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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 70

JASON WRIGHT,

Appellant.

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

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1 CHIEF JUDGE WILSON: The next case on the  
2 calendar is People v. Wright.

3 MR. BOVA: Good afternoon. May it please the  
4 court, Matthew Bova for appellant, Mr. Jason Wright. I  
5 would request three minutes for rebuttal, please.

6 CHIEF JUDGE WILSON: Yes.

7 MR. BOVA: This court should adopt a simple and  
8 clean rule of due process law, where there is an  
9 unexplained, negative identification at a fair line-up  
10 there is no independent source as a matter of law. This  
11 rule will protect due process, promote the accuracy of  
12 identifications - - -

13 JUDGE GARCIA: How clear is unexplained?

14 MR. BOVA: Well, this record provides the  
15 best - - -

16 JUDGE GARCIA: What would your standard be?

17 MR. BOVA: So unexplained, as a good example,  
18 this comes from the McFowler case out of the Seventh  
19 Circuit, there's actually evidence proffered by the  
20 prosecution as to why a negative identification at a line-  
21 up should nevertheless be trusted.

22 So a great example of that is appearance change.  
23 If the appearance of - - - of the suspect changes, and so  
24 the line-up throws off the witness, that could be an  
25 example.

1           If the witness testifies, I was particularly  
2 nervous on that day, something - - -

3           JUDGE GARCIA: So any reasonable explanation gets  
4 you out of the per se rule.

5           MR. BOVA: Well, some record evidence. I mean,  
6 the key is evidence that would allow for a basis to trust  
7 - - - to trust that in-court ID when there nevertheless is  
8 a negative ID. But this case - - -

9           JUDGE RIVERA: But how - - - how do you end up -  
10 - - this is a different type of question. I'm very  
11 disturbed by the court's reliance on the observations at  
12 the crime as its independent course. That's contested.  
13 How can that be an independent source to establish  
14 reliability of the in-court ID? I don't even understand  
15 that.

16           MR. BOVA: So in a case - - -

17           JUDGE RIVERA: I take it you're not arguing that.

18           MR. BOVA: Well, in a case where there's a  
19 negative identification - - -

20           JUDGE RIVERA: Yes.

21           MR. BOVA: - - - the factors that the court  
22 relied on, such as opportunity to view, lighting, the  
23 vantage point, all of those favor a finding of a lack of an  
24 independent source.

25           JUDGE GARCIA: If someone was kidnapped for a

1 week, and they saw the person every day, you wouldn't say  
2 they didn't have an independent source because that's part  
3 of the crime, and it's contested, would you?

4 MR. BOVA: No. If - - - if - - - if there's a  
5 good vantage point, excellent opportunity to view, and as  
6 in the vast majority of cases, there's no negative line-up  
7 ID, then yes, absolutely, because what that - - - what that  
8 record shows is you can look at the factors that typically  
9 serve as a proxy for reliability and say this  
10 identification at trial is reliable.

11 JUDGE RIVERA: But that - - - that's my point.  
12 The whole observation is contested, so how can you have a  
13 judge when that's going to the jury make that reliability  
14 determination? How can the comparator to the point of the  
15 in-court ID be the basis for a reliability determination by  
16 the judge?

17 MR. BOVA: Well, because what happened in this  
18 case was the judge is relying on the fact that the witness  
19 is sitting in the car and - - - and testifies - - -

20 JUDGE RIVERA: Oh, no. I know what the judge  
21 relies - - - that's what I'm saying.

22 MR. BOVA: Right.

23 JUDGE RIVERA: I'm having great difficulty  
24 understanding how the observation at the crime when - - -  
25 when this person does not know the defendant, has no prior

1 relationship with this defendant, didn't spend a week with  
2 the defendant, could possibly - - - that could possibly be  
3 what becomes a independent source to establish reliability,  
4 or some comfort, that it's a reliable identification in  
5 court.

6 MR. BOVA: Well, I think that in - - - I mean, in  
7 - - - in a case like this, generally, that's a question - -  
8 - that would be a question of fact as to the opportunity to  
9 view, and that was resolved by the trier - - - by the judge  
10 below.

11 But the unique thing about this case that sets it  
12 apart is all of those factors, when we look at the totality  
13 of the circumstances, when we look at the whole picture,  
14 all of those factors that typically show that the in-court  
15 ID would be reliable, actually show that the in-court ID is  
16 unreliable in the context of a negative ID because when we  
17 have a negative ID and a good opportunity to observe, the  
18 good opportunity to observe highlights the significance of  
19 that negative ID because that person is looking at a line-  
20 up with the defendant in a line-up, and saying, I had a  
21 good opportunity to observe, and he's not there.

22 This is an objective ironclad record providing  
23 what effectively amounts to an experiment of reliability.

24 JUDGE HALLIGAN: Which - - - which presumably  
25 means if we were to accept those points, the alternative

1 way to think about the case is that there's no record  
2 support.

3 MR. BOVA: That's an alternative way too, Your  
4 Honor, like in Cabrera. I mean, I think however - - -  
5 however the court looks at it, whether there would be no  
6 record support because you have ironclad evidence in the  
7 record proving unreliability, or if you just look at the  
8 case as - - -

9 JUDGE HALLIGAN: And - - -

10 MR. BOVA: - - - presenting a question of law  
11 because of a rule of law, either way.

12 JUDGE HALLIGAN: And how do you - - - how do you  
13 respond to the harmlessness argument that your adversary  
14 makes?

15 MR. BOVA: Because this was a - - - this was  
16 powerful testimony because it filled a critical gap in the  
17 government's case. The government - - -

18 JUDGE HALLIGAN: But why isn't the remaining  
19 evidence sufficient, I think, is the question?

20 MR. BOVA: Right. Because I think - - - well,  
21 the remaining evidence was not overwhelming, and there's,  
22 at a minimum, a reasonable possibility.

23 JUDGE CANNATARO: There was another  
24 identification though, wasn't there?

25 MR. BOVA: So there - - - there was no other

1 identification of Mr. Wright as the shooter. The problem  
2 with the government's testimony is that their testimony is  
3 all over the map as to whether - - - as to where the  
4 shooter is at the time - - - at the time of the incident.  
5 You have Compton (ph.), and Emlay (ph.), saying there's a  
6 confrontation face-to-face, and then shots are fired.

7 You have Smith (ph.), the complainant. He  
8 testifies, and I quote, "I don't know the circumstances of  
9 how I was shot" because he has left the confrontation,  
10 according to him.

11 So we don't know whether or not the shooter is  
12 the person involved in the face-to-face - - -

13 JUDGE TROUTMAN: But you could credit one witness  
14 versus another, and the - - - the complainant, for whatever  
15 reason, could not wish to confirm anything, but there could  
16 be a witness that the jury could, in fact, find credible  
17 because they were in a position to see what actually  
18 occurred.

19 MR. BOVA: That is perhaps true. I mean, but  
20 that gets to sufficiency. That doesn't get to harmless  
21 error.

22 JUDGE RIVERA: But consistency in the evidence is  
23 - - - is just so obvious. The witnesses observed these two  
24 men arguing in daytime in - - - on the street. Shortly  
25 after one of them turns; they are shot. They confirm what

1 they're wearing. It all is corroborated.

2 I mean, a jury can come to the conclusion that  
3 under those circumstances the shooter was the person who  
4 was having the fight with the other human being and was  
5 there in that moment when they turned.

6 MR. BOVA: There is evidence that supports that.  
7 We're not saying the evidence is insufficient, but Smith's  
8 testimony, the person who would know the most about the  
9 circumstances as to how he got shot, he says at A-600 of  
10 the record, he's on the other side of the sidewalk. He has  
11 left the confrontation.

12 So without this ID putting the gun in Mr.  
13 Wright's hand, you have a - - -

14 CHIEF JUDGE WILSON: Well, you've also - - -  
15 you've also got cell site information showing that he left,  
16 and wound up in Brooklyn, and a video showing him taking a  
17 gun out of his jacket about an hour after the shooting, and  
18 the statement that he told this guy Brody's (ph.)  
19 girlfriend that he shot somebody, and he showed Brody a  
20 hole in his pocket. You've got a bunch of stuff.

21 JUDGE GARCIA: And there's DNA at the scene,  
22 isn't there?

23 MR. BOVA: The DNA puts him at the scene, and  
24 again, our point is not that he's not at the scene, and not  
25 that he's not involved in a confrontation, but the point is

1           whether or not he is the person that pulled the trigger,  
2           and when you have a conflict in the proof - - -

3                   JUDGE GARCIA:   What's the DNA on?

4                   MR. BOVA:   The zipper - - - on a zipper pull.

5                   So when you - - - when you have - - - when you  
6           have - - - when you have a conflict in the evidence as to  
7           whether or not the person that's involved in that face-to-  
8           face argument is actually the shooter, this in-court ID is  
9           what seals the deal for the prosecution.

10                   And that's exactly why the prosecution fought so  
11           hard to get this evidence in because they knew they had a  
12           gap in the proof.  They knew that if they didn't have the  
13           ID, they would be forced to argue, yes, we don't have an  
14           ID, but just assume that the person that got into the  
15           conflict with Smith was, in fact, the shooter on that  
16           corner.

17                   JUDGE CANNATARO:  She would know - - -

18                   JUDGE RIVERA:  How significant - - - how  
19           significant was the testimony to the summation?

20                   MR. BOVA:  It was not - - - it wasn't  
21           overwhelmingly significant to the summation, but it was  
22           relied upon.  But again, we're in the context here of - - -  
23           of harmless error, a constitutional error - - - in the  
24           constitutional error concept.

25                   JUDGE GARCIA:  So if this was suppressed, this

1 witness still could have testified, right? Testify to  
2 every other detail they provided except the ID, right?

3 MR. BOVA: Yes, and - - - and that's also  
4 critical because Fabray (ph.), the witness, the eyewitness  
5 that we're talking about, she puts the shooter in the  
6 middle of the street. The other - - - the other - - -

7 JUDGE GARCIA: But she describes that shooter in  
8 exactly the same detail as the other witnesses.

9 MR. BOVA: Generally, yes, yes. Which - - - but  
10 the problem is that the other - - - the other witnesses,  
11 Emlay, and Compon, put - - - put - - - say what actually  
12 happened was there's a face-to-face confrontation, and the  
13 shoot - - - and the - - - the shots are fired at that exact  
14 moment.

15 So there's a conflict in the evidence about  
16 whether or not the shooter is actually the person involved  
17 in the shooting with Smith, and we have the person that's  
18 actually - - - the shooter is actually the person that's  
19 involved in that face-to-face confrontation on the street.

20 JUDGE CANNATARO: You kind of lost me there. I  
21 thought Smith and Emlay were not able to say who the  
22 shooter was.

23 MR. BOVA: Correct, yes.

24 JUDGE CANNATARO: So I'm - - - I'm - - - I'm  
25 missing the connection between their testimony and Fabray,

1 who does establish who the shooter is.

2 MR. BOVA: So what Emlay - - - what Emlay and  
3 Compon testified to is they testified that there's an  
4 argument on the street corner, and that that's when the  
5 shots are fired, while the two are essentially face-to-  
6 face. The rest of the testimony is a conflict in that.  
7 Because Smith - - -

8 JUDGE CANNATARO: Didn't - - - didn't Emlay say  
9 that's the person who I was arguing with?

10 MR. BOVA: Emlay testifies that she sees two  
11 people arguing face-to-face, turns, and then she is shot.

12 So what - - - what we're talking about here is a  
13 conflict in the proof about whether or not the person that  
14 is involved in that street corner argument, which witnesses  
15 testify is Mr. Wright, is actually the person that fires  
16 the shots. There's a gap in the proof.

17 There's - - - this is - - - I'm not here saying  
18 that this is a slam dunk case for the defense, but this is  
19 the - - - this is not sufficiency review. This is the  
20 context of harmless error review, and constitutional error,  
21 where the government bears the heavy burden of proving no  
22 reasonable possibility that a witness who fills gaps in the  
23 proof and says that's the guy that did it, contributed to  
24 the verdict, and they can't meet that burden here.

25 And moving onto the sentencing issues. The

1 structure of CPL 400.15 reserves the decision to controvert  
2 predicate felony allegations to the defendant, both the  
3 statutory structure and the Constitution.

4 JUDGE HALLIGAN: What's - - - what's your  
5 response to - - - to the argument that there are other  
6 provisions that use the word defendant, and reading it as  
7 you would here would be intention with those provisions?

8 MR. BOVA: So there are a few, and I - - - I - -  
9 -

10 JUDGE HALLIGAN: I think there are two they cite.

11 MR. BOVA: Yes. There are a few involving  
12 discharge of - - - of a jury.

13 JUDGE HALLIGAN: Right.

14 MR. BOVA: But what I would say is the special  
15 information statute is really key here, and the Second  
16 Department has interpreted that statute to reserve this  
17 decision for the defendant, and that does not specifically  
18 say anything explicitly referencing the defendant  
19 personally, and that statute is structured just like this  
20 one, and what that statute says is when a predicate is an  
21 element of the offense that - - - it lays out the same  
22 exact preliminary examination standard, the arraignment  
23 standard, and the - - -

24 JUDGE HALLIGAN: But you're - - - you're reading  
25 of the word, I take it, would be intention, and this might

1 not be fatal, but would be intention with, I think, it's  
2 220.50, and 380.50, the - - - the use of those words  
3 there.

4 So - - - so we would attribute a different  
5 meaning to it in those two provisions as opposed to this  
6 one. Yes?

7 MR. BOVA: Yeah. I mean, I think - - - I think  
8 the best answer to that is instead of it relying on an  
9 inference by omission, the legislature would have just said  
10 that this decision is reserved, this - - - that this - - -  
11 that this decision is reserved to the lawyer, and that the  
12 lawyer can override the defendant's express objection.

13 But if we look at the structure of the statute  
14 too, that really gets at this even better because it sets  
15 up an arraignment structure. We don't - - -

16 JUDGE TROUTMAN: So what's the remedy?

17 MR. BOVA: Sorry, Your Honor?

18 JUDGE TROUTMAN: If we were to agree with you  
19 that it's a personal decision for the defendant, what's the  
20 remedy here?

21 MR. BOVA: Then the remedy would be to remit for  
22 a hearing. So if - - - if - - - if this a - - - if this is  
23 a decision that belongs to the defendant as it is under the  
24 statute and under the Constitution, then a hearing would be  
25 statutorily mandated because Mr. Wright stood up and said,

1 I contest the Atlanta County allegations.

2 JUDGE GARCIA: And to that point, if we were to  
3 get a case, and we say that, and we do this, and we were to  
4 get the next case where a defendant comes in and says, you  
5 didn't ask me on the record if I gave up this right, what's  
6 the answer?

7 MR. BOVA: So if - - - if the only thing is a  
8 waiver from the lawyer, and there's no - - - as the statute  
9 requires, and as the pattern - - -

10 JUDGE GARCIA: So it's the judge's obligation, if  
11 we rule this way, that they have to ask this defendant, do  
12 you give up your right to - - -

13 MR. BOVA: They - - - yes. They have to arraign  
14 the defendant, and that's what happens under the pattern -  
15 - -

16 JUDGE GARCIA: So all the cases that - - - until  
17 we make that ruling where that wasn't done, they would all  
18 go back for a hearing?

19 MR. BOVA: If - - - yes, yes. I mean, I think -  
20 - - I think, generally, especially where there is a  
21 specific period identified by the defendant, I mean, that  
22 is - - -

23 JUDGE GARCIA: So let's just say there's nothing.

24 MR. BOVA: Yes.

25 JUDGE GARCIA: They'll come in, and the lawyer

1 says, yeah, okay, we'll concede.

2 MR. BOVA: Yeah. If it's a decision that belongs  
3 to the defendant, the lawyer can't waive it. The lawyer  
4 could perhaps convey the defendant's waiver.

5 JUDGE GARCIA: Every one where there is not in  
6 the pipeline where that wasn't articulated on the record as  
7 a personal waiver of that right would have to go back for  
8 resentencing.

9 MR. BOVA: I don't think that's a problem,  
10 though, Your Honor, because that's already the pattern - -  
11 - that's already the pattern - - - that's the pattern  
12 colloquy.

13 This is a rare situation here where this  
14 happened. The pattern colloquy calls for an arraignment of  
15 the defendant personally. It is unclear why the - - -

16 JUDGE GARCIA: Does it say in there that you have  
17 to have that defendant articulate that they're waiving  
18 their right to have this decided?

19 MR. BOVA: Oh, no. Just to be clear, Your Honor,  
20 there's not - - - you don't need necessarily an affirmative  
21 waiver where the defendant says, I hereby waive. But the -  
22 - - but the - - -

23 JUDGE GARCIA: Let's analogize it to the right to  
24 testify. Do you need something similar to that?

25 MR. BOVA: That's - - - that's - - - yeah. I

1 mean, that's effectively what an arraignment is. You ask  
2 the person whether they want to dispute, or in the context  
3 of testifying, whether you want to testify, and they say  
4 no, and that would be - - - that would be is what - - -  
5 that's what the statute requires, and that's what the  
6 pattern instruction requires. So I don't really think it's  
7 - - - it's a problem.

8 JUDGE GARCIA: So you would have to get a  
9 personal answer from the defendant. If they said do you  
10 want to dispute this to the lawyer, and the lawyer says  
11 we're not disputing this, that's not enough?

12 MR. BOVA: The lawyer could convey the personal  
13 waiver of the defendant, but - - -

14 JUDGE GARCIA: But the lawyer doesn't say, I  
15 talked to my client, and now I'm waiving. The lawyer just  
16 says we're not contesting this. Is that - - -

17 MR. BOVA: Yes. There would need - - - there  
18 would need to be record evidence indicating that it's not  
19 the lawyer making the call. That is the defendant  
20 personally making the call. But I mean, I think hammering  
21 that out - - -

22 JUDGE TROUTMAN: Wouldn't that be a burdensome  
23 process for the court to engage in to confirm that the  
24 defendant, in fact, does not contest that which is in that  
25 statement?

1 MR. BOVA: Yes. I'm sorry. I - - - I just  
2 didn't hear the beginning of the question, Your Honor.

3 JUDGE TROUTMAN: Is it burdensome for the court  
4 to engage in the process that you're requesting?

5 MR. BOVA: No. Not at all. It just has to ask  
6 exactly what the statute says it should ask, and - - -

7 JUDGE GARCIA: But that's going forward, right?  
8 It's not burdensome going forward if they know they have to  
9 do it, but we've never said they have to do it, so I would  
10 imagine there are courts, like this one, that don't do  
11 that. Just not the defendant objects; just they don't  
12 engage in this arraignment.

13 MR. BOVA: I - - - I - - - I mean, there's - - -  
14 there's no evidence at all that the courts are - - - are  
15 departing from the pattern colloquy, and also, I mean, this  
16 is kind of - - -

17 JUDGE GARCIA: We're going to be interpreting  
18 what that colloquy requires, right. If what might have  
19 satisfied that colloquy in the past, if we say this is a  
20 personal right, and it's analogous to the right to testify,  
21 and we have a case on the docket where a prior case was  
22 reversed because of that, if the defendant doesn't  
23 articulate that they've made that personal decision, or the  
24 lawyer conveyed in some meaningful way that they have, the  
25 record is not good, and we have to send it back.

1 MR. BOVA: I mean, yes, but that's - - - that's a  
2 very easy rule for the court to employ. They already do so  
3 under the pattern colloquy. All they have to do is say  
4 here are the allegations; do you dispute them? And if the  
5 defendant says, no, I don't dispute them, then the issue is  
6 over. If the defendant says, yes, under 415, there's a  
7 hearing.

8 It's a very simple protocol, and the court  
9 just - - -

10 JUDGE RIVERA: Could - - - could counsel simply  
11 say defendant does not dispute them?

12 MR. BOVA: I think - - - I think to the extent  
13 that that would be read as the defendant is personally  
14 declining to speak, yes, that would be fine.

15 JUDGE GARCIA: But it's different than a - - -  
16 you can't do that with the right to testify, right?

17 MR. BOVA: No. The right to testify there has to  
18 be - - - there has to be some indication that it's coming  
19 from the defendant personally, yes. I mean, so - - -

20 JUDGE GARCIA: And the defendant doesn't have to  
21 on the record indicate - - -

22 MR. BOVA: No, no. It could be - - - you know,  
23 yes, no. It doesn't have to be some explicit statement  
24 from the lawyer that, oh, in fact, I have spoken to the - -  
25 - I have spoken to my client.

1 JUDGE HALLIGAN: But what if the lawyer says we  
2 are not controverting?

3 In other - - - in other words, I think as Judge  
4 Garcia's questions maybe are getting at you may have a  
5 range of practice that has transpired, so I'm trying to  
6 understand where you would draw the lines. It sounds like  
7 you're saying that the court does not need to specifically  
8 interrogate the defendant, and receive an answer; that the  
9 lawyer can make a representation.

10 And so if that's - - - if I'm understanding you  
11 correctly, what does that entail? Does the lawyer have to  
12 say, I asked my client, and - - - and he agreed we won't -  
13 - - can the lawyers simply say we aren't controverting?  
14 Can you give us some guidance as to what you think on that?

15 MR. BOVA: I think that the court should just  
16 follow the pattern colloquy. I think that this frame - - -

17 JUDGE HALLIGAN: Okay. But in the circumstances  
18 where it has not.

19 MR. BOVA: Well, in terms of guidance going  
20 forward, I would not - - - the - - - I think what - - -

21 JUDGE HALLIGAN: Sorry. Sorry. I'm asking you  
22 about - - - you were getting questions about cases in the  
23 pipeline, and so - - -

24 MR. BOVA: I think where the record is ambiguous  
25 as to - - - cases in the pipeline, I mean, I - - - where -

1 - - where the record is ambiguous, I mean, I think we have  
2 a different question.

3 JUDGE HALLIGAN: As to what?

4 JUDGE CANNATARO: So what do you think, when - -  
5 - when - - - when counsel says we don't dispute that, is  
6 that ambiguous, or not ambiguous?

7 MR. BOVA: I think that that's ambiguous, and I  
8 think this court can - - - can develop the rule later on as  
9 to how you deal with an ambiguity, but that's not this  
10 record. This record is crystal clear.

11 CHIEF JUDGE WILSON: Well, you might have - - -  
12 you might have context around that question too, right?  
13 The model colloquy asks first have you seen the copy of the  
14 statement, and under the law you have the right to do this.  
15 If you get all that, and then the lawyer says we don't  
16 controvert, I think that's different than just a plain old  
17 we don't controvert with nothing in front of it. Right, so  
18 - - -

19 MR. BOVA: Yeah. Absolutely. Absolutely. I  
20 mean, I think - - -

21 CHIEF JUDGE WILSON: These are all going to be  
22 context dependent.

23 MR. BOVA: No. I mean, if the pattern colloquy  
24 is followed, then there's no problem.

25 CHIEF JUDGE WILSON: Well, my point is it could

1 be partially followed and partially not followed, and then  
2 you're in a gray area, and some come out - - -

3 MR. BOVA: Yes. And - - -

4 CHIEF JUDGE WILSON: - - - one way, and some  
5 another way.

6 MR. BOVA: I think what you need is record  
7 evidence that it's not the lawyer's own call independent of  
8 - - - of the defendant's desires. Here we have the exact  
9 opposite. We have - - -

10 JUDGE TROUTMAN: So are you saying - - -

11 JUDGE RIVERA: All you have is the judge to ask  
12 the defendant.

13 MR. BOVA: Yes.

14 JUDGE RIVERA: The judge doesn't have to ask the  
15 lawyer?

16 MR. BOVA: No, no.

17 JUDGE RIVERA: Just ask the defendant?

18 MR. BOVA: Yes. The pattern colloquy. Have you  
19 - - - have you seen and discussed the statement with your  
20 lawyer? Do you wish to deny any allegation in the  
21 statement, or controvert the statement? Do you admit that  
22 you were the person named in that statement who was  
23 convicted of that felony?

24 This is very simple. It's not - - - it's - - -  
25 it's surprising that this created this level of error in

1 this case. The simple thing to do is follow the colloquy,  
2 and especially where you have a defendant saying, I am  
3 absolutely fighting these allegations - - -

4 JUDGE GARCIA: But what if later, and I don't  
5 know the whole colloquy, they say, yeah, but I was  
6 contesting the toll, right?

7 MR. BOVA: Yes.

8 JUDGE GARCIA: Is that in there, like, do you  
9 contest the toll?

10 MR. BOVA: No. It's - - - what that says were  
11 any allegations set forth in that statement.

12 JUDGE GARCIA: And you think that's sufficient to  
13 waive the tolling specific - - -

14 MR. BOVA: Yes, because that's an allegation in  
15 the statement. I mean, normally what happens is the - - -  
16 the judge will read the actual allegations. I mean, that's  
17 what an arraignment on the predicate statement is. You  
18 read the allegations to - - - to the defendant.

19 JUDGE GARCIA: Is the allegation, and I just  
20 don't know this, that that crime took place within a  
21 certain amount of time, or the allegation contains the  
22 specifics of any tolling of the - - -

23 MR. BOVA: No. The alle - - - no, the allegation  
24 will contain - - - the predicate statement will contain the  
25 allegations of tolling because it's statutorily required



1 that those tolling allegations be placed in the statement.

2 So all of this will - - - all - - - all of this  
3 gets read to the defendant. The defendant is asked if he  
4 admits, or denies, and that's the end of the - - - that's  
5 the end of the question. Thank you.

6 MS. SCHMIDT: Good evening, Your Honors.  
7 Elizabeth Schmidt for the People.

8 May it please the court, to start on point one,  
9 no per se rule barring a finding of an independent source  
10 any time after a nonidentification occurs is warranted,  
11 especially under the complicated record here, with  
12 compelling reasons to credit the witness.

13 JUDGE HALLIGAN: How can you get record support  
14 for the identification here?

15 MS. SCHMIDT: We can get record support because  
16 it's - - -

17 JUDGE HALLIGAN: Given the negative ID.

18 MS. SCHMIDT: Yes. First, I would point out that  
19 the witness did that same day - - - before she made the  
20 negative ID, she also positively IDed the defendant.

21 JUDGE HALLIGAN: But then made a negative ID?

22 MS. SCHMIDT: Yes. All in - - - my point is  
23 merely that it is a complicated situation here, and she not  
24 only identified the defendant initially, she also did - - -  
25 excuse me - - - identified him very strongly. She said to

1 a detective, that's him. I'm a hundred percent sure that's  
2 him.

3 JUDGE HALLIGAN: So remind me of the  
4 circumstances. If I'm recalling, he was - - - he was not -  
5 - - he was alone with - - - with an officer at that point;  
6 is that right, or am I misremembering that?

7 MS. SCHMIDT: That - - - you're right, Your  
8 Honor. The way it proceeded - - -

9 JUDGE HALLIGAN: So there might have been more  
10 suggestiveness around that viewing than subsequently, I  
11 would think.

12 MS. SCHMIDT: There was some suggestiveness. The  
13 way it played out - - -

14 JUDGE RIVERA: Well, that's what the court  
15 concluded.

16 MS. SCHMIDT: Yes. Absolutely.

17 JUDGE CANNATARO: And - - - and that goes to your  
18 question of complication. I mean, it doesn't seem very  
19 complicated in the sense - - - I'm paraphrasing something  
20 defense counsel said to the trial court. When the context  
21 is suggestive, he's identified, and when the context isn't  
22 suggestive, he's not identified. That sounds pretty  
23 simple. So where is your record support to reask the  
24 question?

25 MS. SCHMIDT: Sure. In addition to that initial

1 identification, which if I might expand on that too, I  
2 think it's also important to acknowledge that she initially  
3 identified him and had that encounter with him, because  
4 that could have influenced her subsequent identification in  
5 other ways.

6 I think it's reasonable to infer, for instance,  
7 that she saw the defendant, and knew that he saw her face-  
8 to-face, and she might have felt quite unnerved from that  
9 encounter. She might have also been thrown off  
10 subsequently at the line-up because there was likely a  
11 change of clothes.

12 JUDGE RIVERA: We can't have a rule that depends  
13 on this level of speculation if there is nothing in the  
14 record to support any of that.

15 MS. SCHMIDT: Well, we're not - - - if I  
16 understand your question correctly, Your Honor, we're not  
17 asking - - -

18 JUDGE RIVERA: If you're right about everything  
19 you've said, wouldn't she have turned to the - - - to the  
20 officer, and said, it's him, I'm a hundred percent certain  
21 of it, but I'm afraid to ID him because he's seen me?

22 MS. SCHMIDT: I can't - - -

23 JUDGE RIVERA: I mean, maybe - - - I don't - -

24 JUDGE HALLIGAN: Is there anything beyond the  
25 initial ID you would point us to?

1 MS. SCHMIDT: Yes. I'd also point to the fact  
2 that the description she gave was corroborated by quite a  
3 bit of other evidence in this case, such as her description  
4 of the defendant's haircut, the description of his build,  
5 and approximate height, the description - - - the very  
6 detailed description of his clothes, and to further  
7 evidence that she had a memory of the defendant and the  
8 memory of the event in general.

9 JUDGE HALLIGAN: But a memory - - - you know,  
10 what I'm wrestling with is whatever memory there is, what  
11 are we to make of the negative ID? And how - - - how do  
12 you move beyond that on this record?

13 MS. SCHMIDT: Sure. I agree that the  
14 nonidentification makes this an ambiguous, complicated  
15 situation, but I think that's why this - - - this case  
16 illustrates the reason why no per se rule should be found  
17 because this is the sort of complicated situation where we  
18 want our trial judges to be considering - - -

19 JUDGE TROUTMAN: So you would agree that the  
20 negative ID is a factor, but you don't want it to be the  
21 decisive factor?

22 MS. SCHMIDT: Yes.

23 JUDGE TROUTMAN: Is that what you're suggesting?

24 MS. SCHMIDT: That's correct. I think it is best  
25 for judges to be fully empowered to look at all evidence

1 related to identification.

2 JUDGE CANNATARO: And is the independent source  
3 hearing the correct remedy for this kind of nuanced,  
4 complicated situation? Is that the correct way to address  
5 it?

6 MS. SCHMIDT: That's a complicated question, Your  
7 Honor.

8 JUDGE CANNATARO: It's so complicated.

9 MS. SCHMIDT: Yes, because I - - - the  
10 independent source, the premise, and I apologize for  
11 explaining something you all already know, but they were  
12 testing for taint arising from the suggestive encounter,  
13 and the court concluded that the witness was not so tainted  
14 by that suggestive encounter that she could give an  
15 identification, and in so doing, the court did also assess  
16 her for reliability.

17 JUDGE RIVERA: What is that base - - -

18 JUDGE CANNATARO: So you're saying the - - -

19 JUDGE RIVERA: What is this analysis and  
20 conclusion that it's not tainted?

21 MS. SCHMIDT: Why did the court determine that?

22 JUDGE RIVERA: What's the basis for that  
23 conclusion?

24 MS. SCHMIDT: I think the court largely based it  
25 off of the fact that the witness seemed largely right in

1 her description of the defendant, if I remember the court's  
2 ruling.

3 JUDGE RIVERA: But that - - - that is not helpful  
4 when she cannot pick him out of a line-up.

5 MS. SCHMIDT: But I think that line-up - - - I  
6 apologize for repeating myself a little, but I think that  
7 line-up is complicated because you have that immediately  
8 preceding event that may have thrown her off.

9 She may have been thrown off because she saw him  
10 in one set of clothes right before, and then at the line-up  
11 everyone was wearing black sweatshirts, and she may have  
12 been confounded by this momentarily.

13 JUDGE RIVERA: Well, that - - - that is really  
14 putting in question the ability - - - the ability to make  
15 an identification if that's what throws you off.

16 MS. SCHMIDT: Maybe so. Maybe so, Your Honor.

17 JUDGE RIVERA: Because your comparator is  
18 supposed to be, right, as your argument has been in these  
19 briefs, the observation at the crime. That's what she's  
20 relying on.

21 MS. SCHMIDT: Yes. But - - -

22 JUDGE RIVERA: And she's closer in time. I mean,  
23 this is three days after her observations.

24 MS. SCHMIDT: Yes. And the court took this all  
25 into account when it was making this determination, but

1 again, ultimately the court decided, okay, she was exposed  
2 to this suggestive encounter. I don't think that this  
3 affected her memory of the crime, and so she will be  
4 allowed to make an in-court identification.

5 JUDGE RIVERA: Although even the judge - - - you  
6 - - - you remember the record, right? It seems skeptical  
7 of her ability to do so. And then - - -

8 MS. SCHMIDT: He - - -

9 JUDGE RIVERA: - - - even the court appears to  
10 acknowledge that the in-court ID would be suggestive?

11 MS. SCHMIDT: Yes. The court did consider that,  
12 and I - - - I think that's roundly agreed upon by courts of  
13 this state. And so the court took that into account in its  
14 ruling.

15 JUDGE GARCIA: Could you address harmless error?

16 MS. SCHMIDT: Sure. The - - - any error  
17 committed here would absolutely be harmless.

18 The two things I'd really point to are, one, that  
19 one of the two victims, not the victim who was involved in  
20 the fight with defendant; that's Kareem Smith (ph.). Joan  
21 Emlay testified that in the moments before she was shot she  
22 was watching the fight, in those moments before she turned  
23 away because she knew something bad was going to happen,  
24 she saw defendant alone standing in her direction, or  
25 facing in her direction, and moments later she got shot.

1           In addition, as, I forget which of you, I  
2 apologize, pointed out defendant barely an hour after the  
3 shooting is caught on - - - in Brooklyn on surveillance  
4 video on the sidewalk showing a gun off.

5           In addition, defendant didn't contest that he was  
6 at the scene of the crime or that he was involved in a  
7 fight with one of the victims. He had motive to use the  
8 gun because he had been knocked down by Kareem Smith, one  
9 of the two victims, and other wit - - - excuse me - - -  
10 other witnesses also gave a description of the shooter that  
11 matched defendant's appearance that day.

12           If there are no further questions on - - -

13           JUDGE HALLIGAN: Do you want to address the - - -  
14 the question about the - - - whether it's a personal right  
15 to controvert the predicate felonies?

16           MS. SCHMIDT: Yes. Moving to point two, Your  
17 Honor. The decision to controvert a specific tolling  
18 allegation contained in a predicate felony statement is a  
19 limited statutory right and just one decision among many to  
20 be made at sentencing. It is, therefore, a matter of trial  
21 management that belongs to an attorney, and is not - - -

22           JUDGE TROUTMAN: But with respect to whether to  
23 admit or deny, with respect to that predicate, it impacts  
24 the defendant beyond just that one case. Subsequent cases  
25 it's deemed admitted, correct?

1 MS. SCHMIDT: It is.

2 JUDGE TROUTMAN: And it does impact him or her in  
3 the future.

4 MS. SCHMIDT: It does.

5 JUDGE TROUTMAN: And you're suggesting that  
6 that's just something a lawyer without even consult - - -  
7 arguably, consulting. He says, I want to contest. He's  
8 shut down here, that they can just do that on their own.

9 MS. SCHMIDT: Yes. I will say, first, counsel  
10 had the benefit of seeing the People's proof behind these  
11 tolling allegations, and so counsel was able to view - - -  
12 I believe they were filed a full month in advance.

13 JUDGE HALLIGAN: Do you agree that the - - - that  
14 the lawyer is required to consult with the defendant on  
15 whether he wishes to controvert?

16 MS. SCHMIDT: I think a lawyer should ethically  
17 consult with - - -

18 JUDGE HALLIGAN: Do you think it's an effective  
19 assistance if the lawyer does not consult with the  
20 defendant?

21 MS. SCHMIDT: I think it - - - it could present  
22 an opportunity for an ineffective assistance of counsel  
23 claim. That claim isn't being made here.

24 JUDGE RIVERA: Counsel argues that this is - - -  
25 this is an aberration; it's unusual. Is that your view?

1 MS. SCHMIDT: I have never practiced at the trial  
2 level, Your Honor. So acknowledging that first, to the  
3 best of my knowledge, there have only been two cases in  
4 this state that have addressed the issue where counsel and  
5 his client come to a disagreement over whether or not to  
6 contest the predicate - - - the tolling allegations  
7 contained in the predicate felony statement.

8 JUDGE TROUTMAN: Would you agree - - -

9 JUDGE RIVERA: And the court, it allows the - - -  
10 the counsel's position to control?

11 MS. SCHMIDT: In one case, this case, the court  
12 went with counsel. In the other case - - -

13 JUDGE HALLIGAN: Well, here the court doesn't ask  
14 the defendant, I don't think, directly.

15 MS. SCHMIDT: Right. No, he - - -

16 JUDGE HALLIGAN: Or explore whatever concerns  
17 there are about whether or not controverting might be  
18 appropriate. At least that's how I read the record.

19 MS. SCHMIDT: Counsel does only address - - - or,  
20 excuse me. The court only addresses counsel.

21 JUDGE CANNATARO: The court shot defendant down.

22 MS. SCHMIDT: Yes.

23 JUDGE HALLIGAN: And counsel doesn't say anything  
24 regarding having consulted with the defendant, or - - - or  
25 I don't think, make any attempt to explain whatever

1 objection the defendant might be trying to interpose.

2 MS. SCHMIDT: Not to my remembrance.

3 JUDGE TROUTMAN: It is - - - what do you say with  
4 respect to counsel's argument that it isn't effectively an  
5 arraignment on that statement, and the inquiry is to be  
6 made up with the defendant. It is not an onerous burden.  
7 I know it because I've done it a number of times as a trial  
8 court judge.

9 And you, yourself, admit what happened here is  
10 not necessarily what normally happens.

11 MS. SCHMIDT: I - - - I say that with the caveat  
12 of prac - - - of practicing only at the appellate level.  
13 So I've only seen the choices set - - -

14 JUDGE TROUTMAN: No. But you said that with  
15 respect to the reviewing of cases. You pointed to one  
16 where it was in favor of the defendant, and the other it  
17 was not.

18 MS. SCHMIDT: Yes. Pointing only to where  
19 subsequently that decision was challenged on appeal.  
20 That's what I'm aware of.

21 JUDGE TROUTMAN: So you can't point to a  
22 widespread or swath of cases wherein this was condoned as  
23 purely a decision of counsel?

24 MS. SCHMIDT: No, Your Honor.

25 JUDGE RIVERA: And it does seem contrary to the

1 pattern colloquy, correct?

2 MS. SCHMIDT: Yes, but I - - - the - - - the  
3 makers of the colloquy don't interpret statutes, and they  
4 don't take briefs on the issue, so I wouldn't consider  
5 that.

6 JUDGE HALLIGAN: It might - - - it might  
7 suggest - - -

8 JUDGE RIVERA: And that, but judges do rely on  
9 it.

10 MS. SCHMIDT: Yes.

11 JUDGE RIVERA: And - - - and use it.

12 JUDGE HALLIGAN: And it might suggest that it  
13 would not be - - - setting to the side for a moment  
14 whatever cases might be in the pipeline, it might suggest  
15 that it wouldn't be terribly burdensome to make the inquiry  
16 if it's included in the model colloquy.

17 MS. SCHMIDT: It - - - it might not be  
18 burdensome. I think a few things put this particular case  
19 apart. First of all, the fact that the court already had  
20 the People's evidence behind the tolling allegations, and  
21 so I - - -

22 JUDGE TROUTMAN: Well, then why wouldn't the  
23 court simply say it on the record as opposed to just  
24 shutting down the defendant, as Judge Cannataro just  
25 stated.

1 MS. SCHMIDT: I think here the court reasonably  
2 relied on defense counsel's representations about those  
3 highlights.

4 JUDGE TROUTMAN: Despite the - - - but what was  
5 the basis of that when there's a conflict between the two?  
6 The judge doesn't articulate.

7 MS. SCHMIDT: No, but I - - - I think the judge  
8 would have recognized - - -

9 JUDGE RIVERA: Well, they've got representation  
10 by counsel. Counsel said, no, I don't want to address that  
11 matter.

12 MS. SCHMIDT: I'm - - - I'm so sorry. Can you  
13 say that - - -

14 JUDGE RIVERA: I'm saying I thought you said  
15 there was - - - the court relied on representation by  
16 counsel. I thought you were referring to defense counsel.

17 MS. SCHMIDT: Yes.

18 JUDGE RIVERA: But defense counsel said, when  
19 asked directly, do you want to be heard on this, the this  
20 being the tolling calculation that the prosecutor has just  
21 gone through in some detail, the lawyer says, no, not on  
22 this matter.

23 MS. SCHMIDT: Yes.

24 JUDGE RIVERA: And then defendant immediately  
25 says that he does wish to controvert it.

1 MS. SCHMIDT: Yes. And I think that  
2 represents - - -

3 JUDGE RIVERA: No. But what I'm saying - - -  
4 what is the judge relying on?

5 MS. SCHMIDT: The judge is relying on the defense  
6 attorney indicating he does not see a challenge to be made  
7 here.

8 JUDGE RIVERA: No. But that's not what he said.

9 MS. SCHMIDT: That's my interpretation, Your  
10 Honor.

11 JUDGE TROUTMAN: But that's not necessarily  
12 record - - - it - - - his - - - the reasoning of counsel  
13 was not articulated. The court did not articulate its  
14 rationale for proceeding in the matter. It just simply  
15 shut the defendant down. You're being sentenced.

16 MS. SCHMIDT: But I think the court recognized  
17 that counsel wasn't entitled to hybrid representation.

18 JUDGE TROUTMAN: But isn't it a problem when you  
19 say, I think, as opposed to I - - - I - - - it was my  
20 understanding that if the trial court puts on the record  
21 rationale for support, it makes appellate review much  
22 easier. Would you not agree?

23 MS. SCHMIDT: Maybe so, Your Honor, but the court  
24 was under no affirmative duty to ask the defendant  
25 personally because this - - -

1 JUDGE HALLIGAN: Well, that's the question before  
2 us, right?

3 MS. SCHMIDT: Yes.

4 JUDGE RIVERA: So if we disagree, is the remedy,  
5 as counsel has argued, a hearing?

6 MS. SCHMIDT: I think it is; at which, the People  
7 would produce the same evidence.

8 I - - - I would like to point one other thing  
9 out.

10 JUDGE HALLIGAN: And presumably the defendant  
11 would be asked.

12 MS. SCHMIDT: Yes.

13 JUDGE RIVERA: And - - - and - - - and if he  
14 wishes to object, make whatever argument he's going to  
15 make.

16 JUDGE HALLIGAN: Yes.

17 MS. SCHMIDT: Yes. I - - - if I may briefly  
18 continue on this though, Your Honors. I'd like to point  
19 out though that this is one very narrow decision that is  
20 presented at sentencing, and I think - - -

21 JUDGE TROUTMAN: But the impact of that decision  
22 it - - - it is far-reaching. Are you suggesting it doesn't  
23 matter?

24 MS. SCHMIDT: No. I would not suggest that, but  
25 I don't think impact is necessarily the inquiry here

1           because - - -

2                   JUDGE TROUTMAN:   What is it?

3                   MS. SCHMIDT:   - - - there are plenty of other  
4           decisions that counsel makes that have a great impact on  
5           the course of a defendant's sentence or outcome in general.  
6           For instance - - -

7                   JUDGE TROUTMAN:   But here it's not just limited  
8           to the sentence.   Would you agree with that?

9                   MS. SCHMIDT:   It does have repercussions if the  
10          defendant - - -

11                   JUDGE TROUTMAN:   In foro turo.

12                   MS. SCHMIDT:   Yes, if the defendant commits  
13          another crime.   That's correct.

14                   But to go back to a point I was earlier trying to  
15          make, this is a narrow decision that takes place that's in  
16          the context of sentencing.   It's one decision among many  
17          that an attorney is confronted with when considering - - -  
18          when confronted with a predicate felony statement filed by  
19          the People, because the attorney must decide which specific  
20          tolling allegation to contest, in addition to considering  
21          whether or not to contest the constitutionality of the  
22          prior conviction.

23                   JUDGE TROUTMAN:   But is there not a difference  
24          between choosing what in the context of the statement to  
25          contest as opposed to overall saying no?

1 MS. SCHMIDT: Can you repeat that one more time?

2 JUDGE TROUTMAN: The attorney just shut it down.

3 No. I don't want to contest anything. We don't have  
4 anything in the record to suggest it was specifically  
5 limited to tolling, as you suggest, or no, I - - - I don't  
6 want to contest anything.

7 MS. SCHMIDT: Well, I think the question  
8 presented here because the defendant wanted to contest the  
9 tolling allegations. But even the predicate felony  
10 statement, the decision, even if you take just the decision  
11 in general to controvert some part of the predicate  
12 statement, that's also taking place within the context of  
13 sentencing.

14 And so my analogy would be to - - - while the  
15 defendant gets to choose whether or not to appeal his  
16 conviction, it is an attorney who gets to decide which  
17 arguments to present on appeal.

18 JUDGE TROUTMAN: And who has knowledge of his  
19 past conviction?

20 MS. SCHMIDT: The defendant has knowledge, but so  
21 too is the defense attorney positioned to consider this  
22 issue because the defense attorney understands the statute,  
23 the defense attorney understands - - -

24 JUDGE TROUTMAN: And is it clear that they fully  
25 discussed it here, and that he made that decision based

1 upon those discussions, consulting the client?

2 MS. SCHMIDT: It is not clear in this instance.  
3 I believe that they talked specifically about this, but the  
4 record is littered with moments of the defense attorney  
5 asking for an adjournment, or a pause in proceedings, to  
6 talk to his client, and explain something to him. He was  
7 very - - -

8 JUDGE TROUTMAN: And that is the difficulty  
9 because the court did not allow for it.

10 MS. SCHMIDT: If - - - if defense attorney - - -  
11 if the defense counsel had asked for an adjournment, I  
12 think the court - - - the court would continue its practice  
13 of allowing for a pause in the proceedings.

14 JUDGE RIVERA: You have your red light. Do you  
15 quickly want to address the Erlinger claim?

16 MS. SCHMIDT: Thank you, Your Honor. Yes, I do.  
17 Very briefly.

18 There are multiple threshold reasons for this  
19 court to decline to address the defendant's Erlinger claim.  
20 To begin, his claim is unpreserved on two separate levels.

21 First, because counsel affirmatively declined to  
22 contest any of the factual allegations contained in the  
23 predicate felony statement, and this court recently held in  
24 Hernandez that similar circumstances constituted a failure  
25 to preserve.

1           Second, no one raised a constitutional objection  
2 of any kind to the tolling determination made here, and not  
3 one ground in the Sixth Amendment, or based on Apprendi,  
4 and this court has made clear that a defendant must make a  
5 specific constitutional objection in order to preserve an  
6 Apprendi challenge.

7           Those two levels of preservation are independent  
8 of one another and equally sufficient for this court to  
9 find that the defendant did not preserve his claim.

10           In addition, the record evidence in this case  
11 would make any error harmless. Official documentation  
12 established every period of incarceration alleged in the  
13 statement, including the period of New Jersey detention  
14 that the defendant personally sought to contest, such as  
15 the certificate of conviction, admission and discharge  
16 forms, facility records, fingerprint cards, and a  
17 photograph of the defendant.

18           JUDGE GARCIA: Do you think, Counsel, that - - -  
19 I take all your points, but the fact that this defendant is  
20 arguing this was a personal right to me, the answer to that  
21 would be affected by whether or not it's a right to a jury  
22 trial on the issue.

23           MS. SCHMIDT: Could you say - - - I apologize for  
24 how many times I ask people to re - - -

25           JUDGE GARCIA: Assume just for purposes of this

1 argument agree to not directly raise - - - no  
2 constitutional issue directly raised on confrontation;  
3 however, what is raised here is I get to decide - - - me,  
4 the defendant, I get to decide, and in deciding that issue,  
5 which is here, is the fact that that defendant would have a  
6 right to a jury trial on that issue affect whether it's a  
7 personal right or not?

8 MS. SCHMIDT: I don't think so here because the  
9 defendant wasn't concerned with his Sixth Amendment right  
10 to a jury. So I don't think this issue is presented here.

11 His statement that the tolling is all wrong  
12 doesn't indicate that the tolling may or may not be right,  
13 but I'd like a jury to determine the issue.

14 JUDGE RIVERA: If - - - if we - - - if we agree  
15 with the defendant on what you called the second issue  
16 about the controverting, right, is the question on Erlinger  
17 rendered academic since it's going back anyway? He wants  
18 to now preserve his Erlinger claim he can do so?

19 MS. SCHMIDT: I'd have to think about that, Your  
20 Honor.

21 JUDGE RIVERA: Okay.

22 MS. SCHMIDT: If there are no further questions,  
23 we ask that you affirm.

24 CHIEF JUDGE WILSON: Thank you.

25 JUDGE RIVERA: Thank you.

1 MR. FEINBERG: May it please the court, Ira  
2 Feinberg, Deputy Solicitor General for the Attorney  
3 General.

4 The Attorney General has intervened in this case  
5 to defend the constitutionality of Criminal Procedural Law  
6 Section 400.15(7) (a), which requires the court, and not a  
7 jury, to decide the tolling issue that often arises when a  
8 defendant with a prior conviction is being sentenced as a  
9 predicate felony offender.

10 I realize there are two very substantial issues  
11 before you get to this issue, and that the court may not  
12 get to this issue at all, but I - - -

13 JUDGE RIVERA: How would that be the case if  
14 either we sent it back for a new trial, or if on the second  
15 issue, just on the resentencing, we take it back.

16 MR. FEINBERG: Your Honor, I was actually going  
17 to just answer your question now - - -

18 JUDGE RIVERA: Yes.

19 MR. FEINBERG: - - - and that is that the court  
20 would - - - if the court decides to remit this case for  
21 another hearing on resentencing, the court wouldn't have to  
22 decide the issue. It could certainly - - - because the  
23 issue is not preserved in this appeal, but the court could  
24 choose to provide guidance to the lower courts as to what  
25 the right procedure ought to be going forward.

1 JUDGE GARCIA: Is it preserved in any way - - -  
2 the question I asked your cocounsel, here, does it affect  
3 our decision on whether this is a personal right or not?

4 MR. FEINBERG: I'm not prepared - - - I hadn't  
5 prepared to deal with the personal right issue. That's not  
6 one of the issues that the Attorney General had intervened  
7 on.

8 JUDGE GARCIA: But you are arguing preservation,  
9 right?

10 MR. FEINBERG: I - - - we are arguing that it is  
11 not preserved in two different ways, yes.

12 JUDGE GARCIA: So is it preserved in a third way?  
13 Because a personal right - - - not personal right jury - -  
14 - right to a jury trial on the issue, not right - - - no  
15 jury trial.

16 MR. FEINBERG: If you're asking my view, I don't  
17 think that the fact potentially there's a jury trial at - -  
18 - at stake affects the question of whether it's a personal  
19 right or not.

20 CHIEF JUDGE WILSON: Would your - - - would your  
21 answer be different if we were talking about a personal  
22 statutory right or a personal constitutional right to  
23 controvert?

24 MR. FEINBERG: Again, I'm not fully on top of the  
25 personal right versus - - - versus counsel's right issue.

1 I wouldn't think the constitutional - - - constitutional  
2 over statutory would make the relevant difference there.  
3 It seems to me that the question is - - - is, is this  
4 something that counsel is entitled to be addressing.

5 And in this case, if I can get back to this case,  
6 counsel here did say he - - - he specifically waived any  
7 objection. If the court determines that that is - - - that  
8 counsel had the right to make that decision, then, clearly,  
9 the issue is not preserved for this court because it,  
10 frankly, would be the same situation as the court addressed  
11 in the Hernandez case earlier this year where no one had  
12 contested the tolling calculation.

13 And the second ground for holding it not  
14 preserved is that - - - neither counsel, nor the defendant  
15 personally, ever suggested that he was - - - thought he was  
16 entitled to a jury trial here.

17 And preservation is generally required for  
18 constitutional claims. The court reinforced that two years  
19 ago in the Cabrera case when it dealt with Bruen claims.  
20 And pre-Erlinger, this court has already specifically held  
21 in the Kelly case that it could not reach the - - - the  
22 same jury trial issue then made under Apprendi.

23 JUDGE HALLIGAN: Why no futility exception here?  
24 Why no futility exception here to the preservation  
25 argument?

1 MR. FEINBERG: Well, the court in Cabrera, as you  
2 well know, hasn't acknowledged that there is a futility  
3 exception, but assuming that - - -

4 JUDGE HALLIGAN: But if there were?

5 MR. FEINBERG: - - - the court decides to go that  
6 route, I would argue that objection wasn't futile here  
7 because the law was not that clear that an objection could  
8 not be - - - could not be properly - - - had been raised.

9 JUDGE HALLIGAN: And - - -

10 MR. FEINBERG: I know that the court - - -

11 JUDGE HALLIGAN: - - - is that - - - is that  
12 because of the cases in between Apprendi and Erlinger?

13 MR. FEINBERG: Well, it's because the court has  
14 dealt with - - - has not fully explored this issue and  
15 fully dealt with it. It has issued a series of short  
16 decisions which simply announce the claim as rejected. It  
17 hasn't explained its reasoning.

18 JUDGE HALLIGAN: I was - - - I was thinking about  
19 it, sorry, from the perspective of the U.S. Supreme Court,  
20 I guess.

21 MR. FEINBERG: I'm not understanding the  
22 question.

23 JUDGE HALLIGAN: So - - - so do you think that it  
24 would be - - - it would be futile because of this court's  
25 decisions and - - - and - - - sorry, not futile because of

1 this court's decisions, and - - - and how would the Supreme  
2 Court's evolving precedent from Apprendi to Erlinger affect  
3 that - - - that analysis, if at all?

4 MR. FEINBERG: Thank you. There are two separate  
5 points here, and - - - and - - - as you've identified.

6 First of all, this court's decisions have not  
7 been - - - have not fully explained the reasoning as to why  
8 there's no claim here. They've been very brief. They  
9 leave plenty of room for someone to raise questions about  
10 it and try to seek to - - - to develop the law further.

11 Secondly, the Supreme Court has every few years  
12 issued a new decision expanding the scope of Apprendi, and  
13 there's no reason why counsel, who could not have raised  
14 the similar claim, anticipating where - - - where Apprendi  
15 might go in terms of reaching an issue that could come up  
16 in sentencing. In fact, it - - -

17 JUDGE GARCIA: Expanding, but preserving  
18 Almendarez-Torres, right?

19 MR. FEINBERG: My point is that he could have - -  
20 - he could have - - -

21 JUDGE RIVERA: I'm not saying in that - - - in  
22 that - - -

23 MR. FEINBERG: It was not futile to raise - - -

24 JUDGE RIVERA: We're talking about the SCOTUS  
25 cases in between. The court has been cautious, at least

1           until now, to preserve the exception in Almendarez-Torres,  
2           right?

3                       MR. FEINBERG: Yes. It has. And Erlinger  
4           itself. Explicitly said - - -

5                       JUDGE RIVERA: But as I understand defendant,  
6           he's only relying on Erlinger. He's not - - - I may have  
7           misunderstood. He can correct me when he gets - - - I  
8           thought the point was about Erlinger, that Erlinger has  
9           changed the game, not about those prior cases.

10                      MR. FEINBERG: But I don't think Erlinger has  
11           changed the game that much.

12                      JUDGE RIVERA: No, just in response to just - - -  
13           Judge Halligan's question. I understood his argument to be  
14           much more limited. It was about Erlinger. Erlinger is the  
15           difference.

16                      MR. FEINBERG: But the question here is whether  
17           it would have been futile to have raised a claim even  
18           before Erlinger, whether it would have been futile to have  
19           raised a claim that he was - - -

20                      JUDGE CANNATARO: And - - -

21                      MR. FEINBERG: - - - entitled to a jury trial;  
22           you know what I'm saying? It would not have been futile.

23                      JUDGE CANNATARO: And on that question, your  
24           conclusion is that the - - - the Supreme Court  
25           jurisprudence is sufficiently in a state of flux that it

1 would not have been futile to - - - to make that argument.

2 MR. FEINBERG: Thank you, Your Honor. Yes,  
3 completely. And in fact, in the Shepard case, the court  
4 both in the opinion, the majority consent, debated the  
5 extent to which Erlinger - - - or excuse me, Apprendi  
6 issues might apply to issues that arise at sentencing. And  
7 clearly, defense counsel who was following all this case  
8 law, could have anticipated that a challenge along those  
9 lines would have been appropriate well before Erlinger came  
10 in.

11 CHIEF JUDGE WILSON: So were we to remit, do you  
12 see any reason why the defendant couldn't raise, at the new  
13 hearing, his Erlinger argument?

14 MR. FEINBERG: No. I do not see any reason why  
15 he couldn't raise it. I assume, frankly, if that's what  
16 you do, that's exactly what will happen. And for that - -  
17 -

18 JUDGE RIVERA: And - - - and if we did that,  
19 would it not be better not to comment on it since - - - if  
20 - - - if indeed, he raises this challenge depending on what  
21 happens, maybe he's in an appeal at the Appellate Division,  
22 and we'd have the benefit of the Appellate Division's view.

23 MR. FEINBERG: I think it would probably advis -  
24 - - be advisable, and I don't purport to tell the court how  
25 it should handle its calendar, but I think it probably

1 would be advisable to let the issue develop and continue to  
2 develop in the lower courts.

3 There have been relatively few - - - there have  
4 been a lot of trial court decisions on this issue. Most  
5 have come out saying that Erlinger does - - - does not  
6 require a jury trial here. Some have gone the other way  
7 and said a jury trial is appropriate.

8 To the best of my knowledge, only one of the four  
9 Appellate Divisions has ruled on the issue and has held  
10 that Erlinger does not apply, but there's still a lot of -  
11 - - a lot of development of the law that could happen. And  
12 it might put the court in a better position to decide the  
13 issue down the road. But I'm happy to address the issue,  
14 and the merits of the issue, if the court would like to  
15 hear me briefly.

16 The - - - you know, we - - - we think that the  
17 Erlinger does not apply here for several reasons. First of  
18 all, the court has already rejected an Apprendi argument  
19 pre-Erlinger that raised this precise issue.

20 In a series of cases 15 years ago, the court held  
21 that - - - that there was no right to a jury trial here,  
22 and there's really nothing in Erlinger that should cause  
23 the court to - - - to revisit those rulings or overrule  
24 them.

25 JUDGE HALLIGAN: Doesn't it kind of boil down to



1           what the court meant when it said that, you know, you can  
2           do no more consistent with the Sixth Amendment than  
3           determine what crime with what elements the defendant was  
4           convicted of, and whether that encompasses the  
5           determination here or not.

6                       MR. FEINBERG:   The court's opinion in Erlinger  
7           had a lot of very broad language in it, but the court also  
8           emphasized that its holding was narrow, and in fact, Chief  
9           Justice Roberts joined the opinion precisely in a very  
10          narrow interpretation of what the court was saying, and  
11          that is the - - - the issue that was particularly involved  
12          was the issue under the Armed Career Criminal Act whether  
13          defendant's prior crimes were all committed on separate  
14          occasions rather than as part of a continuing course of  
15          conduct.

16                      And the court - - - the court explained that that  
17          required a jury trial because it was a fact-laden task  
18          which required consideration of the proximity of the - - -  
19          of the prior crimes in time and place, and whether they  
20          were intertwined in purpose or - - - or in character.

21                      And the court pointed out this resulted - - -  
22          required a nuanced assessment of the facts here of the  
23          defendant's conduct in connection with those prior crimes,  
24          and that is why the court held that a jury trial was - - -  
25          wasn't required.

1           In fact, every single one of the Supreme Court's  
2 decisions in this Apprendi line of cases has focused on  
3 some aspect of the defendant's conduct in connection with  
4 his crimes, and in Apprendi it was whether the defendant  
5 was acting with racial bias.

6           And in Booker it was whether the defendant  
7 possessed additional quantities of narcotics beyond what he  
8 had been charged with. In Blakely it was whether the  
9 defendant acted with deliberate cruelty. In Alleyne it was  
10 whether the defendant brandished a firearm.

11           In contrast, the tolling inquiry here does not  
12 involve any - - - any assessment of the defendant's conduct  
13 at all. It involves a simple calculation of the amount of  
14 time the defendant was in custody, but it's easily made on  
15 reliable state records which the court can often take  
16 judicial notice of.

17           It's a question of historical fact where there is  
18 an objective, correct answer. It is not a question of the  
19 judgment of the jury. It makes no sense to impanel a jury  
20 to make this calculation, and nothing in Erlinger requires  
21 it.

22           The Supreme Court has flat out never addressed an  
23 issue of this kind, and it's never held that a jury trial  
24 is required on an issue of this kind.

25           I know the court has said - - -

1 JUDGE RIVERA: But at the trial doesn't a jury  
2 also consider what, if any, weight, or credibility, to give  
3 to documents presented to it, even if a witness  
4 authenticates it? Even if a witness says there's something  
5 specific in the writing that the jury should take into  
6 consideration?

7 MR. FEINBERG: Yes, of course, but no jury has  
8 been deciding issues of this kind in terms of - - - of a  
9 simple mathematical calculation.

10 I know that the Supreme Court has said that - - -

11 JUDGE RIVERA: But the simplicity of the  
12 mathematical calculation, I don't disagree with you about  
13 that. But the question is whether or not the numbers are  
14 correct, right? You have to start out with whether or not  
15 the documents are, for whatever reason, inaccurate.

16 MR. FEINBERG: There's always room for that sort  
17 of a challenge, but the question is do you need a jury  
18 trial for that sort of challenge, or is it appropriate to  
19 allow the sentencing court to make that determination, and  
20 we submit that it is entirely appropriate to let the  
21 sentencing court do it, as - - - as the state law requires.

22 You know, the Supreme Court in ICE versus - - -  
23 excuse me - - - in Oregon v. ICE, rejected, which involved  
24 whether the court - - - whether a jury trial - - - whether  
25 a jury trial was required on issues that related to whether

1 the defendant could get a consecutive sentence versus a - -  
2 - a - - - a concurrent sentence.

3 And the court held that it was not going to  
4 extend Apprendi to that - - - that type of determination,  
5 and they did so in part because what they looked at was the  
6 longstanding common law practice whether there's any  
7 tradition of - - - of juries making this kind of a  
8 decision, and found that there wasn't, and they said the  
9 core concern of Apprendi is whether there should be a jury  
10 trial for facts that relate to the specific offense. And  
11 looking at the time that somebody served in the past is not  
12 - - - not brought in there.

13 CHIEF JUDGE WILSON: Thank you, Counsel. Your  
14 time is up. If you want to conclude, go ahead.

15 MR. FEINBERG: I'd just like to say we have a  
16 second theory in our case as to why a jury trial is not  
17 required, and that is because this is a fact in mitigation  
18 of sentence. The Supreme Court has made clear that - - -  
19 that the Apprendi rule does not apply to facts that will  
20 mitigate a defendant's sentence.

21 The - - - the - - - the statute here, the - - -  
22 the tolling inquiry, is part of a statutory scheme which is  
23 specifically intended to mitigate the sentences of  
24 defendants who have a prior conviction, but who have led a  
25 clean life for ten years before - - - before they get

1 charged with - - - with another crime.

2 The tolling rule is simply an aspect of that ten-  
3 year limitation, and the - - - the - - - the - - - I don't  
4 think there's any question that the statute here said that  
5 defendant is subject to an enhanced sentence. He's  
6 committed a prior violent felony, but that the defendant  
7 can avoid that penalty if he can show he lived for ten  
8 years on the outside before committing another offense.

9 I don't think there's any question that would be  
10 considered a mitigating aspect of the law, and no jury  
11 trial would be required.

12 But that is effectively the statute that we have  
13 here because subsection (1)(a) of Penal Law 70.04 sets out  
14 the baseline that a defendant is a second violent felony  
15 offender if he's previously convicted of a violent felony,  
16 and subsection (1)(b) then sets out the exception, and  
17 therefore, the court can't include convictions more than  
18 ten years old taking into account the tolling rule.

19 And so I know that my time is up, but the Supreme  
20 Court in ICE - - - Oregon v. ICE, again, said that - - -  
21 made the point that there be no constitutional objection if  
22 the State made consecutive sentences the baseline, and  
23 allowed the judge to make the factual findings to reduce  
24 it, and said - - - and that it made scant sense to hold  
25 that a jury trial was required simply because the State did

1 it the other way around.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. FEINBERG: Other than that, we'll rest on the  
4 brief.

5 MR. BOVA: The core concern of Apprendi is not  
6 defendant's conduct. It's the bright-line rule whether a  
7 factual finding is necessary to enhance the minimum or  
8 maximum range.

9 But I do agree, however, that if the court agrees  
10 as to the - - - as to point 2 of our brief regarding who  
11 gets to make the call as to the predicate allegations, this  
12 court can order a hearing under 400.15, and that hearing  
13 can be proceeded by jury right litigation. However - - -

14 JUDGE SINGAS: Can we just go back again to the  
15 right of the defendant versus counsel?

16 My concern is - - - I mean, I think every is very  
17 unsettled by what happened in court. You know, the judge  
18 just not engaging at all to figure out what the issue was,  
19 notwithstanding, you're asking for a rule that this right  
20 is a defendant's right, and my concern is that the  
21 legislature - - - when the legislature wanted something to  
22 be a defendant's right, they were very clear about that,  
23 the model colloquy and allocution notwithstanding.

24 So that's what - - - where I'm getting stuck here  
25 because they're not clear in this case, and they have been

1 clear other times, and they don't write the model colloquy.

2 MR. BOVA: So the legislature has said that in  
3 the jury right context as far as it's a pers - - - the  
4 defendant must do it in writing. It said that in - - - in  
5 some - - - in the context of removal of a juror.

6 JUDGE SINGAS: Yeah.

7 MR. BOVA: But that's just relying on an  
8 inference by omission. I think that's - - -

9 JUDGE SINGAS: No, no. They were very explicit.  
10 My concern here is that now someone might say, okay, every  
11 time the word defendant is in the penal law, that means not  
12 defense attorney, but actually defendant because we've now  
13 adopted your definition.

14 MR. BOVA: No. I don't think so because the  
15 unique thing about this statute is it sets up an  
16 arraignment protocol. The legislature knows that we don't  
17 arraign lawyers on allegations or legal theories.

18 JUDGE HALLIGAN: So you'd use the context of this  
19 particular requirement to cabin your reading to - - -

20 MR. BOVA: Absolutely, and I think it's the same  
21 thing as the special information statute, which does not  
22 say specifically that it's defendant personally. But the  
23 State's theory here is that in that context too, an  
24 attorney could admit an element of the offense when it's a  
25 prior conviction because that's what at issue in special

1 information context.

2 That is a troubling theory that undermines a  
3 defendant's autonomy and also shows that the legislature  
4 doesn't always specifically say that it belongs to a  
5 defendant personally.

6 But I think it's not just, though, the arrai - -  
7 - - the arraignment protocol that makes it unique. It's  
8 that this is a decision that binds the defendant not just  
9 in this case, but in all cases in the future.

10 So the stakes under subdivision 8 where it's a  
11 double waiver, it's not just waiver in this case, it's a  
12 waiver for the rest of someone's life. And what we're  
13 talking about here, and I think it's related to the  
14 Apprendi point too, we're not talking here about a strategy  
15 of how to challenge evidence, about who to cross-examine,  
16 which jurors to strike.

17 We're talking about an admission that elevates  
18 the sentencing range automatically, and in this case it  
19 doubles the minimum. But in other cases, and the State  
20 doesn't try to distinguish its argument, it says its  
21 argument applies to all sentence enhancements.

22 Other situations you can have a D violent felony  
23 where the range will go up from 7 flat to 25 to life. That  
24 should - - -

25 JUDGE SINGAS: That happens in a lesser-included

1 offense, and we've said that that's a decision that an  
2 attorney can make, and that has a significant impact on  
3 what someone could be convicted of or what sentence they  
4 could face, right?

5 MR. BOVA: Well, so in Colville, that's a statute  
6 that specifically said, and this court specifically relied  
7 upon the fact that that statute preserved the lesser-  
8 included right to the People also. So therefore - - - and  
9 that was a central driving force in this court's decision  
10 in Colville that it made no sense to say that it's the  
11 defendant's personal right if the statute also gives - - -  
12 gives the right to the attorney - - - to the People.  
13 Excuse me.

14 But I think, more fundamentally, the lesser-  
15 included issue is not a concession of guilt. It's simply  
16 just giving a lesser-included option to the jury, and at  
17 least the lesser-included theory can work significant  
18 benefits to a defendant. If an attorney says, I'm going to  
19 request a lesser-included, that could spare him time; if he  
20 chooses to go all in, that could also be a benefit to the  
21 defendant.

22 Here, there is no benefit at all. It's just  
23 locking in; it's locking in a waiver that elevates the  
24 range. It's not as if, oh, this gives him the chance to  
25 have a lower sentence as in the lesser-included context.

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It's all downside for the defendant, no upside.  
It increases the range. That is a decision that belongs to  
the defendant personally both under the statute and under  
the Sixth Amendment, the State constitutional right to  
counsel, as well - - - and also the State and federal due  
process clauses. Thank you.

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, Cecelia Black, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Wright (Jason), No. 70 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Cecelia Black*

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