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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 5

RAFAEL L. BELLIARD,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 2, 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.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 5, People v.  
2 Rafael Belliard.

3 Okay, counselor, go ahead.

4 MR. JUERGENS: May it please the Court,  
5 David Juergens. I'm representing Mr. Belliard. I'd  
6 request three minutes for rebuttal, if I could.

7 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
8 counselor.

9 MR. JUERGENS: The bottom line on Mr.  
10 Belliard's appeal is that he may not have pled guilty  
11 if he had been advised that he was getting a twelve-  
12 year mandatory consecutive sentence.

13 JUDGE READ: So what should the judge have  
14 done?

15 MR. JUERGENS: The judge should have  
16 advised him that if he pleads guilty and this is a  
17 twelve-year sentence that under 70.25(2-a), this is  
18 going to be mandatory.

19 JUDGE PIGOTT: If we unwind the facts a  
20 little bit - - -

21 MR. JUERGENS: Sure.

22 JUDGE PIGOTT: - - - and he'd taken the  
23 plea before the federal sentence, and as I think you  
24 know, everybody waits for the feds because you can't  
25 make them concurrent if they're - - - if the federal

1 comes after the state, would that have been an error  
2 by the judge? I mean, is he supposed to advise the  
3 defendant, if you have any federal cases pending get  
4 them cleaned up before this because you can't make  
5 them concurrent?

6 MR. JUERGENS: The federal case is almost a  
7 red herring here because what we're focusing on is  
8 the undischarged state sentence.

9 JUDGE PIGOTT: I know, but what I was  
10 looking at is your argument is the judge should have  
11 inquired, found out that there was this undischarged  
12 parole violation that he's doing time on, find out  
13 the quality and quantity of it and then advised the  
14 defendant, as long as you understand this is  
15 consecutive to that.

16 I'm just thinking - - - let's assume that's  
17 not there but the federal charge is and he's taken a  
18 plea. If he takes the - - - if he gets sentenced - -  
19 - if he takes the plea, I guess, under federal,  
20 before the state, there - - - no, if he takes the  
21 state before the federal, the federal will not be - -  
22 - will not be concurrent and - - -

23 MR. JUERGENS: Well, we wouldn't have a  
24 direct consequence in that circumstance because  
25 mandatory consecutive sentencing only applies if you

1 have a state - - -

2 JUDGE PIGOTT: Right.

3 MR. JUERGENS: - - - undischarged sentence.

4 JUDGE PIGOTT: But should the judge advise  
5 any defendant, if you have any federal case - - - my  
6 point is at what point do we stop saying to the  
7 judge, assume what should really be counsel's job,  
8 which is to investigate, find out what the sentencing  
9 structure is here, the situations, advise your client  
10 and then come on in.

11 MR. JUERGENS: I would stop at the nine  
12 categories of predicate felony offenders that apply  
13 to 70.25(2-a). You have discretion to run a state  
14 sentence concurrent or consecutive to a federal  
15 sentence, and under the case law Wilson v. McGinnis,  
16 you don't have to advise of a - - - that the sentence  
17 may be consecutive because there's discretion  
18 involved.

19 JUDGE PIGOTT: But there isn't the other  
20 way, is my point. I don't think that the feds are  
21 going to make their sentence concurrent with the  
22 state.

23 MR. JUERGENS: Well, this is the state  
24 court judge advising regarding - - - and again, I say  
25 that federal matter is a red herring because our sole

1 focus is on the fact that there's mandatory  
2 consecutive sentencing when you're talking about an  
3 undischarged state sentence and you have another  
4 state sentence. And the reason is because those two  
5 sentences are fundamentally connected.

6 JUDGE READ: Well, is there - - - there's  
7 no question - - - the judge didn't know, did he?

8 MR. JUERGENS: The judge in this case, I  
9 think - - - there's all over the record that he knew  
10 - - - first of all, what I would say is the trigger  
11 for the court's constitutional duty to make an  
12 advisement is when he has knowledge that this person  
13 is a predicate felony offender. And that's very  
14 clear; that's on the record. It's also clear that -  
15 - -

16 JUDGE READ: You mean he could have figured  
17 it out from the dates and so forth?

18 MR. JUERGENS: Well, no, I don't think the  
19 judge has a duty to get into the dates or advise the  
20 defendant of exactly what it's going to mean if the  
21 sentence is consecutive or concurrent. What the  
22 judge has to do is say that, okay, I've been advised  
23 by the district attorney that you're a second-felony  
24 offender, and it's clear from the record because  
25 there was a parole detainer; he was held on a parole

1           detainer.  It was - - - there was an undischarged  
2           sentence.

3                   JUDGE GRAFFEO:  Is it the violation of the  
4           PRS?  What's the undischarged sentence?

5                   MR. JUERGENS:  The undischarged sentence,  
6           he was being held on a violation of the PRS, and he  
7           owed the state - - -

8                   JUDGE GRAFFEO:  I was trying to find in the  
9           record, where does this record tell us that he was  
10          charged with a violation of PRS?

11                  MR. JUERGENS:  Well, it - - - the defense  
12          attorney refers - - -

13                  JUDGE GRAFFEO:  - - - because I couldn't  
14          find it.

15                  MR. JUERGENS:  - - - the defense attorney  
16          refers to it as a parole violation.

17                  JUDGE GRAFFEO:  Well, in the minutes of the  
18          proceeding, the defense attorney was more concerned  
19          with what was going on in federal court.

20                  MR. JUERGENS:  True.

21                  JUDGE GRAFFEO:  I didn't find that that  
22          attorney ever mentioned anything about the violation  
23          of PRS.

24                  MR. JUERGENS:  He mentioned that there had  
25          been a pre-trial conference with the court and the DA

1 and that they were going to run this twelve-year  
2 sentence concurrent with - - - and he characterized  
3 it as a state parole violation. And we know from the  
4 second-felony offender statement that there was, in  
5 fact, an undischarged prior state sentence because it  
6 was six months before he picked up this charge and  
7 there was no way - - -

8 JUDGE GRAFFEO: Well, I guess I'm trying to  
9 figure out what's the rule you're looking for because  
10 is a judge in every instance going to know - - -

11 MR. JUERGENS: The rule that - - -

12 JUDGE GRAFFEO: - - - that they need to  
13 give this type of warning or alert the defendant to  
14 this type of situation? Are they always going to  
15 know the background of the other pending charges?

16 MR. JUERGENS: All the judge would have to  
17 know, initially, is that the person is a predicate-  
18 felony offender. Once the judge knows that, and  
19 we're in a plea situation where there should be a  
20 discussion between the defense attorney and - - -

21 JUDGE GRAFFEO: Okay. So what is it you  
22 want to judge to - - - what's the rule? What is it  
23 you want the judge to announce - - -

24 MR. JUERGENS: The rule is to announce - - -

25 -

1 JUDGE GRAFFEO: - - - if they know - - -

2 MR. JUERGENS: - - - that this twelve-year

3 - - -

4 JUDGE GRAFFEO: - - - if he or she knows

5 that it's a predicate?

6 MR. JUERGENS: This twelve-year sentence

7 will be consecutive to any outstanding undischarged

8 sentence.

9 CHIEF JUDGE LIPPMAN: So every time there's

10 a predicate felon, they should say that's your rule.

11 MR. JUERGENS: Every time.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. JUERGENS: Every time.

14 JUDGE SMITH: The record - - - I mean, the

15 record you were just referring to says that - - - at

16 79, the defense lawyer was saying, we talked about

17 having sentences that would be running concurrent

18 with any federal and state violations of parole and

19 probation. And then he says, I think this court had

20 indicated that if Mr. Belliard pled it would agree to

21 sentence concurrent with the federal court. Isn't it

22 - - - can't you infer from that that everybody knew

23 that he couldn't do concurrent - - - he wasn't going

24 to do concurrent and couldn't do concurrent with the

25 state court?



1                   MR. JUERGENS: I don't think you  
2 necessarily have to read the record that way because  
3 no one - - -

4                   JUDGE SMITH: I mean, it casts doubt on  
5 your saying that he might not have pled if he knew he  
6 was going to get consecutive.

7                   MR. JUERGENS: Well, I - - - again, I  
8 wouldn't read the record that way because you have a  
9 general default rule that if nothing is said at the  
10 time of sentencing, then state sentences are going to  
11 be concurrent with each other. And if, in Mr.  
12 Belliard's mind, there's the possibility of  
13 concurrency, we go to sentencing, nothing is said,  
14 then he has the idea that it's going to be  
15 concurrent.

16                  JUDGE READ: I have one more question. In  
17 Harnett, we said that we had - - - should never - - -  
18 we talked about direct consequences, and we said they  
19 are essentially - - - we've limited them to the core  
20 components of a defendant's sentence, term of  
21 probation or imprisonment, term of post-release  
22 supervision, and a fine. So you would ask us to  
23 extend that?

24                  MR. JUERGENS: I would ask you to include  
25 that concurrent sentencing - - - concurrent or

1 consecutive nature of a state sentence is an integral  
2 part of the sentence which was the language in K2 and  
3 was Chief Judge Lippman's language in Sergio  
4 Rodriguez from last year where he talked about that a  
5 consecutive or concurrent nature is - - - it's an  
6 integral part of the sentence and - - -

7 JUDGE READ: Okay.

8 MR. JUERGENS: - - - that was undisputed by  
9 the majority in that case.

10 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
11 counselor.

12 MS. WOLFORD: Good afternoon, Your Honors.

13 CHIEF JUDGE LIPPMAN: Counselor.

14 MS. WOLFORD: May it please the Court,  
15 Kelly Wolford on behalf of the District Attorney's  
16 Office of Monroe County.

17 CHIEF JUDGE LIPPMAN: Counselor, does it  
18 cast doubt on the voluntariness of this if the judge  
19 did not make clear that in this situation where  
20 there's a predicate felon?

21 MS. WOLFORD: No, not in this situation and  
22 I - - -

23 CHIEF JUDGE LIPPMAN: Why not? Why isn't  
24 this precisely the kind of situation where the judge  
25 should make clear that fact?

1 MS. WOLFORD: Well, first of all, I think,  
2 Your Honor, we have to speak of the lack of  
3 preservation of the defense argument here and the  
4 effect that it's having on the court's ability to  
5 actually find out what happened in this case. Here,  
6 we have a direct appeal from a conviction where the  
7 defendant never asked to withdraw his plea before the  
8 trial court and never filed a 440 motion to expand  
9 the record.

10 JUDGE SMITH: But you don't have to - - -  
11 we know you don't have to preserve K2 claims when you  
12 don't know about them.

13 MS. WOLFORD: Correct. You don't have to  
14 preserve - - - well, you still have to make the  
15 motion.

16 JUDGE SMITH: It's hard to preserve - - -  
17 for starters, it's hard to preserve the objection,  
18 hey, you forgot to tell me something I don't know.

19 JUDGE READ: Right.

20 MS. WOLFORD: And when you have the post-  
21 release supervision cases, there's a - - - there's  
22 two different lines of cases. You have the post-  
23 release supervision cases where they're not advised  
24 at the time of the plea that they're going to get  
25 post-release and then the court imposes it, in which

1 case the defendant has to make the motion before - -  
2 - and the record is pretty clear for direct appeal.  
3 And then you have the cases - - - the whole line of  
4 cases where it was not discussed ever, where it  
5 wasn't discussed at the time of the plea. The  
6 defendant wasn't sentenced in open court to the post-  
7 release, and then it comes up because DOCs imposed it  
8 once they got to prison. And then those cases came  
9 by - - - came to you by way of a 440 motion.

10 Here, we have none of that. We have no  
11 indication on the record. The court is completely  
12 silent on consecutive or concurrent time. The  
13 defendant never made a motion to withdraw his plea  
14 either during the course of the pendency of the case  
15 or after the case was resolved and there was a 4 - -  
16 - he never brought a 440 motion. So here we have a  
17 complete lack of record as to what actually happened  
18 at that point. And as a result, we're in this  
19 situation where we truly have no idea if this  
20 individual was subject to an undischarged term of  
21 imprisonment.

22 There is no place in the record that  
23 establishes that he was actually subject to an  
24 undischarged term of imprisonment at the time that he  
25 was sentenced here. The record is completely devoid

1 of where he stood on the other charge at the point in  
2 time.

3 JUDGE SMITH: Well, can't you just figure  
4 it out from the rap sheet - - - I mean, from the  
5 numbers?

6 MS. WOLFORD: You can't, Your Honor,  
7 because as you are very aware, once a parole detainer  
8 is filed, parole proceeds on its own outside of the  
9 criminal justice system, and the prosecutor and the  
10 courts are not involved whatsoever. At any point in  
11 time, he could have resolved his parole violation  
12 with, say, agreeing to nine months and it could have  
13 been over by the time that we got to the time we're  
14 at now.

15 CHIEF JUDGE LIPPMAN: But your adversary  
16 suggests that there should be a rule that if it's - -  
17 - if you know that it's a predicate felony situation,  
18 that, therefore, you know that there could be a  
19 problem with it in that it would be - - - it would  
20 make sense to - - - in every situation like that to  
21 at least raise that.

22 MS. WOLFORD: Okay.

23 CHIEF JUDGE LIPPMAN: Is that a bad rule?  
24 Is that a good rule?

25 MS. WOLFORD: Well, I think it's just

1           slippery slope rule. I think at - - -

2                   CHIEF JUDGE LIPPMAN: Why?

3                   MS. WOLFORD: Because our courts are  
4           burdened with everything that they have to come  
5           forward and tell the defendant at the time they enter  
6           a guilty plea.

7                   CHIEF JUDGE LIPPMAN: Yeah, but defendants  
8           have rights. That's the whole point.

9                   MS. WOLFORD: Absolutely.

10                  CHIEF JUDGE LIPPMAN: So - - -

11                  MS. WOLFORD: And that's why this - - -

12                  CHIEF JUDGE LIPPMAN: So it's not that  
13           great a burden if it's a central right that the  
14           defendant has.

15                  MS. WOLFORD: And that's exactly why this  
16           court has distinguished between a direct consequence  
17           of a plea and a collateral consequence of a plea and  
18           has - - -

19                  CHIEF JUDGE LIPPMAN: What could be more  
20           direct than this, though?

21                  MS. WOLFORD: Well - - - and it actually -  
22           - - in Gill v. Greene, this court talked about this  
23           exact - - - this exact statute.

24                  CHIEF JUDGE LIPPMAN: At the plea stage?

25                  MS. WOLFORD: I'm sorry?

1 CHIEF JUDGE LIPPMAN: At the plea stage?

2 MS. WOLFORD: No. It was under a different  
3 context, but what happened - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but I'm saying  
5 at the plea stage, if this automatically happens and  
6 immediately happens, how could it not be a direct  
7 consequence?

8 MS. WOLFORD: Well, Your Honor, first of  
9 all, I think we have to make - - -

10 CHIEF JUDGE LIPPMAN: It's not a rhetorical  
11 question.

12 MS. WOLFORD: No, I understand.

13 CHIEF JUDGE LIPPMAN: Tell me how it could  
14 not be a direct consequence.

15 MS. WOLFORD: Well, I think there's a lot  
16 of reasons, and let me go through them, just - - -

17 CHIEF JUDGE LIPPMAN: Sure, go ahead.

18 MS. WOLFORD: I'll move past the  
19 preservation thing just - - - but I do think it's  
20 important because I do think that it complicates this  
21 case, and I know that the issue of whether or not a  
22 defendant needs to be advised of whether or not his  
23 sentence is concurrent or consecutive is an important  
24 issue, but here I suggest that the court doesn't have  
25 the proper record to make that determination because

1 of lack of preservation.

2 But with respect to the argument about  
3 voluntariness, first I want to point out the  
4 misstatement by counsel. Here, we're under a  
5 circumstance where there was mandatory consecutive  
6 sentencing. This defendant is a second-time drug  
7 offender, and Penal Law 70.20(2-a) requires that the  
8 sentence be consecutive to - - - if there is an  
9 undischarged term of imprisonment.

10 JUDGE SMITH: Well, that's - - - doesn't  
11 that make it automatic?

12 MS. WOLFORD: It does make it automatic,  
13 but it's important in what way it makes it automatic,  
14 Your Honor. And what the court has to look at and  
15 what the court focused on in Gill v. Greene is, under  
16 New York sentencing laws, if a defendant is given  
17 concurrent time - - - now, that would be an illegal  
18 sentence here, but if he was given concurrent time,  
19 not only would he - - - he'd get the twelve plus five  
20 which was promised here, but he'd get credit for the  
21 five years he did on his prior conviction, and in  
22 essence getting seven years for his new crime, so - -  
23 -

24 JUDGE PIGOTT: I'm not sure I understood  
25 you, if I could interrupt for a minute.



1 MS. WOLFORD: Sure.

2 JUDGE PIGOTT: The sentencing judge was not  
3 aware that he was serving a parole violation  
4 sentence?

5 MS. WOLFORD: There's no indication in the  
6 record that he was aware.

7 JUDGE PIGOTT: And that's because parole  
8 has its hearing and then it orders him reincarcerated  
9 and the courts never touch it?

10 MS. WOLFORD: We don't even know if that  
11 happened under the facts of this case.

12 JUDGE SMITH: Let me vary the - - -

13 MS. WOLFORD: We have no idea what happened  
14 with parole.

15 JUDGE SMITH: Sorry. Let me give you a  
16 variation, a hypothetical. Suppose he had pleaded  
17 guilty to two counts which called for mandatory and,  
18 for some reason, consecutive sentencing was  
19 mandatory. I don't know if that's ever true, but  
20 let's say it is.

21 MS. WOLFORD: Okay.

22 JUDGE SMITH: Do they - - - is that a  
23 direct consequence? Do they have to advise him that  
24 you're getting these two consecutive? Or even if  
25 consecutive sentencing is a possibility, do you have

1 to warn him of that?

2 MS. WOLFORD: Yes. I mean, if it's part of  
3 this plea proceeding and it's going to happen right  
4 there in court, yes, you would have to be warned that  
5 this is the agreement; you'd have to know what the  
6 agreement was. In this case, he was told what the  
7 agreement was. He was going to get twelve years. He  
8 was going to get five years post-release supervision,  
9 and there was a lot of discussion regarding its  
10 effect on his federal - - -

11 JUDGE SMITH: So you make a distinction in  
12 the relationship between the two counts in the  
13 hypothetical case, the two counts that are before - -  
14 - both before the court - - -

15 MS. WOLFORD: Right.

16 JUDGE SMITH: - - - and the one count  
17 that's before the court in the other one on which  
18 he's serving an undischarged sentence.

19 MS. WOLFORD: Correct, because this court  
20 has no control over what's happening with parole and,  
21 quite frankly, has no knowledge of what's happening  
22 with parole. It's the obligation - - - and we go  
23 back to where we were with, ultimately, Padilla where  
24 the onus is on the defense attorney who knows the  
25 most about this defendant's circumstance, not on the

1 court to inquire as to all possibilities.

2 In this particular case, if we established  
3 a rule such as suggested by the defense at this point  
4 that says every second-felony offender needs to be  
5 told that this - - - that any sentence here is going  
6 to run consecutively to an undischarged term of  
7 imprisonment, it would mean nothing because then  
8 every second-felony offender - - - we have second-  
9 felony offenders sentenced every single day in our  
10 courts, and it would mean nothing. It would give  
11 them no additional information.

12 JUDGE SMITH: Well, the ones who were - - -  
13 the ones who didn't know they were looking at  
14 consecutive time would find it out.

15 MS. WOLFORD: Well, and - - - I'm sorry.  
16 What?

17 JUDGE SMITH: The ones who were looking at  
18 consecutive time and didn't know it would presumably  
19 find that out when the judge told them.

20 MS. WOLFORD: Assuming that that means  
21 anything to them, I guess, if - - -

22 JUDGE READ: Well, I guess if you know you  
23 have an undischarged portion of your sentence, it  
24 would tell you something, right?

25 MS. WOLFORD: Well, and it's the People's

1 position that that information is in the hands of the  
2 defense attorney, and it is their obligation to know  
3 what their - - - situation of their client is. The  
4 judge is in a different position. This judge on this  
5 record had no indication.

6 CHIEF JUDGE LIPPMAN: Yeah, but the judge  
7 has to determine if it's voluntary.

8 MS. WOLFORD: I'm sorry?

9 CHIEF JUDGE LIPPMAN: The judge has to  
10 determine if it's voluntary, right?

11 MS. WOLFORD: Right.

12 CHIEF JUDGE LIPPMAN: So doesn't that place  
13 a great responsibility on the judge?

14 MS. WOLFORD: It does, and I think this  
15 judge did a good job of going through and making sure  
16 that - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but the whole  
18 point of this case is, in this situation, is that  
19 something that he must - - - that he or she, being  
20 the judge, must make the defendant aware of at least  
21 as to the possibility of that?

22 MS. WOLFORD: If I could just take us back  
23 to where - - - to Gill v. Greene for a second because  
24 I think that that rule and the fact - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but this is the

1 plea; this is the plea where he's finding out - - -  
2 he, the defendant - - -

3 MS. WOLFORD: Right.

4 CHIEF JUDGE LIPPMAN: - - - is finding out  
5 what awaits him and there's an issue as to - - - we  
6 want to make sure - - - the judge wants to make sure  
7 that he's doing this with knowledge and that it's  
8 voluntary.

9 MS. WOLFORD: Right. And this court has  
10 said that that is only required as to the direct  
11 consequences of the plea.

12 CHIEF JUDGE LIPPMAN: Yeah, but again I  
13 come back to the question I asked you before and say  
14 it again. How can anything be more direct than this  
15 is? If it's immediate, automatic, how is it not  
16 direct?

17 MS. WOLFORD: Well, direct means it  
18 involves the sentence as being pronounced in the  
19 courtroom that day, and that is what your case - - -  
20 your line of cases has - - -

21 CHIEF JUDGE LIPPMAN: But he's taking a  
22 plea.

23 MS. WOLFORD: Correct.

24 CHIEF JUDGE LIPPMAN: And he wants to know  
25 what he's pleading to.

1 MS. WOLFORD: Right. And in all the cases,  
2 we discuss this.

3 CHIEF JUDGE LIPPMAN: And it's the judge's  
4 responsibility to tell him what he's pleading to.

5 MS. WOLFORD: In every single case, Ford  
6 and Gravino and Harnett, all of those cases are plea  
7 cases where there is a significant consequence that  
8 results after this plea takes place. And in this  
9 case, it's the same - - - it's the same thing. And  
10 this court has said, repeatedly, that it's the core  
11 components of the sentence that's being imposed.  
12 It's the term of probation or the term of  
13 imprisonment, the term of post-release supervision,  
14 the fine, and it's limited it to that.

15 JUDGE READ: So you say - - - you would say  
16 we would be expanding Harnett?

17 MS. WOLFORD: Absolutely, absolutely. And  
18 I would say to the court, exactly where does that  
19 end, because we have a situation here where there was  
20 discussion on the record about a federal sentence.  
21 There was - - - the defense attorney clearly had  
22 discussed consecutive and concurrent time. I will  
23 point out that the quote that is attributed to the  
24 defense attorney - - -

25 CHIEF JUDGE LIPPMAN: Does it end - - -

1 doesn't it end with a direct consequence under state  
2 law? Doesn't that - - -

3 MS. WOLFORD: Well - - -

4 CHIEF JUDGE LIPPMAN: - - - make sense in  
5 terms of a plea under state law?

6 MS. WOLFORD: - - - only in the sense that  
7 he got what he asked for, Your Honor, because if - -  
8 - here, to give him - - - to go back to this court's  
9 language, he was never under the impression that he  
10 should get that extra five years from his prior  
11 sentence as time off on this one because we have to  
12 talk about concurrent and consecutive time and the  
13 reality of how it's calculated in New York. And he  
14 never was promised seven years; he was promised  
15 twelve plus five, and the only way to accomplish that  
16 under New York law was to give him consecutive time.  
17 Concurrent time would have given him from 2001 until  
18 he was released to parole because concurrent time  
19 requires that you give him time served for the prior  
20 offense.

21 That - - - when this court discussed the  
22 fact that the court doesn't have to even pronounce  
23 the fact that a sentence is consecutive in Gill v.  
24 Greene, it went back to say that - - - that exact  
25 thing. The court - - - I'm sorry. The court does

1 not have to tell the defendant that he's not getting  
2 a bargain he would have gotten by concurrent time.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 Thanks.

5 MS. WOLFORD: Thank you.

6 CHIEF JUDGE LIPPMAN: Counselor.

7 MR. JUERGENS: Yes. If I may, three quick  
8 points. Harnett doesn't get extended because we're  
9 talking about punishment here.

10 JUDGE PIGOTT: Does it make any difference  
11 that this is in the middle of a trial? I'm wondering  
12 what the judge should do. You pick a jury, evidence  
13 is being entered. It's not going well, apparently.  
14 The defendant then decides to plead guilty and - - -  
15 I mean, do you then shut everything down and say,  
16 well, let's get a pre-sentence investigation? I need  
17 to know the facts of this federal thing so that we  
18 can make sure that your client who is now stopping a  
19 trial and wants to plead guilty to a much higher - -  
20 - to more counts than he would have - - - was offered  
21 beforehand, that we now have to immediately declare a  
22 mistrial and advise him of all that?

23 MR. JUERGENS: Well, there was no mistrial.  
24 Basically, any time a defendant takes a plea, he's  
25 going to look at a totality of the circumstances, and



1           this may have been a situation where there's a  
2           tipping of the scales and he decided to enter the  
3           guilty plea, but we cannot say that if he'd have been  
4           advised that this was a mandatory twelve-year  
5           consecutive sentence that that would not have tipped  
6           the scales the other way - - -

7                     JUDGE PIGOTT: Right, but wouldn't - - -

8                     MR. JUERGENS: - - - and maybe hadn't  
9           continued - - -

10                    JUDGE PIGOTT: I get - - - my point is,  
11           where's the defense - - - and a very good defense  
12           lawyer; I don't mean to pick on the defense lawyer.  
13           But at some point, isn't that his job to say, you're  
14           in the middle of a trial, pal, I mean we're going and  
15           - - -

16                    MR. JUERGENS: But - - -

17                    JUDGE PIGOTT: - - - if you want to take a  
18           plea, understand that these are the circumstances.  
19           Not the judge. I mean, the judge is - - -

20                    MR. JUERGENS: The judge just needs to warn  
21           him if it's going to be mandatory consecutive. The  
22           defense attorney can explain the circumstances and go  
23           over all the other - - - all the other factors that  
24           may enter into his guilty plea. But what I would  
25           like to point out - - -

1                   JUDGE GRAFFEO: Is parole required to  
2 proceed on the revocation?

3                   MR. JUERGENS: No. Parole, when they filed  
4 it, they don't have to proceed. When they file their  
5 - - -

6                   JUDGE GRAFFEO: But just ignore it and - -  
7 -

8                   MR. JUERGENS: Well, what happens is they  
9 file - - -

10                  JUDGE GRAFFEO: - - - presume and figure  
11 that the next - - - that he's pleaing to another  
12 charge. In other words, we don't know what the  
13 status of the parole violation was in this case, do  
14 we?

15                  MR. JUERGENS: And we don't need to know;  
16 we don't need to know because our new sentence - - -

17                  JUDGE GRAFFEO: So it's based - - - but I  
18 thought it's only if it's automatic. Now we're  
19 talking about that maybe it's - - -

20                  MR. JUERGENS: He may end up - - -

21                  JUDGE GRAFFEO: - - - it's only potentially  
22 out there.

23                  MR. JUERGENS: He may end up getting more  
24 severe consequences depending on how parole proceeds,  
25 but what happens when they file the parole detainer

1 is that that sentence stops. And you have a  
2 situation where you're getting two sentences, and if  
3 they're consecutive, you're going to aggregate them  
4 and you're going to add them together. If they're  
5 concurrent, you're going to merge - - -

6 JUDGE PIGOTT: But that just - - - I mean,  
7 I think the point being made here is parole can say  
8 he's doing another dozen years on this one, we're not  
9 doing anything; he's fine.

10 MR. JUERGENS: They can, but he still owes  
11 four-and-a-half years.

12 JUDGE PIGOTT: He can't, and Ms. Wolford's  
13 point was we don't have the record. I mean, bring a  
14 440 and put all this into motion papers, and maybe we  
15 can - - -

16 MR. JUERGENS: Well, we're attacking the  
17 plea, and the plea is clear. We're talking about a  
18 plea defect, and it's clear from the record of the  
19 plea.

20 JUDGE PIGOTT: Right. You just want to go  
21 straight on, all times, this one - - -

22 MR. JUERGENS: Well - - -

23 JUDGE PIGOTT: - - - he should have been  
24 advised, period.

25 MR. JUERGENS: Well, the solution is that

1 all these cases involve predicate-felony offenders.  
2 The DA is required to file a predicate-felony  
3 offender - - -

4 JUDGE PIGOTT: Ms. Wolford makes the  
5 argument that we may be very, very busy if we do  
6 this.

7 MR. JUERGENS: Well, we'll make it simple.  
8 Put in one line in the predicate-felony offender  
9 statements where the defendant - - - this is a pre-  
10 sentencing proceeding.

11 JUDGE PIGOTT: But no, I mean the 440s that  
12 are going to come after we find in your favor.

13 MR. JUERGENS: There shouldn't be any 440s  
14 because - - -

15 JUDGE PIGOTT: Why? They're all going to  
16 say the same thing.

17 MR. JUERGENS: The 4 - - - this - - - it's  
18 clear from the record, this is a direct appeal issue;  
19 K2 issues are direct-appeal issues, and this is - - -  
20 and this is - - -

21 JUDGE PIGOTT: I know, but once you win  
22 that, then all of the people that are sitting in  
23 Attica are going to say, geez - - -

24 MR. JUERGENS: They haven't raised it on  
25 direct appeal.

1                   JUDGE PIGOTT: No. The 440 is going to  
2 bring it up saying my lawyer was ineffective for not  
3 raising the issue that Mr. Juergens argued so  
4 articulately in the Court of Appeals last time.

5                   MR. JUERGENS: Well, rather than speak to  
6 that, looking to the future, what I suggest is that  
7 the prosecutors put in their second-felony offender  
8 statements one line where the defendant, while he's  
9 admitting his predicate-felony conviction, says, I  
10 also understand that this is going to be a  
11 consecutive sentence under 70.25(2-a). Once you do  
12 that, everyone's protected; the prosecutor, the  
13 court, the defendant.

14                   JUDGE PIGOTT: I don't know. It doesn't  
15 sound very clear to me. What does 70.25(2-a) mean?

16                   MR. JUERGENS: Well, that's the mandatory  
17 consec - - -

18                   JUDGE PIGOTT: I know that. I know that;  
19 I'm a judge.

20                   MR. JUERGENS: I'm sorry.

21                   JUDGE PIGOTT: But I'm saying, what is the  
22 guy who just got caught - - -

23                   MR. JUERGENS: Well, all - - -

24                   JUDGE PIGOTT: - - - with the drugs in his  
25 car?

1                   MR. JUERGENS: All he needs to know is that  
2                   it's going to be a consecutive sentence. If he's  
3                   told that as a part of the second-felony offender  
4                   statement, then he can say to his attorney, what does  
5                   that mean?

6                   JUDGE PIGOTT: Why doesn't his defense  
7                   lawyer tell him?

8                   MR. JUERGENS: Well, apparently, neither  
9                   the defense attorney, the prosecutor or the judge  
10                  realized that, because they all reached a pre-trial  
11                  agreement that the new sentence was going to be  
12                  concurrent with the parole violation, and that's  
13                  illegal. And that's a common problem that we have in  
14                  these cases. And if that one line was put in the  
15                  second-felony offender statements, the - - - that's  
16                  the point in time where the defendant has enough time  
17                  to say, wait a minute, what do you mean  
18                  consecutive/concurrent, and he can move to withdraw  
19                  his plea at that point.

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

22                  Thank you both. Appreciate it.

23                  (Court is adjourned)

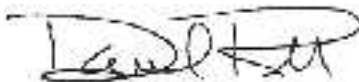
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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Rafael L. Belliard, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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