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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 94

BRIAN NOVAK,

Appellant.

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20 Eagle Street  
Albany, New York  
September 6, 2017

Before:

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

Appearances:

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1 CHIEF JUDGE DIFIORE: Next matter is number 94,  
2 The People of the State of New York v. Brian Novak.

3 Good afternoon, counsel.

4 MS. REILLY: Good afternoon. May it please the  
5 court, my name is Danielle Neroni Reilly, and on behalf of  
6 Brian Novak we're bringing this issue to the court's  
7 attention. We filed this brief on behalf of - - -

8 CHIEF JUDGE DIFIORE: Counsel, do you care to  
9 reserve any rebuttal time for yourself?

10 MS. REILLY: Sure. Two minutes, please?

11 CHIEF JUDGE DIFIORE: Sure.

12 MS. REILLY: Thanks. So at this time we're  
13 bringing this issue to the court's attention due to the  
14 fact that Mr. - - - or Judge Sypniewski presided over not  
15 only the trial but as a bench trial, he was a trier of the  
16 facts, the law, and thereafter he became the appellate - -  
17 -

18 JUDGE STEIN: When - - - when did the defendant  
19 or his counsel discover that?

20 MS. REILLY: So I had responded to the court's  
21 letter wherein I showed this court that I had appealed this  
22 matter to Judge Drago who was a sitting county court judge.  
23 Thereafter, Jerry Dwyer, on behalf of the People, responded  
24 again to Judge Drago. Thereafter, it kind of got lost in  
25 the mist. A few months later, I get a decision saying it's

1 Judge Sypniewski who decided his own decision.

2 JUDGE STEIN: So there was no oral argument?

3 MS. REILLY: No. No.

4 JUDGE STEIN: Okay.

5 MS. REILLY: We just got the decision in the mail  
6 stamped by Judge Sypniewski, so we then went to the CPL,  
7 and here we are. So - - -

8 JUDGE FAHEY: So we - - - ineffective assistance  
9 of counsel wasn't argued, was it? So it's really - - - we  
10 either got to say it's a mode of proceedings error or it's  
11 not preserved, right?

12 MS. REILLY: Well, it is preserved in terms of -  
13 - - well, it is a mode of proceedings error, but it - - -

14 JUDGE FAHEY: I get the argument but that's - - -  
15 for us to decide, essentially, I think we have to declare  
16 this to be a mode of proceedings error and then - - -

17 MS. REILLY: Yes.

18 JUDGE FAHEY: All right.

19 MS. REILLY: So I'd ask the court to do so.

20 JUDGE FAHEY: No. That's fine. Go ahead.

21 MS. REILLY: All right. So in essence, Mr. Novak  
22 is in the position now that he was arguing all the trial  
23 errors to Judge Sypniewski, and it's the defense position  
24 that it is, in fact, an abuse of discretion. I'd also like  
25 to bring to the court's attention that it was a

1 jurisdictionally defective accusatory instrument. This was  
2 raised at the time of the trial. It was - - -

3 JUDGE RIVERA: Where - - - where are you  
4 grounding the right to have the appellate judge not be the  
5 same judge who - - -

6 MS. REILLY: In due - - -

7 JUDGE RIVERA: - - - sat at the trial?

8 MS. REILLY: In - - - I guess in basic principles  
9 of due process, Your Honor.

10 JUDGE RIVERA: Federal or state?

11 MS. REILLY: Both. So - - - and I understand  
12 that the federal constit- - - or the federal law actually  
13 prohibits that. As the court's aware, our legislation - -  
14 - our legislative have not ruled on that so there is no  
15 actual law but - - -

16 JUDGE WILSON: It actually used to prohibit it by  
17 statute and repealed the statute that prohibited it, right?

18 MS. REILLY: In what - - - in the feds or - - -

19 JUDGE WILSON: No. State.

20 MS. REILLY: It used - - -

21 JUDGE WILSON: New York - - - New York State.

22 JUDGE FEINMAN: In the - - - in the state  
23 Constitution from 1861 to 1961 when they made some change.  
24 It was either statutory or constitutional. I don't know if  
25 you have any insight about that.

1 MS. REILLY: No.

2 JUDGE FEINMAN: And if so - - - if it was  
3 repealed does that mean anything for the result here?

4 MS. REILLY: I - - - I know that the respondents  
5 have cited to the judiciary law as to what is now in place  
6 for when a judge should recuse themselves. I'm asking this  
7 court, as I guess basic principles of fundamental due  
8 process, that, in fact, this should not be a practice that  
9 is allowed by law or by statute. So - - -

10 JUDGE GARCIA: But there is an old case out of  
11 this court, right, Pierce, 1847. It's a goodie. And - - -  
12 and as we've been talking about, this - - - the  
13 Constitution has changed and the statutes have changed over  
14 time in New York, as Judge Feinman says. But the language  
15 of that case where a judge on this court decides that he  
16 can sit on appeal from a decision he participate in, the  
17 Supreme Court says, "There's nothing in the nature of the  
18 thing which makes it improper for a judge to sit in review  
19 upon his own judgments."

20 MS. REILLY: Well, was that a trial by a bench  
21 trial or was that a jury trial? I guess - - -

22 JUDGE GARCIA: So it makes - - - it would make a  
23 difference if a judge was sitting on appeal of his own just  
24 purely legal rulings?

25 MS. REILLY: Well, I think that there would be a

1 better decision, similar to like a Mapp/Dunaway where he  
2 ruled on - - - but there's always then - - -

3 JUDGE FAHEY: How about a 440?

4 MS. REILLY: Well, again, with a 440, is - - - it  
5 makes sense to go back to the same judge who originally  
6 heard it because they'd be in the best position to say,  
7 hey, look, this evidence may have made a difference, but a  
8 440 motion specifically prohibits trial-related rights to  
9 be raised therein.

10 JUDGE STEIN: But isn't the difference that here  
11 the - - - the defendant is being deprived of any appellate  
12 review? On a 440 or any of these other things, there is  
13 still appellate review.

14 MS. REILLY: Right. Yeah. This - - - I mean  
15 this ends it for him. In other words, to have, I guess - -  
16 -

17 JUDGE RIVERA: Well, there is appellate review.  
18 You're just complaining about who - - - who sat on the  
19 appeal. You're - - - you're not really saying there's no  
20 appellate review, or maybe you are?

21 MS. REILLY: I - - - I am saying there is no  
22 appellate review in this case.

23 JUDGE GARCIA: So how would you - - -

24 JUDGE RIVERA: So tell me what's that grounded  
25 in. That's where - - - I want to get to that.

1 MS. REILLY: That's grounded in the fact that the  
2 trial judge who heard the actual case was the trier of the  
3 fact, the trier of the law, and then he's saying, oh, by  
4 the way, I didn't make any mistakes. And where are we able  
5 to go?

6 JUDGE GARCIA: I thought he did say he made a  
7 mistake?

8 JUDGE FAHEY: Yeah. I did too. I thought he,  
9 interestingly, said that he did make a mistake in one area.

10 JUDGE GARCIA: It was harmless.

11 MS. REILLY: Right.

12 JUDGE FAHEY: Which was it?

13 MS. REILLY: So, yes. There was a discovery  
14 violation that was determined to be harmless, but with  
15 respect to the - - - the actual accusatory instrument,  
16 whether there was a Rosario violation - - -

17 JUDGE RIVERA: Does your argument turn on the  
18 actual bias or the appearance?

19 MS. REILLY: The appearance of impropriety.  
20 Judge Sypniewski is a fair judge through and through. It -  
21 - - there's no indication that he actually had an actual  
22 bias in this case, but that's not what I'm asking the court  
23 to determine. I think that the court has to determine that  
24 Brian Novak went behind - - - before him and then had  
25 basically no appellate review because no one was there to

1 review his decisions on the law. He can't do a 440.

2 JUDGE RIVERA: But what's the impropriety - - -  
3 what's the appearance you're referring to?

4 MS. REILLY: Because it - - - I think that we  
5 have to have public confidence in our judiciary, and we  
6 have to have, you know, just the appearance. If you say  
7 that the judge, in fact, is deciding that everything that  
8 he did was right, it's human nature. You're not going to  
9 say you made a mistake. Although you can say in the  
10 abstract, yeah, I guess you could look at that both ways,  
11 he was never going to reverse himself.

12 JUDGE FEINMAN: Let me ask you this. How would  
13 you fashion the test in terms of when a judge has to recuse  
14 himself or herself?

15 MS. REILLY: Well, I think for the purposes for  
16 this, if you sat on a trial and you're the judge of the  
17 fact and you're the judge of the law, I don't think that  
18 you should sit in judgment of your own rulings.

19 JUDGE FEINMAN: So take it one step further.  
20 Imagine - - - put it in the civil context, and, you know,  
21 you have a motion to dismiss a cause of action that's one  
22 of five causes of action. You dismiss that cause of  
23 action. A few years later, it finally goes to trial in  
24 front of a different judge. It gets sent out. They try  
25 the case. There's a verdict, goes up on appeal, and now

1 that judge who dismissed one cause of action out of five is  
2 on the Appellate Division, reviews it. Does that judge  
3 have to be off the case or can they be on the case?

4 MS. REILLY: Well - - -

5 JUDGE FEINMAN: I mean you see where I'm going  
6 with this? I mean where are the parameters?

7 MS. REILLY: I - - -

8 JUDGE FEINMAN: Where are the outer limits?

9 MS. REILLY: So I have never done a civil case,  
10 but with respect to - - - my argument would be that no.  
11 They shouldn't hear the case. They shouldn't sit on the  
12 case because they made a decision. However, you know, I  
13 think it's almost akin - - -

14 JUDGE FEINMAN: Decision on the merits, is that  
15 what you're saying the test - - -

16 MS. REILLY: Yes.

17 JUDGE FEINMAN: - - - is? If you've ruled on the  
18 merits of the underlying claim or accusation or criminal -  
19 - -

20 MS. REILLY: Or the - - - the law and the facts,  
21 make a factual determination.

22 JUDGE FAHEY: So how about if they set bail on  
23 him and then later, they - - - somebody else hears the case  
24 and then there's an appeal after that?

25 MS. REILLY: Are we going back to - - - so if - -

1 -

2 JUDGE FAHEY: Your case. Say your guy comes in.  
3 He's got a DUI. He sets bail on him, 2,500 dollars. Boom,  
4 some other judge handles it. Does he have to recuse  
5 himself on the case in the appeal?

6 MS. REILLY: No.

7 JUDGE FAHEY: Okay.

8 MS. REILLY: This is a case - - - this is where  
9 it is a trial. The fundamen- - - -

10 JUDGE FAHEY: Now is this something - - - no, I  
11 get it.

12 MS. REILLY: Right.

13 JUDGE FAHEY: Is this something that comes up  
14 often? It - - - in my research it seems there are 24 of  
15 the counties have single-county court judges in it. Is  
16 that correct? Do you know?

17 MS. REILLY: Sure. No.

18 JUDGE FAHEY: Okay.

19 MS. REILLY: I - - - I don't.

20 JUDGE FAHEY: All right. Okay.

21 MS. REILLY: I don't know that, Judge.

22 JUDGE FAHEY: All right. But it - - - it's  
23 something - - - let's for argument's sake say this, it's  
24 something that will come up relatively often as a policy  
25 matter. The issue could come up, though normally I assume

1 they refer to another county judge or get a state supreme  
2 court judge to sit in, if they can, to cover these cases.

3 MS. REILLY: Right.

4 JUDGE FAHEY: Yeah.

5 MS. REILLY: And that - - - and that's what  
6 Schenectady does a lot. If there's an instance where Judge  
7 Sypniewski was a prior prosecutor. We've had a case where  
8 other - - - other courts come in, which is why there was no  
9 reason whatsoever to believe that he, in fact, would have  
10 decided the - - - this decision in this case.

11 JUDGE RIVERA: So - - - so he's recused himself  
12 since his appointment on cases where he served as a  
13 prosecutor so he's gone through this process in the past?

14 MS. REILLY: Sure. We - - -

15 JUDGE RIVERA: And - - - and the county has found  
16 a way to deal with it?

17 MS. REILLY: Absolutely.

18 JUDGE FAHEY: It does sound like since the matter  
19 wasn't brought to his attention he could have not even know  
20 about it, quite honestly. Yeah.

21 MS. REILLY: Perhaps.

22 JUDGE FAHEY: You disagree.

23 MS. REILLY: But - - - I - - - I don't think it  
24 should be allowed.

25 CHIEF JUDGE DIFIORE: Thank you.

1 JUDGE RIVERA: Well, I'm sorry.

2 JUDGE FAHEY: That's a different question. Yeah.

3 JUDGE RIVERA: If I may just ask to follow-up on  
4 Judge Fahey's question. How much time had expired between  
5 the end of the case and when he took it as the appeal?

6 MS. REILLY: About a year.

7 JUDGE FAHEY: A year.

8 MS. REILLY: Thank you.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 Counsel.

11 MS. BRUNECZ: Thank you. May it please the  
12 court, my name is Tracey Brunecz, and I represent the  
13 People in this matter. With respect to the recusal issue,  
14 we first point out that this certainly was not a mandatory  
15 recusal situation.

16 JUDGE GARCIA: Counsel, was this a - - - was this  
17 an appeal as of right?

18 MS. BRUNECZ: The - - - from city court to county  
19 court was an appeal as of right. Yes.

20 JUDGE GARCIA: So do you think there's just a  
21 fundamental appearance problem with the person who's  
22 sitting on your as of right appeal being the same person  
23 that presided over your trial?

24 MS. BRUNECZ: That - - -

25 JUDGE GARCIA: Doesn't that undercut as your

1 adversary was saying?

2 MS. BRUNECZ: That certainly is the argument,  
3 Your Honor.

4 JUDGE GARCIA: Why is that argument wrong?

5 MS. BRUNECZ: Not necessarily wrong, but what I'm  
6 saying is this was not a mandatory situation. This was a  
7 situation - - -

8 JUDGE GARCIA: So why wouldn't it be - - -

9 MS. BRUNECZ: - - - where it was discretionary.

10 JUDGE GARCIA: - - - an abuse of discretion not  
11 to recuse yourself when you've been the sole fact finder  
12 and decider of the legal issues and now you're sitting as  
13 an appellate tribunal and an as of right appeal as the only  
14 judge in that appellate role?

15 MS. BRUNECZ: If you're going to make the  
16 argument - - - I submit that if you're going to make the  
17 argument that if there is an appearance of impropriety and  
18 you have the discretion to decide whether to continue to  
19 sit or not, the mere fact that you do make the decision,  
20 and that's all we have in front of us, is the fact that he  
21 made the decision, apparently, to decide the issues on  
22 appeal. That's a bootstrap argument in terms of reason  
23 it's an abuse of discretion is because he made the  
24 decision. Isn't that a mandatory argument? That - - -

25 JUDGE GARCIA: No. It would be under the facts

1 of this case where he said as - - - at least as the fact  
2 finder and the finder of - - - determinate - - - you know,  
3 the deciding all the legal issues, that he may have used  
4 his discretion in saying it was okay to sit as the sole  
5 appellate judge in an as of right appeal. Why isn't that  
6 what we always do and look at the facts and circumstances  
7 in an abuse of discretion case? It may be an easier call  
8 in certain circumstances, but it's not a bootstrap  
9 argument.

10 MS. BRUNECZ: Well, we do look at whether there  
11 was an abuse of discretion. But what do we have in front  
12 of us?

13 JUDGE FAHEY: Isn't - - - isn't there something  
14 broader indicated than - - - here than that? Here - - -  
15 here it's about the administration of justice and the  
16 appearance of impropriety. Assume there's no actual  
17 impropriety by the judge, that he might have not known the  
18 case. He decided it. But how justice is seen to be  
19 administered seems to be a fundamental right that everyone  
20 should be entitled to, and to have the same person decide  
21 the facts and the law on one level and then decide your  
22 viability of your appeal on the next level, even if it's  
23 just merely an oversight, certainly creates an appearance  
24 of - - -

25 MS. BRUNECZ: But - - -

1 JUDGE FAHEY: - - - of unfairness.

2 MS. BRUNECZ: But then - - -

3 JUDGE FAHEY: And lack of - - - and more - - -

4 MS. BRUNECZ: Right.

5 JUDGE FAHEY: - - - more specifically, a lack of  
6 objectivity that I think every - - - all litigants are  
7 entitled to when they come to the appellate process. Let  
8 me give you an example. I've wormed my way up through the  
9 entire legal system of New York State, and as each level as  
10 I've gone through, and many of the judges have gone through  
11 the same experience, as we've gone through each level, we  
12 always recused on all the cases that were below us, even  
13 things that were minor motions or anything else. And it  
14 wasn't - - - some of them we could have sat on, but quite  
15 honestly, we recused where we had been judges in the - - -  
16 in the lower courts because the - - - we wanted the  
17 litigants to feel that they had a fair shot. That Fahey  
18 isn't sitting there and having - - - he already decided my  
19 case once. Shouldn't the litigants here have the same  
20 opportunity?

21 MS. BRUNECZ: I'm not saying they shouldn't, but  
22 then that shouldn't make - - - then that should be a  
23 mandatory recusal situation. What we have here, still, the  
24 law as it is, is a discretionary decision, and we have to -  
25 - -

1           JUDGE RIVERA: But if - - - if you ground it in  
2 due process, aren't we now - - - you're kind of begging  
3 that question, aren't you? So if it's grounded in due  
4 process, isn't - - - the argument is that due process  
5 mandates this outcome.

6           MS. BRUNECZ: Well, I took a look at that very  
7 argument, and I looked at People v. Alomar, which this  
8 court decided in 1999. And it does say, and I quote:  
9 "Recusal as a matter of due process is required only where  
10 there exists a direct, personal, substantial, or pecuniary  
11 interest in reaching a particular conclusion or where  
12 there's a clash in judicial roles is seen to exist." And  
13 in discussing that - - - and the cite for Your Honors,  
14 that's 93 N.Y.2d. 239, at 246. And in discussing that,  
15 this was a - - - the Alomar case was a reconstruction  
16 hearing situation, slightly different, obviously, than what  
17 we have here today. But nonetheless - - -

18           JUDGE FEINMAN: Then that - - - that was one with  
19 the certifying of the record, right?

20           MS. BRUNECZ: Yes. Correct.

21           JUDGE FEINMAN: Okay.

22           MS. BRUNECZ: But nonetheless, the court there  
23 went on to discuss that with respect to a showing of abuse,  
24 there - - - or bias, the litigants were arguing that the  
25 only bias the court had was the protection of the criminal

1 conviction, and the court that in that instance said but  
2 that falls short of the mark. So my point here is this  
3 court, Judge Sypniewski - - -

4 JUDGE FEINMAN: And so then how do you interpret  
5 that clash of judicial roles language?

6 MS. BRUNECZ: I looked further into - - -

7 JUDGE FEINMAN: What constitutes a clash of  
8 judicial rules?

9 MS. BRUNECZ: Yeah. It - - - in further look at  
10 Alomar, they refer to U.S. v. Murchison out of the Supreme  
11 Court, and in there, it seemed that when they were  
12 discussing the clash of judicial roles, they were talking  
13 about a judge - - - a situation in Murchison where the  
14 judge was the grand jury, was the prosecutor, was the trier  
15 of fact, and obviously the trial judge in the matter on the  
16 law. So I think they were referring to a clash of judicial  
17 roles at Alomar in a broader sense than what we're talking  
18 here. The - - - I think the point remains - - -

19 JUDGE RIVERA: So you mean when you're - - - when  
20 you're the advocate?

21 MS. BRUNECZ: I'm sorry, Judge?

22 JUDGE RIVERA: So when you're the advocate it's  
23 mandatory? So - - - so he doesn't have discretion - - -

24 MS. BRUNECZ: It is mandatory when they - - -

25 JUDGE RIVERA: - - - if he was a prosecutor in

1 the case as - - - as your adversary has already commented?

2 MS. BRUNECZ: That is a mandatory recusal  
3 situation if you were a prior advocate. Here, again, we  
4 have no allegation of what the abuse of discretion is.  
5 There's no allegation that the court was biased in any way.

6 JUDGE RIVERA: No. I think the - - - the  
7 question is about the appearance, and - - - and as I think  
8 more than one member of the court has either expressly  
9 stated - - -

10 MS. BRUNECZ: Right.

11 JUDGE RIVERA: - - - or suggested, the appearance  
12 is not solely about this individual judge and its impact.  
13 The appearance is - - - the appearance of - - - of the  
14 potential inability to be neutral and that impact on public  
15 perception - - - but not just perception - - - confidence  
16 in our entire judiciary and our judicial system.

17 MS. BRUNECZ: I fully understand, and - - - and I  
18 don't disagree with that, but my point is - - -

19 JUDGE RIVERA: Well, you must. Otherwise, I  
20 don't understand - - -

21 MS. BRUNECZ: - - - than that should be a  
22 mandatory - - -

23 JUDGE RIVERA: - - - what position you're taking.

24 MS. BRUNECZ: That - - - then it should be a  
25 mandatory rule. It should be legislated that whenever

1 there's an appearance of impropriety, you must recuse.  
2 Why, then, leave it up to the discretion of the judge?

3 JUDGE RIVERA: I guess I'm not - - - I'm not  
4 clear why you're saying that can't be grounded in due  
5 process. I don't understand that.

6 MS. BRUNECZ: I'm sorry. I guess I don't under -  
7 - -

8 JUDGE RIVERA: If we - - - if the argument is  
9 grounded in due - - - in due process why that doesn't  
10 resolve the problem. I - - - I'm not understanding why  
11 you're saying it cannot be grounded in due process.

12 MS. BRUNECZ: It can be grounded in a - - - okay.  
13 I'm sorry. You're right, Judge. Yes. No. It can be  
14 grounded in due process.

15 JUDGE RIVERA: Okay.

16 MS. BRUNECZ: I'm not saying that it - - - it  
17 can't be.

18 JUDGE RIVERA: Okay.

19 MS. BRUNECZ: But I still think we still need - -  
20 - and I do think - - -

21 JUDGE STEIN: So you're say - - - well, are you  
22 saying that the court can't impose that obligation, only a  
23 legislature can impose that?

24 MS. BRUNECZ: No. No. No. No. I'm not - - -

25 JUDGE STEIN: Okay. So -

1 MS. BRUNECZ: No. I'm not saying that at all.

2 JUDGE STEIN: But - - - because when you say - -  
3 - when you say than make it mandatory, well, I mean, does  
4 it really matter if we call it a mandatory rule in this  
5 particular set of circumstances or if we say it was an  
6 abuse of discretion in this particular set of  
7 circumstances? I don't see the distinction there.

8 MS. BRUNECZ: I - - - and I think what Your Honor  
9 just hit upon is in this set of circumstances. I don't  
10 think we can have review of a discretionary decision unless  
11 we look at the particular situation, and that's what I'm  
12 arguing.

13 JUDGE RIVERA: Well, I guess there I'm losing you  
14 because that - - - that's about an individualized to - - -  
15 to the specific judge, because that's what we're talking  
16 about, the appellate judge at issue, and if the question is  
17 the appearance. What - - - what does it matter if the  
18 judge, in good faith, acted wholly in a way that appears  
19 neutral on its face? It's not doing anything untoward.

20 MS. BRUNECZ: No. No. The judge wouldn't be.  
21 But - - -

22 JUDGE WILSON: I'd like to redirect you for just  
23 a moment - - -

24 MS. BRUNECZ: Sure.

25 JUDGE RIVERA: To the second issue.

1 JUDGE WILSON: - - - the other argument to the  
2 prosecutors.

3 JUDGE RIVERA: Yes, please.

4 JUDGE WILSON: Could you - - - could you explain  
5 why under Article 100 you think that the prosecutor's  
6 information can properly superseded a simplified traffic  
7 information?

8 MS. BRUNECZ: Because I don't think it can  
9 supersede a - - - only a simplified track of - - - traffic  
10 information. What we have here is a simplified traffic  
11 information filed with and supported by a supporting  
12 deposition or a bill of particulars sworn out by the  
13 officer who made the stop. And I think when you look at  
14 CPL 115 and 140, that those two documents together become  
15 an information, and then you can use the prosecutor's  
16 information to override that.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MS. BRUNECZ: Thank you.

19 CHIEF JUDGE DIFIORE: Mrs. Reilly.

20 MS. REILLY: If the court doesn't have any  
21 further questions - - -

22 JUDGE FEINMAN: I actually do.

23 MS. REILLY: Okay.

24 JUDGE FEINMAN: So I want to go back to  
25 preservation for a moment.

1 MS. REILLY: Yes.

2 JUDGE FEINMAN: And do you - - - is there another  
3 way to get around any problem of preservation other than  
4 mode of proceedings? And - - - and specifically, you know,  
5 in terms of what your first opportunity to have objected  
6 would have been after the appeal was decided because you  
7 didn't know that he was deciding it. Is that an exception  
8 that would - - -

9 MS. REILLY: No.

10 JUDGE FEINMAN: - - - get you around the  
11 preservation problem?

12 MS. REILLY: No. It's not a prereq- - - -  
13 prerequisite that I have to go back to the court who denied  
14 me to reconsider that. I think that when I have everything  
15 on the records, it becomes a mode of proceedings error that  
16 this court is - - -

17 JUDGE GARCIA: But what if - - - to put it a  
18 different way, I think what Judge Feinman's asking, what if  
19 when you filed this you knew this judge was sitting on  
20 appeal and you say, okay, I'm going to let him decide.  
21 Maybe lightning will strike, maybe I'll win, and he'll  
22 realize the error of his ways. You get a bad decision and  
23 then your mode of proceedings error and then you don't have  
24 to have preserved the objection. Why would we do that?

25 MS. REILLY: I - - - I think it's the same issue.

1 Even if the - - - I think then shame on the judge in that  
2 situation. The same shame on the judge when I don't know  
3 about it.

4 JUDGE GARCIA: Isn't that also shame on the  
5 lawyer for not objecting? You know that this - - -- the  
6 situation.

7 MS. REILLY: Yeah. But I think that we still  
8 have to go back to the fundamental due process violation  
9 that - - - that Brian Novak, as the defendant here, he's  
10 the one erred in the judge deciding the cases. This - - -  
11 and I understand the court's - - - this is so unique  
12 because there was a change and there was no way for me to  
13 have known because I addressed all of my arguments to Judge  
14 Drago.

15 JUDGE FEINMAN: And that's what I was getting at.  
16 So - - - so - - -

17 MS. REILLY: Yeah.

18 JUDGE FEINMAN: - - - if you didn't know and the  
19 first opportunity you had was after the appeal was decided,  
20 is that the exception to the requirement of preservation as  
21 opposed to calling it a mode of proceedings error? That's  
22 what I was driving at.

23 JUDGE STEIN: Is that another way to look at it?  
24 Yes.

25 JUDGE FEINMAN: Is that another way to look - - -

1 MS. REILLY: Yes. That's - - - that's another  
2 way you could look - - - you could have looked at it.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 JUDGE RIVERA: Could you - - - I'm sorry. Could  
5 you address the second issue?

6 MS. REILLY: Which - - - what - - - which? With  
7 respect to - - -

8 JUDGE RIVERA: The simplified - - -

9 MS. REILLY: The - - - yeah. I think that the  
10 statute's very clear on that that you cannot use a  
11 prosecutor's information to supersede a simplified traffic  
12 information. If the - - - if the officer in this case  
13 wanted to just file a simplified information with a  
14 supporting bill of particulars, absolutely. The People are  
15 in their position. They can file their prosecutor's  
16 information. But here we had a simplified traffic  
17 information, albeit with a supporting deposition. That  
18 doesn't convert it to an information such as - - -

19 JUDGE RIVERA: Why not? Arguing the form over  
20 substance, right? Arguing look at what is actually being  
21 used as opposed to whatever title might have been given to  
22 it.

23 MS. REILLY: Sure. And I understand the People  
24 cited People v. Casey, and I understand the general premise  
25 behind that. However, the statute specifically delineates

1 when and where you cannot do it, and I don't think it's a  
2 form over substance. I think that if you want to legislate  
3 to that you can - - - you can change that.

4 CHIEF JUDGE DIFIORE: Thank you.

5 MS. REILLY: Thank you.

6 (Court is adjourned)

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