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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 175

ALLY GOLO,

Appellant.

(Papers sealed)

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20 Eagle Street  
Albany, New York 12207  
October 22, 2015

Before:

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

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with 175, People v. Golo.

3 Counsel, would you like any rebuttal time?

4 MR. GREENBERG: Yes, Judge, I'll go eight  
5 and two, please.

6 CHIEF JUDGE LIPPMAN: How much?

7 MR. GREENBERG: Two minutes.

8 CHIEF JUDGE LIPPMAN: Two.

9 MR. GREENBERG: Two minutes.

10 CHIEF JUDGE LIPPMAN: Two. Go ahead,  
11 you're on.

12 MR. GREENBERG: May it please the court.  
13 I'm David P. Greenberg for Appellant Golo.

14 And the first thing I'd like to say,  
15 because I know there's a lot going on here, is that  
16 the statute couldn't be clearer that before a hearing  
17 - - - a trial court can rule on the merits of a DLRA-  
18 3 motion, the defendant is entitled to a hearing on  
19 the merits.

20 CHIEF JUDGE LIPPMAN: Even - - - even if  
21 the judge, as in this case, indicated quite clearly  
22 his views on the merits?

23 MR. GREENBERG: Absolutely, Judge, and the  
24 reason for that is that the statute - - - by the  
25 wording of the statute, the hearing court, or the

1 nonhearing court here, didn't have the discretion - -  
2 -

3 CHIEF JUDGE LIPPMAN: What does it say,  
4 counsel, the sta - - -

5 MR. GREENBERG: It says, after laying out  
6 the - - - the criteria for determining the merits,  
7 the statute says, "The court shall offer an  
8 opportunity for a hearing and bring the applicant  
9 before it."

10 CHIEF JUDGE LIPPMAN: So if you're  
11 eligible, you get a hearing?

12 MR. GREENBERG: That's right. Now, right  
13 after that, there's additional language that informs  
14 that reading, not that I think it's required; it  
15 says, "The Court may also conduct a hearing, if  
16 necessary, to determine whether such person qualifies  
17 and to determine any other controverted issues." So  
18 - - -

19 JUDGE RIVERA: Can I ask - - can I ask, why  
20 - why have it be a discretionary choice on the  
21 controverted factual issues related to the  
22 sentencing? Why is that not mandatory in the - - -  
23 in the hearing? I'm - I'm - - I find that confusing.  
24 I understand the discretion on a hearing regarding  
25 eligibility, but if there are truly controverted

1 issues related to the sentence, why is that not part  
2 of the - - - what you're saying is the required  
3 hearing, or the hearing that - - - that your client  
4 can request, has to have an opportunity to say, I  
5 want that hearing.

6 MR. GREENBERG: Well, he's - - - he's  
7 entitled to come before the court and present  
8 evidence, and especially to have his say. I think  
9 that the - - - that the second part of it has - - -  
10 primarily focuses on the issue of eligibility, which,  
11 to be honest, often isn't, as far as - - - as the  
12 facts go, really isn't controvertible. I mean,  
13 there's - - - there's a - - - usually there's  
14 documentary proof about the defendant's record, and  
15 there isn't necessarily a need for an evidentiary  
16 hearing because it can be determined on the papers.

17 JUDGE RIVERA: No, no, I get that. But it  
18 says, "any controverted issue of fact relevant to the  
19 issue of sentencing". It would strike me that that  
20 would be part of the first - - - right, the other  
21 section in Section 23.

22 MR. GREENBERG: Well, I think that makes  
23 clear that beyond the defend - - -

24 JUDGE RIVERA: Isn't it that if there's any  
25 - - - any fact that's in dispute, maybe it's part of

1 the hearing, maybe it's not, but once you resolve  
2 those facts and ev - - - and the judge is satisfied  
3 that the person is eligible for resentencing, the  
4 hearing that we're really talking about, that your  
5 client would be entitled to, is the hearing on: I'm  
6 now going to make a decision on this resentencing  
7 request?

8 MR. GREENBERG: I'm not - - -

9 JUDGE RIVERA: Is that - - -

10 MR. GREENBERG: - - - sure I'm foll - - -

11 JUDGE RIVERA: No, I - - - I just - - -

12 MR. GREENBERG: Yeah.

13 JUDGE RIVERA: - - - don't understand the -  
14 - - I understand, as I say, the discretionary hearing  
15 on eligibility. I'm not understanding on these  
16 controverted issue of fact relevant to the issue of  
17 sentencing.

18 MR. GREENBERG: I think it's probably just  
19 a general catch-all phrase because in practice, and I  
20 think probably as anticipated - - -

21 JUDGE RIVERA: That might be helpful;  
22 what's the practice?

23 MR. GREENBERG: In practice, these  
24 resentencing hearings - - - and our office is one of  
25 these primary assigned counsel on these in the City;

1 we did hundreds of them.

2 JUDGE RIVERA: Um-hum.

3 MR. GREENBERG: Normally, it's very similar  
4 to the sentencing hearing that happens after a guilty  
5 plea - - - or after a conviction.

6 JUDGE RIVERA: Um-hum.

7 MR. GREENBERG: The judge wants - - -  
8 generally wants to hear from the defendant, wants to  
9 see what the defendant looks like, what his bearing  
10 is, what his attitude is. And I don't remember, to  
11 tell you the truth, a situation where we called  
12 witnesses and so on, but I - - - we did find - - -  
13 and the trial level cases that I cited in my brief  
14 exemplify this, but there's many more situations that  
15 didn't result in a written opinion that, you know, we  
16 did ourselves - - - judges want to hear from the  
17 defendant; they want to see what he looks like. They  
18 want to hear what he or sh - - - or his or her  
19 attitude is.

20 JUDGE ABDUS-SALAAM: Is that why, counsel,  
21 the statute says that the defendant shall be offered  
22 an opportunity to be heard, because it's the  
23 defendant's choice to come forward, right?

24 MR. GREENBERG: Right. The - - - there may  
25 be situations where on - - - on advice of counsel, or

1 just on the defendant's own decision, just as with  
2 regular sentencing, after a conviction, the defendant  
3 doesn't want to speak, or counsel thinks it's better  
4 to rest on the papers. So it's - - - it's - - - they  
5 don't have to do it, but if they want - - - if we  
6 want it, we're entitled to it.

7 JUDGE PIGOTT: Are you saying, though, that  
8 upon the filing of a motion, you're automatically  
9 going to have a hearing?

10 MR. GREENBERG: No, I mean, the court - - -  
11 I'll concede that the court doesn't have to hold a  
12 hearing if, on the papers, and there's no  
13 controverted issue, the defendant isn't eligible.  
14 The hearing comes in once there's a determination of  
15 eligibility. But once - - - once that happens, once  
16 the case is in play, the defendant's entitled to a  
17 hearing.

18 And I - - - and I just want to emphasize  
19 one thing about that. You were asking me about  
20 controverted issues and so on. What the defendant  
21 has to say, how he comes off, what - - - what the  
22 judge thinks of him, is always a controverted issue.  
23 A defendant may have a - - - a poor record, but he's  
24 still entitled to have the judge assess him and weigh  
25 that against - - - against his documentary record.

1                   JUDGE PIGOTT: So when - - so when you say,  
2                   "The Court shall offer an opportunity for a hearing  
3                   and bring the applicant before it", are you saying  
4                   that on any motion, there must be a court appearance  
5                   by the petitioner?

6                   MR. GREENBERG: No, I think that if - - -  
7                   if the issue of eligibility can be determined - - -

8                   JUDGE FAHEY: Well, it's only when he's  
9                   resentenced, right? You're not asking for more than  
10                  that, to follow up on the judge's question.

11                  MR. GREENBERG: No, no.

12                  JUDGE FAHEY: No, because this is - - -  
13                  this is like any other sentence, isn't that your  
14                  argument?

15                  MR. GREENBERG: That's - - - that's the  
16                  point.

17                  JUDGE FAHEY: In essence, that's the core  
18                  of your argument. But you have to be eligible first.

19                  Let me just take a step back on - on the  
20                  eligibility. It seems, under the analysis that -  
21                  that you're presenting on the look-back period, that  
22                  this would, in essence, eliminate eight of the ten  
23                  years of the look-back period that - - - that we'd  
24                  actually have to look at. There would only be two  
25                  years of conviction-free behavior for the - - - for



1 the court to actually look back on it. Is that  
2 correct? Am I reading it right?

3 MR. GREENBERG: That's way the statute's  
4 written, Judge. It - - - it - - -

5 JUDGE FAHEY: I have to admit I struggled  
6 with the reading of this. I went over it carefully a  
7 number of times, and my clerks pounded it into me  
8 that - - - that - - - that this is the way - - - that  
9 I - - - that this is your analysis, anyway, to try  
10 and make sense of it. But it seems that it's hard  
11 for me to see why - - - how the legislature would  
12 devise a reading where, in essence, a - - - a a post-  
13 conviction pred - - - or felony could serve as a  
14 predicate and essentially eliminate a look-back for  
15 eight of the ten years, in this instance, whatever it  
16 would be in another case.

17 MR. GREENBERG: I'd like - - -

18 JUDGE FAHEY: Yeah.

19 MR. GREENBERG: - - - to talk about that.  
20 I'd also like to talk later about why I don't think  
21 the court can even reach that issue - - -

22 JUDGE FAHEY: Go ahead.

23 MR. GREENBERG: - - - that we won in the  
24 Appellate Division.

25 But just on the merits of that, start with

1 the language, and then I'll - - - I'll get to the - -  
2 - the policy. I think the language - - - I know it's  
3 a long sentence there, I mean - - -

4 JUDGE FAHEY: But just so I'm clear, you're  
5 relying on the sentence where "between the time of  
6 commission" - - -

7 MR. GREENBERG: Right.

8 JUDGE FAHEY: - - - "of the previous  
9 felony", that language?

10 MR. GREENBERG: That's right.

11 JUDGE FAHEY: Okay.

12 MR. GREENBERG: The reference to a previous  
13 felony doesn't make sense if the felony that we're  
14 talking about - - -

15 JUDGE FAHEY: Um-hum.

16 MR. GREENBERG: - - - the commission of it  
17 - - -

18 JUDGE FAHEY: And the time of the  
19 commission of the present felony.

20 MR. GREENBERG: - - - post-dates the  
21 present one, which can only refer to the - - - to the  
22 drug crime on which the resentencing is sought. And  
23 I - - - whether you - - - whether you think that it  
24 was a good idea or not, or - - - or are struggling to  
25 find a reason for it, that language is - - - is - - -

1 it may be convoluted, but it's clear in its convolu -  
2 - -

3 JUDGE STEIN: Can I ask you, when you say  
4 post-dates or pre-dates, are you talk - - - what - -  
5 - are you talking about the date of commission of the  
6 act or - - -

7 MR. GREENBERG: That's - - - that's what it  
8 refers - - -

9 JUDGE STEIN: - - - a conviction of the  
10 act? You're talking about commission.

11 MR. GREENBERG: That's what it refers to.

12 JUDGE STEIN: Okay.

13 MR. GREENBERG: It refers to how the  
14 commission of - - - how they line up in terms of - -  
15 - of commission.

16 But as far as the reason they may have done  
17 it, you know, there are plenty of things that judges  
18 typically take into account in these re - - - in  
19 determining the merits of these motions, that happens  
20 after the - - - after the date of the - - - of the  
21 drug crime: institutional record, misdemeanors, for  
22 example, that aren't covered by the exclusionary  
23 language.

24 JUDGE RIVERA: Well, you're saying the  
25 look-back goes to eligibility, but a judge can always

1 consider - - -

2 MR. GREENBERG: Absolutely.

3 JUDGE RIVERA: - - - your criminal record.

4 MR. GREENBERG: Absolutely. And so the  
5 judge, if there had been a hearing, and if my client  
6 had gotten to have his say, and the judge saw him,  
7 and the judge look - - - should have found him  
8 eligible, could have considered those post-drug crime  
9 robberies.

10 JUDGE RIVERA: So you're saying your  
11 interpretation is - - - I think you're arguing your  
12 interpretation is in line with the legislative intent  
13 to - - - to cast a broad net, in terms of the class,  
14 but doesn't in any way preclude the judge from  
15 exercising discretion and determining whether or not  
16 this person indeed should be resentenced - - -

17 MR. GREENBERG: Absolute - - -

18 JUDGE RIVERA: - - - based on their  
19 criminal history.

20 MR. GREENBERG: Absolutely not - - - well,  
21 absolutely yes. The - - - the court would, I'm sure,  
22 look, as it did - - - not in the right way - - - look  
23 at these post-drug crime robberies. But they're not  
24 disqualifying because of the language.

25 CHIEF JUDGE LIPPMAN: Okay, counselor,

1 let's hear from your adversary.

2 MS. FENN: Danielle Fenn for Respondent  
3 Richard A. Brown. May it please the court.

4 CHIEF JUDGE LIPPMAN: Counsel, assume that  
5 defendant is eligible, doesn't he have to have a  
6 hearing?

7 MS. FENN: Your Honor, in this case, a  
8 hearing was unnecessary. The statute says that the  
9 court "shall offer the opportunity" for the hearing,  
10 but then in the next sentence, it says, the court  
11 "may also conduct a hearing, if necessary, to  
12 determine controverted issues of fact and determine  
13 eligibility".

14 JUDGE STEIN: So when is a hearing  
15 necessary?

16 MS. FENN: It's - - - it's when - - -

17 JUDGE STEIN: It's nev - - -

18 MS. FENN: - - - it's a con - - -

19 JUDGE STEIN: It's never necessary?

20 MS. FENN: It's when there's controverted  
21 issues of fact, and here there - - -

22 JUDGE STEIN: No, no; it says "may", if  
23 it's controverted issues of fact. That's what the -  
24 - -

25 MS. FENN: Yes.

1 JUDGE STEIN: That's what the language  
2 says. So how could it say that - - - that "must  
3 offer" an opportunity for a hearing, and then say  
4 "may" if there are controverted issues of fact. Are  
5 - - - could - - - doesn't there have to be some  
6 situation in which it must be a hearing?

7 MS. FENN: In this situation, this "shall"  
8 and "may", it's ambiguous. But that sentence with  
9 the "may" - - -

10 CHIEF JUDGE LIPPMAN: You really think the  
11 - the - the - the input of the statute is ambiguous?  
12 That's what - - -

13 MS. FENN: This language is - - -

14 CHIEF JUDGE LIPPMAN: Read the first  
15 sentence. I mean, doesn't that say it all?

16 MS. FENN: The first sentence is informed  
17 by the second sentence.

18 CHIEF JUDGE LIPPMAN: Yeah, yeah - - -

19 MS. FENN: There's "shall" - - -

20 CHIEF JUDGE LIPPMAN: But the second sent -  
21 - -

22 MS. FENN: - - - and then "may".

23 CHIEF JUDGE LIPPMAN: I think you're really  
24 stretching in terms of - - - of - of that. You mean,  
25 on the merits, you don't need a hearing? That's

1 really your interpretation of the statute?

2 MS. FENN: Your Honor, it says that they  
3 may - - -

4 CHIEF JUDGE LIPPMAN: I know what it says;  
5 I've read it the same way you have.

6 MS. FENN: Yes, Your Honor. And it's clear  
7 that it's necessary if there's controverted - - -

8 CHIEF JUDGE LIPPMAN: It's not clear to me  
9 that what you're saying is right, in terms of the  
10 statute.

11 MS. FENN: According to the language of the  
12 statute, it's "may" - - -

13 JUDGE RIVERA: Okay. But let's try even  
14 under your reading. Why does that exclude the - - -  
15 the prior sentence saying "shall", meaning "shall"?

16 MS. FENN: It's "shall offer the  
17 opportunity".

18 JUDGE RIVERA: Okay.

19 MS. FENN: And then it goes on to explain  
20 when a hearing is necessary, what the purpose - - -

21 JUDGE RIVERA: No, no, no, no, no.

22 MS. FENN: - - - of a hearing is.

23 JUDGE RIVERA: No, no, because you're  
24 deciding to excise the word "also". You're reading  
25 it "may conduct".

1 MS. FENN: "May also".

2 JUDGE RIVERA: It says "may also".

3 MS. FENN: Yes.

4 JUDGE RIVERA: In addition thereto. So  
5 we're starting out with the first sentence, "shall  
6 offer the opportunity". If his client wants it,  
7 that's the opportunity; you can move ahead with the  
8 hearing. Client doesn't want it, don't have to go  
9 ahead with the hearing.

10 The Court "may also"; so now these are  
11 other circumstances, other opportunities, during  
12 which the court has the discretion to decide, I want  
13 to proceed with a hearing; I believe the hearing will  
14 be helpful to me. That's on the eligibility. That's  
15 on the controverted issues.

16 MS. FENN: Yes, if the - - - if the  
17 defendant wants a hearing.

18 JUDGE RIVERA: I'm just only saying, how  
19 does that change the first sentence? We're all sort  
20 of - - -

21 JUDGE FAHEY: It seems like - - -

22 JUDGE RIVERA: - - - back to that.

23 JUDGE FAHEY: It seems like - it seems like  
24 the statute reads to say if there's a question of  
25 eligibility, the court may conduct a hearing to



1 determine whether or not you have a question, to  
2 satisfy himself on eligibility. But once you're  
3 eligible, you "shall" bring the person in for  
4 resentencing. That - - - that would be the way I  
5 would read it.

6 MS. FENN: In this case - - -

7 JUDGE FAHEY: Do you see what I'm saying,  
8 that the - - -

9 MS. FENN: Yes, Your Honor.

10 JUDGE FAHEY: All right.

11 MS. FENN: There's the "shall" and then the  
12 "may". And even - - -

13 JUDGE FAHEY: I understand that - - -

14 MS. FENN: - - - in that situation - - -

15 JUDGE FAHEY: - - - but they refer to two  
16 different situations. It's a two-pronged analysis.  
17 Before we were talking about what - - - how - - - how  
18 you can have a look-back period, and - - - and  
19 whether or not he'd be eligible. The eligibility  
20 question is sentence from - - - separate from the  
21 sentencing question. The Court "may" conduct a - - -  
22 a hearing on eligibility, but you "shall" sentence  
23 anyone, as you would sentence them in any other  
24 situation. They have to be present and have a right  
25 to speak at their own sentencing.

1 MS. FENN: Your Honor, this is very  
2 different from a right-to-be-present issue, because  
3 he wasn't sentenced - - -

4 JUDGE FAHEY: See, I don't know - - -

5 MS. FENN: - - - and he wasn't resentenced.

6 JUDGE FAHEY: - - - if it really is. I  
7 think, policy-wise, it seems that the legislature  
8 seemed to be saying they're treat - - - while it is a  
9 resentencing, it's still a sentencing, and that's  
10 kind of a special right. You don't put people away  
11 without having them have an opportunity to say  
12 something.

13 MS. FENN: A defendant definitely has a  
14 right at a sentencing or resentencing proceeding.  
15 Here it's a decision on a motion. He - - - his claim  
16 of error is that the court decided his motion without  
17 a hearing, and defendant could have moved to reargue  
18 and alerted the court of this error, the procedural  
19 error, which he's now claiming is that he didn't have  
20 a hearing, and the court could have rectified that.  
21 But that didn't happen. And as the Appellate  
22 Division held - - -

23 JUDGE FAHEY: Yeah, but - - -

24 MS. FENN: - - - it's unpreserved.

25 JUDGE FAHEY: - - - the Supreme Court here

1 held two things: first that he was eligible - - - or  
2 excuse me, that - - - yeah, they - - - they held two  
3 things: that - - - that he - - - he wasn't eligible,  
4 and that substantial justice dictated that he not get  
5 it anyway. The Appellate Division said that he was  
6 eligible, but substantially agreed with the Supreme  
7 Court on - - -

8 MS. FENN: Yes, Your Honor.

9 JUDGE FAHEY: - - - substantial justice.  
10 So you see the problem. In the Supreme Court's  
11 initial ruling, they did both the "may" and the  
12 "shall", when they should have only done the "may"  
13 and not the "shall".

14 MS. FENN: Your Honor, the Supreme - - -  
15 Supreme Court correctly decided this motion on the  
16 papers. The issue of eligibility - - - and there  
17 weren't contested issues of fact. Everyone agreed,  
18 basically, on the facts. We all - - - both sides  
19 included the same papers. It was the conclusions to  
20 be drawn from those.

21 JUDGE FAHEY: So should the Appellate  
22 Division then, once he was eligible, at least have  
23 remitted it for a hearing?

24 MS. FENN: No, Your Honor. That was not  
25 necessary.

1 JUDGE FAHEY: Why not?

2 MS. FENN: Because the court properly  
3 considered - - - the Appellate Division properly  
4 considered the substantial justice argument. And the  
5 court - - - and the Appellate Division actually  
6 looked at the entire record. They noted his efforts  
7 at rehabilitation, that he - - -

8 JUDGE STEIN: Yeah, but - - -

9 MS. FENN: - - - he went to different  
10 programs.

11 JUDGE STEIN: But what about that  
12 intangible factor of having the person before the  
13 court and - - - and, you know, having him - - - his  
14 demeanor and his attitude and his sincerity or - - -  
15 you know, or any other intangible factor viewed by  
16 the court? Isn't that what the purpose of the - - -  
17 the - - - the requirement for an appearance is?

18 MS. FENN: No, Your Honor, the - - - it's  
19 "may offer" - - - I'm sorry - - - "shall offer the  
20 opportunity". But the court - - - that was  
21 unnecessary in this case, and it could be unnecessary  
22 in other cases as well. Not every defendant might  
23 want a hearing.

24 JUDGE STEIN: So "shall" doesn't mean  
25 "shall"?

1 MS. FENN: And it shouldn't go uncontested.

2 JUDGE STEIN: I guess we're back to that.

3 MS. FENN: It's "shall offer the  
4 opportunity" of a hearing.

5 JUDGE RIVERA: But that's not the case  
6 here, because he wanted the hearing. When else  
7 wouldn't "shall" be "shall"?

8 MS. FENN: It's - - - again, it's the two -  
9 - - two sentences. In this case, as to - - - he  
10 wanted the hearing. In this case, defendant points  
11 to that he would be able to come alive for the court  
12 - - -

13 JUDGE RIVERA: No, no, no, no.

14 MS. FENN: - - - but there would really be  
15 some form - - -

16 JUDGE RIVERA: No, but are - - - let me say  
17 this. I don't think the question is whether or not  
18 we think it's a - - - it's a smart idea for him to  
19 choose a hearing. It's what this - - - the language  
20 says. It's not for us to determine whether or not  
21 that's a good idea for the legislator to have written  
22 it this way or - - - or a good strategy for his  
23 client to decide to appear. The question is what  
24 does this language say. You may think he gains  
25 nothing from this, so the judge would not benefit

1 from this. But it's what the language says.

2 MS. FENN: Yes, Your Honor. And again,  
3 it's "shall offer the opportunity", but "may also  
4 conduct a hearing", and it's that part after, "if  
5 necessary to determine controverted" - - -

6 JUDGE ABDUS-SALAAM: Counsel, if the  
7 eligibility has to be determined first, wouldn't you  
8 think that the court - - - it would say the - - - the  
9 court shall determine eligibility and then decide  
10 whether to conduct a hearing, or may conduct a  
11 hearing based on the eligibility? I mean, I'm a  
12 little confused about why you think that the second  
13 sentence controls the first sentence.

14 MS. FENN: These should be read together.  
15 It's "may also conduct a hearing". And it does say  
16 "shall offer the opportunity for a hearing". It's  
17 ambiguous in the sense that - - -

18 JUDGE PIGOTT: Well, doesn't - - -

19 MS. FENN: - - - one says "shall" and one  
20 says "may".

21 JUDGE PIGOTT: Doesn't your interpretation  
22 lead to the possibility that a judge says I'm not  
23 granting - - - I'm not granting hearings on any of  
24 these things because I think the DLRA was a dumb  
25 idea. So if somebody wants to apply to me for one of

1           these hearings, the answer is no.

2                   MS. FENN:  No, Your Honor.

3                   JUDGE PIGOTT:  What would you do if they  
4           said no?  Who has the right to appeal, and under what  
5           grounds?

6                   MS. FENN:  In that situation, the defendant  
7           could move to reargue or could - - -

8                   JUDGE PIGOTT:  I say no again, because I  
9           don't believe in a DLRA.

10                  MS. FENN:  And the defendant could also  
11           appeal to the Appellate Division.  They have - - -

12                  JUDGE PIGOTT:  On what grounds?

13                  MS. FENN:  That - - - well, it depends on  
14           what the - - -

15                  JUDGE PIGOTT:  Well, your argument is that  
16           he's not entitled to a - - - to a hearing anyway.  So  
17           I'm exercising my - - - my discretion to say no.

18                  MS. FENN:  Is - - - is the ruling, the  
19           lower court ruling - - - as in this case, he wasn't  
20           eligible and substantial justice dictated.  It would  
21           be the same situation; he could appeal, like this  
22           defendant received an adverse ruling on the issue of  
23           eligibility and substantial justice.  He appealed  
24           that to the Appellate Division.  And he also raised  
25           his hearing claim.  His hearing claim - - - the

1 Appellate Division - - -

2 JUDGE PIGOTT: You said he - - -

3 MS. FENN: - - - held his hearing claim was  
4 unpreserved.

5 JUDGE PIGOTT: Well, your argument, though,  
6 even if he had raised it, is that that's not a valid  
7 claim because that's all within the province of the  
8 court.

9 MS. FENN: No, Your Honor.

10 JUDGE PIGOTT: Oh.

11 MS. FENN: The - - - the "may" sentence  
12 talks about when it's necessary to determine the  
13 hearing, and there's controverted issues of fact.  
14 And the court - - - the defendant, in your hypo,  
15 could appeal it to the Appellate Division. In this  
16 case, that's what happened. There was an - - - a  
17 determination on eligibility and the - - - the  
18 merits, and the defendant appealed to the Appellate  
19 Division.

20 JUDGE PIGOTT: I picture a lot of cases.  
21 This is, of course - - - they're all unique, I  
22 suppose, but there are a lot of people, I assume,  
23 who've already served their sentence under the DLRA,  
24 have led a law-abiding life, and then - - - but  
25 they're stuck with this sentence, and they want to



1 get it taken care of, and they had this opportunity,  
2 so they can file a motion. And this seems to be a  
3 very welcoming statute, and - - - and that's why the  
4 language is the way it is. You know, you have a  
5 right to appear, and you can say, Judge, you know, I  
6 was convicted fifteen years ago, and - - - you know,  
7 and I'm trying to get a promotion at work and, you  
8 know, this thing is stuck in my - - - you know, so  
9 I'd like to get it done. And I don't think, if I was  
10 a judge, I could say, you know, well, I don't believe  
11 in a DLRA so you're denied. I would think that you  
12 have a right to appear and explain yourself and then  
13 a decision could be made. Does that make sense?

14 MS. FENN: Yes, Your Honor. The white  
15 light is on. May I respond?

16 CHIEF JUDGE LIPPMAN: Yes, sure.

17 MS. FENN: In - - - in that case - - - in  
18 the DLRA, there was an ameliorative intent, but there  
19 were also requirements in terms of eligibility and  
20 the substantial justice prong. And a court  
21 considering these motions should consider both. It's  
22 not that everyone is eligible.

23 In this specific instance, in regard to the  
24 eligibility argument, the court could have - - - the  
25 legislature could have easily said everyone's

1 eligible and then substantial justice. But the - - -  
2 the legislature said no, violent felons should not  
3 be, within the ten preceding years - - - following  
4 this court's decision in Sosa, should not be  
5 eligible. So in any DLRA motion, there is both the  
6 eligibility and the substantial justice prong, and  
7 the court should consider both and follow the proc -  
8 - - follow those procedures and of course the  
9 defendant would have the remedy of an appeal - - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MS. FENN: - - - to the Appellate Division.

12 JUDGE RIVERA: Okay, wait, wait. I'll just  
13 ask - - -

14 CHIEF JUDGE LIPPMAN: One last question,  
15 Judge Rivera.

16 JUDGE RIVERA: - - - just very quickly, why  
17 is he not eligible? Just very quickly.

18 MS. FENN: Your Honor, because of the two  
19 exclusion offenses. This court's case in Sosa said  
20 that the preceding ten years starts at the filing of  
21 the motion, when the - - - there's a resentencing  
22 motion. And the definition of exclusion offense is  
23 "violent felony where a defendant or person was  
24 previously convicted within the preceding ten years".  
25 That total phrase, starting from the resentencing

1 motion back, would include these two robbery  
2 convictions, the first-degree robbery convictions,  
3 and thus defendant would be ineligible for  
4 resentencing.

5 JUDGE RIVERA: Okay.

6 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
7 counsel.

8 MS. FENN: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

10 MR. GREENBERG: The one thing I want to  
11 really emphasize, because I didn't get to this in my  
12 main argument, is that I think it would make it a  
13 little easier with the whole eligibility thing in  
14 this case - - - I don't think the court can reach the  
15 issue of eligibility here. I have - - - I've covered  
16 that in two - - - in sections in each of my briefs,  
17 and I specifically emphasized People against  
18 Carracedo, which came to this court after an  
19 affirmance in the Appellate Division, just as this  
20 case did. And the question there was what the relief  
21 should have been in the Appellate Division.

22 JUDGE ABDUS-SALAAM: And the People did not  
23 cross-appeal; is that basically where you're going  
24 with this, counsel?

25 MR. GREENBERG: I don't think they could

1 have cross-appealed but - - -

2 JUDGE ABDUS-SALAAM: Because - - -

3 MR. GREENBERG: - - - the problem is that  
4 what - - - what - - - the only thing - - - the only  
5 issue in front of this court is what our relief  
6 should have been in the Appellate Division. And they  
7 can't come in the back door and - - - and take that  
8 issue away by arguing eligibility because that'll  
9 give them affirmative relief.

10 CHIEF JUDGE LIPPMAN: Okay, counselor,  
11 thanks.

12 Thank you both.

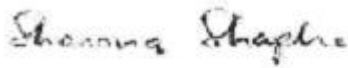
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Ally Golo, No. 175, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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