COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 9

MITCHELL HERNANDEZ,

Appellant.

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20 Eagle Street
Albany, New York
January 8, 2025

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 JUSTICE LARA J. GENOVESI

Appearances:

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CHIEF JUDGE WILSON: Next case on the calendar is People v. Hernandez.

MR. JAIN: Good afternoon, Your Honors. My name is Amit Jain, and I'm in association with the Office of the Appellate Defender. I represent Appellant Mitchell Hernandez. If I may, I'd like to reserve five minutes for rebuttal?

CHIEF JUDGE WILSON: Yes.

MR. JAIN: Thank you, Your Honor.

Mr. Hernandez's life sentence is unlawful, and the PVFO adjudication that mandated it must be vacated for two independent reasons. First, it violated the plain language of the Penal Law. And second, it rested on judged found facts as to exactly when Mr. Hernandez was or was not incarcerated, not just on the alleged predicates, but for any reason in violation of his right to a jury trial, which he zealous - - -

JUDGE GARCIA: Let's start with the statute. If you look at sub 5, it seems to say that - - - you know, when you calculate the ten-year period, you exclude this time. Or time between the time of commission of the previous felony and time of commission of the present felony shall be excluded from such ten-year period, meaning the period in 4.

So on the plain terms of that statute, how do you

read it the way you would have us read it?

MR. JAIN: Oh, well, Your Honor, I guess I would start by acknowledging there is some ambiguity in the statutory text.

JUDGE GARCIA: I don't think there's ambiguity.

MR. JAIN: Well - - -

JUDGE GARCIA: I think it's fairly clear.

MR. JAIN: - - - if I may?

JUDGE GARCIA: So how do you get by the lack of ambiguity of the statute in reading out the time of commission in that first part of the statute?

MR. JAIN: Well, so I'll explain why our reading is perfectly consistent with the word "commission". But I just want to note first that respondent's reading does far more violence to the text of the statute, and I will - - - I will get into why. But on the word "commission" itself, Your Honor, as we note on page 5 of our reply brief, the legislature also used the term "excluded". And the term "excluded" means to bar from consideration and - - - or basically, to not count.

And so when you're calculating - - - sorry. When you're excluding time from a limitation period - - -

JUDGE GARCIA: It doesn't only say excluded, right? It says also "shall" - - - "that ten-year period shall be extended by a period or periods equal to the time

served."

MR. JAIN: Absolutely, Your Honor. And so the "shall be extended" and "shall be excluded" clauses work hand-in-hand, right? I don't think anybody here is offering - - -

JUDGE GARCIA: So one just doesn't mean anything.

MR. JAIN: No. If - - - to the extent there is superfluity issues, it's respondent's reading that completely reads out "shall be excluded" from the statute, right? Under respondent's interpretation, the legislature could just as easily have enacted a statute that said the period in subparagraph 4 shall be extended by time spent incarcerated. But this - - - the legislature said, "shall be excluded." It specified how the extension happens and it's by excluding that - - -

JUDGE GARCIA: And what does the second part mean under your interpretation?

MR. JAIN: So I think that the "shall be extended" part under our interpretation, it plays an important clarifying role. And so - - - you know, it's true that excluded itself - - -

JUDGE GARCIA: But isn't that - - - then that would be their point, too? It clarifies what's clear.

MR. JAIN: I don't think "excluded" does anything under their reading of the statute. Under our reading,

what "extended" does is make clear that you don't just exclude - - - you know. I point to actually page 23 of respondent's brief on the statutory issue where they - - - they make this accusation. They say if it's really just about exclusion, then you could only account for the time spent incarcerated during that initial ten-year period. And the answer is, no, you exclude that time and then you extend the period by that time.

And so subsequent incarceration that now falls within that extended period also tolls the period. So you're accounting - - - you're accounting for all of that.

And if I may? I understand respondent's argument really makes a lot out of this one word in the statute, "commission". As I said earlier, you know, Judge Donnino has acknowledged, in colorful language, that the statute could have been written more clearly. But respondent's reading has far more deficiencies when it comes to the text alone, before you even get to the half century of precedent about the plain purpose of the statute and how it operates in practice.

And so I'll start actually with the ten-year period. So twice in subparagraph 5 and once in CPL 400.15, the legislature referred to a ten-year period or ten-year limitation, but there is no ten-year period under Respondent's reading of the statute. It is a variable

period that fluctuates based on the, at best, arbitrary fact - - -

JUDGE GARCIA: But it's a period that's defined, right? The ten-year period of subsection 4 is defined except as defined - - - except as detailed in subsection 5. So in this case, even under your reading, the ten-year period isn't a ten-year period. We're talking about thirty years here, right?

MR. JAIN: Well, ten years has some real-world significance, I think, is the point. The legislature clearly thought that the ten-year period should mean something. And under our interpretation, as the court has said, in case after case across several decades, the rule that the legislature enacted is that following the admonishment on the prior sentence, a defendant must be able to live ten years at liberty and show that they have been sufficiently chastened with that cumulative ten years.

JUDGE GARCIA: But they could have said that.

JUDGE SINGAS: But then you're ignoring - - -

JUDGE GARCIA: I'm sorry.

JUDGE SINGAS: - - - the second part of the statute, which says, "And such ten-year period shall be extended."

MR. JAIN: Well, Your Honor, as I - - - as I said earlier, the extended clause does play an important

clarifying role. I haven't heard an answer from respondent on what the excluded clause does.

And, again, I think under respondent's reading there just - - - there is no ten-year period. I mean, it lets the exception swallow the rule. Right? It gets the rule backwards, and it lets this tolling provision in subparagraph 5 effectively blow up the policy in subparagraph 4, that this court has - - - has long described.

JUDGE GARCIA: But it's blown it up in this case, as you - - - just putting it in your terms - - - for a hundred days or whatever the days are. It's already been extended even acceptably, under your interpretation, for much, much longer than that. So the ten-year period often doesn't mean ten years from - - - as a pure period of time.

Here, it means even under your interpretation, I believe almost thirty years.

MR. JAIN: So it does not mean ten years from - - - from sentence on the prior felony to commission of the - - -

JUDGE GARCIA: Right.

MR. JAIN: - - - new offense. I agree with that. But it means something, right? Ten years has some real-world meaning. The defendant knows that he has to live at liberty for a cumulative total of ten years to escape

enhanced punishment, in the court's words.

JUDGE GARCIA: And couldn't in calculating that ten-year period which they placed the stock in, they have subtracted from there, or not given credit or excluded, time that you were incarcerated immediately prior to the sentencing? That is, from the time of commission of the prior felony?

MR. JAIN: No, Your Honor. And I'd be happy to explain why by turning to the next grave textual deficiency.

JUDGE GARCIA: But why wouldn't they use your term? Why wouldn't they use, "from the time of sentencing on the prior felony"?

MR. JAIN: Your Honor, again, I agree that there - - - there - - - I think that there is ambiguity in the statute. And so - - -

JUDGE GARCIA: But it wouldn't have been ambiguous to say that. Is the same way it doesn't appear to be ambiguous to say, "commission."

MR. JAIN: It - - - that - - - there would have been a much clearer way to write the statute, I grant you that, Your Honor. But again, I think our reading is far better than theirs. We've talked about the issue with the ten-year period, which is just written out of the statute from subparagraph 5 in CPL 400.15. We've talked about the

issue with the "shall be excluded" clause, which is pure surplusage under respondent's reading.

CPL 400.15 itself as well, simultaneously enacted companion provision to this very statute that actually implements subparagraph 4. The legislature couldn't have been clearer in what subparagraph 4 - - - subparagraph 5 - - - excuse me - - - accomplishes and it effectuates tolling of the ten-year limitation. Every single word in that phrase except for, "of the", contravenes respondent's reading.

Respondent has not offered an alternative definition of tolling. We're not aware of any. And in fact, respondent has not even mentioned CPL 400.15 when it comes to the statutory issue.

And finally, to my comment about blowing up the statute earlier. I think the fourth grave textual deficiency here in respondent's reading, goes to subparagraph 4's clear emphasis on the moment of sentence as that key triggering moment. And as this court explained in cases like People v. Morse over four decades ago, based on that textual focus on the moment of sentence in the limitation period itself and the decades of statutory history leading up to that provision's enactment, the legislature made clear that what it's doing in these enhanced sentencing statutes is it is requiring additional

punishment only for those defendants who refuse to reform after their admonishment on the prior sentence, not based on purely arbitrary, at best, events that happened before the prior sentence.

So I think for those reasons - - - you know, we went on the text alone. We don't have to get to this court's consistent half century of precedents describing this as a tolling provision, explicating the plain purpose, and so forth.

If there are no further questions on the statutory issue, I'd be happy to turn to the constitutional point. And on the constitutional issue, Your Honors, as I said earlier, to find that the statutory requirements for the sentence were satisfied here, the judge was required to find the facts of exactly when Mr. Hernandez was or was not incarcerated.

JUDGE RIVERA: Well, I - - -

JUDGE SINGAS: He just - - -

JUDGE RIVERA: - - - thought he - - - he conceded?

MR. JAIN: He - - - I - - - two responses.

JUDGE RIVERA: What fact-finding occurred? Let me put it that way.

MR. JAIN: Sorry, Your Honor?

JUDGE RIVERA: What fact-finding occurred?

MR. JAIN: The judge was required under CPL 400.15 to enter a finding that the allegations in the predicate statement were sufficient to support the enhanced sentence, i.e., that he had, in fact, been incarcerated on those dates.

JUDGE RIVERA: But if he concedes those periods, what - - - what fact-finding has gone on?

MR. JAIN: Well, I think two responses to that, Your Honor. I would gently push back on - - - you know, I would say it's not rising to the level of a concession to decline to affirmatively controvert particularly in the context of the Sixth Amendment. Where, of course, it is not the defendant's burden to disprove the prosecution's case or to introduce evidence, you know, against the prosecution's case. And for the purposes of the Sixth Amendment, to the second point, the - - - the court, the Supreme Court has been clear - - -

JUDGE TROUTMAN: Did he do so through his counsel? Challenged the dates of incarceration? Pre-incarceration?

MR. JAIN: He - - - he - - - did he challenge the dates, Your Honor?

JUDGE TROUTMAN: Yes. Would that violate his Sixth Amendment right for him to, through his attorney, say, I challenge the time that you're asserting?

MR. JAIN: He could have, Your Honor. But the Sixth Amendment does not require him to do that.

CHIEF JUDGE WILSON: But didn't he sort of do the - - - I'm sorry. Over here. Didn't he do the opposite? Didn't he essentially stipulate to those dates?

MR. JAIN: He did not stipulate. But I - - - the point I want to make is even under the Constitution, if he - - - if he had said, you know, I admit to those dates, even that - - -

JUDGE TROUTMAN: But let me ask you. Did he have the opportunity to controvert the information?

MR. JAIN: He had the opportunity, Your Honor, but the Constitution is violated - - -

JUDGE TROUTMAN: No. I just want to know did he have the opportunity?

MR. JAIN: Yes.

JUDGE TROUTMAN: And you would acknowledge that he's supposed to have that opportunity, correct?

MR. JAIN: Under statute he's supposed to have the opportunity and under the Constitution as well. But the Constitution is still violated if a jury is not given the - - - if the prosecution, rather, does not prove its case to a jury when it comes to do that.

CHIEF JUDGE WILSON: But he can't waive that right?

MR. JAIN: He can waive that right.

CHIEF JUDGE WILSON: And so - - -

MR. JAIN: He certainly did not do so here, Your Honor.

CHIEF JUDGE WILSON: Well, why not?

MR. JAIN: So I point to the court to Florida v. Nixon, for example, in which the Supreme Court was unequivocal that even a tactical admission of guilt before the jury does not amount to a waiver. Both because that admission is made through counsel rather than the defendant himself, and because there is a miles-long gap between admitting something and waiving your constitutional right to have a jury find that fact beyond a reasonable doubt. And so even if the failure to affirmatively controvert the allegations here rose to the level of what you might call an admission, it's still - - -

JUDGE GENOVESI: Counsel, he did more than not affirmatively controvert. He said we - - - the court interpreted, you don't dispute that he served the time, you dispute whether he - - - that time should be included. The dates are not in dispute.

MR. JAIN: That was - - - again, Your Honor. A, that was through counsel. And I think, B - - - and I understand this concern, right? About, you know, why are we here? Right? If he didn't affirmatively dispute. But

maybe it would helpful to take a step back and go back to the nature of the underlying right itself. Right? Because as the Supreme Court said in Erlinger and has said from Apprendi onwards, this is not just a procedural technicality. This is a fundamental reservation of power to the American people. And what the jury does is it stands as that bulwark between the powerful government and the vulnerable individual.

JUDGE GARCIA: But this is a preservation argument for us. We've said Apprendi arguments have to be preserved, right? So it's a different issue than is coming before the Supreme Court. Supreme Court has said we can apply our procedural rules even when they change the law, and it's arguable whether they did that here. But we're asking this from a preservation point of view, not a waiver point of view, not a did he give up the right, but did he preserve the issue so that this court is - - - can reach it?

And by admitting it, I think the question is, did he fail to preserve?

MR. JAIN: We agree that there was no objection that preserved the issue at the time of trial. And the objection, of course, would have been foreclosed under this court's precedents in Bell and Porto. And so on that point, I would - - -

JUDGE GARCIA: But it's not an objection. It's just did you preserve by asking the judge to decide this? Then, arguably, you could have preserved that a jury should have. But by not asking for anyone to decide this, you haven't preserved the issue for us. And there's a supreme court case - - - a trial court case, I think in - - - in Manhattan, where because of a procedural issue they went back to the Erlinger issue. And even in that case where I believe the judge said Erlinger required a jury to consider this, they said, well, as to these facts, you admitted them the first time around when they filed the defective statement.

MR. JAIN: Well, I think on the preservation point, Your Honor, this court has never required, even as it has required preservation for Apprendi legal claims, it has never once required that there be also a challenge to the actual facts. Right? So in Bell, for example, there was no challenge to the facts of tolling. There was just a challenge in that case to the legal issue and the court - - - the court reached the merits.

But in any event, we're not disputing here that the issue was not preserved in the trial court. And so I think the issue then is does an exception to preservation apply? And the answer is yes. And we've briefed four of them. I want to touch on two very briefly.

On People v. Page, right? That's the case about the written waiver of the jury trial, right? My adversaries haven't even addressed that case and that exception to preservation. And this case cuts much more -- - much more closely to the core of the jury trial. Right? It's a wholesale conversion of what the Constitution requires to be a jury proceeding into something that is a judge proceeding. And so that is one basis.

But there is an even more clear, straightforward hand-in-glove fit, very narrow, and that is the Baker, Patterson, and Cabrera doctrine. It was designed, I think, over the wisdom of decades of precedent for exactly this moment. Right now in courthouses across the state, within courthouses, from one courtroom to the next, we have a situation where one defendant, similarly situated, is getting an indeterminate life sentence. Right next door a defendant, similarly situated, is getting a determinate sentence of years based on a pure question of law regarding the application of a bright line rule that this court can resolve here and now, and that has been briefed up and down, left and right.

JUDGE SINGAS: How does Cabrera affect that?

MR. JAIN: Well, so I think that Cabrera stands for the proposition that when those three elements are

satisfied, which we briefed - - - you know, why we do satisfy - - - clearly, we all agree Bell and Porto foreclosed the objection at the time of trial. Erlinger, I think, directly addressed the constitutional issue, which is why respondent previously conceded it in cases like Lopez and Banks. And there is no further factual record necessary for the application of Apprendi's bright line rule here. When those three factors are satisfied, then I think Cabrera - - - excuse me - - - stands for the proposition that there is nothing to gain and much to lose from delaying the inevitable.

And so when those three factors are satisfied, I think it's very wise that in the - - - that very narrow situation, it's rare, it's unique for all three of those things to be true. That overenforcement of preservation is not necessary and, in fact, is inappropriate.

CHIEF JUDGE WILSON: Thank you.

And Counsel, before you start. I fell asleep at the switch and forgot to announce that we're joined by Judge Lara Genovesi of the Second Department. We're delighted to have her here and have her assistance.

MR. WU: Thank you, Your Honor. May it please the court. Steven Wu for the people. Excuse me. I'll begin with the statutory argument. I would like to reserve some time to discuss the Erlinger issue as well at the end.

On the statutory question, the plain text of the Penal Law here unambiguously requires that the calculation of the lookback period for predicate sentencing purposes include any period of incarceration served from the time of commission of the first predicate felony.

JUDGE RIVERA: Yes, that is true. And - - - and there's been some discussion about whether or not that's ambiguous given romanette iv. But it's talking about the calculation of that ten-year period, which means you are talking about the period as set out in romanette iv. And that period is from the sentence, right? It's - - - well, it's ten years back up to the sentence. You're trying to see if the sentence is ten years out from the commission of the felony.

MR. WU: That - - - that - - -

JUDGE RIVERA: So - - - so how do you end up before the sentence?

MR. WU: Well, but - - -

JUDGE RIVERA: It seems to me that romanette v, by referring to the period above, is cabining it - - -

MR. WU: So - - -

JUDGE RIVERA: - - - to that period only.

MR. WU: Yeah. So I think one thing you said there when you were correcting your description of the statute is critical, which is that sub 4 talks about when

the sentence took place in a ten-year period before the commission of the most recent felony. And so the way that the statute sort of uses this data is it starts from the date of the most recent felony, counts backwards ten years as an initial matter, and then extends that time by the additional period of incarceration from the time of the commission.

The sentence is not the triggering date. The sentence is not the triggering date for when the ten years starts to run. It runs from the commission, not from the sentence.

JUDGE RIVERA: Right, but then you add the ten - - - you add the time of incarceration on the tail.

MR. WU: Correct.

JUDGE RIVERA: You're trying to add it on the head. That doesn't make any sense to me.

MR. WU: Well, except that's exactly what the statute requires when the statute says - - -

JUDGE RIVERA: Well, that's what I'm saying. How do we explain the continued reference to this ten-year period under sub-paragraph 4, because - - - under romanette iv? Romanette iv is about exactly the period that we're - - - that you and I are now talking about. Right? You just want to make sure that sentence is not more than ten years out. But it is very clear from the way the legislation is

written, the way the law is written, that your - - - the ten-year period is not an unbroken period of time, because you can add time to make up for the period when someone is incarcerated.

MR. WU: That's correct. So the people's interpretation here asked the same question as the statute - - -

JUDGE RIVERA: Uh-huh.

MR. WU: - - - which was, was the sentence for the first felony imposed during a particular lookback period? During a particular period of time before the commission of the most recent felony? And the only dispute here is whether, in defining that time period - - - in defining how far back in time you look, you include every period of incarceration since the commission of the first felony, or you exclude pre-trial commission - - - a pre-trial sentence, right? And so we're not in disagreement at all that the date of the sentence is critical here. We're just talking about the period of time that you look backwards.

And I think the language that is unambiguous and that has to be given force, is the legislature deliberately chose to look at the period of incarceration from the commission of the first felony. They could easily have written that statute differently. They could have said the

time from the date of the sentence from the first felony. And we know they know how to refer to the date of the sentence.

In other statutes, like the sealing statute, instead of talking about the date of commission of the first felony, they talk about the date of conviction from the first felony, which would have changed the rule as well.

CHIEF JUDGE WILSON: And so if the - - - if sub 5 ended with shall be excluded; just stopped there, wouldn't it mean exactly what you're saying?

MR. WU: It would still mean what we're saying. And so I do agree that "exclude" and "extend" are sort of a belt and suspenders approach.

CHIEF JUDGE WILSON: So what you - - - oh, so that's your explanation of "extended"?

MR. WU: Well, "extend" for us has sort of this commonplace meaning where you start with the ten years, you figure out the additional time from the periods of incarceration - - -

CHIEF JUDGE WILSON: Well, if I were doing this - - - if I were doing this as a math problem for my seventh grader. And I said, here's a unit of measure, and what I'm going to do is exclude - - - let's say the unit of measure is A - - - I'm going to exclude B from it and extend it by

B. I would think that that's asking me to double count B. To take B away from A, right? Right, so that now I've excluded it. And then I've got to add B as well, and I'd be double counting the measure.

MR. WU: Well it's not double counting because this is exactly the way that the statute pushes the time backwards. It looks at the periods of incarceration and it tacks it on to this default ten-year period. And I should say - - -

CHIEF JUDGE WILSON: Well, the first thing it does is, it says when I'm measuring that A, to actually come up with the value of A, I've got to subtract B from it. So it's no longer a ten-year period. So I've got to then run out more than that just to get to the ten years. And then, once I've done that, I've got to add that period back again.

MR. WU: I don't think these are two separate points. I think "exclude" and "extend" are doing the same thing here to the same period of time. The legislature was pointing to - - - and I agree, it's a mathematical problem - - - was pointing to a specific number, which is all the incarceration defendant has served since the time of the commission of the first felony. And was saying that period of time has to be disregarded for purposes of the ten-year period and instead added to the front end of that period,

so that we look further back in time for the defendant's conviction.

CHIEF JUDGE WILSON: And I have to say, my seventh grader walked in while my clerks and I were trying to figure this out, and she drew something on a Post-it and said, oh, this is really easy, and we had no idea what she was talking about.

MR. WU: Well, I trust the seventh grader for this. But I do want to respond.

JUDGE RIVERA: No offense taken, thank you.

MR. WU: Yes. No offense.

I do want to respond to the idea, the argument that we are - - -

JUDGE RIVERA: But no. I want to get back to - - - why you - - - or maybe we're talking about different things. I think you're saying you put it at the head, which I read this to mean you put it - - - you add the time back in at the tail. And maybe we are talking about the same thing, maybe we're not. But again, it - - - I understood your brief to basically mean - - - or your briefing on this to mean you're adding the time in advance of the sentence, and I just can't see how that squares with romanette iv. And romanette v is about how you figure out the period to show the distance between the sentence and the commission of the felony.

MR. WU: Well, let me try this answer. The People's position - - -

JUDGE RIVERA: Yeah.

MR. WU: - - - does not turn at all on whether the sentence is served before or after the sentencing date for the first felony offense. It does not turn at all on that, because the statute doesn't turn at all on this. The People's calculation here - - - and it is straightforward in a sense - - - just adds up all the time the defendant has been incarcerated - - -

JUDGE RIVERA: Yeah.

MR. WU: - - - since the commission of the first felony, adds that aggregate period, which here was something like fourteen years, on top of a default ten-year period. And it just runs that aggregate time backwards as sub 4 requires - - -

JUDGE RIVERA: Yes. My - - - my - - -

MR. WU: - - - from the date of commission of the second felony.

JUDGE RIVERA: - - - my problem is that - - - that - - - my problem is that then you're reading romanette v in isolation, right? Romanette v is about romanette iv, and that's the period you're trying to set the boundaries on.

MR. WU: But we're not reading it in isolation.

Subparagraph 4 says there's this ten-year lookback period.

JUDGE RIVERA: Uh-huh.

MR. WU: And then subparagraph 5 then defines what it means to look at that ten-year period. It says, "In calculating the ten-year period" - - -

JUDGE RIVERA: But the only - - -

MR. WU: - - - here is - - -

JUDGE RIVERA: - - - purpose of the lookback period is to get that distance between the sentence and the commission of the felony.

MR. WU: No. That's where I disagree. The purpose of the calculation is to define a period in history within which any conviction of the defendant will qualify as a predicate felony.

JUDGE RIVERA: But then romanette v would have been written differently, is my point to you.

MR. WU: Well - - - well, romanette v would have been - - -

JUDGE RIVERA: Right? Romanette v would just be, we just want to figure out if they've ever been at liberty for ten years?

MR. WU: Romanette v is not written in that way.

JUDGE RIVERA: Correct.

MR. WU: It's not written in that way.

JUDGE RIVERA: Correct. That's my point.

MR. WU: And that is why defendant's argument that this is something like a ten-year-at-liberty rule doesn't work. For example, nothing in the statute talks at all about the date of the defendant's release from prison. That date, which is critical to most of the examples the defendant has raised, is completely absent from the statute. And instead by using the phrase "any time", what the legislature made clear was they were indifferent to the question of when the defendant served their sentence when they were released. Again, as long as this aggregate time period were.

JUDGE GARCIA: Counsel, could you address the 400.15 point that was made by your adversary?

MR. WU: Absolutely. So this is an argument that, I think, prioritizes the labels the legislature gave in 400.15 over how it actually described the operation of the statute. It is true the legislature talks about tolling in 400.15, but it does so as a cross-reference to the Penal Law provisions that define this actual calculation.

And between the two of them, when the label would require a calculation that is inconsistent with the statutory language, this court follows the way the legislature has defined the actual calculation taking place. One of the problems with defendant's argument is

they are trying to give independent meaning to the word "tolling" as though there is some ambiguity about the calculation in sub 4 and sub 5, and there just is no ambiguity on that front.

I do want to respond to the argument that we are somehow - - -

JUDGE RIVERA: If we disagree with you on that, if we think there is ambiguity, do they then win?

MR. WU: Well, they still do not. But I refuse to give up the premise - - -

JUDGE RIVERA: Why not? Why not? No, no, I understand that. But why not?

MR. WU: Well, I refuse to give up the premise that there is ambiguity here, and I apologize for pushing back on you on this. Because this is a case where, by defining the time period in a specific way, any calculation of the lookback period has to take that into account. And this is the answer - - -

JUDGE RIVERA: Except it seems nonsensical because of romanette iv, but I get your point. But can you get back to the - - -

MR. WU: It - - - well, but it also - - -

JUDGE RIVERA: - - - other question?

CHIEF JUDGE WILSON: Yeah.

MR. WU: This is also an answer to the argument

that we are somehow ignoring the word "exclude". There's a very commonsense understanding of the word exclude here. Sub 5 says, you exclude the periods of incarceration from the calculation of the lookback period. And what that means is that when you are determining how far back in time to look to when a defendant's predicate convictions stand, right, you have to - - - you have to take into account that entire period of incarceration. And that's what exclude means. It means you have to take into account. And defendant's argument - - -

JUDGE RIVERA: The purpose of the - - -

MR. WU: - - - the basic defect - - -

JUDGE RIVERA: - - - the purpose of the lookback period we find in subsection 4 - - - in romanette iv, excuse me.

MR. WU: Right.

JUDGE RIVERA: That - - - again, that - - - that's why I'm still having difficulty. But we've gone through this, so I get your point.

CHIEF JUDGE WILSON: Yeah. I would like to get to Judge Rivera's question about what you think the legislative history is, if we thought there were ambiguity?

MR. WU: Yeah. So the legislative history here is, I think, at best, unclear. I don't know that it was sure the legislature was actually focused on this specific

problem about pre-trial versus post-trial detention. I'll say a couple of things about it, though, that I think are helpful.

One is that at the time that this legislation was enacted, defendants did serve time in pre-trial detention. It wasn't as though pre-trial detention only existed after the statute was enacted. So it wouldn't have been a surprise to the legislature that defining a period of incarceration from the commission of the first offense would include plenty of defendants' time served before trial that was then credited to their sentence afterward.

The second point is that we know since the enactment of the statute, the legislature has chosen different language in other statutes to refer to this time calculation. The sealing statute in CPL 160.59, as I mentioned, talks about the date of conviction. And the legislature knows when to refer to the date of the sentence or the date of the conviction versus the date of the commission of the first offense.

Now, I think there has been some argument from defendant that this is a nonsensical policy, that this leads to disparities in the way that different defendants are treated. But it does not for this reason - - - and this is an example that we try to articulate on page 28 and 29 of our brief. What this statute does is it equalizes

defendants who commit their first felony on the same date, are sentenced on the same date, and then later commit a second felony on the same date. For both of those defendants, they are exempt from the predicate consequences of their first felony at the same date in the future, at the exact same date in the future. And that date is exactly the same regardless of when the defendant served their sentence.

In other words, if the defendant served their entire sentence before the trial, right? Then they - - - the date that they're free from the predicate conviction is going to be ten years plus the pre-trial time out. If they served their entire period after the sentence, then it is still ten years plus the amount of time they have served incarceration. And it is reasonable for the legislature to have wanted to keep that date the same. It - - - because they might have - - - they might have reasonably have believed that the time the defendant serves, when they served it, is immaterial for the policy underlying this statute.

If there are no other questions on the statutory question, I'd like to turn to Erlinger for a couple of minutes. There are threshold reasons for this court to decline to reach the Erlinger question in this case. I'll begin with the problem of preservation.

Defendant here failed to preserve an objection to the predicate sentence here in two ways. One, by failing to controvert at all whether the predicate sentence, the calculation, was inaccurate. And second, by failing to raise a constitutional objection under the Sixth Amendment to the calculation here. And both of those grounds are independently sufficient to make this a lack of preservation.

The reason that the failure to controvert it factually makes a difference here is because Erlinger itself, and Apprendi, the case that it is based upon, depends upon a contested issue of fact being given to the judge instead of a jury. But here there was no contest over the facts, here. Defendant had a full and fair opportunity to raise an objection to the prior periods of incarceration here. And not only was that true under the statute, but the judge then, before defense counsel got into the statutory argument we've been discussing, asked whether he contested the periods of incarceration, defense counsel said, no, I only have a statutory objection.

As a result, the Erlinger question is arguably not even presented to this court. There was no dispute of fact that would lead to a question about who the right factfinder should be in this context.

And the failure to raise a legal objection under

the Sixth Amendment also fails to preserve the issue. As Judge Garcia correctly noted, this court has required Apprendi claims to be preserved. Other challenges to the sentence that don't raise Apprendi do not preserve the Sixth Amendment claim as well.

Second, and sort of independently of preservation, defendant here also admitted to the periods of incarceration. And the combination of his admission to those periods and other evidence in the record showing that he was incarcerated for this period of time, makes any error here harmless. Again, defendant's admissions here were done in the course of a proceeding where he had every incentive to contest the facts of his prior incarceration, if he had a reason to contest it.

The whole purpose of the 400.15 procedure is to give the defendants the opportunity to say, I disagree with the periods of time as articulated in the predicate felony statement. By merely making that objection, not by satisfying any threshold evidentiary requirement, a defendant can get a factual hearing, albeit in front of the judge, and can require the people to prove beyond a reasonable doubt every period of incarceration that is established in the predicate felony statement.

Defendant knew that here; there's no argument that he did so unknowingly. And by failing to controvert

it under the statute, and then in the colloquy, he admitted to those periods. That admission is sufficient under Apprendi.

Again, Apprendi and Erlinger are only triggered when a defendant contests a fact and wants it submitted to a jury instead. But here, as the federal courts have said, when a defendant admits or fails to contest it, what the defendant has done is taken this issue away from the factfinder, right? It is not the court that has done so. It is not the People that has done so. The defendant has removed this issue from the court, and therefore, the Erlinger question is not squarely presented.

CHIEF JUDGE WILSON: Thank you.

MR. WU: Thank you.

MS. UNDERWOOD: Good afternoon, Barbara Underwood for the Attorney General.

There are several reasons not to reach the constitutional issue that we came here to defend, including lack of preservation.

But in case you do reach it, I'd like to make two points about the jury trial claim that is being made in this case. One, it should be rejected because the jury right recognized in Apprendi and Erlinger doesn't apply to the sentence calculation at issue here.

And two, if it does apply, the remedy is to

provide a jury and not to invalidate the entire recidivist sentencing scheme.

And this tolling question comes up not only in the persistent violent felony offender sentences that are at issue here, but also in the second violent felony offender and second felony offender statute. So it has more general application.

I can speak to preservation if you like, but I -- - I'd prefer to go right to Erlinger. So turning to the merits. The jury right recognized in Apprendi and Erlinger does not apply to the tolling calculation at issue here for two reasons. One, it's not the kind of fact that is traditionally given to a jury. It falls comfortably within the rule of Almendarez-Torres recognized by Apprendi. That rule holds that a judge, rather than a jury, can properly determine the fact of a prior conviction, the elements of the prior crime, and the date of conviction. And we would say that reasonably includes also determining whether the judgment of conviction was entered within or beyond a lookback period, defining when a conviction is too old to use for recidivist sentencing.

To be clear, the tolling calculation is the only thing that Hernandez claims should have gone to a jury here. One of his two prior convictions qualifies as a predicate without regard to tolling, because he was

sentenced for that crime within ten calendar years of the current crime. So only the older of the two falls outside the ten calendar years and depends on this tolling or addition of time to make it qualify.

So Erlinger said some information about prior crimes can - - - must be found by a jury. In particular whether two prior crimes count as one because not committed on separate occasions. But the calculation of the lookback period involved in this case is quite unlike that fact or the fact at issue in Erlinger. It doesn't involve any judgment about the defendant's offense-related conduct. In fact, it doesn't involve his conduct at all, just a count of the days when he was incarcerated, which is an objective fact contained in records of the criminal justice system like the date of his conviction.

The Supreme Court has held that many facts about defendant's conduct, formerly called sentencing facts, must now be found by a jury. But some courts, including this court, pre-Erlinger, have held that there are other facts about prior convictions that do not require a jury, and the Supreme Court hasn't confronted those rulings. For example, that the defendant was, in fact, the person convicted of prior crimes; that the two prior crimes were committed in a certain timing and sequential relationship to each other.

CHIEF JUDGE WILSON: And when you say that those haven't been - - - sorry, right in front of you - - - haven't been confronted by the Supreme Court, you're asking for a maybe slight extension of Almendarez-Torres? Over its holding. Over the facts in its holding. And the Supreme Court seems very unhappy with that case.

MS. UNDERWOOD: The Supreme Court has, in all the cases that have come before it, found that various facts that were said to be outside Almendarez-Torres are not outside Almendarez-Torres, are - - - are included.

CHIEF JUDGE WILSON: But - - -

MS. UNDERWOOD: But all of those facts have been facts about the defendant's conduct: brandishing a firearm; whether a murder was heinous, they're all aggravating facts that go to the defendant's conduct. The innovation, if it was one of Erlinger, is that the conduct of the predicate was also being concerned, but it too involved evaluating the defendant's conduct. And the court has not decided - - - has not confronted or decided any case involving something as outside the defendant's conduct as this. Something which is simply a matter of the records of the - - - of the - - - sometimes the information will be on the judgment of conviction, sometimes it will be - - - it'll be corrections records. But their official institutional records about the mechanics of prior convictions - - -

JUDGE RIVERA: But if defendant disputes it, does the judge get to make that decision under your analysis of Erlinger?

MS. UNDERWOOD: Yeah. This - - - what I'm saying now is that this kind of fact, which is not about the defendant's behavior, but is about the mechanical operation of the criminal justice system, about when he went in and when he went out of various correctional facilities, can be decided by a judge when it's in dispute. Of course, in this case, we have the whole other issue that it may not have been in dispute at all.

CHIEF JUDGE WILSON: Right.

MS. UNDERWOOD: But when it has to be decided, I think Almendarez-Torres does not prohibit - - - I can't say it endorses - - - but it does not prohibit a determination by a judge.

CHIEF JUDGE WILSON: And the sort of facts you're describing are ones that, I mean, maybe could be characterized as ones we could take judicial notice of?

MS. UNDERWOOD: That's correct. They are contained in records that are commonly - - - of which judicial notice is commonly taken. Although, when judicial notice is taken in a criminal case, it still has to go to it. That doesn't take care of the jury issue entirely.

CHIEF JUDGE WILSON: Right.

MS. UNDERWOOD: But it is the type - - - it does describe the kind of fact that I'm suggesting is outside the rule of Almendarez-Torres. And despite the broad claims - - - you know, nothing more than the fact of conviction in Almendarez - - - in Erlinger, the court was only deciding the case that was before us and may very well not have contemplated this type of fact at all. It certainly wasn't before the court.

In addition, the jury right recognized in Apprendi and Erlinger doesn't apply to this tolling calculation for an entirely independent reason. And that is that the lookback period of ten years plus incarceration time, however, the incarceration time is calculated, is a calculation that mitigates sentence, and such facts are not governed by the Apprendi/Erlinger jury right at all. And Apprendi said that, and Erlinger says that.

New York law provides that a jury verdict of guilty plus two prior felonies that can properly be found by a judge under Almendarez-Torres, authorized the sentence for a persistent violent felony offender. For Apprendi purposes, that is the baseline. And then, excluding some prior convictions for remoteness - - - and calculating remoteness is a defense to that sentence; it reduces the sentence by excluding some convictions from the calculation. And Apprendi said that a jury is not needed

for findings that mitigate the sentence.

Supreme Court applied that principle a few years later in Oregon against ICE to approve a law that required a judge, not a jury, to find certain facts before imposing consecutive rather than concurrent sentences. And in ICE, the court relied on historical practice - - - this determination was traditionally made by judges - - - and the history of the statute in question, which was to encourage concurrent, rather than consecutive, sentences, to conclude that the Oregon law was mitigating and not aggravating and therefore, was not subject to the Apprendi - - - the jury right.

And actually, a few years earlier, the Second Circuit, in a case called Snipe, which we cited but didn't discuss at length, reached a similar conclusion about a - - - about a provision in the federal three-strikes law which identified numerous felonies that would suffice for aggravating an offense. And then allowed the defendant to exclude any robbery that was committed without firearms and without death or serious injury, and the court held that it was okay for a judge to make that determination rather than a jury because that provision operated like a safety valve that the defendant can invoke. It's the same idea that a mitigating fact doesn't require a jury under Apprendi.

And in this case, there is clear, overwhelming,

in fact, evidence, legislative history that the lookback and tolling provision was aimed at excluding - - - at benefiting the defendant and excluding old felonies from consideration and thus mitigating - - - compensating, really - - - for the harshness of the new mandatory persistent violent felony offender statute.

I see my time is up and we have gone over the history in detail in our brief. I just want to make one last point about remedy, if I might, which is that the - - - if the provision - - - if you were to determine that the provision in the CPL requiring trial by the court of the facts underlying recidivist statute - - - status is unconstitutional, then that provision should be stricken from the statute or limited in its application. And the error can be compelled by that provision, can be avoided by going forward in the future with submitting the issue to a jury, bifurcating the trial if necessary.

The prospect of doing just that featured prominently in the Erlinger argument itself, in which there was much discussion about if they decided Erlinger as the way they did, the solution would be to bifurcate trials. The U.S. agreed that it would - - - was consenting - - - would consent to that. It's well within the inherent powers of a trial court in this state to do such a thing, and defendant's suggestion that the statute forbids this

result makes no sense. If the prohibit - - - if the prohibition is unconstitutional, then it doesn't prohibit anything, and it ought to be possible to resolve any constitutional difficulty by providing the jury trial that the defendant is requesting.

CHIEF JUDGHE WILSON: Thank you.

MR. JAIN: Just a few points, Your Honors, starting with the constitutional violation and then moving to the statutory claim.

On the constitutional violation, I just want to be very clear that an admission under Supreme Court law is not a substitute for a jury finding unless there is a waiver of rights. The Supreme Court squarely held as much in the Hurst v. Florida case, and my adversaries do not address that holding either in their briefs or at argument today.

You could imagine, for example, a case where a is on trial for homicide, and he takes the stand and he testifies, and he admits several elements of the substantive events for a justification defense that he makes. The jury still has to make a finding that the prosecution has met its burden on the elements of the underlying offense, even if the defend - - - the defendant, excuse me, testifies to them.

Now, the defendant's testimony is, of course,

great evidence of that fact the jury may consider, but fundamentally, he has not waived his right to a jury trial by taking the stand and admitting certain facts. And for the same reason, it is baseless and inaccurate to say that the Sixth Amendment right hinges on whether a fact is contested. The Sixth Amendment right is retained by the defendant until or unless he waives it.

As for the merits of the constitutional issue, I think we'll largely rest on our briefs. But I do want to say, it is really quite unfaithful, I think, to the Supreme Court precedent to suggest that these cases are factual islands, and that each one of these holdings only applies to the kind of facts that were at issue in the particular case. And the very nature of the constitutional right, I think, makes clear why that is wrong. And that's why in Apprendi and Blakely and Cunningham, the court has repeatedly described this as a bright line rule that applies to all facts that are necessary to enhance a statutory sentencing range. The reason for that is that if it were instead up to judges and lawyers to figure out when it feels like it makes sense intuitively for a jury to find a fact or not - - -

JUDGE SINGAS: Yeah, but in this case, how would that work practically? You know, there's statutory periods, incarceratory periods. Are you going to give

jurors calculators and say, figure out the time? Like, I don't understand how that works in a jury scenario.

MR. JAIN: Your Honor, I think that that's a question fundamentally for the legislature. There could be a bifurcated proceeding, the legislature could enact that. The legislature could specify exactly what findings the jury has to make, whether it needs to take the calculators or whether it just needs to - - - you know, find - - -

JUDGE SINGAS: Well, we know what - - - we know what they have to find within a ten-year period. We know that there's - - - and there's a definition how to exclude it, and now you're saying give that to a jury. And I'm just wondering how the jury does that?

MR. JAIN: Well, I think the jury finds - - - I think there's two questions in terms of how does the jury find the facts, you know? The same way it finds, I guess, any other fact in terms of what the facts are that it has to find? I think that goes to why my adversaries' argument that - - - you know, the courts can just freeform, fashion new procedures out of whole cloth.

JUDGE RIVERA: Well, let's take an example. What facts would a jury have found here?

MR. JAIN: So I think there's a few different paths, but just to give an example.

JUDGE RIVERA: Uh-huh.

MR. JAIN: So one possibility is that the jury finds the exact dates that the defendant was or was not incarcerated for any reason, and then the judge does the calculation. Another possibility - - -

JUDGE CANNATARO: Would that be an issue that was open to much dispute? I mean, most of this argument has been centering on the fact that you get a document, it has a date in, and it has a date out, and there just isn't a lot of fact-finding to do there. As opposed to what one of your adversaries said, something having to do with the quality of the defendant's behavior?

MR. JAIN: Well, I think two points. I think one, that kind of line drawing is exactly what the court said repeatedly, including in Erlinger, that judges can't do. Right? There's no efficiency exception, the court said.

But I would also gently push back on this idea that the question of when a defendant happened to be released from incarceration, perhaps over a decade ago, is always going to be so straightforward. Or even that, for example, the separate occasions inquiry that was at issue in Erlinger is always going to be more complex.

JUDGE CANNATARO: Can you just be a little more specific? I'm just, like, looking for an example of when a jury might be called for because there - - - there's some

confusing or unclear or - - - I don't want to say discretionary, but some judgment call to be made about dates?

MR. JAIN: Well, so Your Honor, the dates may be wrong. I think that's - - - that's what the jury's role as a factfinder is, is to find the facts. Right? So what's on a bureaucratic record - - - which may not even be from the state, right? It could be incarceration outside the state - - - is not sacrosanct. Right? The jury would need to find that it's actually correct and that the facts are correct beyond a reasonable doubt.

JUDGE GENOVESI: So is it your position that you don't - - - you don't dispute the dates, but because it wasn't waived, they need to go through the jury process?

MR. JAIN: That - - - because Mr. Hernandez never waived his right, that's exactly right. He - - - the jury had to find every fact under Apprendi necessary to enhance the sentence.

I see my time has expired. If I may briefly make a few points on the statutory issue?

CHIEF JUDGE WILSON: Yes. Quickly.

MR. JAIN: So the first point I want to make is, we have not heard a persuasive definition or really any sensical definition - - - if that's a word - - - of the term "exclude" from my adversaries. I heard "exclude"

means take into account - - - exclude means the opposite, right? For the time to be excluded, it's removed from consideration from within the period. And that's why, for example, in CPL 30.10 sub 4, which the legislature enacted just three years before it first used this formulation in Penal Law 70.06. In CPL 30.10.4, the legislature used very similar language: "shall not be included" and the term, excluded - - - or "extended", sorry - - - to start and stop the clock, as respondent conceded in its briefing.

I also, you know, respondent dismissed CPL 400.15 as just a label or a cross-reference. I think that really - - - it disserves the fact that the legislature simultaneously enacting this statute made clear what subparagraph 5 did.

And then, finally, I did not hear any persuasive response from respondent on the consequences and the injustices that would flow from its reading. There's, first of all, no reason, nothing in this court's precedent or the legislative history that suggests that the legislature was so concerned about some arbitrary calendar date in protecting wealthy defendants who can make bail, and making sure that there is parity in a calendar date, right? What this court has long said is that the legislature was concerned with making sure that a defendant had reformed or had been chastened after their admonishment

at sentencing.

And the problem - - - the fundamental issue with respondent's rule is that it introduces all kinds of injustices and arbitrariness that have nothing to do with that. And even under a calendar date framing, things like court congestion, things like someone exercising their trial rights, may result in a defendant who was arrested on the same day, sentenced to the exact same term, released on the same day, being held to a much higher expectation. Again, based on just where they happened to be venued or the fact that they dared to litigate their case while they were detained either under the long-standing framework that this court has adopted, or under a calendar date parity framework.

And so for those reasons, we urge the court to vacate the PVFO adjudication.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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. Mitchell Hernandez, No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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