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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE EX REL ELLIS,

Respondent,

-against-

NO. 54

IMPERATI,

Appellant.

20 Eagle Street
Albany, New York
May 14, 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 JUDGE CAITLIN J. HALLIGAN

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

3 MS. DIEHN: Good afternoon, Your Honors. My name
4 is Anna Diehn, and I represent the appellant in this case.
5 May I ask for three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MS. DIEHN: Thank you. While recent reforms have
8 eliminated bail for the vast majority of misdemeanors and
9 nonviolent felonies, lawmakers have expressly provided
10 twenty-one categories of qualifying offenses, any one of
11 which a court can rely on when setting bail.

12 JUDGE RIVERA: Why, in your view, is the
13 majority's framing general versus specific with respect to
14 (a) versus (g)? Why is that wrong? It seems right,
15 doesn't it? (a) is about these felonies with two express
16 exceptions. (g) is about a particular class of crimes.

17 MS. DIEHN: Sure. I would answer that question
18 by first pointing out how the statute operates. It's a
19 disjunctive statute. It's twenty-one separate provisions,
20 each focusing on a different type of theme of offense,
21 separated by semicolon and the word "or." It's meant to be
22 read in the disjunctive. A judge - - - when a judge sets
23 bail, he does not go through one, two, three, four, five.
24 He can set bail if they qualify under any, he or she. So
25 that's one reason that the general versus specific

1 construction should not apply.

2 JUDGE TROUTMAN: But reading it that way, then
3 what happens to (g)? Is it meaningless?

4 MS. DIEHN: So there's three points I want to
5 make in response to that. So first, I don't think it's
6 rendered meaningless. It means that when an individual is
7 charged with that crime, a judge does not have the
8 authority to set bail under that provision. It does not
9 apply. It does not - - -

10 JUDGE HALLIGAN: But that doesn't change the
11 ultimate result under your theory at all. I mean, what
12 actual meaning do those words have under your
13 interpretation?

14 MS. DIEHN: Sure. I - - -

15 JUDGE HALLIGAN: And how could it actually alter
16 what a court could or couldn't do?

17 MS. DIEHN: Sure. I would answer that by, again,
18 focusing on the disjointed - - -

19 JUDGE HALLIGAN: I guess I think - - - I don't
20 mean to interrupt - - - but I guess I think it's a yes or
21 no question. Does it have some specific effect on what a
22 judge can do? And if so, what is that?

23 MS. DIEHN: I think - - - yes, judge, I think it
24 does have a specific effect. It means that the judge
25 cannot set bail under that provision for that crime. And

1 then, in addition, I don't think that - - -

2 JUDGE HALLIGAN: But for the same offense, I take
3 it, you could do so under (a), under your reading, right?

4 MS. DIEHN: Correct. And - - -

5 JUDGE HALLIGAN: So maybe I should rephrase my
6 question. Does it have any effect as to - - - you know,
7 from the defendant's or the court's perspective? I
8 understand that you're saying maybe it would prevent the
9 court from reciting that provision, but does it actually
10 affect whether bail can be set in those circumstances at
11 the end of the day?

12 MS. DIEHN: Practically, no. The judge would
13 have the authority under (a) to set bail if he - - - if he
14 or she deems it appropriate. It's not that bail would be
15 set automatically in every case - - -

16 JUDGE HALLIGAN: Understood. Right. So in that
17 respect, at least, the provision is nugatory. It has no
18 free standing effect under your reading with respect to
19 whether, at the end of the day, the judge has discretion to
20 set bail for that particular offense.

21 MS. DIEHN: I understand that view, Judge. I
22 would respond by saying that the principle of avoiding a
23 superfluous interpretation, it doesn't make sense here the
24 way that the majority used it because it rendered language
25 in (a) superfluous. (a) is - - -

1 JUDGE HALLIGAN: Well, that may be. It may be
2 that there are two provisions, and the reading will
3 inevitably, whichever way you go, render one or the other
4 effectively superfluous. But I'm just trying to make sure
5 I understand your argument. It's not that - - - that (g)
6 somehow has some effect standing on its own; it sounds like
7 you're saying it's one or the other. Either (a) will be
8 effectively rendered superfluous or (g). Is that a fair
9 characterization?

10 MS. DIEHN: Correct. And that's why I don't
11 think the principle applies here to get the result that the
12 Appellate Division - - -

13 JUDGE HALLIGAN: So if that's right, if it's one
14 or the other, why should we give effect to (a) and not to
15 (g), if that's what it comes down to?

16 MS. DIEHN: So I think we should give effect to
17 (a) because under the plain language of (a) it incorporates
18 by reference Penal Law 70.02 which expressly provides
19 making a terroristic threat is a class D violent - - -

20 JUDGE HALLIGAN: But that seems like an argument
21 that it - - - it can apply here. I guess what I'm asking
22 is if we're faced here with two provisions - - -

23 MS. DIEHN: Uh-huh.

24 JUDGE HALLIGAN: - - - that could be viewed as
25 irreconcilable, why should we give effect to (a) and not to

1 (g)?

2 MS. DIEHN: Because the statute is meant to be
3 applied in the disjunctive. If the legislature intended to
4 exclude this crime based on its violent classification as a
5 bail eligible offense, it would have done so under (a), and
6 it didn't. It did it under (g), knowing that it was a
7 disjunctive list, knowing that each of the twenty-one
8 categories focuses on different type - - -

9 CHIEF JUDGE WILSON: I think your argument, you
10 would - - - they would have had to do it under (a) and (g)
11 is what you're saying, no?

12 MS. DIEHN: Sorry.

13 CHIEF JUDGE WILSON: You just said that they
14 would had - - - had to have put the exclusion into (a).
15 But moving it from (g) to (a) wouldn't solve the problem,
16 would it?

17 MS. DIEHN: Moving it to (a) would solve the
18 problem because then it would not be bail eligible. It
19 wouldn't be bail eligible as a violent offense because it
20 would - - -

21 CHIEF JUDGE WILSON: Well, why wouldn't it be
22 eligible under (g)?

23 MS. DIEHN: Well, (g) excludes.

24 CHIEF JUDGE WILSON: Well, but I moved the
25 exclusion to (a).

1 MS. DIEHN: Oh, sorry. I was adding it.

2 CHIEF JUDGE WILSON: Yeah. So you - - - so
3 that's my question. Under your theory, they have to put it
4 in both places.

5 MS. DIEHN: Correct.

6 CHIEF JUDGE WILSON: And any other place that it
7 - - - that this is for - - - because it reaches other
8 things that are specifically reached in other parts of the
9 statute as well, right?

10 MS. DIEHN: Correct. And I think that all goes
11 back to the idea that it's a disjunctive statute, that any
12 one of these bases can apply, that they're not meant to be
13 read, one to limit the other.

14 CHIEF JUDGE WILSON: But so if we - - - is it - -
15 - let me ask this. If we gave effect to the exclusion in
16 (g), would that render all of (a) superfluous?

17 MS. DIEHN: If you gave effect to the - - - the
18 exclusion - - - exclusionary language - - -

19 CHIEF JUDGE WILSON: To the exclusion in (g).

20 MS. DIEHN: - - - in (g) - - -

21 CHIEF JUDGE WILSON: - - - would that render all
22 of (a) superfluous?

23 MS. DIEHN: No, judge.

24 CHIEF JUDGE WILSON: Okay. If we gave effect to
25 (a), would that render all of (g) superfluous?

1 MS. DIEHN: No. If you see them as disjunctive
2 statutes. And merely, it more represents a - - -

3 CHIEF JUDGE WILSON: We're - - - no. No. I'm
4 sorry.

5 MS. DIEHN: Uh-huh.

6 CHIEF JUDGE WILSON: Maybe I'm not - - - does (a)
7 cover everything in (g)?

8 MS. DIEHN: Money laundering charges are not bail
9 eligible on their own. So the first number of - - - of - -
10 -

11 JUDGE GARCIA: Under (a).

12 MS. DIEHN: Yeah. Under (a). They're not
13 included under (a). So there's - - - the first - - - the
14 first four lines in (g) are non-bail eligible - - -

15 CHIEF JUDGE WILSON: Or - - -

16 MS. DIEHN: - - - on their own. And so that - -
17 - that was - - - my understanding is that that was the
18 intent of - - - of (g) is to put non-bail-eligible crimes
19 that were associated with terrorism in (g).

20 CHIEF JUDGE WILSON: Okay.

21 JUDGE GARCIA: Counsel, it seems - - -

22 JUDGE RIVERA: You know, it's a lot of work for
23 the one word, "or," to read - - - to ignore an express
24 statement in (g) given the one word, "or," at the end of
25 (t). That's your argument? I just want to be clear.

1 MS. DIEHN: Yes. That the framework is to apply
2 in the disjunctive. That it's twenty-one separate
3 independent bases separated by a semicolon. And that's how
4 we read those kind of statutes. And that it doesn't - - -
5 it's not reasonable for a judge - - -

6 JUDGE RIVERA: How would you read it if it said,
7 "and?"

8 MS. DIEHN: Huh? I'm sorry - - -

9 JUDGE RIVERA: How would you read it if it said,
10 "and?"

11 MS. DIEHN: If it said, "and," it would be
12 complicated.

13 MS. DIEHN: I would - - -

14 JUDGE SINGAS: It'd be different.

15 MS. DIEHN: - - - probably - - -

16 JUDGE RIVERA: You mean it's not now? Oh - - -

17 MS. DIEHN: I would probably - - - I would
18 probably say it was a clerical error and ask Your Honor to
19 change it to "or."

20 JUDGE SINGAS: Uh-huh.

21 JUDGE HALLIGAN: So is your reading that the - -
22 - the offenses covered by (g) are not covered anywhere
23 else? They're not covered under (a) or (d) either?

24 MS. DIEHN: So - - -

25 JUDGE HALLIGAN: They're only covered under (g)?

1 MS. DIEHN: So looking at (g), the first four
2 lines all - - - one, two, three, four - - - involve money
3 laundering charges under 470.

4 JUDGE HALLIGAN: Uh-huh.

5 MS. DIEHN: Those are all not bail eligible on
6 their - - - on - - - under another provision. Then that -
7 - - at the end of the fourth line and onto the fifth line,
8 that's when lawmakers included that language, felony crime
9 of terrorism as defined in 490 of the Penal Law, other than
10 the crime defined in Section 490.20 of such law. And so
11 that - - - the felony crimes of terrorism under 490, those
12 are bail eligible either under - - - as their violent
13 classification, or some are (a) felonies too, which is a
14 separate subdivision.

15 JUDGE HALLIGAN: (d) maybe, yes?

16 MS. DIEHN: Yes. Yes.

17 JUDGE HALLIGAN: Yeah. So I'm just - - - I'm not
18 sure I'm following the answer to my question. Are the
19 offenses enumerated in (g) covered only in (g), or are they
20 also covered in, for example, (a) or (d)?

21 MS. DIEHN: They're covered - - - an offense can
22 be bail eligible under multiple provisions. One - - -

23 JUDGE HALLIGAN: Yes. So what do we make of (g)?
24 Do we know why it's there? I'm just trying to understand
25 its function, which maybe would shed some light on how we

1 square those arguably - - -

2 MS. DIEHN: Of - - -

3 JUDGE HALLIGAN: - - - inconsistent provisions.

4 I thought it was mostly kind of - - -

5 MS. DIEHN: There's very little legislative
6 history - - -

7 JUDGE HALLIGAN: Yeah.

8 MS. DIEHN: - - - on this, and unfortunately, I
9 have not been able to find anything about that particular -
10 - -

11 JUDGE GARCIA: But Counsel, just so I'm clear on
12 the first answer to Judge Halligan - - - or the one before
13 this - - - all of these crimes enumerated in (g) would
14 either be covered under (a) or (d)?

15 MS. DIEHN: Not the first four lines that involve
16 - - - the offenses that involve money laundering.

17 JUDGE GARCIA: So money laundering - - - to get a
18 money laundering as a qualifying offense, you need (g)?

19 MS. DIEHN: Yes.

20 JUDGE GARCIA: Okay.

21 MS. DIEHN: Correct.

22 JUDGE CANNATARO: So then (g) is not superfluous
23 in its entirety.

24 MS. DIEHN: Correct.

25 JUDGE HALLIGAN: But parts of it are.

1 MS. DIEHN: The - - - that - - - I - - - I don't
2 - - -

3 JUDGE HALLIGAN: In addition to - - -

4 MS. DIEHN: - - - view it as superfluous. I view
5 it as just an expression of the legislature focusing on a
6 specific type of crime in that offense. And making a
7 terroristic threat, it does - - - it is different than the
8 other types of crime. It's not possession of - - -

9 JUDGE RIVERA: Okay. But just to be clear, the
10 crime that we're talking about at the very end - - -

11 MS. DIEHN: Correct.

12 JUDGE RIVERA: - - - that one, if they had not
13 included that, it wouldn't matter under your reading.
14 Because if it's under (a); is that correct?

15 MS. DIEHN: A judge would have the - - - yes,
16 judge - - - it would have - - - the judge would have the
17 permission to set bail under (a).

18 JUDGE RIVERA: But everything else is necessary
19 because if it doesn't fit under any of the other enumerated
20 groups, right - - - enumerated categories here - - -
21 descrip - - - am I right, or have I misunderstood?

22 MS. DIEHN: So - - - sorry. I'm sure it's me
23 that's not being clear. So for (g) there's the money
24 laundering offenses and then it says, or a felony crime of
25 terrorism as defined in Article 490.



1 JUDGE HALLIGAN: At - - -

2 MS. DIEHN: So there's a number of crimes under
3 there. They are all bail eligible as the statute is
4 currently written under other provisions. So they are bail
5 eligible under this one as well as other ones.

6 JUDGE RIVERA: That's it.

7 MS. DIEHN: And the judge could use either one -
8 - -

9 JUDGE HALLIGAN: So some aspects of (g), in
10 addition to the exclusion, are otherwise covered in other
11 provisions as well. Not all of them - - -

12 MS. DIEHN: Correct.

13 JUDGE HALLIGAN: - - - not the money laundering.
14 So there's additional redundancy that we have in the
15 provision?

16 MS. DIEHN: Yes. And if I may, there - - - the -
17 - -

18 JUDGE RIVERA: Okay. So if I'm now understanding
19 you, if everything after this last - - - well, penultimate
20 semicolon, I guess - - - or felony, crime of terrorism,
21 that one - - - that - - -

22 MS. DIEHN: Correct.

23 JUDGE RIVERA: - - - that - - - okay. You're
24 saying that's covered somewhere else?

25 MS. DIEHN: Yes. A judge could set bail under a

1 separate provision, this one or that one.

2 JUDGE RIVERA: On its own. Okay. So if that's
3 true, and then the end of that, other than the crime
4 defined in section 490.20, you're saying the first part is
5 the redundancy. So why isn't the second part a redundancy?
6 In the sense that it is already also covered somewhere
7 else, but here the legislature decided, well, now we're
8 going to expressly exclude that.

9 MS. DIEHN: So I would ask - - -

10 JUDGE RIVERA: It's already repetitive this last
11 - - - between the two semicolons - - - already repetitive.

12 MS. DIEHN: Correct.

13 JUDGE RIVERA: So why wouldn't we give we give
14 effect to the express language in that redundancy?

15 MS. DIEHN: I think - - - I would ask that the
16 court give meaning to the plain language of (a) because
17 this - - - lawmakers were not - - - they didn't - - - their
18 goal wasn't to avoid all redundancy when they - - - when
19 they drafted this. There's other provisions that have
20 overlap too. For example, in - - -

21 JUDGE HALLIGAN: But there was some intent to
22 single out and exclude for at least some purposes - - -

23 MS. DIEHN: Correct.

24 JUDGE HALLIGAN: - - - the offense at issue here.

25 MS. DIEHN: Correct. And unfortunately, I do not

1 know the reason for that.

2 JUDGE HALLIGAN: Right. We just have the text,
3 right?

4 MS. DIEHN: Correct. And that it's a disjunctive
5 statute, and that the idea that these are twenty-one
6 separate offenses where lawmakers were focused on - - - on
7 a certain type of crime, and that this type of crime is
8 different than the other ones that are associated with
9 terrorism - - -

10 JUDGE GARCIA: But it's very strange in that it
11 also seems to be, as you look at it now, an exclusion from
12 a redundancy. Right. They're adding that whole clause
13 unnecessarily, in a way, because those felonies are already
14 covered in either (a) or (d) or whatever it is, right?

15 MS. DIEHN: Correct.

16 JUDGE GARCIA: And then they're excluding from
17 the redundancy, which is unnecessary, a crime, right?

18 MS. DIEHN: Correct. And I can't tell you what
19 they were exactly thinking then, but - - -

20 JUDGE RIVERA: I guess the point is, do we need
21 to concern ourselves with that when we have the express
22 language?

23 MS. DIEHN: I don't think so.

24 JUDGE RIVERA: Why are we going to figure out
25 some intent that's nowhere to be found when we have the

1 clear language in front of us?

2 MS. DIEHN: I would agree. And that clear
3 language is under (a). And the fact that you - - - that
4 these are twenty-one separate and independent - - -

5 JUDGE RIVERA: Well, no, (g) is the clear
6 language - - -

7 JUDGE CANNATARO: The clear language could be the
8 exclusion.

9 JUDGE RIVERA: - - - because it's dealing with a
10 specific offense.

11 MS. DIEHN: I - - -

12 JUDGE RIVERA: Not a general category of violent
13 felonies; it's dealing with this specific offense.

14 MS. DIEHN: Again, since the lawmakers knew how
15 to exclude - - -

16 JUDGE RIVERA: Uh-huh.

17 MS. DIEHN: - - - felonies that were classified
18 as violent - - -

19 JUDGE RIVERA: Uh-huh.

20 MS. DIEHN: - - - they did it for two specific
21 offenses - - -

22 JUDGE RIVERA: Uh-huh.

23 MS. DIEHN: - - - under (a) - - -

24 JUDGE RIVERA: Uh-huh.

25 MS. DIEHN: - - - they didn't do it for this.

1 That - - - that - - -

2 JUDGE RIVERA: I agree they could have written it
3 there, but they chose to write it here.

4 MS. DIEHN: And I would respond that because they
5 wrote it there, it does not exclude it from (a).

6 CHIEF JUDGE WILSON: Well, I'm - - - I'm - - -

7 JUDGE CANNATARO: So it sounds to me like you're
8 arguing that the only way they could have successfully
9 excluded the 490.20 crime was to put the exclusion in (g)
10 and in (a) as well, that leaving that omission in (a) sort
11 of forgives the sin. Is that the - - -

12 MS. DIEHN: Yes - - -

13 JUDGE CANNATARO: - - - the gist of it?

14 MS. DIEHN: That is one way. They could also
15 just have not included any of that - - - the language or
16 felony crime of terrorism starting at that line, because
17 those crimes were already covered under (a). So - - -

18 CHIEF JUDGE WILSON: So I'm always thinking about
19 ice cream. And if I send my daughter to the little corner
20 store and say, buy every one of every dairy item in the
21 store, and I write that out, and I also then write below
22 that, also make sure you get every ice cream except not
23 pistachio, I would be pretty surprised if she came back
24 with pistachio. Why is that different?

25 MS. DIEHN: So sorry, could you repeat the - - -

1 CHIEF JUDGE WILSON: Yeah.

2 MS. DIEHN: - - - hypothetical? I've - - - I've
3 been thinking about ice cream.

4 CHIEF JUDGE WILSON: Go buy every dairy ice cream
5 - - - sorry - - - go buy every dairy product in the store.

6 MS. DIEHN: Okay.

7 CHIEF JUDGE WILSON: First sentence. Second, go
8 buy every ice cream in the store, but do not bring back
9 pistachio.

10 MS. DIEHN: I think that's a little bit
11 different. It's a command coming from a parent, and - - -

12 CHIEF JUDGE WILSON: As opposed to the
13 legislature.

14 JUDGE RIVERA: You assume his child views it as
15 such, but okay.

16 MS. DIEHN: I think that's just a little bit
17 different. I think if my daughter came back with all ice
18 creams and including pistachio, I think I would have
19 considered her - - - I wouldn't - - - she didn't violate
20 what I asked her to do. I - - - there - - - I gave - - -
21 there were two different requests that I made of her, and
22 she complied with one of them - - -

23 JUDGE TROUTMAN: But wouldn't it be easier just
24 to read - - - bring back all the dairy products, but
25 instead of reading it that way, just say don't bring back

1 pistachio. Isn't that easier? It's clear. Don't bring
2 pistachio.

3 MS. DIEHN: I agree. If that were the clear
4 command. But here in this statute, the - - -

5 JUDGE TROUTMAN: Don't include, except.

6 MS. DIEHN: And if they had done that in one, it
7 would be clear. But because these are twenty-one
8 independent bases, that's why the fact that it's excluded
9 under (g) - - -

10 JUDGE HALLIGAN: So in other words, the parent -
11 - -

12 MS. DIEHN: - - - is not excluded under (a) - - -

13 JUDGE HALLIGAN: - - - the parent could say bring
14 back every dairy product but not pistachio ice cream.

15 JUDGE GARCIA: Well, wouldn't they be really
16 saying bring back, you know, every one, or bring back every
17 one but pistachio. And if you did either one, you'd really
18 be complying, right?

19 MS. DIEHN: Correct.

20 JUDGE GARCIA: That seems to be what you're
21 arguing.

22 JUDGE CANNATARO: And that all comes down to
23 semicolons and ors.

24 MS. DIEHN: Statutory interpretation.

25 JUDGE CANNATARO: It's a - - - that's what's

1 doing the lifting.

2 MS. DIEHN: Correct. And the idea that a judge -
3 - - and is - - - these - - - the statute wasn't written for
4 a judge to go through each category - - - twenty-one
5 categories. They - - - they each have their own purpose
6 and they each have their own legislative intent.

7 JUDGE RIVERA: But it - - - there is some
8 importance to a judge looking to see is there an express
9 exclusion, and there is an express exclusion.

10 MS. DIEHN: And I would say that's why it doesn't
11 qualify under (g). And if at some point later the
12 lawmakers determined that this crime was no - - -

13 JUDGE RIVERA: Wait. I'm sorry. I don't
14 understand that. (g) is the expressed exclusion I was
15 talking about. What - - - I misunderstood you, or perhaps
16 I was not being clear.

17 MS. DIEHN: I'm sure it was me. I would say that
18 if the judge looked - - - had somebody was charged with
19 making a terroristic threat, the judge under (g) does not
20 have the authority to set bail. The judge does have the
21 authority under (a). And if lawmakers want to limit a
22 judge's discretion to set bail under these - - - in such a
23 serious violent felony, they need to do it under (a).

24 CHIEF JUDGE WILSON: Thank you.

25 MS. ZHOU: Good afternoon, and may it please the

1 court. Grace Zhou for the New York Attorney General as
2 amicus curiae in support of the appellant. This court
3 should reverse the Appellate Division's holding that courts
4 lack authority to fix bail for the crime of making - - -

5 JUDGE HALLIGAN: So what - - - what do we make of
6 (g)?

7 MS. ZHOU: Sure. So the exclusionary language in
8 (g) is not superfluous. It reflects the legislature's
9 judgment that unlike the other crimes of terrorism
10 enumerated in chapter - - - or Article 490 of the Penal
11 Law, which the legislature saw fit to qualify for bail both
12 under (a) and (g), terroristic threats do not independently
13 warrant bail by virtue of their association with terrorism
14 - - -

15 JUDGE HALLIGAN: Well, why shouldn't we read that
16 as an implicit exception to (a), which governs the specific
17 offense that's enumerated here?

18 MS. ZHOU: Sure. So the specific versus general
19 canon is not - - -

20 JUDGE HALLIGAN: So even set that aside. I just
21 mean in terms of - - - it's an odd statute, right? Because
22 there are some offenses which are eligible under different
23 subsections. So in trying to make sense of that, why don't
24 we read the exclusion in (g) into (a)?

25 MS. ZHOU: Sure. So it's because each of the

1 twenty-one subsections reflects the legislature's judgment
2 about why a particular crime or category of crimes warrants
3 bail, because of its interplay with risk of flight. So
4 what you have under (a) is any crime that is designated as
5 a violent felony offense, which has sentencing
6 implications, might warrant bail because the defendant
7 would be facing a mandatory sentencing range, and it's
8 reasonable to assume that a defendant who faces a longer
9 sentence might be more likely to flee. That is the logic
10 behind (a).

11 However, the legislature went through and then
12 also set forth twenty additional categories of crimes for
13 which it found bail to be independently warranted. And (g)
14 is intended to capture crimes of terrorism. And what the
15 language of (g) means is that the legislature intended
16 certain crimes of terrorism to qualify independently for
17 bail, regardless of their designation as a Class A felony
18 offense or as a violent felony offense. What - - -

19 JUDGE CANNATARO: And what about the exclusion?

20 MS. ZHOU: The exclusion means that the
21 legislature did not intend terroristic threats to double
22 qualify like the other crimes - - -

23 JUDGE HALLIGAN: Well, wait, isn't the crux of
24 this that you have one provision which indicates that this
25 crime is of a nature that it should be bail eligible and a

1 separate provision which says that very same crime is not
2 bail eligible. Those are different judgments. Whatever
3 the way it is you tee it up, those are competing judgments
4 about the same offense and whether it is bail eligible or
5 not, right? Are - - -

6 MS. ZHOU: So I think they can be harmonized in
7 this way. The legislature made a judgment that terroristic
8 threats warrant bail by virtue of their designation as a
9 violent felony offense, which carries with it sentencing
10 implications. It means that a defendant who is charged
11 with this offense, if convicted, faces a mandatory
12 sentencing range. And the legislature determined that this
13 sort of sentencing range has an interplay with risk of
14 flight because the defendant is facing a mandatory term of
15 imprisonment.

16 What (g) means is that the legislature
17 independently determined that the crime of making a
18 terroristic threat does not warrant bail by virtue of its
19 mere association with terrorism. And I think - - -

20 CHIEF JUDGE WILSON: Well, perhaps, or perhaps -
21 - - sorry - - - or perhaps if we're now trying to put
22 ourselves in the minds of the legislature, and we have no
23 real legislative history, we might think the legislature,
24 as a categorical matter, thought, look, as a general
25 proposition, something that is a violent felony ought to be

1 something you can set bail on, and then said, now let's
2 think about a bunch of specific categories of crimes. And
3 they thought about the specific category of terrorism, and
4 they looked at those particular crimes and said, yep, these
5 all counts except for this one.

6 So we could say, well, when the legislature was
7 actually thinking about this crime in particular, it made a
8 determination about this crime. When they were thinking
9 about a broad category of crimes, they weren't drilling
10 down to this particular crime; they were just thinking of a
11 broad category. But so if we thought of it that way, which
12 maybe is not the way the legislature went through this
13 process at all, we might say where they actually made a
14 judgment about this particular crime, they said, not bail
15 eligible.

16 MS. ZHOU: I don't think that that would be a - -
17 - the most reasonable reading of the statute because the
18 legislature - - - in terms of statutory interpretation - -
19 -

20 CHIEF JUDGE WILSON: Uh-huh.

21 MS. ZHOU: - - - the court does have to read the
22 statute in a way that best harmonizes all of the
23 subsections. And I - - -

24 JUDGE HALLIGAN: What do we make of the exclusion
25 in (a) of a specific crime, which is robbery II?

1 MS. ZHOU: I think that that is very strong
2 evidence that the legislature only - - - the only two
3 crimes that the - - - the only two violent felonies that
4 the legislature intended to exclude were the ones that it
5 expressly carved out of (a). If the legislature wanted to
6 also exclude terroristic threats from qualifying under (a),
7 it knew how to do so and surely what - - -

8 JUDGE RIVERA: Well, that just seems so
9 nonsensical to me. Isn't the statutory interpretation
10 first principle is you go by the text. In (g), it clearly
11 sets out this offense as excluded. That should end it,
12 full stop. If we're wrong, the legislature can correct us.

13 MS. ZHOU: I think, unfortunately here, Your
14 Honor, you are also contending with the plain language of
15 (a), which clearly and unequivocally qualifies the crime.
16 So to the extent - - -

17 JUDGE RIVERA: Except that (g) is much more
18 specific about this offense - - -

19 MS. ZHOU: I - - -

20 JUDGE RIVERA: - - - and we have another canon
21 about general versus specific language.

22 MS. ZHOU: I think that canon does not map onto
23 disjunctive schemes like this one, because (a) through (u)
24 are all equal - - -

25 JUDGE RIVERA: But it's the only way you can

1 write this is through the word, "or," otherwise,
2 apparently, you have some confusion if you use the word,
3 "and."

4 MS. ZHOU: That's true, but I think this court
5 recognized just last year - - -

6 JUDGE RIVERA: How else would one write a list?

7 MS. ZHOU: That's true. The - - - if the
8 legislature had intended certain subsections to be read
9 conjunctively, they could have separated those subsections
10 with, "and."

11 JUDGE RIVERA: Uh-huh.

12 MS. ZHOU: If they intended certain subsections
13 to be read together, they could have included a cross-
14 reference. None of those are applicable here. And this
15 court recognized in the Brann v. Rankin case just last term
16 that, where a statute sets forth equal and alternative
17 bases for application, restrictions on any one category
18 should not preclude a court from taking another, nor should
19 it be imputed to another. So I think it's well understood
20 that disjunctive schemes do not operate in a way where one
21 section supersedes another - - -

22 JUDGE CANNATARO: This is the only example in
23 510.10(4) where a crime is included under one subsection
24 and explicitly excluded under another, right? I mean,
25 there isn't - - - we're not going to have another appeal

1 coming down the line with another crime that has this
2 problem, would you - - - is that your reading of the
3 statute?

4 MS. ZHOU: So I actually think that (k) presents
5 a very similar problem.

6 JUDGE CANNATARO: Really?

7 MS. ZHOU: And that's another reason why the
8 court should not adopt respondent's reading. So (k) has
9 restrictive language that in effect says strangulation in
10 the second degree qualifies under (k) only if it is alleged
11 to have been committed the offense against a member of the
12 defendant's same family or household - - -

13 JUDGE CANNATARO: Uh-huh.

14 MS. ZHOU: - - - and strangulation otherwise is a
15 violent felony offense that qualifies under (a). So if you
16 adopt Respondent's reading, we're limiting language in one
17 set subsection can be imputed to another, you would have
18 this odd scenario - - -

19 JUDGE CANNATARO: You're going to have the
20 problem again.

21 MS. ZHOU: - - - with (k). Exactly.

22 JUDGE CANNATARO: So that would seem to support
23 your argument that you have to read them all disjunctively;
24 otherwise, it starts to become a little bit of a mess.

25 MS. ZHOU: Yes. Precisely.

1 JUDGE RIVERA: Although, if I can just get back
2 to Rankin, given your comment. Rankin didn't - - - I don't
3 think, but maybe you see it differently - - - didn't
4 involve, as it does here, clearly inconsistent language,
5 right? Those are just alternative paths. These are
6 inconsistent - - - there's a contradiction in them because
7 you have an expressed exclusion.

8 MS. ZHOU: I think the reasoning of Rankin still
9 applies here because there, there were two different bases
10 for modifying a defendant's securing order, and one of them
11 entailed very specific procedural restrictions - - -

12 JUDGE RIVERA: Well, one didn't implicate the
13 other, is what I'm saying.

14 MS. ZHOU: Yes.

15 JUDGE RIVERA: It didn't undermine the other.

16 MS. ZHOU: Well - - -

17 JUDGE RIVERA: Which is, it seems, that that
18 would be the case here.

19 MS. ZHOU: I think that (g), again, the
20 exclusionary language can be read in a way that is confined
21 only to (g). It means that when the legislature said all
22 other terrorism related crimes under 490 qualify for bail
23 under (g), but not this one, what the legislature meant is
24 that terroristic threats do not independently warrant bail
25 by virtue of their designation as a crime of terrorism

1 alone.

2 And I actually think that the distinction between
3 terroristic threats and other crimes of terrorism under 490
4 make a lot of sense, because the other crimes that you have
5 under 490 are acts of terrorism, such as use of a chemical
6 or biological weapon. You have acts in support of
7 terrorism. Terroristic threats are very serious offenses,
8 but they are distinguishable from those types of crimes.
9 So the legislature could have reasonably determined that,
10 based on the sentencing implications of being designated a
11 violent felony offense under (a), being charged with a
12 terroristic threat is a good proxy for increased risk of
13 flight.

14 JUDGE RIVERA: But again, I think you undermine
15 yourself with that, because if you're going to go about the
16 business of categorizing in the way you've just described,
17 then you'd have - - - you'd be clear about this exclusion
18 in (a). I mean, I - - - perhaps I'm just misunderstanding
19 the argument, but I find it very difficult to follow.

20 MS. ZHOU: I guess I'll try it this way, which is
21 that there are crimes - - - there are many crimes that can
22 qualify for bail under multiple subsections under the
23 statute. So I - - - rape in the first degree is another
24 example. It's both a violent felony offense and an - - - a
25 class (a) offense.



1 And so I think that recognizing that crimes can
2 qualify under multiple subsections, the exclusionary
3 language in (g) just makes clear that the legislature did
4 not intend terroristic threats to qualify under (g), but it
5 doesn't mean that it does not intend terroristic threats to
6 qualify altogether.

7 JUDGE CANNATARO: I guess, the - - - the problem
8 with that, that you might be hearing from some of us, is
9 that it seems like an awful waste of effort. They create
10 this section terrorism offenses, and then they say this
11 one, however, is not a terrorism offense for the reasons
12 you said, which all make sense, but don't worry about it
13 because we included it somewhere else. But why bother, I
14 guess, is the question?

15 MS. ZHOU: I think it really goes back to the
16 overarching structure of this provision, which is that the
17 legislature set forth twenty-one independent bases, or
18 twenty-one categories of crimes, for which it thought that
19 that type of crime was a good proxy for increased risk of
20 flight and for which - - -

21 JUDGE HALLIGAN: And it seems like it did so
22 without looking back to see if it was covered someplace
23 else, and if so how to square that?

24 MS. DIEHN: Exactly. And - - -

25 JUDGE HALLIGAN: Is that fair?

1 MS. ZHOU: Yes, that's fair, and that's exactly
2 the case with (k) as well. So it's just a - - - a product
3 of the statutory scheme.

4 I just also - - - if I may, briefly emphasize
5 that if you were to adopt respondent's reading of the
6 statute, you would also have issues with other purportedly
7 general provisions like (r) and (s). (r), for example,
8 qualifies any felony offense that's committed by a
9 principal while on probation or a term of supervised
10 release. And if you read the exclusionary language in (g)
11 to exclude terroristic threats from ever qualifying, then
12 they also could not qualify under (r) or (s). So you run
13 into many problems with the statute that you do not run
14 into if you accept our reading that the subsections are
15 disjointed - - -

16 CHIEF JUDGE WILSON: Well, (r) - - - (r) and (s)
17 don't have any expressed exclusion in them, right?

18 MS. ZHOU: That's true. (r) and (s) do not have
19 any express exclusions, and that's why any sort of carve-
20 out in (g) or the limiting language in (a) should not bar a
21 crime from independently qualifying under (r) and (s). But
22 under Respondent's reading, you would be reading
23 subsections like (g) together with an (r) and (s) to
24 prevent certain crimes from qualifying if they are carved
25 out of another subset.

1 CHIEF JUDGE WILSON: Well, (g) would only carve-
2 out making a terroristic threat from (r) and (s) is what
3 you're saying, or no?

4 MS. ZHOU: Oh, sorry, I should clarify. I'm
5 saying that if you accept Respondent's reading - - -

6 CHIEF JUDGE WILSON: Yes.

7 MS. ZHOU: - - - then terroristic threats would
8 also categorically be excluded from (r) and (s).

9 JUDGE CANNATARO: Or the crime in (k), I would
10 assume.

11 MS. ZHOU: Yes, exactly.

12 CHIEF JUDGE WILSON: Right.

13 MS. ZHOU: And - - - and that's not - - -

14 CHIEF JUDGE WILSON: Right. It would be a
15 determination that bail could not be set for making a
16 terroristic threat.

17 MS. ZHOU: Yes.

18 CHIEF JUDGE WILSON: Under any provision.

19 MS. ZHOU: Well, under any provision.

20 CHIEF JUDGE WILSON: Right. Yeah.

21 MS. ZHOU: And I don't - - - I think that's
22 contrary to the broad language of (r) and (s).

23 JUDGE RIVERA: But it seems to be the logical
24 conclusion if you have express language that excludes a
25 terroristic threat.

1 MS. ZHOU: I - - - I think, Your Honor - - -

2 JUDGE RIVERA: Is it - - -

3 MS. ZHOU: - - - to the extent there is sort of
4 an irreconcilable conflict that you find between (g) and
5 (a), you can also look to what sparse legislative intent
6 there is. I think if you look to the other types of threat
7 based crimes that the legislature chose to qualify under
8 (a), you have crimes like falsely reporting an incident in
9 the second degree or placing a false bomb or hazardous
10 substance, it just doesn't make sense for the legislature
11 to say that these types of threat-based crimes are
12 qualifying, but exclude terroristic threats, without there
13 being any indication in the history that the legislature
14 was particularly keen on excluding terroristic threats.

15 So to the extent there is any sort of ambiguity
16 that you find in the statute or the text of (a) does not
17 plainly resolve this case, I think you can look to the
18 legislative history and divine the legislature's intent to
19 include this crime.

20 CHIEF JUDGE WILSON: Thank you.

21 MS. ZHOU: Thank you.

22 MR. ELLIS: Good afternoon. May it please the
23 Court. My name is Andrew Ellis of the Dutchess County
24 Public Defender's Office. I'm here on behalf of the
25 respondent, Michael Cavagnolo.



1 As has been robustly discussed today, we're here
2 before the court on a bread and butter issue for this
3 court. It's statutory interpretation. It's whether or not
4 making a terroristic threat qualifies for bail, as the
5 People are arguing, under subdivision (a), or whether it's
6 specifically excluded under subdivision (g).

7 Putting forward that it is specifically excluded
8 for subdivision (g), the courts are instructed, as has been
9 set numerous times by this court, repeatedly in precedent,
10 that we have to come to a harmonious reading between the
11 two statutes. It's always been brought up that we also
12 have to apply a general rule only where there is a - - -

13 JUDGE RIVERA: Well, why - - - why doesn't the
14 approach in Rankin apply? Why aren't they right about
15 that?

16 MR. ELLIS: Well, as you stated before, it's a
17 different situation now - - -

18 JUDGE RIVERA: I'm taking the other view now.

19 MR. ELLIS: Well, then I'll say ditto, but more
20 specifically, as you stated, there are two different
21 hearings that are contemplated, two different standards,
22 there's different things that are being contemplated by
23 them as well. One was drafted - - - I believe it was in
24 the 1980s, and the other one was drafted in 2019 by
25 completely different legislatures. And by doing one,

1 you're not prevented from doing another. However, it was
2 very distinctly decided by this court that - - -

3 JUDGE HALLIGAN: But - - -

4 MR. ELLIS: - - - once you proceed, you have to
5 decide which way you're heading.

6 JUDGE HALLIGAN: But couldn't - - - - if you
7 wanted to be clear in the way that - - - and interpret it
8 the way you're proposing, couldn't the legislature have
9 said in (g), notwithstanding any other subsection of
10 510(4). Could have been precise about it if it was
11 isolating the terroristic threat, even though perhaps
12 otherwise covered by other subsections, and ensuring that
13 it would have no coverage elsewhere.

14 MR. ELLIS: They could have done that. But just
15 because the legislature was not as specific as the courts
16 may wish, which I feel like that - - -

17 JUDGE HALLIGAN: Well, I guess I'm - - - I'm
18 maybe - - - I think maybe it's a little bit different than
19 just specificity. Isn't it a question, really, of whether
20 you read (a) and all of the other - - - I think it's
21 twenty-one, if I have the right number - - - provisions
22 separately unto themselves as discrete units, right, or
23 whether we take what's in (g) and we import the exclusion
24 to (a). That seems to me that that's in part a question
25 about the structure of the statute. And so why shouldn't

1 we treat it, as your adversary says, as twenty-one discrete
2 provisions and not imply?

3 MR. ELLIS: So I'd answer with three reasons for
4 that. The first being that there's no indication that we
5 should read it like that. And to be frank, I don't think
6 I've ever heard of another reading of this until the
7 dissent from the Appellate Division, Second Department
8 stated these as twenty-one separate categories.

9 JUDGE HALLIGAN: Well, there is overlap
10 elsewhere. And I guess what I'm asking is just in terms of
11 the structure of the statute, it's, I guess, possible, but
12 I'm not sure typical to import language that the
13 legislature decides to insert in one provision and not in
14 another and imply it. The legislature could have put it in
15 (a); it could have clarified it in (g). So why should we
16 make that textual move?

17 MR. ELLIS: Well, this court has also repeatedly
18 held that we should review statutes as a whole and construe
19 each and every subdivision subparagraphs of that statute as
20 a whole, right - - -

21 JUDGE CANNATARO: Well, related to that, though,
22 I was very intrigued by the Attorney General's argument
23 that this - - - the structure of the statute is meant to
24 allow courts to, you know, find a box where the crime under
25 consideration fits not to have to review the whole - - -

1 all twenty-one subdivisions to see if something else knocks
2 it out. So in response to your rhetorical question, why -
3 - - you know, why would you do that, it - - - it is
4 arguably more efficient if you read it that way. What's
5 wrong with that approach to it?

6 MR. ELLIS: Well, if we - - - this - - - I have
7 made my first two points. My third point actually is that
8 the statute states a principle stands with a qualifying
9 offense. It doesn't say that he stands or she stands
10 charged with a qualifying category of offenses. It doesn't
11 have the previous "or" or under every single subdivision.
12 There's no textual indication that this was read to be
13 categories. When we look to the origin of the statute - -
14 - and maybe not the original, original origin of it. But
15 what I mean by that is the Bail Elimination Act of 2019,
16 there weren't twenty-one categories. There was only nine.
17 It stopped at subdivision I. We've gone through three
18 subsequent amendments of that where they've expanded it
19 repeatedly. And when you look to - - -

20 JUDGE GARCIA: So would you read (k) the way your
21 adversary then is suggesting that it would have to be read
22 under your interpretation that that specific crime is
23 excluded, related to family members, I believe it is?

24 MR. ELLIS: I would. So it is - - - but there
25 are numerous instances where there are actually violent

1 felony offenses that are under 70.02 of the Penal Law, and
2 they are included throughout the statute as well here - - -

3 CHIEF JUDGE WILSON: So I want to see if I
4 understood your response to Judge Cannataro's question,
5 which - - - was it that - - - you - - - so you said the
6 statute reads a defendant stands charged with an offense.
7 Is - - - do I take from that answer that your answer to his
8 question about efficiency is that what a judge would do is
9 not run through all of these twenty-one but would say, is
10 there one that deals with this particular offense and go to
11 that one and determine it under that and not have to look
12 through the rest? Is that what you were saying? So here
13 in this particular case - - -

14 MR. ELLIS: Uh-huh.

15 CHIEF JUDGE WILSON: - - - because the charge is
16 a terrorism charge, you would say, okay, (g) deals with
17 terrorism, so that's the one I look at.

18 MR. ELLIS: They could do that. In reality, what
19 all practicing attorneys, I would assume DA's, defense
20 attorneys, judges, they all have a cheat sheet to this. As
21 soon as it came through, everybody made - - - cheat sheets
22 are distributed through the - - - I believe through the
23 Unified Court System as well as our office has our own. I
24 believe the District Attorney's has their own. Because it
25 would be very cumbersome for somebody in court every single



1 time to go open it up, look through each one and try to
2 figure out - - - we'd be spending way too much time on
3 that. So we create shortcuts. We look at it - - -

4 JUDGE HALLIGAN: So why would the cheat sheet
5 direct you to (g) and not to (a) in this case?

6 MR. ELLIS: The cheat sheet would direct you to
7 everything. So it would go through every single offense
8 listed under 70.02 of the Penal Law, which are the violent
9 felony offenses. You'd also look at all the sex offenses.
10 You'd have to look at all the broad brushstrokes that are
11 in 510.10(4), as well as all of the specific statutes that
12 are in there. And if you run into a conflict, you'd have
13 to resolve that through the interpretation of the statute.

14 JUDGE GARCIA: Counsel, could we go back to - - -

15 JUDGE SINGAS: Yeah, but what - - - I guess I
16 don't understand - - - sorry, Judge Garcia - - - the
17 difference between the general and the specific. Because
18 to me, (a) is very specific. It incorporates expressly a
19 statute, which expressly lists this, and then it excludes
20 two specific statutes. So I really don't understand why
21 we're referencing that as a general statute. It's very
22 clear. (a) is very clear in my mind about what it's doing.
23 And how do we reconcile that with our canon of expressio
24 unius, which we say, you know, there's an irrefutable
25 inference that everything else is included unless it's

1 specifically excluded. How do you get around that?

2 MR. ELLIS: So clarity does not mean that
3 something is not general. Right. So it is very clear it's
4 supposed to be the violent felony offense of 70.02. It's
5 also very clear that 5 - - - 490.20 is supposed to be
6 excluded. Right. So the clarity is not what's in
7 question; it's whether or not it's general or specific.
8 While both are referring to a statute, you look into 70.02
9 and there's numerous statutes within that - - - can't give
10 an exact count at the moment - - - of that - - - are listed
11 therein. Whereas - - -

12 JUDGE HALLIGAN: But why isn't it better
13 understood as, you know, sort of like different fonts of
14 jurisdiction. Right. So in a federal case, you could have
15 diversity jurisdiction or federal question jurisdiction,
16 and they're totally separate grounds to go into court.
17 Right. And if you have a restriction on one, you don't
18 import it into the other because they are distinct. Why
19 isn't it - - - twenty-one different? I think this circles
20 back to Judge Cannataro's question, twenty-one different
21 grounds on which a court can find an offense bail eligible;
22 and so therefore, whatever (g) says doesn't bear on what
23 (a) says.

24 MR. ELLIS: If these were broken up into
25 different statutes, perhaps we would be looking at it like

1 that, but this is - - -

2 JUDGE HALLIGAN: But the fact that they're in
3 subsections makes it different?

4 MR. ELLIS: Yes, because everything is - - -

5 JUDGE HALLIGAN: Why is that?

6 MR. ELLIS: - - - everything is all in one spot -
7 - - one place. With your example, you're looking at
8 different types of jurisdiction. Right. And those aren't
9 all going to be in the same place. Whereas here,
10 everything is a list. Not only is it a list, this is a
11 complex list, which is why you have the difference between
12 the commas and the semicolons throughout this. Right. So
13 we're looking at a list of qualifying offenses, not a list
14 of qualifying categories.

15 JUDGE SINGAS: Yeah. But there's still an "or"
16 in there.

17 JUDGE GARCIA: Counsel, can I just ask one
18 question here? Do you agree that or a felony crime of
19 terrorism as defined in article 490 is redundant? That
20 that's also covered by (a) or (d) or one of the other
21 sections?

22 MR. ELLIS: That portion of it is covered under
23 another portion, yes.

24 JUDGE GARCIA: So it seems to me the legislature
25 thought there was value in adding that section to (g).

1 MR. ELLIS: Yes.

2 JUDGE GARCIA: Why couldn't that same approach
3 apply to there is independent value to taking the threat
4 part out of (g)? If there's independent value in adding to
5 (g) when you have it in some other section - - -

6 MR. ELLIS: Uh-huh.

7 JUDGE GARCIA: - - - why isn't there independent
8 value to taking it away from (g) - - -

9 MR. ELLIS: So - - -

10 JUDGE GARCIA: - - - when you have it in another
11 section?

12 MR. ELLIS: So let's - - - not to cut you off - -
13 -

14 JUDGE GARCIA: Yeah. Sorry.

15 MR. ELLIS: So when we think about it, how would
16 you have made a list? You're going to get together and
17 you're going to look at the Penal Law as a whole, right?
18 And there is structure to 510.10(4). If you look at
19 subdivision (g) - - - (b), they're looking at witness
20 intimidation, (c) is looking at witness tampering, (d) is
21 looking at (a) felonies, (e) is looking at sex trafficking,
22 (g) looking at terroristic crimes, (h) is looking at
23 criminal contempt crimes, (i) is looking at - - -

24 JUDGE GARCIA: And eventually we're going to get
25 to the answer to my question.

1 MR. ELLIS: Yeah, we could go through all of
2 them, but there is structure and - - -

3 JUDGE GARCIA: But why - - - if there's value to
4 add something to (g) independently - - -

5 MR. ELLIS: Uh-huh.

6 JUDGE GARCIA: - - - why isn't there also value
7 independently on taking it out of (g)?

8 MR. ELLIS: Well, we have to read the text of the
9 statute that is there. It's within there, and so we have
10 to give value to it. When we're looking at perhaps the
11 legislator is going to decide that 490.20 shouldn't be a
12 violent felony offense, but they're not going to change
13 510.10(4), whether or not it's a qualifying offense. Right
14 - - -

15 JUDGE CANNATARO: I don't understand how the
16 argument you just made supports your overall goal here. If
17 you're conceding that each subsection is a category, and
18 obviously (g) is terrorism offenses, and I think we can all
19 agree that because of the exclusion, just like your
20 adversaries have argued, 490.20 is not a terrorism offense,
21 it's still a different kind of offense that qualifies
22 whatever the category defined in (a) is, felonies that
23 qualify under 70.02. So I - - - I'm - - - you know, all
24 I'm hearing is it's not one category, but it is another
25 category, which is equally valid, isn't it?

1 MR. ELLIS: No. So I'm not saying that it's a
2 category. I'm saying that there's structure, and when you
3 look at this, it makes sense why they would have done this.
4 Right. We're making a complex list. So we have to look at
5 how do we organize this list in a way that might make
6 sense. But that doesn't make it that it's a category of
7 offenses that qualify. It's just how you would organize;
8 it is how you would debate it. When this - - -

9 JUDGE CANNATARO: But didn't you just list a
10 series of categories for each subsection? I thought I
11 heard you do that. I can't repeat it because you obviously
12 know the statute much better than me. But you said each
13 subsection sort of deals with a general type of crime.

14 MR. ELLIS: A policy decision, yes. So it's not
15 a category per se. Right. But they are making a list in a
16 way that makes sense. Right. What wouldn't make sense is
17 if there is no structure to it at all. We wouldn't expect
18 them to just willy nilly put some in under (a) and (b) and
19 (c) and (d).

20 And if we're going to argue about it in court,
21 especially in arraignment court, where we're trying to
22 process through cases quickly, we are going to want to say,
23 Judge, it qualifies, if you look under subdivision (a) or
24 subparagraph (d), subparagraph - - - that's a very quick
25 and easy way to get to it, versus if they would have made

1 one long laundry list, it would have been much less clear.
2 This is just breaking it up to make it easier to read
3 through.

4 And if you look at the semicolons, it's not just
5 that there's a semicolon after each subparagraph. If you
6 look specifically at (g), you can count the semicolons
7 within there. There's five semicolons within subdivision
8 (g). So the argument that these are different categories,
9 it wouldn't even be that there's only twenty-one. There
10 would be even more of them when you start to break up
11 within (g). I - - - the reason why I think the semicolons
12 are there is simply, again, to provide clarity when reading
13 through the statute.

14 There's nothing that I've ever seen or heard,
15 until the dissent said, that these are categories. Never
16 heard or seen anyone ever refer to the list of qualifying
17 offenses as categories. It's always been referred to as a
18 list. These are the offenses that do, and these are the
19 offenses that don't qualify.

20 And I believe there is a question that was asked
21 about expressio unius exclusio alterius. In my research, I
22 found about seventy-eight cases that the Court of Appeals
23 has ruled on utilizing this specific statutory maxim. I
24 could not find a single case where it has ever been used
25 within the same statute. What I mean by that is normally

1 it - - - the court would take it to compare two different
2 statutes and then read them together. I have never found a
3 case where - - - and I can one hundred percent say within
4 the last twenty-five years, because I've read through each
5 one of those line by line - - - that it exists where it's
6 in one subdivision of the paragraph, but it's not in not in
7 another.

8 So typically, when we're looking at it - - - I
9 mean, the court has simply never applied it in that way
10 before.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. ELLIS: Thank you.

13 MS. DIEHN: Just briefly, I want to iterate that
14 my adversary and I use different cheat sheets for
15 determining whether a crime is bail eligible. Under mine,
16 as well as the lower court's, making a terroristic threat
17 is a Class D violent felony. It is bail eligible because
18 it is plainly - - - it plainly falls under the sub - - -
19 under subdivision A, the statute is disjunctive, and
20 there's no indication that exclusion from one is an
21 exclusion from all.

22 If there are no further questions, I would rely
23 on my brief.

24 CHIEF JUDGE WILSON: Thank you.

25 (Court is adjourned)



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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People ex rel Ellis v. Imperati, No. 54 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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