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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 179

SANDY FERNANDEZ,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 13, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 179, People v.  
2 Fernandez.

3 Counselor, do you have any - - - do you  
4 want any rebuttal time?

5 MS. KORNFELD: Yes, two minutes, please.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure.  
7 Go ahead.

8 MS. KORNFELD: May it please the court,  
9 Svetlana Kornfeld for Sandy Fernandez.

10 The inform - - - the instrument charging a  
11 traffic misdemeanor at issue here is a  
12 jurisdictionally defective misdemeanor complaint, not  
13 as the People contend, a simplified traffic  
14 information - - -

15 CHIEF JUDGE LIPPMAN: Counsel - - -

16 MS. KORNFELD: Yes.

17 CHIEF JUDGE LIPPMAN: - - - why - - - what  
18 are we looking at here? Why - - - shouldn't there be  
19 what is the substance of the document rather than the  
20 form that should prevail? At least - - -

21 MS. KORNFELD: Well - - -

22 CHIEF JUDGE LIPPMAN: - - - at least from a  
23 policy perspective?

24 MS. KORNFELD: - - - well, from a policy  
25 perspective, and from the statutory definitions, the

1 distinction between the two different - - - the two  
2 instruments, lies in the presence of evidentiary  
3 facts on the face of a complaint, because it's  
4 statutorily required; and the absence of such facts  
5 from the face of a simplified traffic information,  
6 because that's how it's defined, because it was  
7 designed as a - - -

8 CHIEF JUDGE LIPPMAN: What is more - - -

9 MS. KORNFELD: - - - streamlined  
10 instrument.

11 CHIEF JUDGE LIPPMAN: - - - when you have  
12 more information, what consequences does it have?

13 MS. KORNFELD: Well, it has significant  
14 consequence, because - - - because the complaint is  
15 required to have evidentiary facts to provide  
16 reasonable cause to believe the defendant committed  
17 that offense that's charged, one would expect that  
18 that instrument not only would have a designated  
19 space for facts, but it would call for such facts, it  
20 would have - - - it would have a command or  
21 instruction - - -

22 CHIEF JUDGE LIPPMAN: Don't more facts just  
23 give you notice - - - give more notice as to the  
24 offense?

25 MS. KORNFELD: No, it doesn't. Because

1 the way that the simplified traffic information is  
2 designed, it's intended to be without any facts. And  
3 what the - - - to streamline it. And what the  
4 legislature provided - - -

5 JUDGE SMITH: But that's not - - -

6 MS. KORNFELD: - - - is the opt-in - - -

7 JUDGE SMITH: - - - for your client's  
8 protection that it's without any facts?

9 MS. KORNFELD: No, no. But for our  
10 client's protection, they are told that they can - -  
11 - defendants who receive an actual simplified traffic  
12 information are told that they can opt in, and they  
13 can demand a supporting deposition that provides  
14 facts - - -

15 JUDGE CIPARICK: What was missing here?

16 JUDGE GRAFFEO: Well, here there is - - -

17 JUDGE CIPARICK: - - - yes, that's what I  
18 was talking about.

19 JUDGE GRAFFEO: What was missing on the  
20 face of this document?

21 MS. KORNFELD: Well, our document, because  
22 it's a complaint, because it complies precisely with  
23 the form and content requirement of a complaint, it  
24 omitted the element, the facts providing reasonable  
25 cause to believe that Mr. Fernandez knew or had

1 reason to know that his license had been suspended.

2 And that's what - - -

3 JUDGE SMITH: I guess maybe the question,  
4 though is - - -

5 MS. KORNFELD: What?

6 JUDGE SMITH: - - - if you pretend - - -  
7 assume it's a simplified - - - or assume it's an  
8 attempt to write a - - -

9 MS. KORNFELD: Oh, okay.

10 JUDGE SMITH: - - -simplified traffic  
11 information. I know you say it isn't. But if it  
12 were - - -

13 MS. KORNFELD: Right.

14 JUDGE SMITH: - - - what's wrong with it as  
15 a simplified traffic - - - other than it has too much  
16 information?

17 MS. KORNFELD: Well, what's wrong with it,  
18 that in - - - that first of all, the People are  
19 getting their justification for calling it a  
20 simplified traffic information from the patrol guide.  
21 And as you saw from that simplified traffic  
22 information that's used everywhere outside of New  
23 York City, which is the very clean form called  
24 "Simplified Traffic Information Form", their form in  
25 the patrol guide is a universal summons and complaint

1           that can be used for any misdemeanor. And in fact,  
2           specifically, if their authority is through the  
3           commissioner - - - the police commissioner or from  
4           the commissioner of motor vehicles, and in fact the  
5           patrol guide is just under his aegis, then the patrol  
6           guide instructs the officers that you cannot use  
7           this. It says you can use this for traffic  
8           misdemeanors, except unlicensed operator,  
9           unregistered vehicle, no insurance.

10                   JUDGE CIPARICK: So they used the wrong  
11           form. That's what you're saying.

12                   MS. KORNFELD: Well, in - - -

13                   JUDGE CIPARICK: I'm looking at the - - -

14                   MS. KORNFELD: - - - our particular case -  
15           - -

16                   JUDGE CIPARICK: - - - patrol guide now - -  
17           -

18                   MS. KORNFELD: - - - there's nothing in  
19           the patrol guide that says they can use it as a  
20           simplified traffic information.

21                   JUDGE SMITH: What is generally - - - what  
22           is supposed to be used in cases like this in New York  
23           City?

24                   MS. KORNFELD: Well, in New York City,  
25           actually, there's no equivalent of that - - - of that

1 form that's used - - -

2 JUDGE SMITH: Is there no valid - - - I

3 mean, if you arrest someone - - -

4 MS. KORNFELD: No.

5 JUDGE SMITH: - - - for a - - -

6 MS. KORNFELD: No. In fact - - -

7 JUDGE SMITH: - - - a traffic misdemeanor

8 in New York City, there is no valid accusatory

9 instrument you could use?

10 MS. KORNFELD: No. Well, there is.

11 There's the complaint.

12 JUDGE SMITH: So I should go to New York

13 and drive without a license?

14 MS. KORNFELD: No, no, no, Judge Smith.

15 No, there's a complaint. In fact, three boroughs - -

16 - Manhattan, Bronx, and Queens - - - prosecute

17 traffic misdemeanors by complaints and informations.

18 They attach a DMV - - -

19 JUDGE SMITH: You said they do that in - -

20 - you say they're doing that in Brooklyn, too. Just

21 that it was defective.

22 MS. KORNFELD: Well, no, no. In Brooklyn

23 - - - no, in Brooklyn - - - in Brooklyn and Staten

24 Island they're using these patrol guide forms which

25 are really - - -

1 JUDGE SMITH: But you call - - - which you  
2 say is a complaint.

3 MS. KORNFELD: Well, they are complaints.  
4 I mean, they call - - -

5 JUDGE GRAFFEO: Is there more than one  
6 form?

7 MS. KORNFELD: - - - for facts.

8 JUDGE GRAFFEO: Did they just - - - did  
9 this officer just use the wrong form, or this is the  
10 only form being used in those two boroughs?

11 MS. KORNFELD: This is the form that's  
12 used in our case. I've seen other similar cases - -  
13 -

14 JUDGE JONES: What about the waiver?

15 MS. KORNFELD: - - - and they used this  
16 form. Your Honor, there was no waiver. The  
17 ostensible - - - the purported waiver occurred at the  
18 top of the arraignment session before our client had  
19 been brought out. So to the extent that counsel - -  
20 - are you talking about the waiver of notice?  
21 Because there were - - -

22 JUDGE SMITH: The waiver - - - I'll read it  
23 to you.

24 MS. KORNFELD: - - - two waivers here.  
25 I'm talking about the waiver of notice.



1                   JUDGE SMITH:  It's from page A11.  It says,  
2                   "All right, without ruling on whether or not this is  
3                   a simplified traffic" - - -

4                   MS. KORNFELD:  You're talking about the  
5                   other waiver?

6                   JUDGE JONES:  Yes.

7                   MS. KORNFELD:  Well, it's clear from that  
8                   colloquy that there was some uncertainty as to the  
9                   nature of the accusatory instrument.  But once the  
10                  court effectuated that waiver of prosecution by  
11                  information, then that's how the court treated it.  
12                  And in fact, even if the court - - - even if it - - -  
13                  even if the court didn't treat it as a complaint, it  
14                  is a complaint.

15                  JUDGE PIGOTT:  If - - -

16                  MS. KORNFELD:  It is by form and content,  
17                  a complaint.

18                  JUDGE PIGOTT:  If the officer had put in  
19                  "knew or had reason to know" on this document, would  
20                  you - - - would that have satisfied you, as far the  
21                  jurisdiction is concerned?

22                  MS. KORNFELD:  Well, I mean, the officer  
23                  would have had to set forth facts as to why.  And I  
24                  don't know how the officer would have known that.  I  
25                  mean, I think usually in these - - -

1 JUDGE SMITH: Whether it would - - -

2 MS. KORNFELD: - - - cases they attach - -

3 -

4 JUDGE SMITH: - - - have satisfied you, I  
5 mean, are you conceding, though, that if there had -  
6 - - if there had been a complaint with all the  
7 elements in it, that is, if this document had had all  
8 the elements in it, it would be a valid complaint?

9 MS. KORNFELD: Yes. Of course. I mean,  
10 just - - - this is just - - -

11 JUDGE SMITH: So this - - -

12 MS. KORNFELD: - - - a Dreyden case. This  
13 is a Dreyden case.

14 JUDGE SMITH: Yeah, so this is not - - -  
15 what happened - - - there's no problem that's going  
16 to infect every case here. It's only a problem when  
17 they leave something out, when they miss an element.

18 MS. KORNFELD: Well, for Mr. Fernandez,  
19 this is a Dreyden problem. But I think that  
20 generally in terms of what this court needs to  
21 decide, because in New York there is no simplified  
22 traffic information, and the People, in two counties,  
23 are using this form which clearly is not - - -

24 JUDGE SMITH: You mean there's none for  
25 misdemeanors?

1 MS. KORNFELD: No, none for traffic  
2 misdemeanors. This form is clearly not intended to  
3 be used. It doesn't direct the officer that - - - it  
4 doesn't give the officer permission - - - remember,  
5 the officers are only doing what they're instructed.  
6 And here, all the instructions are for a regular  
7 complaint and information on - - -

8 JUDGE SMITH: That sounds like you're  
9 making a different argument. You're saying that even  
10 if they had made it a perfect complaint, because  
11 there's an instruction in the margin that says don't  
12 use this in unlicensed operation cases, it's still no  
13 good?

14 MS. KORNFELD: No, what I'm saying is  
15 apart - - - Mr. Fernandez's case suffers from the  
16 Dreyden defect. Even if this were a simplified  
17 traffic information, in his case, he didn't waive  
18 notice, because he was not even there when this  
19 purported waiver of notice for the supporting  
20 deposition. So you know, had this been an actual - -  
21 -

22 JUDGE SMITH: Well, he waived - - -

23 MS. KORNFELD: - - - simplified - - -

24 JUDGE SMITH: - - - he apparently waived  
25 the reading of his rights, one of which was the right

1 - - - if it's a simplified traffic information - - -

2 MS. KORNFELD: But he wasn't there.

3 JUDGE SMITH: - - - one of the rights is  
4 the right to notice?

5 MS. KORNFELD: That's right. Well, of  
6 course, the notice to a supporting deposition  
7 providing reasonable cause. And he could have asked  
8 for it or one could have been attached to this, even  
9 though it had facts, you know, just to cover. But it  
10 wasn't.

11 JUDGE SMITH: Well, if he'd had - - - if  
12 he'd had before him a simplified traffic information  
13 labeled simplified traffic information - - -

14 MS. KORNFELD: Yes.

15 JUDGE SMITH: - - - in perfect form - - -

16 MS. KORNFELD: Yes.

17 JUDGE SMITH: - - - and the judge had said  
18 do you waive the reading of the rights and charges,  
19 and the lawyer said yes, then you wouldn't have to  
20 tell him about his right to a deposition, correct?

21 MS. KORNFELD: Well, if he was there when  
22 the lawyer waived it. I mean, he was - - - the  
23 waiver happened - - - they attached these extra  
24 minutes from the top of the - - -

25 JUDGE SMITH: So you're - - -

1 MS. KORNFELD: - - - arraignment session.

2 JUDGE SMITH: - - - it sounds to me that  
3 this is a whole new deal. You're saying that he  
4 waived it as to all cases that day. And you're  
5 saying that doesn't work, because maybe his client  
6 wasn't there.

7 MS. KORNFELD: Well, the client wasn't  
8 there. And how could you waive his right to notice  
9 of a supporting deposition - - -

10 JUDGE SMITH: So basically, you're saying  
11 that everybody - - -

12 MS. KORNFELD: - - - if he's not there?

13 JUDGE SMITH: - - - everybody - - - there's  
14 a problem in everybody who was there that night,  
15 except for the first case?

16 MS. KORNFELD: Well, we're talking about a  
17 waiver - - - we're talking about a waiver - - -

18 JUDGE PIGOTT: It's not a bad argument. I  
19 wouldn't back away from that necessarily. We had a  
20 case a while back where the judge got sick and tired  
21 of telling everybody they had a right to a lawyer, so  
22 he said, all right, everybody listen up. And he  
23 would give a speech to everybody in the room saying  
24 it. And now that was reversed, they said you can't  
25 give a blessing to the whole courtroom and say you

1 now all have been advised. And I would think it's  
2 the same thing here. I don't know that a lawyer can  
3 waive everybody's rights that may - - - that he or  
4 she may be - - -

5 MS. KORNFELD: But there - - - but how  
6 could she waive rights? And not only that, you know,  
7 there was that confusion which we talked about before  
8 at the actual arraignment. I'm not deciding if this  
9 is a simplified traffic information and then just in  
10 case we're going to - - - so how could counsel waive  
11 his rights ahead of time, when there wasn't even - -  
12 -

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 MS. KORNFELD: - - - any certainty.

15 CHIEF JUDGE LIPPMAN: You're going to have  
16 some rebuttal time. Thanks.

17 Counselor?

18 MR. JOBLove: May it please the court, my  
19 name is Leonard Joblove for the respondent.

20 CHIEF JUDGE LIPPMAN: What's this all  
21 about, counselor? Is this form versus substance or  
22 something more significant?

23 MR. JOBLove: It's about form, and it's  
24 about a statute that was enacted by the legislature  
25 to streamline and simplify the handling of

1 prosecutions of - - -

2 CHIEF JUDGE LIPPMAN: But when you do it, I  
3 guess your adversary's saying, it's got to be  
4 according to that simplified pattern that's laid out.  
5 Why is this - - - why does this come within that  
6 simplified approach?

7 MR. JOBLove: Because, Your Honor, the test  
8 is set out in CPL 100.40, which sets out the  
9 standards for determining facial sufficiency of a  
10 simplified traffic information. And the document,  
11 the accusatory instrument in this case, satisfies  
12 those requirements.

13 JUDGE PIGOTT: Isn't the key here whether  
14 or not he was advised that he has a right to a  
15 supporting deposition?

16 MR. JOBLove: Certainly, Your Honor, if he  
17 wasn't advised of that, and if he didn't waive his  
18 right to be advised of it, then that would undermine  
19 the sufficiency of - - -

20 JUDGE PIGOTT: Is the form supposed to have  
21 that on there, that you're entitled to a supporting  
22 deposition; you can request one?

23 MR. JOBLove: Your Honor, what the CPL  
24 provides is that in a case where a defendant is  
25 actually given an appearance - - -

1 JUDGE PIGOTT: No, I didn't ask you that.  
2 I said doesn't it require the form - - - doesn't the  
3 form require that there be notice that you're  
4 entitled to one? Because a lot of these get mailed  
5 in. You know, people get these - - -

6 MR. JOBLove: Yes.

7 JUDGE PIGOTT: - - - and so they have to be  
8 advised on the ticket that they have a right of a  
9 supporting deposition if they plead guilty. And that  
10 wasn't - - - that wasn't on this one, right?

11 MR. JOBLove: No, it wasn't. But, Your  
12 Honor, because the CPL actually distinguishes between  
13 how the notice is required to be given to the  
14 defendant when he gets an appearance ticket, and so  
15 he's out and told to come back on a court date or  
16 when, as in a case like this, he's arrested and taken  
17 into custody - - -

18 JUDGE PIGOTT: But aren't we fighting over,  
19 or discussing, I guess - - - because these things  
20 always say complaint - - - I forget what the other -  
21 - -

22 JUDGE CIPARICK: Information.

23 MR. JOBLove: Slash information.

24 JUDGE PIGOTT: Yes. And you never know  
25 which one they are. And - - - but if it's a



1 simplified traffic information, you're entitled to a  
2 supporting deposition. And if you ask for one and  
3 you don't get one by the time of your appearance, you  
4 can get a dismissal. It's kind of a routine thing, I  
5 think, in almost all these courts.

6 On the complaint side, as your opponent is  
7 arguing, you've got to have facts of an evidentiary  
8 nature establishing each and every element of the  
9 crime charged. In this case it's "knew or had reason  
10 to know" wasn't there. So it's defective as a  
11 complaint and it's defective as a simplified, because  
12 he was not advised of his right to a supporting  
13 deposition.

14 And your argument, then, is that when the  
15 lawyer stood up that night and said I'm waiving that,  
16 that that took care of that?

17 MR. JOBLove: Yes, Your Honor. And the CPL  
18 provides for the case of a defendant who's been taken  
19 into custody for arraignment, that the court has an  
20 obligation to advise the defendant of his right to  
21 request a supporting deposition.

22 JUDGE CIPARICK: Counsel, going back, why  
23 are the police not using simplified traffic  
24 informations in New York City? Is it because by  
25 statute they're not allowed to - - - 207 of the VTL?

1 MR. JOBLove: Yes. Well, 207 of the VTL  
2 and then the regulations of the commissioner of DMV -  
3 - -

4 JUDGE CIPARICK: Right.

5 MR. JOBLove: - - - both carve out an  
6 exception and say - - -

7 JUDGE CIPARICK: Right.

8 MR. JOBLove: - - - that the authority - -  
9 -

10 JUDGE CIPARICK: So if they - - -

11 MR. JOBLove: - - - of the commissioner - -  
12 -

13 JUDGE CIPARICK: - - - if they can't use a  
14 simplified traffic information, they're using this  
15 complaint/information, shouldn't it comply with the -  
16 - - you know, with what's needed?

17 MR. JOBLove: Well, and Your Honor, it does  
18 because 207 of the VTL, which provides an exception,  
19 essentially for New York City, and says that the  
20 commissioner of DMV does not have the authority to  
21 prescribe the form, has a provision, subdivision 4 of  
22 that statute, which says in the cities with a  
23 population of over one million, that the local  
24 authorities, essentially, get to prescribe the form.

25 JUDGE SMITH: But the CPL says that it's

1 got to be substantially in the form promulgated by  
2 the commissioner of motor vehicles. There is no - -  
3 - this is not on a commissioner of motor vehicles  
4 form.

5 MR. JOBLove: Well, that's correct, Your  
6 Honor.

7 JUDGE SMITH: Well, why doesn't that end  
8 the case? It doesn't comply; that's all there is to  
9 it?

10 MR. JOBLove: Well, it would end the case  
11 if VTL 207 wasn't there, and these two statutes that  
12 are addressing this same subject matter have to be  
13 read together.

14 JUDGE SMITH: Well, which - - - what  
15 statute is it that says it's okay if the form is  
16 written by the police department?

17 MR. JOBLove: Well, VTL 207 says that in  
18 general, throughout the state, the DMV commissioner  
19 has the authority to - - -

20 JUDGE SMITH: It says - - -

21 MR. JOBLove: - - - prescribe the form.

22 JUDGE SMITH: - - - yes, it says in  
23 general, the DMV commissioner has the authority, but  
24 he does not have the authority in New York. How does  
25 that give the police the authority to write a

1 simplified traffic information?

2 MR. JOBLove: Well, I think there's two  
3 parts to Your Honor's question. One would be, if  
4 it's - - - where is there authority for anyone other  
5 than the DMV commissioner to determine the form of  
6 the simplified - - -

7 JUDGE SMITH: Yes.

8 MR. JOBLove: - - - traffic information.  
9 And the answer is that 207 says, in effect, that for  
10 New York City, the appropriate public official or  
11 agency in New York City stands in the shoes of the  
12 commissioner of DMV.

13 JUDGE SMITH: But what are the words that  
14 you say say that, in effect?

15 MR. JOBLove: Subdivision 4 of VTL 207,  
16 which says that - - -

17 JUDGE CIPARICK: Shall not apply. The  
18 section shall not apply.

19 MR. JOBLove: Right. And the provision  
20 says the section is the section that in general  
21 authorizes the commissioner of DMV to prescribe the  
22 form of the simplified traffic information.

23 JUDGE SMITH: I guess I - - -

24 JUDGE GRAFFEO: Am I missing something? I  
25 thought that this form is derived from the patrol

1           guide. Am I wrong?

2                       MR. JOBLove: No, that's correct, Your  
3 Honor.

4                       JUDGE GRAFFEO: Well, and then the patrol  
5 guide says that it can be used for traffic  
6 misdemeanors except unlicensed operator. And that's  
7 what we have here. So - - -

8                       MR. JOBLove: Right.

9                       JUDGE GRAFFEO: - - - I'm trying to  
10 understand what is it that was supposed to be used  
11 for an unlicensed operator?

12                      MR. JOBLove: Your Honor, that language in  
13 the patrol guide, the reasonable understanding of  
14 that is that's addressing a direction to police  
15 officers about when, as a matter of police department  
16 policy, they're authorized to release somebody and  
17 give them an appearance ticket to come back, as  
18 opposed to when they're to take the person into  
19 custody.

20                      This is a uniform - - - for New York City -  
21 - - a uniform summons and complaint. There are two  
22 components to this. The term "summons" is used a  
23 little inartfully in the common practice. But in  
24 this case, the summons form and the complaint form  
25 were used, even though this isn't a case where the

1 defendant was given an appearance ticket. He was  
2 taken into custody and arraigned.

3 JUDGE SMITH: So you're saying the summons  
4 is what the - - - the summons or the appearance  
5 ticket, which is the equivalent of a summons, is what  
6 he's not supposed to use? But it's okay to use the  
7 whatever it is, the information/complaint/simplified  
8 traffic information?

9 MR. JOBLove: You, police officer who are  
10 charging somebody with this offense, should not  
11 release an individual who's just being stopped for  
12 driving without a license, or driving an unregistered  
13 vehicle, or driving without proof of insurance,  
14 because if you let him go, he might get back into his  
15 car.

16 JUDGE SMITH: So, I mean, I don't know  
17 exactly, but it says somewhere don't use this. But  
18 you're saying that translates to don't let the guy  
19 go?

20 MR. JOBLove: Don't use it as a summons  
21 with a notice - - -

22 JUDGE PIGOTT: But don't you argue that  
23 it's a simplified traffic information?

24 MR. JOBLove: I'm sorry, Your Honor?

25 JUDGE PIGOTT: You're arguing that it's a

1 simplified traffic information.

2 MR. JOBLove: Certain - - - yes. Yes.

3 It's being - - - this one - - -

4 JUDGE GRAFFEO: But that would allow the  
5 person to go. Isn't that one of the purposes of the  
6 simplified traffic? You're just telling them when -  
7 - - here's the charge, and then show up on a certain  
8 date at a certain court.

9 MR. JOBLove: It could be used that way,  
10 and perhaps often is used that way. But there's no  
11 requirement in the CPL that a simplified traffic  
12 information can be filed only when the defendant gets  
13 an appearance ticket. And in fact - - -

14 JUDGE SMITH: Why doesn't the Casey case  
15 just take care of this? I mean, Casey says in rather  
16 plain English, I don't care whether it qualifies as a  
17 banana or an apple or an orange; if you label it a  
18 peach, it's a peach. That's all there is to it.

19 MR. JOBLove: Two answers to that, Your  
20 Honor. The first one is that the title of this  
21 document says "Complaint/Information". Information,  
22 when you look at the definition in the CPL of  
23 simplified traffic information, distinguishes between  
24 a simplified information and a regular information.  
25 And the terminology used in the title here is as

1 broad as could be. Complaint - - -

2 JUDGE PIGOTT: So you're saying it's a  
3 banana-peach.

4 MR. JOBLove: I'm saying it could be used  
5 as a banana or as a peach, depending - - -

6 JUDGE CIPARICK: Or a peach.

7 MR. JOBLove: - - - on what the - - -

8 JUDGE READ: So you're saying it doesn't  
9 conflict with Casey.

10 JUDGE CIPARICK: Should they cross one out?

11 JUDGE PIGOTT: You're trying to advise a  
12 defendant, right?

13 MR. JOBLove: Yes.

14 JUDGE PIGOTT: So he says what is it? And  
15 you say it's a banana-peach.

16 MR. JOBLove: Well, in this - - -

17 JUDGE PIGOTT: Well, I need to know,  
18 because I think it's an apple.

19 MR. JOBLove: - - - in this particular  
20 case, the judge actually stated on the record, I'm  
21 not ruling on whether this is a simplified traffic  
22 information, but just in case there would be a  
23 problem with that, with viewing it that way, I'd like  
24 a waiver of the right to - - -

25 JUDGE PIGOTT: But Ms. Kornfeind's making



1 the argument that if it's an information, you've got  
2 to state each and every element of the crime charged  
3 - - - if it's a complaint. You're saying it's not a  
4 complaint. So she says, okay, if it's a simplified  
5 traffic information, you've got to advise on the  
6 document that you're entitled to a supporting  
7 deposition. Because when you mail in your not  
8 guilty, you can ask for that, and then when you show  
9 up and they don't have it, you get it dismissed.

10 MR. JOBLove: Let me break that down.  
11 First, there's no requirement in the CPL that the  
12 accusatory instrument have a title or a designation  
13 on it - - -

14 JUDGE PIGOTT: I know, but - - -

15 MR. JOBLove: - - - stating what it is.

16 JUDGE PIGOTT: - - - but maybe it should?

17 MR. JOBLove: As far as it - - - as far as  
18 that right, for a defendant who's taken into custody  
19 and brought to arraignment directly without being  
20 released, the CPL says there's a requirement that the  
21 court advise the defendant of the right to request a  
22 supporting deposition. And in this case, the  
23 defendant, through his attorney, at that previous  
24 arraignment, waived the reading of those - - - of all  
25 the rights, including that right.

1 JUDGE PIGOTT: What is the motor - - -

2 MR. JOBLove: And just in terms of my  
3 opponent's argument that that somehow is not  
4 effective because the defendant wasn't there; in  
5 Ferguson, this court said a lawyer, without the  
6 defendant's consultation or even presence, could  
7 waive his right to double jeopardy.

8 JUDGE SMITH: Did we ever say you could it  
9 wholesale, you can wa - - - I'm waiving for today.  
10 Isn't that the - - -

11 MR. JOBLove: But this - - - looking at  
12 what it is that's being waived is to have the court,  
13 in every case, say that there's a right - - -

14 JUDGE SMITH: I see - - -

15 MR. JOBLove: - - - and I didn't harm him.

16 JUDGE SMITH: - - - I see that point. But  
17 here it's a little different, because he - - - when  
18 the lawyer said I waive the reading of the rights,  
19 presumably he wasn't focused on the fact that he was  
20 going to have a guy that day who was there for  
21 unlicensed aggravation on this funny looking form,  
22 and it might be the wrong form, and he might be  
23 waiving the right to read - - - the right - - - might  
24 be waiving his client's right to notice of a  
25 supporting deposition. Isn't that putting a lot of

1 weight on this yeah, I waive for the whole evening?

2 MR. JOBLove: No, Your Honor. It's putting  
3 far less than a lawyer standing up without his client  
4 even there saying I'm waiving double jeopardy. I  
5 consent to a mistrial. Let's have a retrial. And  
6 that can be done - - -

7 JUDGE SMITH: At least he knows which  
8 client he's waiving for.

9 MR. JOBLove: Yes. And this lawyer is  
10 certainly in a position to say you don't have to read  
11 that right. I'll tell him, to the extent it's  
12 relevant. And in a case like this, if the client is  
13 willing to plead guilty - - -

14 JUDGE SMITH: It's okay for him to say that  
15 once for twenty cases, even though case number 13 on  
16 the list has this rather strange wrinkle, which might  
17 have made him hesitant to waive the right.

18 MR. JOBLove: Nothing prevented the lawyer  
19 from saying, by the way, Judge, I think it would be a  
20 good idea to read the rights of prosecution by - - -  
21 excuse me, the right to request a supporting  
22 deposition, because Your Honor already flagged the  
23 possibility this could be viewed as - - -

24 JUDGE SMITH: Well, actually, what the  
25 court had said, let's assume this isn't a simplified

1 traffic information. So why would he have said, well  
2 in that case, why don't you read him his rights  
3 relating to a simplified traffic information?

4 MR. JOBLove: I disagree with that  
5 characterization of the record. The court didn't say  
6 I'll assume it's not. The court said without ruling  
7 on whether or not it is. So I recognize there's an  
8 issue. I'm leaving open the possibility that it is.

9 JUDGE GRAFFEO: Can I just ask - - -

10 CHIEF JUDGE LIPPMAN: Judge Graffeo.

11 JUDGE GRAFFEO: - - - I know your light's  
12 on. What statute are you saying authorizes the use  
13 of simplified traffic informations in the City of New  
14 York?

15 MR. JOBLove: The definitional section one  
16 - - -

17 JUDGE GRAFFEO: You agree the DMV regs  
18 exempt New York City from the prescribed form?

19 MR. JOBLove: Yes, Your Honor.

20 JUDGE GRAFFEO: Okay, so where's - - - on  
21 what basis are you saying substitutes in New York  
22 City?

23 MR. JOBLove: It's reading V - - - excuse  
24 me, CPL 100.10, which defines the simplified  
25 information with reference to the commissioner - - -

1 DMV commissioner's regulations. The problem with 207

2 - - -

3 JUDGE GRAFFEO: Right. But that doesn't  
4 address New York City one way or the other, that  
5 section.

6 MR. JOBLove: Yes, Your Honor. And I think  
7 - - - I think the principle, if reading the two  
8 together doesn't lead to the conclusion on the terms  
9 itself of the statute that 207 is, in effect, saying  
10 that the local authority of New York stands in the  
11 shoes of the commissioner of motor vehicles for  
12 purposes of prescribing the form of uniform - - -

13 JUDGE GRAFFEO: I guess what I'm asking is  
14 - - -

15 MR. JOBLove: Um-hum.

16 JUDGE GRAFFEO: - - - does the City of New  
17 York have simplified traffic informations?

18 MR. JOBLove: Yes. They have the - - -  
19 they have the authority to issue simplified traffic  
20 informations. And this document in the patrol guide  
21 is broadly characterized to permit its use as a  
22 universal summons. It can - - -

23 JUDGE SMITH: Just to clarify the point.  
24 They clearly have authority for traffic infractions,  
25 don't they? That's a nonproblem.

1 MR. JOBLove: Through the Traffic  
2 Violations Bureau. Yes.

3 JUDGE SMITH: Yes. Yes.

4 JUDGE GRAFFEO: Appearance tickets.

5 JUDGE SMITH: Yes.

6 MR. JOBLove: Yes.

7 JUDGE SMITH: The problem comes with the  
8 misdemeanors?

9 MR. JOBLove: Yes, in construing the  
10 requirement - - - the facial sufficiency and  
11 definitional provision of 100.10, that it's got to be  
12 in a form prescribed by the commissioner of DMV. But  
13 I think a critical principle here is the notion that  
14 if a literal reading of this statute were to mean  
15 that a statutory creation of this type of accusatory  
16 instrument that was designed to deal with high volume  
17 of traffic offenses and to streamline the handling of  
18 those cases, that the legislature would have intended  
19 that in the largest city in the state they would  
20 exclude the application of that type of accusatory  
21 instrument - - -

22 CHIEF JUDGE LIPPMAN: Okay - - -

23 MR. JOBLove: - - - that would just do  
24 violence - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1                   MR. JOBLove: - - - to the legislative  
2                   intent - - -

3                   CHIEF JUDGE LIPPMAN: Judge Read?

4                   JUDGE READ: Yes. I've been trying to get  
5                   a word in here.

6                   CHIEF JUDGE LIPPMAN: Go for it.

7                   JUDGE READ: I just was wondering, if you  
8                   lose, what difference this case makes? I mean, I  
9                   know it makes a difference in the particular case.  
10                  Is it just a question, then, of your having to change  
11                  a form going forward, or does it have broader  
12                  implications?

13                  MR. JOBLove: Well, certainly, if there  
14                  were a view that there's no authority in the City of  
15                  New York to have simplified traffic informations,  
16                  that would have dramatic implications, of course.

17                  JUDGE SMITH: In misdemeanor cases why  
18                  can't you just go by complaint, as apparently you  
19                  normally do? You usually use something that says  
20                  "complaint" at the top. And the only problem here is  
21                  they forgot to put something in.

22                  MR. JOBLove: But the simplified traffic  
23                  information could be repealed statewide. There are  
24                  other misdemeanor accusatory instruments that could  
25                  be filed. But the point of the simplified

1 information, which by definition, applies to traffic  
2 misdemeanors as well as infractions, is to simplify  
3 the process.

4 JUDGE SMITH: But I guess what I'm saying  
5 is, the world would not come to an end, the world  
6 would not even change that much, if the rule was that  
7 until somebody gives somebody some more authority,  
8 you're going to have to use complaints and  
9 informations for misdemeanor traffic cases in New  
10 York City?

11 MR. JOBLove: Well, and I believe Judge  
12 Read's question was what the impact would be - - -

13 JUDGE READ: That's right. That's the  
14 question. What difference does it make? Is it just  
15 a question of changing a form in the future?

16 MR. JOBLove: The use of this form is  
17 widespread in Kings County. So the numbers that I've  
18 been given by the NYPD for 2011, out of approximately  
19 70,000 arrests that resulted in an arraignment on  
20 charges, approximately something over 6,000 were done  
21 on a summons form. Now whether those summons - - -

22 JUDGE SMITH: Yes, but the form is fine, as  
23 long as you don't leave an element out of the facts,  
24 isn't it?

25 MR. JOBLove: The form - - -



1                   JUDGE SMITH:  And she doesn't - - - I tried  
2                   to get her to admit that, and she wouldn't.  But it  
3                   seems to me we could reasonably say that this is a  
4                   perfectly fine form, but it's a complaint form, and  
5                   you've got to put in all the allegations, which you  
6                   usually do.

7                   MR. JOBLove:  Yes.  And the question in  
8                   this case is whether this form, which was designed as  
9                   a universal summons, and the governor's memorandum  
10                  from the 1967 legislation, which is cited in the  
11                  Gindi case, which is cited in the People's brief,  
12                  shows that there was intent - - - the reason that New  
13                  York City asked for an exemption from this  
14                  requirement that you comply with the requirements of  
15                  the DMV commissioner, is they wanted to have a  
16                  universal summons that could be used not just for  
17                  traffic offenses and not just as a simplified  
18                  information.  So this is a multipurpose form.  It  
19                  could be used as a misdemeanor complaint.

20                  CHIEF JUDGE LIPPMAN:  Okay, counselor.  
21                  Thanks.

22                  MR. JOBLove:  Thank you, Your Honor.

23                  CHIEF JUDGE LIPPMAN:  Counselor?

24                  MS. KORNFELD:  Yes.  I - - -

25                  CHIEF JUDGE LIPPMAN:  What would be - - -

1           you know what the impact would be if we ruled in your  
2           favor?

3                       MS. KORNFELD: Well, yes. If it were a  
4           complaint, I mean, the only thing that I can think of  
5           is that now, because - - - and this is what I also  
6           wanted to say - - - is that this is not just about  
7           form. The form is bundled with the defendant's  
8           rights with the sufficiency standards. Okay? The  
9           simplified traffic information has a much lower  
10          sufficiency standard. For instance, those supporting  
11          depositions do not require nonhearsay. It's - - -

12                      JUDGE SMITH: I'm not sure you've addressed  
13          the Chief's question, which is what happens - - -

14                      MS. KORNFELD: Well - - -

15                      JUDGE SMITH: - - - what happens to the  
16          world if you win?

17                      MS. KORNFELD: Right. Well, I'm trying to  
18          say that they would not - - - if I win, they would  
19          have to start either providing nonhearsay, which  
20          means attaching DMV abstracts to all of their  
21          complaints. I think right now, they're sufficient if  
22          these are properly deemed simplified traffic  
23          informations, they can attach an officer's affidavit  
24          and say I checked on the DMV computer, and he's had  
25          three notices mailed to him, therefore, he knows or

1 he should have known that his license has been  
2 suspended. And that's a hearsay document. It's got  
3 mixed hearsay and personal information.

4 If they had to use a complaint, they would  
5 have to attach DMV abstracts. I don't think - - -

6 JUDGE SMITH: But you - - -

7 MS. KORNFEIND: - - - that's - - -

8 JUDGE SMITH: - - - you don't concede that  
9 there would be no case here if they had simply put  
10 the "know or should have known" into this document?

11 MS. KORNFEIND: No. Because it would be a  
12 jurisdictionally sound - - - yes?

13 JUDGE SMITH: But isn't that important  
14 here? I mean, couldn't we rule on the basis that  
15 this is admittedly not a sufficient misdemeanor  
16 complaint? If it were a sufficient misdemeanor - - -  
17 if it had the ingredients of a misdemeanor complaint,  
18 then a much different case.

19 MS. KORNFEIND: Well, if it had all the  
20 elements, I wouldn't be here.

21 JUDGE SMITH: Okay.

22 MS. KORNFEIND: I mean, by - - - right?

23 JUDGE SMITH: But I'm sorry. I thought you  
24 were saying - - - I thought you were not admitting  
25 that?

1 MS. KORNFELD: No, no.

2 JUDGE SMITH: So all they had to do - - -

3 MS. KORNFELD: All I'm saying is that this  
4 is a complaint.

5 JUDGE SMITH: So all they had to do was  
6 type on the form "and for the following reasons" - -  
7 -

8 MS. KORNFELD: Yes.

9 JUDGE SMITH: - - - "he should have known".

10 MS. KORNFELD: Absolutely. I'm sorry if I  
11 didn't make that clear. That's why it's a  
12 jurisdictionally defective complaint. But - - -

13 JUDGE SMITH: Okay, but then the answer - -  
14 - isn't the answer to the Chief's question, what  
15 happens if you win, what happens is, next time  
16 they've got to be more careful about doing the - - -  
17 filling out the form.

18 MS. KORNFELD: Well, only if this is a  
19 complaint. See, if it's a - - -

20 JUDGE SMITH: Yes, I understand.

21 MS. KORNFELD: Right.

22 JUDGE SMITH: If you win, it's a complaint,  
23 right?

24 MS. KORNFELD: Yes. But then what about -  
25 - - yes. Yes.

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CHIEF JUDGE LIPPMAN: Okay.

MS. KORNFELD: Thank you.

CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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

I, Penina Wolicki, certify that the  
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