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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 4

JUDE FRANCIS, (Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York
January 2, 2018

Before:

CHIEF JUDGE JANET DIFIORE
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:

JENIN YOUNES, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant
111 John Street, 9th Floor
New York, NY 10038

ANTHEA H. BRUFEE, ADA
BROOKLYN DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
350 Jay Street
Brooklyn, NY 11201

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on the
2 calendar is the People of the State of New York v. Jude
3 Francis.

4 MS. YOUNES: Good afternoon, Your Honors; I'm
5 Jenin Younes from Appellate Advocates, and I represent the
6 appellant, Jude Francis. I'd like to reserve two minutes
7 for rebuttal.

8 CHIEF JUDGE DIFIORE: Two minutes?

9 MS. YOUNES: Yes, thank you.

10 CHIEF JUDGE DIFIORE: You may. Counsel, does
11 this case come down to a straightforward statutory
12 interpretation analysis?

13 MS. YOUNES: I think that's where it starts, yes.

14 CHIEF JUDGE DIFIORE: Okay.

15 MS. YOUNES: It's - - - it's a question of
16 whether or not the - the board exceeded its authority when
17 it interpreted offenses in the correction law to include
18 youthful offender adjudications. I think that's - - -

19 JUDGE RIVERA: And what's our standard of review
20 of that?

21 MS. YOUNES: Your standard of review is whether
22 or not the board abused its discretion in interpreting the
23 statute in that manner which we're arguing that the board
24 did. The - - - it conflicts with the statutory scheme
25 underpinning youthful offender legislation which - - -



1 which precludes - - -

2 JUDGE RIVERA: But if 720.35(2) - - - CPL
3 720.35(2) not only recognizes that there can be a statutory
4 or a court authorization for access to YO records but also
5 says that DOCCS - - - and the board consists of DOCCS
6 employees, that DOCCS employees have access to these
7 records to the extent that they find necessary to comply
8 with their duties and obligations. Why don't they have
9 this access and why can't - - - and the access has to mean
10 for some purpose, the purpose here being to satisfy the
11 requirements of their SORA duty.

12 MS. YOUNES: I don't think that access is
13 commensurate with assessing points in those categories.
14 Our argument is that the automatic assessment of points and
15 in risk - - - under Risk Factors 9 and 10 is - - -
16 conflicts with the youthful offender - - -

17 JUDGE RIVERA: Let me try it differently. You
18 concede that under 720.35(2) the board has access to these
19 records, that for - - - for the board these records are not
20 treated as confidential?

21 MS. YOUNES: Just because they're not
22 confidential - - -

23 JUDGE RIVERA: No, no. That's a yes or no.

24 MS. YOUNES: Well, there are confidential - - - I
25 suppose that the board does have access to them. The board



1 probably does - - - should know about youthful offender
2 adjudications.

3 JUDGE RIVERA: So what would be the point of that
4 - - -

5 MS. YOUNES: So - - -

6 JUDGE RIVERA: - - - if not to use those records
7 for some purpose, that purpose defined by the SORA statute?

8 MS. YOUNES: Well, our position is that in
9 certain circumstances youthful offender adjudications could
10 be the basis for an upward departure, certain rare,
11 exceptional circumstances. And - - -

12 JUDGE RIVERA: Let me ask you about that because
13 I saw that in your brief and I'm a little perplexed as to
14 this particular argument of yours because I thought your
15 argument that a YO adjudication is not a conviction.
16 Therefore, it can never be considered by the board. End of
17 story. But yet you're arguing that there may be
18 circumstances when it can be considered. I don't
19 understand how you square that with your statutory
20 interpretation argument.

21 MS. YOUNES: It's not a conviction, so it
22 shouldn't be considered under the prior crimes categories
23 for the automatic assessment of points. There is, however,
24 a different - - -

25 CHIEF JUDGE DIFIORE: What about under the prior



1 criminal history?

2 MS. YOUNES: Sorry?

3 CHIEF JUDGE DIFIORE: Is that different?

4 MS. YOUNES: It is different. You mean criminal
5 history in the guidelines?

6 CHIEF JUDGE DIFIORE: - - - in the statute, yeah.

7 MS. YOUNES: Well - - -

8 JUDGE RIVERA: The board's own category. That
9 particular categorization is the board's - - - is of the
10 board's making.

11 MS. YOUNES: Yes, but that - - - in that way the
12 board is wrong. The board should not have mandated the
13 automatic assessment of points for youthful offender
14 adjudications because those are not indicative of
15 irretrievable - - - irretrievably bad character or - - - or
16 risk of recidivism in the same way that adult conduct is.

17 JUDGE STEIN: Well, the board said that it was,
18 and the board is made up of experts on this so why - - -
19 why would we not defer to the board in that regard?

20 MS. YOUNES: Well, because - - -

21 JUDGE STEIN: Or at least give some credence to
22 that?

23 MS. YOUNES: Because in that way the board - - -
24 the board's interpretation of the statute conflicted with
25 the legislative intent underlying the youthful offender



1 legislation which is - - -

2 JUDGE WILSON: 168-1 doesn't even limit the board
3 in determining the factors to prior criminal history by the
4 language says: "Such guidelines should be based upon but
5 not limited to the following" and then gives a long list
6 but it doesn't - - - presumably if there was statistical
7 evidence showing that men who are under 5'6" were more
8 likely to be sexual offender recidivists than those over,
9 the statute allows the board to take that into account, no?

10 MS. YOUNES: The statute allows the board to take
11 offense - - - it - - - that specific part says that it can
12 consider offenses, but offenses isn't defined in the SORA
13 statute first of all. I'm - - - I disagree with the
14 attorney general's interpretation which says that offenses
15 - - - or understanding offenses should be defined as it is
16 in the penal law. The penal law definition of offense is
17 extremely broad and it - - -

18 JUDGE WILSON: Doesn't 168-a, the definitional
19 section of the SORA statute equate convictions with
20 offenses?

21 MS. YOUNES: It doesn't as far as I know.

22 JUDGE WILSON: Okay.

23 MS. YOUNES: It - - -

24 JUDGE FEINMAN: But I mean the CPL actually says
25 in the YO statute that YO adjudication is not an offense.



1 Doesn't it say that?

2 MS. YOUNES: Well, it says it's not a conviction
3 - - - a judgment of conviction - - -

4 JUDGE FEINMAN: Well, I thought the - - - the
5 rest of the sentence it goes on: "A youthful" - - - I'm
6 reading from the 720.35(1): "A youthful offender
7 adjudication is not a judgment of conviction for a crime or
8 any other offense."

9 MS. YOUNES: Offense.

10 JUDGE GARCIA: But it's not a judgment of
11 conviction for any other offense.

12 MS. YOUNES: Yes.

13 JUDGE GARCIA: Doesn't mean it's not any other
14 offense, right?

15 MS. YOUNES: But - - - right. That's true. It's
16 - - - it's not a judgment of conviction, but as to whether
17 offense in the SORA statute should be interpreted to
18 include youthful offender adjudications, that is what we
19 are arguing is - - - is ambiguous and conflicts with the
20 legislative intent underlying the youthful offender
21 legislation.

22 JUDGE RIVERA: But - - - but all that SORA - - -
23 all that the board says is not that YO adjudication is a
24 conviction. They never say that. If - - - that's not
25 their position at all. Their position is that a YO



1 adjudication is a reliable indicator, as would a
2 conviction, but for this purpose is a reliable indicator of
3 the risk of re-offense and for that purpose, they're using
4 it. They're not using it in violation of what appears to
5 be the purposes and intent of the CPL. They're not
6 attaching a stigma or attaching some other - - - to his
7 conduct. They're using it as a reliable indicator of risk
8 of re-offense which as, you know, we've said before is not
9 a punishment.

10 MS. YOUNES: Well, I think that's - - - that's
11 the point at which we might go beyond statutory
12 interpretation and look at the science which we've cited
13 extensively which shows that crimes committed by youth are
14 not indicative of recidivism or bad character in the same
15 way that adult - - -

16 JUDGE STEIN: But that's just two competing
17 opinions on that. I mean that doesn't really get us
18 anywhere, does it, even if we do consider that?

19 MS. YOUNES: You mean the board's - - -

20 JUDGE STEIN: You have certain experts saying
21 it's not and - - - and then you have the board's experts
22 saying that it is. So - - -

23 MS. YOUNES: As far as I know, all experts, all
24 neuroscience and psychological experts agree that youthful
25 behavior is not indicative of bad character in the way that

1 adult behavior is.

2 JUDGE STEIN: But is it not predictive of future
3 - - - of recidivism?

4 MS. YOUNES: Exactly, yes. It's not.

5 JUDGE FEINMAN: So - - - so if a seventeen-year-
6 old commits even a sexual offense, right, not - - - not the
7 kind of - - - which is not the facts here. I get that.

8 MS. YOUNES: Yeah.

9 JUDGE FEINMAN: Gets a YO and two years later
10 when he's nineteen or maybe three years later when he's
11 twenty does another one, the - - - nobody should look at
12 the underlying facts of that?

13 MS. YOUNES: That's exactly - - -

14 JUDGE FEINMAN: The first one?

15 MS. YOUNES: That's exactly where we would say an
16 upward departure might be appropriate, those very rare
17 circumstances where somebody had committed a very similar
18 type of sex crime as a youth and then as an adult. That
19 might show that he hasn't - - - you know, that - - - that
20 actually was more indicative of his character.

21 JUDGE FAHEY: I - - -

22 MS. YOUNES: But typically - - -

23 JUDGE FAHEY: Go ahead.

24 MS. YOUNES: Typically, youthful behavior is not
25 indicative of - - - of one's character as adult behavior



1 and one should not be penalized. That - - - that's the
2 whole purpose of youthful offender legislation is not to
3 allow somebody to have that counted in any way against them
4 in the future.

5 JUDGE STEIN: Well, it's also to prevent the
6 stigma of having a criminal record, right? And - - - and
7 here, the - - - this defendant has a criminal record not
8 because of something that he did as a youth but something
9 that he did as an adult. So how does that - - - how does
10 that contravene the purposes of the statute?

11 MS. YOUNES: Well, first, there are two things.
12 First of all, it - - - it infringes upon the integrity of
13 the youthful offender adjudications if they can - - - if
14 they were carving out this exception, which the legislature
15 really hasn't. It's the board who's done that. And second
16 of all - - -

17 JUDGE STEIN: Well, but in all fairness the - - -
18 the board carved out also the JD exception, right, and - -
19 - and case law has since said that that's not applicable.
20 But so - - -

21 MS. YOUNES: Yes.

22 JUDGE STEIN: Right?

23 MS. YOUNES: Yeah, but I wanted to get back to
24 the other part which is that having - - - well, one might
25 have a criminal - - - well, someone might have a criminal

1 record at that point. Having this additional youthful
2 offender adjudication be used against them is an additional
3 - - - it's an increased penalty and that's what we're
4 arguing should not be permitted.

5 JUDGE RIVERA: Well, but - - - but doesn't the
6 CPL already recognize at 720.35, doesn't it already as a
7 statutory matter, meaning the legislature intended it,
8 already recognize that YO adjudications can be used for
9 what I read this provision to mean either for the benefit
10 of the youth like the educational plan or for public
11 security which is like DOCCS and the Article 10 provisions?

12 MS. YOUNES: It - - -

13 JUDGE RIVERA: It already takes that into
14 consideration. How - - - how is the board acting in abuse
15 of its discretion or arbitrarily and capriciously by
16 interpreting that it could look at the YO adjudication for
17 purposes of risk assessment?

18 MS. YOUNES: The - - - we're not - - - it can
19 look at it. That's the point of the upward departure. But
20 it can't count as this automatic - - - and in some cases -
21 - - this case it was - - -

22 JUDGE FAHEY: What you're saying is it can't fit
23 into Categories 9 or 10? But could it fit into other
24 categories?

25 MS. YOUNES: It could - - - not another category.



1 It's an upward departure which is a separate - - -

2 JUDGE FAHEY: Okay. All right.

3 MS. YOUNES: It's a separate mechanism for - - -

4 CHIEF JUDGE DIFIORE: Did the defendant request a
5 downward departure?

6 MS. YOUNES: Yes, he did at the SORA hearing.
7 The - - - the point is that these can't be considered the
8 same way that adult convictions are. That's why there
9 could be this safety valve for a situation in which someone
10 - - -

11 JUDGE FAHEY: I guess - - - I guess what I - - -
12 what I struggle with is - - - is that a JD isn't a criminal
13 conviction even though it's - - - it's a determination
14 based on an act that if committed by an adult would be a
15 conviction. Whereas the YO is an actual conviction and
16 then at sentencing the court ameliorates the effect of the
17 sentence so there actually is a criminal conviction. And
18 then that criminal - - - at sentencing that criminal
19 conviction - - - the effect of it is ameliorated and
20 someone is given a second chance and say we're not going to
21 give you a record. We're going to - - - we're going to say
22 this conviction is now a youthful adjud - - - we'll give a
23 YO and therefore it doesn't count against you.

24 But that isn't the same as saying you can't
25 consider it in a SORA setting. It seems we allow hearsay



1 through <undecipherable>. We allow an enormous amount of
2 information to go before the SORA board that's it seemed to
3 me without any restrictions on it at all even where there's
4 not even been an adjudication. Here there's been an
5 adjudication. In many instances, there's been a verdict of
6 one kind or another or a plea and then on top if we go
7 around - - - we - - - we're saying that you're given a
8 break. And what's being considered is - - - is you don't
9 get two bites at the YO adjudication. If there's a second
10 crime, then the acts that underlied the adjudication could
11 be considered.

12 MS. YOUNES: Well, there's nothing in the SORA
13 statute that says that the YO can be retroactively sort of
14 taken away.

15 JUDGE FAHEY: You see where I'm asking you about
16 the categories because I - - -

17 MS. YOUNES: Yeah.

18 JUDGE FAHEY: I could see the strict statutory
19 argument maybe for Category 10, but - - - but I don't see
20 it for consideration for the initial determination. I
21 guess that's what I'm struggling with.

22 MS. YOUNES: The - - -

23 JUDGE FAHEY: So in other words, all right. So
24 you're saying it can only go - - - apply to upward - - -
25 upward departure. I'm saying to you you have all these



1 categories. Many of them include a consideration of acts
2 that you've committed before. In Category 10, though, it
3 specifically refers to recency of prior felonies or sex
4 crimes. You're saying that this wouldn't apply because a
5 YO is not a crime.

6 MS. YOUNES: Right.

7 JUDGE FAHEY: Even though the acts underlying it
8 are a crime.

9 MS. YOUNES: They - - - they can still be
10 considered. Again, they can be considered. But they just
11 can't be assessed mandatory points which in some cases - -
12 -

13 JUDGE FAHEY: So in other words, 9 and 10 are out
14 but the other categories would be in is your argument?

15 MS. YOUNES: Yes.

16 JUDGE FAHEY: I see okay. Just so I got it. I
17 understand. Okay. Thank you.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 Counsel.

20 MS. BRUFEE: Good afternoon, Your Honors; Anthea
21 Bruffee for the People. The board and the SORA hearing
22 court appropriately considered the prior youthful offender
23 adjudication of the defendant, and that's based on many
24 provisions in the SORA statute.

25 JUDGE RIVERA: But isn't really the core of the



1 CPL YO framework that when this young person is adjudicated
2 a youthful offender is it the court deciding something so
3 serious as you get another chance, you will not have to
4 suffer the consequences of being convicted for these
5 actions? Doesn't that equate with your slate is clean, you
6 are now on the same footing with someone who has not
7 committed this conduct?

8 MS. BRUFEE: That's absolutely true - - -

9 JUDGE RIVERA: Okay. So why can the board - - -

10 MS. BRUFEE: - - - until - - -

11 JUDGE RIVERA: - - - look at it?

12 MS. YOUNES: Well, it's absolutely true until
13 that offender commits another sex crime. So the youthful
14 offender, by the provisions of the Youthful Offender
15 Statute - - -

16 JUDGE WILSON: What do you mean another sex
17 crime? You mean a sex crime?

18 MS. BRUFEE: A sex crime.

19 JUDGE WILSON: A sex crime, yeah.

20 MS. BRUFEE: Assuming that the YO conviction was
21 not for a sex crime, I stand corrected. So in this case,
22 it wasn't a sex crime. The offender was convicted of a
23 non-sex crime. He received his YO adjudication, and if
24 he'd done nothing further he would not have been
25 stigmatized - - -



1 JUDGE RIVERA: Yeah, but - - - but when you get
2 adjudicated YO the judge doesn't say unless you go and do
3 something else and then this is going to count again.

4 MS. BRUFEE: Doesn't, but case law provides that
5 a youthful offender if he does something else the court can
6 then consider that YO adjudication in enhancing a future
7 sentence. And that's true - - -

8 JUDGE FEINMAN: Now have we said that or just the
9 Appellate Divisions?

10 MS. BRUFEE: The Court of Appeals has not said
11 that. However, in - - -

12 JUDGE FEINMAN: Okay. Just wanted to be clear
13 about that.

14 MS. BRUFEE: Yes. However, in even a more
15 difficult situation in the juvenile offender situation
16 where an offender - - - not juvenile offender, juvenile
17 delinquent, where the delinquent could be thirteen or
18 fourteen years old. He becomes a juvenile delinquent based
19 on a finding. There's a confidentiality statute in the
20 Family Court Act 381.2 which provides, like the YO
21 confidentiality rules, that this YO finding is not going to
22 be public but under subsection (2) it specifically provides
23 - - - the legislature specifically provides - - - and so I
24 don't get it wrong let me read what it says:
25 "Notwithstanding the provisions of subdivision (1), another



1 court in imposing sentence upon an adult after a conviction
2 may receive and consider the records and information on
3 file with the family court unless the records and
4 information has been sealed under a provision that there's
5 a finding in favor of the juvenile." So if there is an
6 adverse finding, the child is thirteen or fourteen, he is
7 covered as the youthful offender is covered. But then if
8 as an adult he commits a crime then the court by statute is
9 allowed to consider that in enhancing a sentence.

10 JUDGE FEINMAN: Okay. So - - - so where is the
11 statutory language that allows this?

12 MS. BRUFEE: And there is not one.

13 JUDGE FEINMAN: We talked about the JD statute -
14 - -

15 MS. BRUFEE: But by implication, there is based
16 on - - -

17 JUDGE FEINMAN: Where it is implied?

18 MS. BRUFEE: - - - the SORA statute. Well, let's
19 back up. The confidentiality provisions in the CPL have
20 many exceptions. And let me just get to that. Provides
21 that: "YO records are confidential except where
22 specifically required or permitted by statute." And all
23 the provisions in the SORA statute which allow for the
24 board and the hearing court and DOCCS employees to access
25 these records and use them to make risk level determination



1 by implication permits it.

2 JUDGE FEINMAN: Let's - - -

3 JUDGE WILSON: Well, it's not the board - - - I'm
4 sorry.

5 JUDGE FEINMAN: Sorry. If they have access, what
6 do you say in response to the argument that was made by
7 your adversary that access doesn't necessarily mean you get
8 an automatic point assessment under Factors 9 and 10? It's
9 two different things to say you can have access to this and
10 maybe use it for to request an upward departure as opposed
11 to it's an automatic point assessment on 9 and 10?

12 MS. BRUFEE: Well, according to SORA 168-1,
13 subdivision (5), the legislature's provided this scheme
14 where the board is required to issue guidelines. And one
15 of the provisions is in this subdivision (5) it suggests
16 that the board should consider an offender's - - - the
17 nature, the date, and the number of prior offenses. So
18 that's the - - -

19 JUDGE FEINMAN: All right. So that brings me to
20 the question about the plain language.

21 MS. BRUFEE: Yes.

22 JUDGE FEINMAN: If that's where you're going to
23 hang your hat - - -

24 MS. BRUFEE: That is one of the hooks.

25 JUDGE FEINMAN: - - - why is this an offense given



1 the language that I asked about previously?

2 MS. BRUFEE: So prior offenses. It does not say
3 prior criminal convictions. It doesn't exempt YO. So the
4 board has the statutory authority to issue guidelines. In
5 the guidelines, which I appended in the respondent's
6 appendix at 11-12, the board has specifically said courts
7 may look at YO adjudications in making - - -

8 JUDGE FEINMAN: Yeah, but that's somewhat
9 circular - - -

10 MS. BRUFEE: Well - - -

11 JUDGE FEINMAN: - - - to say that the guidelines
12 say it, therefore, it's allowed. I mean - - -

13 MS. BRUFEE: Well, this - - - the legislature has
14 empowered the board to make accurate risk-level
15 determinations specifically saying that it's based on prior
16 offenses. YO adjudication is - - - a prior offense.

17 JUDGE WILSON: In 168-a repeatedly when it
18 defines sex offense says a conviction, a conviction, a
19 conviction, a conviction equating - - -

20 MS. BRUFEE: You're talking about 168-a?

21 JUDGE WILSON: -a, right.

22 MS. BRUFEE: Yes.

23 JUDGE WILSON: Which equates conviction and
24 offense.

25 MS. BRUFEE: Well, basically that provision is -



1 - - the definitional provision is basically saying what
2 triggers the SORA provisions. A YO does not trigger SORA
3 provisions. However, a YO adjudication can be considered.
4 And the reason I say that even though it says that in 168-
5 a, it's not - - - if you look at the statute it doesn't - -
6 - sorry, let me just get that provision. If you look at
7 168-a(2)(c)(1), the way the statute is worded says: "SORA
8 applies if the offender has previously been convicted of a
9 sex offense defined in this article." If the sex offense
10 always literally means a conviction, this provision
11 wouldn't make any sense because what it would say is the
12 offender has previously been convicted of a conviction.
13 It's just very circular. So if you read that provision,
14 what it's basically saying is these enumerated convictions
15 of these various offenses, most of which are sex offenses,
16 is what initially triggers the SORA proceedings. So that's
17 the way to read that. It doesn't limit offenses that would
18 be - - - be able to be looked at. And the provision that
19 under -1 does not say "sex offense." It says "offenses" so
20 basically it wouldn't cover that definitional statute
21 anyway.

22 JUDGE WILSON: The provision under - - - under -1
23 doesn't limit it to criminal anything, right?

24 MS. BRUFEE: It - - - it says -1 says "prior
25 offenses." It doesn't say criminal convictions, I believe.



1 JUDGE WILSON: You're looking at which part of -
2 1?

3 MS. BRUFEE: -1(5).

4 JUDGE WILSON: -1(5) says: "Shall be" - - -

5 MS. BRUFEE: (5)(iii).

6 JUDGE WILSON: Yeah, but - - - but (5) itself
7 says: "Based upon but not limited to the following" - - -

8 MS. BRUFEE: Right, and it says - - -

9 JUDGE WILSON: So "not limited to" could mean
10 anything that the board - - -

11 MS. BRUFEE: Well, but it - - -

12 JUDGE WILSON: - - - deems relevant.

13 MS. BRUFEE: - - - expressly authorizes the
14 board, suggests that the board should be basing its
15 guidelines on the number, date, and nature of a sex
16 offender's prior offenses.

17 JUDGE FEINMAN: Let me ask you this. Could you
18 use as evidence of a prior - - - nature of prior offenses
19 conduct that perhaps was reported to the police but never
20 prosecuted for whatever reason? Let's say a husband and
21 wife have a domestic incident and there's a claim, there's
22 a domestic incident report even filed of some sort of - - -
23 you know, whether it's a rape or whatever, but for whatever
24 reason the wife chooses not to prosecute, could you then in
25 a subsequent situation use that conduct?



1 MS. BRUFEE: Well, there has to be clear and
2 convincing evidence of it. So it would be less than - - -

3 JUDGE FEINMAN: Domestic incident report, she
4 made the statement to the police. You know, maybe it was
5 even filed but it never actually went forward to the point
6 of a conviction because she for whatever reason chose not
7 to cooperate with the people.

8 MS. BRUFEE: Well, that scenario probably
9 wouldn't, but if she'd made a sworn - - - if she'd
10 testified in the grand jury, for example, and there'd been
11 an indictment and there's sworn testimony that's possible.

12 JUDGE FEINMAN: So - - -

13 MS. BRUFEE: So it has to be clear and
14 convincing. It doesn't - - -

15 JUDGE FEINMAN: So offense doesn't require a
16 conviction then?

17 MS. BRUFEE: An offense.

18 JUDGE FEINMAN: Nature of prior offenses then
19 doesn't require - - -

20 MS. BRUFEE: It has to be - - -

21 JUDGE FEINMAN: - - - a conviction is what you're
22 saying?

23 MS. BRUFEE: It doesn't require a conviction but
24 it requires more than what you have outlined.

25 JUDGE RIVERA: Yeah, but that's a - - - how do



1 you have an offense unless you've been found guilty of the
2 underlying conduct?

3 MS. BRUFEE: Well, it has to be - - - I mean I
4 would suggest that for youthful offender adjudications
5 there has been a conviction because that's the basis of
6 this - - -

7 JUDGE RIVERA: Well, I think that's the only way
8 you get out of this because otherwise it - - - it cannot be
9 conduct that's not been found, right?

10 MS. BRUFEE: Well, that's not our case.

11 JUDGE RIVERA: Even in Domingo where's your
12 reliability finding there?

13 MS. BRUFEE: That's not our case so we don't have
14 to decide that.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MS. BRUFEE: Thank you, Your Honor.

17 CHIEF JUDGE DIFIORE: Ms. Younes.

18 MS. YOUNES: I just want to stress that again a
19 YO is not a conviction. The statute specifically says
20 that.

21 JUDGE STEIN: I - - - I'm having a hard time
22 understanding your argument - - - where in the statute you
23 derive your argument that acts underlying a YO conviction
24 can be considered for a departure but not as a - - - as a
25 factor. It seems to me that that's sort of a convenient



1 way of making a distinction, but I just don't see where it
2 comes from in the statute.

3 MS. YOUNES: Because youthful crimes committed as
4 - - - or conduct one engages in as a youth is not
5 indicative of one's character in the same way.
6 Automatically assessing points conflicts with the
7 legislature's intent automatically allowing one to be a
8 higher level than one would be without that. However,
9 again, this - - - we're envisioning this in extremely rare
10 circumstances where somebody might have, you know,
11 committed a very similar type of sex crime a few years
12 earlier. We don't want to say that under no circumstances.

13 JUDGE STEIN: So - - - so there would have to
14 actually be proof that in this particular case that was
15 indicative? I mean is - - - is it enough that in fact
16 there was a second - - - second sex crime?

17 MS. YOUNES: Well, that would be up to the
18 hearing court and - - -

19 JUDGE STEIN: On what basis, though?

20 MS. YOUNES: I'm sorry. I'm not sure that I
21 understand that question I guess. On what basis - - -

22 JUDGE STEIN: Can - - - can the court decide that
23 it - - - you're saying it's not indicative. The experts
24 have said it's not indicative, but there may be these very
25 rare circumstances in which it is indicative. How does the

1 court make that determination?

2 MS. YOUNES: The way - - -

3 JUDGE STEIN: Do you need expert testimony?

4 MS. YOUNES: No, the way that it makes all other
5 determinations. The court makes determinations about
6 upward and downward departures which are fact specific and
7 just depend on - - - on the arguments put forth by the
8 parties. It would be no different than that. And - - -

9 JUDGE GARCIA: Your argument - - - I'm sorry,
10 just to go to Judge Stein's point - - - is the abuse of
11 discretion here was assigning a certain number of points
12 for a YO offense?

13 MS. YOUNES: Yes.

14 JUDGE GARCIA: Does it matter how many points
15 they assign? Like what if they assigned five for a YO?
16 Would that be an abuse of discretion?

17 MS. YOUNES: Well, our - - - our logic doesn't
18 change. No, there should never be an automatic assessment
19 of points. Again, it's - - - it's - - - this upward
20 departure could be reserved for very rare circumstances in
21 which there was a clear pattern and the court determined
22 that there was a clear pattern that significant - - - that
23 really was indicative of a - - - of a risk of re-offense.

24 JUDGE RIVERA: So, counsel - - -

25 MS. YOUNES: Yes.



1 JUDGE RIVERA: - - - this whole argument turns on
2 the body of science that you say supports this position
3 which is counter to what the board decided in 2006 or
4 whenever it decided that the science was in the other
5 direction.

6 MS. YOUNES: Yeah.

7 JUDGE RIVERA: Was - - - was that science-based
8 argument, this isn't part of an evidentiary argument,
9 squarely presented to the SORA hearing court?

10 MS. YOUNES: That - - - the science was not
11 itself used but I don't think that that changes the
12 preservation analysis. The legal claim is the same. We're
13 using a little bit more to support that legal claim on
14 appeal.

15 JUDGE RIVERA: Well, how is the legal claim the
16 same?

17 MS. YOUNES: The legal - - -

18 JUDGE RIVERA: How - - - how is it that the
19 hearing court really had an opportunity to consider whether
20 or not the reason that the board exceeded its authority is
21 because it based its decision - - - or it did not have
22 proper basis upon which to come to this conclusion that you
23 should get points for a YO?

24 MS. YOUNES: Well, the legal claim still rests on
25 the statutory interpretation which serves as the basis for



1 our claim here or simply using science which, you know, the
2 Supreme Court has recognized and other courts in recent
3 years just to buttress our argument. If I may very
4 quickly, while youthful offender can be used at sentencing
5 to enhance the sentence, it can't be used as a predicate.
6 And I would argue that this is sort of a similar situation.
7 It - - - the youthful offender adjudication shouldn't
8 automatically enhance points in this way. The judge could
9 look at it and say, again, this is a very rare circumstance
10 in which an upward departure is warranted.

11 JUDGE RIVERA: I'm sorry. Where - - - where is
12 the authorization to use YO to enhance a sentence?

13 MS. YOUNES: I believe that a YO, sorry, can be
14 considered. It can't enhance the range or it can't change
15 the range. But within the range it can - - - the judge can
16 consider that in imposing a higher sentence than he might
17 otherwise would have.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 JUDGE FEINMAN: Again, we've never said that.
20 That's just the Appellate Divisions?

21 MS. YOUNES: Sorry?

22 JUDGE FEINMAN: It's just the Appellate Divisions
23 who have said that, right?

24 MS. YOUNES: Yes.

25 JUDGE FEINMAN: Okay.



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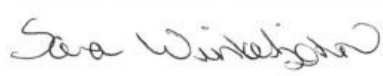
CHIEF JUDGE DIFIORE: Thank you.

MS. YOUNES: Thank you.

(Court is adjourned)

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. Jude Francis, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: January 08, 2018

