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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK EX
REL. ANGEL ORTIZ,

Appellant,

-against-

No. 75

DENNIS BRESLIN, SUPERINTENDENT OF
QUEENSBORO 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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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 75, ex rel. Ortiz v.
3 Breslin.

4 Good afternoon, counsel.

5 MR. PAGE: Good afternoon, Your Honors. Will
6 Page, Legal Aid Society, on behalf of Mr. Ortiz.

7 I think, as you've heard from my colleagues, the
8 narrow constitutional question that's in front of the court
9 is whether DOCCS can speculate about the existence of
10 compliant housing and use that speculation to preemptively
11 violate these vested liberty interests, and to do so
12 against those individuals that are homeless.

13 What we're - - - what we're hearing Your Honors
14 asking is what alternatives are available. This case is
15 all about the different alternatives that are available.
16 And DOCCS has not availed themselves of any of those.
17 Could DHS house these individuals? Let's find out.

18 DHS, Judge Wilson, is not violating the consent
19 decree because DHS is never getting the opportunity to have
20 these individuals present themselves. And that's what the
21 Bonilla court specifically found was that, if these
22 individuals presented to shelter intake, DHS would find
23 housing for these individuals.

24 It's not really a question of what type of
25 shelter beds are currently available because the Callahan



1 Consent Decree establishes that New York City is a right-
2 to-shelter city. They would have to use some means to find
3 shelter. Indeed, DOCCS has those alternative means too.
4 They have emergency hotel funding. DHS has been very
5 creative, in handling this COVID crisis, in finding whole
6 new ways to shelter individuals who need to be sheltered.
7 Let's find out what kind of creative solutions they could
8 employ that would not violate - - -

9 JUDGE STEIN: How long after the consent decree
10 did this arrangement between DHS and - - - and DOCCS come
11 to be?

12 MR. PAGE: Are we talking about in 2014, Your
13 Honor, when - - - when they - - -

14 JUDGE STEIN: Well - - -

15 MR. PAGE: - - - when DHS tried to work with - -
16 -

17 JUDGE STEIN: The consent decree - - -

18 MR. PAGE: - - - DOCCS?

19 JUDGE STEIN: The dissent decree was - - - no,
20 no, no, no, no, no.

21 MR. PAGE: You're asking about Callahan Consent
22 Decree?

23 JUDGE STEIN: Yes.

24 MR. PAGE: In the mid/early 1980s, yes, Your
25 Honor.



1 JUDGE STEIN: Okay. All right. So and the
2 agreement to limit it to a certain number of people, when
3 did that come into play?

4 MR. PAGE: That started in 2014 when DHS agreed
5 with DOCCS' perspective to have a containment strategy.
6 DOCCS wanted to concentrate individuals in New York City
7 because, let's face it, how else can you house people in
8 New York City if they're not concentrated? So DOCCS wanted
9 to do that, and DHS - - - which is in this memorandum which
10 I reference in the briefs - - - DHS came together and said,
11 okay, we'll do our best to help you with that, and there
12 are about three or four shelters where we can put these
13 people. From our experience, the majority of them are
14 Wards Island. And so they've concentrated them and they've
15 agreed, for administrative ease, to have ten a month. And
16 that number hasn't changed as these numbers have grown.
17 When - - - when Ms. Murdukhayeva was here last time, I let
18 you know it was 175 people. Well, now it's 250 people.

19 JUDGE STEIN: So is there - - -

20 MR. PAGE: How many people is enough?

21 JUDGE STEIN: Is there any evidence - - - I think
22 it's similar to the question I asked before. Is there any
23 evidence in the record as to, you know, perhaps in the
24 1980s everybody thought there were enough beds, and so
25 there was this consent decree. Is there any evidence in



1 this record, in this case, that DHS could actually comply
2 with that today, given the understanding that - - - that
3 there's no longer an understanding that all shelters are
4 available to people with - - - with SARA conditions and - -
5 -

6 MR. PAGE: I think the Bonilla court - - -

7 JUDGE STEIN: -- and the numbers of people that
8 are - - - that are in that situation now? Is there any
9 evidence in this record about that?

10 MR. PAGE: Well, I think the Bonilla court. And
11 we relied below, to the writ court, on the Callahan Consent
12 Decree and the regulations that provide housing for even
13 those who are sex offenders. And I think the Bonilla court
14 relied upon Ms. Yvonne Tinsley-Ballard's testimony.

15 JUDGE STEIN: We would have to accept that that
16 testimony is before us.

17 MR. PAGE: Well, I think the right to shelter is
18 pretty fairly established. The Bonilla court just hammers
19 it home and makes it excruciatingly clear that they feel
20 that the Callahan Consent Decree includes those who are
21 subject to SARA.

22 JUDGE STEIN: I guess my question is more of this
23 practical one. So the right to shelter may exist, but - -
24 - but as a practical matter may not be able to be complied
25 with --



1 MR. PAGE: Well, I think, Your Honor, that's why
2 I was - - -

3 JUDGE STEIN: -- in every situation.

4 MR. PAGE: - - - mentioning that DHS uses other
5 alternatives in its - - - it its arsenal. And so can
6 DOCCS. They seem to be spending approximately 70,000
7 dollars a year to keep these individuals in prison. So
8 that money, I think, could easily be spent on finding
9 someplace to house - - -

10 JUDGE RIVERA: The reality is when you have a
11 consent decree, you will have times when people do not
12 comply with their obligations under the consent decree, and
13 then the attorneys go in, they point out the flaws, they
14 either come to some other understanding, or people come
15 into compliance, or they end up going to court.

16 MR. PAGE: That's correct.

17 JUDGE RIVERA: That - - - that is not about what
18 DOCCS is doing. That's about whether or not DHS is
19 complying with its consent decree. DOCCS doesn't get to
20 decide, on its own, whether or not DHS can, will, should
21 comply with its obligations that it signed off on decades
22 ago.

23 MR. PAGE: But DOCCS has to release them - - -

24 JUDGE RIVERA: So - - -

25 MR. PAGE: - - - to find that out.



1 JUDGE RIVERA: - - - in any event, just to be
2 clear with your response to Judge Stein's question,
3 although I understand you're referring to the Bonilla
4 decision -- certainly it's a decision; one can look at for
5 what it's worth, but I understood really your arguments
6 were based on the legal commitment of DHS, pursuant to its
7 own consent decree.

8 MR. PAGE: Yes, and the consent decree
9 specifically says present to shelter intake. So that is
10 why we can't sue DHS. That's why DHS is not a party to
11 these proceedings is because they've never presented to
12 shelter intake so as to trigger the consent decree so as to
13 allow suit. So they are - - -

14 JUDGE FAHEY: Can I - - -

15 MR. PAGE: - - - heading off that note - - -

16 JUDGE FAHEY: Before you go off on another point
17 here, these broader policy questions are interesting. Some
18 of it, it seems to me, it's outside the record because
19 we're struggling with what's admissible and what isn't.
20 But isn't this - - - the ultimate question in this case
21 we're talking about is continued incarceration. The
22 factual point is that this individual has rea - - - their -
23 - - reached their maximum release date; is that correct?

24 MR. PAGE: So Mr. Ortiz was held for seventeen
25 months at his conditional release - - -



1 JUDGE FAHEY: Um-hum.

2 MR. PAGE: - - - and then eight more months at
3 his maximum expiration. So he spent twenty-five months in
4 prison.

5 JUDGE FAHEY: So the short answer is yes, he's
6 reached - - -

7 MR. PAGE: Yes.

8 JUDGE FAHEY: - - - his maximum release date,
9 right?

10 MR. PAGE: Correct.

11 JUDGE FAHEY: Okay. So this isn't a parole case.

12 MR. PAGE: Well, he has a term - - - so he has
13 ten years of incarceration that might be eight-and-a-half,
14 if he's good, which is what happened. And then he has five
15 years of post-release, in the community, supervision. And
16 so correct, it's not a parole case like Mr. Johnson, but
17 it's a community supervision case.

18 JUDGE FAHEY: Right.

19 MR. PAGE: And so DOCCS - - -

20 JUDGE FAHEY: So even though there's no right to
21 conditional release, the question then becomes, for the
22 court, is after you've reached your maximum release date,
23 how does that right change, right?

24 MR. PAGE: Absolutely.

25 JUDGE FAHEY: And how does it change?



1 MR. PAGE: Well, so the fundamental liberty to be
2 released from confinement is the oldest core liberty that's
3 recognized by the due process clause. The most
4 conservative justices of the Supreme Court, Justice Thomas,
5 for example, would limit substantive due process principles
6 only to that freedom from confinement.

7 So the - - - the ability for the State to
8 incarcerate someone, and restrict that fundamental liberty,
9 which never disappears, right, that is based on the
10 sentencing scheme. And while there may be no ethereal
11 right to conditional release or to parole, once it's been
12 granted, then those restrictions are diminished. That's
13 when the fundamental right is present and must - - - any
14 restriction on it has to be subject to strict scrutiny.
15 And if - - - if it weren't subject to strict scrutiny,
16 think about the opposite situation that would occur. The -
17 - - the Supreme Court has recognized another -- a number of
18 other fundamental liberties, the right to associate with
19 your family, your child, your spouse. So those, which are
20 subject to strict scrutiny when you're on supervision,
21 could just be wiped out because they'd never let you out to
22 begin with. That can't be the case.

23 JUDGE FAHEY: All right. When he was on -- when
24 he was on his PR - - - were there - - - was there any
25 violation besides - - -



1 MR. PAGE: Mr. Ortiz never intended to be
2 homeless, no, Your Honor. Mr. Ortiz did not violate
3 something that would have allowed the revocation of his
4 good time, nor did he do anything that would have allowed
5 the revocation of his supervision. And that's why DOCCS
6 never invoked those procedural avenues. They did this with
7 no process whatsoever, as we explained to the writ court.
8 So that's why this is a substantive due process question
9 because they invoked no process and they completely
10 eliminated the right.

11 And the reason it's a cruel and unusual
12 punishment is because they're only doing this to the people
13 that are reliant on shelter, right? The Supreme Court has
14 said, in Robinson v. California, that the Eighth Amendment
15 prohibits punishment based on your involuntary status.

16 So while Mr. Ortiz was "residing" at the
17 residential treatment facility, he could not leave the
18 facility to see his family, he could not leave the facility
19 to get gainful employment, he could not do any of the
20 things that the Supreme Court, in Morrissey, explained is
21 the freedom of a parolee, someone who's able to be part of
22 a community, right, and regain his life.

23 CHIEF JUDGE DIFIORE: Thank -- thank --

24 MR. PAGE: And the only thing he needed to do - -
25 - I'm sorry, Your Honor; I just want to finish. The only



1 thing he needed to do was to present himself to shelter
2 intake, and they thwarted that.

3 CHIEF JUDGE DIFIORE: Thank you.

4 MR. PAGE: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel?

6 MS. MURDUKHAYEVA: May it please the court.
7 Ester Murdukhayeva for the respondents.

8 I'd like to begin with the substantive due
9 process claim. It is subject to rational basis review.
10 Mr. Ortiz has no fundamental right to serve post-release
11 supervision in a manner that is different from what the
12 legislature has indicated. The liberty interest of someone
13 on post-release supervision is not absolute; it is
14 conditional, and it is conditioned by the ways in which the
15 legislature has designed a scheme of PRS. And there are
16 two important parts here that at that - - -

17 JUDGE FAHEY: So let me ask this. How does he
18 get out? If he hasn't violated, he's not being held on a
19 violation of any condition, how does he get out of PRS?
20 How does he get out of the residential treatment facility?

21 MS. MURDUKHAYEVA: Well, he would be out of - - -

22 JUDGE FAHEY: Just stick with that question.

23 MS. MURDUKHAYEVA: Sure. He would be out - - -

24 JUDGE FAHEY: How does he get out?

25 MS. MURDUKHAYEVA: - - - of the residential



1 treatment facility by finding SARA-compliant housing which
2 would permit him to comply with his conditions of post-
3 release supervision. So one of the restrictions that the
4 legislature has determined to impose on people on PRS is -
5 - -

6 JUDGE RIVERA: Why won't DOCCS let him try by
7 presenting himself to the shelter system in the City?

8 MS. MURDUKHAYEVA: Well, Your Honor, several
9 answers to that. The first is that it would not be
10 rational to require DOCCS to transport people to shelter
11 intake without confirming that DHS can or will accept those
12 people. And it would be - - -

13 JUDGE RIVERA: Well, why would you think they
14 can't if they've entered a consent decree that they will
15 provide shelter to those who present?

16 MS. MURDUKHAYEVA: Well, Your Honor, I think
17 DHS's representations in the Alcantara case, to which they
18 were actually a party, are really instructive here. In the
19 Alcantara case, what DHS represented is that the ten-
20 person-per-month policy, in their view, is consistent with
21 their obligations under Callahan, that the ten-person
22 limitation is a rational way to - - -

23 JUDGE WILSON: You ought to be careful about
24 arguing what DHS said in some other case if you want us to
25 take your motion seriously.



1 MS. MURDUKHAYEVA: Well, Your Honor, I think what
2 the - - - what my reference to the Alcantara statements are
3 intended to show is that it is impossible to resolve
4 factual questions about what DHS would or would not do when
5 presented with someone at shelter intake by looking at
6 records from two ex rel record proceedings. What Mr. Ortiz
7 is asking this court to do is actually quite extraordinary.
8 He is asking - - -

9 JUDGE RIVERA: Yeah, but you're assuming that
10 they're not going to comply with their legal obligations
11 under a consent decree. I mean, I'm not understanding the
12 rationality of that.

13 MS. MURDUKHAYEVA: Well, again, Your Honor, what
14 DHS has represented to DOCCS is that they're taking - - -
15 that they will take the ten people per month. There is no
16 evidence, even in the Bonilla case - - - I think the
17 Bonilla judge was very careful to say that the decision was
18 limited to the one person.

19 In the Bonilla case, what the evidence showed is
20 that there are an average of four open spots in SARA-
21 compliant shelters per night, and the DHS official even
22 testified in Bonilla that, quote, "she could not state
23 exactly how many SARA-compliant pers - - - how many SARA-
24 compliant offenders they would be able to accept" -- that
25 is at C-156 - - - and admitted that DHS has adopted a



1 policy of accepting ten SARA-restricted persons per month.
2 Now whether or not that is consistent with DHS's
3 obligations - - -

4 JUDGE RIVERA: Let me try this hypothetical.
5 Let's say you had an individual who's transgender, and the
6 City said, well, we know there's a law in the City that we
7 can't discriminate against someone who's transgender, but
8 we just can't assure you, we just can't make the promise to
9 you that we will not do that when they come into the
10 shelter. Is that a basis not to release the person who's
11 transgender because the City says I know we're not supposed
12 to discriminate, but we just can't promise that we won't?

13 MS. MURDUKHAYEVA: Well, Your Honor, I don't
14 think that that hypothetical is analogous to what is
15 happening here because the position - - -

16 JUDGE RIVERA: Well, that's why it's a
17 hypothetical.

18 MS. MURDUKHAYEVA: Well, the position that DHS
19 has taken is that this policy does comply with its
20 obligations under the Callahan Decree. That's at addendum
21 pages 17, 24 to 25, and 63 to 64. So in the Alcantara
22 case, DHS took the position that this policy is consistent
23 with its obligations under Callahan, and it even said that
24 this policy allows it to meets it - - - meet its
25 obligations under Callahan. Whether or not - - -



1 JUDGE RIVERA: Okay. So let's change my
2 hypothetical slightly, and the City says: we don't think
3 we're violating any rights of someone who's transgender if
4 we don't accept them into the shelter, regardless of what
5 the law says. We just think we'd be in compliance.

6 MS. MURDUKHAYEVA: Well, Your Honor, if the State
7 was under an obligation to release people only to SARA-
8 compliant shelter housing, and it did not have confirmation
9 that there was a SARA-compliant residence for that person
10 to go to upon release, the State cannot release that
11 person. I think that's what this court said in Gonzalez,
12 that whatever the City's obligations may be, from DOCCS's
13 perspective, DOCCS has an obligation to enforce SARA which
14 means to en - - -

15 JUDGE FAHEY: So would you consider this a
16 punishment, this person who can't meet the SARA rule? Is
17 this a - - - is this a punishment?

18 MS. MURDUKHAYEVA: No, Your Honor, and we think
19 the Second - - -

20 JUDGE FAHEY: Is it the basis of a violation of a
21 - - - of a PRS condition?

22 MS. MURDUKHAYEVA: It is not, Your Honor. The
23 Second Department - - -

24 JUDGE FAHEY: So let me just stay on that then,
25 all right? So it's - - - it's not a punishment to - - - to



1 lock somebody up in the same jail that they were in for the
2 eight-and-a-half years before?

3 MS. MURDUKHAYEVA: Well, it - - - the RTF is a
4 different facility and is subject to different rules than -
5 - - than other types of correctional facilities.

6 JUDGE FAHEY: They're pretty much the same,
7 though, right?

8 MS. MURDUKHAYEVA: The - - -

9 JUDGE FAHEY: Intellectual honesty is always a
10 virtue on these things. It doesn't always win you the
11 case, but there's a certain clarity - - -

12 MS. MURDUKHAYEVA: Well - - -

13 JUDGE FAHEY: - - - that we need when we're
14 looking at these things, and it's hard for me to see much
15 difference in the - - -

16 MS. MURDUKHAYEVA: Well, Your Honor, what I would
17 note is that the legislature was very well aware of what an
18 RTF is because - - -

19 JUDGE FAHEY: No, but that's not what I'm asking
20 you, not what the legislature was aware of. I want to
21 know, this is an Eighth Amendment case, this person's being
22 kept incarcerated, and one of the principles we look at is
23 whether this can be considered a punishment. Is this a
24 punishment?

25 MS. MURDUKHAYEVA: Well, Your Honor, the reason

1 for why people like Mr. Ortiz are housed in the RTFs is to
2 facilitate compliance with SARA. And SARA itself is not
3 punitive. I think courts have been consistent in saying
4 that - - -

5 JUDGE FAHEY: So if I understand you correctly,
6 then you're saying, no, it's not a punishment?

7 MS. MURDUKHAYEVA: Correct, it is not a
8 punishment. This housing is used to facilitate compliance
9 with SARA which is, itself, not a punitive condition. It
10 is intend - - - the statute was passed to protect - - -

11 JUDGE FAHEY: And let me just - - - because
12 you're time's almost up; you've only got -- so - - - so the
13 violation is the violation of the SARA requirement, that
14 the prisoner can't meet the SARA requirement because he
15 can't find available shelter, right?

16 MS. MURDUKHAYEVA: The individual would not be
17 able to comply with SARA, and DOCCS has its own obligations
18 under SARA, which is not to release people without ensuring
19 that they have SARA-compliant housing.

20 JUDGE FAHEY: Okay.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 Mr. Page, I took the liberty of reserving one
23 minute of rebuttal time for you, sir.

24 MR. PAGE: I appreciate that, Your Honor.

25 CHIEF JUDGE DIFIORE: Do you care to exercise



1 that?

2 MR. PAGE: It slipped my mind. I would love to.

3 CHIEF JUDGE DIFIORE: Okay.

4 MR. PAGE: I would just like to say, it's
5 interesting that we fall back to the rationality of SARA
6 and the rationality of imposing this condition because
7 that's not what we're talking about. We're not talking
8 about what it's like when you're out on the street
9 experiencing the liberty that you're entitled to. We're
10 talking about what DOCCS keeps saying that they're doing
11 which is holding you in the same prison so that they don't
12 have to violate you.

13 JUDGE STEIN: Well, do you agree that if, say,
14 let's just take Queensboro, was operated in the way that,
15 you know, there's been some discussion about how a
16 residence should be operated as an RTF, then - - - then we
17 wouldn't be talking about punishment here. Is that - - -
18 do you agree with that?

19 MR. PAGE: Your Honor is talking about if 73(10)
20 was interpreted according to its plain words --

21 JUDGE STEIN: Well --

22 MR. PAGE: -- as a residence where you could come
23 and go, then absolutely - - -

24 JUDGE STEIN: No, I'm just - - -

25 MR. PAGE: - - - that would solve the problem.



1 JUDGE STEIN: I'm just applying it to your
2 arguments about what is required under - - - under the
3 correction law.

4 MR. PAGE: Yes, I think 73(10), if properly
5 interpreted, according to the amicus that PLS put in in
6 McCurdy, and according to the arguments that we presented
7 to the writ court below, if it were interpreted as a
8 residence - - - which again, the plain words between 73(10)
9 and 70.45(3) are quite different. 70.45(3) talks about
10 participation in a residential treatment facility and its
11 programming. It doesn't talk about using it as a residence
12 for persons.

13 And if 73(10) really means what it says, then
14 it's a temporary stopping off point that can be a shelter,
15 then the individual could present themselves to DHS intake
16 and we could really find out whether or not, as they
17 presented to the Bonilla court, they would house all of
18 these individuals, which is what they said they would do.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. PAGE: Thank you, Your Honors.

21 (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 ex rel. Angel Ortiz v. Dennis Breslin, Superintendent of Queensboro Correctional Facility, et al., No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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