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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 138

VINCENT IZZO,

Appellant.

1320 Eagle Street
Albany, New York 12207
September 11, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 138, People v. Izzo.
2 Counsel, you want any rebuttal time?

3 MR. BEVELACQUA: Two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
5 go ahead.

6 MR. BEVELACQUA: May it please the court,
7 I'm Adam Bevelacqua, and I represent Vincent Izzo,
8 the appellant.

9 The lower court in this case failed to give
10 the proper weight to compelling mitigating evidence
11 of both statutory rape and mental disability and
12 developmental delay. Also, the lower court
13 improperly scored points under risk factors 3 and 7,
14 therefore they improperly designated Mr. Izzo as a
15 Level 2 sex offender.

16 As a Level 2 sex offender, versus a Level
17 1, he'll spend the rest of his life on the sex
18 offender registry - - -

19 CHIEF JUDGE LIPPMAN: Tell us about the
20 particular issues that you say they mishandled. What
21 about the webcam business?

22 MR. BEVELACQUA: Okay. Well, regarding
23 risk factor 3 - - -

24 CHIEF JUDGE LIPPMAN: Yes.

25 MR. BEVELACQUA: - - - this - - - the court

1 is supposed to determine the number of victims. Mr.
2 Izzo is registered for - - - the sex offender
3 registry lists him as having engaged in acts with two
4 teenagers.

5 CHIEF JUDGE LIPPMAN: Right.

6 MR. BEVELACQUA: The court decided to find
7 a third - - -

8 CHIEF JUDGE LIPPMAN: Because of the
9 webcam?

10 MR. BEVELACQUA: Because there was a
11 particular - - - there's a - - - a passage in the
12 grand jury testimony where someone he was texting
13 with describes a webcam conversation. And it isn't
14 very clear what happened on the webcam conversation.

15 JUDGE STEIN: But counselor, there's Penal
16 Law Section 235.22, it sets forth a crime of
17 disseminating indecent materials to a minor, which
18 requires that the defendant intentionally depict or
19 describe sexual conduct that is harmful to a minor
20 through a computer communication system, in order to
21 invite the minor to engage in sexual acts. And
22 sexual conduct, as defined in that statute, includes
23 physical contact with a person's clothed or unclothed
24 genitals.

25 Under that section, isn't it at least

1 arguable that - - - that there was a sex offense
2 committed about - - - towards this young woman in - -
3 - in the webcam?

4 MR. BEVELACQUA: Well, neither of the lower
5 courts found on that basis. And more importantly,
6 it's not just whether there's some evidence. There
7 must be clear and convincing evidence, which does not
8 exist in the grand jury testimony or the passage that
9 the People and the county court have relied on - - -

10 JUDGE FAHEY: I thought you were arguing
11 that sexual conduct required actual physical contact?

12 MR. BEVELACQUA: That it requires contact
13 that rises to the level of a SORA-level sex offense.
14 Because that's generally what the - - -

15 JUDGE FAHEY: So - - -

16 MR. BEVELACQUA: - - - counting of victims
17 requires.

18 JUDGE FAHEY: - - - there - - - there can
19 never be a digital crime, then? Or a digi - - - you
20 can never meet the requirements - - - I guess it's
21 risk factor 3 - - - under a digital link?

22 MR. BEVELACQUA: If the sexual conduct was
23 something that was prohibited by a SORA-level sex
24 offense - - -

25 JUDGE FAHEY: Um-hum.

1 MR. BEVELACQUA: - - - then presumably that
2 would be acceptable. That's what the language of the
3 guidelines seems to suggest is that activity - - -

4 JUDGE FAHEY: I think I see. I'm not
5 exactly sure I do. But I think I understand your
6 argument. Okay.

7 MR. BEVELACQUA: Okay. The - - - right.
8 The language of the guidelines seems to suggest that
9 even uncharged conduct can be counted, but only if it
10 rises to the level and meets the elements of a SORA-
11 level sex offense.

12 In really all of the Appellate Division
13 case law other than this case, that's essentially
14 what they found. The person committed acts that
15 would have satisfied a SORA-level sex offense, but
16 that wasn't actually charged in the indictment, it
17 was just that there was some other person or victim
18 that was found later.

19 JUDGE ABDUS-SALAAM: But on that point,
20 before you leave that point, counsel, your position
21 is that the webcam - - - assuming what was described,
22 the testimony was clear or accurate, that would not
23 be a sex offense? Is that - - - is that your
24 position?

25 MR. BEVELACQUA: Based on what is actually

1 said in the testimony, it doesn't rise to the level
2 of sexual conduct. And there's nothing in it that
3 presents clear and convincing evidence of something
4 that is sexual conduct.

5 JUDGE FAHEY: So you're asking us to remit
6 for a downward departure hearing to county court?

7 MR. BEVELACQUA: Well, I'm asking you to
8 reverse. I - - - this - - - there's abundant factual
9 record. There isn't really any contested facts,
10 especially regarding the downward departure issues of
11 statutory rape and - - -

12 CHIEF JUDGE LIPPMAN: Well - - - talk about
13 the - - -

14 MR. BEVELACQUA: - - - autism spectrum.

15 CHIEF JUDGE LIPPMAN: - - - statutory rape
16 exception. Why - - - why is that something we should
17 be considering?

18 MR. BEVELACQUA: Well, the Fourth
19 Department has developed a very large body of cases -
20 - -

21 CHIEF JUDGE LIPPMAN: Only the Fourth
22 Department, right?

23 MR. BEVELACQUA: Well, but other
24 Departments have applied it. But its main - - - the
25 main case law is People v. Weatherely and progeny,

1 that's been developed in the Fourth Department. And
2 it's completely consistent with People v. Gillotti,
3 which this court decided. It's a subtype of downward
4 departure based on a rather common issue of when
5 there's a person who's in their early twenties - - -
6 late teens, early twenties, and they have sex with a
7 teenager, especially if there's other mitigating
8 factors which are listed.

9 This case - - -

10 JUDGE STEIN: Well, assuming that there is
11 such an exception, aren't - - - aren't they usually
12 closer in age than - - - than this defendant and --
13 and his victims?

14 MR. BEVELACQUA: My - - - my brief clearly
15 goes over all the established case law from the
16 Appellate Division; and this case squarely falls
17 within the age differential - - -

18 JUDGE STEIN: Well, and - - - and also,
19 don't they usually deal with a couple - - - I'll put
20 that in quotes - - - relationship, you know, an
21 ongoing relationship?

22 MR. BEVELACQUA: I mean, in this case
23 that's a - - - a matter of perspective in that
24 Vincent, who has mental issues that give him - - -
25 that make him about the mental age of the people he

1 was speaking to, was communicating with them for a
2 while, as friends. This was like a date, as he
3 perceived it. They went, they, you know, watched
4 movies, played video games. And then with one person
5 there was oral sex, and another person he made out
6 with them and felt them.

7 CHIEF JUDGE LIPPMAN: So what's the
8 significance of the developmental disability in terms
9 of the relief that you're seeking?

10 MR. BEVELACQUA: Well - - -

11 CHIEF JUDGE LIPPMAN: Why - - - why - - -
12 how does that play into the points?

13 MR. BEVELACQUA: So it - - - it explains in
14 a mitigating way why the statutory rape occurred in
15 one - - - on one hand. And on the other hand, it's a
16 mitigating factor all on its own, that's very
17 compelling, because there are three expert reports
18 that all converge to conclude that he is not a danger
19 of recidivism, and that his condition is really
20 developmental delay. It's not something where he's
21 going to have a lifelong compulsion. He's not a
22 pedophile or something like that. It - - - he
23 literally developed too slowly.

24 JUDGE ABDUS-SALAAM: So at twenty-one he -
25 - - under your - - - your theory, counsel, at twenty-

1 one he has the mental capacity or emotional capacity
2 of a thirteen- or fourteen-year-old. So when - - -
3 when does he become a twenty-one-year-old emotionally
4 and - - - and mentally?

5 MR. BEVELACQUA: That's a good question.
6 But I think for the issues of regarding downward
7 departure, it's only relevant to look at whether or
8 not he will progress and whether he has the capacity
9 to.

10 JUDGE ABDUS-SALAAM: Well, that's what I'm
11 - - - I'm kind of asking that.

12 MR. BEVELACQUA: Oh, okay.

13 JUDGE ABDUS-SALAAM: Because you're
14 suggesting that there will be a progression. He
15 won't be stuck in the thirteen, fourteen-year-old
16 emotional state. So you're - - - because you're
17 arguing that he is less of a danger to be a
18 recidivist. If he doesn't progress, then what?

19 MR. BEVELACQUA: That's something that I'm
20 not really sure how to speculate on if he doesn't
21 progress after a certain point what would happen.
22 But the expert reports say that he was very
23 responsive to therapy. He participated well. He
24 does have the intelligence to engage in therapy, to
25 better himself, to understand sexually and age-

1 appropriate - - - sexually age-appropriate behavior.

2 JUDGE ABDUS-SALAAM: That goes all back to
3 why we should re - - - you want to reverse. But we
4 could remit to the court to take a look at that?

5 MR. BEVELACQUA: That's one possibility.
6 The reason why I ask for a reversal is because one of
7 the issues that exists in all of the Appellate
8 Divisions regarding the application of People v.
9 Gillotti, is that there seems to be this idea that
10 even if somebody presents multiple compelling
11 mitigating factors, such that exist in this case,
12 under the third step, a court can just sort of wave
13 their hands, say like well, I don't want to give it
14 anyway.

15 There isn't really any sort of specific
16 application of that third step of Gillotti where
17 there's the balancing of the various factors,
18 balancing the aggravating and mitigating
19 circumstances.

20 JUDGE STEIN: You're saying that didn't
21 happen here.

22 MR. BEVELACQUA: That definitely - - -

23 JUDGE STEIN: Right?

24 MR. BEVELACQUA: - - - didn't happen here.

25 JUDGE STEIN: Okay. So wouldn't that be a

1 - - - a reason, if we agreed with you, just to remit?

2 MR. BEVELACQUA: I don't know if that would
3 be good enough. I think there needs to be a - a more
4 - - -

5 JUDGE STEIN: So you think we should just
6 grant it, even though there's never been a - - - by
7 another court - - - with the parties in front of
8 them, that balancing? You think we should just
9 reverse and assume that he should be entitled to - -
10 - to the downward departure?

11 MR. BEVELACQUA: I think the facts of the
12 record make clear the arguments that we advanced in
13 all of the lower courts, that the - - - the defense
14 advanced in all of the lower courts. And a reversal
15 with an explanation of why would pre - - - present
16 very specific guidance to the lower courts about how
17 the balancing of the totality of circumstances under
18 the third step of Gillotti should function and how a
19 court can determine whether somebody is a moderate
20 risk or a low risk, based on the facts of the record.

21 And essentially, that's - - - that didn't
22 happen in the way it should've in this case, but the
23 record was fully developed in order to allow for that
24 balancing to happen. And under SORA, you know, the
25 appellate courts are given leeway to determine the

1 facts of the case.

2 JUDGE FAHEY: Listen, just - - - just one
3 final point. On this - - - on what you've referred
4 to as the statutory rape exception, is that language
5 used in any specific case?

6 MR. BEVELACQUA: I - - - I was sort of - -
7 -

8 JUDGE FAHEY: Or is that your language?

9 MR. BEVELACQUA: That was my shorthand for
10 not having to repeat the letter - - -

11 JUDGE FAHEY: That - - - that's your - - -
12 as I understand it, what you're arguing is, in
13 certain cases courts have exercised discretion when
14 the age difference between the parties involved is -
15 - - is relatively small compared to some other cases.

16 But there is not a statutory rape
17 exception, but that's how you characterize the cases
18 where they exercise discretion to do that.

19 MR. BEVELACQUA: Under - - -

20 JUDGE FAHEY: Am I right about that?

21 MR. BEVELACQUA: - - - under - - -

22 JUDGE RIVERA: Or is that in line with the
23 guidelines?

24 MR. BEVELACQUA: - - - under risk factor 2
25 of SORA, there is a very specific statutory rape - -

1 - that was what I was specifically - - -

2 JUDGE FAHEY: I see - - -

3 MR. BEVELACQUA: - - - just saying the
4 exception - - -

5 JUDGE FAHEY: Okay.

6 MR. BEVELACQUA: - - - under risk factor 2,
7 which is if the victim's lack of consent is due only
8 to age - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel. We
10 got it. Thanks. You'll get your rebuttal.

11 Counselor?

12 MR. SONSIRE: Damian Sonsire, Chemung
13 County District Attorney's Office, for the People.

14 CHIEF JUDGE LIPPMAN: Counsel, this guy has
15 a very immature, developmentally delayed persona.
16 How does that - - - isn't that something that should
17 play into these - - - a lot of these issues, in
18 relation to the downward modification? Wouldn't we
19 want to know how, really, that affects - - - impacts
20 on some of these points, that - - - that he's being
21 given?

22 MR. SONSIRE: Well, Judge, first of all, I
23 would say, he's - - - he was a twenty-one-year-old
24 man at that time. He was living - - -

25 CHIEF JUDGE LIPPMAN: But clearly, all the

1 - - - all the testimony says he doesn't behave like a
2 twenty-one-year-old guy.

3 MR. SONSIRE: He was living by himself,
4 holding down a job, driving, going - - -

5 CHIEF JUDGE LIPPMAN: But all the medical
6 testimony shows that apparently - - - do you dispute
7 the fact - - - that medical testimony that - - -

8 MR. SONSIRE: No, I don't dispute it.

9 CHIEF JUDGE LIPPMAN: - - - he basically is
10 operating at the thirteen-, fourteen-year-old level?

11 MR. SONSIRE: I don't dispute that during
12 the pendency of this case, he was diagnosed with
13 Asperger Syndrome. I don't dispute that.

14 JUDGE STEIN: Well, you didn't have an
15 expert to contest any of the experts.

16 MR. SONSIRE: No, we did not.

17 JUDGE STEIN: So that - - - so that's - - -
18 I mean, if - - - if the court found that testimony
19 credible, that's - - - you know, those are the facts
20 before us.

21 MR. SONSIRE: Certainly, if the case is
22 remitted for a fact-finding hearing, that's something
23 that we potentially may get into. When we - - - when
24 he pled guilty to the indictment, and then obviously
25 we went forward and now we're back for SORA, we

1 submitted on the papers. There was no request for a
2 hearing at that time. And if there had been a
3 request for a hearing, potentially, that's something
4 that we would have done, at that time, is to have him
5 evaluated ourselves, to make that determination from
6 the People's perspective, to present to the court.

7 So, but - - -

8 JUDGE STEIN: You have the burden of proof
9 here.

10 MR. SONSIRE: No, I understand that.

11 JUDGE STEIN: Right?

12 MR. SONSIRE: By clear and convincing
13 evidence. Correct.

14 JUDGE STEIN: Okay, yeah.

15 MR. SONSIRE: So - - -

16 JUDGE ABDUS-SALAAM: And how did you meet
17 that burden with respect to the webcam incident?

18 MR. SONSIRE: Well, the webcam incident,
19 again, the testimony that was presented at the - - -
20 the grand jury, the third victim, fourteen-year-old
21 girl, who he had no prior knowledge of and met over
22 the internet on Facebook, she testified that she - -
23 - the defendant was touching himself outside of his
24 clothing. The prosecutor asked: Where? Below his
25 waist on his penis.

1 And when he was touching himself what was
2 he saying? He was saying how I could help him with
3 my hands to fix it and that I would be good at it.

4 JUDGE STEIN: How does that make it a SORA
5 sexual offense?

6 MR. SONSIRE: I don't think it does make it
7 a SORA sexual offense.

8 JUDGE STEIN: And so you're saying it
9 doesn't have to.

10 MR. SONSIRE: Correct. I think the - - -
11 defendant and my adversary is advocating for a bright
12 line rule that only a SORA sex offense would apply
13 under that risk factor. And we're advocating for
14 something somewhat more expansive. Obviously there
15 has to be some factual nexus, I think, between the
16 SORA offense and what we're asking for, for a
17 separate victim, that may not "be eligible" for a
18 SORA level 130 crime or something under 265.

19 I think that there - - -

20 JUDGE STEIN: So any conduct of a sexual
21 nature, would it have to be with a minor, or - - - or
22 would you say - - -

23 MR. SONSIRE: No.

24 JUDGE STEIN: - - - the same thing if - - -
25 if it was an adult?

1 MR. SONSIRE: Well, there are - - - there
2 are a number of cases that specifically - - - the
3 Clavette case, the Ramirez case from the Third
4 Department, where individuals are present when a sex
5 offense is happening, so - - -

6 JUDGE STEIN: Okay, but this - - - we're -
7 - - we're talking about over a webcam. There - - -
8 the two people are not physically in the same
9 location at all.

10 MR. SONSIRE: Correct. Correct.

11 JUDGE STEIN: Okay. And - - - and so let's
12 just say that this victim, instead of being a minor,
13 was a twenty-year-old woman or a twenty-five-year-old
14 woman. Would that still - - - would she be a victim?

15 MR. SONSIRE: No, I don't think so.

16 JUDGE STEIN: Why not?

17 MR. SONSIRE: Well, she would not be - - -
18 I mean, first of all, it wouldn't even have been part
19 of the indictment, most likely. He was charged - - -
20 the indictment charged on endangering and an
21 aggravated harassment. I don't think, if it was - -
22 - I mean, you could potentially have an aggravated
23 harassment just on that, depending on their previous
24 relationship. We'll just assume for a moment, that
25 they're complete strangers, and this was happening.

1 If that was the case, then you may have
2 some type of case. Again, I think you - - - there
3 has to be some way for courts to be able to analyze
4 this information and potentially to include those
5 "victims" in this risk factor. Because it can't just
6 be that if it's not SORA, we don't care.

7 JUDGE RIVERA: Is it because he was
8 inviting her to participate in some kind of sexual
9 conduct that - - -

10 MR. SONSIRE: Well - - -

11 JUDGE RIVERA: - - - makes that webcam
12 communication - - - for lack of a better phrase - - -
13 something that fits within the guidelines - - -

14 MR. SONSIRE: I - - -

15 JUDGE RIVERA: - - - for scoring purposes?

16 MR. SONSIRE: - - - I think it's because
17 there's a - - - in my mind, a factual nexus between
18 the SORA victims in the first dozen counts and this
19 girl. And the factual nexus is the fact that he was
20 contacting all of them on the internet, started with
21 Facebook, moved to phones and text messages, and then
22 did, in fact, invite them; which he was doing with
23 this girl.

24 JUDGE RIVERA: So the contact only matters
25 to the extent that it has some sexual aspect to it.

1 MR. SONSIRE: Certainly.

2 JUDGE RIVERA: The question is, what does
3 that mean for SORA purposes? What does that sexual
4 conduct - - -

5 MR. SONSIRE: If - - - if he's contacting
6 her and saying let's play baseball, we're not having
7 this conversation. But he's not. He's contacting
8 her and having - - -

9 JUDGE RIVERA: He said let - - - I want to
10 have sex with you.

11 MR. SONSIRE: Very highly sexualized. He's
12 - - - he - - - and she testifies at grand jury that
13 he buys her fuzzy handcuffs, a kinky outfit.

14 JUDGE RIVERA: Um-hum.

15 MR. SONSIRE: When the case breaks and the
16 state police are investigating the case, the state
17 police investigator is texting the defendant from her
18 phone. He thinks he's communicating with her. He's
19 saying I have condoms. He's saying come over. Don't
20 worry, you're not going to get pregnant.

21 So all of this, in - - - in totality, I
22 think, makes it very clear that this is a highly
23 sexualized conversation and contact with a fourteen-
24 year-old girl.

25 JUDGE STEIN: But going to - - - to risk

1 factor 7, which sort of follows from this, where - -
2 - what is the clear and convincing evidence that
3 these online relationships were started for the
4 purpose of victimizing?

5 MR. SONSIRE: I think it's very simple.
6 The first time he had contact with the first two
7 victims, the thirteen-year-old girl and a fourteen-
8 year-old girl, the first time they ever met face-to-
9 face, he sexually abused them.

10 JUDGE STEIN: And that's enough?

11 MR. SONSIRE: That's - - - that's - - -
12 yes. That's enough. He doesn't go to the mall to
13 have pizza. He doesn't go - - -

14 CHIEF JUDGE LIPPMAN: So he was - - - he
15 was - - -

16 MR. SONSIRE: - - - to the - - -

17 CHIEF JUDGE LIPPMAN: - - - he was grooming
18 them?

19 MR. SONSIRE: Clearly. I mean, what - - -
20 what else was he doing?

21 CHIEF JUDGE LIPPMAN: With a thirteen or
22 fourteen-year-old mind, he was grooming them?

23 MR. SONSIRE: I - - - again, Judge, I have
24 - - - I don't dispute that during the pendency of
25 this case - - -

1 JUDGE STEIN: I thought these first two
2 talked online for like a month or two?

3 MR. SONSIRE: At least that long, correct.

4 JUDGE STEIN: So - - - so - - -

5 MR. SONSIRE: So they're not strangers.

6 JUDGE STEIN: - - - but - - - but we don't
7 know if - - - if there's anything in - - - in those
8 e-mails or whatever they did that was related to sex,
9 do we? Or - - - we don't know the context.

10 MR. SONSIRE: We don't know that, no.

11 JUDGE STEIN: Okay.

12 MR. SONSIRE: No, we don't know that.

13 JUDGE STEIN: So how do we know - - - I
14 mean - - -

15 MR. SONSIRE: We know because - - - I mean,
16 I think this argument becomes a lot more difficult if
17 he meets these girls and they go to a ball game, and
18 they have some popcorn together, or go to a movie or
19 something.

20 He sends a cab to a local park to pick up a
21 thirteen-year-old girl, to bring them to his house
22 and he has oral sex with her, first time they meet.

23 JUDGE PIGOTT: You - - - you - - -

24 MR. SONSIRE: The other girl, he sends a
25 cab to a mall, brings them to her - - - his house.

1 JUDGE PIGOTT: Different - - - different
2 girls?

3 MR. SONSIRE: Dif - - - two different
4 girls.

5 JUDGE PIGOTT: The point is that - - -
6 didn't - - - wasn't - - - wasn't the expert testimony
7 that he could not form the necessary intent to groom,
8 so regardless of what was going on, he did not have
9 the intent to - - -

10 MR. SONSIRE: That's what their experts
11 said.

12 JUDGE PIGOTT: And do you have anything
13 that refutes that?

14 MR. SONSIRE: No. We didn't - - - we did
15 not - - - I mean, again, we did not get into a - - -
16 a fact-finding hearing before the judge. We did not
17 have our own experts evaluate him.

18 CHIEF JUDGE LIPPMAN: But even the way he's
19 doing this, the things that you're talking about,
20 sending the taxi to the mall, this is not a
21 sophisticated guy grooming these - - - these - - -

22 MR. SONSIRE: I would dis - - -

23 CHIEF JUDGE LIPPMAN: - - - young girls.

24 MR. SONSIRE: - - - I would disagree,
25 Judge.

1 CHIEF JUDGE LIPPMAN: You think that this
2 all - - -

3 MR. SONSIRE: This is a fairly
4 sophisticated - - -

5 CHIEF JUDGE LIPPMAN: - - - within an
6 emotional calculated - - -

7 MR. SONSIRE: Yes.

8 CHIEF JUDGE LIPPMAN: - - - investment in
9 grooming these young girls?

10 MR. SONSIRE: Yes.

11 JUDGE PIGOTT: If you - - - if you - - -

12 MR. SONSIRE: Yes, I do.

13 JUDGE PIGOTT: - - - if - - - if there was
14 somebody that every day was going by a fruit stand
15 and - - - and taking an apple, and you wanted to
16 charge him with three counts of petty larceny, and
17 somebody said they don't have the mental capacity - -
18 - they didn't know they were stealing, they were just
19 taking an apple because they thought they were
20 entitled to it; you would lose the case because you
21 couldn't show the appropriate intent.

22 Here you can show all the facts that you
23 say add up to - - - to an intent to groom - - - all
24 the facts are there, but this - - - this person
25 cannot form the intent because of his mental

1 condition, and there was no evidence to refute that.

2 MR. SONSIRE: Well, I think there is some
3 evidence to refute that, because the record - - -

4 JUDGE PIGOTT: I asked you and you said no.
5 You didn't think - - -

6 MR. SONSIRE: Well, I - - - I'm thinking
7 about it more, Judge, and I'm - - -

8 JUDGE PIGOTT: I see.

9 MR. SONSIRE: - - - going back to the same
10 point that I made earlier.

11 CHIEF JUDGE LIPPMAN: Okay, go ahead.

12 MR. SONSIRE: This is a fellow that was
13 living by himself, was holding down a job, was taking
14 college-level classes, had a driver's license, had a
15 computer; was sophisticated enough to utilize the
16 computer to latch on to these girls and draw him
17 (sic) into his home.

18 JUDGE ABDUS-SALAAM: Counsel, are we only
19 dealing with grooming issue because there was some
20 contact or a lot of contact with these young ladies
21 before they actually meet? What if - - - what if
22 there had been one contact before they actually meet,
23 and then just - - -

24 MR. SONSIRE: Well, they would be
25 strangers.

1 JUDGE ABDUS-SALAAM: They would be
2 strangers.

3 MR. SONSIRE: Right.

4 JUDGE ABDUS-SALAAM: Okay.

5 MR. SONSIRE: So, I mean, that risk factor.
6 And they're not strangers, because there was some
7 contact going back and forth. But I go back to the
8 same point - - -

9 JUDGE ABDUS-SALAAM: But how much contact?
10 That's what I'm trying to get at. How much contact
11 takes him out of the stranger category into the
12 friend category, and then grooming category? That's
13 - - - that's what I'm trying to figure out?

14 MR. SONSIRE: There's a - - -

15 JUDGE ABDUS-SALAAM: Would it be three
16 times - - -

17 MR. SONSIRE: - - - there's a body of case
18 law that we - - - we really didn't get into in this
19 case, because I think everybody agreed that they were
20 not, in fact, strangers.

21 JUDGE ABDUS-SALAAM: No, no, I understand
22 that.

23 MR. SONSIRE: There had developed - - -

24 JUDGE ABDUS-SALAAM: But I'm just - - -
25 assuming they were friends. I'm just trying to

1 figure out on the back end, how many contacts would
2 constitute grooming versus just he meets them, you
3 know, for the first time; they've had a few
4 conversations, either over the internet or, you know,
5 they're Tweetering (sic) or whatever they do, and
6 then there's sexual contact?

7 MR. SONSIRE: Well, again - - -

8 JUDGE ABDUS-SALAAM: Where's the grooming?
9 That's what I'm looking for?

10 MR. SONSIRE: Well, again, the - - - the
11 grooming is this - - - this contact. He is
12 developing a trusting relationship, trusting enough
13 for these girls, who are - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but he may not
15 - - -

16 MR. SONSIRE: - - - he doesn't know but for
17 - - -

18 CHIEF JUDGE LIPPMAN: - - - he may not be
19 capable of doing that. That's - - - that's what
20 we're saying, - - - that you're - - - you're
21 interpreting this but ignoring the medical testimony
22 that's come in.

23 MR. SONSIRE: I - - -

24 CHIEF JUDGE LIPPMAN: Don't we have to
25 assume that it's uncontested and that it's not so

1 obvious, you know, that that's what he's doing, and
2 when you combine that with testimony that seems to
3 make clear he's not capable of that kind of
4 calculated conduct?

5 MR. SONSIRE: Well, I - - - again, Judge, I
6 res - - - respectfully disagree, because I think the
7 record shows that he is capable of that calculating
8 conduct. And one of the major factors - - -

9 CHIEF JUDGE LIPPMAN: Despite the medical -
10 - -

11 MR. SONSIRE: Despite the medical. And one
12 of the major factors I bring up is his term on
13 interim probation. And what did he do while he was
14 on interim probation that lasted all of four months?
15 He purchased a computer, when he shouldn't have; got
16 onto Facebook under an assumed name of Vincent
17 Sevillion; and started contacting girls up at the
18 Corning Community College.

19 JUDGE PIGOTT: It's intent to groom. I - -
20 - I understand all of that. One of the - - - one of
21 the concerns I have, if no one else is, we - - - we
22 slam these people routinely. These are tiring. We
23 don't like them - - - I'm speaking as - - - as
24 judges. You know, he was in jail for - - - for bad
25 things, we're going to SORA - - - we'll SORA 2, so

1 it's not a 3, and we're done. And we're not going to
2 waste our time with these things.

3 And every now and then, you know, you get a
4 dolphin in the tuna net, and it - - - and you've got
5 to make sure that - - - that what we did was correct.
6 That's I think why we have all these questions and
7 why the dissent raised this grooming issue in their -
8 - - in their - - -

9 MR. SONSIRE: I understand, Judge. Again -
10 - -

11 JUDGE STEIN: Would you - - - just one
12 other thing. Would you agree that - - - that the
13 courts below did not engage in that third - - - you
14 know, step, weighing the process?

15 MR. SONSIRE: The lower court's decision -
16 - - county court's decision - - - it was Judge Hayden
17 - - - it was a twelve-page decision, and it was
18 fairly well rounded.

19 JUDGE STEIN: Well, it was very extensive.
20 But did it - - -

21 MR. SONSIRE: Yes.

22 JUDGE STEIN: - - - ever get to that step?
23 I mean, you know - - -

24 MR. SONSIRE: He doesn't explicitly say in
25 a paragraph, the court is weighing these mitigating

1 factors, no. But I think in the overall dozen pages
2 of the decision, I think the court does go back and
3 forth. He specifically - - -

4 CHIEF JUDGE LIPPMAN: Would it be helpful
5 to have it sent back for that kind of weighing?

6 MR. SONSIRE: I'll leave that for you to
7 decide.

8 CHIEF JUDGE LIPPMAN: Okay, fair enough.
9 Counsel, rebuttal?

10 MR. SONSIRE: Thank you, Judges.

11 CHIEF JUDGE LIPPMAN: Thank you.

12 Counsel, was there a weighing in terms of
13 the requirements here?

14 MR. BEVELACQUA: There - - - there was not.
15 And actually, the People - - -

16 CHIEF JUDGE LIPPMAN: If you look at the
17 totality, did he do a weighing analysis?

18 MR. SONSIRE: They decided - - - the - - -
19 the Appellate Division Third Department decided the
20 downward departure issue by saying there wasn't a
21 preponderance of the evidence of any mitigating
22 factor, which the People now concede in their brief,
23 was erroneous, and they've - - - they're asking for
24 you to weigh the third step.

25 So the Appellate Division committed error

1 just on that regard. But I think the issue of the
2 dolphin in the net is actually important in the sense
3 that there is this sort of issue of automatically
4 labeling people that have been convicted of sex
5 offenses and not really giving them the sort of
6 protections under SORA that they might be entitled to
7 in other areas of the criminal law, because SORA has
8 been, you know, sort of classified as regulatory.

9 But the difference between Level 1 and
10 Level 2 is vast, and there are punitive aspects to
11 it, which I don't want to get into the punitive
12 regulatory issue today. But having clear guidance on
13 how to balance the totality of evidence, specifically
14 with downward departure is important.

15 JUDGE ABDUS-SALAAM: And what - - - what
16 exactly - - - you said that on your initial case,
17 counsel. What exactly would you suggest that we tell
18 the courts about the balancing?

19 MR. BEVELACQUA: Well, I think Gil - - -

20 JUDGE ABDUS-SALAAM: That we haven't
21 already told them.

22 MR. BEVELACQUA: - - - I think Gillotti
23 goes halfway, and I want to go another fifty percent.
24 I think - - - or I would ask this court to go another
25 fifty percent, which is Gillotti makes clear that

1 downward departure is like a type of affirmative
2 defense, where once the - - - once certain evidence
3 has been proven by a preponderance, then there needs
4 to be some sort of rebuttal by the People that is
5 proven and that, like, negates the mitigating
6 circumstances, and then under the totality proves - -
7 - under the totality of evidence proves that the
8 person is not, in fact, a lower risk.

9 For example, if the defense proves that the
10 offender is a low risk offender with these mitigating
11 factors, by a preponderance of the evidence, then it
12 is incumbent upon the People to either disprove it or
13 advance other evidence that shows that they are, in
14 fact, a moderate risk instead of a low risk.

15 JUDGE PIGOTT: Or - - - the judge seemed to
16 spend an awful lot of time on this case in - - - in
17 its rather thorough opinion. Is there something in
18 the opinion that - - - that you think is wrong?

19 MR. BEVELACQUA: In the county court
20 opinion?

21 JUDGE PIGOTT: Yeah.

22 MR. BEVELACQUA: Most of that twelve pages
23 is just reiterating the arguments of the two sides.
24 Very little of it is actual analysis. Thank you.

25 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank

1 you. Thank you both. Appreciate it.

2 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Vincent Izzo, No. 138 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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