

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS  
STATE OF NEW YORK

-----

PEOPLE,

Respondent,

-against-

NO. 49

GREEN (HIKEEM),

Appellant.

-----

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:

SARAH B. COHEN, ESQ.  
APPELLATE ADVOCATES  
Attorney for Appellant  
111 John Street  
9th Floor  
New York, NY 10038

JONATHAN E. MASENG, ESQ.  
QUEENS COUNTY DISTRICT ATTORNEY  
Attorney for Respondent  
125-01 Queens Blvd.  
Kew Gardens, NY 11415

Leda Yeager  
Official Court Transcriber



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

3 MS. COHEN: Good afternoon, Your Honors. Sarah  
4 Cohen from Appellate Advocates, on behalf of Appellant  
5 Hikeem Green. And may I please reserve two minutes for  
6 rebuttal?

7 CHIEF JUDGE WILSON: Yes.

8 MS. COHEN: Thank you. When considering a  
9 departure request, SORA courts should have the discretion  
10 to consider all relevant information to make an accurate,  
11 individualized risk assessment.

12 JUDGE HALLIGAN: What is that bounded by? If  
13 there's - - - if there's some circumstance that's not  
14 addressed in the guidelines, any circumstance? Can a court  
15 take that into account in your view?

16 MS. COHEN: It's bounded by relevance. So and  
17 we're in step one here. So at step one, when requesting a  
18 downward departure, the movant would have to propose a - -  
19 - a mitigating factor, which means a factor that tends to  
20 reduce the risk of recidivism.

21 JUDGE HALLIGAN: Right. But - - - but if it's a  
22 factor, what I'm trying to understand is if it's a factor  
23 that's not addressed in the guidelines, and the defendant  
24 says this is mitigating, so there's a causal connection and  
25 it's present here, can the defendant point to any factor

1 that - - - that you know is at play in his or her life, in  
2 your view, as long as - - - as some connection to risk of  
3 recidivism can be established or lack thereof?

4 MS. COHEN: Yes. If it's of a kind or degree  
5 that is not adequately accounted for by the guidelines.

6 JUDGE CANNATARO: Can we just stick on kind?  
7 What's the court's function in determining - - - you - - -  
8 the defendant comes in, says, I've got this mitigating  
9 factor that's not taken into account by the RAI. You - - -  
10 you tell the court what it is. What's the court's function  
11 in then saying, well, yes, that's true. That is a - - - a  
12 mitigating factor or it's not a mitigating factor?

13 MS. COHEN: That's a question of law that the  
14 court would decide at step one.

15 JUDGE CANNATARO: It's purely a question of law?

16 MS. COHEN: Yes.

17 JUDGE CANNATARO: Sounds like science to me a  
18 little bit and policy a little bit. It doesn't seem as  
19 simple as being a question of law.

20 MS. COHEN: In Gillotti, though, this court set  
21 forth a three-step framework and said clearly that step one  
22 is an issue of law. The question is, as a matter of law,  
23 has the person identified a proper factor?

24 JUDGE GARCIA: What are the factors you want us  
25 to consider here?

1 MS. COHEN: At step one?

2 JUDGE GARCIA: What to consider?

3 MS. COHEN: The factors would be family or  
4 community support and employment.

5 JUDGE GARCIA: Aren't those, though, very  
6 speculative to consider at the time of imposing the initial  
7 level? Because it seems to me the equivalent of saying,  
8 I'm going to take a really great sex offender treatment  
9 course and I'm going to ace it, so I'd like a level two  
10 now. What's the difference?

11 MS. COHEN: So I think that that inquiry would be  
12 past step one, right? At step one - - -

13 JUDGE GARCIA: So if I say I'm going to take a  
14 really great sex offender treatment course and I'm going to  
15 do great, so you should reduce my level now, you get by  
16 step one?

17 MS. COHEN: I - - - I don't - - - that's not one  
18 of our proposed - - -

19 JUDGE GARCIA: But what's the difference? I  
20 mean, you're saying I have employment. Let's say, and I'm  
21 the judge, I agree, I give you a departure to one, and on  
22 Monday you get fired?

23 MS. COHEN: Yeah, I think the difference - - - so  
24 the guidelines already contemplate that inappropriate  
25 employment would be an - - - an aggravating factor.

1 JUDGE GARCIA: Because on day one you're not  
2 going to have anything. You're going to be in that  
3 situation, right? And if that changes over time, you can  
4 come in as a defendant and get a modification and say for a  
5 year, for two years - - - and there are many cases that do  
6 this - - - I have had a family living situation. I've had  
7 steady and appropriate employment, and you can have the  
8 level reduced based on a demonstrated track record that  
9 reduces your risk to the community. Here, you're asking  
10 for a reduction up front on very speculative factors that  
11 can change day one, and the People cannot come in in a year  
12 or two years or Tuesday and say, no, they actually got  
13 fired and were thrown out of their house, and that level  
14 will stay for the entire time. So if you've reduced from a  
15 two to a one based on speculative factors that actually  
16 don't turn out to pan out, the People have no recourse.

17 MS. COHEN: A few things, Your Honor. The  
18 factors weren't speculative here, because Mr. Green was  
19 able to show a track record of stable employment by the  
20 time of the hearing.

21 JUDGE HALLIGAN: But they can change their  
22 dynamic going forward, right? I guess I think the question  
23 is with respect to factors that through circumstances  
24 completely outside the defendant's control can change and  
25 can be present at one point and then absent because, you

1 know, a - - - a place of employment closes down or  
2 something happens to one's family members that's  
3 unanticipated. So - - - so how do we think about that?  
4 Because comparison I think to most of the other types of  
5 considerations that a SORA court's asked to - - - to look  
6 at, we are asking the court to rely on some prediction, not  
7 just about how the circumstance will affect the defendant's  
8 recidivism, but whether the circumstance will continue to  
9 exist going forward.

10 MS. COHEN: The - - - the risk assessment is  
11 inherently a snapshot in time. And the legislature could  
12 have said that, you know, there needs to be a periodic  
13 reevaluation of the risk assessment.

14 JUDGE CANNATARO: I think that's the only answer  
15 you could possibly give to that question. That sounds  
16 right to me, but - - - but it doesn't answer the second  
17 half of the last question, which is if the situation  
18 changes and the - - - the departure has already been given  
19 in the past, what's the remedy for the People who want to  
20 correctly assess the risk?

21 MS. COHEN: Well, under Correction Law 168-0, it  
22 does allow the people to modify - - - to seek a  
23 modification for a higher risk level under certain  
24 circumstances, so.

25 JUDGE CANNATARO: Can they come back afterwards?

1 MS. COHEN: And they can come back if the person  
2 either is convicted of a new crime or violates a condition  
3 of parole.

4 JUDGE CANNATARO: But what if they - - - no, but  
5 if their circumstances just change, that great family  
6 support that they - - - in the snapshot they had it. But  
7 sometime later, but way before they reoffend or they never  
8 reoffend, it's - - - it's changed? It's different. That  
9 great family support isn't there anymore. What is - - -  
10 you know, what's the remedy for that situation?

11 MS. COHEN: There may be no remedy for that  
12 situation, but there is no - - - first, let me just say the  
13 prosecution hasn't contested that these are mitigating  
14 factors. Their position is that these are accounted for by  
15 the guidelines, but - - -

16 JUDGE RIVERA: But what - - - what's the remedy?  
17 If the aggravating factor disappears?

18 MS. COHEN: I guess it would be to move for a  
19 modification.

20 JUDGE RIVERA: Can you do that at any time, or do  
21 you have to wait?

22 MS. COHEN: You can do it, I believe, once a  
23 year.

24 JUDGE RIVERA: Uh-huh.

25 MS. COHEN: But the modification - - - the - - -

1 is a higher burden of proof. So to get a modification  
2 downward you have to prove by clear and convincing  
3 evidence, but you have the right to an initial  
4 determination, where you only have to prove by a  
5 preponderance of the evidence. So to say that - - - that  
6 these mitigating factors won't be considered - - -

7 JUDGE RIVERA: Are saying this - - - this  
8 possibility - - - let's take the hypothetical we were  
9 working with that you might get fired or that there's no  
10 track record. When is that taken into consideration? Step  
11 three?

12 MS. COHEN: I think so. Step three, so - - - so  
13 we're not saying that if you come forward at step one and  
14 say, I have employment, that you're automatically entitled  
15 to a downward departure at all. Our position is that  
16 courts should be entitled to consider evidence of  
17 employment. If it's - - -

18 JUDGE CANNATARO: So let - - - let me ask you  
19 this just for the sake of fairness, whether I think it  
20 would probably happen at step three, but you - - - you  
21 might have a different view. Could the court at least  
22 consider the fact that it's making a prospective sort of  
23 determination here that if - - - if the court were inclined  
24 to grant the downward departure based on this type of  
25 circumstance, that it factor into its decision making, that

1 it might not be of a permanent nature?

2 MS. COHEN: Absolutely. And it could look at the  
3 - - - at step two and three, especially three. It could  
4 look at the nature of the employment evidence before it in  
5 that specific case. Is there evidence of long-term, full-  
6 time, stable employment, for instance, as there is here,  
7 that might make a court more inclined to grant the downward  
8 departure than other circumstances.

9 JUDGE RIVERA: And is your position at step one  
10 it's just employment? You just have to show you're  
11 employed, or do you have to meet a particular standard with  
12 respect to the employment?

13 MS. COHEN: My position is that any employment  
14 should be enough to open the door at step one, because if  
15 the door is closed at step one, then the court cannot  
16 consider the evidence.

17 JUDGE TROUTMAN: What exactly does open the door  
18 mean?

19 MS. COHEN: The only way that the court can  
20 consider the evidence of employment is if it gets through  
21 step one. So step one is the - - - the legal question.  
22 Has the person identified a proper factor? If and only if  
23 - - -

24 JUDGE TROUTMAN: So employment is a proper  
25 factor?

1 MS. COHEN: Yes. That is the rule that we are  
2 asking for, because only if employment is a proper factor,  
3 is the person able - - -

4 JUDGE TROUTMAN: So if we just - - - if we were  
5 to disagree with you that employment is not a proper factor  
6 because it's - - - it's - - - it's fluid, then you wouldn't  
7 be able to have that considered, correct?

8 MS. COHEN: That's correct. And that would not -  
9 - - that would not be conducive to the entire goal of the -  
10 - - the SORA hearing, which is an accurate determination of  
11 the risk.

12 JUDGE TROUTMAN: Well, what about the fact that  
13 you get to go - - - come back later for modification?

14 MS. COHEN: But the person is entitled to an  
15 initial hearing with an accurate - - -

16 JUDGE TROUTMAN: They are, but they're not  
17 entitled to a particular determination, are they?

18 MS. COHEN: Absolutely not. And that's why we  
19 just want courts to be able to consider this evidence.

20 JUDGE RIVERA: Is there anything in Gillotti that  
21 suggests it is only - - - that this process, this three-  
22 step process, is only backward looking?

23 MS. COHEN: No.

24 JUDGE RIVERA: Okay. So then what would cabin  
25 the prospective aspects of Gillotti? Or is it uncabin?

1 Doesn't matter.

2 MS. COHEN: I think - - -

3 JUDGE RIVERA: It all goes to step three.

4 MS. COHEN: I think that it - - - that - - - that  
5 if it's a - - - if it is not accounted for by the  
6 guidelines and it tends to bear on the likelihood of  
7 reoffense, then it should come in at step one under  
8 Gillotti.

9 JUDGE GARCIA: Then should my hypothetical where  
10 I am going to take a class on sex offender treatment and  
11 I'm going to do really well, get you to step two or three?

12 MS. COHEN: Judge, I don't see - - -

13 JUDGE GARCIA: I'm enrolled in a class - - -

14 MS. COHEN: - - - the harm in that because - - -

15 JUDGE GARCIA: I'm enrolled in a class.

16 MS. COHEN: We want the courts to be able to  
17 consider the evidence. It - - -

18 JUDGE GARCIA: So yes, is your answer? That's a  
19 step one pass?

20 MS. COHEN: I think it's a weaker step one pass  
21 than we have here, and especially because the guidelines  
22 themselves - - -

23 JUDGE RIVERA: Well, how is that if you've just  
24 taken a class? I mean, you're just in the class. Don't  
25 you need the history in that particular example? I'm not

1 understanding now what - - - what you view as the - - - the  
2 - - - the parameters of step one.

3 MS. COHEN: I'm not sure - - -

4 JUDGE RIVERA: I mean, isn't what matters for  
5 this particular example, that one has succeeded in the  
6 class? And so the fact that one has enrolled, is that  
7 going to be good enough? I'm - - - I'm not understanding  
8 the way you've used step one.

9 MS. COHEN: I - - - it - - - my view of step one  
10 is that if a person is able to - - - to identify a factor  
11 that, as a matter of law, tends to reduce the risk of  
12 recidivism, then the court should be able to consider that  
13 under the totality.

14 JUDGE RIVERA: But it - - - it - - - it - - - oh,  
15 okay. So in this hypothetical, your position is the mere  
16 enrollment in the class, not how one does in the class,  
17 because that would be the track history, is enough at step  
18 one?

19 MS. COHEN: It - - - it's a bit of a tough  
20 question, I think it's - - - it's - - -

21 JUDGE RIVERA: What we do.

22 MS. COHEN: It's different than what I'm  
23 presenting here. I - - -

24 JUDGE GARCIA: I'm enrolled in a job, right? I  
25 haven't done it yet, but I assume the job is prospective.

1 Not - - - I'm enrolled in a job. I have not set foot in  
2 that office yet. I'm enrolled in a class. I have not set  
3 foot in the classroom yet. What's the difference?

4 MS. COHEN: The difference is that we - - - is  
5 that studies have shown, and the prosecution does not  
6 contest, that employment reduces the risk of recidivism.

7 JUDGE HALLIGAN: Okay. So is that the limiting  
8 factor? So is the limiting factor at step one, whether  
9 there is some evidence, most likely some kind of - - - of  
10 analysis, study, whatever it is, to show a causal  
11 relationship between whatever the factor is, signing up for  
12 a class, taking a class, being employed, whatever it is,  
13 and the risk of recidivism?

14 MS. COHEN: Yes. As a matter - - -

15 JUDGE HALLIGAN: So that's the gate for - - - for  
16 one?

17 MS. COHEN: I - - - yes.

18 JUDGE HALLIGAN: So for example, if I said I have  
19 blonde hair, that would not be relevant and I couldn't get  
20 through step one because there's no way I could show any  
21 relationship to risk of recidivism?

22 MS. COHEN: Yes. And in - - -

23 JUDGE GARCIA: But what's the difference in my  
24 hypothetical, though? So how would you apply that blonde  
25 hair theory to my enrollment? Because sex offender

1 treatment is a recognized - - - extraordinary response to  
2 sex offender treatment is recognized.

3 MS. COHEN: I think that's where I - - - where I  
4 want to respond to your hypothetical is that the guidelines  
5 say exceptional response to treatment is a - - - is a basis  
6 for downward - - -

7 JUDGE CANNATARO: Can I propose a different  
8 response?

9 JUDGE GARCIA: So enrollment in a job is - - -  
10 does that too, or isn't it having the job and having that  
11 support which is the mitigator, which is what reduces your  
12 risk? Not the fact that I have an offer. It's the fact  
13 that I've been doing this, and it's providing support for  
14 me not to reoffend. I don't see the difference.

15 MS. COHEN: Well, what reduces - - - what - - -  
16 what it is about employment that reduces the risk of  
17 reoffense is that it provides structure. It provides a - -

18 JUDGE GARCIA: Right.

19 MS. COHEN: - - - pro-social activity. It  
20 provides norms. So to be - - -

21 JUDGE GARCIA: Just having the offer to do that  
22 isn't mitigating anything. It doesn't happen - - - that  
23 mitigation doesn't happen until you do it. Same with sex  
24 offender treatment.

25 MS. COHEN: At the very least, then stable

1 employment should be a valid mitigating factor at step one.

2 JUDGE GARCIA: A track record.

3 JUDGE SINGAS: Do you think that the RAI board  
4 considered that? I mean, I think they're saying, look, the  
5 only thing that we care about in terms of employment is the  
6 fact that you're working at a nursery school. So we think  
7 that's inappropriate and we think that's going to affect  
8 your recidivism rate. But other than that, they're not  
9 looking at any other employment, so they're not even  
10 considering employment. Like, it's already taken into  
11 account to the extent of they're saying it's a negative.  
12 If you have negative employment, then you're going to get  
13 points and that's going to raise your risk - - - your risk  
14 level. But other than that, it's a judgment call that  
15 they've already made.

16 MS. COHEN: So I agree with Your Honor's  
17 assessment that the guidelines only take into account  
18 negative employment, because that will increase your risk.  
19 But a score of zero doesn't take into account positive  
20 employment.

21 JUDGE SINGAS: I guess I'm saying I think the  
22 board maybe made that judgment already. And I don't know  
23 what we can do about that.

24 MS. COHEN: Well, it's because the board also  
25 said that it allows for downward departures for factors

1 that aren't adequately considered.

2 JUDGE CANNATARO: I think the debate we're having  
3 here, though, is whether mere employment in and of itself  
4 really is a factor.

5 MS. COHEN: I think that especially considering  
6 the - - - how difficult it is for sex offenders to obtain  
7 employment, which has been recognized by federal courts, on  
8 the Unified Court System website, by the Chief Judge in a  
9 recent concurrence earlier this year in Collier. It is  
10 immensely difficult for people with sex offenses to even  
11 obtain any employment, and it has a mitigating effect on  
12 their risk of - - -

13 JUDGE CANNATARO: Okay, but then they get work.  
14 It's hard because of stigma and all sorts of things. It's  
15 hard for a sex offender to get a job. They get a job. But  
16 what exactly does that tell us about their likelihood to  
17 reoffend or the safety of the community?

18 MS. COHEN: It tells us that their likelihood to  
19 reoffend is lower because they have the structure to - - -  
20 of going to a job every day, or - - -

21 JUDGE RIVERA: It's based on research?

22 MS. COHEN: Yes, it is, Your Honor. It's based  
23 on numerous studies, including one that counsel - - -

24 JUDGE RIVERA: Then that's what you're saying  
25 would be presented at step one?

1 MS. COHEN: At step one as a matter of law. So  
2 it's not that every person coming into a SORA hearing needs  
3 to present research.

4 JUDGE HALLIGAN: Yeah, but for you to show that  
5 you get past step one - - - let me - - - let me ask it this  
6 way. Suppose - - - I imagine you're going to tell me this  
7 is not the case, but assume that there were studies  
8 demonstrating that, in fact, there was no correlation  
9 between stable employment and recidivism. Would you agree  
10 that it would then not be an appropriate factor to  
11 consider?

12 MS. COHEN: Yes.

13 JUDGE HALLIGAN: I appreciate you think that's  
14 not empirically the case, but - - - but so that's what you  
15 need is some - - - some, you know, reliable enough  
16 demonstration of a connection?

17 MS. COHEN: I agree with that, Your Honor. And  
18 thank you.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. MASENG: Good afternoon, Your Honors. And  
21 may it please the court, Assistant District Attorney  
22 Jonathan Maseng on behalf of D.A. Melinda Katz and the  
23 People. The Appellate Division properly concluded that  
24 family support and gainful employment are factors of a kind  
25 adequately taken into account by the guidelines, and that

1 they weren't present to such a degree in defendant's case.

2 JUDGE CANNATARO: Can we parse that sentence? So  
3 they are factors. You agree with your adversary, at least  
4 to the extent of saying that they are factors, right?

5 MR. MASENG: As a matter of law, that's another  
6 question.

7 JUDGE RIVERA: Why not? If inappropriate  
8 employment is a factor, why wouldn't appropriate employment  
9 be a factor? One swings one way, one swings the other.

10 MR. MASENG: I think when you're talking about  
11 something that is of a kind that's not taken into account  
12 by the guidelines, that's a clear question as a matter of  
13 law. When you're talking about something to a degree that  
14 is not taken into account by the guidelines, that's  
15 necessarily bringing in questions about the facts present  
16 in that particular case. In order to decide whether - - -

17 JUDGE RIVERA: So you think step one is sometimes  
18 a question of law, sometimes not?

19 MR. MASENG: Yes, actually.

20 JUDGE HALLIGAN: How could that be? I'm not sure  
21 I understand that.

22 MR. MASENG: Sure.

23 JUDGE HALLIGAN: When would it be and when would  
24 it not be?

25 MR. MASENG: So if - - - if you have something

1 that isn't taken into account by the guidelines, that it's  
2 of a kind that isn't taken into account by the guidelines,  
3 that is a pure question of law. If it's just not there.  
4 If it's a question of a degree, then you have to consider  
5 the facts of that particular case.

6 JUDGE CANNATARO: If that's true, what happens to  
7 step three of Gillotti?

8 MR. MASENG: Step three of Gillotti is the point  
9 where the court, saying, let's say it's - - - the court  
10 finds that it's present to a degree that's not accounted  
11 for by the guidelines, then it has to weigh against - - -

12 JUDGE CANNATARO: But it's a balance against all  
13 the other pros and - - -

14 MR. MASENG: Correct.

15 JUDGE CANNATARO: - - - cons?

16 MR. MASENG: Correct.

17 JUDGE CANNATARO: Okay.

18 MR. MASENG: But even if you go to step two in  
19 the guidelines, defendant's case here would also fail  
20 because defendant hasn't shown that in his particular case  
21 - - -

22 CHIEF JUDGE WILSON: Did the Appellate Division  
23 go to step two here?

24 MR. MASENG: It's - - - it's not entirely clear  
25 whether the Appellate Division went to step two here. The

1 Appellate Division just said it was adequately taken into  
2 account. And so - - -

3 CHIEF JUDGE WILSON: It sounds like step one.

4 MR. MASENG: The implication is it's more step  
5 one. But I think in order to consider whether it's present  
6 to a degree, you kind of start mixing those steps because  
7 you have to consider the facts being presented in the case  
8 to see whether that degree of not being taken into account  
9 by the guidelines is present there.

10 JUDGE CANNATARO: It sounds very confusing from  
11 an appellate administration point of view, right? Because  
12 legal questions are analyzed under one standard; things  
13 that are more factual in nature would be analyzed under a  
14 different standard. How do you manage that mixed nature of  
15 things?

16 MR. MASENG: Well, one - - - one option would be  
17 to say that they are not factors that could be considered.  
18 The other would be to set it at a level of exceptional.  
19 Something has to be so outside the norm. So exceptional.

20 JUDGE CANNATARO: Well, it's extraordinary.  
21 That's what we've chosen. I don't know if that's good  
22 enough for you, but that seems to - - - I don't think that  
23 part of the law is going to change.

24 JUDGE RIVERA: Why isn't that a legal standard?

25 MR. MASENG: That is a legal standard, Your

1 Honor.

2 JUDGE RIVERA: Okay.

3 MR. MASENG: And - - - and I think if - - - if -  
4 - -

5 JUDGE RIVERA: Why isn't that similar to saying  
6 to a degree?

7 MR. MASENG: It - - - it is similar to saying to  
8 a degree, but I think - - -

9 JUDGE RIVERA: Then to a degree has a legal  
10 component?

11 MR. MASENG: It has a legal component to it, yes.  
12 But it does require a court to kind of examine step one and  
13 step two together in that particular case, in order to see  
14 whether - - -

15 JUDGE RIVERA: Well, step two is saying, well,  
16 let's see if it's present in this case.

17 MR. MASENG: Correct. So I think - - -

18 JUDGE RIVERA: Let's assume for one moment, I - -  
19 - I know you disagree, that stable employment would be a  
20 factor, not appropriately, let me use that word, taken into  
21 consideration and might meet step one. Isn't step two  
22 okay, does this person have that type of employment, right?  
23 Isn't that then step two?

24 MR. MASENG: That would be step two of stable  
25 employment.

1 JUDGE RIVERA: All right. And then step three  
2 would be okay, now you've established that that exists.  
3 Established that it could be a mitigating factor. I'm now  
4 going to weigh that, considering everything that's in the  
5 record before me as the - - - as the SORA judge.

6 MR. MASENG: Correct. That's how it would work.  
7 But the question is whether stable employment in and of  
8 itself - - -

9 JUDGE RIVERA: Yes, I understand. It was just to  
10 kind of walk through the hypothetical, assuming for the  
11 moment that it would meet step one. I understand you say  
12 it doesn't.

13 JUDGE CANNATARO: Stay with the assumption that  
14 stable employment could be a factor. What would the  
15 analysis look like in terms of kind and degree for stable  
16 employment? I mean, kind is easy, right? Do you have a  
17 good job that you can go to every day? What's degree mean  
18 with stable employment?

19 MR. MASENG: I think you're looking at to a  
20 degree as to whether it was taken into account by the  
21 guidelines to that degree. Our argument is that the  
22 guidelines do actually take stable employment into account  
23 in that that's what you get zero points for.

24 JUDGE CANNATARO: You don't think that the  
25 guidelines are more along the lines, I think of what Judge

1 Singas was asking a little while ago, more focused on the  
2 circumstances of the employment?

3 MR. MASENG: I - - - I think that - - -

4 JUDGE CANNATARO: Where you're working, what kind  
5 of work you're doing?

6 MR. MASENG: They are to an extent focused on  
7 that. But the guidelines also specifically state in the  
8 release environment section that it has to be an assessment  
9 of their planned work and living arrangements upon release  
10 from custody. And it's very broad in how that's to be  
11 assessed.

12 CHIEF JUDGE WILSON: I see where there's maybe  
13 some tension between this argument and the prior argument.  
14 I hope - -

15 MR. MASENG: Yes.

16 CHIEF JUDGE WILSON: - - - that, right, that if  
17 we're sort of dealing with two sides of the same coin. If  
18 criminal history is a maximum 30 in the guidelines, the  
19 argument you're making now could be used by the defendant  
20 in that case and likewise here. Is - - - the guidelines  
21 either I think have to be viewed as having sort of  
22 presumptive maximum-minimums for these cat - - - for many  
23 of these categories, not all of them, but for many of these  
24 categories that there can be a deviation from based on  
25 extraordinary circumstances. And it seems to me unless you

1 have a - - - you can explain why it should be different,  
2 that the upward and downward departures should be logically  
3 parallel.

4 MR. MASENG: I think the guidelines recognize  
5 that these prior convictions, these prior sex offenses, are  
6 an aggravating factor. That is in the guidelines. We know  
7 that they think - - -

8 CHIEF JUDGE WILSON: Uh-huh.

9 MR. MASENG: - - - that that's an aggravating  
10 factor. We do not know that the guidelines think that  
11 stable employment or family support are mitigating factors.

12 JUDGE HALLIGAN: You don't think this case and  
13 the prior case rise or fall together?

14 MR. MASENG: No.

15 JUDGE SINGAS: Right. And that's I think that  
16 what I was trying to get at and we had a discussion about  
17 that. So it's your position that no employment is a  
18 mitigating factor. The only thing it could be is an  
19 aggravating factor if it's inappropriate.

20 MR. MASENG: Correct.

21 JUDGE SINGAS: And that's a step one analysis.

22 MR. MASENG: Correct. The guidelines simply do  
23 not state anywhere that employment, stable employment, or  
24 family support, are a mitigating factor. They don't  
25 recognize that.

1 JUDGE RIVERA: But does Gillotti say that the  
2 guidelines have to identify everything that is a mitigating  
3 factor or an aggravating factor?

4 MR. MASENG: No, but - - -

5 JUDGE RIVERA: Okay.

6 MR. MASENG: It would seem illogical that the  
7 guidelines committee did not consider that when writing the  
8 guidelines, because they speak about the negative side of  
9 the employment.

10 JUDGE HALLIGAN: But why wouldn't we think about  
11 that as the distinction? I - - - I think you - - - you  
12 heard this in another question, between inappropriate  
13 employment as something that can be an aggravator and not  
14 touching on the question of whether stable employment can  
15 be a mitigating factor?

16 MR. MASENG: Because I believe that would be the  
17 job of the guidelines committee if they wanted to rewrite  
18 this.

19 JUDGE HALLIGAN: It's pretty clear that the  
20 guidelines don't take into account, I think you just - - -  
21 just acknowledged this, every single circumstance that can  
22 be an aggravator or a mitigator. And so if that's right,  
23 as a starting premise, then it seems to me the guidelines  
24 don't constrain what can come in - - - the guidelines alone  
25 don't constrain what can come in in step one. What does

1 probably is whether there's any demonstration that it  
2 actually affects recidivism.

3 MR. MASENG: Yeah. And whether it actually  
4 affects recidivism is - - - is essentially the question  
5 here. And as a matter of law, I'm not sure that defendant  
6 has proven that it - - - as a matter of law.

7 JUDGE HALLIGAN: But you think defendant could  
8 prove that then and not that the - - - the identification  
9 of inappropriate employment as an aggravator answers the  
10 question with respect to stable employment?

11 MR. MASENG: I think you would still have to take  
12 account of the fact that the guidelines say specifically  
13 that mitigating factors are supposed to be these - - -  
14 these downward departures are supposed to be an exception  
15 to the rule, and they're supposed to be essentially rare.

16 JUDGE RIVERA: But the way you might get to that  
17 exception is indeed to show that there are mitigating  
18 factors that reduce the risk?

19 MR. MASENG: Correct.

20 JUDGE RIVERA: That's - - - that's what the judge  
21 has got to go through that exercise. The - - - the  
22 individual carries a particular burden, as do the People  
23 with respect to whoever's seeking the departure.

24 JUDGE CANNATARO: Do you have some notion of how  
25 a defendant would show a court that something could be a

1 mitigating factor of a kind or degree sufficient to  
2 constitute a departure?

3 MR. MASENG: Your Honor, I know my time has  
4 expired.

5 CHIEF JUDGE WILSON: Please go ahead and please  
6 answer.

7 MR. MASENG: I - - - I think you would have to  
8 bring forward an essentially - - - an extraordinary showing  
9 of evidence that it was present in your case, that it - - -  
10 that it was - - - you'd have to bring forward studies and  
11 things like defendant has done here.

12 JUDGE CANNATARO: So for those of us who come  
13 from the civil bar, you have to do some kind of Daubert  
14 case or something like that?

15 MR. MASENG: Not - - - not quite. But  
16 essentially the SORA hearing itself is already giving you  
17 the opportunity to put these things in front of the court  
18 and to show the court that - - -

19 JUDGE SINGAS: Can I ask about a support network?  
20 Because we spent a lot of time on employment, and I  
21 understand your position is that it's already accounted for  
22 because of the zero points, but can you - - - what - - -  
23 what's the language that you can point to that already  
24 incorporates a support network?

25 MR. MASENG: I think that would come in under the

1 living environment, the - - - the living situation.  
2 Courts have long understood that living environment  
3 includes things like community ties and proximity to  
4 family. I believe we provided a few cases in our briefs  
5 showing that. So it is something that seems to be  
6 considered. You can also look to the New Jersey  
7 guidelines, which our guidelines were explicitly based upon  
8 and which included some language about that under the  
9 sections because of how they - - -

10 JUDGE RIVERA: But did we include that language?

11 MR. MASENG: We did not include that language.

12 JUDGE RIVERA: But doesn't that say something?

13 MR. MASENG: I think it necessarily means it was  
14 considered by the guidelines and that perhaps - - -

15 JUDGE RIVERA: Doesn't mean we - - - we agreed,  
16 otherwise we'd put it in, right?

17 MR. MASENG: We could have put it.

18 JUDGE RIVERA: We thought it would be helpful as  
19 guidance or at least the board, not we, the board.

20 MR. MASENG: I think it would be helpful as - - -  
21 as guidance in that the board didn't think it was a  
22 mitigating factor because they would have probably put it  
23 in had they thought of it.

24 JUDGE RIVERA: Yes. But of course, you've  
25 already agreed that it's step one. There could be some

1 kind of circumstance that is not accounted for at all. So  
2 if you read it that way, why isn't something that is  
3 accounted for but not adequately an appropriate factor?

4 MR. MASENG: Yeah. Again, I'm - - - what we're  
5 not saying is that you could never, ever, ever show a  
6 situation in which you could get a downward departure.  
7 There - - - there - - - of course - - -

8 JUDGE RIVERA: Well, of course you couldn't say  
9 that, because that would be contrary to all the  
10 jurisprudence and the guidelines.

11 MR. MASENG: Correct. But you would have to show  
12 such an extreme or extraordinary situation that it was just  
13 not adequately taken into account.

14 CHIEF JUDGE WILSON: And that should be true for  
15 an upward departure as well, in your view, no?

16 MR. MASENG: Theoretically, yes. You would have  
17 to show an - - - an extraordinary situation for an upward  
18 departure as well. Defendant did not do that here. And so  
19 we would ask that you uphold the Appellate Division's  
20 decision. And in any event, were you find that there was  
21 error here, to find it harmless because had the Appellate  
22 Division reached section three, they would not have given a  
23 downward departure in this case.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. MASENG: Thank you.

1 MS. COHEN: Gillotti does not say that something  
2 has to be extraordinary in order to be a valid factor at  
3 step one. It simply has to be of a kind or a degree that  
4 is not accounted for by the guidelines.

5 JUDGE GARCIA: Counsel, this case is - - - is  
6 somewhat different because there was a reversal earlier,  
7 right? It went back - - - am I - - - do I have the facts  
8 right?

9 MS. COHEN: In this case, yeah.

10 JUDGE GARCIA: Yeah.

11 MS. COHEN: Yes.

12 JUDGE GARCIA: So by the time you get back to the  
13 SORA court, it's years later I think, isn't it? How long  
14 has your client - - -

15 MS. COHEN: Yes. The - - - the - - - the RAI was  
16 scored in 2019 when he was still incarcerated. And this  
17 hearing was in 2023.

18 JUDGE GARCIA: So it seems somewhat different in  
19 your case. And perhaps as you were getting at before and I  
20 didn't process it, right? But your client here has  
21 established a time frame with these factors in place,  
22 right?

23 MS. COHEN: That's exactly right.

24 JUDGE GARCIA: Which seems to me very different  
25 in arguing for a mitigating factor than a prospective

1 aspirational climate?

2 MS. COHEN: He was able to show because of the  
3 procedural posture of his hearing, stable employment, which  
4 most people wouldn't be able to show.

5 JUDGE GARCIA: Right. Which seems to - - - to be  
6 more of a showing that I have done this, right?

7 MS. COHEN: Yes.

8 JUDGE GARCIA: And because I have done this, this  
9 is a mitigator, which makes this case to me somewhat  
10 different, right?

11 MS. COHEN: Yes, certainly it - - - this court  
12 should at a minimum hold that - - - that a showing of  
13 stable employment at step one and family support, which he  
14 was able to show - - -

15 JUDGE GARCIA: In fact?

16 MS. COHEN: In fact, over the past three years  
17 since his release from prison that those were not accounted  
18 for by the RAI, which was prepared.

19 JUDGE RIVERA: Isn't that really step two under  
20 your analysis?

21 MS. COHEN: No, because - - -

22 JUDGE RIVERA: The fact that it is actually his  
23 experience and his life?

24 MS. COHEN: Well, if - - - I - - - if the factor  
25 at step one - - -

1 JUDGE RIVERA: Yes.

2 MS. COHEN: - - - were - - -

3 JUDGE RIVERA: Right.

4 MS. COHEN: - - - stable employment.

5 JUDGE RIVERA: Yeah. Then don't you have to go  
6 to step two and show, yes, I - - - I have a history of  
7 stable employment?

8 MS. COHEN: Exactly.

9 JUDGE RIVERA: Okay.

10 MS. COHEN: Yes. But the problem here is that  
11 the court cut off the inquiry at step one and didn't - - -  
12 didn't do the step two and three inquiries.

13 JUDGE GARCIA: I don't see - - - I have a hard  
14 time seeing I'm going to have stable employment as enough  
15 to get you by step one. That's what you're showing at step  
16 one. But you're not showing that here. You're showing at  
17 step one stable employment.

18 MS. COHEN: Yes. So our - - -

19 JUDGE GARCIA: And how long that has been and  
20 because you've done it, can go to step two or step three.  
21 But my issue, given my hypothetical, is the I'm going to  
22 take sex offender treatment, I'm going to have a great job,  
23 I'm going to have family support, which is not your case.

24 MS. COHEN: That - - -

25 JUDGE GARCIA: Your case is I have this, it's a

1 mitigating factor.

2 MS. COHEN: That's right. I was asking for a  
3 broader rule, but at a minimum, I would ask for the rule  
4 that stable employment - - -

5 JUDGE HALLIGAN: So if - - - I know your light's  
6 on, but indulge me for a minute, if you will. If a SORA  
7 court were to decide that you are saying you expect to have  
8 stable employment, but you haven't demonstrated that yet  
9 and so denies a departure, and then you have stable  
10 employment for a period of time, could you use that as  
11 grounds to seek a modification at that juncture?

12 MS. COHEN: You could, you - - - yes, you would  
13 have a higher burden. You'd have to show by clear and  
14 convincing evidence at that juncture, as opposed to a  
15 preponderance at the original.

16 JUDGE GARCIA: Have to show, I'm sorry, clear and  
17 convincing evidence of what?

18 MS. COHEN: Of a change in conditions from the  
19 initial hearing warranting a downward modification.

20 JUDGE GARCIA: It's the same proof, right? It  
21 would be I worked this period of time in this job?

22 JUDGE CANNATARO: You have to show a history of  
23 employment - - -

24 MS. COHEN: Sure.

25 JUDGE CANNATARO: - - - that you didn't have

1 before, right?

2 MS. COHEN: Yes.

3 JUDGE CANNATARO: If you came in one day - - -  
4 one year and said, I have every intention of having a great  
5 job, I just haven't gotten it yet, but then you come in the  
6 next year and you say, I got the great job, I've been doing  
7 it, that's a - - - that's a different argument, right?

8 MS. COHEN: That is a different argument.

9 JUDGE CANNATARO: Can I just ask one more thing,  
10 Chief, real quick?

11 CHIEF JUDGE WILSON: Sure.

12 JUDGE CANNATARO: Sure. Let's assume you are  
13 correct and stable employment is a factor - - - as a matter  
14 of law, that is a factor. Is it a factor of a kind or a  
15 degree, or that - - - do you also have to show that you  
16 have stable employment of a particular kind that qualifies,  
17 or stable employment of a particular degree? I don't know  
18 what stable employment of a particular degree would be.  
19 But you know, is it just enough to say stable employment,  
20 or does it have to have that extra oomph to get you into  
21 the departure framework?

22 MS. COHEN: Just stable employment.

23 JUDGE CANNATARO: Just that?

24 MS. COHEN: Yes. Because - - -

25 JUDGE CANNATARO: So the kind of employment you

1 have, the degree of employment you have doesn't matter?

2 MS. COHEN: As long as it's appropriate  
3 employment, right? Legal, appropriate, gainful employment.

4 JUDGE CANNATARO: That's a kind, right? You  
5 could - - - you know, if you're working in the, you know, I  
6 don't know, some - - - some industry that you wouldn't want  
7 sex offenders working in.

8 MS. COHEN: Of course, that's - - - and that's  
9 not what we're advocating. And that would actually be a  
10 basis for points under factor 15.

11 JUDGE CANNATARO: Okay.

12 CHIEF JUDGE WILSON: Thank you.

13 MS. COHEN: Thank you.

14 (Court is adjourned)

15

16

17

18

19

20

21

22

23

24

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Leda Yeager, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Green (Hikeem) , No. 49 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 7227 North 16th Street  
Suite 207  
Phoenix, AZ 85020

Date: April 23, 2026

