

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

PEOPLE,

Appellant,

-against-

No. 149

RONI SMITH,

Respondent.

PEOPLE,

Appellant,

-against-

No. 150

KEITH FAGAN,

Respondent.

20 Eagle Street
Albany, New York 12207
September 13, 2016

Before:

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

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

Appearances :

DANA POOLE, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Appellant
1 Hogan Place
New York, NY 10013

JUSTIN J. BRAUN, ADA
THE OFFICE OF THE BRONX COUNTY DISTRICT ATTORNEY
Attorneys for Appellant
198 East 161st Street
Bronx, NY 10451

DAVID J. KLEM, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorneys for Respondent Smith
120 Wall Street
28th Floor
New York, NY 10005

BARBARA ZOLOT, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorneys for Respondent Fagan
120 Wall Street
28th floor
New York, NY 10005

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 149, the People v. Roni Smith, boxed with
3 number 150 People v. Keith Fagan.

4 MS. POOLE: Good afternoon, Your Honors.
5 Dana Poole, on behalf of the People in the case of
6 People v. Smith.

7 The plain language of the C - - -

8 CHIEF JUDGE DIFIORE: Counsel, would you
9 like rebuttal time?

10 MS. POOLE: Oh, I'm sorry. Yes - - - yes,
11 Your Honor. May I reserve four minutes?

12 CHIEF JUDGE DIFIORE: Four minutes?

13 MS. POOLE: Yes, please.

14 CHIEF JUDGE DIFIORE: Yeah.

15 MS. POOLE: Thank you.

16 CHIEF JUDGE DIFIORE: Please.

17 MS. POOLE: The plain language of the CPL
18 provides that for the purposes of a predicate
19 offender adjudication, an established conviction may
20 be challenged only on the grounds that it was
21 obtained in violation of the defendant's rights under
22 the United States Constitution.

23 Here, defendant challenged his 2002 conviction
24 on the grounds that it had been obtained in violation of
25 his rights as provided by People v. Catu. And this

1 court's own plain language in People v. Pignataro
2 clarified that, in fact, the constitutional protections
3 discussed in Catu were those provided by the State
4 Constitution. This court - - -

5 JUDGE FAHEY: If - - - if we decide that
6 Catu doesn't apply retroactively, do we need to reach
7 that issue at all?

8 MS. POOLE: Well, it applies retroactively
9 in - - - in the scenario only if it - - - if Catu
10 were decided - - -

11 JUDGE FAHEY: Um-hum.

12 MS. POOLE: - - - as a Federal
13 constitutional matter because that is the only viable
14 means of - - - of - - -

15 JUDGE GARCIA: But I guess what Judge Fahey
16 is asking, if I understand it right is, if we say - -
17 - if we were to say that this is not a retroactive
18 opinion, do we need to reach this issue on whether or
19 not you could have a blatant State constitutional
20 violation, but the conviction would be okay as a
21 predicate?

22 MS. POOLE: In - - - in this particular
23 case, I don't - - -

24 JUDGE FAHEY: In other words, do we answer
25 two- - - if we answer two, do we have to answer one?

1 MS. POOLE: Well, two - - - two would
2 certainly implicate one.

3 JUDGE FAHEY: I'm sorry, I didn't hear you.

4 MS. POOLE: Deciding on - - - on
5 retroactivity would certainly implicate the - - - the
6 initial question of - - - of whether Catu is - - - is
7 a Federal Consti - - -

8 JUDGE FAHEY: You're saying it depends on
9 our answer.

10 MS. POOLE: Yes.

11 JUDGE FAHEY: Okay.

12 JUDGE GARCIA: In what way?

13 MS. POOLE: Because the on - - - because
14 the only valid challenge to a predicate conviction is
15 that it was violative of the United States
16 Constitution. If it's violative only of the State
17 Constitution, then there is no valid challenge in the
18 first place.

19 JUDGE GARCIA: I understand that part. But
20 what if we said - - - I understand your argument.
21 What if we said it isn't retroactive, we would still
22 have to go on and say, and nevertheless it only
23 violated the State Constitution?

24 MS. POOLE: I - - - I don't think that it
25 would be necessary to go on to state that, but I

1 think that - - - I think that the question of
2 retroactivity simply doesn't arise - - -

3 JUDGE FAHEY: Well, yeah. If we say Catu -
4 - - I think if I have the analysis right, if Catu was
5 a new rule not dictated by precedent - - -

6 MS. POOLE: Um-hum.

7 JUDGE FAHEY: - - - then it wouldn't be
8 retroactive - - -

9 MS. POOLE: That is correct.

10 JUDGE FAHEY: - - - right?

11 MS. POOLE: That is correct.

12 JUDGE FAHEY: So we don't need to address a
13 question at all of whether this is a violation of the
14 State or the Federal Constitution at this particular
15 juncture.

16 MS. POOLE: If - - - if this court were to
17 find that it does not apply retroactive - - -

18 JUDGE FAHEY: All right. So going back to
19 my first question. If we rule that way, then we
20 would not be addressing this question.

21 MS. POOLE: It would not be absolutely
22 necessary to address the question. Whether that - -
23 - that question could be raised again in a different
24 kind of context or - - -

25 JUDGE FAHEY: It may be able to, it may be

1 able to, yes.

2 MS. POOLE: It may be able to.

3 JUDGE FAHEY: Yes.

4 MS. POOLE: And certainly what we're seeing
5 as a result of Smith is - - - is quite a few of these
6 kinds of - - -

7 JUDGE FAHEY: I agree with you, that's
8 true; that will happen, yes.

9 MS. POOLE: So certainly answering the
10 initial question, our position is - - - is somewhat
11 crucial.

12 JUDGE FAHEY: Well for both parties,
13 sometimes maybe the guidance of some part of it may
14 lead to the resolution of some of the other cases.

15 CHIEF JUDGE DIFIORE: What's the difference
16 between the Federal and the State constitutional duty
17 of a trial court at plea?

18 MS. POOLE: Well, the duties are - - - are
19 the overarching duties are - - - are certainly very
20 similar in that - - - in that the court is required
21 to advise a defendant of the direct consequences of
22 his guilty plea.

23 Where the distinction lies is in - - - is
24 in the remedy. So to - - - for a defendant to
25 prevail on a claim that his plea was - - - was

1 obtained in violation of his federal due process
2 rights, he actually has to establish prejudice, in
3 that he must allege and prove that he did not, in
4 fact, know of the PRS term; he had never been
5 informed, he was not aware of this statute, all of
6 these sorts of issues, and that it would have, in
7 fact, affected his guilty plea. He would not have
8 pled guilty had he known.

9 Catu, on the other hand, provides automatic
10 vacature. So all the defendant has to do to obtain a plea
11 withdrawal in that situation is to provide the minutes of
12 the plea hearing or the plea proceeding, and establish
13 that, in fact, the judge never advised him - - -

14 JUDGE FAHEY: But isn't that a remedy, not
15 a right? Isn't the right - - - you have a right to
16 know the consequences of your plea.

17 MS. POOLE: Um-hum.

18 JUDGE FAHEY: You have that right under the
19 Federal and the State Constitution. But here, your
20 argument, if we get to the first question, is that -
21 - - that the - - - this is a separate State
22 constitutional remedy, but it seems to me that the
23 right is - - - what we're talking about here is
24 available under both the U.S. and the State
25 Constitution, which is knowing the consequences of

1 your plea.

2 MS. POOLE: Right. And part of the
3 evaluation under - - - under a federal analysis is
4 this - - - is first this actual knowledge. And as
5 this court discussed in Lingle, in fact, many
6 defendants did actually know of PRS.

7 JUDGE FAHEY: Um-hum.

8 MS. POOLE: Regardless of whether the judge
9 informed them, it is part of the statute, defendants
10 are charged with the knowledge of the law, they are
11 represented by presumably competent counsel who is
12 informing them of - - - of what's happening.

13 When they - - - you know, in some
14 situations, defendants are - - - it's pronounced at
15 sentencing; that was not the case here. When they
16 arrive at DOCs, they are informed of these; when they
17 are released from DOCs to post-release supervision,
18 they are certainly advised.

19 So - - - so there is this - - - there are many
20 situations - - - many steps along the way at which
21 defendants have actual knowledge.

22 JUDGE STEIN: Can ask you this? If we were
23 to find that this is purely a State constitutional
24 issue, what would be the remedies if it - - - if it's
25 clear on the face of the record, if it's evident - -

1 - what remedy would there be? You couldn't do coram
2 nobis, right, you couldn't have a 440; would there be
3 any remedy at all?

4 MS. POOLE: The remedy is - - -

5 JUDGE STEIN: I should say, if we find that
6 - - - that 400.15 doesn't apply.

7 MS. POOLE: Right.

8 JUDGE STEIN: That's right.

9 MS. POOLE: There would not be a
10 disqualification in - - - in that situation, because
11 the disqualification is - - - is purely for the
12 violation of a Federal constitutional right. And
13 when that - - - when that statute was enacted - - -

14 JUDGE STEIN: But you're saying there would
15 be no remedy.

16 MS. POOLE: There would be no
17 disqualification of the conviction as a predicate.
18 That does not at all affect the defendant's initial
19 right under Catu to plea withdrawal, and certainly,
20 many defendants undertook that remedy, and in fact,
21 those defendants who sought and were granted plea
22 withdrawal, if they were reconvicted when PRS was
23 imposed, then there is no Catu error established in
24 that later reconviction.

25 JUDGE STEIN: But if - - - if they - - - if

1 their attorney was ineffective, say, and they didn't
2 move to withdraw their plea in a timely manner - - -

3 MS. POOLE: Um-hum.

4 JUDGE STEIN: - - - and then it comes
5 later, and it wants to be used as a predicate, is
6 there any remedy whatsoever - - -

7 MS. POOLE: Well - - -

8 JUDGE STEIN: - - - for that defendant?

9 MS. POOLE: - - - Stewart - - - you do have
10 the situation where, you know, we do have the
11 petition for error coram nobis, so a defendant who
12 perhaps had the right to complain that he was not
13 advised of PRS during his plea, and that was not
14 properly raised on appeal, that defendant can, in
15 fact, attack the - - - his - - - whether he received
16 the effective assistance of counsel on appeal. And
17 if it were found that, in fact, his counsel had been
18 ineffective - - -

19 JUDGE STEIN: Even though - - -

20 MS. POOLE: - - - he would get a new direct
21 appeal, and presumably in that situation, he would
22 then be able to raise the Catu claim.

23 So really what the CPL provision that
24 allows for this attack on - - - on Federal
25 constitutional violations is premised on a problem

1 relationship, and particularly when we're talking
2 about it in the context of a predicate challenge, it
3 matters not that Mr. Smith hasn't taken a direct
4 appeal, that he hasn't brought a collateral attack.

5 JUDGE GARCIA: Right.

6 MR. KLEM: This court - - -

7 JUDGE GARCIA: But just looking at the
8 retroactivity aspect, which is what we do, assuming
9 we get by the State constitutional issue. But if
10 we're looking at a retroactivity analysis, which we
11 are, right, under the Supreme - - - under the Court
12 of Appeals case, and I can't get - - -

13 MR. KLEM: Catalonotte.

14 JUDGE GARCIA: Yes. Which I probably
15 couldn't pronounce I could think of the name of it.
16 But - - -

17 MR. KLEM: I'm not sure I pronounced it
18 correctly.

19 JUDGE GARCIA: But under that, Judge Simons
20 is saying you look at a retroactivity analysis,
21 right, in terms of the attack on the underlying
22 conviction here. So we've said in Stewart that you
23 can't bring a 440 collateral attack, which if you
24 look at the Appellate Division opinion in that, that
25 appeal was exhausted; it was a pure collateral after

1 Catu was decided.

2 MR. KLEM: Yes.

3 JUDGE GARCIA: And the Appellate Division,
4 and we affirmed, said you can't do that. And the
5 Appellate Division said, you would have to find it
6 retroactive to be able to do that under a 440.

7 So why hasn't Stewart somewhat addressed the
8 retroactivity argument here?

9 MR. KLEM: Well, I don't think the Court of
10 Appeals decision in Stewart addresses it at all. But
11 I think we have to go back to the fundamental basis
12 of a retroactivity analysis, which looks at whether
13 or not, in this case Catu, represented a fundamental
14 shift of the law, or is just the application of well-
15 established precedent.

16 And federal courts have looked at this
17 directly in the context of supervised release, and
18 they too have recognized that there is nothing new.
19 Boykin, Brady - - -

20 JUDGE GARCIA: But if we say that here, and
21 we say it's retroactive, then do we have to also say
22 people can attack it through 440s?

23 MR. KLEM: I don't think you have to. I
24 mean, there is a different rule. Why it can't be
25 attacked through a 440 is because the claim could

1 have been brought on direct appeal. That it wasn't
2 brought on direct appeal is a different question.

3 JUDGE RIVERA: Well - - -

4 MR. KLEM: That doesn't open it up to a 440
5 challenge.

6 JUDGE RIVERA: Well, Stewart actually
7 doesn't say you can never bring it up on a 440,
8 right? It says, it's rare - - - it would be a rare
9 case, and one could think of the argument that that
10 case might be were your counsel - - - your appellate
11 counsel was ineffective.

12 MR. KLEM: Yes. Or - - -

13 JUDGE RIVERA: Doesn't that allow the
14 opening, as she has already recognized coram nobis?

15 MR. KLEM: Yeah.

16 JUDGE RIVERA: So it's not that you can
17 never attack other than by direct appeal - - -

18 MR. KLEM: Yeah.

19 JUDGE RIVERA: - - - it's just that the
20 opportunity or the likelihood of it is diminished
21 given the nature of the error, which is one that's
22 obvious on the face of the record.

23 MR. KLEM: That's certainly correct. But
24 here, even if we were to apply a retroactivity
25 analysis, keep in mind that at the time of Mr.

1 Smith's sentence, he was entitled to relief.

2 There was one binding Appellate decision in
3 the State at the time of his judgment, and that was
4 Goss, which I don't believe it's an automatic
5 vacature rule, but if you want to call it automatic
6 vacature, Goss had that too.

7 That - - - the Third Department anticipated
8 exactly what this court would do in Catu. The law at
9 that time was clear, the law at the time his
10 conviction became final, which we don't know quite
11 when that is, but it certainly was after Catu was
12 decided, because he filed a notice of appeal, was the
13 same, the law as it is now is the same, and frankly,
14 the law has always been this since long before Catu.

15 The law has always been you need to know
16 your sentence at the time of the plea.

17 The People try to get around that by arguing
18 that, well, there is something special about this so-
19 called "automatic" vacature rule. There is nothing
20 special or different about that than what the federal
21 courts are doing.

22 JUDGE STEIN: Didn't - - - didn't it change
23 all the decisions of the four departments - - -

24 MR. KLEM: It - - -

25 JUDGE STEIN: - - - with perhaps the

1 exception of the Third in Goss?

2 MR. KLEM: With the exception of the Third
3 in Goss, but those decisions came out after the
4 sentence in Mr. Smith's case.

5 JUDGE STEIN: The federal rule isn't
6 automatic vacature.

7 MR. KLEM: No. The federal rule applies a
8 harmless analysis - - - a harmless error analysis or
9 plain error if there was notice. And if there was
10 notice, this court has said, you have no claim, so
11 let's talk about the harmless error analysis, the
12 federal courts are very clear. When the total
13 sentence that you were told you could receive - - -

14 JUDGE STEIN: Right.

15 MR. KLEM: - - - is exceeded by the
16 sentence you are forced to receive - - -

17 JUDGE STEIN: But Catu added something - -
18 -

19 MR. KLEM: - - - you get - - -

20 JUDGE STEIN: - - - on top of that; didn't
21 it?

22 MR. KLEM: But for Mr. Smith, that's his
23 situation. He would win under the federal court's
24 harmless error analysis. It matters not that there
25 may be a case in New York - - - Hill may be

1 different, but that doesn't matter. He suffered - -
2 -

3 JUDGE STEIN: So you're saying we don't
4 have to decide in - - - in this particular case
5 whether it's retroactive or not; is that your
6 argument?

7 MR. KLEM: No. My argument is Mr. Smith
8 clearly suffered a Federal constitutional error. He
9 did not know that he could receive more than eight
10 years at the time he pled guilty. Whether it's
11 reversed under automatic reversal under Catu or a
12 harmless error of reversal - - -

13 CHIEF JUDGE DIFIORE: What is your view of
14 the status of that conviction, that predicate conv -
15 - - with the effect of it now; what is it?

16 MR. KLEM: The effect is the same if we
17 look back at this court's Harris case in 1983, which
18 was looking at challenges to predicate convictions,
19 the court had six cases before it, the sixth
20 defendant was a guy by the name of Vargas. The court
21 looked at it and said, you know, Mr. Vargas's
22 convictions, no good; it was unknowing. And
23 therefore, it can't be used.

24 CHIEF JUDGE DIFIORE: Was that predicate a
25 nullity?

1 MR. KLEM: It doesn't render it a nullity;
2 it just renders it unusable for purposes of enhancing
3 the defendant's sentence in the instant case. That's
4 all that Mr. Smith is asking. It's not the windfall
5 that the People are talking about; he wants his
6 predicate status established only through
7 constitutional convictions.

8 JUDGE PIGOTT: Well - - - well, it's a
9 windfall to the extent that we're not talking about
10 the conviction. In other words, he doesn't deny the
11 conviction; he just says that, you know, I got PRS, I
12 didn't know I was going to get that. But at no time
13 is he saying, I'm innocent of the crime for which I
14 pled guilty.

15 MR. KLEM: And he certainly doesn't have to
16 establish his innocence; he has to establish - - -

17 JUDGE PIGOTT: I know, but when you said -
18 - -

19 MR. KLEM: - - - that it was unconstitution
20 - - -

21 JUDGE PIGOTT: - - - when you said it's not
22 - - -

23 MR. KLEM: I'm sorry.

24 JUDGE PIGOTT: No, go ahead. Sorry.

25 MR. KLEM: All he has to establish is that

1 it's unconstitutional, not that he is innocent of it.
2 He's established that it's unconstitutional; he
3 doesn't have to go on direct appeal in that case or
4 on a collateral proceeding to undo it.

5 JUDGE PIGOTT: I was fencing with you on
6 the issue of windfall. I mean, the fact of the
7 matter is that he's - - - he's not saying, you know,
8 I've been convicted of something I am innocent of; he
9 is only saying, you know, when I pled guilty to what
10 I did, I didn't know I was getting PRS.

11 MR. KLEM: He is saying it was an unknowing
12 unconstitutional plea. It's not a windfall also
13 because look at what Mr. Smith suffered in that case.
14 He suffered through DOC's imposed post-release
15 supervision, and then he suffered again when the
16 court illegally imposed post-release supervision upon
17 him. And his so called "windfall" benefit for that
18 is he got a resentencing. A resentencing at which
19 the lower court imposed the same exact sentence on
20 him that he had before.

21 And in fact, in most of these cases, the
22 courts are imposing the same exact sentence. Then
23 his benefit was he got the Appellate Division to be
24 able to review his case for excessiveness. And they
25 looked at his case, and they looked at the extensive

1 mitigation, and they said, you know, six years
2 instead of seven years is the appropriate sentence
3 here. I'm not sure that's fairly characterized as a
4 windfall.

5 The law has always been in this State that
6 unconstitutional convictions can't be used. There
7 shouldn't be a special rule that if it's unconstitutional
8 under Catu, well then it can be used.

9 JUDGE PIGOTT: No, but can't it be waived?

10 MR. KLEM: There certainly was no waiver
11 here. Whether it can be waived or not, perhaps.
12 Here, Mr. Smith had served the entirety of his
13 sentence at the time of the illegal 601-d
14 resentencing. He should never have been in that
15 proceeding; it violated double jeopardy.

16 And then when he was in that proceeding, he
17 - - - the option that was given him was, well, we
18 don't know if it's Catu defective or not. If you
19 want it, you know, wait, and let us get the plea
20 minutes, then you're going to get five years if it
21 says five years of post-release supervision in the
22 plea minutes. Or you could take two-and-a-half years
23 now and serve a few more months of post-release
24 supervision.

25 At that point, after the service of so much

1 of his sentence, all of his sentence actually, he was
2 at a point of no return. That's not a waiver; that's
3 not an entry of a new plea.

4 JUDGE PIGOTT: Well, it's a great argument,
5 but I - - - are we supposed to do that? Are we
6 supposed to say, well, gee, he's a nice guy and, you
7 know, he played out his cards, and, you know, so
8 rather than wait for the - - - the sentencing
9 minutes, which would have shown that maybe he's
10 entitled, you know, he should be getting five, he
11 says, I'm just too tired so I don't want to see the
12 sentencing minutes, and we're supposed to then say,
13 therefore we rule in his favor?

14 MR. KLEM: Well, he's not waiving the
15 unconstitutionality.

16 JUDGE PIGOTT: No, I understand.

17 MR. KLEM: He is making a decision on how,
18 in that day, having completed his sentence, he wants
19 to go forward. And that as a rational - - - any
20 rational person at that point would say, I'm not
21 going to risk so many more years in prison when I'm
22 done with my sentence, fine, I'll take that.

23 That's not waiving the unconstitutionality
24 of the predicate.

25 CHIEF JUDGE DIFIORE: Thank you, Mr. Klem.

1 MR. KLEM: Thank you.

2 CHIEF JUDGE DIFIORE: Ms. Poole.

3 MS. POOLE: Returning to the - - - to this
4 question of retroactivity. What we have in - - -
5 what defense is arguing in this case is essentially
6 that this defendant can choose not to bring a Catu
7 claim on his direct appeal, and he would be prevented
8 from bringing it in a 440.10 accepting - - - and
9 perhaps this - - - this sort of strange Stewart
10 exception, which he has never alleged in this
11 situation. So he would not be able to retroactively
12 - - -

13 JUDGE RIVERA: But he did allege his
14 counsel as ineffective at some point down through
15 this chronology, right, it's not like he - - -

16 MS. POOLE: He - - -

17 JUDGE RIVERA: - - - he is saying, I have
18 no reason why, right?

19 MS. POOLE: He is not challenging the - - -
20 his - - - the effectiveness of his counsel at his - -
21 - and his plea - - -

22 JUDGE RIVERA: At the plea, I understand
23 that - - -

24 MS. POOLE: - - - plea, he's challenging -
25 - -

1 JUDGE RIVERA: - - - but the point in time
2 when one is uninformed, right - - -

3 MS. POOLE: He's - - -

4 JUDGE RIVERA: - - - or not properly
5 informed.

6 MS. POOLE: He's chal - - - he's
7 challenging his - - - the effectiveness of his
8 counsel at the sentencing proceeding on the 2012 case
9 for not investigating Catu, and raising that as a
10 Federal constitutional violation. And at that period
11 in time, that was certainly not the practice of
12 defense attorneys in general.

13 And so the idea that defendant could fail
14 to raise the Catu claim for the benefit that this
15 court provided, which is withdrawal of the plea, and
16 would be prevented from doing that on 440, and that
17 this - - - that this conviction would be allowed to
18 stand and get - - - nevertheless, upon committing a
19 second violent felony offense, he would be permitted
20 to simply not have that counted as a predicate
21 offense.

22 And what we also have, you know, is - - -
23 is again, as - - - as Catu is sort of famous for,
24 this sort of cascade of - - - of, you know,
25 unintended consequences, what you have in certain

1 situations is if - - - if a Catu defective plea is
2 discounted as a predicate, the time spent
3 incarcerated that - - - on that time under People v.
4 Love is also discounted. So courts can't look back
5 to even older convictions.

6 There are defendants who are using
7 sequentially rules on - - - under Smith and Fagan
8 resentencings. But to get - - -

9 JUDGE RIVERA: But the point - - - the
10 point of Catu in this case is that there are
11 consequences for a constitutional violation.

12 MS. POOLE: Yes.

13 JUDGE RIVERA: You may very well be right
14 with the rest of the ones that you've described, but
15 that there are consequences, and that's the way our
16 criminal justice system works.

17 MS. POOLE: Absolutely.

18 JUDGE RIVERA: A constitutional violation
19 occurs - - -

20 MS. POOLE: And - - -

21 JUDGE RIVERA: - - - there are consequences
22 to that that both the People and defendant have to
23 deal with, and the justice system has to respond to.

24 MS. POOLE: Exactly. And what this court
25 did was to grant defendants a very easy means of - -

1 - of obtaining the plea withdrawal, and we are not -
2 - - we're not at all challenging the validity of that
3 ruling. So again, defendants were not permitted to -
4 - -

5 JUDGE RIVERA: Yes, but you still - - - if
6 I can put it in a way that perhaps is not the best
7 way to describe it, but the one that comes
8 immediately to mind, you are seeking yet to get some
9 value out of what this court has said was a violation
10 of the defendant's constitutional rights.

11 MS. POOLE: Because the defendant has never
12 sought the very easy remedy provided by this court.
13 And certainly many defendants chose not - - -

14 JUDGE RIVERA: He's almost do - - - he's
15 almost do - - - well, he's done.

16 MS. POOLE: Right. But - - - but he never
17 brought it under - - -

18 JUDGE RIVERA: He's done, why are you
19 saying he should - - -

20 MS. POOLE: - - - he filed - - -

21 JUDGE RIVERA: - - - he should throw the
22 dice and risk so much more time when he is almost
23 done, after the violation had occurred?

24 MS. POOLE: But he filed the notice of
25 appeal, and he never raised that complaint. Before -

1 - - before - - -

2 JUDGE RIVERA: Yeah, and that may be
3 because he's got an ineffective counsel, that may be
4 for other reasons.

5 MS. POOLE: And he is certainly free - - -
6 this - - - the State provides him with the means of
7 raising those particular claims. So the idea that he
8 can - - - he can not follow up with those
9 opportunities and simply keep Catu as sort of in his
10 pocket so that if he does commit a later crime, that
11 the consequence of his conviction that - - -

12 JUDGE RIVERA: Is it in his pocket or
13 yours?

14 MS. POOLE: It's certainly not in ours,
15 Your Honor.

16 CHIEF JUDGE DIFIORE: Thank you, Ms. - - -

17 MS. POOLE: Thank you, Your Honor.

18 CHIEF JUDGE DIFIORE: Excuse me.
19 Counsel.

20 MR. BRAUN: May it please the court, Justin
21 Braun for the Office of Darcel Clark.

22 Your Honors, in this particular case, just to
23 sort of reframe the issue a little bit. Once more, the
24 issue here isn't that the defendant is attacking the
25 underlying conviction here on Catu grounds. What he is

1 trying to say is that the underlying Catu infected
2 conviction now can't be used as a predicate, which of
3 course, is an unintended consequence of the Catu decision
4 itself, something that wasn't contemplated in the Catu
5 decision, and something that therefore coming along in
6 this line is essentially giving the defendant a completely
7 different, if you want to use the word windfall or what
8 have you, based on the fact that there is an
9 unconstitutionality argument here.

10 CHIEF JUDGE DIFIORE: May I interrupt a
11 moment?

12 MR. BRAUN: Sure.

13 CHIEF JUDGE DIFIORE: Forgive me, I forgot
14 to ask if you would like some rebuttal time.

15 MR. BRAUN: Oh, I'm sorry, yes. I would
16 reserve four minutes' rebuttal.

17 CHIEF JUDGE DIFIORE: You have it.

18 MR. BRAUN: Thank you.

19 CHIEF JUDGE DIFIORE: Please continue.

20 MR. BRAUN: So again, what the First
21 Department has done is open up a whole field of fresh
22 new litigation in the Catu realm, not just in the
23 ineffective assistance of counsel context, but also
24 in the context of now, previously dormant Catu
25 convictions themselves, if they are to be considered

1 unconstitutionally obtained, opens up a whole world
2 of problems, as my colleague mentioned. For example,
3 if they're considered unconstitutionally obtained in
4 the predicate context, it's not just that they can't
5 be used as predicate, but now the tolling issues
6 involved in those particular instances, you can't
7 toll even further convictions.

8 So now, whereas you might have a persistent
9 felony offender, he is now a first felony offender,
10 because it's not just that the - - - that the Catu
11 infected claim is in issue, but the tolling that was
12 going on is now also - - -

13 JUDGE PIGOTT: Are you - - - are you
14 addressing the issue, I think Ms. Zolot raised, that
15 - - - that the appeal is still pending; it has never
16 been dismissed.

17 MR. BRAUN: Which appeal? I'm sorry.

18 JUDGE PIGOTT: The defendant's appeal from
19 whatever they are arguing. There's an open appeal at
20 some point. It's not yours, that was - - - oh, that
21 was the first one.

22 MR. BRAUN: That was not mine. Yeah.

23 JUDGE PIGOTT: I should've gotten her when
24 I had it.

25 MR. BRAUN: I'm sorry. But I will also - -

1 - you know, speaking of appeal, I would also say
2 along with this sort of parade of horrors that I'm
3 laying out, if you're saying that there is - - - that
4 these dormant Catu convictions are also - - - now can
5 be attacked as unconstitutionally obtained, that puts
6 440.10(a) and (g) directly in a collision course with
7 this court's ruling in *People v. Louree*.

8 In *People v. Louree*, it was very explicitly
9 stated that you cannot attack a Catu conviction on a
10 440 - - - on a 440.10 ground. And yet, 440.10 states
11 that if the conviction is unconstitutional, it can,
12 in fact, be attacked.

13 So within this context, this particular case
14 arises, and we agree with our colleagues on several
15 grounds. We agree that Catu is - - - should be
16 considered, this court should rule that it's a state law
17 matter.

18 It should do so for several reasons. It should
19 do so because the Catu decision itself does not cite
20 federal law. The Catu decision itself, when the federal
21 courts have examined it, they have found that Catu is a
22 decision of state law. I had cited a couple of Southern
23 District cases. And also, the Catu decision itself is not
24 directly analogous to the federal counterparts, as my
25 colleagues have mentioned, for some of the reasons that

1 have been discussed already, but also the federal
2 counterparts, I would say for example my colleague - - -

3 JUDGE RIVERA: But aren't we back to
4 whether or not the right or the remedy are grounded
5 in state law, and whether or not that makes a
6 difference?

7 MR. BRAUN: Whether or not it's grounded in
8 state law and whether or not it makes it - - - well,
9 it does - - -

10 JUDGE RIVERA: The right or the remedy?

11 MR. BRAUN: I'm sorry.

12 JUDGE RIVERA: The right or the remedy?
13 Right, whether or not the relief that the court
14 constructed is responding to a right that is one both
15 recognized under the Federal and State Constitution.

16 MR. BRAUN: Right. I - - - I see Your
17 Honor's point, but, you know, again, that's where the
18 differences become crucial, I think between the
19 Federal and the State, especially in terms of when
20 you're looking at the retroactivity analysis,
21 especially in terms of the fact that this is a per se
22 rule, Catu.

23 JUDGE RIVERA: All right. But for the
24 retroactivity analysis, are we looking at the right
25 or the remedy? We're looking at the relief available

1 upon violation of the right, or just whether or not
2 the right itself was one that was recognized at a
3 particular point in time?

4 MR. BRAUN: Whether the right was
5 recognized at the particular point. So - - -

6 JUDGE RIVERA: So isn't - - - isn't the
7 right about being informed of the direct consequences
8 of a plea, and isn't that a right that was well
9 established pre-Catu, under the Federal Constitution?

10 MR. BRAUN: Well, I guess - - - I guess I
11 wouldn't part - - - I guess the way we're - - - I'm
12 trying to parse it more similar to the Dennis
13 decision, which I cited in my case, which is a lower
14 court decision, where, yes, they agreed that that
15 right existed, but that that right is so intertwined
16 with the remedy that it actually becomes very
17 difficult to separate it because the right to a per
18 se - - - it's almost the right to a per se reversal
19 versus the right to then litigate a harmless error
20 question or a prejudice question.

21 Now, I would also - - -

22 JUDGE RIVERA: Is it tied to the fact that
23 the sentence is illegal?

24 MR. BRAUN: What's that?

25 JUDGE RIVERA: Is it tied to the fact that

1 the sentence is illegal?

2 MR. BRAUN: Well, the sentence is illegal,
3 that's true, and that gets - - - that gets back to
4 our Pignataro argument, which is that 70.40 - - -
5 70.85 is the only statutory mechanism in which to
6 deem that illegal sentence legal.

7 And I see that I am out of time, maybe I can get
8 to it in rebuttal, but we absolutely believe that a 70.85
9 proceeding - - - we have every reason to believe that a
10 70.85 proceeding occurred here.

11 So in addition to the retroactivity argument, we
12 believe that for his 2000 case, even if you want to say
13 2005 Catu applied, that it - - - it's a non-retroactive
14 application, we're still constitutionally sanitized.

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 Counsel.

17 MS. ZOLOT: May it please the court.

18 Barbara Zolot for respondent Keith Fagan.

19 CHIEF JUDGE DIFIORE: Ms. Zolot, isn't this
20 case really about an illegal resentencing, and not a -
21 - - an unconstitutionally obtained conviction?

22 MS. ZOLOT: No, Your Honor, because the
23 predicate was unconstitutionally obtained, the Catu
24 defect is present in Mr. Fagan's 2000 plea, and
25 therefore that unconstitutional predicate couldn't

1 provide a basis for his ultimately enhanced sentence.

2 And that sentence or a persistent sentence
3 was illegal insofar as it was predicated on an
4 unconstitutional predicate. If that answers Your
5 Honor's question.

6 CHIEF JUDGE DIFIORE: It's a view. Please
7 continue.

8 MS. ZOLOT: To begin, just a few points
9 that I'd like to address. For one thing, this
10 question of whether Catu represents the State or
11 Federal constitutional violation actually isn't in
12 Mr. Fagan's case because the People failed to
13 preserve that from the outset; it wasn't in their - -
14 - they never preserved in court below. In fact, that
15 argument was struck by the Appellate Division, though
16 I am happy to address it if Your Honors wish.

17 As for - - - to coin my adversary's phrase,
18 parade of horrors, it's - - - these horrors are - - -
19 are grossly exaggerated. And I'll just tick them off one
20 by one why these aren't fears that are legitimate. As for
21 the, you know, great number of cases that will supposedly
22 be implicated here, well, the rule that we're advancing is
23 very narrow and limited.

24 Only defendants who can establish a Catu
25 violation in the prior offense, and who have served post-

1 release supervision would be even able to bring the
2 predicate challenge, putting aside whether it would even
3 be successful, but could even bring the predicate
4 challenge.

5 JUDGE GARCIA: Why couldn't they bring a
6 challenge to the conviction under 440 then, if it's
7 retroactive?

8 MS. ZOLOT: The original conviction. Well
9 - - -

10 JUDGE GARCIA: Why are we opening up
11 retroactivity challenges to Catu or Catu?

12 MS. ZOLOT: I don't - - - I don't see that
13 at all, Your Honor, because - - -

14 JUDGE GARCIA: But it's retroactive now.
15 We're going to find it ratroactive so - - -

16 MS. ZOLOT: Well, Stewart, except for
17 perhaps the unusual case, Stewart very clearly closed
18 the door on 440s, not on the basis of retroactivity
19 though - - - the court could have, but chose not to,
20 which I think is circumstantial evidence that
21 retroactivity wasn't in the air when Stewart was
22 decided. Instead this - - -

23 JUDGE GARCIA: It wasn't in the Appellate
24 Division, and maybe it wasn't in here either.

25 MS. ZOLOT: The People apparently weren't

1 proposing that to this court, because the ruling of
2 Stewart is that because you can raise the issue on
3 direct appeal, because there is a sufficient record
4 for that, the 440 can't be brought.

5 In fact, in deciding Stewart the way it
6 did, it implies that the case is retroactive because
7 otherwise there would be no need to carve out this
8 exception for no 440.

9 JUDGE GARCIA: So if Stewart himself then
10 gets arrested again, and now the People seek to use
11 the Stewart conviction to enhance the penalty, even
12 though he couldn't challenge that conviction, it's
13 untouchable, we would now say, no, but it's
14 retroactive, and it won't count for the retroactivity
15 analysis of the enhancements that it - - -

16 MS. ZOLOT: Well, it's really not a
17 retroactivity analysis. Mr. Stewart, or Mr. Fagan,
18 has an independent statutory right to challenge an
19 unconstitutionally obtained conviction. Catalonotte
20 tells us when a predicate is good, even if the law -
21 - - if the law seems to have changed in some regard.

22 Catalonotte provides two ways to do that.
23 One doesn't implicate retroactivity at all, and
24 that's one of the main ways - - - reasons why we're
25 saying it applies here. Catalonotte asks what the

1 law was at the time of the prior conviction. It's
2 not - - - it doesn't depend on retroactivity per se;
3 it's looking what the rules were at the time of the
4 original - - - of the predicate conviction.

5 JUDGE GARCIA: Could you do this with
6 Padilla?

7 MS. ZOLOT: Excuse me?

8 JUDGE GARCIA: Could you do it with
9 Padilla, the immigration cases?

10 MS. ZOLOT: I'm - - - I'm familiar with
11 those cases.

12 JUDGE GARCIA: Could you do that here?
13 Could you challenge the underlying conviction, even
14 though you can't - - - it's not retroactive, could
15 you go back now and say, you know, that conviction is
16 no good, it was unconstitutional; it was obtained in
17 violation of Padilla.

18 MS. ZOLOT: Well - - -

19 JUDGE GARCIA: Because Padilla didn't
20 change the law either, did it?

21 MS. ZOLOT: Looking - - -

22 JUDGE GARCIA: Under your analysis.

23 MS. ZOLOT: Well, insofar as this court in
24 Ford, I believe, said that lawyers did not have a
25 duty to advise defendants of, you know, what was

1 deemed a collateral consequence of immigration, I'm
2 not sure that Padilla would - - -

3 JUDGE GARCIA: So is Ford still good? I
4 mean, Padilla said there is an obligation, right?

5 MS. ZOLOT: But - - - but in looking at
6 what the law was at the time of the original
7 conviction, Catu didn't change the law. When Mr.
8 Fagan wasn't told about post-release supervision,
9 that wasn't in compliance with what the law required
10 at the time.

11 JUDGE GARCIA: Almost like the exclusionary
12 rule didn't change the law. And to me, reading those
13 cases, it's a very fuzzy line as to remedy and what
14 the law was. Because in ways, especially with Catu
15 which has spun ten years or more of litigation and
16 legislative fixes for something that didn't change
17 the law under your view, I think that line is hard to
18 pin down.

19 MS. ZOLOT: I think that - - -

20 JUDGE GARCIA: I think it's very difficult
21 to say the law was this except now you can't use the
22 evidence, right, the law was the same in the Fourth
23 Amendment, but now you can't use anything.

24 MS. ZOLOT: I think there is a distinction
25 between a new rule and a rule that applied well

1 settled principles but had wider application that
2 might have been anticipated at the time.

3 JUDGE PIGOTT: Well, didn't we - - - it
4 seemed to me the department's up until the time of
5 Catu was more almost the Federal constitutional
6 standard saying, you know, not only, you know, must
7 there be a violation, but you have to show prejudice.

8 MS. ZOLOT: Well - - -

9 JUDGE PIGOTT: And then we said in Catu,
10 you don't have to show prejudice anymore.

11 MS. ZOLOT: The Appellate Divisions were
12 wrong. I mean, based on the preexisting law.

13 JUDGE PIGOTT: I understand that, but what
14 I'm saying - - -you're saying - - - you're saying
15 that it's not new law, that it was, you know, that's
16 the way it always had been, which is essentially
17 saying we had three out of four departments who year
18 after year, after year were violating the law.

19 MS. ZOLOT: Well, it was really a very
20 confined period from maybe 2001 to 2004.

21 JUDGE PIGOTT: I'll give you that.

22 MS. ZOLOT: But putting that to the side -
23 - -

24 JUDGE PIGOTT: But still - - - still, I
25 mean, what the Appellate Divisions were doing was the

1 law up until the time that the Court of Appeals said,
2 no longer do you need to show prejudice.

3 MS. ZOLOT: I think in Catu we only need to
4 look at the Catu decision itself to see that in the
5 six-paragraph decision with no extensive discussion
6 of either the need to advise the defendant of the
7 direct consequences or the remedy, in - - - and Catu
8 in fact cited a 1984 case, People v. Coles, for the
9 idea that harmless error really is an inappropriate
10 application on a guilty plea.

11 I don't believe - - - and then in
12 correcting what the Appellate divisions were doing,
13 the court - - - this court wasn't going out of its
14 way to explain that this was some new development in
15 the law; it seemed very, if you will, a pedestrian
16 application.

17 JUDGE PIGOTT: Well, don't you then get
18 back to what I think Judge Garcia was saying was, so
19 it was no big deal. Catu was just a simple little
20 adjustment on a law, and why everybody has been so
21 excited about it for the last fifteen years is a
22 mystery to all of us.

23 MS. ZOLOT: Well, I think what happened - -
24 - I think Judge Read's comments, which my adversary
25 actually cited, supports that it isn't a new - - - at

1 least from the - - - you know, I'm trying to surmise
2 from comments made by a former judge, but from what
3 Judge Read did say, it appears that the court, at the
4 time, was applying well-settled principles to a new
5 situation and didn't foresee the wider application of
6 that rule.

7 That doesn't make it a new rule; it just
8 means that the application of this appropriate proper
9 rule had more consequences than it might have been
10 intended. But I will say, these consequences are
11 fewer than what my adversary is saying, is these - -
12 -

13 JUDGE RIVERA: Okay. If I could just
14 clarify - - -

15 MS. ZOLOT: I'm sorry.

16 JUDGE RIVERA: - - - in the history, isn't
17 it what - - - at that point in time that you have a
18 legislative change that creates PRS, and then that
19 works its way through the courts until it finally
20 reaches the Court of Appeals. But am I
21 misunderstanding your point, that's sort of the
22 history - - -

23 MS. ZOLOT: Yes.

24 JUDGE RIVERA: And - - - but the Court of
25 Appeals is rendering a decision based on an existing

1 right.

2 MS. ZOLOT: That's correct.

3 JUDGE RIVERA: Whether or not this piece of
4 legislation falls within - - -

5 MS. ZOLOT: Exactly. All - - -

6 JUDGE RIVERA: - - - this existing right.

7 So we're back to whether or not that's a
8 new rule or, as you have already said, instead just
9 the application of existing principles to some
10 change.

11 MS. ZOLOT: Yes.

12 JUDGE PIGOTT: So it's new to the extent
13 that we never had PRS before, and it wasn't until PRS
14 that this became the law.

15 MS. ZOLOT: True. We didn't have PRS; PRS
16 is just another sentence. It's just letting the
17 defendant know about his sentence. I would remind
18 the court that there is on the federal side, People
19 against Ferguson - - - U.S. v. Ferguson decided well
20 before Catu, which I think provides a very useful
21 analysis on how, you know, courts advising defendants
22 of their sentences is business as usual. There have
23 been a lot of conse - - -

24 JUDGE RIVERA: So - - - so the rule is that
25 the courts didn't appreciate - - - the courts below

1 didn't appreciate that the rule is that sentences
2 include PRS. That's the error below that Catu was
3 responding to.

4 MS. ZOLOT: Yes. That they were in - - -

5 JUDGE RIVERA: But that that is grounded in
6 an existing right that the Court of Appeals did not
7 carve out a right that did not exist.

8 MS. ZOLOT: That's - - - that's - - -

9 JUDGE RIVERA: Is that - - -

10 MS. ZOLOT: - - - correct.

11 JUDGE RIVERA: - - - where you're going
12 with this?

13 MS. ZOLOT: Yes.

14 JUDGE RIVERA: Okay. So then what's the
15 response to the issue of the remedy? Isn't that then
16 what's new?

17 MS. ZOLOT: Remedy, and I think we can also
18 draw, you know, instruction from Catu, remedy for an
19 unknowing and involuntary plea, from Boykin on has
20 always been plea vacature. There is nothing new
21 about that. In fact, this court in Catu didn't feel
22 the need apparently to cite a case after stating
23 because the plea is unknowing and involuntary the
24 conviction must be reversed. This was nothing
25 controversial.

1 are creating now; that's an existing independent
2 statutory right. Yes, the legislature considers it
3 important to give enhanced sentence to recidivist
4 offenders; that's also important, but no more
5 important than the legislative prerogative to ensure
6 that convictions, especially when it may involve a
7 life sentence, especially when the sentence may be
8 very long, need to be enhance - - - an enhanced
9 sentence on that conviction needs to be predicated on
10 a valid conviction.

11 And there is nothing manipulative or
12 deferious (sic) about a defendant exercising their
13 statutory right to ensure that that conviction,
14 whether it's because there's a Catu violation,
15 whether it's because they weren't otherwise advised
16 of the consequences of the plea, or as in the Vargas
17 case, there just wasn't much discussion at all, that
18 is - - -

19 JUDGE FAHEY: You know - - - you know, your
20 time is almost up, so I just - - - Justice Kagan in
21 the - - - I think it was the case that decided that
22 there is no retroactive - - - retroactive application
23 to Padilla, I think it was Chaidez, I'm not sure if
24 I'm saying it correctly.

25 But she referred to a new rule as the one

1 that settled a previously unsettled threshold
2 question, and one of the things I've struggled with
3 here, and I think it's a legitimate issue, I'm not
4 sure if I agree with you, but I think it's an
5 important issue, a legitimate issue, but one of the
6 things I struggled with here, if PRS is new, and then
7 the rules then grow out of PRS, these new rules then
8 grow out of PRS, how does - - - how does - - how do
9 we end up with a retroactive application of it where
10 it couldn't have possibly existed prior to PRS, the
11 Catu rule; you see what I'm saying?

12 MS. ZOLOT: Well, I think the Catu rule is
13 - - - its origins are in the requirement that courts
14 advise defendants of the immediate and - - - I'm
15 going to avoid the word direct, but that's the word
16 the court has used, but we - - -

17 JUDGE FAHEY: So it falls on - - - we have
18 to decide on whether it falls, for us, we have to
19 decide whether it falls on one of two sides, either
20 PRS's new rules that came out, new law, or
21 consequence of guilty plea and therefore - - -

22 MS. ZOLOT: That's always included
23 sentence, and - - -

24 JUDGE FAHEY: Yeah, and always included a
25 full discussion of the sentence. So that's kind of

1 the divide that we're faced with.

2 MS. ZOLOT: Yes.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 JUDGE FAHEY: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel.

6 MR. BRAUN: Thank you very much.

7 Just to respond to a few of the arguments. As
8 far as the State versus Federal rule, I mean, that is part
9 and parcel of the retroactivity analysis, which is
10 something that is an issue that we have brought up and
11 does need to be addressed.

12 So it's - - - it's - - - in other words, whether
13 or not we're going to determine if it's retroactive under
14 Teague, under Pepper, what have you. So we believe that
15 is properly before this court, not just in the Smith case,
16 but in this case as well.

17 And to that end, we would point out that in
18 Pignataro itself, Pignataro, in referencing 70.85, and
19 Catu, talks about very specifically, the State
20 Constitution.

21 JUDGE RIVERA: Does that mean that it's not
22 also a right under the Federal Constitution? Does it
23 say exclusively the State Constitution?

24 MR. BRAUN: That's - - - no.

25 JUDGE RIVERA: Not a federal right?

1 MR. BRAUN: Well, I mean, in - - - I think
2 that's - - - that - - - you know, again, it gets back
3 to Your Honor's original point, what is the - - - is
4 it the right or is it the remedy or what is it, I
5 mean, that's for this court to determine what Catu
6 actually is and what it means.

7 But if we're looking at Catu purely in
8 terms of precedent, what we see is over and over
9 again references to state law, and the State
10 Constitution, which I think is very, very telling.

11 JUDGE PIGOTT: There is an illusion Ms.
12 Zolot raised, and I think someone else did too about
13 - - - and nobody called it a slippery slope, but if
14 we disagree with you, you know, is there a landslide
15 coming of Catu claims?

16 MR. BRAUN: Is there a landslide, yes, I
17 believe there is a landslide coming.

18 JUDGE PIGOTT: What do you base that on? I
19 - - - Ms. Zolot said it's not true. You know - - -

20 MR. BRAUN: Well, because why not. I mean,
21 because then at that point what you have is you have
22 a court saying that these very dormant old
23 convictions are unconstitutionally obtained. You
24 have a vehicle for attacking those at any time in
25 440.10, why wouldn't you? Get it off your book; get

1 it off the books, you know, make it - - - make it so
2 that you couldn't possibly under any situation be
3 considered a - - -

4 JUDGE RIVERA: I - - - perhaps I've
5 misunderstood, so hopefully you can clarify this for
6 me. Unless you're saying it's really a very narrow
7 class that you're talking about; isn't that true?

8 MR. BRAUN: Well, no, you - - -

9 JUDGE RIVERA: It's not everybody.

10 MR. BRAUN: Well - - -

11 JUDGE RIVERA: It's not everyone who had a
12 Catu error, is it?

13 MR. BRAUN: Well, the First Department
14 really didn't make any sort of distinction - - -

15 JUDGE RIVERA: No, no, I'm asking you.

16 MR. BRAUN: You're asking me what the rule
17 - - -

18 JUDGE RIVERA: Yes, is it every person who
19 is - - - who suffered a Catu error?

20 MR. BRAUN: Sure. I mean - - -

21 JUDGE RIVERA: Well, then who then
22 obviously has a subsequent conviction of the - - -

23 MR. BRAUN: I mean, because I think - - -

24 JUDGE RIVERA: - - - the category is
25 already narrow, but she said it's not everyone who

1 falls in that group; it's a much narrower - - -

2 MR. BRAUN: Right, she is saying it's only
3 for the ones who actually served PRS. So if 70.85
4 works when you haven't served PRS, but 70.85 does not
5 work when you have - - - I'm not sure how I phrase
6 that, but you know where I'm going.

7 JUDGE RIVERA: I do know.

8 MR. BRAUN: So anyhow, but that - - - but
9 that's not what the First Department said. That is
10 not the rule the First Department laid down; it made
11 no such distinction. And if - - -

12 JUDGE RIVERA: But is that not what - - -
13 are we unable to view it that way?

14 MR. BRAUN: Well, even if you did it that
15 way - - -

16 JUDGE RIVERA: Um-hum.

17 MR. BRAUN: - - - then you still have a
18 problem, and you still have a - - - it's unknowable
19 how large a class of cases, but Catu is in terms of
20 tens of thousands of cases. So presumably, you could
21 have many, many, many cases. And again, you are
22 rewarding somebody who pled guilty, where the guilt
23 is not in doubt, and now they're no longer a
24 recidivist. And I would further note - - -

25 JUDGE RIVERA: The plea of guilty is not in

1 doubt.

2 MR. BRAUN: Well, correct - - -

3 JUDGE RIVERA: The plea of guilty is not in
4 doubt.

5 MR. BRAUN: Correct, correct. The plea of
6 guilty. But I would add to that that in the parade
7 of horribles, which I forgot to mention, now what
8 we're having to do in these predicate - - - in these
9 predicate informations is now attorneys, judges,
10 everybody is going to have to check every single
11 conviction, order minutes, find out if there was a
12 Catu violation there, find out if there was a 70.45 -
13 - -

14 JUDGE RIVERA: What's wrong with that?

15 MR. BRAUN: Well, I mean, we're talking
16 about burdening a system with - - -

17 JUDGE RIVERA: I understand, but are we
18 talking about a constitutional error? Forget about
19 whether it's Federal or State, but we are talking
20 about a constitutional error - - -

21 MR. BRAUN: Right, but I'm - - -

22 JUDGE RIVERA: - - - are we not?

23 MR. BRAUN: Well, if - - - if it's
24 determined that it's a constitutional error, then
25 correct, then it's - - - then I guess you would have

1 to say that that's worth it. But - - - but we don't
2 believe that this error, like the judges have (sic)
3 saying is like Padilla, even though it's an important
4 matter, it doesn't - - - it's not the same as saying,
5 every time - - - I mean, you won't be able to
6 practically make an information that you can rely on
7 for anybody.

8 And that's even in the context of predicate
9 convictions, that is really something.

10 JUDGE RIVERA: Well, we assume past Catu.
11 The trial - - -

12 MR. BRAUN: What's that?

13 JUDGE RIVERA: We assume past Catu, trial
14 courts - - - trial judges, right, are correctly
15 informing.

16 MR. BRAUN: But how would you - - -

17 JUDGE RIVERA: - - - defendants of the plea
18 as are lawyers?

19 MR. BRAUN: But how could you know for sure
20 unless you - - - unless you order those minutes, and
21 they could be from - - - they could be from years and
22 years ago from far flung jurisdictions.

23 So - - - and I would just - - - I know my
24 time is out, but I would just lastly say that, you
25 know, the defendant here has a remedy when there is -

1 - - when there is a Catu violation, even if he served
2 time on the PRS. And that - - - and he has civil
3 remedies.

4 In this particular case, he shouldn't
5 necessarily get the remedy of, I don't get to have
6 that conviction on my predicate for all time in the
7 future.

8 Thank you very much.

9 CHIEF JUDGE DIFIORE: Thank you, sir.

10 (Court is adjourned)

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Roni Smith, No. 149 and People v. Keith Fagan, No. 150 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 19, 2016