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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

CAVELL CRAIG TYRELL,

Appellant.

No. 230  
(APP. TERM 10-290)

No. 231  
(APP. TERM 10-288)

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20 Eagle Street  
Albany, New York 12207  
November 13, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 230 and 231.

2 Counsel, do you want any rebuttal time,  
3 counsel?

4 MR. FERGUSON: Yes, I'd like three minutes,  
5 Your Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes, sure.  
7 Go ahead.

8 MR. FERGUSON: Harold Ferguson for  
9 appellant, Cavell Craig Tyrell. Judicial expediency  
10 should not be trumping constitutional rights and  
11 that's really what's happening here.

12 CHIEF JUDGE LIPPMAN: What's missing here  
13 in the plea?

14 MR. FERGUSON: In - - - in the first case,  
15 everything. All you have is - - - no different than  
16 the gentleman who is handing you the briefs now, my  
17 client was no more than a spectator at - - - to - - -  
18 at a life-changing event in his life.

19 JUDGE READ: Is this - - -

20 JUDGE PIGOTT: This is not a life-changing  
21 event for - - -

22 MR. FERGUSON: It may not be a life-  
23 changing event in his life, but it's a great job  
24 here.

25 JUDGE READ: Does this - - - is this common

1 when it comes to misdemeanors in these courts?

2 MR. FERGUSON: Sad - - - sadly, what we  
3 have found out over the course - - - when we started  
4 to do more of the misdemeanor cases - - - the Legal  
5 Aid Society - - - we're seeing that this is a  
6 recurrent problem. And - - - but it's a recurrent  
7 problem only in the City of New York.

8 When I checked and looked at Boykin cases  
9 that arose in the Third and Fourth Department,  
10 there's exactly one in the last twenty-five years  
11 that made it to the Appellate Division in the Third  
12 and Fourth Department. It's - - -

13 CHIEF JUDGE LIPPMAN: Why does that happen  
14 in the City of New York, do you think?

15 JUDGE READ: Volume?

16 MR. FERGUSON: I - - - I think, it's  
17 volume, but the reality is the amount of time it  
18 would take to properly allocute someone, and all of  
19 you, with the exception of Judge Rivera, were trial  
20 court judges. It only takes a short amount of time  
21 to do it right.

22 CHIEF JUDGE LIPPMAN: Does - - - does - - -  
23 in answer to Judge Read's question, it's not the  
24 norm, though, is it?

25 MR. FERGUSON: Is it not the norm, but it

1 does happen on a fairly - - -

2 CHIEF JUDGE LIPPMAN: Frequently?

3 MR. FERGUSON: - - - regular basis, and  
4 we're seeing more of it, and I know that there are a  
5 number of other lead applications that have - - -  
6 will ask to reargue in the event that this decided in  
7 our favor.

8 JUDGE SMITH: But why - - - but why - - - I  
9 mean, if - - - if your client did suffer this  
10 terrible thing. He went through a life-changing  
11 event and he was only a spectator, and it's - - - and  
12 this has done him some harm. Is he - - - there was  
13 something he didn't understand. This was a bad thing  
14 that he didn't get all this information about Boykin  
15 rights. Can't he put - - - why - - - why shouldn't  
16 he have to put in an affidavit and say so?

17 MR. FERGUSON: Because Your Honor, of - - -  
18 because this isn't a type of situation where there  
19 was a plea, an adjournment, and a sentence. This was  
20 instantaneous. The plea and sentence were at the  
21 exact same event. It is a singular proceeding here.  
22 Unlike what you saw in - - -

23 JUDGE SMITH: You're - - - you're really  
24 suggesting - - - this - - - this suggests maybe a  
25 larger exception to the Lopez rule than - - - than

1 just for this kind of case. You're saying that where  
2 a plea and sentence are on the same day, Lopez should  
3 have no application anyway?

4 MR. FERGUSON: I think that we could go  
5 that far and say that, because what you have in - - -  
6 what's you're having here is there's no opportunity.  
7 How could he preserve it? There is no ability once  
8 sentence is imposed, and it's being - - - it's  
9 happening at his arraignment - - -

10 JUDGE SMITH: And he can't - - - and a 440  
11 motion doesn't work?

12 MR. FERGUSON: 440 motion doesn't work, and  
13 there are a series of cases when we tried to raise  
14 Catu issues, where if it's on the face of the record,  
15 it cannot be raised in a 440 motion, and - - -

16 JUDGE PIGOTT: Let's assume you're right,  
17 Mr. Ferguson. You know, when I look at these, these  
18 are sweet deals in a lot of cases. And a lot of it  
19 seems to be, you know, almost bazaar - - - you know,  
20 Turkish-bazaar type, you know, exchanges that happen  
21 very quickly, and there are some pretty sweet deals  
22 in terms of sentencing and things like that.

23 If we then say to the - - - to the courts,  
24 don't do this anymore, and all of sudden, the DA is  
25 there all night instead of for three hours, and, you

1 know, and - - - and we get into these in a little bit  
2 more detail, maybe - - - maybe this could inure to  
3 the detriment, not so much to this if we reversed it,  
4 but to a whole lot of other people.

5 MR. FERGUSON: I don't believe that's  
6 really true, because the amount of time it takes to  
7 take a proper plea took - - - takes maybe another  
8 minute to ask the proper questions.

9 JUDGE SMITH: And how many - - - and how  
10 many defendants are there in this - - - these parts  
11 in a week?

12 MR. FERGUSON: There can be - - - there  
13 could be several hundred. But not - - - but - - -

14 JUDGE SMITH: Several hundred minutes - - -  
15 several hundred minutes adds up.

16 MR. FERGUSON: It does add up, Your Honor,  
17 but - - -

18 JUDGE GRAFFEO: Is it really only New York  
19 City? Don't the justice courts do this quite a bit  
20 at night?

21 MR. FERGUSON: They - - -

22 JUDGE GRAFFEO: I mean, you go - - -  
23 sometimes your client's scheduled for the  
24 arraignment. You go early; you talk to the ADA or  
25 the town attorney. You work out whatever the

1 sentence is going to be on the misdemeanor, and boom.  
2 It's just done in thirty seconds - - -

3 MR. FERGUSON: Right.

4 JUDGE GRAFFEO: - - - up at the bench.

5 MR. FERGUSON: But what we see is there - -  
6 - there are - - -

7 JUDGE GRAFFEO: Your client's told to go  
8 pay the fine.

9 MR. FERGUSON: Right. But what we see is  
10 in the Appellate Courts of those justice courts, the  
11 cases arising from that, we don't see that issue  
12 being raised on appeal. So the only thing that I can  
13 logically assume - - -

14 CHIEF JUDGE LIPPMAN: Your conclusion is it  
15 doesn't happen in the same way.

16 MR. FERGUSON: That it doesn't happen.  
17 That they - - - they must do it right, because  
18 otherwise, I can't say that, you know, in the Third  
19 and Fourth Department, there would only be one Boykin  
20 case in the last twenty-five years that's raising  
21 this issue. I can't imagine that no at - - - no  
22 appellate attorney has - - -

23 JUDGE GRAFFEO: Are we going to get a lot  
24 of ineffective assistance claims, then, afterwards,  
25 claiming my lawyer didn't - - -

1                   JUDGE SMITH: They didn't anticipate the  
2 ruling in People v. Cavell Craig Tyrell?

3                   MR. FERGUSON: That - - - but again, you're  
4 looking at the overall performance and then you would  
5 be looking at what - - - then you would have what he  
6 - - - what he had talked to him about. But what  
7 you're talking about here is in Mr. Tyrell's case,  
8 let me make it very specific, is that this occurs at  
9 arraignment. This is, you know - - - this is - - -  
10 he's meeting him for the first moment. Maybe he  
11 spoke to him in the pens for a couple of - - - a  
12 couple of moments before this occurred.

13                   JUDGE GRAFFEO: And I'm - - - and I'm  
14 saying that's not unlike justice court, where you  
15 meet your client that night; you talk a couple of  
16 minutes. You go talk to whoever the prosecuting  
17 attorney is, and they call your case, and you go up  
18 to the bench.

19                   MR. FERGUSON: But if you look at it  
20 particularly even the first case here of Mr. Tyrell,  
21 he's still negotiating - - - the defense attorney is  
22 actually negotiating with the prosecutor at the  
23 proceeding, so - - -

24                   CHIEF JUDGE LIPPMAN: What was the maximum  
25 sentence under that first one?



1 MR. FERGUSON: He was criminal sale of  
2 marijuana. He could have gotten a year.

3 JUDGE PIGOTT: Yeah.

4 MR. FERGUSON: But again, none of that is  
5 ever told to him what the possible sentence is.

6 JUDGE PIGOTT: But couldn't that be one of  
7 the reasons why we don't see these, because I just -  
8 - - it just looks so pro-defendant in these things,  
9 because it's sort of, like, pleas generally. I mean,  
10 we can - - - if - - - if every defense lawyer said  
11 we're not taking anymore pleas, period, you'd - - -  
12 you'd cripple the courts within a month.

13 MR. FERGUSON: Right.

14 JUDGE PIGOTT: And so pleas help defendants  
15 a lot. And it seems to me that isn't this a kind of  
16 mini-thing in the same way?

17 MR. FERGUSON: No.

18 JUDGE PIGOTT: No?

19 MR. FERGUSON: And I'll tell you where a  
20 lot of this has arisen from. It's that - - - and I  
21 don't think that attorneys were really on top of it -  
22 - - was that there are immigration consequences to  
23 these cases - - -

24 JUDGE PIGOTT: Oh.

25 MR. FERGUSON: - - - that I don't think

1 people really appreciated. I mean, this would - - -

2 JUDGE SMITH: But, again, why - - -

3 JUDGE RIVERA: Well, but your argument is a  
4 plea - - -

5 MR. FERGUSON: Right.

6 JUDGE RIVERA: - - - of guilty is a plea of  
7 guilty.

8 MR. FERGUSON: A plea of guilty is a plea.

9 JUDGE RIVERA: And it has consequences,  
10 whatever they may be.

11 MR. FERGUSON: Right. But what I'm saying  
12 is that where this has really come to - - - come to  
13 light is that people are being deported. Mr. Tyrell  
14 was being deported over this.

15 JUDGE SMITH: Well, well, but if that's - -  
16 - if that's the case, let me go back to the dialogue  
17 we had a few minutes ago. I said, why shouldn't he  
18 put in an affidavit? You said, well, he can't do it  
19 because he's sentenced that day. And I said, why not  
20 a 440? And you said, because it's apparent on the  
21 face of the record. Isn't that circular? It's  
22 apparent on the face of the record, if we hold, as  
23 you want us to hold - - -

24 MR. FERGUSON: Right.

25 JUDGE SMITH: - - - that this record is - -

1           - is defective on its face. But why shouldn't we  
2 hold that the record is - - - that this plea is not  
3 bad, unless he comes in and says, hey, wait a minute.  
4 There are deportation consequences nobody told me  
5 about, or I - - - no - - - I - - - I didn't know that  
6 I was giving up my right to trial by jury; I never  
7 would have taken this plea.

8                         Why shouldn't we put the burden on the  
9 defendant to do that when, as Judge Pigott says, most  
10 of these people should be thrilled with, you know,  
11 time served and a B misdemeanor?

12                         MR. FERGUSON: Under certain circumstances,  
13 sure they might want to be, but for people like Mr.  
14 Tyrell, this has immigration consequences now. So  
15 that what might have appeared to be a great deal at  
16 that time - - - but again, we don't even know - - -  
17 he's truly a spectator in the first case. No one  
18 asked him a single question. He doesn't utter a  
19 sound. And when you have the attorney - - -

20                         JUDGE SMITH: And if - - - and most of  
21 these spectators, I'm suggesting to you, are very  
22 happy spectators. And when we get an unhappy  
23 spectator, why couldn't he - - - why shouldn't he be  
24 able to come in and say, this is why I'm an unhappy  
25 spectator. This is why I got the short end in this

1 deal.

2 MR. FERGUSON: Because then the People's  
3 response would be - - - and they - - - and they did  
4 in the Catu situations is - - - it was on the face of  
5 the record; he could have made the issue at the time.  
6 I mean, it's - - - it's - - - I don't think it's  
7 realistic to believe that we could go back in on a  
8 440, providing the defendant's affidavit - - -

9 JUDGE SMITH: We have - - - we have a  
10 couple of cases that say there's no catechism.  
11 You've got to judge each one on its - - - on its  
12 merits.

13 MR. FERGUSON: Absolutely, which is why - -  
14 -

15 JUDGE SMITH: And then - - - then you're -  
16 - - you're saying there has to be at least - - -  
17 there has to be at least some - - - some - - - some  
18 conver - - - there's got to be, if not a catechism,  
19 there's got to be dialogue.

20 MR. FERGUSON: There has to be something.

21 JUDGE RIVERA: Well, he's got to say - - -  
22 the defendant's got to say something.

23 MR. FERGUSON: Some - - - that's right.  
24 That's why this - - -

25 JUDGE RIVERA: Yes, I'm guilty; yes, I take

1 the plea.

2 MR. FERGUSON: Right.

3 JUDGE RIVERA: He's got to say something.

4 MR. FERGUSON: Right. Well, that's why the  
5 second case involving Mr. Tyrell was far more  
6 difficult than - - - for us than the first case.  
7 Because the second case, you see, there is an  
8 allocution in the second case. It is simply Boykin  
9 rights that aren't given. That's a far more  
10 difficult case for us. The first case is the one  
11 where there is nothing. He doesn't utter a sound.  
12 He's the one who - - - and he's basically a neophyte  
13 to the criminal justice system.

14 JUDGE SMITH: But his - - - his lawyer does  
15 - - - I've forgotten the words - - - his lawyer  
16 conveys rather clearly that he's willing to plead  
17 guilty in exchange for time served.

18 MR. FERGUSON: He does that, but he is - -  
19 -

20 JUDGE SMITH: Why - - - why should we not,  
21 at least, presume, absent proof of the contrary, that  
22 his lawyer was speaking with his authority?

23 MR. FERGUSON: Because you need at least  
24 some type of assent from the defendant at that point.  
25 All it would have been is one single question to him:

1 is this what you want to do? That might have been  
2 enough.

3 CHIEF JUDGE LIPPMAN: So the judge is  
4 responsible for basically doing this; at least  
5 initiating this conversation about - - -

6 MR. FERGUSON: Absolutely.

7 CHIEF JUDGE LIPPMAN: - - - losing your  
8 right to trial?

9 MR. FERGUSON: Right, at least to make some  
10 statement.

11 CHIEF JUDGE LIPPMAN: So there's no - - -  
12 let me just make sure - - - so there's no particular  
13 language, but this doesn't do it, because there's no  
14 language, period.

15 MR. FERGUSON: That's right. There's no  
16 language, period, whatsoever.

17 CHIEF JUDGE LIPPMAN: So this is kind of  
18 prophylactic to cure the kind of situations you might  
19 get into with Padilla and all kinds of other  
20 collateral consequences that, at least, you should  
21 know you're giving up your right to trial. And  
22 you're - - - you're proposing this as sort of a base  
23 line; is that the idea here?

24 MR. FERGUSON: That's right. There would  
25 be a base line to - - -

1 CHIEF JUDGE LIPPMAN: That that's what  
2 should be in every case - - -

3 MR. FERGUSON: And it's - - -

4 CHIEF JUDGE LIPPMAN: - - - even if it  
5 takes a little more time.

6 MR. FERGUSON: Right. And it's really just  
7 what - - - going back to what Judge Read indicated -  
8 - - it is really in the justice court or the criminal  
9 courts, because if this was in a typical trial court,  
10 if this was in the Supreme Court, plea and sentence  
11 don't happen on the same day. There is an  
12 adjournment for pre-sentence report, and there would  
13 be time for him then to make a plea withdrawal  
14 motion.

15 CHIEF JUDGE LIPPMAN: So the lower courts  
16 have all this volume, and - - - and maybe we're  
17 cutting corners.

18 MR. FERGUSON: We're - - - we're absolutely  
19 cutting corners here, and it's something that can't -  
20 - - it just can't happen. And it really shouldn't be  
21 that there is a problem down in the city and there  
22 isn't a problem upstate.

23 CHIEF JUDGE LIPPMAN: Well, I - - - I agree  
24 with you and I agree in practice that that's what  
25 happens, because I know that, but it is surprising

1           that in the justice courts outside the city where a  
2           lot of people are very, very critical of the justice  
3           courts and the justices themselves and all of that,  
4           that that doesn't seem to be the case.

5                       MR. FERGUSON: Does not seem to be the  
6           case, because there are no reported appellate cases  
7           in the last twenty-five years on it. So, it would  
8           seem to indicate that this - - -

9                       CHIEF JUDGE LIPPMAN: Maybe it's because  
10          they get training regularly, the justice courts, of  
11          what they're supposed to be doing.

12                      MR. FERGUSON: I can't say exactly what  
13          type of train - - -

14                      CHIEF JUDGE LIPPMAN: But that's  
15          speculation on my part. Okay.

16                      MR. FERGUSON: That - - - that would be  
17          speculation on your part, and it'd be speculation  
18          from me as well.

19                      JUDGE PIGOTT: But this is really an  
20          immigration case, you're saying.

21                      MR. FERGUSON: I'm saying, as it affects  
22          Mr. Tyrell, this - - - the - - - the impact for Mr.  
23          Tyrell is his pending deportation.

24                      JUDGE PIGOTT: Is that your experience? I  
25          mean, with others as well?



1 MR. FERGUSON: Not all of the cases that  
2 has arisen - - -

3 JUDGE PIGOTT: Not all, but - - -

4 MR. FERGUSON: Not all of the cases that  
5 has arisen through the Legal Aid Society all involve  
6 defendants who were facing deportation. That there  
7 are cases of, you know, American citizens that are  
8 having the same type of situation, but I'm saying  
9 that, you know - - -

10 CHIEF JUDGE LIPPMAN: It doesn't have to be  
11 deportation.

12 MR. FERGUSON: It doesn't have to be - - -

13 CHIEF JUDGE LIPPMAN: It doesn't have to be  
14 immigration, right?

15 MR. FERGUSON: Right, but that - - - I  
16 think that's where, when we start - - - when the  
17 realization that people were being deported over  
18 things like fare jumping, and you know, minor mis - -  
19 - minor marijuana possession cases, that suddenly  
20 now, what seemed what might have been an expedient  
21 case at the time, now has more - - - far more serious  
22 consequences.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 Thanks, counsel.

25 MR. GEE: May it please the court, Ryan Gee

1 for respondent, People of New York.

2 CHIEF JUDGE LIPPMAN: Counsel, why - - -  
3 what - - - what could be more basic than this to - -  
4 - to let the defendant understand what he's giving  
5 up? And why is this even open to question?

6 MR. GEE: Why is this open to ques - - -

7 CHIEF JUDGE LIPPMAN: Yeah, why - - - why  
8 would you look at this and say, there's not something  
9 wrong here?

10 MR. GEE: Well, Your Honor, there are - - -  
11 well, first I would start - - - I'd like to start  
12 with Judge Smith's point, because I think this is the  
13 fundamental point here, which is that even though  
14 defendant urges this court to vacate his pleas as not  
15 knowing, voluntary or intelligent, he himself has  
16 never even alleged that there was anything about his  
17 pleas that he did not actually know or understand.

18 JUDGE PIGOTT: Well, that - - - that raises  
19 the point that Mr. Ferguson put it toward the end  
20 there, if - - - if - - - this - - - this works. I  
21 think this whole system works, generally speaking for  
22 all of these defendants and - - - and an overloaded  
23 court system and everything else.

24 But at some point, if it - - - if it ends  
25 up doing, as - - - as in this - - - this person's

1 case, more damage than anybody knew, than the judge  
2 knew, than the People knew, than the defense lawyer  
3 knew or anything else, all of sudden he's on a - - -  
4 on a list sending - - - sending him back to another  
5 county, shouldn't we, as a justice system, be a  
6 little more conscious of that and in the plea, make  
7 sure - - - as I think the CPL requires judges to do -  
8 - - that if this has any affect on - - - on your  
9 immigration status, you know, you should be aware of  
10 it?

11 MR. GEE: Well, Your Honor, if - - - if  
12 defendant's concerns in this case are his immigration  
13 consequences, then his claim is a Padilla claim, but  
14 that's not the claim that defendant has ever brought  
15 in these appeals. He's bringing, essentially, a  
16 Boykin claim.

17 And it is long settled law under this  
18 court's jurisprudence that if you're going to attack  
19 the sufficiency of a plea allocution because certain  
20 things were not mentioned with respect to your so-  
21 called Boykin rights, then you must in the general  
22 case, either move to withdraw the plea, or move to  
23 vacate the plea under a 440.10.

24 JUDGE SMITH: And the - - - the - - - he's  
25 right, isn't he, that the former is not an option

1 here, because they had - - - the plea and sentence  
2 were simultaneous.

3 MR. GEE: Yeah, we would concede that.

4 JUDGE SMITH: You're saying - - - you're  
5 saying that the preservation - - - here, he had to  
6 make a 440.

7 MR. GEE: Correct, Your Honor.

8 JUDGE PIGOTT: But they don't know that,  
9 and - - - and I know, at least, upstate, you don't -  
10 - - you're not entitled to a lawyer on a 440. And -  
11 - - and so, you know, somehow, you know, when you - -  
12 - when you get the immigration papers, you say what  
13 am I supposed to do? You're not entitled to an  
14 attorney. You just don't know where to turn.

15 MR. GEE: Well, Your Honor, well, first I  
16 would just again note, it's this court's longstanding  
17 rules, every since Lopez, for decades that this is  
18 the - - - the course of a - - -

19 JUDGE PIGOTT: We might change it. I'm  
20 just - - -

21 MR. GEE: You could change it, but - - -  
22 but I would also note that it's not un - - -

23 CHIEF JUDGE LIPPMAN: Is this a basic  
24 fairness issue?

25 MR. GEE: Well, I - - -

1 CHIEF JUDGE LIPPMAN: I mean, why would you  
2 - - - why would you not, you know, want the judge to  
3 be telling them that, hey, you relinquish your right  
4 to a trial? Isn't this the most basic, most  
5 elemental thing? We have to wait for them to then -  
6 - - then make some kind of motion, based on what is  
7 so obviously not fair and inconsistent with what  
8 we're supposed to be doing? Even given, which I  
9 understand coming out of the city, you know, the  
10 volume issues.

11 It's just so basic that you, the defense  
12 attorney, and everyone would say, obviously, Judge,  
13 you got to tell them that they're giving up their  
14 right to a trial. Isn't this the most - - - almost  
15 the most fundamental thing that you could possibly  
16 have?

17 MR. GEE: Well, Your Honor, I think if  
18 there was - - -

19 CHIEF JUDGE LIPPMAN: In fairness terms?

20 MR. GEE: If there was such a great  
21 unfairness in this case, then I don't understand why  
22 Mr. Tyrell has never come forward with any  
23 allegations about what he did not actually know or  
24 understand. And under this court's - - -

25 JUDGE SMITH: So may - - - is it - - -

1 would you say that most people who plead guilty do  
2 understand that that means they're not going to get a  
3 trial?

4 MR. GEE: I - - - I don't know if I would  
5 say most people. But I think certainly, in this  
6 case, under this court's jurisprudence of Harris and  
7 Nixon, there are sufficient indicia in this existing  
8 record to suggest that defendant's plea was entered -  
9 - -

10 CHIEF JUDGE LIPPMAN: Yeah, yeah, but  
11 counsel, he didn't know he was going to be deported,  
12 did he?

13 MR. GEE: Well, I - - - I don't know that,  
14 but that's not the claim that defendant is raising.  
15 Defendant is complaining about the fact that certain  
16 trial rights - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but one is the  
18 result of the other, isn't it? He's not told that  
19 he's - - - that he's going to - - - that he, you know  
20 - - - that he gives up his right to trial, and it led  
21 ultimately to - - - to deportation - - -

22 MR. GEE: Well, Your Honor - - -

23 CHIEF JUDGE LIPPMAN: - - - or any other  
24 consequences that one could have.

25 MR. GEE: Well, that's - - - that's a

1 Padilla claim, Your Honor. And I - - - I'm not aware  
2 of any decisions from this court or others that have  
3 conflated the Boykin rights with - - -

4 JUDGE PIGOTT: No, you're probably right.  
5 I - - - I - - - it - - - I just - - - it just seems  
6 to me that when we're talking about this, we're  
7 talking volume, for you, the People, for the court  
8 and for the public defender in these cases. And it  
9 would seem logical at some point that if we are all  
10 aware of - - - if he's bootstrapping a Padilla claim  
11 on a - - - on a Boykin claim, but it brings it to our  
12 attention, shouldn't something be done?

13 I mean, shouldn't we write something that  
14 says, you know, if this is happening, even though - -  
15 - even though it's fully understandable what the  
16 courts are doing, and what everyone's doing, because  
17 these really are sweetheart deals, it seems to me.  
18 They're fine, but - - - but make sure you're not  
19 doing more damage to a defendant than he or she is  
20 aware of, simply because she gets to - - - or he gets  
21 to walk out of court that afternoon, because he, you  
22 know, got time served.

23 MR. GEE: Well, Your Honor, I mean, if this  
24 court wants to write some dicta about immigration  
25 consequences, then I suppose this court could, but -

1 - -

2 JUDGE PIGOTT: Give all the dicta you want.

3 MR. GEE: But this - - - these would not be  
4 the - - - the proper - - - the appropriate cases to  
5 decide that issue.

6 JUDGE RIVERA: Okay, but counsel, are you -  
7 - - let's just take the first case. Are you actually  
8 saying that - - - that someone can be sentenced  
9 without having said a word that yes, I plead guilty?  
10 Is that really the position the DA's Office is taking  
11 in this court?

12 MR. GEE: Your Honor, we would never  
13 suggest that this first case was a model proceeding.  
14 That - - - that is a given. But under this court's  
15 longstanding jurisprudence, first, if defendant  
16 really wants to challenge the sufficiency of the  
17 allocution, then the proper way to do so, is through  
18 - - - in this particular case - - - a motion to  
19 vacate the judgment.

20 CHIEF JUDGE LIPPMAN: Why shouldn't we tell  
21 the judge to do this the right way? Why wouldn't  
22 that be the most basic thing?

23 MR. GEE: I think it's - - -

24 CHIEF JUDGE LIPPMAN: I mean, as Judge  
25 Pigott says, even it's understandably - - - if these



1           guys are getting a great deal and everything else,  
2           why wouldn't we tell them that, hey, this isn't the  
3           way to do this? And why would it be dicta?

4                       Isn't this, again, basic fundamental  
5           fairness that goes beyond, gee, it's not quite the  
6           right practice? Isn't this a little more than that?  
7           That - - - that, gee, you're not - - - you're not  
8           doing it; better practice would be - - - this is not  
9           just a better practice case, or is it, in your mind?  
10          This is just better practice?

11                      JUDGE RIVERA: Counsel, if I could just  
12          add, I don't understand how you're arguing in the  
13          first case there's an allocution. He doesn't say  
14          anything. Where is there an allocution?

15                      MR. GEE: Well, Your Honor, there's no  
16          constitutional requirement for certainly a factual  
17          allocution and I don't think it's - - -

18                      JUDGE RIVERA: But - - - but to say, yes, I  
19          take the plea. I mean - - -

20                      MR. GEE: Well, Your Honor, I think - - -  
21          well, first, this court has said in - - - in Harris,  
22          that when evaluating the voluntariness of a plea,  
23          it's matters of reality and not mere ritual that  
24          should be controlling. And the reality in these  
25          cases here is that defendant was pleading guilty to

1 misdemeanor offenses at arraignment for favorable  
2 sentences of time served in the first case, and - - -  
3 through active bargaining of counsel - - - ten days  
4 in the second.

5 And throughout these cases, defendant was  
6 represented by an attorney, who, the record shows,  
7 was actively engaged in the process. I believe, even  
8 defendant is conceding that point before this court.  
9 And defendant has never challenged the competence or  
10 effectiveness of the attorney.

11 Certainly there's never been an opportunity  
12 for the parties to develop the necessary record to  
13 assess whether these omissions from the allocution  
14 had any real bearing on the voluntariness of the  
15 plea.

16 CHIEF JUDGE LIPPMAN: So your argument is -  
17 - - and I don't say this in a negative way - - - is  
18 that it's really all ritual, and that it just doesn't  
19 matter. I mean, that - - - your argument, in  
20 essence, is it really doesn't matter. It's ritual;  
21 it's window-dressing. We all know what's going on.  
22 Essentially, that's the argument.

23 MR. GEE: No, Your Honor, I - - - my - - -  
24 my argument is that under this court's jurisprudence,  
25 if a defendant wishes to challenge the voluntariness

1 of his plea and there is nothing from the face of the  
2 record that suggests that the plea was somehow  
3 improvident, then what defendant has - - -

4 CHIEF JUDGE LIPPMAN: Nothing on this  
5 record that looks like the plea was improvident?

6 MR. GEE: Not according to this juris - - -  
7 this court's jurisprudence, Your Honor.

8 CHIEF JUDGE LIPPMAN: So your argument is -  
9 - - a yes or a no - - - that this doesn't matter. It  
10 doesn't matter that the judge says to him you're  
11 giving up your right to trial or whatever the judge  
12 says.

13 MR. GEE: No - - -

14 CHIEF JUDGE LIPPMAN: It's doesn't matter.

15 MR. GEE: No, no, it - - -

16 CHIEF JUDGE LIPPMAN: It matters, but you -  
17 - - you - - - you want to - - - if you want to point  
18 it out, you got to do it later.

19 MR. GEE: Right. Your Honor, no - - - our  
20 position is not that defendant cannot challenge his  
21 plea. It's that, as this court has held, the correct  
22 place to do so in the general case, including in  
23 these cases - - -

24 CHIEF JUDGE LIPPMAN: So it doesn't matter  
25 whether the judge does it in this kind of setting,

1           because there's another place to bring it up. That's  
2           your position in - - - yes?

3                         MR. GEE: I - - - it - - -

4                         JUDGE SMITH: Are you - - - are you perhaps  
5           saying that sometimes it matters, and sometimes it  
6           doesn't?

7                         MR. GEE: I - - - I'm sorry; I'm just not  
8           following. I'm sorry.

9                         JUDGE SMITH: I mean, I guess, the - - -  
10          the - - - as I understand the Chief's question, it's  
11          whether the - - - the traditional allocution - - -  
12          whether you think the traditional allocution has any  
13          point or it's just an empty ritual?

14                        MR. GEE: No, well - - - well, first, I'm  
15          not - - - I'm not sure what we mean by a traditional  
16          allocution, because as this court - - -

17                        JUDGE SMITH: The - - - the recital of the  
18          Boykin rights and the ask - - - the asking the  
19          defendant what he did, and asking him whether he  
20          pleads guilty or not guilty.

21                        MR. GEE: It - - - certainly, it matters if  
22          the defendant has knowingly and voluntarily entered  
23          his plea of guilt.

24                        JUDGE SMITH: Okay, but I guess, there's -  
25          - - there is - - - whether we like rituals - - - so

1           there is a kind of a ritual that is usually gone  
2           through, at least on pleas of - - - that are more  
3           serious than B misdemeanor and time served. I'm  
4           sure, we've all read allocutions. They had - - -  
5           they look a little bit alike. Why do we do that?  
6           Why - - - why are those things done?

7                         MR. GEE: Well, why are we - - - well, I  
8           think in a felony case, certainly these allocutions  
9           would not be appropriate.

10                        JUDGE SMITH: Well, the answer has to be to  
11           make sure that the person isn't - - - that the plea  
12           is knowing, voluntary and intelligent, right?

13                        MR. GEE: Yes, but - - -

14                        JUDGE SMITH: And when it's omitted - - -  
15           say, do we - - - the question for me, anyway, is when  
16           it's omitted, do we just assume that it wasn't  
17           knowing, voluntary and intelligent, or do we have to  
18           litigate it on a case-by-case basis?

19                        MR. GEE: You must litigate it on a case by  
20           case basis. And that - - - that's this court's  
21           longstanding jurisprudence. And - - - and the way we  
22           do that is we go through a post-allocation motion,  
23           because that gives the parties an opportunity to  
24           investigate all the surrounding circumstances, which  
25           is the rule under this court in Harris, and certainly

1 the Supreme Court in Brady, and we determine whether  
2 the defendant's plea was knowing, voluntary and  
3 intelligent.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. GEE: Thank you.

6 CHIEF JUDGE LIPPMAN: Thanks, counsel.

7 Counselor, rebuttal?

8 MR. FERGUSON: Yes. After this court came  
9 down with People v. Catu, we have a number of - - -  
10 we had a number of defendants who had not filed a  
11 notice of appeal. We attempted by 440.10 to go back  
12 in and challenge those convictions. And the  
13 Manhattan District Attorney's Office opposed them on  
14 the grounds that it was on the face of the record.  
15 To suggest that they would now say that we could go  
16 in for a 440.10 - - -

17 JUDGE SMITH: This is - - - are we going -  
18 - - is - - - is Tyrell going to be another Catu? We  
19 won't get - - - we're not going to get any 440s, but  
20 we're going to get a lot of direct appeals?

21 MR. FERGUSON: I think you'll get a lot of  
22 direct - - - you may get a lot of direct appeals  
23 depending on what happens.

24 JUDGE SMITH: You're going to keep us in  
25 business, yeah.

1 MR. FERGUSON: And I will say, and to go  
2 back to the preservation point, I do want to point  
3 out this court's opinion in Fooks, which was one of  
4 the cases in Nixon. In Fooks, the defendant did not  
5 make any motion whatsoever to withdraw his guilty  
6 plea. And this court still - - - and that was the  
7 case where there was a plea and then a gap and then a  
8 sentence - - - and this court still reached it on the  
9 merits.

10 So I believe that there are circumstances  
11 where we wouldn't have - - - that this court wouldn't  
12 have to create some sort of earth-shattering rule  
13 that changes preservation, because - - -

14 JUDGE GRAFFEO: So what - - - what is the  
15 rule you want us to articulate here?

16 MR. FERGUSON: The rule that I want you to  
17 ar - - -

18 JUDGE GRAFFEO: Is it the same rule for  
19 both cases?

20 MR. FERGUSON: I believe that, yes, that  
21 there has to be that - - - sort of what the Second  
22 Circuit did in Hanson v. Phillips. That there has to  
23 be a discu - - - there has to be some level of a  
24 discussion to un - - - to make sure that defendant  
25 knows what's going on. Particularly someone who's

1 not particularly versed in what's happening in a  
2 court proceeding. Realistically, there is no way - -  
3 -

4 CHIEF JUDGE LIPPMAN: Why can't you just  
5 challenge it later, as your adversary suggests?

6 MR. FERGUSON: I - - - I think because what  
7 their response would be that this would appear on the  
8 face of the record. Exactly what they did in the  
9 Catu cases.

10 JUDGE SMITH: Well, but that - - - but  
11 that's circular. I mean, if there's - - - if - - -  
12 if this record is - - - if there is indeed a defect  
13 on the face of this record, you're going to win this  
14 appeal.

15 MR. FERGUSON: Right.

16 JUDGE SMITH: But if you lose the appeal,  
17 then we've decided for you that there is no defect of  
18 it appearing on the face of the record, so  
19 congratulations, you've got a good 440.

20 MR. FERGUSON: Okay, then that would be a  
21 possibility. But then I would - - - I would remind  
22 the court to take a look at - - - Hanson v. Phillips  
23 came from the Second Circuit after this court's  
24 opinion in Harris. And it does - - -

25 CHIEF JUDGE LIPPMAN: Why isn't it just



1 ritual? That's all we're trying to get at.

2 MR. FERGUSON: It is not ritual. It - - -

3 CHIEF JUDGE LIPPMAN: Why - - - why not?

4 It's the question Judge Smith asked before.

5 MR. FERGUSON: It's - - - it's more than  
6 ritual. It's to assure that the defendant  
7 understands what is going on, and that he's waiving  
8 important and constitutional rights, and understands  
9 what his rights are. And when you're talking about  
10 something that's appearing at arraignment, to take -  
11 - - I think that takes a little bit more time than  
12 what is being done here. And that the rush to  
13 judgment is unfortunate here and is not proper, and  
14 needs to be changed; that the defendant's  
15 constitutional rights cannot be vitiated because the  
16 courts are busy, and they need to rush to judgment.

17 JUDGE RIVERA: And why can't - - -

18 MR. FERGUSON: Thank you.

19 JUDGE RIVERA: I'm sorry; why can't - - -  
20 why can't the lawyer get up and say, yes, my client  
21 pleads guilty. Why is that not good enough?

22 MR. FERGUSON: It's not good enough because  
23 in - - - particularly in the first case, because when  
24 he says, he's authorized me, if you look at the face  
25 of the allocution, he - - - or what the - - - the

1 proceeding, he's actually negotiating with the  
2 prosecutor at that time. How could he have  
3 authorized him to plead to something when he's still  
4 in the midst of the negotiations? There was no break  
5 in the proceeding, whatsoever.

6 JUDGE SMITH: You've never - - - you've  
7 never - - - you've never had a negotiation where your  
8 client has given you a little authority to move off -  
9 - -

10 JUDGE RIVERA: In advance.

11 JUDGE SMITH: - - - your best offer?

12 JUDGE RIVERA: Or in advance have said,  
13 I'll take X. When you get X as the offer.

14 MR. FERGUSON: All it would have taken  
15 would have been a simple question to the defendant by  
16 the court, are you - - - what you asked - - - what  
17 you had asked my adversary; there was no assent  
18 whatsoever. There wasn't in - - - even an illusion  
19 to it.

20 JUDGE RIVERA: It has to be an inquiry to  
21 the defendant?

22 MR. FERGUSON: To the defendant.

23 JUDGE RIVERA: It cannot be through the  
24 counsel.

25 MR. FERGUSON: Not simply through counsel.

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CHIEF JUDGE LIPPMAN: Okay, counsel.

MR. FERGUSON: Thank you, Your Honor.

CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Cavell Craig Tyrell, Nos. 230 and 231 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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