APL 2018-00115

Court of Appeals of the State of New York

The People of the State of New York,

Respondent,

v.

Michael Cubero,

Appellant.

Brief of Amici Curiae
New York County Lawyers Association Committee on Appellate Courts,
The Center for Appellate Litigation, and
The Office of the Appellate Defender
in Support of Appellant

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STATEMENT OF INTEREST

The New York County Lawyers Association ("NYCLA") is a not-for-profit organization founded in 1908 and one of the first major bar associations in the country to admit members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence and has continuously played an active role in legal developments and public policy. NYCLA's Committee on Appellate Courts is committed to promoting access to appellate review, and to furthering the efficiency and effectiveness of New York's appellate courts.[1]

The Center for Appellate Litigation ("The Center") is a non-profit, public-defense firm. The Center represents indigent defendants appealing their convictions to the First Department and this Court.

The Office of the Appellate Defender ("OAD") is one of New York City's oldest providers of appellate representation to poor people convicted of felonies, the City's second oldest institutional indigent defense office, and a national model of effective, innovative and holistic defense representation. OAD routinely litigates appeals before the First Department and this Court.

[1] This brief has been approved by NYCLA's Appellate Courts Committee and approved for filing by NYCLA's President; it has not been reviewed by NYCLA's Executive Committee and does not necessarily represent the views of its Board.

In this appeal, the government seeks to curtail the appellate courts' jurisdiction. Specifically, the government argues that the appellate courts cannot hold an appeal in abeyance and remit for further proceedings, such as a hearing. Because that approach would improperly curtail appellate review and subvert the efficiency and fairness of the appellate process, the NYCLA Committee on Appellate Courts, CAL, and OAD, have a direct interest in this case. We argue that this Court should reaffirm the longstanding abeyance-remittal power regardless of the preservation posture of the appeal.[2]

STATEMENT OF THE CASE

Before the Third Department, Appellant Cubero argued that his conviction was unconstitutional because the Justice Center for the Protection of People with Special Needs ("Justice Center"), an executive agency, unilaterally prosecuted the case without the District Attorney's consent or oversight. Cubero argued that his prosecution by the special prosecutor violated the state constitutional requirement that prosecutors be elected, not appointed by the governor.[3] Cubero sought review of this unpreserved claim in the interest of justice. *See* C.P.L. § 470.15(3)(c) and (6)(a).

The appellate record did not indicate whether the District Attorney had retained control over the case or consented to the special prosecutor's entry. Thus, to review Mr. Cubero's claim, remittal for a fact-finding hearing was required.

[2] *E.g.*, *People v. Shilitano*, 215 N.Y. 715, 715-16 (1915).
[3] *People v. Cubero*, 160 A.D.3d 1298, 1299 (3d Dept. 2018).

The Appellate Division nevertheless held that it lacked abeyance-remittal power because C.P.L. § 470.15(3)(c) "only" permits "revers[al] or modif[ication] in the interest of justice."[4] And, the majority reasoned, since "the outcome could be to affirm, we find no authority that would permit us to take corrective action with respect to this issue in the interest of justice."[5]

Justice Lynch dissented, arguing that the Appellate Division retained the power, after remittal for fact-finding, to either reverse in the interest of justice or affirm.[6] Thus, unlike the majority, Justice Lynch found no statutory impediment to withholding decision, collecting more information, and then deciding the appeal.

Justice Lynch granted leave to appeal.

ARGUMENT

The Criminal Procedure Law authorizes the essential abeyance-remittal power.

A. Overview

For at least a century, our appellate courts have held appeals in abeyance and ordered further trial-level proceedings, such as a hearing ("abeyance remittal").[7] This abeyance-

[4] *Cubero*, 160 A.D.3d at 1299.

[5] *Id.* at 1299-1300.

[6] *See id.* at 1302 (Lynch, J., dissenting).

[7] *E.g.*, *Shilitano*, 215 N.Y. at 715-16; *People v. Bermudez*, 154 A.D.3d 410, 411 (1st Dept. 2017) ("[D]efendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a 'reasonable probability' that he would not have pleaded guilty had the court advised him of the possibility of deportation. Accordingly, we remit for the remedy set forth in *Peque,* and we hold the appeal in abeyance for that purpose.") (*citing People v. Peque*, 22 N.Y.3d 168, 198, 200-01 (2013) (other citation omitted).

remittal procedure is essential, as it allows the appellate court to gather critical information before deciding an appeal.

The government would nullify this longstanding power. In the face of a century of precedent, it argues that appellate courts lack jurisdiction to withhold decision and order a fact-finding hearing—even if a hearing is essential to the appeal's accurate resolution. This Court should reject this radical limitation and reaffirm the abeyance-remittal power.

Because the government indicates that abeyance remittal may be barred in *all cases* (even if the error is preserved by objection),[8] this amici brief first establishes that courts possess abeyance-remittal power when a claim is preserved. As we demonstrate, Article 470's text, its structure, and common sense, all confirm that longstanding and critical power.

In turn, we address the government's narrower position: C.P.L. § 470.15 deprives appellate courts of abeyance-remittal power when a claim is unpreserved.[9] As shown below, this strained argument rests on a misreading of C.P.L. § 470.15, a flawed reliance on this Court's decision in *People v. Chavis*,[10] and irrelevant policy contentions.

[8] *See* Respondent Justice Center Brief ("JC") 15-16 & 15 n. 3; Intervenor Attorney General Brief ("AG") 17-18.

[9] JC14-20; AG14-28.

[10] 91 N.Y.2d 500, 506 (1998)

B. The Statutory Framework

Article 470 of the Criminal Procedure Law governs the "determination" of appeals by the intermediate appellate courts and this Court.[11] C.P.L. § 470.15(2) generally states that the intermediate appellate court "must either affirm or reverse or modify."

C.P.L. § 470.10 defines "reversal" as the "vacating" of a judgment and "modification" as the "vacating of a part thereof and affirmance of the remainder."[12] C.P.L. § 470.15(3) then specifically lists the "base[s]" for "reversals" or "modifications":

> 3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:
>
> (a) Upon the law; or
>
> (b) Upon the facts; or
>
> (c) As a matter of discretion in the interest of justice . . . .

C.P.L. § 470.15(6)(a) then states that a "reversal or modification" is made "in the interest of justice" when an unpreserved error "deprived the defendant of a fair trial."

Under this scheme, when reviewing an unpreserved error, an appellate court can dispose of an appeal in two ways:

- it can affirm the judgment by either finding no error or declining to find, in its discretion, that the error deprived the defendant of a "fair trial";[13] or

[11] C.P.L. § 470.10-470.45.
[12] C.P.L. § 470.10(1)-(2).
[13] *See* C.P.L. § 470.15(2),(3)(c),(6)(a).

- it can reverse/modify in the interest of justice under C.P.L. § 470.15(3)(c) and (6)(a).

C. The appellate courts possess the essential abeyance-remittal power.

1. The longstanding abeyance-remittal power.

Although the government casts doubt on the existence of abeyance-remittal power[14]—and the Justice Center flatly denies it[15]—our appellate courts have routinely exercised that power for decades. For a century, appellate courts have held appeals in abeyance and ordered further proceedings, e.g., a fact-finding hearing, a reconstruction hearing, or a judicial decision. Below are but a few of the hundreds upon hundreds of such cases:

1. *People v. Massey*, 173 A.D.3d 1801 (4th Dept. 2019) (holding that under *People v. LaFontaine*, 92 N.Y.2d 470, 473-74 (1998), the Appellate Division lacked the power to review an issue that was not decided adversely to the Appellant, and "remit[ting] the matter to Supreme Court to" address that issue);

2. *People v. Disla*, 173 A.D.3d 555 (1st Dept. 2019) (finding plea-withdrawal counsel ineffective and thus holding the appeal in abeyance and ordering a plea-withdrawal hearing);

3. *People v. Bermudez*, 154 A.D.3d 410, 411 (1st Dept. 2017) (holding appeal in abeyance and remitting for *Peque*-prejudice hearing) (citing *People v. Peque*, 22 N.Y.3d 168, 200 (2013) (holding that defendant was "entitled to a remittal" for a hearing on whether the court's failure to inform him of the deportation consequences of a plea prejudiced his decision to plead guilty));

4. *People v. Chazbani*, 144 A.D.3d 836, 839-40 (2d Dept. 2016) (remitting for consideration of legal claim that the Appellate Division could not reach under *LaFontaine*);

[14] AG17-18 (hedging on this issue by stating that the power "may" exist).
[15] JC15-16 & 15 n. 3.

5. *People v. Watson*, 141 A.D.3d 23, 30 (1st Dept. 2016) (holding the case in abeyance and ordering a *Batson* hearing);

6. *People v. Fermin*, 123 A.D.3d 465, 466 (1st Dept. 2014) (holding appeal in abeyance and remitting for a *Peque*-prejudice hearing);

7. *People v. Farrell*, 201 A.D.2d 665, 666 (2d Dept. 1994) (remitting for reconstruction hearing to determine whether the defendant was present during *Sandoval* hearing);

8. *People v. Whisby*, 55 A.D.2d 687, 687 (2d Dept. 1976) ("Case remitted to the County Court to hear and report on the issue of defendants' claim that they were denied their right to a speedy trial and appeal held in abeyance in the interim.");

9. *People v. Malinsky*, 15 N.Y.2d 86, 96 (1965) ("The determination of this appeal should be withheld and the case remitted to the Supreme Court, Queens County, for a further hearing on the motion to suppress.");

10. *People v. Glazer*, 23 A.D.2d 483, 483 (1st Dept. 1965) ("Determination of the appeal withheld and the case remitted . . . for a hearing and determination before [the trial judge] on the issue of voluntariness of the confession.");

11. *People v. Coffey*, 11 N.Y.2d 142, 148 (1962) ("The determination of this appeal should be withheld in order that defendant may [move] to suppress the challenged evidence as to the search and seizure and so that the [trial court] without a jury may hold a hearing on that motion and render a decision thereon.");

12. *People v. Merrihew*, 7 A.D.2d 811, 811 (3d Dept. 1958) (holding an appeal in abeyance and remanding for determination as to whether defendant was present during jury instructions);

13. *People v. Winship*, 309 N.Y. 311, 315 (1955) ("The final determination of this appeal will be withheld so that the defendant may promptly renew in [ ] Supreme Court [ ], the motion for a new trial, upon affidavits and notice to the District Attorney, as limited by the Per Curiam opinion herein. This is in accord with our practice."); and

14. *People v. Shilitano*, 215 N.Y. 715, 715 (1915) (Cardozo, J.) ("We will, therefore, withhold the determination of the appeal now before us until the fall session of the court to the end that an opportunity may be given

to the defendant to renew the motion for a new trial . . . .").[16]

Indeed, several of this Court's most seminal (and most-cited) cases have specifically authorized abeyance remittal.[17]

Despite this longstanding abeyance-remittal practice, the Justice Center argues that the appellate courts categorically lack that power, even when a claim is preserved by objection.[18] Straightforward statutory construction and common sense prove that this theory—which would work a sea change in appellate procedure—is wrong.

As a preliminary matter, in the decades since the C.P.L. was enacted in 1970, both this Court and the Appellate Division have ordered abeyance-remittal power literally hundreds of times.[19] The notion that this Court and the Appellate Divisions have violated their jurisdictional limitations in every such case is rather far-fetched. If true, such a claim would fundamentally reshape appellate procedure in this State. Fortunately, the Justice Center's proposed overhaul of longstanding practice finds no support in statutory text, history, or common sense.

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[16] A Westlaw search for "abeyance" revealed more than 4500 decisions issued by this Court or the Appellate Division; searching within those 4500 decisions for the term "remit!" revealed more than 1600 such cases.

[17] *Peque,* 22 N.Y.3d at 168; *LaFontaine*, 92 N.Y.2d at 474; *Shilitano*, 215 N.Y. at 715; *see also People v. Allard*, 28 N.Y.3d 41 (2016) (affirming an Appellate Division decision that followed the holding of an appeal in abeyance).

[18] *See* JC15-16 & 15 n. 3.

[19] *See* n.16, *supra.*

2. C.P.L. Article 470 does not abolish the abeyance-remittal power.

When a court holds an appeal in abeyance and orders further proceedings at the trial level, it is collecting additional information *before* deciding the appeal. Critically, Article 470 says nothing about the procedural steps an appellate court can (or cannot) take *before* affirming, reversing or modifying. For example, Article 470 does not say that reply briefs must (or cannot) be submitted, that oral argument must (or cannot) be held, or that an appellate court can order a reconstruction hearing. Sensibly, the Legislature left these *pre*-dispositional procedures—including abeyance remittal—to the courts' inherent discretion.

History reinforces the abeyance-remittal power. That power stretches back to at least 1915 (when then-Judge Cardozo ordered abeyance remittal in *Shilitano*), long predating C.P.L. Article 470's enactment in 1970.[20] Had the Legislature intended the radical repeal the government envisions, the Legislature would have most certainly said so.[21] It

[20] L.1970, c. 996, § 1; *People v. Malinsky*, 15 N.Y.2d 86, 96 (1965); *People v. Glazer*, 23 A.D.2d 483, 483 (1st Dept. 1965); *People v. Coffey*, 11 N.Y.2d 142, 148 (1962); *People v. Merrihew*, 7 A.D.2d 811, 811 (3d Dept. 1958); *People v. Winship*, 309 N.Y. 311, 315 (1955); *People v. Shilitano*, 215 N.Y. at 715.

[21] *See Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013); *see also Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) (legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

did not. One would also expect a mention of that radical repeal in the legislative history.[22] There is none. Accordingly, the Legislature should be "regarded" as having enacted Article 470 "in the light of and as having accepted" the abeyance-remittal power.[23]

C.P.L. § 470.15's basic structure, along with common sense, further confirm this important remittal power. In C.P.L. § 470.15(2), the Legislature granted the appellate courts the power to "affirm," "reverse," or "modify." In doing so, the Legislature necessarily provided appellate courts with the procedural tools to *accurately* determine which of those three dispositions is required.[24] The abeyance-remittal power is one of those procedural tools; it is a "necessary corollary" of the statutory obligation to accurately resolve cases.[25] After all, depriving our appellate courts of that critical power would

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[22] The modern C.P.L. was the product of an exhaustive analysis performed by the New York Temporary Commission of the Revision of the Penal Law and Criminal Code, chaired by Judge Bartlett. *People v. Collier,* 72 N.Y.2d 298, 302 n. 1 (1988) ("The Bartlett Commission comprehensively studied the entire body of law."). The Commission provided detailed comments on each section of the new Criminal Procedure Law (which replaced the Code of Criminal Procedure in 1970). The staff comments to Article 470 reveal no reference to any repeal of the abeyance-remittal power. Bartlett Commission, Staff Comments, N.Y. Temp. Commn. on Revision of Penal Law and Crim Code, Article 240 (now Article 470) at 321-35 [1967]).

[23] *Orinoco Realty Co. v. Bandler*, 233 N.Y. 24, 30 (1922); *Knight-Ridder Broad., Inc. v. Greenberg*, 70 N.Y.2d 151, 157 (1987).

[24] *E.g.*, *Matter of New York State Ass'n of Crim. Def. Lawyers v. Kaye*, 96 N.Y.2d 512, 518 (2001) ("In discharging its [powers], the Court's authority is not restricted to narrow readings of powers expressly conferred by the statute, but includes implied powers necessary for the proper discharge of those broad responsibilities."); *Doe v. Axelrod*, 71 N.Y.2d 484, 490 (1988) (a statute implicitly confers powers which are "'essential to the exercise'" of the statutory function) (quoting *Lawrence Const. Corp. v. State*, 293 N.Y. 634, 639 (1944)).

[25] *E.g.*, *Natl. Energy Marketers Assn. v. New York State Pub. Serv. Commn.*, 33 N.Y.3d 336, ___, 2019 N.Y. Slip Op. 03655 at 14 (May 9, 2019) (statutes confer powers which are the "necessary corollary" of a body's statutory function); *Gross v. Bd. of Educ. of Elmsford Union Free Sch. Dist.*, 78 N.Y.2d 13, 18 (1991) (same).

unreasonably hamstring their ability to acquire essential information before determining whether to affirm, reverse, or modify.[26]

It is difficult to overstate the harm that would result if the abeyance-remittal power were abolished. Often, (1) a fact-finding hearing is necessary (as here),[27] (2) reconstruction of the record is required,[28] (3) the lower court must decide an issue in the first instance (C.P.L. § 470.15(1) and *LaFontaine*),[29] or (4) the Constitution mandates a hearing (*e.g.*, as a remedy for ineffective assistance of counsel).[30] Without the abeyance-remittal power, the appellate courts could not accurately—and legally—decide a whole host of appeals.

Unable to locate an express limitation on the abeyance-remittal power in the C.P.L., the Justice Center speculates that the Legislature abolished that power by implication.[31]

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[26] *People v. Garson*, 6 N.Y.3d 604, 614 (2006) (courts "must interpret a statute so as to avoid an unreasonable or absurd application of the law) (internal quotation marks omitted).

[27] *E.g.*, *Merrihew*, 7 A.D.2d at 811 (remanding for determination as to whether defendant was present during jury instructions).

[28] *People v. Degondea*, 256 A.D.2d 39, 40-42 (1st Dept. 1998) (holding appeal in abeyance, and remanding the matter for a hearing to reconstruct the *voir dire* testimony of Jurors Nos. 5 and 11); *generally People v. Parris*, 4 N.Y.3d 41 (2004).

[29] *Chazbani*, 144 A.D.3d at 836, 839-40; *LaFontaine*, 92 N.Y.2d at 476.

[30] *People v. Clermont*, 22 N.Y.3d 931, 934 (2013) (finding counsel ineffective for failing to move to suppress and thus ordering a *de novo* suppression hearing).

[31] JC15 n. 3.

Specifically, the Justice Center argues that since C.P.L. § 470.15(2) only lists three dispositions—affirmance, reversal, or modification[32]—the Legislature intended to preclude that which is not listed, such as abeyance remittal.[33]

But C.P.L. § 470.15(2) just lists the three broad ways in which an appellate court can *dispose* of a case. It does not purport to catalogue the *procedures* available to the appellate courts *before* disposing of the appeal. As C.P.L. § 470.15(2) does not list *pre*-dispositional procedures, the omission of one of those procedures (abeyance remittal) from the list proves nothing.

As explained above, there is similarly no reference in C.P.L. § 470.15 to "oral argument," "re-argument," "reconstruction hearings," or the acquisition of the record from the trial court. Apparently though, the Justice Center would bar all of these traditional powers simply because they are not included in a list that does not even purport to address *pre*-dispositional procedures.

The Justice Center's unnatural reading of C.P.L. § 470.15(2) would force appellate courts to reverse/affirm instead of ordering a limited remittal remedy. Suppose defendant-appellant claims that he was absent from a suppression hearing. Under the Justice Center's position, an appellate court can only "reverse," "modify," or "affirm," it cannot "remit" to determine the presence question. Thus, the appellate court would have

[32] C.P.L. § 470.15(2) (stating, generally, that the appellate court "must either affirm or reverse or modify").

[33] *See* JC15 n. 3.

to decide the appeal on an incomplete record and could not access critical information before doing so. Absent an express statement from the Legislature, this Court should not presume the Legislature intended to paralyze the appellate courts in this manner.

3. Judiciary Law § 2-b(3) independently supports the abeyance-remittal power.

Although this Court need not reach Judiciary Law § 2-b(3)'s application to the question presented (the C.P.L. already provides the answer), that statute provides an independent basis for the abeyance-remittal power. Under Judiciary Law § 2-b(3), a "court of record has power . . . to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."[34] Abeyance remittal easily satisfies that standard as it is "necessary" for the appellate courts to do their job. Moreover, that procedure is often required by jurisdictional rules (C.P.L. § 470.15(2)) or the Constitution itself (e.g., *People v. Clermont*).[35] The abeyance-remittal power is thus "necessary" for the appellate courts to "carry into effect" their "powers and jurisdiction."[36]

[34] *People v. Wrotten*, 14 N.Y.3d 33 (2009).

[35] *Clermont*, 22 N.Y.3d at 934 (finding counsel ineffective for failing to move to suppress and thus ordering a *de novo* suppression hearing).

[36] Judiciary Law § 2-b(3).

D. There is similarly no "interest of justice" exception to the abeyance-remittal power.

1. C.P.L. § 470.15 does not limit the abeyance-remittal power when a claim is unpreserved.

The government alternatively contends, like the Third Department panel below, that the C.P.L. does not permit abeyance remittal when a claim is unpreserved.[37] There is no power to "remit in the interest of justice," the government says.[38] The government's tortured efforts to divine an implied jurisdictional limitation all fail.

The Justice Center grounds its new limitation on the odd assumption that the "CPL classifies remittitur as a form of 'corrective action'" because C.P.L. § 470.20(1) states that remittal for a "*new trial*" is a corrective action.[39] In turn, the Justice Center reasons that "because remittitur is a corrective action, and because corrective actions can only be taken . . . *after* . . . reversal or modification[,] the Appellate Division lacks the power to remit . . . without *first* reversing or modifying the judgment."[40]

For starters, this argument is not limited to "unpreserved" appellate claims; it would categorically nullify abeyance-remittal in *all cases*. As explained above, that result would work an startling reconfiguration of settled law.[41]

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[37] AG16-28; JC14-18.
[38] *Id.*
[39] JC15.
[40] JC15-16 (emphasis added).
[41] *See* pp. 6-8, *supra*.

The Justice Center's argument also rests on the flawed premise that abeyance remittal is somehow a "corrective action." But unlike remittal for a new trial—which follows reversal and is thus a "corrective action"[42]—abeyance remittal is not a "corrective action" as it *precedes* the final disposition of the appeal (that is, reversal, modification, or affirmance). Thus, Article 470's requirement that a "corrective action" must follow a reversal or modification is simply irrelevant to the scope of the abeyance-remittal power.

The government next strains to interpret C.P.L. § 470.15(3) as implicitly establishing a jurisdictional bar.[43] This argument, which rests on a fine parsing of statutory text, similarly fails.

Under C.P.L. § 470.15(3)(c), a "reversal or a modification of a judgment . . . must be based upon a determination made"—among other grounds—"[a]s a matter of discretion in the interest of justice."[44] The government correctly reads this subsection to only permit "reversal or modification" (not affirmance) in the "interest of justice." The government then leaps to the conclusion that when an appellate court orders abeyance remittal, it is exercising "interest of justice" power, thus locking the appellate court into reversing or modifying post-remittal. And as it would be absurd to mandate reversal or

[42] C.P.L. § 470.10(3); C.P.L. §470.20(1).

[43] AG17-18; JC15-16.

[44] *See also* C.P.L. § 470.15(6)(a) ("The kinds of determinations of reversal or modification deemed to be made . . . in the interest of justice include . . . [t]hat an error . . . occurring at a trial . . . which . . . was not duly protested . . . deprived the defendant of a fair trial.").

modification following remittal while barring affirmance, C.P.L. § 470.15(3) must, the argument apparently goes, categorically preclude abeyance-remittal "in the interest of justice."[45]

The critical flaw with this convoluted argument is that when an appellate court orders abeyance remittal, it is not doing anything in the "interest of justice." Under C.P.L. § 470.15(3)(c), an appellate court either "reverses" or "modifies" in "the interest of justice."[46] Abeyance remittal, however, does not constitute a "reversal" or "modification" as it does not dispose of the appeal.[47] Instead, abeyance remittal suspends final decision so the appellate court can gather more information. Then, *after* abeyance remittal, the appellate court will decide to either: (1) "affirm" under C.P.L. § 470.15(2); or (2) "reverse"/"modify" in "the interest of justice" under C.P.L. § 470.15(3)(c),(6)(a). Accordingly, the theory that an appellate court cannot affirm after ordering further proceedings on an unpreserved claim misreads C.P.L. § 470.15.

Perhaps more fundamentally, the Legislature does not legislate through statutory riddle. Had the Legislature intended the jurisdictional limitation the government proposes, it would have just said so.[48] It would not have created a jurisdictional bar by

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[45] AG17-19.

[46] C.P.L. § 470.15(3)(c), (6)(a).

[47] An appellate court no more remits an unpreserved issue "in the interest of justice" than it permits oral argument, post-argument briefing, or amicus curiae participation on an unpreserved issue "in the interest of justice."

[48] *Cruz*, 22 N.Y.3d at 72.

strained implication, and certainly not in a provision (C.P.L. § 470.15(3)) that does not even mention the purportedly abolished power by name. Simply put, this Court should not "create a limitation that the Legislature did not enact."[49]

The Legislature did not bar abeyance-remittal in this context because that bar would be unreasonable. The interest of justice power to review unpreserved claims is inherently discretionary. There would be no sound reason to grant that broad discretionary power while simultaneously stripping courts of the tools necessary to exercise it.

A *Batson* jury-selection example demonstrates the point. Suppose, the record reveals a strong possibility of discrimination during jury selection (discriminatory use of the peremptory strikes). But, as counsel never objected, the record does not indicate whether the prosecutor had a non-discriminatory justification for the strikes. The Appellate Division thus wants to remit to acquire more information before determining whether to reverse in the interest of justice or to affirm.[50] Under the government's theory, the Appellate Division is stuck with an incomplete record.

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[49] *Theroux v. Reilly*, 1 N.Y.3d 232, 240 (2003) ("If the Legislature had intended to restrict [statutory] eligibility to employees injured when performing specialized tasks, it easily could have and surely would have written the statute to say so. We may not create a limitation that the Legislature did not enact.").

[50] *People v. Bridgeforth*, 28 N.Y.3d 567, 571 (2016) ("At step one [of the *Batson* inquiry], the movant must make a prima facie showing that the peremptory strike was used to discriminate; at step two, if that showing is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and finally, at step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination."); *Watson*, 141 A.D.3d at 30 (holding appeal in abeyance and ordering further step- two and three proceedings after finding that the defendant satisfied step one).

2. People v. Chavis does not control.

Contrary to the Attorney General's position, *People v. Chavis*[51] is irrelevant to the question presented.[52]

There, the trial court dismissed the indictment on speedy-trial grounds; the Appellate Division reversed (agreeing with the prosecution's preserved speedy-trial argument); and this Court then rejected the prosecution's preserved argument. The prosecution, however, requested that this Court remit to the Appellate Division for "interest of justice" review—on the merits—of an alternative argument that it had conceded away before the motion court. This Court held that the Appellate Division could not consider the merits of that unpreserved argument in the "interest of justice" since the defendant had no chance to build a responsive factual record before the motion court.[53]

The Attorney General surmises that *Chavis* somehow nullifies abeyance-remittal when a claim is unpreserved.[54] This argument suffers from two serious flaws.

First, *Chavis* cannot stand for the proposition—pressed by the government here—that Article 470 nullifies abeyance-remittal power as the *Chavis* decision does not cite any statute at all. As *Chavis* did not even discuss Article 470, it does not support the statutory-jurisdictional bar proposed by the government.

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[51] 91 N.Y.2d 500 (1998).

[52] AG19-20

[53] 91 N.Y.2d at 506 (citing *People v. Nieves*, 67 N.Y.2d 125, 135-36 (1986) and *People v. Dodt*, 61 N.Y.2d 408, 416 (1984)); AG19-20.

[54] AG19-20.

More importantly, the *Chavis* prosecutors sought an Appellate Division *decision* on an unpreserved claim in "the interest of justice," not, as Cubero seeks here, mere *remittal* to the trial court for further proceedings. Thus, *Chavis* merely held that the Appellate Division cannot reach the *merits* of an unpreserved claim in the interest of justice if a party had no chance to counter it at the trial level.[55] The decision says nothing about the appellate court's power to, in its discretion, remit to the trial court so both parties can build a factual record.

Lacking any support in this Court's cases, the Attorney General claims that "before the Third Department's decision here, every other department . . . had concluded that it could not reach an unpreserved issue in the interest of justice where the record on appeal lacked the necessary information to resolve the matter."[56] On the contrary, the Appellate Divisions have routinely held appeals in abeyance and remitted for further proceedings on unpreserved claims.[57] True, the Appellate Divisions have soundly declined to exercise their discretionary power to review an unpreserved claim *on the merits*

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[55] *Nieves*, 67 N.Y.2d at 136; *see also People v. Finch*, 23 N.Y.3d 408, 414-15 (2014).

[56] AG 26 (citing *People v. Brown*, 81 A.D.3d 499, 500 (1st Dept. 2011) (declining to review an unpreserved claim because the record was insufficient without even addressing remittal power); *People v. Thompson*, 34 A.D.3d 852, 854 (2d Dept. 2006) (same); *People v. Allen*, 93 A.D.3d 1144, 1146 (4th Dept. 2012) (same); *People v. Carreras*, 209 A.D.2d 350, 351 (1st Dept. 1994) (same); *People v. Roman*, 233 A.D.2d 116, 116 (1st Dept. 1996) (same); *People v. Williams*, 260 A.D.2d 651, 651 (2d Dept. 1999) (same); *People v. Brooks*, 231 A.D.2d 867, 867 (4th Dept. 1996) (same).

[57] *E.g.*, *Watson*, 141 A.D.3d at 23, 27, 30; *People v. Grigg*, 73 A.D.3d 806 (2d Dept. 2010); *People v. Fernandez*, 179 A.D.2d 553 (1st Dept. 1992); *People v. Chiapetti*, 67 A.D.2d 20 (1st Dept. 1979).

These Appellate Division decisions stated that they were "reaching the issue in the interest of justice" and then held the appeal in abeyance and ordered additional trial-level proceedings. As explained above, when an appellate court holds an appeal in abeyance, it is not doing anything in the "interest of justice." It is only *after* remittal that the court will decide whether to reverse in the interest of justice

where the record was incomplete. But not a single case (until the Third Department's decision here) had held that the Appellate Divisions categorically lacked abeyance-remittal power because a claim is unpreserved. As far as we can tell, the Third Department's 2018 decision in *Cubero* is the first decision in New York history to locate a jurisdictional limitation on the abeyance-remittal power. The fact that this purported jurisdictional limitation somehow laid dormant for 50 years, only to be discovered for the first time in 2018, speaks volumes.

3. The government's policy arguments are irrelevant and unpersuasive.

The government contends that *merits* review of an appellant's unpreserved claim is generally unfair because the respondent has not had the opportunity to present counter evidence.[58] This concern is irrelevant to this appeal—and indeed misses the entire point of the narrow abeyance-remittal power at issue. The question presented is not whether the appellate court can engage in merits review of an unpreserved argument based on an incomplete record (which is what the government sought in *Chavis*). Instead, the power at issue is *remittal* so the parties can build a record *before* the appellate court reaches the merits.

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or to affirm. C.P.L. § 470.15(2), (3)(c), (6)(a).

To ensure clarity and accuracy, this Court should advise the intermediate appellate courts thatwhen they remit for further development of an unpreserved claim, their order should contain words to this effect: "we are holding the appeal in abeyance and remitting for further proceedings while withholding decision on whether the judgment should be reversed (or modified) in the interest of justice."

[58] AG21-22.

Remittal may, the Justice Center adds, result in a "speculative" fact-finding hearing.[59] But that is an argument for the prosecution to make when opposing discretionary remittal (or when the case returns to the Appellate Division post-abeyance remittal); it's not a justification for a *wholesale* nullification of that power. Appellate jurists can be trusted to competently determine if abeyance remittal will be "speculative" based on the particular circumstances before them.

Next, the Attorney General claims that C.P.L. § 440.10, which gives a post-conviction court "discretion" to review a claim that requires further factual development, is a sufficient substitute for direct-appellate review.[60] Thus, it presses, C.P.L. § 440.10 implicitly transplants a jurisdictional limitation into Article 470 for that single class of appeals.

The scope of post-conviction-review under Article 440 is irrelevant to the text and structure of a statute governing direct-appellate review (C.P.L. § 470.15). The mere fact that a defendant could pursue relief under C.P.L. § 440.10 does not categorically nullify direct-appellate remedies; the two regimes are not mutually exclusive. For instance, a defendant can secure direct-appellate review of an unpreserved claim in the "interest of justice" or he can pursue relief under C.P.L. § 440.10(1)(h) on ineffective-assistance grounds. Similarly, a defendant can raise an unpreserved right to counsel claim on direct

[59] JC19 (a fact-finding hearing may be "speculative" in some cases).
[60] AG24-25 (citing C.P.L. § 440.10(3)(a)).

appeal or under C.P.L. § 440.10(1)(h).[61]

In any event, C.P.L. § 440.10 is not an adequate substitute for interest of justice review in the intermediate appellate court. Under C.P.L. § 440.10(3)(a), a defendant must show "good cause"—that is, a legitimate excuse—for the failure to adduce the relevant facts before the imposition of sentence. Thus, barring rather extreme circumstances, a defendant cannot surmount § 440.10(3)(a)'s procedural bar.[62] Interest of justice review, on the other hand, does not require any excuse for the default. Instead, it allows the appellate court to review a claim because it concludes that the "interests of justice" trump the absence of an objection.

When all else fails, the Justice Center invokes a vague "finality" argument, suggesting that this Court should interpret the C.P.L. to block appellate review because it will promote finality.[63] But finality is a policy argument, used to justify *judge-made* rules limiting *collateral* review, not *statutory* rules governing *direct-appellate* review.[64] The concern driving that policy argument is that a defendant should not have the opportunity to repeatedly challenge his conviction on collateral review.[65] We are aware of no precedent suggesting that a finality concern can somehow change the meaning of a statute governing direct-

[61] *People v. Grubstein*, 24 N.Y.3d 500, 503 (2014); *see also* C.P.L. § 440.10(3)(a) (permitting right to counsel claims to be raised under § 440.10 even if a supporting record could have been developed before the imposition of sentence).

[62] Unsurprisingly, the Attorney General does not cite a single case where a defendant overcame C.P.L. § 440.10(3)(a)'s procedural bar.

[63] JC19.

[64] *E.g.*, *Teague v. Lane*, 489 U.S. 288, 308 (1989)

[65] *Custis v. United States*, 511 U.S. 485, 497 (1994); *United States v. Timmreck,* 441 U.S. 780, 784 (1979).

appellate review.

More importantly though, relying on a finality theory to limit direct-appellate review makes little sense when interpreting a statutory scheme (interest of justice review) that is intended to *open up* appellate review. As the Supreme Court has held, a finality "policy consideration, standing alone, is unpersuasive in the interpretation" of a power—here the interest of justice power—"whose whole purpose is to make an exception to finality."[66]

Ultimately, this invocation of finality just begs the question: did the Legislature promote "finality" by cutting off abeyance-remittal power in one particular class of appeals (unpreserved error), or did it reject finality by permitting that power. The answer to that question hinges on statutory construction, not the State's subjective arguments about whether a rule satisfies its desire for finality. And as shown above, statutory-construction analysis confirms that the Legislature did not limit the abeyance-remittal power.

[66] *Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005).

CONCLUSION

This Court should reverse the Appellate Division's decision and remit to that court to decide, in its discretion, whether to remit to the trial court for fact-finding proceedings.

Respectfully Submitted,
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