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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 206

STEVEN FINKELSTEIN,

Appellant.

20 Eagle Street
Albany, New York
November 17, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Our first appeal today is
2 number 206, the People of the State of New York v. Steven
3 Finkelstein.

4 Counsel?

5 MS. GURWITCH: Good afternoon, Your Honors. Sara
6 Gurwitch, from Office of the Appellate Defender, for Mr.
7 Finkelstein. I would like two minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: You may.

9 MS. GURWITCH: Thank you. Your Honors, the
10 problem in this case is that there's a factual distinction
11 between coercion in the first degree and coercion in the
12 second degree, but that factual distinction did not go to
13 the jury. Now what we know from - - -

14 JUDGE STEIN: Did - - - did - - -

15 JUDGE RIVERA: What did - - -

16 JUDGE STEIN: - - - did defendant ever request
17 that the jury be charged?

18 MS. GURWITCH: The defendant - - -

19 JUDGE STEIN: On - - - on - - - on the factual
20 difference, the heinousness. I'm sorry, maybe I was
21 jumping - - -

22 MS. GURWITCH: Yeah, on - - -

23 JUDGE STEIN: - - - jumping too - - -

24 MS. GURWITCH: Your Honor, the defendant raised
25 the Apprendi issue and the trial judge said that he would

1 not charge the heinousness; that he recognized the issue,
2 and I can refer the court to pages 924 through 928 of the
3 appendix, where the judge says, I'm - - - I'm not - - - I'm
4 sorry; very specifically, page 928 of the appendix, the
5 judge says, "So it is unnecessary to submit to the jury the
6 word 'heinous.'" So it's presented to the court and just
7 what proceeds that, is the judge says "The problem with
8 heinousness is that it may be an extra element." But then
9 he goes on to say but I'm not going to charge it.

10 Now if he had charged it, then we wouldn't have
11 an issue here, because the jury could have passed on the
12 question. If it found heinousness, it's coercion in the
13 first degree. There's no Apprendi issue.

14 JUDGE STEIN: I - - - I may - - - I may have
15 misread it a little differently or whatever. I thought the
16 judge was just sort of talking about the - - - the
17 uncertainty in the law about all of this and how confusing
18 it was. I - - - I didn't think that he was responding to a
19 request, and - - - and then actually denying it, but we'll
20 - - - we'll take another look.

21 MS. GURWITCH: Well, I mean, if Your Honor - - -
22 and, you know, forgive me if I misunderstand the question.
23 If the question is, was this presented? Is it preserved?
24 The answer is yes, that not only was the issue presented,
25 but the cases that present the Apprendi issue were given to

1 the court. The Adams case from the First Department
2 presents the Apprendi issue, but it's unpreserved there, so
3 it couldn't come to this court. But there's no question
4 that everybody understood that there's this problem of
5 whether it's an extra element or a factual distinction - -
6 -

7 JUDGE PIGOTT: How - - - how do you see that
8 unfolding? It - - - it - - - you're right that - - - you
9 know, when you look at the statute it says, "A person is
10 guilty of coercion in the first degree when he or she
11 commits the crime of coercion in the second degree," and
12 then it goes on to say "and when" and there's a - - - and
13 there's a, you know, 1 and 2 as to - - - as to what those -
14 - - part of it being a - - - a fear that he or she will
15 cause physical injury.

16 Is it your position that in order to - - - in
17 order to indict on first degree, you have to submit to a
18 grand jury second degree as well in order to have a clean
19 bill for - - - to then present to, you know, to a jury?
20 And say to the jury then you have to find second and then
21 you have to find the elements that add up to first.

22 MS. GURWITCH: Well, that makes sense, Your
23 Honor, because if coercion in the second degree is one of
24 the elements and we can't expect jurors to understand what
25 that means. I mean, I think as a technical matter. You

1 wouldn't have a grand jury submission issue, even if it
2 wasn't defined, but we know from Eboli, just to go back,
3 that - - - I mean, Eboli was decided, as the court knows,
4 in 1974. And the starting point there was these are the
5 same. The statutory language is the same. So first
6 degree, second degree, it's the same.

7 The court was presented with that as an equal
8 protection, due process violation. The court in 1974 makes
9 an appropriate effort to figure out what to do, that the
10 legislature, you know, as the trial judge said here,
11 probably just made a mistake.

12 JUDGE GARCIA: But as I read that decision,
13 Eboli, it's not that they're reading an extra element into
14 the felony count. They're saying that's the ordinary
15 understanding of those terms. The lesser, the misdemeanor,
16 is a mitigating section, almost. So if you have something
17 that's less than what you would ordinarily understand the
18 physical harm and the threat to property elements to be,
19 then there's discretion to charge it as a misdemeanor, but
20 it's something less.

21 So I'm having trouble on many levels with an
22 Apprendi analogy, but even if you're trying to apply it
23 here where the jury had all the elements of the statute,
24 where - - - it really - - - it seems to me a misreading of
25 Eboli. That Eboli says the standard language of those

1 charge - - - the charge is the felony, and it's something
2 less than what you would ordinarily understand those terms
3 to be to get a misdemeanor.

4 JUDGE FAHEY: Yeah, I guess to - - -

5 MS. GURWITCH: Your Honor - - -

6 JUDGE FAHEY: - - - to follow up on that, why - -
7 - why shouldn't we just consider the word "heinous" in
8 Eboli and it - - - referenced in Discala to - - - to be
9 just a descriptive term.

10 MS. GURWITCH: Your Honors, I agree, I think with
11 the - - - the court's reading of Eboli. If you - - - Eboli
12 in 1974, years and years before Apprendi, the court - - -
13 my understanding is the court was trying to provide
14 guidance for prosecutors, to say, well, you have certain
15 acts. How should you charge it? And to the prior
16 question, the presumption is that coercion is with
17 heinousness. That's what we understand coercion to be,
18 right? So this court basically said, presume it's first
19 degree. But if it without this degree of heinousness that
20 we commonly - - -

21 JUDGE PIGOTT: But isn't - - - isn't that
22 backwards, though? I mean, and that's why I say, the - - -
23 the statute says "First degree, when he or she commits the
24 crime of coercion in the second degree, and when" and then
25 it says - - - you know, "places the victim in fear that" he

1 or she will - - - a physical injury and then it has a - - -
2 a few more. It's - - - it seems to me that you got to
3 prove second in order to get to first.

4 MS. GURWITCH: Your Honor, I agree that it might
5 have been described in a way that was analytically
6 backwards, but that's how the court described it. And then
7 Eboli, I think, needs to be read with Discala. So it's not
8 until Discala's decided and the court then says, in the
9 context of lesser-included analysis, but just to understand
10 Eboli, the court says in Discala, that if there is a
11 reasonable view of the evidence, taken in the light most
12 favorable to the defense, that this coercion, these acts,
13 are without heinousness, then you, trial judge, must charge
14 coercion in the second degree. So after - - -

15 JUDGE PIGOTT: But we - - - we created that
16 heinousness thing, right? I mean, that's not in the
17 statute.

18 MS. GURWITCH: Correct, that's a judge-made law.

19 JUDGE PIGOTT: And - - - and everybody - - -

20 MS. GURWITCH: A court-made law.

21 JUDGE PIGOTT: Well, it's an adjective. And - -
22 - and everybody get - - - or maybe it's a noun - - - but
23 everybody gets caught up in this one, well, this one word
24 that doesn't exist, then why - - - why can't we just stick
25 with the statute that says what it says, and it says it's

1 second plus, and - - - and the se - - - and the plus is a
2 fear thing, a compulsion or - - - or an inducement to do
3 something. And if none of those are there, then it's over,
4 whether that's considered heinous or not.

5 MS. GURWITCH: Well, Your Honor, I think there -
6 - - there are really two questions. One is, what can the
7 court do in Mr. Finkelstein's case. In Mr. Finkelstein's
8 case, this is the law. Eboli, Discala were the law, and
9 there was a factual distinction.

10 JUDGE STEIN: Well, don't - - - can - - - can we
11 go to whether there is a reasonable view of the evidence,
12 because as I analyze it, what he was arguing was, that it
13 wasn't - - - it - - - there was a reasonable view of the
14 evidence that it wasn't heinous because she didn't - - -
15 she wasn't prompted to act, she wasn't coerced to act by
16 any threats. She was in control of the situation. They
17 had a certain relationship, whatever.

18 To me, that says that he wasn't guilty of either
19 the felony or the misdemeanor, not that he was guilty of
20 the misdemeanor, but not the felony. I just don't see how
21 - - - how there is any reasonable of the - - - view of the
22 evidence based on what he's arguing that - - - that - - -
23 that the lesser-included would be an appropriate charge.

24 MS. GURWITCH: But Your Honor, that goes to the
25 question of whether the defendant was entitled to have the

1 coercion in the second degree charged as the lesser-
2 included offense, and for the reasons we said in our brief,
3 he was entitled - - - there was a reasonable view of the
4 evidence that - - -

5 JUDGE STEIN: Well, that's what I'm asking. How
6 could there be a reasonable view of the evidence? It seems
7 to me he's saying I didn't do either one, because I didn't
8 - - - because both felony and misdemeanor require that she
9 - - - that she acted on his threats of personal injury or -
10 - - or - - - or damage to property. So if she didn't act
11 on his threats, then it's a neither - - - it's - - - it's
12 not a question of heinousness. It's - - - it's neither the
13 felony nor the misdemeanor.

14 MS. GURWITCH: But Your Honor, that is not what
15 Discala says. Discala says if there's a reasonable view of
16 the evidence, taken in the light most favorable to the
17 defense, and keeping in mind that the court can consider
18 some evidence and not other evidence, that the defendant's
19 entitled to have - - - entitled to have the second degree.
20 But getting back to the notion of whether Discala
21 establishes that there's a factual distinction, it does
22 establish that.

23 So going back to the prior question about what
24 can the court do. In Mr. Finkelstein's case, Discala and
25 Eboli are the controlling law. There was a factual

1 distinction that was never decided by a juror, the jury.
2 It was decided by the prosecutor in charging. That's an
3 Apprendi violation.

4 What the court does moving forward, if it wants
5 to say you much charge heinousness, we - - - we overrule
6 Eboli, I mean, there are so many options to the court, but
7 they're not available in Mr. Finkelstein's case.

8 CHIEF JUDGE DIFIORE: Ms. Gurwitch, before we
9 honor the light, I have one question - - -

10 MS. GURWITCH: Yes.

11 CHIEF JUDGE DIFIORE: - - - getting back to the
12 beginning of the argument. If the jury convicts the
13 defendant on coercion in the first degree, at sentencing,
14 what determination is the judge making - - - what factual
15 determination is the judge making that the jury hasn't
16 already made to enhance punishment?

17 MS. GURWITCH: I'm not sure I understand the
18 question.

19 CHIEF JUDGE DIFIORE: In terms of the Apprendi
20 analysis?

21 MS. GURWITCH: The - - - the judge isn't making
22 the determination then. It's the prosecutor - - -

23 CHIEF JUDGE DIFIORE: How is he enhancing
24 punishment at the end?

25 MS. GURWITCH: I'm sorry. I - - - I now

1 understand the question. That - - - that's not when the
2 enhancement occurs. The enhancement occurs on the front
3 end, that the prosecutor is faced with certain facts, and
4 says, as prosecutors do, if this is a typical coercion with
5 heinousness, I'm going to charge it - - - I'm going to put
6 it in as a felony and that's a felony sentencing range. If
7 I, the individual prosecutor, decide it doesn't feel like
8 that to me, I'll put it in as a misdemeanor, and then it's
9 a misdemeanor sentencing range capped at one year.

10 CHIEF JUDGE DIFIORE: I'm talking about the
11 findings of the jury.

12 MS. GURWITCH: Right, but what I'm saying is that
13 the jury never makes the finding because it's never
14 charged. It's the prosecutor that basically made the
15 findings.

16 JUDGE GARCIA: But the only difference there in -
17 - - in an ordinary case, a prosecutor has very wide
18 discretion whether or not to charge something as a felony.
19 And I know you're going to say there are different
20 elements, and there are. But as a felony, in terms of
21 narcotics or as a possession and it's a misdemeanor, and
22 the only difference here is the elements you're saying are
23 exactly the same. But isn't that really a challenge on a
24 selective prosecution type of analysis, rather than, as the
25 Chief Judge I think is saying, an Apprendi analysis?

1 I mean, prosecutors make those decisions all the
2 time, and if you can show that a prosecutor is making that
3 decision retu - - - with respect to a misdemeanor or a
4 felony on coercion, when the elements are the same, you
5 would have to try to argue that you're applying that
6 differently because of race or some other inappropriate
7 reason, rather than saying the jury is not getting to
8 decide something that increases a penalty, which is really
9 in a charging decision.

10 MS. GURWITCH: Well, Your Honor, I think there
11 are two answers to that. The first is, that would have - -
12 - that was the case back in 1974 before this court decided
13 Eboli and Discala and said there's a factual distinction.
14 And that made sense in 1974 before the Constitutional
15 landscape changed with the cases that started with pre - -
16 -Apprendi. So that's the first thing.

17 If - - - if Eboli had not been decided - - -
18 Eboli and Discala, there would be no Apprendi issue. It's
19 the fact that this court said there's a factual
20 distinction.

21 JUDGE GARCIA: I think this court was - - - as I
22 read Eboli - - - was saying, here is guidance as to how
23 those charging decisions are rationally made. That the way
24 we understand the statutory scheme, if you have one and
25 two, I believe it is, of the misdemeanor factors, those

1 ordinarily imply, you know, a threat a physical harm, a
2 threat of harm to property, I think it is, ordinarily apply
3 a level of threat that is - - - is a felony level.

4 If there is some type of mitigator in an unusual
5 circumstance that doesn't have what is ordinarily perceived
6 as that, then there's discretion to charge it as a
7 misdemeanor. That's how I read Eboli. So I don't see
8 Eboli as reading in that adjective. I mean, it's - - -
9 it's really just saying that's what's ordinarily in the
10 statute, and in terms of a logical application of felony
11 versus misdemeanor, here's how to look at it.

12 MS. GURWITCH: But Your Honor, that doesn't
13 square with Discala. In Discala the court - - - this court
14 said that if there's a reasonable view of the evidence that
15 the acts are committed without that heinousness, then it's
16 coercion in the second degree. So after Discala, there's
17 no question that there's a factual distinction. And
18 there's no question that the factual distinction did not go
19 to the jury here.

20 So the Apprendi issue is not on the face of the
21 statute. It's - - - it's a product of the Eboli-Discala
22 decisions. If this court wants to overrule those
23 decisions, it, of course, has the authority to do so, but
24 that does not impact the state of the law, but - - -

25 JUDGE GARCIA: I disagree that that's what

1 Discala did. I mean, Discala, yes, was a different issue,
2 but Discala repeats the same language as Eboli and says,
3 it's an "unusual event for the prosecution to have
4 established coercion by threat of personal physical injury
5 without showing the heinousness ordinarily associated with
6 it," citing back to Eboli. I mean, really saying, we
7 recognize that this will be an exception, but it remains
8 reasonably possible. So I - - -

9 MS. GURWITCH: But Your Honor - - -

10 JUDGE GARCIA: - - - I think Apprendi comes in,
11 but Apprendi is such a different Constitutional analysis
12 than the one that you're proposing. Apprendi, you know,
13 hate crime in that case, I believe, saying the - - - the
14 judge increased the sentence based on facts not found by
15 the jury, weight and drug cases comes to mind, those types
16 of issues, not a - - - a court-read interpretation of a
17 statutory scheme that goes to when a prosecutor has
18 discretion or lesser-included offense charges.

19 MS. GURWITCH: Your Honor, that - - - the intent
20 of the court was probably different. The intent of the
21 court in 1974, I agree with you, was not to say there's a
22 factual distinction or an element or anything like that.
23 The court was trying - - - it seems to save this problem,
24 that there was a problem. There was an equal protection
25 due process problem, by the fact that - - - these are not

1 overlapping statutes, like a typical, you know,
2 prosecutorial discretion. These are identical.

3 So the court was trying to save that, and in 1974
4 it made sense. But since that time, looking at Apprendi,
5 Ring - - - Ring makes clear - - - if you look at Justice
6 Scalia's concurrence. Justice Scalia says that it doesn't
7 matter what we call it - - - I'm paraphrasing - - - it
8 doesn't matter what we call it, if the sentencing scheme,
9 the range, is different because of a factual distinction,
10 then that is a jury trial Sixth Amendment violation. Now
11 here - - -

12 CHIEF JUDGE DIFIORE: Thank you, Ms. Gurwitch.

13 MS. GURWITCH: - - - that's what happened. Thank
14 you, Your Honors.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MS. POOLE: Good afternoon, Your Honors. Dana
17 Poole, for the People respondent in this case.

18 JUDGE RIVERA: So is heinousness a fact?

19 MS. POOLE: No, Your Honor.

20 JUDGE RIVERA: Why isn't it a fact?

21 MS. POOLE: It's not a fact because it's - - -
22 it's a descriptor. And - - - and what the court - - -

23 JUDGE RIVERA: A descriptor of what?

24 MS. POOLE: Of the legislative intent.

25 JUDGE RIVERA: Of the intent, not the conduct?

1 MS. POOLE: No. Of - - - of how the - - - how
2 the legislature intended these crimes to be charged.

3 JUDGE RIVERA: But - - - but it - - - doesn't
4 that mean intended the crimes to be charged based on how
5 one interprets the conduct? Isn't that then a descriptor
6 of the conduct? It's either heinous or it's not.

7 MS. POOLE: Well, what - - - no, what the - - -
8 what the court in Eboli is saying is - - - is, yes, we have
9 these two statutes with basically identical language. We
10 can look to the legislative intent, and the legislative
11 intent tells us that the felony was intended. And the
12 reason that the felony was intended if the acts - - - you
13 know, if the acts committed by the defendant meet these
14 elements, the reason the legislature chose that is because
15 they have made the determination that coercion by these two
16 methods of threats are more heinous than the other seven
17 listed in second degree coercion. And the legislature
18 routinely makes those sort - - -

19 JUDGE RIVERA: Okay, but in - - - in second
20 degree, with the two that are heinous, why isn't that
21 exactly the same thing?

22 MS. POOLE: They - - - they're the same acts and
23 what - - - what the - - -

24 JUDGE RIVERA: They're the same acts that - - -

25 MS. POOLE: Yes.

1 JUDGE RIVERA: - - - that are, as you are saying,
2 described in a particular way. So the - - - the same
3 statutes. This is a - - - it's a determination about
4 whether or not that conduct rises to the level of being
5 heinous. I'm not really understanding the argument.

6 MS. POOLE: Well, but - - - but what the court
7 was talking about was, that the - - - that the legislature
8 intended that these acts, they - - - they looked at those
9 acts and found that in - - - in their qualification,
10 whether we agree, whether the jury agrees, those are more
11 heinous, therefore they are a - - - a higher crime.

12 JUDGE RIVERA: Okay, let me try it a different
13 way. What - - - what would a prosecutor take into
14 consideration to decide that the same act that is heinous
15 under both of the statutes, nevertheless, gets you a felony
16 in one case, gets you a misdemeanor in the other.

17 MS. POOLE: That's - - - that's left rather
18 unclear by both Eboli and Discala. They're - - - in - - -
19 in both cases, that situation is discussed as an entirely
20 theoretical possibility. It is described as unusual,
21 extraordinary, peculiar. The closest - - -

22 JUDGE RIVERA: Would it not turn on facts?

23 MS. POOLE: We're not sure. I mean, one - - -
24 one thing that - - - that - - -

25 JUDGE RIVERA: Obviously, as Judge Garcia said,

1 it can't turn on the fact that I'm targeting this
2 defendant, right?

3 MS. POOLE: Right, and - - - and I - - - it's not
4 even clear that this real - - - that this exists in
5 reality. You know, Discala talks about the possibility
6 that a threat may be made that is not inherently fearsome.
7 But one of the elements of coercion is that it actually
8 insteer - - - instills fear in the victim. So that doesn't
9 - - - that doesn't quite jive.

10 But what the court is discussing is not an
11 element. It's discussing a safety valve. In both cases,
12 that is how the - - - the discretion to charge the lesser
13 crime is des - - - is described. It's a safety valve for
14 leniency.

15 JUDGE RIVERA: I - - - I understand but it has to
16 turn on something, and if it's not turning on targeting a
17 defendant, isn't it turning on - - - excuse me - - -
18 turning on the - - - the conduct - - - the facts of the
19 conduct. The facts that go the jury under Apprendi.

20 MS. POOLE: But the - - - the facts of the
21 conduct remain the same and - - - and that's why it's not
22 an Apprendi situation.

23 JUDGE PIGOTT: How do you - - - how do you
24 decide, though? How - - - if - - - if they're the - - -
25 the same, and you've got - - - you've got a target

1 defendant, who makes the determination that we're ask for a
2 felony in this case and we're going to ask for a
3 misdemeanor in this case?

4 MS. POOLE: Is the first instance, that's left to
5 the discretion of the prosecutor.

6 JUDGE PIGOTT: And that discretion is unfettered,
7 if I understand it, because there - - - the elements are
8 the same. So I don't like this particular person, so even
9 though I could charge him with a misdemeanor, I think I'll
10 charge him with a felony, and that's - - - since I'm
11 proving the same thing, no one can challenge that.

12 MS. POOLE: Well, I - - - I - - - there is a
13 challenge on abuse of discretion. That - - - that
14 certainly exists as in - - - in the example that Judge
15 Garcia mentioned, you know, if - - - if a prosecutor is
16 doing it based on race or some other inappropriate
17 standard. But the - - - but the prosecutor's ability to -
18 - - to make that determination is a grant of discretion and
19 it is a grant of discretion that - - -

20 JUDGE PIGOTT: So granting that then, when - - -
21 when the case is over, and you've proved the same thing
22 either way, right?

23 MS. POOLE: Um-hum.

24 JUDGE PIGOTT: Proven - - - so now it goes to the
25 jury. Do we tell the jury, you can pick, because the - - -

1 the - - - the crime is identical? The facts - - - you can
2 - - - you can convict of - - - of first or second. It's
3 totally up to you, because we have - - - we have proven it
4 on both sides. And the jury would be within its - - -
5 within its authority to say, nah, we like - - - we kind of
6 like the defendant, we'll make it a misdemeanor.

7 MS. POOLE: Discala says no. And - - - and
8 Discala acknowledges that that - - - that at first blush,
9 Discala says the - - - the logic of that is - - - is there,
10 but that's not, in - - - in fact, how it works.
11 Fundamentally, it would be - - -

12 JUDGE PIGOTT: Well, I - - - right. And that - -
13 - and that gets to my real question. You're saying, we
14 can, we the People, the - - - the district attorney. We
15 can pick just because we want to pick. But a jury can't.
16 A jury can hear all of the elements, hear the testimony,
17 the defendant, hear everything that went in front of the
18 guy, but they can't pick second; they have to pick first.

19 MS. POOLE: Right, and - - - and - - - and
20 Discala - - - and Discala acknowledges that, that - - -
21 that as a fundamental matter, that is not left to the jury,
22 just as it's not left to the jury to decide whether they
23 agree that, you know, the - - - the facts of - - - of, you
24 know, first degree assault are - - - are more heinous than
25 third degree assault. That's not left to the jury.

1 JUDGE ABDUS-SALAAM: Counsel, how then does the
2 judge convey to the jury - - - assuming there is a
3 reasonable view of the evidence, which would permit the
4 judge to give an instruction on the lesser crime, how then
5 does the judge explain to the jury what they're supposed to
6 deliberate on at that point?

7 MS. POOLE: That - - - that is not clear from
8 Discala - - -

9 JUDGE PIGOTT: That gets to our - - -

10 MS. POOLE: - - - and - - - and - - -

11 JUDGE PIGOTT: Doesn't that get us to the ca - -
12 - the - - - exactly this case? In other words, the judge
13 is saying, you know, I'm going to make that determination,
14 that factual determination that this is a first, not a
15 second. Even though I could just as easily, and for - - -
16 with no change in the facts, say it's - - - it's a second.

17 MS. POOLE: Except that what we know is that, as
18 this court has said, the legislature intended these to be
19 charged as a felony. And this court left open the safety
20 valve, and it's a very narrow safety valve, for - - - for
21 the prosec - - - for a prosecutor to say, this case is so
22 extraordinary and peculiar, that somehow the heinousness we
23 normally associate with threats of personal injury and
24 property destruction, simply doesn't exist here. And
25 that's the only time that - - -

1 JUDGE RIVERA: But - - - but why isn't that
2 turning on facts? That's what I'm not understanding. I
3 mean, maybe you're arguing those are not the kinds of facts
4 that Apprendi and the Supreme Court intended to go to the
5 jury, okay, maybe you want to go down that rabbit hole.
6 But aren't those facts?

7 MS. POOLE: I - - - this court never made that
8 clear. You know, what - - -

9 JUDGE RIVERA: Well, we're here today, so.

10 MS. POOLE: Right, so, and - - - and - - - but
11 what this court did make clear, is that in a case like
12 Discala and a case like this, where threats are - - - where
13 the malevolence is - - - is inherent in the nature of the
14 threats, where, you know, there is no question that, you
15 know - - -there's no lack of odiousness - - -

16 JUDGE RIVERA: Well, that's why - - - is - - -is
17 your argument that, well, all threats are heinous, some are
18 more heinous than others?

19 MS. POOLE: That's - - -

20 JUDGE RIVERA: Is that where you're going? Be -
21 - - because again, isn't that a factual question that goes
22 to the jury?

23 MS. POOLE: No, because - - - because what this
24 court was discussing in Eboli was why - - - so there are
25 nine versions of coercion in the misdemeanor statute and -

1 - - and what the court was saying, is why were two pulled
2 and elevated to a felony? Because the legislature
3 determined that those versions are more heinous. But that
4 does not mean that the jury has - - -

5 JUDGE RIVERA: Well, then why - - - why have them
6 in the misdemeanor?

7 MS. POOLE: That - - -

8 JUDGE RIVERA: If that's true, why do you have
9 them in the misdemeanor at all?

10 MS. POOLE: This court described it as a safety
11 valve. A safety valve for a leniency.

12 JUDGE RIVERA: Well, this is getting back to - -
13 - there's heinous and then there's heinous, right?

14 MS. POOLE: Well, there's heinous - - -

15 JUDGE RIVERA: And that strikes me as embedded
16 within the - - -

17 MS. POOLE: - - - and there's - - - there's not
18 heinousness - - -

19 JUDGE RIVERA: - - - factual determination, that
20 you can't decouple them, which is what I think you're
21 trying to do. Let me ask you a different question. I - -
22 - I think I know the answer. Is there anything similar at
23 all in the penal law to this particular, I'll call it, an
24 anomaly, that the court tried to resolve in Eboli and
25 Discala?

1 MS. POOLE: In - - - in the Fourth Department had
2 several cases, in which sexu - - - predatory sexual abuse
3 of a child can have the same elements as rape in the first
4 degree.

5 JUDGE FAHEY: But wouldn't it - - - wouldn't it
6 make - - - from your point of view, it seems to me that, in
7 looking at it, that - - - that there may be a drafting
8 error here in between the two statutes. I think a
9 reasonable person could think that. But that's not the
10 argument we're being presented with, is some form of
11 statutory or Constitutional drafting error.

12 Instead, we're being asked to say whether or not
13 there's been an Apprendi violation. And that's a much
14 narrower question that Judge Garcia was getting at before.
15 And isn't that really your stronger argument that this
16 isn't an Apprendi violation? There may be an error, but
17 that's not the issue that's been brought in front of us.

18 MS. POOLE: Right, I mean, what - - - what's
19 really being argued about here is a charging error.

20 JUDGE FAHEY: Right.

21 MS. POOLE: And - - - and that's not the same
22 thing as Apprendi.

23 JUDGE FAHEY: Well, this isn't a judge making a
24 determination using a different standard to enhance a
25 sentence beyond its maximum. That's not what we have here.

1 MS. POOLE: No, absolutely not, Your Honor. What
2 - - - the - - - the facts found by the jury meet the
3 elements of first degree coercion - - -

4 JUDGE RIVERA: Well, but the argument - - -

5 MS. POOLE: - - - and the judge sentenced - - -

6 JUDGE RIVERA: - - - the argument is that there
7 are actually other facts. This - - - there's heinousness
8 and then there's heinousness. And - - - and that those
9 facts - - - and that's the lesson from Apprendi, they have
10 to be decided by the jury, not the judge, as - - - as
11 indicates in Apprendi, but if the judge can't do it,
12 certainly it can't be the ADA.

13 MS. POOLE: But - - -

14 JUDGE RIVERA: You're not - - - you're not taking
15 the position that ut - - - that - - - that facts in some
16 other penal statute could be decided by an ADA, right?
17 Just because Apprendi was focusing on the judge, you're not
18 taking that position.

19 MS. POOLE: Apprendi, yeah - - - Apprendi does
20 focus on the judge. The - - - the - - - Apprendi focuses
21 on facts found by the jury and whether the - - - the judge
22 then uses some other qualification, a hate - - - you know,
23 I determined that this is a hate crime; I determined that
24 there is such, you know, such viciousness or anything like
25 that - - -

1 JUDGE RIVERA: But you're not taking the position
2 that if a prosecutor were to decide facts that would lead
3 to a greater sentence, that that somehow would escape
4 Apprendi's core holding, which is the jury decides those
5 facts.

6 MS. POOLE: It is also a core holding that
7 prosecutors have the discretion to choose between
8 overlapping statutes, identical statutes. That's within
9 the prosecutor's discretion. That is what - - -

10 JUDGE STEIN: What you're saying is, is that once
11 a defendant is convicted of a crime - - -

12 MS. POOLE: Yes.

13 JUDGE STEIN: - - - then the court can't enhance
14 the sentence for that crime for which they've been
15 convicted by bringing in other facts that weren't before
16 the jury.

17 MS. POOLE: Exactly.

18 JUDGE STEIN: It had - - - so as I understand
19 your argument is Apprendi doesn't apply to charging
20 decisions?

21 MS. POOLE: That's right.

22 JUDGE STEIN: So once they're - - - once that
23 determinaza - - - determination has been made, they're in
24 court, they've been tried, then there may be a question
25 about what - - - what charges should go to jury, whether

1 lesser-included or not should go to the jury, that's an
2 issue, but it - - - but Apprendi is about what happens
3 after that conviction. Is - - - is that your - - -

4 MS. POOLE: Yes, yes.

5 JUDGE STEIN: - - - position? Okay.

6 MS. POOLE: Once - - - once the jury has - - -
7 has - - - has found the elements to have been proven beyond
8 a reasonable doubt, and the judge sentences within the
9 guidelines established for that level of crime, there is no
10 Apprendi violation.

11 JUDGE RIVERA: Yeah, but - - - but isn't - - -
12 when you have the defendant seeking to have the lesser
13 crime, right, the - - - the misdemeanor, being charged, and
14 that's turning on, as you say, so - - - some things are
15 heinous, and some things are even more heinous, right?
16 That's a determination for the jury to decide.

17 MS. POOLE: But - - - but - - - but this court
18 was not saying that so - - - that all of these crimes are
19 heinous, but some are more heinous than others. What
20 they're saying - - - what this court was saying - - -

21 JUDGE RIVERA: No, I'm asking you - - - that
22 seemed to be your argument. If that's not your argument -
23 - -

24 MS. POOLE: No, my - - -

25 JUDGE RIVERA: - - - you can tell me otherwise.

1 MS. POOLE: My argument is not that there is an
2 addition - - - an additional heinousness. What this court
3 was saying is in some theoretical situation, there could be
4 an entire lack of heinousness. Just the - - - whatever
5 badness we - - - we normally associate with making threats,
6 a physical injury and - - - and property disco - - -
7 damage, whatever we - - - whatever makes us think that is
8 bad, is somehow lacking. And - - - and - - - because what
9 this court is discussing is basically in - - - in Eboli, is
10 basically - - -

11 JUDGE RIVERA: And we - - - and we would know
12 that from the fact that it's identical language?

13 MS. POOLE: We know that from the legislative
14 intent. This court - - - in Eboli the court looked to the
15 Practice Commentaries.

16 JUDGE RIVERA: It - - - it said this court has
17 said that in the past.

18 MS. POOLE: Yes, yes.

19 CHIEF JUDGE DIFIORE: Thank you, Ms. Poole.

20 MS. POOLE: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MS. GURWITCH: Your Honors, if there was a
23 drafting error, that - - - and that's a - - - that's the
24 most reasonable explanation, but that argument was
25 foreclosed after Eboli and Discala. In Discala and Eboli,

1 this court said there's a factual distinction. And the
2 factual distinction is made on the front end. The
3 prosecutor says, if this seems to me, the prosecutor - - -
4 if this seems to me like this is without the typical
5 heinousness associated with coercion, I'm going to charge
6 it as a misdemeanor - - -

7 JUDGE PIGOTT: But that's not Apprendi, right?

8 MS. GURWITCH: That's not - - - that's not
9 Apprendi, but it is Ring.

10 JUDGE PIGOTT: I know, but you - - - we've been
11 talking about Apprendi, and - - - and the fact of the
12 matter is that it's not Apprendi, but you - - - I - - - I
13 take it that it's an - - - an analogy that's being used.
14 It's more like a charge down from assault second to assault
15 third, or any number of the cases that come and - - - and
16 go in front of a jury where a reasonable view of the
17 evidence would - - - would lead one to believe that the
18 lesser charge would be the one that they should convict.
19 And that's what you're saying, right? You want - - - you
20 want them to be able to say - - - the jury - - - to say
21 assault second, not assault first.

22 MS. GURWITCH: Want the jury to make the factual
23 determinations that result in an applicable sentencing
24 scheme. In - - -

25 JUDGE ABDUS-SALAAM: So in that case, counsel,

1 just before you move on, in - - - because the - - - the
2 statute is exactly the same for both, you know, levels of
3 the crime, would the jury then have to be told each time
4 that you can pick, either this one or that one, whether or
5 not there's a reasonable view of the evidence that would
6 get the lesser crime before the jury?

7 MS. GURWITCH: My understanding is that, because
8 Eboli and Discala were the law at the time of the
9 conviction here, that what could have happened is the jury
10 could have been instructed on the presumption the way of
11 heinousness, the way the ju - - - jurors are instructed on
12 presumptions all the time, vehicle, drug factory, intent.
13 Instructing a jury on a presumption is common. So if the
14 jury had been instructed consistent with Eboli and Discala,
15 there would be no Apprendi, Ring, Blakely, Cunningham Sixth
16 Amendment violation here.

17 JUDGE STEIN: So you - - - so your reading the
18 cases as creating a presumption? I - - - I didn't
19 understand that from your argument until just now.

20 MS. GURWITCH: Yes, that my understanding - - -

21 JUDGE STEIN: - - - the presumption.

22 MS. GURWITCH: - - - of Eboli is, it's
23 instructions to the prosecutor to say, it's presumptively
24 first degree. We understand that to be with this degree of
25 heinousness. If it's without, then it is the safety valve

1 position, which is this misdemeanor. And you, the
2 prosecutor, are going to decide this on the frontend, and
3 if you decide misdemeanor, the sentence is capped at one
4 year. If you decide it's the typical one, it's a multi-
5 year felony sentence - - -

6 JUDGE STEIN: Then the defendant can argue at
7 trial that there's a reasonable view of the evidence that
8 the - - - that the lesser-included should be charged.

9 MS. GURWITCH: Right.

10 JUDGE STEIN: And if that showing isn't made,
11 then we don't even get to the issue of what - - - of
12 heinousness or anything as far as what the jury gets to
13 decide. Is that - - - do you agree with that?

14 MS. GURWITCH: Well, that would be a separate
15 question of whether the lesser-included standard were met -
16 - - was met. But in a case like this, where only coercion
17 in the first degree went to the jury - - -

18 JUDGE STEIN: No, no, but in terms of the judge
19 deciding whether the lesser-included should go to the jury.
20 We know what the standard is for - - -

21 MS. GURWITCH: Correct. It's a Rob-Cap (ph.)
22 standard.

23 JUDGE STEIN: - - - right, so we have to meet
24 that threshold first?

25 MS. GURWITCH: Correct, and so it's not a - - -

1 the - - - the Sixth Amendment violation here arose with the
2 charging. That's what set these two different tracks in
3 terms of sentencing exposure. And Apprendi, Ring,
4 Cunningham, each one of those cases is clear. There's one
5 exception. The one exception to the fact that the fact
6 finder needs to find facts is the fact of a prior
7 conviction. This is not that case.

8 Here, the factual distinction was made by a
9 prosecutor, and that violates the Sixth Amendment.

10 CHIEF JUDGE DIFIORE: Thank you, Ms. Gurwitch.

11 MS. GURWITCH: Thank you, Your Honors.

12 (Court is adjourned)

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I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Steven Finkelstein, No. 206 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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