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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 73

ANTHONY BLUE,

Appellant.

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20 Eagle Street  
Albany, New York  
September 10, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the matter is  
2 People v. Anthony Blue.

3 MR. DANNER: Good afternoon, Your Honors, and may  
4 it please the court. My name is Scott Danner, and with the  
5 Office of the Appellate Defender. I represent the  
6 appellant, Anthony Blue. I'd like to focus on the counsel-  
7 waiver issue.

8 CHIEF JUDGE WILSON: Do you wish to save any time  
9 for rebuttal?

10 MR. DANNER: Thank you, Your Honor, for the  
11 reminder. I'd like to save four minutes.

12 CHIEF JUDGE WILSON: Okay.

13 MR. DANNER: Thank you.

14 More than fifty years ago, in Matter of Lawrence  
15 S., this court announced the rule that governs this appeal:  
16 That to be valid, a counsel waiver must be made with an  
17 apprehension of the nature of the charges, the statutory  
18 offenses included within them, and the range of allowable  
19 punishments. This court then applied that rule in that  
20 case - - -

21 JUDGE TROUTMAN: When you're looking at - - - do  
22 you look at the whole record here with respect to the - - -  
23 from beginning with the defendant's arraignment, being  
24 advised of the charges against him, to understand whether  
25 or not he's clearly apprised of what risks he's facing?

1 MR. DANNER: Yes, Your Honor. You look at the  
2 whole record to evaluate a question at a point in time.  
3 You need to understand what the defendant knew when he  
4 waived. So you're looking at the whole record to  
5 understand the defendant's knowledge at that point. So  
6 that would include everything preceding that point,  
7 certainly, including the arraignment, including, in this  
8 case, the hearing in - - -

9 JUDGE TROUTMAN: So when the defendant is  
10 initially arraigned on the indictment, he's given a copy of  
11 the indictment, advised of the nature of the allegations  
12 against him, are they not apprised of possible penalties if  
13 they are convicted and the people prove their case?

14 MR. DANNER: Well, I think they are. And in this  
15 case, he was warned of the nature of the charges. He did  
16 understand it's reflected in the record that he faced  
17 second degree burglary. I think it might have been said  
18 that that's a C felony. So the nature of the charges and  
19 the statutory offenses in this case were disclosed.

20 And I think as a typical matter, and as a best  
21 practice, it would be a good thing if at arraignment,  
22 maximum penalties were disclosed, but they weren't  
23 disclosed here. And in fact, maximum penalties were never  
24 disclosed and certainly not disclosed before he waived.  
25 That's a necessary condition in addition to the nature of

1 the charges in the statutory offense.

2 JUDGE GARCIA: And what would the specificity be?  
3 Like, what are the maximum sentence on each count? You  
4 know, what - - - what would they have to be told?

5 MR. DANNER: Sure. So we know at a minimum there  
6 has to be the range of allowable punishments, and we're  
7 trying to articulate what does that mean, the range. So to  
8 Your Honor's question - - -

9 CHIEF JUDGE WILSON: Well, it has to be according  
10 to the quote you read, apprehension of the range, which may  
11 be a little different than a - - - you know, an exact set  
12 of numbers.

13 MR. DANNER: Well, that's right, Your Honor. And  
14 I don't think in this case you need to approach the degree  
15 of precision that is required in a particular case, given  
16 that we have next to nothing in the pre-waiver colloquies  
17 here. But as a general matter, I think if the court wanted  
18 to announce a sufficient rule, the min/max on each charge  
19 count with a warning that they could be run consecutive.

20 JUDGE HALLIGAN: But what if - - -

21 JUDGE SINGAS: But what if it's not so clear?  
22 What if somebody's a predicate, and you're waiting until  
23 after trial to do a predicate hearing? Or what if the  
24 trial judge gets it wrong? What are the consequences then?

25 MR. DANNER: Well, two questions there. On the



1 predicate, that's an enhancement that could, potentially,  
2 based on facts not known at the time, change the sentence.  
3 And we're not saying that the judge has to say anything  
4 other than what is known. And what is always known is the  
5 statutory min/max, the possibility of consecutive, and the  
6 possibility of enhancements. So if those are on the  
7 record, you've given the defendant everything that is  
8 readily known at the judge's fingertips and gives them the  
9 best information without speculating what may happen, and  
10 that is adequate.

11 JUDGE HALLIGAN: It seems - - - it seems to me  
12 that our cases have generally eschewed a bright-line rule  
13 or a rule that requires the use of some very specific  
14 words. But it sounds to me like the rule you just proposed  
15 to us is of a different sort. And so how do you reconcile  
16 the more specific and granular rule you're requesting with  
17 what I take to be a different approach in our precedent?

18 MR. DANNER: Well, Your Honor, I don't know that  
19 it is a different approach. In terms of bright-line rules,  
20 there are constitutional minimums that must be conveyed.  
21 That's the point of Lawrence S. That's the point of the  
22 United States Supreme Court law and all the Federal Circuit  
23 law, that the range of allowable punishments is - - - sets  
24 a constitutional floor.

25 In terms of the concerns about catechism, cases

1           like Providence - - -

2                         JUDGE HALLIGAN:   Yes.

3                         MR. DANNER:   - - - they're really referring to,  
4           are you reciting the right words in the searching inquiry  
5           in the last colloquy?  That's not what we're saying.  We're  
6           saying you can look at the record of the whole - - - as a  
7           whole.  You should, including the arraignment, which will  
8           often have the range of allowable punishments stated with  
9           the charges - - -

10                        JUDGE HALLIGAN:  So - - - it's your view that we  
11           cannot - - - or court could not review a record and  
12           conclude, based on a range of statements, that the  
13           defendant apprehended the range of allowable punishments or  
14           that, you know, such a finding was a reasonable one for the  
15           trial court to make.  It - - - can we - - - can we do that,  
16           or does there need to be a specific recitation with respect  
17           to numbers?  I took you to be suggesting the latter, but  
18           maybe I misunderstood.

19                        MR. DANNER:  So we're not advocating a specific  
20           recitation, to Your Honors point, and I do believe the  
21           court can look at the record as a whole to evaluate the  
22           defendant's knowledge at a state in time.

23                        Your question as to do there have to be numbers,  
24           I think the answer is yes.  Range is expressed in numbers.  
25           Sentences are imposed in numbers.  If you're trying to

1 figure out, did the defendant have the right information to  
2 make this very momentous decision, that's the best  
3 information possible.

4 CHIEF JUDGE WILSON: So there's a point, I think,  
5 in the record, although, I'm not certain if this is before  
6 or after, but I think it's during the colloquy where the  
7 judge is trying to convince him that maybe he should not  
8 represent himself, that she says, you don't need to go to  
9 jail for twenty-five, thirty, forty years.

10 MR. DANNER: Yes, Your Honor. That is a post  
11 waiver statement. That occurred - - - let's see here - - -  
12 on June 6th. That's right - - - sorry - - - September  
13 29th. This is almost nine months after he's waived and  
14 gone pro se in February of 2014. That sort of post-waiver  
15 information cannot retrospectively or retroactively cure a  
16 deficient waiver. This court held that in Crampe

17 CHIEF JUDGE WILSON: So would that statement, if  
18 made before the waiver, had been sufficient?

19 MR. DANNER: That's a much closer case. I think  
20 - - - and this gets at another question I'd received, this  
21 is whether - - - what happens if you get an inaccurate  
22 number. Right? And so if you're giving a range like this  
23 that isn't sort of the min/max on each count, and it's not  
24 precise, then I think you have to look at the facts of each  
25 case and look at all of the other factors to decide, is it

1 sort of close enough? And I understand that's not a  
2 satisfying bright-line rule, but that's the rule that gets  
3 applied in plea cases in this - - -

4 JUDGE HALLIGAN: I thought your - - -

5 JUDGE CANNATARO: So it sounds like you're  
6 promising us a whole new strain of appeals where there's a  
7 dispute over whether the court was in the ballpark when it  
8 gave out these numbers.

9 MR. DANNER: Well, I don't think this case has to  
10 invite it, Your Honor, because this isn't an inaccurate-  
11 range case. This is a no-range case.

12 JUDGE CANNATARO: But - - -

13 JUDGE HALLIGAN: So just to clarify, I thought  
14 you responded to Judge Troutman's question by saying that  
15 the entire record was what we should look at in evaluating  
16 this, but I took you to be saying to the chief a moment ago  
17 that any statements made post waiver can't be considered,  
18 so - - - so which one is it?

19 MR. DANNER: It - - - yeah, to clarify, they can  
20 be considered to the extent they bear on the knowledge at  
21 the point of waiver. So for example - - - and this is not  
22 our case - - - if the post-waiver statement was, oh, yes,  
23 judge, I was told before I pled or before I waived counsel  
24 by my lawyer that the range was this, that is in. And the  
25 Ninth Circuit addresses this hypothetical in U.S. v.

1 Erskine, which I encourage the court to read. That is not  
2 what we have here. What we have here is, nine months  
3 later, the court says twenty-five, thirty, forty, and we're  
4 supposed to infer - - - the respondent asks us to infer  
5 based on that statement, and the lack of a verbal  
6 expression of surprise on the record, that Blue must have  
7 known that that was the range before he waived. And that  
8 is not a legitimate inference. He could have learned at  
9 any point between his waiver and September that that was  
10 the range, or he could have jumped up out of his chair and  
11 it not been trans - - -

12 JUDGE HALLIGAN: So I take it your position is if  
13 a post-waiver statement appears to reflect or further  
14 explicate some understanding that's on the record before  
15 the waiver, is that - - - is that - - -

16 MR. DANNER: Sure. And I can - - -

17 JUDGE HALLIGAN: - - - more or less - - -

18 MR. DANNER: Yes, Your Honor. And I apologize  
19 for interrupting. I think the clearest case would be the  
20 defendant stands up and says, oh, I've known all along. I  
21 was told. I cracked the penal law. I did the math myself,  
22 and here's what it was.

23 JUDGE RIVERA: So what - - - what were the  
24 numbers? Because you say the range is numbers. You got to  
25 give numbers. What were the numbers that the judge had to

1 provide to the defendant before the defendant actually  
2 waived?

3 MR. DANNER: I'm going to answer after the caveat  
4 that because we have no range here, it needn't be reached.  
5 But with that said, our rule or our proposal for stating a  
6 minimally sufficient that will work in every case would  
7 have been - - -

8 JUDGE RIVERA: Uh-huh.

9 MR. DANNER: - - - three and a half - - - these  
10 are two - - - these are six C violent felonies - - - three  
11 and a half to fifteen. That's in the penal law. The fact  
12 that they're violent C felonies is in the indictment. This  
13 is all known. There's six of them. They could be stacked  
14 depending on how the facts come out at trial. There could  
15 be enhancements depending if the people charged one later.  
16 And that's it. And that's all known information that is  
17 not requiring the judge to do anything other than look at  
18 the indictment and look at the penal law, which is  
19 something trial judges do in this state every day.

20 JUDGE HALLIGAN: And so is it your view that - -  
21 - that we can't assume that the defendant can infer  
22 anything from the severity or number of the charges? I  
23 mean, obviously, you know, there will be a wide range in  
24 terms of the severity of the charges themselves and - - -  
25 and often the number.

1 MR. DANNER: Well, I don't think that the  
2 defendant can infer the range of allowable punishments from  
3 a characterization or an adjective. Right. We have here,  
4 you're facing a serious charge. That was inadequate - - -

5 JUDGE HALLIGAN: No. No. I mean, from the  
6 charges themselves as set forth in the indictment.

7 MR. DANNER: I see. No, Your Honor, I don't  
8 think so. I think a - - - a - - -

9 JUDGE HALLIGAN: Why is that - - - why not?

10 MR. DANNER: Well, uncounseled by hypothesis,  
11 this is a defendant waiving his counsel, layperson, doesn't  
12 necessarily have any conception of what charges or sentence  
13 - - -

14 JUDGE HALLIGAN: You're charged with - - - you're  
15 charged with murder, as opposed to, you know, you're  
16 charged with, you know, a petty larceny. Obviously,  
17 someone will infer that there's a meaningful distinction  
18 between the exposure from those two sets of charges, so - -  
19 -

20 MR. DANNER: I think that's fair. Although, Your  
21 Honor, there would be a difference. But the question is,  
22 is a relative difference between a major charge and a minor  
23 charge enough to convey the range of a - - -

24 JUDGE TROUTMAN: What about here? When the  
25 defendant begins, he wants to be pro se, and the court

1 says, that's a big mistake. You face a lot of time. The  
2 defendant says, I understand, but I'm making my decision.  
3 I want to do this. That's not an indication that it - - -  
4 prior to that time, because of the differences he's had  
5 with respect to what he wants done with his case, that he's  
6 not making an informed decision.

7 MR. DANNER: Well, I don't think it meets the  
8 minimum standard of a warning him of the range of allowable  
9 punishments. A lot of time - - - the phrase, a lot, means  
10 a lot of different things to a lot of different people.  
11 All right. A lot of time is one thing to a twenty year old  
12 - - -

13 JUDGE TROUTMAN: But taking into account you've  
14 been arraigned, there is an indictment. We're talking  
15 felonies. We're not talking misdemeanor county time.  
16 There's a big difference. It seems that that should be  
17 some indication this is serious. And the judge doesn't  
18 just limit it to, you're facing a lot of time. The judge  
19 goes into particulars. But the defendant seems to be more  
20 fixated with respect to what he wants to do, which is  
21 pursue 30.30 challenges and other - - - the things he  
22 wants, and that the attorney is not being a part of the  
23 team adopting what he wants.

24 Isn't knowing and intelligence more than just  
25 giving a number, it's telling the defendant the risks.

1 There's a trained lawyer on the other side, and this judge  
2 goes through a lot. And you're saying, even though the  
3 judge is emphasizing, "big mistake," and it says that more  
4 than once, says, a lot of time, that's just not enough.

5 MR. DANNER: Your - - - Your Honor, it's not  
6 enough where the - - - where the actual punishment is not  
7 disclosed. And in this case, this court has said as much.  
8 This ca - - - this court said as much in Lawrence S. In  
9 Sawyer, the defendant was warned that you're facing serious  
10 charges. And Kaltenbach, the defendant was warned you're  
11 facing serious charges. Serious, a lot, huge, these are  
12 relative terms. These are subjective terms.

13 JUDGE TROUTMAN: But it also depends on what else  
14 occurred within the record itself.

15 MR. DANNER: If there were other information in  
16 the record that the defendant understood the range, the  
17 worst that could happen - - - right. He's facing an  
18 important choice - - -

19 JUDGE TROUTMAN: But again, you're focusing  
20 simply on the range of punishment, not with respect to  
21 other information that the court specifically telling the  
22 defendant about the risks themselves of representing  
23 oneself.

24 MR. DANNER: Yes, Your Honor, I am drawing that  
25 distinction, and I think both are necessary. And I think

1 that's borne out in the case law, so - - -

2 CHIEF JUDGE WILSON: Can I ask you to turn - - -  
3 I'm sorry - - - to the speedy-trial issue.

4 MR. DANNER: Yes, Your Honor. The dispositive  
5 question on the speedy-trial issue is whether fifty-seven  
6 days - - - it's called the contested period in the briefs -  
7 - - was properly excluded from the count. That turns on  
8 whether or not the time that ran while Mr. Blue's  
9 codefendant, Puello, was making motion practice, whether  
10 that time was countable or chargeable as to Mr. Blue, who  
11 at that time had not been arraigned.

12 JUDGE HALLIGAN: Could you specifically address  
13 the People's argument regarding 200.40?

14 MR. DANNER: Yes, Your Honor - - -

15 JUDGE HALLIGAN: And why - - - why that shouldn't  
16 control our interpretation here.

17 MR. DANNER: Yes, Your Honor. The - - - 240 does  
18 not define the term joined for trial. It defines joinder,  
19 but it does not use the phrase joined for trial. And in  
20 fact, no other provision of the CPL uses the phrase joined  
21 for trial other than 30.30(4)(d), and that's interesting.  
22 And then - - - and so we need to interpret this unique  
23 phrase in the context of this provision, which also refers  
24 to the defeat of the of the applic - - - of the exclusion  
25 by a motion to sever.

1 JUDGE SINGAS: So is there a difference between  
2 joinder on indictment and joinder for trial? Is that your  
3 position?

4 MR. DANNER: Well, given that the different  
5 phrases are used, I think they ought to be given different  
6 meaning, and particularly in the context of this clause,  
7 where the only way to stop the exclusion is to move to  
8 sever. I think we give meaning to join for trial by  
9 looking to the fact of arraignment, which is the first time  
10 with - - -

11 JUDGE SINGAS: And where is it - - - and - - -  
12 and what authority are you invoking arraignment? Where in  
13 the statute does - - - does it say anything about  
14 arraignment?

15 MR. DANNER: Well - - -

16 JUDGE SINGAS: I think the statute reads pretty  
17 clearly on its face.

18 MR. DANNER: Well, I think at best the statute we  
19 believe is ambiguous and can't be interpreted for the  
20 result. The defendant, who has no opportunity to stop this  
21 exclusion, by moving to sever it, can have this time run  
22 against him. The first moment at which the defendant can  
23 protect himself from his co-defendants dilatory tactics is  
24 upon arraignment, we can make a motion to sever. And so  
25 the statute shouldn't be interpreted in a way that allows a

1 completely innocent, unknowing defendant to lose valuable  
2 statutory rights when another interpretation is available  
3 that upholds that right by saying that a defendant only  
4 becomes joined for trial, which again is a unique statutory  
5 phrase, upon arraignment.

6 JUDGE HALLIGAN: But - - -

7 CHIEF JUDGE WILSON: So the judge at one - - -  
8 I'm sorry - - - the judge at one point was going to hold a  
9 factual hearing to determine whether the defendant knew and  
10 absconded or was - - - didn't know. Is that the remedy you  
11 would ask for on this?

12 MR. DANNER: Well, the remedy we would ask for is  
13 dismissal of the indictment, Your Honor. But as an  
14 alternative - - -

15 CHIEF JUDGE WILSON: And why is that - - - yeah -  
16 - - why is that not a better - - - well, I understand why  
17 it's not better for you.

18 MR. DANNER: Yes, Your Honor. But it's - - -  
19 well, it's ultimately the People's burden to establish the  
20 applicability of exclusion. They did not establish the  
21 applicability of C, the absconding exclusion. And I don't  
22 know that they should be relieved of that in this court.  
23 The Appellate Division had the same argument - - -

24 JUDGE HALLIGAN: But I thought that the court - -  
25 -



1 MR. DANNER: - - - and didn't - - - I apologize,  
2 Your Honor.

3 JUDGE HALLIGAN: I thought that the court  
4 declined to decide that. It is your view that - - - that  
5 that has been determined?

6 MR. DANNER: The court did decline to decide it.  
7 That's accurate, Your Honor. And then the Appellate  
8 Division did not send it back for a hearing on this issue,  
9 but did not charge under C, did not find the absconding on  
10 the record that exists.

11 So I think under Lafontaine, this court may send  
12 the issue back, and I think that may be an appropriate  
13 remedy in this case to determine whether or not he  
14 absconded.

15 JUDGE HALLIGAN: And I - - -

16 JUDGE SINGAS: And just - - - I'm sorry.

17 Can I just ask you the practical implications of  
18 a rule if we adopted your rule?

19 MR. DANNER: Yes, Your Honor.

20 JUDGE SINGAS: So suppose that we have two co-  
21 defendants on the same indictment being charged with  
22 different amounts of time, and at some point, the People  
23 decide they have to do a hearing for one of the defendants  
24 because they have sixty days charged, and then they're  
25 going to find themselves in a position of doing one hearing

1 and calling witnesses for one co-defendant, and then maybe  
2 later on, doing the same hearing with the same witnesses  
3 for another co-defendant.

4 And isn't that across purposes with what the  
5 legislature was intending by instituting this statute, by  
6 saying, look, when you have two co-defendants in - - - in -  
7 - - for judicial economy, we're going to treat them as one  
8 so that we avoid these kinds of issues. But I think you're  
9 inviting these kinds of issues if we adopt your rule. Am I  
10 wrong about that?

11 MR. DANNER: Well, Your Honor, I - - - this - - -  
12 the legislature could have said that once you're co-  
13 indicted, your time runs the same. That's it. But it  
14 didn't. It added an exclusion where if you show good cause  
15 for severance, you can get out, if you're the defendant,  
16 from that co-running of time. And that remedy - - - that  
17 out, which the legislature chose to give in its wisdom, is  
18 not being respected if the time can run against them while  
19 they have no ability to protect themselves.

20 JUDGE SINGAS: But the legislature - - -

21 MR. DANNER: So I'm saying - - -

22 JUDGE SINGAS: - - - also didn't put in the word  
23 arraignment. And it could have. It knew how to. There's  
24 certainly other sections of the CPL where they talk about  
25 arraigned versus unarraigned defendants. They chose not to

1 here, and I think they did so for a reason.

2 MR. DANNER: Well, Your Honor, I'd suggest if  
3 there are two available interpretations, one of which  
4 results in - - - in this defendant and all defendants being  
5 powerless to protect themselves from the dilatory tactics  
6 of their co-defendants. The court should favor the  
7 available interpretation that requires arraignment to find  
8 the defendant ready for trial.

9 JUDGE RIVERA: As - - - as I recall, I think they  
10 countered that, given that 30.30 would be raised later  
11 anyway, any argument about the - - - the possibility of a  
12 severance could be raised later also.

13 MR. DANNER: They do raise that possibility.

14 JUDGE RIVERA: Okay. Uh-huh.

15 MR. DANNER: That's not the position, I'll say,  
16 that is taken by the people in lower courts. That's not  
17 the rule that's been applied in lower courts. And it  
18 raises a host of questions. Are we going to allow a  
19 defendant who has a good motion to sever, who's been  
20 arraigned, to wait until the speedy-trial clock would run  
21 to say, oh, wait, never mind. I'm going to raise my hand  
22 and move to sever, and you know, it turns out I get the  
23 indictment dismissed. It would invite a whole other host  
24 of questions.

25 So while that is a position in a brief, that's

1 not the reality on the ground, and that's not the reality  
2 Mr. Blue faced or defendants face all over the state.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. DANNER: Thank you.

5 MR. TISNE: May it please the court. I'm Philip  
6 Tisne on behalf of the respondent. Defendant had a general  
7 understanding of his sentence exposure in this case.  
8 Together with the extensive and unchallenged warnings about  
9 the specific risks associated with proceeding without a  
10 lawyer, defendant's general awareness about his sentence  
11 exposure was more than enough for this defendant to make an  
12 informed decision about whether he wanted to waive counsel.

13 JUDGE RIVERA: So if there had been none of those  
14 general statements - - - none of those general statements  
15 about the potential sentence, would - - - would then they  
16 succeed on this appeal?

17 MR. TISNE: Well, what I'd like to do - - -

18 JUDGE RIVERA: Is it a necessary component, even  
19 if you accept your argument that it can be a general  
20 statement?

21 MR. TISNE: Yes. So our view is that some  
22 awareness on the defendant's part of their sentence  
23 exposure is required to knowingly waive the right to  
24 counsel.

25 JUDGE HALLIGAN: And to your adversary's comments

1 about - - - about remarks after the waiver, why should we  
2 or could we take a exchange following the waiver, which  
3 isn't clearly tethered to, you know, the defendant's own  
4 understanding or to some prior exchange - - - some prior  
5 colloquy between the judge and the defendant, as relevant  
6 to what the defendant understood at the time of waiver.

7 MR. TISNE: So I'd like to answer that question  
8 by first starting with the information that predates the  
9 waiver, and then talk to you about why the information that  
10 postdates the waiver is relevant to the pre-waiver  
11 information.

12 JUDGE HALLIGAN: Yeah. Thank you.

13 MR. TISNE: And Judge Troutman, as you  
14 recognized, this defendant was told at arraignments that he  
15 was facing six counts. He was told that they were violent  
16 felonies. He was told that they could run successively.  
17 He had a criminal history. His most recent conviction was  
18 - - - he received a sentence for - - - of eleven years on a  
19 nonviolent felony - - - on a single nonviolent felony. And  
20 he knew that he was being offered twelve years on a plea to  
21 the charge in this case. So that is twelve years to a plea  
22 to a single of the violent felonies that he faced.

23 Just there alone, the defendant must have known  
24 that he faced either a maximum of sixty-six years or  
25 seventy-two years if all of those counts ran consecutively.

1 We know this because when we get to the time of the plea  
2 colloquy and the defendant asks to waive counsel and defen  
3 - - - the lawyer - - - the judge says, you can't do this.  
4 It's a terrible idea. You're facing a ton of time. The  
5 defendant says, I know, but I'm making my decision anyway.

6 All of that goes to show that the defendant had a  
7 general awareness, at least, about the consequences that he  
8 faced if he was convicted after trial. Very significant  
9 prison sentence. Many decades in prison.

10 Now, to your question, Judge Halligan, the  
11 statements after - - -

12 JUDGE HALLIGAN: Uh-huh.

13 MR. TISNE: - - - the plea colloquy are relevant  
14 to that because they substantiate the fact that, before, he  
15 did know what he was talking about when he said, yeah, I  
16 know it's a bunch of time - - -

17 JUDGE HALLIGAN: If he knew exactly why that's  
18 the case, if you would, why - - - why is it substantiating  
19 something that he knew previously as opposed to something  
20 he comes to realize in the moment?

21 MR. TISNE: Well, I - - - I suppose there might  
22 be a case where something changes in the interim - - -

23 JUDGE HALLIGAN: Uh-huh.

24 MR. TISNE: - - - and a superseding indictment or  
25 new information - - -

1                   JUDGE HALLIGAN: But absent that, you assume it  
2 reflects the knowledge that he's had since the day he  
3 walked in the door?

4                   MR. TISNE: Exactly. But absent that, if we  
5 assume that the things that he says after his pro se  
6 colloquy reflect the information that he had before he  
7 waived the colloquy. And here after the colloquy, he said  
8 - - - the judge says, listen - - - I mean, the judge says  
9 this just about every three months in this case. Your  
10 exposure in this case is huge. I'd need a calculator to -  
11 - - to come up with your exposure. At one point, he says,  
12 you're facing twenty-five to thirty to forty years. You  
13 don't need to do this. Don't - - - and those were in the  
14 context of a plea negotiation. But the defendant says,  
15 yeah, I know what my exposure is, and I know what I'm doing  
16 here. All of that reflects what the defendant said to the  
17 judge at the plea colloquy, and what he learned before the  
18 plea.

19                   JUDGE TROUTMAN: With respect to plea  
20 discussions, and he's talking to his lawyer before the  
21 lawyer is discharged, is that also relevant that he  
22 complains that the lawyer is just wanting to talk about  
23 taking a plea, that there was some discussion, and that  
24 they - - - he did have knowledge of exposure?

25                   MR. TISNE: I think all of that goes to show that

1 the defendant knew what he said when, at the plea colloquy,  
2 the judge said, you're facing a ton of time here, and the  
3 defendant said - - -

4 JUDGE RIVERA: But why - - - why is all this  
5 guesswork a better rule than here's the minimum, here's the  
6 maximum? It might differ, but that's at a minimum what you  
7 should take into consideration.

8 MR. TISNE: Though, there are two answers, I  
9 think, to that question.

10 JUDGE RIVERA: Better than one. Yes.

11 MR. TISNE: So the better answer, the more  
12 important answer, is that it is not going to be the case  
13 that every case giving an exact number is the best way  
14 forward. This case - - -

15 JUDGE RIVERA: Well, that's not even what's  
16 required. It's just a range. Nobody's talking about the  
17 exact number - - -

18 MR. TISNE: It's a range of number - - -

19 JUDGE RIVERA: Right.

20 MR. TISNE: So now we're saying - - - we're  
21 hearing them say, well, you needed to give the range. If  
22 he was a predicate, it was twenty-one to ninety. If he was  
23 - - - if he wasn't - - - if he wasn't a predicate, it was  
24 twenty-one to ninety. If he was a predicate, it was thirty  
25 to ninety.

1           In their brief they say, actually, you know, you  
2           should have calculated it according to the statutory cap  
3           that DOCCS administers, so really it's going to be twenty.  
4           So in this case it's not quite so simple to come up with an  
5           - - -

6           JUDGE HALLIGAN: But what - - - what is - - -

7           JUDGE RIVERA: But that - - - isn't that  
8           troubling? You're telling me that a court won't even know  
9           - - - can't even say to a defendant this is the range?

10          MR. TISNE: No. No. No.

11          JUDGE RIVERA: I mean, you got to know something.

12          MR. TISNE: I - - - and I - - - so there was, I  
13          think - - -

14          JUDGE RIVERA: How can he know if the court  
15          doesn't?

16          MR. TISNE: So I think there was confusion about  
17          whether this defendant was a predicate, just because there  
18          was some question about how long - - -

19          JUDGE TROUTMAN: But even - - -

20          JUDGE RIVERA: But that's about the enhancement.  
21          He's already said that. So - - -

22          MR. TISNE: I'm sorry?

23          JUDGE RIVERA: But that's about of a potential  
24          for an enhancement, right?

25          MR. TISNE: But - - - but my point is - - -

1 JUDGE TROUTMAN: But let me ask you this. Quite  
2 simply, I did pleas all the time and started out with, this  
3 is what you're charged with, and would give them the  
4 potential maximum sentence of a C violent or of a B.  
5 Doesn't mean that's what they're going to get. They're  
6 factors that affect whether it's more, whether it's less.  
7 But why can't the court just say, here's the max  
8 potentially you could face?

9 MR. TISNE: Okay.

10 JUDGE TROUTMAN: Wouldn't that be better?

11 MR. TISNE: The court certainly could. I think  
12 my answer was getting to the possibility that there might  
13 be cases where it is a little more complex. I think you'll  
14 hear - - -

15 JUDGE TROUTMAN: Uh-huh.

16 MR. TISNE: - - - about another one of those  
17 cases later today - - -

18 JUDGE TROUTMAN: But - - - but may - - - doesn't  
19 may take that into account?

20 MR. TISNE: I'm sorry? Doesn't - - -

21 JUDGE TROUTMAN: May. It's - - - it may happen.

22 MR. TISNE: It may. So - - -

23 JUDGE TROUTMAN: This is your worst-case  
24 scenario.

25 MR. TISNE: The - - - the second answer then, if

1           you don't find that particularly satisfying, is that the  
2           thing that we're focused on here is not what the court  
3           says, but what the defendant knows. And it doesn't matter  
4           that the court says you're getting seven to fifteen on each  
5           count, or they're going to be stacked, or anything like  
6           that. What matters is, did the defendant have a knowledge  
7           about what their sentencing exposure was sufficient to make  
8           an informed and knowledgeable decision about whether they  
9           wanted to waive the assistance of counsel? And I think - -  
10          -

11                         JUDGE CANNATARO: But doesn't your first argument  
12           cut against the second argument? If the court's not even  
13           in a position to offer a somewhat reliable range or set of  
14           numbers, whatever you want to call it, then how can we  
15           expect the defendant to understand it? And even in this  
16           case, I'm struck by the fact that, you know, a post - - -  
17           post-motion colloquy talks about twenty-five, you know,  
18           thirty, forty years, and you're telling us that what he  
19           understood was sixty-six to seventy-two. There's - - -  
20           there seems to be all sorts of different notions of what  
21           the right number is here.

22                         MR. TISNE: I'm - - - the sixty-six to seventy-  
23           two was just based upon the information that was told to  
24           him, specifically at his arraignment. His actual maximum  
25           was ninety. In their brief, they say the thing that he

1 needed to be told was that he was facing twenty years, a  
2 much different maximum. Now, they've changed their  
3 position, and they're saying, actually, he needed to be  
4 given the range on each count and told about the  
5 possibility that they could be more than just - - -

6 JUDGE CANNATARO: But could you address the  
7 underlying concern that it's - - - these numbers are not so  
8 easy to ascertain, and they must be all the more difficult  
9 for a nonlawyer, nonjudge to ascertain. So how - - - how  
10 can we just assume that they understand these things?

11 MR. TISNE: Fair enough. And I - - - I don't  
12 think it is going to be every case where the number is  
13 going to be difficult. I think the judge could, in this  
14 case, have said, listen, I don't care whether you're a  
15 predicate or not, you're facing three and a half to fifteen  
16 on each count, and when you add those up and they're  
17 stacked, you get a twenty-one to ninety range. That's - -  
18 - that's knowable. The judge could have said that.

19 JUDGE CANNATARO: But he didn't have to.

20 MR. TISNE: I don't think that is the case for  
21 every case, but I do think that is a possibility here. And  
22 then - - -

23 JUDGE TROUTMAN: So are you acknowledging that  
24 there may be an instance, without giving more specific  
25 information on exposure, that it could be insufficient?

1 MR. TISNE: I think in every case, the question  
2 is going to be whether the defendant had sufficient  
3 information about their sentencing exposure - - - the  
4 potential sentencing exposure to make an informed decision  
5 about whether to waive counsel, in addition to all of the  
6 other information that they need to know about how terrible  
7 an idea it is to waive the right to counsel and go it alone  
8 through hearings and trial.

9 You know, we don't - - - we haven't talked too  
10 much about the fact that this defendant got essentially a  
11 model colloquy on that information, length, you know,  
12 eighteen pages in the transcript about, you know, how  
13 you're going to have to go to hearings by yourself, you're  
14 going to have to go to trial, and the judge - - -

15 JUDGE RIVERA: But that part of the colloquy is  
16 not at issue. And you've already said that, yes, indeed,  
17 they have to have some knowledge of this particular range  
18 of the punishment, so that's the only one we're focused on.

19 MR. TISNE: But the bedrock question, Judge  
20 Rivera, is whether the defendant has enough information to  
21 make a knowing waiver. And all of this information has to  
22 be viewed in totality and - - - to come up with an answer  
23 about that. And we think - - - I mean, the federal cases  
24 don't require a specific number - - - a knowledge of a  
25 specific number. They required a general understanding - -

1 -

2 JUDGE RIVERA: But you agree they require some  
3 information about the range?

4 MR. TISNE: As I conceded earlier, yes.

5 JUDGE RIVERA: But that that - - - right.

6 MR. TISNE: The general understanding - - -

7 JUDGE RIVERA: So that's all we're focused on.  
8 That that is the one - - - they argue this is the one thing  
9 that was not expressly stated to the defendant.

10 MR. TISNE: A defendant has to have a general  
11 understanding of their sentencing exposure is what I was  
12 saying.

13 JUDGE RIVERA: Yes. You're saying if you look at  
14 the whole record, we can draw this conclusion that this  
15 defendant had that information, even if the judge didn't  
16 use numbers at the time?

17 MR. TISNE: One hundred percent.

18 JUDGE HALLIGAN: Can I ask you, Counsel, to  
19 address the 30.30 point? And specifically, can you start  
20 by telling me does the record show - - - my understanding  
21 is the defendants were indicted at the same time, yes?

22 MR. TISNE: That's correct.

23 JUDGE HALLIGAN: And they were arraigned at  
24 different times, right, which is what gives rise to the  
25 issue before us. Does the record tell us why? Is it

1           because - - -

2                       MR. TISNE: They were arraigned at different  
3 times?

4                       JUDGE HALLIGAN: Yeah. Is it because the  
5 defendant was not in the - - - available, in the  
6 jurisdiction, findable, or is there - - - is there some  
7 additional reason? What - - -

8                       MR. TISNE: Yeah. So defendant and Puello had  
9 been charged separately in a different case.

10                      JUDGE HALLIGAN: Uh-huh.

11                      MR. TISNE: And so they were in sort of  
12 communication. Their counsel was - - - their appointed  
13 counsel was in communication with the DA's office when this  
14 arrest dropped. When the indictment was filed, they  
15 arranged for a sort of voluntary surrender to be arraigned  
16 on the indictment.

17                      Puello showed up. Blue didn't. The intention of  
18 the people at the 30.30 motion was to put on evidence that  
19 he had absconded to Florida, and I think the record shows  
20 that they, through diligent efforts, found him in Florida  
21 and brought him back, and that's why you get his  
22 arraignment several months later.

23                      JUDGE HALLIGAN: And what's your response to your  
24 adversary's arguments about why we should read 4(d) in the  
25 way that he suggests? I know you rely on 240, but - - -

1 but he suggests that that's not, first of all, the only  
2 reading of 30.30 that - - - that is available and some  
3 reasons why we shouldn't read it that way.

4 MR. TISNE: Sure. The - - - there's nothing in  
5 4(d) that talks about pre and post-arraignment time. It  
6 doesn't distinguish between them. There are other  
7 provisions in 30.30 that - - -

8 JUDGE HALLIGAN: But do you agree - - - sorry - -  
9 - do you agree it doesn't - - - it doesn't preclude the  
10 reading that - - - that your adversary is proposing?

11 MR. TISNE: I mean, it doesn't preclude it, but  
12 in other situations - - - well, yes, it does preclude it  
13 because the - - -

14 JUDGE HALLIGAN: How - - - what - - - what words  
15 - - -

16 MR. TISNE: - - - the legislature has indicated  
17 that it knows how to identify pre and post-arraignment  
18 time, and it wants to, and it hasn't done that here. It  
19 hasn't done that in in other provisions of 30.30. And in  
20 those other provision, courts have not hesitated.

21 JUDGE HALLIGAN: Okay. But nothing on the text  
22 of the provision itself which precludes the reading, I take  
23 it?

24 MR. TISNE: I mean, other than the absence of the  
25 language, no.

1 JUDGE HALLIGAN: Uh-huh.

2 MR. TISNE: No, there is not.

3 JUDGE HALLIGAN: Understood.

4 MR. TISNE: The - - - I think my response to my  
5 adversary's point is that joinder and joinder for trial are  
6 effectively the same thing. There is a distinction between  
7 them that he's trying to draw. But defense lawyers,  
8 prosecutors, courts, this court, have used the terms  
9 interchangeably. When you look at the exclusion, it  
10 doesn't really make sense to say joinder without joinder  
11 for trial.

12 CHIEF JUDGE WILSON: Well, suppose we change the  
13 facts up a bit so that we assume that Mr. Blue has no idea  
14 he's being - - - been indicted. Let's assume we know that  
15 for this hypothetical. And we assume that he's left the  
16 jurisdiction for a vacation that was planned a long time  
17 ago and did that without any idea that he was supposed to  
18 be in court, and that the - - - your office knew exactly  
19 where he was and decided not to go after him. The time  
20 still should not run?

21 MR. TISNE: Well, that might be a situation where  
22 the exclusion doesn't apply because the time that's to be  
23 excluded is unreasonable. The exclusion applies where the  
24 time period to be excluded is un - - - is reasonable and  
25 where - - - effectively where good cause for a severance is

1 not shown. You know, if you could make an argument later  
2 when he does his 30.30 motion about good cause for a  
3 severance, then certainly that might support defeating the  
4 exclusion. Or if you could argue that there was something  
5 unreasonable about applying the exclusion under the facts  
6 of his particular case - - -

7 JUDGE HALLIGAN: Even though he couldn't have, in  
8 fact, moved to sever in that window because he hadn't been  
9 arraigned.

10 MR. TISNE: Well, and - - - and the possibility  
11 of making a severance motion is irrelevant. And in fact -  
12 - -

13 JUDGE HALLIGAN: Why is that? If that's part of  
14 the remedy, why is that - - -

15 MR. TISNE: Well, but it's not part of the  
16 remedy.

17 JUDGE HALLIGAN: What - - -

18 MR. TISNE: The exclusion doesn't turn on the  
19 availability of a severance motion. It says, do you have  
20 good cause to make a - - - to sever your case from your  
21 defendant's.

22 JUDGE HALLIGAN: Okay.

23 MR. TISNE: The federal statute - - - I mean, the  
24 - - - the federal statute is written differently to require  
25 a motion. The state statute doesn't.

1 JUDGE HALLIGAN: And so fair point. But - - -  
2 but so what you're asking us, I think, to conclude, is that  
3 I have good cause to sever, but I could not, in fact, sever  
4 in that window. That seems to me to be a little bit of an  
5 artificial construct. That's why I'm asking.

6 MR. TISNE: No, I don't - - - it's - - - I don't  
7 think it requires the second piece of that argument. He  
8 doesn't have to say, but I - - - but I couldn't have moved  
9 to sever. It's enough for him to say, I had good cause to  
10 sever, and the - - - and all the other - - -

11 JUDGE HALLIGAN: I could have severed if I could  
12 have severed. I - - - it just - - - one last question, if  
13 I can. I know your red light is on. I wanted to follow up  
14 on Judge Singas' question with your adversary about the  
15 practical implications of the interpretation that your  
16 adversary is proposing. I mean, on the ground, what does  
17 that actually mean, if anything? If we were to read it as  
18 - - - as he suggests.

19 MR. TISNE: I mean, the point of the exclusion is  
20 to sync up defendants and multi-defendant cases because the  
21 strong policy of this state is to encourage joint trials.

22 JUDGE HALLIGAN: Yep.

23 MR. TISNE: I - - - you know, as I stand here  
24 right now, I don't think I could tell you how it's going to  
25 work on the ground if all of a sudden you have to start

1 comp - - - computing time differently for co-defendants and  
2 multi-defendant cases and how that works when you've got  
3 not just two defendants like here, but fifteen defendants,  
4 and some are in state, and some are incarcerated, out of  
5 state. Who knows how that works? I suspect that it's not  
6 going to be easy.

7 JUDGE HALLIGAN: Would it frequently or you know,  
8 not frequently in your experience be the case that you  
9 would actually have defendants who are indicted at the same  
10 time and arraigned at different times for whatever reasons?

11 MR. TISNE: It's - - - it is unfortunately not  
12 within my experience - - -

13 JUDGE HALLIGAN: Okay. Thank you.

14 MR. TISNE: - - - to give you an answer on that  
15 question. But I do want to try very quickly, if I can, to  
16 get - - - to answer your question in a satisfactory way,  
17 because I feel like I didn't before, which is to say there  
18 - - - a motion isn't required at the time that the - - - of  
19 the period that the defendant is trying to exclude.

20 So in this case, you know, Blue is not in - - -  
21 is not arraigned. Puello does his motion schedule. And  
22 defendant wants to defeat the exclusion as to that time? I  
23 think probably the way this works in most cases is you go  
24 into the future and the defendant makes a severance motion  
25 later down the line in the case.

1 JUDGE HALLIGAN: Uh-huh.

2 MR. TISNE: Something happens. Maybe there's a -  
3 - - I don't know, a Bruton problem or something like that,  
4 and he wants to get out of the case. And all of a sudden,  
5 at that point, he says, okay, my severance motion is  
6 granted. We're separate. Now, we've got a 30.30 problem,  
7 so let's go back and look. And the question then becomes,  
8 okay, well, this time that you excluded earlier as to my  
9 co-defendant, should that still be excluded as to me now  
10 that - - - now that we're severed.

11 And their view is that, well, it wouldn't - - -  
12 you wouldn't be able to defeat it because you didn't make  
13 the severance motion at the time. But that's the - - - I  
14 think, the point. The statute doesn't require you to have  
15 made the severance motion a severance motion then. All you  
16 have to show is that the good cause for a severance existed  
17 then. And if it did, then you can defeat the exclusion.

18 There is - - - that is a case where there's a  
19 severance motion, true, but it is not a severance motion  
20 that has to happen at the time of the - - - the period that  
21 you're seeking to exclude. And so all this talk about how,  
22 well, this defendant didn't have a way to protect himself  
23 is sort of a red herring because he protects himself down  
24 the line by making an argument, saying at the time of the  
25 period that sought to be excluded, I could have - - - I had

1 good cause to make an exclusion.

2 JUDGE CANNATARO: Is that a common occurrence,  
3 this sort of retrospective exclusion of time? I mean, do  
4 we see that down in the courts - - -

5 MR. TISNE: I mean, all 30.30 issues are - - -  
6 are litigated like that. 30.30 is always retrospective.  
7 It's never prospective. You don't litigate 30.30 time at  
8 the time of the period happens. And in fact, rules from  
9 this court say that you - - - if there is a statement on  
10 the record at the time of a period that says, okay, this is  
11 going to be time that's not chargeable to the People, and  
12 later on, you litigate a 30.30 motion, that's statement  
13 characterizing the period at issue is not going to be  
14 binding. It's what the court determines later when you  
15 issue the 30 - - - when you litigate the 30.30 - - -

16 JUDGE CANNATARO: And that applies irrespective  
17 of being pre-arraignment time. That doesn't change the  
18 practice - - -

19 MR. TISNE: Yeah. That's with respect to every  
20 exclusion.

21 JUDGE CANNATARO: Okay.

22 CHIEF JUDGE WILSON: And to get that result down  
23 the line, he would have to have a meritorious joinder  
24 argument on some other basis, not on the 30.30 basis. The  
25 30.30 would be raised if he could - - - if he prevailed on

1 a joint - - - on a misjoinder - - -

2 MR. TISNE: Severance.

3 CHIEF JUDGE WILSON: - - - right - - - on  
4 severance? Yeah.

5 MR. TISNE: Yeah. I mean, so I think most likely  
6 those cases arise in severance. I think it's conceivable  
7 that a defendant would have a valid severance motion, but  
8 would not want to make it - - -

9 CHIEF JUDGE WILSON: Yeah. Right.

10 MR. TISNE: - - - and then would be able to show  
11 retrospectively that good cause existed for the severance  
12 motion, even if you didn't want to make it. I mean, I'm  
13 not sure there are many cases where a defendant who has a  
14 severance motion doesn't make it.

15 I will just say before I sit down that the  
16 warrant issue is not preserved, and this court can't reach  
17 it.

18 Thank you, Your Honors.

19 MR. DANNER: Thank you, Your Honors.

20 I heard respondent to concede that, in fact, it  
21 is a necessary element of a valid pro se waiver that the  
22 defendant have an understanding of the range of allowable  
23 punishments. The question then is, did - - - is there an  
24 adequate record in this court for this court to conclude  
25 that Mr. Blue had such an understanding? And there isn't.

1 All we have are general statements and presumptions and  
2 speculation based on Mr. Blue's background, statements in  
3 the record of relative terms, and nothing that conveys the  
4 actual sentencing range that he was facing. That requires  
5 a reversal of this court's - - -

6 CHIEF JUDGE WILSON: I think - - - I think  
7 counsel somewhat amended his statement. It said a  
8 understanding of his sentencing exposure.

9 MR. DANNER: Yes, Your Honor. And I'll - - -  
10 I'll take sentencing exposure because there's no adequate  
11 record that he understood that either. What Mr. Blue heard  
12 was a - - - a offer of twelve, which is not the same thing  
13 as his maximum sentence in this case, and it's not close.  
14 In cases - - -

15 CHIEF JUDGE WILSON: So would you - - - would you  
16 be concerned at all if we took your math that you gave us  
17 the last time and he'd been told, you have an exposure of  
18 ninety years, when actually it would be capped at twenty?  
19 Would that bother you?

20 MR. DANNER: In the plea context, this comes up,  
21 Your Honor. And - - - and - - -

22 CHIEF JUDGE WILSON: Well, I know, but how about  
23 in the waiver context?

24 MR. DANNER: It also comes up in the waiver  
25 context in the federal cases. And so the question when the

1 number is wrong is whether it's materially wrong. And you  
2 can look at other factors, including the defendant's  
3 background, what was realistic and what else was conveyed.  
4 We see this in U.S. v. Fore, the Second Circuit case where  
5 a realistic range was given and an unrealistic higher range  
6 wasn't. The court said that's fine because a realistic  
7 estimate was given.

8 Similarly in Hammett, which is the Tenth Circuit  
9 case that we cite, the max range, the ninety in your  
10 example was given, and the Tenth Circuit said, that's  
11 great. As long as you've done that, this is an easy case.  
12 The problem in that case was that there is speculation  
13 about what he would actually serve.

14 So I - - - I don't know that I would be troubled  
15 by the ninety, Your Honor. I think the best practice is to  
16 say, here's six, here's the min/max, and they could be run  
17 consecutively, and they could be capped by the penal law.  
18 But what's not sufficient is to give nothing - - -

19 CHIEF JUDGE WILSON: Well, that's what I was  
20 trying to get at. Suppose there's - - -

21 MR. DANNER: Yes.

22 CHIEF JUDGE WILSON: Suppose there's no mention  
23 of capped by the penal law because that's - - - I mean,  
24 originally, I think when you came and said what you'd like  
25 him to say is whatever - - - three and a half to fifteen,

1 six counts, period.

2 MR. DANNER: Well, six counts could be  
3 consecutive - - -

4 CHIEF JUDGE WILSON: Could be. Right. Could be  
5 consecutive.

6 MR. DANNER: Yeah. Could be consecutive.

7 CHIEF JUDGE WILSON: So I do fifteen by six. Run  
8 them together, I get ninety.

9 MR. DANNER: Yeah. I think the best - - -

10 CHIEF JUDGE WILSON: Wouldn't you have a worry  
11 that that is impinging on his right to represent himself by  
12 dramatically overstating what amount of time he could spend  
13 in prison?

14 MR. DANNER: It may, Your Honor, but the reason  
15 we've focused on those particular warnings is because that  
16 is the federal constitutional floor that's been recognized  
17 as clearly established Supreme Court precedent. Those are  
18 - - - and - - - that comes from Von Moltke itself, or what  
19 you're warning are the nature of the charges and the range  
20 of allowable punishments there under. Other things, like  
21 the capping statute, may be extraneous to that.

22 A better rule, Your Honor, would be a rule that  
23 would require that a warning of both consecutive, and that  
24 if consecutive, there may be a cap. But I - - - but I - -  
25 - focusing in on what the federal courts have held is

1 minimally necessary, you do need the range on each count,  
2 and I believe you also do need a range that it could be  
3 consecutive to give them a realistic picture of what  
4 they're facing.

5 Briefly. I see my white light is on. There's  
6 been talk about he had a general understanding of his range  
7 of allowable punishments based on this or that, or this  
8 term or these relative terms. That's not appropriate, Your  
9 Honor. This court indulges every presumption against  
10 waiver, and it requires the searching inquiry not just to  
11 ensure that the defendant is informed, but to ensure an  
12 adequate record for appellate review.

13 Based on things, what does this judge mean by  
14 big, what does this defendant understand by big, what must  
15 he have been told off the record is inconsistent with this  
16 court's cases requiring specific warnings in this case  
17 concerning the range of allowable punishments.

18 JUDGE RIVERA: What about his argument that - - -  
19 I may have misheard him? You can correct me - - - that at  
20 arraignment, defendant understood it was at least - - - or  
21 it could go up to seventy-two years?

22 MR. DANNER: Well, I don't - - - I don't think  
23 that's right, Your Honor. He was being offered a plea of  
24 twelve on all six counts. There's nothing to suggest in  
25 the record, and certainly not stated in the record, that he

1 was looking at a plea or a potential of six times twelve.  
2 He was looking at a plea of twelve. If we're doing the  
3 math, he was facing ninety. So that's not what the warning  
4 was at all.

5 So if he'd been told, you're facing up to fifteen  
6 on each count, I think that's minimally sufficient. I  
7 think that's necessary. And I think what he had here does  
8 not anywhere give a reliable, nonspeculative basis to think  
9 that he actually understood the max that he was facing, the  
10 worst that could happen.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. DANNER: Thank you.

13 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Blue, No. 73 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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