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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 108

JASON BRISMAN,

Appellant.

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20 Eagle Street  
Albany, New York  
November 19, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's  
2 calendar is People v. Brisman.

3 MS. WEISS: Good afternoon, Your Honors. May it  
4 please the court. Cleo Weiss for Jason Brisman. May I  
5 please reserve four minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MS. WEISS: When my client asked the Appellate  
8 Division, Third Department, to modify his sentence as a  
9 matter of discretion in the interest of justice, that court  
10 was obliged to consider his request, and to do so using the  
11 correct standard of review. Because that court's decision  
12 reveals two errors in its sentencing analysis, this court  
13 should reverse and remit for reconsideration of Mr.  
14 Brisman's claim using the correct standard of review and  
15 encompassing his trial penalty argument, which does not - -  
16 -

17 JUDGE SINGAS: Didn't we bless that language in  
18 Delgado?

19 MS. WEISS: So I think there's three differences  
20 from Delgado, and I would say the - - - the lack of remedy  
21 in Delgado. There's three differences in this case that  
22 merit a different result for Mr. Brisman. One, is that in  
23 this case, it's not purely using the abuse of discretion  
24 language, but the court's decision reveals that it truly  
25 undertook abuse of discretion review.

1           The second sentence of the court's paragraph  
2           discussing sentencing says, "The record reflects that  
3           county court relied on the appropriate factors in imposing  
4           defendant's sentence." So it's not merely the repetition  
5           of an incorrect standard of review, but the fact that the  
6           court actually undertook the incorrect type of review.

7           The second difference from Delgado that I think  
8           is worth mentioning, is that the Third Department standard  
9           was an entrenched standard for over fifty years; whereas,  
10          in Delgado you had a handful of First Department cases that  
11          were kind of one-off cases.

12          And then, I think the third reason that this case  
13          should come out differently from Delgado has to do with  
14          this court's recent decision - - -

15          JUDGE TROUTMAN: When you say, "come out  
16          differently", exactly what do you mean?

17          MS. WEISS: What I mean by that is that there  
18          should be a remedy in this case. In Delgado, though the -  
19          - -

20          JUDGE TROUTMAN: So is - - - is the remedy remit?

21          MS. WEISS: It's remit to the Third Department  
22          for reconsideration of the claims. And I think that's  
23          appropriate because in People v. - - -

24          JUDGE TROUTMAN: Which it does not necessarily  
25          guarantee a particular result, of course?

1 MS. WEISS: Of course, yes. The - - - the Third  
2 Department could still find that Mr. Brisman's sentence was  
3 not unduly harsh and severe.

4 JUDGE TROUTMAN: So your - - - your argument is  
5 that you want him to have an actual review of the claim  
6 that he raised?

7 MS. WEISS: That's correct. And - - - and the  
8 third thing that is different from Delgado is with this  
9 court's recent decision in People v. Jorge Baque, this  
10 court said that we don't look through the court's decision,  
11 and that's exactly what this court did in Delgado. It  
12 said, we read that language to mean that they didn't find  
13 that - - -

14 JUDGE GARCIA: So is Delgado still good law?

15 MS. WEISS: I think that the analysis undertaken  
16 in Delgado is quite different from this court's recent  
17 decision in Baque, where we sort of just looked at the  
18 language and we didn't second guess or look through to what  
19 the panel was thinking.

20 JUDGE CANNATARO: Going back to your first reason  
21 why this case is different. What I take away from Delgado  
22 is that a criteria such as abuse of discretion can be  
23 appropriate in the exercise of harsh and excessive review,  
24 and it's really dependent on how the court uses it.  
25 Whether it uses it improperly to set up a standard to bar

1 review, or whether it considers it more of a factor or - -  
2 - or one of several criteria to use to determine whether  
3 something is an abuse of discretion. And moreover - - -  
4 and this is my question. If it's the latter, if it's part  
5 of just the process that the court is undertaking to  
6 determine whether something is harsh and excessive, we're  
7 not really at liberty to - - - to dictate to the Appellate  
8 Division what their process is. Do you disagree with that?  
9 Should - - - should we be telling the Appellate Division  
10 what factors it must consider in determining whether a  
11 sentence is harsh and excessive?

12 MS. WEISS: So this court does not dictate  
13 factors to the Appellate Division. But what it did, for  
14 instance, in Ba, is it made clear that the fact that a  
15 sentence was negotiated is a factor among many. And I  
16 don't think this court should ever dictate a series of  
17 factors for the Appellate Division to consider. But what  
18 this court does is clarify that certain factors can be  
19 considered. And what this court clarifies is what the  
20 standard of review here is.

21 JUDGE CANNATARO: Okay. So in this case, the  
22 Appellate Division chose, we don't see an abuse of  
23 discretion and we don't see extraordinary circumstances.  
24 Two - - - I don't know - - - facially reasonable factors  
25 that a court could use. What's wrong with their process

1 here?

2 MS. WEISS: What's wrong with the process is that  
3 the legislature has provided a standard of review in  
4 470.15(6)(b), which is unduly harsh and severe. And  
5 extraordinary circumstances and abuse of discretion are  
6 neither. Neither of those are a test that helps a court  
7 determine when a sentence is unduly harsh and severe.

8 And beginning with extraordinary circumstances,  
9 that test is clearly wrong because there are many  
10 absolutely ordinary day-to-day circumstances - - -

11 JUDGE CANNATARO: So then we should tell them not  
12 to use those factors when they're undertaking their harsh  
13 and excessive review? Those are - - -

14 MS. WEISS: The - - -

15 JUDGE CANNATARO: - - - those are off limits?

16 MS. WEISS: The - - - the test I would have this  
17 court - - - or the - - - the ruling I would ask for from  
18 this court is that the Appellate Divisions and the  
19 intermediate appellate courts should review whether a  
20 sentence is unduly harsh and severe, and that doesn't mean  
21 that a defendant needs to demonstrate extraordinary  
22 circumstances.

23 JUDGE CANNATARO: So Delgado doesn't survive this  
24 case?

25 MS. WEISS: Well, Delgado didn't address



1 extraordinary circumstances. It was more focused on the  
2 abuse of discretion language.

3 JUDGE CANNATARO: Sure.

4 MS. WEISS: But I think Delgado, to the extent  
5 that there was no remedy, there was no remittal in Delgado,  
6 I do not think that that would be an appropriate treatment  
7 for this case.

8 And I think that this is still a relevant issue.  
9 Of course, the Third Department has stopped using this  
10 standard, but there's a recent First Department decision,  
11 People v. Paulino, which shows that the application of this  
12 standard is still unsettled in the intermediate appellate  
13 courts. Paulino was interesting. There was a three-judge  
14 majority who denied a modification, and two judges  
15 dissented from that. And the majority says we - - - we  
16 know the right standard. We read Ba. We read Delgado. We  
17 understand what the standard of review is. But every time  
18 we modify, we find extraordinary circumstances. And I  
19 think that that shows that this court's guidance as to how  
20 to apply the unduly harsh and severe standard is very much  
21 needed by the intermediate appellate courts.

22 And there was another appellate term, Second  
23 Department case, that was posted yesterday on the court  
24 reporter's website, People v. Rafael Castro. I have the  
25 citation here if the court would like it. And that court

1 applies, again, the extraordinary circumstances or abuse of  
2 discretion. So - - -

3 JUDGE HALLIGAN: What - - - sorry. Go ahead.

4 MS. WEISS: It - - - the issue remains very  
5 relevant, and I think that the intermediate appellate  
6 courts are unsettled in how they are applying the  
7 legislature's unduly harsh and severe standard, leading to  
8 state-wide disparity between - - -

9 JUDGE HALLIGAN: What - - -

10 MS. WEISS: - - - how these claims are treated.

11 JUDGE HALLIGAN: What's the distinction? Or is  
12 it just semantics? Is - - - is what I'm trying to - - - to  
13 understand, between unduly harsh and extraordinary? Could  
14 those not be two ways of saying the same thing?

15 MS. WEISS: I think they can be two ways of  
16 saying the same thing. But the reason that this court  
17 should reject extraordinary circumstances is that it  
18 suggests that there has to be something above and beyond  
19 normal circumstances when somebody's - - -

20 JUDGE HALLIGAN: Well, unduly harsh is - - - is  
21 above and beyond, normally. The word "unduly", it seems to  
22 me, is maybe doing the same work that extraordinary is.

23 MS. WEISS: I think that unduly harsh and severe  
24 is what the legislature has selected. And by terming it to  
25 be only extraordinary circumstances, it leads a court to



1 look away from the ordinary factors, such as age or family  
2 circumstances, or the relative culpability of somebody.

3 JUDGE RIVERA: So - - - so do you have examples  
4 of what the Appellate Division has stated are extraordinary  
5 circumstances?

6 MS. WEISS: Well, focusing on the Third  
7 Department - - -

8 JUDGE RIVERA: Yeah.

9 MS. WEISS: - - - what we see when we look at  
10 cases where the - - - when the Third Department was still  
11 using the incorrect standard in cases where they did  
12 modify, they've never - - - in the cases I reviewed from  
13 2020 to 2022 - - - did not identify what an extraordinary  
14 circumstance was. There were some cases where they would  
15 specifically find that a judge abused their discretion.  
16 But the extraordinary circumstances language would only  
17 show up in the cases where they were denying a  
18 modification.

19 And I think that that shows that they're using it  
20 as an extra-statutory barrier. And Mr. Bloom argues in his  
21 brief that the extraordinary circumstances or abuse of  
22 discretion language was a voluntary, sort of a self-imposed  
23 limitation.

24 JUDGE GARCIA: I - - - I'm sorry. Are they - - -  
25 just to go back to the cases where they have modified a

1 sentence. They're not saying these are extraordinary  
2 circumstances?

3 MS. WEISS: They discuss the circumstances that  
4 lead to the modification - - - you know, what was - - -  
5 what was the - - - you know, what merited it. They sort of  
6 dig into the details of it, but they don't say this was an  
7 extraordinary circumstance.

8 JUDGE GARCIA: So then what is the - - - how does  
9 that show that they're using that as a bar before you can  
10 get a modification?

11 MS. WEISS: Well, because it's unclear for an  
12 advocate to know what they're trying to demonstrate. Can  
13 they just talk about their life and their circumstances?  
14 Their unextraordinary circumstances?

15 JUDGE GARCIA: But doesn't it sort of go to Judge  
16 Halligan's position that extraordinary - - - I mean, it's  
17 not just harsh, it's unduly harsh. So extraordinary. So  
18 they're saying that. But then, when they're modifying  
19 they're not saying extraordinary, they're saying this was  
20 unduly harsh. Right?

21 MS. WEISS: What I would submit to Your Honors is  
22 that, though they may seem similar: unduly harsh and  
23 extraordinary circumstances, the legislature picked a  
24 standard of review, and the Appellate Divisions were not at  
25 liberty - - -

1 JUDGE GARCIA: What you're asking - - - what  
2 you're asking us to do is to say to the Appellate Division,  
3 you don't understand your power. Right?

4 MS. WEISS: I would - - -

5 JUDGE GARCIA: You don't understand it. We have  
6 to correct you. And - - - and we're going to tell you now,  
7 you have to do this, and you can't look at this, and you  
8 should look at this. That's what we would have to do here,  
9 right?

10 MS. WEISS: But that's not dictating to the  
11 Appellate Divisions any factors or the exact analysis they  
12 have to undertake.

13 JUDGE GARCIA: No. It's schooling them on - - -

14 MS. WEISS: Telling them - - -

15 JUDGE GARCIA: - - - on what their power is.

16 MS. WEISS: - - - the statute says you may modify  
17 a sentence that is unduly harsh and severe, apply that  
18 standard of review. It's what the legislature wanted.

19 JUDGE CANNATARO: So you don't disagree, though,  
20 that the Appellate Division could have said here, we do not  
21 find that this sentence is unduly harsh and severe, and  
22 left it at that?

23 MS. WEISS: Correct. Right. Under Minko - - -

24 JUDGE CANNATARO: So how does that advance your -  
25 - - the problem that you cite to? This lack of

1 understanding of - - - of what the Appellate Division is  
2 using? Because it seems to me that if we start - - - you  
3 know, schooling them or admonishing them, the better course  
4 for them would be to just say nothing. Just say this is  
5 not unduly harsh and severe. Goodbye.

6 MS. WEISS: I think that we do want to encourage  
7 the Appellate Divisions to write the reasons for their  
8 rulings.

9 JUDGE CANNATARO: But we can't make them.

10 MS. WEISS: But what is more important - - -

11 JUDGE TROUTMAN: We don't in most - - - in - - -  
12 in a significant number of instances, the Appellate  
13 Division does, with respect to excessive sentence, say,  
14 it's not unduly harsh and severe, period.

15 MS. WEISS: That's correct. Most decisions on  
16 these fact - - - on denying sentence modifications tend to  
17 be very short. But I think what is more important than  
18 whether the Appellate Divisions explain themselves and  
19 write a long opinion, is that a party and a litigant knows  
20 what standard of review their case will be treated with and  
21 knows what treatment they're going to get from that court.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. BLOOM: Good - - - good afternoon. Nathan  
24 Bloom for the Chemung County DA's office. May it please  
25 the court.



1           The Appellate Division's broad plenary power of  
2 sentence review includes the power to review sentences for  
3 extraordinary circumstances or abuse of discretion. That's  
4 what this court decided in Delgado, and the court should  
5 reaffirm Delgado here.

6           JUDGE TROUTMAN: So extraordinary circumstances  
7 is what they're supposed to apply for a claim of excessive  
8 sentence, and that's proper; is that what you're saying?

9           MR. BLOOM: I think there - - - there are two  
10 answers to that question. First, there's - - - there's one  
11 argument that extraordinary circumstances - - - to Judge  
12 Halligan's point - - - simply is the same as unduly harsh  
13 or severe. It merely fleshes out - - -

14           JUDGE TROUTMAN: But is it? Or is it creating an  
15 extra bar for them to get a review?

16           MR. BLOOM: And - - - and to - - - yet - - - to  
17 the point in my brief, even if that's true, even accepting  
18 the defendant's premise there, that's acceptable. Because  
19 that falls under the broad discretion that's given to the  
20 Appellate - - -

21           JUDGE CANNATARO: Haven't we said that the  
22 Appellate Division cannot set up an extra-statutory bar, a  
23 standard to the exercise of their interests of justice  
24 jurisdiction to review a sentence?

25           MR. BLOOM: And - - - and just to - - - to clear

1 up a - - - a misstatement in my brief. I do want to  
2 emphasize that sentence review, broadly is mandatory. I -  
3 - - I misstated that in my brief. But de novo sentence  
4 review is not mandatory.

5 JUDGE HALLIGAN: But if the legislature says  
6 unduly harsh, how could the Appellate Division impose an  
7 additional hurdle beyond that? That's a separate question  
8 from whether extraordinary means unduly harsh. But - - -  
9 but if you're suggesting that somehow the Appellate  
10 Division can treat it as a - - - as a higher bar even than  
11 unduly harsh, I don't see how that would be authorized by  
12 the statute.

13 MR. BLOOM: I think where I'm getting that is the  
14 word "discretion". I think since the discretion - - -

15 JUDGE HALLIGAN: Well, but - - - but how does  
16 discretion - - - discretion may allow for some exercise of  
17 judgment, which is probably necessary to decide whether  
18 this is or is not unduly harsh. But how would it allow the  
19 ApDiv to - - - to change what the - - - the standard itself  
20 that the legislature has provided is?

21 MR. BLOOM: I think, as this court stated in  
22 Delgado, that the Appellate Division may review without  
23 deference to the sentencing court, but it doesn't have to.  
24 And I think - - -

25 JUDGE HALLIGAN: I thought I heard you say that -

1 - - that the Appellate Division could impose some  
2 requirement of extraordinary circumstances if that went  
3 above and beyond what unduly harsh - - -

4 MR. BLOOM: I - - - I think - - - I think - - - I  
5 think that's what I mean. That in reviewing - - - in  
6 reviewing a sentence somewhat deferentially, in  
7 acknowledging that the sentencing court was in a somewhat  
8 better position because it had firsthand knowledge of the  
9 case. In doing that, it makes - - - it does raise the bar  
10 in - - - in viewing what - - -

11 JUDGE HALLIGAN: So your view is that the  
12 Appellate Division does not look at this on its own in a -  
13 - - in a - - - in a sort of de novo, fresh way in deciding  
14 whether the sentence was unduly harsh but should - - -  
15 should say, well, if the sentencing court thought it was  
16 appropriate, then that's probably okay?

17 MR. BLOOM: It can. It - - - it can review de  
18 novo, as this court stated in Delgado, but it doesn't have  
19 to. And I'm getting that from the word "discretion", and  
20 I'm also getting that from the unduly harsh or severe  
21 language itself.

22 JUDGE CANNATARO: Where - - - which - - - the  
23 word "discretion", you're getting it from where?

24 MR. BLOOM: As a matter of discretion in the  
25 interest of justice from 470.15(6)(b).

1 CHIEF JUDGE WILSON: So could you use discretion  
2 to - - - could the Appellate Division say, in our excessive  
3 sentence review, we're not going to review any sentences  
4 that unless they're ten years or longer in our discretion?  
5 Because it just wouldn't be - - - it wouldn't be  
6 extraordinary or excessively harsh if - - - unless it's  
7 more than ten years.

8 MR. BLOOM: I think to set a - - - a fixed bar  
9 from that would be arbitrary. And I think that might be a  
10 - - - a due process problem, which is independent. I  
11 think, generally, if we're talking about lower sentences  
12 that might be less of - - - it might be less appropriate  
13 for the - - -

14 JUDGE TROUTMAN: Are you saying that even when a  
15 defendant requests the sentence be reviewed for  
16 excessiveness, that the Appellate Division isn't supposed  
17 to look at it and actually render a decision as to - - -

18 MR. BLOOM: No. It absolutely is supposed to.  
19 It has a duty, that's as of right. But whether it reviews  
20 it de novo or from a - - -

21 JUDGE TROUTMAN: So discretion doesn't allow them  
22 to not entertain in the - - -

23 MR. BLOOM: Correct.

24 JUDGE TROUTMAN: - - - proper light?

25 MR. BLOOM: Look - - - looking elsewhere in the



1 Criminal Procedure Law, it's clear. It does have a duty at  
2 least to look at the sentence, but - - -

3 JUDGE RIVERA: So - - - so maybe it would be  
4 helpful if you clarify what you mean by "de novo" in this  
5 context?

6 MR. BLOOM: Conducting a completely fresh  
7 analysis completely independent of what the sentencing  
8 court decided.

9 JUDGE RIVERA: So is the flip side of that, that  
10 they must defer?

11 MR. BLOOM: And I think - - - yes. And I think  
12 deference is a spectrum. I think - - - I think - - -

13 JUDGE RIVERA: So - - - so you believe they - - -  
14 they always have to defer to the sentencing judge?

15 MR. BLOOM: No. I - - - I think they can not  
16 defer at all, as this court stated in Delgado, or defer  
17 somewhat in its discretion. And I think - - -

18 JUDGE TROUTMAN: But you recognize the Appellate  
19 Division can? They - - - they have powers, unlike this  
20 court, to look at the facts - - - even if there is no abuse  
21 of discretion - - - and change the sentence of the  
22 sentencing court - - -

23 MR. BLOOM: Yeah. Of course. Yes.

24 JUDGE TROUTMAN: - - - by rendering a different  
25 decision based on how they are considering the

1 circumstances?

2 MR. BLOOM: Yes. And I think the unduly harsh or  
3 severe language itself indicates that the court should not  
4 mandate de novo review. Because on its own terms, it seems  
5 to be looking at what the sentencing court did. It's not -  
6 - -

7 JUDGE TROUTMAN: But - - - but when you're saying  
8 that the - - - the court can just look at it anew. They -  
9 - - they don't have to find abuse. They can look at it and  
10 render a sentence - - -

11 MR. BLOOM: Yes.

12 JUDGE TROUTMAN: - - - that's different from what  
13 the trial court did.

14 MR. BLOOM: Correct.

15 JUDGE TROUTMAN: So aren't they looking at it  
16 anew in that instance? No abuse of discretion but based on  
17 the record, the sentence is X instead of Y.

18 MR. BLOOM: I think it's - - - I think it's - - -  
19 it is possible for the court to say, were we sitting in the  
20 sentencing court's chair, we would reach a slightly  
21 different sentence, but because we're going to recognize  
22 that the sentencing court was in a somewhat better  
23 position, we're going to - - - we're going to defer in that  
24 instance. I think that's part of the discretion that's  
25 granted to the Appellate Division by statute.



1           I - - - I don't think unduly harsh or severe is  
2 necessarily a standard of review. I think it's - - - it  
3 merely sets the outer boundary of the court's power as it  
4 sees fit to modify a sentence. I think the - - - the  
5 statute is designed to empower the Appellate Division, and  
6 - - - and the defendant is improperly using it to handcuff  
7 the Appellate Division and force it to adopt a particular  
8 framework for reviewing a sentence.

9           JUDGE TROUTMAN: But they don't have to. It - -  
10 - if we were to agree with the defendant, I think the  
11 defendant recognizes we can send it back. They can say,  
12 okay, we've looked at it and the answer is no. Sentence is  
13 fine.

14           MR. BLOOM: Absolutely.

15           JUDGE TROUTMAN: It - - - it's not handcuffing or  
16 mandating the result. I - - - I believe what the defendant  
17 is asking, is for an actual considered review of their  
18 claim, even if the answer is no.

19           MR. BLOOM: I - - - I think the record shows that  
20 the court did review the claim for extraordinary - - - for  
21 - - - of course, for extraordinary circumstances or abuse  
22 of discretion.

23           JUDGE RIVERA: My understanding - - - if I'm  
24 understanding you - - - your position is that the Appellate  
25 Division has the authority to determine for itself that it

1 will only modify a sentence if there are extraordinary  
2 circumstances, because that's the only basis by which a  
3 sentence could be unduly harsh or severe. Am I  
4 understanding you correctly?

5 MR. BLOOM: Yes. I think one understanding of -  
6 - - of what - - -

7 JUDGE RIVERA: Where - - - where would one find  
8 the authority for the Appellate Division to do that?

9 MR. BLOOM: In the word discretion and in the - -  
10 -

11 JUDGE RIVERA: So that means every department can  
12 decide for itself what is the baseline of unduly harsh and  
13 severe?

14 MR. BLOOM: Yeah. I - - - I think - - - I think  
15 that's by design. I think that's built into the statute.

16 CHIEF JUDGE WILSON: So somebody else in another  
17 department could say unusual circumstances, another one  
18 could pick a different - - - what I'm struggling with is  
19 where the legislature has set out a particular standard by  
20 which this discretion is supposed to be exercised, why  
21 would we not insist that, when they think about the  
22 question, they use the standard the legislature provided  
23 them? Instead of substituting words that to somebody else  
24 may mean something different or may mean the same thing.

25 MR. BLOOM: Well, I don't think that unduly harsh

1 or severe is a standard. And - - -

2 JUDGE RIVERA: So what is it, if it's not the  
3 standard?

4 MR. BLOOM: It's simply to give the Appellate  
5 Division as much latitude to modify a sentence as it  
6 wishes. And if it wants to take a somewhat deferential  
7 posture toward what the sentencing court decided.

8 JUDGE HALLIGAN: So - - -

9 JUDGE RIVERA: Well, I thought it said you can  
10 modify it if - - - if you conclude that it's unduly harsh  
11 or severe? I thought that was the whole point. So that's  
12 the standard; is it not? That's your sole basis?

13 MR. BLOOM: I think it's - - - I think it's - - -  
14 I think it's the goal. I think the goal of - - - the goal  
15 of the court is to - - -

16 JUDGE RIVERA: Oh, so under your view, the  
17 Appellate Division panel could decide it's not unduly harsh  
18 but they're going to modify it anyway?

19 MR. BLOOM: No. No, I think - - -

20 CHIEF JUDGE WILSON: Well, then it can't be to  
21 give them as much discretion as possible, because it has to  
22 be not just harsh, it has to be unduly harsh. That's - - -  
23 that's a standard, isn't it?

24 MR. BLOOM: I think it's - - - well, of course,  
25 arguably it's the same standard as extraordinary

1 circumstances or abuse of discretion.

2 JUDGE RIVERA: Why is that? Extraordinary  
3 circumstances is not necessarily a standard. It's just a -  
4 - - a particular factor of the way you look at the records.  
5 Not necessarily the standard.

6 MR. BLOOM: It - - - it could be, to Judge  
7 Cannataro's point.

8 CHIEF JUDGE WILSON: Well, it might be - - -

9 JUDGE RIVERA: Well, how would we know?

10 CHIEF JUDGE WILSON: - - - but it might be a  
11 standard, but it isn't the standard - - - it isn't the  
12 words the legislature chose. So I just wonder why, if  
13 we're not certain that in all cases, every Appellate  
14 Division justice views extraordinary the same as unduly  
15 harsh, we wouldn't make them use the words the legislature  
16 chose?

17 MR. BLOOM: And certainly there's no harm.

18 CHIEF JUDGE WILSON: The Third Department seems  
19 to have come to that realization.

20 MR. BLOOM: Yes. Certainly - - - certainly,  
21 there's no harm in - - - in expressly using the term unduly  
22 harsh or severe. I just don't see what is the harm in - -  
23 - in using extraordinary circumstances or abuse of  
24 discretion. I don't see how it undermines - - -

25 CHIEF JUDGE WILSON: Is it possible that some

1 person could view those two things as different?

2 MR. BLOOM: They could.

3 CHIEF JUDGE WILSON: Yeah. That might be the  
4 harm then?

5 MR. BLOOM: But falls within the appellate  
6 court's discretion. Even if it somewhat raises the bar to  
7 review because the court is - - -

8 CHIEF JUDGE WILSON: Well, that - - - then I  
9 don't know how to reconcile that with my ten-year example.  
10 Couldn't somebody think that a sentence - - - an Appellate  
11 Division justice colorably think, look - - - and if you  
12 don't like ten, you could take five, you could take three,  
13 you could take just felonies. But to say, look, in my  
14 view, it's not extraordinary unless it meets some  
15 threshold, and I'm going to substitute that for unduly  
16 harsh.

17 MR. BLOOM: I think - - -

18 CHIEF JUDGE WILSON: And you - - - and you - - -  
19 you rest on discretion to give them the authority to do  
20 that.

21 JUDGE HALLIGAN: So under that reading, I take it  
22 - - - and I think maybe you indicated this before - - - the  
23 First Department could say, we'll look at any sentence  
24 that's - - - you know, ten years or more, and the Second  
25 could say five years or more, et cetera. So that depending

1 on where you were sentenced, the review that you would get  
2 from the Appellate Division of your sentence excessiveness  
3 would be completely different.

4 MR. BLOOM: I'm sorry. I - - - I - - -

5 JUDGE HALLIGAN: I took you to be saying that the  
6 Appellate Division - - - in response to - - - to the Chief  
7 Judge's question - - - that the Appellate Division can  
8 decide that it will deem something - - - something unduly  
9 harsh or as you say, extraordinary or not, that it has  
10 discretion to set different bars or cutoffs. And so if  
11 that's right, it seems to me that one appellate - - - one  
12 department could say, well, by definition, any sentence  
13 that is less than two years can't be extraordinary and so  
14 we're not going to even look at that. And the next  
15 department could say, well, for us, it's anything under  
16 five years and so forth. So that depending on where the  
17 defendant is sentenced, the defendant would - - -

18 MR. BLOOM: Right.

19 JUDGE HALLIGAN: - - - or would not get any  
20 meaningful review of something that the legislature has  
21 instructed that the Appellate Division should look at.

22 MR. BLOOM: I think that sort of bar is different  
23 because elsewhere in the criminal - - -

24 JUDGE HALLIGAN: So wait. So do you agree that  
25 is possible under your reading, or it's not possible?



1 MR. BLOOM: I think Chief Judge Wilson's  
2 hypothetical would not be allow - - - allowable.

3 JUDGE HALLIGAN: Because?

4 MR. BLOOM: Because the - - - elsewhere, the  
5 Criminal Procedure Law does say that appeals of - - - of  
6 sentences for undue - - - undue harshness or severity are  
7 as of right. So someone with a sentence of ten years or  
8 less - - -

9 JUDGE HALLIGAN: But then how can you square that  
10 with saying that the word discretion allows the Appellate  
11 Division to import some different standard? I - - - I  
12 guess - - -

13 MR. BLOOM: Because - - - because a court that's  
14 reviewing this sentence with some level of deference to the  
15 sentencing court, is still reviewing it. In Judge - - -  
16 Chief Judge's hypothetical.

17 CHIEF JUDGE WILSON: So we did - - - well, they  
18 are reviewing. They're just imposing a - - - I mean, if  
19 you think about our decision in Epakchi, right? What we  
20 were concerned about, I think - - - and this was an abuse  
21 of discretion - - - sorry. This was a - - -

22 JUDGE GARCIA: Interest of justice.

23 CHIEF JUDGE WILSON: - - - interest of justice  
24 question, was - - - we were concerned about  
25 standardization. Right? That we didn't want - - - I

1 think, it was the Appellate Term and the Second Department  
2 using a different standard than elsewhere.

3 MR. BLOOM: And I - - - I think there are all  
4 sorts of policy reasons why standardization might be a good  
5 thing. I just don't think that it's required under the  
6 Criminal Procedure Law, as it - - - as it is. I think it's  
7 a feature, not a bug. And - - - and if I - - - if I might  
8 just pivot briefly in my remaining time to point two.

9 I - - - I do want to make the point that I think  
10 there's a fundamental disconnect between point one and  
11 point two of the defendant's argument. In point one,  
12 they're - - - they're arguing that de novo review is  
13 required, it has to be a completely fresh look. And at the  
14 same time, in point two, they're saying, no, you have to  
15 look to - - - to the sentencing court and see whether they  
16 imposed a trial penalty or not. So I think they kind of  
17 undermine their argument there.

18 JUDGE TROUTMAN: But wouldn't that go to an abuse  
19 of discretion? That standard? Well, they - - - you could  
20 look at it and say the trial court was wrong in - - - in  
21 what they did. As opposed to, there is no abuse, but I  
22 just want to do a different sentence because I have that  
23 extraordinary power as the Appellate Division and the  
24 interest of justice to just change it because under the  
25 facts, I believe it should be changed. I don't see an

1 inconsistency.

2 MR. BLOOM: I think it's inconsistent if - - - if  
3 the de - - - if de novo review is required. It's not  
4 inconsistent if the Appellate Division is allowed to - - -  
5 to look at the sentencing court - - - to look at the  
6 sentence with some level of deference. And that - - -  
7 that's the main - - -

8 JUDGE TROUTMAN: The de novo - - - de novo review  
9 saying, but you have to - - - I took her argument as being  
10 that, in the first instance you must review the claim.

11 MR. BLOOM: Yes, and I agree with that. You must  
12 review the claim.

13 JUDGE TROUTMAN: Okay.

14 MR. BLOOM: And I think that distinguishes it  
15 from the ten-year hypothetical as well.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. BLOOM: Thank you.

18 JUDGE GARCIA: Counsel, could we pick up with the  
19 ten-year hypothetical or whatever bar you want to set? It  
20 seems to me that is an Epakchi issue. And the court is  
21 setting up an - - - a rule outside the CPL, and every case  
22 that doesn't meet that rule is gone. Right? That was that  
23 case. It was an interest of justice power, but - - - on a  
24 refiling, but they were dismissing them all.

25 Here, I think the question is, is this Epakchi,

1 or is this Delgado? Because Delgado seemed to say, you may  
2 have used different words, but you're applying the right  
3 standard, where you understand your power. Epakchi is,  
4 you're setting up a rule: ten years. They didn't set up a  
5 rule that said ten years. So why is this more like Epakchi  
6 and not like Delgado?

7 MS. WEISS: So I think a premise for my response  
8 is going to be that the standard of review is unduly harsh  
9 and severe. And if you view the abuse of discretion or  
10 extraordinary circumstances test as a gloss on that - - -  
11 and my - - - Mr. Bloom argues that that's acceptable,  
12 they're allowed to do that. They can set up their own  
13 discretionary rule. I think that falls squarely under  
14 Epakchi as an extra-statutory barrier - - -

15 JUDGE GARCIA: What we said in Delgado - - - this  
16 is a way to reconcile, I think. We said in Delgado is when  
17 they used abuse of discretion, they were applying the  
18 unduly harsh and severe standard. We understand that to be  
19 what they were doing. You couldn't say that about a ten-  
20 year bar. Well, when they apply the ten-year bar we  
21 understand that. So that's the difference to me.

22 So why is this more like a rule that they can't  
23 set up extra outside of the CPL, than it is a shorthand way  
24 to express their authority, which is consistent with unduly  
25 harsh and severe?

1 MS. WEISS: Because I think the endpoint of the  
2 people's argument here is that a court could find, while  
3 the sentence is unduly harsh and severe, we don't think it  
4 was an abuse of discretion, so we're not going to modify  
5 it. That's the endpoint of their argument. Is that the  
6 Appellate Division, in their own customized interest of  
7 justice jurisdiction, can have their own test that's  
8 separate from unduly harsh and severe, but what a defendant  
9 - - -

10 JUDGE GARCIA: But we'd have to find that that's  
11 what we think they were doing. In Delgado, with at least  
12 partially the same language, we said we don't think that's  
13 what they're doing.

14 MS. WEISS: And I would refer Your Honor to the  
15 opening brief that I filed in which I cite many Third  
16 Department cases. And I think that the way that they  
17 discuss that standard of review in case after case shows  
18 that it's - - - that it is a bar to review - - -

19 JUDGE CANNATARO: Counsel, I - - - I - - - I want  
20 to take issue with that. I - - - I was very interested in  
21 those block quotes that you gave. They're on page 28 of  
22 your brief. And - - - and when I looked at those, some of  
23 those were Epakchi. Some of those seemed to me, in  
24 context, that they were setting up some sort of extra-  
25 statutory bar towards exercising of their interests of

1 justice review.

2 Others, to me, seemed more like Delgado. That  
3 they were just using these words as - - - I don't know - -  
4 - signifiers for what could be or what looked like to me  
5 appropriate, harsh - - - harsh and severe review.

6 So I posit to you, and wonder if you agree, isn't  
7 this dependent on a textual analysis of - - - of what the  
8 court is saying, in terms of whether they're moving outside  
9 their - - - their statutory power or they're really just  
10 undertaking their own version of harsh and severe review?

11 MS. WEISS: I think Your Honor is right. But I  
12 think the same result is reached either way, because this  
13 is either an - - - an application of an incorrect standard  
14 of review under Delgado and under Ba, more specifically.  
15 Or it's a creation of an extra-statutory barrier to  
16 something that a party, a defendant, is otherwise entitled  
17 to, and that is review of his or her sentence for whether  
18 it's unduly harsh and severe.

19 I'd like to briefly touch on the trial penalty  
20 argument, if I may? Members of this court agreed in Ba  
21 that the fact that a sentence is negotiated is a  
22 permissible factor to be considered in sentencing review.  
23 And of course, Ba considered successful plea negotiations  
24 and what we have here, is an unsuccessful plea negotiation.  
25 But I think it follows from Ba that on-the-record plea

1 negotiations that ultimately do not lead to a plea, may be  
 2 considered as a factor in evaluating the ultimate post-  
 3 trial sentence. And all we ask for from this court is  
 4 similar to Ba, just to when - - - if - - - if this case  
 5 were to be remitted to the Third Department for  
 6 reconsideration of Mr. Brisman's claim, that that  
 7 contention about the disparity between the sentences may be  
 8 reviewed under 470.15(6)(b) without any preservation.

9 And if I might just conclude briefly? We've been  
 10 talking about standards of review, which is, of course, an  
 11 inherently abstract legal question. But I'd like to bring  
 12 it to the ground level just for my conclusion. This is an  
 13 incredibly important issue for criminal defendants. For my  
 14 clients, the possibility of a sentence modification is a  
 15 hope and a prayer while they sit in prison. And it's a  
 16 hope and a prayer for their families who think that perhaps  
 17 a panel of judges might have mercy on their loved one, and  
 18 they might come home a year earlier. And of course, it's  
 19 very important for victims of crimes as well.

20 The vast majority of criminal defendants raise  
 21 this issue on their direct appeal. And for many, it's the  
 22 only issue raised. Few defendants, of course, receive  
 23 modifications, but what each and every defendant deserves  
 24 is a fair consideration of their claims using the correct  
 25 standard.

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CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)





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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jason Brisman, No. 108 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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