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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 167

JOSEPH CONCEICAO,

Appellant.

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PEOPLE,

Respondent,

-against-

No. 168

FEDERICO PEREZ,

Appellant.

-----

PEOPLE,

Appellant,

-against-

No. 169

JAVIER SANCHEZ,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
October 20, 2015

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Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 167, 168,  
2 and 169.

3 Counsel, you're going to argue on  
4 Conceicao?

5 MR. WIENER: Yes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. WIENER: I'd like to reserve two  
8 minutes.

9 CHIEF JUDGE LIPPMAN: Two minutes, go  
10 ahead. You're on. First of all, tell us how does  
11 your case differ from the others.

12 MR. WIENER: Our - - - my case - - - first  
13 of all, my case is exactly like Tyrell in every - - -  
14 in every single way.

15 CHIEF JUDGE LIPPMAN: Well, I mean the  
16 other two that's being heard today.

17 MR. WIENER: I mean, the other two, I  
18 believe one has to do with whether Boykin rights  
19 apply to a violation, one has to do whether it - - -  
20 it applies to - - - to a misdemeanor. In my case - -  
21 -

22 CHIEF JUDGE LIPPMAN: Go ahead.

23 MR. WIENER: - - - it - - - it is identical  
24 and indistinguishable from - - - in every way from  
25 Tyrell. Appellant pled guilty, was sentenced

1 immediately at arraignment. There was a record that  
2 was completely silent. There's no indication he was  
3 ever given Boykin rights. There's no indication he  
4 ever consulted with counsel.

5 CHIEF JUDGE LIPPMAN: What year was your  
6 case on?

7 MR. WIENER: My case was 2009, Your Honor.

8 CHIEF JUDGE LIPPMAN: Um-hum.

9 MR. WIENER: And - - - and Tyrell also did  
10 not create a new rule of law.

11 CHIEF JUDGE LIPPMAN: Well, that's the  
12 question. Is it a new rule, is it a - - - a bold  
13 departure?

14 MR. WIENER: It's - - - it's absolutely not  
15 a new rule.

16 CHIEF JUDGE LIPPMAN: Tell us why not.

17 MR. WIENER: I'll - - - I'll tell you why  
18 not, Your Honor. First of all, Tyrell merely applied  
19 the longstanding principles of Alabama v. Boykin,  
20 which was decided in 1969; People v. Harris, 1983;  
21 People v. Fiumefreddo, 1993; that there has to be an  
22 affirmative showing on the record that the defendant  
23 waived his Boykin rights. Recently this court  
24 reversed, in People v. Moore, in an identical case.  
25 I understand that - - -

1                   JUDGE PIGOTT: But you want - - - you want  
2 to reverse this and go - - - and go to trial; is that  
3 what we're looking at?

4                   MR. WIENER: I - - - no, we - - - we want  
5 to - - -

6                   JUDGE PIGOTT: Why wouldn't we go to trial?  
7 You know, as you know I dissented in - - - in - - -  
8 in Tyrell and one of the things is that from  
9 experience, I know a lot - - - not necessarily your  
10 client, but there's a lot of people that - - - get me  
11 out of this thing, you know, I'll take the impaired,  
12 you know, and you go in and you plead them guilty to  
13 impaired. And now somebody says well, gee, you  
14 didn't tell me that I had a right to a jury trial et  
15 cetera, et cetera. Which the remedy would seem to me  
16 to be okay, we'll - - - we'll go back to square one  
17 and we'll let you go to trial on your DWI. That's  
18 the last they want.

19                   And - - - and so what I'm concerned about  
20 in these cases is that we don't make a joke out of  
21 the legal process. If you really sincerely believe  
22 that because you didn't get your Boykin rights, you -  
23 - - you did something you did - - - would not  
24 otherwise have done, that's understandable. But if  
25 all you're doing is saying I'm taking a plea because

1 I'm getting time served and they caught me red handed  
2 but now I can - - - I can try to get, you know, the  
3 whole thing thrown out on a technicality, that - - -  
4 I would think you'd agree with me, that's not a good  
5 thing.

6 MR. WIENER: Well, Your Honor, I - - -  
7 first of all, I don't think it's a technicality and  
8 these are important Constitutional rights. This case  
9 is exactly the same as Tyrell, it's exactly the same  
10 as Moore, and they're indistinguishable, so the same  
11 results should apply. And in terms of - - -

12 JUDGE ABDUS-SALAAM: It's only - - -

13 MR. WIENER: - - - remedy - - - I'm sorry.

14 JUDGE ABDUS-SALAAM: You say that, counsel,  
15 as you started to say, because the plea was taken at  
16 arraignment; there was no opportunity to consult with  
17 counsel about the plea or to find out anything,  
18 essentially, at least not on the record.

19 MR. WIENER: There's nothing on the record.  
20 That's right, Your Honor. Absolutely not.

21 CHIEF JUDGE LIPPMAN: And - - - and that's  
22 the - - -

23 JUDGE FAHEY: Well, where the - - - where  
24 the - - -

25 CHIEF JUDGE LIPPMAN: - - - key that the -

1 - - the - - - the silence in the record is the - - -

2 MR. WIENER: It's a completely silent  
3 record.

4 CHIEF JUDGE LIPPMAN: - - - is what you're  
5 basically relying on?

6 MR. WIENER: Absolutely, and that's the  
7 key.

8 JUDGE RIVERA: But - - - but isn't the - -  
9 - the question of the new rule about preservation?

10 MR. WIENER: It would - - -

11 JUDGE RIVERA: Not the Boykin rights.

12 MR. WIENER: With - - -

13 JUDGE RIVERA: Boykin rights, you're  
14 correct, well established - - -

15 MR. WIENER: With regard to - - -

16 JUDGE RIVERA: - - - decades ago.

17 MR. WIENER: There - - - there is no new  
18 rule with regard to preservation, Your Honor. First  
19 of all, in People v. Lopez, this court found that  
20 there's no preservation required where the record  
21 called into question the voluntariness of the plea.  
22 Subsequently, in Tyrell - - -

23 JUDGE FAHEY: Yeah, but that's - - - that -  
24 - - that's not - - - not the issue because in Tyrell,  
25 there was a - - - the analysis in Tyrell was either

1 using the Lopez-Louree exceptions, and there I think  
2 you're right where there - - - it wasn't - - -  
3 whether - - - whether the record was silent or if the  
4 record itself - - - if the plea and the sentence  
5 occurred at the same time, I think, and then once  
6 again the - - - the - - - the defendant wouldn't be  
7 able to do it and you're within the Lopez-Louree  
8 exception area.

9 But it also made reference to a mode of  
10 proceeding error, and one of the things perhaps that  
11 we have to clarify, whatever happens in your case, is  
12 what's the proper preservation rule. One would  
13 create a new rule and one wouldn't, see - - - so you  
14 see the problem?

15 MR. WIENER: I mean, I think the mode of  
16 proceedings error, I think Lopez was a mode of  
17 proceedings case. I think that - - -

18 JUDGE FAHEY: Um-hum.

19 MR. WIENER: - - - that - - - that the mode  
20 of proceedings language follow from Lopez. And  
21 you're absolutely right, Your Honor, in terms of  
22 Louree, in terms of the practical inability to  
23 object, you had Louree. You also had McAlpin which  
24 was decided in 2011, we had Peque. So this is a  
25 very, very well-established principle of law and all

1 the court was doing was taking these - - - the - - -  
2 these series of cases and just applying - - -

3 JUDGE FAHEY: So really, you're  
4 characterizing it, then, as following within the  
5 whole line of cases going all the way back to Harris  
6 where you look at the totality of circumstances and  
7 not a per se rule that you got to read these rights  
8 or don't read the rights. But in these  
9 circumstances, it's not a new rule, it's an  
10 application of our old law to new circumstances?

11 MR. WIENER: Exactly. I mean, these are -  
12 - - these are well-established principles and all  
13 you're doing - - -

14 JUDGE FAHEY: Which makes it retroactive?

15 MR. WIENER: Which - - - which makes it  
16 retroactive, Your Honor.

17 JUDGE FAHEY: Right.

18 MR. WIENER: That's exactly right. I just  
19 want to briefly, with respect to the People's other  
20 argument that somehow this is a new rule regarding  
21 misdemeanors, there are absolutely no cases saying  
22 that. They haven't cited any cases saying that.

23 CHIEF JUDGE LIPPMAN: Why - - - why - - -  
24 why is it the same whether it's a serious crime or a  
25 misdemeanor?

1 MR. WIENER: Well - - -

2 CHIEF JUDGE LIPPMAN: What - - - what's  
3 it's in comm - - - what - - - what do they have in  
4 common?

5 MR. WIENER: Well, I think a misdemeanor is  
6 a seri - - - misdemeanors are - - - are serious in  
7 the sense that there are potentially serious  
8 consequences. You could be deported, you could - - -  
9 you could face loss of housing, you could face loss  
10 of benefits. So - - - so - - -

11 CHIEF JUDGE LIPPMAN: The loss of liberty  
12 in and of itself is not the determining factor?

13 MR. WIENER: It's a - - - it's - - -  
14 misdemeanors are serious and - - - and there's  
15 absolutely nothing saying that Boykin, you know, that  
16 this is somehow a new rule and that - - - that Boykin  
17 rights shouldn't be given under these circumstances.

18 I would just like to say, you know, even if  
19 - - - and absolutely this is a new rule and that  
20 should be the end of the analys - - - excuse me, it  
21 is not a new rule; that should be the end of the  
22 analysis. Even if, just for the sake of argument,  
23 this was a new rule, which it isn't, the federal rule  
24 under Griffith v. Kentucky should apply, not the  
25 Pepper rule. Pepper only applies if no federal

1 Constitutional principles are involved. Here, Tyrell  
2 involved federal Constitutional principles, you - - -  
3 that you need an affirmative record that the  
4 defendant waived his federal Constitutional rights.  
5 Also to the extent that this is a mode of proceedings  
6 error, that is also intertwined with the deprivation  
7 of those rights. Thank you, Your Honor.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.  
9 Thanks, counsel.

10 MR. WASHER: Good afternoon, Your Honors;  
11 Eric Washer for the Bronx County District Attorney's  
12 Office.

13 CHIEF JUDGE LIPPMAN: Counsel, what's new  
14 about all of this? Why isn't this basic apple pie  
15 and motherhood?

16 MR. WASHER: Well, I - - - I think that the  
17 starting point is the fact there have been about - -  
18 - by my count, about thirty-six reversals since  
19 Tyrell. So I think that's a clear indication that  
20 something new happened in Tyrell. And I think - - -

21 JUDGE PIGOTT: Thirty-six out of how many  
22 cases, do you think?

23 MR. WASHER: Well, there are a lot of  
24 misdemeanor pleas taken in - - - in New York City,  
25 that - - - that's for sure, but thirty-six is a lot.

1                   JUDGE ABDUS-SALAAM: Well, all that means,  
2 counsel, is that there were thirty-six people in  
3 Tyrell's situation like Mr. - - - as - - - as your  
4 adversary says, like Mr. Conceicao's situation, where  
5 everything was done at arraignment and there was no  
6 opportunity to actually discuss a plea. It wasn't a  
7 pre-negotiated plea, it just happened on the spot.

8                   MR. WASHER: Well, not all of the reversals  
9 have been at arraignments or have involved arrai - -  
10 - in arraignment pleas. There have been reversals in  
11 other context as well.

12                   CHIEF JUDGE LIPPMAN: Yeah, but if there's  
13 supposed to be a reversal, so why is that bad, if  
14 we're doing justice and someone's rights were  
15 violated?

16                   MR. WASHER: Well - - -

17                   CHIEF JUDGE LIPPMAN: Why is that a  
18 problem? We're supposed to - - -

19                   MR. WASHER: I - - - I think - - -

20                   CHIEF JUDGE LIPPMAN: - - - count them up  
21 and say what if it was twenty, what if it was forty,  
22 what if it was sixty, what if it was ten? What's the  
23 difference?

24                   MR. WASHER: Well, Your Honor, I - - - I  
25 think I would - - - I would go back to what Judge

1 Pigott said that in the - - - in these situations,  
2 the defendant doesn't have to make an allegation that  
3 he actually wanted to go to trial or that he  
4 actually, as a - - - as a factual matter, was  
5 ignorant of his Boykin rights.

6 JUDGE PIGOTT: I always have a flip side,  
7 though, and one of the ones in this one is that this  
8 - - - this particular defendant didn't have a lawyer,  
9 and I would think if he had one - - -

10 MR. WASHER: He had a lawyer at his - - -  
11 his had a Legal Aid lawyer at his - - - his  
12 arraignment.

13 JUDGE PIGOTT: That - - - I didn't - - - I  
14 don't have it at the time of the plea. Maybe I  
15 misunderstood.

16 MR. WASHER: Yes, yes.

17 JUDGE PIGOTT: Because obviously you want  
18 to be able to at least negotiate the - - - you know,  
19 down from a misdemeanor to a violation.

20 MR. WASHER: Right, but - - -

21 JUDGE FAHEY: Are you - - - are you talking  
22 about the remedy, the remedy problem? What we do  
23 afterwards, dismissal or remit?

24 MR. WASHER: Well, we - - - we don't think  
25 that the accusatory instrument should be dismissed in

1           these cases. We think that he should be restored to  
2           the pre-pleading status.

3                   JUDGE FAHEY: But usually the rule is when  
4           you look at the cases and - - - I haven't been here  
5           that long, but when you look at the cases, it seems  
6           to me that something's dismissed if somebody's  
7           already served the time anyway. But here, there was  
8           a two-day - - - he did two days in jail on a  
9           conditional discharge so - - - and it was an A  
10          misdemeanor, right - - -

11                   MR. WASHER: Right.

12                   JUDGE PIGOTT: - - - the plea. So he could  
13          have gotten, you know, a jail - - - he could have - -  
14          - he could have - - - could have done six to nine  
15          months, theoretically, so - - - so remittal may be  
16          appropriate because, of course, you know, the  
17          exercise of the rights is fundamental but you - - -  
18          you shouldn't be able to get - - - you - - - you  
19          should still have to go through the plea negotiation  
20          process in a realistic fashion.

21                   MR. WASHER: Well, yeah.

22                   JUDGE FAHEY: So I'm assuming that's your  
23          position?

24                   MR. WASHER: Yes, and we think if - - - if  
25          the harm here is that he didn't understand his Boykin

1 rights, then he should be placed back in a position  
2 where he can understand them, and that he can have  
3 another allocution, maybe it'll be more thorough than  
4 the one that happened here. But I do think that it's  
5 very clear that Tyrell did announce a new  
6 preservation rule, which is a state law rule. So the  
7 Pepper-Mitchell - - -

8 JUDGE ABDUS-SALAAM: Which is what? What  
9 is the new rule that you think Tyrell announced,  
10 counsel?

11 MR. WASHER: I think it announced a new  
12 exception to the preservation requirement. Lopez - -  
13 - it relied on Lopez and Louree. Of course, Lopez  
14 was a case about factual allocutions, when a  
15 defendant says something that negates an essential  
16 element of the crime and casts doubt on his innocence  
17 or guilt. That's not what happens in a Boykin  
18 situation. And Louree was PRS situation where the  
19 defendant wasn't informed of the post-release  
20 supervision component of his sentence. Neither of  
21 those things dictated the outcome of the preservation  
22 analysis in Tyrell.

23 And I think it's interesting because Tyrell  
24 still didn't resolve exactly which preservation  
25 exception it relied on. It said this could be a

1 Lopez-Louree situation.

2 JUDGE ABDUS-SALAAM: Exactly.

3 MR. WASHER: It could be - - -

4 JUDGE ABDUS-SALAAM: So we never committed  
5 to this new rule that you're talking about. It could  
6 - - - the - - - as I read Tyrell, I was - - - I  
7 didn't take part in that case, but as I read the  
8 case, it was either it could be a mode of preserv - -  
9 - a mode of proceedings error or it could be Lopez-  
10 Louree-Peque.

11 MR. WASHER: Right.

12 JUDGE ABDUS-SALAAM: So we never committed  
13 to - - -

14 MR. WASHER: Right.

15 JUDGE ABDUS-SALAAM: - - - which one, so I  
16 don't know where - - - I'm - - - I'm having a little  
17 trouble figuring out - - -

18 MR. WASHER: I - - - I think - - -

19 JUDGE ABDUS-SALAAM: - - - what the new  
20 rule is.

21 MR. WASHER: I - - - well, I think it  
22 speaks to the ambiguity, that we don't know - - - we  
23 know that there's a preservation exception created in  
24 Tyrell, because the claims were not preserved in any  
25 way, but this court reviewed them and found that it

1 was preserved. So one way or the - - - or another  
2 there was a new preservation rule articulated. I  
3 think there's just a lack of clarity as to what it  
4 is.

5 JUDGE ABDUS-SALAAM: But if we looked at  
6 the totality of the circumstances, there were - - -  
7 noth - - - nothing was done with respect to Boykin  
8 rights or - - - or any opportunity to consider the  
9 offer that was being made; then - - -

10 MR. WASHER: Well - - -

11 JUDGE ABDUS-SALAAM: - - - that would  
12 suggest that, you know, that - - - that was what was  
13 not preserved.

14 MR. WASHER: Well, the - - -

15 JUDGE ABDUS-SALAAM: And we said that in -  
16 - - we said that in Peque and Louree and Lopez.

17 MR. WASHER: Right, but of course none of  
18 those cases involved Boykin. And - - - and also, I -  
19 - - I do think it's interesting that Tyrell didn't  
20 cite any cases involving misdemeanors or preservation  
21 of misdemeanor cases. This is act - - - Tyrell is  
22 actually the first case that discussed, I think, a  
23 preservation requirement during a misdemeanor plea  
24 allocution and it did - - -

25 JUDGE RIVERA: But is - - - is it really

1 your argument that the - - - the custom was that no  
2 one did this, and then when we said you got to do  
3 this, that that's what makes the difference? That's  
4 what this is, a break from - - -

5 MR. WASHER: I - - -

6 JUDGE RIVERA: - - - the past - - -

7 MR. WASHER: Well - - -

8 JUDGE RIVERA: - - - that's what makes this  
9 a new rule?

10 MR. WASHER: - - - I think there's the  
11 preservation aspect that's new and I do think is it -  
12 - - it is a substantively new rule that requires more  
13 than cases like Harris and even Boykin itself had  
14 anticipated. Of course, Harris dealt with six felony  
15 pleas.

16 JUDGE RIVERA: What's the more that's  
17 required? What - - - what - - -

18 MR. WASHER: Well, I think that there's a  
19 way of reading to - - -

20 JUDGE RIVERA: Didn't those cases require  
21 that somehow the record makes clear that it's a  
22 knowing and intelligent waiver, a plea?

23 MR. WASHER: Right, but where I think  
24 Tyrell took an additional step, what it seems to  
25 suggest, that some of the three Boykin rights have to

1 put on the record, and I don't think any of this  
2 court's precedents make that necessary. Boykin, I  
3 don't believe, makes that necessary.

4 JUDGE RIVERA: And how would you otherwise  
5 know?

6 MR. WASHER: Excuse me, Your Honor?

7 JUDGE RIVERA: How - - - how would a judge  
8 otherwise know?

9 MR. WASHER: Well, he - - -

10 JUDGE RIVERA: If it's not on the record,  
11 how would one know?

12 MR. WASHER: Well, here, he's with an  
13 attorney. The court will also know that -- in this  
14 particular case, the defendant has eight prior guilty  
15 pleas. He's not a novice to the criminal justice  
16 system, which was apparently the case in Tyrell, or  
17 at least that was emphasized. And this court's  
18 precedents do say that the - - - the defendant's  
19 particular circumstances in the criminal justice  
20 system, his history in the criminal justice system,  
21 are relevant to the judge who's accepting the plea.

22 JUDGE STEIN: Well, what if he had a bunch  
23 of prior misdemeanors in which nobody ever told him  
24 about his Boykin rights?

25 MR. WASHER: Well, here there were - - -

1 here - - -

2 JUDGE STEIN: Why would you think that he  
3 got them in - - - in another case if he didn't get  
4 them here?

5 MR. WASHER: Well, I think it decreases - -  
6 -

7 JUDGE RIVERA: Especially since you say  
8 that's how - - - that's how this goes.

9 MR. WASHER: Well, I think it certainly  
10 decreases the possibility that he is actually  
11 ignorant of his Boykin rights, particularly because  
12 that means in eight prior occasions, he's had eight  
13 different attorneys appointed to represent him. And  
14 bef - - - and of course, before he took the plea in  
15 this case, he did have the opportunity to speak with  
16 his attorney. He would have spoke with his Legal Aid  
17 attorney before he took the plea. So he is not going  
18 into a situation where he has absolutely no idea  
19 what's coming to him.

20 JUDGE RIVERA: So the presumption should be  
21 if you've spoken with your attorney, your attorney  
22 has informed you of these rights?

23 MR. WASHER: That's the only reasonable  
24 assumption because every attorney has that  
25 responsibility to their client before they allow

1 their client to enter a plea.

2 JUDGE RIVERA: And - - - and that didn't  
3 apply in Tyrell because?

4 MR. WASHER: Well, I think the more  
5 problematic issue in Tyrell was the first plea. The  
6 defendant in that case said absolutely nothing. We  
7 don't have that here. The defendant did say that he  
8 wanted to plead guilty. That was a - - - a Boykin -  
9 - -

10 JUDGE RIVERA: And represented by a lawyer?

11 MR. WASHER: He was represented by a lawyer  
12 but I think this - - -

13 JUDGE RIVERA: So why doesn't your  
14 presumption hold in that case then?

15 MR. WASHER: Well - - -

16 JUDGE RIVERA: Represented by a lawyer;  
17 can't we presume the lawyer informed him of his  
18 rights before - - -

19 MR. WASHER: Well, I think we can - - -

20 JUDGE RIVERA: - - - he got the plea?

21 MR. WASHER: I think we can presume that  
22 and we should presume that, but this court might have  
23 been troubled by the fact that he didn't say  
24 anything, which is exactly what happened in Boykin.  
25 In that case, the judge said nothing about the plea -

1 - -

2 JUDGE RIVERA: Um-hum.

3 MR. WASHER: - - - and the defendant Boykin  
4 said absolutely nothing about the plea, that was a  
5 totally silent record. And that is kind of what  
6 happened in the first - - - in the first Tyrell case  
7 that was considered by this court.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.  
9 Anything else?

10 MR. WASHER: Thank you, Your Honor.

11 CHIEF JUDGE LIPPMAN: Thank you.

12 Counsel, rebuttal.

13 MR. WIENER: Yes, Your Honor. I just want  
14 to emphasize again, this case is indistinguishable  
15 from Tyrell. In fact, in Tyrell, too, the de - - -  
16 the defendant said a lot more than - - - than - - -  
17 than my client said. In that case there was a  
18 factual allocution. There was a lot less - - - less  
19 in this case. So this - - - this case is completely  
20 indistinguishable in every way from Tyrell. I also -  
21 - -

22 JUDGE PIGOTT: But looking at it  
23 practically - - - I - - - I think I understand your  
24 argument. But if - - - I picture, you know, the - -  
25 - the city courts that I'm familiar with and stuff,

1 and - - - and pleas are taken and - - - and  
2 conditional discharges are issued in a fairly routine  
3 fashion by the - - - I don't want to say by the  
4 dozens, but certainly substantially a lot of them.  
5 Is it your argument that all of these should be set  
6 aside now and that all of them should come back or  
7 that all of them should be dismissed? Or what - - -  
8 what's your position with respect that - - -

9 MR. WIENER: I - - - I mean - - -

10 JUDGE PIGOTT: Your client is probably a  
11 typical one. Is that a fair statement?

12 MR. WIENER: Perhaps, but I mean our - - -  
13 our - - - I can't speak for - - - for all - - - for  
14 other cases, Your Honor.

15 JUDGE PIGOTT: Pretend. I - - -

16 MR. WIENER: I'm saying that my - - - my  
17 case is just like Tyrell and Moore and not - - -

18 JUDGE PIGOTT: Let's assume that you win.  
19 You win. Tyrell, you - - - you win. You go home and  
20 your - - - and your - - -

21 MR. WIENER: The rem - - - the reme - - -

22 JUDGE PIGOTT: - - - and - - - and in  
23 glorious victory. But my point is that are there  
24 then 50,000 more?

25 MR. WIENER: No, there aren't 50,000 more.

1 JUDGE PIGOTT: Are there 5,000 more?

2 MR. WIENER: No, there aren't 5,000 more.

3 I mean, I think the number of reversals - -  
4 - there - - - there - - - the number of reversals  
5 there - - - there - - - in the first eleven months  
6 after Tyrell was decided, there were twenty-nine  
7 reversals. There - - - there have been twenty in the  
8 last - - -

9 CHIEF JUDGE LIPPMAN: Why does it matter?

10 MR. WIENER: - - - eleven mon - - -  
11 there've only - - - it doesn't - - -

12 CHIEF JUDGE LIPPMAN: Why does it matter?

13 MR. WIENER: It doesn't matter because this  
14 about whether this is - - - you know, doctrinally,  
15 there was a new rule in this case and there - - -  
16 there wasn't.

17 JUDGE FAHEY: I guess - - - I guess the  
18 question that kind of leaps out at anybody - - - I  
19 think if you're not a lawyer, you would say to  
20 yourself, you could have gotten a year in jail and  
21 you got two days' conditional discharge - - - or two  
22 days of community service and a conditional  
23 discharge. Why are we here for this? Why challenge  
24 the fact that they didn't read these rights to you?  
25 I can see if - - - if you're in jail and you've got a

1 - - - a more serious crime and - - - and - - - and it  
2 affects your - - - your freedom, it makes all the  
3 sense in the world. Boykin involved the death  
4 penalty. This case is a long way removed from  
5 Boykin.

6 MR. WIENER: Again, this is a misdemeanor;  
7 misdemeanors have serious consequences.

8 JUDGE FAHEY: Well, no, I - - - I accept  
9 all that.

10 MR. WIENER: And - - -

11 JUDGE FAHEY: I accept all that. But in  
12 this circumstance, if you're - - - if we say fine,  
13 your client can - - - the case is remitted, he can  
14 withdraw his plea if he wants?

15 MR. WIENER: It - - - it - - - Your Honor,  
16 it shouldn't be remitted. In Tyrell - - -

17 JUDGE FAHEY: Well, I - - - I understand  
18 that. But - - -

19 MR. WIENER: This a 2009 case - - -

20 JUDGE FAHEY: - - - but then why are we  
21 here at all if the case isn't going to be remitted?  
22 To dismiss the two days of community service?

23 MR. WIENER: Be - - - be - - - because it  
24 was dismissed in Tyrell, it was dismissed in Moore,  
25 it was dismissed in Burwell. We - - - the court's

1           been doing that. This is a 2009 case, to send this  
2           back - - - the guy did two days' community service  
3           which he served - - - would, in my opinion be - - -  
4           not make any sense, Your Honor.

5                       CHIEF JUDGE LIPPMAN: Okay, counsel.  
6           Thanks.

7                       All right, now we're going to do People v.  
8           Perez.

9                       Counsel, you want any rebuttal time?

10                      MR. FERGUSON: Two minutes, Your Honor.  
11           Harold Ferguson for - - -

12                      CHIEF JUDGE LIPPMAN: Two minutes, go  
13           ahead. How does your - - - how does your case fit  
14           into this - - -

15                      MR. FERGUSON: The issue here is - - -

16                      CHIEF JUDGE LIPPMAN: - - - trio?

17                      MR. FERGUSON: - - - what the Appellate  
18           Division got wrong here. The Appellate Division got  
19           wrong is they came to a determination that it didn't  
20           apply because this was a violation. But what they  
21           said was that the only consequence of my client's  
22           guilty plea in this case was a hundred-dollar fine.  
23           That's absolutely wrong. A violation has tremendous  
24           impacts on people.

25                      CHIEF JUDGE LIPPMAN: You think we

1 trivialize it if we don't take it seriously?

2 MR. FERGUSON: Absolutely, Your Honor.

3 Your - - - this court has, from the time of  
4 Hildebrandt back in the 1950s, has drawn a line of  
5 demarcation between traffic offenses and criminal  
6 offense. Whether this constitutes a criminal record  
7 or not, it does have serious consequences for the  
8 defendant. Your Honor, I - - - I know that you are  
9 involved with the Columbia University Pro - - -  
10 Project that ind - - - indicates all the collateral  
11 consequences. My client's violation leads to a two-  
12 year ban from residing in an New York City Housing -  
13 - -

14 JUDGE FAHEY: Yeah, I read that. I read  
15 that. But it's a plea to disorderly conduct, right?

16 MR. FERGUSON: It's a plea to disorderly  
17 conduct. And, Your Honor, more importantly, all of  
18 us are attorneys. Question number 12 on the Bar  
19 application indicates, have you ever been arrested  
20 for a violation? It is something that we as  
21 attorneys, who are attempting to become attorneys,  
22 have to present to the Bar Committee to - - -

23 JUDGE PIGOTT: Did you - - - did you fill  
24 it out appropriately?

25 MR. FERGUSON: I filled it out

1 appropriately.

2 JUDGE PIGOTT: So did I.

3 MR. FERGUSON: I have - - - I have no  
4 record. But there are - - - there have been  
5 attorneys who have worked at the legal - - -

6 JUDGE PIGOTT: Of course, we - - - I don't  
7 think we've ever said to somebody, you know, because  
8 you were found guilty of disorderly conduct, we're  
9 not let - - - going to let you be a lawyer.

10 MR. FERGUSON: However, Your Honor, it has  
11 been the subject of interviews and the Bar Admission  
12 Committee interview has been related to that.

13 CHIEF JUDGE LIPPMAN: So we can't  
14 differentiate by the level of the criminal - - -

15 MR. FERGUSON: Absolutely not, Your Honor.  
16 And - - - and - - -

17 CHIEF JUDGE LIPPMAN: - - - violation or  
18 crime?

19 MR. FERGUSON: - - - in fact it would - - -  
20 it would ignore the entire jurisprudence of this  
21 court dealing with the distinction.

22 JUDGE STEIN: Yeah, but that's here,  
23 though. If we look at the Harris - - - you know,  
24 what's on the record, what do we have on the record?

25 MR. FERGUSON: Well, we have - - -

1                   JUDGE STEIN: We - - - we know that this  
2 wasn't a, you know, arrest, arraignment, and plea all  
3 at the same time or in very close proximity. This is  
4 a case where it was ongoing for several months, seven  
5 months - - - this is for a violation - - - seven  
6 months and if - - - I don't recall if there were  
7 motions or - - - but I think it was pretty actively  
8 litigated. There was obviously an involved attorney.

9                   MR. FERGUSON: But, Your Honor, it - - -

10                  JUDGE STEIN: Why isn't this enough to - -  
11 -

12                  MR. FERGUSON: No.

13                  JUDGE STEIN: - - - to say that - - - that  
14 - - - that the record shows that it was a voluntary -  
15 - -

16                  MR. FERGUSON: Because it would go against  
17 what Tyrell said. Tyrell imposed a - - - an  
18 obligation on the court to make sure that there was  
19 an understanding of what was going on, to assure - -  
20 -

21                  JUDGE PIGOTT: So what was missing here?

22                  MR. FERGUSON: What was missing here was  
23 any - - - if they had asked counsel, did you discuss  
24 the Constitutional implications of this?

25                  JUDGE PIGOTT: Wait, defense counsel is the

1 one who went up there. He said "Judge, we have a  
2 disposition today for Mr. Perez. He's authorized me  
3 to enter a plea of guilty to the added charge of  
4 disorderly conduct", yadda yadda. The court says,  
5 "People, is that in fact the offer?" "Yes."  
6 "Waiving formal allocution", prosecution -- defense  
7 counsel says, "Yes, Judge." And the court says, "Mr.  
8 Perez, your attorney's indicated that you would now  
9 like to plea guilt to the added charge. The plea is  
10 in satisfaction of charges pending against you. Is  
11 that a fact? Do you want to do that?" "Yes." "Have  
12 you had enough time to speak with your lawyer?"  
13 "Yes." "Any objections to the waiver of allocution?"  
14 "No."

15 MR. FERGUSON: But, Your Honor, that's - -  
16 - that's very close to what was in the second Tyrell.

17 JUDGE PIGOTT: What's missing?

18 MR. FERGUSON: What's missing here is any  
19 understanding that mis - - - my client, who was a  
20 neophyte to the criminal justice system - - - this is  
21 only - - - one and only arrest that he has - - -

22 JUDGE PIGOTT: You have ineffective  
23 assistance of counsel here?

24 MR. FERGUSON: It's not ineffective  
25 assistance of counsel. What court - - - the court

1           could have done is ask counsel, what did you advise  
2           him, did you advise him of his Constitutional right?

3                   CHIEF JUDGE LIPPMAN:   What does waiving  
4           formal allocution mean?

5                   MR. FERGUSON:   Waiving formal allocution -  
6           - -

7                   CHIEF JUDGE LIPPMAN:   What - - - what - - -

8                   MR. FERGUSON:   It's - - -

9                   CHIEF JUDGE LIPPMAN:   - - - what's the  
10          significance of it?

11                   MR. FERGUSON:   There is no significance to  
12          it.   Allocution, if you go back to its etymology,  
13          refer to things that the Pope said, a form of creed -  
14          - -

15                   JUDGE PIGOTT:   Oh, stop.

16                   MR. FERGUSON:   No, that - - - that's really  
17          what - - - that's really where it came from.

18                   JUDGE PIGOTT:   I understand that, but  
19          here's the problem.   Here's the - - - just like I was  
20          asking your - - - your co-counsel here; I get all  
21          this.   I - - - I understand.   It's - - - I used to do  
22          this, but I didn't do it, you know, say - - - saying  
23          to my client, I'm going to sit down and tell you, you  
24          know, because this is a misdemeanor, you get a - - -  
25          you get a jury of - - - of six, you don't get twelve,

1 and because - - - and - - - and go through all of  
2 this stuff. The guy says get me the impaired; I'm a  
3 driver, I got to get back to work. You got the kid  
4 that says, you know, I - - - I want to get back to  
5 school, get - - - you know, get this out - - - it - -  
6 - it's - - - it's the process. And to say all of a  
7 sudden - - - I mean, if I truly believed - - - if you  
8 - - - if you truly believe your client said, you  
9 know, if - - - if somebody told me I was entitled to  
10 a jury trial I'd have been there, that would be a  
11 case, it seems to me. But what are we doing?

12 JUDGE FAHEY: Of course, he wouldn't have  
13 been entitled to a jury trial here.

14 MR. FERGUSON: No, it would have been just  
15 a trial.

16 JUDGE PIGOTT: That's for a violation.

17 JUDGE FAHEY: Yeah, yeah, yeah. So now you  
18 - - -

19 MR. FERGUSON: Bec - - - cause that - - -  
20 it was added to a reduced charge.

21 CHIEF JUDGE LIPPMAN: So where - - -

22 JUDGE FAHEY: Judge Pigott's giving you the  
23 benefit of a doubt on that one; I - - - you know, but  
24 - - -

25 JUDGE PIGOTT: I'm giving you - - - yeah.

1 CHIEF JUDGE LIPPMAN: So finish the answer  
2 to your question.

3 MR. FERGUSON: But - - - but go back to - -  
4 -

5 CHIEF JUDGE LIPPMAN: What - - - what does  
6 - - - what do - - - does he have to - - - how much  
7 detail does there have to be about what - - - what  
8 you spoke to your lawyer about?

9 MR. FERGUSON: I think I'd ask an  
10 indication that he understands that he is waiving  
11 certain Constitutional rights. In Tyrell itself,  
12 this court indicated - - -

13 JUDGE FAHEY: So - - - so you're mandating  
14 the litany? Are we open - - -

15 MR. FERGUSON: No, I am not mandating a lit  
16 - - -

17 JUDGE FAHEY: Well, let me ask you this  
18 then. On this case, in the totality of the  
19 circumstances - - - if this case, in the totality of  
20 the circumstances does not meet the Harrit - - -  
21 Harris test and - - - and isn't knowing and voluntary  
22 and intelligent, then we have to overturn Harris on  
23 this case because this seems to be - - -

24 MR. FERGUSON: Abso - - -

25 JUDGE FAHEY: - - - almost requires us to

1 do that and requires a litany.

2 MR. FERGUSON: Absolutely not, Your Honor.  
3 What could have been done here was, as this court  
4 indicated in Tyrell, if a question was posed to  
5 counsel and counsel indicated on the record what he  
6 discussed with his client - - -

7 CHIEF JUDGE LIPPMAN: So do you have to  
8 list the - - - the three different rights? What do  
9 you have to do?

10 MR. FERGUSON: Again, I - - - I - - - I do  
11 believe it goes to the totality of circumstances.

12 CHIEF JUDGE LIPPMAN: Okay, so - - - so  
13 there is no litany?

14 MR. FERGUSON: I - - - I don't believe  
15 there's a litany, but there has to be something that  
16 indicates that - - -

17 JUDGE PIGOTT: What - - - what - - - what?

18 JUDGE FAHEY: Tell me what, in your plea,  
19 you would have required?

20 MR. FERGUSON: I would have had - - -  
21 either had questions asked getting a waiv - - -

22 JUDGE PIGOTT: But what are they? What - -  
23 -

24 MR. FERGUSON: - - - a waiver from my  
25 client or a statement on the record by counsel

1           indicating that he had advised my client of - - -

2                   JUDGE PIGOTT:   Ferguson, what are those  
3           questions?  You keep saying I would have, you know,  
4           asked these questions, I would have seen that he was  
5           satisfied.  What would you ask - - -

6                   MR. FERGUSON:  I would ask counsel - - -

7                   JUDGE PIGOTT:  - - - as the judge?

8                   MR. FERGUSON:  I would ask counsel, did you  
9           discuss the Constitutional rights you - - - that your  
10          client is waiving?

11                  JUDGE PIGOTT:  What Constitutional rights?

12                  MR. FERGUSON:  And that would be the - - -  
13          the right to trial, the right to - - -

14                  JUDGE PIGOTT:  The right to a trial?

15                  MR. FERGUSON:  - - - the ones that are  
16          denoted in Tyrell, but again, not a specific litany.

17                  JUDGE PIGOTT:  No, say it.  Tell them.  Say  
18          it.  Say it.  Because you keep saying, we should have  
19          said this - - -

20                  MR. FERGUSON:  Well - - -

21                  JUDGE PIGOTT:  - - - and I'm - - - I'm  
22          still not sure what we're supposed to say to some kid  
23          who's up here in violation for a disorderly conduct.

24                  MR. FERGUSON:  Well, Your Honor, from even  
25          the first - - - the first sentence of Tyrell

1 indicated what the three rights were: the right to a  
2 trial, the right to con - - - confront the accused  
3 against you - - -

4 JUDGE ABDUS-SALAAM: So then you are asking  
5 for a litany.

6 MR. FERGUSON: - - - and the right to  
7 remain silent.

8 JUDGE ABDUS-SALAAM: You're asking for  
9 litany from the judge. You're asking for a litany -  
10 - - you're asking the judge to ask counsel, what is  
11 the litany that you gave of rights that you told your  
12 client.

13 MR. FERGUSON: Something more than what was  
14 here. What we have here is a silent record.

15 CHIEF JUDGE LIPPMAN: All right, so let's -  
16 - - so let's get it precise. Something more than was  
17 here but not the right to - - - to trial by jury - -  
18 - in your case that's not the case - - -

19 MR. FERGUSON: Right.

20 CHIEF JUDGE LIPPMAN: - - - but not that  
21 specific, but something more than here. So your  
22 basic premise is you got to say that - - - that - - -  
23 you have to say that yes, discussed the - - - the  
24 waiving his Constitutional rights - - -

25 MR. FERGUSON: That's correct, Your Honor.

1 CHIEF JUDGE LIPPMAN: - - - in the broadest  
2 sense?

3 MR. FERGUSON: In a broadest sense - - -

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. FERGUSON: - - - that's what's not  
6 here. And if I could just go back to your question  
7 about - - -

8 JUDGE RIVERA: Okay. Can I - - - can I ask  
9 what - - - what - - - then what of your - - - what is  
10 waived when you waive the allocution?

11 MR. FERGUSON: What's waived, it - - -

12 JUDGE RIVERA: You said it means nothing.

13 MR. FERGUSON: It - - - well - - -

14 JUDGE RIVERA: It must mean something to  
15 counsel and defendant.

16 MR. FERGUSON: It - - - it seems to be like  
17 this pro forma statement. It's our belief - - - and  
18 that's in the parlance of defense attorneys - - -  
19 waiver of formal allocution refers to factual  
20 allocution. If you look at the - - - the history of  
21 allocution over time, how it's met, originally it was  
22 a statement by the Pope, then it became a formal  
23 decree, it became something that - - - that a  
24 defendant would say before sentencing, and then it's  
25 become factual allocution. It is not defined in the

1 Penal Law. It is not defined in statute.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MR. FERGUSON: No court has ever said what  
4 formal allocution - - - and so when my client is told  
5 - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. FERGUSON: - - - that his cli - - - his  
8 attorney waives formal allocution, he has no idea  
9 what that means.

10 CHIEF JUDGE LIPPMAN: Okay, you'll have  
11 your rebuttal. Let's hear from your adversary.

12 MR. WASHER: Good afternoon, Your Honors;  
13 may it please the court; Eric Washer for the Bronx  
14 District Attorney's Office. And - - -

15 CHIEF JUDGE LIPPMAN: Counsel, don't you  
16 have to have some discussion that - - - that - - -  
17 that you know that you're waiving your Constitutional  
18 rights?

19 MR. WASHER: Well - - -

20 CHIEF JUDGE LIPPMAN: "You spoke with your  
21 attorney, what did you discuss"?

22 MR. WASHER: Well - - -

23 CHIEF JUDGE LIPPMAN: Doesn't something  
24 have to be said that they are under - - - the  
25 defendant has an understanding - - -

1 MR. WASHER: Well - - -

2 CHIEF JUDGE LIPPMAN: - - - of what he or  
3 she is giving away here?

4 MR. FERGUSON: Well, preliminar - - -  
5 preliminarily, I mean, I - - - Your Honor, I think  
6 the claim is waived. He waived - - - the defense  
7 counsel waived an allocution.

8 CHIEF JUDGE LIPPMAN: What does that mean -  
9 - -

10 MR. WASHER: Well, it doesn't - - -

11 CHIEF JUDGE LIPPMAN: - - - the formal  
12 allocution? What does it mean?

13 MR. WASHER: - - - it doesn't mean - - - it  
14 doesn't mean factual allocution, because in this case  
15 he was - - -

16 CHIEF JUDGE LIPPMAN: What does it mean?

17 MR. WASHER: It means an address from the  
18 court about all of the consequences that he's  
19 pleading, that's the only - - - giving up by pleading  
20 guilty. That's the only thing - - -

21 CHIEF JUDGE LIPPMAN: So that's enough to  
22 say, I give up all my Constitutional rights? That's  
23 translated to mean I - - - I understand that - - -  
24 that I have no - - -

25 MR. WASHER: That's enough - - -

1 CHIEF JUDGE LIPPMAN: - - - Constitution -  
2 - - I'm giving them away?

3 MR. WASHER: That's enough in the context  
4 of this case when he's pleading guilty to disorderly  
5 conduct, Your Honor. And that's not the - - -

6 CHIEF JUDGE LIPPMAN: What's the difference  
7 what he's pleading guilty to?

8 MR. WASHER: Your Honor, there is a  
9 difference. And Harris - - -

10 CHIEF JUDGE LIPPMAN: What's the  
11 difference?

12 MR. WASHER: - - - Harris - - - Harris  
13 makes clear there's a difference, because Harris says  
14 that the seriousness of the offense is a factor that  
15 the court can consider in deciding the depth of the  
16 allocution that is necessary in its discretion. So  
17 Harris itself acknowledges, there's going to be a  
18 sliding scale.

19 CHIEF JUDGE LIPPMAN: So if it's a lower-  
20 level violation or whatever it is - - -

21 MR. WASHER: Yeah.

22 CHIEF JUDGE LIPPMAN: - - - basically, you  
23 give up your Constitutional rights because it's not  
24 important? Does - - - isn't all crime important?  
25 Doesn't it all have its consequence - - -

1 MR. WASHER: Of course.

2 CHIEF JUDGE LIPPMAN: - - - no matter how -

3 - -

4 MR. WASHER: Of course.

5 CHIEF JUDGE LIPPMAN: - - - minor, if it's  
6 criminal, every crime has its consequence?

7 MR. WASHER: Of course, but - - -

8 CHIEF JUDGE LIPPMAN: And we do know about  
9 collateral consequences. So - - - so why isn't it -  
10 - - why does it matter that it's disorderly conduct?

11 MR. WASHER: It matters because this  
12 court's precedents - - - Boykin itself makes clear  
13 that the seriousness of the offense is going to  
14 dictate the degree of allocution that exists.

15 JUDGE PIGOTT: We don't know any more - - -  
16 you can be deported, I think, for possession of  
17 marijuana.

18 MR. WASHER: Yes, but not for disorderly  
19 conduct, Your Honor. And - - -

20 JUDGE PIGOTT: No, but this - - - this guy  
21 - - - I mean, I - - - I don't know what the other one  
22 was about, failing to disclose a recording was, but -  
23 - -

24 MR. WASHER: But I - - - I should say - - -

25 JUDGE PIGOTT: - - - my - - - my point was

1           - - - was only this, that - - - let's assume for a  
2           minute that - - - that we - - - we - - - we don't go  
3           your way. Is it a big deal to tell a - - - somebody  
4           who's about to take a - - - take a plea, you know,  
5           you have a right to a trial before, you know, a fact-  
6           finder, and you have a right to remain silent, and  
7           they've got to produce witnesses, do you still want  
8           to plead guilty?

9                       MR. WASHER: It's not a big deal, Your  
10           Honor, but - - - and - - - and maybe it's the best  
11           practice, but the question is does Boykin require it,  
12           and does Tyrell require it, does the Constitution  
13           require it? And here, when you look at all of the  
14           circumstances - - -

15                      CHIEF JUDGE LIPPMAN: But doesn't there  
16           have to be at least something that translates into  
17           what Judge Pigott is saying? Even if you don't say  
18           it in those exact words - - -

19                      MR. WASHER: Well - - -

20                      CHIEF JUDGE LIPPMAN: - - - do you - - -  
21           don't you have to say listen, you're giving up your  
22           Constitutional rights here? Don't even list what the  
23           three is; your adversary says, just - - - just get it  
24           across that you know what you're doing. What's wrong  
25           with that?

1 MR. WASHER: Well, his attorney waived  
2 allocution, so that in itself - - -

3 CHIEF JUDGE LIPPMAN: Yeah, yeah, but we're  
4 disputing what - - -

5 MR. WASHER: Right.

6 CHIEF JUDGE LIPPMAN: - - - that's the  
7 whole dialogue to tell - - -

8 MR. WASHER: Okay.

9 CHIEF JUDGE LIPPMAN: - - - what it means  
10 to waive formal allocution.

11 MR. WASHER: Right, and I think it means  
12 necessarily, the attorney is communicating to the  
13 court that the voluntary nature of the plea is not -  
14 - -

15 CHIEF JUDGE LIPPMAN: That the guy - - -  
16 he's communicating that the guy said he's giving up  
17 his Constitutional rights?

18 MR. WASHER: Well, that's not a great leap  
19 of faith here in this case, Your Honor, because if  
20 you look - - -

21 CHIEF JUDGE LIPPMAN: Say that again?

22 MR. WASHER: It's not - - - that's not a  
23 great leap of faith here, Your Honor, because in this  
24 case, it was adjourned for an entire month so that  
25 the defendant could consider whether he wanted to

1 take the plea.

2 CHIEF JUDGE LIPPMAN: Doesn't someone have  
3 to say, listen, he gets it, we talked about this,  
4 he's giving up his Constitutional rights?

5 MR. WASHER: Well, he - - - the defend - -  
6 -

7 CHIEF JUDGE LIPPMAN: Isn't it important  
8 enough that someone say it?

9 MR. WASHER: Well, the defendant in this  
10 case told the court he had enough time to talk about  
11 the plea with his attorney. That is also record  
12 evidence.

13 CHIEF JUDGE LIPPMAN: Yeah, yeah, but  
14 that's one step removed from what I'm asking you.

15 MR. WASHER: It is one step removed, but I  
16 think the only reasonable inference is that he  
17 understands the consequences of his plea.

18 CHIEF JUDGE LIPPMAN: Is this the kind of  
19 thing that should be done by inference?

20 MR. WASHER: Your Honor, we have a  
21 tremendous record in this case. This was litigated  
22 over eight months; motions were filed, hearings were  
23 ordered. If you look, over time, the plea offer gets  
24 better. There's - - - I think it's - - -

25 CHIEF JUDGE LIPPMAN: So in each case we're

1 going to say, oh, in this case, it's minor, it's been  
2 on a long time, he must give up his Constitutional  
3 rights, when in another case we're going to say, this  
4 is a little more serious, there's a shorter period of  
5 time, huh-uh, we need to require - - - it can't be  
6 like that. It can't be by the seat of our pants,  
7 right?

8 MR. WASHER: No, respectfully, Your Honor,  
9 it can be, because we're looking at - - -

10 CHIEF JUDGE LIPPMAN: Can it be by the seat  
11 of our pants in these?

12 MR. WASHER: No, no, no.

13 CHIEF JUDGE LIPPMAN: That's how you  
14 determine whether you give up Constitutional rights?

15 MR. WASHER: No, this was not a seat-of-  
16 your-pants situation, Your Honor. This was a case  
17 that was litigated over eight months and was - - -

18 CHIEF JUDGE LIPPMAN: Yes, but I'm saying,  
19 doesn't there have to be a common framework, whether  
20 it's on one extreme or the other, whether it's saying  
21 our litany, you must say I'm giving up this right and  
22 that right or the other right; whether you don't  
23 really have to say too much of anything and it could  
24 all be by inference; or there's at least something  
25 concrete that gets across the fact that he

1 understands he's giving up his - - - his  
2 Constitutional right? It can't be that on each case  
3 we figure out, eh, maybe there he should have said or  
4 he shouldn't. There's got to be some kind of rule,  
5 some kind of a precedent that we're laying down,  
6 right?

7 MR. WASHER: But I think that would be a  
8 departure from Harris, Your Honor, which says that  
9 there is not - - - does not have to be uniform  
10 mandatory catechism. You have to look at all of the  
11 circumstances - - -

12 CHIEF JUDGE LIPPMAN: But does there have  
13 to be something, if not uniform, that gets across  
14 that you're giving up your Constitutional rights?  
15 That's not uniformity with a litany of words. It's  
16 that we understand on a serious issue of giving up  
17 your Constitutional rights that that's what you're  
18 doing. And if it's not a litany, if it's short of a  
19 litany, it can't be nothing, there's got to be  
20 something. What's the something?

21 MR. WASHER: Well, here, Your Honor, the  
22 defendant said he had enough time to talk to his  
23 attorney about the plea and - - -

24 CHIEF JUDGE LIPPMAN: Okay, let's stop.

25 MR. WASHER: Okay.

1 CHIEF JUDGE LIPPMAN: So you're saying the  
2 rule is, if he says I talked to my attorney about the  
3 plea, good enough?

4 MR. WASHER: No, because that's not all we  
5 have here, Your Honor. We have the defense - - -

6 CHIEF JUDGE LIPPMAN: What's the rule,  
7 counsel?

8 MR. WASHER: The rule is that you have to  
9 look at the totality of the circumstances. You have  
10 to look at everything, and you don't have to limit  
11 yourself to the four corners of the plea allocution.  
12 You can look at everything. Here, there is very  
13 compelling evidence that this was a knowing and volun  
14 - - -

15 CHIEF JUDGE LIPPMAN: We have to give some  
16 guidance, don't we?

17 MR. WASHER: Yes, absolutely. But there's  
18 also been a rejection of the system that a uniformy -  
19 - - uniform catechism system. I don't think that  
20 that would be any more meaningful than what happened  
21 here.

22 JUDGE RIVERA: But, counsel, I guess what  
23 I'm - - - I'm finding difficulty in and here's where  
24 you can help me, is it seems that you're saying a lot  
25 of time passed - - -

1 MR. WASHER: Um-hum.

2 JUDGE RIVERA: - - - he seemed to have had  
3 a lawyer who was very aggressive during that period  
4 of time.

5 MR. WASHER: Absolutely.

6 JUDGE RIVERA: He got an even better deal  
7 than the one he was offered before.

8 MR. WASHER: Um-hum.

9 JUDGE RIVERA: And that must mean that he  
10 understands he's giving up his rights.

11 MR. WASHER: But that's not - - -

12 JUDGE RIVERA: But it strikes me that's - -  
13 - that's what I'm missing there, as opposed to that  
14 means he understands he's gotten a good offer. I can  
15 - - - I understand your argument about that.

16 MR. WASHER: Well, but there is one other  
17 piece, and I do think it's significant, that this  
18 case was adjourned for a whole month so that he could  
19 consider whether he wanted to take the offer. Now -  
20 - -

21 JUDGE RIVERA: No, I understand - - - I - -  
22 - I - - - I understand your argument about that, that  
23 he's had a - - - a significant amount of time to  
24 consider the offer - - -

25 MR. WASHER: Correct.

1                   JUDGE RIVERA: - - - and to consider taking  
2                   the plea. But the question is whether or not he  
3                   understand what he's giving up when he does that. He  
4                   may very well understand what he's getting. The  
5                   question is does he understand these rights that he's  
6                   giving up.

7                   So where - - - I - - - I appreciate what  
8                   you're saying; beyond the four corners of the plea,  
9                   beyond the transcript of the plea, what - - - what  
10                  else is there, or is there something specific in the  
11                  plea that tells us about those rights? I think  
12                  that's what we're all - - - what some of us are  
13                  asking you about.

14                  MR. WASHER: Right. Well, I - - - no,  
15                  there is - - - of course there's no express mention  
16                  of the Boykin rights in this case. I mean, that is  
17                  the issue. But the issue is whether you can glean  
18                  from everything that happened that this was a  
19                  voluntary, intelligent choice - - -

20                  JUDGE RIVERA: Yeah, but that's what I'm  
21                  saying. What - - - what he refers to as the plea,  
22                  which is not the rights - - - I could see your point  
23                  if he - - - if the court said have you had enough  
24                  time to speak to Ms. Goetz, the lawyer, about this  
25                  plea and your rights, and he says yes, I could see

1 your argument there.

2 MR. WASHER: Um-hum.

3 JUDGE RIVERA: Because you've got the  
4 mention of the - - - of these words "and rights".

5 MR. WASHER: But - - -

6 JUDGE RIVERA: We might not what know what  
7 they are, but I would see your argument there.

8 MR. WASHER: Um-hum.

9 JUDGE RIVERA: Where's the argument about  
10 the rights and the understanding of the rights? Does  
11 it boil down to the interpretation of forfeiting this  
12 formal allocution? Is that - - -

13 MR. WASHER: Yes, that - - -

14 JUDGE RIVERA: - - - really what this is  
15 about?

16 MR. WASHER: That - - - well, that's a big  
17 part of it as well. She's waiving an allocution. I  
18 think it's significant for two reasons. One, it's a  
19 preservation reason. The Lopez-Louree exception says  
20 that if it - - -

21 JUDGE RIVERA: Does - - - does waiving  
22 allocution mean the same thing in - - - every time a  
23 defense lawyer says that? Is it exactly the same  
24 thing regardless of the county and regardless of the  
25 judge?

1 MR. WASHER: I think - - -

2 JUDGE RIVERA: Always the same thing?

3 MR. WASHER: I think it - - - I think it  
4 boils down to the same thing that he's not going to  
5 get - - - the defendant's not going to get the depth  
6 of the allocution that he might otherwise have  
7 gotten. Now, if - - -

8 JUDGE RIVERA: He says it's only about the  
9 facts.

10 MR. WASHER: I don't think that's  
11 reasonable on this record. He's pleading guilty to a  
12 bargained-for disposition. He's not going to  
13 allocute to the elements of disorderly conduct in  
14 this particular case. So I don't think that makes  
15 sense, Your Honor.

16 JUDGE ABDUS-SALAAM: Do we have to assume  
17 that the defense counsel is at least minimally  
18 competent and would give some sort of advice about  
19 what the defendant is giving up - - -

20 MR. WASHER: Yes, I think we do.

21 JUDGE ABDUS-SALAAM: - - - as opposed to  
22 what the defendant is also getting?

23 MR. WASHER: I think that we can assume  
24 that both things happened, particularly when they  
25 have a full month to determine the merits of the

1 offer. The - - - we have to assume that she would  
2 have explained to him that if he pleads guilty to  
3 disorderly conduct, he's not going to have a trial.  
4 And I do think that that waiver is important. I  
5 don't think this claim is preserved. If this  
6 attorney had simply said to the judge, no, I'm not  
7 waiving allocution, I want you to explain to my  
8 client the rights he's giving up by pleading guilty,  
9 there would be no error, he would have gone into  
10 greater detail.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. WASHER: Thank you.

13 CHIEF JUDGE LIPPMAN: Thanks, counsel.

14 Okay, rebuttal, counsel.

15 MR. FERGUSON: Your Honor, the record here  
16 is silent as to the waiver of my client's  
17 Constitutional rights. No court has ever defined  
18 what formal allocution means. Normal parlance was  
19 that it refers to factual allocution. This court has  
20 never held it - - -

21 JUDGE RIVERA: Well, if no one knows what  
22 it means, how does the defendant know what it means?

23 MR. WASHER: Exactly, Your Honor. That's  
24 the exact - - -

25 JUDGE PIGOTT: Well, I'm surprised that

1 people don't know what it means. I'm - - - I mean,  
2 my goodness, that's about as common a phrase as  
3 you'll ever - - -

4 MR. FERGUSON: Right.

5 JUDGE PIGOTT: - - - hear in a court. So  
6 should we go back - - - send it back and let the  
7 judge explain what he meant by allocution and then we  
8 can - - - then the the defendant - - -

9 MR. FERGUSON: Abso - - - absolutely not,  
10 Your Honor.

11 JUDGE PIGOTT: Why not? I mean it's an  
12 important - - -

13 MR. WASHER: What - - - I - - - I believe  
14 what we - - -

15 JUDGE PIGOTT: - - - it's an important  
16 right that he was denied, and he ought to be given it  
17 before he decides whether he's going to plead guilty  
18 or not, and therefore we should send it back, don't  
19 you think?

20 MR. FERGUSON: Absolutely not, Your Honor.  
21 It - - - it's our understanding that allocution  
22 referred to factual allocution because there is no  
23 case that says - - - on record that indicates that  
24 waiver of allocution means waiver of your  
25 Constitutional rights. It means waiver of factual

1 allocation.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 JUDGE ABDUS-SALAAM: Well, why couldn't - -

4 -

5 CHIEF JUDGE LIPPMAN: Oh, sorry.

6 JUDGE ABDUS-SALAAM: - - - why wouldn't

7 counsel say that? We - - -

8 MR. FERGUSON: What's that?

9 JUDGE ABDUS-SALAAM: Why wouldn't defense  
10 counsel say that, Judge, we waive factual allocution?

11 MR. FERGUSON: Because it's become almost  
12 this cryptic way - - - it's this pro forma thing  
13 that's taken in pleas which is the exact reason that  
14 we brought Tyrell here back in December of 2013.

15 JUDGE RIVERA: But in - - - but in those  
16 pleas, people don't discuss their rights, so why - -  
17 - why doesn't it tip the other way that by - - - that  
18 waiving formal allocution must also include the  
19 rights - - -

20 MR. FERGUSON: I don't believe it does.

21 JUDGE RIVERA: - - - since no one talks  
22 about his rights?

23 MR. FERGUSON: Again, Your Honor, it would  
24 be - - - and it would be something that my client,  
25 who's a neophyte - - - if there's never been a court

1 case that indicates, how does my client know that by  
2 counsel, by say - - - uttering a phrase that he has  
3 never heard before is going to understand what that  
4 means - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 JUDGE FAHEY: What - - - what - - - what -  
7 - -

8 CHIEF JUDGE LIPPMAN: Sorry, Judge Fahey.

9 JUDGE FAHEY: What remedy are you ask - - -  
10 I - - - I'm asking everybody this.

11 MR. FERGUSON: Right. I - - -

12 JUDGE FAHEY: What remedy are you asking  
13 for?

14 MR. FERGUSON: I want do this in a  
15 practical basis. I was here two-and-a-half years ago  
16 with this court in People v. Wells against the same  
17 district attorney's office, who fought tooth and  
18 nail. It was a misdemeanor case involving drunk  
19 driving. They fought tooth and nail saying that we  
20 should not get Burwell relief, that they were  
21 insistent on trying Mr. Wells again.

22 He was never produced in court when it was  
23 remanded. The People sua sponte ended up dismissing  
24 the case without ever appearing, without even counsel  
25 appearing. So for the People to - - -

1                   JUDGE FAHEY: Okay, that's fine. But what  
2 about in this case? You've got a hundred-dollar  
3 fine?

4                   MR. FERGUSON: We got a hundred-dollar  
5 fine, Your Honor, and it's many years after it. I  
6 believe that the approp - - - the appropriate  
7 disposition here would be - - -

8                   JUDGE PIGOTT: Well, can you make that  
9 representation without your client?

10                  JUDGE FAHEY: Or do you need a formal  
11 allocution?

12                  MR. FERGUSON: Your Honor, again, it would  
13 be if - - - if - - -

14                  JUDGE PIGOTT: I'm just picking on you.

15                  MR. FERGUSON: No, but - - - but, Your  
16 Honor, just to answer your question, this does  
17 frequently come up in this situation and it is - - -

18                  JUDGE FAHEY: Well, in fairness, is there -  
19 - -

20                  MR. FERGUSON: - - - part of the discussion  
21 whenever - - - whenever we are raising an issue that  
22 re - - - that could result in dismissal or a new  
23 trial and we have not said, limit it simply to  
24 dismissal, it - - - we have an ethical obligation to  
25 our client.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Judge  
2 Fahey, last question.

3 JUDGE FAHEY: Yeah.

4 CHIEF JUDGE LIPPMAN: Go ahead.

5 JUDGE FAHEY: Just so I'm clear, you would  
6 check with your client, is basically what you're  
7 saying?

8 MR. FERGUSON: What was that?

9 JUDGE FAHEY: You - - - you're saying you  
10 would check with your client before you would  
11 articulate what remedy you were seeking?

12 MR. FERGUSON: No, we would articulate - -  
13 - yes, before we filed the brief, because if we were  
14 simply asking for dismissal - - -

15 JUDGE FAHEY: So - - - so here today - - -

16 MR. FERGUSON: That would be - - - our goal  
17 would be dismissal. We would accept, of course, a  
18 reversal, but we think that line of Tyrell and what  
19 happened before - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 Thanks a lot, counsel.

22 MR. FERGUSON: Thank you.

23 CHIEF JUDGE LIPPMAN: Okay, let's go to the  
24 third case, People v. Sanchez.

25 MS. HUMMEL: May it please the court,

1 Jordan Hummel for the Office of the District  
2 Attorney, Bronx County.

3 CHIEF JUDGE LIPPMAN: Okay, counsel. How  
4 does this case fit in with the other two?

5 MS. HUMMEL: This case fits in in that the  
6 defense counsel waived allocution and that the  
7 defendant pled guilty to a misdemeanor so - - -

8 CHIEF JUDGE LIPPMAN: All - - - all right,  
9 so what is to waive allocution mean?

10 MS. HUMMEL: So waiving allocution - - -  
11 allocution means a discussion between the People,  
12 defense counsel as defendant's agent, defendant, and  
13 the court about the terms of the plea bargain. It's  
14 - - -

15 CHIEF JUDGE LIPPMAN: It's the whole kit  
16 and caboodle, including your Constitutional rights?

17 MS. HUMMEL: Yes, it can be.

18 CHIEF JUDGE LIPPMAN: Yeah? How so?

19 MS. HUMMEL: Because it's an accepted term,  
20 and I believe that courts have been using this  
21 practice - - -

22 CHIEF JUDGE LIPPMAN: What about Boykin?  
23 What's the - - - how does this - - - this comport  
24 with the - - - the spirit as well as the literal  
25 reading of Boykin?

1 MS. HUMMEL: Well, I mean, I think the  
2 distinguishing factor is between Boykin, the fact  
3 that Boykin was pleading guilty to five felony counts  
4 of robbery. That - - -

5 CHIEF JUDGE LIPPMAN: So it's the  
6 seriousness? If it's serious, then you - - - we got  
7 to watch before we give away your Constitutional  
8 rights, and if it's a less serious crime, we don't  
9 have to be so careful?

10 MS. HUMMEL: No, you always have to be  
11 careful, but I think that it is a sliding scale  
12 depending on what the consequences are going to be  
13 for the particular - - -

14 CHIEF JUDGE LIPPMAN: I'm sorry, counsel.  
15 Let me stop you.

16 MS. HUMMEL: Sure.

17 CHIEF JUDGE LIPPMAN: Do you want rebuttal  
18 time?

19 MS. HUMMEL: Oh, yes; two minutes, please.

20 CHIEF JUDGE LIPPMAN: Two minutes, keep - -  
21 - keep going.

22 JUDGE PIGOTT: Let me - - - let me - - -

23 CHIEF JUDGE LIPPMAN: Go ahead. Judge  
24 Pigott.

25 JUDGE PIGOTT: I - - - I apologize for - -

1 -

2 MS. HUMMEL: No problem.

3 JUDGE PIGOTT: - - - but we - - - we keep  
4 arguing over what - - - what an allocution is.

5 MS. HUMMEL: Um-hum.

6 JUDGE PIGOTT: We say, "waived allocution"  
7 and we - - - when they properly allocute, let's say  
8 in a first-degree robbery case and somebody says I'm  
9 - - - I'm willing to take a plea to a reduced robbery  
10 third, what is the allocution that you have to go  
11 through to - - - to accept that plea if you're a  
12 court?

13 MS. HUMMEL: In a robbery case?

14 JUDGE PIGOTT: Yeah.

15 MS. HUMMEL: I believe that you would need  
16 to go through the con - - - the Boykin rights that  
17 we're talking about here. You would need - - -

18 JUDGE PIGOTT: Everybody said Boykin, but I  
19 don't think anybody knows what they are. I mean,  
20 what - - - what are - - -

21 MS. HUMMEL: I mean, I don't think Boykin  
22 knows what they are. I mean, Boykin listed those  
23 three rights as far as - - -

24 JUDGE PIGOTT: What are they?

25 MS. HUMMEL: - - - a jury trial, cross-

1 examining witnesses, and - - - I'm blanking on the  
2 last one.

3 JUDGE RIVERA: Self - - - self-  
4 incrimination.

5 JUDGE FAHEY: Self-incrimination.

6 MS. HUMMEL: Self-incrimin - - - the  
7 privilege against self-incrimination. So those are  
8 the three rights that Boykin listed, but as this  
9 court held in - - - I believe in Harris - - -

10 JUDGE PIGOTT: But more than that, I - - -  
11 you know, on - - - if it - - - if you're pleading on  
12 a felony, I think you go into greater detail than  
13 that, do you not?

14 MS. HUMMEL: Yes, you would go into greater  
15 detail. But in a misdemeanor, where you have a - - -

16 JUDGE PIGOTT: No, I understand that. I'm  
17 - - - I'm just - - - I'm still back on the  
18 definition. So when - - -

19 MS. HUMMEL: Sure - - -

20 JUDGE PIGOTT: - - - when you're asking a  
21 client to allocute in a major felony case, you're  
22 asking them a lot of questions?

23 MS. HUMMEL: Yes.

24 JUDGE PIGOTT: More than the three?

25 MS. HUMMEL: Yes.

1 JUDGE PIGOTT: And - - - and why do you do  
2 all that? I mean what's the big deal?

3 MS. HUMMEL: I think because of the  
4 seriousness of the offense and the seriousness of the  
5 consequences to the defendant and - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but you know  
7 about collateral consequences. How could you  
8 possibly say in the misdemeanor cases it's less  
9 important? There are things that the collateral  
10 consequence of a "less serious", in quotes, case  
11 could be more - - - have more of an impact than in a  
12 - - - than in a so-called "more serious" case. Isn't  
13 that possible?

14 MS. HUMMEL: That is possible but that's  
15 not the case that we have here. Defendant here is  
16 not - - -

17 JUDGE PIGOTT: Still - - - still, shouldn't  
18 we then take the allocution that you were about to go  
19 through with respect to a robbery third and apply it  
20 to this DWI?

21 MS. HUMMEL: You could, but I think that  
22 where the - - - you're looking at the totality of the  
23 circumstances, so the allocution is one part of it,  
24 but we're also going to look at everything else  
25 that's happened in the case to understand if the

1 defendant is knowingly, intelligently, and  
2 voluntarily taking a plea to that crime and accepting  
3 the consequences that are attached to it. In this  
4 case, this was a non-incarceratory sentence with a  
5 minimum fine that was prescribed by the statute.

6 CHIEF JUDGE LIPPMAN: But it seems to defy  
7 common sense to be saying that - - - that - - - that  
8 the seriousness of the crime determines how seriously  
9 we take your Constitutional rights. Doesn't make  
10 sense.

11 MS. HUMMEL: I think the - - - I mean - - -

12 JUDGE FAHEY: Yeah, wouldn't - - - wouldn't  
13 a better distinction be drawn between non-criminal  
14 offenses and criminal offenses? I can see that  
15 distinction - - - even though counsel obviously  
16 doesn't agree, but that's okay. But what I - - - I  
17 have a hard time seeing how this wouldn't be a  
18 serious consequence. First off, it could set up  
19 future charges for felonies in - - - in DWI. I mean  
20 the endless ramifications, it could have employment  
21 ramifications, and - - - and there seems an enormous  
22 level of civil ramifications. It can affect your  
23 insurance rates, it can affect even your ability to  
24 drive which could affect your ability to work. So it  
25 can kind of be a life-altering experience for someone

1 to have this kind of a charge on their record.

2 And the law doesn't - - - the law draws a  
3 distinction between criminal and non-criminal, which  
4 - - - which I can rationalize, but I have a hard time  
5 rationalizing the difference between the grades of  
6 criminality. That seems to me a distinction without  
7 a difference.

8 MS. HUMMEL: I think that the best way to  
9 distinguish it is between incarceratory and non-  
10 incarceratory sentences.

11 JUDGE FAHEY: Well, that - - - that - - -  
12 that's a matter of plea negotiations, somebody's  
13 criminal record and - - - and you're right, the  
14 totality of the circumstances imply that, but it  
15 isn't enough in and of itself to dismiss with a  
16 litany. The question is whether a litany should be  
17 given in all circumstances, right?

18 MS. SCHWARZ: Right, and we believe that no  
19 litany should be required in keeping with what this  
20 court has said before. And additionally - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but what's a  
22 litany? If you don't - - - if - - - is it a litany  
23 if you don't list the three rights that you're giving  
24 away but you say, you know, that - - - did you talk  
25 about - - - yeah, there my client talked to me or we

1 talked about he's waiving his Constitutional rights?

2 Is that a litany - - -

3 MS. HUMMEL: So - - -

4 CHIEF JUDGE LIPPMAN: - - - or is that just  
5 enough to let us know that the defendant understands  
6 he's giving away his Constitutional right? You know  
7 what I'm saying? What's a litany?

8 MS. HUMMEL: I think that a litany would be  
9 where you have to say these three rights that were  
10 listed in Boykin.

11 CHIEF JUDGE LIPPMAN: Okay, so let's say we  
12 say - - - let's just suppose that we say you don't  
13 have to say that you're giving away - - - you know,  
14 the - - - the jury trial, whatever it is, but we do  
15 say you do have to understand that you're giving away  
16 Constitutional rights by taking this plea. What's  
17 wrong with that?

18 MS. HUMMEL: I think that, you know, there  
19 are many ways to say that. Here, the defense counsel  
20 - - -

21 CHIEF JUDGE LIPPMAN: Let's say if we said  
22 it just that way.

23 MS. HUMMEL: That would - - -

24 CHIEF JUDGE LIPPMAN: What's wrong with  
25 that?

1 MS. HUMMEL: There's nothing wrong with  
2 that. I think that's a great record, but - - -

3 CHIEF JUDGE LIPPMAN: So don't you think we  
4 should require at least that?

5 MS. HUMMEL: No, because I think that then  
6 you - - - you know, you are sticking to the script  
7 and the so-called line.

8 JUDGE STEIN: Well, what about - - - how -  
9 - - how about like in waiver of the right to appeal;  
10 what - - - what do we require there?

11 MS. HUMMEL: For the waiver in the right to  
12 appeal?

13 JUDGE STEIN: Um-hum, yeah.

14 MS. HUMMEL: You have to separate it away  
15 from the trial rights.

16 JUDGE STEIN: So - - - so - - -

17 MS. HUMMEL: So - - -

18 JUDGE STEIN: - - - we say that there's  
19 something that you have to show on the record so that  
20 we know that the defendant understood what that  
21 meant.

22 MS. HUMMEL: Yes.

23 JUDGE STEIN: Even if it just means did  
24 your attorney explain it to you, you understand it,  
25 yes, okay.

1 MS. HUMMEL: Yes.

2 JUDGE STEIN: How does - - - how does that  
3 compare to - - - to - - - to these rights?

4 MS. HUMMEL: I don't - - - those - - - I  
5 think that this is a good comparison in that - - -  
6 you know, you don't have the specific words that you  
7 need to say. You can - - -

8 JUDGE STEIN: But we don't - - - in - - -  
9 in the waiver right to appeal cases, we don't look to  
10 the all the totality of the circumstances and say  
11 even without anything that specifically refers to  
12 that right to appeal, we can cobble that together and  
13 say yeah - - - but - - - but - - - but it shows that  
14 he had time, he talked to his counsel generally so we  
15 can assume that his attorney explained to him what  
16 the waiver of right to appeal meant. We don't do  
17 that in those cases. Why should we do that here?

18 MS. HUMMEL: I think that we should do it  
19 here because there are just - - - you know, when  
20 you're talking about the waiver of the right to  
21 appeal, it's just - - - it - - - it - - - to me, it's  
22 a more limited record. Here, when you're talking  
23 about your right to trial, we have defense counsel in  
24 this case saying, you know, the case is on trial  
25 today, but my pli - - - client would like to plead

1 guilty. I think that's strong evidence that the  
2 defendant is aware of his trial rights. It's being  
3 spoken about in front of him, he says nothing about  
4 it.

5 CHIEF JUDGE LIPPMAN: So there's no need to  
6 say anything - - -

7 MS. HUMMEL: He says he wants to plead  
8 guilty.

9 CHIEF JUDGE LIPPMAN: - - - about giving  
10 away rights? Once you're saying I'm willing - - -

11 MS. HUMMEL: I - - -

12 CHIEF JUDGE LIPPMAN: - - - to take the  
13 plea, I'm taking the plea?

14 MS. HUMMEL: I think where defense counsel  
15 has already mentioned some of the rights and where  
16 they have also waived allocution, which is a term  
17 that they understand or should not be waiving on the  
18 record if they do not understand it, then I think  
19 that you - - - there is no need. When the defense  
20 counsel waives allocution, it's as if the court had  
21 asked, do I need to - - -

22 CHIEF JUDGE LIPPMAN: I get it. When I say  
23 - - - so your view is - - -

24 MS. HUMMEL: - - - explain.

25 MS. HUMMEL: - - - if you're taking the

1 plea and if you say I waive further or formal  
2 allocution, the two of those together is a waiver of  
3 your Constitutional rights?

4 MS. HUMMEL: Yes, because I think that we  
5 can - - -

6 CHIEF JUDGE LIPPMAN: In all circumstances?

7 MS. HUMMEL: No, because I think you do  
8 need to look at the totality. In a case like this  
9 where it's litigated over six months, the case was  
10 scheduled for trial, defense counsel says we're here  
11 for trial today but my client would like - - - would  
12 prefer to plead guilty, I think that that shows on  
13 the record that the plea was knowing.

14 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
15 hear from your adversary and then you'll have your  
16 rebuttal.

17 Counselor.

18 MS. SCHWARZ: Kristina Schwarz with The  
19 Legal Aid Society.

20 CHIEF JUDGE LIPPMAN: Address what your  
21 adversary says. That your adversary says, if - - -  
22 if you take the plea and there is some language about  
23 waiving further allocution - - - allocution or formal  
24 allocution, you're giving up your Constitutional  
25 rights. Why aren't you? Why isn't it obvious from

1 all the circumstances that you're giving that up?

2 MS. SCHWARZ: Well, just like Mr. Ferguson  
3 said, waiver of allocution is an undefined term.

4 JUDGE STEIN: Well, what - - - what - - -  
5 what do most defense attorneys think that means?

6 MS. SCHWARZ: In my experience - - - and I  
7 have been a - - - a trial attorney in jurisdictions  
8 in the First Department and the Second Department. I  
9 was a trial attorney for more than ten years and now  
10 on appeal I do primarily appeals of guilty pleas.

11 JUDGE STEIN: What - - - what do you think  
12 it means?

13 MS. SCHWARZ: Primarily - - - a - - -

14 JUDGE STEIN: Waiver of allocution, what do  
15 you think it means?

16 MS. SCHWARZ: Prim - - - primarily, it  
17 means waiver of the factual allocution. How - - -

18 JUDGE STEIN: Okay, so in all of these  
19 cases that we're hearing about where, you know, all -  
20 - - all of these re - - - these cases that are up for  
21 reversal, and - - - and the court isn't mentioning  
22 the Boykin rights at all or even referring to them at  
23 all, so what - - - what are defense counsel doing  
24 there? When they say - - - and I'm limiting it to  
25 cases where they waive allocution. So that they're

1 sitting there thinking to themselves okay, well, I -  
2 - - I only waive factual allocution and we're not  
3 getting the allocution of the - - - of the Boykin  
4 rights, but I'm just going to sit here and remain  
5 silent and then maybe my client will have a ground  
6 for appeal. Is that what's going on?

7 MS. SCHWARZ: I don't think that's what's  
8 going on.

9 JUDGE STEIN: So what is - - - what is  
10 going on, then, if this is so prevalent?

11 MS. SCHWARZ: Well, I don't know that it's  
12 so prev - - - prevalent. It - - - I - - - I think  
13 there - - - there's been thirty-six reversals; I  
14 think primarily most pleas, even misdemeanor pleas at  
15 arraignment, do speak about Boykin rights. They can  
16 do it very perfunctorily. They can say you have  
17 valuable Constitutional rights you're waiving by  
18 pleading guilty. Pleading guilty gives - - - is, you  
19 know - - -

20 CHIEF JUDGE LIPPMAN: So in the vast  
21 majority of cases, in your opinion, Boykin rights are  
22 in some sense directly addressed?

23 MS. SCHWARZ: I - - - I do believe so, yes.

24 JUDGE PIGOTT: The way you just said it,  
25 you think that does it?

1 MS. SCHWARZ: I think - - - it - - - again,  
2 there is a totality of the circumstances. You need  
3 to look at the facts of the case. In this case, my  
4 client still had - - -

5 JUDGE PIGOTT: But if I'm the judge and I  
6 say, you know, by pleading guilty, you're waiving  
7 certain Constitutional rights, do you still plead  
8 guilty; I'm - - - I'm covered? I've done it?

9 MS. SCHWARZ: Again, I think it's a  
10 totality of the circumstances. I think you'd have to  
11 look at Harris - - -

12 JUDGE PIGOTT: That's what I'm doing - - -  
13 that's the whole totality. I'm trying to pin you  
14 down.

15 JUDGE ABDUS-SALAAM: Counsel, I - - -

16 MS. SCHWARZ: Well, I - - - I - - - I don't  
17 think that that's this case, but I can tell you what  
18 the Supreme Court said in Boykin. It said - - -

19 JUDGE PIGOTT: I understand all that; I  
20 read it too. What I'm saying is you said, you know,  
21 a judge can say, do you waive your Constitutional  
22 rights, and if she or he says yes, then it's over.

23 MS. SCHWARZ: I - - - I think it'd be  
24 better to say, do you understand that by pleading  
25 guilty you're giving up valuable Constitutional

1 rights.

2 JUDGE PIGOTT: That's enough?

3 MS. SCHWARZ: I - - - I think that in many  
4 circumstances, that would be sufficient.

5 JUDGE PIGOTT: Why is that enough? Why is  
6 that - - - I mean what - - - I don't even know what  
7 my Constitutional rights are. When I was asking  
8 counsel here, they're flipping back to get the - - -  
9 to - - - to get to Tyrell.

10 MS. SCHWARZ: I'll tell you why; because  
11 with that question, you're opening it up to the  
12 defendant to say, what do you mean?

13 JUDGE PIGOTT: No, they're not, because  
14 first of all, the three that you're giving up, you  
15 know. I mean, you know you're not going to trial and  
16 you know the cop's not going - - - on your case is  
17 not going to come in and testify and say you blew a  
18 0.12. And you know that you - - - you know that  
19 you're now going to have to say, that's what  
20 happened, so you've given up your right to remain  
21 silent. Where's the Constitutional infirmity? I - -  
22 - I'm just looking at the practicality of this stuff.  
23 I - - - I - - - I'm mystified.

24 MS. SCHWARZ: The - - - the - - - you see,  
25 and I don't understand what you're saying. By

1 pleading guilty - - -

2 JUDGE PIGOTT: Well, here's what I'm  
3 saying.

4 MS. SCHWARZ: You do have that right.

5 JUDGE PIGOTT: You said - - - let me  
6 finish.

7 MS. SCHWARZ: You've chosen - - -

8 JUDGE PIGOTT: You - - - you said all I got  
9 to say is you're giving up Constitutional rights and  
10 we - - - and we're done. And I'm saying, people  
11 don't even know what that means, and yet you think  
12 it's okay. And now you're saying, you know, but we  
13 have a right to appeal because we weren't told about  
14 Constitutional rights that we have no - - - the  
15 foggiest idea what we're talking about.

16 MS. SCHWARZ: Well, obviously, it would be  
17 better practice to discuss those rights.

18 JUDGE ABDUS-SALAAM: But, counsel, you're -  
19 - - just on this point, you're saying that defense  
20 counsel when they say waiving formal allocution or  
21 further allocution means only the factual allocution.  
22 What do you think the judge thinks that means?  
23 Because the judge is not saying well, that's nice,  
24 counsel, we won't do the facts, but let me make sure  
25 the defendant knows that he has some Constitutional

1 rights that are being given up here.

2 MS. SCHWARZ: In this case, it - - - the  
3 judge asked counsel, do you waive further allocu - -  
4 - cution, prosecution by information, and adjournment  
5 for sentence, three things. Those three things are  
6 guilty plea procedural things. They have nothing to  
7 do with a trial, and so that's why I don't think that  
8 that has anything to do with trial rights.

9 JUDGE ABDUS-SALAAM: So all the judges who  
10 hear - - - all the judges who hear waive formal  
11 allocution or further allocution are thinking, we  
12 don't have to ask about Boykin rights because we're  
13 only - - - we're - - - we've already dealt with that  
14 because they're waiving formal allocution?

15 MS. SCHWARZ: I don't think so. Because I  
16 think waiving allocution, perhaps it means something  
17 like waiving further discussion on the record.

18 CHIEF JUDGE LIPPMAN: But your - - - but  
19 let - - - let me - - -

20 MS. SCHWARZ: And that's not the same as -  
21 - -

22 CHIEF JUDGE LIPPMAN: Counsel, let me ask  
23 you a question that - - - that we've been asking  
24 before. In most cases, do you think the judge does  
25 say, in addition to your waiving formal allocution,

1 has some kind of colloquy about the Constitutional  
2 rights?

3 MS. SCHWARZ: Yes, I do.

4 CHIEF JUDGE LIPPMAN: So in - - -

5 MS. SCHWARZ: Most of the time, they ask.

6 CHIEF JUDGE LIPPMAN: - - - in the great  
7 majority of cases that's what happens, and that's why  
8 you don't get these kind of cases?

9 MS. SCHWARZ: Yes, I believe that's the  
10 case. And - - - and - - -

11 CHIEF JUDGE LIPPMAN: In your experience as  
12 a trial lawyer, is that your experience?

13 MS. SCHWARZ: Yes. Yes, it is. And - - -

14 JUDGE PIGOTT: So the surprise came to your  
15 defendant. He found out, you know, after he pled  
16 guilty and - - - and agreed to drunk driving school  
17 that, oh, my goodness I was entitled to a jury trial  
18 and I was entitled to have people testify against me  
19 and I was ent - - - and I was entitled to remain  
20 silent and if I'd known that, I would never would  
21 have pled guilty?

22 MS. SCHWARZ: I might have gone to trial  
23 with it. Yes, it's possible. But it's more  
24 important that it is such a fundamental and important  
25 right that the case law requires the court to produce

1 an affirmative record.

2 JUDGE PIGOTT: But - - - but that's not  
3 done - - -

4 MS. SCHWARZ: So it's import - - - it's so  
5 important - - -

6 JUDGE PIGOTT: Let me finish. That's not  
7 done when the lawyer says, Judge, I've talked to my  
8 client, he wants to plead guilty to the impaired, and  
9 - - - and he'll go to driver's school?

10 MS. SCHWARZ: No, it's done then. It's  
11 done then. The judge says, okay, but before I'll  
12 accept that guilty plea, I want to make sure that you  
13 understand that by pleading guilty, you're giving up  
14 a Constitutional right.

15 JUDGE PIGOTT: So your lawyer says you're  
16 pleading to an impaired. I'm not going to let you  
17 plea to an impaired unless you understand the  
18 following rights?

19 MS. SCHWARZ: Yes, and I think that's  
20 routine.

21 JUDGE STEIN: Why shouldn't the lawyer have  
22 to - - -

23 MS. SCHWARZ: And it's important because -  
24 - - oh.

25 JUDGE STEIN: Why shouldn't the - - - the

1 attorney have to alert the judge, hey, Judge, you  
2 know, you didn't allocute regarding my client's  
3 Constitutional rights?

4 MS. SCHWARZ: It's the court's duty. It's  
5 never been a requirement of the - - - of the defense  
6 to - - - to do that. And again - - -

7 CHIEF JUDGE LIPPMAN: It's the court's  
8 burden to do that?

9 MS. SCHWARZ: I'm sorry?

10 CHIEF JUDGE LIPPMAN: It's the court  
11 burden?

12 MS. SCHWARZ: It's the court's burden.  
13 They have to make that record.

14 JUDGE PIGOTT: This is so mystifying to me.  
15 I - - - I can't tell you the number of DWIs I've been  
16 - - - not personally charged with but - - - but  
17 involved in as a pro - - - as a lawyer that, I mean,  
18 you - - - you take the plea, you get out, and, you  
19 know, if the - - - if the guy's got a CDL, commercial  
20 driver's license, and he says, I can't take the plea.  
21 Fine. I mean, you know, then you don't take the  
22 plea. But there's never some big discussion about  
23 the fact then let - - - let me tell you now if you're  
24 going to take this impaired, then you got to a right  
25 to a jury trial - - - that's what I'm for, that's

1           what the lawyer's for. And that - - - and my clients  
2           generally know what I'm talking about and they want  
3           the impaired and they're going to driver school and  
4           they're going to get this thing off.

5                        JUDGE FAHEY: That's why I guess - - -

6                        MS. SCHWARZ: But - - - but - - -

7                        JUDGE FAHEY: That's why they - - - it  
8           seems for us that the issue is formal allocution in  
9           some form. No matter what you say, we're stuck with  
10          some litany that we would have to put in place versus  
11          non-formal allocution which looks at each case in the  
12          totality. And - - - and I agree with you, maybe in  
13          totality here it favors your client, maybe - - -  
14          that's very possible. But - - - but it seems the  
15          policy choice for us to make is between those two  
16          parameters or those two extremes.

17                       One is a formal allocution of the three  
18          Boykin rights that the courts must give to satisfy  
19          that requirement and - - - and some of the - - - of  
20          the appellants here today would argue even in non-  
21          criminal cases. And then another is a totality of  
22          the circumstances tes - - - test where the - - - you  
23          look at the eight factors I think there are in Harris  
24          and apply those factors.

25                       See, I think Tyrell can be applied within

1 the Harris framework. You know, sometimes you need  
2 to articulate more rights than others, but you have  
3 to look at all the circumstances. So the question,  
4 as the People bring up to you, they say this case is  
5 down for trial today so he - - - he knows the case is  
6 there for trial.

7 MS. SCHWARZ: Um-hum.

8 JUDGE FAHEY: I think that's a pretty  
9 reasonable inference. Is that sufficient in the  
10 totality, on the Harris end of the extreme of the  
11 cases, to meet the standard here?

12 MS. SCHWARZ: Well, I don't think it  
13 satisfies the court's requirement of an - - - an  
14 affirmative record that establishes that it's a  
15 knowing waiver of his right.

16 JUDGE FAHEY: So - - - so - - -

17 MS. SCHWARZ: That's not sufficient just to  
18 know that he's come for trial.

19 JUDGE FAHEY: - - - a defense attorney and  
20 the - - - and the - - - and the defendant both come  
21 to court, it's scheduled for trial, they know it's  
22 scheduled for trial, he says he know it's scheduled  
23 for trial, but that's not enough to tell him he's got  
24 a right to a trial?

25 MS. SCHWARZ: Yes, for Boykin rights and

1 that's because of case law: Tyrell, Boykin, and - -  
2 -

3 JUDGE PIGOTT: I know, but you're making a  
4 circular - - -

5 JUDGE FAHEY: So let me just finish the  
6 thought then.

7 MS. SCHWARZ: - - - they all require - - -

8 JUDGE FAHEY: So then your argument is we  
9 must articulate all three Boykin rights on every  
10 single plea on every single criminal and non-criminal  
11 offense that comes before us in New York?

12 MS. SCHWARZ: I don't think that's what  
13 Tyrell and - - - and Boykin say.

14 CHIEF JUDGE LIPPMAN: I don't think that's  
15 what you - - -

16 MS. SCHWARZ: They say that you need to - -  
17 -

18 CHIEF JUDGE LIPPMAN: Counsel, I don't  
19 think that's what you said at the beginning in answer  
20 to Judge Pigott, correct? We're just trying to get  
21 what your positions are. Your position is you don't  
22 necessarily have to articulate all three Boykin  
23 rights, but you do have to get across that you are  
24 waiving certain Constitutional rights by taking this  
25 plea. So your position is sort of in between the two

1 extremes, or am I misstating that?

2 MS. SCHWARZ: That is my - - - my position.  
3 And I would just say that the Boykin rights are  
4 special rights. It's a waiver of the entire trial -  
5 - -

6 JUDGE PIGOTT: Before you go - - -

7 MS. SCHWARZ: - - - the whole shebang so  
8 they require - - -

9 CHIEF JUDGE LIPPMAN: Judge Pigott.

10 JUDGE PIGOTT: But stick - - - stick with -  
11 - -

12 MS. SCHWARZ: - - - extra protections.

13 JUDGE PIGOTT: I mean, as - - - as Judge  
14 Fahey said, your client's showed up, he's got his tie  
15 on, he's ready, you know, to go to trial - - -

16 MS. SCHWARZ: Um-hum.

17 JUDGE PIGOTT: - - - and he takes a plea.  
18 And now we're going to reverse it because he wasn't  
19 told he had a right to a trial?

20 MS. SCHWARZ: That's right. And the - - -  
21 it - - - the record is insufficient. And what we're  
22 really doing is sending a message to the courts in  
23 this state that the Boykin rights - - - well, they  
24 need to be following Tyrell, they need to be follow -  
25 - -

1                   JUDGE RIVERA: Okay, so let - - - let me  
2 ask you a question just to be clear about who's got  
3 to say what under your scenario. So Tyrell says, "A  
4 valid waiver can be established where the record  
5 shows that the defendant consulted with his attorney  
6 about the Constitutional consequences of a guilty  
7 plea." So if I'm the judge, am I asking that of  
8 counsel or must I ask that of the defendant?

9                   MS. SCHWARZ: I think either, as long as  
10 the record clearly shows - - -

11                   JUDGE RIVERA: But if I ask the lawyer,  
12 have you discussed the Boykin rights - - - do I even  
13 have to say Constitutional rights, can I just say the  
14 Boykin rights with your client - - - and the lawyer  
15 says yes, are we done?

16                   MS. SCHWARZ: That's a - - - that's a  
17 question that - - - that I haven't fully thought of  
18 because it's not in my case because - - -

19                   JUDGE RIVERA: Well, I'm asking you. You  
20 say you're the experienced trial lawyer. I'm asking.

21                   MS. SCHWARZ: Well, it's - - - it - - - I -  
22 - - it would be better if it was asked to the defend  
23 - - - defendant, for sure.

24                   CHIEF JUDGE LIPPMAN: Yeah, but your - - -

25                   MS. SCHWARZ: But again, we're going to

1 look at the totality of the circumstances.

2 CHIEF JUDGE LIPPMAN: But - - - but - - -  
3 but, counsel - - - but I think Judge Rivera's asking  
4 you, you know what the Boykin rights are.

5 MS. SCHWARZ: Um-hum.

6 CHIEF JUDGE LIPPMAN: So if you're saying  
7 as a representative of the court that yeah, I've  
8 talked about my client - - - about it, that means  
9 I've talked to my client about the right to trial,  
10 the right to self - - - not self-incriminate, and all  
11 that. So in your mind, you know what you're saying,  
12 right?

13 MS. SCHWARZ: Yeah, and I would think that  
14 it would satisfy it. And certainly, it's a far cry  
15 better than saying that waiver of allocution - - -

16 CHIEF JUDGE LIPPMAN: Okay.

17 JUDGE ABDUS-SALAAM: Well, does - - - what  
18 - - -

19 MS. SCHWARZ: - - - which doesn't even use  
20 the word trial or have anything to do with trial.

21 CHIEF JUDGE LIPPMAN: Last question, Judge  
22 Abdus-Salaam.

23 JUDGE ABDUS-SALAAM: I - - - I'm just  
24 trying to understand why, if - - - if you could say  
25 as defense counsel, I explained Boykin rights to my

1 client, why couldn't the judge infer that you  
2 explained what waiver of allocution means to your  
3 client as well? I'm - - - I'm just confused about  
4 that.

5 MS. SCHWARZ: Well - - -

6 JUDGE ABDUS-SALAAM: There's - - - there's  
7 so much confusion about this waiver of allocution.

8 MS. SCHWARZ: - - - waiver of allocution,  
9 allocu - - - is the same as like waiving further  
10 discussion, but it's not the same as waiving the  
11 underlying rights. And it's one of a - - - it is a  
12 guilty plea procedure.

13 JUDGE ABDUS-SALAAM: You say a waiv - - -

14 MS. SCHWARZ: There's no allocution at a  
15 trial. So - - -

16 JUDGE ABDUS-SALAAM: If defense - - -

17 MS. SCHWARZ: - - - waiving allocution has  
18 nothing to do with going to trial. It - - - they - -  
19 - they don't have anything to do with each other. So  
20 waiving allocution couldn't equate with waiving - - -

21 JUDGE ABDUS-SALAAM: But if the judge  
22 doesn't go further with the Boykin rights or any  
23 other Constitutional rights, which is what happened  
24 here and in a number of other cases, then there is  
25 some breakdown in communication about what waiver of

1 allocation means between defense counsel and the  
2 judge and defense counsel, apparently, and defendant.  
3 It just seems to me that because the - - - then the  
4 defendant is left saying well, what am I here for,  
5 I'm just here to take my plea and let me take it and  
6 go, and I don't know what I'm giving up.

7 MS. SCHWARZ: Rig - - - well, right. And  
8 that's why - - -

9 JUDGE ABDUS-SALAAM: And - - - and  
10 defendant doesn't say anything - - -

11 MS. SCHWARZ: - - - the case law requires  
12 the Boykin rights to be separate - - -

13 JUDGE ABDUS-SALAAM: - - - like I don't  
14 know what I'm giving up.

15 MS. SCHWARZ: Why the defendant didn't say  
16 he didn't - - - the question wasn't asked of the  
17 defendant. Defendant - - - the defense counsel said  
18 sure, we'll waive all of those things, none of them  
19 having to do with trial rights - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MS. SCHWARZ: - - - and then they - - -

22 CHIEF JUDGE LIPPMAN: Thanks, counsel.

23 Let's go to rebuttal.

24 MS. HUMMEL: In this case, it's clear that  
25 defense counsel did not think that allocution was

1 limited to a factual allocution.

2 JUDGE STEIN: Well, did the People have any  
3 obligation to say anything to the judge; hey, Judge,  
4 I think you forgot something here?

5 MS. HUMMEL: I think after Tyrell, where  
6 this court has said that, you know, we would like to  
7 see this record, that - - - that the People are on  
8 notice that they should say something. Defense  
9 counsel should also say something.

10 CHIEF JUDGE LIPPMAN: Whose burden is it,  
11 counsel?

12 MS. HUMMEL: To create the record?

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MS. HUMMEL: It would be between the court  
15 and the People. But it is - - -

16 CHIEF JUDGE LIPPMAN: Don't you think the  
17 court has a particular obligation in this regard of  
18 everything we've been talking to - - - about today?  
19 Isn't it the court's obligation to make the record?

20 MS. HUMMEL: They do, and it's defense  
21 counsel's obligation to protect the defendant's  
22 rights and not misrepresent what they've communicated  
23 to the court.

24 CHIEF JUDGE LIPPMAN: And it's the People's  
25 obligation as - - - to do justice - - -

1 MS. HUMMEL: Yes.

2 CHIEF JUDGE LIPPMAN: - - - as everybody in  
3 this scenario is trying to do.

4 MS. HUMMEL: Of course.

5 CHIEF JUDGE LIPPMAN: But the burden to  
6 make the record is the judge's.

7 MS. HUMMEL: Yes, but I believe that - - -

8 CHIEF JUDGE LIPPMAN: You don't disagree  
9 with that, do you?

10 MS. HUMMEL: No, I don't disagree with  
11 that, but I believe where defense counsel's  
12 representing on the record that they have advised  
13 their client that they told them, we're here for  
14 trial but my def - - - client wants to plead guilty -  
15 - -

16 JUDGE RIVERA: Well, why doesn't that  
17 devolve to just if you're represented by a lawyer, we  
18 all presume that the lawyer gave you your rights?  
19 Why aren't we back there?

20 MS. HUMMEL: Well, I think because it would  
21 be ineffective for a lawyer to allow their client to  
22 plead guilty if they thought there was any question  
23 that the plea would not be knowing, intelligent, and  
24 voluntary. Then the defense counsel has no business  
25 even partaking in the defendant pleading guilty if

1           they think they really don't understand their rights.  
2           If they get to - - -

3                       CHIEF JUDGE LIPPMAN:  Counsel, but in these  
4           kind of situations, the defense lawyer, the  
5           prosecutor, cannot fulfill their obligations always  
6           perfectly.

7                       MS. HUMMEL:  Of course.

8                       CHIEF JUDGE LIPPMAN:  But someone has the  
9           burden here, and the burden is on the judge to ensure  
10          that people's - - - there's a record that people's  
11          Constitutional rights are protected.  What's  
12          complicated about this?

13                      MS. HUMMEL:  I think what's complicated is  
14          that they - - - that courts are relying, properly so,  
15          on defense counsel's representations that when they  
16          show up to court with a client who wants to plead  
17          guilty - - -

18                      CHIEF JUDGE LIPPMAN:  Okay, so your rule -  
19          - - okay, then your rule is when you come in to take  
20          a plea, you've given up your Constitutional rights,  
21          period?

22                      MS. HUMMEL:  No, I believe that you need -  
23          - -

24                      CHIEF JUDGE LIPPMAN:  So what more - - -  
25          what more has to happen?

1 MS. HUMMEL: I believe that through - - -  
2 if - - - if the defense attorney says that they're  
3 waiving allocution or further allocution, and then -  
4 - -

5 CHIEF JUDGE LIPPMAN: So your rule is if  
6 you're coming to take your plea and what's said is I  
7 give up formal or further allocution, then it's over  
8 and you're giving up your Constitutional rights?

9 MS. HUMMEL: Again, I think you would need  
10 to look at all the other circumstances.

11 CHIEF JUDGE LIPPMAN: In most  
12 circumstances, is that the case?

13 MS. HUMMEL: I think there are too many  
14 variables to say whether it is most.

15 JUDGE PIGOTT: Let me - - - let me - - -  
16 you're charged with 1180D, you're speeding, and  
17 you're going to take a plea to a muffler. Do you  
18 have to admit that you had a noisy muffler even if  
19 you didn't have one?

20 MS. HUMMEL: No, a factual allocution isn't  
21 required - - -

22 JUDGE PIGOTT: You have to be told that you  
23 have a right to a trial in front of fact finder and  
24 that you have the right to a lawyer and you don't  
25 have to - - - you don't have to testify against

1           yourself and they have to produce witnesses against  
2           you - - -

3                       MS. HUMMEL:  No, I don't think you need  
4           that entire record.

5                       JUDGE PIGOTT:  - - - in order to plead  
6           guilty to a muffler violation?  Okay.

7                       CHIEF JUDGE LIPPMAN:  Okay.

8                       MS. HUMMEL:  Thank you.

9                       CHIEF JUDGE LIPPMAN:  Thank you - - - all  
10          of you, thank you.  Appreciate it.

11                       (Court is adjourned)

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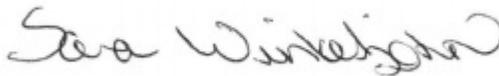
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Joseph Conceicao, No. 167, and People v. Federico Perez, No. 168, and People v. Javier Sanchez, No. 169 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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