

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS  
STATE OF NEW YORK

-----

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 19

DARIA N. EPAKCHI,

Respondent.

-----

20 Eagle Street  
Albany, New York  
February 11, 2021

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:

JUSTIN W. SMILOFF, ESQ.  
SUFFOLK COUNTY TRAFFIC AND PARKING VIOLATIONS AGENCY  
Attorney for Appellant  
100 Veterans Memorial Highway  
Hauppauge, NY 11788

DAVID A. DAY, ESQ.  
LAW OFFICES OF DAVID A. DAY, P.C.  
Attorney for Respondent  
3 School Street  
Suite 303  
Glen Cove, NY 11542

Penina Wolicki  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, counsel.  
2 This is appeal number 19 - - - The People of the State of  
3 New York v. Daria Epakchi. Counsel?

4 MR. SMILOFF: Good afternoon, members of this  
5 honorable court. My name is Justin Smiloff, and I'm  
6 representing the appellant, The People of the State of New  
7 York, in this matter. Before I begin, Madam Chief Justice,  
8 may I reserve five minutes of my time for rebuttal?

9 CHIEF JUDGE DIFIORE: Yes, sir, you may.

10 MR. SMILOFF: Thank you.

11 CHIEF JUDGE DIFIORE: You may proceed.

12 MR. SMILOFF: I would like to start with - - -  
13 thank you, Judge.

14 I would like to start with addressing the issue  
15 raised by my adversary in his brief regarding the  
16 jurisdiction of the court to hear this matter.

17 We submit that the court does have jurisdiction  
18 to hear this matter, pursuant to CPL 450.90(2)(a), which  
19 allows the court to determine whether or not the  
20 intermediate appellate court's reversal was based upon the  
21 law alone or upon the law and such facts which, but for the  
22 determination of law, would not have led to reversal or  
23 modification.

24 Additionally, in People v. D'Allesandro and  
25 People v. Giles, this court found that it's not bound by an



1 intermediate appellate court's characterization of an  
2 order, and must determine on its own whether a reviewable  
3 legal question exists.

4 JUDGE FEINMAN: Chief, if I may?

5 CHIEF JUDGE DIFIORE: Yes, Judge Feinman.

6 JUDGE FEINMAN: So more simply, isn't it a fact  
7 that regardless of how they label it, when you, as an  
8 intermediate appellate court, create a legal standard, just  
9 because you call it an interest of justice, you are  
10 creating something, as a matter of law.

11 And - - - and what seems to have gone here - - -  
12 on here, is that this particular Appellate Term, contrary  
13 to every other intermediate appellate court in the state,  
14 has chosen to create a rule that allows it to sort of  
15 basically do ad hoc justice on each of these, contrary to  
16 Nuccio. Would you agree with that?

17 MR. SMILOFF: Yes, Judge. A hundred - - - I  
18 would agree with that a hundred percent. In the dozens of  
19 cases over thirty years, the - - - the Appellate Term has  
20 used that rule couched in a - - - disguised as an interest-  
21 of-justice determination, that is really a legal standard  
22 in - - - for over thirty-one years.

23 JUDGE STEIN: Judge DiFiore, may I ask a  
24 question?

25 CHIEF JUDGE DIFIORE: Yes, Judge Stein.



1 JUDGE STEIN: Yes. Counsel, would you just  
2 clarify me - - - for me whether you are asking us to  
3 clarify Nuccio to - - - or extend Nuccio to a reprosecution  
4 by a subsequent simplified information as opposed to the  
5 long form information? Is - - - is that your request here?

6 MR. SMILOFF: Judge, our req - - - our position  
7 is that Nuccio covers both simplified informations as well  
8 as long form informations.

9 In Nuccio, the accusatory instrument in question  
10 happened to be filed on a long form. In that case, there  
11 was the misdemeanor and - - - driving while intoxicated;  
12 and there was an arrest. And that was the form that  
13 happened to be used in that case.

14 However, in this case, the trial judge determined  
15 that the fact that the simplified information that was used  
16 for reprosecution here, combined with the supporting  
17 deposition, was the same in - - - served the same purpose  
18 as the long form. It was - - - it was the functional  
19 equivalent of a long form.

20 So we submit that Nuccio was not limited to long  
21 forms. And here, the accusatory instrument that the  
22 reprosecution was predicated based upon, was similar - - -  
23 was equivalent to a long form in content, purpose, and  
24 fact.

25 JUDGE STEIN: Would it - - - would it make a



1 difference if the second simplified information was not  
2 accompanied by the - - - the supporting deposition?

3 MR. SMILOFF: Yes, Judge. In that case, you  
4 would have just an accusatory instrument. And here - - -  
5 and it would just - - - it would just be - - - the  
6 accusatory instrument wouldn't have the narrative section.  
7 It wouldn't have the rest of it, where it's a - - - a long  
8 form has a narrative and a supporting deposition has a  
9 narrative, that lets the individual know what they're  
10 charged with in greater detail, so they can pre - - -  
11 better prepare for trial.

12 And here, that was provided with the fact that  
13 the supporting deposition accompanied the allegation, the  
14 accusatory instrument itself, which merely states the - - -  
15 the charge, the person's name, and the vehicle information.

16 JUDGE STEIN: So just to be perfectly clear, if  
17 here a new pro - - - a new prosecution was commenced with a  
18 simplified information, without the supporting deposition,  
19 giving the defendant the opportunity to, again, request the  
20 supporting deposition within the time limits required, that  
21 would not - - - that - - - that would have been  
22 dismissible, right at the beginning.

23 MR. SMILOFF: Correct, Judge. It would have been  
24 dismissible upon motion, at the beginning.

25 JUDGE STEIN: Okay. Even if - - - even if the



1 time set forth in the statute generally for providing  
2 supporting depositions hadn't run yet on that new  
3 prosecution?

4 MR. SMILOFF: Yes, Judge. I - - - I would agree  
5 with that.

6 JUDGE STEIN: Okay.

7 MR. SMILOFF: But obviously that's not the  
8 situation before the court here.

9 JUDGE FAHEY: Judge, can I ask a question?

10 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

11 JUDGE FAHEY: Judge Stein's point, I was  
12 concerned about that too. You're saying if the People try  
13 to re prosecute within the allowable time, that there would  
14 be another dismissal, in the interests of justice. Mr.  
15 Smiloff? Do you understand what I'm saying?

16 MR. SMILOFF: Judge, could you please clarify the  
17 question?

18 JUDGE FAHEY: Sure.

19 MR. SMILOFF: I just want to make sure I  
20 understand exactly - - -

21 JUDGE FAHEY: Sure, no problem.

22 MR. SMILOFF: - - - what you're asking.

23 JUDGE FAHEY: So - - - so it's initially  
24 dismissed. You don't have an affidavit in the interest - -  
25 - from the officer. And so it's dismissed in the interests



1 of justice.

2 You file a simplified form within the allowable  
3 time. Would it still be dismissed? Is that the practice  
4 in the Appellate Term, to still dismiss it in the interests  
5 of justice?

6 MR. SMILOFF: Yes, the Appellate - - - the  
7 Appellate Term, whenever one is dismissed, in every case  
8 that they - - - that they've decided, they will dismiss the  
9 subsequent re - - - the instrument - - -

10 JUDGE FAHEY: The - - -

11 MR. SMILOFF: - - - that was - - - the  
12 reprosecution was based upon.

13 JUDGE FAHEY: So did that happen here?

14 MR. SMILOFF: No. Here there was - - - the  
15 supporting deposition was provided with the - - - the newly  
16 - - - that the - - - the instrument that reprosecution was  
17 predicated upon. They actually were served at the same  
18 time upon the respondent.

19 JUDGE FAHEY: Thank you.

20 JUDGE WILSON: Chief, if I might?

21 CHIEF JUDGE DIFIORE: Yes.

22 JUDGE WILSON: I wanted to go back to the  
23 question - - -

24 CHIEF JUDGE DIFIORE: Judge Wilson.

25 JUDGE WILSON: - - - Mr. Feinman - - - Judge



1           Feinman was asking.

2                   Mr. Smiloff, is it - - - my understanding is that  
3           the court has the power to dismiss the indictment and  
4           prevent reprosecution out of the interest of justice, at  
5           least if it does that on a case-by-case basis. Are you  
6           with me so far?

7                   MR. SMILOFF: Yes, Judge.

8                   JUDGE WILSON: So if it said there's something -  
9           - - you know, Ms. Epakchi is seventeen years old and she's  
10          been through a lot, and we're dismissing it, you would have  
11          no quarrel with that?

12                  MR. SMILOFF: Yes, Judge. And that - - - and we  
13          would never have appealed that issue to this court.

14                  JUDGE WILSON: Right. Right.

15                  MR. SMILOFF: Because it would a fact-specific  
16          dismissal.

17                  JUDGE WILSON: Right.

18                  MR. SMILOFF: Here they didn't - - - they didn't  
19          - - -

20                  JUDGE WILSON: And - - -

21                  MR. SMILOFF: - - - know - - -

22                  JUDGE WILSON: I got it. I just - - - that's  
23          just where I'm starting from. So next - - - next  
24          hypothetical: instead of the rule that the Appellate Term  
25          has, they have a rule that says we will always, with no



1 exception, dismiss an indictment, when you fail to provide  
2 the supporting declaration within the time. That's a - - -  
3 that seems to me, that's a rule of law, and you - - - your  
4 position is that's reviewable by us?

5 MR. SMILOFF: Yes, Judge. I - - - we submit - -  
6 -

7 JUDGE WILSON: Okay.

8 MR. SMILOFF: - - - that that is - - - that is a  
9 rule of law, and it's reviewable by the - - - by the court  
10 - - -

11 JUDGE WILSON: Okay.

12 MR. SMILOFF: - - - pursuant to 450.90(2).

13 JUDGE WILSON: So they have something a little  
14 bit different here, which is there's the ability of the  
15 People to prove special circumstances to allow the - - -  
16 the reprosecution, correct?

17 MR. SMILOFF: Correct - - - correct, Judge.

18 JUDGE WILSON: So why isn't that still not a  
19 rule; that is, it's just explaining, essentially, that the  
20 burden is going to be on the People rather than on Ms.  
21 Epakchi, to justify the exercise of interest of  
22 jurisdiction - - - justice jurisdiction. Why isn't it  
23 still discretionary, because of that exemption?

24 MR. SMILOFF: It's not dis - - - it's - - - it's  
25 not discretionary because they're - - - in each and every



1 case this rule has been applied - - - approximately a dozen  
2 cases on this issue have come up subsequent to this case as  
3 well. And in each and every case, they've applied that  
4 rule; and never in their decision, have they specified what  
5 circums - - - special circumstances are. They've never  
6 defined it. It's in a - - - we submit - - - illusory term  
7 that they've never provided a definition for.

8 And in the one case they found that special  
9 circumstances were present, People v. Alexander. They  
10 didn't say what those special circumstances were. It was a  
11 very brief opinion just saying they found special  
12 circumstances, not what they are or what they were in that  
13 case. And then in that case, they were permitting  
14 reprosecution, based upon - - -

15 JUDGE STEIN: Chief, if I may ask a question?

16 CHIEF JUDGE DIFIORE: Judge Stein.

17 JUDGE STEIN: Would - - - would you agree with  
18 me, as - - - as I - - - as I look at it a little bit, it  
19 sort of seems like the - -the reverse side of the statute  
20 which allows that discretion to dismiss. But basically  
21 what it says is it's an abuse of discretion as a matter of  
22 law not to dismiss a second simplified information under  
23 these circumstances. Is that how you understand the  
24 Appellate Term's rule?

25 MR. SMILOFF: I was - - - I understand the



1 Appellate Term's rule to be that any case they will dismiss  
2 on - - - as reprosecuted, unless their arbitrary standard  
3 that's undefined can be met, which on the trial level,  
4 that's impossible to know, because they've provided  
5 absolutely no guidance as to what that standard means.

6 So a trial judge is looking at this with nothing  
7 to go on.

8 JUDGE RIVERA: Judge, if I may ask - - -

9 CHIEF JUDGE DIFIORE: Counsel - - - counsel, is  
10 the - - - counsel, is the rule set forth by the Appellate  
11 Term, is that supported anywhere in the CPL?

12 MR. SMILOFF: No, Judge. It's not submitted - -  
13 - supported anywhere in the - - - in the - - - the CPL or  
14 in Nuccio, or in any other decision of the Court of  
15 Appeals.

16 JUDGE RIVERA: Judge, if I may ask a question?

17 CHIEF JUDGE DIFIORE: Judge Rivera.

18 JUDGE RIVERA: Thank you.

19 So and I - - - I'll ask this of Mr. Day also.  
20 Mr. Smiloff, what - - - what's the - - - what's the genesis  
21 of the rule? What - - - what is the problem the Appellate  
22 Term is trying to address with the "rule", with this  
23 approach?

24 MR. SMILOFF: It appears, Judge that their - - -  
25 that their - - - their primary concern is judicial economy



1 and calendar control. And interestingly, once a case has  
2 already been tried and it's up to appeal, then it's - - -  
3 it's already taken up a spot on the calendar. So it's a  
4 bit of dichotomy they make - - - they cite this in every  
5 one of these decisions, for calendar control. But it  
6 already was tried, it was already appealed, it was already  
7 argued before them. So - - - or it - - - that doesn't even  
8 serve the purpose that they cite.

9 JUDGE RIVERA: Okay. So it's an intent to  
10 incentivize compliance, so that there's not another  
11 document - - - let's just put it that way - - - presented  
12 to the court?

13 MR. SMILOFF: Correct. It looks as if that  
14 they're saying, look, if you re prosecute, the trial court  
15 allows you to re prosecute, they appeal it, we're just going  
16 to dismiss it. We're just going to reverse the conviction  
17 and dismiss it. So why are you wasting your time  
18 re prosecuting if we're going to dismiss it anyway on  
19 appeal.

20 CHIEF JUDGE DIFIORE: Thank you.

21 JUDGE FEINMAN: Well - - - Chief, if I may?

22 CHIEF JUDGE DIFIORE: Yes.

23 JUDGE FEINMAN: Isn't there also a concern,  
24 though, following up on Judge Rivera's question, that these  
25 are traffic infractions. Traffic infractions are not



1 subject to speedy trial. And what they're really trying to  
2 do is say, you know what, we're not going to let these hang  
3 over people's heads indefinitely. And you know, this is  
4 the only way we can regulate this, because there is no  
5 speedy trial requirement on traffic infractions?

6 MR. SMILOFF: Judge, the rule is - - -

7 JUDGE FEINMAN: Isn't that also an alternative  
8 rationale for - - -

9 MR. SMILOFF: Judge, although - - - although  
10 there is no speedy trial applicable to traffic infractions,  
11 there is only a one-year statute of limitations. So after  
12 a year, it cannot be reprosecuted. So it's the - - - the  
13 cutoff is one year anyway. So the defendant will not have  
14 the matter hanging over their head for a period of time  
15 longer than a year.

16 JUDGE FAHEY: Judge - - -

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 JUDGE FAHEY: - - - can I ask one question?

19 CHIEF JUDGE DIFIORE: Oh, Judge Fahey, yes.

20 Excuse me.

21 JUDGE FAHEY: Just speaking from experience, Mr.  
22 Smiloff, this is one of those points in the judicial system  
23 where practicality and legality collide. I think that the  
24 it's - - - it may be a very practical solution that the  
25 Appellate Term has - - - has come up with. I don't know if



1 it's a - - - if it's a legal solution.

2 But as I understand the problem from my Buffalo  
3 City Court days, what would happen is, is the first time  
4 out, we'd never have an affidavit, because they'd want  
5 everybody to plead out, and then the people who wouldn't  
6 plead out, the second time, they'd do the work and they'd  
7 get their affidavit.

8 But quite often, they'd be overwhelmed, and not  
9 always, but in a number of instances, they wouldn't have  
10 affidavits to - - - to solve the problem. Is that what  
11 we're confronted with here?

12 MR. SMILOFF: No, Judge. We're - - - we're not  
13 confronted with that - - - that - - - that situation.

14 JUDGE FAHEY: Well, let me you ask you this. Is  
15 it your experience that - - - and the first time when  
16 somebody comes in on a V and T charge, let's say running a  
17 stop sign, that there's no affidavit, ever, from a - - - an  
18 officer, or sometimes they're there and sometimes not.  
19 What's your experience?

20 MR. SMILOFF: Right now, the vast majority of  
21 tickets are served - - - they're electronic tickets. And  
22 the Department of Motor Vehicles, has the simplified  
23 information and the supporting deposition. It's - - - it's  
24 two separate pieces of paper. And it's actually - - -

25 JUDGE FAHEY: But it's all - - - it's all done at



1 - - -

2 MR. SMILOFF: - - - stop.

3 JUDGE FAHEY: Let me just ask this. It's all  
4 done at once now, isn't it?

5 MR. SMILOFF: Correct.

6 JUDGE FAHEY: Right.

7 MR. SMILOFF: They're both served at the traffic  
8 stop.

9 JUDGE FAHEY: But - - - but it didn't used to be  
10 that way. They used to be separate.

11 MR. SMILOFF: Right. Correct. When they - - -  
12 the police officer would write the ticket - - -

13 JUDGE FAHEY: So you see - - -

14 MR. SMILOFF: - - - and then - - -

15 JUDGE FAHEY: - - - you see what I'm saying about  
16 the law and practicality colliding with each other, here.  
17 Okay. I've got - - - I've got it. Thank you, Mr. Smiloff.

18 CHIEF JUDGE DIFIORE: And thank you, counsel.

19 Counsel? Unmute yourself, sir. Thank you.

20 MR. DAY: Thank you, Judge - - - Chief Judge.

21 May it please the court, David Day for the respondent.

22 In essence, what the People here are trying to do  
23 is circum - - -

24 CHIEF JUDGE DIFIORE: Counsel, may I interrupt  
25 for a second? I don't know about my colleagues, but I'm



1 having difficulty hearing you. Perhaps you can get closer  
2 to the microphone?

3 MR. DAY: Yes, Judge.

4 CHIEF JUDGE DIFIORE: Let's try that.

5 MR. DAY: In essence, what the People here are  
6 trying to do to circumvent CPL 100.25 and 100.40 by  
7 refiling the same simplified traffic information - - -

8 JUDGE FAHEY: Mr. Day, I - - - I can't hear you.  
9 Turn up the volume on your - - - that might help. Okay,  
10 thanks.

11 MR. DAY: Is this - - - is this okay?

12 CHIEF JUDGE DIFIORE: It sounds fine.

13 MR. DAY: Is this okay?

14 CHIEF JUDGE DIFIORE: Yes.

15 MR. DAY: So - - - so here, what the People are  
16 trying to do is circumvent the statute, the statutes being  
17 100.25 and 100.40, by filing a new identical simplified  
18 traffic information or uniform traffic ticket, in common  
19 parlance - - -

20 JUDGE FEINMAN: Well, if I may? Is it - - - is  
21 it truly identical, if they're also serving it with the  
22 supporting deposition that makes it all non-hearsay and  
23 gives the details?

24 MR. DAY: It is identical, Judge, in my opinion,  
25 because the - - - the supporting deposition is not part of



1 the accusatory instrument.

2 What gives the court jurisdiction is the filing  
3 of the uniform traffic ticket. And if the uniform traffic  
4 ticket is found insufficient on its face, due to the  
5 failure of the police officer to serve timely a supporting  
6 deposition, that divests the court of jurisdiction.

7 And that should be the end of the line. The - -  
8 - the - - -

9 JUDGE GARCIA: Chief Judge, may I ask a question?  
10 Chief Judge?

11 CHIEF JUDGE DIFIORE: Judge Garcia.

12 JUDGE GARCIA: Counsel, could you give me, as  
13 succinctly as possible, the principal basis for  
14 distinguishing Nuccio?

15 MR. DAY: The last four words of the Nuccio  
16 decision, Judge Garcia. And the last four words of the - -  
17 - of the Nuccio decision says "absent some statutory bar".  
18 Here, there is a statutory bar - - - bar. And it's 100.40,  
19 which very clearly states that the failure for the officer  
20 to timely respond renders a simplified information  
21 insufficient on its face.

22 JUDGE STEIN: May I follow up, Judge - - - Judge  
23 DiFiore?

24 CHIEF JUDGE DIFIORE: Judge Stein.

25 JUDGE STEIN: But wasn't that same statute in



1 place when Nuccio was decided?

2 MR. DAY: Yes, yes, Judge.

3 JUDGE STEIN: Okay, so - - - so that doesn't  
4 answer how, then, we distinguish Nuccio. And - - - and  
5 then I'd add to that the fact that - - - that the CPL seems  
6 to distinguish between indictments and - - - and  
7 informations.

8 MR. DAY: So - - -

9 JUDGE FEINMAN: And if I may just add to that,  
10 Chief? Isn't that actually a distinction that we drew upon  
11 in our recent case, People v. Hardy, where we said they  
12 have to do exactly what they've been doing here. You  
13 dismiss the accusatory instrument. And the People have,  
14 within certain time constraints, the right to refile. I  
15 mean, I - - - I don't see the distinction.

16 MR. DAY: Nuccio is a different case, because in  
17 that case the court permitted the case to proceed on the  
18 long form information. And a long form information must  
19 state reasonable cause, sufficient detail, and set forth  
20 all the elements of the crime or the - - - or the traffic  
21 infraction, which in this case, combining the supporting  
22 deposition, if you - - - even if you were, with the ticket,  
23 it does not.

24 Also, what's interesting in this case is that the  
25 special requirements rule is - - - is actually not relevant



1 to the case at hand. In - - - in fact, it inures to the  
2 benefit of the prosecutor. It gives the prosecutor,  
3 basically, a second bite at the apple, by showing a reason  
4 why they should recommence the action.

5 JUDGE FEINMAN: But let me - - - if - - - if I  
6 may, Chief?

7 What - - - what I don't understand is at the  
8 trial level, all right, if you want to get something  
9 dismissed in the interest of justice, you have to make your  
10 motion as the defendant, and you have to go through that  
11 ten-factor analysis. There's ten specific factors that are  
12 enumerated in the statute. Where are they coming up with  
13 this rule that they've invented that - - - you know, and  
14 how are they grounding it in the CPL or common law?

15 MR. DAY: So Judge, are you referring to the  
16 special requirements rule?

17 JUDGE FEINMAN: Well, their whole rule about  
18 special requirements, and special circumstances, and  
19 whatever that means. It's not defined anywhere.

20 MR. DAY: So - - -

21 JUDGE FEINMAN: And you know, part of my concern,  
22 frankly, about special circumstances, is okay, well, so  
23 you've got the defendant here driving her Mercedes through  
24 - - - seventeen years old, at a reckless speed through a  
25 stop sign, not even coming to a rolling stop. She doesn't

1 have to worry, because they're going to dismiss it.

2 And some other, you know, Joe Schmoe comes along,  
3 driving - - - I don't know, you know - - - they don't like  
4 the way he appears. It's just so vague and undefined.

5 MR. DAY: So - - -

6 JUDGE FEINMAN: It's very troubling to me.

7 MR. DAY: So Judge, the - - - the special  
8 circumstances was actually promulgated by the court in  
9 People v. Aucello, which is a - - - an Appellate Term case.

10 JUDGE FEINMAN: It - - - it's one of their early  
11 cases doing this.

12 MR. DAY: It's - - - it's a year before Nuccio,  
13 and what's interesting is Nuccio does not reference or  
14 mention it. And what's further interesting to me, Judge,  
15 is that Aucello was cited thirty-five times, thirty-three  
16 times of which were after Nuccio. And not just cited by  
17 the Appellate Term of the Ninth and Tenth Judicial  
18 Districts, it was - - - it's been cited in many different  
19 courts throughout the state.

20 So it - - - it's not an issue that's - - - that's  
21 limited to the ju - - - judicial district that the case  
22 before us was litigated at. It's - - - it's - - -

23 JUDGE STEIN: Judge, may I ask a question?

24 CHIEF JUDGE DIFIORE: Yes, Judge Stein.

25 JUDGE STEIN: If - - - if we can just sort of



1 move on to the rule itself. How - - - I mean, I looked at  
2 a number of cases in which the - - - the rule was invoked  
3 by the Appellate Term, and I haven't found anything that  
4 defines or explains why - - - what the standards are or  
5 what circumstances are considered to be special.

6 Can - - - can you explain to me what the rule  
7 means?

8 MR. DAY: So that's why I raised the argument, my  
9 point 1, which was regarding the interest of justice that  
10 the court has the power on a case-by-case basis, to review  
11 the facts of the case.

12 And - - - and I recognize that the issue is a  
13 mixed one of law and fact. But I thought it was important  
14 to point out that the - - - the - - - the lower court and  
15 the - - - and the - - - actually all - - - the intermediate  
16 court and - - - and so on, should have the - - - the  
17 authority, constitutionally, to look at the facts of the  
18 case, case-by-case.

19 JUDGE FEINMAN: But - - -

20 MR. DAY: The same question was presented to me  
21 by Judge Garguilo, at the Appellate Term. And I said,  
22 well, simply, if the special circumstance would be if the  
23 police officer is not available, if he's in the military,  
24 if - - - if there was some aggravating circumstance here.  
25 And Judge Garguilo nodded - - - nodded his head in

1 agreement. So - - -

2 JUDGE FAHEY: Can I - - - can I ask a question,  
3 Judge?

4 CHIEF JUDGE DIFIORE: Judge, Fahey.

5 JUDGE FAHEY: Yeah. Mr. Day, I think what  
6 concerns me is - - - is not the exercise of interest-of-  
7 justice jurisdiction in an individual case, based on  
8 individual facts. That seems to be pretty clearly within  
9 the power of the court. What - - - what I wonder, though,  
10 is - - - is in this situation, it seems that the exercise  
11 of interest of justice jurisdiction has been converted to a  
12 legal precedent that may be contrary to precedent in other  
13 parts of the state.

14 And that's when it's not interest-of-justice  
15 jurisdiction, that's when you're moving to legal precedent  
16 in circumstances - - - and establishing legal precedents  
17 that's contrary to the law in the rest of the state.

18 MR. DAY: Judge Fahey, my - - - my response to  
19 that is that there's not a single case in this state where  
20 a subsequently filed uniform traffic ticket was permitted  
21 to proceed after the original one was dismissed, under  
22 these circumstances. There's not a single - - - and I've  
23 read a hundred of these - - - this case has been going on  
24 since 2013. I've read maybe a hundred of these cases, to  
25 the point where it's hard for me to distinguish the names



1 at this point, between the cases.

2 JUDGE FEINMAN: But - - -

3 MR. DAY: They all routinely state - - -

4 JUDGE FEINMAN: Chief, if I may?

5 CHIEF JUDGE DIFIORE: Judge Feinman.

6 JUDGE FEINMAN: So I just want to understand what  
7 you're saying when you're talking about the interest-of-  
8 justice jurisdiction of an intermediate appellate court.  
9 You know, we've already talked about the ten-factor test  
10 that you have to do at the trial level to get something  
11 dismissed in the interest of justice.

12 But are you saying because - - - and I don't  
13 think you meant to say this - - - but perhaps you did - - -  
14 that an intermediate appellate court can look at the  
15 record, let's say after trial, completely satisfied that  
16 there's sufficient evidence to support the charges, and  
17 it's not against the weight of the evidence, but they can  
18 turn around and - - - and - - - and dismiss a - - - you  
19 know, a petit larceny, a drug case - - - I don't even want  
20 to get into the felonies, because of the distinction  
21 between felonies and misdemeanors - - - but you - - -  
22 you're not arguing that. Because that would have  
23 absolutely no support in the CPL.

24 MR. DAY: No, Judge. I - - - I'm not - - -

25 JUDGE FEINMAN: So where does the support come,



1 then, to be able to do that here?

2 MR. DAY: So the support for that would be that  
3 it's a matter of discretion. And you would look to this  
4 court's own decisions in People v. Baker and People v.  
5 Belge, which I cited in my brief, which - - - and also the  
6 statute in question, which is CPL 450.90, that the court  
7 has the inherent discretion to look at the facts of the  
8 case and substitute its own judgment for that of the trial  
9 court.

10 JUDGE RIVERA: Judge, can I - - -

11 MR. DAY: So that's - - - that's all I was  
12 saying, Judge.

13 CHIEF JUDGE DIFIORE: Judge Rivera?

14 JUDGE RIVERA: Yeah, okay. So Mr. Day, let me -  
15 - - let me just appreciate - - - if I can fully appreciate  
16 what you just said.

17 So if - - - if the court does not rule in your  
18 favor on this, does that mean that the Appellate Term, the  
19 day after the court renders its decision, just says okay,  
20 it's not - - - not a blanket rule, doesn't apply in every  
21 case, we're going to look at the facts, but essentially,  
22 statistically, end up in the same place?

23 MR. DAY: So what - - -

24 JUDGE RIVERA: Decide in every case, oh, given  
25 the facts of this case, I'm dismissing.



1 MR. DAY: Okay, so - - - so if - - - if the court  
 2 were not to agree with me, the only result that I would see  
 3 is that a simplified traffic information can be re - - -  
 4 refiled, just using a different summons number, and be  
 5 permitted to proceed, even though it violates 100.40 and  
 6 100.25, which required the supporting deposition to be  
 7 supplied - - -

8 JUDGE RIVERA: Okay, so I'm sorry. I'm not being  
 9 clear. So then it - - - it's your position that a judge  
 10 couldn't, under the circumstances say, I know you filed  
 11 again, I know the court says that the Appellate Term's rule  
 12 is no longer valid and we can't follow that rule, but given  
 13 the facts of this case, I'm going to dismiss? The court  
 14 could not do that?

15 MR. DAY: A court can do it, in the interest of  
 16 justice, yes. Okay.

17 JUDGE RIVERA: So that's what I'm saying. Could  
 18 - - - could - - - if the court were to find that this is a  
 19 rule, that the rule is not supported by the CPL, maybe it's  
 20 in violation of the CPL, whatever the court might decide,  
 21 could - - - could you get to the same place statistically,  
 22 that is, in terms of how many are dismissed, by just in  
 23 each case saying: I'm doing it on the basis of the facts  
 24 in this case?

25 MR. DAY: Theoretically I believe that the



1 intermediate court could just substitute its own - - - its  
2 own discretion.

3 JUDGE RIVERA: Okay. Let me ask you a different  
4 question, which is the one that I asked Mr. Smiloff and I  
5 said I'd ask you. So what - - - what is your understanding  
6 of the reason for this approach?

7 MR. DAY: Okay.

8 JUDGE RIVERA: What animates the - - - the  
9 Appellate Term's decision to proceed in this way? Is it  
10 the violation of the CPL, the timeline?

11 MR. DAY: Judge, just to clarify, are you asking  
12 me what - - - what I believe the - - -

13 JUDGE RIVERA: Why - - - why do they choose to  
14 proceed this way? Why? What problem are they trying to  
15 address?

16 MR. DAY: In terms of - - - in terms of demanding  
17 that a supporting deposition be filed within thirty days,  
18 or - - - or - - -

19 JUDGE RIVERA: No, no, no, no, no. That they'll  
20 dismiss if you - - - if they file a second one?

21 MR. DAY: They - - - they're trying to streamline  
22 the system, Judge. You know the - - - and to curb  
23 overzealous prosecutors. You know, as a - - - as a  
24 litigator, you know, doing this for over twenty years, it -  
25 - - it's - - - I don't envy my colleagues who regularly



1 practice at the Traffic Violations and Parking Agency,  
2 because there - - - there are - - - there are a hundred  
3 cases on the docket, and it seems as if that the - - - the  
4 judge - - - whichever judge you're - - - you're assigned to  
5 that day, doesn't necessarily want to follow precedent.

6 So in other words, it's important to give the  
7 public confidence that their system is - - - is working to  
8 give them an opportunity to - - - to appear for their case  
9 and to instill confidence that they're going to be treated  
10 fairly.

11 JUDGE FEINMAN: But if - - - if I may?

12 CHIEF JUDGE DIFIORE: A final question. Judge  
13 Feinman.

14 JUDGE FEINMAN: Yeah. Why isn't the solution to  
15 that to go to the legislature and either say traffic  
16 infractions need a speedy trial deadline or traffic  
17 infractions have to be prosecuted in a particular way,  
18 whether it's not through a bureau or a district court? You  
19 know, why - - - why is it up to the Appellate Term to  
20 create a solution to a problem that it receives, as opposed  
21 to, you know, going to the legislature?

22 MR. DAY: That's a valid point, Judge. I - - - I  
23 don't see why the legislature would not want to, you know,  
24 adopt such a position and look at the issue.

25 But that's not the case we have here. I mean,



1 the case here is very - - - is a very simple one where a -  
2 - - a simplified traffic information which was previously  
3 dismissed was replaced with a new one, which there's a  
4 statutory bar to it. It's - - - and it's - - - and it's  
5 what the legislature did in 100.40.

6 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank  
7 you. We have your point.

8 MR. DAY: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

10 MR. SMILOFF: Thank you, Judge. Just very, very  
11 briefly.

12 No other appellate courts in - - - no appellate  
13 courts in the state followed the Aucello decision. And all  
14 other courts who have decided this issue, that I've seen,  
15 have followed this court's decision in Nuccio, from all  
16 over the state. There's a decision in Rochester. There's  
17 a decision in Ossining. There's a decision in Chattanooga  
18 County, decision in Nassau County.

19 And I cited them on page 12 of my brief, and I  
20 just want to close with the - - - this court, after Nuccio,  
21 decided a case, People v. Jackson, and found that the  
22 teaching of cases like Nuccio is that courts should be wary  
23 of imposing the harsh remedy of dismissal in the absence of  
24 explicit statutory direction. So - - -

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. SMILOFF: Thank you.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Daria N. Epakchi, No. 19, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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

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

Date: February 23, 2021

