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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 9

MITCHELL HERNANDEZ,

Appellant.

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20 Eagle Street  
Albany, New York  
January 8, 2025

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 JUSTICE LARA J. GENOVESI

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People v. Hernandez.

3 MR. JAIN: Good afternoon, Your Honors. My name  
4 is Amit Jain, and I'm in association with the Office of the  
5 Appellate Defender. I represent Appellant Mitchell  
6 Hernandez. If I may, I'd like to reserve five minutes for  
7 rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MR. JAIN: Thank you, Your Honor.

10 Mr. Hernandez's life sentence is unlawful, and  
11 the PVFO adjudication that mandated it must be vacated for  
12 two independent reasons. First, it violated the plain  
13 language of the Penal Law. And second, it rested on judged  
14 found facts as to exactly when Mr. Hernandez was or was not  
15 incarcerated, not just on the alleged predicates, but for  
16 any reason in violation of his right to a jury trial, which  
17 he zealous - - -

18 JUDGE GARCIA: Let's start with the statute. If  
19 you look at sub 5, it seems to say that - - - you know,  
20 when you calculate the ten-year period, you exclude this  
21 time. Or time between the time of commission of the  
22 previous felony and time of commission of the present  
23 felony shall be excluded from such ten-year period, meaning  
24 the period in 4.

25 So on the plain terms of that statute, how do you

1 read it the way you would have us read it?

2 MR. JAIN: Oh, well, Your Honor, I guess I would  
3 start by acknowledging there is some ambiguity in the  
4 statutory text.

5 JUDGE GARCIA: I don't think there's ambiguity.

6 MR. JAIN: Well - - -

7 JUDGE GARCIA: I think it's fairly clear.

8 MR. JAIN: - - - if I may?

9 JUDGE GARCIA: So how do you get by the lack of  
10 ambiguity of the statute in reading out the time of  
11 commission in that first part of the statute?

12 MR. JAIN: Well, so I'll explain why our reading  
13 is perfectly consistent with the word "commission". But I  
14 just want to note first that respondent's reading does far  
15 more violence to the text of the statute, and I will - - -  
16 I will get into why. But on the word "commission" itself,  
17 Your Honor, as we note on page 5 of our reply brief, the  
18 legislature also used the term "excluded". And the term  
19 "excluded" means to bar from consideration and - - - or  
20 basically, to not count.

21 And so when you're calculating - - - sorry. When  
22 you're excluding time from a limitation period - - -

23 JUDGE GARCIA: It doesn't only say excluded,  
24 right? It says also "shall" - - - "that ten-year period  
25 shall be extended by a period or periods equal to the time

1 served."

2 MR. JAIN: Absolutely, Your Honor. And so the  
3 "shall be extended" and "shall be excluded" clauses work  
4 hand-in-hand, right? I don't think anybody here is  
5 offering - - -

6 JUDGE GARCIA: So one just doesn't mean anything.

7 MR. JAIN: No. If - - - to the extent there is  
8 superfluity issues, it's respondent's reading that  
9 completely reads out "shall be excluded" from the statute,  
10 right? Under respondent's interpretation, the legislature  
11 could just as easily have enacted a statute that said the  
12 period in subparagraph 4 shall be extended by time spent  
13 incarcerated. But this - - - the legislature said, "shall  
14 be excluded." It specified how the extension happens and  
15 it's by excluding that - - -

16 JUDGE GARCIA: And what does the second part mean  
17 under your interpretation?

18 MR. JAIN: So I think that the "shall be  
19 extended" part under our interpretation, it plays an  
20 important clarifying role. And so - - - you know, it's  
21 true that excluded itself - - -

22 JUDGE GARCIA: But isn't that - - - then that  
23 would be their point, too? It clarifies what's clear.

24 MR. JAIN: I don't think "excluded" does anything  
25 under their reading of the statute. Under our reading,

1 what "extended" does is make clear that you don't just  
2 exclude - - - you know. I point to actually page 23 of  
3 respondent's brief on the statutory issue where they - - -  
4 they make this accusation. They say if it's really just  
5 about exclusion, then you could only account for the time  
6 spent incarcerated during that initial ten-year period.  
7 And the answer is, no, you exclude that time and then you  
8 extend the period by that time.

9 And so subsequent incarceration that now falls  
10 within that extended period also tolls the period. So  
11 you're accounting - - - you're accounting for all of that.

12 And if I may? I understand respondent's argument  
13 really makes a lot out of this one word in the statute,  
14 "commission". As I said earlier, you know, Judge Donnino  
15 has acknowledged, in colorful language, that the statute  
16 could have been written more clearly. But respondent's  
17 reading has far more deficiencies when it comes to the text  
18 alone, before you even get to the half century of precedent  
19 about the plain purpose of the statute and how it operates  
20 in practice.

21 And so I'll start actually with the ten-year  
22 period. So twice in subparagraph 5 and once in CPL 400.15,  
23 the legislature referred to a ten-year period or ten-year  
24 limitation, but there is no ten-year period under  
25 Respondent's reading of the statute. It is a variable

1 period that fluctuates based on the, at best, arbitrary  
2 fact - - -

3 JUDGE GARCIA: But it's a period that's defined,  
4 right? The ten-year period of subsection 4 is defined  
5 except as defined - - - except as detailed in subsection 5.  
6 So in this case, even under your reading, the ten-year  
7 period isn't a ten-year period. We're talking about thirty  
8 years here, right?

9 MR. JAIN: Well, ten years has some real-world  
10 significance, I think, is the point. The legislature  
11 clearly thought that the ten-year period should mean  
12 something. And under our interpretation, as the court has  
13 said, in case after case across several decades, the rule  
14 that the legislature enacted is that following the  
15 admonishment on the prior sentence, a defendant must be  
16 able to live ten years at liberty and show that they have  
17 been sufficiently chastened with that cumulative ten years.

18 JUDGE GARCIA: But they could have said that.

19 JUDGE SINGAS: But then you're ignoring - - -

20 JUDGE GARCIA: I'm sorry.

21 JUDGE SINGAS: - - - the second part of the  
22 statute, which says, "And such ten-year period shall be  
23 extended."

24 MR. JAIN: Well, Your Honor, as I - - - as I said  
25 earlier, the extended clause does play an important

1 clarifying role. I haven't heard an answer from respondent  
2 on what the excluded clause does.

3 And, again, I think under respondent's reading  
4 there just - - - there is no ten-year period. I mean, it  
5 lets the exception swallow the rule. Right? It gets the  
6 rule backwards, and it lets this tolling provision in  
7 subparagraph 5 effectively blow up the policy in  
8 subparagraph 4, that this court has - - - has long  
9 described.

10 JUDGE GARCIA: But it's blown it up in this case,  
11 as you - - - just putting it in your terms - - - for a  
12 hundred days or whatever the days are. It's already been  
13 extended even acceptably, under your interpretation, for  
14 much, much longer than that. So the ten-year period often  
15 doesn't mean ten years from - - - as a pure period of time.

16 Here, it means even under your interpretation, I  
17 believe almost thirty years.

18 MR. JAIN: So it does not mean ten years from - -  
19 - from sentence on the prior felony to commission of the -  
20 - -

21 JUDGE GARCIA: Right.

22 MR. JAIN: - - - new offense. I agree with that.  
23 But it means something, right? Ten years has some real-  
24 world meaning. The defendant knows that he has to live at  
25 liberty for a cumulative total of ten years to escape

1 enhanced punishment, in the court's words.

2 JUDGE GARCIA: And couldn't in calculating that  
3 ten-year period which they placed the stock in, they have  
4 subtracted from there, or not given credit or excluded,  
5 time that you were incarcerated immediately prior to the  
6 sentencing? That is, from the time of commission of the  
7 prior felony?

8 MR. JAIN: No, Your Honor. And I'd be happy to  
9 explain why by turning to the next grave textual  
10 deficiency.

11 JUDGE GARCIA: But why wouldn't they use your  
12 term? Why wouldn't they use, "from the time of sentencing  
13 on the prior felony"?

14 MR. JAIN: Your Honor, again, I agree that there  
15 - - - there - - - I think that there is ambiguity in the  
16 statute. And so - - -

17 JUDGE GARCIA: But it wouldn't have been  
18 ambiguous to say that. Is the same way it doesn't appear  
19 to be ambiguous to say, "commission."

20 MR. JAIN: It - - - that - - - there would have  
21 been a much clearer way to write the statute, I grant you  
22 that, Your Honor. But again, I think our reading is far  
23 better than theirs. We've talked about the issue with the  
24 ten-year period, which is just written out of the statute  
25 from subparagraph 5 in CPL 400.15. We've talked about the

1 issue with the "shall be excluded" clause, which is pure  
2 surplusage under respondent's reading.

3 CPL 400.15 itself as well, simultaneously enacted  
4 companion provision to this very statute that actually  
5 implements subparagraph 4. The legislature couldn't have  
6 been clearer in what subparagraph 4 - - - subparagraph 5 -  
7 - - excuse me - - - accomplishes and it effectuates tolling  
8 of the ten-year limitation. Every single word in that  
9 phrase except for, "of the", contravenes respondent's  
10 reading.

11 Respondent has not offered an alternative  
12 definition of tolling. We're not aware of any. And in  
13 fact, respondent has not even mentioned CPL 400.15 when it  
14 comes to the statutory issue.

15 And finally, to my comment about blowing up the  
16 statute earlier. I think the fourth grave textual  
17 deficiency here in respondent's reading, goes to  
18 subparagraph 4's clear emphasis on the moment of sentence  
19 as that key triggering moment. And as this court explained  
20 in cases like *People v. Morse* over four decades ago, based  
21 on that textual focus on the moment of sentence in the  
22 limitation period itself and the decades of statutory  
23 history leading up to that provision's enactment, the  
24 legislature made clear that what it's doing in these  
25 enhanced sentencing statutes is it is requiring additional

1 punishment only for those defendants who refuse to reform  
2 after their admonishment on the prior sentence, not based  
3 on purely arbitrary, at best, events that happened before  
4 the prior sentence.

5 So I think for those reasons - - - you know, we  
6 went on the text alone. We don't have to get to this  
7 court's consistent half century of precedents describing  
8 this as a tolling provision, explicating the plain purpose,  
9 and so forth.

10 If there are no further questions on the  
11 statutory issue, I'd be happy to turn to the constitutional  
12 point. And on the constitutional issue, Your Honors, as I  
13 said earlier, to find that the statutory requirements for  
14 the sentence were satisfied here, the judge was required to  
15 find the facts of exactly when Mr. Hernandez was or was not  
16 incarcerated.

17 JUDGE RIVERA: Well, I - - -

18 JUDGE SINGAS: He just - - -

19 JUDGE RIVERA: - - - thought he - - - he  
20 conceded?

21 MR. JAIN: He - - - I - - - two responses.

22 JUDGE RIVERA: What fact-finding occurred? Let  
23 me put it that way.

24 MR. JAIN: Sorry, Your Honor?

25 JUDGE RIVERA: What fact-finding occurred?

1 MR. JAIN: The judge was required under CPL  
2 400.15 to enter a finding that the allegations in the  
3 predicate statement were sufficient to support the enhanced  
4 sentence, i.e., that he had, in fact, been incarcerated on  
5 those dates.

6 JUDGE RIVERA: But if he concedes those periods,  
7 what - - - what fact-finding has gone on?

8 MR. JAIN: Well, I think two responses to that,  
9 Your Honor. I would gently push back on - - - you know, I  
10 would say it's not rising to the level of a concession to  
11 decline to affirmatively controvert particularly in the  
12 context of the Sixth Amendment. Where, of course, it is  
13 not the defendant's burden to disprove the prosecution's  
14 case or to introduce evidence, you know, against the  
15 prosecution's case. And for the purposes of the Sixth  
16 Amendment, to the second point, the - - - the court, the  
17 Supreme Court has been clear - - -

18 JUDGE TROUTMAN: Did he do so through his  
19 counsel? Challenged the dates of incarceration? Pre-  
20 incarceration?

21 MR. JAIN: He - - - he - - - did he challenge the  
22 dates, Your Honor?

23 JUDGE TROUTMAN: Yes. Would that violate his  
24 Sixth Amendment right for him to, through his attorney,  
25 say, I challenge the time that you're asserting?

1 MR. JAIN: He could have, Your Honor. But the  
2 Sixth Amendment does not require him to do that.

3 CHIEF JUDGE WILSON: But didn't he sort of do the  
4 - - - I'm sorry. Over here. Didn't he do the opposite?  
5 Didn't he essentially stipulate to those dates?

6 MR. JAIN: He did not stipulate. But I - - - the  
7 point I want to make is even under the Constitution, if he  
8 - - - if he had said, you know, I admit to those dates,  
9 even that - - -

10 JUDGE TROUTMAN: But let me ask you. Did he have  
11 the opportunity to controvert the information?

12 MR. JAIN: He had the opportunity, Your Honor,  
13 but the Constitution is violated - - -

14 JUDGE TROUTMAN: No. I just want to know did he  
15 have the opportunity?

16 MR. JAIN: Yes.

17 JUDGE TROUTMAN: And you would acknowledge that  
18 he's supposed to have that opportunity, correct?

19 MR. JAIN: Under statute he's supposed to have  
20 the opportunity and under the Constitution as well. But  
21 the Constitution is still violated if a jury is not given  
22 the - - - if the prosecution, rather, does not prove its  
23 case to a jury when it comes to do that.

24 CHIEF JUDGE WILSON: But he can't waive that  
25 right?

1 MR. JAIN: He can waive that right.

2 CHIEF JUDGE WILSON: And so - - -

3 MR. JAIN: He certainly did not do so here, Your  
4 Honor.

5 CHIEF JUDGE WILSON: Well, why not?

6 MR. JAIN: So I point to the court to Florida v.  
7 Nixon, for example, in which the Supreme Court was  
8 unequivocal that even a tactical admission of guilt before  
9 the jury does not amount to a waiver. Both because that  
10 admission is made through counsel rather than the defendant  
11 himself, and because there is a miles-long gap between  
12 admitting something and waiving your constitutional right  
13 to have a jury find that fact beyond a reasonable doubt.  
14 And so even if the failure to affirmatively controvert the  
15 allegations here rose to the level of what you might call  
16 an admission, it's still - - -

17 JUDGE GENOVESI: Counsel, he did more than not  
18 affirmatively controvert. He said we - - - the court  
19 interpreted, you don't dispute that he served the time, you  
20 dispute whether he - - - that time should be included. The  
21 dates are not in dispute.

22 MR. JAIN: That was - - - again, Your Honor. A,  
23 that was through counsel. And I think, B - - - and I  
24 understand this concern, right? About, you know, why are  
25 we here? Right? If he didn't affirmatively dispute. But

1 maybe it would helpful to take a step back and go back to  
2 the nature of the underlying right itself. Right? Because  
3 as the Supreme Court said in Erlinger and has said from  
4 Apprendi onwards, this is not just a procedural  
5 technicality. This is a fundamental reservation of power  
6 to the American people. And what the jury does is it  
7 stands as that bulwark between the powerful government and  
8 the vulnerable individual.

9 JUDGE GARCIA: But this is a preservation  
10 argument for us. We've said Apprendi arguments have to be  
11 preserved, right? So it's a different issue than is coming  
12 before the Supreme Court. Supreme Court has said we can  
13 apply our procedural rules even when they change the law,  
14 and it's arguable whether they did that here. But we're  
15 asking this from a preservation point of view, not a waiver  
16 point of view, not a did he give up the right, but did he  
17 preserve the issue so that this court is - - - can reach  
18 it?

19 And by admitting it, I think the question is, did  
20 he fail to preserve?

21 MR. JAIN: We agree that there was no objection  
22 that preserved the issue at the time of trial. And the  
23 objection, of course, would have been foreclosed under this  
24 court's precedents in Bell and Porto. And so on that  
25 point, I would - - -

1 JUDGE GARCIA: But it's not an objection. It's  
2 just did you preserve by asking the judge to decide this?  
3 Then, arguably, you could have preserved that a jury should  
4 have. But by not asking for anyone to decide this, you  
5 haven't preserved the issue for us. And there's a supreme  
6 court case - - - a trial court case, I think in - - - in  
7 Manhattan, where because of a procedural issue they went  
8 back to the Erlinger issue. And even in that case where I  
9 believe the judge said Erlinger required a jury to consider  
10 this, they said, well, as to these facts, you admitted them  
11 the first time around when they filed the defective  
12 statement.

13 MR. JAIN: Well, I think on the preservation  
14 point, Your Honor, this court has never required, even as  
15 it has required preservation for Apprendi legal claims, it  
16 has never once required that there be also a challenge to  
17 the actual facts. Right? So in Bell, for example, there  
18 was no challenge to the facts of tolling. There was just a  
19 challenge in that case to the legal issue and the court - -  
20 - the court reached the merits.

21 But in any event, we're not disputing here that  
22 the issue was not preserved in the trial court. And so I  
23 think the issue then is does an exception to preservation  
24 apply? And the answer is yes. And we've briefed four of  
25 them. I want to touch on two very briefly.

1           On People v. Page, right? That's the case about  
2           the written waiver of the jury trial, right? My  
3           adversaries haven't even addressed that case and that  
4           exception to preservation. And this case cuts much more -  
5           - - much more closely to the core of the jury trial.  
6           Right? It's a wholesale conversion of what the  
7           Constitution requires to be a jury proceeding into  
8           something that is a judge proceeding. And so that is one  
9           basis.

10           But there is an even more clear, straightforward  
11           hand-in-glove fit, very narrow, and that is the Baker,  
12           Patterson, and Cabrera doctrine. It was designed, I think,  
13           over the wisdom of decades of precedent for exactly this  
14           moment. Right now in courthouses across the state, within  
15           courthouses, from one courtroom to the next, we have a  
16           situation where one defendant, similarly situated, is  
17           getting an indeterminate life sentence. Right next door a  
18           defendant, similarly situated, is getting a determinate  
19           sentence of years based on a pure question of law regarding  
20           the application of a bright line rule that this court can  
21           resolve here and now, and that has been briefed up and  
22           down, left and right.

23           JUDGE SINGAS: How does Cabrera affect that?

24           MR. JAIN: Well, so I think that Cabrera stands  
25           for the proposition that when those three elements are

1 satisfied, which we briefed - - - you know, why we do  
2 satisfy - - - clearly, we all agree Bell and Porto  
3 foreclosed the objection at the time of trial. Erlinger, I  
4 think, directly addressed the constitutional issue, which  
5 is why respondent previously conceded it in cases like  
6 Lopez and Banks. And there is no further factual record  
7 necessary for the application of Apprendi's bright line  
8 rule here. When those three factors are satisfied, then I  
9 think Cabrera - - - excuse me - - - stands for the  
10 proposition that there is nothing to gain and much to lose  
11 from delaying the inevitable.

12 And so when those three factors are satisfied, I  
13 think it's very wise that in the - - - that very narrow  
14 situation, it's rare, it's unique for all three of those  
15 things to be true. That overenforcement of preservation is  
16 not necessary and, in fact, is inappropriate.

17 CHIEF JUDGE WILSON: Thank you.

18 And Counsel, before you start. I fell asleep at  
19 the switch and forgot to announce that we're joined by  
20 Judge Lara Genovesi of the Second Department. We're  
21 delighted to have her here and have her assistance.

22 MR. WU: Thank you, Your Honor. May it please  
23 the court. Steven Wu for the people. Excuse me. I'll  
24 begin with the statutory argument. I would like to reserve  
25 some time to discuss the Erlinger issue as well at the end.

1           On the statutory question, the plain text of the  
2 Penal Law here unambiguously requires that the calculation  
3 of the lookback period for predicate sentencing purposes  
4 include any period of incarceration served from the time of  
5 commission of the first predicate felony.

6           JUDGE RIVERA: Yes, that is true. And - - - and  
7 there's been some discussion about whether or not that's  
8 ambiguous given romanette iv. But it's talking about the  
9 calculation of that ten-year period, which means you are  
10 talking about the period as set out in romanette iv. And  
11 that period is from the sentence, right? It's - - - well,  
12 it's ten years back up to the sentence. You're trying to  
13 see if the sentence is ten years out from the commission of  
14 the felony.

15           MR. WU: That - - - that - - -

16           JUDGE RIVERA: So - - - so how do you end up  
17 before the sentence?

18           MR. WU: Well, but - - -

19           JUDGE RIVERA: It seems to me that romanette v,  
20 by referring to the period above, is cabining it - - -

21           MR. WU: So - - -

22           JUDGE RIVERA: - - - to that period only.

23           MR. WU: Yeah. So I think one thing you said  
24 there when you were correcting your description of the  
25 statute is critical, which is that sub 4 talks about when

1 the sentence took place in a ten-year period before the  
2 commission of the most recent felony. And so the way that  
3 the statute sort of uses this data is it starts from the  
4 date of the most recent felony, counts backwards ten years  
5 as an initial matter, and then extends that time by the  
6 additional period of incarceration from the time of the  
7 commission.

8 The sentence is not the triggering date. The  
9 sentence is not the triggering date for when the ten years  
10 starts to run. It runs from the commission, not from the  
11 sentence.

12 JUDGE RIVERA: Right, but then you add the ten -  
13 - - you add the time of incarceration on the tail.

14 MR. WU: Correct.

15 JUDGE RIVERA: You're trying to add it on the  
16 head. That doesn't make any sense to me.

17 MR. WU: Well, except that's exactly what the  
18 statute requires when the statute says - - -

19 JUDGE RIVERA: Well, that's what I'm saying. How  
20 do we explain the continued reference to this ten-year  
21 period under sub-paragraph 4, because - - - under romanette  
22 iv? Romanette iv is about exactly the period that we're -  
23 - - that you and I are now talking about. Right? You just  
24 want to make sure that sentence is not more than ten years  
25 out. But it is very clear from the way the legislation is

1 written, the way the law is written, that your - - - the  
2 ten-year period is not an unbroken period of time, because  
3 you can add time to make up for the period when someone is  
4 incarcerated.

5 MR. WU: That's correct. So the people's  
6 interpretation here asked the same question as the statute  
7 - - -

8 JUDGE RIVERA: Uh-huh.

9 MR. WU: - - - which was, was the sentence for  
10 the first felony imposed during a particular lookback  
11 period? During a particular period of time before the  
12 commission of the most recent felony? And the only dispute  
13 here is whether, in defining that time period - - - in  
14 defining how far back in time you look, you include every  
15 period of incarceration since the commission of the first  
16 felony, or you exclude pre-trial commission - - - a pre-  
17 trial sentence, right? And so we're not in disagreement at  
18 all that the date of the sentence is critical here. We're  
19 just talking about the period of time that you look  
20 backwards.

21 And I think the language that is unambiguous and  
22 that has to be given force, is the legislature deliberately  
23 chose to look at the period of incarceration from the  
24 commission of the first felony. They could easily have  
25 written that statute differently. They could have said the

1 time from the date of the sentence from the first felony.  
2 And we know they know how to refer to the date of the  
3 sentence.

4 In other statutes, like the sealing statute,  
5 instead of talking about the date of commission of the  
6 first felony, they talk about the date of conviction from  
7 the first felony, which would have changed the rule as  
8 well.

9 CHIEF JUDGE WILSON: And so if the - - - if sub 5  
10 ended with shall be excluded; just stopped there, wouldn't  
11 it mean exactly what you're saying?

12 MR. WU: It would still mean what we're saying.  
13 And so I do agree that "exclude" and "extend" are sort of a  
14 belt and suspenders approach.

15 CHIEF JUDGE WILSON: So what you - - - oh, so  
16 that's your explanation of "extended"?

17 MR. WU: Well, "extend" for us has sort of this  
18 commonplace meaning where you start with the ten years, you  
19 figure out the additional time from the periods of  
20 incarceration - - -

21 CHIEF JUDGE WILSON: Well, if I were doing this -  
22 - - if I were doing this as a math problem for my seventh  
23 grader. And I said, here's a unit of measure, and what I'm  
24 going to do is exclude - - - let's say the unit of measure  
25 is A - - - I'm going to exclude B from it and extend it by

1 B. I would think that that's asking me to double count B.  
2 To take B away from A, right? Right, so that now I've  
3 excluded it. And then I've got to add B as well, and I'd  
4 be double counting the measure.

5 MR. WU: Well it's not double counting because  
6 this is exactly the way that the statute pushes the time  
7 backwards. It looks at the periods of incarceration and it  
8 tacks it on to this default ten-year period. And I should  
9 say - - -

10 CHIEF JUDGE WILSON: Well, the first thing it  
11 does is, it says when I'm measuring that A, to actually  
12 come up with the value of A, I've got to subtract B from  
13 it. So it's no longer a ten-year period. So I've got to  
14 then run out more than that just to get to the ten years.  
15 And then, once I've done that, I've got to add that period  
16 back again.

17 MR. WU: I don't think these are two separate  
18 points. I think "exclude" and "extend" are doing the same  
19 thing here to the same period of time. The legislature was  
20 pointing to - - - and I agree, it's a mathematical problem  
21 - - - was pointing to a specific number, which is all the  
22 incarceration defendant has served since the time of the  
23 commission of the first felony. And was saying that period  
24 of time has to be disregarded for purposes of the ten-year  
25 period and instead added to the front end of that period,

1 so that we look further back in time for the defendant's  
2 conviction.

3 CHIEF JUDGE WILSON: And I have to say, my  
4 seventh grader walked in while my clerks and I were trying  
5 to figure this out, and she drew something on a Post-it and  
6 said, oh, this is really easy, and we had no idea what she  
7 was talking about.

8 MR. WU: Well, I trust the seventh grader for  
9 this. But I do want to respond.

10 JUDGE RIVERA: No offense taken, thank you.

11 MR. WU: Yes. No offense.

12 I do want to respond to the idea, the argument  
13 that we are - - -

14 JUDGE RIVERA: But no. I want to get back to - -  
15 - why you - - - or maybe we're talking about different  
16 things. I think you're saying you put it at the head,  
17 which I read this to mean you put it - - - you add the time  
18 back in at the tail. And maybe we are talking about the  
19 same thing, maybe we're not. But again, it - - - I  
20 understood your brief to basically mean - - - or your  
21 briefing on this to mean you're adding the time in advance  
22 of the sentence, and I just can't see how that squares with  
23 romanette iv. And romanette v is about how you figure out  
24 the period to show the distance between the sentence and  
25 the commission of the felony.

1 MR. WU: Well, let me try this answer. The  
2 People's position - - -

3 JUDGE RIVERA: Yeah.

4 MR. WU: - - - does not turn at all on whether  
5 the sentence is served before or after the sentencing date  
6 for the first felony offense. It does not turn at all on  
7 that, because the statute doesn't turn at all on this. The  
8 People's calculation here - - - and it is straightforward  
9 in a sense - - - just adds up all the time the defendant  
10 has been incarcerated - - -

11 JUDGE RIVERA: Yeah.

12 MR. WU: - - - since the commission of the first  
13 felony, adds that aggregate period, which here was  
14 something like fourteen years, on top of a default ten-year  
15 period. And it just runs that aggregate time backwards as  
16 sub 4 requires - - -

17 JUDGE RIVERA: Yes. My - - - my - - -

18 MR. WU: - - - from the date of commission of the  
19 second felony.

20 JUDGE RIVERA: - - - my problem is that - - -  
21 that - - - my problem is that then you're reading romanette  
22 v in isolation, right? Romanette v is about romanette iv,  
23 and that's the period you're trying to set the boundaries  
24 on.

25 MR. WU: But we're not reading it in isolation.



1 Subparagraph 4 says there's this ten-year lookback period.

2 JUDGE RIVERA: Uh-huh.

3 MR. WU: And then subparagraph 5 then defines  
4 what it means to look at that ten-year period. It says,  
5 "In calculating the ten-year period" - - -

6 JUDGE RIVERA: But the only - - -

7 MR. WU: - - - here is - - -

8 JUDGE RIVERA: - - - purpose of the lookback  
9 period is to get that distance between the sentence and the  
10 commission of the felony.

11 MR. WU: No. That's where I disagree. The  
12 purpose of the calculation is to define a period in history  
13 within which any conviction of the defendant will qualify  
14 as a predicate felony.

15 JUDGE RIVERA: But then romanette v would have  
16 been written differently, is my point to you.

17 MR. WU: Well - - - well, romanette v would have  
18 been - - -

19 JUDGE RIVERA: Right? Romanette v would just be,  
20 we just want to figure out if they've ever been at liberty  
21 for ten years?

22 MR. WU: Romanette v is not written in that way.

23 JUDGE RIVERA: Correct.

24 MR. WU: It's not written in that way.

25 JUDGE RIVERA: Correct. That's my point.

1 MR. WU: And that is why defendant's argument  
2 that this is something like a ten-year-at-liberty rule  
3 doesn't work. For example, nothing in the statute talks at  
4 all about the date of the defendant's release from prison.  
5 That date, which is critical to most of the examples the  
6 defendant has raised, is completely absent from the  
7 statute. And instead by using the phrase "any time", what  
8 the legislature made clear was they were indifferent to the  
9 question of when the defendant served their sentence when  
10 they were released. Again, as long as this aggregate time  
11 period were.

12 JUDGE GARCIA: Counsel, could you address the  
13 400.15 point that was made by your adversary?

14 MR. WU: Absolutely. So this is an argument  
15 that, I think, prioritizes the labels the legislature gave  
16 in 400.15 over how it actually described the operation of  
17 the statute. It is true the legislature talks about  
18 tolling in 400.15, but it does so as a cross-reference to  
19 the Penal Law provisions that define this actual  
20 calculation.

21 And between the two of them, when the label would  
22 require a calculation that is inconsistent with the  
23 statutory language, this court follows the way the  
24 legislature has defined the actual calculation taking  
25 place. One of the problems with defendant's argument is

1 they are trying to give independent meaning to the word  
2 "tolling" as though there is some ambiguity about the  
3 calculation in sub 4 and sub 5, and there just is no  
4 ambiguity on that front.

5 I do want to respond to the argument that we are  
6 somehow - - -

7 JUDGE RIVERA: If we disagree with you on that,  
8 if we think there is ambiguity, do they then win?

9 MR. WU: Well, they still do not. But I refuse  
10 to give up the premise - - -

11 JUDGE RIVERA: Why not? Why not? No, no, I  
12 understand that. But why not?

13 MR. WU: Well, I refuse to give up the premise  
14 that there is ambiguity here, and I apologize for pushing  
15 back on you on this. Because this is a case where, by  
16 defining the time period in a specific way, any calculation  
17 of the lookback period has to take that into account. And  
18 this is the answer - - -

19 JUDGE RIVERA: Except it seems nonsensical  
20 because of romanette iv, but I get your point. But can you  
21 get back to the - - -

22 MR. WU: It - - - well, but it also - - -

23 JUDGE RIVERA: - - - other question?

24 CHIEF JUDGE WILSON: Yeah.

25 MR. WU: This is also an answer to the argument

1 that we are somehow ignoring the word "exclude". There's a  
2 very commonsense understanding of the word exclude here.  
3 Sub 5 says, you exclude the periods of incarceration from  
4 the calculation of the lookback period. And what that  
5 means is that when you are determining how far back in time  
6 to look to when a defendant's predicate convictions stand,  
7 right, you have to - - - you have to take into account that  
8 entire period of incarceration. And that's what exclude  
9 means. It means you have to take into account. And  
10 defendant's argument - - -

11 JUDGE RIVERA: The purpose of the - - -

12 MR. WU: - - - the basic defect - - -

13 JUDGE RIVERA: - - - the purpose of the lookback  
14 period we find in subsection 4 - - - in romanette iv,  
15 excuse me.

16 MR. WU: Right.

17 JUDGE RIVERA: That - - - again, that - - -  
18 that's why I'm still having difficulty. But we've gone  
19 through this, so I get your point.

20 CHIEF JUDGE WILSON: Yeah. I would like to get  
21 to Judge Rivera's question about what you think the  
22 legislative history is, if we thought there were ambiguity?

23 MR. WU: Yeah. So the legislative history here  
24 is, I think, at best, unclear. I don't know that it was  
25 sure the legislature was actually focused on this specific

1           problem about pre-trial versus post-trial detention. I'll  
2           say a couple of things about it, though, that I think are  
3           helpful.

4                         One is that at the time that this legislation was  
5           enacted, defendants did serve time in pre-trial detention.  
6           It wasn't as though pre-trial detention only existed after  
7           the statute was enacted. So it wouldn't have been a  
8           surprise to the legislature that defining a period of  
9           incarceration from the commission of the first offense  
10          would include plenty of defendants' time served before  
11          trial that was then credited to their sentence afterward.

12                        The second point is that we know since the  
13          enactment of the statute, the legislature has chosen  
14          different language in other statutes to refer to this time  
15          calculation. The sealing statute in CPL 160.59, as I  
16          mentioned, talks about the date of conviction. And the  
17          legislature knows when to refer to the date of the sentence  
18          or the date of the conviction versus the date of the  
19          commission of the first offense.

20                        Now, I think there has been some argument from  
21          defendant that this is a nonsensical policy, that this  
22          leads to disparities in the way that different defendants  
23          are treated. But it does not for this reason - - - and  
24          this is an example that we try to articulate on page 28 and  
25          29 of our brief. What this statute does is it equalizes

1 defendants who commit their first felony on the same date,  
2 are sentenced on the same date, and then later commit a  
3 second felony on the same date. For both of those  
4 defendants, they are exempt from the predicate consequences  
5 of their first felony at the same date in the future, at  
6 the exact same date in the future. And that date is  
7 exactly the same regardless of when the defendant served  
8 their sentence.

9 In other words, if the defendant served their  
10 entire sentence before the trial, right? Then they - - -  
11 the date that they're free from the predicate conviction is  
12 going to be ten years plus the pre-trial time out. If they  
13 served their entire period after the sentence, then it is  
14 still ten years plus the amount of time they have served  
15 incarceration. And it is reasonable for the legislature to  
16 have wanted to keep that date the same. It - - - because  
17 they might have - - - they might have reasonably have  
18 believed that the time the defendant serves, when they  
19 served it, is immaterial for the policy underlying this  
20 statute.

21 If there are no other questions on the statutory  
22 question, I'd like to turn to Erlinger for a couple of  
23 minutes. There are threshold reasons for this court to  
24 decline to reach the Erlinger question in this case. I'll  
25 begin with the problem of preservation.

1           Defendant here failed to preserve an objection to  
2           the predicate sentence here in two ways. One, by failing  
3           to controvert at all whether the predicate sentence, the  
4           calculation, was inaccurate. And second, by failing to  
5           raise a constitutional objection under the Sixth Amendment  
6           to the calculation here. And both of those grounds are  
7           independently sufficient to make this a lack of  
8           preservation.

9           The reason that the failure to controvert it  
10          factually makes a difference here is because Erlinger  
11          itself, and Apprendi, the case that it is based upon,  
12          depends upon a contested issue of fact being given to the  
13          judge instead of a jury. But here there was no contest  
14          over the facts, here. Defendant had a full and fair  
15          opportunity to raise an objection to the prior periods of  
16          incarceration here. And not only was that true under the  
17          statute, but the judge then, before defense counsel got  
18          into the statutory argument we've been discussing, asked  
19          whether he contested the periods of incarceration, defense  
20          counsel said, no, I only have a statutory objection.

21          As a result, the Erlinger question is arguably  
22          not even presented to this court. There was no dispute of  
23          fact that would lead to a question about who the right  
24          factfinder should be in this context.

25          And the failure to raise a legal objection under

1 the Sixth Amendment also fails to preserve the issue. As  
2 Judge Garcia correctly noted, this court has required  
3 Apprendi claims to be preserved. Other challenges to the  
4 sentence that don't raise Apprendi do not preserve the  
5 Sixth Amendment claim as well.

6 Second, and sort of independently of  
7 preservation, defendant here also admitted to the periods  
8 of incarceration. And the combination of his admission to  
9 those periods and other evidence in the record showing that  
10 he was incarcerated for this period of time, makes any  
11 error here harmless. Again, defendant's admissions here  
12 were done in the course of a proceeding where he had every  
13 incentive to contest the facts of his prior incarceration,  
14 if he had a reason to contest it.

15 The whole purpose of the 400.15 procedure is to  
16 give the defendants the opportunity to say, I disagree with  
17 the periods of time as articulated in the predicate felony  
18 statement. By merely making that objection, not by  
19 satisfying any threshold evidentiary requirement, a  
20 defendant can get a factual hearing, albeit in front of the  
21 judge, and can require the people to prove beyond a  
22 reasonable doubt every period of incarceration that is  
23 established in the predicate felony statement.

24 Defendant knew that here; there's no argument  
25 that he did so unknowingly. And by failing to controvert

1           it under the statute, and then in the colloquy, he admitted  
2           to those periods. That admission is sufficient under  
3           Apprendi.

4                        Again, Apprendi and Erlinger are only triggered  
5           when a defendant contests a fact and wants it submitted to  
6           a jury instead. But here, as the federal courts have said,  
7           when a defendant admits or fails to contest it, what the  
8           defendant has done is taken this issue away from the  
9           factfinder, right? It is not the court that has done so.  
10          It is not the People that has done so. The defendant has  
11          removed this issue from the court, and therefore, the  
12          Erlinger question is not squarely presented.

13                       CHIEF JUDGE WILSON: Thank you.

14                       MR. WU: Thank you.

15                       MS. UNDERWOOD: Good afternoon, Barbara Underwood  
16          for the Attorney General.

17                       There are several reasons not to reach the  
18          constitutional issue that we came here to defend, including  
19          lack of preservation.

20                       But in case you do reach it, I'd like to make two  
21          points about the jury trial claim that is being made in  
22          this case. One, it should be rejected because the jury  
23          right recognized in Apprendi and Erlinger doesn't apply to  
24          the sentence calculation at issue here.

25                       And two, if it does apply, the remedy is to

1 provide a jury and not to invalidate the entire recidivist  
2 sentencing scheme.

3 And this tolling question comes up not only in  
4 the persistent violent felony offender sentences that are  
5 at issue here, but also in the second violent felony  
6 offender and second felony offender statute. So it has  
7 more general application.

8 I can speak to preservation if you like, but I -  
9 - - I'd prefer to go right to Erlinger. So turning to the  
10 merits. The jury right recognized in Apprendi and Erlinger  
11 does not apply to the tolling calculation at issue here for  
12 two reasons. One, it's not the kind of fact that is  
13 traditionally given to a jury. It falls comfortably within  
14 the rule of Almendarez-Torres recognized by Apprendi. That  
15 rule holds that a judge, rather than a jury, can properly  
16 determine the fact of a prior conviction, the elements of  
17 the prior crime, and the date of conviction. And we would  
18 say that reasonably includes also determining whether the  
19 judgment of conviction was entered within or beyond a  
20 lookback period, defining when a conviction is too old to  
21 use for recidivist sentencing.

22 To be clear, the tolling calculation is the only  
23 thing that Hernandez claims should have gone to a jury  
24 here. One of his two prior convictions qualifies as a  
25 predicate without regard to tolling, because he was

1 sentenced for that crime within ten calendar years of the  
2 current crime. So only the older of the two falls outside  
3 the ten calendar years and depends on this tolling or  
4 addition of time to make it qualify.

5 So Erlinger said some information about prior  
6 crimes can - - - must be found by a jury. In particular  
7 whether two prior crimes count as one because not committed  
8 on separate occasions. But the calculation of the lookback  
9 period involved in this case is quite unlike that fact or  
10 the fact at issue in Erlinger. It doesn't involve any  
11 judgment about the defendant's offense-related conduct. In  
12 fact, it doesn't involve his conduct at all, just a count  
13 of the days when he was incarcerated, which is an objective  
14 fact contained in records of the criminal justice system  
15 like the date of his conviction.

16 The Supreme Court has held that many facts about  
17 defendant's conduct, formerly called sentencing facts, must  
18 now be found by a jury. But some courts, including this  
19 court, pre-Erlinger, have held that there are other facts  
20 about prior convictions that do not require a jury, and the  
21 Supreme Court hasn't confronted those rulings. For  
22 example, that the defendant was, in fact, the person  
23 convicted of prior crimes; that the two prior crimes were  
24 committed in a certain timing and sequential relationship  
25 to each other.

1 CHIEF JUDGE WILSON: And when you say that those  
2 haven't been - - - sorry, right in front of you - - -  
3 haven't been confronted by the Supreme Court, you're asking  
4 for a maybe slight extension of Almendarez-Torres? Over  
5 its holding. Over the facts in its holding. And the  
6 Supreme Court seems very unhappy with that case.

7 MS. UNDERWOOD: The Supreme Court has, in all the  
8 cases that have come before it, found that various facts  
9 that were said to be outside Almendarez-Torres are not  
10 outside Almendarez-Torres, are - - - are included.

11 CHIEF JUDGE WILSON: But - - -

12 MS. UNDERWOOD: But all of those facts have been  
13 facts about the defendant's conduct: brandishing a firearm;  
14 whether a murder was heinous, they're all aggravating facts  
15 that go to the defendant's conduct. The innovation, if it  
16 was one of Erlinger, is that the conduct of the predicate  
17 was also being concerned, but it too involved evaluating  
18 the defendant's conduct. And the court has not decided - -  
19 - has not confronted or decided any case involving  
20 something as outside the defendant's conduct as this.  
21 Something which is simply a matter of the records of the -  
22 - - of the - - - sometimes the information will be on the  
23 judgment of conviction, sometimes it will be - - - it'll be  
24 corrections records. But their official institutional  
25 records about the mechanics of prior convictions - - -

1 JUDGE RIVERA: But if defendant disputes it, does  
2 the judge get to make that decision under your analysis of  
3 Erlinger?

4 MS. UNDERWOOD: Yeah. This - - - what I'm saying  
5 now is that this kind of fact, which is not about the  
6 defendant's behavior, but is about the mechanical operation  
7 of the criminal justice system, about when he went in and  
8 when he went out of various correctional facilities, can be  
9 decided by a judge when it's in dispute. Of course, in  
10 this case, we have the whole other issue that it may not  
11 have been in dispute at all.

12 CHIEF JUDGE WILSON: Right.

13 MS. UNDERWOOD: But when it has to be decided, I  
14 think Almendarez-Torres does not prohibit - - - I can't say  
15 it endorses - - - but it does not prohibit a determination  
16 by a judge.

17 CHIEF JUDGE WILSON: And the sort of facts you're  
18 describing are ones that, I mean, maybe could be  
19 characterized as ones we could take judicial notice of?

20 MS. UNDERWOOD: That's correct. They are  
21 contained in records that are commonly - - - of which  
22 judicial notice is commonly taken. Although, when judicial  
23 notice is taken in a criminal case, it still has to go to  
24 it. That doesn't take care of the jury issue entirely.

25 CHIEF JUDGE WILSON: Right.

1 MS. UNDERWOOD: But it is the type - - - it does  
2 describe the kind of fact that I'm suggesting is outside  
3 the rule of Almendarez-Torres. And despite the broad  
4 claims - - - you know, nothing more than the fact of  
5 conviction in Almendarez - - - in Erlinger, the court was  
6 only deciding the case that was before us and may very well  
7 not have contemplated this type of fact at all. It  
8 certainly wasn't before the court.

9 In addition, the jury right recognized in  
10 Apprendi and Erlinger doesn't apply to this tolling  
11 calculation for an entirely independent reason. And that  
12 is that the lookback period of ten years plus incarceration  
13 time, however, the incarceration time is calculated, is a  
14 calculation that mitigates sentence, and such facts are not  
15 governed by the Apprendi/Erlinger jury right at all. And  
16 Apprendi said that, and Erlinger says that.

17 New York law provides that a jury verdict of  
18 guilty plus two prior felonies that can properly be found  
19 by a judge under Almendarez-Torres, authorized the sentence  
20 for a persistent violent felony offender. For Apprendi  
21 purposes, that is the baseline. And then, excluding some  
22 prior convictions for remoteness - - - and calculating  
23 remoteness is a defense to that sentence; it reduces the  
24 sentence by excluding some convictions from the  
25 calculation. And Apprendi said that a jury is not needed

1 for findings that mitigate the sentence.

2 Supreme Court applied that principle a few years  
3 later in Oregon against ICE to approve a law that required  
4 a judge, not a jury, to find certain facts before imposing  
5 consecutive rather than concurrent sentences. And in ICE,  
6 the court relied on historical practice - - - this  
7 determination was traditionally made by judges - - - and  
8 the history of the statute in question, which was to  
9 encourage concurrent, rather than consecutive, sentences,  
10 to conclude that the Oregon law was mitigating and not  
11 aggravating and therefore, was not subject to the Appendi  
12 - - - the jury right.

13 And actually, a few years earlier, the Second  
14 Circuit, in a case called Snipe, which we cited but didn't  
15 discuss at length, reached a similar conclusion about a - -  
16 - about a provision in the federal three-strikes law which  
17 identified numerous felonies that would suffice for  
18 aggravating an offense. And then allowed the defendant to  
19 exclude any robbery that was committed without firearms and  
20 without death or serious injury, and the court held that it  
21 was okay for a judge to make that determination rather than  
22 a jury because that provision operated like a safety valve  
23 that the defendant can invoke. It's the same idea that a  
24 mitigating fact doesn't require a jury under Appendi.

25 And in this case, there is clear, overwhelming,

1 in fact, evidence, legislative history that the lookback  
2 and tolling provision was aimed at excluding - - - at  
3 benefiting the defendant and excluding old felonies from  
4 consideration and thus mitigating - - - compensating,  
5 really - - - for the harshness of the new mandatory  
6 persistent violent felony offender statute.

7 I see my time is up and we have gone over the  
8 history in detail in our brief. I just want to make one  
9 last point about remedy, if I might, which is that the - -  
10 - if the provision - - - if you were to determine that the  
11 provision in the CPL requiring trial by the court of the  
12 facts underlying recidivist statute - - - status is  
13 unconstitutional, then that provision should be stricken  
14 from the statute or limited in its application. And the  
15 error can be compelled by that provision, can be avoided by  
16 going forward in the future with submitting the issue to a  
17 jury, bifurcating the trial if necessary.

18 The prospect of doing just that featured  
19 prominently in the Erlinger argument itself, in which there  
20 was much discussion about if they decided Erlinger as the  
21 way they did, the solution would be to bifurcate trials.  
22 The U.S. agreed that it would - - - was consenting - - -  
23 would consent to that. It's well within the inherent  
24 powers of a trial court in this state to do such a thing,  
25 and defendant's suggestion that the statute forbids this

1 result makes no sense. If the prohibit - - - if the  
2 prohibition is unconstitutional, then it doesn't prohibit  
3 anything, and it ought to be possible to resolve any  
4 constitutional difficulty by providing the jury trial that  
5 the defendant is requesting.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. JAIN: Just a few points, Your Honors,  
8 starting with the constitutional violation and then moving  
9 to the statutory claim.

10 On the constitutional violation, I just want to  
11 be very clear that an admission under Supreme Court law is  
12 not a substitute for a jury finding unless there is a  
13 waiver of rights. The Supreme Court squarely held as much  
14 in the Hurst v. Florida case, and my adversaries do not  
15 address that holding either in their briefs or at argument  
16 today.

17 You could imagine, for example, a case where a is  
18 on trial for homicide, and he takes the stand and he  
19 testifies, and he admits several elements of the  
20 substantive events for a justification defense that he  
21 makes. The jury still has to make a finding that the  
22 prosecution has met its burden on the elements of the  
23 underlying offense, even if the defend - - - the defendant,  
24 excuse me, testifies to them.

25 Now, the defendant's testimony is, of course,

1 great evidence of that fact the jury may consider, but  
2 fundamentally, he has not waived his right to a jury trial  
3 by taking the stand and admitting certain facts. And for  
4 the same reason, it is baseless and inaccurate to say that  
5 the Sixth Amendment right hinges on whether a fact is  
6 contested. The Sixth Amendment right is retained by the  
7 defendant until or unless he waives it.

8 As for the merits of the constitutional issue, I  
9 think we'll largely rest on our briefs. But I do want to  
10 say, it is really quite unfaithful, I think, to the Supreme  
11 Court precedent to suggest that these cases are factual  
12 islands, and that each one of these holdings only applies  
13 to the kind of facts that were at issue in the particular  
14 case. And the very nature of the constitutional right, I  
15 think, makes clear why that is wrong. And that's why in  
16 Apprendi and Blakely and Cunningham, the court has  
17 repeatedly described this as a bright line rule that  
18 applies to all facts that are necessary to enhance a  
19 statutory sentencing range. The reason for that is that if  
20 it were instead up to judges and lawyers to figure out when  
21 it feels like it makes sense intuitively for a jury to find  
22 a fact or not - - -

23 JUDGE SINGAS: Yeah, but in this case, how would  
24 that work practically? You know, there's statutory  
25 periods, incarceratory periods. Are you going to give

1 jurors calculators and say, figure out the time? Like, I  
2 don't understand how that works in a jury scenario.

3 MR. JAIN: Your Honor, I think that that's a  
4 question fundamentally for the legislature. There could be  
5 a bifurcated proceeding, the legislature could enact that.  
6 The legislature could specify exactly what findings the  
7 jury has to make, whether it needs to take the calculators  
8 or whether it just needs to - - - you know, find - - -

9 JUDGE SINGAS: Well, we know what - - - we know  
10 what they have to find within a ten-year period. We know  
11 that there's - - - and there's a definition how to exclude  
12 it, and now you're saying give that to a jury. And I'm  
13 just wondering how the jury does that?

14 MR. JAIN: Well, I think the jury finds - - - I  
15 think there's two questions in terms of how does the jury  
16 find the facts, you know? The same way it finds, I guess,  
17 any other fact in terms of what the facts are that it has  
18 to find? I think that goes to why my adversaries' argument  
19 that - - - you know, the courts can just freeform, fashion  
20 new procedures out of whole cloth.

21 JUDGE RIVERA: Well, let's take an example. What  
22 facts would a jury have found here?

23 MR. JAIN: So I think there's a few different  
24 paths, but just to give an example.

25 JUDGE RIVERA: Uh-huh.

1 MR. JAIN: So one possibility is that the jury  
2 finds the exact dates that the defendant was or was not  
3 incarcerated for any reason, and then the judge does the  
4 calculation. Another possibility - - -

5 JUDGE CANNATARO: Would that be an issue that was  
6 open to much dispute? I mean, most of this argument has  
7 been centering on the fact that you get a document, it has  
8 a date in, and it has a date out, and there just isn't a  
9 lot of fact-finding to do there. As opposed to what one of  
10 your adversaries said, something having to do with the  
11 quality of the defendant's behavior?

12 MR. JAIN: Well, I think two points. I think  
13 one, that kind of line drawing is exactly what the court  
14 said repeatedly, including in Erlinger, that judges can't  
15 do. Right? There's no efficiency exception, the court  
16 said.

17 But I would also gently push back on this idea  
18 that the question of when a defendant happened to be  
19 released from incarceration, perhaps over a decade ago, is  
20 always going to be so straightforward. Or even that, for  
21 example, the separate occasions inquiry that was at issue  
22 in Erlinger is always going to be more complex.

23 JUDGE CANNATARO: Can you just be a little more  
24 specific? I'm just, like, looking for an example of when a  
25 jury might be called for because there - - - there's some

1           confusing or unclear or - - - I don't want to say  
2           discretionary, but some judgment call to be made about  
3           dates?

4                   MR. JAIN: Well, so Your Honor, the dates may be  
5           wrong. I think that's - - - that's what the jury's role as  
6           a factfinder is, is to find the facts. Right? So what's  
7           on a bureaucratic record - - - which may not even be from  
8           the state, right? It could be incarceration outside the  
9           state - - - is not sacrosanct. Right? The jury would need  
10          to find that it's actually correct and that the facts are  
11          correct beyond a reasonable doubt.

12                   JUDGE GENOVESI: So is it your position that you  
13          don't - - - you don't dispute the dates, but because it  
14          wasn't waived, they need to go through the jury process?

15                   MR. JAIN: That - - - because Mr. Hernandez never  
16          waived his right, that's exactly right. He - - - the jury  
17          had to find every fact under Apprendi necessary to enhance  
18          the sentence.

19                   I see my time has expired. If I may briefly make  
20          a few points on the statutory issue?

21                   CHIEF JUDGE WILSON: Yes. Quickly.

22                   MR. JAIN: So the first point I want to make is,  
23          we have not heard a persuasive definition or really any  
24          sensical definition - - - if that's a word - - - of the  
25          term "exclude" from my adversaries. I heard "exclude"

1 means take into account - - - exclude means the opposite,  
2 right? For the time to be excluded, it's removed from  
3 consideration from within the period. And that's why, for  
4 example, in CPL 30.10 sub 4, which the legislature enacted  
5 just three years before it first used this formulation in  
6 Penal Law 70.06. In CPL 30.10.4, the legislature used very  
7 similar language: "shall not be included" and the term,  
8 excluded - - - or "extended", sorry - - - to start and stop  
9 the clock, as respondent conceded in its briefing.

10 I also, you know, respondent dismissed CPL 400.15  
11 as just a label or a cross-reference. I think that really  
12 - - - it disserves the fact that the legislature  
13 simultaneously enacting this statute made clear what  
14 subparagraph 5 did.

15 And then, finally, I did not hear any persuasive  
16 response from respondent on the consequences and the  
17 injustices that would flow from its reading. There's,  
18 first of all, no reason, nothing in this court's precedent  
19 or the legislative history that suggests that the  
20 legislature was so concerned about some arbitrary calendar  
21 date in protecting wealthy defendants who can make bail,  
22 and making sure that there is parity in a calendar date,  
23 right? What this court has long said is that the  
24 legislature was concerned with making sure that a defendant  
25 had reformed or had been chastened after their admonishment

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at sentencing.

And the problem - - - the fundamental issue with respondent's rule is that it introduces all kinds of injustices and arbitrariness that have nothing to do with that. And even under a calendar date framing, things like court congestion, things like someone exercising their trial rights, may result in a defendant who was arrested on the same day, sentenced to the exact same term, released on the same day, being held to a much higher expectation. Again, based on just where they happened to be venued or the fact that they dared to litigate their case while they were detained either under the long-standing framework that this court has adopted, or under a calendar date parity framework.

And so for those reasons, we urge the court to vacate the PVFO adjudication.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Mitchell Hernandez, No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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