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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 48

TOWNSEND (KENNETH),

Appellant.

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20 Eagle Street  
Albany, New York  
April 16, 2026

Before:

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

Appearances:

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

3 MS. ERONDU: Good afternoon, Your Honors. May it  
4 please the court. Nkechi Erondy for Kenneth Townsend. I'd  
5 like to reserve three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MS. ERONDU: The upward departure here was  
8 unlawful because it rested entirely on factors already  
9 accounted for by the RAI, which is impermissible under  
10 Gillotti.

11 JUDGE SINGAS: So are you saying criminal history  
12 can never be accounted for? There could never be an upward  
13 departure for, and - - - and conversely, a downward  
14 departure for criminal history?

15 MS. ERONDU: No. We're not saying that there  
16 could never be. We can think of a situation where a  
17 registrant has an exceptional number of prior offenses,  
18 something so extraordinary that it would be - - - that it  
19 would fall out of the factors that the RAI accounts for.  
20 But that's not what we have here. We have Mr. Townsend,  
21 who has three prior sex offenses.

22 JUDGE SINGAS: Some might say that's  
23 extraordinary.

24 MS. ERONDU: Sure. Someone could say that it's  
25 extraordinary. But again, his prior history is exactly

1 what the RAI is intended to account for. Again, he has  
2 three prior - - - three prior sex offenses in seven years,  
3 and he received the maximum number of points in factors 9  
4 and 10. The RAI - - -

5 JUDGE TROUTMAN: So the fact that he received the  
6 maximum points you submit takes into account the number of  
7 offenses that he had been convicted of in the past?

8 MS. ERONDU: Well, at least it takes into account  
9 the risk associated with those offenses, because that's  
10 truly what the RAI is supposed to - - -

11 JUDGE TROUTMAN: And if he had one prior sex  
12 offense?

13 MS. ERONDU: Yeah. Yes. We would make the  
14 argument that the board clearly contemplated the - - - the  
15 types of the - - - the offenses - - -

16 JUDGE TROUTMAN: So whether it be one or three or  
17 20, it's the same?

18 MS. ERONDU: No. We're not saying it's the same.  
19 We can imagine, again, a scenario where a registrant has an  
20 - - - an exception.

21 JUDGE GARCIA: So you're not making this argument  
22 as a matter of law that this can never be taken into  
23 account under the guidelines. So if someone had ten first  
24 degree rape convictions, that could be the basis of an  
25 upward departure. Your argument is the criminal history

1 here did not justify the upward departure?

2 MS. ERONDU: Yeah. We're saying here the - - -  
3 the criminal history did not justify the upward departure.

4 JUDGE HALLIGAN: So how would you have us  
5 articulate a rule along those lines? You're making an  
6 argument, I think, with respect to the specific  
7 circumstances of this case. But we would be deciding that,  
8 I think, inevitably, as a matter of law, given the - - -  
9 the way in which we review these questions. So what's the  
10 rule that you would be asking for?

11 MS. ERONDU: Well, we're asking this Court to - -  
12 - to adhere to the floor that it set in Gillotti. That  
13 being that first there has to be - - -

14 JUDGE HALLIGAN: But why is it - - - how - - -  
15 how would we describe in a writing what it is about this  
16 particular number of offenses and their severity that is  
17 not enough, whereas as I think you have agreed in response  
18 to a couple of questions, there could be some number of  
19 offenses that - - - that would warrant that treatment? So  
20 what do we do about that?

21 MS. ERONDU: Well, again, we can look to Gillotti  
22 which - - - which says that there has to be something  
23 different, something qualitatively different.

24 JUDGE HALLIGAN: I appreciate that. I'm just  
25 looking for some help in understanding how we would explain

1 why these offenses don't rise to that level.

2 JUDGE GARCIA: Well, and let me ask it a  
3 different way, a little bit in the Gillotti - - - Gillotti  
4 framework, are you saying this is step one where it could  
5 never factor in? Or is it step two where even if it could  
6 be the basis in some scenario for an upward departure, it  
7 wasn't here, they didn't meet their burden? Which step are  
8 you arguing?

9 MS. ERONDU: Well, with respect to prior criminal  
10 history, we're saying they did not meet their - - - they -  
11 - - there was no - - - that is not a valid aggravating  
12 factor.

13 JUDGE SINGAS: So that's step two?

14 MS. ERONDU: No. We're saying that with here  
15 with respect to Mr. Townsend's criminal history, they did  
16 not meet step one of identifying - - -

17 JUDGE CANNATARO: So can you - - - in my view - -  
18 - and I want you to educate me on my understanding of  
19 Gillotti. If - - - if it could or could never be an  
20 aggravating factor, that to me, I think would be a Gillotti  
21 one, and then two - - - step two would be whether, you  
22 know, here, this suffices.

23 MS. ERONDU: Uh-huh.

24 JUDGE GARCIA: You seem to be conflating those  
25 two steps.

1 JUDGE CANNATARO: Right.

2 MS. ERONDU: We're - - - we're not conflating the  
3 two steps. The first step is identifying a valid  
4 aggravating factor that is not accounted for - - -

5 JUDGE GARCIA: In theory.

6 MS. ERONDU: - - - in the RAI.

7 JUDGE HALLIGAN: But - - - but isn't that at some  
8 level of generality? I mean, isn't the step one question  
9 here - - - I think - - - you know, if you have a different  
10 view, I - - - I would welcome it. But the step one  
11 question, can additional criminal history be the type of  
12 factor when, if present in a kind, or to a degree not taken  
13 into account by the guidelines?

14 MS. ERONDU: Uh-huh.

15 JUDGE HALLIGAN: And then if - - - if the answer  
16 to that is yes, then I thought we would move on to step  
17 two, which is, I guess, where I thought you were focusing  
18 your argument, which is to say, what we have here, the - -  
19 - I think it's three offenses - - - is - - - is not  
20 sufficient to show that it is actually aggravating.

21 MS. ERONDU: Yeah. So - - -

22 JUDGE HALLIGAN: Can - - - can you clarify that?

23 MS. ERONDU: Yes.

24 JUDGE CANNATARO: That was my understanding as  
25 well.

1 MS. ERONDU: So yes. We are saying that as - - -  
2 a registrant's criminal history, it's possible, yes. That  
3 you could identify a valid aggravating factor.

4 JUDGE HALLIGAN: So doesn't that answer the step  
5 one question and move us on to step two?

6 MS. ERONDU: Sure, yes. So we can move on to  
7 step two and say that here that was not met. Mr. - - -

8 CHIEF JUDGE WILSON: Well, to not throw - - - not  
9 to throw a wrench into this, but maybe that's step three.  
10 And step two is just they have to produce some evidence  
11 that - - - that is - - - fits in with what they've  
12 identified in step one.

13 MS. ERONDU: Yes.

14 CHIEF JUDGE WILSON: And it's when you get to  
15 step three that you start then looking at all the evidence  
16 and saying, is this enough or not enough. Is that fair?

17 MS. ERONDU: Yes. That's fair. But again,  
18 turning to Mr. Townsend's criminal history. So we have - -  
19 - the RAI also does account for the crim - - - number and  
20 nature of a registrant's criminal history, and it does so  
21 as a comprehensive scheme that includes overrides - - -

22 JUDGE TROUTMAN: Does it - - -

23 MS. ERONDU: - - - as part of the - - -

24 JUDGE TROUTMAN: - - - specifically account for  
25 sex offenses?

1 MS. ERONDU: It does. The override specifically  
2 say that if someone has a prior sex offense, they're - - -  
3 they automatically trigger that override to level three.  
4 So our argument is that the RAI and the guidelines create -  
5 - - they preempt the field. They ensure that someone with  
6 a - - - with a criminal history that is indicative of  
7 higher risk that - - -

8 JUDGE RIVERA: But doesn't that vary based on  
9 numerosity, severity, nature of the - - - isn't that what  
10 you're really going to be trying to stress to the SORA  
11 court?

12 MS. ERONDU: Yes. And our argument is that the  
13 RAI does account for variations because it uses graduated  
14 scoring, particularly in the criminal history part of the  
15 assessment.

16 JUDGE RIVERA: So then I don't understand. If  
17 that's your position, that would mean that criminal history  
18 is already accounted for - - -

19 MS. ERONDU: Yeah.

20 JUDGE RIVERA: - - - which seems contrary to your  
21 first answer to Judge Singas.

22 MS. ERONDU: Criminal history - - - our argument  
23 is criminal history will oftentimes, almost always be  
24 accounted for through the I - - - RAI. But there is going  
25 to be the exceptional case, the extraordinary case. You

1 can borrow language from People v. Pittman, which is a  
2 Second Department case that says there has to be something  
3 extraordinary about that criminal history, something that's  
4 - - - that's different in some way. And that is the rule  
5 that we're - - - we're positing.

6 JUDGE SINGAS: And can I just ask on that? If  
7 it's - - - if you call it a step two or step three, what's  
8 our standard of review there? Is that a - - - a discretion  
9 - - - abuse of discretion and Gillotti's only a matter of  
10 law in step one? What do you think? How should we be  
11 reviewing this?

12 MS. ERONDU: So that would be - - - yes. That  
13 would be a step three abuse of discretion. But again, the  
14 threshold inquiry would have to be - - - would have to be  
15 satisfied first. And oftentimes, more often than not, when  
16 you're pointing to merely criminal history, unless you  
17 identify something that is different, exceptional,  
18 qualitatively different, you're not going to get past that  
19 point.

20 JUDGE CANNATARO: What's that something - - -  
21 just numerosity, severity, it could be any of those, or is  
22 it - - - are you talking about a different something?

23 MS. ERONDU: It could be any of those. But  
24 again, it's the People's job to identify that. Here they  
25 only point to Mr. Townsend's criminal history, and they

1 point to the fact that he has three prior sex offenses in  
2 seven years, which is exactly the type of criminal history  
3 that the RAI accounted for.

4 CHIEF JUDGE WILSON: Can I ask you something a  
5 little off the topic? Why does this matter to him? He's  
6 already level two. He's already persistent and violent for  
7 - - - had nothing even to do with this proceeding at all.  
8 What difference does this proceeding make to him?

9 MS. ERONDU: Well, SORA is an offense specific  
10 assessment. So the legislature decided that every time  
11 someone has a sex offense conviction, they will go through  
12 this adjudication. So it matters that we, again, you know,  
13 adhere to the guidelines, adhere to the rule, but also to  
14 Mr. Townsend. If he's a level one, then he could use that  
15 - - -

16 CHIEF JUDGE WILSON: But he's - - - he's a level  
17 two for other reasons, right?

18 MS. ERONDU: Yeah. He is a level two for other  
19 reasons.

20 CHIEF JUDGE WILSON: So he's going to have to  
21 comply with lifetime registration and - - - right?

22 MS. ERONDU: That's true. But he could - - -

23 CHIEF JUDGE WILSON: And he's persistent and  
24 violent.

25 MS. ERONDU: That's true.



1 CHIEF JUDGE WILSON: And that's not from this.

2 MS. ERONDU: Yeah.

3 CHIEF JUDGE WILSON: So what does this add? What  
4 - - - what difference practically does this make to him?

5 MS. ERONDU: Well, Mr. Townsend could use this  
6 level one to then seek a modification. So it - - - it is  
7 meaningful for Mr. Townsend in that - - - in that respect.

8 JUDGE CANNATARO: Seek a modification of the  
9 prior assessment?

10 MS. ERONDU: Yes, exactly. And so again, not  
11 just for Mr. Townsend. I think it's important that we  
12 remind lower courts that they have to adhere to what was  
13 made clear in Gillotti.

14 CHIEF JUDGE WILSON: Thank you.

15 MS. NOTCHICK: Your Honors, and may it please the  
16 court, Anna Notchick for the People.

17 JUDGE HALLIGAN: And Counsel, is this a Gillotti  
18 step two or step three in your view?

19 MS. NOTCHICK: Your Honor, I understood counsel's  
20 argument to rest on step one, which is whether these  
21 aggravating factors were accounted for as a matter of law.  
22 We think we surpass that - - -

23 JUDGE HALLIGAN: You take the argument, I - - - I  
24 think we just heard otherwise to be, that - - - that  
25 additional criminal offenses can never be considered? That

1 seems to me to be the step one inquiry.

2 MS. NOTCHICK: That - - - that is a step one  
3 inquiry. I - - - I think after today, it's - - - it's  
4 clear that that can be some ag - - - some criminal history  
5 can be unaccounted for by the RAI. And then that would - -  
6 -

7 JUDGE CANNATARO: And - - -

8 MS. NOTCHICK: - - - bring us to level two - - -

9 JUDGE CANNATARO: And you take their argument to  
10 be that it can never be accounted for as an extraordinary  
11 circumstance?

12 MS. NOTCHICK: That's how I understood their  
13 argument, or at least that in this case it was unaccounted  
14 for somehow.

15 JUDGE HALLIGAN: Well, those are very different  
16 things - - -

17 JUDGE GARCIA: Well, those are different things.

18 JUDGE HALLIGAN: - - - aren't they? I mean, one  
19 is to say, this type of circumstance, offenses that go  
20 beyond what - - - what's set forth in the guidelines can  
21 never be considered. And the second is to say here, it's  
22 not enough to justify, you know, some different treatment.  
23 So which of those two do you understand - - - do you  
24 understand us to be dealing with here?

25 MS. NOTCHICK: Your Honor, initially, step one.

1 But if step one is met, then step - - - we would have to  
2 move to step three. And I think step one is met here.

3 JUDGE HALLIGAN: And what about step two? Why is  
4 it step three and not step two?

5 MS. NOTCHICK: Because step two is just whether  
6 the aggravating factors actually exist in the case at hand.  
7 And I don't think counsel disputes that any of the evidence  
8 that supported these aggravating factors.

9 JUDGE CANNATARO: So do you view step two more  
10 like a burden of production requirement as opposed to step  
11 three, which would be a burden of proof requirement? Is  
12 that the way you're defining it?

13 MS. NOTCHICK: Yes, Your Honor, because under  
14 step one is just whether there are aggravating  
15 circumstances. Step two is whether they actually exist in  
16 the case at hand. The People have to provide documentary  
17 or some sort of evidence showing by clear and convincing  
18 evidence that they actually exist.

19 JUDGE HALLIGAN: The circumstances themselves,  
20 not whether they are aggravating, you mean?

21 MS. NOTCHICK: Correct. I - - - I think whether  
22 or not they're aggravating actually goes to level one,  
23 whether it's an aggravating factor. And then - - -

24 JUDGE SINGAS: Well, but - - - well, how do you  
25 define that? How do you define the aggravating factor?

1 MS. NOTCHICK: A factor that shows a higher  
2 likelihood of reoffense than is what - - - than what is  
3 scored on the RAI.

4 JUDGE SINGAS: And that's a matter of law?

5 MS. NOTCHICK: That's what this - - - this court  
6 has defined whether something is of a degree or of a kind  
7 unaccounted for by the RAI - - -

8 JUDGE CANNATARO: I thought that was step one.

9 MS. NOTCHICK: - - - as a matter of law is a  
10 legal question.

11 JUDGE GARCIA: That's step one.

12 JUDGE HALLIGAN: So whether - - -

13 MS. NOTCHICK: That's step one.

14 JUDGE GARCIA: Yes.

15 JUDGE HALLIGAN: Whether these particular - - -  
16 what I think I'm hearing you say, which doesn't make sense  
17 to me is, whether these particular offenses here are  
18 aggravating is a step one inquiry? What's left for step  
19 three then?

20 MS. NOTCHICK: So step three is the weighing of  
21 the factors and whether the aggravating factors outweigh  
22 the mitigating factors supporting the upward and downward.

23 JUDGE HALLIGAN: I would think that we would  
24 consider step one to be whether criminal history beyond  
25 what's set forth can, in any circumstance, when present of

1 a kind or to a degree, be something that can be treated as  
2 an aggravator. You would have us go even before we get to  
3 step two, where there's some, you know, burden of  
4 production or whatever you think step two means - - - I - -  
5 - I don't understand. It seems to me you're inverting the  
6 inquiry.

7 MS. NOTCHICK: Well, Your Honor, I - - - I just -  
8 - - I understand counsel's argument to be that it's just  
9 not of a degree here unaccounted for and that the degree is  
10 accounted for.

11 JUDGE GARCIA: And what step would that be?

12 JUDGE CANNATARO: Right. Because - - -

13 MS. NOTCHICK: That's level - - - that's step  
14 one.

15 JUDGE GARCIA: No.

16 JUDGE CANNATARO: How can that be true?

17 JUDGE GARCIA: That's step two. Because step  
18 one, to me seems to be if I had a hundred convictions, any  
19 universe of convictions I could think of stacked this way,  
20 could that ever qualify? Even if you had a million  
21 convictions it couldn't. Step two is, I showed you ten.  
22 Is that enough? If it's possible, is ten enough? If it's  
23 theoretically possible. I take the argument to be, they  
24 have conceded it's theoretically possible. But you didn't  
25 produce the ten convictions that needs to tip the scales in

1 your favor for clear and convincing evidence. So which is  
2 it? Is the argument it can never, no matter what you show,  
3 tip the scales for an aggravating factor, or is it, yes, it  
4 can theoretically, but you didn't make the burden here?

5 MS. NOTCHICK: After counsel's argument today, I  
6 understand it to be, yes. It can theoretically be a  
7 factor. It just doesn't meet that here, which leads us to  
8 the next steps.

9 JUDGE CANNATARO: And if I can just stop you. I  
10 know - - - I don't want to - - - would you agree, having  
11 made that concession of your understanding of your  
12 adversary's argument, the step one analysis is now over,  
13 and we're moving on to something above one? I'm not sure  
14 if it's two or three, but it's above one.

15 MS. NOTCHICK: That - - -

16 JUDGE CANNATARO: Do you agree with that?

17 MS. NOTCHICK: Yes. And then that would be an  
18 abuse of discretion standard for this court to review  
19 whether there is a lack of record support - - - supporting  
20 the court's determination. And here going to - - -

21 JUDGE RIVERA: So you would say step one is a  
22 legal question?

23 MS. NOTCHICK: Step one is a legal question. I  
24 think this court has already acknowledged that this - - -

25 JUDGE RIVERA: Step two is a mixed question?



1 MS. NOTCHICK: It can be. I think it's a  
2 question of whether the People produced enough evidence.  
3 So that would - - - could be a mixed question of law and  
4 fact. But then step three is an abuse of discretion  
5 standard.

6 CHIEF JUDGE WILSON: Sorry, enough evidence for  
7 what?

8 MS. NOTCHICK: To show that the defendant's level  
9 one presumptive risk level underassessed his risk of  
10 reoffense.

11 CHIEF JUDGE WILSON: Well, then what's left for  
12 step three?

13 MS. NOTCHICK: The weighing of the aggravating  
14 versus the mitigating factors. There were mitigating - - -

15 JUDGE RIVERA: I thought step two was just to  
16 show that, indeed, what you've identified could - - -  
17 could, right, be an aggravating factor actually exists in  
18 this case?

19 MS. NOTCHICK: Yes. And I - - - and whether  
20 we're on step two or step three, the mitigating - - - or  
21 aggravating factors here outweigh the mitigating factors.  
22 They actually exist in the case at hand. Given the number  
23 of defendant's prior crimes, the nature of them, the  
24 frequency with which they occurred, and the fact that he  
25 was already a level two sex offender at the time he

1 committed this offense. It would make no sense for the  
2 court below to find that he was somehow a lower risk of  
3 reoffense after his third forcible touching than he was  
4 after his second.

5 And the - - - if we're on step two, the - - - the  
6 aggravating factors actually do exist in this case.  
7 Defendant has - - -

8 JUDGE RIVERA: What's the standard on step one,  
9 sort of that matter of law? Is it that it has to be  
10 extraordinary, or is it something else?

11 MS. NOTCHICK: Your Honor, based on the - - - the  
12 guidelines, it seems that it has to be some level of  
13 exceptional or extraordinary. And that's also the eight -  
14 - - the Appellate Division's language when it comes to  
15 downward departures. And we do think - - -

16 JUDGE RIVERA: For step one. I'm asking about  
17 step one since you said that's a legal question.

18 MS. NOTCHICK: Yeah.

19 JUDGE RIVERA: I'm saying what's the standard for  
20 step one? You're saying on criminal - - - with respect to  
21 criminal history, it would be that the factor that's being  
22 proffered, that's identified is of an extraordinary nature.  
23 Is that what you're arguing is the standard? Because that  
24 was her argument. I want - - - are - - - are you agreeing  
25 with that?

1 MS. NOTCHICK: Well, I - - - the - - - that is  
2 what we initially set out, that it has to be extensive in  
3 the papers, but I think this court has already - - - or  
4 there's been discussion today that just anything more than  
5 that which assesses points is an aggravating factor.

6 JUDGE RIVERA: Well, what is your rule? Is that  
7 your rule now?

8 MS. NOTCHICK: Yes, Your Honor. That's - - -  
9 that the minimum standard that gets you 30 points, anything  
10 above that is an aggravating factor. And that is  
11 exceptional because what assesses - - -

12 JUDGE HALLIGAN: When you say, is an aggravating  
13 factor, you don't mean that necessarily justifies an upward  
14 departure. You mean it could be the basis for an upward  
15 departure, yes?

16 MS. NOTCHICK: Yes. Yes, Your Honor. And it did  
17 support the upward departure here because of the  
18 defendant's criminal history.

19 JUDGE HALLIGAN: Yeah, but - - - but there will  
20 be different sets of - - - whether we agree with you or not  
21 on this particular case, there will be different  
22 circumstances in each case?

23 MS. NOTCHICK: Yes, Your Honor. I think that's  
24 the level - - - the level three inquiry of whether they  
25 actually outweigh the mitigating factors supporting the

1 upward departure.

2 JUDGE RIVERA: And factor one is whether or not  
3 it really goes to - - - to risk, whether it's aggravating  
4 or mitigating? What are you aggravating and mitigating?  
5 The risk.

6 MS. NOTCHICK: Yes. And the aggravating factors  
7 here are aggravating. The board has already identified  
8 that criminal history is indicative of a defendant's risk  
9 of reoffense. And here the criminal history did suggest  
10 that he was a higher risk of reoffense than his level one  
11 presumptive adjudication would suggest.

12 JUDGE RIVERA: So why weren't the points enough?  
13 Why - - - why didn't the RAI take this, whatever you're  
14 arguing is the criminal history that's not really taken  
15 into account?

16 MS. NOTCHICK: Well, the defendant - - -

17 JUDGE RIVERA: To an appropriate degree.

18 MS. NOTCHICK: Well, the defendant would have  
19 been assessed 30 points under factor 9 if he had either a  
20 violent prior sex crime - - - or either a prior violent  
21 crime or a sex crime, or the endangering the welfare of a  
22 child conviction. But here, defendant had multiple  
23 convictions that would - - -

24 JUDGE RIVERA: So it's the numerosity?

25 MS. NOTCHICK: Yeah.

1 JUDGE RIVERA: It's the extensiveness of the  
2 history - - -

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

4 JUDGE RIVERA: - - - that's not captured by the  
5 RAI?

6 MS. NOTCHICK: The extensiveness. And also, we  
7 would argue that the nature of that history, the fact that  
8 - - -

9 JUDGE CANNATARO: I'm sorry, didn't he get 30  
10 points under factor 9?

11 MS. NOTCHICK: He - - - he did.

12 JUDGE CANNATARO: Okay.

13 MS. NOTCHICK: He did. But we - - - but our  
14 argument is just that that doesn't fully encapsulate - - -  
15 encapsulate the extent of his criminal history because he  
16 had multiple convictions that could have - - - that could  
17 have warranted that 30 points. And also, he had a myriad  
18 of misdemeanor convictions since 2013. He had committed  
19 some - - -

20 JUDGE CANNATARO: So in your eyes, the totality  
21 of the picture is much more than what 30 points can  
22 capture?

23 MS. NOTCHICK: Yes. And that - - - and even  
24 though it may seem as though we are conflating the - - -

25 JUDGE CANNATARO: And is that because of

1 numerosity, severity, recency, all of the above?

2 MS. NOTCHICK: It's - - - it's really all of the  
3 above. And that's what makes this defendant so different.  
4 And that's why the board acknowledged that this defendant's  
5 criminal history, his prior adjudication were unaccounted  
6 for and that a level two was warranted.

7 JUDGE SINGAS: So in your analysis or your  
8 rubric, are you saying that there are RAI factors that  
9 could never, as a matter of law, either be aggravating or  
10 mitigating under step one?

11 MS. NOTCHICK: No, Your Honor. I - - - I think  
12 that just - - - just to say that there's nothing that could  
13 ever be of a kind or to a degree, unaccounted for by the  
14 RAI, that's not our argument. There is factors that are  
15 taken into account by the RAI, could be of a degree or of a  
16 kind unaccounted for. That's this court's reasoning in  
17 Gillotti. And just based on the defendant's actual history  
18 here, the upward departure was warranted. Thank you.

19 CHIEF JUDGE WILSON: Thank you.

20 MS. NOTCHICK: If there are no further questions,  
21 we ask that you affirm. Thanks.

22 MS. ERONDU: I want to clarify that step one is -  
23 - - is a legal question. And it's about identifying an  
24 aggravating factor that is not taken into account. In this  
25 case that didn't happen, because the rule that we are

1 putting forth is that there is nothing extraordinary about  
2 Mr. - - -

3 JUDGE TROUTMAN: And how do you define  
4 aggravating factor?

5 MS. ERONDU: An aggravating factor is something  
6 that increases a registrant's risk of reoffense. So - - -

7 JUDGE TROUTMAN: And you say here there was a  
8 problem. So what was it? How did they fall short?

9 MS. ERONDU: Because they relied only on factors  
10 that have - - - that were completely taken into account by  
11 the RAI. The RAI, again, factors 9 and 10 - - -

12 JUDGE RIVERA: What about the numerosity  
13 argument?

14 MS. ERONDU: The numerosity argument is - - -  
15 that is what we're saying, that you have to identify  
16 something exceptional, something extraordinary. Otherwise  
17 any time someone reached the - - - got 30 points under  
18 factor 9, then they would have a valid aggravating factor.  
19 That - - - that would be - - - that would mean - - -

20 JUDGE HALLIGAN: I think the argument here is  
21 that there are offenses beyond what yields the 30 points.

22 MS. ERONDU: Yes. There are offenses beyond that  
23 - - - what yields the 30 points.

24 JUDGE CANNATARO: And that really wouldn't be  
25 taken into account by the RAI, right? If you reach the RAI

1 max - - -

2 MS. ERONDU: Uh-huh.

3 JUDGE CANNATARO: - - - but you could have  
4 reached that with much less than what's in this specific  
5 case, is there a sound reason why that could then not  
6 proceed to a Gillotti upward departure analysis framework?

7 MS. ERONDU: What we're saying is that the board  
8 clearly when it created this - - - the assessment, it - - -  
9 it had to have thought about, or taken into account, the  
10 numerosity of offenses, but it made the assessment that it  
11 didn't - - - it didn't impact risk in a meaningful way.

12 JUDGE SINGAS: But it's also, adequately take  
13 into account. It's not just, take into account, because if  
14 it's just, take into account, then maybe your argument is  
15 right. You know, they did take it into account, but  
16 they're saying, did they adequately take it into account,  
17 which means there might be something else that you have to  
18 look at to say, did this capture who this person is? Like,  
19 what work does adequate do?

20 MS. ERONDU: Well, adequate does a lot of work.  
21 And we are saying that because he maxed out on criminal  
22 history, it did adequately take into account.

23 JUDGE SINGAS: But he would have maxed out on  
24 criminal history if he had one conviction, one of these  
25 could have maxed him out.

1 MS. ERONDU: Well, yes. One of them could have.  
2 But again, looking at the - - -

3 JUDGE TROUTMAN: So again, if - - - if one could  
4 max you, how can you then say having an excessive number is  
5 accounted for, or additional number of convictions is  
6 accounted for?

7 MS. ERONDU: Because we have to look at the  
8 overrides as well. And what is included in the RAI and  
9 guidelines is just as important as what's left out. The  
10 number is not necessarily accounted for in the RAI, but it  
11 is accounted for in the overrides. If someone has a prior  
12 felony conviction, no matter if that happened 20 years ago,  
13 50 years ago, they automatically become a level three.

14 JUDGE CANNATARO: I don't - - - I don't mean to  
15 go back in history, but now it sounds like you're arguing  
16 Gillotti one. You're saying we have the RAI, and we have  
17 the override.

18 MS. ERONDU: Uh-huh.

19 JUDGE CANNATARO: So we don't need anything else.  
20 We don't - - - you know, there's no - - - there's no  
21 purpose to having - - - having this aggravating factor  
22 analysis, which to me sounds like, this is not a factor  
23 that could ever be aggravating.

24 MS. ERONDU: We - - - I agree with you.

25 JUDGE HALLIGAN: Wait, I thought you have said -



1 - -

2 JUDGE CANNATARO: But I thought you said before  
3 that this could be.

4 MS. ERONDU: No. I - - - I agree with you, but  
5 our - - - our rule is that if it is - - - if you are saying  
6 that there's something about the number of offenses that is  
7 not taken into account, it has to be exceptional. It has  
8 to be extraordinary. So we're not saying that criminal  
9 history will not ever matter. Of course there - - - if  
10 someone has a hundred prior offenses, that's exceptional.  
11 Often - - - but I also want to say that it is a rare case  
12 that it will almost never happen, that someone has a  
13 hundred prior offenses and they don't automatically trigger  
14 the override. They will almost always be a level three.  
15 So if you have one hundred offenses and you somehow do not  
16 fall into the override category, that's exceptional. So -  
17 - -

18 CHIEF JUDGE WILSON: Go ahead and conclude. Yes.

19 MS. ERONDU: Yeah. So - - -

20 JUDGE RIVERA: Let me - - - why isn't that then  
21 step three?

22 MS. ERONDU: Because - - -

23 JUDGE RIVERA: It's now exceptional?

24 MS. ERONDU: Yes. So then you would - - -

25 JUDGE RIVERA: Right? I mean, it would just be

1 the record. Either they - - - they have that criminal  
2 history or they don't. That gets you past step two.

3 MS. ERONDU: Uh-huh.

4 JUDGE RIVERA: Step three.

5 MS. ERONDU: Yeah. So then in that case where  
6 someone has a hundred prior convictions, they would get to  
7 step three, right. And then it would be at that point the  
8 court can make the - - - the discretionary choice as to  
9 whether to upwardly depart.

10 Whether the Court finds the outcome of Mr.  
11 Townsend's assessment intuitively satisfying is a different  
12 question. But Gillotti doesn't ask the guidelines to  
13 produce the right result. It asks it - - - it produces the  
14 right result in each case. It asks whether People  
15 identified a factor that the guidelines did not adequately  
16 take into account. And they did not do so here. So we ask  
17 the court to reverse - - -

18 JUDGE RIVERA: Yeah. But that - - - that's to  
19 achieve a particular goal, right? When you say the right  
20 result. I mean the - - - the point of taking into  
21 consideration what the RAI - - - RAI may have missed.

22 MS. ERONDU: Uh-huh.

23 JUDGE RIVERA: And if you get to step three, that  
24 weighing process is in furtherance of what purpose? What  
25 are you trying to achieve?

1 MS. ERONDU: Well, the whole point of SORA is  
2 public safety, right? So the whole point is to assess a  
3 registrant's risk, right?

4 JUDGE RIVERA: Accurately.

5 MS. ERONDU: Accurately. Yes, Your Honor. And  
6 what we're saying is that Mr. Townsend's risk for this  
7 offense was assessed accurately. So we ask this - - -

8 JUDGE SINGAS: I don't see how we would - - - you  
9 would get to a level three based on the overrides. If he  
10 had a hundred forcible touchings, I think that he would  
11 still max out at 30. And I don't see any of the overrides,  
12 unless I'm missing them, would be applicable.

13 MS. ERONDU: So yes. If he had a hundred  
14 forcible touching he - - - those are all misdemeanors. But  
15 Mr. Townsend was actually convicted of persistent sexual  
16 abuse here, which is a felony because he had three forcible  
17 touching convictions. So our argument is that, again, the  
18 whole - - - the legislative scheme, the - - - the  
19 guidelines, the RAI, they all - - - they all work together  
20 to - - - to assess a registrant's risk. And so yes. In  
21 that scenario, if someone somehow skirted being convicted  
22 of a felony with one hundred forcible convictions, that  
23 would be exceptional, right. That would get you past step  
24 one. That would be a valid aggravating circumstance.

25 So we ask this court to reverse and adjudicate

1 Mr. Townsend a level one registrant.

2 CHIEF JUDGE WILSON: Thank you.

3 (Court is adjourned)

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

I, Bobby Hodges, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Townsend (Kenneth), No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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