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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 103

RUDOLPH KAVAL,

Respondent.

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20 Eagle Street  
Albany, New York  
November 15, 2022

Before:

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

Appearances:

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1           ACTING CHIEF JUDGE CANNATARO: Our next appeal is  
2           number 103, People v. Kaval.

3           MR. BLIRA-KOESSLER: Good afternoon, Your Honors.  
4           Chris Blira-Koessler from the office of Melinda Katz, the  
5           Queens County DA, for appellant.

6           At the outset, I'd like to ask for two minutes of  
7           rebuttal time, Judge.

8           ACTING CHIEF JUDGE CANNATARO: You have two  
9           minutes.

10          MR. BLIRA-KOESSLER: Thank you so much.

11          I think there's one thing that we can all agree  
12          upon, one fact that's indisputable here, one thing that  
13          even my adversary would agree upon. Mr. Kaval is a  
14          persistent violent felony offender. We know that because  
15          that's what the facts show. That's what the complete  
16          record shows.

17          ACTING CHIEF JUDGE CANNATARO: That's not what  
18          the facts showed to the Appellate Division, though. The  
19          facts showed to the Appellate Division that the People  
20          couldn't establish that he was a persistent violent - - -  
21          as a matter of fact, that finding by the Appellate Division  
22          was made at the behest of the Queens County District  
23          Attorney's Office, was it not?

24          MR. BLIRA-KOESSLER: Well, both sides had agreed  
25          to a resentencing. The problem with the decision is that



1 it was based upon an incomplete record. The city jail time  
2 wasn't even litigated - - -

3 JUDGE SINGAS: And that was the fault - - -

4 MR. BLIRA-KOESSLER: - - - under - - -

5 JUDGE SINGAS: - - - of the People. It was the  
6 People's failure to produce the evidence to get the ruling  
7 and then the People's concession afterwards that the  
8 defendant wasn't one that really puts us in this position  
9 today, right?

10 MR. BLIRA-KOESSLER: Well, you can't really  
11 concede your way around the statute because the statutes  
12 contain mandatory language. It's - - -

13 ACTING CHIEF JUDGE CANNATARO: It's not conceding  
14 around the statute, though. There was a - - - there was a  
15 - - - you know, there was a fact finding at the sentencing  
16 below. The People indicated that there was city time that  
17 could be used for purposes of tolling here. They were  
18 instructed by the judge to get all their ducks in a row, to  
19 have that all ready to go for the hearing, and it didn't  
20 happen. And after that, when it gets up to the Appellate  
21 Division, the matter is conceded.

22 So it's - - - it's not as if there wasn't a - - -  
23 it's not just a factor of inopportunity to litigate the  
24 issue.

25 MR. BLIRA-KOESSLER: Excuse me.



1           ACTING CHIEF JUDGE CANNATARO: It actually was  
2 litigated.

3           MR. BLIRA-KOESSLER: We - - - we - - - we didn't  
4 concede, though, that he was not under any circumstances a  
5 persistent violent - - - and when we asked for the  
6 resentencing, we asked for it in a very broad way. We  
7 said, for example, he could perhaps be sentenced as a  
8 persistent felony offender. We never conceded under no  
9 circumstances - - -

10           JUDGE WILSON: So let - - - let - - - let me ask  
11 - - -

12           MR. BLIRA-KOESSLER: - - - could this never  
13 occur.

14           ACTING CHIEF JUDGE CANNATARO: - - - that he  
15 could perhaps - - -

16           MR. BLIRA-KOESSLER: Sorry. Right.

17           ACTING CHIEF JUDGE CANNATARO: - - - be sentenced  
18 as a discretionary felony offender?

19           MR. BLIRA-KOESSLER: Right, as one example. We  
20 used that as one example. We never limited our options  
21 upon resentencing.

22           ACTING CHIEF JUDGE CANNATARO: You - - -

23           MR. BLIRA-KOESSLER: And as far - - -

24           ACTING CHIEF JUDGE CANNATARO: Did you suggest at  
25 the Appellate Division that it could be remanded and he



1           could once again be found a persistent violent - - -  
2           persistent violent felony offender?

3                       MR. BLIRA-KOESSLER: Well, that - - - that  
4           argument wasn't made. The cases are routinely remitted  
5           when there's an error below which involves the mandatory  
6           requirement to file a predicate statement or a persistent  
7           violent felony offender statement.

8                       JUDGE WILSON: So let me - - - let me ask you  
9           this. Suppose on the first appeal to the Appellate  
10          Division, the Appellate Division had remitted to the  
11          Supreme Court and said, you have to resentence him as a  
12          second violent felony offender. Could the sentencing judge  
13          have sentenced him as a persistent?

14                      MR. BLIRA-KOESSLER: Well, I think after all the  
15          facts came out, we might have made three arguments - - -

16                      JUDGE WILSON: No, no. I'm - - - if that was the  
17          remittal, if it was, you must sentence him as a second  
18          violent offender, not a persistent - - - if that was the  
19          order on the first appeal - - -

20                      MR. BLIRA-KOESSLER: Right.

21                      JUDGE WILSON: - - - could Supreme Court have  
22          done something different?

23                      MR. BLIRA-KOESSLER: Well, before I can get to  
24          that, though, I have to say one thing.

25                      JUDGE WILSON: Sure.



1 MR. BLIRA-KOESSLER: If those were the facts, we  
2 would have probably moved to reargue before the Appellate  
3 Division to ask the Appellate Division to change its  
4 remittal order - - -

5 JUDGE WILSON: And suppose they - - -

6 MR. BLIRA-KOESSLER: - - - to allow us - - -

7 JUDGE WILSON: And suppose they didn't.

8 MR. BLIRA-KOESSLER: Suppose they - - -

9 JUDGE WILSON: Did not.

10 MR. BLIRA-KOESSLER: Suppose they didn't allow  
11 it?

12 JUDGE WILSON: Right. They stuck to their  
13 opinion. It goes back. Can Supreme Court do something  
14 different?

15 MR. BLIRA-KOESSLER: I - - - I would submit no.

16 JUDGE WILSON: Okay.

17 MR. BLIRA-KOESSLER: I would submit no, because  
18 the - - -

19 JUDGE WILSON: So - - -

20 MR. BLIRA-KOESSLER: - - - statute is mandatory.  
21 It doesn't say "may". You know, in the last case, I - - -

22 JUDGE WILSON: So I'm sorry.

23 MR. BLIRA-KOESSLER: I - - -

24 JUDGE WILSON: I'm sorry. I don't understand the  
25 no, then. You're saying that even if the Appellate



1 Division had said, you must sentence him as a second  
2 violent, not a persistent, Supreme Court could sentence him  
3 as a persistent?

4 MR. BLIRA-KOESSLER: But that's what the statute  
5 says. I mean, I know it's - - -

6 JUDGE WILSON: I - - - I'm just asking - - -

7 MR. BLIRA-KOESSLER: I know it's an - - - an  
8 anomalous result. But if a judge is presented - - -

9 JUDGE WILSON: I'm asking you whether a  
10 subsidiary court has to obey the order, if it's clear, of a  
11 superior court.

12 MR. BLIRA-KOESSLER: And my answer to that is - -  
13 - is that the court has its first and foremost duty to obey  
14 the legislature.

15 JUDGE WILSON: So your answer is no.

16 MR. BLIRA-KOESSLER: The answer is that - - -  
17 that - - -

18 JUDGE WILSON: Okay. Okay.

19 MR. BLIRA-KOESSLER: - - - that it could go ahead  
20 - - - I mean, you know, it - - - it seems like a strange  
21 result. They'd be - - -

22 JUDGE TROUTMAN: So let me ask you this.

23 MR. BLIRA-KOESSLER: - - - disobeying an  
24 intermediate court, but - - -

25 JUDGE TROUTMAN: With respect to that information



1 that there was time that the defendant was incarcerated,  
2 once the district attorney discovers that information prior  
3 to sentence, whether it's resentence or initial sentence,  
4 what is their obligation?

5 MR. BLIRA-KOESSLER: When we discover that  
6 information? You - - -

7 JUDGE TROUTMAN: When you discovered the  
8 information, is it optional for you to deliver that to the  
9 court?

10 MR. BLIRA-KOESSLER: No. I mean, it's mandatory,  
11 and it's mandatory for the court to act upon it once it has  
12 that information. You know, that's basically the import of  
13 this court's ruling in Scarbrough, which was a - - -  
14 basically a reversal based upon the dissenting decision,  
15 which said that negligence, even oversight, does not change  
16 a court's duty to comply with the statute.

17 JUDGE RIVERA: But if - - -

18 MR. BLIRA-KOESSLER: That - - -

19 JUDGE RIVERA: If - - - if, as you say, to the  
20 Appellate Division you give an example, that - - - there  
21 might be an opening to create a different record, to  
22 request discretionary - - - right? Discretionary status,  
23 assignment - - -

24 MR. BLIRA-KOESSLER: This is now on appeal?

25 JUDGE RIVERA: Yes, yes. That's what I'm talking





1 about. Yes. If you did - - - if you did that and you only  
2 gave the example of the discretionary, why - - - why does  
3 that not lead us to conclude that you were not seeking - -  
4 -

5 MR. BLIRA-KOESSLER: I mean, again, I - - -

6 JUDGE RIVERA: - - - a reopening of the record  
7 and to proceed in that way? I mean, I don't understand why  
8 you wouldn't have said - - - and - - - and we can get those  
9 city records.

10 MR. BLIRA-KOESSLER: Right. I mean, but, you  
11 know, I don't think the standard is could we have written a  
12 better brief. I mean, maybe so.

13 JUDGE RIVERA: No, no, no. But if - - -

14 MR. BLIRA-KOESSLER: Right.

15 JUDGE RIVERA: - - - you're being clear with the  
16 Appellate Division of what - - - you're - - - you've made a  
17 concession, and now you're being clear with the Appellate  
18 Division of how you see this case proceeding so that the  
19 judge below does not have any confusion about what the  
20 judge is able to do and should do.

21 MR. BLIRA-KOESSLER: I mean, the - - - the  
22 concession was based upon the existing record, and the - -  
23 -

24 JUDGE RIVERA: Well, the - - -

25 MR. BLIRA-KOESSLER: - - - Appellate Division



1 reached - - -

2 JUDGE RIVERA: And as already has been pointed  
3 out - - -

4 MR. BLIRA-KOESSLER: Right.

5 JUDGE RIVERA: - - - it's a record that you all  
6 created, and then you wanted to create a different record.

7 MR. BLIRA-KOESSLER: Well, I mean, if we're going  
8 to go to how the record was created, yes, we did have a  
9 duty - - - I will admit that - - - under the statute to  
10 file it in writing - - -

11 JUDGE RIVERA: Yes. Yes.

12 MR. BLIRA-KOESSLER: - - - not just the oral  
13 representation. But the prosecutor did orally represent  
14 that. Now, nobody took issue with that. That - - - that  
15 is deemed - - - that fact is - - - that uncontroverted fact  
16 - - -

17 JUDGE RIVERA: Did you argue that - - -

18 MR. BLIRA-KOESSLER: - - - is deemed weighty.

19 JUDGE RIVERA: - - - to the Appellate Division?

20 MR. BLIRA-KOESSLER: That - - - that was not  
21 argued to - - -

22 JUDGE RIVERA: Well, you made a concession.

23 MR. BLIRA-KOESSLER: - - - to the Appellate  
24 Division.

25 JUDGE RIVERA: So the - - -



1 MR. BLIRA-KOESSLER: A - - - concession - - - but  
2 - - - but what if the Appellate Division decided to, based  
3 - - -

4 JUDGE RIVERA: Well, you say that the record was  
5 good. You could have tried to argue. I don't know how you  
6 would have succeeded, but you know, that case is not here.

7 MR. BLIRA-KOESSLER: Right. I mean, you could  
8 have tried - - -

9 JUDGE RIVERA: Could have said - - -

10 MR. BLIRA-KOESSLER: Exactly, though. That's - -  
11 -

12 JUDGE RIVERA: - - - we - - - we - - - we  
13 mentioned - - - but why not tell the Appellate - - - we  
14 mentioned this on remand, we're going to pursue this.

15 MR. BLIRA-KOESSLER: It - - - it probably would  
16 have been sent back anyway based - - - I - - - I mean,  
17 look.

18 JUDGE RIVERA: Okay.

19 MR. BLIRA-KOESSLER: You can make the argument  
20 based on Bouyea, any number of cases, well, there was an  
21 oral representation. But the response would have been, but  
22 you have to do it in writing, so it could - - - could have  
23 been sent back anyway.

24 But my only point is that the concession - - -  
25 the words you use in a brief cannot be used to circumvent



1 the court's - - -

2 JUDGE TROUTMAN: When a case - - -

3 MR. BLIRA-KOESSLER: - - - mandatory duty.

4 JUDGE TROUTMAN: - - - is sent back for  
5 resentencing, is it - - - do you start from scratch, or is  
6 it simply that you just resentence him as if it were, as  
7 it's argued here, based on what was presented to the  
8 Appellate Division?

9 MR. BLIRA-KOESSLER: Well, I mean, a resentencing  
10 by definition is a de novo proceeding. That's why the  
11 court could consider the additional evidence in Mr. Kaval's  
12 rehabilitation and actually sentence him to twenty to life  
13 instead of twenty-three to life. But that applies - - -

14 ACTING CHIEF JUDGE CANNATARO: But that get - - -  
15 that gets me back to Judge Wilson's question, that answer.  
16 Why couldn't the Appellate Division have said, resentence  
17 him as a discretionary second?

18 MR. BLIRA-KOESSLER: A discretionary second  
19 felony offender?

20 ACTING CHIEF JUDGE CANNATARO: Yes.

21 MR. BLIRA-KOESSLER: Okay. So I mean - - -

22 ACTING CHIEF JUDGE CANNATARO: And - - - and that  
23 wouldn't be de novo; that would be a tightly directed  
24 resentencing hearing.

25 MR. BLIRA-KOESSLER: Okay, but that - - - that



1 still would have been in contravention of the facts that  
2 came before the resentencing court. So I guess the  
3 resentencing court could be seen to be in a bit of a  
4 dilemma. You have a remittal order from the Appellate  
5 Division, and under Judge Wilson's scenario, they don't - -  
6 - they - - - they refuse to change the remittal order. But  
7 still, you have the statute. So yes, you have to obey the  
8 orders - - -

9 ACTING CHIEF JUDGE CANNATARO: But didn't this -  
10 - -

11 MR. BLIRA-KOESSLER: - - - from an appellate  
12 court, but the - - - the words of a statute I think come  
13 before that.

14 JUDGE RIVERA: Yeah, but the record would have  
15 been the same. I - - - you're - - - you're still arguing  
16 that you had - - - that the - - - under the law, you have  
17 the opportunity to come and create a different record.

18 MR. BLIRA-KOESSLER: I'm sorry. Can - - - can -  
19 - - can you say that again, Judge?

20 JUDGE RIVERA: I'm sorry. As I understand your  
21 argument, it's that under the law, you are able to create  
22 another record, not the one that you didn't succeed on at  
23 the first appeal. Am I misunderstanding your position?

24 MR. BLIRA-KOESSLER: I - - - I think my position  
25 - - -



1 JUDGE RIVERA: Because otherwise, the judge is -  
2 - - has the record that went before, and you had conceded  
3 that on that record - - -

4 MR. BLIRA-KOESSLER: Our - - - my - - - my - - -  
5 my basic - - -

6 JUDGE RIVERA: - - - that - - -

7 MR. BLIRA-KOESSLER: Sorry?

8 JUDGE RIVERA: Go ahead. No, no. Finish - - -

9 MR. BLIRA-KOESSLER: No. I mean, our basic  
10 overarching position is that this is not a law-of-the-case  
11 case. This is a the-court-has-to-follow-the-statute case.

12 JUDGE WILSON: But my question is - - -

13 JUDGE SINGAS: Okay - - -

14 JUDGE WILSON: - - - not really directed at law  
15 of the case. I mean, my - - - what you're proposing,  
16 really, is that if a lower court disagrees with a clear  
17 order from a superior court, it can turn to the statute and  
18 evaluate the statute for itself, regardless of what the  
19 superior court says. And I'd be surprised if anybody on  
20 this bench thinks that.

21 MR. BLIRA-KOESSLER: I mean, I - - - I know  
22 that's a strange result, but it's not really evaluating the  
23 statute because there's nothing to evaluate. The statute  
24 says "must". If information comes before - - - what - - -  
25 what's the court supposed to do, then? Just ignore the



1 fact that somebody's a persistent - - -

2 JUDGE RIVERA: No, no. Doesn't our legal system  
3 allow for a challenge to that order from the Appellate  
4 Division?

5 MR. BLIRA-KOESSLER: Oh, we - - - we - - -

6 JUDGE RIVERA: Isn't - - - isn't that your  
7 opening, that the mistake - - -

8 MR. BLIRA-KOESSLER: You know, we - - - we  
9 correctly - - -

10 JUDGE RIVERA: - - - is not with the judge who  
11 does or doesn't follow; the mistake is, in your view, from  
12 your view, at the Appellate Division?

13 MR. BLIRA-KOESSLER: I mean, we - - -

14 JUDGE RIVERA: And that's what you need to  
15 challenge?

16 MR. BLIRA-KOESSLER: We could seek relief through  
17 appeal based on the remedy, I guess. That's a  
18 discretionary determination. We don't get that as a matter  
19 of law. I don't know. I've - - - I've never seen that  
20 sort of situation happen. I - - - I just think that the  
21 words of the statute would take precedence over an order -  
22 - -

23 JUDGE SINGAS: Regardless of what - - -

24 MR. BLIRA-KOESSLER: - - - the complete record -  
25 - -



1 JUDGE SINGAS: - - - the People do?

2 MR. BLIRA-KOESSLER: Sorry.

3 JUDGE SINGAS: Regardless of what the People do?  
4 You're just saying, he's a mandatory, the statute says so.  
5 We couldn't have - - - the People didn't have to file  
6 anything.

7 MR. BLIRA-KOESSLER: Yeah. I mean, like,  
8 unfortunately, we didn't fully comply with the statute  
9 here. No - - - nobody's saying that. We should have filed  
10 the writing, should have filed the city time. When that  
11 information comes before the court, though, the court can't  
12 just ignore it.

13 There was a broad remittal for resentencing here.  
14 That's all we had. We didn't have a specific remittal  
15 until Kaval II. We had a broad remittal. Under that broad  
16 remittal for, quote, just the resentencing, the court was  
17 allowed to sentence Mr. Kaval as a persistent violent  
18 felony offender.

19 ACTING CHIEF JUDGE CANNATARO: Thank you,  
20 Counsel.

21 MR. BLIRA-KOESSLER: Thank you.

22 MR. GREENBERG: Good afternoon. Simon Greenberg  
23 for Respondent Rudolph Kaval.

24 JUDGE TROUTMAN: Was it sent back - - - when it  
25 was sent back for sentencing, is it a de novo proceeding





1 that takes place?

2 MR. GREENBERG: It - - - it is not a de novo  
3 proceeding, Your Honor. In this case, the People conceded  
4 that they had not - - - well, the People in fact did not  
5 meet their burden on the tolling issue, and they conceded  
6 it. And the - - - the - - - you know, the - - - in Kaval  
7 II, the Appellate Division interprets its prior decision as  
8 saying, you know, we decided this issue and sent it back.

9 JUDGE TROUTMAN: So when it went back, the People  
10 weren't required to present to the court information  
11 regarding the defendant's status so that he could be - - -  
12 receive a legal sentence?

13 MR. GREENBERG: I don't - - - they were not  
14 required to do so, and in fact, they were not permitted to  
15 do so because - - -

16 JUDGE TROUTMAN: So the statute is permissive, is  
17 what you're arguing?

18 MR. GREENBERG: The statute is not permissive,  
19 Your Honor. However, litigation on even a mandatory issue  
20 has to - - - an issue that has to be litigated has to end  
21 at some point. And - - - and here - - -

22 JUDGE TROUTMAN: So it's a mandatory statute, but  
23 because of the way the case went up, the unique  
24 circumstances of this case, the People should not be  
25 permitted to offer information, valid or otherwise, that



1 the defendant was a proper persistent felony offender?

2 MR. GREENBERG: It was mandatory that the People  
3 file the predicate felony statement at the original  
4 sentencing and that they prepare for a hearing on the issue  
5 as the - - -

6 JUDGE TROUTMAN: But not when it went back?

7 MR. GREENBERG: Well, when it went back, the  
8 Appellate Division had - - - had decided this issue and  
9 taken it off the table. And at that point, the People - -  
10 -

11 JUDGE RIVERA: Well, based on the record the AD  
12 had in front of it. So that was my point to your  
13 adversary. The question is whether or not they can go back  
14 and say, we want to create a different record.

15 MR. GREENBERG: Not if the - - - they cannot ask  
16 to make a different record in front of this - - - the  
17 resentencing judge once they've conceded that they've  
18 failed to meet their burden and this issue has been decided  
19 by the Appellate Division. So - - -

20 ACTING CHIEF JUDGE CANNATARO: If that's the  
21 case, why was it that your client - - - I mean, I think  
22 this is what happened - - - at the resentencing made a  
23 request for an - - - consideration of his exemplary  
24 behavior? If it's not a new proceeding, all we really have  
25 to do is recalculate the sentence. Now you're - - - you're



1 introducing new elements into the sentencing determination.  
2 Why can't the People?

3 MR. GREENBERG: The distinction, Your Honor, is  
4 that Mr. Kaval never had an opportunity to present this  
5 evidence at the original sentencing because the evidence of  
6 his rehabilitation obviously did not exist at that point.  
7 And also, the judge at the resentencing still had to make a  
8 determination of the appropriate sentence within the range  
9 that was legal, which - - -

10 JUDGE TROUTMAN: So the defendant could present  
11 information because he was being sentenced anew, but the  
12 People could not? Is that what you're arguing?

13 MR. GREENBERG: The - - - well, that - - - I'm  
14 arguing that the defendant could present information about  
15 his rehabilitation to aid the judge in coming to the  
16 judge's decision about where in the, for example, second  
17 violent felony offender sentencing range the sentence  
18 should fall. But that doesn't mean the People can bring in  
19 new information to relitigate an issue that has already  
20 been decided by the Appellate Division.

21 JUDGE GARCIA: Well, Counsel - - -

22 JUDGE WILSON: But could the People have brought  
23 in evidence that the prisoner had misbehaved?

24 MR. GREENBERG: They could have, yes, Your Honor.  
25 And they - - - and they - - - and the - - - the - - - you



1 know, the - - - this court's decisions say that the - - -  
 2 the People, you know - - - for example, the case law on  
 3 vindictive sentencing allows on a - - - on a - - - if - - -  
 4 if a defendant wins on an appeal and the case - - - he - - -  
 5 - you know, the - - - the conviction gets overturned and  
 6 then ultimately the defendant gets convicted and sentenced  
 7 again, the People can ask the - - - the judge at the second  
 8 sentencing to impose a higher sentence than the first time  
 9 around specifically based on post-sentencing misconduct.

10 And so yes, it's - - - it's definitely something  
 11 the People could have done. They could have asked - - -

12 JUDGE WILSON: Well, that's a whole different - -  
 13 -

14 MR. GREENBERG: - - - for a higher sentence.

15 JUDGE WILSON: That's a whole different  
 16 conviction, though, in that circumstance.

17 MR. GREENBERG: That's true, Your Honor.

18 JUDGE WILSON: Okay.

19 JUDGE GARCIA: But - - - but the People - - -

20 JUDGE RIVERA: But isn't - - - isn't the point -  
 21 - -

22 JUDGE GARCIA: Counsel, can I ask you a question?

23 JUDGE RIVERA: Oh, sorry. Go ahead.

24 JUDGE GARCIA: The - - - it seems like - - -  
 25 well, I have a hard time with the law-of-the-case idea



1 here. But it seems like your argument is it goes case by  
2 case, and you look at what the Appellate Division did in  
3 each case. And your view of this record is the Appellate  
4 Division ruling combined with the People's argument in this  
5 appeal precluded this evidence from going in at the  
6 resentencing. It's not a general rule; it's a case-by-case  
7 Appellate Division argument rule.

8 MR. GREENBERG: That's correct, Your Honor. In  
9 this case, the Appellate Division conclusively decided the  
10 - - - the question of whether the - - - whether my client -  
11 - - whether the 1987 case was a valid predicate based on  
12 the People failing to meet their burden.

13 JUDGE GARCIA: And it - - - clearly, the  
14 Appellate Division could have done I think what Judge  
15 Wilson proposed before in his hypothetical, which is you  
16 have to go back and sentence as X, right? They could have  
17 done that, and that would have been an order to the court,  
18 but they didn't do - - - and they've done that - - -  
19 something like that, I think, in some of the other cases  
20 I've seen. But they didn't do that here. So does that go  
21 the other way, then?

22 MR. GREENBERG: It does not, Your Honor. And  
23 yes, the Appellate Division could do that, but here, there  
24 was - - - you know, the People had not made a request to  
25 seek to - - - to relitigate the tolling issue about whether



1 my client was a persistent. They conceded it, and they - -  
2 - they - - - they basically represented to the Appellate  
3 Division, I - - - I think pretty clearly, that they were  
4 not going to try to relitigate this issue because they  
5 said, we're going to seek discretionary specifically  
6 because discretionary persistent felony offender sentencing  
7 does not require us to present any evidence of tolling.

8 But we - - -

9 JUDGE WILSON: So Judge Garcia has carried out my  
10 hypothetical exactly where I wanted to go, which is the  
11 Appellate Division on the first appeal didn't issue a  
12 directive as clear as the one I gave in my hypothetical,  
13 but when it came up the second time, the Appellate Division  
14 interpreted its first decision as if it were that clear.  
15 What is our view of that?

16 MR. GREENBERG: I - - - I think that, you know -  
17 - - I - - - I think there is federal case law saying that  
18 courts - - - higher courts will give deference to a lower  
19 court in interpreting its own prior mandate and the meaning  
20 of its prior decisions. But - - -

21 ACTING CHIEF JUDGE CANNATARO: Is there a  
22 standard - - -

23 MR. GREENBERG: But I think that's an appropriate  
24 rule, Your Honor.

25 ACTING CHIEF JUDGE CANNATARO: - - - of review



1 for that, Counsel?

2 MR. GREENBERG: I apologize.

3 ACTING CHIEF JUDGE CANNATARO: Is there a  
4 standard of review for that kind of analysis, and under  
5 what standard do we defer to their interpretation?

6 MR. GREENBERG: I - - - I think - - - I - - - and  
7 I don't know if I would call it abuse of discretion, but  
8 some level of deference given that the court has, you know,  
9 better knowledge, for example, of its own internal  
10 processes about how a particular decision was made.

11 JUDGE RIVERA: It - - - it's a bit odd here  
12 because the dissenter is the only person who was on that  
13 first panel.

14 MR. GREENBERG: That's true. Judge Dillon was on  
15 the first panel, and no one else was.

16 JUDGE RIVERA: I mean, it - - - it - - - yeah.  
17 It's pretty hard to work that one through.

18 JUDGE SINGAS: Would you agree, Counselor, in  
19 fact that the defendant is a mandatory persistent felon?

20 MR. GREENBERG: No, Your Honor.

21 JUDGE SINGAS: Why not?

22 MR. GREENBERG: Because the statute and law  
23 require the People to meet a burden, and they didn't meet  
24 their burden.

25 JUDGE SINGAS: All right. I - - - I - - - I



1 think that's where I'm having some issue, right? Because  
2 there - - - there should be a right answer here. This  
3 isn't - - - this isn't a concept that's amorphous. There's  
4 a number, and we can calculate that number. And if we  
5 calculate that number, there should only be one right  
6 answer. And if he is a mandatory persistent felon, which  
7 it appears he is, if we adopt your position, are we  
8 sanctioning an illegal sentence?

9 MR. GREENBERG: No, Your Honor, because the - - -  
10 the - - - what was actually illegal was - - - I mean, once  
11 the People failed to meet their burden at the - - - at the  
12 sentencing, it was actually illegal to make my client a  
13 persistent because the reality - - -

14 JUDGE TROUTMAN: So did your client challenge  
15 what was being offered?

16 MR. GREENBERG: My client at the beginning of the  
17 sentencing specifically controverted the tolling, which was  
18 - - - and the - - - and the - - - and the judge had asked  
19 the - - - had directed the People several weeks before to  
20 prepare their paperwork for a hearing on the persistent  
21 violent issue.

22 So the People had full notice, and they filed  
23 their predicate felony statement sixteen months before the  
24 sentencing. So they had months and months and months to  
25 ask the New York City Department of Correction for a simple





1 document, and instead, it took them, you know, six years  
2 after they filed their predicate felony statement to  
3 finally go out and get it.

4 JUDGE RIVERA: I don't think there's any way to  
5 read the record other than what you suggest, which is they  
6 failed. That's what the AD said. That's what they  
7 conceded to. The question is, can they on the remand get  
8 it right? That's the point.

9 MR. GREENBERG: Not - - -

10 JUDGE RIVERA: If they can do that. Is there  
11 anything that forecloses them from, on the remand, getting  
12 it right?

13 MR. GREENBERG: There is the Appellate Division's  
14 decision conclusively deciding this issue and then  
15 accepting their representation, you know, we're - - - we're  
16 not going to try this again. And - - - and there's - - -

17 ACTING CHIEF JUDGE CANNATARO: At the expense of  
18 an illegal sentence? The - - - the - - - does - - -

19 MR. GREENBERG: Well, it's - - - it's not an  
20 illegal sentence, Your Honor - - -

21 JUDGE RIVERA: Well, do you agree - - -

22 MR. GREENBERG: - - - because of the burden - - -

23 JUDGE RIVERA: - - - they could have done what  
24 they said, the example, we can ask for it discretionarily?  
25 You agree with that?



1 MR. GREENBERG: I'm sorry?

2 JUDGE RIVERA: That they could have asked for it  
3 discretionarily?

4 MR. GREENBERG: Asked the Appellate Division?

5 JUDGE RIVERA: No, no, no, no, no. On the  
6 remand. Do you agree with that? They used that - - -

7 MR. GREENBERG: As for what - - -

8 JUDGE RIVERA: - - - as their example, that on  
9 remand - - -

10 MR. GREENBERG: They could have - - -

11 JUDGE RIVERA: Yes?

12 MR. GREENBERG: Yes. On the - - - at the  
13 original - - - at the - - - at the resentencing in 2019,  
14 the People could have asked the - - - the judge to - - - to  
15 impose a discretionary persistent sentence.

16 JUDGE RIVERA: Then why not do it based on the  
17 actual record that shows the - - - the calculation, as  
18 Judge Singas has suggested?

19 MR. GREENBERG: I'm sorry. I don't think I - - -  
20 what do you - - - discretionary persistent - - -

21 JUDGE RIVERA: Yes.

22 MR. GREENBERG: - - - sentencing meaning under  
23 Penal Law 70.10, which does not require proof of tolling.

24 JUDGE RIVERA: Correct.

25 MR. GREENBERG: They could have asked the - - -



1 the resentencing judge to sentence my client on - - - as a  
2 discretionary persistent because that wouldn't require them  
3 to relitigate the tolling issue. But they could not ask  
4 the - - - as - - - they were - - - they should not have  
5 been permitted, based on the Appellate Division's - - -

6 JUDGE RIVERA: But all I'm saying is if it - - -  
7 if the court could have granted it without them having to  
8 meet the burden, once they're trying to meet the burden and  
9 apparently do, why would the court be foreclosed from  
10 acting on the actual record?

11 MR. GREENBERG: Because litigation, Your Honor,  
12 has to come to an end at some point. That's a universal  
13 rule in - - - in our legal system, that - - -

14 JUDGE RIVERA: Isn't the end after the  
15 resentencing?

16 MR. GREENBERG: I'm sorry?

17 JUDGE RIVERA: Isn't it once you get through the  
18 resentencing?

19 MR. GREENBERG: Well, not - - -

20 JUDGE RIVERA: I know you rely on Havelka. I  
21 understand the argument.

22 MR. GREENBERG: Yeah.

23 JUDGE RIVERA: It's not one that's not - - - that  
24 it has - - - doesn't have any force to it. I understand.  
25 But I think we're stuck with the statute, and it's not so



1 obvious that the AD isn't sending down a general de novo  
2 resentencing.

3 MR. GREENBERG: Well, I mean, again, our  
4 position, as I've made clear, Your Honor, is that based on  
5 what - - - what happened in the Appellate Division, this  
6 issue was completely decided. And the People had a full  
7 and fair opportunity to litigate this issue at multiple  
8 stages, and - - - and they failed to meet their burden.

9 JUDGE GARCIA: And Counsel, that's really - - -  
10 to me, it seems like what the Appellate Division said the  
11 second time. It didn't say, we ordered you the first time  
12 to sentence him as X. It said, we decided this already,  
13 right? This is law of the case. You had a full and fair  
14 opportunity, you're done. It didn't say, you violated our  
15 order, right? We ordered you to sentence this defendant as  
16 the other thing, right? It said, we made this decision  
17 already.

18 MR. GREENBERG: They made a decision on this  
19 specific issue, which - - -

20 JUDGE GARCIA: On the record that was before them  
21 at the time, but they made the decision, right?

22 MR. GREENBERG: Well, the record - - -

23 JUDGE GARCIA: And that was the basis of their  
24 decision the second time.

25 MR. GREENBERG: The basis of their decision the



1 second time was that in order - - - that - - - that the - -  
 2 - that the Appellate Division on - - - on - - - on the  
 3 second appeal had discretion to decide whether the People  
 4 should be permitted to present this evidence that they - -  
 5 - they knew all along they would need and yet they took  
 6 years to just simply ask the New - - - New York City  
 7 Department of Correction to get it.

8 So the - - - the second time around, the  
 9 Appellate Division is saying, we're not going to reconsider  
 10 our prior decision because - - -

11 JUDGE GARCIA: Right.

12 MR. GREENBERG: - - - because of the People's  
 13 failure to exercise any diligence - - -

14 JUDGE RIVERA: But that isn't the real legal  
 15 question to us, whether or not they could create that  
 16 record. The Appellate Division is wrong in saying that  
 17 they couldn't do that.

18 MR. GREENBERG: Well, that's - - - the issue is  
 19 whether - - - yes. The issue is whether the Appellate  
 20 Division could tell the People, you can't make a new  
 21 record. That - - - that is the issue. But I - - - I  
 22 think, you know, here, the - - - the Appellate Division  
 23 acted well within its authority to cut off further  
 24 litigation.

25 You know, the - - - the People - - - there has to



1 be some incentive for the People to be prepared for a  
2 hearing. And - - - and here, what happened is that years  
3 and years went by. Mr. Kaval still doesn't know what his  
4 sentence is going to be. And you know, that's prejudicial  
5 - - -

6 JUDGE RIVERA: Well - - -

7 MR. GREENBERG: - - - to him - - -

8 JUDGE RIVERA: - - - isn't the incentive the  
9 statute, they look terrible because they didn't do what  
10 they needed to do, they failed to meet their burden, the  
11 loss of resources to their own office to continue to have  
12 to litigate this case? Isn't that incentive enough?

13 MR. GREENBERG: Well, that's some incentive, but  
14 I think there's also - - -

15 JUDGE RIVERA: I mean, I could see if we're on  
16 the fourth round of this, right?

17 MR. GREENBERG: I - - - I - - - I - - - it is  
18 incentive that, you know, obviously, their office needs to  
19 conserve their own resources, but there's also judicial  
20 resources that need to be conserved. And also, there's the  
21 prejudice to Mr. Kaval going nine years without knowing  
22 what his sentence is going to be.

23 JUDGE TROUTMAN: But when Mr. Kaval came back - -  
24 -

25 MR. GREENBERG: Basically being in limbo.



1 JUDGE TROUTMAN: When he came back for  
2 resentencing, he was in a position to challenge their  
3 assertion with those new documents that he was a  
4 persistent; was he not?

5 MR. GREENBERG: Yes, he was, Your Honor.

6 JUDGE TROUTMAN: Okay.

7 ACTING CHIEF JUDGE CANNATARO: Thank you,  
8 Counsel.

9 MR. GREENBERG: Thank - - - thank Your - - - oh,  
10 for - - - for the reasons I've stated, Your Honors should  
11 affirm the reversal of the resentencing and also affirm the  
12 Appellate Division's instructions that Mr. Kaval be  
13 resentenced as a second violent felony offender. Thank  
14 you.

15 ACTING CHIEF JUDGE CANNATARO: Thank you.

16 MR. BLIRA-KOESSLER: I think Your Honors said it  
17 best. If you affirm what the Appellate - - - what - - -  
18 what the AD did here, you're basically sanctioning an  
19 illegal sentence. I - - -

20 JUDGE GARCIA: But Counsel, what about this last  
21 - - - one of the last points? I mean, what's the  
22 incentive, then, for your office to get this right the  
23 first time? Well, we're try the state time. If the state  
24 time doesn't work and we lose on appeal, then we'll try the  
25 city time.



1 MR. BLIRA-KOESSLER: I mean, this - - - this is  
2 just about compliance with the statute. You know, we  
3 always look - - -

4 JUDGE GARCIA: No, but - - - but - - - I  
5 understand that. But - - -

6 MR. BLIRA-KOESSLER: - - - to get it right. You  
7 know, it's not - - -

8 JUDGE GARCIA: - - - we have to look at, you  
9 know, what's going to happen the next time around. And I  
10 know to me, it's a little distracting, one, the statute,  
11 and two, this law of the case. The real issue to me is are  
12 you permitted to reopen this as a de novo hearing when it  
13 goes back. For that reason - - - that's the reason that I  
14 think pulls the other way, that - - - what's the incentive  
15 for your office to get this right the first time?

16 MR. BLIRA-KOESSLER: I mean, there - - - there's  
17 really no incentive to not get it right, you know. The - -  
18 - no - - - no one wants to do a sentencing a second time  
19 just to comply with a mandatory statutory duty. There is -  
20 - - there is no incentive to keep this going. You want to  
21 get it over with, and it's really through pure inadvertence  
22 or oversight or whatever that this even happened in the  
23 first place. This isn't like an error that happens every  
24 day. Usually - - -

25 JUDGE TROUTMAN: So it's the exception, what





1           happened here, not the rule?

2                   MR. BLIRA-KOESSLER: I - - - I'd say this case is  
3           quite exceptional, given the procedural path that it's  
4           followed. But like, I think when we - - -

5                   JUDGE GARCIA: But it's not exceptional to have  
6           city time and state time, right?

7                   MR. BLIRA-KOESSLER: No. I - - - I mean - - - I  
8           mean just to see something bouncing back and forth the way  
9           this does through iterations of the Appellate Division  
10          decision, just for that reason. I've never seen a case  
11          like this. I don't think we ever will see a case like this  
12          again.

13                   But really, again, you know, I'll - - - I'll - -  
14          - I'll end as I started. The easiest way - - - the easiest  
15          guidance for courts is to just follow the statute. The  
16          statute says "must", and there are no exceptions. It  
17          doesn't say, you don't get a second bite. It says "must".  
18          End. And for those reasons, we ask that you reverse the  
19          Appellate Division's decision. Thank you very much.

20                   ACTING CHIEF JUDGE CANNATARO: Thank you.

21                   (Court is adjourned)

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

I, Aubrey A. Haslow, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Rudolph Kaval, No. 103 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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