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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SERGIO DEL ROSARIO,

NO. 89  
(papers sealed)

Appellant.

-----

20 Eagle Street  
Albany, New York  
November 18, 2020

Before:

ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 JUDGE RIVERA: The last case on today's calendar,  
2 number 89, People v. Sergio Del Rosario.

3 Counsel?

4 MS. CASSIDY: May I have one minute for rebuttal,  
5 please, Your Honor?

6 JUDGE RIVERA: Yes, you may. One minute.

7 MS. CASSIDY: Good afternoon, Debra Cassidy, from  
8 the Office of Clare Degnan, on behalf of appellant, Sergio  
9 Del Rosario.

10 It is illogical for a hearing court to grant an  
11 upward departure - - -

12 JUDGE FEINMAN: So - - - so let me just start by  
13 asking you, if - - - if we conclude that the defendant's,  
14 you know, what I'll term the revenge motive was a separate  
15 aggravating factor justifying an upward departure, do we  
16 have to decide whether the defendant's close familial  
17 relationship with the victim is also an aggravating matter?  
18 In other words, is that an offramp, if you will, to  
19 resolution?

20 MS. CASSIDY: With the - - - I would argue that  
21 the revenge motive was already taken into consideration by  
22 the risk assessment instrument in this case. In this case,  
23 the court, under factor 12, cited that as being a reason  
24 why the court found points for the defendant not accepting  
25 responsibility. So in this situation, the court already



1 took that into consideration under - - -

2 JUDGE WILSON: But didn't - - -

3 MS. CASSIDY: - - - that factor.

4 JUDGE WILSON: - - - didn't the SORA - - - didn't  
5 the SORA court say it - - - it satisfied 12, but 12 didn't  
6 capture it entirely? Isn't that sort of the gist of it?

7 MS. CASSIDY: My understanding was the revenge  
8 motive really was something that seemed to be thrown in in  
9 the People's application for the upward departure. The  
10 main crux of their argument was that this was a gross abuse  
11 of familiar (sic) trust. And then it cited - - - in  
12 looking at the sex offender counseling and treatment  
13 program records, it then indicated, and this is the first  
14 time we're hearing about this revenge motive.

15 I - - - I would submit that in some ways, this  
16 revenge motive was given in order to prop up the request  
17 for the upward departure.

18 JUDGE STEIN: Well, let - - - let me ask you  
19 this. Do you disagree - - - let's assume for the moment  
20 that we agree with you that the - - - the close familial  
21 relationship, in and of itself, is - - - cannot be the  
22 basis of an upward departure. We'll just assume that for  
23 the moment, okay.

24 Do - - - do - - - do you not agree that that  
25 relationship may exist and may be somehow intertwined with



1 some other aggravating factor that would entitle - - - in  
2 other words, you're not saying that just because this close  
3 family relationship exists, there can never be an upward  
4 departure, right?

5 MS. CASSIDY: I - - - I'm saying for the purpose  
6 of an upward departure based on a close family  
7 relationship, there cannot be an upward departure.

8 JUDGE STEIN: No, I - - - I'm not saying - - -

9 MS. CASSIDY: Oh.

10 JUDGE STEIN: - - - but - - - but sometimes the  
11 close family relationship may be part and parcel of the  
12 other aggrav - - - of other aggravating factors. For  
13 example, you know, there - - - there are a number of cases  
14 which cite that in connection with other aggravating  
15 factors. Are you saying that that is not permissible?

16 MS. CASSIDY: I'm saying, in order for there to  
17 be an upward departure, there has to be an aggravating  
18 factor, and that aggravating factor has to be connected to  
19 the higher likely of reoffense and also the higher, like,  
20 need for community notification.

21 JUDGE STEIN: So - - - but you - - -

22 MS. CASSIDY: I - - - I - - -

23 JUDGE STEIN: - - - you disagree that lack of  
24 insight or whatever, however the - - - the court termed it,  
25 that's not an independently sufficient aggravating factor.



1 MS. CASSIDY: I think in this case, the revenge  
2 motive and the lack of insight were considered together,  
3 and basically, when she said revenge motive and lack of  
4 insight, basically, they were the same thing. And they  
5 were taken into consideration, when she looked at factor  
6 12, and she found that the defendant did not in - - -  
7 accept responsibility for the - - -

8 JUDGE STEIN: But what about - - - couldn't - - -

9 MS. CASSIDY: - - - crime.

10 JUDGE STEIN: - - - couldn't the degree of lack  
11 of insight or re - - - or - - - or something justify an - -  
12 - an upward departure if it wasn't adequately taken into  
13 account? So maybe there's a lack of - - - you know, a  
14 failure to take responsibility, but this goes be - - - I'm  
15 just, again, hypothesizing. This goes beyond that.

16 MS. CASSIDY: The - - - the lack of insight is  
17 not really defined here, other than except for the revenge  
18 motive. In certain cases, I can see where a lack of  
19 insight may be more defined, and as far as a rationale for  
20 an upward departure, but in this situation, the lack of  
21 insight was equated with the revenge motive. And I believe  
22 the revenge motive was really something that was kind of  
23 thrown in, as far as in the argument.

24 This revenge motive came about from them looking  
25 at the sex offender counseling and treatment program



1 records. It was something that de - - - the defendant  
2 admitted to as part of his treatment. It was found that he  
3 did successfully complete that treatment according to the  
4 people who were giving that treatment.

5 JUDGE RIVERA: But what - - - what depend - - -

6 MS. CASSIDY: And - - -

7 JUDGE RIVERA: - - - what - - - what - - - I'm  
8 sorry. Hello. All right.

9 MS. CASSIDY: Sorry.

10 JUDGE RIVERA: No, no, it's hard with the mask.  
11 But what matters is - - - isn't what matters - - - let me  
12 put it that way - - - what - - - what the court dec - - -  
13 based its decision on - - - so even if they, as you say,  
14 threw in the revenge as a motive, if that is what the court  
15 relied on, isn't that then what we're focusing on?

16 MS. CASSIDY: And if that is what the court  
17 relied on, they already relied on that to give points under  
18 factor 12. So therefore, it's based on the total - - -

19 JUDGE RIVERA: So - - - so your position is they  
20 can't double-dip?

21 MS. CASSIDY: Correct.

22 JUDGE RIVERA: They can't say, okay, that takes  
23 care of some of the points, and now it also informs, as a  
24 judge, my analysis as to whether or not to grant the upward  
25 departure request?



1 MS. CASSIDY: I would argue that's correct, given  
2 the fact that in order for there to be an aggravating  
3 factor, the aggravating factor has to be one that's not  
4 taken into consideration by the risk assessment instrument.  
5 And in this situation - - -

6 JUDGE FEINMAN: So - - - so how is it - - -

7 MS. CASSIDY: - - - that was taken into  
8 consideration.

9 JUDGE FEINMAN: - - - how is it that the familial  
10 relationship is taken into account?

11 MS. CASSIDY: Familial relationship is taken into  
12 account under factor 7. Factor 7 specifically delineates  
13 three situations where a relationship should be assessed  
14 points. And those are when the relationship between the  
15 offender and the victim is a stranger. When the - - -

16 JUDGE FEINMAN: Yeah, factor 7 is more about a  
17 notice - - - you know, what I'll call stranger danger, you  
18 know. I'll - - - I'll grant you that. But the guidelines  
19 and the cases make clear that a factor may be aggravating  
20 if it is the kind or to a degree not adequately accounted  
21 for by the guideline. And I don't see where this familial  
22 relationship is - - - is accounted for in the guidelines.

23 MS. CASSIDY: The guidelines and the commentary  
24 under factor 7, specifically exclude familial  
25 relationships. They say in the commentary that there - - -

1 the reason why they're assessing points for these three  
2 relationships is because there is a heightened need for  
3 community notification. And they specifically say, for  
4 example, they're not minimizing a familial relationship,  
5 but that there's usually not a heightened need for  
6 community notification.

7 And in that way, they're specifically - - -

8 JUDGE FEINMAN: You just said "usually" - - -

9 JUDGE GARCIA: Right.

10 JUDGE FEINMAN: - - - and that - - - that brings  
11 up the question of, to a degree. And you know, it may be  
12 that you're right in the usual case of familial abuse or  
13 family relationship situations, but maybe this one's the  
14 outlier.

15 MS. CASSIDY: I would note, Judge, also in the  
16 Cook case, this court specifically indicated that basically  
17 - - - that if - - - if you were considering abuse of  
18 familial or abuse of trust, the court indicated then that  
19 would bring about every relationship, and they said, and  
20 that would include familiar (sic) relationships, which are  
21 specifically excluded under factor 7.

22 JUDGE GARCIA: But doesn't that go really back to  
23 Judge Stein's initial point, which is, it may be a very  
24 different case where you say, okay, familial relationship  
25 isn't an - - - you know, is an aggravator. I think Judge





1           Feinman's variation on that is, yes, you don't get points  
2           for that. You definitely don't get points under risk  
3           factor 7, and - - - and Cook pretty much says that.

4                        But there may be circumstances surrounding that  
5           relationship, aggravators, the not-usual case of a familial  
6           relationship that make it - - - that warrant an upward  
7           departure. And we don't want to shut the door by saying,  
8           anytime you have that type of relationship, that's - - -  
9           it's a nonstarter. It may be that that's the outlier that  
10          would justify, for example, where you have the  
11          circumstances that have been mentioned here, revenge motive  
12          or other things, that would justify it.

13                       It - - - the fact that it doesn't get the points  
14          under the risk factor doesn't mean that some of those facts  
15          and circumstances can't factor into a aggravating  
16          circumstance, right?

17                       MS. CASSIDY: No, it's just that - - - it's not  
18          just that it doesn't get to the points. The guidelines and  
19          the commentary specifically looked at when - - - when a  
20          relationship is a danger, and they specifically indicated  
21          that a relationship is not a heightened concern or a need  
22          for a greater notification when it's a family relationship  
23          - - -

24                       JUDGE GARCIA: So let - - - let me - - - let me  
25          try - - -



1 MS. CASSIDY: - - - so they excluded that.

2 JUDGE WILSON: Let me try a variation on - - - on  
3 Judge Garcia's question. So suppose we - - - we accept  
4 your position that because the family relationship is  
5 involved, that can't be - - - that can't figure into the  
6 upward departure at all. You know, hyp - - - forget this  
7 case for a moment. In a hypothetical case, can you tell me  
8 if, and if so, where, the guidelines pick up an offender  
9 who offends against someone to hurt a different person?

10 MS. CASSIDY: I'm not sure if I'm following the  
11 hypothetical.

12 JUDGE WILSON: Sure.

13 MS. CASSIDY: I'm sorry, Judge.

14 JUDGE WILSON: The - - - the revenge motive here  
15 is - - - supposedly what he - - - the reason he commits  
16 this rape is to get - - - is to extract revenge against his  
17 wife, not the victim, right?

18 MS. CASSIDY: Yes.

19 JUDGE WILSON: Do the guidelines pick up that  
20 situation? And if so, where?

21 MS. CASSIDY: In this case, the court equated  
22 that - - -

23 JUDGE WILSON: I'm asking about the abstract.

24 MS. CASSIDY: Okay.

25 JUDGE WILSON: In the abstract.



1 MS. CASSIDY: Whether a revenge motive is - - -  
2 is an additional factor?

3 JUDGE WILSON: Specific - - - not even just  
4 specific - - - not just revenge. I want it specific. You  
5 are try - - - you are committed a sex offense against  
6 somebody to hurt a third party. Is that captured in the  
7 guidelines anywhere?

8 MS. CASSIDY: In that hypothetical, the revenge  
9 motive may not be specifically captured in the guidelines,  
10 and given the facts of that specific case, it may be  
11 something that may be able to be considered by the hearing  
12 court. But I would argue here, it is not, because it was  
13 already considered by the hearing court under factor 12, in  
14 the lack of insight and as a revenge motive for not  
15 assessing points. I - - -

16 JUDGE STEIN: If I can just follow up with Judge  
17 - - - on Judge Wilson's question. If it was a situation  
18 where it would be appropriate to take that revenge motive  
19 into account, are you saying - - - as - - - as an  
20 aggravating factor, are you saying that - - - that - - -  
21 that it - - - it will be precluded, if the offender also  
22 happened to be in a family relationship with the victim?

23 MS. CASSIDY: I'm saying the family relationship  
24 - - - I - - - I'm saying a family relationship cannot be  
25 used as an upward departure.



1 JUDGE STEIN: By itself?

2 MS. CASSIDY: By itself.

3 JUDGE STEIN: Okay. So - - -

4 MS. CASSIDY: The risk factor - - -

5 JUDGE STEIN: - - - so the answer to my question  
6 is, no, it wouldn't be precluded just because that  
7 relationship existed, correct?

8 MS. CASSIDY: I - - - I believe that the only way  
9 the revenge motive can be an aggravating factor is if it  
10 meets the definition of establishing a higher risk of  
11 reoffense or danger to the community.

12 JUDGE STEIN: Well, let - - - let me give you a  
13 different example then, since - - - since the - - - the  
14 revenge motive seems to be a problem. What about just  
15 heinousness? The heinousness of the crime.

16 MS. CASSIDY: Well, I think - - -

17 JUDGE STEIN: Does it matter whether the victim  
18 is a family member or not a family member in terms of  
19 whether it can be considered as an aggravating factor?

20 MS. CASSIDY: Then you're just considering the  
21 heinousness, and you're not really considering the  
22 relationship. So in determining a heinousness, then you  
23 deter - - -

24 JUDGE STEIN: Well, I - - - I - - - I didn't say  
25 that. That may be the case. But the heinousness may



1       somehow be - - - or the - - - the - - - the family  
2       relationship may be somehow inextricably intertwined with  
3       the - - - you know, the two maybe intertwined in such a way  
4       that you can't really separate them out.

5       ██  
6       ██  
7       ██  
8       ██

9                               MS. CASSIDY: Well - - -

10       ██  
11       ██  
12       ██

13                               MS. CASSIDY: A family re - - -

14                               JUDGE GARCIA: Would that qualify as a heinous  
15       crime?

16                               MS. CASSIDY: My argument is, is that a family  
17       relationship cannot be used as an upward departure because  
18       it has already been taken into consideration under the risk  
19       assessment - - -

20       ██  
21       ██  
22       ██  
23       ██  
24       ██

25                               MS. CASSIDY: That's based just on the family

1 relationship. And the family relationship has already been  
2 calculated - - -

3 [REDACTED]  
4 [REDACTED]

5 MS. CASSIDY: - - - in the risk assessment  
6 instrument, so therefore, the family relationship cannot  
7 form the basis for an upward departure.

8 JUDGE RIVERA: Well, Counsel, on the - - - on the  
9 - - -

10 MS. CASSIDY: It's already been decided - - -

11 JUDGE RIVERA: Is the other underlying  
12 scholarship and studies that the - - - the experts, when  
13 they wrote the guidelines, relied on, did it discuss  
14 incest? Do you know?

15 MS. CASSIDY: They - - - I know that they  
16 discussed family relationships and they indicated that a  
17 family relationship - - -

18 JUDGE RIVERA: No, no, I'm not talking about what  
19 we already find in the guidelines. I'm talking about the  
20 sources of - - - of - - - that they may have - - - the  
21 experts turned to to decide what the - - - how best to  
22 draft the guidelines. Did those sources not discuss  
23 incest?

24 MS. CASSIDY: I - - - I believe the sources, in  
25 looking at the New York City Bar Association - - -



1 JUDGE RIVERA: Yeah.

2 MS. CASSIDY: - - - report and looking at that,  
3 they found that family relationships was not a factor of  
4 reoffense.

5 JUDGE RIVERA: Okay.

6 MS. CASSIDY: And I believe that the experts, as  
7 far as on the guidelines, also looked at that, and also  
8 said that that was not a basis of a reoffense or a  
9 heightened risk to the community - - -

10 JUDGE RIVERA: Oh.

11 MS. CASSIDY: - - - and that's why they excluded  
12 family relationships.

13 JUDGE RIVERA: Okay. That's not a - - -

14 JUDGE FEINMAN: So I just want to be clear. I'm  
15 - - - I'm sorry.

16 JUDGE RIVERA: No, go ahead.

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]



1 MS. CASSIDY: You can't look at the family  
2 relationship. That doesn't mean that there may not be some  
3 other aggravating circumstance that led it to become an  
4 aggravating factor. So there may be a circumstance where  
5 there's a greater risk of reoffense and there's more - - -  
6 greater need for a community notification, but it's not  
7 based on the family relationship. The family relationship  
8 has been looked at by the guidelines, by the commentary, by  
9 this court, and all have indicated that a family  
10 relationship is not a reason for points to be assessed.

11 So if you're saying that points should not be  
12 assessed, you're saying that there's not a heightened risk,  
13 and therefore, that would not form the basis of an upward  
14 departure either.

15 JUDGE RIVERA: Okay. Thank you, Counsel. You  
16 have your rebuttal.

17 Counsel?

18 MS. DISALVO: Good afternoon, Your Honors, may it  
19 please the court, Christine DiSalvo, assistant district  
20 attorney of Westchester County on behalf of the respondent.

21 Your Honors, I'd like to start off by sort of  
22 piggybacking off of Judge Rivera's question regarding the  
23 research and the experts that the guide - - - that the  
24 guidelines relied upon in propagating the RAI. That  
25 research does not suggest that intrafamilial sexual abuse



1 can never be assessed in terms of the risk of recid - - -  
2 recidivism of an offender. And that research actually - -  
3 -

4 JUDGE STEIN: Yes, but if we - - - if we - - - if  
5 we say you can use that relationship as the sole basis for  
6 an upward departure, doesn't that completely negate what  
7 factor 7 says? I mean, isn't that just getting around the  
8 - - - the Board's determination that it - - - that that  
9 relationship isn't - - - is not generally, you know,  
10 provide a need for greater community notification?

11 MS. CASSIDY: Yes, Your Honor, but the rule that  
12 we are proposing is not that intrafamilial sexual abuse and  
13 the gross abuse of trust that results from a case, such as  
14 the one that's before the court, is - - - are a reason  
15 alone for an upward departure. Essentially - - -

16 JUDGE STEIN: Okay. So you - - - it has to be  
17 connected with some other aggregate - - - aggravating  
18 factor, you - - - you agree with that?

19 MS. DISALVO: Yes.

20 JUDGE STEIN: Okay.

21 MS. DISALVO: Because otherwise, essentially, you  
22 would be acting as an override.

23 JUDGE STEIN: Okay.

24 JUDGE RIVERA: So - - - so then you're - - - so  
25 in this case - - -



1 MS. CASSIDY: No, Your Honor. It - - -

2 JUDGE RIVERA: Excuse me. So in this case, if  
3 there had not been an argument and a mention from the court  
4 about the motive, you would agree that then this would have  
5 been error to upward depart because it's abuse of the  
6 daughter?

7 MS. DISALVO: I would agree that an upward  
8 departure based on an abuse of trust within a familial  
9 relationship alone would not be - - - would not be - - -  
10 could not be a basis for an upward departure, because then  
11 you would have it in every single case where there's abuse  
12 with - - -

13 JUDGE RIVERA: Correct. Okay. So then your  
14 position is that in this case, that's not what the judge  
15 did. [REDACTED]

16 MS. DISALVO: Correct.

17 JUDGE RIVERA: Okay.

18 MS. DISALVO: The - - -

19 JUDGE RIVERA: So that then is it only the  
20 addition of the motive?

21 MS. DISALVO: No, it was also defendant's lack of  
22 self-control, which was cited - - - which the People argued  
23 at the SORA hearing, and it was also included in the SORA  
24 court's decision.

25 JUDGE RIVERA: Based on?



1 MS. DISALVO: It was based on the totality of the  
2 circumstances, the facts of the matter, which included his  
3 revenge-type intent for having committed the crime. Now,  
4 my adversary - - -

5 JUDGE RIVERA: So what else is there other than  
6 the revenge? We've got the revenge. I understand your  
7 point on that.

8 MS. DISALVO: Well, the lack of self - - -

9 JUDGE RIVERA: Maybe that's the only one, so.

10 MS. DISALVO: Well, the lack of self-control  
11 encompasses the fact that the defendant here physically  
12 beat the victim, and then stripped her of her clothes in  
13 the backseat of his car, and then raped her [REDACTED]

14 [REDACTED] And I think the court  
15 considered that, the depravity of that, and took - - - in  
16 conjunction with a statement that he had made during his  
17 sex offenders counseling, which is where the revenge-type  
18 motive originated. It was a statement made by the  
19 defendant.

20 JUDGE RIVERA: Okay. So it - - - but I got you  
21 on the revenge. So it is what he did during this assault,  
22 during the rape?

23 MS. DISALVO: It is the totality of the  
24 circumstances, yes, at the point - - -

25 JUDGE RIVERA: What he did during the rape to



1 her, the - - - the other physical aspects, this beating and  
2 so forth - - -

3 MS. DISALVO: Correct.

4 [REDACTED]

5 [REDACTED]

6 MS. DISALVO: Yes, the RAI could not adequately,  
7 to a degree, account - - -

8 JUDGE RIVERA: Because those - - - those show a  
9 lack of control - - -

10 MS. DISALVO: Yes.

11 JUDGE RIVERA: - - - beyond the rape, showing a  
12 lack of control.

13 MS. DISALVO: Yes, Your Honor. Yes.

14 So - - - and again, it was intertwined, so it was  
15 additional. It was the gross abuse of trust - - -

16 JUDGE RIVERA: Did the judge say that in that  
17 way?

18 MS. DISALVO: What was that, Your Honor?

19 JUDGE RIVERA: Did the judge say that in that  
20 way, that this is what also was the basis for granting the  
21 upward departure?

22 MS. DISALVO: This - - -

23 JUDGE RIVERA: Just as you have described it?

24 MS. DISALVO: Yes, in the SORA court's decision,  
25 the judge talks about the depravity of the incident as a



1 whole. And the - - - the judge used that as a basis to  
2 upwardly depart to the highest risk level.

3 JUDGE RIVERA: It sounds that - - - it sounds  
4 like it does come down to family relationship because it's  
5 going to be hard to really show any kind of assault against  
6 a family member that doesn't fit into something like what  
7 you've described, some - - -

8 MS. DISALVO: Well - - -

9 JUDGE RIVERA: - - - physicality, some threat,  
10 doing it at home.

11 MS. DISALVO: Well, the underlying crime might be  
12 different in a different case. It - - -

13 JUDGE RIVERA: Well, sure, I get that.

14 MS. DISALVO: For example, at - - -

15 JUDGE RIVERA: But - - - but the kinds of things  
16 that you're pointing to, although terrible and horrendous -  
17 - - no one is saying otherwise - - - strikes me as also the  
18 kinds of things one would - - - one would find as facts in  
19 a family assault.

20 MS. DISALVO: Well, I - - - I think that's why  
21 it's - - -

22 JUDGE RIVERA: Could be in a stranger assault,  
23 right? Could have done that to a stranger.

24 MS. DISALVO: Right, but I think that it's  
25 important to look to the guidelines and that they asked

1           these per se rules - - -

2                   JUDGE RIVERA: Yes.

3                   MS. DISALVO: - - - and they look for an  
4 individualized approach to each case.

5                   JUDGE RIVERA: Correct. And do they - - -

6                   MS. DISALVO: Now - - -

7                   JUDGE RIVERA: Do they ever say anything about  
8 sort of the heinous nature against a family - - - a  
9 familial, right, someone who's related to you as a family  
10 member, being a basis for an upward departure?

11                   MS. DISALVO: Well, the cases that have used - -  
12 -

13                   JUDGE RIVERA: No, no, I'm asking about the  
14 guidelines.

15                   MS. DISALVO: Well, the guidelines - - - all  
16 that's in the guidelines regarding familial relationships  
17 is that generally, there is a greater need for community  
18 notification when it's a stranger-based crime.

19                   JUDGE RIVERA: Okay.

20                   MS. DISALVO: But here we have a defendant who  
21 commits a heinous crime - - -

22                   JUDGE RIVERA: Yes.

23                   MS. DISALVO: - - - is related to the victim - -  
24 -

25                   JUDGE RIVERA: Well, rape is a heinous crime,



1 even without all those other things, but yes - - -

2 MS. DISALVO: Yes, and because of that - - -

3 JUDGE RIVERA: - - - I get your point.

4 MS. DISALVO: - - - he can't be assessed points  
5 on the RAI and now - - -

6 JUDGE WILSON: Well, the - - - the use of  
7 physical force is picked up by a different guideline  
8 factor, right?

9 MS. DISALVO: Yes, it - - - he was scored points  
10 for use of violence.

11 JUDGE WILSON: Yeah.

12 MS. DISALVO: However, there - - - there are - -  
13 - the purpose of the departure provision. Even in any case  
14 where you're scored points is that if the RAI can not  
15 adequately or to a degree, which is what - - - when we can  
16 depart, to a degree not considered by the RAI, and it can  
17 be a basis for an upward departure.

18 JUDGE RIVERA: What's - - - what's the limiting  
19 principle? Because I don't see a limiting principle in  
20 what you've just argued.

21 MS. DISALVO: Well - - -

22 JUDGE RIVERA: It sounds to me like it's sort of  
23 anything that a judge can point to to justify that upward  
24 departure. Where's the limiting principle?

25 MS. DISALVO: Well, the limiting principle would



1 be the SORA court exercising its discretion and - - - and  
2 dealing with the - - - with the facts and the individual  
3 facts of the case before it. And this court recognizes the  
4 SORA court's discretion to upwardly depart to consider the  
5 totality of the circumstances in each case.

6 And here, the court did just that. It was based  
7 on the gross abuse of trust, in conjunction with the  
8 revenge-type motive, which, while the defendant was scored  
9 points, that is an unpreserved issue as - - -

10 JUDGE RIVERA: How - - - how is the - - - help me  
11 understand your argument about the gross abuse of trust  
12 somehow not being another permutation of the family  
13 relationship?

14 MS. DISALVO: Well, it's all - - - it's  
15 encompassing. It's all encompassing. [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 JUDGE RIVERA: Right. But you've - - -

20 MS. DISALVO: - - - and - - -

21 JUDGE RIVERA: - - - you've said that, on its  
22 own, would not be a basis for an upward departure?

23 MS. DISALVO: Correct.

24 JUDGE RIVERA: Okay.

25 JUDGE WILSON: Isn't that always an abuse of





1 trust?

2 MS. DISALVO: Well, yes, which is why our  
3 proposed rule is not in and of itself, it can - - - it can  
4 stand for the basis for - - -

5 JUDGE FEINMAN: So - - - so that brings me to my  
6 question, which is, if you can just clearly articulate to  
7 me what your proposed rule is?

8 MS. DISALVO: The proposed rule is that a SORA  
9 court should be able to exercise its discretion, based upon  
10 the facts before it, and upwardly depart in considering as  
11 an aggravating factor the fam - - - the gross abuse of  
12 trust that results from - - - from the sexual abuse of a  
13 family member, in conjunction with the - - - whatever else  
14 is before the court, whether it be here, with this revenge-  
15 type motive, or whether it's a lack of self-control, for  
16 which this defendant was scored zero points on the RAI - -  
17 -

18 JUDGE RIVERA: So - - - so is that rule that if  
19 the - - - the other - - - the other bit of fact is not, on  
20 its own, enough to meet the - - - the clear and convincing  
21 standard the People have to satisfy - - - that you can bump  
22 it up and boost that by pointing to the fact that it was a  
23 family member - - -

24 MS. DISALVO: Well, Your Honor - - -

25 JUDGE RIVERA: - - - who was assaulted?



1 MS. DISALVO: That was not what was done here.  
2 That is how it's being characterized by my adversary - - -

3 JUDGE RIVERA: No, I - - - then - - - then I  
4 misunderstood you. I thought when - - - in response to  
5 Judge Feinman's question, what's your rule, that you  
6 started not with something that obviously isn't taken into  
7 consideration under the guidelines, but rather with what is  
8 - - - what you've admitted is taken under consideration,  
9 the family relationship and the breach of trust, which, as  
10 Judge Wilson asked you before, isn't it always a breach of  
11 trust, and - - - and then you went to something else that  
12 isn't considered in the guidelines.

13 MS. DISALVO: Well - - -

14 JUDGE RIVERA: So I don't understand where you're  
15 starting with what, you yourself, concede is already  
16 recognized under factor 7, and on its own, would not  
17 support an upward departure.

18 MS. DISALVO: Well, the - - - risk factor 7 does  
19 not contemplate familial relationships. Our position is  
20 that - - - I see that my light is on; may I continue?

21 JUDGE RIVERA: Yes, please, please.

22 MS. DISALVO: The - - - you - - - the abuse - - -  
23 gross abuse of trust that comes out of familial  
24 relationships is not accounted for by the guidelines, which  
25 is why - - -



1 JUDGE RIVERA: How could that - - - I don't  
2 understand that at all. I mean, that's - - - that's  
3 obviously something into consideration. It's impossible to  
4 - - - to say that that is not something that the - - - the  
5 experts, when they drafted the guidelines, were not taking  
6 into consideration. That's the whole point pointing to the  
7 other part of factor 7, where someone who is grooming,  
8 right, you're trying to develop trust. So obviously, the  
9 concept of trust was very much before the members of the  
10 board.

11 MS. DISALVO: Well, they took it into  
12 consideration - - - well, I'm just speaking - - - not abuse  
13 of trust, because there's an abuse of trust in every sex  
14 offense case. I'm talking about - - -

15 JUDGE RIVERA: Well, a complete stranger, you  
16 don't know them, so no.

17 MS. DISALVO: Well, an abuse of trust in - - - in  
18 the familial sense - - -

19 JUDGE RIVERA: Yes.

20 MS. DISALVO: - - - is not accounted for. The  
21 guidelines took it into account but not for an assessment  
22 of risk factor points, because to the experts, you can't be  
23 presumptively considered a higher risk, based on your  
24 familial relationship to your victim, because generally,  
25 the risk of reoffense, or the risk of recidivism, is lower

1 in those cases.

2 However, the research suggests that while it's  
3 lower, it's quantifiable. It's not marginal. And in most  
4 interfamilial sexual abuse cases, there's underreporting.  
5 So the risk of reoffense is actually - - -

6 JUDGE STEIN: Yeah.

7 MS. DISALVO: - - - greater.

8 JUDGE STEIN: But - - - but isn't the - - - the  
9 effect of saying that the - - - the breach of familial  
10 trust - - - well, first of all, I - - - I can't imagine any  
11 situation in which that wouldn't be a heinous act. So if -  
12 - - if you're automatically lumping in heinousness and  
13 breach of familial trust, aren't you then, in fact, giving  
14 it more weight than a risk factor? Because in risk - - -  
15 in - - - in risk factor 7, if you have the appropriate  
16 relationship, you get points.

17 MS. DISALVO: Yes.

18 JUDGE STEIN: For an upward departure, you get -  
19 - - you get bounced to a whole other risk level  
20 automatically. So it seems to me that that's sort of  
21 countering what the Board determined was the greatest risk  
22 requiring community notification.

23 MS. DISALVO: But Your Honor, that's the purpose  
24 of the departure provisions. We have these provisions  
25 because the RAI is an objective instrument. It can't



1 capture the nuances of every single case, so you have  
2 defendants, like the one before the court, who scored  
3 points, and then he's presumptively a level 2. However,  
4 when the court looks at the totality of the circumstances,  
5 and hear the - - - the heinousness of the crime, which the  
6 facts are the facts, and then on top of - - -

7 [REDACTED]

8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 Go ahead, Counsel.

13 MS. CASSIDY: Yes, I would just say in looking at  
14 the hearing minutes, it's clear that the request for the  
15 upward departure was based on the family re - - - family  
16 relationship.

17 The court, in its hearing, specifically stated  
18 that it traditionally found in factual - - - factual  
19 scenarios [REDACTED]

20 [REDACTED] that they would upwardly depart. And that was in  
21 the minutes, and that they would normally consider it an  
22 aggravating circumstance. So I would argue that the court  
23 was quite clear during the hearing that that was the basis  
24 for the upward departure.

25 In terms of when you can upwardly depart, the law



1 has been quite clear. You can only upwardly depart if  
2 there is an aggravating circumstance that is not considered  
3 by the risk assessment instrument, and there is - - - that  
4 aggravating circumstance is one that - - - where there is a  
5 greater risk of reoffense or danger to the community.

6 And again, the Board and the guidelines have  
7 already considered that and determined that family  
8 relationships should not be gotten points under factor 7.  
9 Therefore, I would argue that it's a particularly specious  
10 argument to argue that since you can't get points for it  
11 under factor 7, you can then turn around and upwardly  
12 depart - - -

13 JUDGE RIVERA: But if - - -

14 MS. CASSIDY: - - - for that same relationship.

15 JUDGE FAHEY: Yeah, the problem with that is that  
16 - - -

17 JUDGE RIVERA: - - - if we agree - - - I'm sorry.

18 JUDGE GARCIA: - - - the problem with that is I -  
19 - - I - - -

20 Sorry, Judge.

21 I - - -

22 JUDGE RIVERA: No problem.

23 JUDGE FAHEY: - - - I struggle to see how a  
24 revenge, in and of itself, isn't something that could be a  
25 continuing offense. As I understood, there were nine



1 incidents in this case of - - - of sexual abuse. So it  
2 seems it was reoccurring, and that he - - - he's been  
3 deported, I guess, but in the appropriate case, it could  
4 once again, be an occasion for continued abuse.

5 MS. CASSIDY: Again, I think those are two  
6 separate issues. And again, I think that the family  
7 relationship was the basis for the upward departure, based  
8 on the hearing minutes and based on the written decision.  
9 And before - - -

10 JUDGE GARCIA: So what you're saying is, so I'm  
11 clear, that he - - - you're saying that the family  
12 relationship was the motivation behind the sexual abuse,  
13 not revenge.

14 MS. CASSIDY: The family relationship was the  
15 reason why the court upwardly departed, and that's what  
16 they basically - - -

17 JUDGE FAHEY: No, but I want you to answer my  
18 question. Was - - - was revenge taken into account? What  
19 if there wasn't a family relationship, but the act was  
20 still motivated by revenge? Wouldn't that be something  
21 outside the guidelines?

22 MS. CASSIDY: Again, only if that fits within the  
23 definition of being a higher likelihood for the person to  
24 reoffend, or - - -

25 JUDGE FAHEY: And wouldn't that - - - if that's



1 the case, would - - -

2 MS. CASSIDY: - - - or - - - or a danger to the  
3 community.

4 JUDGE FAHEY: Slow down, now. If that's the  
5 case, then wouldn't a higher likelihood to reoffend --  
6 wouldn't you look at the pattern of the crime, and say this  
7 has happened a number of times before to the same person  
8 for revenge purposes?

9 MS. CASSIDY: The - - -

10 JUDGE FAHEY: Couldn't the court look at that?

11 MS. CASSIDY: The court - - -

12 JUDGE FAHEY: The court, I was - - - you can  
13 correct me if I'm wrong. I thought it was nine incidents,  
14 so.

15 MS. CASSIDY: The - - - the defendant was scored  
16 points for having more than one incident of this crime,  
17 yes. And I'm not disputing that this crime was a terrible  
18 crime, but it doesn't raise to the level of other egregious  
19 violent acts that other cases where they have upwardly  
20 departed based on that - - -

21 JUDGE FAHEY: I see.

22 MS. CASSIDY: - - - in as far as the violence  
23 goes.

24 JUDGE FAHEY: Thank you.

25 JUDGE RIVERA: Let me - - - let - - -





1 MS. CASSIDY: And he was scored points for that,  
2 as well.

3 JUDGE RIVERA: Let - - - let me ask you this.  
4 Let's say we disagree with your reading of the transcript,  
5 and we think that the judge is saying that it was not - - -  
6 this decision to grant the upward departure is based on  
7 both the revenge - - - the attack is based on a revenge  
8 motive and the familial relationship.

9 Is your position that if the judge ever - - -  
10 let's say we agree with you on the familial relationship  
11 piece in factor 7 - - - makes that mistake and mentions the  
12 familial relationship, that even though the judge is  
13 relying on something else, that that could never be clear  
14 and convincing evidence that supports an upward departure?

15 MS. CASSIDY: Hypothetically, if - - - if it was  
16 a mistake, and just happens to mention that as part of it,  
17 as long as that's not part of the reason. I don't - - - a  
18 family relationship is already considered by the risk  
19 assessment instrument, so therefore, my position is, is  
20 that it cannot form the basis for an upward departure.

21 JUDGE RIVERA: But - - - but I'm - - - I'm just  
22 trying to sort of figure out, as we asked your colleague  
23 over here, what - - - what - - - what would be the rule,  
24 sort of your rule. I understand your rule is you can't  
25 consider this, period. And my question is, let's say -- it



1 is mentioned. And we agree with your rule that you can't  
2 consider it, but they are mentioned. The court is  
3 mentioning other bases. Are you saying that the reference  
4 to the familial relationship so taints the analysis, or we  
5 are unable to disentangle this analysis, that therefore, it  
6 cannot support an upward departure?

7 MS. CASSIDY: No, Judge. I think that as long as  
8 the factor that is being - - - the factors that are being  
9 considered are factors that are not taken into  
10 consideration by the risk assessment instrument and are  
11 something that changes the nature of how the defendant is  
12 viewed is something that an upward departure could be  
13 considered for. But again, if it's taken into  
14 consideration by the risk assessment instrument, then it's  
15 something that should not be used as an upward departure.  
16 And a relationship is a relationship. That doesn't change.  
17 So that factor is solid, as far as that goes.

18 There's nothing, really, that a court can see  
19 about a relationship that's different as opposed to, for  
20 example, violence. I can see how there are certain cases  
21 where a person was kidnapped, and beaten, and they're  
22 physically abused, or pepper sprayed and thrown out of a  
23 truck, where the heinousness and the egregiousness of those  
24 types of crimes changes the nature of how that person is  
25 looked at in terms of the violence is so much greater.



1                   Certainly, here though, it's mostly - - -  
2                   everything has been taken into consideration by the risk  
3                   assessment. No one's going to argue that the crime was not  
4                   a terrible crime, but everything was considered under the  
5                   risk assessment instrument, including the use of violence,  
6                   and including the number of times. So therefore, I would  
7                   submit that - - - that this was really based just on the  
8                   family relationship.

9                   JUDGE RIVERA: Thank you so much.

10                  MS. CASSIDY: Thank you.

11                  JUDGE RIVERA: Thank you.

12                  (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Sergio Del Rosario, No. 89 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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