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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,
Respondent,

-against-

No. 135

CHRISTOPHER BRINSON,
Appellant.

PEOPLE,
Respondent,

-against-

No. 136

LAWRENCE BLANKYMSEE,
Appellant.

20 Eagle Street
Albany, New York 12207
May 30, 2013

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

Appearances:

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1 CHIEF JUDGE LIPPMAN: 135 and 136, Brinson
2 and Blankymsee.

3 (Pause)

4 CHIEF JUDGE LIPPMAN: Counsel?

5 MR. LAISURE: Good afternoon, Your Honors.
6 I would like to reserve two minutes rebuttal. Skip
7 Laisure with Appellate Advocates for Christopher Blin
8 - - - Brinson and Lawrence Blankymsee.

9 CHIEF JUDGE LIPPMAN: Counsel, how's this
10 case different from Williams?

11 MR. LAISURE: How is it different from
12 Williams? The - - -

13 CHIEF JUDGE LIPPMAN: Yeah, how - - -

14 MR. LAISURE: - - - defendants in this case
15 - - -

16 CHIEF JUDGE LIPPMAN: Does Williams apply
17 here? Are they - - -

18 MR. LAISURE: It - - - it applies in our -
19 - - in our favor, because he had - - - they both - -
20 - both of these defendants had completed their
21 determinate sentence before they PR - - - PRS was
22 added - - -

23 CHIEF JUDGE LIPPMAN: They - - - they could
24 - - -

25 MR. LAISURE: - - - to their sentence.

1 CHIEF JUDGE LIPPMAN: Yeah, did they
2 complete their aggregate sentence?

3 MR. LAISURE: There is no such thing as an
4 aggregate sentence.

5 JUDGE SMITH: So in the consecutive
6 sentencing case - - - I forget which one that is - -
7 - but how does - - - how does the defendant know
8 which one he served first?

9 MR. LAISURE: Well, the judge said which
10 one he served first. The judge said that I'm
11 imposing a ten-year term on Count II, and then the
12 judge said, and "Count III and IV shall run
13 concurrent with each other, but consecutive to Count
14 II."

15 JUDGE SMITH: So if he'd said it the other
16 way around, if the - - - if he'd said that Count - -
17 - the - - - he said the ten-year count will run
18 consecutive to three-year count, then - - - then
19 you'd lose the case?

20 MR. LAISURE: I think that's right. And -
21 - - and - - -

22 JUDGE SMITH: Do you really think that he -
23 - - that it made the slightest difference to the
24 judge when he said that? The - - - don't those
25 things seem equivalent to most people, ten years

1 consecutive to three, and three years consecutive to
2 ten?

3 MR. LAISURE: Your Honor, the - - - the
4 fact is that everything lines up. What he said lines
5 up with the fact that - - - that general practice is
6 to impose the highest sentence first, and the - - -
7 the paramount sentence that's being served is the
8 longest sentence for the - - -

9 JUDGE SMITH: But if - - - but if the judge
10 - - - if the judge wants to avoid a - - - some kind
11 of Catu problem, he can - - - he can switch them
12 around, and impose the shorter sentence first?

13 MR. LAISURE: I suppose he could, yes, yes.
14 He did not do that in this case.

15 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
16 what's the rule? How do we know - - - it doesn't - -
17 - it's not what you - - - is it physically that
18 you're in? What's the - - - what's the rule as to
19 how we determine what you want in these - - - in
20 these cases?

21 MR. LAISURE: The rule is that each
22 sentence is served separately. There's an
23 aggregation statute, quote - - -

24 JUDGE PIGOTT: What? Wait a minute. You
25 just said before - - - that's what got me going here.

1 You said there's no such thing as an aggregate
2 sentence.

3 MR. LAISURE: That's right. There is - - -

4 JUDGE PIGOTT: But what did you just say?

5 You just said that they aggregate them.

6 MR. LAISURE: That - - - they aggregate the

7 time. The - - -

8 JUDGE PIGOTT: Oh, but what's a sentence?

9 MR. LAISURE: - - - in other words, what
10 happens is that the Department of Corrections comes
11 up with a date for earliest release and a date for
12 latest release.

13 JUDGE PIGOTT: Can we call that an
14 aggregation?

15 MR. LAISURE: Then he - - - they call it an
16 aggregation, but it's not an aggregate sentence.

17 JUDGE GRAFFEO: But is that how we
18 interpreted 70.30 in the Buss case?

19 MR. LAISURE: It is, but that was a - - -
20 that - - - you did not do it that way in Rashid. So
21 if you don't do it in Rashid, then how is it that
22 this automatically creates an aggregate sentence?
23 You would have had in Rashid to allow the - - - the
24 State for file the Article 10 - - -

25 JUDGE PIGOTT: Doesn't aggregation inure to

1 the benefit of the defendant?

2 MR. LAISURE: No, it does not.

3 JUDGE PIGOTT: You don't think so?

4 MR. LAISURE: Certainly not in - - - in
5 double jeopardy situations.

6 JUDGE PIGOTT: Well, I know, and - - - and
7 you're obviously going to make that in - - - in PRS
8 cases, too. But I don't know why, you know, once
9 you've - - - you know, you've got all these sentences
10 that don't put them all together for you, so you what
11 - - - you know, when you're getting out.

12 MR. LAISURE: Oh, as far as clarity,
13 certainly it inures to the benefit of the defendant,
14 so he knows when he's going to be released, but - - -

15 JUDGE PIGOTT: And he knows that it's at
16 the end of the aggregate sentence. And so if the PRS
17 is imposed before that, it's not a surprise.

18 MR. LAISURE: In - - - it's not - - - it is
19 a surprise.

20 JUDGE PIGOTT: Oh.

21 MR. LAISURE: And the reason it's a
22 surprise is that's an expectation in how much time
23 he's to serve, is not the same thing as an
24 expectation of how long each sentence is. Each
25 sentence is served separately.

1 CHIEF JUDGE LIPPMAN: But there's one
2 release date, right?

3 MR. LAISURE: There's one release date, but
4 the release date can change. That's - - -

5 JUDGE SMITH: Which - - - which is the
6 defendant likely to care more about, how long each
7 sentence is, or how much total time he's going to
8 serve?

9 MR. LAISURE: I'm not sure, Your Honor.
10 And in this case, certainly, I - - - my client has
11 talked to me about, you know, the finality of his
12 sentence; that is very important.

13 JUDGE SMITH: Yeah, well, I - - - yeah,
14 okay. I guess what I'm saying is, is it not - - - is
15 it not part of - - - part of the point of the double
16 jeopardy clause to protect a - - - really a, uh,
17 almost an emotional interest in repose - - -

18 MR. LAISURE: I - - -

19 JUDGE SMITH: - - - a sense of finality?

20 MR. LAISURE: I disagree with that. I
21 think that the expectation of finality is a legal
22 concept. It is not an emotional concept related to
23 the individual's - - -

24 JUDGE SMITH: And the expectation is not -
25 - - doesn't actually exist in anyone's head. It's a

1 pure fiction?

2 MR. LAISURE: A pure fiction, I don't know,
3 but - - - but the - - -

4 JUDGE SMITH: Most - - - mostly fiction.

5 MR. LAISURE: Mostly fiction, yes. It's -
6 - -

7 JUDGE PIGOTT: How about if the public has
8 a - - - a view that this guy isn't getting out until
9 2017?

10 MR. LAISURE: But when he gets out does not
11 mean that he hasn't completed interim sentences.

12 JUDGE PIGOTT: I understand that, but I
13 mean, we - - - you were saying that an expectation is
14 just a fiction, and I would think that the victim,
15 you know, might be saying, you know, he's getting out
16 2017 - - -

17 MR. LAISURE: Well, Your Honor, I - - - I
18 believe that we're confusing expectation for how long
19 he's serving a sentence with expectation of finality
20 for double jeopardy purposes. I'm talking about
21 expectation of finality in the - - - in when a
22 sentence has - - - has been completed. And that's
23 different - - -

24 CHIEF JUDGE LIPPMAN: So at the end of his
25 ten years, he says, good, I'm done with that. No one

1 can - - - no one can try me again for - - -

2 MR. LAISURE: Exactly. And that's
3 different from his expectation, I know I'm going to
4 stay in jail longer because of these other crimes
5 I've committed, but this one's done.

6 JUDGE PIGOTT: But the - - - but PRS stands
7 for post-release - - -

8 MR. LAISURE: Correct.

9 JUDGE PIGOTT: - - - supervision. It
10 doesn't stand for double jeopardy saving clause. I
11 mean - - -

12 MR. LAISURE: No. It doesn't. But the
13 question is, does the court have the authority to add
14 a portion of a sentence to something that's already
15 complete. It's not - - - it is not an equity
16 argument I'm making. This is - - - this is purely a
17 constitutional double jeopardy argument.

18 JUDGE PIGOTT: But what does post - - -

19 MR. LAISURE: When you finished your
20 sentence - - -

21 JUDGE PIGOTT: What does post-release mean?

22 MR. LAISURE: Post-release means that - - -
23 that once you've finished your sentence, then you're
24 released out into the community.

25 JUDGE PIGOTT: Right.

1 MR. LAISURE: You're going to - - - you're
2 going to be supervised by - - - by parole.

3 JUDGE PIGOTT: Right.

4 JUDGE ABDUS-SALAAM: Counsel, in - - - in
5 Buss we said that the purpose behind the penal law,
6 Section 70.30 is the proposition that these two
7 sentences, whether - - - whether they be consecutive
8 or concurrent get merged into a single sentence.

9 MR. LAISURE: It - - -

10 JUDGE ABDUS-SALAAM: Right?

11 MR. LAISURE: Yes.

12 JUDGE ABDUS-SALAAM: And - - - and you're
13 saying that we didn't say that in Rashid, but why
14 shouldn't we follow what we decided in Buss?

15 MR. LAISURE: Well, the reason is because
16 Buss and Rashid both had to do with civil concepts
17 that did not involve double jeopardy determinations.
18 It's - - - the - - - the question before the court in
19 each case was, ought we, should we, consider that
20 70.30 controls the outcome of this civil
21 determination that we have to make?

22 That's a totally separate question from can
23 the court, as a matter of double jeopardy in a
24 criminal action, add something to a sentence beyond
25 what the original judge said the sentence was on the

1 basis of 70.30, and the answer is no, because 70.30
2 doesn't create a new sentence. It doesn't - - -

3 JUDGE PIGOTT: Does it make any difference
4 if they're all in the same indictment?

5 MR. LAISURE: I don't think it makes any
6 difference at all. They - - - they - - - it's a
7 clearer case if they're separate indictments, but the
8 - - - the fact is that 70.30 doesn't create a single
9 sentence. And if you look at 70.40, it doesn't even
10 purport to.

11 JUDGE PIGOTT: But I - - - I would think
12 that, you know, if you're representing a defendant
13 and you're working out a plea, and - - - all of this
14 stuff gets figured out. I mean, you know, the reason
15 you're taking the plea is because you know that these
16 are going to be concurrent, you know, with - - - with
17 that one. They're not going to consecutive; that
18 they are going to be merged into one sentence, and
19 you're getting out and - - - whenever you're getting
20 out.

21 MR. LAISURE: But that's when you're
22 talking about the expectation of incarceration, not
23 the expectation of finality in each of the two
24 sentences.

25 JUDGE PIGOTT: Well, no, I know that, but I

1 mean, what I'm saying is, you - - - you can go to
2 trial, you know, and then you got all - - - you know,
3 whatever expectations you want. You don't. You work
4 out a plea - - -

5 MR. LAISURE: Right.

6 JUDGE PIGOTT: - - - in these cases. And -
7 - - and now you know what you're going to be doing.
8 And the question of post-release supervision comes up
9 in the course of that. I don't know where double
10 jeopardy gets - - - I understand your argument about
11 double jeopardy, but I don't know why that becomes a
12 part of the contemplation of the parties in this
13 thing.

14 MR. LAISURE: Well, it's not. It's not.
15 It - - - it shouldn't be considered a contemplation
16 of the parties. It's a question of the authority of
17 the court. When - - - when they marched into court,
18 they - - - the court didn't have the authority to do
19 what - - - what they were talking about doing.

20 JUDGE PIGOTT: What he - - - what he - - -
21 what should he have done at sentencing if we get rid
22 of all of our - - - you know, when we made them all
23 come back. I mean, should've he said you got ten
24 years plus five years PRS, and then on the - - - on
25 the three and the two, you've got six months PRS on

1 each one of those for an aggregate of something else?

2 MR. LAISURE: Well, the other - - - the
3 other sentences were indeterminate. All he had to do
4 was say, you know, that the post-release period on
5 the ten years and on the five years in the other
6 case.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 You'll have your rebuttal.

9 MR. LAISURE: Thank you.

10 CHIEF JUDGE LIPPMAN: Let's hear from your
11 adversary.

12 MS. SPANAKOS: Excuse me. Good afternoon,
13 Your Honors. Anastasia Spanakos for the People and
14 for the Queens County District Attorney, Richard
15 Brown.

16 CHIEF JUDGE LIPPMAN: Counsel, why isn't it
17 reasonable - - - why isn't your - - - your
18 adversary's position reasonable that he completed one
19 sentence, you know. Release date is something
20 different. Well, how can you tack - - - how do you
21 have the authority to tack on PRS when your sentence
22 is complete in light of our precedents?

23 MS. SPANAKOS: Well, in light of the
24 precedent, Your Honor, here the addition of the post-
25 release did not violate double jeopardy. I think

1 these cases - - -

2 CHIEF JUDGE LIPPMAN: Why - - - why not?

3 MS. SPANAKOS: Well, there - - - there - -

4 -

5 CHIEF JUDGE LIPPMAN: Why if I put in a
6 very practical way, I said exactly what counsel says,
7 I said to myself that one's finished; you know, now
8 at least, I - - - I - - - nobody can add anything on
9 to my sentence. There's an expectation of finality.
10 Double jeopardy. Why not? What's wrong with that?

11 MS. SPANAKOS: Because that - - - that's
12 not a realistic assumption.

13 CHIEF JUDGE LIPPMAN: Why is it not
14 realistic? I know what I'm - - - what - - - what I'm
15 serving. I focused on that. I didn't focus - - - I
16 know there's an ultimate release date. I focused on
17 the - - - on the - - - on this first sentence. And
18 boy, I finished it, and I'm feeling great. I go on
19 to the second. Why isn't that a good argument?

20 MS. SPANAKOS: Because it's not reasonable,
21 because it doesn't apply any of the statutes - - -

22 CHIEF JUDGE LIPPMAN: What's not reasonable
23 about it?

24 MS. SPANAKOS: It doesn't apply any of the
25 statutes. It's not applying this court's precedent

1 at all. It looks at sentence time under criminal
2 statutes as passing - - - just as a normal lapse of
3 time, from point A to point B.

4 CHIEF JUDGE LIPPMAN: Yeah, but you're
5 talking about release date. He's talking about the
6 sentences.

7 MS. SPANAKOS: There's - - - there's no - -
8 - three's no parsing this. Release date, sentence -
9 - -

10 CHIEF JUDGE LIPPMAN: Why not? But that's
11 what I'm asking. Why is there no parsing of it?

12 MS. SPANAKOS: Because it - - -

13 CHIEF JUDGE LIPPMAN: Why can't they be two
14 separate things?

15 MS. SPANAKOS: Because it all goes
16 together. Because - - -

17 CHIEF JUDGE LIPPMAN: Why?

18 MS. SPANAKOS: Why? For several reasons:
19 one, you have one individual who receives multiple
20 sentences, okay. He received only a single
21 punishment. He's being sentenced all at the same
22 time for multiple crimes, but it's all one single
23 punishment. You can't part and parcel it out. It
24 doesn't work that way.

25 CHIEF JUDGE LIPPMAN: No matter it's

1 consecutive or concurrent?

2 MS. SPANAKOS: It - - - it only matters
3 based on - - - for the calculation purposes, but it
4 doesn't matter because the defendant is still in on
5 these crimes. Okay? He's still - - - and he's still
6 serving that same one punishment. It's slightly
7 different with consecutive than it is concurrent, but
8 it really doesn't make a difference.

9 JUDGE PIGOTT: Well, it's not really one
10 punishment, because you - - - there are separate
11 sentences for each one of the crimes.

12 MS. SPANAKOS: There are separate
13 sentences, but it's the single punishment, Your
14 Honor. He goes in one time for these crimes, and
15 he'll come out one time for these crimes.

16 JUDGE PIGOTT: Not if - - - but it's still
17 - - -

18 JUDGE RIVERA: What if it's overturned
19 while he's - - - right? If he's overturned, he's - -
20 - he doesn't have to serve that time anymore. He
21 moves onto, if there's another crime, the other
22 crime, if only one is overturned, right?

23 MS. SPANAKOS: That's true. You could have
24 a single individual conviction reversed - - -

25 JUDGE RIVERA: Um-hum.

1 MS. SPANAKOS: - - - and then that time
2 will go away, and then everything is recalculated.

3 JUDGE RIVERA: Um-hum.

4 MS. SPANAKOS: But he's still in on this
5 one punishment. The punishment - - -

6 JUDGE RIVERA: On the other sentence?

7 MS. SPANAKOS: Other sentences for the
8 other crimes all related still to this.

9 JUDGE RIVERA: But you'd now decouple?
10 You'd have to decouple at that point, right?

11 MS. SPANAKOS: If - - - if there's a
12 reversal, you do, but that's not the case that we
13 have here. What you have here is these individuals
14 are in. They were sentenced on multiple crimes at
15 the same time; they received a single punishment.
16 They go in. Their sentences are looked at. The
17 applicable statute switched to fit the - - -

18 JUDGE PIGOTT: If it's not a single
19 punishment, if you get ten years on one, and you get
20 three and two on the others and there's no PRS on the
21 three and the two, but there is PRS on the ten, and
22 the ten is done - - - the reason we give post-release
23 supervision is because of the crime that's been
24 committed. So you're going to do ten, and then we're
25 going to keep an eye on you for five. Well, he's

1 already done the ten, so there's no reason to keep an
2 eye on him on the five. But we say, because you also
3 had a, you know, a grand larceny, even though you
4 don't get PRS in that, now you do. Is that the logic
5 of it?

6 MS. SPANAKOS: No, no, Your Honor. You
7 don't get - - - the PRS only attaches to the
8 determinate sentence.

9 JUDGE PIGOTT: Okay.

10 MS. SPANAKOS: You're not getting it on the
11 other crimes that are indeterminate sentences.

12 JUDGE PIGOTT: So what are you attaching it
13 to if the ten's gone?

14 MS. SPANAKOS: The ten's not gone. The ten
15 is - - - the ten is not finished until the statutes
16 say it's finished.

17 JUDGE PIGOTT: How long did he serve?

18 MS. SPANAKOS: This defendant, because he -
19 - - the one with the ten is Brinson. All right. He
20 had ten, and he had three to six and a two to four.
21 The three to six and the two to four are concurrent
22 with each other, but they're consecutive to the ten.

23 So what ends up happening here is his
24 minimum time is calculated by adding six-sevenths of
25 the ten, and the three, and he comes up with a

1 minimum time of, like to say, eight-and-a-half years.
2 This is what happens, whether it's consecutive or
3 concurrent, everything is either merges or is
4 aggregated. That's why you can't part and parcel and
5 say, well, ten years has lapsed; that means I
6 finished my ten year. Besides the fact that, there's
7 no - - -

8 CHIEF JUDGE LIPPMAN: Yeah, yeah. Counsel
9 says there's no such thing as an aggregate sentence.

10 MS. SPANAKOS: Well, it - - - the statute
11 allows for aggregate sentences. It's the first time
12 I've ever heard anybody say that, to be honest with
13 you. The statute allows for the sentences. That's
14 how they're added together.

15 CHIEF JUDGE LIPPMAN: Well, there's two
16 sentences that you're adding together, right? That's
17 your aggregate sentence?

18 MS. SPANAKOS: Right. You would - - - you
19 add them together. What happens here - - - an
20 aggregation works in a lot of times to a defendant's
21 benefit. In Brinson's case, when he aggregates it,
22 it's six-sevenths of the ten, and then his three is
23 the minimum. That's his minimum term.

24 JUDGE PIGOTT: That's what I thought; Mr.
25 Laisure doesn't think so. And - - - and we don't

1 give PRS for indeterminates.

2 MS. SPANAKOS: Correct, Your Honor.

3 JUDGE PIGOTT: So why are we giving PRS
4 when the last part of his sentence is - - - is
5 indeterminate and the ten's gone?

6 MS. SPANAKOS: But the ten isn't gone, Your
7 Honor. You're assuming there's a particular order
8 he's serving his sentences. And he - - -

9 JUDGE PIGOTT: Well, not only - - - not
10 only am I assuming that, but I'm assuming that we do
11 the PRS because we didn't like what he did in the
12 robbery and we want to keep an eye on him. We're not
13 too worried about the grand larceny for some reason.
14 We give an indeterminate figuring that the - - - the
15 prison guards will keep track of him for whatever the
16 dis - - - the time is there, and then we're going to
17 let me go, and we're not going to ask for PRS.
18 Right?

19 MS. SPANAKOS: He received the PRS on the
20 ten years. The ten years does not start from the
21 moment he goes in, and it doesn't finish at the
22 completion of ten years.

23 JUDGE ABDUS-SALAAM: When he gets out,
24 after he serves this aggregate sentence that he
25 doesn't believe exists, that's when the PRS kicks in.

1 MS. SPANAKOS: Correct.

2 JUDGE ABDUS-SALAAM: So it's not while he's
3 in jail?

4 MS. SPANAKOS: No, there's no sense of
5 having the PRS in jail.

6 JUDGE SMITH: And when he - - - and if - -
7 - if one of the sentences is indeterminate, he's
8 going to be let out by the parole board presumably,
9 right?

10 MS. SPANAKOS: Well, no. What ha - - -
11 this is what ends up happening, as I was saying
12 earlier. Six-sevenths of the ten, plus his three is
13 his minimum. His maximum is the ten plus three. He
14 loses the six. He gets a benefit from this
15 aggregation. He loses the six completely and it goes
16 - - -

17 JUDGE SMITH: Why? I don't understand
18 that.

19 MS. SPANAKOS: - - - and it goes away under
20 the statute. So his maximum is the thirteen, which
21 is the ten plus the three. And when he - - -

22 JUDGE SMITH: The PRS is tacked on to the
23 thirteen?

24 MS. SPANAKOS: The PRS is - - - no, I
25 wouldn't say it that way, Your Honor.

1 JUDGE SMITH: A third time, huh?

2 MS. SPANAKOS: I wouldn't say it that way.
3 The PRS occurs after his release. He gets the five
4 years of PRS after his release.

5 JUDGE SMITH: After his release, which is
6 after thirteen years, forgetting about the little
7 one-seventh wrinkle there.

8 MS. SPANAKOS: Well, the - - - the thirteen
9 - - - the thirteen years, if he served the thirteen
10 years, he's completely maxed out.

11 JUDGE PIGOTT: Well, the - - -

12 MS. SPANAKOS: And he just receives the
13 five years PRS when he gets out.

14 JUDGE PIGOTT: Okay.

15 MS. SPANAKOS: Okay? We'll - - -

16 JUDGE SMITH: It sounds - - - sounds like
17 putting PRS on top of thirteen to me.

18 MS. SPANAKOS: Only if he maxes out, Your
19 Honor, because he - - - when they aggregate the
20 sentence, because he has an aggregate sentence that's
21 indeterminate only - - --

22 JUDGE SMITH: Only if he maxes out? How -
23 - - but you say there's no parole. How else does he
24 get out?

25 MS. SPANAKOS: I - - - I never said there

1 was no parole, Your Honor.

2 JUDGE SMITH: Okay, I'm confused.

3 MS. SPANAKOS: I didn't say there was no
4 parole. He's got a minimum and he's got a maximum.
5 That means that if he behaves well, he can get out
6 before his maximum expiration date.

7 CHIEF JUDGE LIPPMAN: Counsel, but you know
8 it sounds awful to - - - I know you understand it.
9 But it sounds awful technical when there's a simple
10 issue here, which is, is there an expectation of
11 finality? I finished one sentence, why do I get PRS
12 tacked on? And this is a really - - - and - - - and
13 again, I know you understand it, and it's a really
14 fine explanation, but very technical in terms of
15 what's happening, when this is a very basic issue,
16 about is it double jeopardy? Is there an expectation
17 of finality? And through, you know, your technical
18 calculations as to whatever, it still says to me,
19 when I see it all, and maybe because I'm not quite
20 understanding what you're - - - you're saying, it
21 still seems to me two sentences, one release date.

22 MS. SPANAKOS: I'm sorry, Your Honor. Two
23 sentences?

24 CHIEF JUDGE LIPPMAN: Two sentences, one
25 release date. And if you've finished one sentence,

1 how can you get PRS?

2 MS. SPANAKOS: You don't finish your
3 sentences like that. You don't part and parcel.
4 Your sentences are either aggregate or you - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but what I'm
6 saying to you, I understand that technically you're
7 saying that you don't, but - - - but this is a very
8 basic right that one has not to, you know - - -

9 MS. SPANAKOS: To understand and know your
10 sentences, and when defendants are - - -

11 CHIEF JUDGE LIPPMAN: To have an
12 expectation of finality, and - - - and - - -

13 MS. SPANAKOS: Right, and you don't have an
14 expectation of finality on each discrete sentence.
15 You have an expectation of finality, and when you
16 look at all the - - -

17 CHIEF JUDGE LIPPMAN: How do we know that?
18 How do we know what you just said is right, that you
19 don't have an expectation of finality in each
20 discrete sentence?

21 MS. SPANAKOS: Because expectation of
22 finality is based on the statutes. Double jeopardy
23 jurisprudence is based on the statutes, the statutes
24 which allow how much time you're going to get and
25 what a court is allowed to give you and not give you.

1 And it's based on, I know I can get five to ten years
2 of that. And then the - - - I go up before the
3 judge. The judge gives me my time.

4 CHIEF JUDGE LIPPMAN: But does that
5 determine your release date or your sentence?

6 MS. SPANAKOS: That - - - the - - - those -
7 - - there are statutes for both. There are statutes
8 that determine the amount of time you can get, then
9 there are statutes that determine your release date.
10 And the defendants - - -

11 CHIEF JUDGE LIPPMAN: I mean, I understand
12 how you push them together and you get - - - you get
13 that release date, but does that change the fact that
14 they're two sentences?

15 MS. SPANAKOS: It's - - - everything is
16 merged - - - when you have multiple sentences
17 together, they are merged or added together and you
18 have to do that. You can't part and parcel them.

19 CHIEF JUDGE LIPPMAN: Okay.

20 JUDGE GRAFFEO: Is it - - - is it clear
21 what sentence is being served first? I think that's
22 the question.

23 MS. SPANAKOS: No, Your Honor. There is no
24 sequence to the serving the sentences, as the
25 Appellate Division said. And I know that my

1 adversary has been pushing this, that he served one
2 sentence first, based on what the judge said at
3 sentencing. But the judge just gave him his
4 sentences, and didn't say what order they're in.
5 There's no statute that allows that. There's no case
6 law that talks about the order - - -

7 CHIEF JUDGE LIPPMAN: The judge can't do
8 that, can't say one sentence goes first and the other
9 one second?

10 MS. SPANAKOS: I've never heard a judge
11 ever do that, and what the judges sentence their
12 defendants on - - -

13 CHIEF JUDGE LIPPMAN: Are you saying they
14 can't do it?

15 MS. SPANAKOS: I don't know, Your - - -

16 CHIEF JUDGE LIPPMAN: They can't say, you
17 will serve this sentence of X years first, and then
18 you're going to serve this sentence of Y years. And
19 we're going to put them together and here's your
20 release date, or whatever.

21 MS. SPANAKOS: I would say, no, Your Honor,
22 because the sentences are aggregated and merged by
23 the statute. There are statutes that allow this.

24 JUDGE PIGOTT: Well, us - - - they usually
25 do top count first. I mean, you do the longest

1 sentence first, and then the other ones, you know,
2 are covered in. I guess, there's logic to it.

3 MS. SPANAKOS: That is - - - that is
4 customary, Your Honor. And that's based on the way
5 the people indict the defendants, because that's how
6 the indictments usually list them, but that's not
7 because that's required under any statute.

8 JUDGE PIGOTT: Well, that's right. I'm - -
9 - I'm agreeing with you. I'm say - - - but I'm
10 saying that the minor charges are always going to be
11 merged into the longer one. You don't merge the
12 longer one into a smaller one.

13 MS. SPANAKOS: When they're concurrent,
14 that is correct. The longest one always survives.

15 CHIEF JUDGE LIPPMAN: Okay, counsel.
16 Thanks, counselor.

17 MS. SPANAKOS: Thank you very much, Your
18 Honors.

19 CHIEF JUDGE LIPPMAN: Counselor, go ahead.
20 What's - - - what's wrong with her argument?

21 MR. LAISURE: Well, the - - - I think the -
22 - - the - - - the question about whether par - - -
23 one of the sentences might be dismissed on appeal is
24 instructive. If this was really such an inseparable
25 aggregate sentence, and if part of - - - if one of

1 those counts were reversed, you'd be reversing the
2 entire sentence.

3 JUDGE GRAFFEO: So what happens to the PRS?
4 He never has to serve it?

5 MR. LAISURE: That's right. That's right,
6 Your Honor. It's - - - it - - - it's not necessarily
7 - - - I said, it's not an equitable argument I'm
8 making, and it's an - - - it's an authority of the
9 courts argument. It's a double jeopardy claim. You
10 can't sentence someone after they finished serving
11 their sentence. The - - - you look at the - - - at
12 the 70.30 and 40, they say - - -

13 JUDGE SMITH: But why - - - why should
14 double jeopardy be so divorced from equity? I mean,
15 isn't the point of double jeopardy to treat people
16 fairly?

17 MR. LAISURE: Well, the equity of it is
18 that he doesn't have to worry about being resentenced
19 after he's done.

20 JUDGE PIGOTT: Yeah, but he can't serve PRS
21 in prison. It's just impossible.

22 MR. LAISURE: I - - - I suppose.

23 JUDGE SMITH: But isn't the - - - I mean, I
24 - - - I - - - I see - - - I see that he doesn't have
25 to worry, but isn't - - - and this - - - and I - - -

1 double jeopardy is sort of a freedom from worry
2 clause.

3 MR. LAISURE: Yes.

4 JUDGE SMITH: But isn't the moment at which
5 you - - - most people would stop worrying - - - the
6 moment when you get out of prison, or when your - - -
7 or when your - - - when you're supervision ends,
8 rather than the - - - I mean, nobody - - - nobody
9 gives a party in prison saying, oh, my ten years in
10 up; now I can start on the three.

11 MR. LAISURE: Well, that's true, but this
12 situation almost never comes up. That's why this is
13 such a - - - an odd circumstance, because - - -

14 JUDGE SMITH: Yeah, but a long time before
15 they had post-release supervision, people were giving
16 parties when they got out of jail.

17 MR. LAISURE: That's - - - that's right.

18 JUDGE PIGOTT: What's the - - - what are
19 the ramifications of PRS? Let's - - - let's assume
20 he has a PRS and he violates it. What happens?

21 MR. LAISURE: Oh, there are dreadful - - -

22 JUDGE PIGOTT: Well, I know.

23 MR. LAISURE: - - - possibilities.

24 JUDGE PIGOTT: They're dreadful for
25 everybody. But, I mean, what - - - what physically -

1 - - what - - -

2 MR. LAISURE: Yeah, you can end up serving
3 five - - - he could end up serving fifteen years and
4 six months instead of ten on that - - - on that
5 sentence.

6 JUDGE PIGOTT: Another five years added to
7 the ten - - -

8 MR. LAISURE: That's right.

9 JUDGE PIGOTT: if he screws up.

10 MR. LAISURE: And if - - - if you violate
11 towards the very end, you can add another six months
12 on top of that. So it's a very substantial
13 additional burden for the defendant.

14 JUDGE GRAFFEO: So would judges be able to
15 say you're going to serve the shorter sentences first
16 to insure that - - -

17 MR. LAISURE: I think you're - - - yes.

18 JUDGE GRAFFEO: - - - a defendant gets PRS?

19 MR. LAISURE: Yes, sure.

20 JUDGE GRAFFEO: So we've got to - - -

21 MR. LAISURE: But the point is - - -

22 JUDGE GRAFFEO: So the judges have to
23 change their - - -

24 MR. LAISURE: No, no, no, no. The o - - -
25 the reason - - - the only reason this would come up -

1 - -

2 JUDGE GRAFFEO: - - - their way of how they
3 sentence?

4 MR. LAISURE: I'm sorry. The only reason
5 this has come up is because of - - - of the strange
6 circumstances of courts assuming that PRS was already
7 included. That's never going to happen again.

8 JUDGE SMITH: You - - - you're saying it'd
9 be easier - - - it'd be easier for the judge not to
10 commit Catu error in the first place, rather than - -
11 -

12 MR. LAISURE: Exactly, and they - - - and
13 they aren't now.

14 CHIEF JUDGE LIPPMAN: Can the judge say - -
15 -

16 MR. LAISURE: Nobody's creating this
17 problem.

18 CHIEF JUDGE LIPPMAN: Can the judge say,
19 you serve this one first and you serve the other one
20 second?

21 MR. LAISURE: Can the judge say that? I
22 don't see why not? It's - - -

23 JUDGE PIGOTT: I don't think - - -

24 MR. LAISURE: The jud - - - the sentence is
25 what the judge says it is.

1 JUDGE SMITH: Isn't - - - isn't there
2 something arbitrary about having a - - - having - - -
3 whether a PRS - - - whether a guy has PRS or not,
4 turn on - - - on the order in which the judge
5 happened to mention the sentences?

6 MR. LAISURE: I - - - I suppose it is, but
7 double jeopardy is then - - - is an arbitrary
8 concept. There's - - - it's an authority question.
9 It's not an equity question.

10 JUDGE ABDUS-SALAAM: But counsel, isn't
11 this a lot like the legal argument that this is
12 substantially - - - he's substantially completed the
13 sentence because you haven't, you know, I'm still in
14 prison, but there is a little bit more to go that has
15 nothing to do with my original determinate sentence?

16 MR. LAISURE: It's not like that all.

17 JUDGE ABDUS-SALAAM: Isn't that like - - -

18 MR. LAISURE: It's not like that all,
19 because - - - because you can't - - - but the - - -
20 the sentences are parsed. The sentences do not - - -
21 are not - - - are not merged into another long
22 sentence. So it's not just that he has a little bit
23 left to serve. He's finished with the ten years.
24 He's - - - Mr. Blankymsee's finished with the five
25 years. There's - - - there's nothing at - - - if you

1 look at 70.40, it talks about this - - - the minimum
2 sentences being credited to one another. There's no
3 single sentence even contemplated by this - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
5 you both. Appreciate it.

6 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Christopher Brinson, No. 135 and People v. Lawrence Blankymsee, No. 136 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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