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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 116

ROBERT MITCHELL,

Appellant.

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PEOPLE,

Respondent,

-against-

No. 117

JOSUE DELISER,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
May 2, 2013

Before:

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



1 CHIEF JUDGE LIPPMAN: Number 116 and 117.

2 Counselor, would you like any rebuttal time?

3 MS. PAZMINO: Yes, please, two minutes. Thank  
4 you.

5 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go  
6 ahead.

7 MS. PAZMINO: Good afternoon. Rebecca Pazmino  
8 for the Office of the Appellate Defender representing the  
9 appellant, Robert Mitchell.

10 Your Honors, this case demonstrates a failure at  
11 every stage to properly consider the troubling allegations  
12 underlying Mr. Mitchell's plea withdrawal motion. As the  
13 record shows, the court below did not provide Mr. Mitchell  
14 with a reasonable opportunity to advance his claims as  
15 required by this court's precedent.

16 JUDGE SMITH: It got him a new lawyer. Why - -  
17 - why couldn't his new lawyer advance them?

18 MS. PAZMINO: Well, his - - - the new lawyer did  
19 raise specific factual allegations, and what is  
20 interesting is the court never addressed or even  
21 considered them. Instead, all the court did was repeat  
22 its earlier assertion that the motion was conclusory and  
23 boilerplate which it def - - -

24 JUDGE SMITH: What's - - - then what's the most  
25 specific claim you've got that is not conclusory or

1 boilerplate?

2 MS. PAZMINO: That not only did counsel fail to  
3 meet with Mr. Mitchell but, more importantly, never  
4 discussed possible defenses or trial strategy with him, in  
5 effect, telling him only take whatever plea you can get.

6 JUDGE SMITH: So that's - - - so that's all  
7 you've got to do. You're - - - you've pleaded, you want  
8 to withdraw your plea. You say - - - you put on a piece  
9 of paper that says, my lawyer never met with me or  
10 discussed trial strategy, you'll get an evidentiary  
11 hearing?

12 MS. PAZMINO: We're not - - - we're not saying  
13 that a formal hearing is required here, Your Honor. What  
14 we are saying is that, at minimum, some additional inquiry  
15 was required because there was a conflict that existed  
16 here between what prior counsel was asserting and what Mr.  
17 Mitchell was seeing at the sentencing proceeding.

18 JUDGE PIGOTT: It occurred to me when it - - -  
19 when this issue of the conflict came up, I mean, once your  
20 lawyer says that you're - - - that you're not representing  
21 him, I mean, why - - - why is there a conflict? That - -  
22 - that's sort of like a medical - - - or a legal  
23 malpractice case where you don't owe any obligation to the  
24 defendant anymore. I mean, he's challenge - - - that  
25 lawyer could have said it's absolutely untrue, or he could

1           - - - yeah, I hit him over the head with it because he's -  
2           - - because he - - - this really was a great deal and he  
3           wasn't getting it.

4                   MS. PAZMINO: Well, but prior counsel made these  
5           adverse statements to Mr. Mitchell's position while he was  
6           still representing Mr. Mitchell, and the court elicited  
7           these statements from counsel at that time. That - - -

8                   JUDGE SMITH: If - - - if counsel had never said  
9           a word and the record is otherwise identical, would it  
10          have been proper to deny the motion without a hearing?

11                   MS. PAZMINO: Well, again, we're not advocating  
12          that a formal hearing is required. I think it - - - it  
13          would have behooved the court to engage in further  
14          inquiry.

15                   JUDGE SMITH: I - - - I guess what I'm saying  
16          is, are you saying that by speaking up, the former lawyer  
17          created the right to a hearing where there wouldn't have  
18          been one otherwise?

19                   MS. PAZMINO: What we're saying is that because  
20          the - - - well, specifically, in this case, when prior  
21          counsel made these adverse statements and did so while  
22          representing Mr. Mitchell and then Mr. Mitchell added  
23          specific factual allegations to his initial pro se plea  
24          withdraw motion, the court was obligated to engage in, at  
25          minimum, some further inquiry. It did not have to take

1 the form of a formal hearing.

2 JUDGE GRAFFEO: What - - - could you tell us  
3 what that further inquiry would be - - -

4 MS. PAZMINO: Well - - -

5 JUDGE GRAFFEO: - - - because obviously the  
6 judge was conducting an inquiry; that's why he was asking  
7 the first attorney these questions.

8 MS. PAZMINO: Well, but Mr. Mitchell was never  
9 given a reasonable opportunity to present his claims.  
10 What the court could have done here was ask pointed  
11 questions of Mr. Mitchell. For example, your prior  
12 counsel - - -

13 JUDGE SMITH: While - - - while Mitchell is  
14 represented, the court is supposed to question him  
15 directly?

16 MS. PAZMINO: No. I mean, at the sentencing  
17 proceeding when he was represented by new counsel.

18 JUDGE SMITH: Isn't even that a little dicey?  
19 He has no lawyer with undivided loyalty at that minute.  
20 Wasn't Justice Tallmer doing the right thing by - - - by  
21 saying, wait a minute, we're going to get you another  
22 lawyer in here and then we'll - - - then we'll decide what  
23 you say?

24 MS. PAZMINO: Well, Judge Tallmer only appointed  
25 new counsel after eliciting these self-serving statements

1 from prior counsel. At that point, Mr. Mitchell was not  
2 represented. And you know, what's unique about this case  
3 is also that at the sentencing proceeding, the minutes  
4 make clear that newly appointed counsel had only met Mr.  
5 Mitchell that very day, had only spoken to him, you know,  
6 just before that proceeding started. Nevertheless, the  
7 allegations that Mr. Mitchell made to him, you know, he  
8 pointed out, if these are true, these indicate a very  
9 serious problem; this indicates ineffective assistance of  
10 counsel. This is very troubling.

11 JUDGE RIVERA: Let's go back. What - - - I'm  
12 sorry. What should the defense counsel have done when the  
13 client comes in and - - - and makes these statements - - -

14 MS. PAZMINO: Prior counsel?

15 JUDGE RIVERA: - - - or submits an - - -

16 MS. PAZMINO: Initially assigned counsel?

17 JUDGE RIVERA: - - - a late document? What - -  
18 - what - - - yes, yes.

19 MS. PAZMINO: Initially assigned counsel should  
20 have not taken a position on the motion. He was not - - -

21 JUDGE RIVERA: Should stay quiet - - - should  
22 stay silent? Is that your position?

23 MS. PAZMINO: Yes, as this - - - as this court  
24 has recognized in prior cases where the court - - -

25 JUDGE SMITH: And wasn't - - - wasn't the judge,

1 in fact, trying - - - started hinting to him to do that?  
2 As I read the record, she's saying, you don't want to say  
3 anything, do you? And he's saying, yes, I do, Judge, this  
4 is all false.

5 MS. PAZMINO: I disagree. The court actually  
6 asked very leading questions of prior counsel and elicited  
7 this information. It's - - - you know, what counsel  
8 should have done was gone with his initial instinct, you  
9 know, essentially I'm precluded from saying anything  
10 that's adverse to the client.

11 JUDGE PIGOTT: Is it true - - - I - - - I'm  
12 missing that. I mean, if - - - it seems to me if a client  
13 says, you know, my lawyer is - - - is telling me that the  
14 bribes didn't work and now - - - and I'm pretty upset  
15 about that, I mean, aren't you waiving attorney-client  
16 confidentiality in allowing the attorney to - - - you  
17 know, to defend him or herself?

18 MS. PAZMINO: No, no, not at all.

19 JUDGE PIGOTT: Really? So - - - so what is the  
20 lawyer supposed to do?

21 MS. PAZMINO: The lawyer is supposed to take no  
22 position.

23 JUDGE PIGOTT: Judge, I've been accused of  
24 bribery, I stand mute.

25 MS. PAZMINO: In that situation, counsel should

1 have said, I should be relieved, you need to appoint a new  
2 attorney. And at that time, if the court wanted to  
3 conduct inquiry - - -

4 JUDGE PIGOTT: Now you've got a second one, and  
5 you make the point that - - - that that lawyer met with  
6 him once at the time of sentencing. When does the third  
7 lawyer get appointed?

8 MS. PAZMINO: We're not saying a third lawyer  
9 should have been appointed. But the point is that the  
10 court simply dismissed these very serious allegations that  
11 counsel - - - newly appointed counsel raised at  
12 sentencing, did not even consider them or acknowledge  
13 them.

14 JUDGE PIGOTT: What were the serious  
15 allegations? Coercion?

16 MS. PAZMINO: No, the serious allegations that  
17 would have amounted to ineffective assistance of counsel.

18 JUDGE PIGOTT: What are they? What are they?

19 MS. PAZMINO: That he did not discuss potential  
20 strategies with him. That he did not discuss the merits  
21 of going to trial. That he did not meet with him. And in  
22 fact, all he ever said - - -

23 JUDGE RIVERA: If - - - if counsel knows for a  
24 fact that it is untrue that I did meet with him, that is  
25 an out-and-out lie, counsel is supposed to stay silent?

1 MS. PAZMINO: Yes. In that situation, he should  
2 not - - - counsel cannot take a position adverse to the  
3 claim.

4 JUDGE PIGOTT: Aren't you - - - aren't you  
5 changing - - - I mean, I can't tell you the number of - -  
6 - of times I've seen lawyers, myself included, you know,  
7 when the - - - when the defendant all of a sudden gets  
8 cold feet about something and says, this is what happened,  
9 and that is not what happened, Judge, I'm telling you  
10 right now. I mean, you - - - so I'm now in violation of  
11 my ethical responsibilities to my client because he's  
12 lying about me, and I can't say that that's true.

13 MS. PAZMINO: The client had - - - the attorney  
14 has an absolute duty of loyalty to the client. Clearly -  
15 - -

16 JUDGE PIGOTT: Sure, and - - -

17 MS. PAZMINO: - - - while - - -

18 JUDGE PIGOTT: But you're say - - - you're  
19 saying that he never waives that, that - - - that if he  
20 accused me of committing the crime, that I - - - I have to  
21 - - - Judge, I know he says I killed those two people, I  
22 stand mute.

23 MS. PAZMINO: Yes, he cannot take a position  
24 adverse to the client while still representing the client.  
25 If that's what was going to happen, then the court needed

1 to assign new counsel before eliciting these statements of  
2 defense counsel.

3 JUDGE RIVERA: He has no role as an officer of  
4 the court?

5 MS. PAZMINO: It's not - - -

6 JUDGE RIVERA: He knows that the person is lying  
7 to the judge.

8 MS. PAZMINO: It's not - - - it's not - - - it's  
9 not about lying. The fact is that Mr. Mitchell's initial  
10 allegations were that there was attorney coercion, amongst  
11 other things, did, you know, unfortunately - - -

12 JUDGE SMITH: But what about the case - - - what  
13 if the judge actually seemed to - - - the client makes an  
14 accusation and the judge seems to believe it and is on the  
15 verge of accepting it, can the lawyer speak up and say,  
16 no, that's not true, Judge?

17 MS. PAZMINO: Well, that's a different situation  
18 than what we have here, of course. And I'm not sure what  
19 the answer to that question is, to be honest. But the  
20 fact of the matter is that, you know, defense counsel here  
21 should not have made all of those adverse statements  
22 directly contradicting Mr. Mitchell's claim of attorney  
23 coercion. The - - - you know, while the court did appoint  
24 new counsel - - -

25 JUDGE SMITH: Assuming - - - assuming you're

1 right, I guess the problem I have is that does - - - by  
2 doing that, does he confer on Mitchell rights that  
3 Mitchell would not otherwise have?

4 MS. PAZMINO: I'm not sure I understand.

5 JUDGE SMITH: I mean, if - - - if Mitchell did  
6 not have a motion that passed - - - you know, that - - -  
7 that would pass inspection before the lawyer spoke, how  
8 did he suddenly acquire one?

9 MS. PAZMINO: Well, I - - - I would argue that  
10 Mr. Mitchell - - - you know, still the serious allegations  
11 he raised initially still require the court to delve into  
12 the situation further, but especially after you have the  
13 court eliciting these statements from defense counsel that  
14 are wholly adverse to the client while the representation  
15 is still ongoing, and that is - - - that is entirely  
16 problematic in that - - -

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MS. PAZMINO: Thank you.

19 CHIEF JUDGE LIPPMAN: Thank you.  
20 Counsel.

21 MR. RAMSAY: May it please the court, Richard  
22 Ramsay for the People. Good afternoon, Your Honor.

23 The - - - Judge Smith, I think, put it best that  
24 the adverse statements that the defense attorney made were  
25 statements that are of no consequence. In fact, these are

1 statements that were made days before by the judge and  
2 defense counsel. I mean, I would refer the court to pages  
3 17 - - - excuse me - - - 14 to 18 where - - - we have gone  
4 through this litany before. We have gone through the  
5 options, the strengths and weaknesses of the case, the  
6 fact that the co-defendant had an appeal that was affirmed  
7 - - - a conviction that was affirmed, and the jury  
8 selection day and the plea offers. I mean, these are all  
9 statements that were already made on the record so they  
10 were - - -

11 JUDGE PIGOTT: One of the things that the judge  
12 said though was that it was conclusory, right? That the  
13 motion was conclusory?

14 MR. RAMSAY: Precisely.

15 JUDGE PIGOTT: And it seemed to me that it  
16 wasn't that long ago they said, well, there - - - you  
17 know, you're just making oral statements that are not in  
18 writing, and so finally, somebody put together a form.  
19 And all I could think of is, you know, the omnibus motions  
20 that we all file within forty-five days of arraignment,  
21 and they're pretty boilerplate, too. And wouldn't there -  
22 - - wouldn't it make sense that at least understand that  
23 somebody's not in a law library and not a lawyer and they  
24 have a form and they - - - and they think the form fits  
25 their claim and they fill it out and give it to the court,

1 that they at least took that much time to find the form,  
2 to fill it out, to get it someplace, that an inquiry  
3 should follow?

4 MR. RAMSAY: Well, I believe Judge Tallmer took  
5 that into consideration. She read the motion into the  
6 record and noted that there were blank spaces that the  
7 defendant didn't fill out, so she didn't know what exactly  
8 the coercion claim was based on. And then she gave the  
9 defendant an opportunity to explain that. And all the - -  
10 - all the defendant said at that point was that he was at  
11 Rikers for four years, and this whole time he's pled not  
12 guilty. That's not the kind of factual allegations that  
13 this court has - - - that this court has wanted a  
14 defendant to say in order to substantiate a claim of  
15 coercion.

16 I mean, where - - - where the - - - it seems  
17 that the defendant is asking for a rule that's going to  
18 run afoul or may be inconsistent with the Article 440 in  
19 the CPL because you have there where you're not entitled  
20 to a hearing unless you're making some sort of facial  
21 claim, and here there is no facial claim. So we - - - I  
22 would propose that this court wouldn't want that kind of  
23 disparity between Article 440 jurisprudence and the issue  
24 before the court right now.

25 I mean, if there are no other questions before

1 the court, I rest on my brief.

2 CHIEF JUDGE LIPPMAN: Okay, counselor. Thank  
3 you.

4 Counselor, rebuttal?

5 MS. PAZMINO: First, I would like to point out  
6 that contrary to respondent's claims, Mr. Mitchell was  
7 never given an opportunity to really explain his position  
8 at the plea proceeding. He was able to get one sentence  
9 out, at which point the court interrupted him and then Mr.  
10 Mitchell later asked the court to make a statement on the  
11 record. The court was quick to remind him that he was  
12 still represented by counsel and should only speak through  
13 his attorney, yet this was the same attorney whose  
14 deficienc - - - deficient conduct Mr. Mitchell was  
15 attempting to explain to the court.

16 JUDGE SMITH: But - - - but it wasn't - - - it  
17 was not - - - I mean, whether he was - - - was or wasn't  
18 represented by counsel, was it not reasonable for the  
19 judge to say, why don't you keep your mouth shut until you  
20 have a nonconflicted lawyer?

21 MS. PAZMINO: Well, perhaps, but here Mr.  
22 Mitchell clearly did that do his detriment. He was never  
23 really allowed to tell his side of the story.

24 JUDGE SMITH: Well, but - - - well, but if - - -  
25 when he comes back with a new lawyer, he's - - - the new

1 lawyer can presumably cause him to do - - - he can do  
2 anything he wants, right? Or he can advise him to do  
3 whatever he thinks is in his best interests. We don't - -  
4 - we don't - - - the new lawyer said, Your Honor, my  
5 client has this great story, can he tell it to you.

6 MS. PAZMINO: No. But the point is that newly  
7 appointed counsel only had a very brief opportunity to  
8 meet with Mr. Mitchell, and yet he raised these very  
9 serious allegations, so there was a conflict that existed.  
10 And that conflict was never resolved by the court. The  
11 court did not even acknowledge the fact that Mr. Mitchell  
12 had raised these specific allegations which it was hearing  
13 for the very first time.

14 JUDGE SMITH: By "conflict", you mean a - - -  
15 you mean - - - you mean a lawyer - - - an ethical conflict  
16 or just a - - - conflicting testimony?

17 MS. PAZMINO: Conflicting statements between  
18 what defense - - - prior counsel was alleging he had done  
19 as part of the representation and what Mr. Mitchell was  
20 saying was not done, and that conflict was never resolved.

21 The fact is that given the incredibly serious  
22 prison sentence Mr. Mitchell was facing, it cannot  
23 possibly be the rule that a court need only appoint a new  
24 attorney and ignore whatever information that attorney  
25 puts forth to discharge its duties to adequately

1 investigate - - - or adequately look into the allegations  
2 underlying a plea withdrawal motion. The court's summary  
3 rejection of these new allegations - - -

4 JUDGE PIGOTT: You're making it both ways  
5 though. I - - - I can see the judge asking the - - - the  
6 counsel who's now being accused of coercion, how many  
7 times did you meet with your - - - with your client  
8 because he's saying you didn't meet with him at all. Can  
9 he answer that, because it might be adverse to his client  
10 who said, yeah, I met with him every week for the last  
11 four years.

12 MS. PAZMINO: I think - - - I think still  
13 defense counsel should not have made any statements  
14 adverse to the client. He - - -

15 JUDGE PIGOTT: I find that amazing. I mean, can  
16 he - - - can he make the motion for the client? Can he  
17 say, you know, Judge, I join in the motion to have a  
18 hearing?

19 MS. PAZMINO: Perhaps, but - - -

20 JUDGE PIGOTT: That might be a - - -

21 MS. PAZMINO: - - - I think - - -

22 JUDGE PIGOTT: That might be adverse to him.

23 MS. PAZMINO: Well, at the - - - at the very  
24 least, counsel was obligated to remain loyal to the  
25 client, and he did not do that here. This is a - - -

1 JUDGE RIVERA: Doesn't silent equal it's true?

2 MS. PAZMINO: No, not necessarily.

3 JUDGE RIVERA: What his client is saying is  
4 true?

5 MS. PAZMINO: No, not at all. You know, as  
6 attorneys have done in other cases, they say, you know, I  
7 cannot adopt the - - - the client's motion, but I can say  
8 nothing further. I think you should - - -

9 JUDGE RIVERA: Well, isn't that saying it's - -  
10 - it's untrue?

11 MS. PAZMINO: Excuse me?

12 JUDGE RIVERA: Isn't that adverse? Aren't you  
13 saying, well, that's untrue, that's why I can't support?

14 MS. PAZMINO: I mean, perhaps if it's extended,  
15 but the point is that say - - - you know, not adopting the  
16 motion is fine and saying, you know, I can't say anything  
17 further, the court should assign new counsel and then  
18 investigate this further.

19 JUDGE RIVERA: Then move to withdraw?

20 MS. PAZMINO: Yes, if that's - - - if that's  
21 what it takes, yes. I would just lastly - - -

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MS. PAZMINO: Thank you.

24 CHIEF JUDGE LIPPMAN: Thank you, counsel.

25 Deliser.

1                   MR. MCINTOSH: Good afternoon, Your Honors. I'm  
2                   Winston McIntosh for Defendant Deliser. I think from this  
3                   court's cases decided in the 1970s, a while back, the  
4                   cases that I cite in my brief, I take three propositions.  
5                   One, that contrary to what the People suggest that the  
6                   decision as to whether to seek withdrawal of a guilty plea  
7                   is absolutely and entirely for the defendant personally to  
8                   make, possibly with the advice of counsel, but even  
9                   against the wishes of counsel; I think that is clearly a  
10                  decision for the defendant.

11                 The second proposition I - - - I think I can  
12                 make is that the defendant is entitled ordinarily to the  
13                 assistance of counsel on his plea withdrawal motion which  
14                 is a critical stage of the proceedings. And the third  
15                 proposition that I think I can make that, at the very  
16                 least, the defendant is entitled not to be saddled by an  
17                 attorney who actually seeks to undercut - - - who opposes  
18                 his motion.

19                 CHIEF JUDGE LIPPMAN: What did - - - what did  
20                 the counsel specifically do wrong here? What did his  
21                 counsel do wrong?

22                 MR. MCINTOSH: I - - - I think several things.  
23                 First of all, he starts off - - -

24                 CHIEF JUDGE LIPPMAN: What's the worst thing  
25                 that counsel did?

1 MR. MCINTOSH: He tells the court at the very  
2 end that the - - - the plea was knowing and is in the  
3 defendant's best interest. In fact, he's telling the  
4 court, given what he said before, basically describing the  
5 circumstance that led to the defendant's guilty plea in  
6 front of the court - - -

7 JUDGE PIGOTT: And so is he lying? Was - - - in  
8 your view, was the - - - was the lawyer lying when he said  
9 that or - - -

10 MR. MCINTOSH: I have no idea whether he's  
11 lying. I think it's - - - I don't think that the issue -  
12 - - I - - - I - - - there's no way for me to determine  
13 whether, in fact, he's lying, but I don't think that's the  
14 point. The point is that defendant had made an  
15 application to withdraw his guilty plea. He's made some  
16 factual allegations.

17 JUDGE PIGOTT: I - - - I guess you and - - - and  
18 your partner over there are saying once one of these  
19 motions are filed, the lawyer's out of the case  
20 automatically. You - - - you - - -

21 MR. MCINTOSH: Well, no, no. It depends on what  
22 - - - what the allegations are. There are - - -

23 JUDGE PIGOTT: Well, there - - - there are  
24 always going to be that - - - that, you know, that I want  
25 to withdraw my plea, that I was coerced, that he - - - you

1 know, that I got ineffective assistance of counsel.

2 MR. MCINTOSH: But - - -

3 JUDGE PIGOTT: And that seems to me that - - -  
4 I'm not suggesting that we - - - you know, we got to worry  
5 about clogging up the courts, but I would think you'd grab  
6 one of those on your way in and - - - and file it before  
7 your sentencing and then - - - well, you got your - - -  
8 you got your plea, you can't do any worse. So if you  
9 filed a motion, you lose that lawyer, you get another one,  
10 and then see how he or she does, and maybe you're okay,  
11 maybe you're not.

12 MR. MCINTOSH: Yes, that's a - - -

13 JUDGE PIGOTT: But we're shutting up the lawyers  
14 and - - -

15 CHIEF JUDGE LIPPMAN: Yes, counsel, pause on  
16 that answer. You want any rebuttal time?

17 MR. MCINTOSH: Yes, I'm sorry, two minutes, Your  
18 Honor.

19 CHIEF JUDGE LIPPMAN: Two minutes. Go ahead,  
20 answer Judge Pigott's question. I'm sorry to distract  
21 you.

22 MR. MCINTOSH: I - - - I'm sorry. I'm not quite  
23 sure that I - - - I get entirely the question, but it's -  
24 - - but it seems to me that - - -

25 JUDGE PIGOTT: I don't know why we're shutting

1 up the defense lawyers. I don't know why we're saying - -  
2 -

3 MR. MCINTOSH: Well, we - - -

4 JUDGE PIGOTT: - - - once a defendant has cold  
5 feet, has questions, once he goes and talks to his family,  
6 and the family says, it's - - - you know, ten years is too  
7 long or whatever, that he then files a motion, and that  
8 lawyer is out. That lawyer, as your partner says, cannot  
9 say anything more. He can't say, Judge, he also  
10 threatened you with bribery. He can't - - - you know, he  
11 can't say anything at all. I mean, that - - - that lawyer  
12 is gone. He's a legal eunuch.

13 MR. MCINTOSH: Well, Your Honor, you - - - you  
14 are skewing the - - - the matter - - -

15 JUDGE PIGOTT: I think so.

16 MR. MCINTOSH: - - - by - - - by saying the  
17 defendant is getting cold feet. You're already assuming  
18 that the defendant is lying - - -

19 JUDGE PIGOTT: No, I'm making - - -

20 MR. MCINTOSH: - - - that I'm trying to  
21 (indiscernible) allegations.

22 JUDGE PIGOTT: I'm making things up because this  
23 isn't - - -

24 MR. MCINTOSH: No, I understand.

25 JUDGE PIGOTT: - - - this isn't the only case

1 and - - -

2 MR. MCINTOSH: I understand.

3 JUDGE PIGOTT: - - - you've been around long  
4 enough to know that sometimes defendants just get cold  
5 feet.

6 MR. MCINTOSH: They may well be. And in fact,  
7 there - - - there are circumstances under which, okay - -  
8 -

9 JUDGE SMITH: But does every - - - does every  
10 defendant who says my lawyer sold me out immediately get a  
11 new lawyer?

12 MR. MCINTOSH: No, I don't think so. I think -  
13 - -

14 JUDGE SMITH: And - - - and if his lawyer says,  
15 no, I didn't, then does the defendant immediately get a  
16 new lawyer?

17 MR. MCINTOSH: I think at that point, yes.

18 JUDGE SMITH: So - - - so - - -

19 MR. MCINTOSH: I don't - - - I don't - - -

20 JUDGE SMITH: So - - - so just saying my lawyer  
21 sold me out is not enough to get you anything presumably  
22 unless you're more specific?

23 MR. MCINTOSH: That's correct.

24 JUDGE SMITH: But if the lawyer gives into the  
25 perhaps human temptation to say, no, I am not a crook,

1 then he is - - - by doing that, he has conferred on his  
2 client the right to some kind of further procedure?

3 MR. MCINTOSH: I think at that point is - - -  
4 what would have happened is that the defendant then  
5 entitled to - - -

6 JUDGE PIGOTT: So the lawyer would - - - the  
7 lawyer would be best serving his client by speaking?

8 MR. MCINTOSH: I'm not - - - I'm not sure that I  
9 understand. I - - - I - - -

10 JUDGE PIGOTT: Well, because the minute he says  
11 I'm not a crook, as Judge Smith suggests, he's helped his  
12 client because his client now gets a new lawyer.

13 MR. MCINTOSH: What the client wants is - - - is  
14 a fair adjudication of his motion.

15 JUDGE SMITH: Maybe he wants ineffective  
16 assistance of counsel even more than that.

17 MR. MCINTOSH: No. The - - - the defendant - -  
18 - a defendant cannot get a fair adjudication of his  
19 application to withdraw his plea if he's being represented  
20 by somebody who argues against the motion. And I - - - I  
21 don't find that difficult to understand.

22 JUDGE SMITH: It's okay if he's represented by  
23 someone who can't argue for it?

24 MR. MCINTOSH: I think - - - I think, in fact, a  
25 court can decide an application to withdraw a plea, okay,

1 with the defense counsel not taking a position one way or  
2 the other on the plea with the court only - - - merely  
3 listening to the defendant giving his reasons why he - - -

4 JUDGE PIGOTT: But can the court - - -

5 MR. MCINTOSH: (Indiscernible) - - -

6 JUDGE PIGOTT: Can the court - - -

7 MR. MCINTOSH: I see nothing wrong with that.

8 Now - - -

9 JUDGE PIGOTT: Can the court talk to the client  
10 - - - the client without talking - - - I mean, one of  
11 these cases - - - they're getting confusing to me, said  
12 you - - - you know, you got to talk to me through your  
13 lawyer.

14 MR. MCINTOSH: No. Well, I - - - I mean,  
15 frankly, Your Honor, I mean, I've seen hundreds of these  
16 cases. I - - - I mean, I don't see a problem if a  
17 defendant presents a pro se motion to withdraw his plea in  
18 these certain allegations. There may not be allegations  
19 against his counselor at all. It may have nothing to do  
20 with conflict of performance. Whatever allegations he  
21 makes, I see nothing wrong with the court making some  
22 inquiry of the defendant personally as to exactly what it  
23 is he is saying, especially if, in fact, the - - - the  
24 factual underpinning of the allegations is not exactly  
25 spelled out in the defendant's motion.

1                   JUDGE RIVERA: Well, if it's not related to the  
2 counsel, are you suggesting that - - - that the court  
3 should require defense - - - defendant on his own, pro se,  
4 to speak?

5                   MR. MCINTOSH: I'm sorry. He what?

6                   JUDGE RIVERA: If it's not allegations related  
7 to the counsel - - -

8                   MR. MCINTOSH: Right.

9                   JUDGE RIVERA: - - - if it's about some other  
10 reason - - -

11                   MR. MCINTOSH: Right.

12                   JUDGE RIVERA: - - - I'm not - - - I don't think  
13 you're suggesting that the inquiry should be directly to  
14 the defendant rather than to his counsel. Did I  
15 misunderstand?

16                   MR. MCINTOSH: No, no, no, your - - - I would  
17 say this, okay. If, in fact, counsel does not want to be  
18 involved one way or the other on the motion, then I see  
19 nothing wrong with the court making inquiry of the  
20 defendant himself or herself. But I think, if - - - I  
21 mean, the - - - I don't think the court should assume,  
22 okay, without counsel saying so that counsel is not  
23 supporting of the motion. If counsel is actually  
24 supporting the motion, then, in fact, counsel should take  
25 the lead in making the application.

1 JUDGE GRAFFEO: How far can the judge go in  
2 making inquiry of the defendant before making a decision  
3 whether to assign new counsel? I mean, the new counsel  
4 may then claim the judge shouldn't have asked what he or  
5 she asked.

6 MR. MCINTOSH: No. I think once it becomes  
7 apparent that - - - once - - - once defense counsel, the  
8 current attorney, takes the position adverse to defendant,  
9 then I think new counsel has - - - has to be appointed.  
10 The motion cannot determine with defendant represented by  
11 a counsel - - - an attorney who is actually speaking  
12 against the motion. There is no point to that.

13 JUDGE READ: So he should stay quiet always?

14 MR. MCINTOSH: If, in fact, he opposes the  
15 motion. If he thinks that this motion has no merit - - -

16 JUDGE SMITH: If he can't - - - if he cannot - -  
17 - can't conscientiously support the motion, he has to stay  
18 mute?

19 MR. MCINTOSH: Then I think he should stay mute,  
20 yes.

21 CHIEF JUDGE LIPPMAN: Okay, counselor, thank  
22 you.

23 MR. MCINTOSH: Thank you, Your Honor.

24 MS. EISNER: Good afternoon, Your Honor. Diane  
25 Eisner for the respondent. For one second - - -

1 JUDGE SMITH: Do - - - do you really argue that  
2 the decision to - - - to make a plea withdrawal motion is  
3 for the lawyer and not for the client?

4 MS. EISNER: Well, when there's a legal basis  
5 for the motion and then it becomes a matter of strategy,  
6 this court's decision in Colville seems to suggest - - -

7 JUDGE SMITH: So - - - so - - -

8 MS. EISNER: - - - that it would be for the  
9 lawyer to make.

10 JUDGE SMITH: So - - - so if I client wants to  
11 withdraw his plea and the - - - the lawyer thinks he may  
12 have a basis for withdrawing it, but he's isn't saying, so  
13 he's going to get twice the time, you say the lawyer can  
14 overrule it?

15 MS. EISNER: That's what this court said in  
16 Colville.

17 JUDGE READ: Did we? Where did we say that?

18 MS. EISNER: Well, you said it in the context of  
19 submitting a lesser-included offense - - -

20 JUDGE READ: Well, that's right. It is talk - -  
21 -

22 MS. EISNER: - - - which is not a fundamental  
23 right of the defendant - - -

24 JUDGE READ: Yeah.

25 MS. EISNER: - - - to seek a fun - - - a lesser-

1 included offense.

2 JUDGE READ: Certainly the right to plea is  
3 something that's personal to the defendant.

4 MS. EISNER: Yes, but the decision to change  
5 your mind about a fundamental right that - - -

6 JUDGE READ: Not - - -

7 MS. EISNER: - - - you have exercised is not  
8 necessarily a fundamental right.

9 JUDGE PIGOTT: What's the solution to this, in  
10 your view, because I - - - I don't get too - - - when the  
11 judges way, well, it's a form, well, of course it is; and  
12 it's conclusory, of course it is. These aren't lawyers  
13 you're dealing with. Who should be making the - - - I  
14 mean, maybe it's true that the defense lawyer never, you  
15 know, went and saw his client, and - - - and didn't give  
16 him proper advice and misspoke when he told him what the  
17 maximum sentence was. Where do - - - where do we draw a  
18 line if you see one, as to how to make sure the system is  
19 working correctly, and not just summarily, you know,  
20 denying it?

21 MS. EISNER: Well, we follow the jurisprudence  
22 on conflict of interest law, and then we look to see,  
23 first of all, whether the - - -

24 JUDGE PIGOTT: No, no, before doing that. Make  
25 - - - make it real. I mean, I understand conflict of

1 interest law, and I'm just saying, you got this situation;  
2 what - - - did the judge do what the judge was supposed to  
3 do with this case?

4 MS. EISNER: Absolutely because we don't have  
5 just a form here. We have - - - in this particular case,  
6 we have a very detailed plea withdrawal motion, and every  
7 allegation goes towards coercion.

8 JUDGE PIGOTT: All right. So should there have  
9 been - - -

10 MS. EISNER: It goes towards saying I was - - -  
11 I was - - -

12 JUDGE PIGOTT: So there should have been a  
13 hearing?

14 MS. EISNER: No, because the defense attorney  
15 didn't dispute anything in the motion, and everything that  
16 he said just as an officer of the court in terms of - - -

17 JUDGE SMITH: You're - - - you're saying there  
18 are a lot of allegations of coercion and they don't add up  
19 to anything?

20 MS. EISNER: The court could ascertain from  
21 reading this motion, without - - - the defense attorney  
22 didn't contradict anything, didn't say it doesn't amount  
23 to legal coercion.

24 JUDGE SMITH: You're - - - you're saying the  
25 judge, and I guess this is probably true in the other

1 case, too, the judge can read it and say there's nothing  
2 here that warrants a hearing?

3 MS. EISNER: Absolutely.

4 JUDGE SMITH: And you're saying that's what he  
5 did and that's the end of the ball game?

6 MS. EISNER: That - - - that's the end of the  
7 ball game.

8 JUDGE SMITH: And it didn't - - - and the fact -  
9 - - and the lawyer can - - - can stand on the desk and  
10 call his client a crook and it doesn't matter?

11 MS. EISNER: No. If the - - - if the lawyer is  
12 putting himself in a position of a conflict, then we have  
13 to step into the second aspect of the - - - of the inquiry  
14 whether or not - - -

15 JUDGE SMITH: Well, suppose - - - suppose we  
16 have - - - by hypothesis, suppose you have a completely  
17 meritless motion to start with but it's - - - but it calls  
18 the lawyer names, and the lawyer finds it necessary to get  
19 up and - - - and defend himself and say, no, no, no, every  
20 word in there is a lie. At that point is the - - - does  
21 the - - - what's supposed to happen then?

22 MS. EISNER: If the court is looking at the  
23 motion and at the plea proceeding itself, which presumably  
24 the court is going to look at that as well, as well as the  
25 allegations in the motion, and the court can tell from

1 looking at that that there's no plausible alternative  
2 defense strategy that another attorney would have pursued,  
3 the court doesn't have to appoint another attorney. It's  
4 baseless. It's time-wasting. It's an exercise in  
5 futility. The court is going to look at this motion - - -

6 JUDGE SMITH: But that - - - I guess what I'm  
7 thinking you're saying is that that would be true whether  
8 the - - - whether the lawyer stood there mute or screamed  
9 at the top of his lungs that his client was not telling  
10 the truth.

11 MS. EISNER: That's right, because the second  
12 inquiry still has to be made, whether there's the  
13 plausible alternative defense strategy whether another  
14 attorney is going to come in here and there's going to be  
15 a possibility of a different result. Now, if you looked  
16 at this motion and you looked at the plea minutes in this  
17 case, you could see that the allegations don't make out a  
18 legal basis for a claim of coercion.

19 JUDGE SMITH: And that - - - that isn't a  
20 universal rule. I mean, if we - - - sometimes, when  
21 there's a conflict between the defendant and his lawyer,  
22 we don't say, oh, well, there's a conflict, you know, your  
23 lawyer works for the other side but it's okay because I  
24 don't see the possibility of a different result.

25 MS. EISNER: It doesn't go to that extreme in

1 this case, Your Honor.

2 JUDGE SMITH: No.

3 MS. EISNER: First of all, the attorney - - -

4 JUDGE PIGOTT: I - - - I - - -

5 MS. EISNER: - - - didn't say anything that  
6 contradicted the allegations in the defendant's motion.  
7 He made very general statements. In fact, he basically  
8 corroborated what was in the defendant's motion, so we're  
9 not in a situation like that. The defendant says, oh, he  
10 told me I was going to, you know - - -

11 JUDGE SMITH: I guess - - -

12 MS. EISNER: - - - get a maximum sentence.

13 Well, yeah.

14 JUDGE SMITH: - - - this - - - I mean, we have a  
15 - - - obviously, I don't have a recurring situation which  
16 is, frankly - - - it happens all the time, I'm sure, that  
17 - - - that defendants take pleas and two months later they  
18 don't like the plea and it's their lawyer's fault. This  
19 is not - - - these are not the first two defendants who  
20 ever - - - who ever took that view.

21 MS. EISNER: That's right. That's why the trial  
22 court has broad discretion - - -

23 JUDGE PIGOTT: But conceivable - - -

24 MS. EISNER: - - - in determining whether or not  
25 to hold a hearing, in determining whether or not to

1           appoint substitute counsel.

2                   JUDGE PIGOTT:  It's possible that the - - - that  
3           there could be coercion and it's in the best interest of  
4           the defendant, too.  I mean, he - - - he may - - - he may  
5           be bucking at - - - at what ultimately is coming down, but  
6           he really ought to be taking this plea, and - - - and if  
7           the lawyer says that - - - I mean, what's coercion to  
8           someone is persuasion to another, I suppose.

9                   MS. EISNER:  Well, in this particular case, the  
10          - - - the attorney never disputed that he strongly advised  
11          taking these pleas, that the - - - that, in fact, the  
12          judge warned him at the suppression hearing before he was  
13          even arrested on the second case, you're rolling the dice;  
14          if you go to trial, it's going to be closer to the maximum  
15          of twenty-five and seven.  How does he not relate that to  
16          his - - - to his client?  He has to; he's obligated to.  
17          That's not coercion.

18                   Now, if that's what the attorney - - - the  
19          defendant is putting in his motion, the court can look at  
20          that and say, well, that's not coercion, why do I have to  
21          appoint a lawyer to get up here and tell me it's coercion  
22          when I know it isn't coercion, and it isn't going to  
23          change my decision, and I've read the plea minutes, and I  
24          can see from the plea minutes that I asked him all the  
25          right questions, I asked him if anybody coerced his plea,

1 I asked him if it was a voluntary act, I asked him if he  
2 was guilty, and he admitted his guilt, and under those  
3 circumstances, why do I have to go through this exercise  
4 of futility and appoint another attorney? He simply  
5 doesn't have to do it. And that's why trial courts have  
6 broad discretion, and in this particular case, the court  
7 didn't abuse its discretion.

8 JUDGE RIVERA: So you're saying if it's within  
9 the - - - the knowledge, based on the record and based on  
10 the way the case has gone, and the - - - of the court,  
11 they can make this decision if it's information outside of  
12 knowledge?

13 MS. EISNER: The court can make this decision  
14 and the courts generally do make it.

15 JUDGE RIVERA: What if it's outside of the  
16 knowledge of the court?

17 MS. EISNER: Excuse me?

18 JUDGE RIVERA: It's an allegation that's - - -  
19 the court has no basis on its face to be able to make a  
20 decision based on what the court knows, based on what has  
21 gone on before --

22 MS. EISNER: Well, then - - -

23 JUDGE RIVERA: - - - the court during the  
24 proceedings, and the claim is - - -

25 MS. EISNER: Maybe then - - -

1 JUDGE RIVERA: - - - that the lawyer did  
2 something that - - -

3 MS. EISNER: Well, then maybe you have an  
4 argument that the court abused its discretion in that  
5 particular case if it looks like there was a reason for  
6 the court to conduct an additional inquiry, but that's not  
7 this case.

8 JUDGE RIVERA: Would that be an appropriate line  
9 for us to draw, if you raise something that's outside of  
10 the knowledge based on the proceeding of the court, in  
11 that case you get a new lawyer?

12 MS. EISNER: No, not necessarily.

13 JUDGE RIVERA: And he gets up to two counsel.

14 MS. EISNER: Not necessarily. I mean, this  
15 court's decision in Fried - - - in the Friedman case back  
16 in 1976, the defendant raised a claim that he was under  
17 the influence of truth serum when he took his plea and  
18 that's outside the record basically. And the attorney  
19 actually made a statement that undermined the claim, and  
20 this court said it was fine. He was speaking to the  
21 circumstances surrounding the plea and the court said I  
22 spoke to the psychiatrist.

23 JUDGE SMITH: What - - - what about the - - -

24 JUDGE RIVERA: Let's look at something that  
25 doesn't sound so unreasonable.

1 MS. EISNER: Excuse me?

2 JUDGE RIVERA: Let's look at something that's a  
3 little bit more reasonable, more like - - -

4 JUDGE SMITH: So what about - - - what about the  
5 client who says he never writes, he never calls, he - - -  
6 I never saw this guy, he never discussed the defense with  
7 me, he - - - I had one one-minute conversation with him  
8 before I pleaded. Is that - - - does that trigger some  
9 obligation of the judge to do more than say denied?

10 MS. EISNER: It might. It might. It depends on  
11 whether I - - -

12 JUDGE RIVERA: When would it not?

13 MS. EISNER: I would assume that the - - -  
14 I assume that the attorney would be given a chance to  
15 respond, and then he might have said, well, yes, he  
16 didn't.

17 JUDGE SMITH: Well - - -

18 JUDGE RIVERA: Isn't that the point --

19 MS. EISNER: What's that?

20 JUDGE RIVERA: -- of the argument.

21 MS. EISNER: No, that's not the point because  
22 that's not this case and that's not - - -

23 JUDGE SMITH: Well, yeah, but are you saying  
24 that in that situation the attorney has to at least be  
25 invited to contradict his client if - - - if the facts are

1 otherwise?

2 MS. EISNER: No. I think it still depends on  
3 how much information is before the court. If you have a -  
4 - - if you have a vacuum and the court needs to fill that  
5 vacuum, then the court should exercise its discretion to  
6 do so and then we can have a different case about whether  
7 the court properly exercised its discretion in that case,  
8 but we don't have that here. We have - - -

9 JUDGE RIVERA: Is it concern, delay? I mean,  
10 maybe - - - why - - - why not fill that vacuum by first  
11 appointing substitute counsel and then call him back and -  
12 - - and then pursue the inquiry?

13 MS. EISNER: You might in such a situation, but  
14 that's not this case. You don't have a vacuum here. You  
15 have a very detailed motion.

16 JUDGE RIVERA: But we're trying to decide what -  
17 - - what might be the appropriate rule.

18 MS. EISNER: Well, right now, the rules are that  
19 the trial courts have broad discretion. I mean, there's  
20 nothing wrong with that rule because it works. And the  
21 rules are in - - -

22 JUDGE RIVERA: Except according to them in these  
23 cases, right?

24 MS. EISNER: Well, they're disregarding the fact  
25 that there was a record here, that there isn't a vacuum in

1 this case. They're disregarding the fact that we have a  
2 very detailed plea withdrawal motion that the court  
3 reviewed. The court got the motion and didn't say, oh, I  
4 don't have enough information, let me get the plea  
5 minutes. The court ordered the plea minutes. The court  
6 then reviewed it. And then, after counsel said a few  
7 words, the court looked over it, he went over it with him,  
8 he said, look, I had this plea colloquy with you, and your  
9 motion is not supported.

10 JUDGE SMITH: Would - - - do you agree that it  
11 was a poor idea for the defense counsel essentially to  
12 make a speech in opposition to his client?

13 MS. EISNER: We don't construe that he made a  
14 speech in opposition to his client. I don't think he said  
15 anything that contradicted what's in the motion. Where  
16 did he make a - - -

17 JUDGE SMITH: I - - - he said, I think he made a  
18 knowing plea.

19 MS. EISNER: Exactly.

20 JUDGE SMITH: Is that really some - - - is that  
21 really for defense counsel to be saying at that moment?

22 MS. EISNER: It didn't contradict anything in  
23 the motion. The motion was clear that the plea was  
24 knowing. The defendant listed about eight to ten  
25 circumstances.

1                   JUDGE SMITH: Well, wait a minute. The  
2 defendant - - - the defendant - - - I mean, the defendant  
3 said he was coerced. You're right, didn't contradict it,  
4 but surely there's some tension between the defendant  
5 saying this is horrible, I've been coerced, the worst  
6 thing that ever happened to me, and the lawyer getting up  
7 and says it's the best thing that ever happened to him.  
8 Is that - - - is that - - - should the lawyer really be  
9 doing that?

10                   MS. EISNER: I don't think there's anything  
11 wrong with the lawyer doing it, especially in this case  
12 where - - - a plea has to be knowing and voluntary both.  
13 And the allegations in this motion specifically were that  
14 this plea was not voluntary. And to say it's knowing  
15 doesn't undermine anything that was in that motion.  
16 Everything in that motion made it very clear that this was  
17 knowing. This defendant listed - - -

18                   CHIEF JUDGE LIPPMAN: Okay, counselor. Thank  
19 you.

20                   MS. EISNER: Thank you.

21                   CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

22                   MR. MCINTOSH: Yes, Your Honor, just a few  
23 points. Ms. Eisner made clear the fact that Mr. Deliser's  
24 motion was a very detailed motion. This was a - - - was  
25 not a form motion, very detailed, very detailed

1           allegations. There is a problem, I think - - -

2                   JUDGE SMITH: They're very detailed, but I don't  
3 really see any that would support vacating the plea.

4                   MR. MCINTOSH: Well, the thing is that without a  
5 hearing, okay, we don't know how these facts - - - further  
6 facts would have played out. For instance, the allegation  
7 - - -

8                   JUDGE SMITH: Well, I - - - I was under a lot of  
9 stress, my - - - my - - - this family member was sick, my  
10 lawyer told me I was going to get a lot of time. I mean,  
11 they're detailed allegations, but they don't sound like -  
12 - -

13                   MR. MCINTOSH: Yes.

14                   JUDGE SMITH: - - - that they would lead you to  
15 say, okay, you get your plea back.

16                   MR. MCINTOSH: But what's - - - well, the  
17 allegation, for instance, that defense counselor  
18 specifically told him not that his exposure was fifty  
19 years but that the judge would, in fact, impose a sentence  
20 of fifty years. What's - - -

21                   JUDGE SMITH: Isn't - - - isn't it - - - isn't  
22 it the defense lawyer's job to predict what's going to  
23 happen if you go to trial?

24                   MR. MCINTOSH: Well, he can offer a prediction,  
25 but I think - - - I think a prediction that - - - that he

1 will get the maximum sentence each count and it would run  
2 consecutive is way out of line.

3 JUDGE SMITH: If you think - - - if you think  
4 the guy is going to get - - -

5 MR. MCINTOSH: It's meant to frighten him.

6 JUDGE SMITH: - - - the maximum rate - - - if  
7 you think - - - if you're convinced, knowing the judge and  
8 knowing the crime, and this crime - - - I'm sorry, that  
9 was the other crime that was kind of horrifying. But in  
10 knowing the judge and knowing the crime, if you think your  
11 guy is going to get the maximum, are you not supposed to  
12 let him in on that? Isn't that what he's paying you for  
13 or not paying you for?

14 MR. MCINTOSH: That's - - - that's with another  
15 allegation. What of the allegation that defense counsel  
16 misled him and his family as to what would happen if they  
17 actually pled guilty. And they came to court thinking  
18 that there was going to be a hearing on some matter; in  
19 fact, it was scheduled for trial when he is now faced with  
20 the immediate affirmative decision as to whether to take a  
21 plea or go to trial without the support of his family. Is  
22 that not a form of manipulation that actually calls into  
23 question the voluntariness of the plea? I think - - - I  
24 think it is if it's - - - if it's, in fact, true.

25 Okay. And if what defense counsel did, he may

1 not have actually sort of point by point make a refutation  
2 of defendant's factual allegations, but he sought to  
3 undermine it. And when he said the plea was knowing, it  
4 was merely a shorthand way of saying that the plea met the  
5 constitutional requirements of being knowing, voluntary,  
6 intelligent. He wasn't differentiating between a knowing  
7 plea and a voluntary plea.

8 I think it's ridiculous to think that, in fact,  
9 that's what he was - - - what he was doing. What would be  
10 the point if defendant makes allegations suggesting that  
11 he was coerced, that the plea was not voluntary, and  
12 defense counsel specifically sort of avoids addressing  
13 those allegations and instead addresses something  
14 differently that is knowing. Defense counsel is  
15 addressing the - - - the issue as to whether defendant  
16 should be allowed to withdraw his plea.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. MCINTOSH: And he is arguing against the  
19 motion.

20 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks.

21 MR. MCINTOSH: Thank you very much.

22 CHIEF JUDGE LIPPMAN: Thank you, all.

23 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Robert Mitchell, No. 116, and People v. Josue Deliser, No. 117 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: May 10, 2013