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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

DENNIS FORD,

No. 47
(Papers sealed)

Appellant

20 Eagle Street
Albany, New York 12207
February 18, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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1 CHIEF JUDGE LIPPMAN: 47, People v. Ford.
2 Counsel, would you like any rebuttal time?

3 MR. TAGLIERI: Yes, Your Honor. Two
4 minutes, please.

5 CHIEF JUDGE LIPPMAN: Good.

6 MR. TAGLIERI: May it please the court, I'm
7 Michael Taglieri for appellant Dennis Ford. The
8 issue in this case - - -

9 CHIEF JUDGE LIPPMAN: Why can't you double
10 count in this situation? Is it - - - is it only that
11 in this - - - this unique situation where he's not
12 able to be in any of these programs where he's - - -
13 he has fourteen months' confinement, that it's in
14 that unique situation that you can't count for his
15 attitude and - - - that make sense to you?

16 MR. TAGLIERI: So you're not talking about
17 respondent's alternative ground for affirm. You're
18 talking about the main issue here.

19 CHIEF JUDGE LIPPMAN: Yeah, the main issue.

20 MR. TAGLIERI: Yes, yes.

21 CHIEF JUDGE LIPPMAN: What's - - - what - -
22 - what I'm saying is what's unique here that these
23 different categories allow you to count - - - and
24 sometimes they're overlapping. But is the unique
25 thing - - - is your argument based essentially on the

1 confinement? Is that - - - is that it, that they
2 couldn't comply?

3 MR. TAGLIERI: No, Your Honor. The issue -
4 - -

5 CHIEF JUDGE LIPPMAN: Shouldn't - - -
6 couldn't show remorse? What is it? What's the heart
7 of your argument?

8 MR. TAGLIERI: The issue here is - - - is
9 whether being unable to take a sex offender treatment
10 can be treated as refusing treatment and refusing to
11 accept responsibility for their crime.

12 CHIEF JUDGE LIPPMAN: I - - - I understand.
13 That - - - that is the heart of your argument. He's
14 confined, therefore he can't get treatment, he can't
15 take responsibility, and therefore you can't count it
16 again?

17 MR. TAGLIERI: You - - -

18 JUDGE READ: He wasn't confined, though,
19 from the beginning, was he? I mean, he wasn't
20 confined during his whole period of incarceration?

21 MR. TAGLIERI: I don't really know how long
22 he was confined. It was - - - he kept violating the
23 rules and getting confined to Special Housing - - -

24 JUDGE READ: So his own conduct was what
25 got him confined, correct?

1 MR. TAGLIERI: Yes, Your Honor. But that
2 does not mean that he refused to accept
3 responsibility for his crime. He pleaded guilty to
4 this case. And then at his - - - at - - - at - - -
5 at his admissions interview, he again said he was
6 guilty. And, therefore, the - - - the failure to be
7 able to take sex offender treatment does not undo
8 that acc - - - acceptance of responsibility.

9 CHIEF JUDGE LIPPMAN: So we were rewarding
10 him with the - - - for his bad conduct, really?

11 MR. TAGLIERI: No, Your Honor. He got - -
12 -

13 CHIEF JUDGE LIPPMAN: He put himself in
14 that situation, right?

15 MR. TAGLIERI: Your Honor, his bad conduct
16 warranted points under risk factor 13, conduct while
17 confined. He got the full allotment points.

18 CHIEF JUDGE LIPPMAN: So it's just you
19 can't do it twice. Is what - - -

20 MR. TAGLIERI: Yes, Your Honor. The - - -
21 the - - -

22 CHIEF JUDGE LIPPMAN: Okay.

23 JUDGE STEIN: What about the alternative
24 grounds?

25 MR. TAGLIERI: The alternative ground, the

1 - - - the People argued that - - - let me see, that
2 his statement that - - - uh - - - to the - - - um -
3 - - during the prison intake interview, "Subject
4 admitted his guilt in the instant offense and
5 attributes his behavior to being under the influence
6 of alcohol." Respondent claims this constitutes
7 denying that he committed the crime, which is absurd.
8 Respondent's - - -

9 JUDGE STEIN: Well, no, he - - - he denies
10 responsibility. He blames it on the alcohol. And
11 there - - - there's - - - there's other - - - there -
12 - - there's a more general - - -

13 MR. TAGLIERI: No.

14 JUDGE STEIN: - - - statement that - - -
15 that - - - that he didn't - - -

16 MR. TAGLIERI: Your Honor - - -

17 JUDGE STEIN: - - - appear to show any
18 insight at all or remorse into - - - into his
19 behavior.

20 MR. TAGLIERI: Your Honor, he had - - - uh
21 - - - that wasn't a denial that he committed the
22 crime. That was the reason why. Say, for example -
23 - - let me give you a hypothetical. Suppose a man -
24 - -

25 JUDGE STEIN: Isn't that saying I'm not

1 responsible because I happened to be intoxicated?

2 MR. TAGLIERI: No, Your Honor. He - - - he
3 said he committed the crime and that he was under the
4 influence of alcohol. He was under the influence of
5 alcohol. That was part of the People's case. But
6 if, say, somebody borrowed your car and crashed it
7 into a tree and he said yes, I crashed the car; I - -
8 - I had too much to drink. That wouldn't be a denial
9 of having the crash the car. That would be the
10 reason why.

11 JUDGE STEIN: No, but - - - but not
12 accepting responsibility doesn't have to be a denial
13 that you did the act. It's a denial that you're
14 responsible for having done - - - you're blaming it
15 on something or somebody else. Yes, I did it but
16 it's not my fault.

17 MR. TAGLIERI: I don't think admitting that
18 he was under the influence of alcohol is claiming
19 that he wasn't at fault. He, in fact, was
20 intoxicated. The - - - the People's case - - -

21 JUDGE STEIN: Did he ever - - - was there -
22 - - is there any indication that he ever expressed
23 any remorse for what he did or - - - or that he had
24 insight into the fact that what he did was wrong? Is
25 there any indication in the record of that?

1 MR. TAGLIERI: I think pleading guilty is
2 an admission that you were wrong.

3 JUDGE STEIN: So anytime somebody pleads
4 guilty that means that - - - that they can't be given
5 points for failure to - - - to take responsibility?

6 MR. TAGLIERI: No, Your Honor. Beyond
7 pleading guilty, he - - - he also accepted
8 responsibility when he admitted guilt at the intake
9 interview. But the - - - the - - - the board - - -

10 JUDGE RIVERA: But the board didn't - - -
11 the board didn't give him points for this.

12 MR. TAGLIERI: The board didn't give him
13 points.

14 JUDGE RIVERA: The board itself never gave
15 him those points.

16 MR. TAGLIERI: No, the board - - -

17 JUDGE RIVERA: And is the basis for the
18 decision below that he didn't take responsibility?

19 MR. TAGLIERI: The board does not consider
20 the inability to take a sex offender treatment to be
21 a denial of responsibility, because the board only
22 gives points for explicit refusal to take sex
23 offender treatment or getting expelled from sex
24 offender treatment.

25 JUDGE ABDUS-SALAAM: But is - - - is the

1 court bound by that consideration of the board in not
2 giving points?

3 MR. TAGLIERI: Your Honor, I think - - -

4 JUDGE ABDUS-SALAAM: Wouldn't the judge's
5 rationale here that you're still a risk because you
6 haven't had - - - I think the judge said one minute
7 of sex offender treatment?

8 MR. TAGLIERI: Your Honor, I think that
9 demonstrated a - - - a complete misunderstanding by
10 the judge. Because the - - - the - - - the board
11 does not con - - - frankly, doesn't consider sex
12 offender treatment to be particularly useful. What
13 it finds is that - - - that refusal to take it or - -
14 - or ex - - - being expelled from it is - - - is
15 evidence that the - - - the defendant does not
16 consider himself a sex offender or does not want to
17 be rehabilitated. And - - -

18 JUDGE RIVERA: So you're saying it's sort
19 of - - - we don't know if it worked, but if you don't
20 want to take it, we know there's a problem.

21 MR. TAGLIERI: Yes. Yes, you - - - you
22 can't presume such an attitude from someone who is
23 unable to take it.

24 JUDGE FAHEY: So - - -

25 MR. TAGLIERI: Even if he was unable to

1 take it because of his own - - -

2 JUDGE FAHEY: So I'm clear, are you saying
3 the only accept - - - it's - - - it's risk factor 12
4 we're talking about, right?

5 MR. TAGLIERI: Yes.

6 JUDGE FAHEY: So acceptance of
7 responsibility, are you - - - for your purposes,
8 then, for your argument, is the only acceptance of
9 responsibility that would - - - would be adequate
10 would be if he had actually taken and completed the
11 program? Or does he - - - or would a statement
12 suffice? Or do - - - can his actions be considered
13 an acceptance of responsibility? Is he - - -

14 MR. TAGLIERI: You mean a - - - a refusal
15 to accept responsibility?

16 JUDGE FAHEY: Right.

17 MR. TAGLIERI: You - - - the board gives
18 these points against a defendant if - - - if he - - -

19 JUDGE FAHEY: I guess I'm trying - - -

20 MR. TAGLIERI: - - - refuses to take
21 responsibility.

22 JUDGE FAHEY: I - - - I'm trying to - - -
23 I'm trying to get to what would you say constitutes
24 evidence of refusal of responsibility? I - - - I
25 think of the old adage, actions speak louder than

1 words. You're saying no, you need more than that?

2 MR. TAGLIERI: Your Honor, he - - - he - -
3 - his actions were that he accepted responsibility by
4 pleading guilty and by telling the prison interview
5 that he committed the crime. But you - - - you
6 cannot - - - as - - - as an example, there - - -
7 there is a document, there - - - there's a new
8 document in this case - - -

9 JUDGE FAHEY: No, I - - - I - - - I hate to
10 - - - to - - -

11 MR. TAGLIERI: - - - which - - - excuse me?

12 JUDGE FAHEY: - - - to - - - to narrow it
13 down for you, but I'm asking you, what would you say
14 constitutes refusal of acceptance of responsibility?

15 MR. TAGLIERI: Explicitly refusing to take
16 the program or getting kicked out of the program.

17 JUDGE FAHEY: Okay. Thank you.

18 JUDGE ABDUS-SALAAM: So - - - so racking up
19 disciplinary points, whatever the reason, you know,
20 wouldn't be an explicit refusal? It has to be
21 explicit, I'm not going to take it or you get into -
22 - - he gets into the program and then does something
23 that gets him expelled.

24 MR. TAGLIERI: Yes, Your Honor.

25 JUDGE ABDUS-SALAAM: Then that would - - -

1 that would require zero points - - - or that would
2 require points under factor 12, but nothing else?

3 MR. TAGLIERI: Yes, Your Honor. That's why
4 the board, who are the experts on this, did not give
5 those points in this case.

6 JUDGE STEIN: So it makes a difference if
7 he's never in the program but his disciplinary
8 behavior keeps him out of ever enrolling, versus what
9 you're saying is, is he would get the points if he
10 was enrolled in the program and then his actions got
11 him expelled.

12 MR. TAGLIERI: Yes, Your Honor.

13 JUDGE STEIN: So if he was in the program
14 for one day and got expelled, he'd get these points.
15 But if he never got in the program at all for the
16 same behavior, he wouldn't get the points?

17 MR. TAGLIERI: The - - -

18 JUDGE STEIN: Isn't that contrary to the
19 purpose?

20 MR. TAGLIERI: No, because the standard is
21 whether you have accepted responsibility for your
22 crime. By going into sex offender treatment and then
23 doing something to get yourself bounced out if it,
24 then you haven't accepted responsibility. But if you
25 never had the chance to get into it - - -

1 JUDGE RIVERA: Well, the - - - the goal is
2 to identify who's at high risk to repeat, correct?

3 MR. TAGLIERI: Yes, Your Honor?

4 JUDGE RIVERA: Who's at high risk to be a
5 recidivist?

6 MR. TAGLIERI: Yes, Your Honor.

7 JUDGE RIVERA: Isn't that the goal? Right.
8 So if your disciplinary violations are non-sex
9 related, how are they getting any insight into your
10 likelihood of repeating a sex crime?

11 MR. TAGLIERI: They're not, Your Honor.
12 Certainly, respons - - - Mr. Ford did not - - - did
13 not set out to commit a sex offender violation in
14 this case. He - - - he set - - - set out to rob a
15 taxicab. The taxicab driver happened to be a woman.
16 So he took that opportunity to also commit the sex
17 offense by touching the woman. But - - -

18 JUDGE RIVERA: Now you're minimizing it
19 too.

20 MR. TAGLIERI: Well, I - - - I might - - -

21 JUDGE RIVERA: You might not want to
22 continue.

23 MR. TAGLIERI: No, I'm saying that - - -
24 that he is not a high risk to reoffend because this
25 was an - - - an opportunistic crime in the first

1 place.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 JUDGE ABDUS-SALAAM: He'll never take a
4 taxicab again.

5 MR. TAGLIERI: I think if - - - if his goal
6 had been to commit a sex crime, something like four
7 percent of the taxicab drivers in New York are
8 female. So that would not be an effective way to do
9 that.

10 JUDGE READ: So he won't have many
11 opportunities again?

12 MR. TAGLIERI: I think - - - excuse me?

13 JUDGE READ: So you're saying he won't have
14 many opportunities. Even if he wanted to commit sex
15 - - -

16 MR. TAGLIERI: No, I'm saying this
17 demonstrates that he was not initially setting out to
18 commit a sex crime.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.
20 Thanks, counsel.

21 Counselor.

22 MS. BRUFFEE: Good afternoon, Your Honor.
23 I'm Anthea Bruffee for the People.

24 CHIEF JUDGE LIPPMAN: Counsel, why is it
25 fair - - - if he doesn't even enter the program or

1 can't enter the program, why is it fair to charge
2 him, you know, twice?

3 MS. BRUFFEE: Well, he wasn't charged
4 twice, Your Honor. He was charged - - -

5 CHIEF JUDGE LIPPMAN: What did - - - what
6 happened here?

7 MS. BRUFFEE: - - - for different conduct.

8 CHIEF JUDGE LIPPMAN: What - - - what is
9 the policy rationale to charge him where he has
10 misconduct, agreed, not able to participate in the
11 program. What's the rationale to give him points?

12 MS. BRUFFEE: There are - - - there are two
13 answers to that. And that is that his conduct and
14 the surrounding circumstances demonstrate that - - -
15 prove, actually, that he did refuse treatment,
16 because his prison offered treatment. That was
17 explained to him when he came into prison that he was
18 required to take sex offender treatment. Because of
19 his egregious misconduct in prison - - -

20 CHIEF JUDGE LIPPMAN: So your argument is
21 he's doing it to himself and by - - - by committing
22 the misconduct, that shows that he's failing to take
23 responsibility, that he's just as - - - as bad or
24 just as culpable as if he had been thrown out of the
25 program or refused to take it?

1 MS. BRUFFEE: Yes, but by - - -

2 CHIEF JUDGE LIPPMAN: That'd be equivalent.

3 That's the argument?

4 MS. BRUFFEE: There are two arguments.

5 CHIEF JUDGE LIPPMAN: The policy argument?

6 MS. BRUFFEE: There are two arguments.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MS. BRUFFEE: My first argument is that
9 because he repeated his misconduct and kept bouncing
10 back and forth into restrictive housing that resulted
11 in him not being able to take the program, that this
12 is tantamount to actually refusing.

13 CHIEF JUDGE LIPPMAN: And - - - and what's
14 your second argument?

15 MS. BRUFFEE: The second argument is a
16 policy argument. And that is that because the
17 defendant engaged in such egregious disciplinary
18 violations - - - I mean, he really took the cake
19 here.

20 JUDGE RIVERA: Well - - - well, counsel,
21 but the - - - but the board's own guidelines and the
22 board's actions in this case run counter to your
23 argument, because the board doesn't write the
24 guidelines, as you suggest.

25 It's - - - it allocates points for the

1 disciplinary record in a different category, which
2 they allocated to him here. And the board didn't
3 allocate points here. Isn't really the proper - - -
4 the correct procedure the one the board followed
5 here, which is no points, but requesting an upward
6 departure? The People just couldn't persuade the
7 judge. If that's how you handle the problem that
8 you're talking about - - - which should be handled, I
9 agree with you - - -

10 MS. BRUFFEE: Your Honor - - -

11 JUDGE RIVERA: - - - at the SORA hearing.

12 MS. BRUFFEE: Your Honor, that would be the
13 case if it was one violation. One violation, a tier
14 violation, then he would get points for - - - under
15 risk factor 13 for unsatisfactory conduct while
16 confined. But here - - -

17 JUDGE RIVERA: I'm - - - I'm - - - I'm
18 sorry. That category only applies to one violation,
19 not multiple?

20 MS. BRUFFEE: Well, it - - - it can apply
21 to more, but if he committed one - - -

22 JUDGE RIVERA: It certainly did here.

23 MS. BRUFFEE: - - - he would get - - - he
24 would get that. But the violations that bumped him
25 up to excessive disciplinary violation that he put

1 him in Special Housing and barred him were these
2 many, many violations.

3 JUDGE RIVERA: But all I'm suggesting to
4 you - - -

5 MS. BRUFFEE: Yes.

6 JUDGE RIVERA: Or all - - - all - - - all
7 I'm saying is that what the board did in this case
8 seems to suggest that the board views that the proper
9 procedure, based on the guidelines, based what it - -
10 - what it's - - -

11 MS. BRUFFEE: Um-hum.

12 JUDGE RIVERA: - - - concerned with in the
13 guidelines, is to then put that evidence before the
14 judge at the hearing and request an upward departure.
15 And it may be a very good argument. I - - - it
16 wasn't persuasive here. Maybe if the judge had done
17 that, nobody would be here.

18 MS. BRUFFEE: Well, nobody probably would
19 be here.

20 JUDGE RIVERA: Nobody would be here.

21 MS. BRUFFEE: Because that's discretionary.

22 JUDGE RIVERA: But that might be the way to
23 resolve it. All I'm saying is if we held against - -
24 - against - - - you're held favorably here, for your
25 opponent, that doesn't, in any way, eliminate the

1 possibility of doing exactly what the board here - -
2 -

3 MS. BRUFFEE: No - - -

4 JUDGE RIVERA: And certainly judges would
5 be on notice that perhaps that's the proper way to
6 deal with this issue.

7 MS. BRUFFEE: The board - - - the board
8 recommended that. And actually the People, at A-16
9 of the record - - -

10 JUDGE RIVERA: Yeah.

11 MS. BRUFFEE: - - - relied on the board's
12 upward departure recommendation.

13 JUDGE RIVERA: Yeah.

14 MS. BRUFFEE: Could have done that. But
15 what I'm saying is, it's different conduct - - -

16 JUDGE RIVERA: But this was the court that
17 came up with this approach.

18 MS. BRUFFEE: The court - - - but it's
19 perfectly - - -

20 JUDGE RIVERA: Not the people who do this
21 all the time in that sense. Well - - -

22 MS. BRUFFEE: No, but it's perfectly
23 appropriate, Your Honor, for both under the facts of
24 this case to - - - to rule that the defendant was
25 aware that - - - that his repeated misconduct was

1 causing him not to enter treatment.

2 CHIEF JUDGE LIPPMAN: You don't think on
3 the surface it seems like you're - - - you're - - -
4 you're penali - - - penalizing for the same conduct?

5 MS. BRUFFEE: No, Your Honor, it isn't.

6 CHIEF JUDGE LIPPMAN: You don't think about
7 - - -

8 MS. BRUFFEE: But - - -

9 CHIEF JUDGE LIPPMAN: - - - when you stand
10 back from the technicalities, the point, that doesn't
11 seem like - - - like, gee, this is the same conduct
12 and we're charging him points for both?

13 MS. BRUFFEE: Your Honor, the guidelines
14 basically say you can charge points for the same
15 conduct. For example, if you look at A-47 of the
16 record, the guidelines say that you can get points
17 under risk factor 8 for the age of the first sex
18 offense.

19 CHIEF JUDGE LIPPMAN: Yeah, but this is 12
20 or 13 now.

21 MS. BRUFFEE: 9 - - - but it - - -

22 CHIEF JUDGE LIPPMAN: This is 12 or 13.

23 MS. BRUFFEE: And defense counsel gives a
24 wonderful example of how you - - - in page 20 of his
25 reply brief - - - of how you can get extra points for

1 both. If you punch somebody in the face during your
2 treatment and get expelled, you can get points under
3 both 12 and 13.

4 JUDGE STEIN: Under your theory, is it
5 critical that we're able to tell whether he knew that
6 his conduct was preventing him from getting
7 treatment?

8 MS. BRUFFEE: No. I'm saying that you can
9 reach that conclusion, but it's not necessary. You
10 can - - -

11 JUDGE STEIN: Why not?

12 MS. BRUFFEE: You can deem him to have
13 refused as a matter of policy, because you don't want
14 to reward somebody for not - - - um - - - where - - -
15 where their misconduct is - - - is basically giving
16 them the benefit of - - -

17 JUDGE RIVERA: Well, I'm sorry.

18 MS. BRUFFEE: - - - not having to refuse.

19 JUDGE RIVERA: Where is - - - where is the
20 reward? They're going to get points for the
21 disciplinary action. They're subject to potentially
22 the argument on the upward departure, which might be
23 a very persuasive one, certainly given this
24 individual's record. Plus they're in segregated
25 housing. What - - - what reward are they

1 contemplating?

2 MS. BRUFFEE: In this case, the reward is
3 not getting the extra five points for having ref - -
4 - refused treatment.

5 JUDGE READ: Well, let - - - let - - -

6 MS. BRUFFEE: And here - - -

7 JUDGE READ: Let's say - - - let's say we
8 disagree with you. What's the remedy then in this
9 case? What happens?

10 MS. BRUFFEE: Well - - -

11 JUDGE READ: Do you get another bite at the
12 apple?

13 MS. BRUFFEE: Your Honor, no, because at
14 the SORA hearing, the People presented clear and
15 convincing evidence that the defendant had not
16 accepted responsibility.

17 And that was in the case summary, if you
18 look at page A-6 of the appendix. The board
19 suggested an upward departure for the defendant's
20 failure - - - or, rather, refusal to be interviewed
21 for the pre-sentence report and his complete failure
22 to express any remorse.

23 And the People relied on that in their - -
24 - at least the part about failure to be interviewed
25 or refusal to be interviewed - - - in their request

1 for an upward departure. So the fifteen points that
2 the judge imposed on the defendant under risk factor
3 12, if you subtract those five and find ten points
4 for failure to accept responsibility, the defendant
5 is still a level 3. The defendant didn't dispute
6 that. There's evidence in the record for it. So
7 it's not - - -

8 JUDGE READ: So you're saying even if we
9 find - - - even if we find against you on the double
10 counting, I'll call it, it doesn't make any
11 difference?

12 MS. BRUFFEE: Well, you have to find that
13 he did not accept responsibility based - - -

14 JUDGE READ: But was it - - - okay, let's
15 say - - -

16 MS. BRUFFEE: - - - on what's in the
17 record. That's undisputed.

18 JUDGE READ: - - - we do that. Let's say
19 we do that. Then what happens? Is it - - -

20 MS. BRUFFEE: What happens is you subtract
21 the five points. You find that the record is
22 sufficient to find that he failed to accept
23 responsibility, whether or not you find that he
24 refused - - -

25 JUDGE READ: The treatment.

1 MS. BRUFFEE: - - - treatment. And he's
2 still a level three. Now, if - - -

3 JUDGE ABDUS-SALAAM: So your - - - your - -
4 -

5 MS. BRUFFEE: - - - this court finds that -
6 - -

7 JUDGE ABDUS-SALAAM: Counsel, your position
8 - - - and - - - and you - - - you pointed out
9 something about the factor, which is sort of a - - -
10 a slash. It's like not accepted responsibility slash
11 refused - - -

12 MS. BRUFFEE: Yes.

13 JUDGE ABDUS-SALAAM: - - - or expelled from
14 treatment. So you're separating the - - - the two
15 things from before the slash and after the slash.

16 MS. BRUFFEE: It's sort of an umbrella,
17 Your Honor. The failure to accept responsibility is
18 what you get points for under risk factor 12. You
19 get an additional five if you've expressly refused
20 treatment or have been expelled from treatment. So
21 if there's enough in the record for this court to
22 find that it's uncontested that he didn't accept
23 responsibility, then you can just, you know, find the
24 ten points. Or you could - - -

25 JUDGE ABDUS-SALAAM: And would that be

1 under the alternative? For example, under the - - -
2 the theory that he said it was the alcohol that
3 caused me to do it. Or - - -

4 MS. BRUFFEE: Could be that or I'm - - -

5 JUDGE ABDUS-SALAAM: Or is it tied to not
6 going into sex offender treatment? That's the
7 question.

8 MS. BRUFFEE: No. I'm suggesting that it
9 should be based on what was in the case summary that
10 the defendant had and didn't dispute, which - - - and
11 that the People raised at the hearing which is that
12 he did not - - - he refused to be interviewed and
13 expressed no remorse. Because the defendant had
14 that, you know, in front of him, basically, at the
15 hearing and didn't dispute it. So - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MS. BRUFFEE: - - - in the alternative, you
18 could remit to let the Appellate Division make that
19 determination.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you,
21 counsel.

22 MS. BRUFFEE: Thank you.

23 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

24 MR. TAGLIERI: Yes, Your Honor. There's -
25 - - there's - - -

1 CHIEF JUDGE LIPPMAN: Counsel, come back to
2 the real issue. Why is this unfair?

3 MR. TAGLIERI: This is unfair - - - there
4 is a document in this case that I hadn't mentioned
5 before. It's in respondent's appendix. It is
6 appellant's time allowance committee program review
7 form. It's on page R-12 of respondent's appendix.
8 And it shows that Mr. Ford's guidance counselors at
9 prison repeatedly told him that he was on the waiting
10 list for the program. There's a box to check saying
11 whether he refused it, and they do not check that.

12 So Mr. Ford - - - re - - - respondent seems
13 to be claiming that he somehow knew his misconduct
14 was keeping him out of sex offender treatment. But,
15 in fact, his guidance counselors were telling him
16 just the opposite.

17 Furthermore, respondent seems to say that
18 his refusal to be interviewed by parole is somehow
19 proof of not accepting responsibility. That is
20 normally something that defense counsels tell
21 defendants prior to sentencing. Because it - - - it
22 - - - it can be harmful to the sentence to be
23 interviewed by parole, so defense counsels may well
24 have told him not to allow to be interviewed. But
25 that has nothing to do with whether he accepted

1 responsibility for the crime.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MR. TAGLIERI: Thank you, Your Honor.

4 CHIEF JUDGE LIPPMAN: Thank you. Thank you

5 both.

6 (Court is adjourned)

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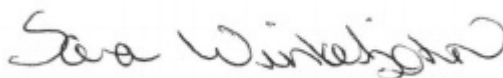
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dennis Ford, No. 47 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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