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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 218

MICHAEL MOX,

Respondent.

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

Before:

Chief Judge Jonathan Lippman  
Associate Judge Carmen Beauchamp Ciparick  
Associate Judge Victoria A. Graffeo  
Associate Judge Susan Phillips Read  
Associate Judge Robert S. Smith  
Associate Judge Eugene F. Pigott, Jr.

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 218, People v. Mox.

2 Okay, counselor, go ahead.

3 MR. KAEUPER: And if I could reserve two  
4 minutes for rebuttal?

5 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
6 Go ahead.

7 MR. KAEUPER: Geoffrey Kaeuper on behalf of  
8 the People.

9 The guilty plea to EED manslaughter in this  
10 case was knowing, intelligent and voluntary.

11 CHIEF JUDGE LIPPMAN: Why weren't there red  
12 flags that should have gone off in the judge's head  
13 based upon stuff about being off my meds, not really  
14 being able to make a good judgment? Why shouldn't  
15 have that triggered in the judge the need to ask a  
16 few more questions and make clear to him that there  
17 may be circumstances where he would be not  
18 responsible altogether? I mean, why shouldn't have  
19 that jumped to the judge's mind?

20 MR. KAEUPER: Well, a couple of things.  
21 First of all, I don't think anything that the  
22 defendant said here negated an element of the crime,  
23 which would be required to trigger the inquiry under  
24 Lopez, so I don't think the Lopez inquiry was ever  
25 triggered, but I think as - - -

1 CHIEF JUDGE LIPPMAN: What did he say?  
2 Didn't he say certain things that certainly would  
3 make one sit up and take attention?

4 MR. KAEUPER: Oh, absolutely. He says he's  
5 in a psychotic state - - -

6 CHIEF JUDGE LIPPMAN: Yeah - - -

7 MR. KAEUPER: - - - when he commits this  
8 crime.

9 CHIEF JUDGE LIPPMAN: - - - I mean, what  
10 could be more?

11 MR. KAEUPER: Well, but - - -

12 JUDGE CIPARICK: He said he didn't  
13 understand - - - he wasn't sure whether he understood  
14 all of the proceedings. He said some of it, maybe  
15 not all of it.

16 MR. KAEUPER: I think yeah, there were a  
17 couple of questions where he made somewhat equivocal  
18 statements. Do you understand what's going on?  
19 Yeah, pretty much.

20 JUDGE CIPARICK: He said he was hearing  
21 voices, he was in a psychotic state, he - - -

22 MR. KAEUPER: Right. Right. With respect  
23 to the - - -

24 JUDGE CIPARICK: Doesn't that all negate  
25 intent, the element of intent?

1                   MR. KAEUPER: I don't think saying he's in  
2 a psychotic state is inconsistent with EED  
3 manslaughter.

4                   CHIEF JUDGE LIPPMAN: Well, isn't it all a  
5 matter of degree, though, basically?

6                   MR. KAEUPER: Certainly it's a matter of  
7 degree, but I think that's exactly the issue here:  
8 the matter of degree involved with Lopez. Simply  
9 saying something which might be consistent with the  
10 defense, but also could be consistent with - - -

11                  CHIEF JUDGE LIPPMAN: Yeah, but what's the  
12 judge's responsibility when he gets up and says that  
13 kind of thing?

14                  MR. KAEUPER: The judge's responsibility is  
15 to ensure that the plea is knowing, intelligent and  
16 voluntary.

17                  JUDGE READ: But is it important here that  
18 the defense counsel made representations about  
19 reviewing a potential insanity defense with - - -

20                  MR. KAEUPER: I think that's - - -

21                  JUDGE READ: - - - rely on that  
22 principally?

23                  MR. KAEUPER: Well, I think that's  
24 absolutely important. I mean - - -

25                  CHIEF JUDGE LIPPMAN: Even without any

1 further explanatory discussion about it?

2 MR. KAEUPER: Well, I mean, I think - - -

3 CHIEF JUDGE LIPPMAN: That would - - - in  
4 response to Judge Read's question, is that  
5 principally what you're relying on here?

6 MR. KAEUPER: I guess I'm principally  
7 relying on the waiver, but I think - - - I mean, I  
8 think - - -

9 CHIEF JUDGE LIPPMAN: But this is important  
10 - - -

11 MR. KAEUPER: This is certainly important.  
12 I mean, frankly, I think this would probably cover it  
13 even without the waiver. The waiver is just - - - is  
14 so cut-and-dried.

15 JUDGE CIPARICK: Well, in response to that,  
16 all the court said to the defendant was, you  
17 understand what he said and that's okay with you, and  
18 he said yes and thank you, and that was all.

19 MR. KAEUPER: But it's at the end of this  
20 long discussion which was lots of discussion about -  
21 - - and not even just at the plea colloquy, but  
22 there's lots of stuff before the judge about this  
23 defendant's mental health. That issue is clearly on  
24 the table. And the judge introduces the plea  
25 colloquy by saying look, we've been having a lot of

1 discussions about your mental state. We've had these  
2 doctors come in; you filed a notice of intent to  
3 introduce psychiatric evidence. So the whole plea is  
4 taking place in the context - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but doesn't it  
6 also take place in the context of this particular  
7 mental illness, a six-month inpatient treatment,  
8 anti-psychotic drugs? Isn't that also the context  
9 for this discussion - - -

10 MR. KAEUPER: Oh, absolutely.

11 CHIEF JUDGE LIPPMAN: - - - that maybe  
12 makes the judge have a greater responsibility?

13 MR. KAEUPER: I mean, I think the judge has  
14 the same responsibility in any case, and that is to  
15 assure that the plea is knowing - - -

16 CHIEF JUDGE LIPPMAN: Yeah, exactly.

17 MR. KAEUPER: Right, and - - -

18 CHIEF JUDGE LIPPMAN: But wouldn't you say  
19 that those conditions, which are the framework for  
20 what happened here, wouldn't that - - - again, I use  
21 the term I used before - - - set off red flags that  
22 gee, I better be awful careful to make sure that this  
23 is voluntary, intelligent, et cetera?

24 MR. KAEUPER: I think it probably would be  
25 prudent of a judge, in a case like this, to be

1 especially cautious. Absolutely.

2 JUDGE CIPARICK: He did - - -

3 MR. KAEUPER: But I - - -

4 JUDGE CIPARICK: - - - ask a lot of  
5 questions. I mean, the allocution was relatively  
6 complete, but when it came to that particular element  
7 of the crime, the intent, he did not explain to the  
8 defendant that, possibly, if he went to trial he  
9 could raise this as a defense and he could be - - -

10 MR. KAEUPER: But - - -

11 CHIEF JUDGE LIPPMAN: - - - acquitted. He  
12 just didn't explain that to him.

13 MR. KAEUPER: Well, but I think - - - I  
14 mean, I think it's clear in the record that the  
15 defense attorney discussed this with him; she says  
16 that at the very beginning of the plea coll - - - or  
17 plea proceedings. It's also made clear by the  
18 waiver. I mean, it's a one-word answer, but the  
19 question is pretty thorough. She's just said we  
20 discussed the possibility of not guilty by reason of  
21 mental disease and defect; we've decided to waive  
22 that defense in order to accept this reduced charge.  
23 That's pretty comprehensive. When the judge then  
24 asks, is that true, it's a one-word answer but it's a  
25 one-word answer to a pretty specific - - -

1                   JUDGE PIGOTT: One of the concerns that I  
2 had is, I think if - - - I forget now how many of  
3 these psychiatrists we had, but they split. I mean,  
4 everyone that the People had said "perfectly sane";  
5 everyone the defense had said he's nuttier than a  
6 fruitcake. I'm exaggerating. And then you have  
7 assigned counsel, and it's an excellent assigned  
8 counsel program, but - - - and then a sentence of  
9 twenty-five years. It's just, I was wondering what  
10 he got for his plea. I mean, do you think if he'd  
11 been convicted he'd have gotten life?

12                   MR. KAEUPER: Yeah, I think that's what he  
13 gets. He gets life taken off the back end of it.

14                   JUDGE CIPARICK: Twenty-five to life.

15                   JUDGE PIGOTT: But you think the EED  
16 defense, was that easily beatable, that that - - - I  
17 mean, it just seemed to me - - -

18                   MR. KAEUPER: Well, I mean - - -

19                   JUDGE PIGOTT: - - - that what he pled to  
20 was probably what he was going to get convicted of at  
21 tops, and so I - - - and so if you looked at the  
22 numbers you wonder if maybe there shouldn't have been  
23 more of an inquiry of these doctors. Because the  
24 judge is there, he's got yours saying he's fine; he's  
25 got theirs saying he's not; and the judge then says,

1           this is my plea colloquy, I'm satisfied, and we're  
2           moving on.

3                       MR. KAEUPER:   Maybe I'm misunderstanding  
4           the question, but I mean, I think really what you're  
5           laying out is a trial.  I mean, if we're really going  
6           to get - - - if we're going to try to resolve the  
7           doubts about innocence and guilt, we're not going to  
8           do it in a plea colloquy; we're going to do it in a  
9           trial.  The plea colloquy has to be the defendant's  
10          knowing, intelligent and voluntary choice.  And I  
11          think the judge assured himself that that is what  
12          this was.  And in fact, in the 440 the defendant  
13          brought later, he acknowledged that yes, this was a  
14          knowing, intelligent, voluntary plea; I just changed  
15          my mind.  So but - - -

16                      JUDGE SMITH:  If - - - why doesn't that  
17          acknowledgement end the whole story?  I mean, if it  
18          was knowing, voluntary and intelligent, why are we  
19          sitting here worrying about the plea colloquy?

20                      MR. KAEUPER:  I'd be very happy to hear  
21          from this court that it ends the inquiry, but - - -

22                      JUDGE SMITH:  Well, I - - -

23                      MR. KAEUPER:  I know that's not a  
24          satisfactory answer.

25                      JUDGE SMITH:  I guess what I'm saying is,

1 is there something in Lopez or something somewhere  
2 that says there are certain minimum standards for a  
3 plea allocution, and what are they?

4 MR. KAEUPER: Yeah, I mean - - - well,  
5 Lopez certainly imposes upon the court a duty if the  
6 colloquy raises significant doubts about guilt, or  
7 negates an element of the crime - - -

8 CHIEF JUDGE LIPPMAN: Could there be  
9 anything that would raise more significant doubts  
10 than this particular colloquy?

11 MR. KAEUPER: Absolutely. I mean, I think  
12 the typical situation in which Lopez is properly  
13 applied is when somebody says yeah, I'll plead guilty  
14 to intentional murder; I shot him, but I didn't  
15 really want him to die. That negates an element.  
16 That's very straightforward. Here you have  
17 statements which they're - - - they raise questions,  
18 absolutely.

19 JUDGE SMITH: Suppose he'd said, I thought  
20 he was Satan and I was an angel of the Lord when I  
21 shot him. Would that - - - that would negate guilt  
22 in the insanity sense, wouldn't it?

23 MR. KAEUPER: I think - - - yeah, I think  
24 that would be more of a negation of guilt through the  
25 affirmative defense than what we have here, which is

1 just the possibility of an affirmative defense.

2 JUDGE CIPARICK: Well, this is close. He  
3 said he was hearing voices. I mean, he could have  
4 been hearing voices that directed him to bludgeon his  
5 father as he - - -

6 MR. KAEUPER: He could have been.

7 JUDGE CIPARICK: Yeah.

8 MR. KAEUPER: He could have been. And if  
9 you'd said that in the colloquy, that might have  
10 negated - - -

11 JUDGE CIPARICK: Maybe the judge should  
12 have drawn that out from him.

13 MR. KAEUPER: I don't think it's- - -

14 JUDGE CIPARICK: What voices were you  
15 hearing? What were they telling you to do? Were  
16 they giving you direction? There's so many things  
17 the judge could have done here. He could have - - -

18 MR. KAEUPER: I don't think it's the - - -

19 JUDGE CIPARICK: - - - could have just  
20 adjourned the proceedings for twenty minutes, to  
21 allow counsel to speak to the defendant. A lot of  
22 things he could have done.

23 CHIEF JUDGE LIPPMAN: Okay, counselor,  
24 you'll have some rebuttal time. Thanks.

25 MR. KAEUPER: Thanks.

1 CHIEF JUDGE LIPPMAN: Counselor?

2 MR. EASTON: Good afternoon. William  
3 Easton for Mr. Mox.

4 The Appellate Division, I believe,  
5 correctly applied this court's holding in Lopez and  
6 Serrano here. When the defendant's factual  
7 allocation here casts significant doubts, and, I  
8 submit, did negate elements of this crime, there was  
9 a duty to inquire further.

10 JUDGE READ: What elements were negated?

11 MR. EASTON: I believe the intent. And I  
12 believe that the - - -

13 JUDGE READ: He said he was hearing voices.

14 MR. EASTON: Hearing voices, in a psychotic  
15 state, had a painful out-of-body sensation.

16 CHIEF JUDGE LIPPMAN: What should the judge  
17 have done?

18 MR. EASTON: Further inquiry launched,  
19 pursuant to Lopez and Serrano, not simply relying on  
20 defense counsel's representation.

21 CHIEF JUDGE LIPPMAN: When he asked that  
22 question, whether this has been discussed, should he  
23 have gone there? Is that the key point? Or is it -  
24 - -

25 MR. EASTON: Yes.

1 CHIEF JUDGE LIPPMAN: Or is it earlier or -  
2 - -

3 MR. EASTON: I believe earlier, but at  
4 least at that moment of further inquiry, to say, Mr.  
5 Mox, do you realize that what you've stated so far  
6 does give you the basis for an affirmative defense or  
7 that you - - -

8 JUDGE SMITH: But he'd already - - - the  
9 insanity defense had been kicking around for months.  
10 There had been both sides' psychiatrists' reports.  
11 He'd been talking to his lawyer for months. Why does  
12 the judge have to go through it all with him on the  
13 record?

14 MR. EASTON: I believe that, that colloquy  
15 between the defendant and the judge is critical here,  
16 because that's when Mr. Mox had set forth that  
17 problematic colloquy that the court has noted about  
18 hearing voices, about being off his medication, about  
19 being in a psychotic state.

20 JUDGE SMITH: Well, but it isn't - - - I  
21 mean, when you're talking about something as  
22 complicated as mental illness, I mean, you could have  
23 a colloquy forever, couldn't you, and you'd still not  
24 know whether the guy's sane or not.

25 MR. EASTON: Well, I believe that the

1 colloquy with a mentally ill defendant may be more  
2 protracted and may command more time, but - - -

3 JUDGE SMITH: How is it - - - and even  
4 after it's protracted, how is the judge supposed to  
5 do the diagnosis when he's done?

6 MR. EASTON: Well, he - - -

7 JUDGE SMITH: He's already got two  
8 psychiatrists who've done them.

9 MR. EASTON: And they've differed in their  
10 ultimate conclusion, but the two psych - - - the  
11 judge can say, well, Mr. Mox, are you aware of this  
12 defense? In light of what you just told me, are you  
13 aware? And - - -

14 JUDGE SMITH: Do you really think there's  
15 any doubt that Mr. Mox was aware of something called  
16 the insanity defense at this point?

17 MR. EASTON: Well, hearing it from a judge  
18 and the judge telling him that he has the basis for  
19 the defense - - -

20 CHIEF JUDGE LIPPMAN: Is it one question?  
21 Is it two questions? Is it a whole barrage of  
22 questions?

23 MR. EASTON: I - - -

24 CHIEF JUDGE LIPPMAN: What is that - - -  
25 let's say he asked the question that you just stated,

1 and the answer was, yup, I'm aware. Is that enough?

2 MR. EASTON: Well, I think - - -

3 CHIEF JUDGE LIPPMAN: Where do you draw - -  
4 - what's the rule?

5 MR. EASTON: Well, I think - - - this court  
6 has already been reluctant for a uniform catechism on  
7 this.

8 CHIEF JUDGE LIPPMAN: But what in the - - -  
9 in relatively precise strokes, what does the judge  
10 have to do?

11 MR. EASTON: I think inform him that what  
12 he's set forth already does provide him a basis of -  
13 - -

14 JUDGE GRAFFEO: Can - - -

15 MR. EASTON: - - - of a defense.

16 JUDGE GRAFFEO: Can someone with this  
17 disorder hear voices, but still comprehend the nature  
18 of their acts and the consequences?

19 MR. EASTON: I think so. I don't think  
20 it's - - -

21 JUDGE GRAFFEO: So how does - - -

22 MR. EASTON: - - - necessarily - - -

23 JUDGE GRAFFEO: How does the judge know,  
24 when he asks these questions, if, in fact, there  
25 really is a defense here or there isn't a defense?

1 MR. EASTON: Well, I think hearing voices  
2 and being in a psychotic state certainly is - - -  
3 you're in the heartland of an insanity defense at  
4 that point, and the judge can inform the defendant -  
5 - -

6 JUDGE GRAFFEO: But they spent months here  
7 talking about that.

8 MR. EASTON: Well, there - - -

9 JUDGE GRAFFEO: And it appears that this  
10 particular defendant didn't want to go that route.

11 MR. EASTON: It appears that way, but if he  
12 had heard from the judge - - - we don't know if the  
13 judge had said, Mr. Mox, here I am, I'm the judge,  
14 I'm telling you this - - -

15 JUDGE GRAFFEO: So he has to say, did you  
16 understand the nature of your acts - - -

17 MR. EASTON: Do you - - -

18 JUDGE GRAFFEO: - - - on that day?

19 MR. EASTON: Do you understand that you  
20 have the basis for a defense - - -

21 JUDGE GRAFFEO: For a defense.

22 MR. EASTON: - - - of insanity here by what  
23 you've told us.

24 JUDGE SMITH: Well, but that wouldn't be  
25 true.

1 JUDGE GRAFFEO: But that wouldn't tell you  
2 anything.

3 MR. EASTON: Well, it - - - he has a basis.  
4 I don't know if he necessarily - - -

5 JUDGE SMITH: Well, I mean, he should have  
6 said, do you understand that there might be a  
7 possibility of an insanity defense here. But what  
8 does he think he's been talking to psychiatrists  
9 about for the last six months?

10 MR. EASTON: Well, he's been talking to  
11 psychiatrists, but he's hearing this from a judge. I  
12 think that the critical - - - the nature of a plea  
13 and that colloquy between the judge and the  
14 defendant, as this court noted in Serrano, which  
15 involved a seventeen year old defendant - - - or I  
16 mean, in Beasley, which involves a seventeen year old  
17 defendant whose factual colloquy is deemed  
18 insufficient - - -

19 CHIEF JUDGE LIPPMAN: The burden is on the  
20 judge. It's the judge's responsibility - - -

21 MR. EASTON: Yes.

22 CHIEF JUDGE LIPPMAN: - - - in the end.

23 MR. EASTON: In the end.

24 JUDGE SMITH: In Nixon, Judge Breitel says,  
25 in substance, in reality, your lawyer is going to do

1           you a lot more good than the judge. You can spend -  
2           - - you're much more likely to get understanding from  
3           a careful lawyer, who's actually paying attention,  
4           than from any colloquy in a courtroom which is going  
5           to be - - - going to be, to some degree, a ritual.  
6           Wasn't Judge Breitel right about that?

7                         MR. EASTON: Well, yeah, I think there's  
8           two functions, but I do think that the allocution in  
9           front of a judge serves a different function. It's  
10          quite apart from what happens with an attorney. It's  
11          a moment of truth where a defendant is in front of a  
12          judge, who gives the imprimatur on the law and - - -

13                        CHIEF JUDGE LIPPMAN: In practical terms,  
14          do you think it really makes a difference? Putting  
15          aside what our case is, do you think in practical  
16          terms, when you hear it from the judge, that's a  
17          night and day difference?

18                        MR. EASTON: I do think it can be, Your  
19          Honor, that many a plea colloquy has veered because  
20          of the fact the judge is - - -

21                        JUDGE GRAFFEO: So if the judge asked him  
22          that question and he says, yes, I'm aware I have an  
23          insanity defense, what happens next?

24                        MR. EASTON: And the judge inquires further  
25          - - - and you're giving that up, and you know you're

1 giving that up - - - and he's walking him through  
2 that, and Mr. Mox waives it, then I think the Lopez/  
3 Serrano inquiry has been fulfilled.

4 JUDGE SMITH: But it's not enough - - -

5 MR. EASTON: But it wasn't fulfilled on  
6 this record.

7 JUDGE SMITH: It's not enough for his  
8 lawyer to say, I have discussed the insanity defense  
9 with him and he is prepared to waive it? She did say  
10 that.

11 MR. EASTON: Yes, but I don't think that's  
12 sufficient under Serrano. Otherwise you could just  
13 sign off on it before you have your colloquy.

14 JUDGE SMITH: But isn't it the reality  
15 that, whatever we say is required in a plea colloquy,  
16 that's what's going to happen in the plea colloquy if  
17 the plea is agreed on; it's just a question of  
18 writing the script?

19 MR. EASTON: Well, sometimes, Your Honor,  
20 but I believe with a mentally ill defendant - - - and  
21 I think what distinguishes this case, is this case is  
22 about as documented and severe a mental illness - - -

23 CHIEF JUDGE LIPPMAN: So you're saying the  
24 judge has to - - - I think I asked your adversary  
25 before, it's the context of this that matters, that

1           you have this guy who did this act, that was in for  
2           six months, that's taken these anti-psychotic  
3           medications, and taking it at the time that - - - of  
4           what's going on here in front of the judge. It's all  
5           of that that triggers this kind of, gee, I better be  
6           awful careful and ask very pointed questions?

7                     MR. EASTON: Yes, and I think that Lopez  
8           and Serrano and Beasley - - - it's the reason this  
9           court is - - -

10                    JUDGE PIGOTT: Do you - - -

11                    MR. EASTON: - - - loath to impose a  
12           catechism.

13                    JUDGE PIGOTT: Mr. Easton, in your 440, Mr.  
14           Kaeuper points out, you said - - - you conceded that  
15           it was a knowing, voluntary plea, right? And then  
16           you have a doctor who says his patient, your client,  
17           is perfectly competent to decide whether to withdraw  
18           his plea. He has the present capacity to make a  
19           decision whether to withdraw his plea, and his  
20           decision appears to be knowing and voluntary. So  
21           where does the line get drawn here? You've got a  
22           doctor that says, yeah, he's good enough to do all of  
23           this. You had a judge, a few months before, who said  
24           exactly the same thing. And we're challenging the  
25           judge but not your physician.

1 MR. EASTON: Well, that's correct, Your  
2 Honor, but it was a motion to vacate the plea, not  
3 the 440, so it was in to the trial court.

4 JUDGE PIGOTT: Right.

5 MR. EASTON: But the defense psychiatrist  
6 on that motion, the question of competence was,  
7 ultimately, he was competent. It took two sessions.  
8 It took a long, two hours - - - I think it was four  
9 hours of tapes. And the question, although it's  
10 ultimately a go/no-go situation, the report was that  
11 competence was met, barely, and there were these  
12 tell-tale problems of timidity, lack of perseverance,  
13 and all the hallmarks of schizophrenia that rendered  
14 - - - although he was competent, it rendered the  
15 process difficult. And I think the report said that  
16 iterations were required and repetition was required.

17 JUDGE SMITH: Are you saying that we can  
18 conclude on this record that the plea was not  
19 knowing, voluntary and intelligent?

20 MR. EASTON: I think the intelligent and  
21 knowing is rendered difficult because of the mental  
22 illness.

23 JUDGE SMITH: I mean, indeed, when your  
24 client moved to withdraw his plea, the lawyer said  
25 very candidly, look, I'm not saying he was coerced

1           into it; I'm saying he wants a second chance, and in  
2           your discretion you should give it to him.

3                       MR. EASTON: Right, and that was the  
4           problem, is the defendant was afflicted with this  
5           mental illness, this timidity, this lack of  
6           perseverance. And trial counsel, as me, said, I  
7           can't say he was under undue pressure, that it was  
8           involuntary in a classical sense. I can say he's  
9           mentally ill, and severely mentally ill, and he does  
10          want to withdraw his plea.

11                      JUDGE SMITH: I guess what I'm asking then,  
12          is there something other - - - is there a test other  
13          than whether the plea was knowing, voluntary and  
14          intelligent? Is there some minimum requirement for a  
15          plea allocution which isn't just a subcategory of the  
16          knowing, voluntary and intelligent test?

17                      MR. EASTON: I think there is, Your Honor,  
18          and I think it lies in Serrano and Lopez, and I don't  
19          know exactly what it is, but I do - - - I think - - -

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

22                      Counselor, what's your answer to Judge  
23          Smith's question?

24                      MR. KAEUPER: Well, I mean, I guess in some  
25          ways my answer is the same as Mr. Easton's. I think

1 the answer is in Serrano and Lopez. But those cases  
2 tell us - - -

3 CHIEF JUDGE LIPPMAN: What do they stand  
4 for, those cases?

5 MR. KAEUPER: But those cases tell us that  
6 the court, when there's some reason to have  
7 significant doubt about the defendant's guilt, that  
8 the court is required to inquire, and as Serrano puts  
9 it, make sure the defendant knows what he's doing,  
10 i.e., a knowing, intelligent and voluntary plea, not  
11 subtle questions about whether the defendant's really  
12 guilty of this or really guilty of - - - those are  
13 trial issues. When you're taking a plea, if we get  
14 into that Lopez territory, the judge has to make an  
15 inquiry to make sure the defendant knows what he's  
16 doing. That's what he did here.

17 Defense counsel says that the court should  
18 have asked - - -

19 JUDGE SMITH: Do you acknowledge that we  
20 were in Lopez territory?

21 MR. KAEUPER: I don't. I don't think that  
22 there was ever a negation of an element of the  
23 offense here. And I think that's - - - I mean, I  
24 think that has to be read into the significant doubt.  
25 It's not just any doubt; it has to be the kind of

1 doubt that is created by negating an element.

2 CHIEF JUDGE LIPPMAN: Again, but knowing  
3 the situation of this particular individual, doesn't  
4 that play into what is this - - -

5 MR. KAEUPER: But - - -

6 CHIEF JUDGE LIPPMAN: - - - question that  
7 comes up?

8 MR. KAEUPER: But I think the situation of  
9 this individual plays into it being a voluntary plea.  
10 All of this stuff has been fleshed out. It's clearly  
11 been discussed with his attorney. That's made clear  
12 on the record in multiple points in the - - -

13 CHIEF JUDGE LIPPMAN: It's also clear he  
14 has a mental illness; isn't it?

15 MR. KAEUPER: Absolutely. But mentally ill  
16 people can take guilty pleas also. And mentally ill  
17 people commit extreme emotional disturbance  
18 manslaughter. Those are not incompatible things. So  
19 I mean, I'm certainly not disputing that the  
20 defendant has a serious mental illness here, but  
21 despite that mental - - -

22 CHIEF JUDGE LIPPMAN: Okay. Thanks.

23 MR. KAEUPER: Thank you.

24 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Michael Mox, No. 218 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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