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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NEIL GILLOTTI,

No. 97  
(Papers Sealed)

Appellant.

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PEOPLE,

Respondent,

-against-

GEORGE FAZIO,

No. 98  
(Papers Sealed)

Appellant.

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20 Eagle Street  
Albany, New York 12207  
April 30, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's get started  
2 with number 97 and 98.

3 Counselor, you want some rebuttal time?

4 MR. FRAZIER: No, thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: No rebuttal time,  
6 okay, you're on.

7 MR. FRAZIER: May it please the court. Joe  
8 Frazier from the Niagara County Public Defender's  
9 Office.

10 On the broader question, we now have a  
11 position statement by the board of examiners which,  
12 at least in some respects, has to modify Johnson,  
13 although the - - -

14 CHIEF JUDGE LIPPMAN: Well, what's the  
15 effect of the policy statement? Does it - - - does  
16 it - - - are they putting forth an ironclad rule?  
17 Are they acting on their policy? Did they act on the  
18 policy before it was even finalized? All - - - all  
19 of those questions. What - - - tell us about the  
20 policy statement.

21 MR. FRAZIER: Let me start with the last  
22 question first, which is yes. In - - - in Mr. - - -

23 CHIEF JUDGE LIPPMAN: Yes that they put it  
24 into place before they officially - - -

25 MR. FRAZIER: And you can see that in Mr.

1 Gillotti's case, my client's case. They didn't add  
2 any points for risk factor 3. They didn't add any  
3 points for risk factor 7. But in the case summary,  
4 they elaborated on all of those considerations that  
5 they put in that position statement. And at the  
6 bottom of those - - -

7 JUDGE GRAFFEO: But - - -

8 CHIEF JUDGE LIPPMAN: Yeah.

9 MR. FRAZIER: - - - factors that they  
10 elaborate, there's a - - - there's a line that says  
11 these factors are - - - are included in the - - -

12 CHIEF JUDGE LIPPMAN: So how does that  
13 impact on us, on the court, in looking at - - - at -  
14 - - at your client's case?

15 MR. FRAZIER: Well, I - - - I think what  
16 trial courts have done is that - - -

17 CHIEF JUDGE LIPPMAN: You have - - - you  
18 have the regs that talked about 3 and 7, right? Then  
19 you have Johnson. Then shortly after this you had  
20 the policy statement became official. How does that  
21 all impact on our role here - - -

22 MR. FRAZIER: Okay.

23 CHIEF JUDGE LIPPMAN: - - - in terms of  
24 determining your client's case?

25 MR. FRAZIER: Well, in terms of my client's

1 case, it has to do with the way the SORA court, in my  
2 client's case, took 3 and 7 as a - - - as a legal  
3 given. The mistake that the SORA court made in - - -  
4 in Mr. Gillotti's case is that they assumed that it  
5 was an oversight. In fact, the - - - in their  
6 decision, they use the word oversight. They say it  
7 was an oversight that 3 and 7 weren't included. But  
8 - - - but the court didn't go on to look at the case  
9 summary and say, well, they did consider all of these  
10 factors, they did consider the number of pictures,  
11 they did consider the content of those pictures. And  
12 I have to make - - -

13 JUDGE SMITH: Am I right in thinking that  
14 the board - - - it is now the board's general  
15 practice never to score factors 3 and 7 separately?

16 MR. FRAZIER: It appears that way, but I  
17 can only answer that anecdotally from the cases that  
18 I've seen and - - -

19 JUDGE GRAFFEO: Do you think they were  
20 responding to our Johnson decision?

21 MR. FRAZIER: They responded to it - - -

22 JUDGE GRAFFEO: I mean, whether they  
23 interpreted rightly or wrongly, we'll make a  
24 decision, but do you think they were reacting to  
25 that?

1 MR. FRAZIER: I think they had already  
2 reacted to it before the position statement. In Mr.  
3 Gillotti's case, they had already - - -

4 CHIEF JUDGE LIPPMAN: No, but I think what  
5 the judge is asking you, is the policy statement a  
6 direct response to Johnson?

7 MR. FRAZIER: I think it's a direct  
8 response to Johnson; it's also a direct response to  
9 the new science. I mean, this is an evolving area of  
10 law, and they are learning as they go.

11 JUDGE SMITH: As I - - -

12 JUDGE GRAFFEO: I can see before Supreme  
13 Court that there was an objection to the factor 3.  
14 Did you preserve in Supreme Court? Was the objection  
15 to factor 7 preserved? That I couldn't find; if you  
16 can tell me where that was raised.

17 MR. FRAZIER: I - - - I don't think it was  
18 preserved, but I would - - - I would ask the court to  
19 consider People v. Thomas, which was out of this  
20 court. It was not cited in my brief, because I  
21 didn't brief the issue of preservation. That came up  
22 only in the People's brief, and that's 50 NY2d 467.  
23 And in that case it said, well, this was settled law,  
24 courts had already ruled on a certain statute, there  
25 was no need for the - - - for the defendant to raise

1           that objection, and it affected a mode of proceeding.  
2           And in this case you can see pretty clearly that what  
3           the counsel did at the trial level was after Judge  
4           Murphy indicated I'm going to add 3 and 7; you can  
5           ask for a departure, and counsel said, well, that's  
6           the law; we've all read Johnson, and that's what  
7           Johnson says we ought to do.

8                         JUDGE SMITH:   So whether - - - whether he  
9           preserved the ten - - - the points for factor 7 or  
10          not, he did preserve the - - - the request for a  
11          downward departure?

12                        MR. FRAZIER:   He'd requested downward  
13          departure.   And that's one of the distinctions  
14          between our case and Johnson is that in Johnson there  
15          was no request for a downward departure, and also in  
16          Johnson, the board had already put in those seven  
17          points.   In our case, the board did not put in points  
18          for - - -

19                        JUDGE SMITH:   So is there - - - I mean,  
20          what is - - - in light of where we are, as I read it,  
21          there - - - there are two - - - two ways to do this.  
22          We sort of suggested in Johnson, and Judge Dwyer  
23          suggested in some case, that the courts should be - -  
24          - to say it, to put it mildly, very open to downward  
25          departures in factor 7 cases, maybe also in factor 3

1 cases. Judge Conviser wrote an opinion in which he  
2 seems to say the board's not scoring these at all,  
3 and I'm going to go along with them.

4 MR. FRAZIER: And it's - - -

5 JUDGE SMITH: Which is a better way to do  
6 it? You can probably get the same result - - -

7 MR. FRAZIER: I think - - -

8 JUDGE SMITH: - - - either way.

9 MR. FRAZIER: Here's the problem: is that  
10 if courts score those points, then departure becomes  
11 the rule instead of the exception, and departure's  
12 supposed to be the exception.

13 JUDGE SMITH: A departure's not a departure  
14 anymore.

15 MR. FRAZIER: It's not a departure anymore.

16 JUDGE GRAFFEO: Why is the board's decision  
17 not to assign points for factor 3 appropriate?

18 MR. FRAZIER: For the number of victims?

19 JUDGE GRAFFEO: Yes.

20 MR. FRAZIER: It's - - -

21 JUDGE GRAFFEO: Considering what child  
22 pornography - - -

23 MR. FRAZIER: Okay.

24 JUDGE GRAFFEO: I mean, it's pretty well  
25 recognized there's a victimization of the children

1 that are used.

2 MR. FRAZIER: And it's not so much a  
3 question of - - - of whether it's a victim or not;  
4 that's - - - that's settled law. The - - - the  
5 question is if someone has contact with more than one  
6 child, that's a different situation, and there's  
7 other factors and other criteria that have to go into  
8 it if it's someone just looking at pictures of more  
9 than three children.

10 JUDGE GRAFFEO: So 1,000 images isn't  
11 enough?

12 MR. FRAZIER: What if - - - well, what if  
13 it's 1,000 images of one child? That may be an  
14 extremely high risk because that person is fixated on  
15 that child.

16 JUDGE GRAFFEO: Well, that wouldn't be  
17 three or more victims, would it?

18 MR. FRAZIER: It would - - - it would only  
19 be one, so they're scored less. But it would - - -  
20 it would be just like - - - it would be the reverse  
21 of what the points are supposed to show. So by the -  
22 - - by the board putting out these guidelines and  
23 saying points under 3 and points under 7 weren't  
24 really intended for child pornography. They  
25 shouldn't be scored anymore; here's the criteria.

1 Now - - -

2 JUDGE ABDUS-SALAAM: Counsel, isn't - - -

3 MR. FRAZIER: - - - with respect - - -

4 JUDGE ABDUS-SALAAM: - - - isn't that the  
5 point? These are guidelines and there is a statute  
6 that says that these two factors can be scored, and  
7 it may be within the discretion of the court?

8 MR. FRAZIER: Under - - - the statutory  
9 requests for factors has - - - has a couple of  
10 subdivisions. Under subdivision A, the legislator  
11 says - - - the legislature says that the factors are  
12 indicative of high risk. But under subdivision B, it  
13 says these are other factors that should be  
14 considered. One of those factors is stranger  
15 relationship. It doesn't say how it should be  
16 scored; it just says it should be considered. And  
17 the board is now saying, in a case of contact, a  
18 stranger relationship is more dangerous. In a case  
19 of child pornography - - -

20 JUDGE SMITH: Does - - -

21 MR. FRAZIER: - - - it may, in fact, be a  
22 mitigating circumstance as opposed to an aggravating  
23 circumstance.

24 JUDGE SMITH: Is there anything stopping  
25 the board from just amending factors 3 and 7 to say

1           except in child pornography cases?

2                   MR. FRAZIER: I think they should have  
3 amended that statement a long time ago.

4                   JUDGE SMITH: I mean, is this - - -

5                   MR. FRAZIER: But there's nothing stopping  
6 them, no.

7                   JUDGE SMITH: I mean, Judge - - - Justice  
8 Conviser seems to think that this is - - - that they  
9 have, in effect, done that, in a very awkward way.  
10 Is that a fair - - -

11                   MR. FRAZIER: In a very awkward way, and -  
12 - - and really the board should be leading the  
13 courts, not the courts leading the board.

14                   CHIEF JUDGE LIPPMAN: Yeah, but your view  
15 is that's what they're doing, in response - - -

16                   MR. FRAZIER: When you say - - -

17                   CHIEF JUDGE LIPPMAN: - - - to Judge Smith,  
18 that they are, in effect, doing that?

19                   MR. FRAZIER: Yes.

20                   CHIEF JUDGE LIPPMAN: Revising the  
21 standard?

22                   MR. FRAZIER: Yes.

23                   CHIEF JUDGE LIPPMAN: Okay. Let's hear the  
24 other appellant.

25                   MR. RITCHEY: May it please the court.

1 Christopher Ritchey, Albany County Public Defender's  
2 Office.

3 CHIEF JUDGE LIPPMAN: What's different  
4 about your client than - - - than your colleague?

5 MR. RITCHEY: The - - - the risk factor  
6 that he was assessed points for. The one that's  
7 preserved is for multiple victims. I believe my co-  
8 counsel's were for stranger relationship. However,  
9 we think the John - - - that the position statement  
10 is a direct response to Johnson, and it eliminates  
11 the need to score points for stranger relationship as  
12 well as multiple victims.

13 We believe the position statement should be  
14 binding like the commentary. The commentary has been  
15 held to be binding.

16 CHIEF JUDGE LIPPMAN: But what about Judge  
17 Smith's question about the - - - why didn't they just  
18 change the - - - the standard?

19 MR. RITCHEY: It would have been more clear  
20 if they had done it that way. However, the only  
21 logical reading of the position statement - - -

22 CHIEF JUDGE LIPPMAN: Is that that's what  
23 they're doing?

24 MR. RITCHEY: - - - is that's what they're  
25 doing. They start out by saying that - - -

1 JUDGE SMITH: Not just the position  
2 statement but the fact they now apparently make a  
3 practice of not scoring, although the position  
4 statement doesn't say we're not going to score.

5 MR. RITCHEY: It doesn't say we're not  
6 going to score, but what it does say is to more  
7 accurately reflect the risk of repeat offense we will  
8 now do this. And what they've outlined below is we  
9 will continue to score for youngest age, however,  
10 they omit the fact that they're going to continue to  
11 score for number of victims or stranger relationship.

12 JUDGE SMITH: So it's not a - - -

13 MR. RITCHEY: So - - -

14 JUDGE SMITH: - - - masterpiece of  
15 draftsmanship, but you say when you look at  
16 everything the meaning's pretty clear?

17 MR. RITCHEY: No, but the canon of  
18 statutory interpretation is the inclusion of one  
19 thing is to the exclusion of other. If they are  
20 saying this is how we're going to go - - - go forth  
21 and score this, and directly omitting the fact that  
22 they're not going to continue scoring for stranger  
23 relationship or multiple victims, then it seems clear  
24 that those have now been eliminated.

25 JUDGE GRAFFEO: Why should the trial court

1 not have discretion to consider those factors? I  
2 mean, the trial judge here commented on - - -  
3 particularly on the nature of the graphic  
4 representations, that your client had accessed the  
5 video, the activities that the children were involved  
6 in. Why - - - why is it wrong for the judge to  
7 consider that?

8 MR. RITCHEY: This is an evolving area of  
9 silent - - - of science. The - - - the RAI is  
10 outdated, it's inaccurate, it's not scor - - - it's  
11 basically misclassifying child pornography offenders  
12 that have a low risk of recidivism.

13 JUDGE SMITH: You're suggesting that child  
14 pornography, the whole idea of community notification  
15 seems a little - - - if all a guy has ever done in  
16 his life is have child pornography, what are we  
17 notifying the community for?

18 MR. RITCHEY: Well, I think they're low-  
19 risk offenders. And that's what one of the studies  
20 from the - - - from the position statement cites to.  
21 The 2011 study by Seto is the only one that - - -  
22 that analyzes what the recidivism rates are. And  
23 what they come to the conclusion is that the  
24 recidivism rates for online offenders were  
25 significantly lower than for other sex offenders.

1 And the online offenders who had no history of  
2 contact offenses almost never committed contact  
3 sexual offenses.

4 CHIEF JUDGE LIPPMAN: Is this evolving?  
5 And when you say evolving, is it also the technology?  
6 Is it the modern world? Is that what - - -

7 MR. RITCHEY: Well - - -

8 CHIEF JUDGE LIPPMAN: - - - is going on  
9 here, as opposed to maybe earlier forms of - - - of  
10 child pornography - - -

11 MR. RITCHEY: I think it's our - - -

12 CHIEF JUDGE LIPPMAN: - - - that weren't  
13 on the Internet.

14 MR. RITCHEY: I think it's our  
15 understanding of the problem. It's been seventeen,  
16 eighteen years since the RAI was promulgated, which  
17 was in '96. The last article they cite to was in  
18 '95.

19 CHIEF JUDGE LIPPMAN: So you think it would  
20 be the same if it was just pictures in one's hand as  
21 opposed to being on the Internet? Do you understand  
22 what I'm saying? Is technology a factor here, or  
23 it's not really relevant?

24 MR. RITCHEY: With the ease with which they  
25 can obtain the photos or - - -

1 CHIEF JUDGE LIPPMAN: With what it means  
2 when someone, you know, views all this pornography,  
3 the number of images that one can get quickly on the  
4 Internet, does that change the - - - the dynamic  
5 here?

6 MR. RITCHEY: I - - - I think it should.  
7 That's why I believe that the first - - - one of the  
8 first departure criteria they put forth were the  
9 number of images possessed; 10,000 is more concerning  
10 than less than 100. It just seems to be how many  
11 times somebody might have downloaded or clicked.

12 JUDGE GRAFFEO: But the expanding market  
13 also means there's more and more children being  
14 subjected to this abuse.

15 MR. RITCHEY: Yes. Yes, I'd agree with  
16 that. But what I do think that - - -

17 JUDGE SMITH: But your point is that  
18 community notification isn't really going to change  
19 that, is it?

20 MR. RITCHEY: No, it's not. I mean, these  
21 aren't photos of somebody - - - this isn't photos of  
22 a neighbor next door, as this court pointed out in  
23 Johnson, whereas that person would presumptively  
24 score less. These are strangers, they're anonymous,  
25 they're over the Internet, people that they're never

1 going to meet. The victimization is - - -

2 JUDGE ABDUS-SALAAM: Well, isn't that - - -

3 MR. RITCHEY: - - - tenuous.

4 JUDGE ABDUS-SALAAM: Well, how do you know  
5 they're never going to meet them? These children who  
6 have been victimized are out there just like anybody  
7 else on the Internet, and so they might meet them.  
8 In fact, they might get so obsessed that they might  
9 want to meet them, depending upon how many images  
10 they downloaded.

11 I was going to ask what would be your  
12 position on whether the - - - when you talk about  
13 recidivism, do you mean that somebody who is  
14 downloading images? But what about people who trade  
15 images, who use these, like, you know, baseball cards  
16 used to be, you know, trading images of - - - of chil  
17 - - - of children on - - -

18 MR. RITCHEY: I don't think that tra - - -

19 JUDGE ABDUS-SALAAM: Is that recidivism - -  
20 -

21 MR. RITCHEY: Well - - -

22 JUDGE ABDUS-SALAAM: - - - or not?

23 MR. RITCHEY: - - - if after - - - I mean,  
24 if after they've been adjudicated that then they  
25 start again trading, that - - - that would be

1           recidivism, but I don't believe that whether or not  
2           their - - - their upload and exchanging has any - - -  
3           has any indication of whether or not they will commit  
4           again. I don't think it's a factor. It's not one  
5           that the board of sex offenders has included.

6                     JUDGE READ: They will commit what again?

7                     MR. RITCHEY: If after they committed the  
8           offense then - - - I mean, what we're really worried  
9           about is what's the risk of them doing it again. I  
10          mean, that's what the RAI - - -

11                    CHIEF JUDGE LIPPMAN: Doing what again?

12                    JUDGE SMITH: Are we - - - in child porn  
13          cases, is that - - - when we're doing risk level in a  
14          child porn case, aren't we really worried about the  
15          possibility of a contact offense in the community? I  
16          just don't - - - I mean, I keep coming back to it,  
17          but the - - - registering with the local police isn't  
18          going to stop a guy from downloading off the  
19          Internet.

20                    MR. RITCHEY: No, but - - -

21                    JUDGE SMITH: But what we're worried about  
22          is - - - what we're worried about is his bothering  
23          the neighbor's children.

24                    MR. RITCHEY: Yes, and that's what the  
25          instrument is devised - - -

1                   JUDGE GRAFFEO: Well, and the neighbors, if  
2 they have children, may not necessarily want their  
3 children in his household.

4                   MR. RITCHEY: Yes.

5                   JUDGE GRAFFEO: So that - - -

6                   MR. RITCHEY: And I think that - - -

7                   JUDGE GRAFFEO: - - - that is an aspect of  
8 community notification.

9                   MR. RITCHEY: Yes. I think what the  
10 instrument is supposed to get at is what the risk is  
11 of recidivism plus what the harm would be. I think  
12 the harm of downloading a photo is less than somebody  
13 committing a contact offense against a neighbor.  
14 That's what the RAI was trying to score. The  
15 pornography offenders fall all across the spectrum.  
16 Some of them just download, some of them download and  
17 have a predisposition towards contact offenses. I  
18 believe the position statement is intended to sort  
19 them out better and make sure that there aren't  
20 misclassifications to people that pose a low level of  
21 risk and recidivism.

22                   JUDGE GRAFFEO: And some contact offenders  
23 use child pornography to groom the children that they  
24 eventually abuse.

25                   MR. RITCHEY: Yes, and the test would

1            hopefully be able to weed them out. But in the  
2            meantime, people who download child pornography, if  
3            that is the sole thing they're doing, they do not  
4            pose a - - - a high risk of recidivism or harm to the  
5            community, shouldn't be classified as level 2 or 3.

6            JUDGE SMITH: When you say that, is that -  
7            - - are you saying the data show that, or that's your  
8            - - - you're saying that's logical?

9            MR. RITCHEY: The 2011 Seto article does -  
10           - - does back that up. They - - - they do say that  
11           online offenders who have no history of contact  
12           offenses almost never committed contact offenses - -  
13           -

14           CHIEF JUDGE LIPPMAN: You're saying the  
15           science supports what you're saying.

16           MR. RITCHEY: Yes, the science - - - the  
17           science. The Seto article is the article that's  
18           cited to - - -

19           CHIEF JUDGE LIPPMAN: Right.

20           MR. RITCHEY: - - - in the position  
21           statement.

22           CHIEF JUDGE LIPPMAN: Okay, counselor.  
23           Thank you.

24           Counselor?

25           MR. SHARP: May it please the court. When

1 a offender's underlying offense - - -

2 CHIEF JUDGE LIPPMAN: You're doing Fazio?

3 MR. SHARP: Yes.

4 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

5 MR. SHARP: When an offender's underlying  
6 offense is possession of child pornography, that does  
7 not and should not mean that a court is precluded  
8 from assessing points under risk factors.

9 CHIEF JUDGE LIPPMAN: But doesn't the board  
10 have some sway here? Is it important what they  
11 think?

12 MR. SHARP: It is - - -

13 CHIEF JUDGE LIPPMAN: It is presumptive  
14 what they think?

15 MR. SHARP: It is important what they  
16 think, but they - - - they have never said that  
17 points should not be assessed.

18 CHIEF JUDGE LIPPMAN: Yeah, but they're not  
19 doing it. We discussed that with your adversaries  
20 that in practice it seems quite clear that they're  
21 not giving points, and the position statement, in  
22 some shape or form, is - - - is really, in reality,  
23 changing the guidelines, right?

24 MR. SHARP: Well, they're not doing it, but  
25 they didn't say that in the position statement - - -

1 CHIEF JUDGE LIPPMAN: Yeah, yeah, yeah, but

2 - - -

3 MR. SHARP: - - - which they should have.

4 CHIEF JUDGE LIPPMAN: - - - but in reality,  
5 my question is, are they, in effect, changing the - -  
6 - the guidelines? Did they change the guidelines?

7 MR. SHARP: It seems like they're moving  
8 that way, yes - - -

9 JUDGE READ: Did they - - -

10 MR. SHARP: - - - but they should have said  
11 it.

12 JUDGE READ: Is it - - - that's what it is,  
13 in your view, that they're not assessing the points?  
14 It's not that they're using what they said in the  
15 position papers, points of departure?

16 MR. SHARP: Yeah, it seems like they're  
17 just not assessing any points. But in Fazio's case,  
18 this happened eight months before the position  
19 statement even was - - -

20 CHIEF JUDGE LIPPMAN: But - - -

21 MR. SHARP: - - - put out.

22 CHIEF JUDGE LIPPMAN: - - - did they have  
23 that policy in place without the statement already.

24 MR. SHARP: We can assume that, based on -  
25 - -

1 CHIEF JUDGE LIPPMAN: Yeah. All right,  
2 yeah.

3 MR. SHARP: - - - the assessment in the  
4 case. But that position statement wasn't there, so  
5 the court - - -

6 CHIEF JUDGE LIPPMAN: Right.

7 MR. SHARP: - - - in this case didn't have  
8 the position statement. And - - -

9 JUDGE SMITH: So why should the court - - -  
10 if the board is not assessing points under, let's  
11 say, factor 7, why should the court override it and  
12 assess the points?

13 MR. SHARP: Well, the board doesn't trump  
14 the court. The court has the discretion to do it,  
15 and - - -

16 JUDGE SMITH: Yeah, okay, but why is it a  
17 good exercise of discretion to add - - - to add  
18 points for stranger victimization in a child porn  
19 case?

20 MR. SHARP: Because there is still a need  
21 for a community notification in these cases. The - -  
22 - the research that's cited, certainly by the board,  
23 and I cited it in my brief, does indicate, and it's a  
24 low percentage, but that there is a risk of these  
25 types of offenders committing contact offense.

1                   JUDGE SMITH: You mean - - - you mean that  
2 when they - - - you're actually saying that the - - -  
3 the child porn consumer who views strangers is more  
4 dangerous than the one who views people he knows?

5                   MR. SHARP: I'm saying - - - dangerous, I  
6 think, is the wrong word here.

7                   JUDGE SMITH: More - - -

8                   MR. SHARP: What's the need - - -

9                   JUDGE SMITH: More of a threat to the  
10 community?

11                  MR. SHARP: Yeah, what's the need for a  
12 community notification? Are - - - is the need for  
13 community notification based - - - based more  
14 substantially on someone going after a stranger than  
15 someone in their own home, for instance? I think  
16 yes, it is, that the community has a greater need for  
17 notification for offenders who are going after  
18 strangers as opposed to those who would prey on  
19 people in their household or family type situations.  
20 There is a difference there. I think danger is  
21 really the wrong word to use in that situation. It's  
22 what the need for the community is notification.

23                  JUDGE SMITH: But you - - - I take it  
24 you're not disagreeing with your adversary what the  
25 data show - - - your - - - but you're saying it's a

1 small percentage, but - - - but, you know, two - - -  
2 if - - - if they - - - if they molest two kids, it's  
3 two too many.

4 MR. SHARP: Yes, it is a small - - - small  
5 percentage, but it still warrants a need for - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but the board  
7 takes cognizance of the changing science. And again,  
8 presumptively is - - - is - - - what they do is  
9 presumptively - - - you know, deserves some  
10 deference, doesn't it or does it?

11 MR. SHARP: It does deserve deference, but  
12 not a complete following of what the board desires.

13 CHIEF JUDGE LIPPMAN: So in your case, why  
14 is it wrong? If that's - - - presumptively they  
15 deserve deference, what's wrong with what they do  
16 that we should take away from that normal deference  
17 or overturn that normal deference?

18 MR. SHARP: Well, what I think the  
19 appropriate type of action in this type of case is,  
20 points can be assessed under risk factors 3 and 7.  
21 Then what happens is a defendant can - - - or an  
22 offender can move for a departure determination. And  
23 then a court can use these factors that are put forth  
24 and determine - - -

25 CHIEF JUDGE LIPPMAN: Well, either side can

1 move for upwards or down - - - or downwards, right?

2 MR. SHARP: You can, but there's - - -  
3 there's a couple reasons why moving - - - putting the  
4 onus on the offender to move for a downward departure  
5 is better.

6 CHIEF JUDGE LIPPMAN: Rather than the  
7 burden being on you?

8 MR. SHARP: Yes, and the one is because the  
9 standard is a little more exacting for an upward  
10 departure. That requires an aggravating  
11 circumstance, and that's not reflected - - -

12 CHIEF JUDGE LIPPMAN: Do you think that the  
13 board, in effect, put the burden on you by doing what  
14 they did, viewed it as your burden?

15 MR. SHARP: I - - - it's our burden, I  
16 guess, to ask for an assessment of points under these  
17 risk factors, I suppose, but - - -

18 CHIEF JUDGE LIPPMAN: But like you say,  
19 you've got to meet a certain test to do it, right?

20 MR. SHARP: Yeah, you have to meet an  
21 aggravating circumstance that's, you know, not  
22 reflected accurately in the guidelines. So it's a  
23 more substantial burden. And also - - -

24 JUDGE SMITH: Doesn't Johnson - - - doesn't  
25 Johnson send the message that in a child porn case,

1           that with factor 7 anyway, a downward departure  
2           should be the norm?

3                         MR. SHARP:  Yeah, it seems to indicate  
4           that, sure.

5                         JUDGE SMITH:  Did the court here get that  
6           message, the Appellate Division?

7                         MR. SHARP:  I - - -

8                         JUDGE SMITH:  They - - - they seem to say,  
9           well, there are the points, so I don't see anything  
10          that justifies a downward departure; goodbye.

11                        MR. SHARP:  Well, I mean, the problem we  
12          had in this case, as was mentioned in Johnson, was  
13          the - - - the offender did not ask for a downward  
14          departure.

15                        JUDGE SMITH:  Oh, Fazio did not ask for  
16          departure?

17                        MR. SHARP:  No.

18                        JUDGE SMITH:  I didn't realize.

19                        MR. SHARP:  There was no downward departure  
20          request, and so the court never had - - -

21                        CHIEF JUDGE LIPPMAN:  No upwards, no  
22          downwards in Fazio?

23                        MR. SHARP:  No, other than - - - other than  
24          the People asking for an assessment of points under 3  
25          and 7.

1 CHIEF JUDGE LIPPMAN: Right, but neither  
2 asked for an upward or downward - - -

3 MR. SHARP: Right, no.

4 CHIEF JUDGE LIPPMAN: - - - modification.

5 MR. SHARP: And I think the other reason,  
6 if I could, to put the - - -

7 CHIEF JUDGE LIPPMAN: Go ahead, finish your  
8 thought.

9 MR. SHARP: - - - put the onus on the  
10 defense is the courts should be applying the plain  
11 meaning in the guidelines, and under the plain  
12 meaning in the guidelines, points can be assessed  
13 under 3 and 7 in child pornography.

14 JUDGE SMITH: Does it make a difference  
15 about the - - - I understand what you're saying about  
16 the plain meaning of the guidelines. What we said in  
17 Johnson was pretty plain. But if it's not plain to  
18 the guy who wrote the guidelines, should we maybe  
19 think about it again? I mean, he could - - - you  
20 know, they could change them if they wanted. And if  
21 they - - - instead of changing them, they say they  
22 don't mean what they say, why should we overrule  
23 that?

24 MR. SHARP: Well, I think that we should  
25 have them change them before assuming what they're -

1           - - they're doing is - - - that's this case is we're  
2           just assuming that they're not going to assess any  
3           points.

4                    JUDGE SMITH: I guess what I'm saying,  
5           isn't there something weird about saying to the  
6           author of the guidelines, who has authority to  
7           rewrite them completely, if he wants to, you cannot  
8           interpret them in this way; you must follow their  
9           plain meaning.

10                   MR. SHARP: Well, that's what this court  
11           said in Johnson.

12                   JUDGE SMITH: Well, we didn't say it to the  
13           board; we said it to the courts.

14                   MR. SHARP: To the courts, yeah.

15                   JUDGE SMITH: But the board, they're their  
16           guidelines.

17                   MR. SHARP: Yeah, but the whole issue here  
18           is whether the court, in its exercise of discretion,  
19           properly assessed the points, not whether the board  
20           should have in the - - -

21                   CHIEF JUDGE LIPPMAN: Yeah, but again, my  
22           point was isn't it presumptive that what they do is  
23           right or what - - - you know, or deserves deference.

24                   MR. SHARP: It deserves deference, sure,  
25           but in this situation, where this court told all

1 courts in Johnson apply the plain meaning of the  
2 guidelines, and in a situation where the People are  
3 asking for points to be assessed, the court should  
4 apply it - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. SHARP: - - - appropriately.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 Thanks.

9 MS. BITTNER: May it please the court. I  
10 think the important point in People v. Gillotti is  
11 that our defendant in that case did show a high risk  
12 of reoffense, based on the number of images, the fact  
13 that there were thousands of them that were  
14 downloaded.

15 CHIEF JUDGE LIPPMAN: You're saying the  
16 sheer volume makes a difference?

17 MS. BITTNER: The volume, the graphic  
18 nature of them. There was also a report submitted by  
19 the defense, from a doctor, stating that based on his  
20 conversations with this individual that there was a  
21 high risk of reoffense. And based on all of those  
22 factors, that's why points were assessed in those  
23 areas for the number of victims and for the  
24 relationship with the victims because of the fear of  
25 the recidivism.

1           As far as the position statement, I believe  
2           that it should have an impact here. We have the  
3           guidelines, which are statutory, which should be  
4           primary in this case, as well as the court's decision  
5           in Johnson, which supports putting those two factors  
6           - - - assessing them as far - - - in child  
7           pornography, cases.

8           JUDGE ABDUS-SALAAM: Counsel, even if the  
9           board had said we're - - - well, we're not going to  
10          assess any points and we don't think the court should  
11          either, should we follow that? Should we give  
12          deference to that?

13          MS. BITTNER: To - - - I apologize.

14          JUDGE ABDUS-SALAAM: In the position paper,  
15          if the board had said clearly we're - - - we seem to  
16          be trying to determine whether the board was saying,  
17          it its position paper, that it wasn't going to assess  
18          points. They didn't assess points under 3 and 7, but  
19          the position paper doesn't seem to say that you  
20          should not assess points.

21          MS. BITTNER: Exactly.

22          JUDGE ABDUS-SALAAM: So even if it had  
23          clearly said that, should we give - - -

24          MS. BITTNER: I think that - - -

25          JUDGE ABDUS-SALAAM: - - - complete

1           deference to it?

2                   MS. BITTNER:   - - - that the deference  
3           still needs to be given to the statute in this case.  
4           I think the fact that they didn't go back and change  
5           that - - -

6                   JUDGE SMITH:   The statute or the guideline?

7                   MS. BITTNER:   I apologize; to the  
8           guidelines.  I think the deference still needs to be  
9           - - -

10                  JUDGE SMITH:   So we have to defer to the  
11           guideline, even though the author of the guideline  
12           isn't deferring to it?

13                  MS. BITTNER:   I think, given the fact that  
14           those guidelines are in place, and given this court's  
15           decision in Johnson, I don't think that the position  
16           statement should be read as though a court - - -

17                  CHIEF JUDGE LIPPMAN:   What do we then do  
18           with the position statement?  What impact does that  
19           have on our looking at this or at the lower court  
20           looking at it?

21                  MS. BITTNER:   I think, as to this case,  
22           specifically, I don't think that it should have an  
23           impact.  I think that the - - -

24                  CHIEF JUDGE LIPPMAN:   So we ignore the  
25           position statement?

1 MS. BITTNER: I think that you don't allow  
2 the position statement to take away a court's ability  
3 to look at those factors.

4 CHIEF JUDGE LIPPMAN: Yeah, but why do we  
5 take - - - if we take it into - - - you wouldn't say  
6 we shouldn't take it into any account, is that what  
7 you're saying?

8 MS. BITTNER: I think that you should be  
9 able to - - - that the court should still, I guess,  
10 not take it into account, that the court should still  
11 - - -

12 JUDGE RIVERA: So you're saying the  
13 guidelines and the policy statement don't stand on  
14 equal footing.

15 MS. BITTNER: Yes.

16 JUDGE SMITH: Granting your point that  
17 there - - - there are reasons in Gillotti where the -  
18 - - where the - - - a higher risk classification  
19 might be justified, isn't there still a question as  
20 to what the right starting point is? That is,  
21 shouldn't - - - shouldn't we decide the question of  
22 whether the court starts with the - - - should give -  
23 - - should start with those risk factor 7 and risk  
24 factor 3 points in there, and assuming they're in  
25 there, whether the court should take into account

1           that they're in there, as we said in Johnson, really  
2           only because of an anomaly in the - - - in the  
3           scoring?

4                       MS. BITTNER:   But I think that is what  
5           needs to be done, is the decision whether or not they  
6           can assess the points there.   In our case, they  
7           assessed the points at the trial court level rather  
8           than by the board and then used the evidence that was  
9           presented by the People to back up the reasons for  
10          scoring those at that point.

11                      JUDGE GRAFFEO:   Do you want us to address  
12          risk factor 3 and 7?   Is 7 appropriately in front of  
13          this court?

14                      MS. BITTNER:   I believe so, Your Honor.

15                      JUDGE GRAFFEO:   Well, we're figure out the  
16          preservation issue.

17                      CHIEF JUDGE LIPPMAN:   Okay.

18                      MS. BITTNER:   Thank you.

19                      CHIEF JUDGE LIPPMAN:   Thanks, counselor.

20          Thank you all.

21                      (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matter of People v. Neil Gillotti, No. 97, and People v. George Fazio, No. 98, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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