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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 199

THOMAS BROWN,

Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 200

JOSEPH HARRIS,

Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 201

DARNELL CARTER,

Appellant.

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Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Thomas Brown, Joseph
2 Harris, Daniel Carter; 199, 200, 201.

3 Go ahead, counselor. Do you want any
4 rebuttal time, counselor?

5 MS. GOETZ: Yes, I'd like to reserve one
6 minute, please.

7 CHIEF JUDGE LIPPMAN: One minute. Go
8 ahead. You represent Brown, right?

9 MS. GOETZ: Good afternoon. On behalf of
10 Thomas Brown, I'm Lily Goetz.

11 CHIEF JUDGE LIPPMAN: Go ahead.

12 MS. GOETZ: The prosecutor's burden-
13 shifting summation in this case deprived Thomas Brown
14 of a fair trial, but I'd like to concentrate my
15 argument today on the sentencing point. A sentencing
16 judge lacks discretion to impose a consecutive term
17 for weapon possession where, as here, there is no
18 proof beyond a reasonable doubt that the perpetrator
19 possessed a gun at any time other than - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but - - -

21 MS. GOETZ: - - - during the shooting.

22 CHIEF JUDGE LIPPMAN: But the possession -
23 - - the (2) is now a C felony for a reason, right?
24 It was changed, and it's now a C felony.

25 MS. GOETZ: It is, Judge. The legislature,

1 indeed - - -

2 CHIEF JUDGE LIPPMAN: Right, so what do you
3 have to show for possession to - - - for that C
4 felony?

5 MS. GOETZ: For the simple possession?

6 CHIEF JUDGE LIPPMAN: Yeah.

7 MS. GOETZ: The elements remain the same,
8 Your Honor, that a defendant need not possess any
9 intent to use that weapon unlawfully, but simply
10 possess a gun outside the home or place of business.

11 JUDGE GRAFFEO: There's no mens rea
12 requirement?

13 MS. GOETZ: There's a knowingly element to
14 the possession, but there's no intent - - - there's
15 no necessary intent to use unlawfully.

16 JUDGE SMITH: The mens rea is you know
17 you've got a gun.

18 MS. GOETZ: Right, and that - - - and that
19 it be operable.

20 CHIEF JUDGE LIPPMAN: So how does that
21 contrast with murder or attempted murder?

22 MS. GOETZ: I'm not sure I understand your
23 question, that there's no overlapping specific
24 intent, is that - - -

25 CHIEF JUDGE LIPPMAN: Well, is there?

1 MS. GOETZ: Well, there's no - - - in this
2 case, the weapon possession charge here does not have
3 the same overlapping intent element as the court
4 considered in the Wright, where this court found that
5 even where the defendant in that case possessed a
6 weapon for a period of time longer than - - - than
7 moments, the - - - the intent necessary for the
8 weapon possession was proved only upon the discharge
9 of that weapon during the murder, during the
10 shooting.

11 JUDGE GRAFFEO: The crime of weapon
12 possession wasn't completed the minute he walks out
13 of the house with - - - knowing he has the gun?

14 MS. GOETZ: In Mr. Brown's case or in the
15 Wright case?

16 JUDGE GRAFFEO: I'm just asking generally.

17 MS. GOETZ: First of all, it's possession
18 of a loaded operable gun, right?

19 JUDGE GRAFFEO: Okay.

20 MS. GOETZ: So - - -

21 JUDGE GRAFFEO: So if he walks out of the
22 house knowing he has a loaded operable gun, is that -
23 - - has the commission of that crime been completed?

24 MS. GOETZ: If that is sufficiently
25 distinct and separate from the use of that weapon at

1 a later time, then yes, that is a separate intent.

2 JUDGE SMITH: But you're saying there's no
3 - - - I mean, he presumably did walk somewhere with
4 the gun, but you're saying there's no proof here that
5 he walked - - - ever walked out of his house with a
6 gun.

7 MS. GOETZ: Right, Judge, exactly; there's
8 no proof at all. In fact, there's merely speculation
9 to support any conclusion, any inference that there's
10 possession of a loaded weapon at a time that's
11 sufficiently distinct from the use of that gun in
12 order to - - -

13 JUDGE SMITH: But how - - -

14 MS. GOETZ: - - - warrant a separate
15 punishment.

16 JUDGE SMITH: How does this tie into the
17 statute? What are you saying here, that the act of
18 possessing the weapon was an element of the murder?

19 MS. GOETZ: This court need not find that
20 possession of the gun was a necessary element of the
21 commission of the murder. But what this court should
22 determine - - -

23 JUDGE SMITH: Or was it that it was
24 committed by the same act? I mean, we've got to
25 apply the statute somehow.

1 MS. GOETZ: Right, so the statute has two
2 portions. One is this overlapping element, the
3 material element of one crime - - - an act of one
4 crime is a material element of another. But what
5 this court - - - in this case, the issue is really
6 whether this particular - - - these two crimes are
7 committed within the same act. And - - -

8 JUDGE SMITH: So you're making a single-act
9 argument, not an element argument.

10 MS. GOETZ: Right, Judge. But here, in
11 fact, we do have almost an overlapping element
12 argument, because there's no proof that this gun was
13 loaded and operable at any time other than when it
14 was discharged. There's no proof, there's no
15 confession in this case by Mr. Brown that he
16 supposedly carried a gun at - - - you know, a loaded
17 gun with him at all times.

18 JUDGE SMITH: In Wright, we said that the
19 actus reus for possession with intent to use
20 unlawfully is essentially - - - you have one act - -
21 - as long as you have one intent; and if you change
22 the intent you have a new act. What's the analog
23 here? How many - - - suppose he had this gun for six
24 weeks, how many actus rei do you have?

25 MS. GOETZ: Well, Judge, this court has

1 already considered a similar issue in the Johnson
2 case, which is a six-day period. That's one
3 continuous possession. And this court has repeatedly
4 held, in assessing the interplay between a possessory
5 offense - - -

6 JUDGE SMITH: But you're not saying that if
7 he had the gun for six days, there could be no
8 consecutive sentencing, or are you?

9 MS. GOETZ: Well, I think six days is a
10 temporally distinct time. That's clear - - -

11 JUDGE SMITH: So I think that's a no.

12 MS. GOETZ: - - - that's six days.

13 JUDGE SMITH: You're not saying that.

14 You're saying - - -

15 MS. GOETZ: Right.

16 JUDGE SMITH: You're saying what makes this
17 - - - the consecutive sentencing bad here is all you
18 have is that he possessed a gun and shot it at the
19 same moment.

20 MS. GOETZ: Right, Judge, exactly. And if
21 there were evidence in the record, in this case, that
22 there was a possession at a time and a place and in a
23 nature and manner of use that was distinct from the
24 use of the gun here, that would be sufficient,
25 potentially.

1 want to follow up on this - - - on the pleading issue
2 in the case, because I think it's outcome
3 determinative here. This case was charged, as the
4 People chose to charge it, and it was proved
5 according to what the People charged it as. In the
6 bill of particulars it charged but a single
7 occurrence for all four offenses here, and that
8 controls what the sentencing court can do in making
9 the legal determination, under 70.25(2). The Court
10 can't override what the jury found and say, well, the
11 bill of particulars may have charged but a single
12 occurrence, the jury may have found one, but now we
13 want to say there is more than one act here. So this
14 case can be determined solely on those grounds
15 entirely.

16 And Judge Smith, I want to follow up on
17 your question about the actus - - - the actus rei
18 here. I'm not sure what the Latin - - -

19 JUDGE SMITH: Actus rei; I checked it.

20 MR. NOSEWICZ: We can do the declension
21 later, maybe.

22 The problem with simple possession is that
23 it's essentially a passive crime. It's defined, as
24 this court has said, in terms of dominion and
25 control. And that's why it's so hard to draw lines

1 here. This court has confronted this issue before,
2 particularly in the Brown case, more than twenty
3 years ago. And it said, when it comes to possession
4 offenses that are, quote, "so naturally or inherently
5 interrelated, as a later offense, it's very hard to
6 draw a line".

7 JUDGE PIGOTT: So you agree with your
8 counsel there that really we've got to be looking at
9 these through the prism of the pleadings?

10 MR. NOSEWICZ: Absolutely, Judge Pigott. I
11 think there can be no dispute that the sentencing
12 court can't override what the jury found. And what
13 the jury found is controlled by the bill of
14 particulars. And that's particularly helpful in this
15 case because we know there was a possession eleven
16 days later. And of course, eleven days later, Judge
17 Smith, that can be consecutive. He could have been
18 prosecuted for that.

19 JUDGE SMITH: What about eleven minutes?

20 MR. NOSEWICZ: I don't - - - Judge, I think
21 - - - first of all, there's no proof of that here.

22 JUDGE SMITH: You haven't even got the
23 eleven minutes, but if you did, would it be a
24 different case?

25 MR. NOSEWICZ: I think when it comes only

1 to time, as the only differentiating thing, for a
2 passive crime like this, it puts so much pressure on
3 it that it's difficult to draw a bright line. And
4 this court has dealt with the single-act consecutive
5 cases, case by case.

6 JUDGE SMITH: Well, what about - - - well,
7 aren't you suggesting a bright line, in a way?
8 You're saying if they're sim - - - if they're really
9 sim - - - if you have no proof of possession except
10 during the shooting, it's a single act. But if you
11 do have proof outside of that time period, it's not,
12 even if it's ten minutes?

13 MR. NOSEWICZ: Well, Judge, that's a bright
14 line drawn by the statute which says a single act,
15 the judge has no discretion. There has to be - - -

16 JUDGE SMITH: Okay. But well - - - but I
17 mean, have I correctly stated your interpretation of
18 the statute?

19 MR. NOSEWICZ: Well, I do want to hesitate
20 to put a time limit in there; I think it does have to
21 be case by case. And the good thing about time is
22 that the more it passes, the more things happen in
23 them. So I think it's going to be a rare case where
24 you have someone standing stock still with a gun for
25 hours and not doing anything else. The more time

1 passes, the more chances there'll be a different
2 location, and we start to get into the Salcedo case
3 or there'll be a different intent. There'll be
4 additional things that happen. And then we'll have
5 the clear, sharp, factual distinctions that this
6 court has always relied on in this context.

7 JUDGE SMITH: Why shouldn't the rule be,
8 and why wouldn't you win the case if it were - - -
9 why shouldn't the rule be that all the cases you've
10 put can be consecutive but not the case where all you
11 have is possession during the act?

12 MR. NOSEWICZ: Absolutely, that's the rule,
13 and I think that's why we would win here. But the
14 People have also made this argument that there is
15 this time element, and I think the court shouldn't
16 even reach that because that's not what the pleadings
17 said here. And again, that goes to how this was a
18 surprise at sentencing. It was not alleged, it was
19 not proved, it wasn't argued in summation, and it was
20 not part of the jury instructions.

21 And the quantum of proof here is so low,
22 there was an offhand statement by the complainant
23 that he had been there for, quote, "about twenty
24 minutes, maybe". That was the only time time came
25 up. Everything else he said was I was paying no mind

1 to what Mr. Harris was doing; it happened all of a
2 sudden. So even if the court wanted to somehow let
3 the sentencing judge override what the jury found,
4 there isn't enough proof here to do it.

5 And I think what the - - - the court, as I
6 said, has addressed these issues before about
7 possession, and I think it should be guided by what
8 Justice Potter Stewart said that these issues about
9 double punishment should be determined by realism and
10 rationality. That's what the court has done in the
11 past - - -

12 CHIEF JUDGE LIPPMAN: Okay, counselor.

13 MR. NOSEWICZ: - - - and it's what it
14 should continue to do.

15 CHIEF JUDGE LIPPMAN: Thanks, counselor.
16 You'll have your rebuttal.

17 Counselor, you have three minutes. Do you
18 want to give any of them up for rebuttal?

19 MS. BOWMAN: I don't, judge. I'm going to
20 give it all right now.

21 CHIEF JUDGE LIPPMAN: Okay, go, three
22 minutes.

23 MS. BOWMAN: Mary-Jean Bowman, representing
24 Darnell Carter on the same issues as co-counsel
25 basically - - -

1 CHIEF JUDGE LIPPMAN: Yeah.

2 MS. BOWMAN: - - - put forth.

3 CHIEF JUDGE LIPPMAN: Go ahead.

4 MS. BOWMAN: In my case, Judge, there was
5 no testimony by any of the witnesses that the gun was
6 used in any other act other than the shooting of the
7 victim. There was no testimony that - - - even
8 though I believe the People argued it was in his
9 waistband and that was sufficient, I would say that,
10 again, was not argued to the jury, it was not
11 requested at sentencing, and there was no testimony
12 that anyone saw - - -

13 JUDGE ABDUS-SALAAM: Well, would it have
14 been sufficient if it had been argued?

15 MS. BOWMAN: Arguably, I think it would,
16 Judge, because I think under some of the cases,
17 Tavares and Laureano, the People have the burden of
18 proving that separate act or intent. And if they had
19 made that argument or pointed that out at sentencing
20 or at jury instructions, I think that would have been
21 sufficient. But none of that was brought up until we
22 got to this level. And to go back now and say that
23 that's what the jury found, I don't think we can
24 disturb that. There was no separate testimony
25 indicating that the defendant brandished the weapon,

1 pointed it at anyone else, even a simple lifting of
2 the waistband to show someone else that he possessed
3 it, nothing of that sort until the shooting and the
4 robbery actually occurred. And that's why, in this
5 case, I don't think Wright has been satisfied. There
6 was no proof of simple possession, separate and apart
7 from the shooting which resulted in the murder of the
8 victim.

9 CHIEF JUDGE LIPPMAN: Okay, counselor,
10 anything else?

11 MS. BOWMAN: No, Your Honor.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 MS. BOWMAN: Thank you.

14 CHIEF JUDGE LIPPMAN: Counsel?

15 MR. FONCELLO: Good afternoon, may it
16 please the court. Martin Foncello on behalf of the
17 People of the State of New York.

18 Just to be clear, of course, the burden on
19 the People here is at sentencing to show some
20 identifiable basis in the record that would support
21 consecutive sentences. This court has said so in
22 People v. Laureano as well as in the Ramirez case.

23 CHIEF JUDGE LIPPMAN: Where is it? Where -

24 - -

25 MR. FONCELLO: With respect to this case,

1 People v. Thomas Brown, the evidence shows, and you
2 have to use common sense, that the defendant goes out
3 at night to a nightclub. We know he goes into the
4 club without a gun on his person at that time. And
5 we all know that because they have security. Both
6 prosecutor and defense attorney argue that to the
7 jury. We know he has a gun at the moment of the
8 shooting. So where does the gun from in between?

9 JUDGE SMITH: He obviously had it before
10 the shooting. Did the jury find he had it before the
11 shooting?

12 MR. FONCELLO: It's our position the jury
13 does not have to find that he had it before the
14 shooting - - -

15 JUDGE SMITH: You've got - - -

16 MR. FONCELLO: - - - because he - - -

17 JUDGE SMITH: He has to be convicted of the
18 crime he was sentenced for, doesn't he?

19 MR. FONCELLO: Of course, in a simple
20 possession crime, since it's continuing in nature,
21 he's being charged with it such that it covers this
22 entire broad period of time. So I think your
23 question is getting at is how do we know what the
24 jury found in particular. We've never before asked
25 for special verdicts to establish, for sentencing

1 purposes, that the crimes were separate and distinct.

2 JUDGE SMITH: Well, we have said that if
3 you're looking for consecutive sentencing, you better
4 be sure you prove - - - you prove the separate crimes
5 at trial.

6 MR. FONCELLO: And we have done so here,
7 because again, the proof shows that the defendant has
8 to get the gun from his car during this interim
9 period of time. There's a continuous chain of events
10 from the club to the shooting, and the only thing in
11 the interim is the car, the van.

12 JUDGE SMITH: Would you concede, if you had
13 - - - if all you had was testimony to - - - a guy
14 walks up to another one and shoots him, and all the
15 eyewitness saw was the shooting, can you get
16 consecutive sentencing for the gun and the shooting?

17 MR. FONCELLO: I think in a case where all
18 the evidence is the person walking up, pointing,
19 aiming and firing, that consecutive sentences would
20 not be appropriate, because in that case the
21 possession of the gun seems to be incidental to the
22 act of the shooting. That's going back to the
23 statutory analysis where we're focused on the act
24 itself. But when you have a case like this one here
25 where it's actually the opposite, it's like the

1 shooting is incidental to his continuous possession
2 of the gun, consecutive sentences are appropriate.

3 JUDGE SMITH: I mean, even in the case I
4 put, where a guy walks up to someone and shoots him,
5 it's a rather obvious inference that he had the gun
6 when he started walking.

7 MR. FONCELLO: I agree that that is an
8 inference that can be drawn from that.

9 JUDGE SMITH: So - - -

10 MR. FONCELLO: In our case we have - - -

11 JUDGE SMITH: So I guess where - - - yeah,
12 does your rule leave any cases where consecutive
13 sentencing is inappropriate?

14 MR. FONCELLO: I think we already
15 articulated, it would be inappropriate if all the
16 evidence is the person walking up, pointing, aiming
17 and firing.

18 JUDGE SMITH: Well, how is that case
19 different from your case when you draw an inference,
20 a perfectly clear inference, an obviously correct
21 inference that he had the gun before?

22 MR. FONCELLO: Well, I think we should
23 remember in our case that the evidence is not just
24 limited solely to the shooting and this continuous
25 chain of events. When they're having the

1 disagreement, the verbal disagreement outside the
2 night club, the defendant gestures to the waistband
3 as if he has access to a gun. So that right there is
4 proof that the jury could have found this is a guy
5 who has a gun. And we know that they ended up
6 finding that - - -

7 JUDGE SMITH: Well, we - - -

8 MR. FONCELLO: - - - because he has a gun.

9 JUDGE SMITH: They could have found he had
10 a gun then. Did they find he had a gun at any moment
11 other than the moment he pulled the trigger?

12 MR. FONCELLO: Again, the difficulty with
13 any general verdict is going to be you cannot parse
14 to determine what exactly the jury did find, unless
15 there was some limitation in the way they were
16 charged.

17 JUDGE SMITH: Whose problem should that be?

18 MR. FONCELLO: And I look at People v.
19 Salcedo - - -

20 JUDGE SMITH: Why should that be - - - that
21 be your problem and not theirs? You could - - - you
22 could certainly have asked for a - - - for a special
23 verdict, for an instruction.

24 MR. FONCELLO: Well, special verdicts - - -
25 there's no provision for them in the CPL. This court

1 has historically actually frowned upon use of special
2 verdict forms.

3 JUDGE SMITH: Then I take it back.

4 MR. FONCELLO: If that's something the
5 court would approve - - -

6 JUDGE SMITH: How about an instruction?

7 MR. FONCELLO: Again, there's no - - - we
8 have never seen the need previously for an
9 instruction, because it's been the law that you only
10 need to show some identifiable basis in the record at
11 sentencing to establish consecutive sentences.

12 JUDGE GRAFFEO: What about the pleading
13 point?

14 JUDGE RIVERA: With respect to your
15 argument about the waistband, I thought your position
16 was that he had to have had this gun in the van
17 because when he was in the club he had gone through
18 security and he couldn't possibly have the gun.

19 MR. FONCELLO: That's - - -

20 JUDGE RIVERA: So how does the waistband
21 movement help your argument?

22 MR. FONCELLO: That's absolutely true. The
23 waistband movement is - - - you know, it's part of
24 the - - - the two men, of course, they're exchanging
25 - - - you know, I guess it's bravado, they're

1 exchanging words. It's an indication that look, I
2 have access to a gun, I have one. We're all agreeing
3 that he doesn't one on him at that time, but that
4 sort of helps to show that it's not as if, I mean, a
5 gun had dropped - - -

6 JUDGE ABDUS-SALAAM: But he could have been
7 - - -

8 MR. FONCELLO: - - - out of the sky at that
9 point.

10 JUDGE ABDUS-SALAAM: - - - pointing to a
11 belt. He had access to a belt, then he could have
12 taken that out and beaten the guy, not a gun.

13 MR. FONCELLO: I guess - - - I mean, it's
14 always subject to your own interpretation of it, but
15 I think the only reasonable way to view the evidence
16 is that during this unbroken chain of events, the
17 only place the defendant could have gotten a gun was
18 from the van, and that would support the imposition
19 of consecutive sentences.

20 JUDGE READ: What about Ms. Goetz's
21 pleading point?

22 MR. FONCELLO: Oh, the pleading point, I
23 think - - - with all due respect, I think it's
24 actually a red herring because since we're only
25 concerned about - - - not about being proven to the

1 jury beyond a reasonable doubt, the only concern here
2 is whether there's an identifiable basis in the
3 record to support consecutive sentences. And that's
4 why I wanted to turn this court to People v. Salcedo,
5 which is a case where the court found you could have
6 consecutive sentences for possession with the intent
7 to use unlawfully and a subsequent shooting, based on
8 evidence that the defendant, you know, corners the
9 ex-girlfriend into a bodega, first is threatening to
10 try to get her to leave with him, and ends up
11 shooting and killing her. Now, I haven't seen - - -
12 I haven't looked at the record in that case, haven't
13 looked at the jury verdict, but I have a tough time
14 believing that it was clear from the verdict that the
15 jury found that there was this two different - - -
16 this change in mental state - - -

17 JUDGE PIGOTT: Is there a difference - - -

18 MR. FONCELLO: - - - because the arguments
19 could have been made to the jury and the evidence
20 could support that, and the prosecutor surely made
21 that argument to the judge in sentencing. But this
22 court was able to come to that conclusion on appeal,
23 just as we ask you to do here.

24 JUDGE PIGOTT: Is there a difference, in
25 your view - - - a number of years ago we had cases

1 where judges were enhancing sentences based upon a
2 finding of some factor that would make it - - - make
3 it an enhanced sentence. And the courts have
4 generally said that's for a jury to determine; you
5 can't take a jury verdict and enhance it based upon
6 something that a judge finds. Aren't we in the same
7 kind of area here?

8 MR. FONCELLO: I think you're hinting at an
9 Apprendi issue - - -

10 JUDGE PIGOTT: Right.

11 MR. FONCELLO: - - - which of course is not
12 preserved. But for the purposes of the merits of the
13 Apprendi issue, the Supreme Court has already
14 resolved that issue in - - -

15 JUDGE PIGOTT: How about - - - here, what
16 I'm suggesting to you is that if you - - - if you
17 plead and prove one thing and say it's a general
18 verdict, we don't know what the jury decided,
19 specifically, but the judge says, well, I'm deciding
20 that; I'm deciding that there are two separate acts
21 here that deserve a consecutive sentence.

22 MR. FONCELLO: Well, I mean, I think we
23 expect the judge is going to make some finding in
24 that respect to support the imposition of consecutive
25 sentences so at least there's a basis to review it on

1 appeal. So I don't think they can fault us for doing
2 that or fault the judge for doing so.

3 JUDGE PIGOTT: No, I'm not faulting; I'm
4 just saying is there a parallel there?

5 MR. FONCELLO: I can see the argument, but
6 again, at least the Supreme Court decision, which is
7 addressed at Oregon v. Ice, the court resolved that
8 there's been no historical practice of juries in
9 determining sentences with respect to consecutive and
10 concurrent, so there's no reason to put fact finding
11 that's a predicate to making that determination.

12 JUDGE SMITH: Okay, counselor. Thank you,
13 counselor.

14 Counsel?

15 MS. FRIEDMAN: May it please the court. My
16 name is Ellen Friedman, representing the People in
17 the Harris case.

18 I'd like to start by saying that it's kind
19 of an unusual position here because I don't think
20 there's a disagreement on what the general rule is.
21 As you articulated pretty well before, you can have
22 consecutive sentences except where all you have is
23 possession during the subsequent crime, during the
24 shooting. And here that's not what happened. The
25 defendant was at the scene of the shooting about

1 thirty minutes prior to it. He was there before the
2 victim happened to arrive, happened to stop because
3 he saw somebody he knew; he stopped to talk. That
4 thirty minutes creates a temporal distinction where
5 he was standing there putting everybody at risk. It
6 shows that he - - - whatever his purpose was - - - I
7 don't know what his purpose was, initially possessing
8 the gun, but I know it wasn't to shoot Leonard Lewis
9 because he didn't know Leonard Lewis would be there.
10 It - - - there's a - - -

11 JUDGE SMITH: How - - -

12 MS. FRIEDMAN: - - - common sense analysis
13 here.

14 JUDGE SMITH: How do we know he had the gun
15 all that time?

16 MS. FRIEDMAN: We know he had the gun all
17 that time because the gun was with him eleven days
18 later when he was arrested. It was his gun. It
19 wasn't a gun that somebody lent him at the last
20 minute. It wasn't a gun that he found in a trash can
21 that was in a hiding place that he then returned. It
22 was his gun that he had with him eleven days later
23 when he was hiding in his friend's apartment.

24 JUDGE SMITH: That he had it eleven days
25 later doesn't seem like an absolutely conclusive

1 proof that he had it half an hour before.

2 MS. FRIEDMAN: There's no other reasonable
3 interpretation there. There's - - - to say that
4 somebody might have handed him the gun is like saying
5 it might have fallen from the roof of a nearby
6 building. There are lots of things you can imagine
7 that might have happened - - -

8 JUDGE SMITH: I guess - - -

9 MS. FRIEDMAN: - - - but there's no other -
10 - -

11 JUDGE SMITH: But aren't you - - -

12 MS. FRIEDMAN: - - - reasonable
13 interpretation.

14 JUDGE SMITH: But aren't you - - - doesn't
15 the argument you're now making make the - - - the
16 rule, as you stated it at the outset, almost
17 meaningless, because it's in every case, or virtually
18 every case the shooter is going to have had the gun
19 sometime before the shooting.

20 MS. FRIEDMAN: I don't think that's - - -
21 that's true, Your Honor. I think that there are many
22 cases you can think of where the possession would be
23 just incidental to the shooting or whatever the other
24 crime is. Sturkey is a little bit unusual because
25 we're not talking about a shooting - - - People v.

1 Sturkey; we're talking about a robbery where the gun
2 was the fruit. In that case, the court had no
3 problem saying, hey, that's one act. That - - - yes,
4 he possessed the gun, he had dominion and control
5 over it, but it was incidental to the other crime.

6 Another situation - - - there was a case a
7 long time ago called People v. Perez, and it wasn't a
8 consecutive sentencing holding, although the issue
9 was discussed, and it was a knife case and they said
10 - - - the evidence showed that somebody handed him
11 that knife, that he then turned around and used it in
12 a robbery. The Court said, you know what, that's
13 nothing more than incidental, that's too close,
14 that's one act.

15 Those aren't what happened here. There are
16 plenty of cases where you can say you know what, he
17 had the gun with the intent to shoot the guy, he
18 turned around and he shot him. But that's not what
19 happened here.

20 CHIEF JUDGE LIPPMAN: Anything - - -

21 MS. FRIEDMAN: A - - -

22 CHIEF JUDGE LIPPMAN: Go ahead, counsel,
23 proceed.

24 MS. FRIEDMAN: A person who possesses a
25 loaded gun in public, when it's not just incidental

1 to another crime, is posing a danger to everybody
2 there. There's a reason why the legislature raised
3 the level of the crime. There's a reason why people
4 who possess guns in public are given prison
5 sentences, even if those people are the same people
6 who then commit a separate crime. As long as - - -

7 JUDGE RIVERA: So you're saying the
8 difference here is fortuitous?

9 MS. FRIEDMAN: It was absolutely
10 fortuitous. He was there on the corner with a gun
11 before he knew that Leonard Lewis was going to be
12 there driving by, stopping because he saw his friend.
13 His intent changed at that point, it must - - - at
14 some point after he arrived to shoot him, because the
15 opportunity to shoot him didn't arise until after he
16 had already possessed the gun.

17 JUDGE RIVERA: There's no other opportunity
18 - - - at least the record doesn't show any other
19 opportunity to get this gun as soon as he identifies
20 Lewis going by in the car.

21 MS. FRIEDMAN: There's no other - - - yeah,
22 there's no other reasonable way - - -

23 JUDGE RIVERA: No enough time - - -

24 MS. FRIEDMAN: - - - to read the evidence.
25 Also, I just want to point out that although the

1 victim's testimony did make clear that the defendant
2 was there when he arrived, it wasn't the only
3 evidence. The - - - the phone records also show that
4 he was there at the scene of the crime before - - -
5 well before the shooting, thirty minutes before.

6 And I think, as you alluded to before, the
7 difference in Wright is because that was a possession
8 with intent, which of course isn't completed until
9 there's a - - - until there's an intent, which again,
10 is not the case here.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MS. FRIEDMAN: If there are no further
13 questions, Your Honor - - -

14 JUDGE SMITH: Thank you, counsel.

15 MS. FRIEDMAN: Thank you.

16 CHIEF JUDGE LIPPMAN: Counselor?

17 MR. BRANDT: Good morning, Your Honors.

18 May it please the court. Tom Brandt on behalf of the
19 Niagara County District Attorney's Office.

20 Some observations about some of the
21 questions and answers that have gone on so far.
22 First, time is not an element of these crimes.
23 Whether the crime occurs at a specific minute or
24 hour, time is not an element of a crime; the court
25 has said that many times.

1 The jury's not given a bill of particulars;
2 they're not given the pleadings. It's the proof
3 before the jury that counts. And the judges have to
4 do something. And in this case, and in all these
5 other sentencing cases, it's the judge's job to
6 search out the record and determine if there's an
7 identifiable basis for the imposition of consecutive
8 time.

9 JUDGE PIGOTT: What do they use to make
10 that determination?

11 MR. BRANDT: The testimony, the exhibits,
12 the proof that was before the jury, identifal (sic)
13 basis - - - identifiable basis, and the record on
14 appeal. The Courts have said that.

15 JUDGE PIGOTT: So in your case, what were
16 the findings that Judge Sperrazza made that - - -

17 MR. BRANDT: Well, Your Honor, the finding
18 was - - - was not articulated. The finding was the
19 imposition of the sentence. And again, it's the
20 record that has to be searched. As long as the
21 record's there and supports the judge's decision, the
22 judge can impose that decision. And in our case - -
23 -

24 JUDGE PIGOTT: Does that call upon us to
25 specul - - - not necessarily us, but the Appellate

1 Division, then, to speculate? In other words, the
2 judge could say, in her mind, I'm doing it, I'm
3 making it consecutive, because I don't like this guy
4 and I saw him here last - - - you know, the last
5 time, and I sentenced him then, and by God, I'm going
6 to teach him a lesson. And the Appellate Division,
7 not knowing any of that, says well, she had a
8 rational basis, whether she used it or not.

9 MR. BRANDT: Judge, I don't think - - -

10 JUDGE PIGOTT: Would that be okay?

11 MR. BRANDT: To answer your question, I
12 don't think that - - - if that type of supposition
13 was allowed, when you look at a judge's sentencing,
14 we wouldn't have any sentencings - - -

15 JUDGE PIGOTT: No, but I mean, what - - -

16 MR. BRANDT: - - - okay?

17 JUDGE PIGOTT: - - - well, what you're
18 saying, that it's not the record and but as long as
19 there's record support, and - - - but usually when we
20 talk about record support, we say there's record
21 support for what the judge did because the judge said
22 so.

23 MR. BRANDT: No, Judge, I think most of the
24 time when you say there's record support, it's your
25 ability to look at the record and point to pieces of

1 evidence that support the decision, not the
2 articulation of the judge's reasoning. Very - - -
3 very few times does a judge articulate exactly why
4 they're handing out a specific sentence.

5 JUDGE PIGOTT: Oh, okay. So you're saying
6 that in this case, if there was any rational basis by
7 which consecutive sentences could be imposed, we go
8 no further?

9 MR. BRANDT: Any identifiable basis in the
10 record and there was in this - - -

11 JUDGE SMITH: And where is your basis in
12 this case?

13 MR. BRANDT: In this case, Your Honor, the
14 defendant admitted to the police, in his statement to
15 the police, that before he went in the convenience
16 store, his accomplices handed him the pistol. He
17 then goes into the convenience store with a pistol in
18 his waistband, talks with some of the patrons in the
19 store, exits the store, and then after he exits the
20 store, he sees the individual that they were trying
21 to rob, absolutely, sees him, chases him, shoots him,
22 robs him, kills him.

23 And so, Your Honor, that is the basis, when
24 the gun was handed to him before he went in the
25 convenience store, and the victim's not in the

1 convenience store.

2 JUDGE SMITH: Now, if it had been handed to
3 him on the street, when the victim is still in sight,
4 it's - - - you say you don't get consecutive
5 sentencing?

6 MR. BRANDT: I disagree with my colleagues;
7 I say yes, he does get consecutive sentencing.

8 JUDGE SMITH: You say even - - - you say if
9 he had it one second before he shot it, he gets
10 consecutive sentencing.

11 MR. BRANDT: One second before.

12 JUDGE RIVERA: Why is that?

13 MR. BRANDT: The only difference, Your
14 Honor - - - the only place I would draw the line,
15 where this court drew the line, and I think it was in
16 Laureano when it said when the single act - - - the
17 single act of grabbing the gun from the police
18 officer, in Laureano, committed both the possession
19 and the robbery. In that case you could not have
20 consecutive sentences.

21 And Your Honor, that would be my position
22 here. In that situation where one act - - - one
23 physical act, and that's what the penal law says,
24 movement - - -

25 JUDGE SMITH: And bodily movement.

1 MR. BRANDT: - - - bodily movement. When
2 you have one bodily movement, that's the act, and if
3 that one act commits two crimes, no - - -

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 MR. BRANDT: - - - the sentences have to be
6 - - -

7 JUDGE PIGOTT: Before you go, Mr. Brandt -
8 - -

9 CHIEF JUDGE LIPPMAN: Judge Pigott.

10 JUDGE PIGOTT: - - - if the judge in this
11 case had decided that these sentences were
12 concurrent, would you say, you know, we have no - - -
13 as long as there's record support for that we're - -
14 - you're done?

15 MR. BRANDT: Your Honor, I've never seen an
16 appeal from a sentence by the People - - -

17 JUDGE PIGOTT: I understand that, but - - -

18 MR. BRANDT: - - - so yeah, I think we
19 would be done.

20 JUDGE PIGOTT: - - - I'm just wondering
21 when you grind your teeth. I mean, you say this is
22 wrong.

23 MR. BRANDT: Well, I never grind my teeth
24 up here, Your Honor.

25 CHIEF JUDGE LIPPMAN: Counselor, thank you.

1 Rebuttal, counselor?

2 MS. GOETZ: Just very briefly. The
3 evidence in this case that supposedly supports a
4 separate sentence is one thing that my adversary
5 pointed to, which was actually evidence that was
6 struck from the jury's consideration, that's some
7 gesticulation towards a belt outside of a club. And
8 there's evidence, from the cooperating witness, that
9 my client supposedly, when he was returning to the
10 van, had a black object in his hand. That's also not
11 - - - not proof.

12 And the last thing is that there's nothing
13 in his hands as he's leaving the van. There's no
14 evidence that anyone sees him leaving the van with a
15 - - - with a gun. So my adversary's pointed
16 repeatedly to this idea that the gun couldn't have
17 come out of nowhere, couldn't have just arisen out of
18 the sky or dropped into his hand; the only logical
19 inference is that it came out of the van. This court
20 cannot, and a sentencing court cannot simply
21 speculate about a basis to impose what's essentially
22 a sentence enhancement. And - - -

23 JUDGE PIGOTT: Not speculate, but Mr.
24 Brandt's saying as long as there's rational basis in
25 the record. So I mean, if we - - - if we do as he

1 suggests and say, you know, there's a possibility
2 here that this was a reasonable sentence under the
3 facts in this case, can we go any further?

4 MS. GOETZ: Well, I don't think this court
5 has ever held that a sentence can be imposed for a
6 conviction that is proven by any standard less than
7 proof beyond a reasonable doubt. So some rational
8 basis or some identifiable basis in the record, these
9 are murky standards. This court should - - -

10 JUDGE SMITH: But you could rationally
11 find, beyond a reasonable doubt, that this guy had a
12 gun for some time before he shot the victim.

13 MS. GOETZ: Because anyone must have had a
14 gun for some moment, some seconds or nanoseconds - -
15 -

16 JUDGE SMITH: Well, there are cases where
17 you grab the gun and shoot immediately; this is not
18 one of them.

19 MS. GOETZ: Well, Judge, actually it is.
20 The record in this case, in Mr. Brown's case, does
21 not support a conclusion that there's any weapon
22 possession other than during the moments of the
23 shooting. There's speculation and there's inference
24 and that's just proof that's far too tenuous to
25 support what's essentially a double punishment, if

1 you look at - - -

2 JUDGE RIVERA: Because he gets the gun from
3 where? Under your - - - what you're - - - I mean,
4 what's the other possible inference? Where is he
5 getting the gun?

6 MS. GOETZ: There's a long period of time
7 during which this perpetrator is walking from the van
8 that's not shown on the camera, and then there's a
9 separate set of events. There's nothing that
10 actually connects, clearly, the two narratives that
11 the jury heard. There's - - - he's in New York City.
12 I really - - - I think it would be pure speculation
13 for us to imagine where a gun came from, but I think
14 it's certainly possible that there was a garbage can
15 on the street - - -

16 JUDGE RIVERA: But he gets in the van and
17 says I'm going to shoot him. He just imagines he's
18 going to find this gun somewhere on the street?

19 MS. GOETZ: The narrative - - - that
20 narrative comes out at trial, Judge, the narrative of
21 supposedly making a statement, a confession.

22 JUDGE RIVERA: Right.

23 MS. GOETZ: That narrative didn't come out
24 to the police, didn't come out to the prosecutor.
25 It's an embellishment that the cooperating witness

1 conveniently comes up with at the trial. But - - -

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MS. GOETZ: Thank you, Judge.

4 CHIEF JUDGE LIPPMAN: Thanks, counselor.

5 Counselor, rebuttal?

6 MR. NOSEWICZ: Yes, Judge. I think it
7 would be helpful for the court to focus on the
8 consequences here, and I mean two things. First of
9 all, the consequence to Mr. Harris, which is an
10 additional twenty years of prison for - - - Judge
11 Rivera used the word "fortuitous" to talk about the
12 evidence in this case. That's exactly what the
13 reference to time here was. It was background
14 information, res gestae that sort of just came out to
15 set the scene. It was mentioned one time. And to
16 let that be the basis for twenty additional years of
17 punishment, I think is a harsh calculus.

18 And the second consequence is, I think,
19 what we've learned from the respondents here, is
20 there essentially is no line. In every shooting, you
21 can always draw an inference the person had the gun
22 before the shooting, excepts in Judge Smith's
23 hypothetical of sort of the daring draw from someone
24 else's holster. And that means there's going to be a
25 fifteen-year consecutive sentence that can be hung

1 over essentially every defendant in a shooting case.
2 And I think when we have possession crimes, that this
3 court has said present special problems, we need more
4 than that. We need crisp, sharp, factual
5 distinctions that are especially vibrant in these
6 kind of cases.

7 CHIEF JUDGE LIPPMAN: Okay. Thanks,
8 counselor. Thank you all.

9 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Thomas Brown, No. 199, The People of the State of New York v. Joseph Harris, No. 200, and The People of the State of New York v. Darnell Carter, No. 201 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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