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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 24

BILLUPS (RICKY),

Appellant.

20 Eagle Street
Albany, New York
February 12, 2026

Before:

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

Appearances:

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Official Court Transcriber

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

3 MR. WU: Good afternoon, Your Honors. Victorien
4 Wu, Office of the Appellate Defender for Ricky Billups. If
5 I may reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MR. WU: Respondent in this case claims that
8 consecutive sentencing is proper whenever a firearm is
9 possessed before or after it is used, regardless of the
10 defendant's intent. This court should reject that rule for
11 three reasons. First, it is contrary to the test
12 established by this court in People v. Thomas Brown, which
13 has proven to be workable in sixty of the sixty-two
14 counties in this state.

15 JUDGE GARCIA: But Counsel, what would your test
16 be?

17 MR. WU: So my test is the test that this court
18 articulated in Brown.

19 JUDGE GARCIA: Well, I think Brown is sort of a
20 buffet, right? You can take what you want depending on
21 your appetite. But what would your test be, that you take
22 from Brown?

23 MR. WU: So the test would be the sentence that
24 this court in Brown said was the test, which is that if you
25 had formed the intent to commit another crime with a

1 firearm and then possessed the firearm, then those two acts
2 are not separate and distinct and - - -

3 JUDGE GARCIA: And how is that different than our
4 test in Wright?

5 MR. WU: So it is slightly different from the
6 test in Wright because you're looking at - - - in Wright,
7 you're looking at the change in intent. But here you're
8 looking at the relationship between the substantive crime
9 and the acquisition of the firearm.

10 JUDGE GARCIA: So could you give me an example of
11 when something would be permissible under your test for
12 simple possession, but not - - - would not pass the Wright
13 test if we were to apply the test from Wright to the same
14 facts.

15 MR. WU: So I think maybe this case - - - this
16 court's decision in Harris might be an example where the
17 consecutive sentencing was proper under the test of Brown.
18 So the facts in Harris was the complainant approached a
19 particular location. There, the defendant was nearby, and
20 twenty minutes later the defendant approached the
21 complainant and shot him. So Harris was convicted of
22 simple possession and attempted assault. And so
23 consecutive sentencing was proper in that case because this
24 court basically concluded that there was a knowing
25 possession before the intent to use the firearm occurred.

1 JUDGE GARCIA: But I don't - - - I - - - the
2 facts as recounted in Brown that you're referring to on
3 Harris don't really say that. In Harris' case, the victim
4 fortuitously encountered Harris, whom he observed talking
5 with a group of people for about twenty minutes before
6 Harris approached and shot Lewis as he sat in his car.
7 This is not a case where someone handed Lewis the gun just
8 before he - - - Harris the gun just before he shot Lewis.
9 That is where the act of possession was simultaneous with
10 the shooting.

11 Rather, there was evidence that Harris possessed
12 the gun for at least twenty minutes before he shot Lewis.
13 There's no mention of intent there. So the only thing you
14 have is they come upon each other, and twenty minutes
15 later, he shoots him. You don't know when he gets the gun,
16 all you know is that he has it for the twenty minutes
17 before.

18 MR. WU: So I would agree that the court there
19 did not specifically mention intent, but because the court
20 previously articulated what it called a test, two
21 paragraphs beforehand, I think that you should read that
22 application to the case of Harris as an application of that
23 test, which looks to intent.

24 JUDGE GARCIA: But the Harris facts, as recounted
25 earlier in the opinion in Brown, are basically just that.

1 And those if you look at the Appellate Division, it's even
2 clearer. So he gets the gun. He has the gun for twenty
3 minutes. He walks up, he shoots him. They fortuitously
4 meet, right? So there's no evidence he had the gun for
5 anything more than the twenty minutes that they see each
6 other, and then he shoots them.

7 So it seems to me that test goes more to a
8 different sentences you could pull also out of Brown, which
9 I'm sure we'll hear about, which are the completed act of
10 possession, because to look -- - focus on intent seems to
11 me to be bleeding into the Wright test where you have
12 possession with intent. So you're looking at the crossing
13 of the intents.

14 MR. WU: Sure. So then this leads me to the
15 reasons why I think Respondent's proposed rule is actually
16 unsound, because - - -

17 JUDGE GARCIA: I'm sorry. It's actually what?

18 MR. WU: Is unsound.

19 JUDGE GARCIA: Okay.

20 MR. WU: And that is by effectively allowing
21 concurrent sentencing to happen only when the use and the
22 possession occur simultaneously, Respondent's rule
23 basically reads out the second prong of Penal Law 70.252,
24 right. The concurrent sentencing is okay only a single act
25 gives rise to two offenses. But the Penal Law also

1 recognizes that if there's an overlapping element,
2 concurrent sentencing is required, and Laureano further
3 holds that there needs - - -

4 JUDGE GARCIA: But I think this separate acts
5 gets you out of that, right? That's the whole point of
6 separate acts. So what we're trying to figure out is how
7 to get out of that. Assume that's true, but you still have
8 - - - need separate acts to get out of that. So you can
9 have that overlapping element. But if you have separate
10 acts, you can have consecutive sentencing. And I think the
11 question we're grappling with, I think, here is are these
12 separate acts.

13 MR. WU: Right. And I think Brown supplies that
14 test. But the other reason why I think Respondent's
15 proposed rule is unsound is that it would it means that
16 Sturkey was wrongly decided by this court. In Sturkey the
17 defendant robbed a gun from a police officer, so he was
18 convicted of robbery and simple possession. And in
19 upholding the consecutive sentence, the first - - -

20 JUDGE HALLIGAN: That's simultaneous virtually,
21 isn't it, in Sturkey?

22 MR. WU: No, Your Honor, because I think the
23 decision - - -

24 JUDGE HALLIGAN: I read it that way.

25 MR. WU: - - - indicated that the defendant held

1 on to the firearm for about two to four seconds after the
2 seizure was conducted.

3 JUDGE HALLIGAN: Okay. Two to four seconds. Let
4 me amend that to say virtually simultaneous. But that's
5 different than a circumstance where, you know, you have it
6 for some long period of time and then you don't form the
7 intent until later, right?

8 MR. WU: Yes.

9 JUDGE HALLIGAN: And that would go - - - that
10 would go completely to the side under your reading, I
11 think. I'm just finding it hard to understand why that's a
12 sensible result.

13 MR. WU: Meaning the test that I think Brown
14 articulates, looking to the intent.

15 JUDGE HALLIGAN: Let's assume that, you know, one
16 concludes that that Brown does not absolutely dictate the
17 result that you are advocating for. Why is it a sensible
18 result?

19 MR. WU: It's sensible because I think this court
20 has recognized a couple of things. One is that possession
21 is, by its nature, a continuing act. So this court
22 emphasized that - - - in Brown itself, it says in order to
23 use the gun, you must possess it beforehand.

24 JUDGE HALLIGAN: But doesn't your reading mean
25 that you could - - - correct me if I'm wrong, but I think

1 you could possess the gun for a very long period of time,
2 and then if you - - - sub - - - months, whatever, if you
3 subsequently then form an intent to use it, those sentences
4 can't run consecutively; is that right?

5 MR. WU: No. So it's the opposite. If you
6 possess the firearm before you form the intent to commit
7 another crime, then that's a simple possession that's - - -

8 JUDGE HALLIGAN: Yes. I'm sorry, the other way
9 around. Yes. But why is that a sensible outcome?

10 MR. WU: Because if you're looking at the amount
11 of time that has elapsed between possession and use, then
12 there is a significant line drawing problem. I watched - -
13 - at what point in time does the possession become
14 separate, right? So if the line is five seconds, in order
15 to maintain Sturkey as this court's precedent, then a
16 person who possesses a weapon, let's say, for four or five
17 seconds.

18 JUDGE SINGAS: Yeah, but it does it make sense if
19 you possess - - - let's say someone makes a decision that
20 I'm going to kill X person, and I obtain a gun to do that,
21 but for four years they have that gun and they don't kill
22 that person. And then on the fifth year they do. That's
23 the same? We can't treat the possession, the four years of
24 possession before as consecutive to what happened in the
25 fifth year? I mean, it seems like at some point it gets

1 nonsensical.

2 MR. WU: No, Your Honor, because I think under
3 the test that this court articulated in Brown, I think
4 concurrent sentencing would be required. And it's also
5 important to note that whether a sentence runs concurrently
6 or consecutively is only one of the sentencing
7 determinations made by the judge. And so the length of the
8 time that the defendant possesses the weapon, the means by
9 which they acquired it, are certainly aggravating facts
10 that may form - - -

11 JUDGE RIVERA: What if it's not - - - what if the
12 target is not clear? What if the defendant gets a gun for
13 self-defense in their house? Someone - - - people have
14 broken in. They now have it. And they say anybody who
15 walks in that door after 10 p.m., I intend to use this gun
16 to shoot them, and someone walks in the door after 10 p.m.
17 and they shoot them? It's not who they planned on shooting
18 other than anyone who walks through that door, I am going
19 to shoot them.

20 MR. WU: So I think if in that hypothetical, the
21 defendant does have the culpable mens rea at the time
22 before they sort of possessed the firearm, then under
23 Brown, yes, concurrent sentencing would be required because
24 they - - - because - - -

25 JUDGE RIVERA: Even though they don't have a

1 particular individual in mind, it's just whoever makes it
2 through that door?

3 MR. WU: Yes because at that point in time there
4 is a culpable mens rea.

5 JUDGE RIVERA: And even if that's - - - let's say
6 no one goes through that door for three months?

7 MR. WU: Yes, Your Honor. I think that under
8 Brown, again, concurrent sentencing would be required. But
9 those kinds of facts are aggravating facts that can inform
10 the sentencing judge's discretion.

11 JUDGE GARCIA: So that would be the same
12 hypothetical. If you get an illegal gun and you say, I'm
13 going to use it to rob people. So every time you rob
14 someone, it's concurrent, because that's what the intent
15 was when I got this gun?

16 MR. WU: Yes. But then if there were multiple
17 robberies, then all those could run consecutively, right?
18 So again, I think the - - - there are - - - the legislature
19 has - - -

20 JUDGE GARCIA: There's no simple possession even
21 if you buy that gun in for a year and you're just waiting
22 for, you know, somebody walking in the right place or wrong
23 place and you rob them, then you can only get concurrent
24 sentences even though you had the gun for a year, because
25 I'm just going to rob somebody when I can?

1 MR. WU: Yes. I think if you form the culpable
2 mens rea of the substantive crime, then yes. Under Brown
3 the sentence would be concurrent. But again, I think the
4 judge can weigh those aggravating factors in determining
5 what the sentence should be.

6 JUDGE GARCIA: The flip side of that argument is
7 the consecutive sentencing statute is permissive. So the
8 judge has discretion to also run the sentences
9 concurrently. What this does is removes that discretion,
10 right? That's what you're asking? And also the Appellate
11 Division has interests of justice authority to run the
12 sentence concurrently, which I think they did with the
13 codefendant here.

14 MR. WU: That's correct. And I think there are
15 multiple reasons. One is, of course, I do believe Brown
16 articulates the test that is applicable. Three of the four
17 Appellate Division departments have applied with ease.
18 There's no sign that it has proven unworkable in those
19 departments.

20 JUDGE HALLIGAN: I'm not sure I see - - - to go
21 back to your comment about line drawing, I'm not sure I see
22 why that should drive the rule here. I mean, maybe there
23 will be a couple of cases where it's two to four seconds.
24 I see your light's on, but - - - but that may well be the
25 exception rather than the rule. And I'm not sure why we

1 couldn't trust courts to distinguish between something that
2 is virtually simultaneous to four seconds, whatever it is,
3 and something where there is a more significant lapse of
4 time. Why is that so problematic?

5 MR. WU: So I think ultimately, if the test is
6 the passage of time between possession and use, there will
7 be those cases that are close to that line. And there's
8 just no reason to think that the legislature - - -

9 JUDGE HALLIGAN: But courts draw lines all the
10 time, right?

11 MR. WU: Sure. But there's no reason to think
12 that the legislature wanted the availability of consecutive
13 sentencing to turn on milliseconds.

14 CHIEF JUDGE WILSON: Let me go back and just ask
15 a variation of Judge Garcia's question for a minute. His
16 question about robbing people generally was your intent
17 when you got the gun. Suppose I get a gun with the intent
18 of robbing my next door neighbor, and then I instead rob my
19 across the street neighbor. How does that work?

20 MR. WU: I think that might be a slightly - - - I
21 mean, I think that the - - - and that was an intentional in
22 your hypothetical - - - change - - -

23 CHIEF JUDGE WILSON: Yeah. Yeah, yeah, yeah,
24 yeah, yeah.

25 MR. WU: I think that's a difficult question,

1 Your Honor.

2 CHIEF JUDGE WILSON: That's why I asked it.

3 MR. WU: I think that in that case, under the
4 very language of Brown, I think the culpable intent, the
5 intent to commit a robbery would have formed before the
6 possession of the firearm and therefore concurrent
7 sentencing would be required. But I think that, again,
8 it's aggravating for someone to intend to rob person A and
9 to rob person B, and that those aggravating facts should
10 inform a sentencing judge's discretion, which is - - -

11 JUDGE RIVERA: So does your - - - your answer
12 changes. If I'm going to rob the neighbor and I go and I
13 shoot someone who I believe is the neighbor, but it's
14 someone else in the neighbor's house, does that change your
15 rule in any the - - - the application of your rule?

16 MR. WU: So there's a shooting involved in - - -
17 in the incident itself? Well, if there's no - - -

18 JUDGE RIVERA: Yes, he shot someone. Let's use
19 that.

20 MR. WU: Yeah. So there's no - - - there was no
21 intent to assault someone then I think that then there is a
22 separate - - -

23 JUDGE RIVERA: No, no, no. I go next door. When
24 my neighbor walks in, I dislike them enough that I'm
25 actually going to shoot them. But someone else, a

1 different neighbor, walks in, right? It's not the person
2 whose house I'm in.

3 MR. WU: Sure. Yeah. Then this is much more
4 closer to the facts of this case. I think - - -

5 JUDGE RIVERA: Yes, that's the point. So how
6 does the rule change?

7 MR. WU: So the concurrent sentencing would be
8 required because you had formed the culpable mens rea
9 before you received it.

10 JUDGE RIVERA: But not to shoot the person I
11 actually shot in this hypothetical, right?

12 MR. WU: Right. But I think that under - - -
13 because the doctrine of transferred intent makes it clear
14 that the identity of the target ultimately doesn't really
15 matter, right? We want to punish people regardless of
16 whether they make a mistake or something like that. Here,
17 I don't think under Brown's rule, concurrent sentencing
18 would be required, but those aggravating facts should
19 inform - - - may well support the imposition of the maximum
20 sentence.

21 JUDGE CANNATARO: Is that the same kind of intent
22 as mistake intent? You know, it's one thing to say you
23 went there intending to shoot a particular individual, but
24 then you, by some combination of events, shot someone else.
25 But in that hypothetical, you go there intending to shoot

1 someone. Someone else walks in and the mental process is,
2 oh, that's not who I originally intended to shoot, but I
3 want to shoot this person also, so boom. That's kind of a
4 new intent, isn't it?

5 MR. WU: Yeah. I think on those facts and I
6 think the intent changes, and so I think consecutive
7 sentencing would be proper. If it's a new intent that
8 emerges before the previous intent basically, yes.

9 CHIEF JUDGE WILSON: And I don't understand the
10 answer to my question before about the across the street
11 neighbor, because shouldn't the answer be the same then,
12 consecutive is allowed?

13 MR. WU: I think if there's a change in intent,
14 as in Judge Cannataro's hypothetical, then there is a
15 difference. But if the intent remains the same - - -

16 CHIEF JUDGE WILSON: Okay. So let me ask you, in
17 the example that I gave you, I intend to shoot my next door
18 neighbor. That's my intent. And I possess the gun. I
19 acquire the gun with that intent.

20 MR. WU: Yes.

21 CHIEF JUDGE WILSON: Right? A little time goes
22 by, or maybe a lot of time goes by, and I decide, you know
23 what, I'm actually going to go shoot the across the street
24 neighbor?

25 MR. WU: Oh, I see what you mean, then - - - then

1 I mean again, I think then I would answer that consecutive
2 sentence would be authorized in that circumstance.

3 CHIEF JUDGE WILSON: Okay. Thank you.

4 MR. WU: Thank you.

5 MR. KRESS: Good afternoon. May it please the
6 court. Stephen Kress, on behalf of the People. The trial
7 court in this case lawfully imposed consecutive sentences
8 because the defendants knowing and unlawful possession of a
9 loaded firearm was a separate and distinct act from his use
10 of the firearm.

11 JUDGE SINGAS: How do we get around the language
12 in Brown?

13 MR. KRESS: So I actually - - - I would echo what
14 Judge Garcia said before. I hadn't thought of it as being
15 a buffet, but I think that's an interesting way to put it.
16 I think there is language in the opinion that would support
17 the rule that we advocated for. And actually, part - - -
18 this is part of the context that I think the court should
19 consider in reading Brown. None of the defendants in that
20 case asked for the rule - - - the rule that the defendant
21 is claiming was announced there.

22 All of the defendants, in fact, agreed that
23 consecutive sentencing would be permissible as long as you
24 have possession outside of use. They actually all agreed
25 on that. And so - - -

1 JUDGE SINGAS: The court didn't.

2 MR. KRESS: Well, I think there's language to
3 suggest otherwise, Judge Singas. I think if you look
4 immediately before and immediately after the so long as
5 sentence. So I'll start with after actually. The court
6 says, "These cases easily pass this test. All of these
7 defendants clearly possess the guns they used to commit
8 their crimes well before firing them". So it was the fact
9 that they possessed it before using them, not performing
10 the intent.

11 And I think the discussion of, of Harris is
12 useful in this case, because there's no discussion
13 whatsoever about when Harris formed the intent to commit
14 that crime. It's simply he possessed the gun before he
15 used it. And that was what authorized consecutive
16 sentencing.

17 And I actually think the fact that the court
18 refers only to the firing of gun and not intent actually
19 reinforces what I think the court meant by intent in this
20 long as sentence, because the very start of that paragraph,
21 it talks about how mens rea can be formed at the very
22 moment of the crime. That's when you actually - - - that's
23 when it actually matters. Because when you have the intent
24 coupled with the actus reus, that's the commission of the
25 crime.

1 So I think the so long as sentence can be more
2 reasonably understood as saying that as long as you have
3 possession before the commission of the crime, when you
4 have intent coupled with actus reus consecutive sentences.

5 JUDGE GARCIA: Counsel, let me ask you a
6 hypothetical then. Video of a convenience store focusing
7 just solely on the counter. The only evidence in the case
8 is the defendant at that counter in that frame shoots the
9 person behind the counter, leaves the frame. That's it.
10 It's clear it's the defendant. It's clear he did it. The
11 only issue is sentencing. With that evidence, could you
12 impose consecutive sentences for simple possession and
13 murder, let's say?

14 MR. KRESS: I don't think you could, and
15 actually, there are a number of cases from the Appellate
16 Divisions, including the First Department, I should say the
17 departments, but including the First Department, where,
18 yes, as a factual matter, you can understand that the
19 defendant, you know, didn't just generate a gun out of thin
20 air. He must have gotten it either, you know, some time
21 before that. But if there's no evidence whatsoever of when
22 he actually came into possession of it other than during
23 the use crime, I think what courts have said is no, you
24 cannot impose consecutive sentences.

25 JUDGE GARCIA: And that would really be a burden

1 issue, I guess, right? People have the burden?

2 MR. KRESS: Exactly. Yeah.

3 JUDGE SINGAS: Yeah. But if that videotape
4 started a few seconds before and you see him walking in
5 with the gun in his waistband, does that change your
6 answer?

7 MR. KRESS: I mean, I think I would use the
8 phrase that Brown actually used, which is, was possession
9 subsumed within use in a particular case. And so if you
10 have, you know, literally two seconds or three seconds or
11 something like that just before the crime, I think you can
12 make a good argument that it really - - - possession really
13 is subsumed within use in those circumstances. And it
14 truly wouldn't be the - - - possession crime wouldn't
15 really be separate in in that circumstance. I would say
16 two things though. One, this case doesn't come close to
17 that. We have a much more significant - - -

18 JUDGE RIVERA: I don't understand that because
19 the gun didn't magically get in your hand. I mean, you
20 must have had it at some point before the actual use. It's
21 just two or three seconds. That's the line?

22 MR. KRESS: No I'm not - - - I don't think you
23 can draw a particular temporal line, and I also don't think
24 that time is the only relevant factor to consider. You
25 know, possessing a gun for 30 seconds or a minute in a

1 crowded subway station at rush hour, I think, poses a very
2 significant difference of harm than having it for a minute
3 before you use it and let's say it's, you know, at midnight
4 in a remote, deserted place.

5 JUDGE RIVERA: Well, I think the point is you
6 either possessed it or you didn't.

7 MR. KRESS: No, certainly. I mean, I think you
8 can have a completed act of possession. That can be
9 enough, I think. What I was responding to is, I guess,
10 this idea of - - - of our rule is unworkable because it you
11 know, raises line drawing questions. But I think if you
12 think of the rule in terms of was possession really
13 subsumed with the use, is there a difference in the harms
14 that were caused here? Come back to what's the purpose of
15 consecutive sentences?

16 JUDGE RIVERA: Isn't the Brown rule the only
17 point of possession is to use it in a particular way that's
18 criminal?

19 MR. KRESS: I'm not sure I understand.

20 JUDGE RIVERA: Well, otherwise, you're not going
21 to carry that gun at that moment. But for the fact that
22 you want to shoot someone, you want to - - - you're going
23 to do a robbery, you're going to commit a robbery, whatever
24 it is that - - - why isn't that the Brown rule is?

25 MR. KRESS: Well, so I think what this court said

1 in People v. Day - - -

2 JUDGE RIVERA: The intent of the crime takes into
3 account that you've chosen a particular way to complete
4 that crime, which is, in this case, a gun, use of a gun.

5 MR. KRESS: I think it's just - - - that has
6 never been a basis for imposing - - - I guess we've never
7 measured, taken intent apart from the possession with
8 intent to use unlawfully scenario, which I think is just a
9 different animal than what we have here with simple
10 possession. Intent has otherwise not mattered except for
11 intent being present at the time that the actus reus of the
12 subsequent crime is actually occurring.

13 JUDGE RIVERA: Well, I just tell me why your rule
14 does - - - doesn't devolve to every crime in which a gun is
15 used also gets you a CPW.

16 MR. KRESS: I think for - - -

17 JUDGE RIVERA: Outside of your home, of course.

18 MR. KRESS: So I think for the reasons that I was
19 talking about with Judge Garcia is that there are a number
20 of cases, I - - - I can cite at least twelve over the last
21 roughly ten years, when courts have found there simply
22 wasn't enough evidence to show that the defendant possessed
23 the gun before or after - - -

24 JUDGE RIVERA: Oh, like someone else brought the
25 gun, and it was just fortuitous or convenient to use their

1 gun instead; is that what you mean?

2 MR. KRESS: It could have been that someone
3 handed it to them right before, or it was stashed
4 somewhere. They gave it to him before.

5 JUDGE RIVERA: Yeah, that's what I'm saying.

6 MR. KRESS: Right. If - - - if you don't - - -

7 JUDGE HALLIGAN: Sturkey might be an example,
8 yes?

9 MR. KRESS: Well, and so Sturkey is another
10 example where - - - where, yes, you have simultaneous - - -

11 JUDGE HALLIGAN: But even if you've identified
12 whatever it is, a dozen and you could put Sturkey in there,
13 it seems like that will be the atypical case, right?

14 MR. KRESS: Well, I think, as this court said in
15 Brown, in most cases a consecutive sentence would be
16 available. Not all, but most and I think this is important
17 too. I know we - - - I think Judge Garcia touched on it
18 before. Sentencing judges have discretion to impose
19 consecutive sentences, and prosecutors have discretion too
20 in asking and seeking for consecutive sentences.

21 So just because a consecutive sentence is
22 available doesn't mean that People will ask for it. It
23 doesn't mean that the court - - - the sentencing court will
24 impose one. And then, of course, the Appellate Division
25 has the power to reduce a sentence.

1 JUDGE SINGAS: Can we go back to my example?

2 MR. KRESS: Sure.

3 JUDGE SINGAS: So in that case, do you think
4 there is consecutive sentencing or no?

5 MR. KRESS: I'm sorry. This is the two or three
6 seconds?

7 JUDGE SINGAS: Yeah, two or three seconds before
8 he walks in.

9 MR. KRESS: I think that would probably be a case
10 where you would have concurrent sentences. I think it's -
11 - -

12 JUDGE SINGAS: Yeah, but don't you think that's
13 the case in most crimes because most evidence - - - you
14 usually don't have evidence about where defendants get
15 guns. And a shop owner will say, I was minding my own
16 business. Suddenly the door opened. Somebody walked in.
17 I saw a gun in his waistband. He pulled it out and said,
18 give me your money, or a burglary and I'm in my home.
19 Suddenly someone breaks in, pulls out a gun, and there's
20 nothing before that.

21 MR. KRESS: It does happen. I don't know that I
22 would say it's - - - it's the typical case, though. I
23 mean, certainly - - -

24 JUDGE SINGAS: Really?

25 JUDGE CANNATARO: You usually know where the gun

1 came - - - sorry. You usually know where the gun came from
2 before the crime was committed?

3 MR. KRESS: Not necessarily where it came from,
4 but just that there's been - - - that the defendant had it
5 for some period of time - - -

6 JUDGE CANNATARO: You know that?

7 MR. KRESS: - - - before that. It happens. It
8 happens. It happens.

9 CHIEF JUDGE WILSON: But then we're sort of
10 disparately, at least potentially disparately, punishing
11 people based on the fortuity of knowing that, right? I
12 mean, to Judge Singas' point, the guy walking in with a
13 waistband clearly had it for a week, a month, something
14 like that, right? It didn't materialize. And if we draw
15 the line at two seconds or four seconds or a day, it really
16 isn't a function of what - - - when - - - what we know
17 about when the person got the gun. It's, you know, what
18 evidence we're able to collect.

19 MR. KRESS: Right. It really - - - right. It
20 comes back to evidentiary sufficiency.

21 CHIEF JUDGE WILSON: Yeah, but in a situation
22 where we know in the real world these people had guns that
23 are outside of the threshold time, whatever it is that you
24 would realistically apply?

25 MR. KRESS: I mean, I suppose the court could

1 adopt - - - could adopt a rule that just - - - just saying
2 that as long as there is any evidence of possession before
3 or - - - and I should say or after as well - - -

4 CHIEF JUDGE WILSON: Okay.

5 MR. KRESS: - - - that - - - that would be
6 enough, and you leave it to the sentencing court's
7 discretion in, like, in the scenario, for example, if you
8 wanted to say consecutive sentences are lawful in a case
9 where it's possessed two or three seconds before,
10 sentencing judge could say, well, I don't think that's
11 enough. I'll impose concurrent sentences and - - - and
12 decline to exercise its discretion. The court could
13 certainly adopt that rule. I think I would just - - -
14 unless there are any other questions.

15 CHIEF JUDGE WILSON: Let me ask one that's a
16 little off base, but and I realize this is not entirely
17 consistent with our case law, so - - - but when I read the
18 statute itself, in particular, the second prong of the
19 statute, I wonder why simple possession isn't a material
20 element of any firearms use or intent to use crime.

21 MR. KRESS: So I think normally when this
22 provision is being applied under the Laureano framework,
23 the court is looking at it from a statutory definitional
24 standpoint, not necessarily based on the facts of the case.
25 So possession of a firearm wouldn't necessarily, like,

1 under the normal analysis, possession of a firearm,
2 wouldn't be a material element of even, like, robbery with
3 a deadly weapon, because you could also have a knife as a
4 deadly weapon or a brass knuckles or something along those
5 lines.

6 So it just - - - it's looking at it from a
7 definitional standpoint as opposed to a - - - an actual,
8 you know, more practical standpoint, because, yes, as the
9 court pointed out in Brown, of course, you have to possess
10 a gun in order to use it. So it - - - it is part of it in
11 that sense, but not in the way that the test has been
12 applied definitionally. I'm also happy to talk about the
13 Sandoval point, if the court has any other questions. But
14 otherwise I would ask that that the judgment be affirmed.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. WU: So just to go back to how to read Brown,
17 I do think that the sentence addition Brown does articulate
18 the test that this court in Brown then applied, even though
19 it didn't mention intent in the subsequent paragraphs. And
20 as evidence of that, this court in People v. Malloy
21 subsequently just quoted that sentence from Brown
22 indicating that it understood that sentence to supply the
23 test to determining whether simple possession or sentence
24 should be consecutive or concurrent.

25 In addition, the Second, Third, and Fourth



1 Appellate Division departments have all understood that
2 sentence to articulate the holding of Brown. They have
3 applied it with ease. And there's no sign again, that that
4 rule, which looks to the intent of the defendant, has been
5 unworkable. So particularly where stare decisis has
6 special force in the context of statutory interpretation, I
7 think that the fact that the prevailing rule in sixty of
8 the sixty-two counties has worked should certainly inform
9 this court's decision in sort of retaining Brown as the
10 rule that applies to this case.

11 The second thing that I want to point out is that
12 I think Respondent basically concedes that they don't
13 really want to draw a line, even though under their test,
14 the question is how much time has elapsed between
15 possession and use, and inevitably if, you know, if under
16 that test, you would have to draw a line. And based on
17 that line, someone would be exposed to consecutive
18 sentencing and another person would be subject to
19 concurrent sentencing, and the difference would be only a
20 few milliseconds.

21 Again, there's no reason to think that the
22 legislature wanted the availability of consecutive
23 sentencing to turn on milliseconds of difference. Instead,
24 when this court in Brown looks to the intent of the
25 defendant, that makes a great deal of sense because if you

1 look to the intent of the defendant, you can meaningfully
2 understand whether the simple possession was actually
3 separate and distinct from the use of the firearm in a
4 subsequent crime. And that also - - -

5 JUDGE GARCIA: But Counsel, I think, in passing
6 the simple possession law, at least in 2006, the
7 legislature was concerned about gun violence. And it seems
8 a rule that doesn't provide for any additional opportunity,
9 at least to impose an additional penalty for carrying a gun
10 around for four years in public would undermine that goal.

11 MR. WU: So I think Brown itself was correct in
12 predicting that under its rule, in most cases, consecutive
13 sentencing would be available. And again, the fact pattern
14 that was available in the companion case of Harris shows
15 how easy it is for the prosecution to obtain consecutive
16 sentencing. In this case, it just happens that the
17 evidence showed - - -

18 JUDGE GARCIA: So let's say it is a situation
19 where you have a video of a person walking towards a
20 convenience store twenty minutes before the robbery, then
21 they get a video of them in the convenience store robbing
22 the convenience store. That's the evidence. Consecutive
23 or concurrent?

24 MR. WU: That sounds very much like Harris. And
25 so I think consecutive sentencing would be available.

1 JUDGE GARCIA: Even though he's walking directly
2 towards the convenience store twenty minutes before he's
3 on, you know, the same long street he's walking up the
4 block, then you have him going to the store?

5 MR. WU: Again, I think it feels very much like
6 Harris. And so in Harris, if this court determined that
7 consecutive sentencing was proper, then I think in that
8 fact pattern consecutive sentence would be available.

9 JUDGE GARCIA: Then how is this different than
10 Harris?

11 MR. WU: No, I think it's very much like Harris
12 where I think Harris the bare facts were the complainant
13 got to the location. Then, twenty minutes later, the
14 defendant who had been there approached the complainant and
15 used the firearm. And this court said consecutive
16 sentencing is proper in that case. So I think that
17 hypothetical shows how easy - - - I mean, Harris just shows
18 how easy it is to - - - for the prosecution to obtain
19 consecutive sentencing. And I would add that that
20 prediction, that is Brown's prediction of how its rule
21 would apply in the real world, has not proven to be wrong.
22 Respondent has not marshaled any evidence.

23 JUDGE GARCIA: In your test, though, if you had
24 somebody who testified that four years before he got that
25 gun to rob the convenience store and he had the same

1 additional proof, then it would be mandatory consec - - -
2 concurrent?

3 MR. WU: Well, I think the sentencing judge has
4 to make a determination, first of all, as to whether the
5 testimony is credible.

6 JUDGE GARCIA: But let's say it is.

7 MR. WU: If the sentencing judge does find that
8 testimony to be credible, then I think, yes, under the
9 application of this court's holding in Brown, and as, you
10 know, the Appellate Division departments in the Second,
11 Third, and Fourth Departments have held, sentencing would
12 be concurrent because the acts are no longer separate and
13 distinct. Thank you.

14 CHIEF JUDGE WILSON: Thank you.

15 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Billups (Ricky), No. 24 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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