

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOSE PEREZ,

NO. 20
(papers sealed)

Appellant.

20 Eagle Street
Albany, New York
February 13, 2020

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:

HAROLD V. FERGUSON, JR., ESQ.
LEGAL AID SOCIETY
Attorney for Appellant
199 Water Street, 5th Floor
New York, NY 10038

JEAN M. JOYCE, ESQ.
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
350 Jay Street, 19th Floor
Brooklyn, NY 11201

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 20, The People of the
3 State of New York v. Jose Perez.

4 Good afternoon, Counsel.

5 MR. FERGUSON: Good afternoon, Your Honors.
6 Harold Ferguson for appellant, Jose Perez. We would
7 request two minutes for rebuttal in this case.

8 CHIEF JUDGE DIFIORE: Sure.

9 MR. FERGUSON: And we're certainly hoping for a
10 better result than the decision that came this morn - - -
11 this morning, where I lost 7-0 last month.

12 CHIEF JUDGE DIFIORE: So Counsel, is it your
13 position that we use the North essential elements analysis?

14 MR. FERGUSON: No, Your Honor. What I - - - what
15 it is, is that this is a not-a-misdemeanor sex crime. That
16 - - - what you have here is that the Appellate Division out
17 of whole cloth reached a dec - - - reached a decision on an
18 argument that was not raised, nor was decided on by the
19 SORA court in this case.

20 JUDGE FEINMAN: So - - - so if that's the case,
21 right, then they're maybe exercising their interest of
22 justice jurisdiction; then what are you doing here?

23 MR. FERGUSON: Your Honor, it's - - - these are
24 unreserved issues. The People did not argue this. The
25 People did not argue that this was endangering the welfare



1 of a child - - -

2 JUDGE GARCIA: I think - - - I think the judge's
3 point is the Appellate Division can reach arguments like
4 that. We can't. So if they based their decision on an
5 argument that we can't reach, our general reviewability is
6 nothing, so we would have to affirm or dismiss, because
7 they've reached it on an issue that we can't review.

8 MR. FERGUSON: I - - - I believe we can reach it,
9 because the Appellate Division - - - this was an issue that
10 was not raised by the People below.

11 JUDGE GARCIA: Right.

12 MR. FERGUSON: This was not raised on appeal by
13 the People.

14 JUDGE GARCIA: But we just had a dismissal of a
15 case like this, I think, where - - - it was a criminal
16 case, I believe, but - - - where they reach an issue in
17 their interest of justice power - - - in this case, a
18 sufficiency, I think it was - - - and we can't reach it - -
19 -

20 MR. FERGUSON: But - - -

21 JUDGE GARCIA: - - - so there's no way for us to
22 review that decision because we can't consider that at all.

23 MR. FERGUSON: But Your Honor, they reached - - -
24 they did not say that they reached this in the interest of
25 justice. They said it was as a matter of law.



1 JUDGE FEINMAN: What happened - - -

2 JUDGE GARCIA: What they say isn't - - -

3 JUDGE FEINMAN: What they say is not controlling.

4 MR. FERGUSON: I - - - I understand that what
5 they say is not controlling.

6 JUDGE FEINMAN: And we would - - - find that all
7 the time.

8 MR. FERGUSON: But you have here a situation
9 where this is a crime against public sensibilities. This
10 was an outlier decision by the Appellate Division. Every
11 single case involving a misdemeanor sex crime that's
12 recorded in the appellate courts of this state all have
13 held that the misdemeanor sex crime is one that's contained
14 in Article 130 of the Penal Law. And every other appellate
15 court case dealing with the issue of lewdness has
16 specifically held that it's not a misdemeanor sex crime.

17 JUDGE GARCIA: The Appellate - - - as you know,
18 the Appellate Division often reaches issues and does things
19 in the interest of justice you perhaps might not agree
20 with, but that isn't a basis for us to get around our
21 jurisdictional role.

22 MR. FERGUSON: I - - - I understand where Your
23 Honors are coming from, but we're asking this court to take
24 a look at - - - what they're - - - in essence, what they
25 are doing is affirming the decision of the SORA court. And



1 what we are arguing is that there is no basis for them to
2 affirm the decision of the - - - the SORA court, and
3 therefore, I do believe that this is still within the
4 confines of the jurisdiction of this court.

5 While they call it a misdemeanor sex crime, what
6 they are actually doing is affirming the decision of the
7 SORA court, and therefore, that's what's before this court:
8 Did they make a correct determination that he should be
9 assessed thirty points under risk factor 9? And it is our
10 position that they do not - - - that there is no basis to
11 assign thirty points under risk factor 9, because it
12 doesn't fall within the confines of the statute. It
13 doesn't come under either Correction Law 168, and it's
14 certainly not one of the sex offenses denoted in Article
15 130.

16 This would create a terrible precedent where the
17 - - -

18 JUDGE STEIN: So if you're right, do the People
19 get chance then to go back and argue whether there should
20 be an upward departure?

21 MR. FERGUSON: On a practical basis, it would be
22 extremely difficult for that to happen. I - - - I - - - I
23 don't know - - - I don't - - -

24 JUDGE FEINMAN: Isn't that because your client's
25 already deported - - -



1 MR. FERGUSON: Our - - - our client is deported
2 in - - - in 2012.

3 JUDGE FEINMAN: - - - and not here subject to the
4 mandates of the court. Maybe we should have granted the
5 motion to dismiss, but that ship sailed.

6 MR. FERGUSON: I've not - - - and again, that's
7 not something that the People have requested before this
8 court. They did not request that this be remanded for an
9 upward departure hearing. All they simply are asking for
10 was an affirmance of the Appellate Division's decision.

11 JUDGE GARCIA: But what if we agree with you and
12 we reverse; what happens?

13 MR. FERGUSON: He would be reduced from a level 2
14 offender to a level 1 offender.

15 JUDGE GARCIA: And they would have no opportunity
16 then to argue that.

17 JUDGE STEIN: Because he's been deported.

18 MR. FERGUSON: I mean, well, there - - - there
19 have been cases, and we - - - we've had these in the
20 Appellate Division, where the idea is that through
21 videoconferencing, it is possible to conduct a SORA hearing
22 via videoconference. So there is the possibility that it
23 could still be done by videoconference upon locating Mr.
24 Perez in the Dominican Republic.

25 So it's not that they wouldn't have an



1 opportunity, it would just be somewhat difficult to do so.
2 But there are cases that have allowed for videoconferencing
3 for such a situation, because certainly, obviously, he's
4 not coming back to the United States. The United States is
5 not bringing him back for a SORA hearing after he was
6 deported in 2012.

7 So, yes, Your Honors, if you remanded it to give
8 them the opportunity for an upward departure hearing, there
9 is a mechanism to do that.

10 Any - - -

11 JUDGE RIVERA: Now, in terms of just clarifying
12 the law, so I can understand what you are advocating is the
13 way to interpret - - - excuse me - - - the requirements of
14 SORA. Your position is not that it - - - the public
15 lewdness conviction doesn't count at all - - -

16 MR. FERGUSON: No.

17 JUDGE RIVERA: - - - right? He's going to get
18 some points under criminal history. It's just not the
19 thirty points - - -

20 MR. FERGUSON: No, he gets - - -

21 JUDGE RIVERA: - - - if I understood your
22 argument.

23 MR. FERGUSON: He gets five points instead of
24 thirty points, and that lowers his score to sixty, which
25 would be presumptively level 1.



1 JUDGE RIVERA: But that allows the People, as I
2 think you are conceding, at that point - - - or even the
3 Board - - -

4 MR. FERGUSON: Right.

5 JUDGE RIVERA: I assume you would concede that
6 the Board could have recommended an upward departure?

7 MR. FERGUSON: That's correct, Your Honor. And
8 in fact, that is what - - -

9 JUDGE RIVERA: And the People could have sought
10 an upward departure, whether the Board made that
11 recommendation or not.

12 MR. FERGUSON: Right, and in fact, the other
13 Appellate Division cases that deal with the issues of
14 public lewdness do reference that and say, this is
15 something that was not taken care of as a sex offense under
16 the Corrections Law or the Penal Law, but it could still be
17 considered, in essence, by an upward departure argument.

18 JUDGE RIVERA: But why aren't they correct - - -
19 I - - - is that - - - she'll correct me, once she gets up,
20 if I've gotten this wrong - - - as I understood their
21 argument below, was that they were relying on the conduct
22 itself, the sexual nature of the conduct. Why isn't that
23 enough to get this to be a point-allocation issue versus an
24 upward-departure issue?

25 MR. FERGUSON: Beca - - - because as defined



1 under the Correction Law, it is adjudications and
2 convictions. There is nothing in the Correction Law 168
3 that allows for the assignment of thirty points based on
4 solely the conduct involved. It specifically references
5 convictions and adjudications. The argument they're making
6 about conduct does not exist in the Correction Law, and
7 they cannot get the points on the basis of conduct. It is
8 simply the wrong argument.

9 At one point, they were making an endangering-
10 the-welfare-of-a-child argument, but that was specifically
11 retracted by the People, so they don't argue that this - -
12 -

13 JUDGE FEINMAN: And they don't bring that back
14 when it comes back for day two of the hearing.

15 MR. FERGUSON: No. It's - - - it's still - - -

16 JUDGE STEIN: When they - - - when they argued on
17 day two of the hearing that - - - that they were going
18 based on conduct, as I read the record, they said, well,
19 you know, we'll - - - we'll withdraw that argument for now,
20 till we get the documents about the underlying conduct,
21 right? And then they get the documents, and then they say,
22 yeah, we're going on the conduct. Could that - - - could
23 that be considered preservation of - - -

24 MR. FERGUSON: Abs - - -

25 JUDGE STEIN: - - - of that issue?



1 MR. FERGUSON: Absolutely not, Your Honor. It
2 would be no different than if we make some generalized
3 argument asking for dismissal without articulating it.

4 Here, the People specifically say at the original
5 SORA hearing that they were retracting the arguments
6 related to endangering the welfare of a child. That
7 required them, at the second day of the hearing, after they
8 got the information, to renew that argument. They did not
9 renew the argument. All the argu - - - the only argument
10 they're making at the second day of the SORA hearing was
11 that it was based on conduct, not on the basis of anything
12 else.

13 So we ask this court - - -

14 JUDGE FEINMAN: Can - - - so you said, you've
15 referenced convictions and adjudications. I just want to
16 be clear. You don't dispute that there is - - - and you
17 can see that there is a conviction in New Jersey for
18 lewdness - - -

19 JUDGE RIVERA: Excuse me.

20 JUDGE FEINMAN: - - - what New Jersey calls a
21 felony-level public lewdness.

22 MR. FERGUSON: That's correct, Your Honor.

23 JUDGE FEINMAN: Okay. And - - -

24 MR. FERGUSON: But - - - but - - -

25 JUDGE FEINMAN: - - - none of your argu - - - and



1 you have never argued that you have to actually have that
2 certificate of conviction in evidence before the SORA
3 court?

4 MR. FERGUSON: No, Your Honor. We're not
5 disputing that he has a New Jersey conviction. Although,
6 on the facts of it, one of the interesting things, if you
7 look at the statements of the victim in that case, my
8 client doesn't have three arms. She indicates that with
9 one hand, he's grabbing his genitalia, with the other hand
10 he's giving her and her brother the finger, and with the
11 other hand, he's blowing her kisses. My client doesn't
12 have three hands. So - - -

13 JUDGE WILSON: What is - - - what is the New
14 Jersey statute under which he's convicted?

15 MR. FERGUSON: He's un - - - he's convicted under
16 the public lewdness statute in New Jersey.

17 JUDGE WILSON: The - - - the citation for it?
18 The - - - do you know the statute number?

19 MR. FERGUSON: The statutes are - - - the statute
20 number is in our brief. I will get it for Your Honor for
21 the - - -

22 JUDGE WILSON: It's in the brief? That's fine.

23 MR. FERGUSON: - - - for the rebuttal part of the
24 argument. And we ask this court to reverse the convict - -
25 - the decision of the Appellate Division.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 Counsel?

3 MS. JOYCE: Good afternoon, Your Honors. May it
4 please the court, Jean Joyce for the Brooklyn District
5 Attorney's Office.

6 Your Honors - - -

7 JUDGE STEIN: Was the endangering argument
8 preserved?

9 MS. JOYCE: I would like to broaden the scope of
10 the - - - of the discussion to the fact that under fa - - -
11 factor 9, there are three ways for this court to conclude
12 that thirty points were properly assessed.

13 JUDGE STEIN: Okay, well, we - - - we can get to
14 that. But is endangering one of them in this case?

15 MS. JOYCE: Yes, it is one of them.

16 JUDGE STEIN: So how was it preserved?

17 MS. JOYCE: So first of all, the People are the
18 prevailing party in this case. 470.05(2) does not apply.
19 We were not required to set forth any error of law on the
20 record, nor when - - - nor when this court is faced with a
21 pure question of law, as respondent, were we required to
22 preserve any particular issue that the defendant could not
23 have countermanded factually. In other words, there are no
24 facts at the hearing court level that are up in the air, in
25 dispute.



1 JUDGE STEIN: So it doesn't matter what you argue
2 to - - - to satisfy your burden of clear and convincing
3 evidence to establish thirty points under factor 9; you can
4 bring it up at any time? Even in the appell - - - this
5 court for the first time, can you do that?

6 MS. JOYCE: Under *Sega v. State*, this court is
7 permitted to consider a pure question of law. I think your
8 addressing the narrower point of what - - - what was the
9 meaning of the words spoken by the ADA when she said, I
10 will retract the factual recitation that I made with
11 respect to the Florida conviction. She made a misstatement
12 of fact. She had a piece of paper; she was relying on it.
13 It happened to be the Florida underlying facts.

14 She said, I would like the time to go and get the
15 New Jersey facts. When she did, the court said, okay,
16 let's go; what - - - what are these underlying facts? She,
17 at that point, was not required to say, I now retract my
18 statement that I retracted those facts. She - - -

19 JUDGE STEIN: But - - - but doesn't the defendant
20 have the right to have - - - to be aware that that's
21 something that he needs to be arguing?

22 MS. JOYCE: And certainly, she argued every
23 permissible permutation of what they're arguing on appeal.
24 But I would li - - - like to get to the merits for a moment
25 and say, factor 9, as set forth by the Board, does not



1 require any Article 130 statute to be considered. It could
2 be a sex crime, a sex offense that is not a registerable
3 offense, not an Article 130 offense. It may be - - -

4 JUDGE STEIN: So - - - so if you can show any
5 under - - - under any conduct underlying any crime to be of
6 a sexual nature, would that then - - - well, I assume it
7 would apply not only to foreign offenses, it would apply to
8 New York offenses, right?

9 MS. JOYCE: I'm - - - I'm not talking about
10 conduct. I'm talking about a conviction. This - - - the
11 factor 9 requires - - -

12 JUDGE STEIN: But you - - - but you - - - you
13 said in the SORA court that you were not re - - - you were
14 not relying on the crime of conviction; you were relying on
15 the underlying conduct.

16 MS. JOYCE: Your Honor, I think that is a very
17 narrow and circumscribed interpretation of what the ADA was
18 saying. She was responding to the defense argument that
19 the New Jersey lewdness conviction is not the equivalent of
20 the New York lewdness statute.

21 JUDGE STEIN: So - - - so your - - - you are not
22 asking us to - - - to make a rule that the underlying
23 conduct is sufficient to bring it within the thirty points
24 of the factor 9?

25 MS. JOYCE: No, Your Honor.



1 JUDGE STEIN: Okay.

2 MS. JOYCE: I'm not asking for conduct alone.

3 JUDGE STEIN: Okay.

4 MS. JOYCE: I'm asking the court to exercise its
5 - - - its power to decide a pure question of law and that
6 is whether under factor 9, an out-of-state conviction for
7 fourth degree lewdness, which is a sex offense, and has an
8 element of sexual gratification, conduct toward a child
9 under the age of twelve, and exposure of one's genitals,
10 whether that offense may be given thirty points as either
11 an adjudication of a sex offense - - -

12 JUDGE RIVERA: So it does require looking at the
13 conduct, though.

14 MS. JOYCE: It would - - -

15 JUDGE RIVERA: The whole argument turns on the
16 conduct, because that was the point of the adjournment,
17 right?

18 MS. JOYCE: It was actually defense counsel at
19 the hearing who wanted to know, what is this underlying
20 conduct of this lewdness conviction, because defense
21 counsel - - -

22 JUDGE RIVERA: No, but I'm - - - I'm - - - I'm
23 asking about the People's position.

24 MS. JOYCE: Right, our position is that you look
25 at the elements of the offense for which the defendant was



1 convicted, and this offense has a sexual element.

2 JUDGE WILSON: So in the - - - in - - -

3 MS. JOYCE: An element of a sex offense.

4 JUDGE WILSON: In the record for this case, I'm
5 having a great deal of difficulty finding a document that
6 shows what the crime of conviction was, what the statute
7 number was. Can you point me to it?

8 MS. JOYCE: The statute under which he was
9 convicted was fourth-degree lewdness.

10 JUDGE WILSON: The place in the record where I
11 can find that? In the record before the SORA court.

12 MS. JOYCE: I believe they were relying on the
13 criminal history report where they - - - and there is a
14 lewdness which is a lower count of the - - - of the charge
15 which was set forth in the complaint and warrant, which was
16 actual - - - actually called a tender-year sexual assault.

17 JUDGE WILSON: The complaint and warrant, I see.

18 MS. JOYCE: Right.

19 JUDGE WILSON: And that's a different statute
20 number that he doesn't - - - he's not convicted under, I
21 believe.

22 MS. JOYCE: Right, so I think - - - I think what
23 - - - I think you have to look at how they described it in
24 the record, in terms of what the - - - what the court said,
25 the prosecutor referred to. I have the adjudication. And

1 you know, I don't have that - - - she referred to it, but
2 it's not in the record.

3 JUDGE RIVERA: So - - - so is your argument that
4 if a foreign jurisdiction identifies in some way as an
5 element that the crime is sexual, even if in New York, it
6 is not viewed as a sex crime, that that then fits within
7 the - - - the point allocation - - - put aside right now
8 the departure - - - the point allocation of criminal
9 history?

10 MS. JOYCE: Yes, yes, Your Honor. That's my
11 argument, that - - -

12 JUDGE RIVERA: What's the support for that?

13 MS. JOYCE: Well, if you look at - - - there's a
14 couple of way - - - a couple of ways to get - - -

15 JUDGE RIVERA: Yeah.

16 MS. JOYCE: - - - to get there. First of all, in
17 - - - in the guideline itself, the only place in the
18 guideline where it states that a penal law offense must be
19 considered is in the commentary; that's page 14 of the
20 commentary for factor 9, where the Board said, if you - - -
21 if you have a violent felony, that means Penal Law 70.02.
22 So clearly the Board, if they had wanted to say, six set -
23 - - misdemeanor sex crimes come under Article 130, sex
24 offenses come under Article 130 or registerable offenses,
25 they knew how to do that.



1 Moreover, in this court's decision in People v.
2 Izzo, you looked at factor 3. And similarly, the argument
3 was, well, factor 3 has to be - - - there has to be a
4 registerable offense. And the court said no, absolutely
5 not. The - - - the language was much broader, it referred
6 to sexual conduct; therefore, we're not going to limit the
7 Board.

8 Third - - -

9 JUDGE STEIN: But did - - - did - - - does - - -
10 did it refer to conduct here - - -

11 MS. JOYCE: No, no, no.

12 JUDGE STEIN: - - - in - - - in this - - -

13 MS. JOYCE: I'm not - - - I'm not relying on the
14 word conduct. I'm saying it's - - - the Board set forth
15 generic - - - generic categories of crimes. Misdemeanor
16 sex crimes, sex offenses - - -

17 JUDGE RIVERA: Well - - -

18 MS. JOYCE: - - - which is very broad.

19 JUDGE RIVERA: But in your - - - but in your own
20 brief, you've attached the guidelines, and for factor 9, it
21 only refers to convictions or adjudications, and in fact,
22 "convictions or adjudications" is actually underlined in
23 this section. Where - - - where does it say that conduct
24 is all we need to look at?

25 MS. JOYCE: No, it does not say that.



1 JUDGE RIVERA: Okay.

2 MS. JOYCE: It does - - - I'm saying that in
3 factor 3, in the Izzo case, this court rejected the notion
4 that the - - - the guideline required a - - - an offense
5 under 162-a. The Board didn't say that this court held.
6 The - - - the Board was much, much broader by merely
7 referring to conduct. I'm not importing that into factor
8 9.

9 JUDGE RIVERA: But that factor 3 is about number
10 of victims, right - - -

11 MS. JOYCE: Right, and I'm not - - -

12 JUDGE RIVERA: But whereas - - - excuse me - - -
13 factor 9 is about a criminal history and speaks
14 specifically one could look up on the criminal history - -
15 -

16 MS. JOYCE: Right.

17 JUDGE RIVERA: - - - of that particular
18 individual who's coming up for classification.

19 MS. JOYCE: That's correct, and you've - - -

20 JUDGE RIVERA: So - - - but let me ask you this.

21 MS. JOYCE: Sure.

22 JUDGE RIVERA: What - - - what, from the People's
23 perspective, is the danger in pursuing the proper
24 classification in the way counsel is advocating for us to
25 read the statute, which is convictions or adequate - - -



1 adjudications, you do your point scale, he concedes that
 2 his client's got to get some points, because indeed he's
 3 convicted for this crime in New Jersey, but anything else,
 4 about the conduct and the sexual nature of it that perhaps
 5 doesn't fit it easily within any of these numerical
 6 categories under factor 9, you have the opportunity, both
 7 the Board and the People, to argue for an upward departure,
 8 and present all of that conduct, make the argument?

9 It's the same standard, right? The clear and
 10 convincing evidence standard? What - - - why is the People
 11 - - - what would make this difficult for the People to - -
 12 - to pursue that, if - - - if we were persuaded by this way
 13 of advocating the interpretation of the statute?

14 MS. JOYCE: It's - - - it's not a matter of
 15 what's easier, whether we did an upward departure or not.
 16 It's that how are you going to recognize out-of-state
 17 convictions that have a sexual element in them that is - -
 18 - you know, New Jersey, a sister state, says look, this
 19 fourth-degree lewdness, you know, ag - - - against a child
 20 is a sex offense. It is labeled a sex offense. It - - -
 21 it comes within the definition of sex offenses.

22 JUDGE RIVERA: I thought his point is that in New
 23 York, it's not a sex offense.

24 MS. JOYCE: But that doesn't matter. The court -
 25 - -



1 JUDGE RIVERA: And so that allows the People
2 and/or the Board to argue for the upward departure, because
3 the point scale will not fully represent the nature of the
4 risk, because it won't capture this aspect of the
5 conviction.

6 MS. JOYCE: Right, but that's not as - - -

7 JUDGE FEINMAN: Now, I think the - - - the - - -

8 MS. JOYCE: - - - guaranteed.

9 JUDGE FEINMAN: - - - concern is, is that you're
10 - - - you - - - you basically two ways to do this. You
11 want a flexible accounting of points, and then you also
12 want to be able to use the upward-departure method. And I
13 don't know that that's really how the guidelines are
14 written.

15 MS. JOYCE: So the guidelines are written with -
16 - - with really one main purpose, and that is, to assess
17 the risk of reoffense, and to be aware and assess the har -
18 - - the potential harm to victims. And if you just look at
19 this particular set of facts, this defendant committed this
20 lewdness crime in New Jersey, and then went on and
21 committed the higher offense in Florida, of an actual
22 groping and sexual touching of a ten-year-old child.

23 So he should have got those points, I think, in
24 order to properly weigh his - - - his assessment.

25 JUDGE RIVERA: But that's what the - - - that - -



1 - the guidelines clearly say that's the problem with the
2 point scale. It may not capture exactly what you're
3 referring to, the nuances about someone's particular risk,
4 because of course, it's the SORA-eligible crime that you
5 start with, so in that sense, the - - - the Board has
6 already taken into consideration the point that you are
7 making and responded to it.

8 MS. JOYCE: Well, not en - - - not entirely,
9 because going forward, we have to look at what's his, you
10 know - - - if he had stayed in New York, what would his
11 future potential risk of harm be, and his risk offending,
12 and I - - - of reoffending, I think will be very - - - very
13 high.

14 JUDGE STEIN: And had - - - and had you - - - had
15 - - - well, if the endangering argument was properly made
16 and preserved, that would provide another way to - - - to
17 get the points, rather than to have to go based on the
18 upper departure, right?

19 MS. JOYCE: I mean - - -

20 JUDGE STEIN: Possibly.

21 MS. JOYCE: If you - - - if you wanted - - - if
22 you felt that an - - - an el - - - equivalent element's
23 test, sort of the North v. Board test, was appropriate,
24 yes, this would have been endangering in - - - in New York.
25 But I don't think the Board should be limited to New York



1 crimes.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 MS. JOYCE: Thank you, Your Honors.

4 CHIEF JUDGE DIFIORE: Counsel?

5 MR. FERGUSON: A couple of points.

6 Your Honor, it's - - - N.J.S.A. 2C:7-2 is the New
7 Jersey public lewdness crime.

8 The People make the argument that make - - -
9 actually make - - -

10 JUDGE FEINMAN: And just to be clear, you don't
11 dispute that everybody is operating on the concession that
12 he was convicted.

13 MR. FERGUSON: Oh, he was convicted; there's no
14 question.

15 JUDGE FEINMAN: Okay.

16 MR. FERGUSON: There's no question.

17 But as to the point that the People are making
18 about that this was - - - that - - - the People's argument
19 where they retracted, it was in reference to the Florida
20 case, that's not true. A-22 is when they're referring to -
21 - - of our appendix - - - is when they're referring to the
22 Florida matter. It is A-26 when counsel is arguing that
23 there was no allegation of endangering the welfare of a
24 child in New Jersey, and that that is when the People say,
25 we retract all of those statements.



1 So they have specifically retracted, in the SORA
2 court, the argument that this was endangering the welfare
3 of a child. And they shouldn't get a second bite of the
4 apple as to that because they had the opportunity to do it,
5 at the renewed SORA hearing, and they didn't do it. Their
6 argument is not preserved. The People can't turn around
7 and say that this is just a question of law and that we
8 don't have to make the arguments. That's - - - it's
9 applied to us as the criminal defendants uniformly that we
10 have to make the arguments.

11 Here, they didn't make the argument. All they
12 argued with - - - was that it was conduct, and as Judge
13 Rivera just pointed out, that's not what's contained in the
14 Correction Law. What's contained is adjudications and
15 convictions. And the - - - as to - - -

16 JUDGE RIVERA: So just to be clear, does New
17 Jersey classify public lewdness as a sex crime?

18 MR. FERGUSON: It is a nonregisterable offense,
19 as it is in New Jersey, just as public lewdness is a
20 nonregisterable offense in New York. And this court in
21 McNamara understood that it is a different classification,
22 a public lewdness than other types of crimes, and - - -

23 JUDGE RIVERA: But is there a sexual element to
24 the crime, under New Jersey law?

25 MR. FERGUSON: Under New Jersey law, yes, there



1 is. But again, and when you look at the Appellate
2 Division's decisions in LaPorte, in Davis, and Brown, they
3 all looked at public lewdness, and each of those courts
4 conceded that this was a crime that had a sexual component,
5 but that it was not a misdemeanor sex crime. For thirty
6 points to count, it has to be a misdemeanor sex crime, and
7 - - - and it's not just a semantic thing. It has to be a
8 misdemeanor sex crime, not a crime that has a sexual
9 component.

10 The cr - - - with the exception of this outlier
11 decision by the Second Department here, every recorded
12 Appellate Division case on this issue has come to the
13 conclusion that public lewdness in New York is not a
14 misdemeanor sex crime; therefore, he should not have been
15 assigned thirty points for this.

16 And that as a result, once you took that away, he
17 should be adjudicated a level 1 offender.

18 Thank you, Your Honors.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 (Court is adjourned)

21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 The People of the State of New York v. Jose Perez, No. 20 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: February 19, 2020

