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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 159

TYRONE SWEAT,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 16, 2014

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: We're going to start  
2 with number 159, People v. [Sweet] or [Swet]. And  
3 counsel, do you want any rebuttal time?

4 MR. TEXIDO: Two minutes, Your Honor,  
5 please.

6 CHIEF JUDGE LIPPMAN: Two minutes for  
7 rebuttal. Go ahead, counselor. You're on.

8 MR. TEXIDO: The central question in these  
9 cases is what was the court's purpose when it held  
10 the defendant - - -

11 CHIEF JUDGE LIPPMAN: Counsel what if it  
12 was kind of a hybrid civil/criminal, you know, if  
13 it's not so - - -

14 MR. TEXIDO: Well - - -

15 CHIEF JUDGE LIPPMAN: - - - clear what  
16 exactly it was? Isn't that what happened here? It  
17 had some of the elements of one and the other?

18 MR. TEXIDO: I think the court did not  
19 follow to a T either - - -

20 CHIEF JUDGE LIPPMAN: I think that's right.

21 MR. TEXIDO: - - - the statute in the  
22 Judiciary Law. But I do think that the court has the  
23 inherent power, regardless of what the Judiciary Law  
24 does or does not say, to hold an individual in  
25 contempt to compel - - -

1 CHIEF JUDGE LIPPMAN: What is - - - what is  
2 the test as to whether - - - to whether it's civil or  
3 criminal?

4 MR. TEXIDO: The test is what was the  
5 court's purpose. And the bellwether indicator of  
6 that in the case law is then - - -

7 CHIEF JUDGE LIPPMAN: Assuming we - - -  
8 assuming we agree with you, what is the purpose here?

9 MR. TEXIDO: The purpose here - - -

10 CHIEF JUDGE LIPPMAN: Was it reme - - -  
11 remedial? Punitive? What?

12 MR. TEXIDO: Yes. Well, the purpose here  
13 was remedial. And - - -

14 CHIEF JUDGE LIPPMAN: How do we know that?

15 MR. TEXIDO: We know that because it was  
16 the People's initial request. We know that because  
17 the defendant was repeatedly brought before the court  
18 to see whether or not he had changed his mind and was  
19 now willing to testify. We know that because the  
20 court said, when it held the defendant in contempt,  
21 it would determine at the end of the trial what  
22 punishment, if any, would be meted out by the court.

23 CHIEF JUDGE LIPPMAN: Did the judge use any  
24 of the magic words relating to criminal intent?

25 MR. TEXIDO: It may have used some of them.

1 It did not use the words "willful" or "contemptuous",  
2 so it didn't use all of them.

3 JUDGE READ: How could it possibly have  
4 been civil contempt? I mean, it doesn't seem to fit  
5 anywhere within the definition of 753 of the  
6 Judiciary Law?

7 MR. TEXIDO: Right. And - - - and I think  
8 753 of the Judiciary Law, it's titled "Power to  
9 Punish for Civil Contempt". I think what we're  
10 looking at here and what the Court did was exercised  
11 its inherent power to use its - - - its contempt  
12 power to compel compliance with its mandates.

13 JUDGE SMITH: Well, suppose - - - suppose  
14 you're under Section 750, which is headed "Power of  
15 Courts to Punish for Criminal Contempt", can it - - -  
16 can't it still be civil within the meaning of the  
17 double jeopardy law?

18 MR. TEXIDO: Yes, it can be. And - - - and  
19 I think that's an important point, that the - - - the  
20 name given by the - - - by the New York State  
21 legislature, does not control for double jeopardy  
22 purposes. And that's been held by this court in  
23 Wood. In Wood, it was the reverse situation. The  
24 legislature termed it civil contempt, but because it  
25 involved - - - in Wood, the defendant was sentenced

1 to a thirty-day unconditional term of incarceration,  
2 and this court said in light of the thirty-day term  
3 of incarceration, it's criminal.

4 JUDGE READ: So you're saying it's the - -  
5 - the critical factor is the purpose, not what you  
6 call it?

7 MR. TEXIDO: Yes, the critical factor is  
8 the purpose. And he - - -

9 JUDGE GRAFFEO: So what do - - - what do we  
10 look at, what factors tell us what the purpose was?

11 MR. TEXIDO: Well, I think the conclusive -  
12 - -

13 JUDGE GRAFFEO: How do we know this was  
14 only to compel his testimony and not punitive at all?

15 MR. TEXIDO: The conclusive indicator of a  
16 court's purpose has always been whether there was an  
17 unconditional sentence imposed, because if I - - -  
18 let's say I break somebody's property and I go to  
19 jail for criminal contempt, and I'm - - - I'm  
20 sentenced to a year. I can't get out of jail by  
21 fixing that person's property, and that's because I'm  
22 being punished.

23 In a contempt proceeding such as this, all  
24 the defendant has to do is do what the court said he  
25 had to do in the first place, and he gets out of

1 jail.

2 JUDGE PIGOTT: So the opportunity to purge  
3 the contempt is what makes the distinction here?

4 MR. TEXIDO: I believe so, Your Honor. And  
5 - - -

6 JUDGE RIVERA: So - - - so regardless of  
7 the defendant's vehement statements that he simply  
8 will not testify and he just won't do it, it doesn't  
9 matter, as long as the possibility is open, which  
10 allows him to change his mind at any time?

11 MR. TEXIDO: Right. And that's a - - -  
12 that's a point that was brought up by former  
13 appellate counsel. And we wouldn't need contempt  
14 proceedings to compel someone who was willing. The  
15 fact that he wasn't willing doesn't mean he's not  
16 going to be willing after a couple hours in jail or  
17 after thinking about spending a night in jail or  
18 whatever it is.

19 CHIEF JUDGE LIPPMAN: Does it matter when  
20 he was let out that there was no one there?

21 MR. TEXIDO: Yeah, I think - - -

22 CHIEF JUDGE LIPPMAN: I mean, should his  
23 counsel have been called in and - - -

24 MR. TEXIDO: Well - - -

25 CHIEF JUDGE LIPPMAN: - - - what would have

1           happened if - - - if counsel was called in?

2                   MR. TEXIDO: Well, I think - - - I think  
3           that indicates that it wasn't a sentence of time  
4           served that was imposed at that time. Because in  
5           order to be sentenced, the individual would have to  
6           be there and would have to be represented by counsel.  
7           The court certainly didn't see this as a sentence,  
8           time served or otherwise.

9                   CHIEF JUDGE LIPPMAN: So just - - - just  
10          letting him out, okay, you can go now, you're  
11          brother's acquitted, whatever it is - - -

12                   MR. TEXIDO: Yes.

13                   CHIEF JUDGE LIPPMAN: - - - that - - -  
14          that, to you, reinforces your position?

15                   MR. TEXIDO: I believe it does.

16                   JUDGE PIGOTT: Judge Eagan relied on  
17          Columbo. Was she wrong?

18                   MR. TEXIDO: Yes. Columbo, if - - - if you  
19          look at the procedural history of Columbo, this court  
20          initially said the person was not placed in jeopardy  
21          by that proceeding.

22                   The Supreme Court said the person was  
23          placed in jeopardy in light of the flat thirty-day  
24          sentence and the court's refusal of the defendant's  
25          offers to purge that contempt and the fine that was

1 imposed.

2 So the three factors that the Supreme Court  
3 used to overturn this court are not present in this  
4 case.

5 JUDGE GRAFFEO: Did we have a fine here?

6 MR. TEXIDO: There was no fine.

7 JUDGE GRAFFEO: I didn't think so.

8 MR. TEXIDO: No. And there was also - - -

9 JUDGE ABDUS-SALAAM: Counsel, do we have to  
10 have all three factors, the fine plus the sentence  
11 and then something else to say that it's criminal?

12 MR. TEXIDO: No, I - - - I think if there  
13 was any - - - any unconditional sentence, I think it  
14 could be found to be criminal contempt. I think the  
15 outer limits of this are in Shillitani v. U.S. And  
16 that should really show this court that what happened  
17 here was not jeopardy. In that case, the defendant  
18 was sentenced, actually, to two years in prison or  
19 until you testify. And then he was later charged  
20 with criminal contempt. He raised a double jeopardy  
21 argument and the Supreme Court said no, you were not  
22 previously placed in jeopardy, even though you got  
23 that two-year sentence, because the opportunity to  
24 purge that contempt existed.

25 JUDGE PIGOTT: Let's assume - - - let's



1           assume that we disagree with you and - - - and the  
2           county court here was right. What are the options  
3           now, if this case now follows - - - the next - - -  
4           the next case like this, what are - - - what are the  
5           options open to a judge?

6                       MR. TEXIDO: Well, first, Your Honor, I  
7           would say, if you disagree with me, I think you're  
8           not finding that county court was right, because  
9           county court did say that the - - - the purpose of  
10          the proceeding was remedial rather than punitive, and  
11          that the defendant had an opportunity to purge.

12                      The court made a legal conclusion after,  
13          which was that the Judiciary Law's definition  
14          controls.

15                      So I think first off, there would be a  
16          Concepcion problem if the court were to find that the  
17          - - - the court's purpose was punitive rather than  
18          remedial. And I see that my time just ran out.

19                      CHIEF JUDGE LIPPMAN: Go ahead. You can  
20          finish - - - are you finished with your answer?

21                      MR. TEXIDO: Yes.

22                      CHIEF JUDGE LIPPMAN: Okay, thank you.

23                      Counselor?

24                      MR. ABBATOY: Good afternoon, Your Honors.

25                      Excuse me. David Abbatooy for Tyrone Sweat.

1 I'd like to start by sort of addressing  
2 Judge Lippman's first question to Mr. Texido, was  
3 whether or not this is a hybrid. I'd be more  
4 inclined to call it something of a hodge-podge,  
5 because I think all of these factors kind of wind  
6 together.

7 It's - - - it's my position here, there's  
8 been a few - - - Mr. Texido raised whether or not  
9 Shillitani should control. Judge Pigott asked  
10 whether or not Columbo - - -

11 JUDGE PIGOTT: Well, there was a - - - in  
12 fact, hodge-podge, I think, was used in some Law  
13 Review article talking about this and the difficulty  
14 and it has.

15 Let me ask you the question I just asked  
16 Mr. Texido, which is, what does a judge do - - - he's  
17 in the sit - - - now, instead of a criminal  
18 possession, let's assume this is a very serious case  
19 involving murder, mayhem, or something. And the same  
20 scenario applies, and you've got somebody who says,  
21 I'm just not testifying, and the judge wants to find  
22 him in contempt.

23 According to city court, he can't find him  
24 in civil contempt, because this is not a civil  
25 proceeding. According to you, as I understand it, he

1 can find him in criminal, but the maximum penalty  
2 were - - - were this a mass murderer who gets off  
3 because this guy doesn't - - - chooses not to  
4 testify, is thirty days and 1,000 dollars. Is that  
5 right?

6 MR. ABBATOY: Well, I - - - I think the  
7 answer to that question kind of answers a bunch of  
8 questions in this case. The - - - the question is  
9 what should the judge do. I think the first thing  
10 the judge should do is just what the Judiciary Law  
11 says. The judge should do what was not done in this  
12 case, which is explicitly say, I'm holding you in  
13 civil contempt. I'm holding you in civil contempt to  
14 compel your testimony.

15 JUDGE PIGOTT: But didn't the judge in city  
16 court that civil contempt applies only to civil  
17 proceedings because it affects, you know, personal  
18 issues and not the court or the - - - so you can't  
19 use civil contempt if she's right.

20 MR. ABBATOY: The city court judge did say  
21 that. But I don't believe - - - I believe that  
22 conclusion was ancillary to the conclusion - - - or  
23 only part of the conclusion actually reached by the  
24 county court in this case. So county court's  
25 decision is the - - -

1 JUDGE ABDUS-SALAAM: Counsel, didn't - - -  
2 didn't the - - - the Assistant District Attorney ask  
3 that the judge hold the defen - - - or the witness in  
4 civil contempt?

5 MR. ABBATOY: The DA did ask that. But - -  
6 -

7 JUDGE ABDUS-SALAAM: Yeah.

8 MR. ABBATOY: - - - but I don't believe  
9 that is controlling at all here. The question before  
10 you - - - and I think Mr. Texido - - -

11 JUDGE SMITH: But - - -

12 JUDGE ABDUS-SALAAM: Why would it be more  
13 controlling to have the judge say I'm holding you in  
14 civil contempt?

15 MR. ABBATOY: Because that's the way the  
16 Judiciary Law spells it out. And that's the way,  
17 really, Shillitani and Columbo shake out in the end.

18 In my view, they make something of a  
19 continuum of how you determine willfulness or even -  
20 - -

21 JUDGE SMITH: But aren't - - - aren't all  
22 the cases consistent with your adversary's theory  
23 that the - - - the test is whether - - - whether your  
24 can purge or not?

25 MR. ABBATOY: I think that's part of the

1 analysis, Judge, but - - -

2 JUDGE SMITH: Well, is there any - - - is  
3 there any case that is inconsistent with that, where  
4 - - - where there was an opportunity to purge and it  
5 was still held to be criminal?

6 MR. ABBATOY: That there was - - - that  
7 somebody was given an opportunity to purge and then  
8 it remained criminal in the end?

9 JUDGE SMITH: Yeah.

10 MR. ABBATOY: I can't think of a state case  
11 on that subject, no. But I - - - I don't believe  
12 that that concession is controlling here, because in  
13 this case - - - first off, Shillitani is a federal  
14 case where purging is a much more important analysis.  
15 Here, the criminal court judge has to - - - or on a  
16 criminal contempt case, the judge has to take into  
17 account a wide variety of factors. The ability to  
18 purge may be part of that, but - - - but here, when  
19 Judge Franczyk put to - - - put everything together,  
20 he came to the conclusion that the judge's purpose  
21 was to punish. And that - - -

22 JUDGE GRAFFEO: Well, how is this - - -

23 MR. ABBATOY: - - - brings me back - - -

24 JUDGE GRAFFEO: - - - at all similar to the  
25 Columbo case. I mean there's - - - there was no

1 threat of thirty days' imprisonment; there was no  
2 fine assessed.

3 MR. ABBATOY: Well - - -

4 JUDGE GRAFFEO: What - - - what are the  
5 indicators that this was all designed to be punitive  
6 as opposed to just trying to compel him to actually -  
7 - -

8 MR. ABBATOY: Sure. And I think this goes  
9 - - -

10 JUDGE GRAFFEO: - - - come and participate  
11 in the proceedings?

12 MR. ABBATOY: I think this goes back to  
13 Judge Abdus-Salaam's question as well. And I think  
14 the issue is - - -

15 JUDGE GRAFFEO: And I'm not asking you the  
16 issue. I'm asking how is this similar to Columbo?

17 MR. ABBATOY: It's similar Columbo because  
18 he was punished, albeit with a much shorter time in  
19 jail than Columbo was. And the lower court judge,  
20 Judge Franczyk, found that the purpose of that  
21 proceeding was to punish him.

22 JUDGE GRAFFEO: Well, then - - - then  
23 there's no civil contempt if - - - when you're trying  
24 to compel testimony.

25 MR. ABBATOY: There certainly could be,

1 perhaps, under the circumstances described in  
2 Shillitani. And I think that's the big dis - - -  
3 distinction between Shillitani and what we have here.

4 CHIEF JUDGE LIPPMAN: Isn't this - - -  
5 isn't it, though, if you look at common sense, the  
6 brother was acquitted and then they let him go  
7 without any great fanfare. You know, doesn't that  
8 tell you something about what the purpose of this  
9 was?

10 MR. ABBATOY: I'm not sure I understand  
11 your question, Judge Lippman.

12 CHIEF JUDGE LIPPMAN: Doesn't it speak for  
13 itself?

14 MR. ABBATOY: That he was let go and that  
15 therefore - - -

16 CHIEF JUDGE LIPPMAN: Yeah, that - - - that  
17 he was acquitted, and okay, we couldn't get you  
18 testify. Now - - - now, you can go.

19 MR. ABBATOY: We're going to let him go  
20 because the opportunity to testify passed?

21 CHIEF JUDGE LIPPMAN: Yeah, yeah. It's  
22 remedial. Why - - - why wouldn't that - - - one  
23 naturally draw that conclusion from - - - from that  
24 being the way the process was conducted?

25 MR. ABBATOY: I - - - I'll tell you,

1           there's a contrary conclusion that this court could  
2           draw.

3                       CHIEF JUDGE LIPPMAN:   Go ahead.

4                       MR. ABBATOY:   Judge Franczyk drew the  
5           opposite conclusion.  I think that's controlling on  
6           you here.  But the opposite conclusion could be that  
7           Mr. Sweat's testimony was not all that critical to  
8           the lower court proceeding.

9                       JUDGE PIGOTT:   Well, he got acquitted.  I  
10          mean, the defendant.

11                      MR. ABBATOY:   Well, but, Judge, you know  
12          what - - - and I think that's maybe the first thought  
13          on that issue.  But it's not - - - we don't know that  
14          Mr. Sweat's testimony - - - because it's not in the  
15          record here at all - - - was critical to the lower  
16          court proceedings.

17                      JUDGE PIGOTT:   Let's - - - let's assume for  
18          a minute that - - - that this is - - - this is the  
19          way things go.  Now, you get a similar situation, and  
20          the judge - - - and the judge wants to find somebody  
21          in contempt for failure to testify.  Should the - - -  
22          should the People then, at that point, say Judge,  
23          please don't do that; we're going to - - - we're  
24          going to pursue him under the Penal Law for contempt  
25          of court, so by our decision to do that, we don't



1 want you to exercise your judicial function, and if  
2 you do, you're going to foreclose us from exercising  
3 our penal function. Does that make sense?

4 MR. ABBATOY: I - - - yes, I think it does.

5 JUDGE PIGOTT: How?

6 MR. ABBATOY: But - - - but ultimately - -  
7 and this is what happened in this case - - - I think  
8 the prosecutor did make that request in this case.  
9 But the judge said - - - and he directly, to Mr.  
10 Sweat, used the words contained in Judiciary Law  
11 750(1). He said, in my presence you've, you know,  
12 made actions that interfere with the proceedings - -  
13 -

14 JUDGE PIGOTT: But couldn't that be  
15 interpreted - - - you know, Mr. Texido makes the  
16 point that the - - - the title doesn't count. And if  
17 we - - - if it read separately, it said, judicial - -  
18 - a judicial action in civil cases, and this is what  
19 you can do in terms of con - - - judicial action in  
20 criminal cases, and this is what - - - and we'll call  
21 one criminal contempt and the other civil contempt,  
22 because it's in those kind of cases - - -

23 MR. ABBATOY: Right.

24 JUDGE PIGOTT: - - - wouldn't that make  
25 that - - - that - - - those sections consistent with

1 each other and with the Penal Law, which is a  
2 separate crime for doing what, in this case, the  
3 People allege your client did?

4 MR. ABBATOY: Well, let me start at the  
5 beginning. I - - - I agree that there - - - there  
6 are cases that say, you know, the title doesn't  
7 matter, it's the purpose. That - - - I think that's  
8 pretty clear.

9 JUDGE GRAFFEO: It's Hicks, isn't it?  
10 Isn't that the rule of Hicks?

11 MR. ABBATOY: Yes. But I'll - - - I'll  
12 take this one step further, and I think it'll maybe  
13 more directly answer your question. 750 tells us - -  
14 - 750 and 753 define what, in New York State,  
15 constitutes a criminal contempt, what constitutes a  
16 civil contempt. And although, you know, the purpose  
17 is - - - is important, that is what should guide this  
18 court, those particular factors listed in 750 and 753  
19 are what should guide this court, towards what the  
20 judge's purpose was.

21 JUDGE RIVERA: So if I - - - just  
22 understanding your position on this. The - - -  
23 you're saying the law provides for the summary  
24 proceeding criminal contempt or for the - - - the  
25 prosecutor to proceed with criminal contempt

1 following the close of - - - of the action - - - of  
2 the matter; or if the judge wants to hold someone in  
3 civil contempt in a criminal proceeding, he or she  
4 may do so, and that does not foreclose the prosecutor  
5 from pursuing criminal contempt following the matter.  
6 But - - - but the judge has to be very clear that it  
7 is civil contempt. Is that your argument?

8 MR. ABBATOY: Absolutely. It's - - -

9 JUDGE PIGOTT: Well, then you're - - -  
10 you're disagreeing with Judge Eagan too, because she  
11 said you can't have civil contempt in a criminal  
12 case.

13 MR. ABBATOY: Well, but - - - Judge Eagan  
14 did make that - - - that ruling. But I - - - I don't  
15 believe that - - - but Judge Franczyk's analysis was  
16 a broader analysis of the entire - - - the entirety  
17 of the factors that went into the conclusion that - -  
18 -

19 JUDGE ABDUS-SALAAM: Counsel, you said - -  
20 -

21 MR. ABBATOY: - - - that she was holding  
22 contempt - - -

23 JUDGE ABDUS-SALAAM: - - - you started to  
24 day earlier, I think, that we were bound by Judge  
25 Franczyk's ruling.

1 MR. ABBATOY: I'm - - -

2 JUDGE ABDUS-SALAAM: Why?

3 MR. ABBATOY: Well, it's my position that  
4 Judge Franczyk had to draw on various facts and draw  
5 various inferences - - -

6 JUDGE ABDUS-SALAAM: So you're saying this  
7 is a question - - - a mixed question of law and fact?

8 MR. ABBATOY: Yes, absolutely.

9 JUDGE ABDUS-SALAAM: Not a question of law?  
10 Double jeopardy is a question of law, isn't it?

11 MR. ABBATOY: Double jeopardy, in the end,  
12 is a question of law. But there are factors that  
13 inform this court's legal decision with regard to  
14 that. So similar - - - you know, by analogy, you  
15 know, probable cause is always a question of law, but  
16 there are various facts and factors that have to be  
17 sorted out before this court can determine that that  
18 question of law presents essen - - - is, you know,  
19 essentially crystal clear, and that there are no  
20 inferences that have to be drawn.

21 It's a - - - it's my position, here, that  
22 at a minimum, Judge - - - Judge Franczyk had to sort  
23 through these various factors - - -

24 JUDGE PIGOTT: Well, he was bound by the  
25 record too, was he not? He was sitting as an

1           appellate court, on the city court determination that  
2           double jeopardy applied.

3                   MR. ABBATOY: Right. But as the inter - -  
4           - intermediate judge, he has the ability to review  
5           the facts at that point and make conclusive findings,  
6           which I suggest, this court is then bound - - -

7                   JUDGE RIVERA: So what - - -

8                   MR. ABBATOY: - - - by.

9                   JUDGE RIVERA: - - - finding - - - what  
10          finding or findings did he find that you say binds us  
11          and requires us to find your - - - the way you're  
12          proposing we resolve this question?

13                   MR. ABBATOY: One of the most important  
14          ones, for the purposes of Columbo, is that he was  
15          punished and received a sentence of time served.

16                   JUDGE SMITH: Is that - - - is that a fact,  
17          or is that the - - - isn't that the legal question  
18          we're - - - we're addressing?

19                   MR. ABBATOY: I - - - my time is up. I - -  
20          -

21                   CHIEF JUDGE LIPPMAN: Go ahead - - -

22                   MR. ABBATOY: - - - if I can answer the  
23          question?

24                   CHIEF JUDGE LIPPMAN: - - - answer the  
25          question.

1                   MR. ABBATOY: Yes, that is a - - - that is  
2 a legal conclusion derived from a fact that is it  
3 really put together from all the facts and  
4 circumstances in the case: what the judge said, that  
5 he issued a mandated commitment, and that he - - -  
6 that he did not explicitly offer Mr. Sweat the  
7 opportunity to purge.

8                   JUDGE RIVERA: There's no dispute about  
9 those facts, is there?

10                  MR. ABBATOY: There's a dispute - - -

11                  JUDGE RIVERA: Is there a dispute about any  
12 facts?

13                  MR. ABBATOY: Not that those facts appear,  
14 but what the meaning of those facts are - - -

15                  JUDGE RIVERA: Okay.

16                  MR. ABBATOY: - - - in the end.

17                  CHIEF JUDGE LIPPMAN: Okay, thanks,  
18 counselor.

19                  Counsel, rebuttal?

20                  MR. TEXIDO: Yes. What Judge Franczyk did  
21 find - - - and this is on page 9 of the record - - -  
22 was that clearly the opportunity to purge his  
23 contempt by testifying was an option that remained  
24 open to the defendant at the end of trial. And this  
25 is the important part: as such, it is evident that

1 county court, having been advised by the People that  
2 criminal charges would be forthcoming, was attempting  
3 to compel his testimony, rather than punish him for  
4 refusing to do so.

5 So county court made that inference from  
6 the facts. We're not asking the court to change  
7 that. We feel that this is a question of law.

8 CHIEF JUDGE LIPPMAN: Okay - - -

9 JUDGE RIVERA: Do you also take - - - I'm  
10 sorry. Do you also agree with - - - or what's your  
11 response to the way I framed that question to your  
12 adversary about whether or not the choices for a  
13 judge are proceed with summary criminal contempt or  
14 the DA can then proceed with - - - with criminal  
15 contempt - - -

16 MR. TEXIDO: Right. And - - -

17 JUDGE RIVERA: - - - or I choose civil  
18 contempt, and I still - - - and that's - - - does not  
19 foreclose the DA from pursuing criminal contempt. Is  
20 that also how you see this?

21 MR. TEXIDO: Well, I think the court would  
22 have no options, because the - - - the civil contempt  
23 statute clearly says, it has to be a party to a civil  
24 action. That's agreed.

25 JUDGE RIVERA: So you can never - - - as a

1 judge, you can never, in a criminal action - - -

2 MR. TEXIDO: Right.

3 JUDGE RIVERA: - - - impose civil contempt?

4 MR. TEXIDO: And - - - and this happened in  
5 our county last week. And we had to ask the judge  
6 not to - - - until this case is decided at least - -  
7 - not to hold the person in contempt.

8 We - - - we had to give up the opportunity  
9 to attempt to coerce that person into testifying in  
10 order to preserve the ability to punish that person  
11 later on. And I don't think that's - - - that's what  
12 was ever intended by these cases that have been  
13 decided on criminal contempt.

14 CHIEF JUDGE LIPPMAN: Counsel, anything  
15 else?

16 MR. TEXIDO: Nothing, Your Honor.

17 THE COURT: Okay, thank you.

18 MR. TEXIDO: Thank you.

19 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Tyrone Sweat, No. 159 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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