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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE EX REL RANKIN,  
Respondent,

-against-

BRANN,

Appellant.

NO. 4

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20 Eagle Street  
Albany, New York  
January 9, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People ex rel Rankin v. Brann.

3 MS. O'BOYLE: Good evening, Your Honors. May it  
4 please the court, for the appellant, Assistant District  
5 Attorney Danielle O'Boyle from the Office of Melinda Katz.  
6 Your Honor, may I reserve two minutes of my time for  
7 rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MS. O'BOYLE: Thank you, Your Honor. Subsections  
10 1 and 2(a) of Section 530.60 of the Criminal Procedure Law  
11 have distinct purposes, analyses and consequences. In this  
12 case, however, the Appellate Division acknowledged the  
13 stark contrast between those two subsections, but  
14 incorrectly held that a court is required to apply  
15 subsection 2(a) whenever the court considers - - -

16 JUDGE GARCIA: I don't take that as what they  
17 held. I thought they held if you're going under one, you  
18 have to make a record essentially of risk of flight. If  
19 you're going under 2(a), it's a dangerousness assessment,  
20 right?

21 MS. O'BOYLE: No, Your Honor. The court  
22 acknowledged the difference between the subsections, that  
23 subsection 1 would require a risk of flight analysis - - -

24 JUDGE GARCIA: Right.

25 MS. O'BOYLE: - - - and that subsection 2(a)

1 would require a dangerousness analysis.

2 JUDGE GARCIA: Right, and they said you didn't  
3 make a risk of flight - - - there was no risk of flight  
4 finding under 1 on this record, as I read that opinion.  
5 They don't say you never can use 1. They just say you  
6 improperly used it here because the findings aren't there  
7 to support a risk of flight.

8 MS. O'BOYLE: Well, Your Honor, the Appellate  
9 Division didn't actually acknowledge that the lower court  
10 here did engage in a risk of flight analysis, as did the  
11 People. But what the Appellate Division held was that if  
12 the court is relying, even in part on the defendant's  
13 commission or alleged commission of new offenses, then it  
14 is required to automatically apply subsection 2(a). And  
15 here the lower court made very clear that its finding was  
16 based upon a showing of good cause, that the least  
17 restrictive means to ensure the defendant's return to court  
18 - - -

19 CHIEF JUDGE WILSON: Wait, so you understand the  
20 Appellate Division to have held that if the felony that's  
21 committed while the defendant is out is one that itself is  
22 strong evidence of risk of flight, they still can't use  
23 that to prove risk of flight. So the person is trying to  
24 hijack a plane, something like that.

25 MS. O'BOYLE: Yes - - -

1 CHIEF JUDGE WILSON: Forge a passport to get out  
2 of the country.

3 MS. O'BOYLE: Yes, Your Honor. The Appellate  
4 Division's decision, the way it reads is that the court  
5 would be precluded from exercising its authority under  
6 subsection 1 if the analysis in any way turns upon the  
7 defendant's commission or alleged commission of this new  
8 offense. And that's where it missed here. The fact that  
9 the lower court very explicitly made a finding that this  
10 was the least restrictive means to ensure the defendant's  
11 return to court and did not in any way invoke  
12 dangerousness. And that's the case for the People's  
13 application as well.

14 JUDGE GARCIA: It seems to me, reading the  
15 Appellate Division decision that they said since the People  
16 applied for remand on the sole basis that the principal was  
17 accused of committing a violent felony offense while at  
18 liberty on the underlying felony, the court was required to  
19 apply 2(a). That means you looked, you went arguing that  
20 violent felony or specified felony under 2(a), you're stuck  
21 with that, and you can't use 1. If, I think as the Chief  
22 Judge is getting at, you had said there are certain factors  
23 here around the commission of these specified felonies,  
24 then you could use one and have a finding that those  
25 factors led to this risk of flight. But you didn't do that

1 here. That's how I read the Appellate Division.

2 MS. O'BOYLE: Well, Your Honor, if I could  
3 address that in two parts. First, I think that the People  
4 certainly did that here in that their analysis - - - in  
5 their request was made for the purpose of a least  
6 restrictive means analysis. The People undoubtedly  
7 mentioned the new arrest, but they specifically stated that  
8 they were making their application under subsection 1 and  
9 using a risk of flight analysis. But the court's ruling  
10 makes that even clearer. The court states that that  
11 subsection can apply because we're dealing with a  
12 qualifying offense. So certainly we're in the realm of  
13 something that's permissible under the statute. And then  
14 it goes on to discuss a number of bail factors that are  
15 relevant to a risk of flight analysis. Certainly, the  
16 court - - -

17 JUDGE TROUTMAN: So could it be said here that  
18 the two sections got mashed together?

19 MS. O'BOYLE: No, Your Honor, because if there  
20 had been some combination of the two, then there would have  
21 had to have been a consideration of dangerousness made.  
22 And neither the People nor the court cite that.

23 JUDGE TROUTMAN: How does the court's power come  
24 into play with respect to the bail as to what - - -  
25 subdivision 1? Does it have to be a request of the People,

1 does the court have its own power to review? How does that  
2 work?

3 MS. O'BOYLE: Under subsection 1, it states that  
4 it can be upon motion or request of the People or  
5 otherwise. That's the language specifically stated in  
6 subsection 1. And here the court makes clear that it's not  
7 just the subsequent arrest - - - the three violent  
8 felonies.

9 JUDGE TROUTMAN: Can the court make its own  
10 ruling invoking 1, despite what the People may have asked  
11 for, for the sake of argument?

12 MS. O'BOYLE: Yes, absolutely, Your Honor. And  
13 that's - - - certainly the court was clearer here than the  
14 People - - - admittedly. The People made their application  
15 under subsection 1. But I admit that there was some  
16 confusion initially.

17 JUDGE GARCIA: Where in the court's finding,  
18 because I'm looking at A55 of the record and it says,  
19 "Based upon my review of the bail statute, I believe the  
20 least restrictive means to ensure the return is remand  
21 based on the defendant's repeated violations of the  
22 conditions of release, which is by committing these  
23 felonies, that he not be rearrested. And going beyond re-  
24 arrest, I believe that the indictment provides good cause  
25 for the application here".

1 MS. O'BOYLE: Yes, Your Honor. The court also  
2 discussed the defendant's criminal history, the fact that  
3 he had two prior misdemeanor convictions, that he had been  
4 found to be a repeat parole violator while he had been on  
5 the course of parole, during the course of - - -

6 JUDGE GARCIA: That was all known before or  
7 that's new?

8 MS. O'BOYLE: It's certainly not new at the time  
9 this application is being made. But those factors are  
10 still part of the total analysis of that defendant.

11 JUDGE GARCIA: What's the record of what changed  
12 beyond he violated the conditions of his release, and he  
13 got arrested on this felony?

14 MS. O'BOYLE: Those were certainly the changes,  
15 Your Honor. But in terms of - - - the analysis is whether  
16 the People have shown good cause to modify that order. So  
17 all of those factors together, the People had made that  
18 showing and the court made that finding. Here, even if we  
19 took apart - - - took aside the factors that were known to  
20 the court previously about the defendant's history, his  
21 status as a parole violator, all of that, and we just  
22 looked at the fact that he had been arrested for several  
23 new violent felonies. Undoubtedly, that shows an inability  
24 to abide by the court's order to not be rearrested.

25 JUDGE GARCIA: But why isn't that 2(b)?

1 MS. O'BOYLE: It could be 2(b), Your Honor, but  
2 it didn't have to be.

3 JUDGE GARCIA: But I thought that if you're just  
4 relying on the fact of re-arrest, it has to be 2(b). It's  
5 the same way it's 2(a) because when you actually - - - one,  
6 I think the statute requires when the defendant's notified  
7 that you can be remanded if you violate the conditions, it  
8 says you're entitled to the two protections, right?

9 MS. O'BOYLE: Yes, Your Honor. But nothing  
10 suggests that that is the exclusive means by which a court  
11 can consider these new arrests. And the other factor  
12 that's important - - -

13 JUDGE GARCIA: No, they can consider them under  
14 1, I think is the point.

15 MS. O'BOYLE: Yes.

16 JUDGE GARCIA: But it has to go to risk of  
17 flight.

18 MS. O'BOYLE: Absolutely, Your Honor. And I  
19 think both the People and the court did make that clear  
20 here, because it was not simply that the defendant  
21 committed these new offenses, but the People highlighted  
22 the strength of the evidence in each of these cases that  
23 there was DNA evidence in both the underlying case, as well  
24 as one of the new cases, that the defendant had been  
25 identified in photo arrays in two of the cases.



1                   CHIEF JUDGE WILSON: Legislative history behind  
2 the amendment from way back is that the People were  
3 frequently, and courts were agreeing, and allowing people  
4 to be held on risk of flight when really it was  
5 dangerousness. And so this was a modest but important  
6 adjustment to the statute, right, to allow dangerousness to  
7 come in, but to eliminate the sort of fiction that we were  
8 holding people for risk of flight when really the issue was  
9 dangerousness, right? And there's an amendment to that  
10 that came in at the same time to subsection 3, which is, I  
11 think what Judge Garcia was getting at a little bit, that  
12 then requires notice to be given to the defendant, that if  
13 you - - - this is as a result really of the amendment, if  
14 you violate by committing a felony, you're going to go back  
15 and that's - - - and you get a hearing there. It  
16 references the right to a hearing.

17                   MS. O'BOYLE: Yes, Your Honor. However, the  
18 hearing requirement was added based upon the concern that  
19 there would need to be this heightened due process  
20 protection when a court were, for the first time and  
21 uniquely, invoking the concern of dangerousness. And  
22 certainly, we're not contesting that.

23                   CHIEF JUDGE WILSON: But that's coupled with the  
24 idea that we're going to remove these ones that are sort of  
25 being called risk of flight that are really dangerousness

1 and we're going to provide that protection for them.

2 MS. O'BOYLE: Yes, Your Honor, I certainly  
3 understand that. But in this case, if we use this as an  
4 example, there was undoubtedly an incentive - - - an  
5 increased incentive to flee based upon these new charges.  
6 There is significant increase in his sentencing exposure.  
7 These are all violent felonies.

8 CHIEF JUDGE WILSON: That kind of reads the  
9 amendment out of existence.

10 MS. O'BOYLE: No, Your Honor, because there would  
11 certainly be circumstances where a defendant could be - - -  
12 could have committed subsequent violent felonies but is not  
13 found to be a flight risk.

14 JUDGE TROUTMAN: So again, when I asked you  
15 earlier, so you're suggesting that the factors that are  
16 required for 2 can in some way impact or apply under 1?

17 MS. O'BOYLE: No, Your Honor, I am not suggesting  
18 that. And I apologize if that was at all unclear. There  
19 could certainly be some overlap. And if the court in any  
20 way here made a finding of dangerousness, even if that was  
21 only part of the analysis, if - - -

22 JUDGE TROUTMAN: No, not a finding of  
23 dangerousness, but relying upon the new arrest.

24 MS. O'BOYLE: Well, I think - - -

25 JUDGE TROUTMAN: Or factoring that in.

1 MS. O'BOYLE: But the fact of the new arrests, so  
2 long as that is tied to a risk of flight analysis, and  
3 genuinely so, then subsection 1 would be appropriate to be  
4 applied.

5 CHIEF JUDGE WILSON: Yeah, but it's the genuinely  
6 so, I guess, that worries me a little bit because if the  
7 idea is you commit a bunch of violent felonies while you're  
8 out and because your sentencing exposure now is much  
9 greater, that's an additional risk of flight. That's going  
10 to be true pretty much every time that you satisfy that - -  
11 - the condition of 2 of the amendment. So you're not going  
12 to really need the amendment if you can always put that  
13 under for dangerousness.

14 MS. O'BOYLE: Your Honor, I see that my time is  
15 up. If I could have leave to answer?

16 CHIEF JUDGE WILSON: Yes, please. Yeah.

17 MS. O'BOYLE: There would likely - - - with the  
18 case of new violent felony arrest, there would certainly  
19 be, in most cases at least, an increased sentencing  
20 exposure. But I think it's important to note that the  
21 strength of the evidence should, in fact, be considered for  
22 a good cause determination. Certainly, we at least have  
23 even without a hearing, there is an opportunity for the  
24 defense to be heard to make arguments. And there's an  
25 instrument providing reasonable cause to believe that that

1 offense was committed.

2 JUDGE TROUTMAN: And adding Section 2, did it  
3 change the court's ability to act under Section 1?

4 MS. O'BOYLE: No, Your Honor. And if it had, the  
5 legislature could have put that in the statute in either  
6 subsection 2(a) or in subsection 1. In subsection 2(a)  
7 currently it states it shall be grounds to revoke the  
8 order. It does not in any way state that it's the  
9 exclusive grounds. And in subsection 1, the Legislature  
10 could have also added language that said except as provided  
11 in subsection 2. So it does not change that.

12 JUDGE RIVERA: May I clarify your interpretation  
13 of the - - - of these subsections in this sense, subsection  
14 1 is discretionary, correct?

15 MS. O'BOYLE: Yes, Your Honor.

16 JUDGE RIVERA: Court need not revoke?

17 MS. O'BOYLE: Yes, Your Honor.

18 JUDGE RIVERA: Okay. Do you view subsection 2 to  
19 be mandatory because it says shall be grounds or is there  
20 still discretion there for the court to choose not to  
21 revoke?

22 MS. O'BOYLE: I think that one is a little bit  
23 complicated, Your Honor, but I think that there is some  
24 discretion that the court now has the option under the new  
25 amendments to either remand the defendant or impose bail,

1           which is something slightly different. But it brings up an  
2           interesting point because I know respondent contends that  
3           the prosecution will always and inevitably seek to modify  
4           an order under subsection one and that that would always be  
5           preferable for the prosecution. But when we're dealing  
6           with subsection 1, the defense actually has an opportunity  
7           to draw a fuller picture for the court as well, because  
8           under subsection 2, we're dealing exclusively with whether  
9           the defendant committed this alleged offense, which is why  
10          we have that extra hearing.

11                    JUDGE RIVERA: Okay. So just to be clear, I'm  
12                    not sure I understood your answer to my question. Is 2  
13                    discretionary or mandatory?

14                    MS. O'BOYLE: I think it would be mandatory for  
15                    the court upon the finding of reasonable cause to believe  
16                    that the defendant committed that offense.

17                    JUDGE RIVERA: Fair enough. I appreciate that.  
18                    Thank you.

19                    MS. O'BOYLE: Under subsection 1, though, Your  
20                    Honor, the defense would have an opportunity, as counsel  
21                    did in this case, to argue about his minimal criminal  
22                    history or lack thereof, his ties to the community and  
23                    other traditional bail factors. So it's not that that  
24                    would always be favorable to the prosecution. And just to  
25                    briefly conclude, I know respondent contends that, and this

1 gets back to Mr. Chief Judge's question earlier, if the  
2 prosecution were to merely utter the words risk of flight,  
3 that we can somehow automatically transform into a  
4 subsection 1 analysis what should otherwise be a subsection  
5 2(a) analysis. But it's not that. And I think what the  
6 court did here really illustrates that there should be an  
7 expectation that the court will do what it's supposed to do  
8 and hold the People to their burden, that there has to be a  
9 finding of good cause and a genuine increased incentive for  
10 the defendant to flee. Thank you, Your Honors.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. REID: Should I wait, Your Honors or should I

13 - - -

14 JUDGE GARCIA: Ignore the judge behind the  
15 screen.

16 MS. REID: Okay.

17 CHIEF JUDGE WILSON: Hopefully, we'll be able to  
18 rejoin Judge Halligan.

19 JUDGE RIVERA: Yeah, maybe she's hearing it.

20 MS. REID: Good evening, Your Honors. May it  
21 please the court, Arielle Reid of the Legal Aid Society on  
22 behalf of Mr. Waller. As evidenced by my adversary's  
23 arguments, the prosecution seeks this court's blessing to  
24 rely on circumstances to revoke someone's liberty - - -

25 JUDGE RIVERA: I'll ask you the same question I

1 asked your adversary. Do you read subsection 1 as  
2 discretionary and subsection 2 as mandatory or both are  
3 discretionary?

4 MS. REID: Your Honor, subsection 1 is certainly  
5 discretionary. Subsection 2, as the defense, we're always  
6 going to argue judges, you don't have to - - - you don't  
7 have to revoke someone's bail based on this. It does use  
8 different language shall be ground versus may. I think the  
9 - - -

10 JUDGE TROUTMAN: So by - - - when subsection 1 it  
11 existed before 2.

12 MS. REID: Yes, Your Honor.

13 JUDGE TROUTMAN: And when 2 was created, was the  
14 court's power taken away by that?

15 MS. REID: Your Honor, I think that that is a  
16 question that we can maybe zoom out a bit and talk about  
17 the structure of the statute to answer that question. The  
18 legislature has crafted a really straightforward and  
19 harmonious framework for CPL 536 - - -

20 JUDGE TROUTMAN: Did they specifically impact the  
21 court's power under 1, and if so, indicate where and how?

22 MS. REID: Yes, Your Honor. So I think for that  
23 question, you have to look at the canon - - - the canonical  
24 principles of statutory construction, which say that when  
25 you have a specific and a general provision of the statute

1 that both apply to the same circumstances, it's the general  
2 or the catchall provision only applies where the specific  
3 provision does not. And so if you - - - if you accept that  
4 canonical principle of statutory interpretation, if you  
5 have a situation in which a particular subsection or a  
6 particular circumstance can imply under both subsection 1  
7 and subsection 2 - - -

8 JUDGE TROUTMAN: So both subsections apply here?

9 MS. REID: I don't think they do, Your Honor,  
10 based on this record and I'll explain.

11 JUDGE GARCIA: Let's give a hypothetical, I think  
12 going back to what the Chief Judge said. Let's say you  
13 have a qualifying - - - one of the qualifying offenses  
14 under 2(a) that involves a violent robbery of blank  
15 passports. And there's certainly an implication that the  
16 defendant plans to use these blank passports. Assume it's  
17 a qualifying offense under 2(a), could you not argue risk  
18 of flight based on the fact that this defendant committed a  
19 robbery of blank passport forms?

20 MS. REID: No, Your Honor, you could not - - - if  
21 you're - - - if you're the only purpose of seeking a  
22 modification of the securing order is because the accused  
23 allegedly committed a new violent felony offense - - -

24 JUDGE GARCIA: It's not. It's because the  
25 circumstances of that felony indicate an increased risk of



1 flight.

2 MS. REID: And Your Honor, I think that goes into  
3 why subsection 2 exists, because even if you're saying - -  
4 - if you're going under subsection 1, and I want to be  
5 clear here about what the statute allows to be considered  
6 under subsection 1 and what it doesn't. My adversary  
7 mentioned strength of evidence and sentencing exposure.  
8 Both of those were factors that courts were allowed to  
9 consider in the bail statute prior to 2019. In 2019, the  
10 legislature excised weight of the evidence and the  
11 legislature excised strength of the - - -

12 JUDGE GARCIA: Is there evidence that that was  
13 done to eliminate them from consideration in the  
14 legislative record?

15 MS. REID: Your Honor, there is. We can, you  
16 know, if you - - - if you look at some of the statements  
17 that were made about - - - I believe it was Senator  
18 Montgomery who said that people are spending more time in  
19 jail.

20 JUDGE TROUTMAN: So - - - so was Section 1 then  
21 changed?

22 MS. REID: Section 1 was implicitly changed, Your  
23 Honor, in the sense that - - -

24 JUDGE TROUTMAN: But not explicitly?

25 MS. REID: Section 1, as my adversary concedes,

1 is based on modifications that go to the original bail  
2 factors of which sentencing - - -

3 JUDGE TROUTMAN: It's a power a trial court has  
4 had for a number of years, and the creation of subsection 2  
5 didn't change that?

6 MS. REID: Your Honor. Again, that - - - that  
7 particular question, I think, is only - - - can only be  
8 answered by the principles of statutory construction. So  
9 like take - - -

10 JUDGE TROUTMAN: So can - - - can the court act  
11 under 1?

12 MS. REID: The court can act under 1.

13 JUDGE TROUTMAN: And it also can act under 2?

14 MS. REID: I want to - - - I want to use this  
15 case as an exemplar of this, Your Honor. So Mr. Waller  
16 here, no dispute that he got rearrested multiple times on  
17 violent felony offenses, which the plain language of  
18 subsection 2(a) explicitly addresses. The prosecution in  
19 their application, stated also explicitly, and I'll read  
20 from the record here page, I believe it's A47 in their  
21 application, they said, "While out on a violent felony  
22 offense on bail, the defendant then committed three  
23 additional violent felony offenses. And we believe the  
24 least restrictive means in order to assure his return to  
25 court is remand". So basically what the prosecution did

1 below is say we're relying on the fact that he got  
2 rearrested and we're just - - -

3 JUDGE TROUTMAN: And what does on the court's own  
4 motion under subsection 1 mean? The other factors that the  
5 court could consider?

6 MS. REID: So yes, Your Honor, subsection 1, I  
7 think the way to think about this statute is subsection 2  
8 has explicit factors - - -

9 JUDGE TROUTMAN: Correct.

10 MS. REID: - - - that the court considers. And  
11 then subsection 1, you know, there's a wide universe of  
12 things that can come into play in any given case.

13 JUDGE TROUTMAN: Let me try it this way. Tell me  
14 why the court could not under these circumstances act  
15 pursuant to subsection 1.

16 MS. REID: Your Honor, the court could not act  
17 pursuant to subsection 1 under these circumstances because  
18 the basis, as the Appellate Division held, the basis for  
19 revoking Mr. Waller's bail in this circumstance was the  
20 commission of a new violent felony, which - - -

21 JUDGE TROUTMAN: So was that the People - - - so  
22 the People had to tell the court what it wanted. So the  
23 court didn't have the right on its own to act under any  
24 section other than the one that the People asked for; is  
25 that your argument? And that they asked for 2?

1 MS. REID: No, Your Honor, my - - - my argument -  
2 - - if the court had some other grounds based on, you know,  
3 a risk of flight analysis that the court had wanted to - -  
4 -

5 JUDGE TROUTMAN: Well, what about those other  
6 factors that the court did mention?

7 MS. REID: Your Honor, as Judge Garcia noted  
8 before, those were all factors that were before the court  
9 originally. The court knew about Mr. Waller's criminal  
10 history. The court knew about his - - - his, you know - -  
11 -

12 JUDGE TROUTMAN: So couldn't it evaluate them now  
13 in light of new circumstances that occurred?

14 MS. REID: Not if the new circumstance, Your  
15 Honor, is a specifically enumerated factor in the statute  
16 that is specific to the particular circumstances in this  
17 case. And I want to note here - - -

18 JUDGE SINGAS: But the People in their argument  
19 on where you were reading from said, "We believe the least  
20 restrictive means in order to assure his return to court is  
21 remand". They didn't say we believe he's a danger to the  
22 community because when he's out, he commits felonies. They  
23 said in order for him to return to court, we believe the  
24 least restrictive means, I know that is not applicable now,  
25 but then it was, is remand and the court agreed and did it

1 according to that argument. So I don't - - - I don't I'm  
2 having trouble saying that this is not a risk of flight  
3 argument that fits squarely into 1.

4 MS. REID: Your Honor - - -

5 JUDGE SINGAS: And it might be 2 as well. But I  
6 mean, that's a legislative issue that we have two avenues  
7 through the legislature to set bail. But I don't see how  
8 we can argue here that to assure his return to court is  
9 somehow transformed into a dangerousness argument. That's  
10 my problem here.

11 MS. REID: Yes, Your Honor. And there's a couple  
12 of points I want to make to - - - to that. And so and I  
13 think the circumstances here are - - - are informative  
14 because Mr. Waller, as we said, he's picked up new arrests.  
15 He's gotten rearrested three times on violent felonies. He  
16 continued returning to court. He didn't miss a court date.  
17 There was no allegation that he was, you know, not abiding  
18 by the responsibility to return to court, which is the only  
19 purpose of a modification under 530.61. The only - - -

20 JUDGE TROUTMAN: So the court couldn't factor in  
21 that - - - the fact that he's collecting additional charges  
22 could now cause him in the future not to appear?

23 MS. REID: No, Your Honor. And the prosecution  
24 hasn't been able to establish a reason why, outside of  
25 factors that have explicitly been removed by the

1 legislature. And again, if we are abiding by long-standing  
2 principles of statutory construction and legislative  
3 intent, the legislature removed strength of evidence and  
4 sentencing exposure as factors. And the prosecution is  
5 relying on those excised factors to say, well, if somebody  
6 gets rearrested on a violent felony offense, necessarily  
7 their sentence is going to be increased. And to Chief  
8 Judge Wilson's point, that's going to apply in every  
9 violent felony, in which case - - -

10 JUDGE RIVERA: Your white light is on. So let me  
11 just ask you perhaps questions in a different vein here.  
12 Subsection 2 as Judge Garcia already pointed out, you've  
13 got this hearing requirement.

14 MS. REID: Yes, Your Honor.

15 JUDGE RIVERA: What's the purpose of the hearing?

16 MS. REID: The purpose of the hearing, Your  
17 Honor, is to establish that there's reasonable cause to  
18 believe the person actually committed the offense that they  
19 were rearrested for.

20 JUDGE RIVERA: That is different, is it not, from  
21 subsection 1, or does the good cause standard in subsection  
22 1 mean that the judge must be persuaded that indeed this  
23 person likely has committed the crime with which they are  
24 charged?

25 MS. REID: Your Honor, I think that that - - -

1 that is different. And I think that's the point in why the  
2 legislature has enacted this protection, because, you know,  
3 the - - - my adversary will say somebody gets rearrested,  
4 like, I think the - - - the example used was they were  
5 forging passports. The purpose of a two-way hearing is to  
6 provide reasonable cause to believe that they actually were  
7 forging the passports. Under subsection 1, for instance,  
8 the prosecutor could come in and say they got rearrested  
9 for forging passports, good cause, go to Rikers. Under  
10 subsection 2, the court is required to actually hold an  
11 evidentiary hearing at which the prosecution, you know,  
12 they can provide the grand jury minutes showing that the  
13 person got indicted.

14 CHIEF JUDGE WILSON: So go back - - -

15 JUDGE RIVERA: Well - - -

16 CHIEF JUDGE WILSON: Go ahead.

17 JUDGE RIVERA: Let me just follow.

18 CHIEF JUDGE WILSON: Yes.

19 JUDGE RIVERA: So under the analysis you're now  
20 advocating for with respect to the hearing under 2 and how  
21 1 would work, would it be possible for the prosecutor to  
22 proceed on 2 and not persuade the court based on the  
23 hearing that it satisfied that reasonable cause standard  
24 and then come back to the well under 1? Because you are  
25 saying, of course, this is a much lower threshold.

1 MS. REID: Your Honor - - -

2 JUDGE RIVERA: Could they do that and then argue  
3 risk of flight as opposed to whatever would be the  
4 standard, as you see it, under subsection 2?

5 MS. REID: Your Honor, if someone - - - if the  
6 prosecution failed to meet the reasonable cause standard  
7 under subsection 2 such that they couldn't revoke bail on  
8 that basis, if they have some other grounds to establish  
9 that the person is a risk of flight, of course they can  
10 come in the future and make an argument based on why that  
11 person is a risk of flight. But that argument cannot just  
12 be - - -

13 JUDGE RIVERA: But if you haven't persuaded the  
14 court under this reasonable cause standard that maybe  
15 there's a likelihood that he has committed the crime with  
16 which they are charged.

17 MS. REID: Yes.

18 JUDGE RIVERA: What - - - how would you satisfy  
19 the good cause? On the fear that even though the defendant  
20 believes that they will be found innocent, nevertheless,  
21 there's a risk that they might be found guilty and that's  
22 good enough?

23 MS. REID: Your Honor, I - - - I - - - I - - -  
24 think, you know, the - - - the - - - the standard under  
25 subsection 2 is not that high. It's just, can you get an



1 indictment. If you've got an indictment and you show your  
2 grand jury minutes and the grand jury minutes establish a  
3 reasonable cause to believe the person, you know, committed  
4 the offense, then there's no question.

5 JUDGE RIVERA: But you think that's a different  
6 standard from good cause in subsection 1? I mean, it is  
7 different phraseology.

8 MS. REID: It is different phraseology, Your  
9 Honor. And I think this case illustrates the importance of  
10 that difference in phraseology, because the prosecution,  
11 despite the fact that Mr. Waller had continued coming to  
12 court despite racking up new arrests, which I will note  
13 here, two of the three were dismissed. And so even though  
14 the prosecution said in their initial application, oh, we  
15 have overwhelming evidence, oh, he's facing 25 years, they  
16 - - - two of the three charges were dismissed, and they  
17 offered him a sentence of two.

18 JUDGE CANNATARO: Is it your argument that the  
19 subsection 1 standard is more lenient than the subsection  
20 2? Because the way you just described it, it sounds pretty  
21 easy to prove under subsection 2 the fact of an indictment  
22 alone would get you the reasonable cause to believe that  
23 the crime was committed.

24 MS. REID: Your Honor, I don't - - - I don't want  
25 to suggest that it's easy. I mean, if the prosecution - -

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JUDGE CANNATARO: No, I'm saying easier.

MS. REID: If the prose - - - if the prose - - - I don't think that that is easier. And I think the fact that the prosecution is trying to avoid having to prove reasonable cause to - - - suggests that it's not easier, under subsection 1, there's really no requirement other than a showing and good cause. Under subsection 2, the prosecution actually has to establish reasonable cause to believe that the person did the thing that they are seeking to put them in jail for.

JUDGE CANNATARO: But didn't you just say just a moment ago that really all you have to do is say he was indicted?

MS. REID: In - - - in - - - in many cases, Your Honor, you know, if they've gotten an indictment, then sure. I think in this in this case, at least one of the cases they were never able to get an indictment for. And so if that had been the only case that they were relying on, you know, the statute allows for them to do preliminary hearing. And I think that's important here too to note, because CPL 180.80 requires that if the prosecution is unable to establish reasonable cause within five days, then if somebody is held in, they have to be released.

JUDGE GARCIA: Can the defendant call witnesses

1 at this hearing?

2 MS. REID: Yes, Your Honor. The defendant can  
3 call witnesses. The defendant - - -

4 JUDGE GARCIA: I'm sorry. Can they call the  
5 grand jury witnesses?

6 MS. REID: The statute allows for the prosecution  
7 to introduce grand jury minutes in lieu of witnesses.

8 JUDGE GARCIA: No, I understand that.

9 MS. REID: But I'm not sure if - - -

10 JUDGE GARCIA: If you're having this hearing, can  
11 the defendant say, I either want a witness or I want the  
12 transcript?

13 MS. REID: Your Honor, the hearing does allow for  
14 yes, the defense to litigate that and - - -

15 JUDGE GARCIA: So maybe it's a gang case and  
16 you're facing mandatory life for gang murder. Would there  
17 be a reason that people didn't want to go under 2(a) then  
18 and put their grand jury witnesses in?

19 MS. REID: Your Honor, I think if there's a - - -  
20 if somebody's charged with, you know, gang murder and is  
21 facing a life sentence, they can just ask for bail on the  
22 gang murder case. And I think that's the other point here,  
23 is that the prosecution has in this case and in all cases  
24 in which someone is charged with a violent felony, the  
25 prosecution, if they believe that the person is a risk of

1 flight, they can ask for bail on the - - - on the - - - on  
2 the new case. They don't have to go back and try to  
3 finagle modification on the old case. A violent - - -  
4 violent felonies are bail eligible in the first instance -  
5 - -

6 JUDGE SINGAS: But if you're a judge and you have  
7 exercised your inherent power and authority to let someone  
8 out on bail - - -

9 MS. REID: Uh-hmm.

10 JUDGE SINGAS: - - - and then they violate a  
11 condition of bail, are you saying that the judge doesn't  
12 have the inherent authority under 1 to revisit the initial  
13 ROR and say, because you didn't put on your ankle bracelet  
14 because you didn't go to a DV program, I am withdrawing and  
15 setting bail? Can a judge do that under 1?

16 MS. REID: Your Honor, the - - - for - - - for  
17 the violation of conditions, there's actually a separate  
18 subsection of the statute that addresses that and that's  
19 CPL 510.40(3).

20 JUDGE SINGAS: So let's say you took - - -

21 MS. REID: And that also requires an evidentiary  
22 hearing.

23 JUDGE SINGAS: - - - a new arrest for a  
24 nonviolent.

25 MS. REID: Yes, Your Honor.

1                   JUDGE SINGAS: That - - - that pertains to  
2 flight, right? That, under 1 a judge could say, I'm going  
3 to remand or I'm going to set different bail conditions  
4 without a hearing. But on a violent felony, a hearing is  
5 required? I'm just trying to say, like, what are you  
6 asking us to say that a judge can't modify an order on a  
7 subsequent charge ever?

8                   MS. REID: No, Your Honor. So and to that  
9 particular point, the felony offense, nonviolent felony,  
10 that's actually addressed by subsection 2(b), and that's -  
11 - - that's the important part. The legislature has picked  
12 out specific circumstances that may come up in a case when  
13 somebody is released and said, if these things happen, then  
14 this is what you do. If none of these things happen and  
15 you're relying on something else, then you can proceed  
16 under this catch all provision. 2 - - - 2(b) - - -

17                   JUDGE SINGAS: You're making it sound like it's  
18 an either/or. And to Judge Troutman's point earlier,  
19 doesn't the court in its inherent authority, isn't it  
20 allowed under 1 to exercise that authority in more  
21 circumstances? It might be that they can also work under  
22 2, but it's not an either/or. But you're saying it is.

23                   MS. REID: Your Honor, it is, because, and again,  
24 it goes back to the statutory construction piece. If let's  
25 say it's a new felony arrest and the prosecution is arguing

1 that it's relevant to risk of flight, but also subsection  
2 2(b) says if you're out on a felony and you pick up a new  
3 nonviolent felony, you have to have an evidentiary hearing.  
4 So the statutory scheme that the prosecution is advocating  
5 for is one in which you have a circumstance that applies to  
6 both 1 and 2, and it's basically up to the prosecution and  
7 to decide, you know, I don't really feel like doing an  
8 evidentiary hearing here, so I'm going to go under 1.

9 JUDGE SINGAS: I think you're - - - I think  
10 you're simplifying the legislative history, right? Because  
11 2(b) was introduced so that the People could ask for bail  
12 under a dangerousness. It expanded, not limited, the  
13 possibility of bail.

14 MS. REID: Your Honor, 2(b) actually was  
15 introduced in 2019. And it has nothing - - - it's not a  
16 dangerous thing, even under 2(b) - - -

17 JUDGE SINGAS: 2(a), I'm sorry.

18 MS. REID: Yes.

19 JUDGE SINGAS: I misspoke.

20 MS. REID: And I think that's important because  
21 even under 2(b), the court is required to consider - - - to  
22 reset bail based on a risk of flight to avoid prosecution.  
23 So risk of flight to avoid prosecution also appears in  
24 subsection 2. And I think that's why it's important to  
25 reiterate here that when you have two different provisions

1 of the same statute that apply to the same facts,  
2 legislative interpretation, years of legislative  
3 interpretation, suggest and require that you apply the  
4 specific provision over the general provision.

5 JUDGE TROUTMAN: And here which one did the - - -  
6 all of what you're saying require the application, only  
7 two? Is that what you're saying, that the court had no  
8 ability to review the status of the defendant's release  
9 under subsection 1?

10 MS. REID: Your Honor, my point is that if the  
11 prosecution had wanted to rely on something else that  
12 wasn't specifically enumerated in the statute, they could  
13 have. They could have chosen any other reason to - - -

14 JUDGE TROUTMAN: So the prosecution failed to ask  
15 and proceed under the right section. Is that your  
16 argument?

17 MS. REID: Yes. The prosecution - - -

18 JUDGE TROUTMAN: And that the court had no  
19 ability to do anything but proceed under the section that  
20 they did ask for; is that your argument?

21 MS. REID: My argument, Your Honor, is that there  
22 was nothing here to - - - nothing new, nothing to modify,  
23 securing order other than the fact that the client got  
24 rearrested. And the statute is clear that if the client  
25 gets rearrested on a violent felony, that it must proceed

1 under 2, both based on the plain language of subsection 2 -  
2 - -

3 JUDGE TROUTMAN: So the court could have acted  
4 under 1 if there were facts sufficient to establish it?

5 MS. REID: If there were some other - - - yes,  
6 Your Honor, unenumerated circumstance. And just briefly in  
7 closing, I want to again highlight and urge the court to  
8 also look at the plain language of CPL 510.30, which also  
9 says that if someone - - - when somebody is being released  
10 on a felony, the judge is required to tell them if you get  
11 rearrested on a felony, you are subject to revocation under  
12 subsection 2. So this is in two places now that the  
13 legislature has indicated that subsection 2 is the  
14 appropriate vehicle here. And so we would just ask, Your  
15 Honor, as the Appellate Division below held - - -

16 JUDGE RIVERA: Well, do you read that section to  
17 mean that the court will not proceed under 1?

18 MS. REID: I do. Your Honor, I believe - - - I  
19 read that section to say that if this particular  
20 circumstance happens, which is a felony rearrest, then  
21 subsection 2 - - - you face revocation under subsection 2.

22 JUDGE RIVERA: May revoke and may be authorized?  
23 There's a lot of mays in there.

24 MS. REID: Yes, Your Honor. I think the may  
25 refers to the fact that a hearing is required. So just



1 because - - - again, just because you get rearrested on a  
2 felony doesn't mean the court is going - - - it doesn't  
3 mean your bail is going to be revoked because the  
4 prosecution has to establish reasonable cause to believe  
5 you actually committed the offense.

6 JUDGE RIVERA: I'm sorry. I just want to be  
7 clear. I may have misheard you. Did you say that risk of  
8 flight is also covered under 2(a)?

9 MS. REID: Risk of flight is also covered under  
10 subsection 2(b), Your Honor. And so that is why it cannot  
11 be as clear cut as appellant suggests, that if you're  
12 talking about risk of flight, you're under 1. If you're  
13 talking about anything other than risk of flight, you're  
14 under 2(b), because 2(b) requires courts to consider risk  
15 of flight when setting a new securing order.

16 JUDGE RIVERA: Thank you.

17 MS. REID: Thank you, Your Honors.

18 JUDGE TROUTMAN: So is the court limited as to  
19 what factors or what evidence can consider if there is a  
20 subsequent arrest as it applies under 1?

21 MS. O'BOYLE: No, Your Honor, so long as it is  
22 part of a least restrictive means or now the kind and  
23 degree of control or restriction necessary and risk of  
24 flight analysis. And so long as the court is considering  
25 appropriate bail factors that are listed under 510.10,

1           there is no restriction. And to turn back to Judge  
2           Garcia's hypothetical earlier about the defendant who would  
3           be subsequently arrested for stealing passports, the  
4           respondent's theory is just not workable because  
5           undoubtedly that would increase that defendant's risk of  
6           flight, and if we adopt the respondent's position, then the  
7           court would be precluded from engaging in a risk of flight  
8           analysis. And if the defendant had done something much  
9           less significant, failed to go to a court-mandated program  
10          that was a condition of his release, committed misdemeanor  
11          offenses, the court could certainly consider all of those  
12          factors, as Judge Singas alluded to earlier, under  
13          subsection 1, without conducting a hearing. But then  
14          suddenly, if the new violent felony arrest plays any role  
15          in the court's determination, a hearing is required  
16          irrespective of any consideration of dangerousness. And  
17          that cannot be what the legislature meant. It is not what  
18          they said in the statute, and at no point here was  
19          dangerousness invoked.

20                   JUDGE CANNATARO: What do you mean, irrespective  
21          of any consideration of flight risk, right?

22                   MS. O'BOYLE: No, irrespective of any  
23          consideration of dangerousness, there was - - - there was  
24          no consideration of that here. So long as that is not  
25          considered, there would be no need to proceed to subsection

1           2(a). I apologize if that was unclear.

2                   JUDGE GARCIA: It seems to me that the default  
3 position in 2, either 2(a) where you commit specified  
4 felonies, or 2(b)(4), I think it is, where you commit a  
5 felony in violation of a condition is based on the fact  
6 that you - - - that you committed the crime itself. The  
7 new crime, like, reasonable - - - and that alone is enough.  
8 You don't have to tie it to appearance. You commit one of  
9 those felonies under (a) or under (b)(4), and that's why  
10 you get this hearing, because the People have this burden  
11 to show if you're going to rely on the fact that you  
12 committed this new crime, you have this obligation. It  
13 seems to me, if you're going to go under 1, then you can't  
14 circumvent that requirement by relying solely on the fact  
15 that he committed - - - the defendant committed a new crime  
16 by showing some relation between the commission of the new  
17 crime and the factors going to risk of flight. Do you  
18 disagree with that?

19                   MS. O'BOYLE: Yes, Your Honor. It's not a  
20 circumventing and I disagree with the respondent's position  
21 that it has to be an either/or analysis. Inevitably - - -

22                   JUDGE GARCIA: Not either/or. But the court can  
23 choose. And I - - - I think, you know, there's an argument  
24 that the court, despite what the People ask for, can go  
25 under 1 or 2. But if the court goes under 1, don't the

1 findings in the record have to support a finding under 1  
2 beyond committed this new crime?

3 MS. O'BOYLE: Absolutely, Your Honor. And the  
4 findings here did establish that.

5 JUDGE GARCIA: I understand that's your position.

6 MS. O'BOYLE: Yes, yes. And here I just want to  
7 point out something briefly that the respondent had  
8 highlighted that two of these cases were subsequently  
9 dismissed. It's important to note the context in which  
10 this case was evolving in all of these cases. It was  
11 during the COVID-19 pandemic, the height of it, as well as  
12 the imposition of the new discovery laws. So things were  
13 not operating under normal circumstances. But at the time  
14 the defendant - - - I'm sorry that the application was made  
15 to modify the bail, those certainly were relevant factors.  
16 Those cases were pending.

17 And once those cases were ultimately dismissed,  
18 the defense had an opportunity to go back to the bail court  
19 to say, I'm now presenting this as a basis for  
20 modification. Ultimately, remand was still ordered by that  
21 court and upheld by the Appellate Division. But it's not  
22 as if the defendant is being denied an opportunity or a  
23 meaningful opportunity to present those factors that would  
24 weigh in his favor as well. And to briefly address the  
25 issue of Section 510.30, I don't read that to say that by

1 notifying the defendant that the bail may be revoked under  
2 subsection 2 if the defendant commits another felony, that  
3 that is going to be the exclusive means of the court  
4 considering that subsequent offense.

5 JUDGE GARCIA: If you had an original - - - I  
6 know you don't here, but if it was a nonqualifying offense  
7 originally, right, and now you commit another felony, can  
8 you get remand under 1?

9 MS. O'BOYLE: No, Your Honor, under subsection 1,  
10 that is necessarily limited to - - -

11 JUDGE GARCIA: Qualifying.

12 MS. O'BOYLE: - - - qualifying because of that  
13 last line that was added into the statute.

14 JUDGE GARCIA: Right.

15 MS. O'BOYLE: So there's no concern there of  
16 trying to - - -

17 JUDGE GARCIA: So you have to go under 2(b), if  
18 it - - - or 2(a) if it qualified?

19 MS. O'BOYLE: Yes, Your Honor. And the point  
20 that respondent highlighted about the least restrictive  
21 means analysis also being incorporated into subsection 2, I  
22 think what's really important and critical there is that  
23 the least restrictive means analysis only applies to  
24 subsection (b), it is not applicable to subsection (a),  
25 which further highlights that that subsection is still the

1 unique section that was added for the courts to consider  
2 dangerousness, which is otherwise not permitted under New  
3 York law. That's when the heightened due process  
4 protection is necessary of this full evidentiary hearing.

5 JUDGE RIVERA: What's your response to counsel's  
6 point that risk of flight is considered under 2(b)?

7 MS. O'BOYLE: Under 2(b), Your Honor, that is - -  
8 - under subsection 2(d), it indicates that there is some  
9 requirement that the court consider the risk of flight and  
10 kind of degree - - - kind and degree of control necessary  
11 when it's invoking that section. But it does not apply to  
12 subsection (a) by the plain language of the statute.

13 JUDGE RIVERA: But it applies to (b) nonetheless.

14 MS. O'BOYLE: Yes, Your Honor.

15 JUDGE RIVERA: Okay. All right. Are you of the  
16 mind that if the People did proceed under 2, or if the  
17 court, as Judge Garcia suggested, decided it's going to  
18 proceed under 2, and you were unsuccessful, that you could  
19 go back and proceed under 1? Are you able to do that? Is  
20 there any limitation on that, given the structure?

21 MS. O'BOYLE: There would be no statutory  
22 limitation to that, Your Honor. And certainly the People  
23 would still have to demonstrate good cause and there has to  
24 be an expectation that the court will do what it's supposed  
25 to do and - - -

1                   JUDGE RIVERA: Well, what's the difference, then,  
2 between those two standards? The good cause of risk of  
3 flight could exist even if you were unable to persuade the  
4 court under 2 - - - subsection 2 that there wasn't  
5 reasonable cause to believe the crime had been committed?

6                   MS. O'BOYLE: Well, Your Honor, I think the  
7 standards are different because in reasonable cause to  
8 believe we're dealing with the burden of proof and we're  
9 dealing with the commission of an actual offense, whereas  
10 under subsection 1, good cause is more broadly considered  
11 to determine whether there is an increased incentive to  
12 flee. The difference is in the hearing requirement, and  
13 respondent contends that it is easy in some ways for the  
14 People to meet that burden.

15                   It's not, in fact, difficult to show that the  
16 defendant - - - that there's reasonable cause to believe  
17 that the defendant committed those offenses by nature, by  
18 virtue of the fact that an accusatory instrument would  
19 establish that. The burden comes in with the hearing  
20 requirement of section 2(c). And that is significant  
21 because not only in the cases that Judge Garcia mentioned,  
22 where you could have reasons where you may not want to call  
23 a grand jury witness. There are other reasons why a  
24 hearing may not be practical, feasible, and certainly just  
25 not necessary. Sometimes the grand jury minutes are not

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immediately available, as was the case here. Subsequent offenses can occur out of county, all over the state.

So to determine whether this full-blown evidentiary hearing is necessary, there has to be an invocation of dangerousness. And because there was not that here, the court was - - - was appropriately modified the bail pursuant to subsection 1.

CHIEF JUDGE WILSON: Thank you.

MS. O'BOYLE: Thank you.

(Court is adjourned)



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

I, Christy Wright, certify that the foregoing transcript of proceedings in the court of Appeals of Brann v. People ex rel Rankin, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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