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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 65

QUANAPARKER HOWARD,

Appellant.

20 Eagle Street
Albany, New York 12207
March 30, 2016

Before:

CHIEF JUDGE JANET DIFIORE
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
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Number 65 on the
2 calendar, People v. Quanaparker Howard.

3 Counsel.

4 MS. FRIEDMAN: May it please the court.
5 Kathryn Friedman representing appellant-defendant
6 Quanaparker Howard in this appeal. I would like to
7 reserve three minutes for rebuttal, Your Honor.

8 CHIEF JUDGE DIFIORE: You may.

9 MS. FRIEDMAN: Your Honors, defendant was
10 convicted in 1999 of two counts of assault in the
11 first degree, one count of assault in the second
12 degree, unlawful imprisonment, and endangering the
13 welfare of a child.

14 Because of - - - he was sentenced to twelve-and-
15 a-half to twenty-five years; we can fast forward to 2013
16 when he - - - when a SORA hearing was held because of the
17 unlawful imprisonment charge.

18 JUDGE STEIN: Do you acknowledge that he
19 was presumptively a level 3 due to the automatic
20 override, and therefore it's just a matter of whether
21 or not he is entitled to a downward departure from
22 that?

23 MS. FRIEDMAN: I - - - I don't agree with
24 that, Your Honor, at all. I don't see this as an
25 abuse of discretion case; I think - - - I am here

1 today to urge this court to reach the constitutional
2 issue that is at the heart of this case.

3 JUDGE STEIN: Did you raise the
4 constitutional issue?

5 MS. FRIEDMAN: Yes, Your Honor, I do think
6 it was raised. I think it was raised of the trial
7 level. I think that when defendant objected - - - or
8 excuse me, when defense counsel objected and - - -
9 and stated on the record that - - - that his score
10 totaled seventy points and was a level 1, and that
11 there was no - - - the crime - - - the physical abuse
12 of this young boy did not involve any sexual abuse.
13 I do think that that was enough to trigger a
14 constitutional issue. This court has said - - -

15 JUDGE ABDUS-SALAAM: What issue is that,
16 counsel?

17 MS. FRIEDMAN: The constitutional issue is
18 the substance - - - substantive due process issue,
19 Your Honor. And that issue is whether the
20 presumptive override in this case, where defendant -
21 - - his score came out - - - was calculated, he was a
22 level 1. There was no evidence of sex - - - sexual
23 abuse with the underlying crimes, and - - -

24 JUDGE FAHEY: So assuming we can get there,
25 isn't Knox dispositive of it?

1 MS. FRIEDMAN: No, Your Honor - - -

2 JUDGE FAHEY: No?

3 MS. FRIEDMAN: No, Your Honor,

4 JUDGE FAHEY: How come?

5 MS. FRIEDMAN: Not at all. So Knox, in
6 effect, dealt with the issue of whether peop - - -
7 defendants who commit unlawful imprisonment and
8 kidnapping, where there is no sexual crime involved,
9 whether or not SORA applies to them.

10 This case is sliced a little bit
11 differently. I am not disputing that Knox exists and
12 that the rationale of Knox applies, and I am not
13 disputing that my defendant is - - - was adjudicated
14 a level 1 under SORA. What I am suggesting is that
15 the presumptive override in this case, adjudicating
16 him a level 3 because of the presumptive override,
17 because of the serious physical injury that was
18 inflicted on the - - - on that young child, that
19 presumptive override - - -

20 JUDGE FAHEY: You are not challenging the
21 SO designation; you're challenging the presumptive
22 override that makes an L3.

23 MS. FRIEDMAN: Because defendant's liberty
24 interests outweigh the State's interest in protecting
25 children from sex abusers in that - - - in this case;

1 that's exactly what I am arguing, Your Honor. And -
2 - -

3 JUDGE ABDUS-SALAAM: And is that the
4 liberty from having to register as a sex offender at
5 level 3?

6 MS. FRIEDMAN: Your Honor, I think it's
7 much more than that. I think - - -

8 JUDGE ABDUS-SALAAM: What is it?

9 MS. FRIEDMAN: I think that the liberty
10 interest cuts to the stigma that is associated with
11 being a level 3 offender, a sexual predator, that - -
12 - and I know stigma alone does not constitute the
13 liberty - - -

14 CHIEF JUDGE DIFIORE: If we classified him
15 a child predator as opposed to a sex offender, would
16 that make a difference to your argument?

17 MS. FRIEDMAN: No, Your Honor. That would
18 not make a difference to me at all. I think that
19 with a level 3 classification, he is bearing a label
20 that is not appropriate to him and that has grave,
21 grave, and serious repercussions that also implicate
22 his liberty interest to find employment.

23 JUDGE PIGOTT: Well, you're - - - you're
24 conceding that he is a sex offender, right? You're
25 saying level 1 is okay.

1 I am saying that because of this court's ruling
2 in People v. Knox, he - - - to be - - - he is adjudicated
3 a level - - - being adjudicated a level 1 sex offender is
4 the law of this state. And at the end of the day - - -

5 JUDGE ABDUS-SALAAM: Isn't the override the
6 law of the state as well?

7 MS. FRIEDMAN: Well, you know, Your Honor,
8 that raises a really, really interesting question.
9 The presumptive override is not mandatory. It is - -
10 - actually there is a Second-Department case that has
11 actually said that the presumptive override is not
12 mandatory. I understand that that has not percolated
13 up here, but it is not mandatory. And what I'm
14 suggesting - - -

15 JUDGE ABDUS-SALAAM: Did you cite that in
16 your - - -

17 MS. FRIEDMAN: Oh, it's on People v.
18 Reynolds. People v. - - - I don't have the cite off
19 the top of my head. It was either determined - - -
20 decided, excuse me, in 2009 or 2011. I forgot the
21 date.

22 But I am just - - - I am suggesting, Your
23 Honors, that in the circumstances of this case, there
24 is no question that Knox and its companion cases say
25 that the State has an interest in protecting children

1 - - - and notwithstanding the fact that a crime does
2 not have a sexual element, you know, for all intents
3 and purposes, to - - -

4 JUDGE RIVERA: Well, the People say there
5 is a sexual component to the case - - -

6 MS. FRIEDMAN: Or there is - - -

7 JUDGE RIVERA: - - - because the children -
8 - - because the child is naked.

9 MS. FRIEDMAN: Your Honor, there was no
10 crime charged. No sexual crime was charged, there
11 was no evidence of sexual abuse, my client has no
12 history - - - my client has no criminal history to
13 speak of. I - - -

14 JUDGE STEIN: Didn't - - - didn't your
15 client require the child to pull his pants down so he
16 could be hit on his naked body and - - - could that
17 be interpreted as having a sexual component to it?

18 MS. FRIEDMAN: I am not comfortable with
19 that interpretation at all, Your Honor. Not at all.

20 JUDGE STEIN: But would it - - - but if a
21 court were to find that, would that be an abuse of
22 discretion?

23 MS. FRIEDMAN: I'm sorry. If a court were
24 to find - - -

25 JUDGE STEIN: Were to find that, would that

1 be an abuse of discretion? If the court were to find
2 that, you know, that the court felt that the
3 presumptive override did apply because of that, would
4 that be an abuse of discretion?

5 MS. FRIEDMAN: I think it would be; I think
6 it would be, Your Honor. I - - - I understand this
7 court's ruling in Knox and I absolutely understand
8 the State's interest in protecting children. But I
9 ask this court, because I have one minute left, to -
10 - - to think about the Kafkaesque world that my
11 client is living in.

12 This is a man who is labeled, for all
13 intents and purposes, a sexual predator, a level 3
14 sexual predator. He cannot find employment, he
15 cannot - - - he can't live in municipal housing.

16 JUDGE ABDUS-SALAAM: If we disagree with
17 you, counsel, that the override is not permissive,
18 but it is mandatory - - -

19 MS. FRIEDMAN: Uh-huh.

20 JUDGE ABDUS-SALAAM: - - - then, you know,
21 what do we do with your argument?

22 MS. FRIEDMAN: Well, I think - - - I think
23 that you can reach the constitutional issue, because
24 I think this court can - - - can find that in matters
25 of grave public policy that you can reach these

1 constitutional issues even if the record and the case
2 law isn't fully developed and percolated down below.

3 I recognize that, again, Knox, there was a
4 lot of the litigation and a lot going on down there,
5 and we don't necessarily have that here. But the
6 court does have the power to reach the
7 constitutionality of the issue. Massachusetts
8 National Bank v. Shin (ph.) allows the court to do
9 so, and I would just encourage you to reach this
10 issue because defendant's liberty interests far
11 outweigh the state's interest.

12 In this case, the state's interest is met
13 with the level 1 designation.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.
15 Counsel.

16 MR. TEXIDO: Good afternoon, Your Honors.
17 May it please the court, Nicholas Texido for the
18 People of the State of New York.

19 I think it's first very important that we
20 analyze this under the proper framework. First, this
21 is not an upward departure. This is a refusal to
22 downwardly depart from the presumptive risk level.

23 JUDGE ABDUS-SALAAM: You agree that the
24 defendant preserved the constitutional issue?

25 MR. TEXIDO: I do not. He - - - the

1 defendant didn't make any constitutional argument
2 whatsoever. His argument was basically, look, Judge,
3 there was no sex here, he should be a level 1 instead
4 of a level 3. He never once mentioned due process,
5 never once mentioned anything constitutional. And I
6 think that the only way that this court can analyze
7 the case is under the rubric of a downward departure.
8 Just - - -

9 CHIEF JUDGE DIFIORE: What did the Judge
10 have to find to get to the override?

11 MR. TEXIDO: All the Judge had to find to
12 get to the override was that serious physical injury
13 was caused in the course of the commission of this
14 enumerated offense, which was unlawful imprisonment
15 in the first degree. And the court did find that.
16 Now - - -

17 JUDGE STEIN: Did you concede in the trial
18 court that there was no sexual component to this
19 crime?

20 MR. TEXIDO: I believe it was certainly in
21 the case summary. I think the prosecutor stopped
22 short of conceding it.

23 JUDGE STEIN: And you - - - but you never
24 raised the - - - the argument that you're raising to
25 this court that maybe there was - - -

1 MR. TEXIDO: Well, it's not that I'm
2 raising that argument, because I don't know. I think
3 - - -

4 JUDGE STEIN: You don't think it matters?

5 MR. TEXIDO: No. And the reference that
6 Knox - - - Knox makes is that one of the reasons that
7 it's okay to include these types of offenses when
8 there - - - there might not be a sexual component, is
9 that it's impossible to divine the defendant's
10 thought process.

11 This defendant had the child tied to a bed
12 naked, he had his head covered with a pillowcase. I
13 don't know what the defendant was getting out of
14 this. It appeared to be - - - and I say this in my
15 brief, it appears that it was a woefully misguided
16 attempt to a punishment. But we don't know.

17 JUDGE RIVERA: But with respect - - - with
18 respect to the level 3, the Citron case and Knox - -
19 -

20 MR. TEXIDO: Sure.

21 JUDGE RIVERA: And the courts specifically
22 point to the fact that that particular individual,
23 even though the actual crime involved there was not a
24 sexual nature, had a history of being violent sexual
25 crimes?

1 MR. TEXIDO: Yes. That was - - - that was
2 a factor that made it okay in that case, made it not
3 an abuse of discretion to downwardly depart. In this
4 case, we don't have that. But we - - - we do analyze
5 it under the framework of a downward departure. And
6 what the defendant has to show is a mitigating factor
7 that's not taken into account by the guidelines.

8 JUDGE ABDUS-SALAAM: Did the defendant here
9 ask for a downward departure?

10 MR. TEXIDO: He did. I - - - I take his -
11 - - and I'll concede that he did. I'll take his
12 argument that he made at the trial court as saying,
13 Judge, you should depart from 3 to 1.

14 JUDGE FAHEY: What was this case - - - was
15 this case pre-Gilotti?

16 MR. TEXIDO: I - - -

17 JUDGE FAHEY: When - - - so the Gilotti
18 rules didn't really - - - really hadn't been
19 formulated at the time that the - - - his level was
20 determined.

21 MR. TEXIDO: I am - - - I'm not aware of
22 that, Your Honor.

23 JUDGE FAHEY: I thought it was, but I
24 wasn't sure about that.

25 MR. TEXIDO: Okay. I think even before - -

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JUDGE FAHEY: Would that make a difference if it was pre-Gilotti?

MR. TEXIDO: Yeah, I think even before Gilotti, in order to receive a downward departure, a defendant had to show that there was a mitigating factor not taken into account by the guidelines.

JUDGE FAHEY: Uh-huh.

MR. TEXIDO: And here - - -

JUDGE RIVERA: By what standard, preponderance or - - -

MR. TEXIDO: It's an abuse of discretion standard - - -

JUDGE RIVERA: What standard?

MR. TEXIDO: - - - at this point.

JUDGE RIVERA: I'm sorry. With respect to whether or not he had met his burden.

MR. TEXIDO: Yes. He would've had to meet his burden by a preponderance. But here, the - - -

JUDGE RIVERA: And is that obvious from the record that that's the standard the court applied?

MR. TEXIDO: It's not obvious. No, it's not. But that argument hasn't been raised, that the court applied the wrong standard.

JUDGE PIGOTT: Mr. Texido, the court said -

1 - - you know, agreed with you that the People have a
2 presumptive level 3, and then he says, "and because
3 of the extensive injury inflicted on the victim,
4 essentially the torture inflicted, I agree with them
5 that he poses a serious risk to public safety and
6 that is not captured by the scoring instrument, and
7 therefore I will employ the presumptive level 3." Is
8 that the proper standard, that he is a danger to
9 public safety?

10 MR. TEXIDO: Yes. Because - - -

11 JUDGE PIGOTT: You find that in the fact
12 that, you know, it was one - - - I mean, I'm not
13 denigrating the seriousness of it, but it was one
14 person involving - - - was it the child of his
15 girlfriend or something - - - I mean, this wasn't a
16 random act of where he grabbed a kid off the street.

17 MR. TEXIDO: No, it wasn't a random act,
18 but the - - - in the SORA commentary the legislature
19 talks about, they tried to capture two things. One
20 is the risk of re-offense, and two is the harm posed
21 if the person does re-offend. Now here, if this
22 defendant goes out and he gets another girlfriend who
23 has a child, and he engages in this type of conduct
24 again, the harm to the child, I think everybody would
25 have to agree, is great.

1 JUDGE RIVERA: But isn't that - - - isn't
2 that true for anyone who commits a crime that they
3 may indeed be a recidivist?

4 MR. TEXIDO: Yes.

5 JUDGE RIVERA: So where do you draw the
6 line? Isn't SORA focused on sexual offenders? And
7 aren't we back then to the question - - -

8 MR. TEXIDO: It is. And what Knox says is
9 that when you cut a child off from their everyday
10 surroundings, and you secrete them somewhere, you
11 lock them, in this case you tie them to a bed with a
12 pillowcase over their head, you're putting them at
13 additional risk of being abused sexually.

14 JUDGE RIVERA: Well, she concedes the level
15 1; her point is the level 3.

16 MR. TEXIDO: Right. I think once you're in
17 the rubric of SORA, you - - - the legislature
18 determined and this court agreed that when commit
19 this offense, you're subject to SORA.

20 JUDGE RIVERA: Uh-huh.

21 JUDGE ABDUS-SALAAM: What - - -

22 MR. TEXIDO: Once you're in that rubric of
23 SORA, the way we have to an - - - the risk we have to
24 analyze is the risk that he will re-offend by
25 committing a similar offense.

1 JUDGE ABDUS-SALAAM: When you say, seclude
2 this child and secrete the child, this was in the
3 home that the child lived in, right, with the - - -
4 his mother and the defendant.

5 MR. TEXIDO: It was. There were times, and
6 this is established in the pre-sentence report, that
7 the defendant and the mother left. And they left
8 another child in the house who was not tied to a bed
9 with a babysitter. And what they did was they put
10 socks in this child's mouth and electrical tape
11 around him so that he couldn't scream. And they left
12 this kid in the room.

13 But why I think that's important, is they
14 are leaving this child unattended, tied - - - naked,
15 tied to a bed with other people in the house. We
16 know the babysitter was there, I don't know if other
17 people were coming in and out of the house.

18 JUDGE RIVERA: Every case involving child
19 violence then falls within a level 3 category?

20 MR. TEXIDO: No. Every case where serious
21 physical injury is caused is a presumptive level 3.

22 Now, this court could have in its - - -

23 JUDGE RIVERA: So then it doesn't matter if
24 the child is naked.

25 MR. TEXIDO: It doesn't matter - - -

1 JUDGE RIVERA: No, I'm asking you.

2 MR. TEXIDO: I didn't hear the question.

3 JUDGE RIVERA: So then it does not matter
4 that the child is naked?

5 MR. TEXIDO: It doesn't - - - no, it
6 doesn't - - - I don't think it does matter that the
7 child is naked. I think when you commit this
8 offense, you're cutting the child off from their
9 everyday surroundings, it was rational for the
10 legislature to include it within SORA.

11 JUDGE STEIN: But might that be a factor if
12 you apply downward departure analysis, so in other
13 words, if - - - if we said that it was subject to
14 that analysis, then the defendant could argue, you
15 know, there was nothing here at all to indicate a
16 sexual motiv - - - motivation, and that should be
17 part of the analysis.

18 MR. TEXIDO: They could argue that, but the
19 problem, I think, with that argument is that it's
20 taken into account by the guidelines. Here, the
21 defendant got zero points for any type of sexual
22 contact with victim - - - with the victim. He - - -
23 there was - - - there is a category were you get five
24 points for contact over clothing, X amount of points,
25 contact under clothing, or then thirty points for

1 sexual intercourse or deviant sexual intercourse.

2 JUDGE ABDUS-SALAAM: So this is based, just
3 essentially, on a public safety sort of concern - - -

4 MR. TEXIDO: Yes, it is. In - - -

5 JUDGE ABDUS-SALAAM: - - - that the
6 defendant might re-offend in the same way.

7 MR. TEXIDO: And if he re-offends in the
8 same way, the legislature and this court have already
9 said that that places a child at a heightened risk of
10 being sexually abused. So including it within SORA
11 is not irrational.

12 But I do want to get back to - - - I - - - it
13 already was taken into account by the guidelines. And
14 that's why it can't be at the basis of a mitigating
15 factor. He received zero points. Now, in our - - - the
16 counterargument to that is, well, because of the override,
17 the points didn't matter. But that would be true on - - -
18 in every override case.

19 So if a defendant didn't use a dangerous
20 instrument, but he has a prior sex felony, he got zero
21 points for the dangerous instrument, he ends up on one,
22 override to three because he has a prior sex felony. He
23 shouldn't be able to go to the court and say, well, I
24 didn't use a dangerous instrument, and that wasn't taken
25 into account because of the override, so this court should

1 lower my level then to a level 1.

2 And that's essentially what - - - to the extent
3 the defendant argues downward departure, that's - - -
4 that's essentially what's being argued here.

5 Unless there are any questions, I'll - - -
6 thank you.

7 CHIEF JUDGE DIFIORE: Thank you.

8 Counsel.

9 MS. FRIEDMAN: Yes. Just a couple - - -
10 just a couple of points, Your Honor. With regard to
11 Judge - - -

12 JUDGE RIVERA: What's the circumstance not
13 taken into consideration? How do you respond to his
14 point? It's already taken into consideration.

15 MS. FRIEDMAN: The - - - I'm sorry - - -

16 JUDGE RIVERA: The grounds that you're
17 arguing for the - - - not giving him a level 3, that
18 downward departure - - - staying within this
19 downward-departure framework.

20 MS. FRIEDMAN: Sure.

21 I - - - so Your Honor, I - - - I th - - - I will
22 speak for myself.

23 JUDGE RIVERA: No, as a question of law,
24 what's the argument?

25 MS. FRIEDMAN: With regard to the downward

1 departure?

2 JUDGE RIVERA: Yes, yes.

3 MS. FRIEDMAN: I think that we are
4 conflating. The up - - - the ability of a court - -
5 - or the ability of counsel to move for an upward or
6 downward departure, with regard to presumptive-risk
7 levels, which is what Gilotti talked about, right.
8 Gilotti - - -

9 JUDGE STEIN: Yes. But what if we - - -
10 you want to base it on a constitutional due process
11 argument. But if we disagree with you on that and we
12 say that it is subject to departure analysis - - -

13 MS. FRIEDMAN: Yes.

14 JUDGE RIVERA: - - - could we answer Judge
15 Rivera's question?

16 MS. FRIEDMAN: So - - - and that's exactly
17 what I'm getting to, Your Honor. What we are talking
18 about, I think, is conceptually different. We are
19 talking about a presumptive override from a
20 presumptive risk level, right. My client was a
21 presumptive level 1, but the override applied and
22 made him a presumptive level 3.

23 I think that that might be conceptually
24 different than having a defendant categor - - - you
25 know, classified as - - - at a particular risk level,

1 and then to apply upward or downward departure
2 analysis. I think because - - -

3 JUDGE RIVERA: You're saying it's what he
4 identified as the counterargument that one is you're
5 counting a bunch of points here, you're not looking
6 at any points, you're just jumping to the override?

7 MS. FRIEDMAN: That's - - - that's right.
8 Because if - - - if this is not - - - if the
9 presumptive override is not mandatory, right, then I
10 think that - - - well, then the burden is on the
11 People to demonstrate, by clear and convincing
12 evidence, aggravating factors; that didn't happen
13 here.

14 I would just - - - I would urge this court
15 in thinking about this whole issue about abuse of
16 discretion and presumptive overrides and upward and
17 downward departures, that if it finds an abuse of
18 discretion within - - - with regard to this issue,
19 that the court can send it back - - - I know it seems
20 academic and sort of a moot point, because - - -

21 JUDGE PIGOTT: Well, Mr. Texido - - - Mr.
22 Texaco (sic), if I'm understanding him, is saying, I
23 start at 3. There is a presumption - - -

24 MS. FRIEDMAN: Right.

25 JUDGE PIGOTT: - - - presumptive 3.

1 You've got to somehow get it down. You - - - what -
2 - - are you saying, there is no 3, it's a 1, and
3 they've got to justify it getting up.

4 MS. FRIEDMAN: That's exactly what I'm
5 saying, Your Honor.

6 JUDGE GARCIA: And is that Reynolds, you're
7 saying, there is a case in - - -

8 MS. FRIEDMAN: Reynolds - - - Reynolds does
9 - - - the Second Department holds that it's - - -

10 JUDGE GARCIA: But it's not cited in your
11 brief, Reynolds, is it?

12 MS. FRIEDMAN: I don't believe I've cited
13 it in my brief, Your Honors.

14 JUDGE GARCIA: But you made this argument
15 in - - -

16 MS. FRIEDMAN: I came across Reynolds as I
17 was preparing for oral argument. So - - -

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MS. FRIEDMAN: Thank you.

20 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Quanaparker Howard, No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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