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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 152

EARL COLEMAN,

Respondent.

20 Eagle Street
Albany, New York 12207
September 10, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 152, People v.
2 Coleman.

3 Counsel, go ahead. Do you want any
4 rebuttal time, counsel?

5 MR. FARRELL: Yes, if I could reserve two
6 minutes, please, Judge.

7 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
8 go ahead.

9 MR. FARRELL: May it please the court,
10 counsel. My name is Jim Farrell. I'm the elected
11 District Attorney of Sullivan County, New York, and
12 was the trial prosecutor in this particular case.

13 I want to underscore for the court that the
14 defendant was not sentenced under the Rockefeller
15 Drug Laws. He was sentenced under the - - - the
16 recidivist statute in the State of New York, what's
17 commonly known as the three-strikes-you're-out
18 statute, 70.10.

19 JUDGE SMITH: Does that make the DLRA
20 inapplicable?

21 MR. FARRELL: It does, for the following
22 reasons. There's a lot of things that are undisputed
23 in this case. What's undisputed is the defendant was
24 sentenced, after a persistent felony offender
25 hearing, as a recidivist. He received a fifteen-

1 year-to-life sentence.

2 CHIEF JUDGE LIPPMAN: Yeah, but his penalty
3 is based on his prior conduct, right?

4 MR. FARRELL: His penalty is based upon his
5 - - - his classification - - -

6 CHIEF JUDGE LIPPMAN: Not the particular
7 offense here.

8 MR. FARRELL: His - - - his - - - that is
9 correct. Well, it - - - it - - - it impacts both,
10 because it's the particular offense, and it's his
11 misconduct.

12 CHIEF JUDGE LIPPMAN: Yeah, but I'm
13 question to you, in terms of eligibility for the
14 Rockefeller Drug Law, why - - - why is it not the
15 offense that we're looking at, rather than the
16 increased penalty which is based on other prior
17 conduct, but not on this particular offense?

18 MR. FARRELL: Well, this court has said
19 over and over again, in interpreting the Rockefeller
20 Drug Laws, that the purpose of the Drug Law Reform
21 Acts was to afford relief to low-level, nonviolent
22 drug offenders who were sentenced under that scheme.
23 This defendant was not sentenced under that scheme.

24 JUDGE SMITH: Are you - - - is this an
25 independent argument you're making? I mean

1 independent of your interpretation of 440.40 - - -

2 MR. FARRELL: No.

3 JUDGE SMITH: You're just - - -

4 MR. FARRELL: No, it isn't. I want to
5 highlight that, because I think it dovetails in with
6 440.46 and what 440.46 specifically says.

7 We know he's sentenced to fifteen-to-life,
8 we know he's serving an indeterminate sentence, and
9 we also know via Correction Law 803(1)(d), which was
10 also put in effect at the very same time that 440.46
11 was put into effect, that he is not eligible for
12 merit time. And as such, because he is not eligible
13 for merit time - - -

14 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -
15 but it doesn't mean merit time is not available.
16 He's not eligible because of the prior conduct that
17 beefed up the severity of the sentence.

18 MR. FARRELL: He is not eligible because he
19 was sentenced as a recidivist under 70.10.

20 CHIEF JUDGE LIPPMAN: Yes.

21 MR. FARRELL: That is correct.

22 JUDGE SMITH: If he were being sentenced
23 today for the former crime, could he get persistent -
24 - - would he be sentenced as a persistent violent - -
25 - or persistent felon?

1 MR. FARRELL: Absolutely.

2 JUDGE SMITH: Isn't there - - - isn't there
3 some reason to think that the DLRA itself repealed
4 persistent felony sentencing for drug offenders?

5 MR. FARRELL: No. No. Not at all. Not at
6 all. The Rockefeller Drug Laws, again, were focused
7 on - - - and I think the legislature knew that when
8 they carved out this exception and said that the
9 resentencing provisions of 440.46 shall not - - -
10 they didn't say, may not; they said "shall not apply
11 to a person who is serving a sentence for an
12 exclusion offense." And then when you look at what
13 the definition of exclusion offense is - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but is this an
15 exclusion offense?

16 MR. FARRELL: Absolutely. And that's what
17 Judge Stein said, and that's what Judge Stein said in
18 terms of the plain reading of the statute. When you
19 read the statute plainly, what's an exclusion
20 offense? An offense is an exclusion offense when a
21 person is serving a sentence for which they cannot
22 receive merit.

23 JUDGE PIGOTT: Yeah, but you can't - - -
24 you can't - - -

25 MR. FARRELL: You can't receive merit,

1 Judge.

2 JUDGE RIVERA: He's saying that - - - he's
3 saying that the legislature - - -

4 JUDGE PIGOTT: You shortened that up a
5 little bit, but - - -

6 MR. FARRELL: Well, I did, I did. I mean,
7 I - - - I'm summarizing that.

8 JUDGE PIGOTT: He's serving a sentence for
9 an exclusion - - - for an exclusion - - - an
10 exclusion offense as defined as a second violent
11 felony offense under 70.04, or a persistent violent
12 felony offense under 70.08.

13 MR. FARRELL: I agree with that. That's
14 section (b), though.

15 JUDGE PIGOTT: Hold on. And he's not a
16 second violent felony offender under 04 - - -

17 MR. FARRELL: Correct.

18 JUDGE PIGOTT: And he's not a persistent
19 violent felony under 08.

20 MR. FARRELL: Correct.

21 JUDGE PIGOTT: So?

22 MR. FARRELL: Well, you - - -

23 JUDGE PIGOTT: He's eligible. What - - -

24 MR. FARRELL: No, he's not. And I'll tell
25 you why. Because you've got to read the whole

1 statute, and in subdivision (5), "The provisions of
2 this section shall not apply to any person who is
3 serving a sentence on a conviction for" - - - and
4 then I forget the rest. Because the "or" - - - he
5 doesn't have a predicate conviction.

6 So then we go to an exclusion offense. And
7 we look at subdivision (a). There's two parts to
8 subdivision (a). There's part 1 - - - that's if you
9 have a crime within the preceding ten years; we know
10 the court's rulings on that, we know Sosa - - - or
11 "any other offense for which a merit time allowance
12 is not available." And we know that this particular
13 defendant is not eligible.

14 JUDGE RIVERA: So you're saying that - - -

15 MR. FARRELL: It's undisputed.

16 JUDGE SMITH: So you changed the word
17 "offense" to the word "defendant". When you read the
18 statute, it says "offense" for which it's not - - -
19 for which merit time is not available. Then when you
20 - - - when you speak, you say, it's not - - - it's
21 not available to this defendant. Isn't there a
22 difference?

23 MR. FARRELL: Correct, under this offense,
24 because this offense was not under the Rockefeller
25 Drug Laws; it was under 70.10.

1 JUDGE SMITH: But it's not - - - I mean, it
2 may be a fine point, but doesn't your adversary
3 literally have a point that it is not the offense
4 itself that renders the sentence - - - the merit time
5 unavailable; it is the nature of the sentence given
6 for the offense.

7 MR. FARRELL: No, I believe the legislature
8 was crafting out an exception with respect to A-1
9 felonies - - -

10 JUDGE SMITH: You don't - - - you don't
11 think the legislature meant to cut it that fine, is
12 what you're saying.

13 MR. FARRELL: That is correct. That is
14 correct.

15 JUDGE RIVERA: Do you - - - are you
16 arguing, in part, that the legislature did not have
17 in mind the opportunity for someone who's gotten a
18 sentence that could go up to life, to be able to
19 reduce a life sentence?

20 MR. FARRELL: They did not. I'm saying
21 what they were looking at is the Rockefeller Drug
22 Laws. And they were not looking at - - - they have
23 not repealed 70.10. 70.10 is still in full force and
24 effect, and if he was convicted today, if he had a
25 trial today, we would do the same thing; we'd move to

1 hold him as a persistent felony offender - - -

2 JUDGE SMITH: You say that; I mean, I'm - -
3 - there's an article somebody showed me. It's by a
4 man named Arthur Hopkirk in something called the
5 Public Defense Backup Center Report, and he says that
6 there is - - - that life sentences are no longer
7 possible under the reformed drug laws. Are you
8 familiar with that argument?

9 MR. FARRELL: Yes, I am, but again - - -

10 JUDGE SMITH: You say it's wrong.

11 MR. FARRELL: No, what I'm saying is that
12 this defendant is - - - has - - - was not sentenced
13 under that. He was sentenced as a recidivist. I
14 think that's different. I think that's totally
15 different. And I think that's what the legislature
16 was talking about - - -

17 JUDGE SMITH: It was drug offense. He was
18 - - - it was a drug offense that he was sentenced
19 for.

20 MR. FARRELL: He was. Correct. But when
21 we sentence someone as a recidivist, we look at the
22 entire package. We look at the prior felonies, we
23 look at the circumstances and the conduct and the
24 history that warrant that jump up to that life
25 sentence.

1 JUDGE ABDUS-SALAAM: Under your estimation,
2 counsel, then, if someone were arrested for a
3 marijuana offense now, under the drug law, and they
4 were - - - they had some priors, and they got this
5 persistent felony or violent felony sentence, they
6 would not be eligible to be sentenced - - -
7 resentenced under the Rockefeller Drug Law for the
8 marijuana offense?

9 MR. FARRELL: I would - - - I would agree
10 if that was a felony, and the person had the
11 persistent felony offender treatment under 70.10; I
12 would agree with that, yes, I would.

13 But I also want to point out, People v.
14 Gregory, which was the Second Department, which held
15 the same way - - - held the same way.

16 CHIEF JUDGE LIPPMAN: No, but the bottom
17 line, the severity here doesn't come from the drugs.
18 It comes from his prior conduct.

19 MR. FARRELL: It comes from the entire
20 package, Judge. It's the entire package.

21 CHIEF JUDGE LIPPMAN: No, I understand.
22 But - - -

23 MR. FARRELL: We got to look at what he's
24 convicted of at the instant - - -

25 CHIEF JUDGE LIPPMAN: But think about what

1 the purpose is of all this is about.

2 MR. FARRELL: Correct.

3 CHIEF JUDGE LIPPMAN: Why - - - why, if it
4 comes from his prior conduct, that's what gets you
5 the severity, not from the drugs. So I don't - - - I
6 don't understand - - -

7 MR. FARRELL: But you - - - but what you've
8 got to - - -

9 CHIEF JUDGE LIPPMAN: - - - the logic of
10 your position.

11 MR. FARRELL: You've got to have both,
12 because if you don't have the instant conviction, you
13 can't look at the prior conduct. You've got to have
14 both.

15 JUDGE PIGOTT: Here's how I walked it
16 though. The question was, has he been convicted of a
17 crime within ten years previous to his commission of
18 the drug crime? And the answer to that is, yes, in
19 January of '82, he had a burglary 3rd, which is
20 nonviolent D; in June of '93, he had a possession of
21 stolen property, which is nonviolent D. He was
22 sentenced on the 220 drug charge in June of 2001,
23 which would put the '93 conviction, the possession of
24 stolen property, within the ten years. But that's
25 not a violent felony offense, and it's not an offense

1 for which merit time is unavailable under the
2 correction law and therefore - - - and it's not an A-
3 1 violent, and it's not any of the enumerated
4 offenses.

5 MR. FARRELL: Correct. But you have to
6 look at subdivision (5), the first conjunctive of the
7 "or". "The provisions of this section shall not
8 apply to any person who is serving a sentence for a
9 conviction" - - - and then we look at exclusion
10 offense, "for which merit time is not available".

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. FARRELL: And it's not, for him.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 MR. FARRELL: Now, I'd also want to point
15 out - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 You'll have your time - - -

18 MR. FARRELL: Okay.

19 CHIEF JUDGE LIPPMAN: - - - your rebuttal.
20 Let's hear from your adversary.

21 MS. BLOOM: May it please the court. I'm
22 Jane Bloom; I represent the respondent, Earl Coleman.

23 Your Honors, I read subsection (5)
24 differently; I think - - - what it says is that "The
25 provision of this section shall not apply to any

1 person who is serving a sentence on a conviction for
2 an exclusion offense; for purposes of this
3 subsection, an exclusion offense is (a)" - - - sub
4 (a) - - - "a crime for which the person was
5 previously convicted", et cetera, having the ten-year
6 look back, "which was" - - - sub (i) - - - this is
7 still under (a) - - - being, the crime, "a violent
8 felony offense, as defined under the law, or (ii),
9 any other offense for which a merit time allowance is
10 not available."

11 There's two things there. First of all, it
12 refers to a prior - - - a previous offense, the crime
13 for which the person was previously convicted, and
14 the statute makes a very distinct difference between
15 the previous offense and the present offense. The
16 present offense is the drug offense. So I would
17 argue - - - and I did in my brief - - - that the
18 exclusion offense, under the statute, is - - - means
19 the prior offense, and there's support for that.

20 When you look at 803 of the Correction Law,
21 the offenses that are listed there are manslaughter,
22 sex crimes, violent crimes; obviously, that's not the
23 present offense.

24 JUDGE SMITH: I didn't - - - maybe I'm
25 missing something. I had a little trouble with this

1 case. But I don't think your adversary is saying
2 that the exclusion offense is the present offense. I
3 think he's - - -

4 MS. BLOOM: Well - - -

5 JUDGE SMITH: He's saying that the prior
6 sentences - - - the prior crime is an exclusion
7 offense because he's not eligible - - - eligible for
8 merit time on that sentence.

9 MS. BLOOM: I believe, Your Honor, what - -
10 - what - - - well, there were two arguments that I
11 was making, and the second one addresses more
12 specifically what my adversary was saying. What he -
13 - - what he is saying is that - - - as I understand
14 it - - - is that it's an exclusion offense because
15 under 803, it lists that if you're serving a
16 sentence, an indeterminate sentence under what was
17 authorized for an A-1, you're not eligible for merit
18 time. But that's backwards, because the statute says
19 that it's an exclusion offense if it's an offense - -
20 - offense - - - for which merit time is not available
21 under 803.

22 JUDGE SMITH: So you - - - you draw a
23 distinction between an offense for which a merit time
24 allowance is not available and a sentence as to which
25 a merit time allowance is not available. Is that - -

1 - that a fair summary of your argument?

2 MS. BLOOM: Well, yes, but I want to add
3 that 803 - - -

4 JUDGE RIVERA: How do you figure out if the
5 offense is one for which merit time is not available,
6 if you do not look at the sentence?

7 MS. BLOOM: You look at the - - - you look
8 at 803, and it lists - - - 803 isn't merely a list of
9 offenses.

10 JUDGE RIVERA: Okay.

11 MS. BLOOM: 803 sets forth exceptions for
12 defendants who will not be allowed merit time.

13 JUDGE RIVERA: Um-hum.

14 MS. BLOOM: It lists a bunch of offenses.
15 A B-felony drug offense is not on the list. They are
16 serious - - - they are - - - like I said, sex
17 offenses, and I think by the nature of the offenses,
18 they're not - - - a defendant is not - - -

19 CHIEF JUDGE LIPPMAN: Well, a sentence for
20 A-1 is not typically applied to a B, right?

21 MS. BLOOM: Well, that's - - - if - - - 803
22 lists conditions in which you're not going to get
23 merit time. Among the conditions is a list of
24 offenses. I submit that the statute is referring to
25 the offenses stated.

1 JUDGE SMITH: You're saying that 440.46(5)
2 refers only to the list of offenses in 803, not to
3 the whole of 803.

4 MS. BLOOM: Correct. Because it says, "or
5 any other offense to which a merit time allowance is
6 not available".

7 CHIEF JUDGE LIPPMAN: So the offense, the
8 merit time is available, in this case.

9 MS. BLOOM: Correct. Correct, because it's
10 not listed.

11 JUDGE SMITH: Even though this defendant
12 can't get it.

13 CHIEF JUDGE LIPPMAN: Because of the
14 sentence - - - because of the severity of the
15 sentence.

16 MS. BLOOM: Well, the Third Department
17 said, you know, there is a difference between the
18 sentence and offense, and under 803 this is not an
19 exclusionary offense; it is - - -

20 JUDGE RIVERA: But that's my point. How -
21 - - if I go - - - if I go and read the offense, do I
22 - - - by just reading the words explaining the
23 offense, do I know what the sentence is?

24 MS. BLOOM: No.

25 JUDGE RIVERA: Don't I have to go to

1 another provision to know the sentence?

2 MS. BLOOM: Yes.

3 JUDGE RIVERA: Okay. So then I'm not
4 understanding your - - - your interpretation, because
5 how would one know whether or not the offense allows
6 for merit time, if I do not go and look at the
7 sentence, if the offense, on its face, as defined,
8 does not tell me whether or not the defendant is
9 eligible for merit time allowance?

10 MS. BLOOM: As I read it in my - - - what I
11 - - - what I'm trying to suggest is that the
12 legislature intended to include the offenses that are
13 listed in 803, which are - - -

14 JUDGE SMITH: So the direct answer to Judge
15 Rivera's question is - - - to how do I know if the
16 offense is eligible for merit time is you look and
17 see if it's listed in 803, and either it is or it
18 isn't - - -

19 MS. BLOOM: Correct.

20 JUDGE SMITH: - - - and that's all there is
21 to it.

22 MS. BLOOM: Correct.

23 JUDGE GRAFFEO: But 803(d), (i) and (ii) -
24 - - little (i), (i) and (ii), refers - - - they use
25 the term, "indeterminate sentence", so they - - -

1 they've got references to sentences in that - - - in
2 803, as well.

3 MS. BLOOM: I'm sorry, could you repeat the
4 question?

5 JUDGE GRAFFEO: 803(d), (i) and (ii) - - -

6 MS. BLOOM: Right.

7 JUDGE GRAFFEO: - - - it's not just a
8 listing of offenses; it also talks about sentences.

9 MS. BLOOM: That's my point, Your Honor,
10 that's precisely my point.

11 JUDGE SMITH: You're saying that that part
12 - - -

13 JUDGE GRAFFEO: But it mixes both in the -
14 - - in the statute, but you want us to only - - -

15 MS. BLOOM: Right, but the - - - but 440.46
16 - - -

17 JUDGE GRAFFEO: - - - you want us to only
18 look at the explicit offenses.

19 MS. BLOOM: Yes, because - - -

20 JUDGE GRAFFEO: But the - - - but 803 - - -

21 MS. BLOOM: - - - because 440.46 - - -

22 JUDGE GRAFFEO: - - - embodies both
23 categories.

24 MS. BLOOM: - - - says, it's "or other
25 offenses".

1 JUDGE SMITH: So you - - - you read - - -
2 and if I'm - - - I think I'm just restating Judge
3 Graffeo's question. You read 440.46(5) as saying
4 only look at part of 803; only look at the part that
5 lists offenses.

6 MS. BLOOM: It says, look at the offenses,
7 in the correctional - - -

8 JUDGE SMITH: I get - - - I mean, I - - -
9 it's - - - my question is, if the legislature really
10 intended to make that kind of subtle distinction that
11 we're all having such trouble getting through our
12 heads, wouldn't they have done it in plainer language
13 than this?

14 MS. BLOOM: Perhaps. You know, there's a
15 number of things that could have been clearer in the
16 statute, and that's what we're grappling with.

17 JUDGE SMITH: Do you - - - if I can switch
18 you - - -

19 MS. BLOOM: But I would also point out,
20 though, that when you look at the Court of Appeals
21 cases, People v. Sosa, People v. Paulin, you've
22 looked at this statute with a different issue before
23 you, but with it being a remedial statute, and you're
24 required to interpret it liberally to extend its
25 beneficial breadth, if you will, that in those cases,

1 having interpreted it the way - - - in a liberal way,
2 you found and reached out for the defendant, and the
3 defendant was included and the court made it clear
4 that if it's deemed over inclusive, the next
5 corrective measure is the next part of the statute,
6 which is a hearing.

7 Now, Mr. Coleman is simply trying to - - -
8 you know, at the moment, looking to get in the door
9 with the application.

10 JUDGE SMITH: If I - - - on your
11 adversary's argument, I tried to suggest an argument
12 based on the abolition of persistent sentence, or
13 what I - - - what I thought might be the abolition of
14 persistent sentencing. I'm not sure I understand the
15 argument myself, but let me see if you do.

16 The - - - did the legis - - - did the DLRA,
17 in 2004, did it abolish persistent violent sentencing
18 for drug - - - persistent felony sentencing for drug
19 crimes?

20 MS. BLOOM: Are you referring to 2004 or
21 2009?

22 JUDGE SMITH: Well, one incorporates the
23 other on this, doesn't it?

24 MS. BLOOM: Right. I don't know. My
25 understanding was not that it does away with that.

1 JUDGE SMITH: Okay.

2 MS. BLOOM: But as far as - - -

3 JUDGE SMITH: Okay. You - - - I mean,
4 you're not familiar with Arthur Hopkirk's article?

5 MS. BLOOM: I'm not familiar with that.

6 JUDGE SMITH: It seems to say that it did.

7 MS. BLOOM: But I think - - - but I also
8 just wanted to make it clear that in, for example,
9 People v. Sosa, I mean, there's just too many
10 anomalies if the - - - if the Third Department were
11 to be reversed, and I think I went through those in
12 my brief. You have - - -

13 JUDGE SMITH: Okay. Let me just - - - let
14 me just try, hypothetically, the argument that I'm
15 trying to construct. Assume that the DLRA does
16 abolish persistent sentencing - - - persistent felony
17 sentencing for drug offenders, so that your guy, Mr.
18 Coleman, if he were being sentenced today on his
19 prior drug offense, the one he's now serving time for
20 - - - not the one he's - - - not for - - - the
21 previous offense, he could not be sentenced as a
22 persistent.

23 If that were true, wouldn't it be strange
24 that the same legislature said that his persistent
25 sentencing bars him from relief?

1 MS. BLOOM: Yes. Yes, it does, and I also
2 think that it would be strange for the legislature to
3 intend this, right now, because you've got - - -
4 because they allow people to come back under the same
5 statute, the 2009 DLRA, with prior violent felonies,
6 which my client doesn't have. And as long as it's
7 ten years back prior to the time that they're
8 applying for resentencing, they're in, whereas my
9 client - - -

10 JUDGE ABDUS-SALAAM: So counsel, so you're
11 saying that there would be an anomaly if someone who
12 has prior violent felonies, unlike your client, could
13 get resentenced under the 2009 DLRA, because they're
14 not serving a sentence for persistent violent felon -
15 - -

16 MS. BLOOM: Correct. Correct.

17 JUDGE ABDUS-SALAAM: - - - and are also not
18 eligible for merit time.

19 MS. BLOOM: Right. And when you interpret
20 a statute that results in these sort of irrational or
21 absurd results, that's - - - that's not permitted in
22 - - - you know, you have to interpret it in a way
23 that's going to have the intended results.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.
25 Thanks.

1 MS. BLOOM: Thank you very much.

2 CHIEF JUDGE LIPPMAN: Counsel?

3 MR. FARRELL: Yeah. Judge, I just want to
4 clarify. I am not alleging that his priors render
5 him ineligible here. I'm alleging that - - -

6 CHIEF JUDGE LIPPMAN: Priors are
7 responsible for the severity of the sentence, aren't
8 they?

9 MR. FARRELL: Absolutely. They are, in
10 part, responsible, because if he didn't have them, he
11 wouldn't have been moved to be a persistent.

12 CHIEF JUDGE LIPPMAN: Right. Exactly.

13 JUDGE SMITH: Oh, oh, okay, I think I
14 misspoke.

15 MR. FARRELL: But what I'm saying is - - -
16 is that because - - -

17 JUDGE SMITH: You're saying it's his
18 current sentence.

19 MR. FARRELL: As Judge Rivera said, we have
20 to look at the sentence, because that's what the
21 statute tells us. We have to look at a person who
22 was serving a sentence for a conviction for an
23 exclusion offense. Is this - - - is what he was
24 convicted of here - - - a persistent felony offender
25 - - - and his sentence - - -

1 CHIEF JUDGE LIPPMAN: Do you look - - -

2 MR. FARRELL: - - - an exclusion offense.

3 CHIEF JUDGE LIPPMAN: - - - at the offenses

4 - - -

5 MR. FARRELL: That's the question.

6 CHIEF JUDGE LIPPMAN: Do you look at the
7 offenses or the sentence? The Third Department - - -

8 MR. FARRELL: I think - - - I think - - -

9 CHIEF JUDGE LIPPMAN: - - - separated the
10 two.

11 MR. FARRELL: Right, and Judge Stein said
12 when you look at the plain reading of the statute, it
13 looks at the sentences. 803 looks at the sentences.
14 He's serving an A-1 felony sentence.

15 JUDGE ABDUS-SALAAM: If your adversary is
16 correct that this statute is not a model of clarity,
17 and the first part of 803 says, "serving a sentence"
18 - - - "serving an indeterminate sentence authorized
19 for an A-1 felony offense", so really, what they're
20 talking about seems to be, under this alleged plain
21 language, an offense - - - not the sentence itself,
22 but the offense.

23 MR. FARRELL: But it is undisputed that Mr.
24 Coleman, as we sit here today, is serving an
25 indeterminate sentence authorized for an A-1 felony

1 offense.

2 JUDGE SMITH: Assume - - -

3 MR. FARRELL: If you read the statute,
4 that's exactly what he's serving.

5 JUDGE SMITH: Assume hypothetically - - -

6 MR. FARRELL: Under 70.10.

7 JUDGE SMITH: Assume - - - just assume for
8 the sake of argument, that Arthur Hopkirk is right in
9 saying that if this guy had been sentenced after the
10 DLRA was enacted, he would not have been eligible for
11 persistent felony sentencing. That's no longer a
12 possibility. If you make that assumption, wouldn't
13 it be very strange for the same legislature to say,
14 because this guy got a sentence which we have just
15 abolished, which we have decided no longer exists,
16 because of that sentence, he's ineligible for DLRA
17 treatment? Wouldn't that be bizarre?

18 MR. FARRELL: But you see, my point is that
19 Arthur Hopkins (sic) - - - and I don't know who
20 Arthur Hopkins (sic) is - - -

21 JUDGE SMITH: Hopkirk.

22 MR. FARRELL: Hopkirk.

23 JUDGE SMITH: I don't know who he is,
24 either.

25 MR. FARRELL: I don't agree with him.

1 JUDGE SMITH: Okay.

2 MR. FARRELL: Because the legislature did
3 not repeal 70.10. Had they also repealed the three-
4 strikes-you're-out, I would agree with Arthur
5 Hopkirk.

6 CHIEF JUDGE LIPPMAN: You disagree with the
7 premise.

8 JUDGE SMITH: He says they didn't - - -

9 MR. FARRELL: The other thing - - -

10 JUDGE SMITH: - - - he says they didn't
11 repeal it, but they have no cross-reference to it in
12 their provision for - - - for sentencing for drug
13 offenders.

14 MR. FARRELL: Well, I believe the cross-
15 reference is that merit time. People v. Gregory,
16 Second Department, found exactly as the lower court
17 here did, the trial court did. And leave was denied
18 by this court by the Chief Judge.

19 CHIEF JUDGE LIPPMAN: Okay. Thanks,
20 counsel.

21 MR. FARRELL: Thank you.

22 CHIEF JUDGE LIPPMAN: Okay. Thank you
23 both. Appreciate it.

24 (Court is adjourned)

25

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

I, Janice Brea, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Earl Coleman, No. 152 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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