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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,  
  
Appellant,  
  
-against-  
  
WILLIAM COOK,  
  
Respondent.

NO. 30

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PEOPLE,  
  
Respondent,  
  
-against-  
  
WILLIAM COOK,  
  
Appellant.

NO. 31

20 Eagle Street  
Albany, New York  
February 15, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

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Appearances :

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1 CHIEF DIFIORE: Good afternoon, everyone. The  
2 first matter on this afternoon's calendar is appeal number  
3 30, People of the State of New York v. William Cook.

4 Counsel.

5 MR. SASLAW: May it please the court. I am  
6 Assistant District Attorney Edward Saslaw.

7 The sole issue in this case - - -

8 CHIEF DIFIORE: Mr. Saslaw, may I interrupt a  
9 moment to ask you if you would like to reserve any rebuttal  
10 time?

11 MR. SASLAW: Two minutes for rebuttal, Your  
12 Honor. Thank you.

13 CHIEF DIFIORE: Certainly.

14 MR. SASLAW: The sole issue is - - - is whether  
15 the Queens adjudication was barred by the previously made  
16 adjudication of the same defendant, Richmond County.

17 I recognize that there is some facial appeal to  
18 such an argument to be sure, especially from the point of  
19 view of a busy Appellate Court or - - - or a trial court,  
20 but the Appellate Division was wrong. Both because the  
21 statute contemplates and requires that the court perform a  
22 role quite separate and distinct from that of the Board of  
23 Sex Examiners, and in that regard, the statute mandates a  
24 adjud - - - a SORA adjudication from each court that  
25 sentenced the defendant.

1 JUDGE STEIN: Where does it say each court?

2 MR. SASLAW: Well, it says - - - it says, the  
3 sentencing court.

4 JUDGE STEIN: Well, but does it address the  
5 situation that we have here, where there are more - - -  
6 there are more than - - - there is more than one sentencing  
7 court, but the - - - but the - - - the determination is  
8 being made based on the charges from both courts?

9 MR. SASLAW: It's no question. And in fact, the  
10 RAI contemplates - - - the RAI is supposed to be filled out  
11 to accommodate the fact that the defendant has been  
12 convicted in two different places.

13 JUDGE STEIN: Right. But does the statute  
14 address it?

15 MR. SASLAW: The statute - - - well, I submit the  
16 statute does address it by saying, the sentencing court,  
17 not, a sentencing court.

18 JUDGE STEIN: But doesn't the statute also, in -  
19 - - looking at Correction Law 168(0), which applies to a  
20 petition for modification of a SORA determination. And  
21 there, it refers to the court - - - the court that made the  
22 determination; it doesn't refer to the sentencing court.

23 MR. SASLAW: Right. But that, presumably, would  
24 be the court, the sentencing court, that made the  
25 determination that the defendant would like modified.

1           But if I could just go back to the difference  
2           between what the RAI is for, and what the court's function  
3           is, because it is true, you - - - all you need is one RAI.

4           JUDGE GARCIA: And when you're doing that,  
5           counsel, one of the ways I think you have to look at this  
6           is, what is a sentencing court doing - - - going through  
7           the SORA proceeding, what information are they looking at  
8           that isn't in the RAI.

9           MR. SASLAW: I submit, probably very little. It  
10          could be a judge's own memory of the case, perhaps the - -  
11          - presumably, the case was before that judge once before.

12          JUDGE GARCIA: But one thing, and I don't know if  
13          this is the case, it appears to be the case that might have  
14          happened here in the Queens proceeding, is that they  
15          considered this fifth victim. And that information, if I'm  
16          right, is in the plea allocation in Queens.

17          MR. SASLAW: In fact, yes.

18          JUDGE GARCIA: And that information isn't in the  
19          RAI.

20          MR. SASLAW: I gather that that's so; I don't  
21          recall. But - - -

22          JUDGE GARCIA: And that was one of the bases for  
23          the Queens upward departure.

24          MR. SASLAW: Indeed, that's correct.

25          JUDGE GARCIA: So would it be the case, I'm - - -

1 this is the way I'm seeing the record, but it is unclear,  
2 could you have information in a plea allocution, which I  
3 think is one of the things in the statute the court  
4 considers - - -

5 MR. SASLAW: Correct.

6 JUDGE GARCIA: - - - that isn't in front of, in  
7 this case it would be, the Richmond judge.

8 MR. SASLAW: Right. I don't want to preempt my  
9 adversary's argument, but it could very well be that that  
10 is a problem that - - - that - - - I think, Judge, you have  
11 - - - you identify a correct the problem, but there are  
12 other ways of addressing that than having each sentencing  
13 court - - -

14 JUDGE GARCIA: Right.

15 MR. SASLAW: But the statute says, each  
16 sentencing court should do its own adjudication. And  
17 there's a good reason for it, largely arising out of Doe v.  
18 Pataki. Because that changed the nature of this whole  
19 proceeding.

20 In other words, The Board of Examiners of Sex  
21 Offenders was, initially, really to deciding body. They  
22 were the ones that made the determination. Once Doe said,  
23 it's not going to be that, it's going to be the court, now,  
24 instead of just rubberstamping or administratively  
25 approving something that a board has done, the court has to

1 do it.

2 JUDGE GARCIA: But what if you get two different  
3 determinations. What if you had a 2 and a 3?

4 MR. SASLAW: I think that's where the Appellate  
5 Division would come in to resolve that.

6 JUDGE GARCIA: But I don't see how that could be  
7 our role for the Appellate Division. One of the - - - one  
8 of the problems with the two adjudications, it seems to me,  
9 is that potentially - - - you don't have it here, but you  
10 get a 2, you get a 3, given the purpose of the statute, it  
11 seems the higher level would apply - - -

12 MR. SASLAW: No question.

13 JUDGE GARCIA: - - - but that gives the  
14 impression of - - - I mean, that argument could be made,  
15 the higher level should apply, that would give the  
16 impression that the People have two shots, two bites of the  
17 apple to get a higher determination.

18 MR. SASLAW: Or vice versa. The defendant has -  
19 - - I think, the defendant - - -

20 JUDGE GARCIA: Yeah, but then the higher level  
21 applies. What do they care? Once they get a 3, what do  
22 they care if they get a 2 the second - - -

23 MR. SASLAW: We may not care, but they will,  
24 because they have now a reasonably decent appeal on a 3 to  
25 say it should be a 2; a judge already found on the same

1 facts it was a 2.

2 JUDGE STEIN: But why wouldn't res judicata  
3 apply?

4 MR. SASLAW: Res judicata is a device that  
5 applies better to cases where the principal purpose is to  
6 resolve a dispute, like a civil case.

7 JUDGE STEIN: Well, this certainly - - - this is  
8 a dispute; is it not?

9 MR. SASLAW: Well, we - - -

10 JUDGE STEIN: And we do apply res judicata in  
11 criminal cases as well.

12 MR. SASLAW: It's true. But by and large, where  
13 a statute is for the purpose of public protection, which  
14 this clearly is, we're not as interested in - - - in  
15 speeding up litigation as we are in getting it right.

16 JUDGE STEIN: Well, but what more, if all the - -  
17 - assuming that all the information is available to one  
18 court, and here there is certainly some indication in the  
19 record that there was - - - there was some sharing of - - -  
20 of information. What more would DCJS need to know or, you  
21 know, or anybody, in terms of community notification?

22 MR. SASLAW: Well - - -

23 JUDGE STEIN: I just - - - I'm trying to  
24 understand what is the purpose of having two adjudications  
25 where one has already been held that - - - that encompasses



1 - - - again, I'm assuming that it encompasses all the same  
2 information, and it's just two different adjudicators - - -

3 MR. SASLAW: I could spin a million - - - or at  
4 least five or six scenarios as to where it might be  
5 important. For instance, if one of the conventions got  
6 either vacated or reversed, and you have some other  
7 adjudication that's - - - that's still available - - -

8 JUDGE ABDUS-SALAAM: But when - - - wouldn't you  
9 then go to that court where there's an adjudication still  
10 outstanding?

11 MR. SASLAW: On what authority? I mean, as Cook  
12 currently stands, the - - - the - - - the second SORA has  
13 to be dismissed, based on res judicata, and it's gone. And  
14 now - - -

15 JUDGE STEIN: But what - - -

16 MR. SASLAW: - - - there's no statutory mechanism  
17 to - - - to bring it back.

18 JUDGE STEIN: But what would happen if there was  
19 only in one court, and there were multiple convictions, and  
20 some of them were vacated or dismissed? Don't you have the  
21 same problem? Isn't there a mechanism to deal with that?

22 MR. SASLAW: Well, but as, you know, as Judge  
23 Garcia points out, it may not make any difference,  
24 depending on what - - - what - - -

25 JUDGE GARCIA: No, but wouldn't you have a

1 modification right, in that case - - -

2 MR. SASLAW: Yes.

3 JUDGE GARCIA: - - - you still have a court - - -

4 MR. SASLAW: Right.

5 JUDGE GARCIA: - - - with jurisdiction.

6 MR. SASLAW: That's correct. You know, you would

7 - - - there would be basis for some modification based on

8 that.

9 Here, you sort of have - - - it's an uncharted  
10 territory. And I do - - - I can - - - I can defend the  
11 reasons why each sentencing court has to look at this  
12 separately. And I could also make an argument as to why  
13 one would be enough, but that's a determination that was  
14 made by the legislature. SOLTA (ph.), when SOLTA was  
15 enacted, which has a similar statute, they decided that  
16 goes to one judge, and that the Attorney General represents  
17 the State.

18 So it's - - - there are two ways of - - - of  
19 approaching this, and in this case, after Doe, the  
20 legislature decided it should be the DA and the sentencing  
21 judges.

22 JUDGE GARCIA: Counsel, are you aware of this  
23 ever happening in another case?

24 MR. SASLAW: I'm not, Your Honor, and I think  
25 that that also goes to the sort of theoretical nature of

1 this problem. And SORA has been in effect for - - - for a  
2 substantial amount of time. We haven't faced this issue  
3 before.

4 Thank you.

5 CHIEF DIFIORE: Thank you, Mr. Saslaw.  
6 Counsel.

7 MS. NAPOLI: Good afternoon. Lisa Napoli of  
8 Appellate Advocates for the respondent.

9 The construction urged by the People would lead  
10 to an irrational result because it would lead to a result  
11 that's contrary to the public safety purpose of the Sex  
12 Offender Registration Act. It would have unconstitutional  
13 consequences for the People that are subject to SORA, and  
14 the duplicative proceedings that they urge are barred by  
15 res judicata.

16 JUDGE GARCIA: Counsel, putting aside the double  
17 jeopardy issue, but on - - - on - - - those were good  
18 arguments, on duplicity, on duplicitous proceedings, res  
19 judicata. One thing you seem to disagree with in the  
20 papers, the parties, is the effect of the reversal, unless  
21 it isn't happening here, but let's use it as the example.

22 MS. NAPOLI: Um-hum.

23 JUDGE GARCIA: So Richmond, the underlying  
24 conviction is reversed. And as I read the Corrections Law,  
25 mandatory expungement of the SORA proceeding.

1                   So now you haven't, in this scenario, had a  
2                   Queens proceeding. And now, if it was, as Judge Stein was  
3                   pointing out, I believe, counts that were dismissed, you  
4                   could still go back to Richmond and a modification motion,  
5                   and a conduct would - - - could be excluded. But now, that  
6                   Richmond court, as I read the statute, no longer has  
7                   jurisdiction to make a SORA determination.

8                   So what happens?

9                   MS. NAPOLI: I think it's an interesting  
10                  question. It's not entirely clear, but I'm not really sure  
11                  why the People are so worried about. From the defense  
12                  point of view, I would be very worried about it. I would  
13                  move - - - as a defense attorney, I would move immediately  
14                  to have the SORA adjudication vacated, and the jurisdiction  
15                  - - -

16                  JUDGE GARCIA: Absolutely.

17                  MS. NAPOLI: - - - that the conviction was  
18                  vacated in, and then we would have a proceeding where the -  
19                  - - in the - - - a new proceeding would commence in the  
20                  jurisdiction where the conviction maintains. You can't - -  
21                  -

22                  JUDGE GARCIA: There are - - -

23                  MS. NAPOLI: - - - get away from being subject to  
24                  SORA.

25                  JUDGE GARCIA: But there are - - - aren't there

1 time limits in the statute for commencing a SORA  
2 proceeding, which has never been done - - - so let's just  
3 use Queens, right - - -

4 MS. NAPOLI: Um-hum.

5 JUDGE GARCIA: - - - and I know it's an  
6 impossibility here now, but like let's say that - - - as if  
7 that had happened. So the underlying conviction is gone,  
8 and it's years later, you're right, you go into the  
9 Richmond County, under the statute, and you say the  
10 conviction is reversed, expunge this proceeding, which I  
11 think is mandatory under the statute.

12 MS. NAPOLI: Um-hum.

13 JUDGE GARCIA: Now, can the People go to Queens  
14 four years after release and say, now we would like this  
15 sentencing court to do a SORA determination?

16 MS. NAPOLI: Yes. They can seek a modification.

17 JUDGE GARCIA: And what's the authority for doing  
18 that?

19 MS. NAPOLI: Well, the modification provision - -  
20 -

21 JUDGE GARCIA: But it's not a modification  
22 because that court never made a determination.

23 MS. NAPOLI: Well, it's true, that court never  
24 made a determination, but there was a determination made,  
25 and the - - - the - - - let's say the Queens conviction

1 remains, right, even if the adjudication was in Richmond,  
2 and that Richmond conviction went away, you are subject to  
3 SORA because the current offense that remains, that  
4 triggers the SORA registration is in Queens.

5 JUDGE GARCIA: But that sentencing court has  
6 never made the determination - - -

7 MS. NAPOLI: They - - -

8 JUDGE GARCIA: - - - and that would be the  
9 operative determination once the Richmond County one is  
10 expunged.

11 MS. NAPOLI: That's true. They didn't. But the  
12 current offense that triggers registration originated from  
13 Queens, right. And they - - -

14 JUDGE RIVERA: You're saying because it's a - - -  
15 it's a jurisdictional issue then, because that offense  
16 still exists, and - - - and the person had been subject to  
17 SORA - - -

18 MS. NAPOLI: But that's - - -

19 JUDGE RIVERA: - - - so as an umbrella matter for  
20 all of these offenses, all of these crimes. So you're - -  
21 - you're losing jurisdiction in one court, but the other  
22 court still has - - - so it's a jurisdictional - - -

23 MS. NAPOLI: It's - - - it is more of a juris - -  
24 -

25 JUDGE RIVERA: - - - question - - -

1 MS. NAPOLI: It is a jurisdictional issue.

2 JUDGE RIVERA: - - - as opposed to a time bar  
3 question, as Judge Garcia is trying - - -

4 MS. NAPOLI: Yeah. I think - - -

5 JUDGE RIVERA: - - - to figure out from your  
6 answers?

7 MS. NAPOLI: Yes. It's a jurisdictional issue,  
8 and they have overlapping jurisdiction.

9 And the thing - - - the thing that's important to  
10 remember is that if - - - look at what happened here.  
11 Richmond - - - the Richmond decision - - - the Richmond  
12 proceeding went first. And in Richmond County, all of the  
13 facts surrounding all of the offenses, Queens - - -

14 JUDGE GARCIA: But what about this fifth victim?

15 MS. NAPOLI: That's true. The - - - I don't  
16 think that the fifth victim was mentioned. But what's  
17 important - - -

18 JUDGE STEIN: But couldn't the Queens DA have  
19 communicated - - -

20 MS. NAPOLI: Exactly. Exactly.

21 JUDGE STEIN: - - - after a conviction?

22 MS. NAPOLI: I was just about to say, you know  
23 from the supplemental appendix that we filed, that there  
24 was multiple documents provided by Queens to the Richmond  
25 County District Attorney's office. They acted, they are

1 both representatives of the People of the State of New  
2 York, they worked together to litigate this proceeding.

3 And if the fifth victim was that important, then  
4 Richmond would have used it.

5 JUDGE GARCIA: But no, and I could certainly - -  
6 -

7 MS. NAPOLI: It certainly had access to that  
8 fact.

9 JUDGE GARCIA: And - - - and that would be a best  
10 practice, and perhaps whatever the decision here, going  
11 forward, if it were to be that way, that would certainly be  
12 something that should be taken into consideration - - -

13 MS. NAPOLI: And - - -

14 JUDGE GARCIA: - - - when that one decision is  
15 going to be made. Perhaps in this case having been  
16 decided, they thought Queens was going to go. But - - -

17 MS. NAPOLI: Oh, I think that they may had  
18 decided, actually, that it wasn't important, or that there  
19 wasn't sufficient evidence for it, and that they had enough  
20 ammunition. They had a lot of documentation from Queens.  
21 I mean, you've - - - you look at what was provided in the  
22 supplemental appendix, they had DD-5s, they had the PSI;  
23 they had a lot of information.

24 And of course, they would have access to the plan  
25 sentencing minutes. Those were coordinated prosecutions.



1 Just to get back - - -

2 JUDGE ABDUS-SALAAM: Counsel, you start - - -  
3 yeah, you started to say something about the Constitutional  
4 concerns from the defendant's point of view about having  
5 two separate hearings. Could you elaborate - - -

6 MS. NAPOLI: That's right. I think - - -

7 JUDGE ABDUS-SALAAM: - - - a little more on that?

8 MS. NAPOLI: - - - that it's - - - an - - - an  
9 offender is entitled to know the reasons why he is subject  
10 to the Sex Offender Registration Act. Not only the fact of  
11 his risk level, but why. And that isn't clear here. And  
12 Mr. - - - Mr. Cook's own case illustrates it.

13 There's two different rationales, and they  
14 conflict with each other. In Richmond County, they  
15 declined to assess points under risk factor 7, which is at  
16 issue in the appeal that we'll discuss next. But in  
17 Queens, obviously - - - I mean, I'm sorry, but in Staten  
18 Island, they assessed points under that risk factor.

19 You can't be assessed points for the same  
20 conduct, so when you - - - you can't mush the two together,  
21 you can't reconcile them. And he deserves to know and is  
22 entitled to know, under - - - as a matter of due process,  
23 why he is the risk level that he is.

24 But the other issue is what Justice - - - Judge  
25 Garcia brought up earlier, which is that you might have

1 people subject to very different duties, depending on where  
2 they stand.

3 This is supposed to be a unified statewide  
4 scheme. Your risk level doesn't depend on what county  
5 you're in. It follows you wherever you go in New York  
6 State. So if you're adjudicated a 3 in Queens and a 1 in  
7 Brooklyn, What are you when you go to Broome County? And  
8 that makes your duties unknowable under the statute. That  
9 is unconstitutional; it is vague.

10 CHIEF DIFIORE: Take you, Ms. Napoli.  
11 Counsel.

12 MR. SASLAW: I think if I could just pick up from  
13 that. I think that that's what is at issue here. Here,  
14 you have a case where the defendant believes, I won't  
15 prejudge the next case, believes that they have a  
16 successful attack on the adjudication in Richmond County,  
17 not so clear that they have an attack on the Queens one, so  
18 the easiest way, or the best way, or the way - - - the  
19 thing they have to do is get rid of the Queens one by  
20 saying, well, Richmond already ruled, that's the end of it.  
21 And that's a windfall that the defendant would get that's  
22 not contemplat - - -

23 JUDGE ABDUS-SALAAM: Well, that's only true,  
24 counsel, if there's no modification, and that you could go  
25 to Queens after there has been an overturning of the

1 Richmond County conviction, right?

2 MR. SASLAW: Right. I - - -

3 JUDGE ABDUS-SALAAM: I mean, the bulk of these  
4 crimes happened in Queens.

5 MR. SASLAW: Well, as a matter fact, we've  
6 already had the Queens proceeding, it was - - -

7 JUDGE ABDUS-SALAAM: Well, I mean, but if - - -  
8 if we decide differently than what's happened.

9 MR. SASLAW: Right. In this instance, you know -  
10 - -

11 JUDGE ABDUS-SALAAM: Yeah.

12 JUDGE WILSON: Well, generally, you solve that  
13 problem, don't you, by only allowing one adjudication.  
14 That is, you don't have the problem of two courts if you  
15 only let one go forward.

16 MR. SASLAW: Well, first of all, frequently,  
17 defendants are convicted of crimes - - - similar crimes in  
18 different counties. Not the same - - -

19 JUDGE FAHEY: Yeah, but doesn't - - - don't the  
20 guidelines cover that? In some ways, it seems to follow up  
21 in Judge Wilson's question, the current defense's section  
22 of the guidelines, which the SORA court is supposed to  
23 follow, seems to really include instructions exactly on how  
24 to deal with this kind of problem.

25 MR. SASLAW: And there is no question, and I have

1 no argument with that.

2 JUDGE FAHEY: Um-hum.

3 MR. SASLAW: But that document, which is used for  
4 scoring by the Board of Examiners of Sex Offenders is not  
5 the end result. That's not how it's determined; it's  
6 determined by a court. And this court has compared the  
7 RAI, the instrument that that board is creating, to a  
8 pre-sentence report.

9 So there's nothing, at least legally different,  
10 conceptually different here than a probation report that  
11 mentions that, by the way, in another county the  
12 defendant's been convicted of similar crimes. That doesn't  
13 - - - that informs the court's decision on sentence, but it  
14 doesn't bind the court as to what sentence it's going to  
15 impose.

16 Plus, of course, the statute does have provisions  
17 in it for automatic upgrade, if a defendant has been  
18 convicted in another county.

19 JUDGE FAHEY: So - - - so if you've got two  
20 victims in one county, and a third in the other, and  
21 they're all included in current offenses, and by going to  
22 the third defendant, you raised the score, which is  
23 relatively common scenario - - -

24 MR. SASLAW: Correct.

25 JUDGE FAHEY: - - - that's correct. And yet,

1           you're not just informing the court; it's actually  
2           affecting the score, which is affecting the ranking.

3                   MR. SASLAW:   That's correct, Your Honor.

4                   JUDGE FAHEY:   But it includes everybody in one  
5           determination.

6                   MR. SASLAW:   It includes everybody in that - - -

7                   JUDGE FAHEY:   It includes - - -

8                   MR. SASLAW:   - - - second determination.   Yes.

9                   JUDGE FAHEY:   Yes.

10                  MR. SASLAW:   Yes.

11                  JUDGE FAHEY:   Okay.

12                  MR. SASLAW:   Thank you, Your Honor.

13                  CHIEF DIFIORE:   Thank you.

14                  Next appeal on the calendar is appeal number 31,  
15           People of the State of New York v. William Cook.  Now that  
16           you've shuffled - - -

17                  MS. NAPOLI:   Lisa Napoli for the appellant.

18                  In the mid-1970s, appellant forged friendships  
19           with four others his age.  In the ensuing decades, those  
20           four others fell in love, married each other - - -

21                  JUDGE RIVERA:   But counsel, why - - - why isn't  
22           he promoting the relationship - - -

23                  MS. NAPOLI:   Because the - - -

24                  JUDGE RIVERA:   - - - by his own statements?

25                  Right, when he fills out that form and indicates - - -

1 MS. NAPOLI: Because - - -

2 JUDGE RIVERA: - - - I did the following to groom  
3 the children.

4 MS. NAPOLI: Because it - - -

5 JUDGE RIVERA: Why isn't that promoting?

6 MS. NAPOLI: That isn't the linchpin of this. It  
7 is the initiation of a relationship.

8 JUDGE GARCIA: That's not the rule.

9 MS. NAPOLI: Well, what the guidelines say is  
10 that when a relationship is established or promoted - - -

11 JUDGE GARCIA: Right.

12 MS. NAPOLI: - - - for the purpose - - - primary  
13 purpose of victimization. Not established and promoted, as  
14 the People urge, or promoted. The language is pretty  
15 clear.

16 JUDGE GARCIA: Um-hum.

17 MS. NAPOLI: Right. And then the explanation  
18 really makes it doubly clear. The explanation for how to  
19 assess these points is, they give the Boy Scout leader  
20 example, as somebody who promotes a relationship with  
21 children in order to have access - - -

22 JUDGE ABDUS-SALAAM: Well, it - - -

23 MS. NAPOLI: - - - to a victim pool.

24 JUDGE ABDUS-SALAAM: - - - the guidelines - - -  
25 counsel, the guidelines seem to suggest that a relative,

1           like an uncle, wouldn't be - - -

2                       MS. NAPOLI:   Exactly.

3                       JUDGE ABDUS-SALAAM:   - - - you know, eligible for  
4 promoting, but that could happen.

5                       MS. NAPOLI:   Right.

6                       JUDGE ABDUS-SALAAM:   I mean - - - if we - - - if  
7 we decided this case, because I gather that your - - - your  
8 assessment of Mr. Cook is he's like an uncle, because he  
9 knew the parents when they were all children, when he and  
10 the parents were children, and he knew these children  
11 before they were born.   So he's more like an uncle than he  
12 is a stranger to these children.

13                      MS. NAPOLI:   That's right.

14                      JUDGE ABDUS-SALAAM:   So since the guidelines say  
15 that an uncle, or someone in an uncle-type position, could  
16 not be someone who could groom these children, then this  
17 person, Mr. Cook, would be like an uncle.

18                      MS. NAPOLI:   That's right.

19                      JUDGE ABDUS-SALAAM:   But if he - - - but if - - -  
20 if the guidelines allowed for an uncle to groom, then you  
21 would say, yes, he - - - he has - - - he could be eligible  
22 for somebody who grooms children.

23                      MS. NAPOLI:   The fact of grooming, just to  
24 address that first and foremost, the fact of the grooming  
25 is not relevant.   You don't get assessed points for

1 grooming.

2 JUDGE GARCIA: But grooming really is a shorthand  
3 term that they're using for certain conduct that they found  
4 falls within the promoting part of this. The trouble I'm  
5 having with the uncle analogy is, the commentary where that  
6 appears, one says generally, generally, an uncle would not.

7 And that, again, to me is a shorthand for, you're  
8 looking in this guideline risk factor for the relationship,  
9 and there's a spectrum here between a stranger, and then  
10 there's this professional issue, but then there's a  
11 spectrum, a range of relationships. And within that range,  
12 could someone have established a relationship to do that,  
13 or - - - to victimize, or could they have promoted. And  
14 promoted is different than establishing.

15 And it doesn't mean you can't have a pre-existing  
16 relationship, and that can never turn into promoting.

17 So the key to me is looking at the facts.  
18 Whether you call it grooming, whether you call it - - - and  
19 what do those facts support, by clear and convincing  
20 evidence, a finding that this relationship was promoted for  
21 the purpose of victimization. And I think when you try to  
22 say uncle or grooming, you're getting into labels that take  
23 away from the purpose of the risk factor.

24 MS. NAPOLI: Right. The purpose of the risk  
25 factor is the closeness of the relationship.



1 JUDGE GARCIA: It's the nature of the  
2 relationship - - -

3 MS. NAPOLI: It's the - - -

4 JUDGE GARCIA: - - - and whether it changes or  
5 whether it's manipulated in a way that creates a greater  
6 risk to the public. So it isn't, seems to me, focused on  
7 an uncle or - - - because you can currently have a blood  
8 relation who has no relationship with the child, and then  
9 comes into life later, almost by accident, not realizing  
10 they're a blood relationship, DNA tests later show they're  
11 an uncle, I think we would say, that's pretty much a  
12 stranger if they didn't know it at that time.

13 So it's not the label, to me, it's the  
14 relationship, and the changing nature of that relationship,  
15 and whether that meets this language, the clear language of  
16 establish or promote to victimize.

17 MS. NAPOLI: The - - - if we accept the  
18 construction that you're urging, then any, all inter-family  
19 abuse offenders are going to be given assessments for this  
20 points. And that - - - that doesn't make any sense - - -

21 JUDGE GARCIA: Foster parent has a child, raises  
22 the child for twelve years, one night, horribly, an  
23 opportunity comes, they - - - they take advantage of that,  
24 and there's a sexual assault. How does that fit within  
25 (indiscernible)?

1 MS. NAPOLI: Well that - - - that is very similar  
2 to People v. Montes, which is relied upon by the People,  
3 which is a case out of my office, which is very similar to  
4 this one, and the Second Department did not assess - - -  
5 did not think that points should be assessed under risk  
6 factor 7, because the - - -

7 JUDGE GARCIA: Right.

8 MS. NAPOLI: - - - relationship was initiated - -  
9 - the becoming a foster parent - - -

10 JUDGE GARCIA: And there's no evidence that it  
11 was later - - -

12 MS. NAPOLI: - - - or not for the - - -

13 JUDGE GARCIA: - - - promoted for that purpose.

14 MS. NAPOLI: - - - purpose of victimization. But  
15 the victimization - - - the relationship changed, but the  
16 Second Department didn't think that points should be  
17 assessed in that situation. And that's exactly the same  
18 thing here.

19 You are exact - - - I think that you're exactly  
20 right, Judge Garcia. It's about the closeness of the  
21 relationship because this is a community notification  
22 statute so we're looking at strangers who target  
23 unsuspecting victims. And look at the - - - look at the  
24 research underlying the stranger risk factor. It all talks  
25 about people that don't know the victim - - - that the

1 victim does not know well.

2 JUDGE RIVERA: Is that - - - is that the point of  
3 footnote 8 to the commentary on factor 7?

4 MS. NAPOLI: That's right. And - - - and look at  
5 what the - - -

6 JUDGE RIVERA: Because otherwise, I don't  
7 understand the point of that footnote, if it's not what  
8 you're suggesting.

9 MS. NAPOLI: Yes. The foot - - - the point of  
10 the footnote is to precisely explain that. And the  
11 scholarly articles relied upon in that footnote, the  
12 McGrath article, when you look at what they cite to, there  
13 is no reference to grooming. That article does, in fact,  
14 have a whole section on grooming, never cite it. Not only  
15 - - - not here - - -

16 JUDGE GARCIA: In terms of the danger to the risk  
17 to the public, which this is trying to capture, your  
18 approach would not distinguish between the foster parent  
19 situation, right, or someone who has friends but then  
20 develops or promotes a relationship with those friends'  
21 children, as an outsider to that family unit, and promotes  
22 that relationship, and engages in the conduct which was  
23 admitted to here, for the specific purpose of creating the  
24 opportunity to abuse the children.

25 Isn't that a greater risk to the general public

1 than someone who has a foster family or a parent, who then  
2 at one point abuses those children? And your approach  
3 gives the court no leeway to factor in that difference, in  
4 terms of the difference to the risk to the public.

5 MS. NAPOLI: No, it does not put the public at  
6 risk. The scholarly evidence - - - the evidence that we  
7 have that supports the assessment of points for this risk  
8 factor, what the - - - it - - - it's very clear - - - you  
9 know, there's not a lot of evidence upon which New York's  
10 risk assessment instrument is based. The little that we  
11 have, we should use. And this risk factor is based on  
12 evidence that those offenders target strangers, people  
13 they do not know who do not know them - - -

14 JUDGE GARCIA: It doesn't - - - but that doesn't  
15 say only strangers, but it doesn't say that.

16 MS. NAPOLI: I'm sorry - - -

17 JUDGE GARCIA: It doesn't - - - then - - -

18 MS. NAPOLI: - - - what doesn't only say - - -

19 JUDGE GARCIA: - - - then the rule would say - -  
20 -

21 MS. NAPOLI: - - - what - - - what doesn't - - -

22 JUDGE GARCIA: - - - the risk factor would say,  
23 strangers. And they could have done that. They could have  
24 awarded twenty points if was only a stranger. They could  
25 have awarded twenty points only in situations where you

1 established the relationship for this purpose. But the  
2 language of the risk factor doesn't say that.

3 MS. NAPOLI: That's right. This - - - the risk  
4 factor in New York is a little broader, right, it is a  
5 little broader because it brings in professionals in that  
6 second part, and it talks about people who put themselves  
7 in positions where they'll have access to a vat - - - a  
8 victim pool, like the Boy Scout leader.

9 JUDGE RIVERA: But isn't your argument trying to  
10 figure out why Judge Garcia is concerned in this  
11 hypothetical. I thought your argument was, in this case,  
12 it's not the primary purpose, whereas I thought the  
13 hypothetical was - - -

14 MS. NAPOLI: No, it's not - - - yes.

15 JUDGE RIVERA: - - - it's the primary purpose,  
16 and you agreed that if it's the primary purpose, it doesn't  
17 matter what - - - if it's a family relationship.

18 MS. NAPOLI: That's - - - that's right. And it's  
19 the initiation of the relationship here wasn't - - - the  
20 primary purpose was not for victimization.

21 JUDGE GARCIA: So if the fourth victim they  
22 found, who was also this child of someone they know, but if  
23 that relationship was just developed through one of the  
24 children for the primary purpose of access and abuse, then  
25 even under your rule they could apply the points.

1 MS. NAPOLI: I'm sorry, if the fourth victim - -  
2 -

3 JUDGE GARCIA: There's a fourth victim here - - -

4 MS. NAPOLI: - - - was not one of the - - -

5 JUDGE GARCIA: - - - he's a child - - -

6 MS. NAPOLI: - - - was not a child of the - - -  
7 of the - - - of any of the - - - of the childhood friends,  
8 but was a - - -

9 JUDGE GARCIA: He is a child of childhood  
10 friends, but he doesn't gain access or develop a  
11 relationship through that friendship.

12 I think the record shows that he develops access  
13 in a relationship through one of the other children, I  
14 think his godson. So in that case, if we take the parents  
15 out of the equation, and he's going to get access and  
16 establishing a relationship this way through another child,  
17 then would the points apply?

18 MS. NAPOLI: That's not what happened in this  
19 case. The - - - he had the - - - but if in your  
20 hypothetical that was true, even though the child was the  
21 child of a childhood friend, but there was no relationship  
22 with that kid except through one of the complainants, I  
23 think there would be an argument that the risk factor  
24 should apply, but that's not what happened here.

25 You know, I'm sorry, I didn't reserve time for

1 rebuttal.

2 CHIEF DIFIORE: I reserved it for you.

3 MS. NAPOLI: Okay.

4 CHIEF DIFIORE: I gave you two minutes.

5 Mr. Kleinbart.

6 MR. KLEINBART: Good afternoon, Your Honors.

7 Getting to the - - - straight to the point of  
8 whether this particular relationship fits within this risk  
9 factor, I would suggest the following.

10 And I'm going to quote from the defendant's own  
11 writing with respect to the relationship that he had with  
12 the parents, and then of course there's the relationship he  
13 has with the children.

14 Now, I'd suggest that part of the confusion that  
15 are bound here is that we - - - there's no question that  
16 he's not a stranger to the parents, that he's a friend of  
17 the parents. That's not really the question. The question  
18 is the relationship with the victims who are the children.  
19 And our position is that what has happened is he has abused  
20 the trust that his friends, the parents, had - - -

21 JUDGE STEIN: But is that the test? I mean, I  
22 think - - -

23 MR. KLEINBART: I would suggest, yes.

24 JUDGE STEIN: - - - I think - - - well, I don't  
25 think - - -

1 MR. KLEINBART: I would - - -

2 JUDGE STEIN: - - - that's what the guidelines  
3 say. I think - - - I think what we are maybe having some  
4 trouble distinguishing is whether grooming is always the  
5 same as promoting a relationship. And if I can put things  
6 a little bit differently, is there a difference between  
7 promoting a relationship for purposes of victimization, as  
8 opposed to redirecting an already close relationship in  
9 such a way as to introduce sex abuse into the equation?

10 MR. KLEINBART: I don't think those two are  
11 different at all. I think that's exactly what the promo -  
12 - - what promoting is, and I think that's exactly what this  
13 defendant admitted to in - - - in his various writings.

14 And particularly, I would draw your attention to  
15 his writing at page A-130 of the appendix, in which he  
16 says, "I began to dislike my friends who happened to have  
17 children. I felt an attraction towards their children, and  
18 I began to groom myself towards feelings of arousal."

19 And then elsewhere, earlier he talks about  
20 grooming the children. So I would indeed suggest - - -

21 JUDGE STEIN: But at any - - - almost any time,  
22 except for in that situation, such as one where Judge  
23 Garcia described, where all of - - - suddenly, somebody  
24 decides to sexually abuse a child, but almost every  
25 situation involving abuse of a child when there's some



1 familiarity has to involve grooming, doesn't it?

2 MR. KLEINBART: Yes.

3 JUDGE STEIN: Okay. And so - - - so are you  
4 arguing that - - - that the guidelines are suggesting that  
5 in all of those situations, factor 7 applies?

6 MR. KLEINBART: In a situation like this one, in  
7 which the defendant admits in his writings that he has  
8 begun to buy presents for the children for this purpose - -  
9 -

10 JUDGE STEIN: But that's grooming.

11 MR. KLEINBART: - - - that he has been - - -

12 JUDGE STEIN: That's grooming.

13 MR. KLEINBART: Okay. And that is exactly what -  
14 - - and that is promoting the relationship with the  
15 children, because the children are the victims, not the - -  
16 -

17 JUDGE STEIN: So you see - - -

18 MR. KLEINBART: - - - not the - - -

19 JUDGE STEIN: - - - you see them as the same.

20 MR. KLEINBART: I do.

21 JUDGE STEIN: Grooming - - -

22 MR. KLEINBART: Indeed, I do.

23 JUDGE STEIN: - - - and promoting.

24 MR. KLEINBART: Indeed, I do.

25 JUDGE STEIN: So why is there no mention of

1 grooming in - - -

2 MR. KLEINBART: This I can't say. This I can't  
3 say. That might be - - -

4 JUDGE STEIN: Then why - - -

5 MR. KLEINBART: - - - a social science question.

6 JUDGE STEIN: Then why didn't the People here  
7 even suggest factor 7 points until the court raised it?

8 MR. KLEINBART: This, I - - - that's not a  
9 question, frankly, I may - - - as I stand here, that I'm  
10 able to answer. But it would seem - - - it would seem to  
11 us, at this point, that throughout his writings, the  
12 defendant is saying - - -

13 JUDGE ABDUS-SALAAM: Could this - - - could these  
14 writings, if they were actually a blood relative, like an  
15 uncle who had grown up with these kids, knew them - - -  
16 same - - - same situation, except this defendant is related  
17 to the parents by blood.

18 Are you saying that under the guidelines, a  
19 person like that would be eligible to get points under  
20 factor 7?

21 MR. KLEINBART: Because the guidelines do not say  
22 - - - the guidelines do not absolutely say, simply because  
23 it's an uncle in these situations, absolutely not. It's a  
24 generally not, but I believe it was Judge Garcia who  
25 pointed out - - -

1 JUDGE RIVERA: Well, then how does that - - -

2 MR. KLEINBART: - - - that it would certainly be

3 - - -

4 JUDGE RIVERA: - - - but how does that fit with

5 the purpose of the notification which is making a

6 distinction between - - -

7 MR. KLEINBART: They purpose - - -

8 JUDGE RIVERA: - - - a stranger, someone who sets

9 up the relationship through a professional - - - through

10 their profession, and family connections?

11 MR. KLEINBART: But the - - - but the overarching

12 point of this, and I would suggest that this is the case,

13 because this risk factor discusses the scoutmaster

14 situation. It's a question of, are you using the

15 relationship in the manner in which it abuses a trust.

16 That, we - - - clearly happens in the Boy Scout - - - in

17 the scoutmaster - - - in the scoutmaster situation. It's

18 clearly abusing that trust relationship, and I would

19 suggest too - - -

20 JUDGE RIVERA: That's true on a family

21 relationship, right?

22 MR. KLEINBART: No. But what I would suggest too

23 is there was a - - -

24 JUDGE RIVERA: I trust my uncle - - -

25 MR. KLEINBART: There's a - - - but - - - that's

1 correct, but there was an abusive nature of - - - that  
2 trust is being abused in this particular circumstance, as  
3 is perfectly - - -

4 JUDGE RIVERA: A child could be much closer to a  
5 scoutmaster than they could to an estranged uncle.

6 MR. KLEINBART: I daresay that many of us, and I  
7 know I have when I was going up, my father's best friend, I  
8 called him uncle - - -

9 JUDGE RIVERA: But I - - - I don't think - - -

10 MR. KLEINBART: I called him uncle.

11 JUDGE RIVERA: I don't think - - -

12 MR. KLEINBART: I called him uncle.

13 JUDGE RIVERA: - - - a guideline - - - excuse me.  
14 I don't think the guidelines in the factors turn on  
15 particularities; it turns on the science - - -

16 MR. KLEINBART: No, I under - - -

17 JUDGE RIVERA: - - - and the purpose. So I - - -  
18 I'm just trying to understand - - -

19 MR. KLEINBART: Right.

20 JUDGE RIVERA: - - - how your analysis fits into  
21 the science and the purpose.

22 MR. KLEINBART: It seems to me that the mere fact  
23 that this is included as trust - - -

24 JUDGE RIVERA: Um-hum.

25 MR. KLEINBART: - - - because obviously, I

1 shouldn't say - - - in our view, the notion that the  
2 scoutmaster can be assessed points for this because he  
3 takes advantage of the circumstance, that really suggests  
4 that it really is the trust that the victim may have in the  
5 - - - not necessarily the trust that the parent, the trust  
6 - - - it's all about the victim, it's not about in this  
7 circum - - - in this case about the parent, it's about the  
8 victim.

9           The victim has developed a level of trust with -  
10 - in this individual. That trust has been abused with the  
11 result, as we see all the things that went on that the  
12 defendant described. And in that circumstance, we would  
13 submit that he has, indeed, promoted this relationship,  
14 this - - - this was not a - - - it's more of a familiar  
15 relationship rather than familial relationship.

16           He's promoted this familiar relationship to  
17 enable him, for example, with a child who suffers from  
18 cerebral palsy to stay - - - to be in her bedroom and help  
19 her dress. Promoted his ability to act this way with the  
20 other child by bringing him presents and violating, with  
21 the child, the rules that the parents had set out for this  
22 child.

23           So I would suggest, yes, indeed, that it's  
24 precisely what this risk factor is talking about. When it  
25 comes to the relationship with offender and victim, it

1 really becomes about, are you abusing a trust relationship  
2 in whatever context that may be. It may be in the familiar  
3 relationship, it may be in the scout or physician/patient  
4 relationship.

5 JUDGE RIVERA: Well, the point of fact is the  
6 guidelines deal with abuse of all kinds of relationships.  
7 I still don't know that you've answered the question  
8 related to why is this referenced in the commentary, making  
9 it clear that there is a difference for community  
10 notification purposes between someone - - -

11 MR. KLEINBART: Well - - -

12 JUDGE RIVERA: Excuse me. Someone who is a  
13 family member and, in this case, of course their argument  
14 is that this person is as close, if not closer than some  
15 family members, to the family and the children, versus  
16 someone who is unknown to them, and comes into the picture  
17 for the purpose of being able to abuse the victim.

18 MR. KLEINBART: It's fair to say on this record,  
19 I would submit - - -

20 JUDGE RIVERA: Um-hum.

21 MR. KLEINBART: - - - that the relationship was  
22 developed with the children, because the children were the  
23 victims; it's not the parents who were the victims. The  
24 parents are victims in another sense. It's the children  
25 who are the victims, and that's what's being taking

1 advantage of here. And that's why I would suggest, this is  
2 all try to be captured - - -

3 JUDGE RIVERA: But they did - - - he's got - - -

4 MR. KLEINBART: - - - in the one circumstance - -

5 -

6 JUDGE RIVERA: - - - other than perhaps the one  
7 person that Judge Garcia is referring to, he's got a  
8 relationship with the children before - - - before even - -

9 -

10 MR. KLEINBART: Yeah.

11 JUDGE RIVERA: - - - his own statements - - -

12 MR. KLEINBART: And he could, but - - -

13 JUDGE RIVERA: Excuse me. Before even his own  
14 statements are indicating that he now has some sexual  
15 attraction or interest in the children, correct?

16 MR. KLEINBART: There's - - - but there's no  
17 suggestion that the buying things for the children,  
18 allowing them to stay in his house and breaking the rules  
19 with - - - for any other purpose than promoting - - -  
20 promoting that.

21 It may well be that he had that relationship, but  
22 on this record, there's every reason to credit the notion  
23 that what is going on here, he recognizes what he's able to  
24 do with these children now, buy them gifts, break the rules  
25 of the family by staying up late; this is exactly promoting

1 the relationship with the children who are indeed the  
2 victims for his - - - the sexual incidents that he  
3 describes in the - - - in his writings.

4 If there are no questions - - -

5 CHIEF DIFIORE: Thank you, Mr. Kleinbart.

6 Ms. Napoli.

7 MS. NAPOLI: This risk factor is not about trust.  
8 It has nothing to do with trust. It has to do with the  
9 closeness of the relationship between the offender and the  
10 complainants. Also, if - - -

11 CHIEF DIFIORE: Is it about access? Is that what  
12 you're saying?

13 MS. NAPOLI: No. It's about the closeness of the  
14 relationship, and it - - - the - - - if you assess points  
15 because the relationship is initiated for the purpose of  
16 victimization or because the relationship is initiated for  
17 an innocent purpose but then is changed, then everybody  
18 gets points.

19 JUDGE GARCIA: Well, going by that - - -

20 MS. NAPOLI: Everybody gets points, there's no -  
21 - -

22 JUDGE GARCIA: - - - everyone gets points,  
23 because I think there clearly are examples under that rule  
24 where people wouldn't. But this is a procedural question.  
25 There was an alternative finding by the Richmond County



1 court here as a - - - for a level 3 offense.

2 MS. NAPOLI: That's right.

3 JUDGE GARCIA: So if we were to agree with you,  
4 what would be the result? Would this go back to the  
5 Appellate Division?

6 MS. NAPOLI: That's right. It would go back to  
7 the Appellate Division, because the upper departure had not  
8 been reached.

9 This is - - - at its core, this risk factor is  
10 about whether the community needs to be notified, the level  
11 of notification that is necessary to the community, the  
12 danger posed to the community by the offender in question.  
13 And the social science says that those that target  
14 unsuspecting victims - - - and the Boy Scout leader is not  
15 given there as an example of trust.

16 JUDGE GARCIA: But these victims would have been  
17 suspecting?

18 MS. NAPOLI: The boy - - - let me just address  
19 the Boy Scout leader, because I think that will get to what  
20 - - - what you want.

21 The Boy Scout leader is there is an example  
22 because the victim pool is - - - are strangers to him; they  
23 are not known. He initiates that relationship, promotes a  
24 relationship with an un - - - with unspecified children in  
25 order to have access to victims. That's why that example

1 is there. That's why the promotion language is there.

2 Does the court - - -

3 CHIEF DIFIORE: Thank you, Ms. Napoli.

4 MS. NAPOLI: Thanks.

5 (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. William Cook, No. 30, and People v. William Cook, No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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