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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 101

TIMOTHY SHADER,

Appellant.

20 Eagle Street
Albany, New York
October 17, 2024

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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Official Court Transcriber



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

3 MS. SANDERS: May it please the court. Jill
4 Sanders for appellant, Timothy Shader. Could I please
5 reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MS. SANDERS: Thank you. In this 168-o(2)
8 petition, Mr. Shader proved, by clear and convincing
9 evidence, that he was a level one, low risk of reoffense.
10 Yet despite all that evidence, he remains on the registry
11 as a level two. The Board, significantly, did not oppose a
12 level one modification.

13 JUDGE GARCIA: What's the error here that we
14 could find? I mean, there's a certain amount of discretion
15 the judge has in weighing the evidence and making a
16 determination whether you prove this, and specifically
17 whether you proved a reduction was warranted from three to
18 a one as opposed to what the judge did, which is three to a
19 two. So how do we - - - what's the error here?

20 MS. SANDERS: So under the abuse of discretion
21 standard, which applies here, there's three things on which
22 the lower court relied and also the Third Department relied
23 in upholding the trial court's decision, which was the
24 nature of the instant offense, the prior instances which
25 occurred prior to the - - -

1 JUDGE GARCIA: Right.

2 MS. SANDERS: - - - the offense, and the 2003
3 misdemeanor - - -

4 JUDGE GARCIA: Right.

5 MS. SANDERS: - - - offense. The prior instances
6 of sexual misconduct which occurred before 1977 were
7 completely accounted for in the risk assessment instrument
8 - - -

9 JUDGE GARCIA: Which gave him a level three.

10 MS. SANDERS: - - - which gave him level three at
11 the 1998 SORA.

12 JUDGE GARCIA: Right.

13 MS. SANDERS: The nature of the instant offense
14 was also accounted for in the risk assessment - - -

15 JUDGE GARCIA: Right.

16 MS. SANDERS: - - - instrument. So those two
17 factors were completely accounted for in arriving at the
18 original level three.

19 JUDGE GARCIA: So he's a level three. And now
20 your burden is, by clear and convincing evidence, to show
21 why you have to come off of a level three?

22 MS. SANDERS: Correct. And he proved with
23 various different factors that he had done everything he
24 could - - -

25 JUDGE GARCIA: Right. But the judge didn't find

1 that was enough. So what's the error of law?

2 MS. SANDERS: What else could he do? That,
3 essentially, is what it is. The only things that were
4 found to have been the flaws that were held against Mr.
5 Shader - - -

6 JUDGE GARCIA: It seems to me that the judge here
7 considered a number of things: the prior offenses, the
8 offenses that led to the designation, some conduct that
9 happened before, time that these things happened. That
10 seems a perfectly fine framework. And are you saying that
11 because it was such a long time, like, from - - - that, as
12 a matter of law, made it an error the way he weighed those
13 fact - - - or she weighed those factors?

14 MS. SANDERS: Yes. It is an abuse of discretion
15 because if we look at the Davis case, which was cited
16 pretty heavily by myself and my colleague here, that it
17 cannot be the tipping point in denying modification.

18 JUDGE GARCIA: What can't be the tipping point?

19 MS. SANDERS: The nature of the instant offense
20 and the things that were relied on.

21 JUDGE GARCIA: Well, let's say I brought - - -
22 you brought this petition two years after. Why couldn't
23 the nature of the offense be the tipping point then?

24 MS. SANDERS: At that point - - - you mean two
25 years after the - - -

1 JUDGE GARCIA: After the - - - yeah.

2 MS. SANDERS: - - - original SORA hearing?

3 JUDGE GARCIA: Say it's 2000.

4 MS. SANDERS: Okay. At that point, that was only
5 two years afterwards.

6 JUDGE GARCIA: So when's the tipping point? Ten
7 years?

8 MS. SANDERS: In this case we have - - -

9 JUDGE GARCIA: We need a rule. So what would we
10 tell judges the tipping point is?

11 MS. SANDERS: I think when you look on balance of
12 the number of factors that were presented in Mr. Shader's
13 favor - - -

14 JUDGE GARCIA: Balance kind of sounds to me like
15 discretion.

16 MS. SANDERS: It is discretion. And here, it was
17 an abuse of discretion to find that the only things that
18 counted against Mr. Shader - - -

19 JUDGE TROUTMAN: And is it abuse of discretion
20 simply because a decision in the opposite direction could
21 have been made? Is that what you're arguing?

22 MS. SANDERS: Because of the fact that there is,
23 I think - - - and also the fact that - - -

24 JUDGE TROUTMAN: Let's say there's equal evidence
25 that would have supported the level one, but the judge

1 found there was equal that would support a two, so gave him
2 a two. That causes it to be an abuse of discretion? Is
3 that what you're arguing?

4 MS. SANDERS: It's an abuse of discretion because
5 we are just essentially looking at Mr. Shader's criminal
6 history and saying he can never be a level one.

7 JUDGE TROUTMAN: You can't look at it - - - the
8 court is forbidden for considering his prior criminal
9 history. Is that what you're arguing?

10 MS. SANDERS: No, and certainly not. And I don't
11 think that's what Davis says. But it cannot be the tipping
12 point to say that he can never be a level one, particularly
13 in light of the - - -

14 JUDGE GARCIA: I don't understand this term, the
15 tipping point. One, the judge looked at his material and
16 said his recent evaluation, and that led to a reduction to
17 level two. So the judge was looking at everything that had
18 been put in and said this - - - you deserve a level two.
19 But it seems to me the balancing that goes on here is the
20 nature of the offenses including prior offenses, offense
21 that led to the designation, subsequent offenses, which may
22 or may not. I know your argument here. These were minor,
23 fine. And in looking at time that's gone by, seriousness
24 of the conduct, what the - - - what the defendant has put
25 in to - - - to contract - - - to - - - to push back against

1 that, that that's a decision that the judge then is
2 weighing all those things. And I don't understand how we
3 can say to a judge, you erred as a matter of law. You - -
4 - you abused your discretion, as a matter of law, by
5 looking at these, we would agree, quite serious crimes.
6 And looking at the time that went by, looking at what
7 happened after, looking at the material that was put in by
8 the defendant and saying this isn't a - - - you're - - -
9 you're no longer a three. I agree, you're a level two.
10 We're not saying you'd never be a level one. As of this
11 moment, right now, what I see before me, you're right. You
12 proved by clear and convincing evidence, you're a two,
13 which is - - - is less onerous than a level three
14 designation. Why - - - how can we say that on this record?

15 MS. SANDERS: Because I think, to your point, is
16 that there is no meaningful path to level one for Mr.
17 Shader.

18 JUDGE GARCIA: What about five years from now he
19 comes in and says, now I should be a level two - - -

20 MS. SANDERS: None of the - - -

21 JUDGE GARCIA: - - - or - - - or next year?

22 MS. SANDERS: None of the factors which were
23 relied upon in denying level one modification would have
24 changed.

25 JUDGE GARCIA: Time would change. Time would

1 change.

2 MS. SANDERS: And - - -

3 JUDGE GARCIA: Since you say that's a factor, how
4 long between the offense and the designation and the
5 determination of modification, time would change.

6 MS. SANDERS: And the evidence that was put
7 before the trial court was that, statistically speaking,
8 that he had already gotten to the point where he was no
9 longer a risk of reoffense.

10 JUDGE GARCIA: And the judge looked at the
11 offenses and looked at the time that had passed and looked
12 at what had happened after he was released and said that's
13 enough to get you to a level two.

14 MS. SANDERS: Here, where there is no path to
15 level one which is - - - is - - -

16 JUDGE GARCIA: Why is there no path? You didn't
17 get a level one.

18 MS. SANDERS: Correct.

19 JUDGE GARCIA: But I don't - - - I don't
20 understand why that means you'll never get a level one.

21 MS. SANDERS: If there is a path to a level one,
22 then there needs to be - - - there is no statement in the
23 law that says, well, then it has to be forty years of - - -

24 JUDGE GARCIA: No. And there's no statement it
25 has to be two years. There's no statement at all. It's up

1 to the judge to weigh these factors.

2 MS. SANDERS: That is correct, Judge. But here,
3 where we're talking about somebody who the offense was, at
4 the time, forty-five years prior to the time of the
5 petition, twenty some years - - - 1998 was the date of his
6 release. He petitioned in 2022, having completed parole,
7 having completed sex offense treatment, having obtained
8 educational vocational training, having abided by his SORA
9 registration requirements for all those years, having been
10 a - - - in a long-term relationship, he's statistically
11 less likely to reoffend. This was put in the paper - - -

12 JUDGE TROUTMAN: So - - -

13 MS. SANDERS: - - - and having the forensic
14 evaluation.

15 JUDGE TROUTMAN: - - - how does the judge's
16 discretion play into it?

17 MS. SANDERS: Here, because there was nothing
18 other than his criminal history to point towards the fact -
19 - -

20 JUDGE TROUTMAN: The judge did have the right to
21 exercise discretion in making its determination, right, in
22 court?

23 MS. SANDERS: The - - - the judge does have
24 discretion and always does - - -

25 JUDGE HALLIGAN: But it seems to me you're saying

1 on these facts, the judge had no discretion and was
2 compelled to go, not down - - - go down to one, not just
3 down to two. Is that right?

4 MS. SANDERS: Here, there was no evidence to
5 overcome the fact that there was a - - - a recommendation.

6 JUDGE HALLIGAN: So - - - so this judge had no
7 choice, on your view - - - did - - - did not have the
8 discretion to go - - - to stop at level one and had to go
9 to level two?

10 MS. SANDERS: Had there been an explanation as to
11 - - - a different explanation as to how the judge got
12 there. But I'm not going to guess. We have a record here
13 that those are the three factors that the judge relied on
14 in denying level one modification.

15 JUDGE CANNATARO: So you're saying the nature of
16 the qualifying offense can never be the determinative
17 factor in not granting - - -- well, I mean, he did grant a
18 downward - - - he gave - - - he gave him a lower
19 assessment. So not granting, I guess, the assessment that
20 the - - - that the petitioner is asking for?

21 MS. SANDERS: It can't be the - - - one's
22 criminal history can - - - in a modification petition, I'm
23 not saying at an original SORA hearing, but at a
24 modification petition where we're only supposed to be - - -
25 mostly supposed to be looking at the significant

1 rehabilitative steps that an individual has taken - - -

2 JUDGE HALLIGAN: What's the legal support for
3 that? I mean, you're not saying that you can't look at the
4 criminal history, right? And the nature of the offense.
5 So - - - so what's your legal support for saying you can
6 look at it, but it can't be dispositive?

7 MS. SANDERS: So the Davis case specifically said
8 that language. It's also the purpose of 168(2). And I
9 believe that the way that the Davis court has interpreted
10 both 168-o(2) and the guidelines is to incentivize a
11 registrant in order to - - - to induce them to rehabilitate
12 - - - rehabilitate themselves. And here - - -

13 JUDGE HALLIGAN: But I'm - - - if I'm not - - -
14 the - - - the Davis case was an Appellate Division
15 decision, right?

16 MS. SANDERS: Second Department.

17 JUDGE HALLIGAN: Right.

18 MS. SANDERS: Yes.

19 JUDGE HALLIGAN: And so - - - so what - - - what
20 in the statute requires the result you're asking us for?

21 MS. SANDERS: The statute doesn't necessarily
22 requirement, if that is specifically your question, but the
23 legislative - - - the legislative intent is the fact that
24 individuals are encouraged to rehabilitate themselves. If
25 they do, then they can petition for these modifications.

1 And in so doing, if we don't have this, what is the
2 incentive to rehabilitate?

3 JUDGE CANNATARO: But isn't - - - isn't the
4 purpose of this whole risk assessment process to determine
5 how much of a risk the person is to the community and
6 whether the community can feel secure in having whatever
7 level of supervision is imposed by the assessment?

8 MS. SANDERS: That is correct.

9 JUDGE CANNATARO: So how is it - - - I - - - I -
10 - - I'm having trouble understanding how there's ever a
11 time where you don't at least hearken back to what it was
12 that got us here in the first place: the offense, the - - -
13 the specific acts contained in them, the severity. I mean,
14 that has to be part of the determination in saying whether
15 or not it's safe for the community to have this person
16 under this level of supervision.

17 MS. SANDERS: The crime requiring registration is
18 the primary reason for your - - - for your initial SORA
19 registration, which occurred for Mr. Shader back in 1998.

20 JUDGE CANNATARO: Okay.

21 MS. SANDERS: When he petitioned this court back
22 in 2000 - - - 2022, he was proving his rehabilitation over
23 all those years. And in those twenty-three intervening
24 years, he worked in the community. He worked as a cable
25 installer going into people's homes, and he never sexually

1 reoffended. He proved, by clear and convincing evidence,
2 he was not a risk. He was a very young man when he
3 committed these offenses - - - the offense requiring
4 registration and those prior acts of sexual misconduct.
5 And the Board was very clear in - - - in its recommendation
6 that they credited every single one of the factors that
7 were submitted in his petition. And the court, in denying
8 his modification, just said the facts of the instant
9 offense, the prior acts of misconduct, and the 2003
10 misdemeanor, which had no violence and no sexual
11 misconduct.

12 CHIEF JUDGE WILSON: Thank you.

13 MS. SANDERS: Thank you.

14 MS. LAVALLEY: May it please the court. Erin
15 LaValley, for the People of the State of New York. To
16 briefly address jurisdiction, this case presents a mixed
17 question of law and fact, and it's the People's position
18 that this court does not have jurisdiction, but - - -

19 CHIEF JUDGE WILSON: Well, can we start right at
20 the end where - - - where counsel left off? So if we're
21 trying to determine present risk, is that fair?

22 MS. LAVALLEY: Yes.

23 CHIEF JUDGE WILSON: So why isn't it an error of
24 law to - - - to rely - - - for the court to have relied on
25 the 2003 misdemeanor auto stripping? What does that have

1 to do with risk of sexual offense?

2 MS. LAVALLEY: Because it shows the defendant's
3 ability to put his own needs over that of society's. He
4 was on parole for the underlying registerable offense when
5 he committed this reoffense in 2003.

6 JUDGE RIVERA: That's true of everyone who
7 commits a crime. And SORA is about protecting the public
8 from sexual offense recidivists, not - - - not someone
9 who's going to go out and commit a crime.

10 MS. LAVALLEY: Correct. But he's - - - those who
11 are registered under SORA have already shown that they're
12 able - - - they're - - - but - - - but they're able to
13 commit sexual offenses.

14 CHIEF JUDGE WILSON: So jaywalking, same thing,
15 if he gets a ticket for jaywalking?

16 MS. LAVALLEY: No. I don't believe that would be
17 the same thing.

18 CHIEF JUDGE WILSON: Why not? I mean, he's
19 putting his needs of getting across the street over the
20 vehicle and traffic law.

21 MS. LAVALLEY: I think it goes towards the - - -
22 the type of conduct, right? So this was - - - he committed
23 this offense in 2003, very shortly after he just served an
24 extensive - - -

25 CHIEF JUDGE WILSON: Well, suppose he jaywalked

1 right after.

2 MS. LAVALLEY: I - - - I don't believe that that
3 would be - - -

4 CHIEF JUDGE WILSON: Why? Because the jaywalking
5 doesn't really bear on whether he's going to commit a
6 sexual offense, right?

7 MS. LAVALLEY: I - - -- that, I - - - I would
8 agree. But in - - - in this case he was in possession - -
9 -

10 CHIEF JUDGE WILSON: But auto stripping does?
11 Taking something off of a - - - the abandoned automobile?

12 MS. LAVALLEY: Well, and he was in the possession
13 of burglar tools, which is important to note - - -

14 CHIEF JUDGE WILSON: Well, what are - - - what
15 are - - - burglar tools are what? A screwdriver? A
16 wrench?

17 MS. LAVALLEY: The record isn't clear as to what
18 it was.

19 CHIEF JUDGE WILSON: The same things you might
20 use to take a hubcap off of a car or catalytic converter or
21 something like that?

22 MS. LAVALLEY: Right. But it's important to note
23 that the underlying conviction that he was convicted of was
24 breaking into a woman's house, burglarizing it, and then
25 raping her. So the fact that he has the burglary tools - -

1 -

2 CHIEF JUDGE WILSON: Did - - - did he have
3 burglar - - - does the record show he had burglar tools
4 when he broke into her house?

5 MS. LAVALLEY: It's unclear how he got it in.

6 CHIEF JUDGE WILSON: It doesn't show that?

7 MS. LAVALLEY: Correct.

8 JUDGE SINGAS: Do you agree with your adversary's
9 reading of Davis?

10 MS. LAVALLEY: I do not. In terms of Davis being
11 the standard, I don't believe that Davis is a standard. I
12 think that, in these cases, these modification proceedings,
13 it has to be an individualized approach that comes down to
14 the very specific facts relevant to each offender. In
15 Davis, you know, different from what we have here, the
16 defendant was found to be permanently disabled. He was
17 unable to ambulate. He had multiple other health issues,
18 and he showed no actual likelihood of reoffending.

19 JUDGE TROUTMAN: So if the record here would have
20 established that the defendant was permanently disabled or
21 severely like in Davis, would then there be a stronger
22 argument that it was an abuse of discretion because he
23 couldn't reoffend in the manner that he had in the past?

24 MS. LAVALLEY: I think when an individual has
25 something like a permanent disability, courts routinely

1 find that that's something that highly impacts their risk
2 of recidivism, right? If they're not physically able to
3 commit an offense, then registration may no longer become
4 necessary like it was for the defendant in Davis. So I
5 think it's certainly something that the court would place
6 great weight on as the court in Davis placed great weight
7 on that. But we don't have that here in this record with
8 this defendant.

9 CHIEF JUDGE WILSON: So what do you make of the
10 fact that the court's order here is under 168-d instead of
11 168-o?

12 MS. LAVALLEY: I'm sorry. I believe this - - -

13 CHIEF JUDGE WILSON: The order that's in the
14 record that the court signed is under 168-d which is the
15 procedure for initial SORA registration risk level.

16 MS. LAVALLEY: I believe that might have been a
17 clerical error because the analysis at the SORA
18 modification proceeding, the court was aware that the - - -
19 they were doing a modification proceeding and that they
20 were modifying the initial risk offense - - - the - - -
21 modifying his registration level from what it was
22 originally. The court said he will - - -

23 CHIEF JUDGE WILSON: Do you think it's clear from
24 the transcript that the court used the right standard?

25 MS. LAVALLEY: I do. Because the standard, as

1 laid out in - - -

2 CHIEF JUDGE WILSON: There are different
3 standards, right? D and m - - - d and o, I'm sorry.

4 MS. LAVALLEY: Right.

5 CHIEF JUDGE WILSON: Okay.

6 MS. LAVALLEY: Yes. Yes. So it is a different
7 standard than an initial proceeding. And I think that is
8 clear because the court referenced the initial - - - the
9 initial registration level in introducing the hearing. So
10 the court did reference back to, you know, the original
11 conviction, the original registration level, and then what
12 they were doing at that time.

13 CHIEF JUDGE WILSON: Why does that assure us that
14 the court understood the difference between the two
15 standards? That is, what you told me certainly convinces
16 me this - - - the court understood that he was a level
17 three because of a prior determination. But I'm not sure
18 it convinces me that the court perceived the difference
19 between the d and o.

20 MS. LAVALLEY: Because the court - - - the court
21 noted that it was the defendant who had the burden to show,
22 by clear and convincing evidence, that there was - - -

23 CHIEF JUDGE WILSON: That would be the same with
24 the downward modification, which is the box the court
25 checked on the form.

1 MS. LAVALLEY: Right. That would be the same for
2 a downward modification, but that would have to come after
3 the original - - -

4 CHIEF JUDGE WILSON: No. I mean, I - - -

5 MS. LAVALLEY: - - - the presumptive level, so -
6 - -

7 CHIEF JUDGE WILSON: Right. In - - - in an
8 original - - - in an original SORA determination?

9 MS. LAVALLEY: Correct.

10 CHIEF JUDGE WILSON: Right. And that's the form
11 the court used and the way the order reads.

12 MS. LAVALLEY: Correct. I - - - I do believe
13 that was just a clerical error at this point because the
14 court did say - - - in reviewing the defendant's petition,
15 the court did say that they took a lot of time to review
16 the materials to go through each of the factors laid out by
17 the defendant in support of his petition. I think that the
18 court did not only rely on the seriousness of the
19 conviction, the history of offenses, or the violation, the
20 court weighed that.

21 JUDGE RIVERA: So - - - so what - - - maybe you
22 can answer her question. What - - - what else can he do?
23 Maybe your answer is nothing. I don't know. What else can
24 he do?

25 MS. LAVALLEY: I think the misconception is that



1 counsel believes that there's supposed to be this
2 meaningful path to be removed from the registry, and I
3 don't believe that that was ever the purpose of SORA.

4 JUDGE RIVERA: So then your answer is nothing?

5 MS. LAVALLEY: I don't think that's the answer
6 either. I think that circumstances can - - -

7 JUDGE RIVERA: Okay. So what - - - what can he
8 do?

9 MS. LAVALLEY: Well, for example, he could apply
10 for a petition under 168-o(1), which is to petition for
11 complete relief from his register - - - from his duty to
12 register. That's something that's become newly available
13 for him because the court chose to modify him from a level
14 three to a level two. This provision is only applicable -
15 - -

16 JUDGE RIVERA: When would that become available?

17 MS. LAVALLEY: - - - under 168-o(1), it only
18 pertains to level two sex offenders without any
19 designation. If that is your category of registration,
20 then after thirty years from your initial registration
21 level, you can petition for complete relief of - - - of
22 your register relief.

23 JUDGE RIVERA: So let's say he doesn't want to
24 wait that long, what - - - what else would make this the
25 kind of petition that if a judge didn't reduce it to level

1 one, it would effectively be an abuse of discretion?

2 MS. LAVALLEY: So just to note that this relief
3 would be available to him in 2028. But also, he could
4 continue his - - - continue applying for modification. He
5 can apply to have his risk assessment - - -

6 JUDGE RIVERA: And - - - and then what would he
7 do?

8 MS. LAVALLEY: The - - -

9 JUDGE RIVERA: What is he - - - what is he left
10 to show, I guess, is the question?

11 MS. LAVALLEY: There could be other factors that
12 could contribute to his petition. For example, like, the
13 defendant in Davis showed he had some serious health
14 factors - - -

15 CHIEF JUDGE WILSON: Let me - - -

16 MS. LAVALLEY: - - - that were going on. So that
17 - - - you know, that could be something - - - I know that's
18 something that courts have placed a lot of weight on. So
19 that could be something, but as - - -

20 CHIEF JUDGE WILSON: Yeah. But to - - - but to
21 sort of say he should become disabled to become a level one
22 seems a little perverse, I guess. Let me - - - let me try
23 Judge Rivera's question in a different way. Is there a
24 point at which somebody could have a record that was - - -
25 that would render a judge's decision not to reduce somebody

1 from three to one an abuse of discretion?

2 MS. LAVALLEY: No. I - - - I - - - I believe
3 that it's - - - it's a discretionary choice - - - it's a
4 discretionary decision based on the individual. There are
5 some circumstances where someone might be fully
6 rehabilitated to the point where registration is no - - -
7 no longer necessary. But on the other hand, there are some
8 offenses that require lifetime registration. You know, for
9 example, any designated offender, if you're - - - if you
10 have a certain designation, you're required to be SORA - -
11 - on the SORA registry for life. There is no way around
12 that.

13 CHIEF JUDGE WILSON: Just to be clear, your
14 position is if - - - if we're talking about a reduction
15 from three to one, there could never be any case that we
16 could hear in which we could say this is an abuse of
17 discretion?

18 MS. LAVALLEY: To - - -

19 CHIEF JUDGE WILSON: To refuse the court from - -
20 -

21 MS. LAVALLEY: For a court not to grant them a
22 three to a one?

23 CHIEF JUDGE WILSON: Right.

24 MS. LAVALLEY: Correct.

25 CHIEF JUDGE WILSON: Okay. I just wanted to - -



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-
JUDGE RIVERA: What if they are quadriplegic?
MS. LAVALLEY: In terms of using that as a factor
to consider - - -
JUDGE RIVERA: Yes.
MS. LAVALLEY: - - - their risk of reoffense?
JUDGE RIVERA: Yes.
MS. LAVALLEY: Courts have found that that lowers
- - -
JUDGE RIVERA: I'm asking you. I'm asking you
under your analysis of the statute.
MS. LAVALLEY: It - - - there - - - there - - -
it's such an individualized approach. I - - - I don't
believe I can answer that question. I think that's
something - - -
JUDGE RIVERA: So then your position is that it
could be possible?
MS. LAVALLEY: It could be possible.
JUDGE RIVERA: It could be - - - well, no, you
didn't let me finish that sentence. It could be possible
that someone who becomes a quadriplegic applies to be
designated level one, be off the registry. It's been
enough years to be off the registry, and a judge could
still decide to keep them on as, let's just say, a level
two for this moment. And in your view, that would not - -

1 - we - - - we could never conclude that's an abuse of
2 discretion?

3 MS. LAVALLEY: I think there are other factors
4 the court needs to consider. For example, in - - - in that
5 instance, it depends on, you know, going back to what his
6 crime of conviction was. If he was an offender who was a
7 violent offender who was committing physical acts - - -

8 JUDGE RIVERA: I thought you would have gone with
9 a yes on that, but okay.

10 MS. LAVALLEY: But for example, if he is still -
11 - -

12 JUDGE RIVERA: It's kind of an easy case, is it
13 not?

14 CHIEF JUDGE WILSON: You should have - - -

15 JUDGE RIVERA: He's physically unable. That - -
16 - that's - - -

17 MS. LAVALLEY: Sure.

18 JUDGE RIVERA: - - - where you started, that
19 there are these cases where courts have recognized they're
20 physically unable to commit - - - well, you said offense.
21 I would have said - - -

22 MS. LAVALLEY: Right.

23 JUDGE RIVERA: - - - sexual offense, but let's go
24 with it. Offense, that that would be that category. So
25 I'm a little bit surprised that in my example, you wouldn't



1 say yes, Judge, that's exactly the one. The whole one of
2 those that will come up in the next fifty years fits that
3 category.

4 MS. LAVALLEY: I think if - - - if that offender
5 had, you know, a long history of child pornography
6 offenses, that might be something - - -

7 JUDGE RIVERA: Okay.

8 MS. LAVALLEY: - - - that the court could
9 consider in the risk of reoffense as to whether or not his
10 condition would affect his ability to reoffend. So for,
11 like, this particular - - -

12 JUDGE RIVERA: But - - - but if - - - in my
13 example, it is someone who cannot physically commit the
14 offense.

15 MS. LAVALLEY: Cannot physically - - -

16 JUDGE RIVERA: Correct.

17 MS. LAVALLEY: Then yes.

18 JUDGE RIVERA: I take your - - -

19 MS. LAVALLEY: Yes.

20 JUDGE RIVERA: - - - point about the child
21 pornography. Okay.

22 MS. LAVALLEY: I see my light is on.

23 CHIEF JUDGE WILSON: Thank you.

24 MS. LAVALLEY: Thank you.

25 MS. SANDERS: Judges, I'd - - - I'd like to

1 address something of the - - - the elephant in this case,
2 which is, Mr. Shader is not subject to automatic lifetime
3 registration. He does not have a sexually violent offender
4 designation. I submit that if he had that designation, we
5 might not be here today because he demonstrated, by such
6 clear and convincing evidence, that he is a low risk of
7 reoffense. And had he been subject to lifetime
8 registration, the court might have been more inclined to
9 give him a level one - - -

10 JUDGE GARCIA: So how - - -

11 MS. SANDERS: - - - registration level.

12 JUDGE GARCIA: - - - would you factor in the
13 crimes that led to the designation?

14 MS. SANDERS: They were already factored into the
15 original level three.

16 JUDGE GARCIA: But let's say - - - level three is
17 the highest, right?

18 MS. SANDERS: Yes.

19 JUDGE GARCIA: So let's say you have fifteen
20 horrific sex crimes, and the best I can do for you is I can
21 give you a level three. And now I have one person who
22 barely gets over the line to a level three. We start at
23 the same place on a downward departure because they're a
24 level three, and we can't consider the fifteen heinous sex
25 crimes this person had in determining whether or not they

1 remain a danger to the community. We have to treat those
2 two people the same. They put the same rehabilitative
3 proof in, and we treat them the same because they start as
4 threes and we're not looking behind the three.

5 MS. SANDERS: As counsel pointed out, every case
6 is an individualized assessment. However - - -

7 JUDGE GARCIA: So the rule is - - -

8 MS. SANDERS: But in your - - -

9 JUDGE GARCIA: - - - you can't look at it?

10 MS. SANDERS: There is never a case where you
11 cannot look at the original.

12 JUDGE GARCIA: Okay.

13 MS. SANDERS: But I submit that this court should
14 adopt the standard which was put forth in Davis, which is
15 that an individual's criminal history, specifically the
16 crime involving registration, should not be the thing that
17 keeps them from having a path to level one.

18 JUDGE HALLIGAN: No matter how - - - how heinous
19 or how much it - - - it appears to indicate some risk of
20 recidivism?

21 MS. SANDERS: Not when there's - - -

22 JUDGE HALLIGAN: You're looking for - - - for a -
23 - - I'm - - - I'm trying to understand why you're looking
24 for - - - for a bright line rule there - - -

25 MS. SANDERS: Because - - -

1 JUDGE HALLIGAN: - - - as opposed to saying it
2 generally shouldn't or should be a rare case or something
3 like that.

4 MS. SANDERS: Because what Davis tells us is that
5 if we don't have a past - - -

6 JUDGE HALLIGAN: We're not bound by Davis, so I'm
7 just asking from - - -

8 MS. SANDERS: Oh, I think - - -

9 JUDGE HALLIGAN: - - - from first principles why
10 - - -

11 MS. SANDERS: No.

12 JUDGE HALLIGAN: - - - why would - - - why would
13 we adopt a bright line rule as opposed to saying that it -
14 - - it should be the rare case or something along those
15 lines?

16 MS. SANDERS: I'm not sure if it's a bright line
17 rule, but I think it's because there needs to be a path
18 whether every individual can get to level one, but there
19 needs to be a path for everybody to know that they can get
20 there.

21 JUDGE GARCIA: Why isn't the path through level
22 two?

23 MS. SANDERS: Excuse me?

24 JUDGE GARCIA: Like, you have a path. You've got
25 to level two, now you have a path to level one.

1 MS. SANDERS: But what is the path to level one?

2 JUDGE GARCIA: But you - - - you want a path from
3 three to one. You can come in and ask for another
4 modification.

5 MS. SANDERS: We could, but what - - - I - - - I
6 submit that - - -

7 JUDGE GARCIA: So you're saying there's - - -

8 MS. SANDERS: - - - what else is there?

9 JUDGE GARCIA: - - - there's - - - there's
10 nothing else? The time, you know, other events, nothing
11 will matter. You're conceding right now on this record,
12 whatever he does in the future, he will never make an
13 argument to get to a level one modification from a level
14 two?

15 MS. SANDERS: I don't know what another judge may
16 say, but statistically speaking, the forensic evaluation is
17 not going to change. His forensic valuation said he's
18 already at that point where he's been out in the community
19 for enough time where he's at that lowest level that his
20 static and dynamic risk factors - - - his static factors
21 are not going to change. But he's done all of those things
22 in which he can lower his risk of reoffense.

23 JUDGE GARCIA: And it isn't the fact that they
24 could take into consideration that you've now been on a
25 level two designation with the level two requirements for X

1 amount of time for - - - I'm a judge. That gives me more
2 comfort that I can now place you on a level one. That, he
3 shouldn't be able to do?

4 MS. SANDERS: I - - - I think that may be
5 appropriate in some cases, but perhaps where it's somebody
6 who has not - - -

7 JUDGE GARCIA: So that's your path to level one.
8 Why isn't that a path to level one?

9 MS. SANDERS: Perhaps that's - - -

10 JUDGE GARCIA: Show that you don't reoffend on a
11 level two with less stringent conditions and then we can
12 talk about level one. Why can't a judge do that?

13 MS. SANDERS: Perhaps it may be more appropriate
14 for somebody who has not been on the registry for as
15 lengthy a time as Mr. Shader has. Mr. Shader has been on
16 the registry for - - - since 1998. It's a very significant
17 period of time in which he was - - -

18 JUDGE GARCIA: But they were very significant
19 crimes he did have. There were relatively minor
20 misdemeanor arrests after that. And you're now a level
21 two. Show me what you can do on level two.

22 MS. SANDERS: And I - - - I just do want to say,
23 though, that it was one misdemeanor arrest with - - - with
24 two charges. And then, as my - - - my opposition did note,
25 there was no facts indicating that there - - - there was

1 any indication that it had any sort of bearing on his risk
2 of recidivism - - - of sexual recidivism, and SORA needs to
3 be about his risk of recidivism. Otherwise, it's just - -
4 - it's becoming punitive if it's not - - -

5 JUDGE RIVERA: Just - - - just - - - if I may,
6 just to clarify between risk level one and two. I know in
7 his case he will be off the registry given the number of
8 years, but let's say that wasn't the case. What - - - what
9 is he going to be doing differently to comply with one and
10 two between those two?

11 MS. SANDERS: For him - - -

12 JUDGE RIVERA: Yes.

13 MS. SANDERS: - - - specifically - - -

14 JUDGE RIVERA: Yes.

15 MS. SANDERS: - - - it - - - it doesn't change
16 his necessarily reporting requirements.

17 JUDGE RIVERA: Yes.

18 MS. SANDERS: The biggest difference is whether
19 you're pictured on the - - - the - - - the internet
20 registry, so - - -

21 JUDGE GARCIA: Three and two, that is. That's a
22 difference between three and two or - - -

23 MS. SANDERS: No.

24 JUDGE GARCIA: - - - two and one?

25 MS. SANDERS: Between two and one. Between two

1 and three, it's a - - - it's a very big difference - - -

2 JUDGE GARCIA: Right.

3 MS. SANDERS: - - - in terms of reporting
4 requirements.

5 JUDGE RIVERA: So - - - so then it boils down to
6 just more - - - more time on the registry?

7 MS. SANDERS: I'm - - - I'm sorry?

8 JUDGE RIVERA: In terms of - - - well, if he's
9 going to come back, it's just more time on the registry
10 with - - - assume having committed no other offense.

11 MS. SANDERS: Assuming, but that's not going to
12 change his - - - his risk of reoffense. The facts are the
13 facts of this case.

14 JUDGE RIVERA: It won't - - - it won't lower - -
15 - it would not allow a judge to have certain comfort that
16 the risk is probably lower if he's now gone yet another ten
17 years under a registry regime?

18 MS. SANDERS: But I think this is why in my
19 rebuttal, I wanted to suggest to this court the - - - the
20 elephant in this case is the prosecution is going to
21 suggest, again, this is about getting him removed from the
22 registry, and they don't want to see that happen. And this
23 is not a 168-o(1) petition. This is a 168-o(2) petition
24 about his risk level, not about whether he's going to be
25 removed from - - -

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JUDGE RIVERA: I understand.

MS. SANDERS: - - - the registry. That's by operation of law. This is a 168-o(2) petition about what is Mr. Shader's risk of reoffense. And he has proved, by clear and convincing evidence, that he is a low risk.

CHIEF JUDGE WILSON: Thank you.

MS. SANDERS: Thank you so much.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Timothy Shader, No. 101 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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