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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 188

CARL D. WELLS,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 10, 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  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

HAROLD V. FERGUSON, JR., ESQ.  
THE LEGAL AID SOCIETY, CRIMINAL APPEALS BUREAU  
Attorneys for Appellant  
199 Water Street  
5th Floor  
New York, NY 10038

ORRIE A. LEVY, ADA  
OFFICE OF THE BRONX DISTRICT ATTORNEY  
Attorneys for Respondent  
198 East 161st Street  
Bronx, NY 10451

Penina Wolicki  
Official Court Transcriber

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CHIEF JUDGE LIPPMAN: Number 188, People v. Wells.

MR. FERGUSON: Good afternoon, Your Honors. Harold Ferguson for appellant, Carl Wells.

Thirty-five years ago, in People v. Grant, this court set the standard - - -

CHIEF JUDGE LIPPMAN: Do you want rebuttal time?

MR. FERGUSON: Could I have two minutes, if necessary?

CHIEF JUDGE LIPPMAN: Two minutes, sure. Go ahead.

MR. FERGUSON: Thirty-five years ago, in People v. Grant, this court issued the seminal ruling on guilty pleas where there has been a successful suppression hearing appeal. This court has consistently applied that principle since that time.

JUDGE SMITH: The ruling does use the word "rarely".

MR. FERGUSON: It does use the term "rarely" but - - -

JUDGE SMITH: Which is not - - - it doesn't mean never, does it?

MR. FERGUSON: It doesn't mean never. But

1 in Coles, this court specifically clarified it and  
2 indicated there were two circumstances, one where  
3 there was a concession by the defendant prior to  
4 entering the guilty plea as to the reason why he was  
5 entering the guilty plea, or if there was a waiver of  
6 the right to appeal.

7 JUDGE GRAFFEO: So what did Defendant say  
8 in this record that would support your position?

9 MR. FERGUSON: Before the suppression  
10 hearing even took place, Mr. Wells indicated - - -  
11 who was representing himself pro se - - - that he was  
12 not interested in a plea disposition prior to the  
13 suppression hearing, but indicated that in the event  
14 that the suppression hearing resulted in a negative  
15 ruling for him, he might be amenable to a plea  
16 disposition.

17 Immediately after the conclusion of this  
18 hearing, he stated affirmatively on the record, and  
19 his legal advisor seconded, that in light of the  
20 negative ruling that he had just received, he was now  
21 willing to take the plea that was offered.

22 CHIEF JUDGE LIPPMAN: Is that - - -

23 JUDGE GRAFFEO: Didn't he also say that  
24 because he was going to have time served applied?

25 MR. FERGUSON: Well, that - - - I think

1 that was what - - - that was part of what the legal  
2 advisor had indicated at that point, that there were  
3 a number of different factors. But he had said that  
4 - - -

5 JUDGE GRAFFEO: It's a pretty considerable  
6 factor, though, also, isn't it?

7 MR. FERGUSON: It was a considerable  
8 factor, Your Honor. However, what you have here is  
9 that when you look at the consistency of the rulings  
10 in this court, it's most similar to this court's  
11 ruling in People v. Rolston. Rolston involved an  
12 armed robbery situation where the only evidence that  
13 was suppressed on the appeal was the gun.

14 In Rolston, there was the identification  
15 testimony of the victims. There was the confession  
16 of the defendant. There was the police testimony.  
17 And this court had no problem affirming the ruling of  
18 the Appellate Division that there - - -

19 JUDGE SMITH: Let - - - let me put a more  
20 extreme hypothetical, which would - - - which isn't  
21 either of the two Coles possibilities that you  
22 mentioned before. A guy has - - - a guy is arrested  
23 in a car and he has sixteen bags of cocaine in his  
24 pockets. And but just before he's arrested, one of  
25 them slips out on the floor. They search him and

1 find the fifteen bags and they search the car and  
2 find the sixteenth. The search of the car is bad.  
3 The search of the person is good. So they suppress  
4 one of the sixteen bags of cocaine.

5 He decides to plead guilty - - - or I'm  
6 sorry, they don't suppress, but they should have  
7 suppressed one of the sixteen bags of cocaine. He  
8 decides to plead guilty.

9 An appellate court later decides oh, that  
10 sixteenth bag should have been suppressed. He gets  
11 his plea back?

12 MR. FERGUSON: I believe he does, Your  
13 Honor.

14 JUDGE SMITH: Does that make any sense?

15 MR. FERGUSON: It does, Your Honor, because  
16 there is a mechanism that this court has indicated,  
17 and if the hearing court applies this court's  
18 precedent, all the court needed to do was get the  
19 concession from the defendant at the time as to the  
20 reason he was pleading guilty; or in that type of  
21 situation, the - - - it - - - waivers of the right to  
22 appeal are - - - you know, they're occurring all the  
23 time.

24 JUDGE SMITH: But do you really think in  
25 the hypothetical case I put there's any unclarity,

1           there's any possibility that he would have said, oh,  
2           if I'd known you were going to - - - I only had  
3           fifteen bags against me not sixteen, I'm going to  
4           trial?

5                       MR. FERGUSON:  It's a more difficult case  
6           than this.  But I don't believe that this court's  
7           precedent would allow that, because when you look at  
8           the only case that this court has ever found that  
9           harmless error did apply, in Lloyd, what you had was  
10          a unique set of circumstances where prior to the  
11          hearing the defendant entered the guilty plea based  
12          on the possibility he was going to get this  
13          conditional sentence.  The court then determined that  
14          the conditional sentence did not lie.  And so the  
15          plea was vacated.

16                      He then had the hearing, and then lost it,  
17          and then immediately after reentered the plea that he  
18          originally had.

19                      CHIEF JUDGE LIPPMAN:  Is it only in that  
20          circumstance that we can rule in that way?

21                      MR. FERGUSON:  I believe you need that  
22          unique set of circumstance.  Where there's an  
23          affirmative showing by the defendant's actions or  
24          words what he intended to do.

25                      Your Honors in Grant indicated a number of

1 reasons why a defendant might plead guilty, and that  
2 a lot of it is speculation. And it could be feelings  
3 of guilt. It could be to try and spare his family.  
4 It could be to avoid a higher conviction. And this  
5 court said we're not going to engage in  
6 psychoanalysis as to why the defendant did this. And  
7 here, we have an affirmative statement by the  
8 defendant indicating why he was pleading guilty. And  
9 it was impacted by the suppression hearing here.

10 JUDGE SMITH: Do you really have to know  
11 why he did it? Don't you just have to be able to  
12 exclude the possibility that he did it because of the  
13 result of the suppression hearing?

14 MR. FERGUSON: Your Honor, he - - - what  
15 you - - - what you have in this particular case is he  
16 has stated on the record why he is doing this.

17 JUDGE ABDUS-SALAAM: So as long as he says,  
18 as he did on the record, if the suppression hearing  
19 goes against me, I'm going to plead guilty, I'm not  
20 going to go to trial, that's sufficient, even if it's  
21 just part of the reason?

22 MR. FERGUSON: Even if it's just part of  
23 the reason. Because there are - - - there are mult -  
24 - - even in Grant - - - said there can be multiple  
25 reasons why a defendant makes a particular decision

1 to plead guilty.

2 Here we don't have to get into the  
3 speculation, because - - -

4 JUDGE SMITH: So when - - -

5 MR. FERGUSON: - - - he stated it on the  
6 record.

7 JUDGE SMITH: - - - so when a suppression  
8 hearing is being reviewed after a plea, the - - - it  
9 becomes critical for the Appellate Division to decide  
10 whether every silly little piece of evidence was  
11 properly suppressed. On the other hand, if it were  
12 being reviewed after trial, they could say, okay, I  
13 got a - - - nineteen-twentieths of the evidence is  
14 fine and the rest is harmless.

15 MR. FERGUSON: That's correct, Your Honor.  
16 And what you have here when you - - - when you look  
17 at the particular circumstances of Mr. Wells' case,  
18 you know, it isn't that - - - what the Appellate  
19 Division did here is it applied traditional harmless  
20 error analysis. It uses the term "overwhelming  
21 evidence" that comes only in a trial court setting.  
22 We don't know if there's overwhelming evidence here,  
23 because all you had that was testified in this  
24 particular case was the testimony of one police  
25 officer.



1                   There were multiple witnesses who were  
2 going to testify at trial, and in fact, even the  
3 hearing court indicated prior to the suppression  
4 hearing that there was going to be an issue at trial  
5 based on the loss of the videotape of the sobriety  
6 test.

7                   You would have had to have had the EMS  
8 lieutenant testify. You would have had - - -

9                   JUDGE SMITH: Okay, but can you - - - can  
10 you give me a plausible scenario in which the guy  
11 says if I'd known you were going to suppress the  
12 bottle of Bacardi and the crack pipe, I would have  
13 gone to trial?

14                   MR. FERGUSON: Absolutely, Your Honor.  
15 Because what you have here is an officer - - - they  
16 have lost the videotape of the sobriety test. There  
17 is no written statement of the defendant. There's no  
18 videotape of the - - -

19                   JUDGE SMITH: But the question I'm trying  
20 to focus on, what difference does it make whether  
21 they've got the crack pipe and the Bacardi?

22                   MR. FERGUSON: Because, Your Honor, what  
23 you have is going on the evidence of the testimony of  
24 Officer Chan. Those two physical items corroborate  
25 his (sic) testimony. Absent that, when you're

1           lacking the video - - - they're lacking a videotape  
2           of the sobriety test, lacking a written confession,  
3           lacking a videotape confession, the statements that  
4           Office Chan alleged that my client makes, he could  
5           dispute at trial.

6                        CHIEF JUDGE LIPPMAN:   Okay.

7                        MR. FERGUSON:   And he did indicate - - -

8                        CHIEF JUDGE LIPPMAN:   Okay, counselor.

9                        MR. FERGUSON:   - - - that he was going to -  
10                      - -

11                      CHIEF JUDGE LIPPMAN:   You'll - - -

12                      MR. FERGUSON:   - - - te - - - that he could  
13                      testify.

14                      CHIEF JUDGE LIPPMAN:   - - - you'll have  
15                      your rebuttal time.   Thank you, counselor.

16                      MR. LEVY:   May it please the court, Orrie  
17                      Levy for the People.

18                      CHIEF JUDGE LIPPMAN:   Counselor, why - - -  
19                      why doesn't Grant control this situation?

20                      MR. LEVY:   Your Honors, I think Lloyd would  
21                      actually be much closer to point - - - Lloyd and  
22                      Coles read in conjunction, which came after Grant.  
23                      Grant certainly set a very high bar.   There's no  
24                      question about it.

25                      CHIEF JUDGE LIPPMAN:   You mean Lloyd has

1 not been followed, right?

2 MR. LEVY: That's true. And that makes  
3 perfect sense given - - -

4 CHIEF JUDGE LIPPMAN: This is a Lloyd  
5 situation, clearly?

6 MR. LEVY: No, I - - -

7 CHIEF JUDGE LIPPMAN: No distinguishing  
8 factors between Lloyd and this case?

9 MR. LEVY: No, Your Honor. I think it  
10 treads the line between Lloyd and Coles. And in  
11 Grant this court said that it's a rare case in which  
12 harmless error can be applied to a guilty plea after  
13 a suppression - - -

14 CHIEF JUDGE LIPPMAN: So why is this one of  
15 those rare cases?

16 MR. LEVY: Because we have his stated  
17 intentions on the record. We have him saying, after  
18 pleading guilty - - - and I - - - I'd like to point  
19 out, he was representing himself pro se here. That  
20 is a unique circumstance that allowed him to actually  
21 express on the record - - -

22 CHIEF JUDGE LIPPMAN: Isn't this - - - at  
23 the very least, isn't the record here ambiguous about  
24 him?

25 MR. LEVY: Not when viewed - - -

1 CHIEF JUDGE LIPPMAN: At the very least?

2 MR. LEVY: - - - not when viewed - - - not  
3 when all of his statements are viewed together. He  
4 said very clearly, the reason I'm - - -

5 CHIEF JUDGE LIPPMAN: Some of his  
6 statements seem to go, you know, exactly, the other  
7 way from what you were - - - you're saying he wanted  
8 to do or he expressed his views.

9 MR. LEVY: I don't believe that's the case,  
10 Your Honor. He - - - he said, after the suppression  
11 hearing, I would only go to trial if I got a - - - if  
12 I got a negative ruling. The only reason I'm - - -  
13 I'm pleading - - - I'm sorry - - - I would only - - -  
14 he says I was getting time served, I was factually  
15 guilty, I didn't want to waste the taxpayers' money,  
16 and then he said, I would only have gone to trial if  
17 I got a positive ruling from the judge.

18 JUDGE SMITH: Well, but he was - - - but he  
19 was entitled to a ruling that was more positive than  
20 the one he got. How do you know that wouldn't have  
21 been positive enough for him?

22 MR. LEVY: You can tell from his questions  
23 at the suppression hearing. Representing himself, he  
24 didn't ask a single question about the crack pipe, a  
25 single question about the Bacardi bottle, about the

1 stop of the car, the search of the car. The focus of  
2 the entire suppression hearing was on his belief that  
3 it was a sham arrest.

4 JUDGE SMITH: Aren't - - - I mean, isn't it  
5 - - - but isn't the relevant unimportance of the  
6 evidence a stronger point from you than trying - - -  
7 for you than trying to read his mind?

8 MR. LEVY: Well, it's both, Your Honors.  
9 First of all, I don't believe it's mind reading.  
10 He's quite clear on the record with numerous reasons  
11 why he was pleading guilty.

12 JUDGE SMITH: On the other hand, he's - - -  
13 like many pro ses, he's not always a hundred percent  
14 lucid what he's thinking here.

15 MR. LEVY: I don't know if that's the case  
16 on this record. He seems perfectly lucid in terms of  
17 what he was saying. And it makes perfect sense in  
18 terms of the case. If he was getting time served, it  
19 was a great deal. He stated the reason I'm pleading  
20 guilty - - - and the words he used, "and regardless  
21 of the fact", and that was after the I would only  
22 have gone to trial about the positive ruling or  
23 negative ruling - - - he says, "and regardless of  
24 that fact, I didn't want to waste the taxpayers'  
25 money." His intentions are perfectly clear on the

1 record.

2 JUDGE RIVERA: You couldn't see that as in  
3 any way perhaps putting himself in the best light  
4 possible to the judge? Sounding very rational,  
5 reasonable?

6 MR. LEVY: That's a possibility, Your  
7 Honors. And that's why his intentionality on the  
8 face of the record is only one part of it. The other  
9 part of it is the overwhelming weight of the  
10 remaining evidence. The fact that you have an  
11 officer observing him slumped over a steering wheel  
12 in his car facing the wrong way on the sidewalk with  
13 alcohol on his breath, extremely unsteady on his  
14 feet, bloodshot watery eyes, he blows a point 00 - -  
15 -

16 JUDGE RIVERA: But is it - - -

17 MR. LEVY: - - - 9 two hours later - - -

18 JUDGE RIVERA: - - - is it so - - - yes.

19 But is it so irrational to see it the way counsel is  
20 suggesting, that he may have seen it as it's going to  
21 be me against the officer?

22 MR. LEVY: I don't think so.

23 JUDGE RIVERA: If it boils down to me  
24 against the officer, I have a shot. Of course if - -  
25 - if you're letting in the bottle and the crack pipe,

1 maybe I don't. Is that so irrational to see it that  
2 way?

3 MR. LEVY: There's an outside chance.  
4 There's no question about it - - -

5 JUDGE RIVERA: How outside is an outside -  
6 - -

7 MR. LEVY: I think that it goes to the  
8 standard of reasonable possibility. There no  
9 reasonable possibility - - -

10 JUDGE SMITH: But were the bottle and the  
11 crack pipe the only physical evidence?

12 MR. LEVY: It was the only physical  
13 evidence, Your Honor.

14 JUDGE SMITH: Didn't they find - - - didn't  
15 they find packets of cocaine on him?

16 MR. LEVY: I'm sorry. I thought you meant  
17 from the car. Yes, they also found seven rocks of  
18 crack cocaine on him. And so that - - - that was  
19 cumulative in a sense. They did find physical  
20 evidence which could have been - - -

21 JUDGE SMITH: Isn't - - - I mean - - -  
22 isn't it critical to your case that the - - - to your  
23 argument that this evidence was cumulative? The  
24 evidence that should have been excluded but wasn't?

25 MR. LEVY: It's - - - it's part of the

1 argument. It's not necessary to the argument,  
2 because we have his intentions on the record. This  
3 is that unique case where because he was representing  
4 himself pro se, we have his intentions and we have  
5 overwhelming evidence.

6 JUDGE GRAFFEO: He had a consulting  
7 attorney, didn't he?

8 MR. LEVY: I couldn't hear Your Honor's  
9 question.

10 JUDGE GRAFFEO: Didn't he have a consulting  
11 attorney?

12 MR. LEVY: Yes, who he referred to a his  
13 co-counsel at the hearing. He did have a consulting  
14 attorney who was standing there right beside him.  
15 And with that attorney present, he put on the record  
16 exactly why he was pleading guilty. And we have the  
17 overwhelming evidence. Those two things together - -  
18 -

19 JUDGE ABDUS-SALAAM: He also - - - counsel,  
20 he also said I wouldn't have pled guilty if you - - -  
21 you know, if the suppression hearing went my way.

22 MR. LEVY: That's true. And the People's  
23 position - - -

24 JUDGE ABDUS-SALAAM: And what case - - -  
25 what case other than Lloyd have we decided that this



1 is sufficient to - - - to allow a conviction - - - a  
2 plea of guilty to stand?

3 MR. LEVY: There isn't any such case. But  
4 this is also the first time this court has touched  
5 this issue in decades. What we do have since all  
6 those decisions is multiple Appellate Division  
7 decisions: Cobaugh, Beckwith, Strain, Gomez, which  
8 have applied the harmless error rule to guilty pleas.

9 And while those cases are rare, there's  
10 only a handful of them - - -

11 CHIEF JUDGE LIPPMAN: This record is so  
12 distinguished, even in light of the statement that  
13 Judge Abdus-Salaam just raised, that - - - that this  
14 belongs with Lloyd up here? It's the only other case  
15 based on the record you have?

16 MR. LEVY: Yes, for two reasons. The first  
17 is that objectively speaking, I don't think any  
18 reasonable person in defendant's shoes would have - -  
19 -

20 CHIEF JUDGE LIPPMAN: You're looking at it  
21 and coming to your conclusion, I think, that, you  
22 know, again, you - - - I would characterize as  
23 looking at this, I think a reasonable person might  
24 characterize the record as ambiguous.

25 MR. LEVY: Even so - - -

1 CHIEF JUDGE LIPPMAN: So if it's ambiguous,  
2 it qualifies under Lloyd?

3 MR. LEVY: Well, it's ambiguous possibly  
4 with respect to what the meaning of the word  
5 "positive" and "negative" is in this context. But  
6 his other statements were not ambiguous at all. His  
7 other multiple reasons for pleading guilty weren't  
8 ambiguous at all.

9 CHIEF JUDGE LIPPMAN: Yeah, but as you say,  
10 we're looking at the entire context here, you know.

11 MR. LEVY: Precisely.

12 CHIEF JUDGE LIPPMAN: So on the entire  
13 context you think this qualifies - - - this is  
14 similar to Lloyd or right on point with Lloyd?

15 MR. LEVY: Absolutely. I think we have an  
16 independent motivation apparent on the face of the  
17 record, both from the weight of the remaining  
18 evidence and - - -

19 CHIEF JUDGE LIPPMAN: Aren't you narrowing  
20 our Grant decision a lot?

21 MR. LEVY: No. I believe this case meets  
22 that very high threshold. This is not a common  
23 situation where you have a defendant representing  
24 himself pro se, explaining his reasons for pleading  
25 guilty on the record and hinting at the focus of the

1 suppression hearing when he asks questions at that  
2 hearing, and the existence of overwhelming evidence.  
3 This is the perfect storm of intentionality. It's  
4 the perfect - - - it's the perfect rare case that  
5 fits into that - - - that exception contemplated by  
6 Grant.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.  
8 Anything else?

9 MR. LEVY: No, Your Honors, thank you.

10 CHIEF JUDGE LIPPMAN: Thank you.

11 Counselor, rebuttal.

12 MR. FERGUSON: Yes. A couple of things.  
13 Absolutely this was a concern of Mr. Wells at the  
14 hearing. Prior to the suppression hearing when they  
15 first asked - - - when they were first addressing  
16 issues of the suppression hearing, they were only  
17 referencing a Huntley hearing. And the defendant  
18 specifically indicated to the court that he did have  
19 a Mapp hearing and he was looking for suppression of  
20 the physical evidence as well.

21 And this really was so clear below. When  
22 we were before the Appellate Division, the People did  
23 not even argue harmless error analysis in the  
24 Appellate Division. The - - - this was something  
25 that was raised sua sponte by the Appellate Division.

1 We had only addressed it cursorily in our brief and  
2 not mentioned at all by the District Attorney in  
3 their brief.

4 And if you look at what the legal advisor  
5 said, it is not simply the defendant's words here at  
6 the time of the plea, it's the legal advisor who said  
7 the same thing, that the negative suppression ruling  
8 played a role in the decision that the defendant was  
9 making.

10 CHIEF JUDGE LIPPMAN: So you both think  
11 that the record is very clear.

12 MR. FERGUSON: I believe the record is  
13 clear.

14 CHIEF JUDGE LIPPMAN: Yeah. Well - - -

15 MR. FERGUSON: And - - -

16 CHIEF JUDGE LIPPMAN: - - - my point to  
17 both of you is, at the very least, we might say it's  
18 ambiguous.

19 MR. FERGUSON: And if it's ambiguous, it  
20 still would be in our favor. And to address Judge  
21 Smith's point - - -

22 CHIEF JUDGE LIPPMAN: If it's ambiguous, it  
23 doesn't fall under Lloyd?

24 MR. FERGUSON: I don't believe it falls  
25 under Lloyd because we cannot determine why he took

1           this plea.

2                         And Your Honor, if we go back to - - - if  
3 we go back to Judge Smith's question as to the  
4 cumulative nature, nothing could have been more  
5 cumulative than this court's opinion in Purdy. In  
6 Purdy, what was suppressed - - - what was suppressed  
7 in the appeal was the second statement of the  
8 defendant simply affirming his original statement.  
9 The first full confession was admitted, and this  
10 court nonetheless held that the suppression of the  
11 second statement, which simply affirmed the first  
12 statement, was sufficient to allow - - -

13                         JUDGE SMITH: Now, can you - - - I'm not  
14 sure which - - - where this comes from. Can you  
15 explain to me the logic of Lloyd? I keep looking at  
16 it, and I don't quite - - - the guy decides to plead;  
17 the judge says I can't give you the sentence I  
18 promised; he takes the plea back; he has a  
19 suppression hearing; he loses it; he pleads again.

20                         How does that prove that the suppression  
21 was harmless?

22                         MR. FERGUSON: I think what they - - - what  
23 the determination of Lloyd was that because he pled  
24 guilty prior to the suppression hearing, that's what  
25 showed he had an independent motivation to plead

1 guilty.

2 JUDGE SMITH: But he took - - - but he took  
3 it back. Well, I - - -

4 MR. FERGUSON: Right - - -

5 JUDGE SMITH: - - - yeah, I understand. I  
6 can't blame you for the Lloyd decision.

7 MR. FERGUSON: No, but - - -

8 JUDGE SMITH: I just don't understand it.

9 MR. FERGUSON: No, but I think that's what  
10 it was is that there you have an affirmative showing  
11 by the defendant in Lloyd that he was willing to take  
12 the plea irrespective as to what was the result of  
13 the suppression hearing. And I just - - - I think -  
14 - - I could disagree with it, but even with it, it  
15 doesn't apply to this situation. And that based on  
16 Grant, a precedent that has been clear by this court  
17 and followed for the past thirty-five years, there's  
18 no reason to change things.

19 CHIEF JUDGE LIPPMAN: Thanks, counselor.

20 MR. FERGUSON: Thank you, Your Honors.

21 CHIEF JUDGE LIPPMAN: Thank you both.

22 Appreciate it.

23 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Carl D. Wells, No. 188 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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

Agency Name: eScribers

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

Date: October 18, 2013