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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 14

MICHAEL PENA,

Appellant.

20 Eagle Street
Albany, New York 12207
January 12, 2017

Before:

CHIEF JUDGE JANET DIFIORE
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:

EPHRAIM SAVITT, ESQ.
THE LAW OFFICES OF EPHRAIM SAVITT ESQ.
Attorneys for Appellant
260 Madison Avenue
Suite 2200
New York, NY 10016

JOSHUA L. HABER, ADA
THE NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on
2 this afternoon's calendar is appeal number 14, the
3 People of the State of New York v. Michael Pena.

4 Counsel.

5 MR. SAVITT: Good afternoon, Your Honors.
6 My name is Ephraim Savitt; I represent the Appellant
7 Michael Pena.

8 Had my client murdered three people and
9 been sentenced to the sentence that he got, seventy-
10 five years to life, I'm sure I wouldn't be standing
11 before this august court - - -

12 JUDGE GARCIA: What - - -

13 CHIEF JUDGE DIFIORE: And Mr. Savitt, may I
14 interrupt you for one second?

15 MR. SAVITT: Please.

16 CHIEF JUDGE DIFIORE: Would you care to
17 reserve rebuttal time - - -

18 MR. SAVITT: Oh, I'm so sorry - - -

19 CHIEF JUDGE DIFIORE: - - - before we get
20 into the argument?

21 MR. SAVITT: - - - yes, yes. If I may have
22 three minutes of rebuttal time.

23 CHIEF JUDGE DIFIORE: Yes, you may, of
24 course.

25 MR. SAVITT: Thank you.

1 JUDGE GARCIA: Counsel, could you address
2 the preservation argument?

3 MR. SAVITT: Yes, Your Honor. First and
4 foremost, under Criminal Procedure Law 470.05, which
5 is actually a - - - a very liberal standard for
6 preservation, there isn't - - -

7 JUDGE ABDUS-SALAAM: But counsel, if they
8 were as liberal as you say it was, then there would
9 never be - - - that would swallow the whole
10 preservation rule.

11 MR. SAVITT: Well, Your Honor dur - - -

12 JUDGE ABDUS-SALAAM: We would have to hear
13 every case that came here, whether the issue were
14 preserved or not.

15 MR. SAVITT: Well, the - - - the
16 unconstitutionality of the sentence only arose after
17 the sentence was pronounced. But even after the
18 sentence was pronounced, and when the People were
19 arguing for a maximum sentence of seventy-five years
20 to life, I argued, because I was also his trial
21 counsel, that my client, and this is on page 12 of
22 the proceeding, as part of my appendix, he deserves
23 to be punished, but not punished as if he had
24 committed multiple murders in a heinous way; he did
25 not.

1 JUDGE STEIN: Well, you - - - you agree
2 that he - - - he committed multiple crimes.

3 MR. SAVITT: He certain - - - yes, I - - -
4 of course, I agree.

5 JUDGE STEIN: And you don't dispute that
6 consecutive sentences are appropriate.

7 MR. SAVITT: Your Honor, I - - - I actually
8 do dispute that consecutive sentences, in this case,
9 are - - - are appropriate. I - - -

10 JUDGE STEIN: Well, you're - - -

11 MR. SAVITT: - - - I'm not saying - - -

12 JUDGE STEIN: You're talking about in terms
13 of the length. I - - - I mean as just as a matter of
14 - - - of - - -

15 MR. SAVITT: Statutory - - -

16 JUDGE STEIN: - - - statutory - - -

17 MR. SAVITT: - - - interpretation. Yes, of
18 course. The statute is - - - it does not forbid
19 consecutive sentencing.

20 JUDGE STEIN: If that - - - that's legal in
21 this case, that's my question - - -

22 MR. SAVITT: Under this - - -

23 JUDGE STEIN: - - - legal to impose
24 consecutive sentences.

25 MR. SAVITT: Under - - - under the statute,

1 of course it is.

2 JUDGE STEIN: And - - - and - - - and do
3 you dispute that twenty-five years to life for one of
4 these crimes is - - - is a reasonable and - - - and
5 not excessive sentence?

6 MR. SAVITT: Well, Your Honor, given the
7 fact that my client was sentenced to three times that
8 amount, as a minimum - - -

9 JUDGE STEIN: Well, I'm not talking about
10 that. I'm talk - - - I'm asking about one. One
11 sentence, twenty-five to life - - -

12 MR. SAVITT: Your Honor - - -

13 JUDGE STEIN: - - - with this - - - for
14 this type of - - -

15 MR. SAVITT: Our pos - - - our position is
16 that because he was a police officer, and under the
17 circumstances of the case, punishing him to a minimum
18 - - - on the minimum side to a sentence that - - -
19 that is twice as long as the average rape sentence in
20 - - - in New York State and across - - -

21 JUDGE ABDUS-SALAAM: Your position,
22 counsel, at - - - both at sentencing was ten years to
23 life would have been more like it. Right. That's -
24 - -

25 MR. SAVITT: Well, that's what I argued

1 before - - -

2 JUDGE ABDUS-SALAAM: Right.

3 MR. SAVITT: - - - the sentencing judge.

4 And - - - and yes, it would've been more like it.

5 But I understand that - - -

6 JUDGE RIVERA: What did the prosecutor ask
7 for?

8 MR. SAVITT: Seventy-five to life. Maximum
9 punishment.

10 JUDGE ABDUS-SALAAM: Twenty - - - yeah,
11 twenty-five on each count.

12 MR. SAVITT: Twenty-five on each count. So
13 that for each touching, there's another dead body,
14 basically.

15 Essentially, equating what, concededly, are
16 terrible crimes, but when there was a single victim
17 who was not, thankfully, killed during the course of
18 these crimes, or even beaten, and was able to return
19 to her job within two weeks, I believe it was, after
20 this - - - this incident, and didn't even require
21 inpatient hospitalization, for each - - -

22 JUDGE STEIN: Well, the trial judge seemed
23 to put a fair amount of - - - of weight on the fact
24 that he was a police officer, and that he did use his
25 police weapon to coerce the victim into performing

1 these pretty horrific acts.

2 MR. SAVITT: Well, that's - - - that's
3 quite clear. And that's why he sentenced him - - -
4 my client to seventy-five years to life. I'm arguing
5 that under the Eighth Amendment, and Article 1
6 Section 5 of our Constitution - - -

7 JUDGE FAHEY: But the - - - the problem is
8 - - - is - - - it seems the key to - - - the heart of
9 this case is whether or not the issue was preserved,
10 before we even address the Eighth Amendment issues -
11 - -

12 MR. SAVITT: Well, it's - - -

13 JUDGE FAHEY: - - - in and of themselves.
14 Let me finish.

15 MR. SAVITT: Oh, I'm so sorry.

16 JUDGE FAHEY: So - - - so as I understood
17 the objection you gave in trial court, and you can
18 correct me, because you know it better than me. You
19 said it was a draconian sentence, and then you made
20 the comparison.

21 But you never use the word
22 unconstitutional, you never challenged it under the
23 Eighth Amendment, those issues were never
24 specifically put before the court, because if they
25 had been, then it would have required the court to do

1 a particular analysis like the Supreme Court's
2 analysis, as it set out and looked the factors in
3 Ewing v. California. And that's - - - and then we
4 would have had a record in front of us to look at
5 those issues, but that didn't take place here. So
6 that's, I think, why we're focusing on the
7 preservation issue.

8 MR. SAVITT: Well, Your Honor, as a
9 practical matter, even though the People asked for
10 seventy-five to life, and even though this is a
11 terrible case, concededly - - -

12 JUDGE FAHEY: Um-hum.

13 MR. SAVITT: - - - I - - - I was actually
14 floored when consecutive sentences were - - -

15 JUDGE FAHEY: That's understandable. But -
16 - -

17 MR. SAVITT: - - - were - - - were - - -

18 JUDGE FAHEY: - - - how about - - -

19 MR. SAVITT: - - - supposed.

20 JUDGE STEIN: - - - is there been - - - is
21 there been a post-trial motion, 440.20, I think is
22 the section, is - - - has that motion taken place,
23 was the sentence challenged that way?

24 MR. SAVITT: No, it wasn't, but certainly
25 there was at least enough of a protest to the - - -

1 to the - - - to the position of the People that there
2 should be maximum punishment in order to preserve it.

3 JUDGE ABDUS-SALAAM: There were a lot - - -
4 yeah, there was a lot of verbiage, counsel, as - - -
5 as you pointed out, but the only word that you used
6 was draconian. You didn't say it was cruel and
7 unusual, you didn't say Eighth Amendment, as - - -

8 MR. SAVITT: I did not - - - it does not
9 say - - -

10 JUDGE ABDUS-SALAAM: - - - Judge Fahey
11 mentioned.

12 MR. SAVITT: - - - concededly, I did not.
13 But, you know, apart from the procedural statutory
14 grounds that I argued, and maybe it's - - - I'm
15 arguing on a slippery slope, this is, in fact, a
16 Constitutional challenge to the sentence that was
17 ultimately imposed.

18 And under the case law of - - - of this
19 court, such a Constitutional challenge does not have
20 to be raised in the first place before the trial
21 court.

22 JUDGE ABDUS-SALAAM: And what case are you
23 relying on for that?

24 MR. SAVITT: People v. Morse, this court,
25 in 1984, held that a - - - an attack against the

1 power of the court to sentence, as it did, may be
2 raised for the first time on appeal.

3 JUDGE ABDUS-SALAAM: Well, you - - - you're
4 talking about the power of the court, that's not the
5 Constitutional issue that you're raising now.

6 MR. SAVITT: Well, Your Honor, the power of
7 the court to sentence as it did, is - - - is the
8 Constitutional issue.

9 JUDGE FAHEY: Yeah, I think you're
10 misunderstand what the power of the court is there.
11 If I'm right about that case, I thought that was - -
12 - it was a jurisdictional issue. It's different than
13 - - - than the - - - the Constitutional issue that
14 you are seeking to raise.

15 MR. SAVITT: But - - -

16 JUDGE FAHEY: You know, the thing about
17 this case is, is that - - - two things that strike
18 me. Of course it's an awful case, we all recognize
19 that, but the other thing is, is that it - - - the
20 legal issue, in and of itself, on the nature of the
21 sentencing, if it - - - if it does, it's a serious
22 issue, it's not a frivolous issue, I don't think
23 that, and you can't say that about everything we see.

24 But it's very difficult for me to get
25 around the preservation issue, and that's why we keep

1 going back to it, I think.

2 MR. SAVITT: If I may, I keep going back to
3 the language at 470.05. It doesn't have to be
4 expressed, doesn't have to be implied, and it - - -
5 it certainly was enough of an argument to the judge
6 that - - - that a triple punishment would - - - would
7 be unfair and - - -

8 JUDGE STEIN: But - - - but if you had
9 raised the Eighth Amendment argument, and some of the
10 - - - and you've presented us with all kinds of
11 statistics, and comparisons, and analysis, I think,
12 isn't the point of raising the argument in - - - in a
13 way that would be recognized as - - - as what it is,
14 so that the trial court could have entertained these
15 kinds of - - - of - - - of this evidence, and these
16 statistics, and the arguments about proportionality,
17 and all of that, so that we would have a record to
18 review.

19 MR. SAVITT: Well - - -

20 JUDGE STEIN: I mean, can we - - - can we
21 do that now?

22 MR. SAVITT: Well, Your Honor, in
23 retrospect, obviously, it would have been better if I
24 came in with all these statistics and mentioned
25 Eighth Amendment, Article 1, Section 5, but as a

1 practical matter, when - - - when a lawyer stands
2 with his client before the court, the lawyer does not
3 expect the judge to impose a - - - a sentence that is
4 six times as long as the average sentence for rape in
5 - - - in the - - - in the United States.

6 I - - - I understood that the judge was
7 going to impose a - - - a tough sentence. The moment
8 he said twenty-five years, I figured twenty-five
9 years, okay, that's a murder sentence. Twenty-five,
10 concurrence it, you know, another pair of twenty-
11 fives, concurrent to another pair of twenty-fives, is
12 a consecutive part of it that I, respectfully, argue
13 is unconstitutional under both, the U.S., as well as
14 the New York State Constitutions.

15 And that does go to the power of the court.
16 How could a court have the power to impose an
17 unconstitutional sentence?

18 CHIEF JUDGE DIFIORE: Thank you, Mr.
19 Savitt.

20 MR. SAVITT: Thank you, Your Honor.

21 CHIEF JUDGE DIFIORE: Counsel.

22 MR. HABER: May it please the court.
23 Joshua Haber for the People.

24 Defendant's claim is jurisdictionally
25 barred because it is unreserved. Of course, now,

1 defendant is claiming that his cumulative sentence is
2 cruel and unusual under the State and Federal
3 Constitution. As evidenced by Your Honors'
4 questions, defendant never argued that his sentence
5 was cruel and unusual before the sentencing court.
6 Defendant never argued that his sentence was
7 unconstitutional. Defendant never attempted to
8 invoke the bill of rights with the Federal
9 Constitution, or the same rights that are in our
10 State Constitution.

11 JUDGE STEIN: Why doesn't the exception to
12 the preservation rule for illegal or invalid
13 sentences apply here?

14 MR. HABER: Because this court made clear,
15 actually, in People v. Ingram, which is controlling;
16 that in order for a defendant to preserve a claim
17 that his or her sentence is cruel and unusual, that
18 defendant is required to preserve it in the court
19 below.

20 And of course, for the past thirty years,
21 that has been the controlling law in this State. The
22 Appellate Division, in all four departments, has
23 repeatedly relied on that law, and with good reason,
24 to find that other claims of cruel and unusual
25 punishment raised for the first time on appeal are

1 unpreserved.

2 And ultimately, contrary to the defense
3 argument here, all of the cases in which this court
4 has found narrow windows through which preservation
5 might be skirted, none of those apply here.

6 For example, in *People v. Fuller*, which
7 defendant attempts to rely on, the judge, there,
8 delegated the sentencing power of the court to the
9 Department of Probation.

10 In other words, the question there was
11 whether the entity, in that - - - in that case, the
12 Department of Probation, had the power in the first
13 instance to sentence according to legislative
14 prerogative.

15 JUDGE ABDUS-SALAAM: Counsel, we've
16 recognized the differences between that case and
17 Ingram, didn't we, in Ingram.

18 MR. HABER: Exactly, Your Honor. In Ingram
19 itself, when the court announced that cruel and
20 unusual punishment claims have to be preserved, there
21 was a cf. cite at the end of that sentence to Fuller
22 and to Morse, on which my adversary now relies.

23 Obviously, that cf. cite meant that in this
24 court's sound judgment, whatever rule of preservation
25 might have applied in those cases that went to the

1 question of whether the legislature in the first
2 sentence, had it empowered a judge to impose a
3 certain sentence, simply doesn't apply in the context
4 of cruel and unusual punishment claims.

5 And the reason for that is also just more
6 fundamental. The legislature is in charge of
7 empowering the judges in our state and the courts to
8 impose sentences.

9 JUDGE ABDUS-SALAAM: Counsel, if we agree
10 with you, is the defendant without a remedy at all?

11 MR. HABER: Yes, Your Honor. The defendant
12 is here without a remedy. But of course - - -

13 JUDGE RIVERA: Doesn't he have an
14 ineffective assistance of counsel claim?

15 MR. HABER: No, I don't think so, Your
16 Honor, for the simple reason that on the merits of
17 this case - - -

18 JUDGE RIVERA: On a 440, no?

19 MR. HABER: No, Your Honor.

20 JUDGE RIVERA: Is counsel saying, I had no
21 clue, I'd didn't think about it, I didn't know what
22 was going on.

23 MR. HABER: No, Your Honor. Because if you
24 read the trial transcript, and with due respect to my
25 adversary, he represented the defendant here with

1 incredible competence and vigor below. And he did so
2 as well at sentencing.

3 And his surprise in the length of the
4 sentence doesn't make him ineffective, because quite
5 frankly, the sentence in this case, even regarded on
6 the merits, is entirely Constitutional.

7 JUDGE STEIN: But that is a question that
8 the defendant could raise by a 440 motion. You're -
9 - - you're saying that - - -

10 MR. HABER: Oh, I'm sorry.

11 JUDGE STEIN: - - - merit, but - - -

12 MR. HABER: Certainly, certainly, I - - - I
13 don't think it's a meritorious argument; it's
14 certainly an argument that the defendant could raise.
15 Of course, the defendant could also attempt to bring
16 a habeas corpus petitions in federal court, if he so
17 chose, and then the federal courts would determine
18 under Federal Constitutional precepts the
19 Constitutionality of this sentence.

20 CHIEF JUDGE DIFIORE: Getting back to Judge
21 Abdus-Salaam's question regarding remedy, are there
22 any executive remedies that can be sought?

23 MR. HABER: Of course, Your Honor. the
24 defendant could always get clemency by the Governor.
25 Admittedly, clemency happens on rare occasions, but

1 as we've recently seen, defendants with
2 extraordinarily long sentences, at times, based on
3 their particular behavior in prison, circumstances
4 change. And governors have that power to grant
5 clemency to defendants.

6 JUDGE RIVERA: Given - - - given the crime
7 here, it's pretty unlikely, don't you think?

8 MR. HABER: I would concede that. Yes,
9 Your Honor. However, in other crimes that involve
10 heinous acts of murder, and even terrorism, governors
11 have granted clemency in the past.

12 So just because a crime is particularly
13 heinous and troubling, doesn't necessarily mean that
14 the remedy of clemency is not available to defendant.

15 JUDGE RIVERA: Did the People request
16 consecutive - - -

17 MR. HABER: Yes, Your Honor.

18 JUDGE RIVERA: - - - sentencing?

19 MR. HABER: Yes, Your Honor. The sentence
20 here, imposed by the court, was the sentence that was
21 recommended by the People here.

22 JUDGE RIVERA: So there was no surprise to
23 counsel.

24 MR. HABER: Correct, Your Honor. Correct,
25 Your Honor. In fact, as counsel just said, he

1 expected that the People would be recommending a
2 sentence of seventy-five years to life. So in other
3 words, going into the sentencing hearing, the defense
4 had before it an expectation that there would be an
5 argument here that a maximum sentence was
6 permissible. And therefore, in that moment, it
7 certainly was, you know - - - could have been
8 possible for the defense to raise a cruel and unusual
9 punishment claim under either Constitution.

10 And just to get quickly to the merits, the
11 merits of this case, albeit we concede this is a very
12 long sentence, but to put defendant's cruel and
13 unusual punishment claim in context, as far as the
14 People know, based on our research, there's not been
15 a single prison sentence in the history of this State
16 that has ever been declared cruel and unusual.

17 In the history of the United States of
18 America, there has only been one prison sentence for
19 an adult defendant that was declared cruel and
20 unusual, and that was in the case of *Solem v. Helm*,
21 in 1983, where a low-level, nonviolent recidivist was
22 sentenced to a life mandatory sentence without the
23 possibility of parole for bouncing a one hundred-
24 dollar check.

25 Here, of course, defendant's conduct is far

1 different. He was an off-duty police officer who
2 committed multiple heinous, violent acts of sexual
3 assault. And I won't even get into the details of
4 it; they are in the record for Your Honors to look
5 at.

6 But to say the least, the content of the
7 defendant's conduct here was a far cry from bouncing
8 a hundred-dollar check, which was the case in Solem.

9 And the defense can't point to another case
10 throughout the country where a serious, violent felon
11 who committed multiple crimes, whether over the
12 course of the same criminal transaction, or on
13 separate days, received what essentially amounts to a
14 life sentence, and where that sentence was regarded
15 as cruel and unusual.

16 As the Supreme Court and this court have
17 observed, applying the cruel and unusual punishment
18 clause to sentences of - - - to prison sentences
19 really can only come up in the exceedingly rare case.

20 And given the facts of this case, given the
21 egregiousness of the defendant's sentence, given the
22 severity of the Penal Law provision under which
23 defendant was convicted here, and the reasons for the
24 Penal Law provision, for predatory sexual assault,
25 this is obviously not the exceedingly rare case.

1 And in any event, as I started my argument,
2 defendant's arguments to the contrary are simply
3 unpreserved for this court's review under well-
4 settled precedent.

5 And unless Your Honors have any questions,
6 we'll rest on our brief.

7 CHIEF JUDGE DIFIORE: Thank you, Mr.
8 Hebert.

9 MR. HABER: Thank you.

10 CHIEF JUDGE DIFIORE: Mr. Savitt.

11 MR. SAVITT: Thank you, Your Honor.

12 First of all, of course I appreciate my
13 colleague's endorsement of my skills. I almost feel
14 that it's a - - - that - - - that I'm willing to
15 agree with Your Honor that perhaps I was not entirely
16 competent by not actually saying the words Eighth
17 Amendment, but I did say, and perhaps to my credit,
18 perhaps to my shame, that he shouldn't be punished as
19 if he committed a triple murder.

20 And it's true that I wasn't surprised,
21 certainly at the time of the sentencing, that the
22 People would ask for a maximum punishment, but I must
23 tell you, I was shocked that the maximum punishment
24 was actually imposed by the judge.

25 The fact of the matter is, Your Honor, that

1 if we're going to start looking at - - - at various
2 cases, such as People v. Ingram, I mean, People v.
3 Ingram was a relatively short opinion, back in 1986,
4 and at that time, I - - - I understand that there was
5 an issue raised by the appellant about Eighth
6 Amendment, but the fact of the matter is that the
7 case was really about a felony murder statute, and
8 whether or not there was any preservation to a
9 challenge to the felony murder statute, when the
10 appellant in that case had been charged and convicted
11 for invading a home, and somebody gets a heart attack
12 inside the home, the question was whether or not, you
13 know, he preserved any challenge to the felony murder
14 statute, or that whether counsel asked for some sort
15 of a - - -

16 JUDGE ABDUS-SALAAM: Counsel, I agree with
17 you. I thought Ingram was a very short opinion, so I
18 got the records in Ingram to find out what was really
19 going on, because I thought maybe counsel might have
20 raised an Eighth Amendment challenge, but he didn't,
21 because both sides, both the People and the defendant
22 agreed with the - - - asked the court to impose the
23 minimum sentence.

24 MR. SAVITT: I - - -

25 JUDGE ABDUS-SALAAM: And he did not raise a

1 in the minimum, in the case of Ingram, who is, you
2 know, like your client, someone who had never
3 committed a crime before, and had just tried to
4 commit a burglary, and as a result of that, the
5 person he committed the burglary against had a heart
6 attack and died. Those are the facts of Ingram.

7 MR. SAVITT: I understand that.

8 JUDGE ABDUS-SALAAM: Right. And so that's
9 the felony murder that you're talking about - - -

10 MR. SAVITT: That - - - that's correct.

11 JUDGE ABDUS-SALAAM: And both the - - - the
12 defendant and the People thought that the minimum
13 sentence was appropriate in that case, and the court
14 imposed the minimum sentence, but the defendant then
15 later thought, well, you know what, that's too much.
16 That sentence is excessive, and it's cruel and
17 unusual, but he never raised that to the - - - to the
18 sentencing court.

19 MR. SAVITT: I understand. But to your
20 point, People v. Ingram involved a case where felony
21 murder, in fact, was - - - was the law that fit the
22 crime. A person doesn't have to intend, as Your
23 Honors know, to - - - to murder anybody, or kill
24 anybody in the course of a burglary, but if somebody
25 dies as a result of that, it's felony murder.

1 Here, it's a little - - - it's different.

2 CHIEF JUDGE DIFIORE: Are there any
3 circumstances, counsel, where the gun point rape of
4 an adult woman causing a life sentence would be
5 unconstitutional?

6 MR. SAVITT: Yes, Your Honor. I believe
7 this is the case, and - - - and - - -

8 CHIEF JUDGE DIFIORE: I'm sorry. I meant
9 to say Constitutional. Excuse me.

10 MR. SAVITT: It was Constitutional.

11 CHIEF JUDGE DIFIORE: Um-hum.

12 MR. SAVITT: We would have to look at - - -
13 at various factors that, frankly, just - - - Judge
14 Carruthers did not. And we'd have to look - - - we'd
15 have to look at the defendant, whether or not he has
16 any - - - any prior criminal history, whether or not
17 this was, in fact, abhorrent to the rest of his life.

18 JUDGE ABDUS-SALAAM: Had the reason Judge
19 Carruthers didn't look at those factors is because
20 you didn't bring them to his attention; isn't that
21 true, counsel?

22 MR. SAVITT: No, I did, Your Honor. I
23 argued that my client is a first time offender, it's
24 a - - - it's a single episode, is a single victim.
25 It's a terrible crime, but don't punish him as if he

1 killed three people. And that - - - that's where the
2 Eighth Amendment and Article - - - Article 1 Section
3 5 come into play.

4 JUDGE FAHEY: Well, you see, that requires
5 an analysis of the harshness of the crime, the
6 harshness of sentence and the seriousness of the
7 crime, and then you have to compare crimes within
8 jurisdictions, and then similar sentences for similar
9 crimes within jurisdictions.

10 Usually, that's the standard that Eighth
11 Amendment cases are argued with under the Supreme
12 Court standard.

13 MR. SAVITT: Yes, Your Honor.

14 JUDGE FAHEY: And that's where our lack of
15 record becomes a problem. But anyway, I do
16 understand your argument, but it's - - - it's
17 difficult, I think, to make it on this record.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. SAVITT: Thank you very much, Your
20 Honor.

21 CHIEF JUDGE DIFIORE: You're welcome.

22 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Michael Pena, No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

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