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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 5

MICHAEL THOMAS,

Respondent.  
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20 Eagle Street  
Albany, New York  
January 9, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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CHIEF JUDGE DIFIORE: The next appeal on the calendar is appeal number 5, the People of the State of New York v. Michael Thomas.

Good afternoon, counsel.

MS. JOYCE: Good afternoon, Your Honors. May it please the court. Jean Joyce for appellant, Brooklyn District Attorney's Office.

Your Honor, I'd like to request two minutes for rebuttal, if I may.

CHIEF JUDGE DIFIORE: You may.

MS. JOYCE: Your Honor, the People are asking this court to - - -

JUDGE RIVERA: Counsel, I'm a little confused by your rule because it appears to me that your rule essentially measures sequentiality from the time of conviction, because your position is the sentence doesn't really matter; what matters is whether or not the defendant has been chastened by the prior conviction, right? And - - - and I'm having difficulty with that particular approach because if that's what the legislature meant, once you have a conviction it doesn't matter when the sentence occurs, it's just the conviction; it's just that they've committed that crime, they would have said so, and they've had opportunities to do that on several occasions and they



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haven't.

MS. JOYCE: So our rule is that the original sentencing date should control, not just the conviction date but the original sentencing date.

JUDGE RIVERA: If the sentence is vacated - - -

MS. JOYCE: That's correct.

JUDGE RIVERA: - - - there's no original sentence, right?

MS. JOYCE: Well - - -

JUDGE RIVERA: There's only one sentence, correct?

MS. JOYCE: There is a sentence, an original sentence, and then there may be, in a variety of circumstances, a resentence, which is an alteration of a sentence.

JUDGE RIVERA: But if an sentence is vacated and another sentence is entered - - -

MS. JOYCE: Right.

JUDGE RIVERA: - - - do you agree there's only one sentence?

MS. JOYCE: I agree there is one original sentence and there may be a resentence, that the original sentence may be vacated; that's true. In this case the sentence was vacated because it had an illegality.



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2 However, we're talking about the date of that original  
3 sentence as being the triggering date for the rule. And  
4 the reason for that is the legislative intent which can  
5 really only be given effect by use of that original  
6 sentence.

7 JUDGE WILSON: Have you seen anything in the  
8 legislative history - - - I've looked and I haven't found  
9 anything - - - that - - - that bears on the question of why  
10 the legislature picked, instead of the date of conviction  
11 the date of sentence and required that the sentence be  
12 issued before the conviction, before the crime to which the  
13 enhancement is being applied? I mean, did you see any  
14 legislative discussion of that or anything?

15 MS. JOYCE: Conviction versus sentence?

16 JUDGE WILSON: Yeah.

17 MS. JOYCE: Well, Morse talks about the idea of  
18 chastening, which is an important part of - - - of the  
19 statutory interpret - - - or statutory intent. In other  
20 words, a defendant has to be given, essentially, notice of  
21 the conviction and that it's - - - it's got some  
22 consequences. That sentence is imposed. He - - - the  
23 defendant hears what the consequence will be, and then has  
24 the opportunity to become chastened by fulfilling his  
25 sentence and staying out of the trouble for the ten-year

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period.

JUDGE STEIN: So it's that pronouncement, like,  
just like - - -

MS. JOYCE: Correct.

JUDGE STEIN: - - - we talked about in Sparber  
things, the pronouncement of sentence, right, that's - - -

MS. JOYCE: That is an important part of the - -  
- of the process, of the intent of the legislature that - -  
-

JUDGE FAHEY: So you would you're essentially  
arguing to expand the Sparber analysis to cover this  
situation?

MS. JOYCE: Yes, I am saying that even if a  
sentence has been vacated because of some irregularity, it  
may be a plen - - - it may require a plenary proceeding.

JUDGE FAHEY: Well, two things. First, it seems  
that the Appellate Divisions, in my review of the cases,  
since about '94, have pretty much ruled the way the Second  
Department did in Esquiled, both - - - all four Appellate  
Divisions have seemed to consistently rule in this fashion.

Now, interestingly, when they have ruled in this  
fashion, sometimes the lookback period helps the defendant,  
sometimes it helps the People. Would you argue that if  
this rule went into effect that the People could ask for a



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resentencing in certain circumstances to bring someone within a lookback period?

MS. JOYCE: Well, first I would say that with respect to the Second Department and the - - - the underlying cases and the Appellate Divisions, I think some of those are based on a - - - really a too broad reading of Bell, of this court's decision in Bell.

JUDGE FAHEY: Okay. But it's been since '94 that they've been ruling in this way, so - - - and I didn't find any Appellate Division cases that really support your point of view. The only thing that supports your point of view is Sparber, and that's pretty much been seen as a ministerial correction by the case law in this court, although I can't say definitively it is, because I don't think definitively it is. But that's my personal view of it.

So that's why I'm asking you this question because there seems to be a very, very big difference between a resentencing and what referencing based on an illegality and what we characterize as an original sentence.

In other words, there's no need to make a fetish out of the phrase "original sentence". What matters in sentencing is when was the legal sentence passed for

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2 enhancement purposes. And enhancement clearly is much more  
3 than an administrative correction or a pronouncement. It's  
4 much more than that; it has serious consequences for all  
5 the parties involved.

6 MS. JOYCE: Right, and the problem with using the  
7 resentencing date is it will not affect the legislative  
8 intent that the - - - the - - - an ever receding  
9 conviction, say, in this case the conviction occurred in  
10 1989, he - - - the underlying conviction he was resentenced  
11 in 2009.

12 JUDGE FAHEY: But that isn't what the case law  
13 shows. What the case law shows that sometimes it helps the  
14 People. They get a case within the lookback period. There  
15 are some Appellate Division cases that say that, and then  
16 there are some Appellate Division cases that benefit the  
17 defendant. And point of fact, this defendant may be  
18 benefited by it, but I don't think you can fairly say that  
19 this will affect - - - that this is a one-sided ruling, one  
20 way or the other. It seems to me that if we say that the  
21 sentence has to be a legal sentence to be considered for  
22 enhancement purposes, that could affect either party in the  
23 lookback.

24 MS. JOYCE: Sure. Whatever rule you'll come up  
25 with, it's going to affect both sides. And our position is



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that what will better affect the legislative intent is the original sentencing date because the defendant is chastened, whereas on resentencing twenty years later, he's not.

JUDGE STEIN: But by the same token, it defeats the legislative intent of giving the defendant - - -

MS. JOYCE: I'm sorry?

JUDGE STEIN: It - - - it defeats the legislative ameliorative intent of the lookback rule. So it may be in - - - you know, not in defendant's favor, but it's still against the legislative intent, isn't it, both ways?

MS. JOYCE: So using the original sentencing date will affect the - - -

JUDGE STEIN: No, if you don't use the original sentencing - - -

MS. JOYCE: Right.

JUDGE STEIN: - - - date you are going contrary to both provis - - - the legislative intent for both provisions.

MS. JOYCE: I believe that's correct, yes.

JUDGE STEIN: Whether it helps or hurts one side or the other, it's still against the legislative intent.

MS. JOYCE: That's our position.

JUDGE FEINMAN: So I want to go back to the



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2 beginning, Bell. All right? In Bell you have the  
3 judgment, which is composed of the conviction and the  
4 sentence, and there, because the conviction is upset,  
5 you're basically upsetting the whole judgment, and instead  
6 of getting into all of these issues of are you vacating the  
7 sentence or modifying the sentence or resetting the  
8 sentence or just pronouncing, wouldn't a simpler rule and a  
9 clear-cut rule be that, unless you have disturbed the  
10 entire judgment, then when that judgment became a judgment  
11 is what should control.

12 MS. JOYCE: That's - - - that's a great rule for  
13 me: unless you disturb the entire judgment then - - -

14 JUDGE FEINMAN: Well, I'm not trying to do this  
15 to favor one side or the other - - -

16 MS. JOYCE: Right.

17 JUDGE FEINMAN: - - - I'm trying to have a clear  
18 bright-line rule.

19 MS. JOYCE: It's a clear bright-line rule that in  
20 some circumstances will benefit particular defendants and  
21 in other circumstances will benefit the People.

22 JUDGE FEINMAN: Correct.

23 MS. JOYCE: It happens to be the - - - a rule  
24 that I would agree with but the - - -

25 JUDGE FAHEY: So what would be the effect of such



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a rule? Would that mean that if there was an error in sentence and you had to open up the judgment that the conviction would then be vacated?

MS. JOYCE: If you have an error in sentence - -

-

JUDGE FAHEY: Right, if you - - -

MS. JOYCE: - - - then the sentence can be - - -

JUDGE FAHEY: - - - say that the judgment - - - if you argue that the judgment has to be treated as a whole, and there's a bright-line rule, conviction plus sentence is judgment, then if you vacate the sentence you could conceivably be vacating the conviction. The People aren't arguing that, are you?

MS. JOYCE: No. No. Judgment doesn't appear in the statutory scheme.

JUDGE FAHEY: So if you're not arguing that then you have to inherently stick with the position that conviction and sentence are two different things and they're considered separately, right?

MS. JOYCE: Well, on an original - - - on a judgment and original sentence, they're - - - they're - - -

JUDGE FAHEY: Well, forget about the whole original thing. You know, let's leave that - - -



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MS. JOYCE: They're together.

JUDGE FAHEY: - - - phraseology alone because that's nowhere in the statute. Those are languages that - - - that have been imposed upon in our own analysis. But you can't separate - - - you're not arguing that those are - - - two are inseparable concepts?

MS. JOYCE: No, what I'm saying is that once there's a valid conviction, that's a triggering date along with the sentence that is imposed.

JUDGE FAHEY: Here's - - -

JUDGE RIVERA: But that's my problem; that's not what the legislature said, and the legislature's had an opportunity, time and again, to change the statute to focus on the conviction, which as you rightly point out in your briefs - - - I'm not saying there's not - - - not something to the argument - - - that that is of course when the individual has committed the - - - the unlawful act, if they do this again, they've not been chastened and that's what the legislature is trying to get to. But the legislature could have made that linguistic change, and it has not. It's always focused on the sentence. And there is only one sentence.

MS. JOYCE: Well, I think in Boyer this court said that the original judgment controls even though the



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sentence is - - - was, in part, illegal.

JUDGE WILSON: Well, Boyer is difficult for you, I think, isn't it, because Boyer - - - the rationale in Boyer, at least as I read its holding, depends on the proposition that the term of imprisonment was not changed. And by, I think necessary implication, had the term of imprisonment been changed, which is the case here, Boyer says the opposite result obtains.

MS. JOYCE: I don't read Boyer quite that broadly. I think the point of Boyer was to say, look, in Lingle the Court of Appeals said we are not reopening all of these PRS cases to de novo review.

JUDGE FAHEY: The only problem with, Boyle, Boyer is it says the date of the sentence is the original date on which the defendant received a lawful prison sentence. Here the People admit that these sentences that we're discussing, the 1989 original youthful offender, were not lawful; you've conceded that. So the question is: can an unlawful sentence be used to enhance a lawful subsequent sentence? That's the question before us.

MS. JOYCE: That's for - - -

JUDGE FAHEY: Can something that's unlawful enhance a lawful sentence?

MS. JOYCE: And I would say that it's the date of



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that sentence, not the inherent illegality of it.

JUDGE WILSON: And the date of the sentence - - -

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. JOYCE: Thank you.

JUDGE WILSON: And the date of the sentence is essentially the conviction?

MS. JOYCE: I'm sorry?

JUDGE WILSON: The date of the sentence is essentially the conviction?

MS. JOYCE: Essentially, that's - - - that's one way to look at it. Thank you.

CHIEF JUDGE DIFIORE: Counsel?

Counsel, will you speak to the legislative intent and the fact that if we - - - that your position that the date of resentencing controls, perhaps there's a view that does indeed undermine the legislative intent around sequentiality?

MS. HORLICK: Yes, Your Honor. First I want to introduce myself, Melissa Horlick for Mr. Thomas. Good afternoon.

The legislature was very clear in its language that the sentence must be imposed before commission of the present felony in order for it to qualify under the



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sequentiality provision.

JUDGE STEIN: But is there any statutory basis for distinguishing between a Sparber resentencing and other resentencings for the purpose of - - - of determining the date, for the purpose - - - we're talking about one purpose, the purpose of determining the date of the predicate sentence.

MS. HORLICK: It develops from this court's case law in Boyer and Lingle where the court has very clearly stated that in assessing whether or not the original sentencing - - -

JUDGE STEIN: But that's not statutory; that's this court. And I'll be the first - - -

MS. HORLICK: Yes.

JUDGE STEIN: - - - one to admit that - - - that if you trace all the cases, they are not crystal clear as to - - - you know, as to what the result is. Because I think if you look at Thompson and Estremera, they speak to - - - they clarify, in some ways, Boyer and Acevedo and - - - and so on. So I'm asking you whether there's anything in the statute that dictates this distinction that has been drawn in some of the cases - - -

MS. HORLICK: Um-hum.

JUDGE STEIN: - - - between - - - between the

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Sparber resentencings and other kinds of resentencing.

MS. HORLICK: I don't think that there is anything in the statute, but I - - - I do disagree that the cases are not clear. Thompson was actually, I think, a very good case for me because Thompson's sentence was a legal sentence. And the court pointed out, I think three times in that decision, that when probation was violated and the defendant was resentenced to a term of imprisonment, that that was not the analog to annulling a sentence. And the exact opposite occurred in this case. My client's sentences were completely annulled and vacated because they were illegal.

JUDGE STEIN: Well, let's talk about Estremera that said that Sparber is - - - is still a resentencing of an illegal sentence.

MS. HORLICK: I think Estremera is mostly on point about the defendant's right to be present at that type of a proceeding.

JUDGE STEIN: But that's how we derived the right to be present.

MS. HORLICK: I think Estremera says that any time that the defendant is being sentenced he has, of course, the right to be present to hear that sentence. In that case the defendant had filed a motion, so he had every



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right to know how the court was going to impact and decide his sentence. I agree with Estremera that the defendant has the right to be present but - - -

JUDGE STEIN: But if Estremera was not an illegal sentence, then what's the point of resentencing?

MS. HORLICK: But the court in Sparber and Acevedo, and in all of its decisions, has rightfully characterized post-release supervision as a more technical procedural remedy akin to a misstatement or a clerical error. And the heart of the defendant's sentence is not implicated at a Sparber resentencing. The heart of the defendant's sentence, on a post-release supervision case, is legal.

JUDGE FAHEY: Well, hasn't the legislature, subsequent to Sparber and this line of cases, actually spoken to clarify their position on - - - on these types of resentencing and in essence backstopped the Court of Appeals opinions?

MS. HORLICK: I'm sorry; can you repeat that?

JUDGE FAHEY: Hasn't the legislature passed a subsequent law, after Sparber, saying that these Sparber resentencings, in essence, are valid?

MS. HORLICK: If the - - - if - - - under certain conditions, yes, they will allow a certain sentence in a



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2 plea arrangement to remain, if the district attorney's  
3 office agrees to that. But my client's situation is  
4 completely different from a Sparber resentencing.

5 Going back to how we're here and why we're here,  
6 when my client was just a seventeen-year-old indigent - - -

7  
8 JUDGE GARCIA: Counsel, going back to that, I  
9 mean, it seems, as a policy matter, and in view of Judge  
10 Stein's comments about, you know, this court's role in  
11 determining this issue, your client, I think, ultimate goal  
12 is to be sentenced as a first-time offender and get rid of  
13 a persistent violent felony offender sentence despite the  
14 fact that there are three prior robbery felonies on his rap  
15 sheet that he was sentenced for, convicted and originally  
16 sentenced for before that persistent violent felony  
17 offender statute was imposed. How is that good policy?  
18 How does that in any way further the goal of the  
19 legislature?

20 MS. HORLICK: I don't think the legi - - - I  
21 understand my - - - I admit my client has a record, and he  
22 may benefit from some remedy that the court may - - - may  
23 or may not decide here today. But that's really besides  
24 the point. My client - - -

25 JUDGE GARCIA: Is it besides the point of a



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statute that was geared towards exactly addressing this type of recidivism?

MS. HORLICK: The statute was very comprehensive in laying out a long list of criteria in order for any - - - any felony to qualify as a predicate felony. And it's an integrated system. So the legislature did not intend to punish every single person that commits another crime; it has to fit within the statute. And my client is only seeking to be sentenced in accordance with the law as it's been written and as it's been interpreted by this court.

JUDGE STEIN: Well, sentencing is also laid out in the statute as to what types of sentencing are included, and nowhere is the term "resentencing" included in the statute. So does that tell us anything?

MS. HORLICK: I don't think so because I think the legislature would have been hopeful that legal sentences were at issue, not illegal ones. And this goes back to why we're here. My client received a youthful offender adjudication when he was just a - - -

JUDGE STEIN: But people are resentenced for many, many reasons, and the legislature certainly is presumed to be aware of that. And so as it's putting together, as you say, this - - - this broad and - - - and carefully crafted system, and seems to have thought of a



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lot of different things, you would - - - wouldn't they have thought about using the word "resentencing". And if they intended to - - -

MS. HORLICK: Um-hum.

JUDGE STEIN: - - - have it apply to resentencing, they've had plenty of opportunity to do that, notwithstanding our cases.

MS. HORLICK: I think - - - I think that might actually complicate things because not all resentencings will reset the clock, not just in terms of Sparber, but in other cases.

JUDGE FAHEY: Well, is there a point of view that can say - - - could you say that the legislature has actually not acted on recommendations that the original sentencing date should be used for predicate felony offenders? The way I understand it is the advisory Committee on Criminal Law and Procedure in 2013 issued a report recommending that the original date be used for predicate felony offenders, not the resentencing date, so long as the original conviction remains intact. This has been before the Senate of number of times, and they haven't acted on it. That doesn't - - - that seems to support your point of view, and that if the legislature has had something in front of it a number of times and hasn't acted



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on it, I don't think that's dispositive by any means,  
legally.

MS. HORLICK: Yeah.

JUDGE FAHEY: I don't want to overstate it, but  
it seems to indicate that - - - that there's not support in  
the legislative body for it, one way or the other.

JUDGE RIVERA: Counsel, I also just want to  
clarify. I understood your argument to be a strict  
statutory construction argument. You're not - - - you're  
not arguing about policy, which I do view as the DA's  
argument. It's not our role to make policy, is it?

MS. HORLICK: I'm not arguing about policy. It  
is - - -

JUDGE RIVERA: You're arguing about what the  
statute says on its plain language, what its terms mean,  
correct?

MS. HORLICK: Its plain meaning and the way this  
court has repeatedly interpret - - - interpreted it that PR  
- - -

JUDGE RIVERA: But in terms what might be better  
policy. Wouldn't it might be better policy - - -

MS. HORLICK: Um-hum.

JUDGE RIVERA: - - - if the trigger was the  
conviction? That's not for this court to decide, correct?



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MS. HORLICK: That would be for the legislature to - - -

JUDGE STEIN: The legislature's already told us what the purpose of the statute is, right?

MS. HORLICK: Yes, and - - -

JUDGE RIVERA: But the legislature has never amended it to address this issue regardless of the fact that the case law is very clear.

MS. HORLICK: Correct, the legislature, as many of the judges has pointed out, has had opportunity to amend it and has not.

I do also just want to point out that my client received illegally harsh sentences. This is not a minor correction, as the prosecutor seems to contend in their brief. He was twice sentenced to more prison than he ever should have received. His youthful offender adjudications were really just an empty promise to him, because just shortly after, the same DA's office went into court - - -

JUDGE STEIN: He's already served all those sentences, right?

MS. HORLICK: Yes, he has.

JUDGE STEIN: Okay. So there's - - - the only practical benefit to him right now - - - and I'm not saying that - - - that it's right and that it should have happened

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that way, but now, as we sit here today, the only practical benefit to him is to reset the clock.

MS. HORLICK: Well, I think that he was entitled to be resentenced in accordance with the law.

JUDGE STEIN: No question about that.

MS. HORLICK: And it is unfortunate that we couldn't - - -

JUDGE STEIN: I'm asking about a practical benefit. There's nothing else that I'm not aware of, is there?

MS. HORLICK: I don't know that I - - - I may see the practical benefit differently. I think that he had a right to have those sentences corrected; that was one benefit, and we achieved that when he got his 1993 sentence vacated. He may - - -

JUDGE RIVERA: So does the statute require that if you've been unfortunate enough to have to serve the term you should not have that you get some practical benefit from a resentencing?

MS. HORLICK: No, but I don't think that can justify punishing him again, even based on a legal sentence.

JUDGE GARCIA: There is another sentence at issue here, not in this case, right? He has a subsequent



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sentence to this one that's an issue here, or am I having that wrong?

MS. HORLICK: No, he does have another sentence.

JUDGE GARCIA: So if you were to do this and be successful, the next domino would be the next sentence. So that would be the practical benefit, right, because he's still serving the twenty-five to life.

MS. HORLICK: He's serving twenty-five to life, and depending on what happens here I would have to assess that and make a decision whether or not we took another step, but that's, you know, not before the Court today.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. HORLICK: Thank you.

CHIEF JUDGE DIFIORE: Counsel, do you care to exercise your rebuttal time?

MS. JOYCE: Just one moment.

CHIEF JUDGE DIFIORE: Um-hum.

MS. JOYCE: I just want to point out that - - -

JUDGE RIVERA: Counsel, why didn't the various district attorneys, during these sentencings, bring to the court's attention that the enhancements were incorrect?

MS. JOYCE: Why didn't - - - I - - -

JUDGE RIVERA: That he was going to be sentenced to time - - - more time than he should serve.



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MS. JOYCE: Well, he was using a number of aliases and it could have been that there was confusion as to who he was and whether his priors were youthful offender adjudications or not. The record isn't clear as to why there was that confusion.

But I would like to point out that if he had - - he did find out, at least in 1990, as to one of the convictions, that he was wrongly sentenced as a predicate. If he had moved any time before 1993 and corrected that sentence, and then committed another felony, using my adversary's rule of a resentencing rule, he would still be a predicate. And that's seems arbitrary that it depends on at what point in time the defendant moves for resentencing.

Thank you for your time.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Michael Thomas, No. 5, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: \_\_\_\_\_

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