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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 49

MICHAEL WORLEY,

Appellant.

20 Eagle Street
Albany, New York
May 18, 2023

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: Counsel, thank you.

2 MR. KASTIN: Thank you. Good afternoon. William
3 Kastin of Appellate Advocates on behalf of Mr. Worley. I
4 would like to request a ref - - - I'm sorry. I'm
5 requesting two minutes for referral.

6 CHIEF JUDGE WILSON: Yes.

7 MR. KASTIN: For rebuttal. Excuse me. If the
8 prosecution seeks a SORA determination different than the
9 recommendation by the Board, the correction law provides
10 that ten days' notice must be provided to the defense. The
11 reason for this - - -

12 JUDGE TROUTMAN: So here was it sua sponte by the
13 court - - -

14 MR. KASTIN: Yes, it - - -

15 JUDGE TROUTMAN: - - - or was it actually the
16 prosecutor's request for an upward?

17 MR. KASTIN: Well, I - - - in this situation it
18 was a hybrid, Your Honor, because it was sua sponte by the
19 court, and once it became clear to the court when defense
20 counsel repeatedly objected that this was improper, the
21 court invited the prosecutor to make the request. So it
22 was sua sponte, which was in error, and then once the
23 prosecutor did make that request, the statute should have
24 kicked in and there should have been ten days' notice and
25 an adjournment to give Mr. Worley an opportunity to respond

1 for this new request for an upward departure.

2 JUDGE SINGAS: Mr. Kastin, what additional
3 information do you think the defendant needed? Because in
4 this case he gets the RAI, which says he's a 3. There's an
5 argument about - - - that the points can't be used, right,
6 for treatment, so it comes back to a 2. And then the judge
7 says, I'm going to now use that for an upward departure
8 back to a 3. Defense counsel argued Ford, presumably read
9 both parts of Ford. What more would have - - - would have
10 - - - what - - - what more information would that
11 adjournment have given the defense counsel?

12 MR. KASTIN: Well, I think it's crucial to
13 remember that it's a different test for a risk factor and
14 for an upward departure. A risk factor must be proven by
15 clear and convincing evidence. An upward departure, the
16 burden's to show, as a matter of law, an aggravating factor
17 tending to establish a higher likelihood of reoffense or
18 danger to the community and be of a kind or to a degree not
19 adequately taken into account by the guidelines.

20 Now, defense counsel - - -

21 JUDGE SINGAS: Right. So what other information
22 would have allowed the defense to make that distinction?

23 MR. KASTIN: The other information would be case
24 law holding that when there are - - - the ground for the
25 upward departure is identical to the ground for the risk

1 factor points that have already been scored, that's
2 improper, the case law holding that for an upward
3 departure, you look at the totality of the circumstances.
4 These are all arguments defense counsel could have made and
5 that were mentioned in the briefs here, but the counsel was
6 caught off guard. That's why all four appellate divisions
7 unanimously, for fif - - - more than fifteen years, have
8 found that when a court does something like this, the
9 proper method - - - proper recourse, is either an
10 adjournment to allow this new ground to be considered by
11 the defense or it's - - - it's waived. It can't take
12 place.

13 JUDGE TROUTMAN: Counsel, it seems - - -

14 JUDGE SINGAS: Right. I - - - I guess my concern
15 is is it really a new ground?

16 MR. KASTIN: It is a new ground, Your Honor,
17 because the - - - it may be - - - it may have mirrored what
18 the points are already scored for, but that's barred by the
19 case law. The case law says that you cannot double count
20 or take into account something that's already been scored
21 for an upward departure. Here, defense counsel was
22 completely caught off guard.

23 JUDGE GARCIA: But, Counsel, it seems to me, also
24 - - - these are good arguments. It seems, reading this
25 record, that defense counsel wasn't given the opportunity

1 to make any argument - - -

2 MR. KASTIN: That's right, Your Honor.

3 JUDGE GARCIA: - - - let alone an adjournment,
4 right? I mean, the issue isn't even, you know, do they get
5 around to I need more time, this is how much time I need.
6 It just seems from this record that all argument on a
7 departure by defense counsel is foreclosed.

8 MR. KASTIN: That's right. The appendix from
9 pages 19 to 21 is the extent of the discussion about this
10 court's sua sponte ground for an upward departure: defense
11 counsel objects, no notice of the departure; People did not
12 request a departure; cites October, which holds that is the
13 law. And the court just says you have an exception, even
14 after defense counsel said I have no notice, he's entitled
15 to ten days' notice. So yes.

16 JUDGE GARCIA: He's never even given the
17 opportunity to make your argument now, it seems?

18 MR. KASTIN: Yes, that's correct, Your Honor.

19 JUDGE HALLIGAN: Regarding preservation of your
20 constitutional claim, you indicate in your brief that the
21 reference to notice is sufficient because it implicates due
22 process. So if that's sufficient, wouldn't that mean that
23 with respect to any statutory notice requirement, of which
24 there are a good number, that the same would be true?

25 MR. KASTIN: Yes, Your Honor. Notice is due

1 process. So when someone's objecting to notice, as this
2 court's held in David W., the bedrock of due process is
3 notice and an opportunity to be heard.

4 JUDGE HALLIGAN: So any time we have a statutory
5 requirement and someone objects, arguing that they have not
6 been given sufficient notice, then the court should assume
7 that that is both a constitutional and a statutory
8 objection?

9 MR. KASTIN: I believe so, Your Honor. At a
10 minimum, it was clearly a statutory problem.

11 JUDGE HALLIGAN: Yes. I'm asking about - - -

12 MR. KASTIN: But - - - yes.

13 JUDGE HALLIGAN: - - - the constitutional
14 preservation specifically.

15 MR. KASTIN: But I agree with the Constitution
16 because - - - because the Supreme Court in Sessions and
17 Mullane have said that notice is an elementary and
18 fundamental requirement of due process. So by specifying
19 notice, it's clear counsel was also saying there was a due
20 process violation.

21 JUDGE HALLIGAN: Although there are very
22 different arguments to be made with respect to statutory
23 and constitutional objections, I would think.

24 MR. KASTIN: That's correct, Your Honor. But I
25 would point this court to its own decision in Chestnut,

1 which is in the reply brief, that when - - -

2 JUDGE HALLIGAN: Um-hum.

3 MR. KASTIN: - - - when we're looking at
4 preservation, it should not be applied in an overly
5 technical way or focus on minutiae or emphasize form over
6 substance. So clearly, when defense counsel is arguing
7 repeatedly for lack of notice, it enveloped the due process
8 claim as well.

9 JUDGE RIVERA: So let's go back to your response
10 to Judge Troutman about hybrid. So then, what does that
11 mean? We're analyzing this as a request by the district
12 attorney, which clearly is untimely, and then the court
13 defaults back to its sua sponte determination? How should
14 we treat that in terms of resolving the appeal?

15 MR. KASTIN: In the sense of resolving the
16 appeal, it was error for the court to sua sponte bring
17 forth a new ground for the first time at the hearing. That
18 was error. In addition, when the court invited the People
19 to repeat - - -

20 JUDGE RIVERA: New ground without providing an
21 opportunity for notice and to, as Judge Garcia's pointing
22 out, eventually speak to that issue, an opportunity to be
23 heard?

24 MR. KASTIN: That's right, Your Honor.

25 JUDGE RIVERA: So how much - - - how much time -



1 - - let's say things had not gone this way, for one moment.
2 The court says, you know, I'm interested in doing this; I'm
3 going to adjourn. Doesn't even let counsel ask for an
4 adjournment, just says they're going to adjourn. How much
5 time would have been appropriate, given, as Judge Singas
6 points out, it seems everything is already on the table?

7 MR. KASTIN: Well, I disagree that everything is
8 on the table. But - - -

9 JUDGE RIVERA: Okay.

10 MR. KASTIN: - - - 168-n(3) provides ten days'
11 notice. What's key to remember in this case, the SORA
12 hearing - - -

13 JUDGE RIVERA: At the DA's request?

14 MR. KASTIN: At the DA's request.

15 JUDGE RIVERA: Okay.

16 MR. KASTIN: But - - - and the case law shows
17 that when the court sua sponte does this - - -

18 JUDGE RIVERA: Um-hum.

19 MR. KASTIN: - - - ten days' notice should apply
20 as well. It's not specified, but that's the procedure that
21 courts have followed.

22 It's important to note that in this case, Mr.
23 Worley's hearing took place on June 22nd. His release was
24 not until July 7th. So there was more than enough time to
25 give him the notice he was due, an opportunity to be heard,

1 adjourn the case, give the parties opportunities to make
2 arguments as to whether or not the upward departure was
3 appropriate. We're not - - -

4 JUDGE RIVERA: It is possible in a particular
5 case - - - because due process is flexible under Mathews v.
6 Eldridge, if that's the appropriate standard we're going to
7 apply here - - - that ten days may not have been necessary
8 here. I mean, the ten days is statutory, and for a
9 particular reason, of course, the legislature trying to
10 ensure that the statute addresses the individual's due
11 process might have set out more time than is necessary,
12 right? I mean, we don't have to decide this here, but I'm
13 curious as to - - -

14 MR. KASTIN: Yes.

15 JUDGE RIVERA: - - - if you have a hard and fast
16 rule that it's always ten regardless?

17 MR. KASTIN: No. Speaking from experience from
18 our office, our office does about forty to fifty SORA
19 hearings a year, and ten days' notice is not always what we
20 request. I mean, it's - - - depends on how much time we
21 need. It could be three days' notice. It could be the
22 afternoon. But you need notice. You can't just go forward
23 and say at the court's own - - - own determination when
24 this was never even mentioned.

25 JUDGE TROUTMAN: And the operative thing here is

1 when it was brought to the court's attention, the court
2 just went - - - went ahead - - -

3 MR. KASTIN: That's correct.

4 JUDGE TROUTMAN: - - - with what it had
5 predetermined?

6 MR. KASTIN: That's correct, Your Honor.

7 JUDGE HALLIGAN: If we thought that your
8 constitutional argument was not preserved, would we still
9 be required to read the statute to require the notice just
10 as a - - - in light of whatever constitutional concerns
11 there might be?

12 MR. KASTIN: Yes, Your Honor. I would turn - - -
13 I would refer to this court's decision in Baxin. In Baxin,
14 the correction law only required the defense to be given
15 what the Board require - - - relied upon in its
16 recommendation. It did not say that the defendant was
17 entitled to the papers relied upon by the People. This
18 court looked at the statute and said that the same due
19 process concerns apply, so the fact that the People were
20 not obligated by the correction law to provide these
21 documents was irrelevant. It's a due process violation.
22 It's meant to protect the individual whose hearing is
23 taking place.

24 JUDGE CANNATARO: But as a strictly statutory
25 matter, would - - - would reading the - - - because to me,

1 it would require reading into the statute that when the
2 People request and/or the court requests or mandates
3 consideration of this upward departure issue that some
4 adjournment is called for, ten days or something else?

5 MR. KASTIN: Yes, because - - -

6 JUDGE CANNATARO: That's not a constitutional
7 issue. That's a purely statutory interpretation issue, and
8 we are, in certain circumstances, loath to read words into
9 statutes that aren't there.

10 MR. KASTIN: Yes, but the same analysis took
11 place in Baxin where the statute did not provide that the
12 SORA individual is entitled to documents relied upon by the
13 People. But this court said, because of due process
14 concerns and notice and the opportunity to be heard, they
15 would read that into the statute.

16 JUDGE RIVERA: Let me - - - I know your red light
17 is on. But just given you mentioned - - - I think you said
18 that your office handles about forty to fifty of these a
19 year, is this an aberration, what occurred here?

20 MR. KASTIN: It isn't - - -

21 JUDGE RIVERA: Or is there some frequency to
22 this? I know there are other Appellate Division decisions
23 that deal with this issue of a sua sponte departure.

24 MR. KASTIN: It's not so much an aberration for a
25 court to raise new grounds or new theories, but usually

1 what happens is the court recognizes the defense was put at
2 a disadvantage. What's unusual - - -

3 JUDGE RIVERA: So the aberration is no
4 adjournment, no opportunity to respond?

5 MR. KASTIN: Correct.

6 JUDGE RIVERA: Okay.

7 MR. KASTIN: Correct. What's different here is
8 that the court was notified of the problem with the lack of
9 notice, and it's continued nevertheless.

10 JUDGE SINGAS: Counsel, Baxin also talked about
11 harmless error. Do you think that applies here?

12 MR. KASTIN: No, Your Honor. It can't apply
13 because there are numerous grounds that - - - the People
14 made this argument in the brief. It's ironic because they
15 say they didn't make arguments, but that's because there
16 was just never any notice. They didn't get notice this
17 would be litigated. But there were plenty of grounds that
18 there was already taken into account: by the guidelines,
19 they were specifically scored those points, that the
20 totality of circumstances.

21 One thing to keep in mind I think is very
22 important, the People entered this hearing pretty much
23 knowing that these points were not going to be scored for -
24 - - for not accepting responsibility because they
25 volunteered to the court that they spoke to this SOCTP

1 counselor, and that it appears that the reason he did not
2 do treatment was not because he refused but was because of
3 disciplinary reasons did not make him eligible. Now, if
4 that was their understanding going into the hearing, they
5 had more than plenty of an opportunity to request an upward
6 departure knowing that would drop into a level 2. They
7 failed to do so, and that was their own decision.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. KASTIN: Thank you.

10 MR. BIERCE: Good afternoon, Your Honors.

11 Michael Bierce of the Kings County District Attorney's
12 Office for the respondent, the People of the State of New
13 York.

14 CHIEF JUDGE WILSON: Let me start by asking you -
15 - -

16 MR. BIERCE: Sure.

17 CHIEF JUDGE WILSON: - - - where in the SORA
18 statute is the court given the power to ask sua sponte for
19 anything different from what either the Board or the People
20 has asked for?

21 MR. BIERCE: I don't know that it says so
22 expressly, Your Honor, but in 168-n(3), it says the court
23 renders "an order setting forth its determinations and the
24 findings of fact and conclusions of law on which the
25 determinations are based." If there was a limitation on

1 its power to do that based on what - - -

2 CHIEF JUDGE WILSON: That's what courts do
3 generally in all litigation, right? And when a plaintiff
4 comes in, a defendant comes in in a civil case or in any
5 criminal case, isn't usually - - - we think of the court as
6 an adjudicator, right, not as the prosecuting attorney or
7 the defense attorney?

8 MR. BIERCE: That's - - -

9 CHIEF JUDGE WILSON: And at least the literal
10 words of the SORA statute say the Board can make a
11 recommendation. That's what's going to go forward. And if
12 the People think that something different from what the
13 Board has recommended is what should be litigated, they
14 have to provide ten days' notice and say so and go forward,
15 and nothing says the court can do this sua sponte.

16 MR. BIERCE: It's true that the statute places
17 upon the People and, by its terms, only the People, this
18 ten-day requirement. It's true in those contexts that you
19 just mentioned I think throughout - - -

20 CHIEF JUDGE WILSON: Well, not just the ten-day
21 requirement, but the power to ask for something different
22 from what the Board has recommended.

23 MR. BIERCE: So throughout those - - - you were
24 just talking about different types of proceedings. I think
25 throughout those different types of proceedings, take a

1 sentencing proceeding, for example, it's fairly common for
2 the prosecution to take a position and to point to certain
3 evidence in the record and to say this justifies this
4 sentence. But if you then come to the hearing and the
5 court says these additional facts get you a harsher
6 sentence in my view, you don't - - - or - - - or have the
7 People reviewed this case that says - - -

8 CHIEF JUDGE WILSON: Sentencing is something
9 peculiar within - - - peculiarly within the discretion of
10 the court, though, right?

11 MR. BIERCE: I would argue that it's the inherent
12 power that the court has in almost any context to perform
13 its own - - -

14 JUDGE TROUTMAN: But even though the - - -

15 MR. BIERCE: Yes, go ahead.

16 JUDGE TROUTMAN: - - - the sentence is ultimately
17 the court's to determine, the defendant always has an
18 opportunity to be heard prior to sentence being imposed.

19 MR. BIERCE: I believe, yes. That's correct,
20 Your Honor.

21 JUDGE TROUTMAN: And did the defendant here have
22 an opportunity to be heard?

23 MR. BIERCE: I read the record that he did, Your
24 Honor. The court suggests, in light of People v. Ford,
25 after defendant brings it up, that maybe that case also

1 suggested that the extensive disciplinary hearing is a
2 reason for the departure, and that's a point when the - - -

3 JUDGE TROUTMAN: Where in the record is the
4 defendant given - - - his attorney given the opportunity to
5 formulate a response to that which he had no notice of?

6 MR. BIERCE: He's on notice that a departure is
7 possible because it's a power that the court has, and when
8 the court says this might be a reason for a departure in
9 the hearing, that's the point at which during the hearing
10 he can say, well, a departure might not be appropriate for
11 this reason or specifically ask for an adjournment because
12 there's an - - - a need to research it further.

13 JUDGE CANNATARO: Well, did - - - I mean, isn't
14 the request - - - didn't he request an adjournment at that
15 point?

16 MR. BIERCE: The request, I don't think is - - -
17 I think the request is, at best, implicit. I'll grant you
18 that there - - - to say I need more time in front of a
19 court during a proceeding is probably - - - or can be read
20 as an request for an adjournment.

21 JUDGE CANNATARO: So I take it you don't - - -
22 you don't read those words or construe those words to be
23 preservation of a constitutional due process challenge?

24 MR. BIERCE: That's correct, Your Honor,
25 especially because the attorney says at some point he's

1 entitled to ten days' notice. And there's nothing in the
2 case law that exists that says a ten-day notice requirement
3 applies to a due process claim. It focuses - - -

4 JUDGE RIVERA: But isn't that in response to the
5 court entertaining the district attorney's request and the
6 district attorney making such a request, or am I missing
7 something in the record?

8 MR. BIERCE: No. That is - - - that is the point
9 in the record where it comes, but taken together, the
10 requests that defense counsel makes, at best, make out a
11 statutory claim. There's nothing that direct the - - -
12 directs the court's attention specifically to due process -
13 - -

14 JUDGE RIVERA: What - - - what if he had never -
15 - -

16 MR. BIERCE: - - - constitutional due process.

17 JUDGE RIVERA: She, I'm sorry. I think it's she.
18 What - - -

19 MR. BIERCE: Sorry.

20 JUDGE RIVERA: What if counsel had never said ten
21 days, just said, I didn't get notice, and I didn't get
22 enough notice; you've just sprung it on me here?

23 MR. BIERCE: I would still read that as a
24 statutory claim, Your Honor, especially with the focus on
25 the prosecution. I think it would be a closer case,

1 though.

2 JUDGE CANNATARO: So what would she have had to
3 say in order to preserve a due process?

4 MR. BIERCE: Something about due process or the
5 Constitution. It's a fairly - - - one- or two-word request
6 to add in.

7 JUDGE RIVERA: But the statute is a response to
8 the requirement in the case law that there be appropriate
9 notice. It is - - - the fact that the legislature chose
10 ten days, that's what they assumed would satisfy due
11 process, but it exists in response to the requirement that
12 there - - - someone in this position be given due process,
13 notice, and an opportunity to be heard.

14 MR. BIERCE: Right, and the statute governs - - -

15 JUDGE RIVERA: So again, if all they do is say, I
16 didn't get notice, how do you know if it's a statute versus
17 a constitutional basis?

18 MR. BIERCE: Again, I - - - I acknowledge that
19 it's probably a closer question because of the focus on
20 what the court can do versus the prosecution. I would read
21 it that way. And I would emphasize that the statute only
22 talks in terms of the district attorney, and then when you
23 turn to constitutional due process, which is unpreserved
24 and beyond the jurisdiction of this court, but even - - -
25 even on the merits, this doesn't look like a notice that

1 you have to get in almost any other proceeding that courts
2 undertake to do. If the court sees something in the record
3 and asks a straightforward question about it or in the law
4 - - -

5 JUDGE TROUTMAN: But aren't - - -

6 MR. BIERCE: Yes?

7 JUDGE TROUTMAN: In every proceeding, isn't it
8 fundamental fairness that a person get an opportunity,
9 proper opportunity, to respond in a thoughtful and
10 meaningful way?

11 MR. BIERCE: Yes, in the abstract, Your Honor.
12 But if you look to the cases and to how that's actually
13 applied, frequently a court looks to - - -

14 JUDGE TROUTMAN: Here, what was meaningful about
15 what the court did?

16 MR. BIERCE: There was clear and convincing
17 evidence in the record of this disciplinary - - -

18 JUDGE TROUTMAN: The court flippantly said it was
19 going to do what it was going to do and then directed the
20 People, hint, ask for it.

21 MR. BIERCE: Respectfully, Your Honor, that - - -
22 that statement from the court is in response to counsel's
23 response saying, not anything about the departure and the
24 propriety of it or a direct request for an adjournment, but
25 simply saying the DA didn't ask for it and I don't have

1 notice of it. The response is to say the court's not
2 necessarily bound by - - -

3 JUDGE RIVERA: Would that be, then, a recognition
4 by the court that it has no authority to proceed on a sua
5 sponte departure?

6 MR. BIERCE: Not at all, Your Honor. I mean, I
7 do - - -

8 JUDGE TROUTMAN: So then why ask for it? Why - -
9 - why ask the People to do it?

10 MR. BIERCE: Potentially, belt and suspenders or
11 to give the defense - - -

12 CHIEF JUDGE WILSON: Well, maybe your point - - -

13 MR. BIERCE: - - - a little bit more of an
14 opportunity.

15 CHIEF JUDGE WILSON: Well, maybe your point that
16 the statute only provides for ten days for the People is a
17 further indication that the legislature assumed that only
18 the People could ask for that?

19 MR. BIERCE: Given the context - - - the - - -
20 the backdrop, again, of how courts operate in almost every
21 context and the fact that it has this language, essentially
22 saying the court here does what it does everywhere else:
23 issue an order of facts and conclusions of law - - -

24 JUDGE TROUTMAN: Yes, but the court is not
25 expected to act as the prosecutor and the judge. The court

1 is expected to give both sides an opportunity to be heard.
2 Isn't that the normal way it happens?

3 MR. BIERCE: Again, yes, Your Honor. But the
4 characterization that the court was acting as a prosecutor
5 here by asking a question about the implications of Ford
6 based on clear and convincing evidence in the record - - -

7 JUDGE TROUTMAN: Asking a question or deciding
8 the avenue in which the court wanted to pursue, itself, and
9 then getting the People to be the vehicle to accomplish it?

10 MR. BIERCE: The court says invite - - -
11 essentially inviting defense counsel to weigh in. I don't
12 know if that case, Ford, suggested that the extensive
13 disciplinary history may be a reason for a departure.
14 That's - - -

15 JUDGE TROUTMAN: Would it not have at least been
16 better if an opportunity had been given for an adjournment?

17 MR. BIERCE: In some cases it will be better.
18 But nothing about what I'm advocating for here suggests
19 that a court can't do that as a best practice or issue an -
20 - - a determination in the alternative or some of the
21 things that defendants suggests - - -

22 JUDGE CANNATARO: I'm sorry. Which things should
23 the court do as a best practice? Raise the issue and
24 invite counsel to second the motion or whether it should
25 make a finding as a best practice?

1 MR. BIERCE: It can grant an adjournment under
2 certain circumstances, I would say, unlike those presented
3 here where defense counsel actually raises a basis that
4 requires further research or where there's a factual
5 dispute or unclarity that warrants further investigation.
6 But to say that in this case, where there's virtually
7 nothing that the defendant could have said - - -

8 JUDGE TROUTMAN: So the - - - what the attorney
9 said here, you're suggesting, wasn't indication of surprise
10 or the need for an opportunity to weigh in in a meaningful
11 way with an adjournment? That's not what happened here?

12 MR. BIERCE: I mean, the defense counsel in this
13 case may have believed that that was the case, but whether
14 she was entitled to an adjournment or not is a legal
15 question based either on statutory interpretation, what the
16 legislature intended - - -

17 JUDGE RIVERA: Well, I think the question is was
18 she - - -

19 MR. BIERCE: - - - or a fundamental minimum of
20 due process.

21 JUDGE RIVERA: The question is really is she
22 entitled to notice. But let me ask you this, the same line
23 of questions your adversary got at the very beginning, is -
24 - - are we presented with a sua sponte departure, an order
25 and judgment that's based on that, or the court granting

1 the DA's belated request for an upward departure?

2 MR. BIERCE: There is language concerning both in
3 the record. I read it as a sua sponte departure. The
4 court does - - - and there've been suggestions during this
5 questioning that the court basically does what it wants to
6 do. It enters its ruling, it grants an exception to the
7 defense, and then it's the defendant who continues on to
8 say there's one more thing I want to put on the record.
9 And the court then does ask to hear as - - - a request of
10 an upward departure. But there's no revisiting of its
11 prior ruling, no suggestion that it - - -

12 JUDGE GARCIA: But why doesn't that trigger the
13 ten days on its own once the People make that motion?

14 MR. BIERCE: Because the adjudication in this
15 case wasn't at all based on it. I mean, if you want to
16 frame it as sort of a causation or a harmless error type of
17 argument, whatever the People requested in this case, it
18 wasn't why he was adjudicated a level 3 offender via an
19 upward departure. It was because of what the court
20 decided.

21 CHIEF JUDGE WILSON: So what if the prosecutor
22 goes to the court and says, you know, we failed to give the
23 ten-day notice, but if you want to do this on your own,
24 that would be great?

25 MR. BIERCE: In open court?



1 CHIEF JUDGE WILSON: Yeah.

2 MR. BIERCE: I think that that would probably be
3 some sort of violation of a different stripe, perhaps.

4 JUDGE HALLIGAN: But it would comport with the
5 language of the statute that you're advancing, it seems to
6 me.

7 MR. BIERCE: Um-hum. Well, I - - - I think in
8 that circumstance, what you would have is is there clear
9 and convincing evidence to support whatever the court does
10 on the record, and if there isn't, you hopefully win on an
11 appeal.

12 CHIEF JUDGE WILSON: Well, then we can just read
13 the ten - - - I mean, prosecutors have the ability to read
14 the ten days right out of the statute. Just do that, and
15 why, then, give the notice? Just go into the court and
16 say, here's what we'd like you to do.

17 MR. BIERCE: Because - - - I mean, reviewing
18 courts can read that if it happens in open court and - - -

19 CHIEF JUDGE WILSON: And say what? You just, I
20 thought, said it would be okay?

21 MR. BIERCE: I mean, at that point, it would be
22 obvious collusion to avoid the - - - the import of a
23 statute. I think that that would be carve-out that would
24 be even more unusual than this has already been
25 acknowledged to date.

1 CHIEF JUDGE WILSON: That's sort of what you've
2 been asking is this subtle collusion to avoid the import of
3 the statute as opposed to obvious.

4 MR. BIERCE: I disagree that that's what happened
5 here, but that's different readings of the record, I
6 suppose.

7 I see my light is on, unless there's - - -

8 CHIEF JUDGE WILSON: Thank you.

9 MR. BIERCE: Thank you.

10 MR. KASTIN: I'd just like to make a few follow-
11 up points, please.

12 JUDGE RIVERA: Does the court have sua sponte
13 authority?

14 MR. KASTIN: Absolutely not, Your Honor. And the
15 reason the statute - - -

16 JUDGE RIVERA: Did you preserve that argument?

17 MR. KASTIN: I'm sorry?

18 JUDGE RIVERA: Did you preserve that argument?

19 MR. KASTIN: Well, she said she had no notice.
20 And that was - - - that's implicit in saying - - -

21 JUDGE RIVERA: Well, that's - - - isn't that a
22 little bit different than saying you can't do that at all?
23 You can't depart at all - - -

24 MR. KASTIN: Well, she - - -

25 JUDGE RIVERA: - - - notice or not?



1 MR. KASTIN: She did cite People v. October, and
2 that's what the court did in People v. October. The
3 prosecutor did not seek an upward departure. The court, on
4 its own, sua sponte requested or sought an upward departure
5 and granted it. So in effect, she did do that, Your Honor.

6 JUDGE RIVERA: What - - - what about - - -
7 doesn't the statute and our case law recognize that these
8 are the recommendations from the Board and the People are
9 recommendations? It is the court that makes a final
10 assessment - - -

11 MR. KASTIN: Yes.

12 JUDGE RIVERA: - - - about the defendant's risk?

13 MR. KASTIN: Yes. And nothing we are saying
14 takes away that authority from the court. I am not
15 suggesting the court lacks the authority to make the
16 ultimate decision. That's - - -

17 JUDGE RIVERA: Well, how would the court do that?
18 Let's say the court, as here, decides that the points fall
19 in a - - - less than a level 3 but thinks that the proper
20 risk would be a level 3. How would the court do that if
21 not by an upward depart - - - just declaring?

22 MR. KASTIN: No. The mechanism is to do an
23 upward departure, but - - -

24 JUDGE RIVERA: I see.

25 MR. KASTIN: - - - I'm saying the court doesn't



1 have the authority to do that without notice. If the court
2 says - - -

3 JUDGE RIVERA: Okay.

4 MR. KASTIN: - - - based on the facts before me,
5 I believe this individual deserves a different level, but
6 you have to give notice. That's the key. I'm not saying
7 the court does not have the authority to reach the
8 determination - - -

9 JUDGE RIVERA: So of its own initiative, it could
10 decide that it doesn't agree with the recommendations,
11 thinks this - - -

12 MR. KASTIN: Yes.

13 JUDGE RIVERA: - - - person should be assessed at
14 a higher risk level; I'm going to give you an opportunity.
15 Does the court at that point have to tell them why it's
16 considering the higher risk level - - -

17 MR. KASTIN: Yes.

18 JUDGE RIVERA: - - - for purposes of the
19 adjournment?

20 MR. KASTIN: Well, otherwise, what notice does
21 the defense have? It's an empty - - - it's an empty
22 adjournment. There's nothing that the defense knows what
23 it's based upon.

24 I want to point out the - - - in the risk
25 assessment instrument, there are fifteen risk factors, but

1 there are twenty-seven bases to score.

2 JUDGE RIVERA: Um-hum.

3 MR. KASTIN: Twenty-seven because some of the
4 risk factors have more than one.

5 JUDGE RIVERA: And I assume your position is, of
6 course, if it - - - if it's notice for the defendant to be
7 able to prepare, that means the DA can also have an
8 opportunity to prepare to respond?

9 MR. KASTIN: Correct.

10 JUDGE RIVERA: To defendant's assumed objection?

11 MR. KASTIN: Yes.

12 JUDGE HALLIGAN: So if your view is that the
13 court can sua sponte do this but must follow the notice
14 requirement, is that solely because of due process
15 considerations or because you think it's implicitly
16 required by 168?

17 MR. KASTIN: I think both. I think the reason
18 168 doesn't specify that the court can't do this is
19 because, as Judge Troutman said, the court is not a
20 prosecutor. I don't think the legislature contemplated
21 that a judge would, at the hearing, throw out grounds to do
22 a dis - - - different level. The Board's already given its
23 recommendation. The People have had an opportunity to
24 present its recommendation. And that's what it's based
25 upon. It's not the judge to be an adversary in this

1 process.

2 JUDGE GARCIA: Counsel, I don't read October as
3 saying the court doesn't have authority. I read October as
4 saying the Appellate Division is saying this record didn't
5 support the upward departure.

6 MR. KASTIN: I believe October said that when the
7 court, on its own, granted an upward departure without
8 notice, that was the problem.

9 JUDGE GARCIA: I think it said that that was one
10 issue was that it went on its own and the level was in the
11 low end of the range anyway that they departed from, and
12 then it went through the different factors it relied on and
13 said that those weren't justified in reaching an upward
14 departure, but it never said this court couldn't sua sponte
15 do it. It just said it shouldn't have done it here.

16 MR. KASTIN: Right. But that - - - that was what
17 - - -

18 JUDGE GARCIA: That's a different argument than
19 the court doesn't have the authority to sua sponte depart,
20 to me.

21 MR. KASTIN: I - - - I - - - then I misspoke.
22 I'm not saying the court doesn't have the sua sponte, but
23 they must give notice.

24 JUDGE GARCIA: I see.

25 MR. KASTIN: They must give notice. They can't



1 do it on their own.

2 JUDGE GARCIA: Thank you.

3 MR. KASTIN: I want - - - I just want to
4 emphasize the consequences of the registry are so
5 important. This is, for many people, the lifetime
6 determination. So to have a judge at the last minute throw
7 out a new ground to give them the highest level without any
8 notice shows the unfairness of the process.

9 Ford was mentioned a couple times. In Ford, the
10 Board had recommended an upward departure. Why would
11 defense counsel in this case think this was a possibility
12 when the Board and the People never sought an upward
13 departure? So presumably, yes, she was familiar with Ford,
14 but it was never on the radar because in Ford, the Board
15 recommended it, and the language of Ford says the People
16 may seek an upward departure based on unsatisfactory
17 conduct while confined. People didn't do that here.

18 JUDGE SINGAS: But in this case - - - but in this
19 case the RAI came in with the 3, so it - -

20 MR. KASTIN: Yes, but many - - -

21 JUDGE SINGAS: So why is that different?

22 MR. KASTIN: Because many times the Board does an
23 upward departure in the alternative. That happens all the
24 time. Or the People do an upward departure in the
25 alternative. They score a 3, and the court or the Board or

1 the People say should the court determine that the risk
2 factor points are not made out for level 3, we are seeking
3 an upward departure in the alternative for these reasons.
4 And they didn't do that here, and the People didn't do that
5 here.

6 I'm - - - I'm - - - that Mr. Worley had some
7 notice rather than none at all in advance of the hearing is
8 irrelevant. The issue is the adequacy of notice. He was
9 entitled to not only timely notice but informed of notice
10 detailing the claims against him.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. KASTIN: Thank you.

13 (Court is adjourned)

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

I, Joy Rako, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Michael Worley, No. 49 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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