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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK EX
REL. JOHNSON,

Appellant,

-against-

No. 74

SUPERINTENDENT, ADIRONDACK
CORRECTIONAL FACILITY, et al.,

Respondents.

20 Eagle Street
Albany, New York
October 13, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal is appeal
2 number 74, Ex Rel Johnson v. Superintendent.

3 Counsel?

4 MS. FABIANO: Good afternoon, Your Honors. My
5 name is Denise Fabiano, and I represent the
6 petitioner/appellant, Fred Johnson. And I'd also like to
7 reserve one minute for rebuttal, please.

8 CHIEF JUDGE DIFIORE: One minute?

9 MS. FABIANO: Yes. So in this case, the State is
10 claiming the absolute authority to hold an indigent person,
11 who has been granted parole, in prison for the rest of his
12 life simply because he can't afford a private SARA-
13 compliant address that's not within 1,000 feet of a school.
14 That's the absolute authority that the State's claiming
15 here, and that's what they're asking you to sanction.

16 JUDGE RIVERA: I thought their - - - their
17 argument was they have the authority to hold them until
18 they find SARA-compliant housing, not forever and ever,
19 which is what I - - -

20 MS. FABIANO: No.

21 JUDGE RIVERA: - - - think you are trying to
22 argue. I understand your point that the logical extension
23 of the - - - their analysis is that that means you could
24 hold someone up to life, but what they're really arguing is
25 that this is a stopgap, this is otherwise what they're



1 doing until the SARA-compliant housing is available for the
2 individual.

3 MS. FABIANO: Actually, I mean, their argument
4 below and here has been that they have the authority to
5 hold Mr. Johnson in for the duration of his sentence, which
6 is life. WE can say, yes, we'd like to take you on your
7 good-faith representation that you won't do that, but when
8 you're balancing that against your absolute right, your - -
9 - your right to liberty here, I don't think DOCCS or the
10 State, we can give them that authority that they're going
11 to do it - - - do the right thing because they say they
12 will.

13 JUDGE GARCIA: But they did it here, right? I
14 mean, they - - -

15 MS. FABIANO: He - - -

16 JUDGE GARCIA: - - - released your client, right?

17 MS. FABIANO: He was ultimately released to - - -
18 to twenty-seven months past his open parole date.

19 CHIEF JUDGE DIFIORE: And on that point, counsel,
20 can we just back up a little bit and address the threshold
21 issue first?

22 MS. FABIANO: Um-hum.

23 CHIEF JUDGE DIFIORE: And what makes your client
24 entitled to a writ of habeas corpus here? He's out, right?

25 MS. FABIANO: Oh, why it's not moot? Because - -



1 - because - - - again, I don't think the State has
2 contested that it's likely to repeat itself. The Third
3 Department said that as well. It's - - - it's whether it's
4 going to evade review. And it will because he's out, and
5 we're here now.

6 JUDGE STEIN: Well, but if he - - - if, as you
7 say - - - first of all, it's two-and-a-half years - - -

8 MS. FABIANO: Yes.

9 JUDGE STEIN: - - - which, arguably, might be
10 enough time to - - - to reach, certainly the Appellate
11 Division, if not this court, and - - - and your argument is
12 it could be much, much longer. So if that is the case, and
13 - - - and your client did find SARA-compliant housing, but
14 maybe some - - - the next person won't. And it seems to me
15 that you're - - - you're making a distinction between this
16 situation and the others that we're hearing about today.
17 And if you look at the - - - actually, the times that the
18 other people were in - - - in RTFs, it is a significant
19 difference. So I guess, to me - - -

20 MS. FABIANO: Well, there's, I guess - - -

21 JUDGE STEIN: - - - how can you make both
22 arguments - - -

23 MS. FABIANO: Well - - -

24 JUDGE STEIN: - - - that it could be indefinite
25 but yet it will evade review?



1 MS. FABIANO: Well, first of all, there's
2 something slightly reprehensible about saying that the very
3 illegality that allows you to hold somebody in prison for
4 life is - - - is what's going to make it evade - - - you
5 know, not likely to evade review, to make it moot.

6 And on top of that, we also - - - the State - - -
7 it would be unseemly to grant them the ability to release
8 somebody off of the list they control, and then every
9 single time they could avoid having to have this issue
10 decided by this court.

11 JUDGE FEINMAN: All right. If we decide it's not
12 moot, what's the illegality you just referred to?

13 MS. FABIANO: The illegality is - - - I guess
14 it's a substantive due process. Mr. Johnson does have a
15 right to liberty here, and with substantive due process,
16 it's always a balancing. There's a ledger, right? What
17 are Mr. Johnson's interests - - -

18 JUDGE FAHEY: Can I just clarify? Are you
19 challenging his - - - his incarcer - - - you're - - - let
20 me get this right. You're challenging his incarceration,
21 not the statute; is that right?

22 MS. FABIANO: I'm sorry - - - yes, correct.

23 JUDGE FAHEY: You're challenging his - - -

24 MS. FABIANO: As applied to Mr. Johnson - - -

25 JUDGE FAHEY: Correct.



1 MS. FABIANO: - - - the State's claimed right to
2 hold him in prison for life because he didn't have a SARA-
3 compliant address is - - -

4 JUDGE FAHEY: Okay.

5 MS. FABIANO: - - - unconstitutional.

6 JUDGE FAHEY: So let me go - - - so the next part
7 of that is, what standard of review are you asking us to
8 apply?

9 MS. FABIANO: I'm asking for strict scrutiny
10 because, at it's core, he - - -

11 JUDGE FAHEY: And what if we say it's rational
12 basis. What's your argument then?

13 MS. FABIANO: I still don't think it meets
14 rational basis because, again, we go back to the
15 substantive due process ledger. We have Mr. Johnson's
16 right to be out in the community. He has been granted
17 parole here.

18 JUDGE WILSON: Is his liberty right a little bit
19 weaker then, let's say, Mr. Ortiz's or Mr. McCurdy's?

20 MS. FABIANO: I don't believe so. He's been
21 granted parole. He's been granted the right to be out in
22 the community. That's a significant liberty interest,
23 right? To serve your - - -

24 JUDGE FAHEY: Yeah, but parole still involves a
25 restraint on liberty - - - on some liberties.



1 MS. FABIANO: Yes.

2 JUDGE FAHEY: So that's pretty clear. That's
3 really not a contestable point.

4 MS. FABIANO: Sure. You - - -

5 JUDGE FAHEY: The contestable point seems to me
6 the imprisonment and the absence of a violation. Isn't
7 that what your point is?

8 MS. FABIANO: Yes, sure.

9 JUDGE FAHEY: Okay.

10 MS. FABIANO: DOCCS is acting prematurely here.
11 Their - - -

12 JUDGE FAHEY: So - - - go ahead.

13 MS. FABIANO: On their side of the ledger - - -
14 right, we're going to go back to the substantive due
15 process ledger - - - nothing has been violated here. Their
16 interest is intact. There is nothing - - - they're acting
17 preemptively. He has not violated parole. And their
18 interest can be achieved by releasing him to avail himself
19 of his statute - - - of his right to SARA-compliant shelter
20 in New York City as a right to shelter city under the
21 Callahan Consent Decree.

22 JUDGE WILSON: I thought there was something in
23 the record suggesting he had violated parole.

24 MS. FABIANO: Oh, well, since - - -

25 JUDGE WILSON: Yes.



1 MS. FABIANO: He's been rearrested, Your Honor -
2 - -

3 JUDGE WILSON: Yes.

4 MS. FABIANO: - - - since he's been out, yes.

5 JUDGE WILSON: And that's a violation of his
6 parole as well?

7 MS. FABIANO: Whether a parole violation drops or
8 not is up to parole.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.
10 Counsel?

11 MR. GINSBERG: May it please the court. This
12 case should be dismissed as moot, but if the court reaches
13 the merits, it should reject petitioner's substantive due
14 process claim.

15 I want to get right to petitioner's argument that
16 a ruling for the State here would authorize indefinite
17 detention for all SARA inmates seeking compliant New York
18 City shelter housing. That is not the case, and I have
19 about four limiting principles to give you.

20 Number one, this is somewhat of an exceptional
21 case on its facts, and this is an as-applied challenge.
22 Petitioner here has a trigger, a sex-offending trigger,
23 that readily applies to minors, namely, adolescent girls.
24 He's triggered by the sight of women in, quote, "a tight
25 dress and tight pants".



1 Also, petitioner's modus operandi for sex
2 offending doesn't require the sort of physicality that
3 greatly diminishes with age. His pattern of sex offending
4 has been seeing women in plain sight, approaching them from
5 behind, and rubbing up against their buttocks, not a great
6 physical hardship. So that's number one, just on attempts
7 of this - - -

8 JUDGE RIVERA: So how does keeping him away from
9 a school address that particular risk?

10 MR. GINSBERG: Keeping him away from a school
11 addresses that risk because he - - - at least according to
12 his own testimony at the parole hearing, there is a
13 substantial risk that he would be triggered to sexually
14 offend by anyone who resembles a woman in a tight dress or
15 - - -

16 JUDGE RIVERA: But he does this on the subway?

17 MR. GINSBERG: I'm sorry, Your Honor?

18 JUDGE RIVERA: He does this on the subway?

19 MR. GINSBERG: He has done this on the subway,
20 but his self-described trig - - -

21 JUDGE RIVERA: Has he done it other than on the
22 subway?

23 MR. GINSBERG: There's no record of him having
24 done it other places.

25 JUDGE RIVERA: Isn't it a better condition:



1 don't ride the subway?

2 MR. GINSBERG: I'm sorry, Your Honor?

3 JUDGE RIVERA: Isn't a better condition to reduce
4 the risk: don't ride the subway?

5 MR. GINSBERG: I suppose that would be a rational
6 condition as well, but I think Your Honor's colloquy is
7 pointing up the fact that the SARA restriction is working.
8 The SARA has - - - has limited his contact with adolescents
9 and, for example, adolescent girls that you'd find at a
10 high school who might wear tight clothes and fit
11 petitioner's trigger.

12 JUDGE RIVERA: I don't know; they ride subways
13 too. I'm not so sure about that.

14 MR. GINSBERG: I'm sorry, Your Honor?

15 JUDGE RIVERA: They ride subways too.

16 MR. GINSBERG: Well, the SARA restriction doesn't
17 have to do with subways; it only has to do with - - -

18 JUDGE RIVERA: I know that.

19 MR. GINSBERG: - - - with - - - right, with
20 distance from a school. And just because it doesn't
21 address every single issue does not mean it's irrational.
22 It's rational if it cuts down on the chance for petitioner
23 to reoffend.

24 JUDGE RIVERA: Let me ask you this. If all the
25 science and all the data says that this type of restriction



1 doesn't achieve goals, can it be rational?

2 MR. GINSBERG: Well, the science and the data
3 doesn't say that. It certainly doesn't say that with
4 respect to people in petitioner's circumstances, people who
5 have a trigger that is activated not by seeking out
6 victims, stalking them, or the like, that he - - -

7 JUDGE RIVERA: I thought he said women. Did he
8 say women?

9 MR. GINSBERG: I'm sorry, Your Honor?

10 JUDGE RIVERA: Did he say women in the tight-
11 fitting clothes?

12 MR. GINSBERG: He did say women in tight-fitting
13 - - -

14 JUDGE RIVERA: Yeah, that's not usually a child.

15 MR. GINSBERG: No, not usually a child, but the -
16 - - but the interest of SARA is not limited to children, as
17 we might think of a child of ten or eleven. It's limited -
18 - - the interest of SARA, that statute is addressed to
19 minors, anyone under the age of eighteen.

20 JUDGE RIVERA: You know, we don't usually refer
21 to a woman and equate her with a minor, is my point.

22 MR. GINSBERG: Oh, I agree with you.

23 JUDGE RIVERA: But I'd like to hear your answer
24 on the science.

25 MR. GINSBERG: Well, my answer on the science is



1 - - - and some of the articles that we cite in our brief
2 show that for people in - - - first of all, we think that
3 would be a legislative issue. The question would be
4 whether the legislature should revisit the wisdom of SARA
5 or not. But the science, according to the articles we
6 cite, show that people like petitioner would be rationally
7 deterred by the SARA - - -

8 JUDGE RIVERA: So it's your position the science
9 is in dispute?

10 MR. GINSBERG: I think there's some dispute about
11 the science. I actually - - -

12 JUDGE RIVERA: If there was not - - - if there
13 was not. I understand your point, of course, about the
14 policy decision. The legislature needs that information -
15 - - I'm not disputing that with you. But can the
16 legislature really enact a law that goes against all of the
17 science regarding the actual achievement of the goal?
18 Isn't that something that's within our bailiwick?

19 MR. GINSBERG: If the science was that lopsided,
20 I would be - - -

21 JUDGE RIVERA: No, no, no, not lopsided;
22 absolutely contrary. My hypothetical is not about science
23 where there's some dispute, there are different - - - I
24 didn't ask that question. I understand your position on
25 that. It's a very compelling one.



1 MR. GINSBERG: Well, if - - -

2 JUDGE RIVERA: If all of the science really shows
3 otherwise - - -

4 MR. GINSBERG: If all of the science really - - -

5 JUDGE RIVERA: It's like climate change.

6 MR. GINSBERG: Yeah, if all of the science really
7 shows otherwise, I suppose there would be a strong argument
8 that it is irrational. Although I would - - - I would go
9 back to the fact that this court's cases have always said
10 that the rational basis test and the rationality with which
11 a legitimate interest is served can be backed up with
12 rational speculation.

13 So I think, really at the rational basis level,
14 aside from just an overwhelming undisputed scientific
15 consensus of the sort Your Honor is positing, the
16 legislature is allowed to engage in simple rational
17 speculation and logical thinking: if A, then B; if B then
18 C, et cetera.

19 JUDGE RIVERA: But anything short of that - - -
20 anything short of that allows the legislature, of course,
21 to act and - - - and then would survive rational review - -
22 - rational basis review?

23 MR. GINSBERG: I think that's right. And I do
24 want to - - -

25 JUDGE RIVERA: Thank you.



1 MR. GINSBERG: - - - address some of the other
2 reasons why a ruling for the State here would not sanction
3 the indefinite detention that petitioner raises the specter
4 of.

5 JUDGE STEIN: Before you do that, I - - -

6 JUDGE FAHEY: Are you particularly concerned - -
7 -

8 JUDGE STEIN: - - - just had a - - -

9 JUDGE FAHEY: Go ahead, Judge. I'm sorry. You
10 finish.

11 JUDGE STEIN: A slightly different question,
12 talking about whether we're talking about rational review
13 or some other rational basis review or some other standard,
14 can there ever be a fundamental right that is based on a
15 statutory or regulatory scheme as opposed to a
16 constitutional right?

17 MR. GINSBERG: Our position is no. Our position
18 is that a fundamental - - - not constitutional rights are
19 fundamental, but all fundamental rights do derive from the
20 constitution.

21 JUDGE STEIN: And where was the right being
22 claimed here derived from, in your view?

23 MR. GINSBERG: Well, it's not only my view; it's
24 also the view of the prominent Second Circuit case that my
25 friend on the other side cites, the Victory case. The



1 right here derives from New York State's legislative and
2 executive parole scheme. As a constitutional matter, there
3 is no fundamental right to release while subject to a valid
4 prison sentence.

5 And as petitioner pointed out, he remains subject
6 to that valid prison sentence. It is a long sentence.
7 It's a life sentence. But strictly speaking, that sentence
8 authorizes imprisonment up to the maximum, up to life. But
9 there are good reasons to think that that sort of life
10 imprisonment, for failure to satisfy the SARA condition,
11 would not apply. And I think I tried to discuss one of
12 them, which is the particular facts of this case, but there
13 are also mechanisms available to the offender to try to
14 extricate himself from the SARA law.

15 Number one, the sex offender can petition to
16 modify his level 3 designation. All the arguments being
17 made on the other side today about why, notwithstanding
18 petitioner's level 3 designation, he's simply not that guy
19 anymore, he's reformed, et cetera, he's aged a little bit,
20 those are all excellent arguments to be pitched - - -

21 JUDGE FAHEY: Well, but that hasn't really been
22 the case in this case, has it?

23 MR. GINSBERG: No, exactly. But what I'm saying
24 is there are avenues open to offenders to take steps to
25 ensure that SARA does not apply indefinitely. So they can



1 - - - they can try to modify their designation. And if the
2 evidence is as persuasive as my friend on the other side
3 says it is, then that modification petition would be taken
4 seriously.

5 JUDGE FAHEY: He was kept in Adirondack, right?

6 MR. GINSBERG: That was the most - - - that was
7 the facility from which he was discharged.

8 JUDGE FAHEY: Was that a residential treatment
9 facility?

10 MR. GINSBERG: No, that was not. That was
11 correctional custody.

12 JUDGE FAHEY: How long was he kept there?

13 MR. GINSBERG: I'm sorry, Your Honor?

14 JUDGE FAHEY: How long was he kept there?

15 MR. GINSBERG: I'm not sure how long - - - he was
16 kept in correctional custody for twenty-seven months. I'm
17 not sure the percentage of that that was at Adirondack.

18 JUDGE FAHEY: I guess my question is: was
19 Adirondack used as an RTF?

20 MR. GINSBERG: No - - - and my answer was no.

21 JUDGE FAHEY: Okay.

22 MR. GINSBERG: No, it is not. It is a
23 correctional custody. And the reason he was in
24 correctional custody is because he was - - - he had a
25 parole sentence. He still was subject to a valid - - -



1 JUDGE FAHEY: After someone has been placed on
2 parole, can the six-month limitation ever kick in for
3 someone who has a lifetime sentence?

4 MR. GINSBERG: Well, as I understand it, the six-
5 month limitation is more geared towards folks on PRS
6 serving definite terms. I don't think that issue has
7 really been brought up in the parole indefinite - - -
8 indeterminate term context. So I - - - I think the - - -
9 the statutory framework would be a little different.

10 I do want to get to just a couple more of these
11 limiting principles because I - - - the - - - the other
12 side's argument - - -

13 JUDGE FAHEY: Go ahead.

14 MR. GINSBERG: - - - really does seem to be that
15 - - - that a ruling for the State here would authorize
16 indefinite detention.

17 So in addition to seeking to modify their level 3
18 designation, which for a petitioner like Mr. Johnson would
19 get him out of SARA, the sex offender might sometimes have
20 avenues, on direct review and thereafter, to try to reduce
21 their actual penal sentence. And of course that would
22 directly reduce the amount of time that they are within
23 DOCCS' jurisdiction, and SARA would apply.

24 And also this court, I suppose, in theory, has
25 another mechanism available to it to police these sorts of



1 situations as well. I could imagine that there would
2 always remain the judicial backstop of review for
3 government conduct that shocks the conscience, even outside
4 of the, sort of, rationality of continued applicability of
5 a legislative act that would implicate the standard
6 rational basis review.

7 So if there are no further questions - - -

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. GINSBERG: - - - we would ask that you
10 affirm. Thank you.

11 CHIEF JUDGE DIFIORE: Thank you.

12 Ms. Fabiano?

13 MS. FABIANO: Just to pick up on a couple of
14 threads there. First of all, Mr. Johnson was held in
15 prison. He was in a correctional facility. There was
16 never even any pretense of transferring him to an RTF at
17 all times. He was in prison - - -

18 JUDGE FAHEY: He was never in an RTF?

19 MS. FABIANO: Never.

20 JUDGE FAHEY: Okay.

21 MS. FABIANO: And that's because DOCCS claims the
22 authority - - - that's the only way they felt they could
23 keep him was if - - - because they felt he was within his
24 life sentence, they had the authority to keep him in
25 prison, pursuant to that life sentence.



1 Picking up quickly on, Justice Rivera, your - - -
2 your line of does the science support, what does it
3 support. I think our brief lays out fairly well, as does
4 the Third Department's concurrence, that the efficacy of
5 these restrictions is - - - is really - - - it's greatly in
6 question. It's not even in question. It shows that it's
7 just not - - - it doesn't achieve the goals that they want
8 to achieve.

9 But aside from that, even if - - -

10 JUDGE RIVERA: Well, why isn't he right that that
11 - - - that really is for the legislature?

12 MS. FABIANO: Yeah, well, I can move on to Mr.
13 Johnson. As applied to Mr. Johnson, he - - - he doesn't
14 have a child victim; he's never had a child victim. His
15 cases, up until this point, have been women on the subway.

16 JUDGE STEIN: But isn't this a point that - - -
17 you know, how do you distinguish between a mature
18 seventeen-year-old and a nineteen-year-old woman? I mean,
19 so - - - so isn't - - - isn't there still the significant
20 risk that his - - - his particular circumstances present -
21 - -

22 MS. FABIANO: Well, I guess it's not locale
23 restricted, I - - - I guess I would say. Whether he's on
24 the subway - - -

25 JUDGE STEIN: Well, but does the restriction - -



1 -

2 MS. FABIANO: You're around - - -

3 JUDGE STEIN: - - - have to cover all possible
4 risks?

5 MS. FABIANO: I'm sorry?

6 JUDGE STEIN: Does the restriction have to cover
7 all possible risks in order to be rational?

8 MS. FABIANO: No, but again, as applied to Mr.
9 Johnson, there's no - - - there's nothing to indicate and -
10 - - that it's always been a woman on the subway, four - - -
11 there's four or five cases.

12 But aside from that, again, we go back to his - -
13 - his - - - he's been granted parole, and he - - - the
14 State can achieve its goal here by releasing him. They can
15 achieve its goal, just as they did when they released him
16 this time. He - - -

17 JUDGE RIVERA: Okay. But your point about - - -

18 MS. FABIANO: He's entitled - - -

19 JUDGE RIVERA: If I can interrupt you here, this
20 point now about parole - - - I get the bigger point about
21 parole - - - is - - - is that that the board of parole has
22 already determined his risk and determined it's appropriate
23 on - - - with conditions in place, to release him?

24 MS. FABIANO: Um-hum.

25 JUDGE RIVERA: Is that yes or no? That's yes or



1 no?

2 MS. FABIANO: I'm sorry.

3 JUDGE RIVERA: I just want to know if that's your
4 position on that.

5 MS. FABIANO: That the board can determine his -
6 - -

7 JUDGE RIVERA: Not that they can, but that they
8 have already made this assessment about risk - - -

9 MS. FABIANO: They may - - -

10 JUDGE RIVERA: - - - is that your point with this
11 line of argument?

12 MS. FABIANO: They've made their assessment.

13 JUDGE RIVERA: Okay. So why aren't they right,
14 because I believe this is what they had in their brief,
15 that that included an understanding, of course, that he
16 would have to comply with SARA, and if he doesn't have
17 compliant housing, that he's not going to be out.

18 MS. FABIANO: Well, because there's nothing to
19 say. Imposing the condition doesn't give them the right to
20 hold him in prison in anticipation of what they believe is
21 going to be a violation. They - - - there's nothing in
22 SARA to give them the right. They can impose conditions.
23 Just like they could say, you've got to go to this drug
24 program when you get out. Fine, I'll sign off on that. If
25 he doesn't go when he's out, then they violate him, and

1 they bring him back in, or they do what they will with him.

2 JUDGE RIVERA: So your approach to this is, he's
3 got parole, you've got to let him out. If he doesn't have
4 SARA-compliant housing, then he's violated parole?

5 MS. FABIANO: Well, there's another - - -

6 JUDGE RIVERA: Where's the victory in that?

7 MS. FABIANO: Well, I don't think that that's - -
8 - because I don't think that's actually how it would play
9 out. He's entitled to the - - - to shelter.

10 JUDGE RIVERA: Yeah.

11 MS. FABIANO: And he's entitled to SARA-compliant
12 shelter in New York City, and that's what he would go avail
13 himself of. That's what he requested, and that's what he
14 has the right to do.

15 But even so, as my colleague had mentioned, DOCCS
16 determines and decides how, and when, and if they're going
17 to enforce any of their conditions. They don't drop a
18 parole warrant every single time you have a dirty urine, or
19 whatever it is - - - you have a curfew violation. They
20 make reasonable decisions about these things.

21 JUDGE RIVERA: Yeah, but that is episodic as
22 opposed to you don't have a place to live that is in
23 compliance with this particular legislative mandatory
24 condition.

25 MS. FABIANO: It's a condition; it's not a bar to



1 release. But - - - but they can - - -

2 JUDGE RIVERA: Well, a condition, it would seem
3 like.

4 MS. FABIANO: He can comply. He can comply with
5 the shelter system.

6 JUDGE RIVERA: Okay.

7 MS. FABIANO: And - - -

8 JUDGE RIVERA: Okay.

9 MS. FABIANO: - - - I would just point out, in
10 Kahn - - - there was a case I cited that came out in
11 September in the Second Department, Kahn v. Annucci, and
12 that sort of will give you a glimpse of what DOCCS does.
13 There, there was somebody who was already out in the
14 community, and a school opened up near him. They gave him
15 time. They were reasonable. So you could put them in
16 temporary housing like that, and then when a SARA-compliant
17 bed opens up, he gets it. And even in Kahn v. Annucci,
18 they allow him - - -

19 JUDGE STEIN: Is there anything in the record to
20 indicate that there are enough SARA-compliant beds in the
21 shelter system to accommodate all of the people being
22 released under this condition?

23 MS. FABIANO: I think all we have to go on in the
24 record is the fact that the - - - that the Callahan consent
25 decree exists, that the City will provide a shelter bed to



1 whoever requests one, and that the Bonilla court
2 specifically found that DHS agreed and was ready, willing,
3 and able to comply with that. When the Attorney General
4 asked, on cross-examination, what if, you know, everybody
5 came - - -

6 JUDGE FEINMAN: All right. But that's assuming
7 we accept and don't grant the motion to strike that
8 testimony.

9 MS. FABIANO: The Bonilla decision actually sets
10 forth everything that we need to rely on anyway.

11 JUDGE FEINMAN: Okay.

12 MS. FABIANO: The Bonilla decision says that the
13 DHS recognizes its obligation and indicated that it would
14 find a bed for anyone even if there were no vacancies.

15 CHIEF JUDGE DIFIORE: Thank you, Your Honor.

16 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York People Ex Rel. Fred Johnson v. Superintendent, Adirondack Correctional Facility, et al., No. 74, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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