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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 8

ANONYMOUS,

Defendant-Appellant.

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20 Eagle Street  
Albany, New York  
January 8, 2020

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 morning's calendar is appeal number 8, The People of the  
3 State of New York v. Anonymous.

4 MS. PECORE: Good morning, Your Honors.  
5 Katherine Pecore - - - oh, excuse me.

6 CHIEF JUDGE DIFIORE: One moment.

7 Ms. Pecore, do you care to reserve some rebuttal  
8 time?

9 MS. PECORE: Yes, I would like to reserve two  
10 minutes for rebuttal.

11 CHIEF JUDGE DIFIORE: Of course.

12 MS. PECORE: Good morning, Katherine Pecore, of  
13 counsel with the Office of the Appellate Defender, on  
14 behalf of appellant. May it please the court.

15 Your Honors, the First Department held in this  
16 case that where the sealing statute, CPL 160.50, is  
17 intentionally and blatantly violated and causes obvious  
18 prejudice to a defendant, there is no remedy on direct  
19 appeal of a criminal conviction.

20 JUDGE GARCIA: Going to the prejudice, Counsel,  
21 and I'm not - - - just not sure of this in the record, but  
22 it seems there's almost an independent source argument  
23 here. I mean, did your client come in to the police, I  
24 believe it was, and essentially recount the version that he  
25 gave in the trial?



1 MS. PECORE: So I think there's some dispute as  
2 to what was said in that meeting, and I know there was some  
3 dispute about that in the bre - - - in the briefing in the  
4 trial court.

5 JUDGE GARCIA: But I think there's a letter  
6 submission from the defense at the sentencing that  
7 essentially says that it tracked the trial testimony,  
8 right?

9 MS. PECORE: Well, you know, the - - - what  
10 happened here is we - - - there - - - there may be, in  
11 fact, an independent source for this evidence.

12 JUDGE GARCIA: So where would the prejudice be?

13 MS. PECORE: But - - - but what hap - - - I - - -  
14 but we don't really know. I mean, what the prosecutor  
15 would have had to do, under my reading of the sealing  
16 statute, is bring in evidence independent of the improperly  
17 unsealed transcript, and use that to enhance appellant's  
18 sentence. But that's not what he did.

19 He represented to the court that he needed this  
20 transcript to be unsealed, that without it, he could not  
21 support his - - - his vigorous sentencing recommendation,  
22 and that it was critical. And that he could not do - - -  
23 the Outley hearing could not be done without this  
24 transcript.

25 So I think it - - - it's up for debate whether



1 the prosecution would have had su - - - sufficient evidence  
2 and witnesses to make this showing that appellant violated  
3 the conditions of his plea.

4 JUDGE FAHEY: Well, this was a little bit unusual  
5 too, wasn't it? I - - - I - - - I thought in this instance  
6 that the court adjourned the sentencing to let the other  
7 trial take place, and then the other trial took place, and  
8 then subsequent to that second trial, then the sentencing  
9 took place on the first trial, with the transcript there.

10 So under that circumstance, of course, the DA  
11 could have moved, when the court adjourned it, to unseal or  
12 - - - yeah, to unseal it in the interest of justice, any  
13 evidence that might come in, or it could have moved  
14 afterwards. That didn't take place, did it?

15 MS. PECORE: Right. So there - - - there is a  
16 mechanism in the statute for when a defendant has another  
17 open case, for the DA to move on notice to the other party  
18 - - -

19 JUDGE FAHEY: Right.

20 MS. PECORE: - - - to stay the sealing in the  
21 first instance.

22 JUDGE FAHEY: Right.

23 MS. PECORE: But that's a different provision and  
24 a different standard than - - - than the standard that is  
25 required to unseal something that is sealed.



1 JUDGE FAHEY: I guess my point is, though - - -  
2 is there was a mechanism for them to preserve the rights,  
3 and they didn't do that here.

4 MS. PECORE: Exactly.

5 JUDGE FAHEY: I see.

6 MS. PECORE: And so Ka - - - in - - - in  
7 Katherine B., this court granted what it - - - what was the  
8 functional equivalent of a suppression remedy.

9 JUDGE GARCIA: Would you stay sealing in that  
10 instance of the entire transcript? Or do you - - - would  
11 you stay sealing of just a portion?

12 MS. PECORE: I think that would be up to the - -  
13 - to the prosecutor, but the - - - the point is, that  
14 didn't happen here. What happened instead was that he  
15 moved after the fact to unseal the proceeding. And the  
16 only difference between this case and Katherine B. is  
17 really the timing - - - the time line.

18 JUDGE GARCIA: I think the difference between  
19 this case and Katherine B. is they were using or were  
20 attempting to use the facts related to the arrest in  
21 Katherine B. to enhance a sentence. And here, they're  
22 attempting to use testimony as to a different crime, to  
23 show that the conditions of the plea were violated, and - -  
24 - and the judge's order was violated. Isn't that a big  
25 difference?



1 MS. PECORE: Well, a couple of points here. A  
2 defendant - - - I don't believe a defendant waives his  
3 right to the protection of the sealing statutes by  
4 exercising his right to testify in a criminal case. But  
5 more importantly, this - - -

6 JUDGE GARCIA: But even that's kind of a broader  
7 sealing. I - - -

8 MS. PECORE: The - - - the statute - - - the  
9 statute doesn't differentiate between parts of the record  
10 that are the acquitted conduct, versus parts of the record  
11 that are other things.

12 The entire record - - - it's categorical - - -  
13 the entire record is sealed, and that's in recognition of  
14 the fact that this individual would never had been brought  
15 into court. He would never had had to testify.

16 JUDGE GARCIA: I mean, I guess that raises the  
17 question can a sentencing judge - - - given the authority  
18 of the sentencing judge, and the fact that there's been an  
19 allegation that that sentencing judge's order has been  
20 violated, does that sentencing judge have the authority  
21 then to get material indicating a different crime has been  
22 committed that's part of the record in this case - - -

23 MS. PECORE: Well, I don't - - -

24 JUDGE GARCIA: - - - or subsequent case.

25 MS. PECORE: I don't - - - so I don't view that



1 as any different from Katherine B. In Katherine B., this  
2 court's holding is very clear. It held that a prosecutor  
3 may not, under the law enforcement exception, unseal  
4 materials for the purposes of making sentencing  
5 recommendations. And not only that - - -

6 JUDGE GARCIA: It's not a sentencing  
7 recommendation here. It's just did you violate the terms  
8 of the order?

9 MS. PECORE: Right, the - - - the - - - the  
10 prosecutor was the one - - -

11 JUDGE GARCIA: It could be, look, you should get  
12 the high end of the range, because you were arrested for, I  
13 think it was attempted robbery, or whatever the second  
14 charge was. So we want to unseal it, and we want to show  
15 you engaged in these bad acts of attempted robbery, even  
16 though you were acquitted, and I think that's what  
17 Katherine B. says you can't do.

18 MS. PECORE: Well - - -

19 JUDGE GARCIA: But here, there's an admission of  
20 a different crime, and they want to say, look, you were out  
21 on the condition that you didn't do this, and you've  
22 admitted doing it. And can you really shield that fact  
23 from a sentencing court?

24 MS. PECORE: Yes, Judge, I believe that's exactly  
25 what the sealing statute does. There is no Outley hearing



1 exception to the mandate that requires these records to  
2 remain sealed. And indeed, the prosecutor was seeking this  
3 transcript to support his recommendation that appellant be  
4 sentenced to twice the promised sentence.

5 JUDGE FAHEY: Can I - - - can I turn you to a  
6 little bit different area, if - - - if you're done there?  
7 The Appellate Division relied on People v. Patterson.  
8 You're familiar with that?

9 MS. PECORE: Yes.

10 JUDGE FAHEY: And there, the Court of Appeals did  
11 not require suppression when the police used a photograph  
12 of defendant in a case that had been dismissed to show the  
13 robbery victim in a photo array. So here, would we have to  
14 reconsider Patterson in the light of Katherine B.? Or do  
15 we have to return it - - - overturn it to apply the  
16 exclusion or suppression?

17 MS. PECORE: No, Judge, this court does not have  
18 to overrule Patterson. Patterson can be reconciled with  
19 Katherine B. I think Patterson is quite distinct from this  
20 case in a couple of important respects.

21 First of all, the sealing statute violation in  
22 Patterson was committed by a police officer. It was  
23 apparently - - - or may have been accidental. And there  
24 would have been no real deterrent value in suppressing the  
25 evidence of the identification, because the police officer





1 is not likely to know that the photo array is suppressed in  
2 a later trial proceeding.

3 In this case, the - - - the violation and the  
4 prejudice to the appellant happened in the same case, and  
5 the prosecutor who order - - - who requested the order  
6 unsealing these records was the one who benefitted from the  
7 unsealing.

8 JUDGE FAHEY: Ah.

9 MS. PECORE: And so there's the - - - the  
10 deterrent benefit.

11 JUDGE FAHEY: I have your - - - I have your  
12 distinction is what - - - you're kind of - - - I don't want  
13 to take all your time. There's just one issue that's  
14 bothered me. The most compelling argument here is, I  
15 think, the presumption-of-innocence argument. That's the  
16 most compelling public policy rationale for this rule.

17 The other side of that, though, is that the  
18 sentencing here doesn't involve a question of guilt or  
19 innocence. It only - - - it - - - it only specifically  
20 involves the range of sentencing, and not in the  
21 determination. So that being the case, does the  
22 presumption-of-innocence argument apply in the context of  
23 sentencing?

24 MS. PECORE: I think it does. So - - - so the  
25 presumption of innocence is the overriding principle - - -



1 I see my light has come on, but if I may answer the  
2 question?

3 CHIEF JUDGE DIFIORE: You may.

4 MS. PECORE: The principle behind the sealing  
5 statute, the legislature had in mind, as you point out, the  
6 presumption of innocence. The presumption of innocence  
7 doesn't narrowly go to the concept of acquittal versus  
8 conviction.

9 The presumption of innocence, I think, refers to  
10 the overall idea that when someone is brought into court on  
11 a charge that is not successful, that is not ultimately  
12 upheld, that person is exposed to all kinds of consequences  
13 that they never would have faced, if they had not been  
14 hauled to court on - - - on that charge. So I think this  
15 court should view the presumption of innocence as - - -

16 JUDGE FAHEY: What you're - - - what you're  
17 saying, if I have it correctly, is that you can't use an  
18 unsuccessful pro - - - evidence from an unsuccessful  
19 prosecution to - - - as evidence in a subsequent  
20 proceeding.

21 MS. PECORE: Exactly. Nothing stemming from that  
22 record can be used, because the presumption of innocence  
23 underlies the whole proceeding.

24 JUDGE FAHEY: Thank you.

25 MS. PECORE: Thank you.



1 CHIEF JUDGE DIFIORE: Counsel?

2 MS. COHEN: Good morning, and may it please the  
3 court, Julia Cohen for the People. Your Honors, as part of  
4 defendant's beneficial plea agreement in this case, the  
5 court mandated that he abide by three pre-sentence  
6 conditions, and promised him that if he abided by those  
7 conditions, he would receive a sentence of four - - -

8 JUDGE STEIN: What concerns me here - - -

9 MS. COHEN: Yeah.

10 JUDGE STEIN: - - - is that if - - - if we allow  
11 this unsealing under these circumstances, don't we - - -  
12 don't we end up with the exception swallowing the rule? I  
13 mean, why wouldn't we allow it then in any sentencing  
14 context?

15 MS. COHEN: No, I don't believe - - -

16 JUDGE STEIN: Or certainly in any sentencing  
17 context where there were pre-conditions. Or is that what  
18 you're saying we should be doing?

19 MS. COHEN: I don't believe that the exception  
20 would swallow the rule. The facts of this case are pre - -  
21 - exceptional and that's what distinguishes it from  
22 Katherine B.

23 JUDGE STEIN: Yeah, so what - - - that's - - -  
24 that's my question - - -

25 MS. COHEN: What is it that -



1 JUDGE STEIN: - - - what makes it exceptional? I  
2 mean, there are - - - there are many, many cases where  
3 these exact - - - well, maybe not these exact  
4 circumstances, but where somebody is released on the  
5 condition that they not be rearrested or you know, get into  
6 trouble, or whatever, so it's so common.

7 MS. COHEN: Sure. So I think one thing that  
8 makes it exceptional is that the defendant went to trial  
9 and testified while this case was still pending. Normally,  
10 you would expect to see a sentence imposed, and then the  
11 trial, and subsequent case to follow.

12 Another reason why - - -

13 JUDGE STEIN: Why - - - to me, that makes it - -  
14 - the argument even stronger the other way, because - - -  
15 because the - - - the DA here could have sought not to have  
16 it sealed in the first place. There's a standard for doing  
17 that, and - - - and didn't - - - didn't make that  
18 application.

19 MS. COHEN: Another thing that I think makes this  
20 case exceptional, Your Honor, is that after the defendant  
21 was arrested and charged with robbery, the prosecutors came  
22 into court and asked the court to vacate the plea, and to  
23 allow them to proceed on the top charge of the indictment.  
24 The defense counsel asked the court to hold this case in  
25 abeyance, pending the outcome of the robbery case. In



1 other words, it was for the defendant's benefit that  
2 sentence was not imposed until after the robbery trial in  
3 this case.

4 JUDGE STEIN: But the - - - but the benefit was  
5 to see if he was convicted or acquitted. And - - - and - -  
6 -

7 MS. COHEN: Well, the benefit - - -

8 JUDGE STEIN: Right?

9 MS. COHEN: - - - I think, was to see - - -  
10 either convicted or acquitted or, as in this case, what  
11 came out at that trial. As to - - -

12 JUDGE WILSON: Why couldn't - - - why couldn't  
13 the defendant have relied on the sealing statute in making  
14 the decision about whether to testify at the trial - - - at  
15 the robbery trial?

16 MS. COHEN: I don't think he could have relied on  
17 the sealing statute, because there was - - - he could not -  
18 - - there was no expectation that he was going to be  
19 acquitted, and if - - - if he were not acquitted, this case  
20 would never have been sealed.

21 JUDGE WILSON: Well, he may have thought he was  
22 going to be acquitted.

23 MS. COHEN: Another reason why - - -

24 JUDGE WILSON: He - - - right? He knew that the  
25 sealing statute was in place. And he knew if he's



1 acquitted, that couldn't be used.

2 MS. COHEN: Sure. Another reason why I think it  
3 would have been unreasonable for him to rely on it, is as  
4 he had already disclosed the sum and substance of his  
5 testimony to the prosecutor in this case, prior to the  
6 robbery trial.

7 JUDGE GARCIA: Why didn't you use that?

8 MS. COHEN: Well, we - - - so we did, Your Honor.  
9 After the de - - - after defendant was acquitted, the  
10 prosecutor came into court and made a sentencing  
11 recommendation of nine years to the sentencing court in  
12 this case, and represented the contents of defendant's  
13 testimony, which you recognize was substantially similar to  
14 what he testified to on the stand - - -

15 JUDGE GARCIA: But why did you need the unsealing  
16 order?

17 MS. COHEN: The judge in this case re - - -  
18 essentially, requested the unsealing. The prosecutors made  
19 a sentencing recommendation, recommended that he impose a  
20 sentence - - -

21 JUDGE RIVERA: I - - - I have been - - - misread  
22 the record, because I thought the prosecutor asked the  
23 judge would the judge entertain a motion to unseal?

24 MS. COHEN: So technically, the - - - the  
25 prosecutor did move to unseal, but it was only made in



1 response to the judge's instructing the prosecutor to  
2 particularize whatever information he had about defendant's  
3 criminal conduct during the pendency of this case in  
4 writing. So - - -

5 JUDGE RIVERA: That - - - that doesn't  
6 necessarily require reference to information that's sealed,  
7 right? I think that was Judge Garcia's prior point.  
8 You've got an independent source for it. That's what you  
9 should be depending on.

10 MS. COHEN: So the - - - the sentencing court  
11 explained that he was not going to impose an enhanced  
12 sentence lightly, and wanted more details, essentially,  
13 about defendant's testimony.

14 JUDGE RIVERA: Yes, and then the prosecutor makes  
15 this motion and this request - - -

16 MS. COHEN: Right.

17 JUDGE RIVERA: - - - and that's why, in part,  
18 we're here, because that seems to be in violation of the  
19 statute.

20 But let me ask you a different question. It  
21 strikes me that your approach results in a - - - what I  
22 think is an anomaly that would be very difficult for the  
23 court to uphold, which is, if they have sought to - - - a  
24 civil action. If they pursued a civil action seeking to  
25 prevent the unsealing or to stay the unsealing pending an



1           appellate determination as to the - - - the priority of the  
2           request to unseal, it might have been successful.  
3           Certainly, the - - - the Appellate Division below thought  
4           that there was an error. And that would prevent the  
5           unsealing, and so we wouldn't be in this place.

6                        But because defendant sought a - - - to raise the  
7           question on direct appeal, going to the error at  
8           sentencing, there is no remedy. And that strikes me as an  
9           anomaly, and just unfair.

10                      MS. COHEN: It - - - it is because the defendant  
11           did not exercise the remedy that was available to him under  
12           the law, and that would be seeking - - - taking a civil  
13           appeal prior to the unsealing. So it's not that there is  
14           no - - -

15                      JUDGE RIVERA: True, to prevent the unsealing,  
16           but now you've got - - - right, now you've got this other  
17           injury at sentencing, right? That - - - that flows from  
18           that original error. You've now got the error of the use  
19           of that unsealed testimony to base the - - - the enhanced  
20           sentence. And that, they - - - they are challenging on the  
21           direct appeal. But - - - but the Appellate Division says,  
22           well, you have no remedy for that; you would have had a  
23           remedy to try and stop the sealing.

24                      MS. COHEN: I would dispute that the error flowed  
25           directly from the unsealing in this case. The - - - the -





1 - -

2 JUDGE RIVERA: Well, did the - - - did - - - I'm  
3 sorry; didn't the sentencing court decide at the Outley  
4 hearing the only reason that the sentence was not going to  
5 be as promised at the plea because he had violated the  
6 conditions by indeed this drug transaction that he admitted  
7 to on the record in the trial in his defense?

8 MS. COHEN: So although defendant was obviously  
9 prejudiced by his exculpatory testimony, it was not the  
10 unsealing that resulted in the prejudice. The court was  
11 aware of the contents of the testimony before the unsealing  
12 even occurred. There - - - there are just going to be - -  
13 -

14 JUDGE RIVERA: Based on what?

15 MS. COHEN: Based on the prosecutor's  
16 representations.

17 JUDGE WILSON: So does - - - does - - -

18 JUDGE RIVERA: But that would not have been  
19 evidence, right?

20 MS. COHEN: I'm sorry?

21 JUDGE RIVERA: They don't have evidence. That  
22 would not have been evidence, correct?

23 MS. COHEN: Well - - -

24 JUDGE RIVERA: I thought you said that's what the  
25 - - - the prosecutor needed to indeed establish - - -



1 satisfy the burden of proof at the Outley hearing.

2 MS. COHEN: So the - - - the court - - - so under  
3 Outley, the court, I would - - - had an obligation to  
4 ensure that it was basing its sentence on reliable ac - - -  
5 and accurate information. I believe the court would have  
6 been entitled to impose a sentence prior - - - the same  
7 sentence as it did in this case, prior to the unsealing,  
8 based on the prosecutor's representations.

9 JUDGE RIVERA: You mean, the prosecutor came in  
10 and said - - -

11 MS. COHEN: That he told me that he was out  
12 committing a massive drug sale.

13 JUDGE RIVERA: And that would have been enough.

14 MS. COHEN: The court could have inquired further  
15 from the defendant, but the fact is the defendant - - -

16 JUDGE RIVERA: Did the prosecutor have to take  
17 the stand - - - I mean, cross-examine?

18 MS. COHEN: I - - - it's up to the court to  
19 determine the - - - the nature and extent of the inquiry  
20 around it.

21 JUDGE WILSON: So the - - - the record has  
22 reference to a letter written by the defendant and sent  
23 directly to the court. The black - - - that letter does  
24 not appear in the appendix or the record. Is it part of  
25 the record in - - - in the trial court, or no?

1 MS. COHEN: Yes, I - - - I believe it should  
2 appear. I believe it's in the appendix. It's from the  
3 defense counsel to the court.

4 JUDGE WILSON: No, no, there's a reference,  
5 actually, to a letter that - - - I think that letter from  
6 defense counsel references a letter written by the  
7 defendant to the court. Do you know anything about that?

8 MS. COHEN: I'm not aware - - -

9 JUDGE WILSON: Okay.

10 MS. COHEN: - - - at this moment of the contents  
11 of that letter, no.

12 JUDGE WILSON: Okay.

13 MS. COHEN: So turning back to Katherine B. and  
14 the distinguishing features of Katherine B. and this case.  
15 In Katherine B., there was no plea agreement. There was no  
16 Outley hearing. And most importantly, there was no  
17 sentencing recommendation until after the unsealing, right.  
18 So Katherine B. dealt with the narrow question of whether  
19 the law enforcement exception under 160.50(1)(d)(ii) allows  
20 a prosecutor to unseal materials for the purpose of making  
21 a sentencing recommendation.

22 JUDGE RIVERA: So what exception does the  
23 unsealing here fit under, if it's not that one?

24 MS. COHEN: I - - - I believe it fits under that  
25 one. And in addition to the CPL provision, the court under



1 - - - under 400.10(4), the court was required to consider  
2 defendant's compliance with the pre-sentencing conditions.  
3 The CPL says, the court "shall" consider whether or not  
4 defendant complied with the pre-sentence conditions.

5 JUDGE STEIN: But that doesn't speak to what  
6 proof is available to - - - to establish the violation of  
7 the - - -

8 MS. COHEN: No, it doesn't specifically speak to  
9 it, but I - - -

10 JUDGE STEIN: So I mean, to - - - it sort of goes  
11 back to that the sealing statute doesn't provide an  
12 exception for the court's obligation to sentence based on  
13 reliable information. That's not in there.

14 MS. COHEN: Not within the sealing statute  
15 itself, but it - - -

16 JUDGE STEIN: Right.

17 MS. COHEN: - - - it does provide this sort of  
18 catchall law enforcement agency exception that says a - - -

19 JUDGE STEIN: Yeah, but the - - - but the  
20 prosecutor's not a law enforcement agency, and the - - -  
21 and certainly, the court is not a law enforcement agency,  
22 right?

23 MS. COHEN: I believe that the pro - - - the  
24 prosecutor - - - a prosecutor is a law enforcement agent,  
25 yes. And I think that to the extent that Katherine B. said



1 that for purposes of that provision, a prosecutor who's  
2 making a sentencing recommendation, I think that has to do  
3 more with an interpretation of the legislative intent in  
4 passing the statute, right.

5 JUDGE STEIN: So you don't read Katherine B. as -  
6 - - as saying that that exception doesn't apply to the DA?

7 MS. COHEN: No, I do not. I - - - I think that  
8 Katherine B. was dealing with a very disparate set of  
9 circumstances as we're dealing with in this case.

10 JUDGE FAHEY: So you're rejecting the Appellate  
11 Division's analysis then?

12 MS. COHEN: That the Kat - - - that the law  
13 enforcement exception - - - I - - - I think that Katherine  
14 B. is sim - - - is not controlling in this case.

15 JUDGE FAHEY: Well, they say that the unsealing  
16 here did violate Katherine B., and basically, this is an  
17 error without a remedy.

18 MS. COHEN: That was what the majority said. I -  
19 - - the concurrence, I believe, said that, you know, the -  
20 - - that this court might find that the unsealing was  
21 justified under CPL.

22 JUDGE FAHEY: If I could only get these guys to  
23 agree with me that my concurrence overrides the majority,  
24 I'd be a happier judge.

25 JUDGE RIVERA: But Katherine B., really, at the



1 heart, stands for the proposition that - - - that a  
2 prosecutor cannot seek to unseal or - - - you can't unseal  
3 the - - - the record that's been sealed under the CPLR  
4 160.50, simply because a prosecutor wants that information  
5 for purposes of making a recommendation for sentencing.

6 And although I know you keep arguing that's not  
7 what happened here, the whole point of the request to  
8 unseal was to have information to present to the court to  
9 show that he had violated, right, the terms of the  
10 conditions of his plea, only to one end, which was to get  
11 him out from under the agreed-to sentence.

12 MS. COHEN: Respectfully - - -

13 JUDGE RIVERA: To enhance that sentence.

14 MS. COHEN: Respectfully - - -

15 JUDGE RIVERA: To impose a more - - - an  
16 excessive - - - a more harsh sentence.

17 MS. COHEN: I think, respectfully, I would have  
18 to disagree. Defendant's sentence - - - the sentencing  
19 range to which he was exposed, was determined prior to the  
20 unsealing, prior to the robbery case. There - - - unlike  
21 in Katherine B., where the unsealing was used to come up  
22 with a sentencing recommendation, defendant here was aware  
23 that his sentence would be between four and nine years.

24 JUDGE RIVERA: So you've made - - - you yourself  
25 have argued that the judge made clear to the prosecutor



1 that it - - - that the court would deviate from the agreed  
2 sentence only if - - - if it had the kind of proof that  
3 would permit that, right? And that's why the prosecutor  
4 wanted to get to this testimony, and that's he presented  
5 this testimony. And that's what the court relied on.

6 MS. COHEN: If I may, Your Honor, I believe that  
7 the court was requi - - - entitled and required to  
8 determine whether or not defendant complied with the terms  
9 of his plea agreement, and simply because that had a  
10 downstream effect on the length of his sentence, that does  
11 mean that that was the sole purpose for the unsealing.

12 Thank you.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 Counsel?

15 MS. PECORE: Yes, I'd just like to touch on a  
16 point that Judge Rivera brought up about the - - - the  
17 First Department's decision in creating sort of an  
18 unfortunately - - - unfortunate anomaly here, which is that  
19 when - - - if - - - if someone does what the petitioners  
20 did in Katherine B. and pursues a inter - - - interlocutory  
21 civil appeal, and goes about it that way, they're entitled  
22 to this, what - - - what is functionally a suppression  
23 remedy.

24 But when someone deals with the issue on direct  
25 appeal, as appellant did in this case, he's effectively out



1 of luck. And I think that would present - - -

2 JUDGE GARCIA: But doesn't that presume we would  
3 find for you on these other issues?

4 MS. PECORE: Well - - -

5 JUDGE GARCIA: I mean, we've never considered  
6 that in the context of what happened here, right? This is  
7 somewhat different. It is a different use than Katherine  
8 B. Your argument, I understand, is it's essentially the  
9 same, but that argument you're making now assumes this  
10 court would find for you on the other issues.

11 MS. PECORE: That's - - -

12 JUDGE GARCIA: So it's really essentially just  
13 your suppression argument, right?

14 MS. PECORE: Well, I - - - I don't want to dwe -  
15 - - dwell too much on the issue - - - the - - - the other  
16 issue in front of the First Department, but my point is  
17 just really that this right under the statute is an  
18 important one, and the legislature recognized that it was  
19 an important right.

20 And under Katherine B., we know there is a  
21 remedy, at least in some cases.

22 JUDGE RIVERA: Let me a - - - let me ask you  
23 this. Does the CPL or our case law, would it have allowed  
24 any other procedure than this one to try and attack the use  
25 of the unsealed material for sentencing enhancement





1 purposes? That is to say, is the only mechanism by which  
2 you could attack that error, because there are two errors,  
3 right? There's the unsealing and then there's the use. I  
4 mean, if you unseal and never use it, that's one story.  
5 But here, it is the actual use for purposes of sentencing.

6 Is there any - - - could there have been some  
7 civil action? Aren't you - - - doesn't CPL require it? Is  
8 this is the only way you can present this error?

9 MS. PECORE: I don't think it's the only way, and  
10 I don't think Katherine B. says it's the only way to  
11 present this error. In fact, it would make perfect sense  
12 for appellants - - - defendants to be able to bring this  
13 issue on direct appeal of a criminal conviction. They're  
14 not entitled to counsel on a civil appeal - - - an  
15 interlocutory civil appeal.

16 It's a situation where, in the interest of  
17 judicial economy and efficiency, we would want to encourage  
18 defendants to preserve this issue, just like any other  
19 trial or sentencing issue in the lower court.

20 CHIEF JUDGE DIFIORE: Counsel, just one final  
21 question. Are you familiar with the Commission on Judicial  
22 Conduct v. Rubinstein?

23 MS. PECORE: Yes.

24 CHIEF JUDGE DIFIORE: So how - - - talk - - -  
25 talk me through that - - -



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MS. PECORE: So that - - -

CHIEF JUDGE DIFIORE: Well, how you distinguish it?

MS. PECORE: - - - that's a case where the - - - this court found that the - - - I believe it was the Commission on Judicial Misconduct (sic) had a statutory obligation to conduct investigations in the public interest to determine whether attorneys or judges have engaged in misconduct, and that empowered the court to access records, to which they were otherwise not permitted access.

And so, here we don't have an equivalent statutory mandate that has that broad, catchall kind of public interest investigatory function. And the court in Rubinstein also limited unsealing in these cases to instances where there are un - - - extraordinary circumstances, and where the mandate would be impossible to fill - - - fulfill without the unsealed materials, and neither one of those circumstances are present in this case.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Anonymous, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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