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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 50

CHRISTOPHER J. WEBER,

Appellant.

20 Eagle Street
Albany, New York
May 18, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Weber.

3 MR. JUERGENS: Good afternoon. Excuse me. May
4 it please the court, Dave Juergens with the Monroe County
5 Public Defender's Office.

6 If I may reserve two minutes for rebuttal?

7 CHIEF JUDGE WILSON: Yes, sir.

8 MR. JUERGENS: Mr. Weber's asking this court to
9 reduce his SORA classification to risk level 2 based upon a
10 correct assessment of a hundred points at the SORA hearing.
11 The issue before this court is whether the People forfeited
12 their right to appellate review of their request for an
13 upward departure because they never raised it at the
14 initial SORA hearing, or does the Appellate Division have
15 unfettered discretion to grant the state remittals upon
16 request? I think the legislature drafted a statute here
17 that gives us our answer. CPL - - - CPLR 5501(a)(1)
18 basically gives respondents on a defendant's appeal the
19 right to tell - - -

20 JUDGE GARCIA: Counsel, let me - - - let me - - -
21 let me ask you this hypothetical. The RAI comes in, and
22 it's a level 1, and the People say it's wrong because they
23 shouldn't have got acceptance or responsibility points,
24 let's say. And the court, the SORA court agrees with them,
25 and they say, you know, you're right; on points, this is a

1 level 2. And it goes up - - - no, the SORA court disagrees
2 with them, and they say level 1. You know what, level 1.
3 This is a level 1. And it - - - defense says, great. The
4 People appeal on the - - - on the points, and they win.
5 They win on the points.

6 So now Appellate Division says, this is a level
7 2. And the defendant says, you know what, I want an
8 opportunity to go back and argue a downward departure now
9 to level 1. Would the defendant have that right?

10 MR. JUERGENS: Absolutely not because the
11 defendant didn't preserve his right to request a downward
12 departure in the alternative - - -

13 JUDGE GARCIA: Even though the defendant won?

14 MR. JUERGENS: Well, the defendant won, but the
15 defendant was on notice that there was a possibility that
16 he was not going to prevail on an appeal and that a level 2
17 could be the result, and in that case, he had every reason
18 to make a request for a downward departure if the record
19 would support that.

20 JUDGE CANNATARO: So in this case, did the people
21 request an upward departure in the alternative in the event
22 that they did not get the level 3 adjudication that they
23 were looking for in the SORA court?

24 MR. JUERGENS: No. No. They - - -

25 JUDGE CANNATARO: So - - -



1 MR. JUERGENS: They - - -

2 JUDGE CANNATARO: - - - is your argument that you
3 get the benefit of going back to argue for the upward
4 departure, but in Judge Garcia's hypothetical, the
5 defendant wouldn't get the benefit of going back to argue
6 for a downward departure - - -

7 MR. JUERGENS: What I - - -

8 JUDGE CANNATARO: - - - on a level 2 adjudication
9 in the Appellate Division?

10 MR. JUERGENS: What I'm saying is that you have
11 the SORA hearing, and the points are contested. Both
12 parties are on notice that if they want their targeted risk
13 level to be affirmed on appeal, they need to make arguments
14 on the points, and if there's a basis for either an upward
15 or downward departure, they've got to put that before the
16 SORA court in the first instance.

17 JUDGE CANNATARO: Wouldn't this entire appeal
18 have been completely obviated if there had been an
19 alternative argument made for an upward departure before it
20 went up?

21 MR. JUERGENS: We wouldn't be here if the People
22 had made, in the first instance, an argument that they
23 should get a - - - an upward departure. And in that case,
24 the Appellate Division would have looked at both arguments,
25 the points, and the departure issue, and rendered a

1 decision at that point. But that's not what happened. The
2 People never made that argument, and they basically got a
3 mulligan when the - - - they asked for remittal and it was
4 granted. And a lot of the cases that we're looking at in
5 the SORA context, especially the older ones, it's hard to
6 determine the basis for the remittal by the Appellate
7 Division, you know, because - - -

8 JUDGE SINGAS: Do you think that was the
9 Appellate Division's exercise of their interests of justice
10 review? Like, how - - - how did the remittal come about?
11 What - - -

12 MR. JUERGENS: I - - -

13 JUDGE SINGAS: What do you think?

14 MR. JUERGENS: The - - - the People are relying
15 on CPLR 5522(a) to try and say that the Appellate Division
16 has discretion to grant remittals. But they're misreading
17 the statute, and it goes against this court's case law.
18 That doesn't expand the scope of the review for the
19 Appellate Division. That is a broad statement of the
20 general powers that the appellate court has when they're
21 considering appeals in general, but - - -

22 CHIEF JUDGE WILSON: Well, is that - - - is that
23 limited actually to the Appellate Division, or does 5521
24 read on us as well?

25 MR. JUERGENS: It - - - I believe it applies to

1 all appellate courts.

2 CHIEF JUDGE WILSON: So if you were reading that
3 as the power to do that, it really couldn't be the interest
4 of justice power because we don't have that?

5 MR. JUERGENS: True. True. And - - - and the
6 People are, again, misreading 5522(a). And this court has
7 - - - has said specifically that neither CPL (sic) 5522 nor
8 any other statutory or constitutional authority permits an
9 appellate court to exercise any general discretionary power
10 to grant relief to a nonappealing party. And that's what
11 we have.

12 The People are a nonappealing party. They're
13 piggybacking, looking for relief - - - affirmative relief,
14 on the defendant's appeal, but they didn't preserve their
15 right to have that review. And that - - - and this court -
16 - - the - - - the cite I just gave was Hecht v. New York,
17 60 N.Y.2d 57.

18 This court in the Parochial Bus Systems case,
19 that's 60 N.Y.2d 539, basically read the statute 5501(a)(1)
20 and interpreted it as having a preservation requirement.
21 They said that a respondent, a nonappealing party, yeah,
22 you can have appellate review if we're looking at the error
23 that the lower court committed and it's been properly
24 preserved and if corrected would support a judgment in the
25 nonappealing party's favor. And if - - -

1 JUDGE RIVERA: So can I ask you a different kind
2 of question and to see if you think it at all affects your
3 argument? Let's say a defendant does not preserve, has not
4 raised to the SORA court a request for a downward departure
5 but makes the argument to the Appellate Division. Can the
6 Appellate Division exercise its interest of justice
7 jurisdiction to en - - - if there's enough of a record, to
8 entertain that request and grant the downward departure?

9 MR. JUERGENS: That is a area that I'm unclear on
10 because I've seen many Appellate Division cases where
11 interest of justice jurisdiction is - - - is exercised, but
12 typically, it's done so in the context of some sort of a
13 due process, lack of notice, some sort of a constitutional
14 grounds where - - - because, I mean, even though SORA - - -

15 CHIEF JUDGE WILSON: You're thinking about - - -
16 you're thinking about criminal cases there?

17 MR. JUERGENS: Yes. And there's this - - - this
18 - - -

19 CHIEF JUDGE WILSON: This is not a criminal case,
20 though.

21 MR. JUERGENS: Right. Right. So there's a
22 specific statute regarding interest of justice jurisdiction
23 over defendants. And I see my light is on, but - - -

24 CHIEF JUDGE WILSON: Continue.

25 MR. JUERGENS: - - - but that's not something

1 that we have in civil cases.

2 JUDGE GARCIA: But wouldn't a practical effect of
3 a ruling along the lines of what you're asking for mean
4 that in any case where there's contested points, the People
5 ask in the alternative for an upward departure? And I can
6 see a string of decisions, then, in any event, they - - -
7 you know, they didn't abuse their discretion in granting an
8 upward departure to the extent the points aren't properly
9 awarded here.

10 And an upward departure decision is, as you know,
11 a much less probing standard of review. So wouldn't you
12 want a court actually reviewing point allocations in RAI
13 scores rather than just saying, in any event, the court
14 didn't abuse its discretion to the extent the points
15 weren't included, and they are properly included in the RAI
16 to upwardly depart?

17 MR. JUERGENS: Well, I - - - I believe the SORA
18 court should make determinations on both the points and if
19 there's a request for - - -

20 JUDGE GARCIA: But your argument is a
21 preservation argument - - -

22 MR. JUERGENS: Correct.

23 JUDGE GARCIA: - - - not a determination by the
24 trial court, so I think all the People have to do is throw
25 the flag in there and say, in the alternative we ask;

1 they've preserved. Your argument isn't the SORA court has
2 to decide it, right?

3 MR. JUERGENS: If - - - well, the People didn't
4 even do that in this case. But if the People had said, you
5 know, we would like to reserve our right to make an upward
6 departure request, I'd argue that's still not enough, but
7 it's better than - - -

8 JUDGE GARCIA: But no, let's say they - - - we
9 want an upward departure, and the SORA courts - - - in the
10 alternative, and the SORA court says, why would I give you
11 that? I've already ruled on your points argument. You're
12 a level 3. I don't - - - I'm not in the - - - you know,
13 I'm not in the business of making advisory rulings. Then -
14 - -

15 MR. JUERGENS: Then - - - then the People are
16 golden. The people are golden because - - -

17 JUDGE GARCIA: Why wouldn't they just do that all
18 the time?

19 MR. JUERGENS: Well, they could. And - - - and
20 maybe they should. If there is a basis for their target
21 risk classification that's supported by the record - - - I
22 mean, courts expect litigants to come prepared with their
23 best evidence and their best arguments, and that's all
24 we're saying should happen here.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. MCCARTHY: Good afternoon. Martin McCarthy
2 for the respondent, Monroe County District Attorney's
3 Office.

4 I want to start where you just finished, and then
5 I also want to address your hypothetical that you asked at
6 the beginning, Judge Garcia. I - - - I think that's a
7 terrible idea to constantly ask for upward departures all
8 the time. To me, that would then increase the likelihood
9 of a defendant, a criminal defendant, getting an upward
10 departure.

11 JUDGE CANNATARO: Are you saying it's a terrible
12 idea to argue in the alternative?

13 MR. MCCARTHY: With respect to whether - - - if I
14 was a criminal defense attorney and I wanted a rule that
15 required the People to always ask for an upward departure,
16 I wouldn't want that rule.

17 JUDGE RIVERA: But how is it any more unfavorable
18 to allow the Appellate Division in its, quote - - - perhaps
19 in its interest of justice to remit so that the People can
20 request an upward departure, but not uniformly apply that
21 and let a defendant do that because we - - - we have - - -
22 we have cases where on occasion the Appellate Division does
23 not let the People do that and on occasion where it doesn't
24 let the defendant do that.

25 MR. MCCARTHY: Yeah.

1 JUDGE RIVERA: I'm just saying how is it - - -
2 how is it any less favorable to the defendant to continue
3 perhaps an - - - a nonuniform application as it now stands?

4 MR. MCCARTHY: I think that may go to the
5 hypothetical that was asked, and let me move to there right
6 now. When you talk about the issue of notice, what is the
7 - - - the - - - the prosecutor's obligation for notice?
8 It's contained in 168-n, and the only obligation there is
9 for the defendant - - - if the People disagree with the
10 Board's assessment, then they have to provide notice.

11 When you talk about a SORA hearing, a defendant
12 doesn't have the burden of proof at a SORA hearing. So if
13 the Board's risk assessment instrument comes in as a level
14 1, at that point, the defendant has no burden. And if, to
15 follow Judge Garcia's hypothetical, the court determined,
16 nope, I read the - - - the Board's risk assessment
17 instrument and I agree it's a level 1, at that point, the
18 burden would never shi - - - shift from the defendant.

19 If the People appeal, which they have the right
20 to do under 168-n, at that point, the defendant can do
21 exactly what the People did in this case: ask for a - - -
22 in that case, a downward departure. And in that scenario,
23 under 5522(a), the Appellate Division could - - - could
24 remit for the purposes of determining that downward
25 departure because at the time - - -

1 JUDGE RIVERA: It does seem to be - - - it does
2 seem to be a bit of a waste of judicial resources.

3 MR. MCCARTHY: Well, the - - - the concept - - -
4 you stressed in Gillotti that - - - that SORA should
5 proceed in an orderly fashion, right? So the - - - the - -
6 - the possibility of a departure, upward or downward,
7 doesn't really become relevant until the - - - the points
8 are assessed.

9 CHIEF JUDGE WILSON: Well, see, but this is civil
10 litigation, and - - - which is what I practiced for a very
11 long period of time. And the orderly process for civil
12 litigation would mean that if I have a con - - - a claim
13 for breach of contract and I have a claim, you know, in the
14 alternative, for quantum meruit, quasi contract, unjust
15 enrichment, whatever the other claims I might have would
16 be, I've got to plead them all at once. I can't go up on
17 the contract claim, win in the district court or the - - -
18 or the Supreme Court, go up to the Appellate Division, lose
19 there, and then get a remittal to try another theory, and
20 that's what's happening here.

21 MR. MCCARTHY: And that's a - - - and - - -

22 CHIEF JUDGE WILSON: And that's - - - that's the
23 point about the waste of judicial resource.

24 MR. MCCARTHY: That's - - - can - - - and
25 obviously, as a civil litigator - - - and it's been a while

1 since I was a civil litigator, but the pleading
2 requirements under Article 3 require that you plead causes
3 of action in the alternative. Our pleading requirements
4 are contained in Correction Law 168-n. You don't have to -
5 - -

6 CHIEF JUDGE WILSON: You're not - - -

7 MR. MCCARTHY: We don't have those requirements.

8 CHIEF JUDGE WILSON: You're not required to plead
9 in the alternative. If you choose not to, you lose the
10 claims you didn't plead.

11 MR. MCCARTHY: Correct, but in the end, you still
12 have to put your plea - - - you have to put your causes of
13 action in a pleading - - -

14 CHIEF JUDGE WILSON: Right.

15 MR. MCCARTHY: - - - in Article 3.

16 CHIEF JUDGE WILSON: And - - - and why shouldn't
17 that be the rule here in this civil litigation?

18 MR. MCCARTHY: Because our pleading requirement -
19 - - we don't - - - we don't have pleadings. We don't have
20 a summon - - - it would be better if we did because then we
21 wouldn't be here talking about this. But we don't - - -
22 our pleadings aren't Article 3 pleadings. We don't have a
23 summons complaint. We don't have an answer or - - - or a
24 special proceeding under Article 4.

25 CHIEF JUDGE WILSON: You have - - -

1 MR. MCCARTHY: We don't have petition and answer.

2 CHIEF JUDGE WILSON: Right. Instead - - -

3 MR. MCCARTHY: We have - - -

4 CHIEF JUDGE WILSON: Instead, what you have is a
5 procedure that says the Board puts in a - - - a
6 recommendation, and if you want a different recommendation,
7 you've got to put it in - - -

8 MR. MCCARTHY: Correct.

9 CHIEF JUDGE WILSON: - - - whatever it is.

10 MR. MCCARTHY: And - - - and that's the thing.
11 We - - - we didn't. We agreed with their assessment of
12 level 3.

13 CHIEF JUDGE WILSON: So let me ask - - -

14 MR. MCCARTHY: That's it.

15 CHIEF JUDGE WILSON: Let me ask it this way.
16 Could you then say, we disagree with the Board on factor 5,
17 and seek a, you know, point total on that basis, win on
18 that in the - - - in the SORA court, go up on appeal, lose,
19 and then go back and try on factor 8 or on factor 15? You
20 have no pleading requirements.

21 MR. MCCARTHY: Well, and - - - well, we did,
22 actually, because you just articulated them because you
23 said that if we ever disagree with the Board's assessment,
24 we have to then, in essence, enter a pleading.

25 CHIEF JUDGE WILSON: Um-hum.



1 MR. MCCARTHY: We have to enter our own risk
2 assessment instrument, and if our risk assess - - -
3 assessment instrument in - - - I think your factual
4 scenario was same points just different categories - - - we
5 still have to do that, right?

6 CHIEF JUDGE WILSON: Um-hum. And you don't have
7 to do that for an upward departure?

8 MR. MCCARTHY: Well, I - - - I think the argument
9 would be no. And - - - well, because in - - - in the
10 essence, no, because the Board's position was level 3, and
11 we weren't disagreeing with the Board's position. We were
12 disagreeing with the Board's point. But let's - - -

13 JUDGE CANNATARO: Counsel, I'm a little confused
14 about how things work in the - - - in the real world. In
15 the last argument that we had here, one of the attorneys
16 said something very interesting, and I wrote it down. The
17 - - - the quote was, "Many times the People request an
18 upward departure in the alternative." I - - - I wrote it
19 down because I knew this appeal was coming up next. And -
20 - - and now I hear you saying that that's - - - not only is
21 that not the case, but maybe that's not even permitted in
22 these - - - in these hearings.

23 MR. MCCARTHY: I wouldn't say it's not permitted.
24 I would say it's not required, and there's a difference
25 between those.

1 JUDGE CANNATARO: Okay. That's true.

2 MR. MCCARTHY: Yes.

3 JUDGE CANNATARO: And I understand that
4 distinction.

5 MR. MCCARTHY: So is it - - - is it permitted?
6 Probably. It's certainly - - -

7 CHIEF JUDGE WILSON: Well, doesn't - - -

8 MR. MCCARTHY: - - - is not prohibited. If
9 anything, not prohibited - - -

10 CHIEF JUDGE WILSON: Doesn't it happen - - -
11 doesn't it happen often?

12 MR. MCCARTHY: I'm sorry. I talked over you.

13 CHIEF JUDGE WILSON: Doesn't it happen often?
14 Often. Doesn't it happen often?

15 MR. MCCARTHY: I don't know if it happens often,
16 honestly, that - - - that a prosecutor asks for - - -

17 CHIEF JUDGE WILSON: So when Mr. Kastin said he
18 does fifty or sixty of these a year, forty or fifty,
19 whatever the number he said was, he said it happens often,
20 you don't have a reason to disagree with that?

21 MR. MCCARTHY: Well, he's also doing them in a
22 different jurisdiction.

23 CHIEF JUDGE WILSON: Okay.

24 MR. MCCARTHY: So - - -

25 JUDGE GARCIA: But what would the circumstances

1 of an alternative be? So if you're the People and you
2 disagree with the RAI assessment of points and you think
3 there should be more, then you might argue in the
4 alternative that absent finding more points, I want an
5 upward departure, right? That's a different argument to
6 me. Right? If you disagree with the RAI, RAI comes in at
7 a 2. You say no. I get - - - think he gets twenty more
8 points for X factor, and I want a 3, then you might make an
9 alternative argument that if you don't give those points, I
10 want a 3 as a departure.

11 MR. MCCARTHY: Then - - -

12 JUDGE GARCIA: And I think you would have to.

13 MR. MCCARTHY: Well, because our - - - our
14 requirement to - - - to articulate our basis would be
15 different, so yeah. Maybe that - - - in that scenario,
16 when - - -

17 JUDGE GARCIA: But you're disagreeing with the
18 RAI?

19 MR. MCCARTHY: Yeah. And not - - - yes, in that
20 scenario because we're disagreeing with the RAI. We're
21 also disagreeing with the level. But in any event, let's
22 say we're - - - let's say we're not.

23 And I think this was - - - I think this was your
24 point, Judge Cannataro. Let's say the points were the
25 same. I think it's arguable that, yeah, the People may

1 have been required - - - or the level is the same. The
2 People may have been required, if the People disagreed in
3 any way with the Board's determination, that they would
4 have had to put in their own determ - - - their own point
5 determination and asked for the departure because they were
6 disagreeing with the Board.

7 JUDGE CANNATARO: I think that's - - -

8 MR. MCCARTHY: But that's not what happened.

9 JUDGE CANNATARO: That's a fair point. And you
10 know, one could make the argument we didn't have to request
11 an upward departure because we thought he should be level 3
12 and that's what the RAI recommended as well and - - - and
13 that's, in fact, what we received from the SORA court. But
14 that goes back to Judge Garcia's hypothetical that - - -
15 that we've been talking about throughout the argument.

16 Wouldn't that same process have to work in the
17 inverse of that case where a defendant is hoping to get a
18 level 1, gets the level 1 from the SORA court, goes up to
19 the Appellate Division, the Appellate Division says, oh,
20 no; it's actually level 2; we've exercised our review
21 power, and - - - and we see level 2. You have to give them
22 the opportunity to go back and ask for level 1, right?

23 MR. MCCARTHY: I don't disagree with that at all.

24 JUDGE CANNATARO: On a downward departure?

25 MR. MCCARTHY: Don't disagree with that at all.

1 And - - - and the - - - and the simple fact is, it's not
2 relevant until the points have been assessed.

3 JUDGE CANNATARO: It is inefficient, though, as
4 Judge Rivera said a little while ago, isn't it?

5 MR. MCCARTHY: Well, once upon a time when I
6 practiced civil appeals, they - - - they're not certainly
7 as efficient as criminal appeals, but granted - - -

8 JUDGE RIVERA: Well, let me ask you this. Let's
9 say the - - - the court, indeed, goes above and does a
10 level 2; let's just take level 2. Can the defendant then
11 ask for reconsideration and at that point make an argument
12 for a downward departure?

13 MR. MCCARTHY: I'm sorry. You're talking about
14 at a trial level, right?

15 JUDGE RIVERA: At the SORA hearing.

16 MR. MCCARTHY: Yeah.

17 JUDGE RIVERA: Often the - - -

18 MR. MCCARTHY: At the - - - but at the trial?

19 JUDGE RIVERA: Often the court will, on the
20 record - - -

21 MR. MCCARTHY: Yeah.

22 JUDGE RIVERA: - - - say - - - give its analysis
23 and, indeed, say what - - - what is its resolution of what
24 should be the appropriate risk level and then subsequently
25 put something in writing - - -

1 MR. MCCARTHY: Yeah.

2 JUDGE RIVERA: - - - or rely on that transcript.

3 MR. MCCARTHY: Yeah. And I think - - - I think -
4 - - I don't - - - I don't know if I want to recount what
5 happened during the last argument, but this wasn't a sua
6 sponte scenario, and I think what you ought to avoid is a
7 sua sponte scenario. If a defendant - - - and that's in
8 your - - -

9 JUDGE RIVERA: Um-hum. Yes.

10 MR. MCCARTHY: - - - your hypothetical. If a
11 defendant finds he's a level 2, at that point, yes, it
12 becomes relevant to him to get a downward departure. He
13 should be able to ask for a downward departure. He should
14 get the analysis of that downward departure. It shouldn't
15 - - - the court should not say, well, it's too late now,
16 because it's not too late.

17 JUDGE RIVERA: Well, what about like in this case
18 where they ask for the downward departure; aren't the
19 People on notice of what, you know, the judge might agree
20 and maybe I should now ask for an upward departure?

21 MR. MCCARTHY: I don't know if I followed that
22 question.

23 JUDGE RIVERA: Well, if a defendant asks for a
24 downward departure - - -

25 MR. MCCARTHY: A downward departure from 2 to 1?

1 JUDGE RIVERA: Well, 3 to 2, 2 to 1.

2 MR. MCCARTHY: Okay.

3 JUDGE RIVERA: Take your pick. You're going
4 downward either way. Aren't the people risking - - -

5 MR. MCCARTHY: Well, I just want to make sure - -
6 -

7 JUDGE RIVERA: Aren't the - - - aren't the People
8 risking a couple of things? Number one - - - if they don't
9 do anything, maybe they object but they don't do anything
10 else - - - number one, that the court might actually grant
11 that downward departure.

12 MR. MCCARTHY: Okay.

13 JUDGE RIVERA: And before the Appellate Division,
14 the Appellate Division might decide I'm not going to remit
15 and let you ask for an upward departure.

16 MR. MCCARTHY: Well, we wouldn't be able to at
17 that point. If in your factual scenario, what's happening
18 is - - - is the People seem to be satisfied with whether
19 it's a level - - - the - - - the points are correctly
20 assessed and that the People are satisfied that that's the
21 correct assessment, right? So let's just say it's a 2.

22 JUDGE RIVERA: Okay.

23 MR. MCCARTHY: And the defendant goes through the
24 departure analysis and says, I'm entitled to a downward
25 departure and puts forward evidence. And at that point, he

1 does now have the burden by a preponderance of evidence to
2 do that. If he does that and the court finds he's a level
3 1, that's it, right? The People go up on appeal; what the
4 People have to argue on appeal is that the court erred in
5 finding those factors. But the court - - - the People
6 can't ask for an upward departure from 1 to 2 at that point
7 because that's not how departures work. You depart from
8 the presumptive risk level.

9 JUDGE RIVERA: I see.

10 MR. MCCARTHY: You don't go from, okay, well,
11 this is a departure from the presumptive risk level of 2 to
12 1. The People then can't turn around and say, well, that
13 departure from 1's not proper; let's go back to 2. That's
14 not how it works.

15 CHIEF JUDGE WILSON: Why not?

16 MR. MCCARTHY: One party gets a departure. It's
17 either going to be upward or downward.

18 CHIEF JUDGE WILSON: Well, why is that? I mean,
19 couldn't it be based on different types of evidence?

20 MR. MCCARTHY: Well, in terms of - - - well, you
21 start with - - - again, you have to - - - what - - - the
22 focus of the SORA hearing is - - - is twofold. First - - -
23 first step is to make sure you have the presumptive risk
24 level, whatever that is, right? And then from there, the
25 party that feels that they should go up or down has the

1 opportunity to go up or down. And yes, there are different
2 factors for an upward departure and different standards of
3 proof for - - - for an upward departure versus a downward
4 departure.

5 CHIEF JUDGE WILSON: Right. But here - - -

6 MR. MCCARTHY: And then - - - and then - - -

7 CHIEF JUDGE WILSON: - - - what you're - - - what
8 you're asking is - - - and what the court allowed is for
9 the People to go back and articulate reasons for an upward
10 departure where they hadn't requested one.

11 MR. MCCARTHY: But we didn't need to request one.
12 If this had come in as a level 2, and I think that - - -
13 back to your hypothetical again. Let's say this came back
14 at a level 2, and maybe - - -

15 JUDGE RIVERA: I'm sorry. What do you mean by
16 "came back"?

17 CHIEF JUDGE WILSON: But no. I'm sorry. But - -
18 - but my question is, why on the remittal can't the
19 defendant now say, no, I want a downward departure, and
20 here's some additional proof?

21 MR. MCCARTHY: I'm sorry?

22 CHIEF JUDGE WILSON: Why on this remittal that
23 you would like to have allowed can't the defendant come
24 back and say, I'd like a downward departure based on the
25 following additional proof?

1 MR. MCCARTHY: A downward - - -

2 CHIEF JUDGE WILSON: Or can he?

3 MR. MCCARTHY: - - - departure from a 2?

4 CHIEF JUDGE WILSON: Yeah. Or from - - - or if
5 you're going to up on the 3 for the following reasons the
6 People give me, I would like to come back down - - -

7 MR. MCCARTHY: Because once the - - - once the
8 points were assessed and - - - and he was found presumptive
9 level 3, it was - - - it was at that point he had to plead
10 to request a downward departure.

11 JUDGE HALLIGAN: But - - -

12 MR. MCCARTHY: The points had been assessed at
13 that point.

14 JUDGE HALLIGAN: Am I understanding the facts
15 correctly that the defendant challenged some of the point
16 allocations, you disputed them, but then on appeal it
17 looked to me like you conceded error with respect to one of
18 the factors, forcible compulsion? Is that right?

19 MR. MCCARTHY: That's factually correct.

20 JUDGE HALLIGAN: Okay. And - - - and so - - -

21 MR. MCCARTHY: It wasn't me personally, but yeah,
22 that's correct.

23 JUDGE HALLIGAN: I - - - I didn't mean you. I
24 meant - - - I meant your office, right. So if that's
25 right, then this all would have been avoided, I take it,

1 had that been clear in the first instance, had the People
2 been clear about the absence of sufficient proof in - - -

3 MR. MCCARTHY: Well, that - - -

4 JUDGE HALLIGAN: - - - the first instance. It
5 seems like - - -

6 MR. MCCARTHY: That mistake was also made by the
7 Board. So in terms of - - - in terms of that mistake, that
8 wasn't as - - - you say - - - you say, oh, my God. The - -
9 - the People conceded. It must be blatant. I don't know
10 if it was blatant, but I think it was legally correct, and
11 I think those are two different things. This was not a
12 scenario where, like, oh my God, this is a blatant error.
13 It wasn't a blatant error.

14 JUDGE HALLIGAN: I'm not - - - I'm not - - -

15 MR. MCCARTHY: But I think legally correct.
16 That's why we conceded on appeal, because it was legally
17 correct, but it wasn't so glaringly obvious.

18 JUDGE HALLIGAN: I'm definitely not taking issue
19 with your concession. I'm simply saying it seems to me an
20 unusual case in that the reason you needed to seek the
21 remittal in part was that you conceded that you were
22 abandoning the position on that particular factor that you
23 took below; is that right?

24 MR. MCCARTHY: Yeah. And because it was le - - -
25 because we also have an obligation to not make frivolous

1 arguments.

2 JUDGE HALLIGAN: I'm - - - I'm not - - -

3 MR. MCCARTHY: Yeah, so - - -

4 JUDGE HALLIGAN: - - - disputing that at all, to
5 be clear.

6 MR. MCCARTHY: So we were - - - we were
7 constrained to do that because we have to.

8 JUDGE HALLIGAN: But if it had been clear before
9 the court in the first instance, then we wouldn't have been
10 in this situation, I take it?

11 MR. MCCARTHY: I - - - I think in that scenario,
12 if it was a level 2, then the - - - then yes, the
13 prosecutor would have been in - - - obligated at that point
14 to ask for an upward departure.

15 JUDGE RIVERA: So I'm sorry. We've gone through
16 so many permutations, I'm not sure you've answered this,
17 and my apologies if this requires you to repeat yourself.
18 But here, as I understand it, defendant did ask for a
19 downward departure and was denied.

20 But let's - - - let's say for one moment he
21 didn't. Let's say he didn't, and he goes up on appeal.
22 The court remits to allow - - - I'm not sure I'm making the
23 right hypothetical here. But the end of this question is,
24 can - - - if the court is going to remit for an upward
25 departure, does it also have to permit the defendant to

1 seek a downward departure?

2 MR. MCCARTHY: I don't think so, and the reason
3 for that is - - - is it goes back to the - - - the parties'
4 respective obligations at the time that the risk assessment
5 points are determined, the presumptive risk order. So once
6 the - - - once the score comes in at a particular level,
7 let's say level 3, the People are under no obligation to
8 ask for anything else because they obtained their level.
9 The defendant there is obligated to ask for a downward
10 departure.

11 And I - - - I just want to make one final point
12 with respect to remittal. When this case was remitted, the
13 remittal court - - - when it was remitted back to the trial
14 court, the trial court limited the proof to say nothing can
15 be introduced into this case - - -

16 JUDGE RIVERA: Yes. That was in response to
17 defendant's motion that it was an alternative argument.
18 Would - - - would it be a different case if the court said,
19 no, I'm going to let them add more into this record?

20 MR. MCCARTHY: I - - - I think - - -

21 JUDGE RIVERA: Create a more robust record?

22 MR. MCCARTHY: I - - -

23 JUDGE RIVERA: Would it be a different case?

24 MR. MCCARTHY: I don't think so. I don't think
25 so.

1 JUDGE RIVERA: Why not?

2 JUDGE CANNATARO: Counsel, can I just ask you,
3 that hypothet - - - I'm sorry, Judge.

4 JUDGE RIVERA: No, no. I'm just curious. Why -
5 - - why not?

6 JUDGE CANNATARO: That hypothetical, would that
7 be a preservation issue? I mean, if you're going into the
8 SORA hearing and the RAI says level 3 and the People are
9 coming in and they're asking for level 3 and the defendant
10 at the SORA level doesn't ask for a downward departure,
11 could the Appellate Division say, well, we're modifying the
12 judgment in some way, but we're going to let you go back
13 and now ask for a downward departure?

14 MR. MCCARTHY: Well, the - - - the Appellate
15 Division has broader authority than - - - in terms of - - -
16 broader review powers than - - - than the Court of Appeals
17 in that sense. It is a preservation issue because at that
18 point when it was a level 3, the defendant was obligated to
19 ask for a downward departure.

20 JUDGE CANNATARO: Could they permit it as a - - -
21 in the interest of justice? If it - - - I can't think of
22 the hypothetical right now, and there are too many out
23 there, so I won't try, but could the court remit it in the
24 interest of justice and allow an application for a downward
25 departure?

1 MR. MCCARTHY: I imagine if there had been
2 anything in the record that would have demonstrated the
3 possibility, that could have fallen under the necessary or
4 appropriate case under 5522.

5 JUDGE RIVERA: What - - - what if the defendant
6 does exactly - - - well, I think it's exactly what went on
7 here; this was the one I was trying to think of - - - tries
8 to get the point reduction based on the argument of Ford.
9 Court doesn't agree. Asks for the downward departure.
10 Court doesn't agree. Appellate Division and the People
11 concede on the points, so you're now at the lower level,
12 but sends it back for the upward departure. Why isn't the
13 defendant able to now argue for a downward departure from
14 the 2 as opposed to the 3, if the People are going to be
15 able to argue go up from the 2 to the 3?

16 MR. MCCARTHY: I'm pausing because I just want to
17 make sure I understand - - -

18 JUDGE RIVERA: I know, the permutations are
19 terrible.

20 MR. MCCARTHY: There are a lot of permutations
21 there, so - - -

22 JUDGE RIVERA: I - - - I'm glad I'm not in your
23 shoes there.

24 MR. MCCARTHY: I think what happened is - - - is
25 in your hypothetical, there was an - - - originally a 3.

1 Defendant asked for a downward departure, was denied, went
2 to the Appellate Division, right?

3 JUDGE RIVERA: Correct.

4 MR. MCCARTHY: And then the - - - the points
5 change - - -

6 JUDGE RIVERA: Division decides on the points it
7 is really a 2 not a 3?

8 MR. MCCARTHY: It's really a 2. In terms of - -
9 - in terms of down - - - departure analysis, I think - - -
10 I mean, theoretically speaking - - - because that's all
11 we're doing right now. This is theoretical - - -

12 JUDGE RIVERA: Because it sounds to me like the
13 division is putting them back into the place that they
14 were, so why can't the defendant now argue, I want to go
15 from 2 to 1? It's a much bigger lift to say I want to go
16 from 3 to 1 than it is to go from 2 to 1.

17 MR. MCCARTHY: And I think when it comes down to
18 departure analysis, I think the - - - crucial to that
19 analysis is the point value. And if that's the case, if
20 the point value's changed, then theoretically speaking,
21 then the departure analysis should change too. I don't
22 know if that answers your question, but I - - -

23 JUDGE RIVERA: Thank you. Thank you.

24 MR. MCCARTHY: - - - I don't know if I disagree
25 with you in your - - -

1 JUDGE RIVERA: Uh-huh.

2 MR. MCCARTHY: - - - hypothetical because I think
3 the - - - the overwhelming factor that - - - that starts
4 all this is the - - - the point - - - the presumptive point
5 value, and people - - -

6 JUDGE RIVERA: Well, the goal - - -

7 MR. MCCARTHY: - - - should know what it is.

8 JUDGE RIVERA: But the goal at the end of the day
9 is to get the proper risk level assessment.

10 MR. MCCARTHY: Absolutely.

11 JUDGE RIVERA: That's the point of the day.

12 MR. MCCARTHY: That's the point of the statute.

13 JUDGE RIVERA: Whether it's on - - - whether it's
14 based on points that the court agrees, yes, the points that
15 are allocated that are recommended do indeed persuade the
16 judge that that's the proper risk level or the judge
17 believes it's too high or that risk level is too low and
18 addresses that through a departure, the - - - the end
19 result of this is supposed to be an accurate risk
20 assessment.

21 MR. MCCARTHY: Correct. And as long as the
22 defendant receives notice and opportunity.

23 Any other questions?

24 CHIEF JUDGE WILSON: Thank you.

25 MR. JUERGENS: I'd just like to point out that

1 the People didn't give notice here, which I think makes
2 their position even worse. And the way this case was
3 briefed - - -

4 JUDGE RIVERA: No notice of the request for the
5 upward departure?

6 MR. JUERGENS: Yes. Yes.

7 JUDGE RIVERA: But there is - - - is there not
8 time between the remittal and when the hearing is held?

9 MR. JUERGENS: Well, we're not arguing lack of
10 notice at the remittal hearing. We're saying that the fact
11 that there is a requirement that they give notice for an
12 upward departure, it undermines their argument in their
13 briefs that they - - - how can they possibly make an
14 argument in the alternative? Because they have points for
15 level 3, and there's no level 4 to go to? I mean, that's
16 one of their arguments.

17 Basically, what we're asking is that the court
18 adopt the current rule from the Third Department, a bright-
19 line test, and that very simply states that the People did
20 not request a upward departure in response to the
21 defendant's challenge to the point assessment or to the
22 classification.

23 And here, the People were on notice that the
24 points were contested. They were on notice that Mr. Weber
25 was arguing for a downward departure. They had every

1 reason to request an upward departure at that point. They
2 were on notice. They - - - they have no excuse for not
3 bringing it at that time. The fact - - - the fact - - -
4 and I - - - the fact that they were saying that - - -

5 JUDGE RIVERA: And then that notice would require
6 ten days under the statute? To put off the hearing ten
7 days?

8 MR. JUERGENS: Well, there could have been - - -
9 if - - - if the defense attorney felt the need to make an
10 objection at the SORA hearing, would have been entitled to
11 ten days, but that's a - - - as the court knows, excuse me,
12 that's a separate issue. But - - -

13 JUDGE SINGAS: Doesn't the Appellate Division
14 have the authority to send cases back for corrective
15 action? Like, let's suppose this was a criminal case and
16 there was an ID procedure that they deemed was improper,
17 and they say, okay, send it back now for an independent
18 source hearing. Why is this any different?

19 MR. JUERGENS: Because I believe that affirmative
20 relief to a respondent on a defendant's appeal is governed
21 by 5501(a)(1). And that - - -

22 JUDGE SINGAS: Why can't it be interest of
23 justice?

24 MR. JUERGENS: Because this court in People v.
25 Hecht said that the statute they're relying on, 5522, does

1 not grant general discretionary authority to the Appellate
2 Division to grant remittals to - - - to give discretionary
3 relief.

4 The - - - the - - - the statute governs the scope
5 of review. The People did not allow the Appellate Division
6 in the first go round to address this issue properly
7 because they didn't preserve their request for an upward
8 departure at the initial hearing. They forfeited their
9 right to appellate review. That - - - it - - - it's
10 straightforward.

11 And the statute's neutral. It applies to both
12 parties. If the defendant had won on the points at the
13 hearing and remained silent, and the People take their
14 appeal, and the defendant's now a nonappealing party - - -
15 the People take their appeal, they get the level 2, they
16 get the higher level reinstated, the defendant has no
17 grounds to ask for the case to be sent back. The defendant
18 - - -

19 JUDGE RIVERA: So if it's - - - if it's - - -
20 okay. So if it's the - - - the defendant appealing, but
21 they didn't ask for the downward departure - - -

22 MR. JUERGENS: Right.

23 JUDGE RIVERA: - - - just appealing on the points
24 - - -

25 MR. JUERGENS: Right.

1 JUDGE RIVERA: - - - the court is unpersuaded at
2 the Appellate Division - - -

3 MR. JUERGENS: Right.

4 JUDGE RIVERA: - - - can the defendant ask in the
5 alternative, can I now get a chance to ask for a downward
6 departure?

7 MR. JUERGENS: And he hasn't preserved that, so
8 the court would - - - would deny it.

9 JUDGE GARCIA: Counsel - - -

10 JUDGE RIVERA: Even though they're the appealing
11 party? But because they - - -

12 MR. JUERGENS: It's - - -

13 JUDGE RIVERA: The Appellate Division has
14 interest of justice jurisdiction to address an unpreserved
15 - - -

16 MR. JUERGENS: It - - - I - - - I think - - - I
17 think the Appellate Division has broader powers when the
18 appea - - - when they're looking at the remedy to the
19 appellant. They can look at the - - - the entire scenario.
20 But when they're looking at what remedy to give to the
21 nonappealing party, they're restricted by the statute. And
22 by this court's interpretation of that statute in the
23 Parochial Bus Systems case, it says you must preserve it.
24 If you're the nonappealing party, you must preserve an
25 issue. And - - - and plus, what error are the People

1 pointing out? What error did the SORA court commit at the
2 initial hearing? There was no error. They didn't preclude
3 the People from arguing for an upward departure. They
4 didn't - - -

5 JUDGE GARCIA: Counsel, just - - - and this is a
6 very different question, and I don't know the answer to it,
7 but there is a provision that someone subject to SORA can
8 come in and periodically ask for an adjustment of their
9 level, right?

10 MR. JUERGENS: Well, both parties can - - - both
11 - - - both sides, there's certain grounds you can come in
12 and ask for down - - - downward or upward modifications.

13 JUDGE GARCIA: Both parties. And is that based
14 solely, though, on changed circumstances over the time - -
15 -

16 MR. JUERGENS: Yes.

17 JUDGE GARCIA: That's what I thought.

18 MR. JUERGENS: Yes.

19 JUDGE GARCIA: Thank you.

20 MR. JUERGENS: Thank you.

21 CHIEF JUDGE WILSON: Thank you.

22 (Court is adjourned)

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

I, Joy Rako, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Christopher J. Weber, No. 50 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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