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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 13

RIOS (JONATHAN),

Appellant.

20 Eagle Street
Albany, New York
January 8, 2026

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 calendar is
2 People v. Rios.

3 MS. REARDON: Good afternoon, Your Honors.
4 Kathleen Reardon on behalf of Jonathan Rios. Please, I
5 would request three minutes' rebuttal time.

6 CHIEF JUDGE WILSON: Yes.

7 MS. REARDON: Thank you. Because Mr. Rios
8 negated the element of forcible taking, denying robbery of
9 anyone, both in the presentence - - -

10 JUDGE TROUTMAN: And when did he negate that?

11 MS. REARDON: He negated it both at the
12 presentence investigation when he spoke to the probation
13 officer - - -

14 JUDGE TROUTMAN: That was after the taking of the
15 plea?

16 MS. REARDON: Subsequent to the taking of the
17 plea, and - - -

18 JUDGE TROUTMAN: So why does Lopez apply if it's
19 after?

20 MS. REARDON: Because he then reiterated those
21 statements when he was at sentencing, and clearly, there -
22 - - this is a very muddled record. And so he raised the
23 question of whether, in fact, there was a forcible taking
24 at all, and in fact, what he said was, there was no
25 forcible taking. This was a plan between the drug dealer

1 and the individuals who had worked at the 7-Eleven
2 basically to take the money from the - - - the cash
3 register, and so that - - -

4 JUDGE RIVERA: And in response to the Judge's
5 inquiry, says, I knew it was illegal.

6 MS. REARDON: Right.

7 JUDGE RIVERA: I'm guilty.

8 MS. REARDON: And the question was, what was he
9 saying I'm guilty of?

10 JUDGE RIVERA: Even - - - even the lawyer is
11 trying to save this plea.

12 MS. REARDON: And I think - - - I think the - - -
13 the attorney here, defense counsel, was sort of, seemed to
14 me, in a - - - in a rush to kind of get this case taken
15 care of. But in fact, the question was - - -

16 JUDGE CANNATARO: Well, he might have been in a
17 rush, but the judge stopped to ask a question, did a
18 colloquy, and - - - you know, and the question was, it's
19 your position, then, that you're not guilty, and it's his
20 answer, no, sir. I knew what I was doing was illegal.

21 MS. REARDON: And the - - - and the question,
22 then, is, what is he saying what I did was illegal? And
23 when he - - - he explained - - -

24 JUDGE TROUTMAN: But before you take a plea and
25 after you take a plea, the defendant is in two different

1 positions, correct?

2 MS. REARDON: Correct. Yes.

3 JUDGE TROUTMAN: So why not go forward with the
4 normal practice if - - - you file a motion to put aside - -
5 - to set aside the plea? If the court unilaterally took
6 away its - - - his plea, would that be okay?

7 MS. REARDON: Well, the court can't do that
8 subsequent - - -

9 JUDGE TROUTMAN: Why?

10 MS. REARDON: The court, on its own, can't vacate
11 that plea or withdraw that plea once it's been taken.

12 JUDGE TROUTMAN: So now - - -

13 JUDGE CANNATARO: That sounds like a rock and a
14 hard place. What do you do?

15 JUDGE TROUTMAN: Yeah.

16 JUDGE CANNATARO: The court can't take away the
17 plea, and he's saying, I'm not guilty, so what do you do?

18 MS. REARDON: You inquire further. And that's -
19 - - and then you - - -

20 JUDGE CANNATARO: To what end?

21 JUDGE HALLIGAN: And isn't that what's happened
22 here?

23 MS. REARDON: I'm sorry?

24 JUDGE HALLIGAN: Isn't that what happened here?

25 MS. REARDON: The judge did inquire, but the - -

1 - the inquiry here was actually focused on the Outley
2 hearing that he suggested he might have to go forward with.
3 And what - - - what it appeared that the judge was trying
4 to do was to determine whether - - - whether Mr. Rios had
5 violated the directive to the - - -

6 JUDGE HALLIGAN: But the - - - but the court - -
7 - the court says, you can't have it both ways, Mr. Rios.
8 Either you robbed someone or you didn't. I'm not in the
9 business of taking pleas and sentencing people that are not
10 guilty. Your Honor, I am guilty. So what should he have
11 done at that juncture, the judge? Or she. I don't
12 actually know.

13 MS. REARDON: He. He - - - he then asked him,
14 what was it that you did that was illegal, and his
15 explanation goes back to I - - - there was this deal
16 between the drug dealer and the - - - the people who owed
17 him the money. That's how they were paid - - -

18 JUDGE HALLIGAN: The passage I just read to you
19 follows that.

20 MS. REARDON: I'm sorry?

21 JUDGE HALLIGAN: The passage I just read you
22 follows that exchange - - -

23 MS. REARDON: Yes.

24 JUDGE HALLIGAN: - - - about Your Honor, I went
25 to go pick up money from two clerks that owed a drug

1 dealer.

2 MS. REARDON: Correct.

3 JUDGE HALLIGAN: He seems fairly unequivocal. So
4 what more should the court have done if the - - - you - - -
5 you said the court couldn't vacate the plea unilaterally,
6 right?

7 MS. REARDON: That's correct.

8 JUDGE HALLIGAN: So what should the court have
9 done absent a motion?

10 MS. REARDON: I think, after making a sufficient
11 inquiry to determine what exactly it was that he was
12 pleading to, the last step would have been, do you want to
13 withdraw your plea?

14 JUDGE GARCIA: He's not pleading. He's being
15 sentenced. When does this end? So let's say he gets an
16 eight-year sentence, hypothetical. Defendant really wants
17 four. He gets eight. As he's turning to leave the
18 courtroom, he says, you know, I didn't do it. I just pled
19 because I was pressured.

20 Now, does the court have to have an inquiry at
21 that point? Is the cutoff when the number is given to the
22 defendant? When do we stop the inquiry that goes on when a
23 person who's presumed innocent is waiving certain rights?
24 When he's about to be sentenced? Just after he's
25 sentenced? If he has to get resentenced on a technicality?

1 When can that defendant just come in and say - - - start
2 creating doubt as to the plea?

3 MS. REARDON: I understand. And I - - - and I
4 think the situation is such that, you know, where - - -
5 where somebody is taking a plea, it's likely that there's
6 an offer - - - perhaps a - - - a favorable offer to the
7 defendant. So the fact that - - - that he's there saying,
8 I didn't - - - I didn't do this, what - - - what I think
9 I'm trying to tell you - - -

10 JUDGE HALLIGAN: I - - - I think the question is
11 why, at this juncture, which is sentencing - - - it seems
12 to me you're suggesting this is akin to the point at which
13 the defendant is taking the plea. Why - - - why would the
14 sentencing be any different than, for example, as Judge
15 Garcia says, he comes in for resentencing on some
16 technicality? If, at that point, the statement had been
17 made, would that be sufficient to trigger the same duty
18 you're suggesting exists here?

19 MS. REARDON: Well, the duty - - - the duty and
20 the obligation is, obviously, on the court to determine
21 that, in fact, this is a knowing and voluntary - - -

22 JUDGE HALLIGAN: I understand, but at the
23 sentencing - - -

24 JUDGE GARCIA: Any time after - - - any time
25 after - - - any time after that plea, he sees - - - he or

1 she, the judge, sees that defendant, they have an
2 obligation to ensure - - - a plea that might have been
3 taken two, three, five years ago on a resentencing on a
4 technicality, that plea was voluntary five years ago
5 because you're now saying, you know, I really thought I was
6 justified in shooting him.

7 MS. REARDON: Again, I - - - I think the problem
8 here - - - and this is a - - - this is a pretty specific
9 case because he says, granted, to the probation officer
10 during the PSI - - - and - - - and understand that defense
11 counsel was not present with him during the presentence
12 investigation, and he says, you know, what they always say,
13 tell me - - - tell me what happened during this. And
14 normally, what happens is defense counsel is there and
15 says, my client's not - - -

16 JUDGE GARCIA: So if the defendant minimizes his
17 role in an attempt to get a better sentence, that sparks an
18 inquiry into whether or not your original plea was
19 voluntary.

20 MS. REARDON: But in here, I don't think this is
21 minimizing anything. I think that, in fact, he's - - -
22 he's saying - - -

23 JUDGE GARCIA: I didn't really do it. I just was
24 there. Like a hypothetical case, right? Any time there's
25 some doubt in a presentence report, and there are a lot of

1 reasons a defendant may want a different version of the
2 crime in a presentence report, or in front of that judge at
3 any time, the judge has to go back and, essentially, redo a
4 plea.

5 MS. REARDON: I - - - I think the difference here
6 - - - well, first of all, the - - - it was the judge who
7 brought this up at sentencing.

8 JUDGE HALLIGAN: Well, that's - - -

9 JUDGE GARCIA: But you're saying he didn't even
10 do enough. The judge, one way to look at it, is did more
11 than the judge needed to do, but now, you're saying the
12 prep - - - the reward for that is that you didn't do
13 enough.

14 JUDGE RIVERA: It does seem that the inquiry that
15 you're asking for was made, and it - - - was made, and it
16 did not go favorably for the defendant.

17 MS. REARDON: Well, the inquiry, I think, was - -
18 - was, did you violate my directive when I told you that
19 you had to tell the truth during a presentence
20 investigation.

21 JUDGE TROUTMAN: And then the court inquires as
22 to whether he lied during the plea, right?

23 MS. REARDON: And so the focus seems to be on did
24 you lie, not what is it that you - - -

25 JUDGE TROUTMAN: How is that - - -

1 JUDGE RIVERA: But the court says, if it's your
2 position that you are not guilty in this case, what is it
3 that you did that was illegal.

4 JUDGE CANNATARO: It might have started out as a
5 violation - - - you know, you're right. I - - - I know
6 what you're saying. And the court starts out by saying,
7 sounds like you violated my order with respect to the
8 admonitions that were given at the plea, but it evolves to
9 the point where - - - you've heard it a couple times, most
10 recently from Judge Rivera, with this question, so are you
11 saying you're not guilty, and he says, no.

12 MS. REARDON: But the question is, what is he
13 saying I'm guilty of, and it's not - - -

14 JUDGE TROUTMAN: But my problem is isn't this
15 colloquy an invitation at that point for the defendant,
16 even initially, to make a request to withdraw his plea?

17 MS. REARDON: And my response to that would be
18 that's the obligation of the court because at this point,
19 this - - - this defendant - - - nobody - - -

20 JUDGE TROUTMAN: Post-plea, it's the court's
21 responsibility.

22 MS. REARDON: I guess the question in terms of
23 vacating - - - or excuse me, of withdrawing the plea never
24 comes up. It's not brought up by defense - - -

25 JUDGE TROUTMAN: But the defendant says, no, I'm

1 not saying I'm not guilty. I'm paraphrasing right now
2 because I didn't turn to the page with the colloquy, but
3 there is a dialogue that is taking place. And I agree with
4 my colleagues. The suggestion here is the court is at
5 fault for inquiring and - - - and to say, well, is there
6 something amiss here that even - - - it gave the court the
7 ability to utilize its discretion to, maybe on its own, ask
8 even further, but based on the responses that the defendant
9 gave, the court stopped. So I'm - - - I'm - - - I'm having
10 difficulty understanding what more the court should have
11 done for this defendant.

12 MS. REARDON: The court at that point, once it
13 had gone through that colloquy and got the answers, I'm
14 guilty, but - - - I'm guilty, but let me tell you about the
15 plan, says nothing in terms of this - - - I'm pleading
16 guilty to the robbery, at that point - - -

17 JUDGE TROUTMAN: But what about the fact that
18 people - - -

19 JUDGE RIVERA: But every time - - - I get your
20 point about that. I do, indeed. But every time there's
21 that little inflection, the response is always something to
22 the effect - - - I'm going to read some of it verbatim.
23 Yes, sir. I knew it was illegal, sir. That is why I'm
24 pleading. That is correct, sir. It was illegal. I knew.
25 Your Honor, I am guilty. So yes, every time there's an

1 opportunity to say it was all a sham, directly to say that,
2 he responds in this particular way.

3 MS. REARDON: But he's - - - he's responding - -
4 -

5 JUDGE RIVERA: What - - - what more would the
6 judge have done if - - - if - - - I've just read it now
7 three times.

8 MS. REARDON: Right.

9 JUDGE RIVERA: When the gentleman says, I knew it
10 was illegal, I'm guilty, yes, sir, I'm not taking anything
11 back, what I said to you is correct - - -

12 MS. REARDON: And - - -

13 JUDGE RIVERA: - - - what - - - what is left for
14 the judge to now ask?

15 MS. REARDON: Again, I think the - - - the last
16 thing for the judge - - -

17 JUDGE RIVERA: Yeah.

18 MS. REARDON: - - - to ask - - - because what I
19 submit to you is the - - - this is such a muddled record as
20 to what he's being asked about and what - - - in his mind,
21 he is telling him, am I - - - am I responding to the
22 robbery, or am I talking about my - - -

23 JUDGE TROUTMAN: But don't defendants take pleas?
24 They take Alford pleas. They - - - they make a gamble
25 whether or not - - - or an assessment, I should say, with

1 the consultation of their - - - their attorney, the chances
2 of being convicted of a higher charge. All of those things
3 go - - - weigh into making the ultimate decision whether to
4 plead or plead - - - not to plead guilty, and sometimes
5 they plead to things that aren't necessarily the exact
6 thing they did.

7 MS. REARDON: Sure.

8 JUDGE TROUTMAN: I'm not understanding here why
9 what you're suggesting he said somehow impacts the knowing
10 entry of his plea.

11 MS. REARDON: I - - - I think, again, the - - -
12 the knowing part of it is when he gets to this point, he's
13 spoken to the probation officer, and what he's told him
14 I've done wrong is I was - - - I was a CI for this person,
15 and my - - - and basically, we were getting the money from
16 the clerks to pay back the drug dealer.

17 JUDGE TROUTMAN: That which he says now not under
18 oath, by the way - - -

19 MS. REARDON: Not under oath. Granted.

20 JUDGE TROUTMAN: - - - because when he takes his
21 plea, he's under oath, right?

22 MS. REARDON: Correct. And I - - -

23 JUDGE TROUTMAN: And the court - - - he doesn't
24 say - - - there's no request for, now, a further discussion
25 under oath as to anything he says. And in fact, he's - - -

1 he doesn't take back what he did in the original plea.

2 MS. REARDON: He - - - he doesn't. And I'm not
3 limiting it just to the - - - the presentence investigation
4 because I think the statement, you know, is - - - are - - -
5 would not necessarily be enough here. What would be enough
6 is the court saying, counsel, your client did not take
7 responsibility for this - - - for this robbery.

8 JUDGE TROUTMAN: So any time someone doesn't take
9 responsibility, that's a open invitation to - - - for the
10 plea to be automatically rescinded without - - -

11 MS. REARDON: No - - -

12 JUDGE TROUTMAN: - - - necessity of a motion?

13 MS. REARDON: No. But in this situation, you've
14 got a client who says - - - who - - - who negates the
15 element - - - one of the two elements of robbery. Is this
16 a - - -

17 JUDGE GARCIA: And you're - - - you're asking us
18 to vacate the plea; is that right?

19 MS. REARDON: Yes.

20 JUDGE GARCIA: So if you had filed a motion at
21 this point, there would have been a hearing, right, and the
22 judge wouldn't necessarily have had to vacate the plea?

23 MS. REARDON: For a 440, right.

24 JUDGE GARCIA: So why would we vacate the plea?
25 We don't know if it's - - - there's no evidence that that

1 plea was involuntary. You're saying later, there should
2 have been an inquiry post-plea. Now, if there's evidence
3 at the plea time that this wasn't voluntary, that's one
4 thing, but now, you're asking us to apply that remedy,
5 which is more than you would get for a motion, to this. I
6 don't - - - I don't understand how we would do that.

7 MS. REARDON: I guess the - - - in terms of - - -
8 of filing a 440 at - - - at this point, what the basis
9 under 440.10 would be, how this would fit in that. And so
10 we're - - -

11 JUDGE HALLIGAN: And I guess, I think, that's the
12 question, right? At what point are we in that world, and
13 at what point during the taking of the plea are we in a
14 different circumstance?

15 MS. REARDON: Yeah. And - - - and again - - -

16 JUDGE HALLIGAN: Why is this on the plea side of
17 the line, which is - - -

18 JUDGE GARCIA: Yes.

19 JUDGE HALLIGAN: - - - what I take you to be
20 arguing, as opposed to the other side?

21 MS. REARDON: Yeah. You - - - I mean, certainly,
22 there's - - - there's the exceptions to Lopez at the - - -
23 at the time of the plea, so if - - - if you take the plea,
24 and then you - - - you know, you move to - - - to vacate or
25 you move to - - - to - - - to take back your plea, I mean,

1 now we've got the situation where he takes the plea, and
2 again, it's a did you do this - - -

3 JUDGE TROUTMAN: So how do you - - -

4 MS. REARDON: Yeah.

5 JUDGE TROUTMAN: - - - apply Lopez to a post-
6 plea?

7 MS. REARDON: Right. So I think, in this
8 instance, because what we submitted is that he negated the
9 element of a forcible taking - - -

10 JUDGE GARCIA: But he negated it later. So in a
11 plea, the question is, did you knowingly plead guilty to
12 that, and in a motion later, you're basically saying, no, I
13 didn't knowingly plead to that, I did it for some other
14 reason or - - - I don't understand what this is that would
15 get you kind of a hybrid of it's better than a motion.

16 I would never make a motion. I would just go in
17 and say, kind of, things like, hey, you know, I don't think
18 I really did it. That's better than a motion at that point
19 because in a motion, I don't automatically get my plea back
20 if you don't ask me the right questions.

21 MS. REARDON: Understood. But - - - but again,
22 you've got - - - you've got an individual who has explained
23 to the court, in his mind, what it is that he did wrong,
24 and they don't converge.

25 JUDGE GARCIA: But how is that different than I

1 submit an affidavit to the court as part of my motion as a
2 defendant saying the same thing?

3 MS. REARDON: The - - - the issue I see with the
4 - - - with the 440 motion, which is the one that I'm
5 assuming that we're talking about, is that I'm not sure
6 where this, his negating the plea, fits within those - - -

7 JUDGE GARCIA: I don't - - -

8 MS. REARDON: Is it - - - is it an IAC? Is it -
9 - -

10 JUDGE GARCIA: I don't think it does. I think
11 that's the point.

12 MS. REARDON: And if - - -

13 JUDGE GARCIA: I mean, I think you could use it
14 to say, look, even at the plea, he was doing this, but the
15 focus of that motion is on the voluntariness of the plea,
16 and you're, it seems to me, trying to push in this colloquy
17 at a sentencing to give it the same effect as someone who's
18 taking a plea, and there may be some question about what
19 that person's giving up, what they're actually admitting
20 to.

21 Now, a year later at a sentencing - - - I know,
22 hypothetically - - - you can come in and say, you know
23 what? I didn't really think I was doing anything wrong,
24 and that has the same effect as you saying that at the
25 guilty plea and a much different effect than if I put those

1 statements in a motion and filed that as an affidavit.

2 MS. REARDON: And - - - and again - - - so, you
3 know, the policy behind some of this - - - and - - - and in
4 - - - in this instance, obviously, it's to save time, it's
5 to save judicial resources, it's to, you know, prevent
6 delay in these instances. It was, basically, not a heavy
7 lift at all for the court to simply, when it did its
8 inquiry, whether it was satisfied or not - - - and clearly,
9 it was not satisfied on this record because the last thing
10 the court said before it moved on to sentencing was, you
11 know, Mr. Defense Attorney, it's not the high-five that I'm
12 concerned about. It's the fact that he denied robbing
13 anyone.

14 JUDGE GARCIA: Well, could the court just say,
15 you know what? Let's stop, make a full-blown motion to
16 withdraw your plea, and we'll have a - - - we'll - - -
17 we'll proceed as we would on a motion? Could the court do
18 that?

19 MS. REARDON: I don't know. I mean - - -

20 JUDGE GARCIA: But you could have it both ways.
21 Like, I don't want to really make that motion, but I want
22 to say maybe I didn't really think I was doing anything
23 wrong.

24 MS. REARDON: I don't know that I've ever seen
25 that happen at a - - - at a sentencing proceeding. I mean,

1 in terms of what would had to have been done here, one
2 simple question. Based upon what - - -

3 JUDGE GARCIA: Isn't part of one doing - - -

4 MS. REARDON: I'm sorry, Judge.

5 JUDGE GARCIA: - - - a plea, there is still some
6 value, some finality for the People to - - - that - - - in
7 the finality of a plea, and isn't that sort of contradicted
8 by the fact that a year later, this whole prosecution has
9 stopped, and a year later, a defendant can come in and say,
10 you know, I - - - I don't think I really intended to do
11 that, and the judge, for not, I don't know, doing what, now
12 is going to face, years later, an appellate court saying,
13 you didn't inquire enough at a sentencing?

14 MS. REARDON: I guess, except in this case, it's
15 not a year later. It's at the sentencing. So he goes
16 through the - - -

17 JUDGE GARCIA: A sentencing could be
18 substantially later than a plea, right?

19 MS. REARDON: Well, he - - - he takes the plea,
20 and then, I think, a month or so - - -

21 JUDGE GARCIA: In this case, but is there a rule,
22 then, about how long you would have to - - - sentencing?

23 MS. REARDON: I think, in terms of what you're
24 trying to accomplish here, right, he asks that one last
25 question, do you wish to withdraw your plea.

1 JUDGE GARCIA: Okay.

2 JUDGE RIVERA: So that's what's missing - - -

3 MS. REARDON: That's what's missing.

4 JUDGE RIVERA: - - - from this lengthy inquiry?

5 MS. REARDON: That's - - - that's the final stop
6 because if he says, no, I don't want to withdraw, he - - -

7 JUDGE RIVERA: What - - - what - - - what about -
8 - - even after the high-five concern, what you say is the
9 judge's last point - - -

10 MS. REARDON: Yeah.

11 JUDGE RIVERA: - - - you have the lawyer - - -
12 it's already previously done it, but in response to that
13 saying, he voluntarily entered this plea, Judge, and then
14 goes on to explain that the video really doesn't show that
15 it - - - that it wasn't without force. So why shouldn't a
16 judge then say, okay, do you want to withdraw the plea? I
17 mean, the lawyer is trying to preserve the plea.

18 MS. REARDON: Because I think that's the
19 obligation of the court to do that. That's - - - that's
20 not the - - - that's not the - - -

21 JUDGE RIVERA: After the - - - after the
22 defendant has said, at least three times, that they're
23 guilty and - - - and their conduct was illegal?

24 MS. REARDON: And I - - - and I don't mean to go
25 back to that, Judge, but I don't think it's clear on this

1 record what he's saying he was guilty of.

2 JUDGE RIVERA: Let's say we disagree with you on
3 that. Do you lose?

4 MS. REARDON: I'm sorry?

5 JUDGE RIVERA: If we disagree with you on that,
6 do you lose? If we think this is clear, what the judge was
7 asking about and what the defendant was responding to.

8 MS. REARDON: And - - - and if - - - and if it
9 turns out that this court believes that he - - -

10 JUDGE RIVERA: Yeah.

11 MS. REARDON: - - - did not negate the - - -

12 JUDGE RIVERA: Yes.

13 MS. REARDON: - - - you know, the - - - the - - -
14 or not the possession - - - excuse me, of - - - of the
15 forcible taking, then - - - then I don't disagree with you,
16 but I don't think that this record supports that
17 interpretation.

18 JUDGE TROUTMAN: And are you suggesting that the
19 court ignores what the attorney - - - that - - - that it
20 has no merit or weight for consideration of the court when
21 the attorney says, no, no, I - - - I want this plea to stay
22 in place?

23 MS. REARDON: I think it's contradictory - - - I
24 think what the defense attorney is saying is contradictory
25 to what his client said, A, in the - - - in the PSI, and B,

1 in his statement to where's he's affirmed - - -

2 JUDGE RIVERA: Is there anything during this
3 colloquy that suggests the defendant wants to withdraw the
4 plea? The fact that he wants to clarify something, that
5 the judge is saying, look, you lied to probation or you
6 lied to me, let's resolve that, and he's trying to show
7 that he's not lying to the judge, is there anything else
8 that suggests that he's - - - he's looking to withdraw the
9 plea?

10 MS. REARDON: He doesn't, but there's nothing
11 here to - - - to show that he knows that that's something
12 that he can do. He - - - he - - - I hate to use the term,
13 but - - -

14 JUDGE TROUTMAN: So the court's failure was - - -
15 was the failure to make clear that the defendant has an
16 invitation at that point to withdraw?

17 MS. REARDON: I wouldn't - - -

18 JUDGE TROUTMAN: Sua sponte, the court should
19 have done that?

20 MS. REARDON: I think the court has an
21 obligation, when it hears something like this and it's
22 uncomfortable with what it heard during this colloquy - - -
23 and it clearly was uncomfortable. He uses the word
24 concern. In a situation such as this, I think, the
25 obligation on the court is to turn to the client, and the

1 last thing is to say, do you wish to withdraw your plea.

2 JUDGE RIVERA: Yeah, but how much closer can you
3 get to that? You can't have it both ways. Judge Halligan
4 already read this to you, but let me just repeat it. Mr.
5 Rios, either you robbed somebody or you didn't. I'm not in
6 the business of taking pleas and sentencing people that are
7 not guilty. Isn't that the opportunity for the defendant
8 to say, then, yeah, don't take my plea?

9 MS. REARDON: I think - - - again, Judge, I think
10 it's on the court to turn to him and say, if that's what
11 you're saying, do you want to withdraw, are you - - - or
12 are you willing - - -

13 JUDGE GARCIA: And what if he says yes? What if
14 he says, I want to withdraw my plea? Does the judge have
15 to, then, say, okay, done?

16 MS. REARDON: Well, it's - - - it's within the
17 court's discretion. And you know, ultimately, what would
18 happen is either they - - - the - - - you know, the case
19 gets remitted and it goes to trial and maybe you see me
20 back here arguing the case, but that's, you know - - -

21 JUDGE GARCIA: But can the judge say, no, you
22 can't withdraw your plea?

23 MS. REARDON: It's within the court's discretion.

24 JUDGE GARCIA: So then why would we vacate the
25 plea here?

1 MS. REARDON: I - - -

2 JUDGE GARCIA: Wouldn't we send it back and just
3 say, do you want to vacate this plea under the standard
4 discretionary call?

5 MS. REARDON: I think it has to be vacated
6 because he's negated the - - - one of the two elements of
7 the crime.

8 JUDGE GARCIA: But you just said if he said - - -
9 the thing he should have said was, I want to withdraw my
10 plea. So if he says, I want to withdraw my plea, he
11 doesn't automatically get to withdraw his plea, right? So
12 if he says, I want to withdraw my plea, what happens?

13 MS. REARDON: If he wants to withdraw this plea,
14 the court, you know, obviously, can either deny or grant.

15 JUDGE GARCIA: Right.

16 MS. REARDON: But if he wants to withdraw the
17 plea and the court grants it, then this case goes back - -
18 - goes - - - starts over.

19 JUDGE GARCIA: But why would we vacate if the
20 judge had discretion to - - - do we have discretion to
21 vacate or not?

22 MS. REARDON: It's - - - no, it's - - - I think -
23 - - I'm going to ask you to repeat that.

24 JUDGE GARCIA: So if he wanted to withdraw his
25 plea - - - you know, he says, you know, I'm innocent, and I

1 want to withdraw my plea, and you're telling me the judge,
2 at that point, has discretion whether or not to allow him
3 to withdraw his plea?

4 MS. REARDON: That's my understanding.

5 JUDGE GARCIA: So why would we automatically
6 vacate now if the judge had - - - why wouldn't we either
7 send it back - - - or are you suggesting we may have
8 discretion whether or not to allow him to withdraw it?

9 MS. REARDON: Well, I think - - - I think you
10 vacate it now because this is not - - - this isn't a valid
11 plea.

12 JUDGE GARCIA: But it seems like you're merging
13 or melding what the inquiry would be at the plea with what
14 the problem is here - - -

15 MS. REARDON: I think it - - -

16 JUDGE GARCIA: - - - because the problem is here,
17 he didn't get a chance to say, I want to withdraw my plea,
18 in which case, you don't automatically get to withdraw your
19 plea. It's not as involuntary per se. It's that, okay,
20 now, the judge can make a decision whether to let you do
21 that or not.

22 But what you're saying is because the judge
23 didn't make that decision on whether to let you do that or
24 not, we have to vacate, which isn't the relief he may have
25 been entitled to there even if he had asked to withdraw his

1 plea.

2 MS. REARDON: I think because - - - because he
3 negated that element - - -

4 JUDGE GARCIA: So then it isn't - - -

5 MS. REARDON: - - - this - - - it goes back - - -
6 I'm sorry.

7 JUDGE GARCIA: - - - the matter that he asked.
8 That he asked to withdraw his plea is a very different
9 thing than, to me, what you're saying negated the element
10 means. Negated the element, seems to me you're saying,
11 automatically, plea is bad, and is that what you're
12 arguing, that at a sentencing, if you, quote, negate an
13 element, the judge has to vacate the plea?

14 MS. REARDON: Because they have to make a
15 determination whether the plea is valid or not, and if - -
16 - and if - - - if - - - he's negated that element, and so
17 that's not a valid plea anymore.

18 JUDGE GARCIA: At the sentencing.

19 MS. REARDON: At the sentence taking into - - -
20 everything, you know, the sentence - - - the presentence
21 investigation. Then, I think, it has to go back, and it
22 has to be vacated. What happens from there is - - - you
23 know, that's up to the trial court.

24 JUDGE GARCIA: Because if you file a motion and
25 you allege to negate one of the elements, it's not

1 automatic, though, right?

2 MS. REARDON: Under a 440?

3 JUDGE GARCIA: Right. So it's just the fact that
4 he says this in front of the judge rather than in an
5 affidavit that makes it automatic vacatur?

6 MS. REARDON: I - - - I - - - yeah, I - - - I
7 think that's correct.

8 JUDGE RIVERA: Well, you mean if - - - if the
9 affidavit and whatever he submits on the 440 establishes
10 that he's negated an element that the judge could actually
11 deny the motion?

12 MS. REARDON: No. No, I don't - - -

13 JUDGE RIVERA: So isn't it the same situation?
14 Either the judge is persuaded that it's negate - - - an
15 element is negated or not.

16 JUDGE GARCIA: But if the - - - if - - - my
17 understanding is if you submit an affidavit, a judge
18 doesn't have to accept that as true, right?

19 MS. REARDON: Doesn't - - -

20 JUDGE RIVERA: But that's all you have here are
21 his statements.

22 MS. REARDON: We have his - - - we have his
23 statements, and we - - - we have - - - we have the inquiry
24 that's made, right? So we have his statements, but - - -
25 but again, it's - - - it's not clear what it is he's

1 telling this court that he's guilty of.

2 JUDGE RIVERA: It could be the judge didn't
3 believe the story. Yes?

4 MS. REARDON: Certainly could be, but that
5 doesn't take away the - - - the court's obligation, A, to
6 do their - - - to do the inquiry - - - an inquiry, which
7 they did, and then take that next step if it's
8 uncomfortable. I mean, granted, this is a somewhat unique
9 situation - - -

10 JUDGE RIVERA: Yeah.

11 MS. REARDON: - - - but - - -

12 JUDGE CANNATARO: What if the court's not
13 uncomfortable? What if the court thinks that it - - - you
14 know, confirms that it - - - it was as voluntary today as
15 it was back when the plea was taken? Do you still have to
16 ask whether or not you want to withdraw the matter?

17 MS. REARDON: I think that - - - I think that he
18 has - - - I think that if he doesn't, then, I think, we
19 find ourselves filing another appeal.

20 JUDGE CANNATARO: Well, this is the appeal - - -

21 MS. REARDON: Right.

22 JUDGE CANNATARO: - - - because that's exactly
23 what didn't happen, right?

24 MS. REARDON: Except that the - - - except that
25 here, it was clear that the court was not comfortable.

1 JUDGE CANNATARO: Well, the court kept asking - -
2 - I mean, is it fair to say the court kept asking questions
3 up until the point that its concerns were satisfied, or - -
4 -

5 MS. REARDON: No.

6 JUDGE CANNATARO: - - - is there some indication
7 in the record that the court remained unsure?

8 MS. REARDON: I think it's clear that the - - -
9 the court remained unsure. It's the last thing that the -
10 - - that the court says is, it's not the high-five that
11 concerns me. It's the statement that he didn't rob
12 anybody.

13 JUDGE RIVERA: And then defense counsel argues
14 why the plea is completely valid and voluntary.

15 MS. REARDON: Defense counsel argue - - -

16 JUDGE RIVERA: So why wouldn't that satisfy the
17 court?

18 MS. REARDON: Because I think that obligation is
19 on the court, not just defense counsel - - -

20 JUDGE RIVERA: I'm saying on this record, how
21 could we read otherwise? That's my point to you.

22 MS. REARDON: Well, I think, the - - - the
23 situation being that defense counsel wasn't with him during
24 the presentence investigation, and I think what defense
25 counsel is saying is contradictory to what Mr. Rios was

1 saying in both the PSI and at sentencing.

2 JUDGE RIVERA: Okay.

3 CHIEF JUDGE WILSON: I do have two questions. My
4 colleagues have been having so much fun, I thought I would
5 wait until the end.

6 One is on this record, how do we know now that
7 Mr. Rios would like his plea withdrawn?

8 MS. REARDON: How do we know - - -

9 CHIEF JUDGE WILSON: That he would like to have
10 his plea withdrawn?

11 MS. REARDON: On this record?

12 CHIEF JUDGE WILSON: Yeah. How do we know that?

13 MS. REARDON: We don't because nobody asked him.

14 CHIEF JUDGE WILSON: Okay. So you're asking us
15 to do something that he might not actually want, possibly?

16 MS. REARDON: It's possible.

17 CHIEF JUDGE WILSON: Okay. The other is, does
18 anyone know whether there is a Mr. Scott Farrow, who is a
19 multi-drug task force agent?

20 MS. REARDON: We do not know at this point, Your
21 Honor.

22 CHIEF JUDGE WILSON: We don't know if there was
23 ever such a person?

24 MS. REARDON: We - - - we - - - not - - - I can't
25 tell you from this record whether there was or not.

1 CHIEF JUDGE WILSON: Well, okay. Thank you.

2 JUDGE RIVERA: I'm sorry. Given the relief
3 you're seeking, you're saying you don't know whether the
4 client wants to retain this plea? This is not possible.
5 You're on an appeal trying to have this vacated. How can
6 it be?

7 MS. REARDON: Whether he wants his plea vacated?

8 JUDGE RIVERA: Yes.

9 MS. REARDON: I may have misunderstood your
10 question.

11 CHIEF JUDGE WILSON: Oh.

12 JUDGE HALLIGAN: Presumably - - -

13 MS. REARDON: Yeah. I mean, certainly, he wants
14 his plea vacated. That's what we're - - - what we're doing
15 here. I apologize, Judge. I didn't - - - I didn't - - -

16 JUDGE RIVERA: No, no. Just didn't understand.
17 Okay.

18 JUDGE HALLIGAN: So - - - so it is clear that
19 that is the relief he wants?

20 MS. REARDON: Yeah. He's seeking to have his
21 plea vacated in - - - in terms of the - - - the - - - you
22 know, the - - - the record below is - - -

23 JUDGE RIVERA: Because notwithstanding his
24 responses, he did not act - - - he didn't satisfy the - - -
25 the element of force.

1 JUDGE HALLIGAN: Right. Thank you.

2 MS. REARDON: And the - - - and the record below
3 is - - - is somewhat limited, so some of that other
4 information is not in the record below. But yeah, I
5 apologize. He - - -

6 CHIEF JUDGE WILSON: Oh, I got it. Yeah.

7 JUDGE RIVERA: Yeah, I got it.

8 MS. WALENDZIAK: Good afternoon. May it please
9 the court, Amy Walendziak on behalf of the People.

10 JUDGE SINGAS: Can we just - - -

11 CHIEF JUDGE WILSON: Is there really a Mr. Scott
12 Farrow?

13 MS. WALENDZIAK: Well, there's no indication on
14 this record, but I'm - - - off the record, I can tell the
15 court that Scott Farrow exists, but he was not employing
16 the defendant as a confidential informant in this incident.

17 JUDGE SINGAS: Can we just clarify something?
18 Could the court vacate this plea under Skinner?

19 MS. WALENDZIAK: This court or the lower court?
20 I'm sorry, Judge Singas.

21 JUDGE SINGAS: No, the lower court. If the
22 defendant had said it then, what would the judge have to
23 do?

24 MS. WALENDZIAK: If the defendant had asked - - -
25 or had said, I would like to vacate my plea, the court,

1 presumably, would have had to adjourn for him to file a
2 motion, and it would have been his burden at that point to
3 support the motion with a sworn affidavit, something other
4 than his unsworn statements that he made at sentencing
5 here.

6 JUDGE SINGAS: Okay.

7 JUDGE CANNATARO: And then the court could decide
8 whether or whether not - - -

9 MS. WALENDZIAK: Yes. And - - -

10 JUDGE CANNATARO: --- to vacate the plea.

11 MS. WALENDZIAK: - - - and if all defendant had,
12 when making his motion, was unsworn statements, I - - - I
13 don't believe that this court or any of the Appellate
14 Divisions would find that a court abused its discretion in
15 denying a motion to withdraw the plea.

16 JUDGE RIVERA: I'm sorry. He wasn't under oath
17 when he made these statements?

18 MS. WALENDZIAK: He was not under oath at
19 sentencing - - -

20 JUDGE RIVERA: Okay. Thank you.

21 MS. WALENDZIAK: - - - nor was he under oath at
22 the probation interview for the PSI.

23 JUDGE RIVERA: That I know.

24 MS. WALENDZIAK: And I - - - I would also note
25 that the PSR statements, I think, are a little bit of a red

1 herring here because this court has squarely addressed what
2 a defendant says to probation during a PSR in People v.
3 Simms. I believe that came out last summer. And if a
4 defendant only says, you know, I'm innocent suddenly or
5 says something ambiguous about his guilt to the probation
6 officer for the PSR, the lower court has no duty to inquire
7 further. So this court - - -

8 JUDGE TROUTMAN: And with respect to the inquiry
9 here, not that the court was obligated to inquire per - - -
10 but the court did.

11 MS. WALENDZIAK: The court did, Judge Troutman.

12 JUDGE TROUTMAN: And what more could the court
13 have asked of this defendant or what did the court do wrong
14 that you could - - -

15 MS. WALENDZIAK: Candidly, Judge Troutman, I
16 don't know what else the court could have asked. All of
17 the questions - - -

18 JUDGE RIVERA: Well, counsel says he should have
19 asked, do you want to withdraw your plea given - - - given
20 the nature of this colloquy and what, allegedly, he was
21 negating.

22 MS. WALENDZIAK: The court could have said that
23 explicit question, but I think the court all but said that
24 in its repeated questions. The - - - I - - - I think it's
25 important to note, too, that this whole inquiry started

1 when defense counsel says, I've seen the PSR, I spoke with
2 my client yesterday, he is reaffirming his plea, and then -
3 - -

4 JUDGE TROUTMAN: So what is the role of the
5 defense counsel making a request to withdraw the plea or
6 assuring the court he wants the plea intact versus the
7 court's responsibility here - - -

8 MS. WALENDZIAK: Well - - -

9 JUDGE TROUTMAN: - - - as was suggested by
10 counsel?

11 MS. WALENDZIAK: I - - - I think the court did
12 exactly what it was supposed to. It saw the PSR. It saw
13 these statements that had some ambiguity about the
14 defendant's guilt, potentially, and it followed up.
15 Defense counsel says, no, we are reaffirming the plea,
16 we're ready to move forward with sentencing, and then the
17 court addressed the defendant directly, and in response to
18 all of the questions from the court, the defendant says,
19 no, I knew what I was doing was illegal. He says, I knew
20 what - - - what I was doing illegal twice. He says, I am
21 guilty. He gives the court absolutely no indication that
22 he wants to withdraw his plea.

23 And I think, in Lopez, where this court has found
24 an exception to the preservation requirement, what Lopez
25 entitles you to, if you say something, you know, that tends

1 to negate an element or draw into question the
2 voluntariness of your plea, it entitles you to an inquiry,
3 and it - - -

4 JUDGE TROUTMAN: So it's the plea at the time the
5 plea is taking place, not a post-plea situation?

6 MS. WALENDZIAK: That was what happened in Lopez,
7 and - - -

8 JUDGE HALLIGAN: And why - - - why is that? Why
9 should we not extend that to a sentencing proceeding?

10 MS. WALENDZIAK: Well, I think, once the plea has
11 been accepted by the court, we're in a different procedural
12 posture. And I think what Lopez is kind of addressing is
13 that there's not really a statutory mechanism prior to the
14 judgment being entered that allows the defendant to, you
15 know, withdraw his plea when he said something during the
16 plea allocution itself that negates an element. When he
17 says something after the plea has been accepted - - -
18 that's why we have CPL 220, subdivision 60. That's where
19 the defendant has a statutory remedy to vacate his plea.
20 He has - - -

21 JUDGE TROUTMAN: What would be the impact of
22 doing what the defendant is asking here?

23 MS. WALENDZIAK: I think that the Fourth
24 Department pretty squarely spelled it out in People v.
25 Brown, one of the cases that says that sentencing

1 statements don't trigger a Lopez inquiry. You could say
2 anything that's completely unsupported at sentencing, and
3 then you're automatically entitled to vacate your plea even
4 though it might not be true, and that kind of - - -

5 JUDGE RIVERA: Well, the judge could make a
6 credibility - - - you could put them under oath, and the
7 judge could make a credibility determination.

8 MS. WALENDZIAK: Which is - - -

9 JUDGE RIVERA: I mean, counsel says it's
10 discretionary.

11 MS. WALENDZIAK: Well, but doing that is, really,
12 the equivalent of making a motion and having a hearing on
13 said motion. Without being put under oath or anything - -
14 - like, the defendant here says all of these things that we
15 don't know - - -

16 JUDGE RIVERA: Isn't it more efficient, if
17 they're right there, just put them under oath?

18 MS. WALENDZIAK: But again, I think, in this
19 situation, the defendant's - - -

20 JUDGE RIVERA: If counsel thinks they need more
21 time, they can say, we need more time. We're going to file
22 a written motion.

23 MS. WALENDZIAK: And counsel could have done
24 that, but instead of saying, Judge, actually, I'd like to
25 talk to my client for five minutes, counsel says, no, he's

1 reaffirming his plea. And everything that the defendant
2 says supports counsel's assertions. Defendant doesn't
3 himself say anything that says, like, no, actually, I want
4 to withdraw my plea. He repeatedly says, I am guilty.

5 He doesn't say - - - when the court tells him,
6 I'm not in the business of taking guilty pleas from
7 innocent people, the defendant doesn't say, you're right,
8 I'm innocent, I'd like to withdraw my plea or, you know, I
9 need more time. He says, I'm guilty, and defense counsel,
10 kind of confirming that, says, we'd like to move
11 sentencing.

12 And then when the court does move sentencing,
13 there - - - there was no objection on this record that, you
14 know, actually, we need more time to discuss this or can we
15 have an adjournment so that I can speak with my client
16 further. None of that happened. There was no affirmative
17 action on this record to withdraw the plea or seek an
18 adjournment to discuss this further.

19 I - - - I don't know what more the court could
20 have asked. I mean, he asked him for - - - I believe it's
21 three pages of the transcript, and every response was, I'm
22 guilty, I'm - - - you know, what I did was illegal, we want
23 to move forward with sentencing. That was all - - -

24 JUDGE RIVERA: It's all geared to figure out if -
25 - - well, for the judge to determine for himself whether or

1 not the defendant lied to him, right, or lied to probation
2 as opposed to do you want to withdraw this plea.

3 MS. WALENDZIAK: I'm sorry, Judge Rivera. I
4 don't fully understand your question.

5 JUDGE RIVERA: Well, I think that's the point
6 that counsel was making before, that really, the focus of
7 the colloquy, at least at the beginning, I'll grant her
8 that, was not to figure out whether or not this person
9 wanted to withdraw this plea, but just to figure out
10 whether or not they had lied to probation or lied to the
11 judge so that the judge could determine how best to respond
12 to that given that they're at sentencing.

13 MS. WALENDZIAK: Yes, I agree, this definitely
14 started out as a discussion about having an Outley hearing,
15 but then, I think, as this inquiry progresses, it's, you
16 know, okay, are you guilty? Yes, Your Honor, I am guilty.
17 I'm - - - what I did was illegal, and I knew it. So again,
18 there was nothing that the defendant - - - it - - - it
19 seemed like the defendant was almost walking back the
20 statements that he made to probation by continuously
21 saying, what I did was illegal, I'm - - - I am guilty, Your
22 Honor.

23 CHIEF JUDGE WILSON: The whole thing still could
24 be in that Outley context where, basically, the defendant
25 is put in the position of either saying, yes, I'm guilty,

1 so I get the sentence that I bargained for, or no,
2 actually, I'm not guilty, in which case, you're going to
3 sentence me more harshly because I lied.

4 MS. WALENDZIAK: The - - - the defendant could,
5 but again, I think, going back to this court's cases with
6 preservation and guilty pleas, it's all about, like, the
7 defendant's opportunity to make that motion and if he has a
8 chance to say something different.

9 And it's also - - - with the Lopez exception, if
10 you say something to negate your plea, the court doesn't
11 have to stop right then and there in the midst of taking
12 the plea. The court makes an inquiry, and if the court's
13 satisfied after that further inquiry that the defendant is
14 pleading guilty knowingly and voluntarily, the court can
15 accept that guilty plea, and it's on the defendant, then,
16 to say that the inquiry was insufficient or make some other
17 objection.

18 And here, I mean, the court inquired with the
19 defendant, and the defendant didn't take any issue with the
20 inquiry that the court did. So at the time that the court
21 was in a position to do something about this and correct
22 the error that defendant is claiming on appeal, defendant
23 didn't ask for any relief. He's - - -

24 JUDGE HALLIGAN: Do you think - - - if - - - if
25 we were to find that Lopez extended to these circumstances,

1 to a sentencing proceeding, is there anything, then, to
2 distinguish that from something that might happen
3 subsequently, like a resentencing?

4 MS. WALENDZIAK: I don't think so. And I - - - I
5 think, to Judge Garcia's point, that would be problematic
6 because a defendant could be brought back in for - - - say
7 the sentence had involved a term of probation. If he was
8 brought in for a violation - - -

9 JUDGE HALLIGAN: A violation - - -

10 MS. WALENDZIAK: - - - of proceeding - - - a
11 probation proceeding, at that point, he could say
12 something, you know, during the VOP proceeding, and that -
13 - - it doesn't seem logical that that would, then, undo
14 something that had happened, potentially, years prior.
15 There would kind of be no end date, and that would
16 undermine the whole point of guilty pleas being filed.

17 JUDGE RIVERA: Would he be able to file a motion?

18 MS. WALENDZIAK: He could - - - and honestly,
19 defendant here could file a 440 - - -

20 JUDGE RIVERA: No, in - - - in this hypothetical
21 we're talking about.

22 MS. WALENDZIAK: With the violation of probation
23 - - -

24 JUDGE RIVERA: Yes.

25 MS. WALENDZIAK: He could file a motion, and I

1 believe, at that point - - -

2 JUDGE RIVERA: So either way, the court would
3 have to make that determination. It's a question of the
4 timing, is it not?

5 MS. WALENDZIAK: Well, I think, in the violation
6 of probation situation, it would be a CPL 440 motion, not a
7 - - - a motion to withdraw the plea pursuant to 220.60.

8 JUDGE RIVERA: I was addressing the hypothetical
9 you were discussing with Judge Halligan.

10 MS. WALENDZIAK: Yes. And the defendant, at that
11 point, could file a motion, but if he didn't, I don't think
12 the court has any duty of - - -

13 JUDGE RIVERA: Oh, no, no. All I'm saying is
14 that if - - - if the person wishes to proceed with this
15 particular request, doesn't matter that it's made years
16 later. There is some - - -

17 MS. WALENDZIAK: There is some - - -

18 JUDGE RIVERA: Is there not? There is some path
19 to do that.

20 MS. WALENDZIAK: Yes, there is, but - - -

21 JUDGE RIVERA: The court can't avoid it either
22 way. The question is the timing of it.

23 MS. WALENDZIAK: Yeah.

24 JUDGE GARCIA: But also, isn't the question what
25 the obligation of the judge is and that there's jeopardy

1 that a plea may be undone if I don't - - - I'm a judge - -
2 - don't ask the right questions at that proceeding? It's
3 not that you - - - you always make a motion. You always
4 file an affidavit, see if you get a hearing. You can
5 always do that.

6 The risk here is I raised these kind of half
7 allegations in court, and then the judge doesn't make
8 enough of an inquiry, and it's an automatic vacatur. That,
9 to me, is the difference between I can always make a motion
10 and the jeopardy, let's call it, you place a judge in at a
11 particular proceeding by imposing a duty to inquire.

12 MS. WALENDZIAK: I do think that is a risk, and I
13 think, going back to this court's decision in Simms, the -
14 - - the court - - -

15 JUDGE RIVERA: Yes, but you can just - - - you
16 can just order a hearing on that to do the inquiry.

17 MS. WALENDZIAK: Well, but the court here - - -

18 JUDGE RIVERA: If that - - - if that is the
19 error, then you order the inquiry.

20 MS. WALENDZIAK: Well, and the court - - -

21 JUDGE RIVERA: The judge, again, exercising
22 discretion, either is persuaded or is not.

23 MS. WALENDZIAK: But I think that - - - that is
24 what happened here is the court inquired further about what
25 the defendant wanted to do, and the defendant says, I am

1 guilty, what I did was illegal, and the attorney, with no
2 contradiction from his client, says, we're ready to move
3 forward with sentencing and he's reaffirming his plea.

4 So there was no indication from the defendant or
5 his attorney that they wanted to do anything different than
6 what happened here, and now, years down the line,
7 defendant's kind of done an about-face and says, no,
8 actually, I'd like to withdraw my plea. And he has an - -
9 - he has the ability to file a 440 motion if he - - -

10 JUDGE GARCIA: Again, aren't we placing a
11 judge - - - and I'm using this word jeopardy, but at risk.
12 If they make the wrong determination as to whether or not
13 to order an inquiry, then it's an automatic vacatur, like,
14 under that rule. If there is a duty to inquire and a duty,
15 at a certain point, to order an inquiry, then if you don't
16 do that, it's an automatic vacatur, but if the burden is on
17 the defendant to make a - - - to - - - if the plea is
18 involuntary, to make a motion, it goes through a very
19 different process.

20 MS. WALENDZIAK: And I don't think the judge
21 should be put in this jeopardy position when, frankly, the
22 judge did more than - - -

23 JUDGE RIVERA: Of course, that would be true if
24 they failed to do it at the plea colloquy, and it could be
25 years later before that comes up on appeal and gets

1 resolved.

2 MS. WALENDZIAK: Of course. But at the plea
3 point, there hasn't been a plea that's accepted. At that -
4 - - once the plea has been accepted, the defendant's no
5 longer presumed innocent. He's presumed guilty because
6 he's admitted to it under oath. At the sentencing, he's
7 made these kind of - - -

8 JUDGE RIVERA: They could argue on appeal that
9 the colloquy was defective and showed that it wasn't
10 voluntary.

11 MS. WALENDZIAK: Yes, but that's not - - -

12 JUDGE RIVERA: All I'm saying is the potential
13 for a court having to deal with these issues years down the
14 road based on a misstep, perhaps, by a judge is what the
15 system is set up to deal with. We - - - we should minimize
16 those opportunities, of course. I'm not suggesting
17 otherwise.

18 And I think you've made very compelling
19 arguments. I think it's clear, from at least my questions
20 to your friend, that she's got a difficult case to make
21 here because it does seem that the inquiry that she is
22 seeking was undertaken except for this one question she's
23 saying that should have been asked, which it's hard to see
24 how that question - - - the - - - the fact that that
25 question wasn't asked really is a basis to reverse it or

1 vacate.

2 MS. WALENDZIAK: And again, I - - - I think that
3 this case, really, is just a prime example of why we have
4 the preservation requirement. We want the trial court, at
5 the time that the alleged error is happen - - - happening,
6 to be able to take corrective measures. And in this case,
7 at the time of the alleged error, nothing was said to do
8 anything differently, and the trial court proceeded on the
9 basis - - -

10 JUDGE CANNATARO: To that end, as an expert to
11 nonexpert, in - - - in the post-plea context, if something
12 like this were to happen going forward, wouldn't the most
13 efficient thing to do, and to mitigate the risk to the
14 judge and even to the defendant, would just be simply not
15 do an extended voluntariness, because that's been - - -
16 there's been a finding on that already, to just say, do you
17 want your plea back or not? Like, to me, that would be the
18 only question that you need to ask. Does that make sense,
19 or is there a risk there as well?

20 MS. WALENDZIAK: Well, I don't think it's do you
21 want your plea back. I'd put a finer point on it than
22 that. I - - - the court could have explicitly asked, do
23 you want to make a motion to withdraw your plea.

24 JUDGE CANNATARO: Right.

25 MS. WALENDZIAK: I - - - I don't think the

1 question is, do you want your plea back because we don't -
2 - -

3 JUDGE CANNATARO: Yeah.

4 JUDGE SINGAS: Right. The question is do - - -
5 the question, do you want your plea back, does nothing
6 because the judge can't do anything. The judge would have
7 to say, make your motions. So the CPL puts that burden on
8 the defendant, which we presume they understand, and they
9 would make their motions. That question is basically
10 irrelevant because the judge can't do anything.

11 MS. WALENDZIAK: The judge can't. And here - - -

12 JUDGE CANNATARO: Fair enough. Then I modify my
13 question. What about, is this a motion - - - are you
14 making a motion to withdraw your plea?

15 MS. WALENDZIAK: Yeah, the court could have asked
16 that, and then it's on the defendant to make the motion and
17 support the motion to entitle him to make a - - -

18 JUDGE TROUTMAN: The court could have asked but
19 was not required to ask further at the point that it
20 stopped here?

21 MS. WALENDZIAK: No, I don't think so because
22 nothing that defendant had said to the court up to that
23 point gave the court any indication that the defendant
24 wanted to withdraw his plea.

25 And I think, if - - - at - - - after the last

1 question from the - - - the defense attorney, if the court
2 had said, you know what, I've heard enough, like, I'm
3 vacating your plea because you clearly did something
4 involuntary, defendant, on appeal, could have easily said -
5 - - if it had gone forward to trial and everything, the
6 defendant - - - it would have been automatic reversal on
7 appeal because the judge cannot vacate the plea without the
8 defendant's consent and without the defendant taking that
9 step to move to withdraw it.

10 JUDGE TROUTMAN: So does the defendant kind of
11 straddle the line in that situation where he's intimating
12 he wants the court to sua sponte act, but if the court does
13 without his assent, then the court gets reversed?

14 MS. WALENDZIAK: The defendant would be, really.
15 And again, I - - - I just go back to the defendant here
16 gave no indication that he wanted his plea vacated at the
17 time the court could have granted him that relief, so it's
18 our position that his contention is unpreserved for this
19 court's review of - - -

20 JUDGE RIVERA: Let me ask you this. If - - -
21 take the beginning of the colloquy. Let's lop off the
22 rest, the three times where he says, it's illegal, I'm
23 guilty. Hold off that. When the judge just says, you said
24 this at probation, you said this to me, were you lying to
25 them, were you lying to me, and he says, no, no, I stand by

1 what I said to both of you, I was not lying to - - - to
2 anyone, leaves it right there, should the judge, at that
3 point, have said, well, do you want to withdraw your plea?

4 MS. WALENDZIAK: I - - - I honestly think the
5 court - - -

6 JUDGE RIVERA: Was this - - - in other words, was
7 this story given to probation one that would have been, as
8 she's arguing, sufficient to show that he was negating an
9 element of the crime?

10 MS. WALENDZIAK: I don't believe so because it's
11 an unsworn statement that contradicts the statements that
12 he made during his guilty plea, and the words that he said
13 during his guilty plea carried a significant amount of
14 legal significance. So at that point, I don't think the
15 court would have abused its discretion saying, no, you
16 can't withdraw your guilty plea. There's been nothing to -
17 - -

18 JUDGE RIVERA: We're not asking - - - we're not
19 asking this question. There wouldn't have been an abuse of
20 discretion to not, then, say, do you, then, wish to move to
21 withdraw your plea?

22 MS. WALENDZIAK: No, I don't believe so at that
23 point. And unless the court has any further questions, I
24 would ask it to affirm the defendant's guilty plea in this
25 case.

1 CHIEF JUDGE WILSON: Thank you.

2 MS. WALENDZIAK: Thank you.

3 MS. REARDON: Your Honors, what we're asking this
4 court to do is two things. The - - - essentially, the - -
5 - when there's a statement in open court where the
6 defendant - - - where the client is saying something that
7 he has negated the element of the crime, the court is
8 required to make an inquiry, which it did here. The
9 question is whether it was sufficient or not.

10 But - - - and then the second part of that would
11 be, and as the court has - - - has - - - has called it,
12 make a motion to withdraw that plea. We're asking the
13 court to do that. The - - - the - - - the courts in Dupree
14 in the First Department and - - -

15 JUDGE GARCIA: So just to instruct them to make a
16 motion? That's what they have to do?

17 MS. REARDON: I think it's - - - it's a process
18 that the court has to go through, and it - - - and again,
19 it's - - - it's a very unique situation where you have
20 somebody who has said, during a presentence investigation,
21 essentially, I - - - I didn't rob anybody for - - - putting
22 aside all the statements made.

23 JUDGE GARCIA: But it seems like, through
24 sentencing, you're - - - through the finality when you say,
25 okay, you're getting X sentence, up until that moment, the

1 court has the same obligation it has when taking a plea.

2 MS. REARDON: It - - - it - - - no, it - - - and
3 it - - - and it's different. I mean, obviously, when
4 you're - - - when you're taking a plea, if - - - if the
5 court is taking the plea and, at some point, it realizes
6 that there's a problem here, it's either going to say, I
7 can't take this plea or, you know, do you not want to go
8 forward.

9 JUDGE GARCIA: Or it inquires and say - - -

10 MS. REARDON: Right.

11 JUDGE GARCIA: - - - he tries it.

12 MS. REARDON: Correct.

13 JUDGE GARCIA: And isn't that what you're saying?
14 You're negating an element, so I have to inquire, as a
15 judge, are you really negating the element, and if I don't
16 do that to an extent, when it gets appealed, please vacate
17 it.

18 MS. REARDON: But now, I think, you're getting to
19 the point where, subsequent to that, the - - - the
20 defendant is saying, in two separate - - - one - - - one I
21 wouldn't call a proceeding, the PSI, but then the
22 sentencing proceeding, that, in fact, I am - - - I have - -
23 - I'm saying this, and I'm - - - I've negated the element.
24 He's not telling the court, this is - - - this is what I -
25 - - I was pleading to, right? There's clearly confusion

1 between what he's saying to the court about what it was
2 that he did illegal. And I know the court, you know, asked
3 him a couple of times, and he continued to say, I'm guilty,
4 but - - -

5 JUDGE GARCIA: But what if that happens after the
6 initial sentencing at a later proceeding?

7 MS. REARDON: I think that's - - - I think that's
8 handled differently.

9 JUDGE GARCIA: Why?

10 MS. REARDON: I think, in - - - I think, where
11 you have it where the - - - it happens, you know, before
12 the sentencing - - - the sentencing proceeding, again, the
13 idea is to try and handle these cases - - - there - - -
14 there has to be a final disposition. These can't go on
15 forever. And that's part of the argument with Lopez, that
16 there has to be an end game to - - -

17 JUDGE GARCIA: All of this back and forth goes to
18 the voluntariness of the plea, not the voluntariness of the
19 sentencing, right?

20 MS. REARDON: Correct.

21 JUDGE GARCIA: So that's a - - - kind of a
22 convenient time to do this. So why would it only be then?
23 It seems like the rule would have to be any time a
24 defendant gets in front of a judge and raises some issue as
25 to an element and whether they actually committed the

1 crime, they have this obligation. Otherwise, what's the
2 artificial cutoff of sentencing? Because you're always
3 going to the plea itself. There's no voluntariness in the
4 sentencing issue.

5 MS. REARDON: I think because you're - - - you're
6 - - - you're trying to - - - to make a determination this -
7 - - this is as far as this - - - this is when this case is
8 going to end. There's going to be some finality to it, so
9 we're going to - - - we're going to, you know, save
10 judicial resources. And - - - and you can do that all in
11 that one proceeding.

12 JUDGE GARCIA: You could do that all at the plea,
13 and then - - -

14 MS. REARDON: And - - -

15 JUDGE GARCIA: - - - there's other mechanisms for
16 challenging that that are provided for by the CPL.

17 MS. REARDON: Correct. That - - - that's
18 correct.

19 CHIEF JUDGE WILSON: So I wanted to make sure if
20 I understood or misunderstood something you said when you
21 started your rebuttal.

22 MS. REARDON: Yeah.

23 CHIEF JUDGE WILSON: If, here, you know, on these
24 facts, this has gone along this way, and the judge said,
25 okay, if you'd like to make a motion to withdraw your plea,

1 I'll entertain one, file the motion, that would be
2 acceptable?

3 MS. REARDON: At the - - - as the final question?

4 CHIEF JUDGE WILSON: Yeah.

5 MS. REARDON: I think - - - I think there's a
6 burden on the - - - there's an obligation on the court to
7 do that in this situation.

8 CHIEF JUDGE WILSON: I'm sorry. What's the
9 "that"?

10 MS. REARDON: To - - - to say - - - to turn to
11 the - - - the client after having said, I'm not comfortable
12 with this - - -

13 CHIEF JUDGE WILSON: Right. And to say, if - - -
14 you can make a motion to withdraw, if you'd like.

15 MS. REARDON: I think - - - I think - - -

16 CHIEF JUDGE WILSON: And if the court had done
17 that, that would have satisfied you?

18 MS. REARDON: I - - - I think that's - - - yeah.

19 I think that's - - - I think that's what has to be done
20 here. Because otherwise, you - - - you have a plea - - -
21 you have the plea, but then you have a sentence where - - -
22 where it's unclear as to - - -

23 CHIEF JUDGE WILSON: Right. If - - - then if
24 that had been done here and the lawyer had then said, no,
25 actually, he wants his plea, then what do we do?

1 MS. REARDON: Then you - - - I think you take a
2 time-out and you give an opportunity for the - - - for the
3 attorney to stop and talk to the client, and that wasn't
4 done here.

5 JUDGE RIVERA: Doesn't the judge rely on the - -
6 - I mean, the - - - the attorney's representing that
7 client. I mean, if the client is dissatisfied, maybe they
8 have some appeal argument or some post-sentencing motion,
9 but it seems odd that the judge can't rely on counsel's
10 representation.

11 MS. REARDON: But - - - but I guess the question
12 is, you know - - -

13 JUDGE RIVERA: I mean, unless the - - - the
14 client gets up and says, no, no, no, that's wrong, I don't
15 want this lawyer saying that.

16 MS. REARDON: Right. But - - - but the client -
17 - - I guess the client doesn't know what the client doesn't
18 know. It's - - -

19 JUDGE RIVERA: Right. That's why you have those
20 post-sentencing motions - - -

21 MS. REARDON: Right. But there's a reliance for
22 - - -

23 JUDGE RIVERA: - - - and appeals.

24 MS. REARDON: There's a certain amount of
25 reliance on defense counsel, but ultimately, that falls on

1 the court to turn and say, this is - - - you know, are you
2 asking to withdraw your plea, and the court never does
3 that. It's never raised. Nobody ever discusses it.

4 JUDGE RIVERA: It must ask the defendant directly
5 is your point?

6 MS. REARDON: I'm sorry?

7 JUDGE RIVERA: It must ask the defendant directly

8 - - -

9 MS. REARDON: Ask the defendant - - -

10 JUDGE RIVERA: - - - regardless of what the
11 lawyer says?

12 MS. REARDON: Ask the defendant directly - - -

13 JUDGE RIVERA: Okay.

14 MS. REARDON: - - - is this what you want to do?
15 Certainly, at that point, defendant could turn and say,
16 Judge, I'd like an opportunity to speak to counsel. And
17 I'm - - - and I'm assuming that may be something that
18 happens, but that never occurred here. And so you have a
19 plea - - - you have a - - - a guilty plea to something, and
20 again, I submit to the court this record is so muddled, we
21 don't know exactly what Mr. Rios was saying he was guilty
22 of.

23 CHIEF JUDGE WILSON: Thank you.

24 MS. REARDON: Thank you.

25 (Court is adjourned)

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

I, Donna Gould, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Rios (Jonathan), No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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