begged the question as to whether the legislature's command of written English was so poor as to not understand it could use the shorthand "such person" to refer to the subject individual serving a sentence for those enumerated offenses.

On the flip side, had the legislature amended SARA with the intent of untethering level three sex offenders from the requirement of current service of a sentence for an enumerated sex offense, surely it would have inserted the language

about level three offenders at a completely different point, *prior* to the text about service of a sentence. Thus the legislature would have written "where a person designated a level three sex offender . . . or where a person serving a sentence for an [enumerated] offense . . . and the victim of such offense was under the age of eighteen . . ., is released on parole or conditionally released . . . the board shall require . . . that such persons shall refrain from knowingly entering into or upon any school grounds."

Placing the level three designation before service of the sentence and using the conjunction "or" to link them readily and easily would have expressed and conformed to an intention to subject level three offenders to SARA whenever they are placed on community supervision for any crime, not just for a designated offense. Respondents want the courts to read §259-c(14) as if the legislature had amended the statute in the above fashion, despite the plain and clear text to the contrary. Moreover, respondents invite acceptance and adoption of this bizarre and non-textual interpretation despite the fact that the legislature had this incredibly plain and simple textual way in which it could have made its intent known and obvious had this actually been its intent. Respectfully, this would require a degree of legislative incompetence and poor draftsmanship breathtaking in scope and would have the judicial branch rewrite the statute. If the legislature's handiwork made no sense and, despite the clear textual language, produced an irrational result,

arguably that could provide a basis for the courts to step in and fix an obviously flawed and poorly worded or constructed statute. But here, exactly the opposite is true. The text of §259-c(14) reflects the commonsensical and obvious legislative intent to subject level three sex offenders to the identical prohibition to which only sex offenders who had victimized a child had previously been subjected.

Respondents, having nothing they can reasonably or even at all say about the text of §259-c(14), look elsewhere to cobble together an argument that the legislature somehow must have intended to subject level three offenders to greater restrictions under SARA than those imposed on sex offenders who have actually victimized a child. Respondents instead suggest, and Supreme Court too seemed to seize upon, the notion and fact that level three sex offenders are subject to lifetime registration, presumably to demonstrate that it therefore somehow made sense for the legislature to subject them to SARA for life, provided they are on community supervision for any crime and not just an offense enumerated in §259-c(14). R. 16.

Indeed, herein may lie the fundamental way in which Supreme Court was led astray in its reasoning in this case. The court seems to have misconstrued and confounded the SORA risk levels and registration requirements with the SARA restrictions. That there might have been a reason the legislature could have decided to subject level three sex offenders to greater restrictions under SARA

does nothing to undermine the unambiguous text and clear intent expressed by that text that it did no such thing.

Furthermore, even on its own terms, respondent's argument involving the undisputed lifetime nature of level three sex offenders' registration requirements proves nothing because numerous sex offenders are subject to lifetime registration, not just level three designees. All sexually violent offenders of any level, all predicate sex offenders of any level, and all level two and level three sex offenders are subject to lifetime registration. *See* Correction Law §168-h(2). The only sex offenders designated under SORA *not* subject to lifetime registration are level one offenders who have not been convicted of a sexually violent offense and are not predicate sex offenders. Thus a great many level one, and all level two, sex offenders who are subject to SORA because their victim was a child are subject to lifetime registration too. Yet, the legislature chose to make these individuals subject to SARA, not also for life, but for only as long as they are serving a sentence for an enumerated offense. As such, and as noted previously, there was nothing incorrect, let alone "disingenuous" about petitioner's argument and the fact that the victim of his particular offense on the fully served and discharged sentence happened to be a minor. [6]

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6 See footnote 3 above.

Respondents also cited the Memorandum in Support of Legislation, issued in conjunction with the enactment of Chapter 544 of the 2005 Laws of New York. That Memorandum summarizes the amendment to Executive Law §259-c(14) as requiring, as a condition of parole or conditional release, that level three sex offenders not enter upon school grounds. As respondents pointed out, the summary does not specifically indicate that application of the amendment is limited to service of a sentence for an enumerated offense. R. 102. While respondents' characterization of the summary is accurate, it is again of no help to them. There is nothing in the summary inconsistent with the amendment only applying to level three sex offenders who are currently serving a sentence for an enumerated offense, and likewise nothing that reveals a specific intent that the amendment actually apply to level three sex offenders who are on parole or conditional release for any crime at all, as opposed to a sex offense enumerated in the statute.

Indeed, given the clarity of SARA's text, the only thing that could have called into question its unmistakable intent – to place level three sex offenders on an equal footing with sex offenders who had victimized children – would have been a statement in the Memorandum of Support that the legislature specifically intended that the amendment adding level three sex offenders to the purview of SARA apply not only when such offenders are paroled or conditionally released

from a sentence for an enumerated offense, but also when they are paroled or conditionally released from a sentence for any offense. Of course, there is no such statement in the Memorandum of Support. Had there been, though, one could only have marveled at the legislature's incompetence in then expressing such true intent through its language and grammar used in the statutory amendment. As it is, one instead can only marvel at how badly and unsoundly respondents, and unfortunately Supreme Court, has misinterpreted SARA's clear language and plain meaning.

To be sure, it is not only respondents and the court below that have so greatly misinterpreted and misunderstood SARA's plain language and obvious intent of that language. Several other supreme courts visited this issue before the decision below was rendered, only one of which recognized and agreed with petitioner's position. Moreover, and to petitioner's dismay, the Fourth Department has recently added its voice on this issue and uncritically adopted DOCCS' painfully tortured interpretation of SARA as well. Petitioner urges this Court to squarely and affirmatively reject the Fourth Department's holding and the fundamentally flawed analysis upon which that holding is founded.

On November 16, 2018, the Fourth Department issued its decision in People ex rel. Garcia v. Annucci, 167 A.D.3d 199 (4th Dep't 2018), upholding DOCCS' application of SARA to an individual in the same circumstances as petitioner.

That is, a person not currently serving a sex offense but who has been designated a level three under SORA for a previous conviction and fully satisfied and discharged sex offense sentence. Id. at 200. Like the court here below, the Garcia Court failed to comprehend and recognize the conclusive nature of the plain text of the statute, and instead sought to look to legislative history to derive law makers' intent. Not only was resort to legislative history of the 2005 amendment to SARA entirely unwarranted and inappropriate, again given the plain language and plain meaning of the statute, the Garcia Court relied upon material in the legislative record that affords no reasonable or rational indication of the actual law makers' intentions.

First, the Garcia Court concluded that there were alternative possible constructions to the statutory language. However, none of these suggested constructions were even rational and some also required dismembering and effectively rewording the text. These included one construction that absurdly would read the word "such" right out of the statute entirely. Another purported construction involved cognitive and grammatical contortions that the "such person" might actually refer to "a person serving a sentence for an enumerated offense against a minor," in a way that artificially divorces level three sex offenders from the entire rest of the language of the text. Id. at 203. In the first place there is no basis in grammar for artificially breaking the sentence at that

point. There's no comma, period, colon, semi-colon, dash or parenthetical after "a person serving a sentence" and therefore no earthly reason to imagine that the legislature intended "such person" to mean "a person serving a sentence for an enumerated offense against a minor." That would be true if the entire statute had been enacted at once, but at issue is an amendment to a statute. When the SARA statute was initially enacted in 2000, there was no question (and not even DOCCS and Parole would claim otherwise) that the "person" in the statute was defined as "a person serving a sentence for [an enumerated] offense. This was the only possible person in the statute. So, how does one go from crystal clarity to ambiguity in the definition of a "person" when the language defining a person had not changed the least bit by the amendment?

Second, while none of these alternatives as to what the plain language and "person" might mean make any sense, the Court used these contrived "ambiguities" to justify turning to and considering legislative history. It was there that the Garcia Court only compounded its errors, holding that the purported legislative history "strongly supports respondents' interpretation of the statute." Id.

On the contrary, Garcia cited no legislative history that supports respondents' view, let alone "strongly" supports it. Indeed, the Court cited and relied upon material in what it refers to as "the legislative record" that can neither

be accurately described as legislative history nor which affords any reasonable or rational indication of the actual law makers' intentions in wording and crafting the amendment as they did. Specifically, the panel in Garcia cited and principally relied upon letters, not from legislators, but from individuals and organizations supporting or opposing enactment of the amendment legislation. These individuals' or organizations' views on, understandings of, or concerns about the legislation have absolutely no bearing on actual legislative intent. For instance, and quite shockingly, the Court placed great emphasis upon a letter from the New York Civil Liberties Union (NYCLU) expressing opposition to the bill, again as if this could have any modicum of probative value as to legislative intent.[7]

While these materials, including this NYCLU letter are not part of the present record in this proceeding, and while the undersigned has not seen or reviewed these letters and materials, it can be readily and strongly urged and stated

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7 Indeed, the quoted language of the NYCLU letter does not even carefully or accurately reflect the original statutory language of the 2000 SARA, let alone anything about how to understand the intent of the language of the amendment. And yet, the Garcia Court emphasized and quoted it at length. Specifically, the Court notes the NYCLU author wrote: "Current law prohibits from school grounds certain past offenders whose victims were under the age of eighteen. The proposed law would apply this restriction to *all persons* designated 'Level Three' sex offenders." Id. at 204 (emphasis in original). In context, however, it is obvious that the NYCLU was referring to level three sex offenders with an adult victim when it wrote that the proposed law would now apply to "all" level three offenders, since as noted previously in this brief, the SARA statute *already* applied to level threes with a child victim and who were serving a sentence for such offense. At the same time, however, this NYCLU letter clearly says and offers nothing to suggest, support, or conclude that the legislature intended "all level three offenders" to include or mean those level threes not also currently serving a sentence for an enumerated sex offense. The Fourth Department was thus entirely wrong to cite, let alone rely upon, that letter as evidence that DOCCS is reading the statute correctly or that its interpretation is warranted and sound.

with confidence that such materials are patently and entirely irrelevant to any notions of deriving legislative intent. They can only reflect the views, however warranted or not, of the authors of such letters, not the intent of legislators. And again, even on the face of the selected quotes and language of the NYCLU letter, for instance, there is nothing to suggest either what the language of the statute and amendment might actually mean and to whom it may apply.

Moreover, it should be noted that, if anything, the NYCLU's letter actually serves to highlight a point petitioner makes and emphasizes in this brief: that DOCCS' interpretation makes no sense because it would subject level 3 sex offenders who have not victimized a child to more onerous restrictions than sex offenders who have victimized a child. As the Garcia Court significantly and jarringly missed, this would make no sense if the SARA law had been enacted all at once, but it is even more nonsensical when one considers that when originally enacted the legislature initially and quite reasonably did not believe that children needed any protection at all from level 3 sex offenders who had not victimized a child.

In short, the Garcia decision is enormously flawed and unsound in a variety of ways. For all the above reasons, this Court should summarily and fully reject and decline to follow in that Court's path.

As noted, there were at least four supreme courts that have faced and addressed the issue presented in this case, prior to the decision below and aside from Garcia. See People ex rel. Madison v. Superintendent, Index No. 291-2017 (Sup. Ct. Dutchess Co. 5/16/17) (Grossman, J.), R. 49-56; Matter of Walker v. Stanford, Index No. 3921-15 (Sup. Ct. Albany Co. 6/21/16) (Ferreira, J.), R. 57-62; People ex rel. Negron v. Superintendent, Index No. 1673-2016 (Sup. Ct. Sullivan Co. 2/8/17) (Schick, J.), R. 63-68; and Matter of Cajigas v. Stanford, Index No. 655-16 (Sup. Ct. Albany Co. 2/10/17) (Elliot, J.), R. 69-76. Copies of these unreported decisions were collectively attached to the petition as Exhibit G. R. 49-76. The remainder of petitioner's brief will discuss these cases, which together with Garcia, provide the present extent of the judicial landscape of this specific issue.

Of the four trial court decisions, the Madison court adopted the position petitioner advances in this proceeding, and in an extremely well-reasoned manner that this Court should carefully consider and fully embrace and adopt. The Madison court properly interpreted the statute and legislative intent, including the legislative intent of the 2005 amendment to SARA, by employing the correct and appropriate tools of statutory construction. The other three decisions, however, either employed incorrect principles of statutory construction (again, as did the Fourth Department in Garcia) or otherwise inappropriately deferred to agency

interpretation. Indeed, Walker, Negron, and Cajigas, like Garcia, all either ignore entirely the text of the statute, which, in a case all about statutory construction is flawed and deeply troubling, or they focus on trivialities, such as a missing comma or the absences of the word "or," while ignoring the critical language of "such person" and "such sentenced offender" and the only reasonable ways to read and understand such language.

In Matter of Walker, the court incorrectly and unnecessarily resorted to consideration of punctuation, and in particular the absence of certain punctuation, in finding that the respondent's interpretation of the statute was "supported by a plain reading of the statute." Specifically, the court emphasized that in both the original and amended versions, there is no comma separating the text about service of a sentence for an enumerated offense from the language about the victim's age. This, the court held, "suggests that the legislature intended the phrase [about service of the sentence] to include the words 'and the victim of such offense was under the age of eighteen at the time of such offense' and, through the 2005 amendment, intended to add a new, separate and distinct category of persons covered by the statute." While the court in Walker should perhaps be given credit for proposing a reading of the statutory text that would make level three sex offenders subject to SARA's purview whenever they are on community supervision for any crime at all, its conclusion only underscores just how

impossible is the task. As the Second Department stated recently: "'[P]unctuation . . . is subordinate to the text and is never allowed to control its plain meaning, but when the meaning is not plain, resort may be had to those marks . . . in order to make the author's meaning clear.' 'Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity; but not in cases where no real ambiguity exists except what punctuation itself creates.'" Elenson v. Nassau County, 150 A.D.3d 1109, 1111 (2d Dept. 2017) (citations omitted).

In the present case, not only is the text plain, but the absence of a comma does not inject any ambiguity. Indeed, were the absence of a comma of any significance at all in tethering the requirement about the victim's age to service of the sentence, the legislature would have placed a comma between the text about the victim's age and the individual's status as a level three sex offender in an effort to genuinely untether the latter from service of the sentence. But there is no such comma. Indeed, the entire discussion about the presence or absence of a comma is both inappropriate and insignificant in the face of the law's plain text, as set forth at length above and as the court in Madison aptly and readily recognized.

Both People ex rel. Negron and Matter of Cajigas are fundamentally flawed and should be rejected as well. Not only are both those courts' statutory interpretations contrary to the plain meaning of the statute, they both afford entirely inappropriate and undue deference to DOCCS' and Parole's interpretation

of the statute while placing unwarranted significance upon the lifetime nature of the SORA level three designation. As noted, supreme court below similarly placed entirely undue and misguided emphasis upon the lifetime nature of the SORA designation as well.

There was no basis in those cases to resort to affording any deference in the first instance to administrators, and by doing so these courts effectively punted in determining statutory meaning and legislative intent as to the questions presented. And as noted, both the Negron and Cajigas courts placed entirely improper, and indeed irrelevant significance upon the lifetime nature of the level three SORA designation in ascribing legislative intent to the 2005 amendment to SARA. Both courts there, like the supreme court below, accept and adopt the notion that because level three SORA designation is for life, it therefore made sense for the legislature to subject them to SARA for life, provided they are on community supervision for any crime at all, not just for a sex offense designated under §259-c(14). See decision below, R. 16. See also footnote 3 above. Perhaps this "lifetime designation" is an enticing notion for interpreting the SARA statute in the way DOCCS and Parole would like, but it is one that must fail under the slightest scrutiny. That there might have been a reason for the legislature to have subjected SORA level three sex offenders to greater restrictions under SARA does nothing to

undermine the unambiguous text and unambiguous intent expressed by that text, as detailed above and as recognized by the court in Madison.

Furthermore, even on its own terms, the Negron and Cajigas courts' views adopting respondents' argument proves nothing because numerous sex offenders are subject to lifetime registration, not just level three offenders. As noted previously above, all sexually violent offenders of any level, all predicate sex offenders of any level, and all level two and level three sex offenders are subject to lifetime registration. See Correction Law §168-h(2). The only sex offenders designated under SORA not subject to lifetime registration are level one offenders whom have not been convicted of a sexually violent offense and are not predicate sex offenders. Thus a great many level one and all level two sex offenders who are subject to SORA – *because their victim was a child even* – are subject to lifetime registration too. And yet, the legislature chose to make these individuals subject to SARA, not for life, but only as long as they are seeking release while serving and are on release from serving a sentence for an enumerated offense.

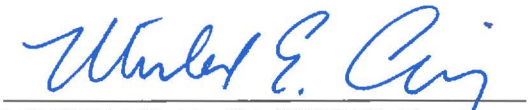
In sum, a central reason the Negron and Cajigas courts held that respondents' interpretation of the statute deserves deference on the grounds that it is not irrational or unreasonable, is itself entirely irrational and unreasonable. Both these cases are presently on appeal to this Court and awaiting decision.

In closing, petitioner offers one final and stark example of the fundamentally illogical and irrational nature of respondents' interpretation of SARA. Under their contorted view of the text, a person who had sexually victimized a child, satisfied that sentence, been designated level one or two, and returned to prison on a non-sex offense, is not subject to SARA upon early release, whereas a person who had never victimized a child, satisfied that sex offense sentence, been designated level three, and returned to prison on a non-sex offense, is subject to SARA. This makes no sense, and produces both an absurd and offensive result, particularly where the entire and undisputed very purpose of SARA is to help safeguard children from possible sexual offenses.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this Court reverse the trial court's decision and grant the relief requested, holding that SARA does not apply to petitioner and directing respondents to release him forthwith.

DATED: February 7, 2019

BY: 

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CERTIFICATE OF COMPLIANCE WITH RULE 1250.8(f)

Michael E. Cassidy, Esq., hereby certifies that this brief complies with the word count limitation of § 1250.8(f) of the Practice Rules of the Appellate Division. This brief was prepared using a word-processing program and, in reliance upon the word-processing program's word count function, it contains 8,083 words, excluding the parts of the brief exempted by this rule.

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